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# THE RIGHT TO DECIDE: FREE PRIOR INFORMED CONSENT IN GHANA.





# THE RIGHT TO DECIDE: FREE PRIOR INFORMED CONSENT IN GHANA.

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# CONTENT

<b>FOREWORD</b> .....	IV
<b>EXECUTIVE SUMMARY</b> .....	VI
<b>ACKNOWLEDGEMENTS</b> .....	XII
<b>DEDICATION</b> .....	XIII
<b>LIST OF FIGURES &amp; TABLES</b> .....	XIV
<b>ACRONYMS</b> .....	XV
<b>CHAPTER ONE: INTRODUCTION</b> .....	<b>1</b>
Background to the study.....	1
Problem statement.....	2
Objectives of the study.....	2
Research questions.....	2
Justification of the study.....	2
<b>CHAPTER TWO: LITERATURE REVIEW</b> .....	<b>5</b>
Participation.....	5
Free, Prior, and Informed Consent: Definition and Application.....	6
FPIC under international law.....	7
FPIC under regional systems.....	8
America.....	8
African Commission on Human and Peoples Rights (ACHPR).....	9
Africa Mining Vision.....	9
African Commission on Human and Peoples Rights.....	9
Pan African Parliament (PAP).....	10
ECOWAS Directive on the Harmonisation of Guiding Principles and Policies in the Mining Sector of 2009 (ECOWAS Mining Directive 2009).....	10
International financial institution safeguards.....	11
International Finance Corporation (IFC).....	11
African Development Bank (AfDB).....	12
Company commitments to FPIC.....	12
Ghanaian Law.....	13
Constitution .....	13
Minerals and Mining Law.....	14
Environmental Regulations - Environmental Protection Agency Law.....	15
Ghana Land Policy .....	16

<b>CHAPTER THREE: GOOD PRACTICE IN CONSENT-SEEKING PROCESSES.....</b>	<b>19</b>
Laying the groundwork.....	20
Establishing oil and/or mining no-go zones or excluded areas.....	20
Implementing community protocols, participatory land use mapping, and field-based investigations.....	21
Obtaining community consent prior to the award of concession licenses, leases, or agreements...22	
Allowing for a “no-action” alternative.....	23
Participatory and gender-sensitive planning of format, timeline, and logistics for consultations....	24
Providing accurate and complete information.....	25
Providing culturally-tailored information.....	26
Promoting inclusivity in consultation processes.....	27
Implementing FPIC at each phase of project development throughout the project lifecycle.....	28
Capacity-building and access to adequate technical and legal support.....	29
Guarding against ‘elite capture’ of the negotiation process.....	30
Including independent third-party facilitators and observers.....	30
Documenting and validating agreements.....	31
Creating framework for continuing dialogue with communities, agreement monitoring, and facilitating early reporting of grievances.....	32
<b>CHAPTER FOUR: METHODOLOGY.....</b>	<b>35</b>
Study area.....	35
Economic activities of the study area.....	37
Research design and method.....	37
Description of sample size.....	37
Data analysis.....	37
<b>CHAPTER FIVE: PRESENTATION AND DISCUSSION OF RESULTS.....</b>	<b>39</b>
Introduction.....	39
Scope of the study and demographic data of respondents.....	39
Communities right to economic activities.....	43
Community understanding and participation in decisions.....	44
Community consent in the granting of mining right to companies.....	47
Community knowledge about FPIC Concept.....	55
The mining industry.....	59
Other stakeholder understandings of FPIC and consultation.....	60
<b>CHAPTER SIX: CONCLUSION AND RECOMMENDATIONS.....</b>	<b>61</b>
Recommendations.....	64
<b>REFERENCES.....</b>	<b>65</b>

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# FOREWORD

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Ghana has experienced three gold rushes, which is described in most literature as Jungle booms because the mining projects are located in rural communities where poverty and illiteracy weakens the capacity of the affected people to effectively engage with mining giants. The third jungle boom has been distinct from the other gold rushes because of its capital-intensive content and the use of cyanide in the heap-leach method of gold extraction.

Though the constitution of Ghana grants the right to own properties by citizens, the President acting as a Trustee for the people of Ghana could grant mineral rights to companies to exploit our minerals. The right of eminent domain as exercised by the President of Ghana in the granting of mineral rights to companies diminishes the right of mining communities in determining their choices of livelihood and what constitute development for them.

The peasant communities that host the mega mining projects are thus compelled to live with problems that threaten their survival and the responses of the host communities in the protection of their right to self-determination had turned the mining communities into hot spots of conflicts.

The technical, financial and lobbying capabilities of the multinational mining companies and the weak capacity of the affected communities create power asymmetry in the engagement between the parties. The absence of protection for the rights of host mining communities in the Minerals and Mining Act of Ghana is regarded as a major weakness of

our mining legislation. The efforts of Civil Society Organisations in addressing some of the weaknesses in the mining laws of mineral endowed countries at the sub-regional level of Africa through ECOWAS have yielded some useful results. The ECOWAS Directive on the Harmonisation of Guidelines and Principles in the Mining sector was born out of the concerted efforts of the ECOWAS Secretariat and CSOs to improve mining codes in the sub-region by including provisions such as the Free Prior and Informed Consent (FPIC), No Go Zones, Human Rights Provisions in the mining codes. The objective of the efforts is to stem the tide of the "Race to the Bottom" in the mining sector which is regarded as the driving force behind the desire of mineral endowed countries in the sub region to use weak mining laws to gain competitive advantage in attracting mining investment.

The Government of Ghana had been quick to ratify and gazette the ECOWAS Directive on mining but had not translated the zeal in the ratification of the ECOWAS Directive on mining into internalisation of the provisions contained in the Directive in the mining laws of Ghana. The advocacy challenge lies in internalising the principle of FPIC in the domestic laws of Ghana and other ECOWAS countries.

The FPIC is a contentious principle because of its potential to be a countervailing power to the eminent domain and the prominence granted to mineral right holders as against the surface rights of communities. The FPIC can potentially change the balance of forces in the stakeholder engagement of the mining sector in favour of the vulnerable mining

communities.

The FPIC is a tool that would empower communities affected by mega projects to take informed decisions in the process of granting social licence to mega projects but it would take a consistent knowledge-based campaign to achieve the success of getting the FPIC to be in the statutes of Ghana.

Sometimes the mistake is made by equating the public hearing aspect of Environmental Impact Assessment (EIA) to the FPIC but the research on FPIC has deepened the blurred lines and placed the FPIC in a proper context as being different in content and importance from the cosmetic engagement in the public hearings of the EIA process. The research would go a long way in providing the information base for CSOs, regulatory institutions, affected communities, traditional authorities and the media to support advocacy and campaigns in ensuring that the FPIC becomes an important provision in the laws of Ghana.

Corporate entities seeking genuine participatory engagement with communities based on mutual respect and the right of communities to self-determination would find the research very useful. The research on the FPIC in Ghana is timely and relevant.

DANIEL OWUSU-KORANTENG



# EXECUTIVE SUMMARY

Like many developing countries in sub-Saharan Africa, Ghana is increasing its dependence on mineral extraction. The mining industry accounts for about 7% of the country's GDP, and mineral exports make up 41% of total merchandise exports and 27.6% of government revenue. Mineral extraction, especially of gold, has been associated with conflicts between host communities and mining companies over the resulting social, environmental and economic impacts. In some instances conflicts have resulted in human rights violations being committed by security forces against members of host communities.

In order to prevent the emergence of these types of conflicts, governments and companies must take proactive measures to promote community participation in decision-making around the use of their lands and natural resources. The principle of Free Prior and Informed Consent (FPIC) requires that project-affected communities be adequately informed in a timely manner about development projects that affect them and be given the opportunity to approve (or reject) a project prior to the commencement of operations. International law establishes FPIC as a basic right for indigenous peoples, derived from the rights to self-determination and participation. In the African context, the African Commission on Human and Peoples' Rights has identified a few major characteristics that embody the concept of indigenous peoples, including self-identification, a special attachment to and use of traditional land, and a state of subjugation or marginalization resulting from ways of life or mode of production different than the national hegemonic and dominant model (see Text Box 1).

However, community consent is also emerging more broadly as a principle of best practice in sustainable development for natural resource development projects that potentially entail significant adverse impacts on local communities, regardless of whether or not the project-affected communities include indigenous peoples. Ensuring community consent for projects prior to their implementation helps to reduce the risk of social conflict and increase stability throughout the life of the project, which benefits all stakeholders. This includes national governments, which stand to lose significant revenues if projects end up mired in protests and conflict as a result of government and company failure to implement FPIC.

## Regional context

In the African context, recent guidance from the Economic Community of West African States (ECOWAS), the African Commission on Human and Peoples' Rights (ACHPR), and the Pan-African Parliament calls on states to respect the FPIC of local communities in the context of extractive industry projects. None of these bodies limit the scope of FPIC application to indigenous peoples. The ECOWAS Directive on the Harmonisation of Guiding Principles and Policies in the Mining Sector requires companies to secure FPIC from "local communities" prior to exploration and subsequent phases in the project life cycle (ECOWAS, 2009). The definition of "mineral" in the Directive includes both industrial minerals and petroleum, so the FPIC requirement applies to both the mining and the oil and gas



sectors. Although the ECOWAS Mining Directive 2009 has no constraining force as an international treaty, Ghana has published the Directive in the official Ghana Gazette, which indicates that the state is taking steps toward making it law.

In May 2012, the ACHPR similarly applied FPIC beyond indigenous peoples in its Resolution on a Human Rights-Based Approach to Natural Resource Governance (224). ACHPR called on States to take measures to ensure the participation and FPIC of “communities” for natural resource governance decision-making, and did not limit its definition of “communities” to any subset of the general population. The Pan-African Parliament identifies the effects of domestic and foreign direct investment in land, water and related natural resources; and in a resolution called on states to “ensure effective consultations with local communities and various people affected by investment projects and ensuring that any investment is approved through free, prior and informed consent of affected communities”.

Ghana has also ratified international legal instruments that give meaning and strength to the concept of FPIC, including the Convention on Biological Diversity (CBD) and the African Convention on the Conservation of Nature and Natural Resources (African Convention). The CBD calls for FPIC in the context of access to the genetic resources of indigenous and local peoples. The African Convention calls on state parties to ensure the FPIC of communities for access to and use of indigenous knowledge, and also requires parties to take measures to facilitate, “active participation of the local communities in the processes of planning and management of natural resources upon which such communities depend with a view to creating local incentives for the conservation and sustainable use of such resources.” This supports the notion that community engagement should go beyond mere consultation, towards participatory decision making.

Ghana also ratified the African Charter on Human and Peoples’ Rights (African Charter), which charges the ACHPR with promoting human and peoples’

rights and ensuring their protection in Africa. While it does not call for FPIC explicitly, the African Charter does contain a number of provisions recognizing the rights of peoples, such as Article 20 on the right to self-determination, Article 21 on the right to freely dispose of wealth and natural resources (including the right to recovery of property and adequate compensation), and Article 22 on the right to economic, social, and cultural development.

## National context

In Ghana, the concept of prior consent has a historical basis. The *Concession Ordinance of 1951* (CAP 136) Section 37 states, “No person who is not a native shall carry on mining without being the holder of a concession granting the right to do so from the native having the power to grant such right”. This ordinance emphasised the recognition that the colonial administration gave to the right of local ownership of minerals. Ghana’s laws have since changed, and its current laws do not establish a prior consent standard explicitly. The 1992 Constitution vests the right of mineral exploitation in the President acting as a trustee on behalf of the people of Ghana. However, since Ghana’s Constitution provides that sovereignty of the state resides in the people, in the exercise of its trusteeship the government must guarantee the rights of citizens to participate adequately in natural resource governance decisions. The Constitution further provides the conditions under which the state can compulsorily take possession of property (including land) from owners. Compulsory acquisition must be subject to existing law that makes provision for prompt payment of fair and adequate compensation, and the procedure is applicable to both individuals and communities.

Ghana’s laws also provide for public participation in the context of environmental regulation. The Environmental Protection Agency (EPA) is responsible for ensuring the conduct of Environmental Impact Assessments (EIA) when strong public concerns are raised over an intended

project and its potential impacts are extensive and far-reaching. The EIA process grants the public the right to ask the company to revise its plans or reject the intended project. The process aims at ensuring that the concerns and needs of the affected population are considered and addressed, and offers key stakeholders an opportunity to influence the decision-making process. The EIA considers alternatives and mitigating measures, and aims to eliminate or minimise negative impacts and optimise positive impacts. The EPA generally organises public hearing within the project area, and an independent panel moderates the process. According to the law, community involvement in an EIA should begin from scoping and continue through the baseline survey; description and evaluation of baseline conditions; mitigation, monitoring and development of alternative methods and strategies to be used (which include changes in venue, technology change or abandonment of the project); presentation of findings to stakeholders (including communities) and monitoring to ensure the correct implementation of the project.

Finally, Ghana's National Land Policy holds community participation in land management and land development as a guiding principle, vital for sustainable urban and rural land development. The drafters of the National Land Policy highlight the lack of consultation with landowners and chiefs in decision making processes for land allocation, acquisition, management, utilisation and development as a significant problem, and include guidelines for landowner participation in planning schemes for all land uses.

## Field research findings

In order to examine how government and companies conduct community consultations in practice, research included case studies around mining projects in the Eastern and Western regions of Ghana. These two regions have a history of mining and recently Ghana has discovered oil in commercial quantities in the Western Region. Researchers

administered 297 surveys and assembled targeted focus groups in four communities. Communities included Saaman (Fanteakwa District) and Hweakwae and Nkwanteng (Birim North District) in Ghana's Eastern Region, as well as Dumasi in the Western Region. The mines impacting these communities included the Prestea Bogoso Mine owned by Golden Star Resources in southwest Ghana, the Newmont Akyem Mine in the Eastern Region, and the local company Solar/Kibi Goldfields in the Akyem area. For comparative purposes, surveys and focus groups were also implemented in Nkwanteng, which has not been affected by mining but has been identified by Newmont Ghana Gold Limited as a potential mining area.

### Key findings from this field research include:

- **Survey responses indicate very limited access to project information from government.** Only 15 survey respondents reported that the Ghanaian government provides communities with access to information on mining before mining commences. More frequently community members reported receiving information on mining from friends in the community, civil society organizations, and community chiefs and elders. In terms of timeliness of access to information, more than half of the survey respondents from mining affected communities reported that they only received access to information when the company destroys their property.
- **Most survey respondents feel that they have the opportunity to influence decisions in their communities when these decisions do not pertain to mining.** Seventy-four percent of all survey respondents (220 individuals) indicated that they participate in community decisions outside of the context of mining. Among women the response was particularly strong – approximately 84% of women surveyed indicated that they participate in community decision making (likely due at least in part to the practice of matrilineal inheritance).

- **However, among mining affected communities far fewer respondents participate in decision making around mining related issues.**

Less than 15% of survey respondents from mining affected communities, including only two women, reported having participated in decisions relating directly to mining operations in their communities. Only around half of those surveyed in mining affected communities (79 men and 28 women) had engaged in mining issues on any level, such as linked to corporate social responsibility projects and replacing destroyed properties. Among these individuals, many described their engagement as limited and inadequate to influence mining decisions.

- **Respondents strongly believe that they have a right to say “no” to mining, but at the same time see traditional leaders and government regulators making this decision in practice.**

While approximately 83% of 288 survey respondents felt they have the right to say “no” to mining, the majority of respondents from mining affected communities (161 of 220 respondents) indicated that chiefs and elders give away community lands for mining. In fact, some respondents claimed to have seen mining company officials and government regulators visiting their chiefs’ palace regularly for closed-door meetings. An additional 51 respondents stated that regulators and government agencies make the decision to grant mining leases on their lands.

- **The majority of survey respondents indicated that they are happy with their current economic activity (most commonly farming) and would not like to replace this with mining.**

In fact, 194 survey respondents from the three mining affected communities oppose mining and believe that it will destroy livelihoods and pollute the environment. Many (149) even claimed to be taking actions in opposition to mining in their communities (e.g. mobilizing fellow community members to prevent mining, reporting companies to traditional leaders,

or even covering mining pits they see as unauthorized).

- **A majority of survey respondents (61% including the community not yet affected by mining) have knowledge of the FPIC concept.**

Both men and women reported familiarity with the FPIC concept, but numbers were higher among the men interviewed (approximately 70%) than women interviewed (not quite 50%). Of those familiar with FPIC, 86% find the process necessary and important in mining.

### **Good practice in consent-seeking processes internationally**

In order for government and company consultations with communities to be meaningful, project sponsors must aim to achieve the agreement or consent of communities regarding projects and communities must have the option to give or withhold their consent for project development. Unfortunately, strong economic and political incentives to launch oil and mining projects quickly often result in rushed consultation processes that fail to meaningfully engage communities. This short-sighted approach may lower short-term costs for project sponsors, but a growing body of evidence suggests that the medium to long-term costs associated with potential project stoppages or even project termination stand to far outweigh any short-term savings.

This report includes recommendations on implementing effective consent-seeking processes that draw on a range of international experiences in consultation and highlight good practices based on legislation, international guidance, or specific project experiences. Key recommendations include:

- **Establishing oil and/or mining no-go zones or excluded areas.**

In most countries there are certain geographic areas in which mining or oil development would present particularly high and prohibitive social and/or environmental risks. National governments should create no-go zones where extractive industry development is prohibited to ensure the protection of these geographic areas.

- **Implementing community protocols, participatory land use mapping, and field-based investigations.** Community protocols and participatory land use mapping help communities to document and communicate their traditional decision making and natural resource use practices. Field-based investigations play an important role in the process of mapping customary lands and usage zones.
- **Obtaining community consent prior to the award of concession licenses, leases, or agreements.** Once a mining or oil concession has been awarded to a company it becomes much more difficult for the community to make a development decision regarding the most appropriate use of their land without being subject to external pressures. In addition, exploration activities can have potentially significant impacts on local communities. For these reasons, consent-seeking processes must be implemented prior to the award of the exploration lease or license.
- **Allowing for a “no-action” alternative.** Governments and companies should make clear to communities at the outset that they will respect a decision to withhold consent if such a conclusion results from the FPIC process.
- **Participatory and gender-sensitive planning of format, timeline, and logistics for consultations.** Communities must be consulted on key considerations regarding the implementation of consultations. In communities where women assume a less active or formal role in decision making, their input on the structure of consultation processes should be solicited separately and taken into account.
- **Providing accurate, complete, and culturally tailored information.** Governments and companies should ensure transparency of technical information, including potential negative impacts and risks associated with project development. Given the highly technical nature of extractive industry projects, in some circumstances information sharing with communities can present challenges. Project proponents should develop a communication plan that considers all aspects of consultation processes and potential barrier to community participation, and addresses all relevant stakeholders (including local government, NGOs, and others). As a general rule, communication should be in the language spoken by communities and using a medium appropriate to communities.
- **Promoting inclusivity in consultation processes.** While recognizing the importance of respecting traditional decision making structures, attention to gender balance and the inclusion of voices from marginalized or vulnerable groups is essential.
- **Implementing FPIC at each phase of project development throughout the project lifecycle.** FPIC is not a ‘one-off’ procedure, but instead an ongoing process. In order for companies to maintain a true social license to operate, they must fulfil their commitments to communities. The power of that license is that it may be revoked if it is not followed.
- **Capacity-building and access to adequate technical and legal support.** Governments and non-governmental organizations should prioritise programs that strengthen indigenous and local community technical and leadership skills, building up their capacity to participate effectively in negotiations with project sponsors.
- **Guarding against ‘elite capture’ of the negotiation process.** If traditional leadership structures fail to represent certain subgroups of the population adequately, project proponents should offer members of the broader community the opportunity to support

information gathering and decision making.

- **Including third-party facilitators and observers.** Engaging independent facilitators and/or observers of dialogue between companies and communities can help to promote adherence to dialogue ground rules and complete provision of necessary information, and can help to ensure that both parties have adequate opportunity to present their views.
- **Documenting and validating agreements.** Formalising agreements reached by parties will help to reduce the risk of uncertainty, instability, or confusion over the long-term. Agreements also help enable communities to maximise benefits and minimize risks associated with project development.
- **Creating a framework for continuing dialogue with communities, agreement monitoring, and facilitating early reporting of grievances.** Companies should find ways to formalize a space for dialogue with communities, and engagement and dialogue should be ongoing.

#### **Specific recommendations for Ghana-based stakeholders**

- Government should take immediate steps to commence the processes for the internalisation of the FPIC in the mining laws of Ghana.
- Government should take measures to comply with provisions of the ECOWAS Directives by internalising them into domestic laws on mining and oil and gas.
- Government should respect its obligations under resolution 224 of the African Commission by ensuring that all necessary measures are taken to ensure participation, including the free, prior and informed consent of communities, in decision making related to natural resources governance.

- Government should pass the *Right to Information Bill* with provisions which reflect the ECOWAS Directives' concept of FPIC.
- Government should expressly incorporate the concept of FPIC in the National Land Policy and all laws regulating land and its usage.
- Government and CSOs should work together to increase awareness on the principles of FPIC by all stakeholders, especially for women, physically challenged and other vulnerable groups.
- Mining and oil and gas communities should advocate for the recognition of FPIC in the country.
- Officials of Environmental Protection Agency, Minerals Commission, Judiciary, Mines Inspectorate, and industry players should be sensitised on FPIC.
- All stakeholders, especially the Executive, Parliament, Minerals Commission, Environmental Protection Agency, the Chamber of Mines and Civil Society must work together in developing a statutory framework which will focus explicitly on the tenets of FPIC to give it credence in Ghana. Specific standards with regards to community consultation and participation, against which adherence to the principles can be measured, must be clearly stipulated in such a framework. Again, this framework must clearly define what constitutes "consent" to remove all forms of ambiguity.
- The public hearing component of the EIA must not be subjected to any conditions. In moving forward, the number of public hearings must be increased from one and must necessarily be a requirement for large scale undertakings within communities.
- There is a need for a research into the impact of oil and gas on the coastal communities.
- There is a need for awareness creation in communities to be impacted by gas facilities on their rights.



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# DEDICATION



This research is dedicated to all mining communities struggling to redeem their rights. We dedicate this especially to mining communities in Ghana who avail themselves to be interviewed for this work to be completed. Again to our family members who had to sit through the night to support our efforts



# LIST OF FIGURES & TABLES

Figure 1	-Map of the Prestea Huni Valley study area marked with yellow patch -Map of the Birim North and Fanteakwa study area marked with yellow Patches.....	39
Figure 2:	Communities involved in the survey.....	42
Figure 3:	Status of respondents in households.....	43
Figure 4:	Marital status of respondents.....	44
Figure 5:	Educational backgrounds of respondents.....	45
Figure 6:	Status of respondents in the community.....	45
Figure 7:	Economic activities of respondents.....	46
Figure 8:	Respondents' perception of their right to say "no" to mining.....	47
Figure 9:	Respondents' participation in community decisions.....	48
Figure 10:	Levels of community participation in decisions of respondents from affected communities.....	49
Figure 11:	Perception of respondents from affected communities on who take decisions on their lands for mining.....	51
Figure 12:	Level of community participation in decisions of the processes of mining.....	52
Figure 13:	Ratio of female to males who are part of community decisions on mining.....	53
Figure 14:	Level at which communities would like to be involved in decision making.....	54
Figure 15:	Community mode of access to information on mining.....	55
Figure 16:	Community efforts and struggles for inclusion.....	56
Figure 17:	Affected Communities perception of mining benefits.....	57
Figure 18:	Communities' awareness of Free Prior and Informed Consent Concept.....	58
Figure 19:	Gender Dimension of Knowledge of FPIC in Communities by Women.....	58
Figure 20:	Gender Dimension of Knowledge of FPIC in Communities by Men.....	59
Figure 21:	Community access to information on FPIC.....	60
Figure 22:	Community belief on whether FPIC would work in mining.....	60
Table 1	Non-fuel mineral production value and export contribution in Ghana as compared to other countries included in this chapter.....	23
Table 2:	Levels of participation in community development programmes.....	50
Table 3:	Timeliness of community access to information on mining in affected communities.....	55
Table 4:	Respondents' consideration of environmental impact in assessing benefits of mining.....	57

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# ACRONYMS

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<b>ECOWAS</b>	Economic Community of West African States
<b>IFC</b>	International Finance Corporation
<b>IFIs</b>	International Financial Institutions
<b>IADB</b>	Inter-American Development Bank
<b>UNPFIP</b>	United Nations Permanent Forum for Indigenous Peoples
<b>EBRD</b>	European Bank for Reconstruction and Development
<b>AfDB</b>	African Development Bank
<b>AsDB</b>	Asian Development Bank
<b>FPIC</b>	Free, Prior, Informed Consent
<b>ILO</b>	International Labour Organisation
<b>UN</b>	United Nations
<b>CERD</b>	Convention on the Elimination of all forms of Racial Discrimination
<b>CRC</b>	Convention on the Rights of the Child
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICESCR</b>	International Covenant on Economic Social and Cultural Rights
<b>CUWU</b>	Central Unitary Workers Union (Colombia)
<b>CBD</b>	Convention on Biological Diversity
<b>EU</b>	European Union
<b>ACHPR</b>	African Charter on Human and Peoples Rights
<b>AU</b>	African Union
<b>UNDRIP</b>	United Nations Declaration on the Rights of Indigenous Peoples



## CHAPTER ONE

# INTRODUCTION

Like many developing countries in sub-Saharan Africa, Ghana is increasing its dependence on mineral extraction. Ghana's economy grew by 14.3% in 2011. The increased prices of solid mineral commodities like gold and receipts from oil accounted for much of the rapid economic growth. Hammah (2012) noted that in Ghana, the mining industry accounts for about 7% of the country's GDP. Mineral exports make up 41% of total merchandise exports and contribute about 17.5% of Ghana's total corporate tax earnings and 27.6% of government revenue. The sector also employs 28,000 people in the large scale mining and mines support service industry. The small-scale mining sub-sector employs over 1,000,000 people who are engaged in gold, diamond, sand winning and quarry industries. By 2011, the total direct investment in Mining Sector of Ghana was USD \$11.5 billion (Hammah, 2012).

Ghana currently has nine large-scale mining companies producing gold, diamonds, bauxite and manganese. There are also over two hundred registered small-scale mining groups and 90 mine support service companies. As at the start of 2008 212 mining companies had been awarded either mining leases or exploration rights (Minerals Commission, 2008 cited in Boon and Ababio, 2009).

Mineral extraction, especially of gold, has been associated with conflicts between host communities and mining companies over the resulting social, environmental and economic effects. The conflicts have led to recorded brutalities meted out by security agencies against host mining communities resulting in gross human rights violations. For example,

the case of *Clement Baffoe and Nkwantakrom community v AngloGold Ashanti*, demonstrated how AngloGold Ashanti security personnel violated the rights of community members and the case was determined in Court.

The 1992 Constitution of Ghana has vested the right of mineral exploitation in the President acting as a trustee on behalf of the people of Ghana. The Constitution of the Republic Ghana provides that sovereignty of the state reside in the people and it is therefore imperative that in the exercise of this trusteeship, there should be instruments to guarantee the right of citizens (especially in the host communities) to participate adequately in the decisions on natural resource extraction from "cradle to grave".

There are administrative instruments such as the Environmental Impact Assessment (EIA) process that require mining companies to undertake consultations with host communities at all stages of mineral exploitation. Additionally, the *Minerals and Mining Regulations on Compensation* require the consent of communities before mining companies pay compensation to those affected by mining operations. Similarly, Article 296 of the 1992 Constitution of Ghana enjoins duty bearers in the exercise of discretionary power to be fair, candid and not to be arbitrary or capricious.

The concept of Free Prior and Informed Consent (FPIC) requires that project-affected communities be adequately informed in a timely manner about development projects that affect them and be

given the opportunity to approve (or reject) a project prior to the commencement of operations. International law establishes FPIC as a basic right for indigenous peoples, derived from the rights to self-determination and participation. In Ghana, the concept of prior consent has a historical basis. The *Concession Ordinance of 1951(CAP 136) Section 37* states,

“No person who is not a native shall carry on mining without being the holder of a concession granting the right to do so from the native having the power to grant such right”.

This ordinance emphasised the recognition that the colonial administration gave to the right of indigenous ownership of minerals. After attaining independence, Ghana has ratified international legal instruments that give meaning and strength to the concept FPIC.

## Problem Statement

Historically, the period of independence struggle in Ghana created an atmosphere in which national ownership of minerals became a paramount concern. The state control of minerals shifted to private foreign interests during the third jungle boom, which began in the 1980s. The third jungle boom had political, economic and technological dimensions. The Economic Recovery Programme (ERP), which the Bretton Woods institutions supported, had political connotations as the control of minerals shifted from the state to foreign multinational interests. The period also marked a shift from underground mining to surface mining, causing land to increasingly become the subject of conflict due to competing interests of communities and multinational interests. In the process, communities gradually lost the control of their lands to multinational foreign interest.

These competing interests unleashed a power struggle in which legislations (Act 703, 2006) pitched unorganised, poor communities against the powerful mining lobby in the context of regulations that increasingly protected the interest

of multinational companies.

The concept of FPIC has the potential to empower host communities to be part of decisions to grant mineral rights. However, to date FPIC is not yet internalised and justiciable in the laws of Ghana, despite its existence in several international laws and instruments.

## Objectives of the Study

This research aims to:

- Document key international, regional, and national laws, regulations, and jurisprudence relevant to community participation and consent around oil and mining projects in Ghana.
- Examine how community consultations are realised in practice in Ghana through case studies around mining projects in which the government and/or companies must consult communities in decisions relating to mining.
- Develop recommendations for effective community participation in decisions relating to mining based on the FPIC concept.

## Research Questions

1. What are the legal requirements for community participation in FPIC based on international, regional, national law and jurisprudence?
2. What are the levels of participation in decision making for communities affected by mining in Ghana?
3. What are communities' levels of understanding of FPIC?
4. How do communities see FPIC working in the mining sector?

## Justification of the study

The mining industry in Ghana has come under serious criticism by government agencies and civil society groups, including the media, communities, and religious bodies. In its Report on the State of Human Rights in Mining Communities in Ghana

(2008), the Commission on Human Rights and Administrative Justice (CHRAJ) concluded that:

- Mining activities in Ghana carry with them very serious social, economic, and political consequences including unemployment and increased poverty and crime.
- There has been widespread pollution of communities' water sources, deprivation, and loss of livelihoods.
- Excessive force by security agencies and mine security contractors had resulted in serious injuries, which were sometimes fatal.
- Medical officers in some private and government hospitals in Obuasi acknowledged the prevalence of mining related diseases.
- State institutions with mining sector regulatory and monitoring responsibilities lack capacity to hold mining companies accountable for their environmental stewardship as required by law.
- CHRAJ also proposed reforms in the Ghanaian mining laws for the protection of communities' rights. The government of Ghana responded to the call for reforms in the mining sector by setting up a committee for the review of the existing mining law to address environmental

and community concerns, among others (CHRAJ, 2008).

The empowerment of communities and the public for effective participation in decisions relating to mineral exploitation is critical to ensure proper management and utilisation of natural resources. Community and public sensitisation and empowerment would help ensure responsible mining practices that would minimise conflict and reward both host communities and the operators of mines in Ghana.

The principle of FPIC has been implied in many forms and statutes in the country. However, the concept has not been internalised in the laws of Ghana due to contention over its applicability in the Ghanaian context. This study would contribute to knowledge about the existence of the FPIC concept present in disparate international laws and conventions. This study would further show the importance of FPIC in preventing conflict through active community participation in decisions affecting natural resource governance.





# LITERATURE REVIEW

## Participation

In the mining sector, stakeholders such as government, companies, civil society organisations (CSOs) and communities have different levels of understanding and appreciation as to what constitutes participation. The World Bank (1991) defines participation as a process whereby those with legitimate interest in a project influence decisions which affect them. According to the World Bank (1996), community participation has been a constant theme in development dialogues for the past 50 years. In the 1960s and 1970s it became central to development projects as a means to seek sustainability and equity, particularly for the poor.

Participation can be measured on a continuum of various levels and intensity, especially when discussing community participation (Oakley, 1991; Nelson and Wright, 1995). In discussing participation, Paul (1987) identifies ascending levels of participation, which should co-exist within a project and include information-sharing, consultation, decision-making and initiating action. Limiting participation to just information sharing and consultation limits the influence that one has on a decision. Actors seeking to promote participation should therefore move farther along the continuum to encourage decision making and the initiation of action.

Tenkorang and Kuevor (unpublished) quoting (Pretty

and Vodouche, 1997) identifies seven categories of participation, moving from the least to the most participatory as follows:

1. *Information sharing* describes the type of participation where locals answer questions to pre-formulated questionnaires or research questions and do not influence the formulation or interpretation of the questions.
2. *Passive participation* describes the type of participation where locals are told what is going to happen and are primarily involved through being informed of the process.
3. *Consultation* describes the type of participation where project beneficiaries meet with external agents who define both problems and solutions in light of the responses, but are under no obligation to take on the views of the beneficiaries or share the power of decision-making.
4. *Provision of material incentives* involves project beneficiaries providing resources, such as labour or land, in return for other material incentives. They do not have a stake in continuing activities once the incentives end.
5. *Functional participation* takes place when locals form groups, usually initiated by and dependent on external facilitators, to participate in project implementation. The groups may become self-dependent and are usually formed after major decisions have been made, rather than during



the early stages of the project.

6. *Interactive participation* describes the type of participation where locals participate in joint analysis with the project planners, leading to the formulation of project plans and the formation of new local institutions or the strengthening of existing ones. The groups or local institutions take control of local decisions and in maintaining structures or practices.
7. *Self-mobilisation* describes the type of participation where locals participate by taking initiative independent of external institutions and develop contacts with external institutions for resources and technical advice, but retain control over how resources are used (Pretty and Vodouche, 1997).

### **Free, Prior, and Informed Consent: Definition and Application**

The principle of FPIC does not have a universally accepted definition even though it is embedded in the legal framework of international laws. The principle of FPIC requires that project-affected communities be adequately informed in a timely manner about development projects that affect them, and be given the opportunity to approve (or reject) a project prior to the commencement of operations. International law establishes FPIC as a basic right for indigenous peoples, derived from the rights to self-determination and to participation. The United Nations (2011), in a report on indigenous peoples and the right to participate in decision-

making, stated;

The element of “free” implies no coercion, intimidation or manipulation; “prior” implies that consent is obtained in advance of the activity associated with the decision being made, and includes the time necessary to allow indigenous peoples to undertake their own decision-making processes; “informed” implies that indigenous peoples have been provided all information relating to the activity and that that information is objective, accurate and presented in a manner and form understandable to indigenous peoples; “consent” implies that indigenous peoples have agreed to the activity that is the subject of the relevant decision, which may also be subject to conditions. (United Nations 2011)

As highlighted above, FPIC requires that communities give their consent before any activity likely to affect them is carried out. Their consent must be determined in accordance with their customary laws and practices (Mackay, 2004). Achieving FPIC does not necessarily require that every member in the community provide his or her consent, but rather that the consent be given in accordance with customary law and practices. The FPIC principle is an empowering tool, which grants communities the authority to define their own goals and destiny and to have a meaningful say in development (Adem, 2009).

## **TEXT BOX 1**

### **Identifying indigenous peoples in Africa**

There is no universally agreed definition for indigenous peoples, and many stakeholders agree that such a definition is neither necessary nor desirable. In Africa, in certain country contexts questions of ethnicity are particularly sensitive and highly politicized. Keeping in mind these challenges, The African Commission on Human and Peoples’ Rights (ACHPR) has identified a few major characteristics that embody the concept of indigenous peoples, including:

- Self-identification;

- A special attachment to and use of their traditional land whereby their ancestral land and territory have a fundamental importance for their collective physical and cultural survival as peoples;
- A state of subjugation, marginalization, dispossession, exclusion, or discrimination because these peoples have different cultures, ways of life or mode of production than the national hegemonic and dominant model.

In their 2007 Advisory Opinion on the United Nations Declaration on the Rights of Indigenous Peoples, ACHPR notes that their interpretation differs from other Continents in which native communities have come close to annihilation. While recognizing that “any African can legitimately consider him/herself as indigene to the Continent,” ACHPR states that within the African context, “the term indigenous populations does not mean ‘first inhabitants’ in reference to aboriginality as opposed to non-African communities or those having come from somewhere else.”

African Commission on Human and Peoples’ Rights, Advisory Opinion of the African Commission on Human and Peoples’ Rights on the United Nations Declaration on the Rights of Indigenous Peoples, Adopted by the ACHPR at its 41st Ordinary Session held in May 2007 in Accra, Ghana (2007).

Community consent is also emerging more broadly as a principle of best practice in sustainable development for natural resource development projects that potentially entail significant adverse impacts on local communities. This is regardless of whether or not the project-affected communities include indigenous peoples. Ensuring community consent for projects prior to their implementation helps to reduce the risk of social conflict and increase stability throughout the life of the project, which benefits all stakeholders (Goodland, 2004).

## FPIC under international law

FPIC is a basic right under international law for indigenous people. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted September 2007, includes several references to FPIC. A majority of 144 states voted in favour, including Ghana. Four states voted against, and 11 abstained. Since that time, all countries that voted against have reversed their position and endorsed the UNDRIP. With regard to development

projects in particular, UNDRIP calls on States to consult with indigenous peoples through their representative institutions in order to secure their FPIC, “prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilisation or exploitation of mineral, water, or other resources.” While not legally binding for States, UNDRIP will likely become more binding as States begin incorporating its principles into national laws and using them to inform their legal decisions (Lehr and Smith, 2010).

The International Labour Organisation’s Convention No. 169 Concerning Indigenous and *Tribal Peoples in Independent Countries* (Convention 169) also requires states to ensure FPIC in certain circumstances. The General Conference of the International Labour Organisation adopted Convention 169 on June 7, 1989. Although the instrument does not clearly articulate the consent standard for development projects, it establishes the right of indigenous and tribal peoples to be consulted

regarding extractive industry projects that would affect them prior to exploration and exploitation, and calls for FPIC in cases of relocation (ILO, 1989). Convention 169 requires that governments consult indigenous peoples “whenever consideration is being given to legislative or administrative measures which may affect them directly”, and states that consultations must be carried out “in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures”. By recognising consent as the objective of consultations, Convention 169 makes clear that adequate consultation processes must move beyond mere dialogue towards agreement-making. Convention 169 also requires state parties to take steps to identify the lands which project-affected peoples traditionally occupy and guarantee effective protection of their rights of ownership and possession. Regrettably, very few countries have ratified Convention 169; with only one African country among them (the Central Africa Republic ratified the convention on August 30, 2010).

While the two instruments referenced above apply only to indigenous and (in the case of Convention 169) tribal peoples, the *Convention on Biological Diversity* (CBD) applies to communities more broadly. The CBD is a multilateral environmental agreement focused on biodiversity conservation and sustainable use, and on equitable benefit sharing as pertains to genetic resources (United Nations, 1992). The CBD references FPIC in the context of genetic resources, specifically requiring that, “access to genetic resources shall be subject to prior informed consent of the contracting party providing such resources, unless otherwise determined by that party”. The conference of contracting parties to CBD have also recognised that the FPIC of indigenous peoples and local communities should be obtained before certain activities that affect them can be undertaken, most notably with respect to access to traditional knowledge, innovations, and practices and in resettlement as a consequence of the establishment and management of protected areas (UNEP, 2012).

The Secretariat of the CBD developed the *Akwé: Kon Guidelines* (2004) to support CBD implementation. These voluntary guidelines address the implementation of cultural, environmental and social impact assessments regarding developments that will likely affect sacred sites, lands and waters traditionally occupied or used by indigenous and local communities. Where national law requires prior informed consent, the guidelines recommend that the assessment process consider whether this has been achieved. Importantly, the guidelines also highlight the on-going nature of FPIC processes: “Modifications to the initial development proposal will require the additional prior informed consent of the affected indigenous and local communities”.

United Nations treaty bodies, such as the Committee on the Elimination of Racial Discrimination and Committee on Economic, Social, and Cultural Rights, have also called on States to respect FPIC for indigenous peoples in the context of development projects (Doyle, 2012).

## FPIC under Regional Systems

### **America**

The Inter-American Court of Human Rights has ruled in several instances that states failed to meet their FPIC obligations. For example, in the case *Awas Tingni Mayagna (Sumo) Indigenous Community v. Nicaragua* (2001), the Nicaraguan government granted a forestry concession to an international corporation on land belonging to the Mayagna Community of Awas Tingni. In its findings, the Inter-American Court on Human Rights established that by failing to consult community members prior to awarding the concession the government had violated their right to property (Page, 2004). Interpreting article 21 of the American Convention on human rights, the court recognises indigenous peoples’ collective rights and resources.

Similarly, in the case of *Saramaka People v. Suriname* (2007), the court ruled that the government of Suriname must review the concessions it had

awarded and consider modifying them if necessary in order to ensure the survival of the Saramaka people. On the consultation process in particular, the court found that, "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".

These and other cases highlight a growing body of jurisprudence in the Inter-American human rights system on the obligation of states to consult indigenous communities likely to be affected by natural resource projects and to ensure FPIC. This jurisprudence references the right to property and the right to self-determination as foundations for FPIC (Page, 2012).

### **Africa**

The African Union's African Convention on the Conservation of Nature and Natural Resources (revised 2003) broadly aims to promote environmental protection, conservation and sustainable use of natural resources, and to coordinate policies in these fields. With regard to the traditional rights of local communities and indigenous knowledge, the Convention calls on state parties to ensure the FPIC of communities for access to and use of indigenous knowledge. The Convention also requires parties to take measures to facilitate, "active participation of the local communities in the processes of planning and management of natural resources upon which such communities depend with a view to creating local incentives for the conservation and sustainable use of such resources". While the Convention does not require project proponents to secure the FPIC of communities for natural resource development projects, it clearly aims to ensure a level of community engagement that moves beyond dialogue towards participation in decision-making on the use of natural resources.

The Africa Mining Vision (AMV, 2009) looks at consent with the objective of encouraging tri-sector partnerships involving government, the private sector and local communities to improve the social and development outcomes of mining at local level. In the same vein, the AMV seeks public participation to secure consent for government and industry actions.

### **African Commission on Human and Peoples Rights (ACHPR)**

The African Charter on Human and Peoples' Rights (African Charter) charges the ACHPR with promoting human and peoples' rights and ensuring their protection in Africa. The African Charter itself contains a number of provisions recognizing the rights of peoples, such as Article 20 on the right to self-determination, Article 21 on the right to freely dispose of wealth and natural resources (including the right to recovery of property and adequate compensation), and Article 22 on the right to economic, social, and cultural development.

The ACHPR referenced FPIC specifically through its 2012 Resolution on a "Human Rights-Based Approach to Natural Resource Governance", which highlights the disproportionate impact of human rights abuses upon the rural communities in Africa that continue to struggle to assert their customary rights of access to and control of various resources, including land, minerals, forests, and fish. Importantly, the ACHPR frames the challenge around access to natural resources within the context of rural communities throughout Africa, and does not limit the scope of the issue to effects on indigenous peoples in particular. Among other recommendations, the resolution specifically calls on states to, "ensure participation, including the free, prior and informed consent of communities, in decision making related to natural resources governance". ACHPR calls for FPIC implementation for natural resource projects affecting any community, regardless of whether the community includes indigenous peoples.

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<sup>2</sup> Ghana ratified this Convention on 13th June 2007

In 2009, ACHPR considered a case called **Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya**. The complainants alleged that the government of Kenya, in violation of the African Charter on Human and Peoples' Rights, the Constitution of Kenya, and international law, forcibly removed the Endorois from their ancestral lands around the Lake Bogoria area of the Baringo. The Koibatek administrative districts, as well as the Nakuru and Laikipia administrative districts within the Rift Valley Province in Kenya, did this without proper prior consultations or adequate and effective compensation. In the instant complaint, even though the respondent state said that it had consulted with the Endorois community, the ACHPR determined that this consultation was not sufficient. It was convinced that the respondent state did not obtain the prior, informed consent of all the Endorois before designating their land as a game reserve and commencing their eviction. The respondent state did not impress upon the Endorois any understanding that they would be denied all rights of return to their land, including unfettered access to grazing land and the medicinal salt licks for their cattle. Additionally, the 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. The Commission found that the state had violated the Endorois' rights to religion, property, culture, adequate compensation or restitution for land, and development (Articles 8, 14, 17, 21, and 22 of the African Charter on Human and Peoples' Rights). Interestingly, this case marks the first time an international tribunal found a violation of the right to development (Williams, 2010). In the light of the precedent this case offers, it is likely similar cases will be brought to the ACHPR in coming years, significantly broadening the body of jurisprudence on FPIC in the African context.

#### **Pan-African Parliament (PAP)**

Similar to the ACHPR, the Pan-African Parliament in its Sixth Ordinary Session held in Addis Ababa, Ethiopia from 16-20 January 2012, notes with deep concern the rise of large-scale land acquisitions. The Pan-African Parliament identified the effects of domestic and foreign direct investment on land, water and related natural resources, and in a resolution called on states to "ensure effective consultations with local communities and various people affected by investment projects and ensure that any investment is approved through free, prior and informed consent of affected communities".

#### **ECOWAS Directive on the Harmonisation of Guiding Principles and Policies in the Mining Sector of 2009 (ECOWAS Mining Directive 2009)**

The ECOWAS *Mining Directive 2009* guarantees the principle of FPIC in the case of mining and petroleum development by state parties. Like most national laws, it affirms that minerals in their natural state are the property of the states. However, it provides for adequate compensation for owners or lawful occupiers of land in cases of resettlement in accordance with international best practice. In addition, states are required to designate some lands as 'no go zones' in cases where mining operations constitute risk to the preservation of security, including areas which have environmental, social, and cultural sensitivity. This can protect local communities' lands. Article 15 of ECOWAS *Mining Directive 2009* deals exclusively with human rights obligations arising from mining activities.

Mining rights holders are required to respect the rights of local communities to own, occupy, develop, control, protect, and use their lands, other natural resources, and cultural and intellectual property. The start of any mining activity is subject to the FPIC of local communities. The *ECOWAS Mining Directive 2009* states specifically that 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" and "maintain consultations and negotiations on important decisions affecting

local communities throughout the mining cycle". Importantly, the timing of FPIC processes must be before exploration begins and the nature of the processes is clearly stated as ongoing throughout the full project life cycle. The instrument also obliges state parties to provide the necessary capacity to local communities for effective engagement with mining rights holders in negotiations and in settling mining disputes.

Although the ECOWAS *Mining Directive 2009* has no constraining force as an international treaty, Ghana has published the Directive in the Gazette, which indicates that the state is taking steps toward making it law. The ECOWAS Court of Justice has jurisdiction over complaints under the Directive, but the complaint should first be brought to the attention of the appropriate state member. In general, the Directive refers to the domestic laws of state parties and states are encouraged to take necessary measures to ensure compliance within five years.

#### **International financial institution safeguards**

A number of international financial institution (IFI) safeguards for investment projects require clients to consult with communities, and some (such as those of the International Finance Corporation, European Bank for Reconstruction and Development, and the Inter-American Development Bank in certain circumstances) even require community consent for projects affecting indigenous peoples in particular. In the Ghanaian context, the policies of the International Finance Corporation and African Development Bank are perhaps the most relevant.

#### ***International Finance Corporation (IFC)***

In 2011 the IFC, which is the private-sector lending arm of the World Bank Group, announced a new policy requiring clients to obtain the FPIC of indigenous communities that could be affected by their projects in certain circumstances. The consent language used in the new policy strengthened the IFC's previous requirement for consultation with indigenous peoples. Approved as part of an updated Sustainability Framework by IFC's board of directors,

the policy took effect on January 1, 2012. The policy sets a standard for a large number of companies and financial institutions, including more than 70 export credit agencies and private banks that commit to the Equator Principles (a voluntary set of standards for identifying and managing social and environmental risk in project financing).

Importantly, the IFC Sustainability Framework also includes a standard that seeks to ensure the support of non-indigenous communities for high-risk projects prior to project approval. For projects that are "likely to generate potential significant adverse effects on communities", the IFC requires "Informed Consultation and Participation" of communities. The IFC is committed to determining whether their client's community engagement process has resulted in "Broad Community Support" – defined by the IFC as "a collection of expressions by Affected Communities, through individuals or their recognised representatives, in support of a proposed business or activity". While a somewhat weaker and less clearly defined standard than FPIC, this requirement for high-risk projects with effects on non-indigenous communities certainly demonstrates that best practice has moved beyond mere engagement with communities towards community participation and agreement making.

The IFC Sustainability Framework also includes a number of client requirements for projects that entail land acquisition and involuntary resettlement. Broadly, in these instances the IFC requires transparency and community participation throughout the full project life cycle:

*Disclosure of relevant information and participation of Affected Communities and persons will continue during the planning, implementation, monitoring, and evaluation of compensation payments, livelihood restoration activities, and resettlement, to achieve outcomes that are consistent with the objectives of this Performance Standard (IFC, 2012).* The IFC safeguards also include several specific client requirements for cases of involuntary resettlement. For example, in these instances clients

must consider alternative project designs to avoid or minimise displacement, establish a grievance mechanism, develop and monitor a Resettlement Action Plan for physically displaced communities or persons, and provide compensation for loss of assets at full replacement cost. When feasible, IFC standards require clients to provide land-based compensation where land is owned collectively or livelihoods of displaced persons are land-based.

### **African Development Bank (AfDB)**

Unlike other IFIs, the AfDB does not have a particular policy for indigenous peoples. Arguably, this is due to on-going controversy around indigenous peoples' rights in Africa. However, the *Involuntary Resettlement Policy* (AfDB, 2003), may be of particular importance to both indigenous peoples and local communities. The Policy contains a number of requirements that the client must implement before the Bank can fund any project that involves resettlement.

The primary aims of the Policy are inter alia to ensure equitable treatment of displaced people and to ensure that they share in the benefits of the projects that led to their resettlement. The Policy also calls for the payment of compensation to the affected people before the implementation of a project that will lead to their resettlement. Further, the Policy stipulates that the needs of vulnerable groups such as ethnic, religious, and linguistic minorities must be at the center of the development approach. The Policy recognises that involuntary resettlement can have a wide range of impacts on the lives of the people including impoverishment, threats to cultural identity, and health problems. Related to the principle of FPIC, the Policy stipulates:

*The affected population and host communities should be involved in the design of the resettlement plan. Community participation helps to ensure that compensation measures, relocation site development programmes, and service provision reflect needs, priorities, and development aspirations of the affected people and their hosts. All stakeholders, particularly the affected population,*

*host communities and their representatives, should be fully informed, consulted and effectively involved in all stages of the project cycle...Special measures need to be put in place to ensure full and effective participation of disadvantaged groups in such processes...*

Like the IFC's policy, the AfDB's policy requires not only community consultation, but also informed community participation in decision making for certain project circumstances.

### **Company commitments to FPIC**

While effective FPIC implementation should start with governments, companies also have an important role to play. Although states have the duty to protect against human rights abuses by third parties (including businesses) through appropriate policies, regulation, and adjudication, companies also have the responsibility to respect human rights, to act with due diligence to avoid infringing on the rights of others, and to address adverse impacts. The Guiding Principles for Business and Human Rights – endorsed in 2011 by the United Nations Human Rights Council – highlight corporate responsibility to respect human rights and provide companies with guidance on how to fulfil this responsibility. Companies that fail to exercise due diligence in preventing rights violations also compromise their responsibilities under domestic laws.

Clearly FPIC has emerged as a principle of best practice in the extractive industries. Several extractive industry companies and multilateral development banks have incorporated elements of FPIC into their policies. The International Finance Corporation has stated:

*There is emerging consensus among development institutions that adopting the term [FPIC] is necessary. Increasingly other IFIs [international financial institutions] (European Bank for Reconstruction and Development, Inter-American Development Bank, Asian Development Bank, International Fund for Agricultural Development), industry associations (e.g., the Hydropower Association), and roundtables*



*have adopted or are considering adopting FPIC (IFC 2010).*

Company commitments to FPIC have also been on the rise. Oxfam America's 2012 Community Consent Index reviews the public commitments made by 28 extractive industry companies on the issue of community consent. The report found that five companies (Inmet, Newmont, Rio Tinto, Talisman, and Xstrata), have made explicit public commitments to FPIC, up from just two companies in the first iteration of the report. In addition, several other companies have publicly incorporated general concepts of community support for social license in their positions regarding development activities (Voss and Greenspan 2012). In addition, in May 2013 the International Council on Mining and Metals (ICMM) announced its new Indigenous Peoples and Mining Position Statement, which sets out ICMM members' approach to engaging with indigenous peoples and FPIC. The policy states that the outcome of an FPIC process should be that, "indigenous peoples can give or withhold their consent to a project, through a process that strives to be consistent with their traditional decision-making processes while respecting internationally recognized human rights and is based on good faith negotiation" (ICMM 2013). Clearly some members of the industry have begun to recognize the human rights and utilize business case arguments for adopting FPIC policies.

Multi-stakeholder initiatives, such as the Forest Stewardship Council (FSC 2010), Roundtable on Sustainable Palm Oil (RSPO 2013), Committee on World Food Security "Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries, and Forests in the Context of National Food Security" (CFS 2012), and the UN World Commission on Dams (WCD 2000) also use FPIC terminology. The first two extend the application of FPIC beyond indigenous peoples to all local communities.

Public company and IFI commitments to FPIC

empower communities, governments, and non-governmental organizations to hold companies and institutions to account and to be proactive in solution-making. Transparency is also fundamental to ensuring that informed decisions can be taken by impacted communities. A lack of transparency limits the ability of local communities to influence project decisions and planning – for example, by impairing the process of identifying social and environmental risks. A lack of transparency also limits the ability of local stakeholders to respond to new challenges and opportunities, and undermines their bargaining power.

## **Ghanaian Law**

When government chooses to exploit minerals on lands inhabited by local communities, specific procedures for project development are subject to the national constitution as well as other statutory acts. The following paragraphs will outline the different provisions of the constitution and other Ghanaian laws which are related to land possession and dispossession, in order to examine whether FPIC can be inferred from these provisions.

### **Constitution**

Under the Ghanaian Constitution, all public lands in Ghana are vested in the President on behalf of and in trust for the people of Ghana<sup>3</sup>. Article 275(6) further states:

*Every mineral in its natural state in, under or upon any land in Ghana, rivers, streams, water courses throughout Ghana, the exclusive economic zone and any area covered by the territorial sea or continental shelf is the property of the Republic of Ghana and shall be vested in the President on behalf of, and in trust for the people of Ghana.*

Concerning the stools and skin lands (these are communal lands belonging to an ethnic group held in trust for the community or group by a stool or skin as symbol of traditional authority) and property, the Constitution states that: "All stool lands in Ghana

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<sup>3</sup> See article 257 (1)

shall vest in the appropriate stool on behalf of and in trust for the subjects of the stool in accordance with customary law and usage".<sup>4</sup> The Ghanaian Constitution provides for restrictions on the acquisition of the land by non-Ghanaian citizens.<sup>5</sup>

The Constitution further provides the conditions under which the state can compulsorily take possession of property (including land) from owners. The compulsory acquisition must be subject to an existing law that makes provision for prompt payment of fair and adequate compensation<sup>6</sup>, and the procedure is applicable to both individuals and communities. Concerning resettlement in case of compulsory land acquisition, the Constitution states: *Where a compulsory acquisition or possession of land affected by the State in accordance with clause (1) of this article involves displacement of any inhabitants, the State shall resettle the displaced inhabitants on suitable alternative land with due regard for their economic well-being and social and cultural values*<sup>7</sup>.

This provision does not allow communities to withhold their consent for relocation, but rather refers to the conditions of resettlement. The textual and contextual understanding of this provision is that communities cannot raise the issue of social or cultural value as a justification for avoiding resettlement, but can negotiate the conditions of

resettlement. At present, the Constitution provides for compensation but not for prior consent<sup>8</sup>.

### **Minerals and Mining Law**

Ownership over minerals is regulated by Section 1 of the *Minerals and Mining Law 2006*, which provides that every mineral in its natural state is the property of the Republic, and is vested in the President in trust for the people of Ghana. Where land is required to secure the development or utilisation of a mineral resource, the President may acquire the land or authorise its occupation and use, under the applicable law for the time in force<sup>9</sup>. The legislation does not include any explicit prerequisites limiting the state in its ability to acquire the land from its owners for the purpose of development or utilisation of a mineral resource. Under Section 4 (1) the Minister may reserve land from mining when this land is not the subject of mineral rights. Several provisions regulate mineral rights, but few provisions address the rights of landowners.

The owner of the land or the successor is entitled to receive a ground rent<sup>10</sup>. The lawful occupier of the land may continue to conduct some activities at the location or land despite the fact that the land is under mineral rights where the mining activities are not extended to that area<sup>11</sup>.

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<sup>8</sup> Article 20 (4) (f)

<sup>9</sup> Section 2

<sup>10</sup> Section 23

1. A holder of a mineral right shall pay an annual ground rent as may be prescribed.
2. Payment of annual ground rent shall be made to the owner of the land or successors and assigns of the owner except in the case of annual ground rent in respect of mineral rights over stool lands, which shall be paid to the Office of the Administrator of Stool Lands, for application in accordance with the Office of the Administrator of Stool Lands Act 1994 (Act 481).
3. The lawful occupier of land within an area subject to a mineral right shall retain the right to graze livestock upon or to cultivate the surface of the land if the grazing or cultivation does not interfere with the mineral operations in the area.
4. In the case of a mining area, the owner or lawful occupier of the land within the mining area shall not erect a building or a structure without the consent of the holder of the mining lease, or if the consent is unreasonably withheld, without the consent of the Minister.
5. The owner of a mining lease shall, in the presence of the owner or lawful occupier or accredited representative of the owner or lawful occupier of land, the subject of a mining lease and in the presence of an officer of the Government agency responsible for land valuation carry out a survey of the crops and produce a crop identification map for the compensation in the event that mining activities are extended to the areas.
6. An owner or lawful occupier of land shall not upgrade to a higher value crop without the written consent of the holder of the mining lease, or if the consent is unreasonably withheld, without the consent of the Minister.

In case of displacement, the owner or lawful occupier of the land is entitled to the payment of compensation by the owner of the mineral rights. The processes leading to the payment of compensation is usually a negotiated deal between two private persons: the owner of the mineral rights and the owner of the land. Apparently, the owner or lawful occupier of the land is entitled to negotiate with the owner of the mineral rights holder for the payment of compensation. The government representative intervenes when an agreement is not reached or when the compensation is by way of resettlement. In addition, the court may intervene where either party is dissatisfied with the compensation proposed by the other party or if the government representative's determination of the

value of compensation payable is unsatisfactory to both of the parties<sup>12</sup>. Compensation is based mainly on material loss. Any moral, religious or cultural loss is not to be taken into consideration. (See section 73&74)<sup>13</sup>.

Again, the minerals and mining law does not require prior consent before the granting of mining rights to a mining company, and the legislation does not reference FPIC.

### ***Environmental Regulations - Environmental Protection Agency Law***

Pursuant to the *Environmental Protection Agency Act 1994*, Environmental Assessment Regulations 1999 (L 11652) was enacted, tasking the Environmental

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<sup>11</sup> Section 72

<sup>12</sup> Section 73

1. The owner or lawful occupier of any land subject to a mineral right is entitled to and may claim from the holder of the mineral right compensation for the disturbance of the rights of the owner or occupier, in accordance with section 74.
2. A claim for compensation under subsection (1) shall be copied to the Minister and the Government agency responsible for land valuation.
3. The amount of compensation payable under subsection (1) shall be determined by agreement between the parties but if the parties are unable to reach an agreement as to the amount of compensation, the matter shall be referred by either party to the Minister who shall, in consultation with the Government agency responsible for land valuation and subject to this Act, determine the compensation payable by the holder of the mineral right.
4. The Minister shall ensure that inhabitants who prefer to be compensated by way of resettlement as a result of being displaced by a proposed mineral operation are settled on suitable alternate land, with due regard to their economic well-being and social and cultural value, and the resettlement is carried out in accordance with the relevant town planning laws.
5. The cost of resettlement under subsection (4) shall be borne by the holder of the mineral right, (a) as agreed by the holder and the owner or occupier as provided under subsection (3) or by separate agreement with the Minister, or (b) in accordance with a determination by the Minister, except that where the holder elects to delay or abandon the proposed mineral operation which will necessitate resettlement, the obligation to bear the cost of resettlement shall only arise upon the holder actually proceeding with the mineral operation.
6. (6) Subject to this section, the Minister and a person authorised by the Minister may take the necessary action to give effect to a resettlement agreement or determination.

<sup>13</sup> Article 74

1. The compensation to which an owner or lawful occupier may be entitled, may include compensation for, (a) deprivation of the use or a particular use of the natural surface of the land or part of the land, (b) loss of or damage to immovable properties, (c) in the case of land under cultivation, loss of earnings or sustenance suffered by the owner or lawful occupier, having due regard to the nature of their interest in the land, (d) loss of expected income, depending on the nature of crops on the land and their life expectancy, but claim for compensation lies, whether under this Act or otherwise (e) in consideration for permitting entry to the land for mineral operations, (f) in respect of the value of a mineral in, on or under the surface of the land, or (g) for loss of damage for which compensation cannot be assessed according to legal principles in monetary terms.
2. In making a determination under section 73(3), the Minister shall observe the provisions of article 20(2)(a) of the Constitution which states that, in the case of compulsory acquisition of property, prompt payment of fair and adequate compensation shall be made.
3. An agreement or determination in respect of a compensation to which an owner or lawful occupier is entitled, shall take account of payments and the value of benefits made or given to the owner or occupier in the past or undertaken to be made or given in the future by or on behalf of the holder and which are in the nature of compensation including without limitation, (a) the cost of resettlement, (b) the annual ground rent, and (c) work that the holder has carried out or undertakes to carry out to make good damage to the land and improvements.

Protection Agency (EPA) with ensuring the conduct of Environmental Impact Assessments (EIA) and involving the public in the review of Environmental Impact Statements (EISs) prepared by the company, where strong public concerns are raised over an intended project and its potential impacts are extensive and far-reaching. The EIA process grants the public the right to ask the company to revise its plans or reject the intended project. Public hearings represent one important form of public consultation under the Environmental Assessment Regulation. The process aims at ensuring that the concerns and needs of the affected population are considered and addressed, and offers key stakeholders an opportunity to influence the decision-making process.

In Ghana, the EPA looks at the completion of EIAs as a process to improve decision-making. It helps to ensure that options under consideration are environmentally and socially sound and sustainable. It is concerned with identifying, predicting and evaluating the foreseeable impacts, both beneficial and adverse, of public and private development initiatives. The EIA considers alternatives and mitigating measures, and aims to eliminate or minimise negative impacts and optimise positive impacts. The broader term impact assessment is used also to describe a suite of different tools, including the EIA, Social Impact Assessment (SIA), Risk Assessment (RA), and Strategic Environmental Assessment (SEA) (EPA, 1996 ). The EPA generally organises public hearing within the project area, and an independent panel moderates the process.

Community and public participation in EIA is important for many reasons.

- For stakeholders to understand the project and the likely effects it would have on them.
- To obtain local and traditional knowledge or indigenous knowledge which is useful in decision making.
- To make it possible to look for alternatives or different approaches to reduce impacts if the impact is irreversible.
- To request and take into account information and views of the affected communities and

public, and include these views in EIA report.

- To make the whole process of EIA creation legitimate and accepted by the public, including the communities affected by the project.
- According to the law, community involvement in an EIA should begin from scoping and continue through the baseline survey; description and evaluation of baseline conditions; mitigation, monitoring and development of alternative methods and strategies to be used (which include changes in venue, technology change or abandonment of the project); presentation of findings to stakeholders (including communities) and monitoring to ensure the correct implementation of the project.

### **Ghana Land Policy**

After a long period of development<sup>14</sup>, the Ghanaian National Land Policy document (Ghana Land Policy 1999) was adopted in June 1999. It aims to serve as a foundation for the review of present and future laws. It further has the general aim of rapidly advancing the socio-economic development programmes and plans of the government.

The Ghana Land Policy document does not refer to the right to FPIC explicitly. However, it mentions the issue of consultation as pertaining to land acquisition. It is important to mention that the national land policy document also recognises community landownership to some extent. It recognises that lands in most parts of the country are in communal ownership, held in trust for the community or group by a stool or skin as symbol of traditional authority, or by a family. Further, the objectives of the policy include (among others) the protection of the rights of landowners and their descendants from becoming landless or tenants on their own lands, the promotion of community participation and public awareness at all levels in sustainable land management, and development practices to ensure the best use of land<sup>15</sup>.

The implied right to FPIC can be drawn from the National Land Policy. In fact, the principle of community participation in land management and

land development at all levels constitutes one of the guiding principles of the National Land Policy and is considered vital for sustainable urban and rural land development. The drafters of the National Land Policy highlight the lack of consultation with landowners and chiefs in decision-making processes for land allocation, acquisition, management, utilisation and development as a significant problem. Thus the National Land Policy includes guidelines for the participation of landowners in the planning schemes for all land uses.

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<sup>14</sup> The first attempt to set up the land policy dated back to 1973. See National Policy, Ministry of lands and Forestry, Accra June 1999, p.1.

<sup>15</sup> Section 4 (3) (c) No interest in or right over any land belonging to an individual, family or clan can be disposed of or declared stool, skin or traditional council land without consultation with the owner or occupier of the land.





## CHAPTER THREE

# GOOD PRACTICE IN CONSENT-SEEKING PROCESSES

In order for government and company consultations with communities to be meaningful, project sponsors must aim to achieve the agreement or consent of communities regarding projects, and communities must have the option to give or withhold their consent for project development. Unfortunately, strong economic and political incentives to launch oil and mining projects quickly often result in rushed consultation processes that fail to meaningfully engage communities. This short-sighted approach may lower short-term costs for project sponsors, but a growing body of evidence suggests that the medium to long-term costs associated with potential project stoppages or even project termination stand to far outweigh any short-term savings (Davis and Franks, 2011); (Herz, et al 2009).

The below recommendations on implementing effective consent-seeking processes draw on a range of international experiences in consultation and highlight good practices based on legislation,

international guidance, or specific project experiences. While many social, economic, and political differences exist among the countries referenced, there are important similarities. Like Ghana, they all produce significant quantities of minerals and most exhibit considerable mineral dependence. Five of the countries referenced in the chapter (Australia, Canada, Peru, Philippines, and Papua New Guinea) join Ghana among the top 20 countries in the world in terms of mineral production value. Additionally, as in Ghana, mineral exports represent a significant share of the value of merchandise exports for most of the countries referenced in this chapter: over 25% for Australia, Bolivia, Papua New Guinea, and Peru. (ICMM 2012). This chapter primarily includes case studies drawn from the oil and mining sectors. However, lessons have also been drawn from FPIC experiences associated with forestry activities in the Congo Basin – Cameroon, Democratic Republic of Congo, Gabon, and Republic of Congo.

**TABLE 1**

**Non-fuel mineral production value and export contribution in Ghana as compared to other countries included in this chapter (ICMM 2012)**

Country	2010 Production value (current US\$ million)	2010 Production value as a percent of GDP	2010 Mineral export contribution
Ghana	3,964	12.7%	25.4%
Australia	71,955	7.8%	40.3%
Canada	13,984	0.9%	11.9%
Bolivia	1,935	9.8%	34.6%
Papua New Guinea	3,166	33.4%	54.0%
Peru	18,832	12.0%	62.7%
Philippines	4,221	2.1%	6.8%

Note that reference to particular cases in this chapter does not represent an endorsement of any particular project by the authors of this report. The examples intend to highlight useful or innovative strategies for promoting effective community engagement and participation in decision-making pertaining to the use and management of natural resources. However, a comprehensive examination of the implementation of all of the particular projects or laws referenced is beyond the scope of this research. The chapter aims to provide a starting point for project sponsors and communities to consider how to best ensure that project planning incorporates community voice effectively. The sections below highlight several strategies employed by governments, companies, and other stakeholders to promote early and inclusive participation of communities in decision making.

**Laying the groundwork**

***Establishing oil and/or mining no-go zones or excluded areas***

In most countries there are certain geographic areas in which mining or oil development would present particularly high and prohibitive social and/or environmental risks. National governments should create no-go zones to ensure the protection of these geographic areas. For example, in the Philippines the implementing regulations for the Indigenous Peoples Rights Act of 1997 (IPRA) describe excluded areas such as: sacred grounds and burial sites of indigenous communities, identified international and local cultural and heritage sites, and critical areas identified or reserved by indigenous communities for special purposes<sup>19</sup>. In addition, Executive Order No. 79 issued in July 2012 in the Philippines (which precedes a new mining law currently under development), prevents application for mineral contracts, concessions and agreements in natural protected areas, prime agricultural lands, tourism development areas, and other critical areas.<sup>20</sup>

<sup>16</sup> Total production value of metallic minerals in 2010.

<sup>17</sup> 2010 production value divided by Gross Domestic Product.

<sup>18</sup> Non-fuel mineral exports in 2010 as a percent of total merchandise exports.

<sup>19</sup> National Commission on Indigenous Peoples (NCIP) Administrative Order N. 3, Series of 2012, "The Revised Guidelines on Free and Prior Informed Consent (FPIC) and Related Processes of 2012," Section 25, 12.

<sup>20</sup> Executive Order 79 issued by the President of the Philippines, Section 1, Official Gazette (2012) <http://www.gov.ph/2012/07/06/executive-order-no-79-s-2012/>.



In the Solomon Islands, the Mines and Minerals Act prohibits mining in sensitive areas, (for example, sites of traditional significance including burial places, and cultivated land or cropland) without written consent from the relevant land owner or occupier. In Queensland, the second largest region of Australia, the government in 2011 announced a prohibition on mining within a two kilometre radius off towns with more than 1,000 people<sup>22</sup>.

***Implementing community protocols, participatory land use mapping, and field-based investigations***

*Community protocols* provide a valuable tool for helping communities to document and communicate their traditional decision making institutions and procedures to external actors. They can be used to define the terms by which outsiders can access community lands and resources. Without clear and agreed upon lines for decision making, governments and project sponsors risk engaging with individuals or groups that lack the full backing of communities. Agreements reached with illegitimate community representatives risk alienating important segments of the local population and even potentially generating local conflict. Consultations should also target key interest groups (trade unions, academics, etc.), relevant non-governmental and civil society organizations, and local governments.

The *Akwé: Kon* voluntary guidelines include guidance on stakeholder engagement prior to launching development projects that will likely impact sacred sites and lands and waters traditionally occupied or used by indigenous and local communities. The guidelines recommend a formal process of stakeholder identification through consultation, and the establishment of an advisory committee consisting of representatives of relevant groups.

A formal process to identify the indigenous and local community members, relevant experts and organisations, and relevant stakeholders, should

be engaged and should include local and open consultations. Once all parties have been identified it is appropriate that a committee representative of the parties be formally established and its mandate be defined to advise on the impact assessment processes, particularly in relation to screening and scoping phases. The mandate should also include advising on the establishment of any environmental management and monitoring plan, as well as cultural and social contingency plans. In establishing this committee, special consideration should be given to ensuring the adequate representation of indigenous and local communities. (*Akwé: Kon Guidelines* 2004).

*Participatory land use mapping*, a process whereby communities create maps documenting their rights to lands and resources, should be incorporated into the development of community protocols where relevant. Participatory mapping can help to clarify tenure claims and land and resource needs for governments and project sponsors. The process can also help identify potential rights impacts that a project could generate. Research conducted in the Congo Basin on FPIC processes in the context of forestry concessions found land use mapping to be, "the most efficient and equitable method of organising benefit-sharing and a very successful strategy for gaining and maintaining FPIC" (Lewis, et al, 2008). When development projects have the potential to impact multiple communities, participatory mapping efforts should attempt to include all impacted communities to ensure that community-by-community mapping efforts do not have the unintended consequence of generating social conflict due to conflicting claims.

Experience in participatory land use mapping demonstrates the importance of ensuring broad and diverse community engagement in the process. A recent report on FPIC in the forestry context states:

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<sup>22</sup> Buffer Zones Set to Protect Urban Areas," Southern Free Times, <http://www.freetimes.com.au/wordpress/index.php/2011/08/buffer-zones-set-to-protect-urban-areas/>

*During the last twenty years, participatory mapping techniques have been developed that involve all parts of the community in mapping community resources. The participation of neighbouring communities in the mapping process is essential so that they can confirm boundaries, and include their own access and use rights to the areas represented on the map. Good practice in participatory mapping makes sure that there is participation of different groups from within a community, including women, youth, poor families, as well as established elders and elites. Each group has different values, uses, and resources to include in the maps. (Anderson, 2011)*

While external facilitators may be useful to provide technical input and support for mapping, it is important that the process should be owned by communities. According to the International Fund for Agriculture's *Good Practices in Participatory Mapping*, "the participatory aspect requires that the community assume as much control as possible over decision-making, management and responsibility for all stages of the mapping process." (IFAD 2009). A case study from Cameroon on FPIC in the forestry sector illustrates a way in which new technology can be used to promote community ownership in mapping processes. Communities designated community cartographers to participate in mapping activities, and these cartographers collected data through a touch-screen global positioning system (GPS). Communities selected the icons for the GPS system, which represented resources like hunting, fishing, and agriculture. This approach addressed literacy and language challenges, but also, "allowed communities to appropriate the data collection process, addressing a frequent reproach made of social mapping initiatives, where communities simply assist an outsider technician in data collection" (Lewis and Nkuintchua, 2012).

*Field-based research* plays an important role in the process of mapping customary lands and community usage zones. The 2012 FPIC regulations for IPRA in the Philippines require "field-based investigations" which consist of on-the-ground research to determine the project overlap and/

or impact to indigenous lands and identify the indigenous peoples who will either grant or withhold their FPIC. The regulations require the participation of indigenous leaders on the field research team. Indigenous leaders, project sponsors, and the relevant government agency must agree on issues such as costs, format for documenting the activity (photo, video, etc.), and other relevant processes, and the results of the field-based investigation must then be validated in a community assembly.

A Bolivia-based case study from 2010 documented by Oxfam America highlights an experience in which field-based research proved critical to facilitating agreement between government and indigenous communities around hydrocarbon exploration. After the government's initial attempt to gain community consent through rushed and essentially administrative processes, Guaraní indigenous leaders demanded substantial adjustments to the methodology for consultation, including additional time for the process and a field inspection which entailed observation and analysis of possible negative impacts from hydrocarbon exploration. The government met the demands of Guaraní leaders and the process ultimately resulted in a signed agreement between the Bolivian government and indigenous leaders (Greenspan, 2012).

### **Obtaining Community Consent prior to the Award of Concession Licenses, Leases, or Agreements**

Once a mining or oil concession has been awarded to a company, and particularly once companies have begun to invest funds in exploration and discoveries have been made, it becomes much more difficult for the community to make a development decision regarding the most appropriate use of their land without being subject to external pressures. In addition, exploration activities can have potentially significant impacts on local communities (through the creation of roads with the potential to increase in-migration, damaging of sacred sites, spread of disease, impacts of seismic lines on wildlife, and other impacts). For these reasons, consent-seeking processes for proposed projects that impact the lands of local communities must be implemented

prior to the award of the license or lease for exploration.

Currently, most governments conduct oil and mining concession bidding processes at the national level prior to consulting potentially affected local communities. However, some countries have established legal requirements aiming to ensure community agreement or consent prior to the initiation of extractive activities. Some examples include:

- The *Native Title Act 1996* of Australia recognizes the right of traditional owners to negotiate over land use. This does not represent a 'veto' right, but does provide incentive to both parties to reach agreement since unresolved negotiations pass to a tribunal for resolution. (Brereton et al 2011). Specifically in the northern territory region of Australia, the *Aboriginal Land Rights (Northern Territory) Act of 1976* (ALRA) establishes special protections for traditional aboriginal owners, requiring project proponents to obtain the consent of Land Councils established to protect the interests of these owners. Land Councils must be satisfied that traditional aboriginal owners understand the nature and purpose of the proposed action and, as a group, consent to it prior to signing pre-exploration agreements. The relevant aboriginal community or group must be consulted and have an opportunity to express its views to the Land Council (Rumler, 2011).
- The *Papua New Guinea Mining Act 1992* requires companies to establish and register agreements with landowners regarding compensation prior to occupying or operating on land (Brereton et al, 2011).
- In the Philippines, the *Indigenous Peoples Rights Act (IPRA) of 1997* requires the National Commission of Indigenous Peoples to certify that FPIC has been obtained "prior to the grant of any license, lease, or permit for the exploitation of natural resources" affecting the interests or ancestral domains of indigenous peoples<sup>23</sup>. As noted above and described throughout this chapter, the government's 2012 implementation of regulation on FPIC provides additional guidance which promotes participatory and legitimate FPIC processes.
- In Peru, in 2011 the government passed the *Right to Prior Consultation for Indigenous or Native Peoples Law* which requires the government to consult with indigenous peoples prior to implementing legal or administrative measures that would affect them directly, including development projects like oil drilling and mining. The law specifies that consultations should aim to secure indigenous peoples' agreement or consent. Peru Petro (the agency responsible for issuing oil and gas licenses) has committed to ensuring that community consultation happens before contracts have been signed (but after companies have been awarded bids for blocks)<sup>24</sup>.

### Allowing for a "no-action" alternative

Only with very early and inclusive implementation of consultations will conditions be adequate for communities to have a true "no-action" alternative for project development. Unfortunately, most often consultation processes move forward without communities being given the opportunity to decide whether to consent or *withhold their consent*. The UN initiative on Reducing Emissions from Deforestation and Forest Degradation (REDD) *Programme Guidelines on FPIC* (which apply to

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<sup>23</sup> Indigenous Peoples Rights Act of 1997 (Republic Act No. 8371), SEC. 46 (a), Philippines, [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=179605](http://www.wipo.int/wipolex/en/text.jsp?file_id=179605).

<sup>24</sup> "Perupetro delimits 36 blocks for the selection of companies 2012," Perupetro (September 11, 2012), <http://www.perupetro.com.pe/wps/wcm/connect/perupetro/site-en/Press%20Room/PressRelease>

REDD projects impacting indigenous and other forest-dependent communities with territory or resource rights) makes clear the validity of “no-action” decisions: “Consent is a freely given decision that may be a ‘Yes’ or a ‘No,’ including the option to reconsider if the proposed activities change or if new information relevant to the proposed activities emerges...” (Laughlin et al. 2013).

Governments have primary responsibility for carrying out community consultations prior to entering into agreements with companies. Even when this fails to occur and companies themselves carry out community consultations, they should make clear to communities at the outset that they will respect a decision to withhold consent if such a conclusion results from the process. In the Philippines, FPIC regulations clearly allow for communities to opt for non-consent, bringing all FPIC proceedings to a halt and preventing consideration of any similar proposals until six months after issuance of non-consent<sup>25</sup>.

All communities that will be impacted directly or indirectly should be consulted with regard to how and whether they would like the oil or mining project to go forward, but the ability to withhold consent should reside in communities that will be impacted directly. The directly affected communities’ decision to agree to development should not be subject to the decisions or communities that will likely experience a lesser impact.

### **Participatory and gender-sensitive planning of format, timeline, and logistics for consultations**

Whether or not communities have developed a more formal protocol for engagement, they must be consulted on key considerations regarding the implementation of consultations such as the timeline, location(s), format for information provision, and appropriate language for the proceedings.

In communities where women assume a less active or formal role in decision making, their input on the structure of consultation processes should be solicited separately and taken into account. For example, research on FPIC application in Congo Basin countries highlights that in villages of the Bantu ethnic group public discussions often marginalise women, and women tend to speak more openly in women’s groups (Lewis et al, 2008). In contexts such as these, project sponsors should create separate women’s forums to solicit women’s views. In the province of Espinar, Peru, interviews with communities impacted by a large mining project called Tintaya found that women expressed different preferences regarding information provision and engagement than men. Women preferred communication in Quechua to Spanish, and preferred for meetings to be held in the morning. Men had no stated language or timing preference with regards to meetings. Women reported receiving information from the radio and through presentations made in workshops or informational meetings, while men reported receiving information in more and varied kinds of media (radio, television, print, etc.) (Greenspan, 2012).

Unfortunately, government agencies and companies face strong economic incentives to move processes forward quickly, and so often allocate inadequate time for consultation implementation. Recent research in Cambodia on the award of Economic Land Concessions or mining licenses in four case studies found that, “at the very grassroots community level, affected IP [indigenous peoples] communities were not privy to any form of true consultation,” and stated that the, “Ministry of Environment highlighted that thirty days is not long enough for them to conduct true community consultation” (Kavenagh et al 2012). Even in the Philippines where IPRA legislation includes a strong FPIC requirement, past consultation processes have often failed to respect community procedures and to allow sufficient time

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<sup>25</sup> NCIP Administrative Order N. 3, Series of 2012, Philippines, Subsection 27.

for community engagement (Buxton 2012).

### Providing accurate and complete information

Governments and companies should ensure transparency of technical information, including potential negative impacts and risks associated with project development. Text Box 1 highlights the criteria for information provision presented in the UN-REDD Programme guidelines on FPIC implementation, offering a useful general overview of the type of information that should be provided to local communities.

#### TEXT BOX 2

##### Informed

Informed refers mainly to the nature of the engagement and type of information that should be provided prior to seeking consent and also as part of the ongoing consent process.

Information should:

- Be accessible, clear, consistent, accurate, constant, and transparent;
- Be delivered in appropriate language and culturally appropriate format (including radio, video, graphics, documentaries, photos, oral presentations);
- Be objective, covering both the positive and negative potential of REDD+ activities and consequences of giving or withholding consent;
- Be complete, covering the spectrum of potential social, financial, political, cultural, environmental impacts, including scientific information with access to original sources in appropriate language;
- Be delivered in a manner that strengthens and does not erode indigenous or local cultures;
- Be delivered by culturally appropriate personnel, in culturally appropriate

locations, and include capacity building of indigenous or local trainers;

- Be delivered with sufficient time to be understood and verified;
- Reach the most remote, rural communities, women and the marginalised; and
- Be provided on an ongoing and continuous basis throughout the FPIC process.

"UN-REDD Programme Guidelines on Free, Prior and Informed Consent," January 2013.

Too often, project sponsors fail to provide complete information which highlights potential negative impacts and risks. Field research on FPIC implementation in the Congo Basin found that in five of seven forest concessions visited by researchers, company staff had excluded important information from their awareness-raising activities within communities. For example, companies failed to highlight potential negative impacts of project activities on community rights and resources, and the community right to say 'no' to exploitation. In fact, only one of the seven companies explicitly informed communities of potential negative impacts through the land use mapping process by asking communities to map areas that might be negatively affected by project activities (Lewis et al, 2008). Recent research on FPIC in Cambodia revealed similar information concerns. In each of the four case studies (focused on economic land concessions and mining licenses granted on indigenous peoples' lands) communities reported having received minimal or no information about the concession or lease, and many were not even aware of the area of the land granted (Kavenagh et al, 2012).

According to the World Bank's guidance note *Stakeholder Consultations in Investment Operations*, consultation processes with communities should include design alternatives, information on impacts (positive and negative, cumulative, intangible,

legacy), design changes, mitigation measures, and implementation arrangements (Gill and Ninio, 2011). Comprehensive and effective consultation processes must highlight the full range of possible impacts and options for adjusting project planning to address these potential impacts. The United Nations Expert Mechanism on the Rights of Indigenous Peoples states that the “informed” component of FPIC requires that communities receive “all information relating to the activity and that that information is objective, accurate and presented in a manner and form understandable to indigenous peoples” (UN 2011).

In the Philippines, the 2012 FPIC regulations outline specific guidance on the type of information that must be presented to communities by the project proponent during the FPIC process, including, “a) The Operation Plan and the scope and extent of the proposal; b) The cost and benefits of the proposal to the ICC/IPs [indigenous communities] and their ancestral domains; c) The perceived disadvantages or adverse effects to the community; and d) The measures adopted by the applicant to avoid or mitigate these.”<sup>26</sup> In particular, the specific requirement to present perceived disadvantages of the project is critical.

### **Providing culturally-tailored information**

Given the highly technical nature of extractive industry projects, in some circumstances information sharing with communities can present challenges. In addition to challenges inherent to understanding technical issues specific to the industry, in many cases low levels of literacy, limited access to internet, and limited knowledge of the official national language of the host country create additional major barriers to participation. While communities should have full access to technical documents such as Environmental Impact Assessments, simply making these technical documents publicly available in most cases will be insufficient to facilitate informed

discussion and participation. Project proponents should develop a communication plan that considers all aspects of consultation processes, and addresses all relevant stakeholders (including local government, NGOs, and others). As a general rule, communication should be in the language spoken by communities and using a medium appropriate to communities (Anderson, 2011).

While limited literacy can represent a key challenge to communication, this is not insurmountable. Project sponsors might consider presenting information and stimulating dialogue with non-literate communities through, for example, video, art, theatre, community radio, maps, or even puppet shows. An important initial step in developing a communication plan for the FPIC process will be to ask local communities how they would like to receive information.

In the context of the aforementioned FPIC research in seven forestry concessions in the Congo Basin, researchers found that company representatives responsible for engaging with communities generally lacked materials for engaging with non-literate people, and that communities found flashcards prepared by the company to communicate messages through visual images difficult to understand. However, some company representatives found innovative and successful ways to illustrate concepts relevant to forestry certification and FPIC, such as through dance and song contests and community radio broadcasts (Lewis et al 2008). In a separate study focused on FPIC in Cameroon (also around forestry issues), community based organizations used illustrated picture books, focus groups, and oral presentations to highlight sections of the Cameroonian Forest Act relevant to communities (Lewis and Nkuintchua, 2012). An adequate communications plan will consider challenges associated with literacy levels and other communication barriers, and will include local community input in communication strategies.

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<sup>26</sup> NCIP Administrative Order N. 3, Series of 2012, Philippines, Subsection 22.

The composition of the team assembled by the government and/or project sponsor to engage with communities will also play a role in determining whether the consultation succeeds. Project proponents should ensure that representatives responsible for engaging with local communities have not only the appropriate technical and legal knowledge and skills, but also cultural understanding and sensitivity. The team should be adequately staffed and funded, and when possible should include local community members (at least in an advisory capacity).

### **Promoting inclusivity in consultation processes**

As previously noted, the International Finance Corporation (IFC), the private-sector lending arm of the World Bank, requires its clients to ensure the FPIC of indigenous peoples in certain circumstances, such as when projects will have potentially adverse impacts on lands and natural resources subject to traditional ownership or under customary use. With regard to gender, IFC states that, "assessment of land and natural resource use should be gender inclusive and specifically consider women's role in the management and use of these resources" (IFC 2012). In addition, the IFC's guidance notes relevant to FPIC state that:

The engagement process will take account of existing social structures, leadership, and decision-making processes as well as social identities such as gender and age, and be cognisant of, inter alia:

- *The existence of patriarchal traditions and social norms and values that may limit women's participation in leadership roles and decision-making processes;*
- *The need to protect and ensure the legal rights of indigenous women; and*
- *Marginal or vulnerable groups' potentially limited realization of their economic and social rights as a consequence of poverty and limited access to economic resources, social services, or decision-making processes (IFC 2012).*

While recognising the importance of respecting traditional decision-making structures, the IFC

also highlights the need to conduct inclusive FPIC processes. The way in which project proponents will structure consultation processes to ensure balanced representation will vary based on specific characteristics of the project-affected population, but all communication plans for consultation should include safeguards to ensure the participation of both women and men, and any marginalised voices within the local community.

According to Rio Tinto mining company, in the early stage exploration work that it undertook around a mining project in the province of Gobi-Altai in Mongolia, the company made a deliberate effort to incorporate women's participation which led to important informational gains for the company. Although women in the project-affected community tended not to speak openly in public meetings and no women participated in the Community Advisory Group elected by community members to engage with the company, Rio Tinto staff chose to engage separately with women. The company found that women had particular concerns about potential risks to the pasture land, and that women tended to provide more detailed information on movements in the area than men. Rio Tinto found that women added different and new contributions to their consultations:

At the household level women were insightful and participated more actively than their husbands, although they were conversing with their husbands throughout the consultation. Men talked about the spiritually significant areas, and the grass, but women talked about vegetation, seasonal migrations and shelters in more detail than the men. (Kemp and Keenan, 2009).

Ultimately both the company and the community benefited by the engagement of women in the consultation and resource mapping process.

Among highland communities of Espinar, Peru neighbouring the Tintaya mining project, considerably fewer women than men participated in a roundtable dialogue established to facilitate



ongoing communication between the mining company BHP Billiton (later replaced by Xstrata) and local communities. Interviews with local community members indicated a number of factors that likely contributed to this outcome, including that women tended to have fewer financial resources to assume the costs of participation (both in terms of time and money), less often won community elections to participate, had less fluency in the official national language (Spanish), and more often suffered from embarrassment about speaking in public (Greenspan, 2012). An effective communication plan will identify primary obstacles to balanced engagement and outline strategies to overcome these barriers.

### **Implementing FPIC at each phase of project development throughout the project lifecycle**

FPIC is not a 'one-off' procedure, but instead an ongoing process. In order for companies to maintain a true social license to operate, they must fulfil their commitments to communities. The power of the license is that it may be revoked if the rules are not followed. If companies maintain high social and environmental standards and if benefits accrue to communities, it will be in the interest of both parties to maintain the agreement (Weitzner, 2009). Research by the Institute of Development Studies at the University of Sussex underscores the ongoing nature of FPIC processes:

*...free, prior and informed consent applies to specific projects proposed by outsiders and is operational at all stages of the project cycle. Where granting their prior, informed consent to projects, communities/peoples may agree to share rights to resources, which may result in certain constraints on use and access to those resources. But this does not mean that they lose their rights to control the resources, even if it becomes joint control (Mehta and Stankovitch 2006).*

The recent guidelines for the implementation of the United Nations REDD program similarly emphasise that FPIC processes continue throughout the project lifecycle. The guidelines state that consent is, "Given or withheld in phases, over specific periods of time for distinct stages or phases of REDD+. It is not a one-off process." (Laughlin et al. 2013).

Adequate implementation of FPIC requires that communities have the ability to withhold consent not only prior to project development, but throughout the life of the project – both in instances where project sponsors fail to meet the conditions of consent and for changes to the project including new phases of project development (such as project expansion or closure). FPIC regulations in the Philippines require multiple FPIC processes during the project's life: "Unless specifically stated in the MOA [Memorandum of Agreement], separate exercise of the right to FPIC shall be for each major phase of the proposed activity such as Exploration; Operation or Development; Contracting of operator; and the like."<sup>27</sup>

Research from the North-South Institute highlights examples of key triggers for obtaining consent in the mining cycle. These include: 1) prior to issuing the concession, 2) prior to accessing the territory for staking, prospecting, flyovers, etc., 3) prior to advanced exploration and early environmental and social impact assessment (ESIA) data collection, 4) prior to full ESIA studies, 5) prior to issuing the permit for exploration, 6) prior to any changes to the scale or scope of mining activities, and 7) prior to mine closure (plan will need to be reviewed and agreed upon) (Weitzner, 2009). In the oil and gas sector in particular, the Expert Mechanism on the Rights of Indigenous peoples has highlighted several areas in which indigenous peoples' right to FPIC should be respected, including: "involvement in legislation; seismic studies and surveys, from the initial stages to the results; and adequate compensation for access

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<sup>27</sup> NCIP Administrative Order N. 3, Series of 2012, Philippines, Subsection 20.



permits, leases, exploration, development and reclamation, which may sometimes best be outlined in impact benefit agreements” (UN, 2012). Project sponsors and communities should review and agree on particular triggers for FPIC throughout the project lifecycle at the outset, and document decisions so that all parties have a clear understanding of expectations for future engagement.

Effective FPIC processes will continue throughout the life-cycle of the project, and early stakeholder agreement on the appropriate timing for these processes will be critical to preventing misunderstandings during project implementation.

### **Capacity-building and access to Adequate Technical and Legal Support**

Governments and non-governmental organisations should prioritise programs that strengthen indigenous and local community technical and leadership skills, building up their capacity to participate effectively in negotiations with project sponsors. Communities with enhanced knowledge of potential project impacts and international human rights norms will be best prepared to defend their rights. Community leaders must be prepared to provide member communities with relevant information and training and must effectively monitor local views and experiences in an ongoing manner.

The Centre for Social Responsibility in Mining’s Good Practice Note on Community Development Agreements recommends a number of strategies to strengthen community capacity to engage in agreement making processes, including:

- Providing financial and logistical assistance.
- Assisting communities to access independent expert advice.
- Providing training on agreement making and negotiation.
- Ensuring that community members and representatives have a good understanding

of the project and are aware of current and emerging practices in the sector.

- Appointing independent mediators.
- Funding initiatives to improve governance capacity at the local level (Brereton et al, 2011).

Community-managed trust funds offer one option for covering the costs of capacity building and technical support, as long as they include good safeguards for independence. In Canada, some aboriginal communities have received funds from companies to hire consultants or lawyers in advance of their negotiations with the company (with no restrictions put on the use of these funds), and in other instances government has financed technical support to communities<sup>28</sup>. To support negotiations with communities around a diamond mine in Australia, Rio Tinto provided funding for traditional owners to acquire legal advice (Brereton, et al, 2011).

Project-affected communities received capacity building support for their engagement in dialogue and negotiations with mining companies both at the Tintaya mine in Peru and at the Ok Tedi mine in Papua New Guinea. In each of these instances, stakeholder dialogue resulted in agreements between the mining company and communities. In the Tintaya example, community leaders strengthened their dialogue and negotiation skills considerably with support from partner organizations. In particular, community members valued hearing about similar experiences from indigenous communities in Canada and observed that trainings helped to build their confidence and leadership skills prior to negotiation (Greenspan, 2012). At the Ok Tedi Mine, community members and company personnel received training on interest-based negotiations and on understanding roundtable processes and requirements (Brereton, et al, 2011).

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<sup>28</sup> “Impact Benefit Agreements Between Aboriginal Communities and Mining Companies: Their Use in Canada,” Canadian Environmental Law Association, Cooperacion, 19, [www.cela.ca](http://www.cela.ca).

## **Guarding against 'elite capture' of the negotiation process**

Communities may choose to be represented in negotiations by traditional leaders, and of course project proponents should respect democratically elected local leaders. However, if this leadership structure fails to represent certain subgroups of the population adequately, project proponents should promote accountability and transparency by offering members of the broader community the opportunity to support information gathering and decision-making. The Akwé Kon voluntary guidelines note that project proponents should, "provide regular feedback to the affected community throughout all stages of the impact assessment and development process." Consultation processes should include project sponsor engagement with the broader project-affected community or communities (beyond local leaders or the negotiating team) as a safeguard to ensure local buy-in with leadership representation and decisions.

In East Kalimantan, Indonesia, the community of Lusan developed a means of discouraging elite capture by meeting as a whole to determine the negotiation team around a forestry project. Ultimately the team included both traditional and elected government leaders. (Anderson 2011).

In Papua New Guinea, for the renegotiation of community agreements around the Ok Tedi mining project in 2005, communities and OK Tedi Mining Limited established a system of participatory dialogue which helped to avoid elite capture and increase gender balance in agreement-making. It is relevant to note that the renegotiations of these agreements took place in a very tense and politically sensitive context. Ok Tedi mine had been in operation for more than two decades, and revenues from the mine generated an important contribution to the national economy – almost 25 per cent of Papua New Guinea's export revenue (approximately 15 per cent of Gross Domestic Product) as of 2008. Disputes between the company and communities dated back several years stemming from pollution of local rivers and had resulted in legal actions by landowners against Ok Tedi Mining Limited and

BHP (the company's largest shareholder, now BHP Billiton) (Sharp and Offer 2008). In an attempt to dissolve mistrust and promote inclusivity in the negotiation, the company established a participatory Review Working Group to facilitate the process of developing revised mine continuation agreements. This democratically-elected group included representatives of communities from the nine regions, the company, and government, as well as women, youth, church, and environment groups. Ultimately this dialogue process resulted in an agreement with communities (Sharp and Offer 2008).

## **Including independent third-party facilitators and observers**

Engaging independent facilitators and/or observers of dialogue between companies and communities can help to promote adherence to dialogue ground rules and complete provision of necessary information, and can help to ensure that both parties have adequate opportunity to present their views. This is particularly valuable in situations characterised by mistrust between the negotiating parties (whether as a result of past incidents or legacy issues involving government or another company). The facilitator must be neutral and trusted by all stakeholders, and should assume the responsibility of documenting agreements reached in the discussion.

In the aforementioned process of renegotiating the Ok Tedi mine continuation agreement, independent facilitators participated in the negotiations to manage the conduct of participants and ensure fairness and equity in the process. The negotiation also incorporated impartial independent observers who prepared and circulated progress reports, including posting them online. A working paper review of this agreement-making process found that, "Using independent facilitators, observers, advisers and funds' administrators to support the process was critical to overcoming the high levels of distrust among some of the parties. It was an important response to the real and imagined power imbalance of the village communities and the company and PNG [Papua New Guinea] Government" (Sharp and

Offer 2008).

## Documenting and Validating Agreements

Formalising agreements reached by parties will help to reduce the risk of uncertainty, instability, or confusion over the long-term. Agreements also help enable communities to maximise benefits and minimize risks associated with project development. Agreements should be written in a language that communities understand. In contexts where literacy levels are low, communities should be presented with key terms of the agreement verbally.

Communities should have the opportunity to review agreements prior to signature by their elected leaders. The FPIC regulation in the Philippines requires that agreements be signed, "during a general assembly called for the purpose, after its contents is fully read aloud and explained by the FPIC Team and understood and affirmed by the community."<sup>29</sup> This practice helps to ensure that communities understand the agreement and that leadership is not concealing internal disagreement within the community. Industry has already begun to recognize the benefits of community ratification of agreements to some extent:

*In Canada, to avoid situations where internal disagreements inside the community may be ignored or concealed by the leadership negotiating the agreement with the company, it is considered best practice to embed a formal process of ratification by community members in the agreement itself, by means such as a vote, referendum or otherwise (ICMM 2010).*

Taking additional measures to promote the legitimacy of the agreement at the outset will help to promote its sustainability over the long term.

In addition, measures should be taken to ensure that

both women and men have a voice in the agreement-making process. In a case study documenting the experience of community agreement-making in the context of the Argyle Diamond Mine in Australia's Barramundi Gap, mining company Rio Tinto notes that an initial agreement between the company and the community did not sufficiently account for the significance of the mining site to women. According to Rio Tinto, after several years, "the re-negotiation of the agreement was triggered by a deteriorating relationship with Traditional Owners and a desire to address past wrongs and include those who were incorrectly excluded from the previous agreement." (Kemp and Keenan, 2009). The revised agreement includes provisions for more engagement of women in project implementation, such as permanent representation on the Relationship Committee (a dialogue roundtable with the participation of Traditional Owners and the mining company). Ensuring that agreements consider priority issues for both women and men will help to promote stronger agreements and reduce the likelihood of tension building up during project implementation.

While written agreements provide the parties with legal proof and a means of redress, in some instances communities may require additional documentation of agreements. For example, research on FPIC processes from the Congo Basin found that local communities prioritized marking the achievement of consent with a traditional la fête de la forêt celebration:

*This event essentially involves the company workers bringing food and drink to join villagers in a big feast which is also attended by the company management and local dignitaries. This practice is a much better marker of consent than any signed forms because it is understood as consent by all involved. Unlike a signed document it exists in the memory of all present and it follows local traditional*

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<sup>29</sup> NCIP Administrative Order N. 3, Series of 2012, Philippines, Subsection 34.

practices (Lewis et al, 2008).

### **Creating a framework for continuing dialogue with communities, agreement monitoring, and facilitating early reporting of grievances**

Companies should find ways to formalize a space for dialogue with communities, and engagement and dialogue should be ongoing. The International Council of Mining and Metals (ICMM) states that the most effective agreements are flexible and provide

a framework for governing long-term relationships, and recommends that agreements be, "characterized by a willingness by all parties to change and improve the agreement as circumstances require."(ICMM 2010). The text box below highlights a number of specific ICMM recommendations aiming to promote the sustainability of agreements between indigenous communities and mining companies. (While the recommendations are particularly tailored to indigenous communities in this context, they are general enough to be applied more broadly.)

#### **TEXT BOX 3**

##### **Recommendations on institutional arrangements for ongoing governance**

- Establish a liaison committee comprising both indigenous and company representatives (and possibly others; for example, representatives from local government authorities) to oversee the agreement, deal with implementation issues and provide a forum for addressing disputes. Some agreements also provide for the formation of committees to address specific functional areas (e.g. employment and training, cultural heritage management). It is important that the role, functions, jurisdictions and powers of these bodies are clearly defined from the outset, to avoid confusion and conflict later on. (For example, is the committee advisory only, or does it have decision-making authority? If the latter, what is the procedure for reaching decisions?)
- Detail financial governance arrangements; for example, the creation of trust mechanisms with clearly defined spending priorities, independent investment advice and external financial oversight.
- Document processes for resolving disputes over the interpretation and application of agreement provisions. Where there is no statutory dispute resolution scheme in place, dispute resolution is best managed through a series of escalating mechanisms from less formal, amicable resolution to more formal meetings between two parties, mediation, to independent arbitration...
- Require ongoing monitoring and reporting on activities undertaken pursuant to the agreement, compliance with key provisions, and actions taken to address issues and concerns raised by the parties...
- Build in regular reviews that provide an opportunity to stand back and assess progress against the objectives of the agreement and to modify and refocus the agreement as appropriate. This may involve splitting the agreement into those components that cannot be easily or regularly altered, as opposed to those which need to be regularly reviewed.
- International Council on Mining and Metals, "Good Practice Guide: Indigenous Peoples and Mining," (2010) 69.

This chapter has highlighted several examples of instances in which committees or dialogue roundtables with community participation proved useful both to communities and to project sponsors. The Diavik Diamond Mine (a joint venture between Rio Tinto and Harry Winston Diamond Corporation) provides an additional example. For this project the company created a committee to monitor compliance with an environmental agreement reached with communities near the mine in Canada's Northwest Territories (ICMM 2010). In the context of the aforementioned Tintaya mining project in Peru, project-affected community members found the dialogue roundtable with the company, as well as the associated written agreement documenting commitments of the parties, to be a key accomplishment. The roundtable created a formal structure for monitoring company compliance with its commitments, allowed for

stability and continuity in the dialogue process, and allowed participating communities to air concerns at an early stage (Greenspan, 2012).

Through several decades of international experience in the implementation of community consultation processes, many lessons have been learned globally regarding strategies to promote inclusivity and establish conditions conducive to an engagement process that benefits communities, governments, and project sponsors. Unfortunately, to date application of good practices has been only sporadic at best. Ghana now has the opportunity to assume a leadership role in Africa on the issue of FPIC. This would help to promote the sustainability of its mining and oil industries, as well as to shine a light on the way forward on these issues for its African neighbours.





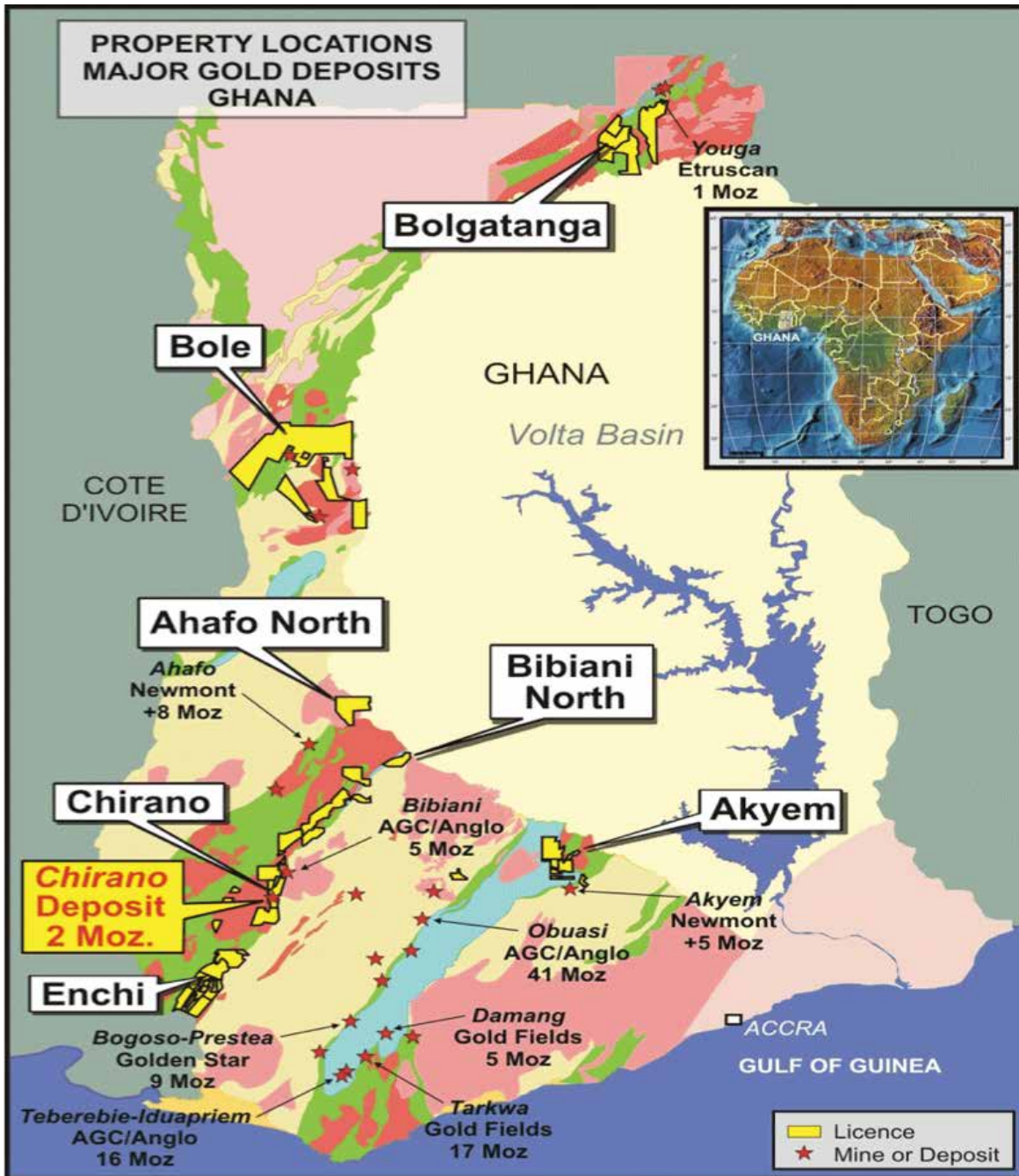
# METHODOLOGY

## The study area

The study was undertaken in the Eastern and Western regions of Ghana. The two regions have a history of mining and recently Ghana has discovered oil in commercial quantities in the Western region. The regions account for the remaining major forest reserves in the country. The Eastern Region has the Ajenua Bopo, Atewa, Mamang River Forest reserves and the major reserves of the Western Region are Bonsa North and South, Neung, and Ekumfi. The above forest reserves provide protection for the sources of major rivers in Ghana including the Pra, Birim, Densu and Bonsa. The survey was conducted in two districts of the Eastern Region, the Fanteakwa and Birim North districts. Saaman is in the Fanteakwa district and Hweakwae and Nkwanteng are in Birim North. The survey was also carried out in Dumasi, which is in the Prestea Huni Valley district in the Western region.

Interviews and focus group discussions were conducted with representatives of communities affected by two mining projects; one of the mine

Prestea Bogoso Mine which is owned by Golden Star Resources, a US-Canadian Company, and located in southwest Ghana (approximately 300 km west of Accra). The second project is the Newmont Akyem Mine located in the Eastern Region of Ghana (approximately 180 km northwest of Accra). Two other communities were selected for this research in the Akyem area – Saaman, where local company Solar/Kibi Goldfields operates, and Nkwanteng, which has not been affected by mining operations and which functions as the control community. Although the community has not yet experienced mining, it has been identified by Newmont Ghana Gold Limited as a potential mining area. It was important to use a control community to examine whether perceptions of community participation in decision making around development programs differed greatly in a context in which the community had not suffered the effects of mining. The use of the control group also provides insight into how such a community perceives mining and their views on FPIC prior to initiation of mining activities. Figure 1 shows the study area.



**Figure 1:**

- Map of the Prestea Huni Valley study area marked with yellow patch
- Map of the Birim North and Fanteakwa study area marked with yellow Patches

Source: Geological Department of Ghana



## **Economic activities of the study area**

Communities in the selected areas of the study are mainly farmers who cultivate cash crops such as cocoa, citrus, oil palm, and rubber, in addition to food crops. Some people in the area, especially the rural women, look for oil palm fruits, snails, herbs, spices and firewood from the forest as a source of income. Rivers in these communities serve as a source of protein and income for the inhabitants. Artisanal mining, popularly called "Galamsey", had been the traditional method of gold mining of the people in the area for over 400 years until the Colonial Administration declared indigenous mining activity illegal in 1905 (Conservation International, 2000). The Prestea Huni Valley district has a blend of community people who have experienced underground mining, artisanal mining, and large-scale surface mining. This presents a unique situation for assessing community development. Dumasi community was selected for its unique exposure to mining of all forms and has people who had worked as underground miners, artisanal miners and farmers.

## **Research design and method**

The study adopted a descriptive design in which quantitative and qualitative analysis of data was used. The descriptive design was chosen because this study is an attempt to describe a situation as it pertained on the ground as compared with what is in the law. Two separate questionnaires were designed for community interviews and the other for duty bearers, experts and mining companies.

Six research assistants were trained to administer the questionnaires in a mini workshop and the research assistants tested the instruments within a community before finalising it.

The communities were purposively selected from the Newmont Akyem area, Golden Star Resource area and a local mining company (Kibi Goldfields) area because the research seeks to review the application of government and company

consultation processes within the three companies and four communities. The houses within the communities were however selected randomly by selecting every fifth house counted.

Duty bearers, regulators and decentralised departments of the Birim North and Prestea Huni Valley District Assemblies were interviewed. In the case of mining companies, only Newmont Ghana Gold responded to the questionnaire. Golden Star Resources did not respond to the questionnaires although they received a copy. The focus of the questionnaire was field data that compiled testimonies from project-affected communities; centred on how the government and the mining companies were involving communities in consultations.

## **Data Collection Description**

The research focused on four communities named above for the collection of primary data. Seventy-five individuals from each target community were interviewed, coming from twenty targeted households. Interviews were conducted within the household, and targeted the head of household; a woman in the household; one youth in the household and one male from the household.

In addition, there were focus group meetings in each community targeting at least six persons from specific subsets of the population: a women's group; men's group; youth group and group of opinion leaders. This was done in order to validate the responses provided by the individual respondents. In total, 297 individuals were interviewed in the four communities.

## **Data analysis**

The data collected was cleaned and screened, and the open-ended questions were coded for analysis using the Statistical Product for Service Solutions (SPSS) programme. Both content and case analyses were used.





## CHAPTER FIVE

# RESULTS AND DISCUSSION

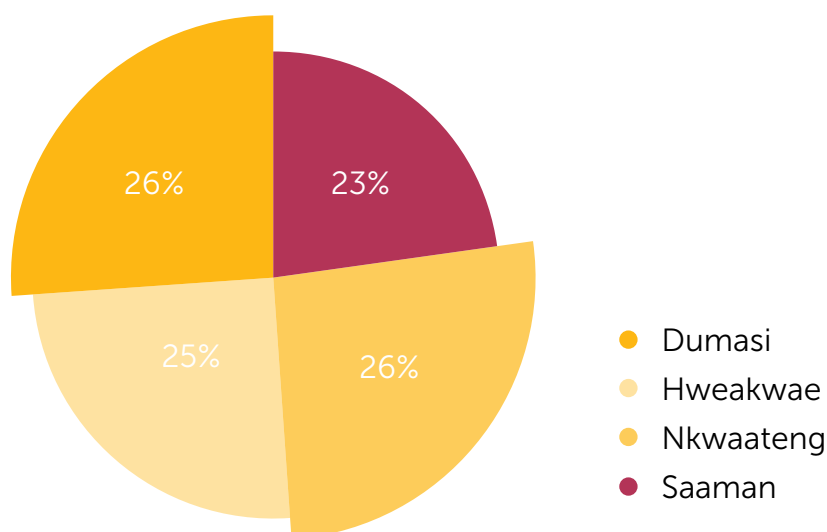
### Introduction

This chapter focuses on the presentation and discussion of the primary data from the field. The data covers the demographic characteristics of respondents and their responses to the subject.

### Scope of the study and demographic data of respondents

The field data was collected from four communities: Dumasi, Hweakwae, Saaman and Nkwanteng with a total sample size of 297 people. Nkwanteng, with 78 respondents, was the control community. There were 77 respondents from Dumasi, while Hweakwae, which had 74 respondents, Saaman, had 68 respondents. The distribution of respondents is illustrated in figure

### NAME OF COMMUNITIES WITH NUMBER OF RESPONDENTS



**Figure 2: Communities involved in the survey**

Source: field data 2012

The data indicated an almost evenly distributed number of respondents in the communities of the study.

For the purpose of this study, the control community was selected in a mining catchment area, but has not directly been affected by any mining company's operations. This notwithstanding, Nkwanteng may experience mining in future and soliciting the views of the community on FPIC helped the researchers to assess how a community that has no direct interactions with mining companies perceive the operations of such companies, and their readiness to use FPIC when it becomes necessary. The responses from the control community indicate that they were well informed and had a good understanding of the effects of mining on other affected communities.

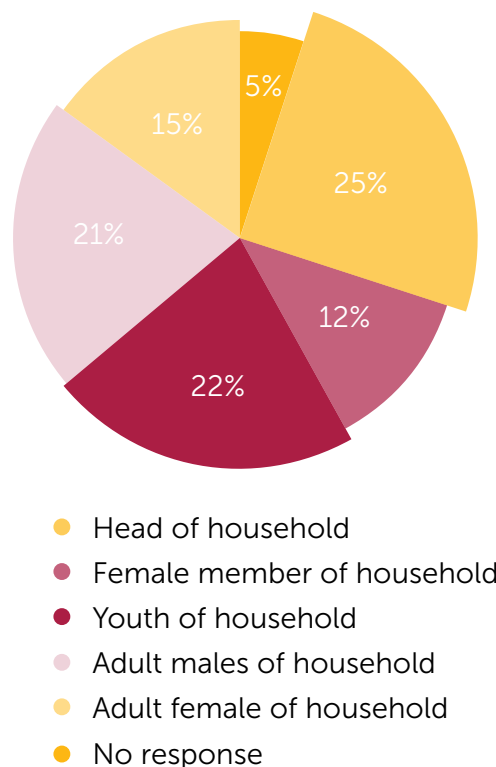
Out of the sample size of 297, 284 responded as having lived in their community for a period of one year to 98 years, with the average residency in their respective community being 30.68 years. 199 respondents (67%) were indigenes (i.e., persons who are natives of those communities), 83 (20.9%) were settlers and only 15 (5.1%) were migrants. The data presented shows that a greater percentage of the respondents were indigenes who have lived in the communities of the study for a long time. This was beneficial to the study as it meant that many community members had in-depth knowledge of the dynamics in the decision-making processes within the community. The fact that about 67% of the respondents were indigenes suggests the likely prevalence of traditional ownership and decision-making structures.

The Houses in the communities were mainly family houses containing multiple family units or households. The size of a family house in the various communities ranged from 6 to 43, with the average size being 13. The composition of the households in the study suggests that the sample population tends to live as a community based on the extended family system, which has implications for decision-making on ownership of resources (which in the traditional

setting depend on adequate consultations and consensus building).

Out of the 297 respondents of the study, 74 were heads of households, of which 23 were females. Thirty six (36) female members of households were interviewed. Apart from these, the respondents also included 45 adult females and an additional 35 female respondents from the youth, bringing the total of female respondents to 116 and representing 39% of total respondents. The pervasive representation of women in the study was important in understanding the participation of women in decisions regarding mineral exploitation because the traditional roles of women in communities predisposes them to experience additional effects of mining. This is caused by the many obstacles to realising equality between men and women, despite gender equality being a matter of human rights and social justice (Macdonald and Rowland, 2002). Figure 3 shows the distribution of respondents and their status in the households.

### STATUS IN THE HOUSEHOLD

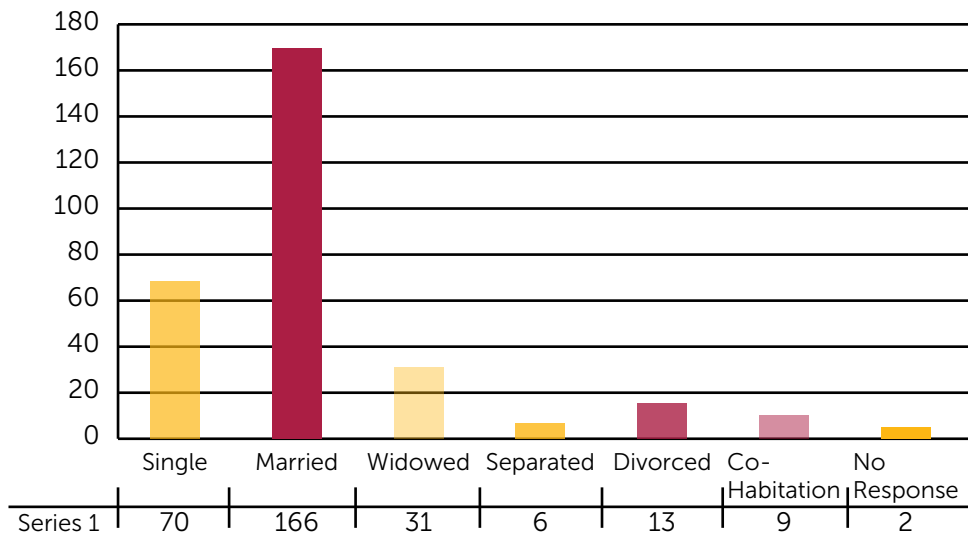


**Figure 3: Status of respondents in households**

Source: Field data 2012

288 out of the 297 respondents disclosed their ages, which fell in the range of 16 to 98. 237 out of the 297 respondents indicated they have children with an average number of children per respondent being four. 166 of the respondents were married, 70 are single and 31 of them are widows, as shown on figure 4.

## MARITAL STATUS OF RESPONDANTS



**Figure 4: Marital status of respondents**

Source: field data 2012

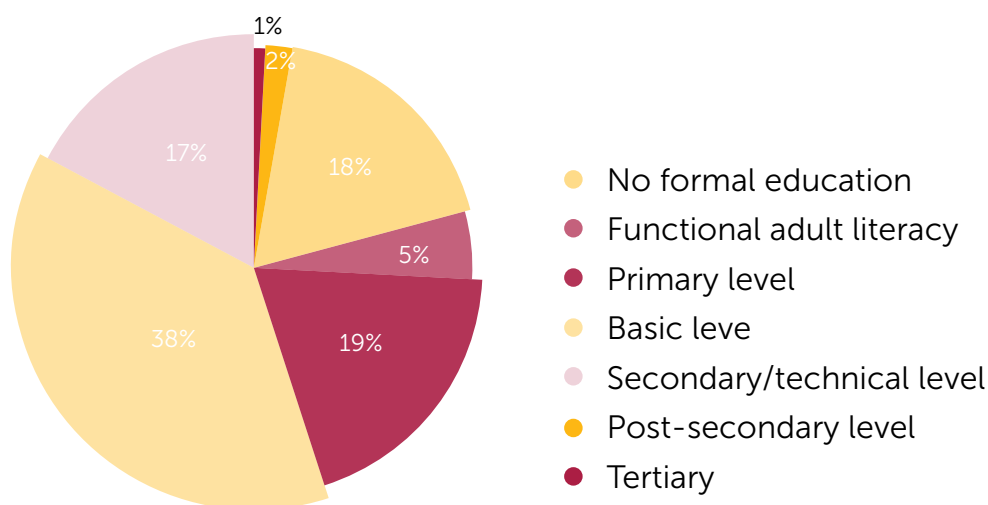
This result revealed that a greater percentage of the respondents are married and have families to care for. The implication is that the decisions relating to mineral exploitation would affect families including women and children. Majority of the respondents (260, or 87.5%) are Christian, 14 are Muslim, and 17 practice traditional religions.

Of the total respondents, 113 (38%) have basic education (Middle school and Junior High School levels), among which 45 (39.8%) of them are women. 57 respondents (19.2%) reached the primary level in school and 54 respondents (18.2%) out of which 38 (70.4%) of them being women had no education.

Only 4 respondents (1.3%) had tertiary education and none of them were women.

Host communities are compelled to engage with mining companies on technical issues such as pollution, negotiating compensation payment, resettlement among others. The low level of education of respondents would negatively affect how they participate in decisions related to mineral exploitation, which would bias outcomes of engagements between communities and mining companies in favour of mining companies. Figure 5 below shows the educational level of respondents.

## EDUCATIONAL LEVEL OF RESPONDENTS



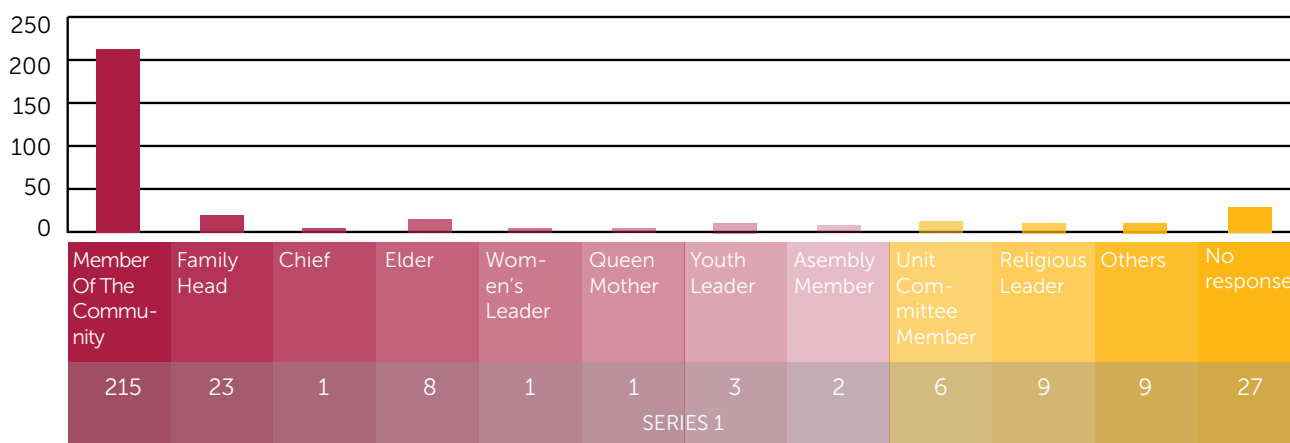
**Figure 5: Educational backgrounds of respondents**

Source: field data 2012

The study interviewed a cross section of community members based on their status in the communities. These include respondents who occupy leadership positions in the communities as well as the ordinary members of the communities. As many as 215 ordinary members of the communities who do not occupy leadership positions were interviewed. The

pool of respondents in leadership positions included opinion leaders, a chief (1), elders (8), one female leader, a queen mother and 23 family heads. 27 of the respondents did not indicate their status in the communities. Figure 6 shows in multiple responses the status of the respondents in the communities.

## STATUS OF RESPONDANTS IN THE COMMUNITY



**Figure 6: Status of respondents in the community**

Source: field data 2012

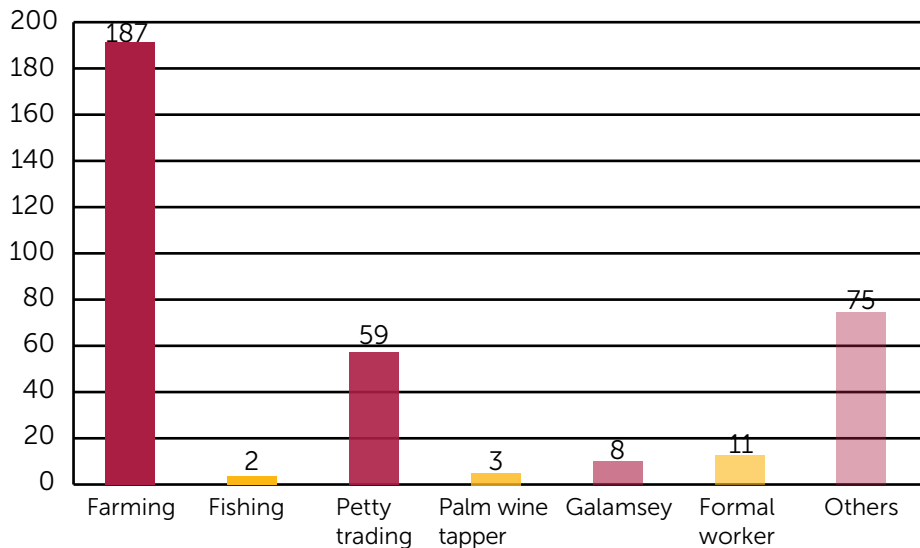
The field data indicates that although 227 of the respondents were aware of mining in the locality, only 8 respondents engaged in mining as a second economic activity to farming or petty trading. The respondents who knew about mining mentioned the names of the companies operating in their area to include Newmont (91), Golden Star Resources (78) and Kibi/Solar Goldfields Company (58).

### Communities right to economic activities

In multiple responses, the respondents indicated that the major economic activity in the communities

is farming (187 responses) followed by petty trading (59 responses) with "other" (including artisans) accounting for 75. Other land based economic activities related to farming included fishing and palm wine tapping. The data confirms that the respondents undertake other economic activities in addition to farming to gain extra income. The data also showed that 11 of the respondents, none of which were women, work in the formal sector. Figure 7 below shows the economic activities of the respondents.

## STATUS OF RESPONDANTS IN THE COMMUNITY



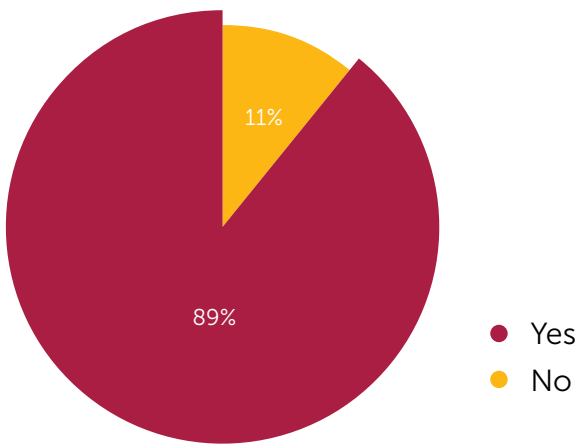
**Figure 7: Economic activities of respondents**

Source: field data 2012

The survey indicates that only 60 of the respondents who are not farmers would like to replace their economic activity with mining (none of them being women). As many as 228 respondents (79.2%) are happy with their economic activity. As to whether the communities have a right to continue with their economic activities if minerals are located in their community, 238 of respondents out of 288 (82.6%) who responded to this question believed they have

a right to say "No" to mining and 29 (11%) indicated that they do not have that right. The study confirms that communities want to protect farming as a lifelong economic activity and a great majority of the respondents affirmed that they have the right to say "No" to mining. The responses of community right to say "No" to mining are indicated in figure 8 below:

## COMMUNITY RIGHT TO SAY NO TO MINING



**Figure 8: Respondents' perception of their right to say "No" to mining**

Source: field data 2012

In multiple responses of the 238 who said they had a right to say "no" to mining, 117 explained that the land belongs to them; they have invested in the land and are managing the land in a manner that will protect their investments and the environment, which mining companies cannot do. A further 9 of the respondents added that mining will increase the incidence of diseases in the community. 14 of the respondents did not believe that mining companies will protect their economic activities and livelihoods. Also, 44 of the respondents said that mining has already destroyed economic crops like cocoa and is not generating the needed employment in their community. Furthermore, 50 of the 238 respondents who said they have a right to say no to mining explained that mining companies are polluting rivers, destroying livelihoods and paying little compensation.

The study indicates that the respondents used their right to own property, the protection of the

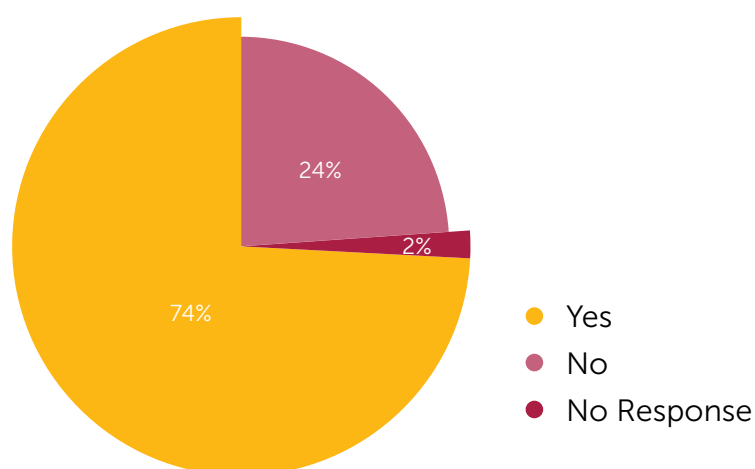
environment, and sustainable benefits from farming, as some of the reasons for stating that they have the right to say "No" to mining. It must be noted that 44 out of the total respondents believe that although they have the right to say "No" to mining, the awareness and the exercise of the right to say "No" to mining is shadowed by the destruction of their property by mining operations. This relationship reflects the despondency and vulnerability that has characterised mining communities.

### **Community understanding and participation in decisions**

In enquiring as to whether the respondents participate in decisions affecting their community which are not related to issues related to mining, 220 (74%) of the total respondents said yes and 71 (24%) said they do not participate in community decisions as indicated in Figure 9. Six (2%) of the respondents gave no response to the question.



## RESPONDENTS PARTICIPATION IN COMMUNITY DECISION



**Figure 9: Respondents' participation in community decisions**

Source: field data 2012

Out of the 220 respondents who said they participated in decisions on issues not related to mining, 98 of them were women (representing 84.48% of female sample and 44.5% of the total respondents) while 122 of them were men (representing 67.4% of the male sample and 55.5% of the total respondents). Further enquiries into why women felt they are part of decisions of the community indicated that the area selected for the survey practice matrilineal inheritance and that gives the power to women to be part of decisions especially if it involves using family land for development. Of the 220 respondents who indicated they participate in decisions not related to mining, 62 (28.1%) of them were from the control community and constitute 79.5% of respondents from the control community. Women from the control community are active in decisions because they have the power under the traditional inheritance to preserve their right to ownership of land for their male children in their family. Only 16 of the 71 (10 from the control community) respondents who said they do not participate in community decisions were women. The 6 respondents who did not provide any response to the question were all from the control community, and 2 of them being

women. The study indicates that a majority of the respondents take part in community decisions. As many as 72.1% (158) of the respondents from the three affected communities and 79.4% (62) of the respondents from the control community take part in community decisions.

155 of the respondents gave their understanding of participation in community decisions to mean, "When they are part of discussions and implementation of a process which allows them to express an opinion in decisions made towards development." Another 114 understood participation in decisions to mean "having access to information based on which communities can live in harmony to improve their livelihoods and protect their environment." The definitions of the respondents are in line with UNDP (1991) concept of development, which states that the basic objective of human development is to enlarge the range of people's choices to make human development more democratic and participatory. These choices should include access to income and employment opportunities, education and health, and clean and safe physical environment. Each individual should also have the opportunity

to participate fully in community decisions and to enjoy human, economic and political freedoms (UNDP, 1991).

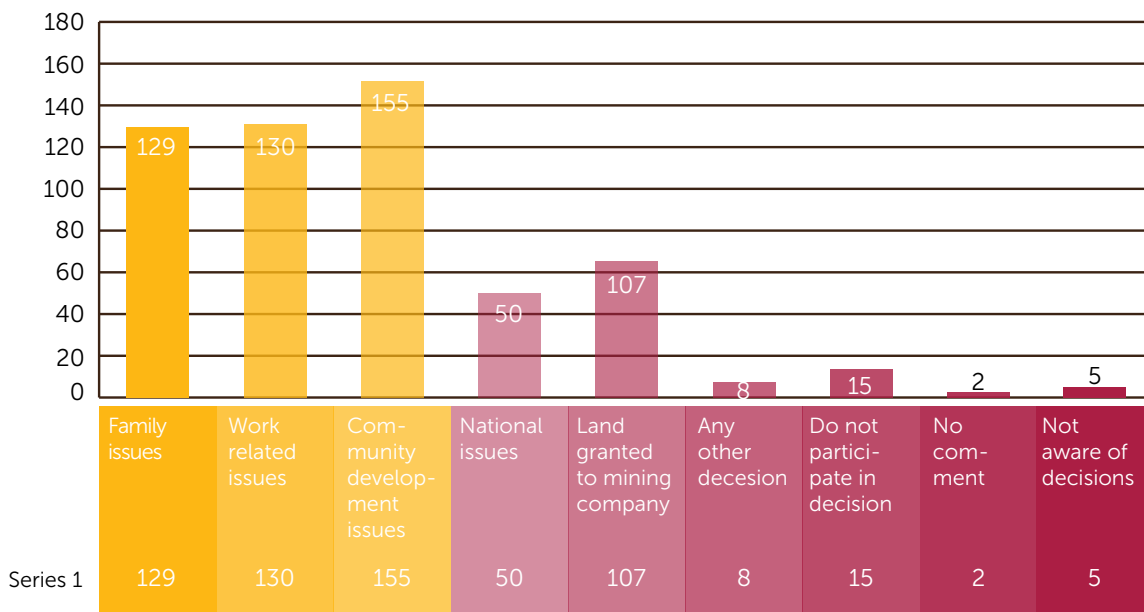
Community participation in decisions takes various forms. 90 of the respondents indicated that participation includes contributing money, labour and ideas to promote community interest. Another 138 respondents said discussions do not end in general meetings but continue with close family members and friends before a final decision is made on development options.

The study shows that respondents participate in decisions affecting their community, families and community development issues. In multiple responses of respondents from the three affected communities, 155 of the respondents (121 males and 34 females) mentioned that they participate in the implementation of decisions that relate to community projects from central government; 130 responses (108 males and 22 females) said they participate in decisions relating to their work; 129 (103

males and 26 females) participate in family issues; while 107 (79 males and 28 females) participated in mining related issues in some manner. The trend of women participation changes as decisions change from inheritance to actual decisions on development and incomes where the balance of power shifts to recognise the role of the man as the head of the family, household and communities.

In the specific case of community infrastructural projects which relates to mining companies, the 107 respondents (48.8%) of the affected communities said they participated in the discussions of issues such as corporate social responsibility projects and replacement of destroyed community properties, but their participation in the discussions was not to address the core question of whether “to mine, or not to mine”. The 107 respondents further indicated that their participation in the discussions was at a low level and not effective enough to influence the decision on mining. The data on levels of community participation in decisions is provided in figure 10 below.

## LEVEL OF COMMUNITY PARTICIPATION IN DECISION OF RESPONDENTS FROM THE AFFECTED COMMUNITIES



**Figure 10: Levels of community participation in decisions of respondents from affected communities**

Source: field data 2012

Out of those 155 respondents who participate in community decisions, in 84 respondents (24 women) constituting 33.2% of the male respondents and 20.7% of the female respondents said they initiate community programmes while 76 respondents (4 women) constituting 39.8% of the male respondents and 3.5% of the female respondents said they participate in deliberations

on issues before the community makes decisions. It is well to note that the 4 women who initiate decisions are queen mothers or women leaders in their community. Other respondents (33) only decide on family issues. Although more men were involved in decisions, Table 1 shows that the general level of community participation is low and worse for women.

**TABLE 2**

**Levels of participation in community development programmes**

Responses	Frequency	%	% of females surveyed	% of female as against population	% of males surveyed	% of male as against population
Initiate development options for my community	84	43.0	28.6	8	17.4	20.2
Deliberate on issues before decisions are made in the community	76	39	5.3	1.3	94.7	24.2
Decide on what the family members should do	33	17.0	27.3	7	72.7	8.1
Work with government on community lands to be used for mining investment	3	1.0	0	0	100	1

Source: field data 2012

**Community consent in the granting of mining right to companies**

The colonial administration recognised the ownership rights of the indigenes relating to mineral wealth. For example, the Concession ordinance

1951 CAP 136 Section 37 states

“no person who is not a native shall carry on mining without being the holder of a concession granting the right to do so from the native having the power to grant such right”.

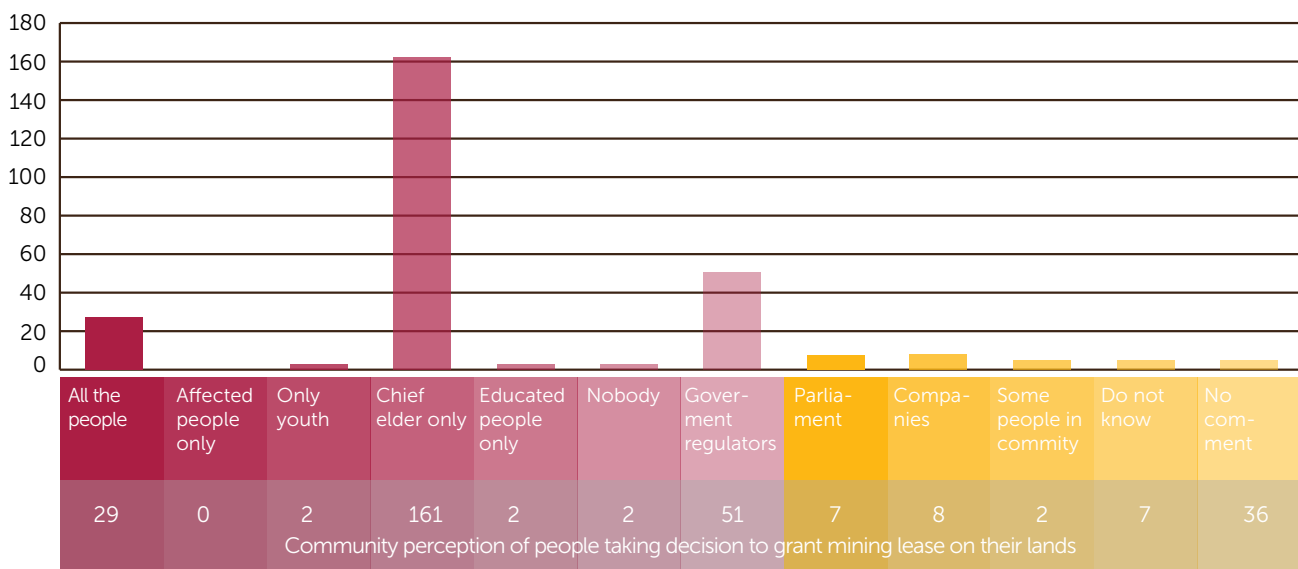
The *Minerals and Mining Act (2006), Act 703*, Section (1) vests the ownership and the right to grant mineral rights in the President in trust for the people of Ghana. Thus the Constitution of Ghana and Minerals and Mining Act 2006, Act 703 took away the power of the indigenes to grant minerals and vested that right in the President. However, the ECOWAS (2009) *Directives on the Harmonisation of Guiding Principles and Policies in the Mining Sector* requires mining companies to obtain the free, prior, and informed consent of local communities, which is an improvement on the Minerals and Mining Act.

In the particular case of decisions on allocating lands for mining purposes, the perception of 220 respondents from the affected communities was that the chiefs, elders and government regulators give away community lands for mining. Out of the 220 respondents, 161 think the chief and elders give away community lands while another 51 think it is the regulators and government agencies who

give out community lands. In probing further on the perception about chiefs' and elders giving away community lands for mining, the respondents said they see officials of mining companies and government regulators coming to their chiefs' palace regularly for closed door meetings. Again, the respondents claimed that government and regulators do not take their views and positions at public hearings into account before they grant mining rights to companies.

When asked who they believed gives out lands for mining in affected communities, respondents from the control community thought the people in the affected communities did not protect their lands and gave it out for mining. As many as 50 out of the 78 respondents from the control community believe that the affected people in the mining communities gave away their lands for mining. Respondents' perception of who is responsible for giving away their lands for mining is shown in figure 11 below.

## COMMUNITY PERCEPTION OF PEOPLE TAKING DECISION TO GRANT MINING LEASE ON THEIR LANDS



**Figure 11: Perception of respondents from affected communities on who take decisions on their lands for mining**

Source: field data 2012

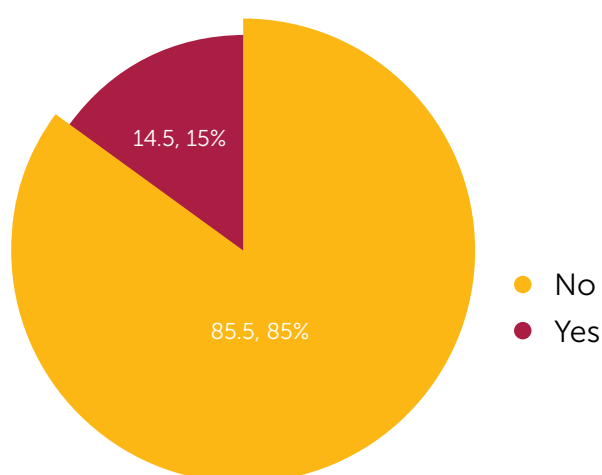
The study shows that a majority (54.2%) of the respondents from the affected communities think chiefs and elders are the key actors in the decision-making process on mining as compared to 8.9% from the control community. The traditional decision-making process requires adequate consultations and consensus building with the broad segments of community.. Yalae, (2008) indicates that traditional Africans practice participatory democracy by consensus because it was inherently harmonious, prevented tyranny and divisiveness and foster unity and stability.

187 respondents (85.5%) from the three communities that are affected by mining operations have never participated in decisions relating directly to mining operations in their communities. The 32 (14.5%) who

did take part in mining decisions participated in one or more of the following stages: prior to feasibility studies stage, granting of concession, scoping, post-granting of concession, Environmental Impact Assessment stage. This clearly shows the lack of participation of a majority of people in mining decisions despite the fact that mining affects the whole community. This contrasts greatly to the higher level of perceived participation in community decisions (among both women and men) presented in Figure 9 in which community participation in mining was limited to decisions of mining company social interventions and replacement for destroyed facilities of communities. Figure 12 shows the level of community participation in decisions granting mining rights to mining companies.

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## RESPONDENTS' PARTICIPATION OF THE PROCESSES OF MINING

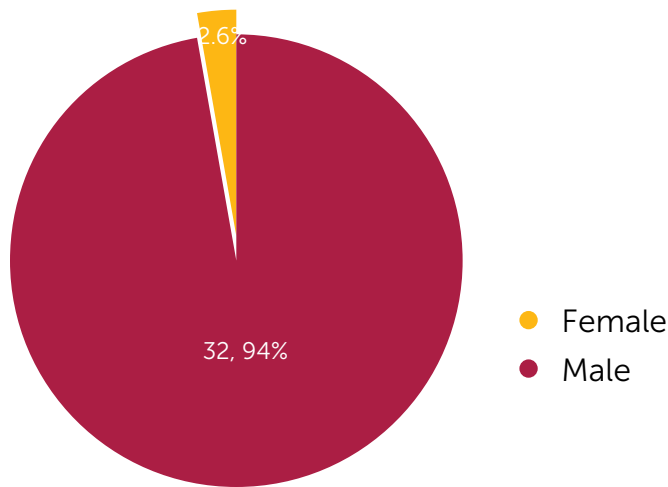


**Figure 12: level of community participation in decisions of the processes of mining**

Source: field data 2012

From the data, out of the 32 respondents who indicated that they have participated in mining related decisions, only 2 (6%) of them were women. This is illustrated in figure 13 below.

## PARTICIPATION OF COMMUNITIES IN MINING DECISION BY GENDER



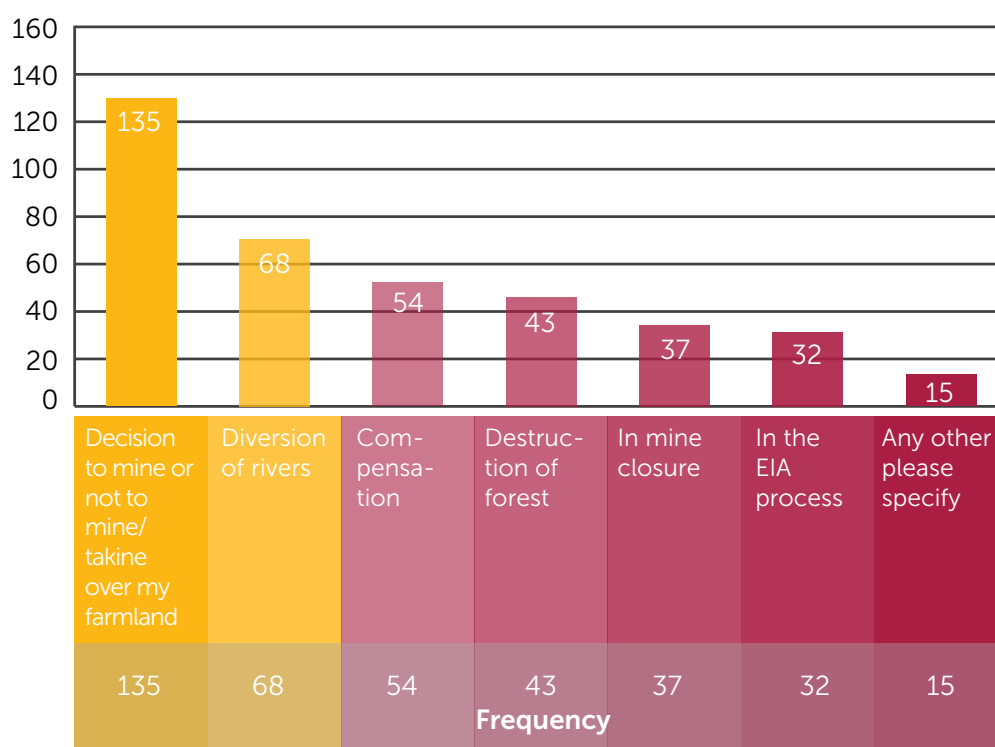
**Figure 13: Ratio of female to males who are part of community decisions on mining**

Source: field data 2012

In multiple responses to a question on the various stages communities would want to be involved in decision making relating to mining, 135 of the total respondents (40 from the control community) would like to participate in decisions on whether government should grant mining companies mining rights. This represents 43.3% of the affected communities, compared to 51.2% of the control communities. 68 respondents, drawn mainly from the affected communities, will like to decide on the

right of mining companies to pollute or divert water bodies. Other respondents will like to contribute to decisions on compensation (54), destruction of forest (43), mine closure (37) and the EIA process (32) respectively, as indicated in figure 14. While responses indicate community interest in engaging in decision making throughout the life of mining projects, surveys demonstrate that community members prioritise engagement in the initial decision of whether mining should happen at all.

## LEVEL AT WHICH THE COMMUNITY WOULD LIKE TO BE INVOLVED IN DECISION



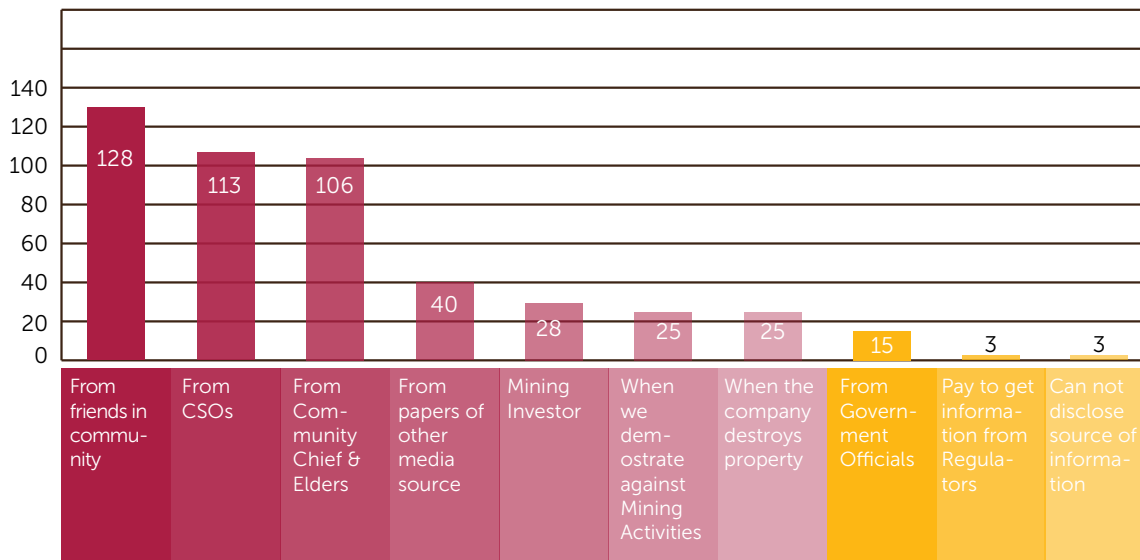
**Figure 14: Level at which communities would like to be involved in decision making**

Source: field data 2012

Many of the respondents had information from Civil Society Organisations (CSOs). The information attributed by respondents to CSOs was gained through direct training of community people or through the training of friends and family members. Respondents stated that community people access information directly (113) or indirectly (128) from CSOs while 106 respondents said the chiefs and elders provided them with information on mining. Ironically, only 15 respondents said community people access information on mining from government agencies before mining commences

and that government agencies inform communities of mining only when mining companies destroy community properties. The media provided some level of information to affected communities, as the field data indicates that 40 respondents attributed their source of information on mining to the media. The study shows that CSOs constitute an important source of information on mining for communities, which indicates a growing awareness on mining issues resulting from the mining advocacy work of CSOs. Figure 15 shows the community mode of access to information.

## COMMUNITY MODE OF ACCESS TO INFORMATION ON MINING



**Figure 15: Community mode of access to information on mining**

Source: field data 2012

In a multiple response to assess the timeliness of information, 82 of the respondents (37.4%) from the three affected communities indicated that communities get information on mining operations when the company shows the intention to begin mining, but 118 of respondents (53.9%) get informed only when the company destroys their properties.

The remaining respondents get informed when the mine is being commissioned (69, 31.5%) and through public hearings (26, 11.9%). Only 4 (1.8%) respondents, who were either chiefs or elders of the community, had information before the government granted the mining lease to the mining company. The responses are shown in table 2.

**TABLE 3:  
Timeliness of community access to information on mining in affected communities**

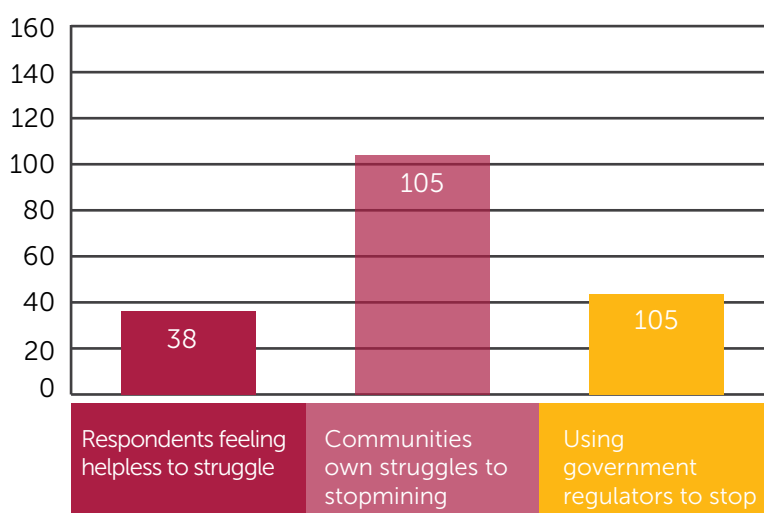
When communities get informed	Frequency	Percentage
When the company destroys my property and I report to regulators for compensation	118	53.9
When the company shows the intention of mining in the community	82	37.4
When the mine is commissioned	69	31.5
Any other comment	45	20.5
During public hearing on the EIA report	26	11.9
Before the government takes the decision to grant mining lease	4	1.8



There has been a large degree of resistance to mining in many of the communities. Apart from 38 respondents (20.3%) of the three affected mining communities who felt helpless because government has granted mining rights without their knowledge, all the other respondents (149, representing 79.7% of respondents who said they had a right to say no to mining operations) are using one form of struggle or another to stop mining in their communities. With regard to tactics utilized, 30 respondents kept vigil on their farms and have mobilised other community people to prevent mining in their community. 75 respondents said they report the companies to their chiefs and elders, and their communities meet to protect their investments and farms. A subsection of the 75 respondents (29) goes further to protect their community water bodies and cover mining companies' pits they see

as unauthorised. 44 respondents were trying to stop the mining companies from operating and have appealed to government regulators. Figure 16 indicates the various modes of struggles that mining communities engage in to have government recognise their right to be part of the decisions government and the industry makes on mining. Many community people are not appealing to government because respondents said government agencies work closely with the industry to violate their rights to livelihoods, self-determination and development. The 38 respondents who felt helpless explained that it was a fruitless effort to struggle against government decisions and the power of the mining companies. However, they recognise their right to participate in such important decisions on mining since mining activities destroy their lives, livelihoods and environment.

## COMMUNITY EFFORTS AT PREVENTING MINING



**Figure 16: Community efforts and struggles for inclusion**

Source: field data 2012

Many of the respondents decided to resist mining in their community based on perceived lack or the lack of benefits from mining operations. 106 (74.7%) respondents from the affected communities in the Akyem area and 43 (55.8%) from Dumase are resisting mining in their community because they believe farming brings more economic benefits than mining. Again, they responded that mining

has the potential of introducing new diseases and increasing the incidence of known diseases in their community. However, 46 (59%) of the respondents from the control community are not sure whether mining is better in terms of benefits to the community compared with their existing economic activities. When respondents were asked whether they considered the environment in assessing

the benefits of mining to community people, 112 of the respondents – 76 (67.9%) of them from the control community and 36 (32.1%) from affected communities - were not sure or did not know the environmental effects of mining. 140 (63.9%) who have experienced mining operations considered

the environment in assessing community benefits. They were concerned about the pollution of water bodies and occupational diseases associated with mining. Only 45 (15.2%) of the respondents did not base their perception of benefits on environmental considerations.

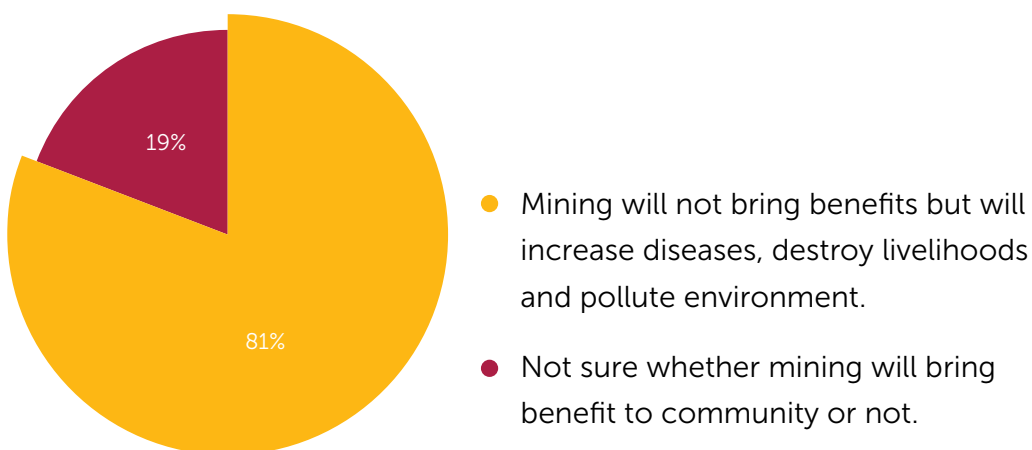
**TABLE 4:**  
**Respondents' consideration of environmental impact in assessing benefits of mining**

Environmental assessment in considering mining benefits	Affected communities	Control communities
Not sure / did not know the environmental effects on mining	36	76
Consider environment	140	0
Will not consider environment	45	0
Total	221	76

Specifically, 194 (81%) of the respondents from the three affected communities oppose mining because they believe that it destroys community livelihoods, causes pollution and or results in mining related diseases. Among the responses that indicate that mining was not bringing benefits, 98 of them were women (representing 100% of the women in the three affected communities, and 50.5% of the

respondents who said mining was not bringing benefits to community people). Figure 17 shows the views of respondents. The majority of respondents from the affected communities expressed opposition to mining based on its potential negative social, environmental and economic effects on communities.

## AFFECTED COMMUNITY PERCEPTION OF BENEFITS FROM MINING



**Figure 17: Affected Communities perception of mining benefits**

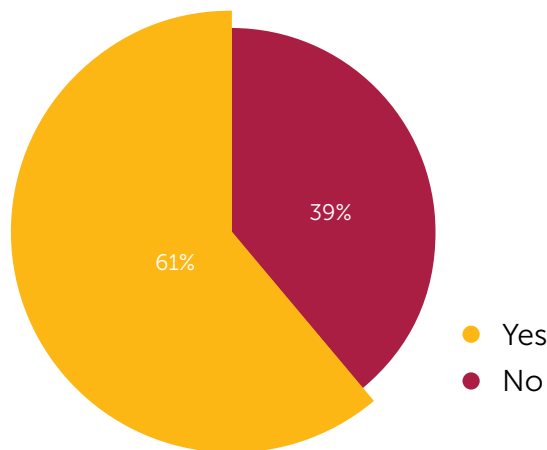
Source: field data 2012

### Community knowledge about FPIC Concept

The survey indicated that a majority of the respondents are aware of the concept of Free Prior and Informed Consent. 61% (180) of respondents

inclusive of the control community know about the concept as against 39% (117) of the respondents unfamiliar with the concept as illustrated in figure 18.

## COMMUNITY AWARENESS OF THE FREE PRIOR AND INFORMATION CONSENT CONCEPT



**Figure 18: Communities' awareness of Free Prior and Informed Consent Concept**

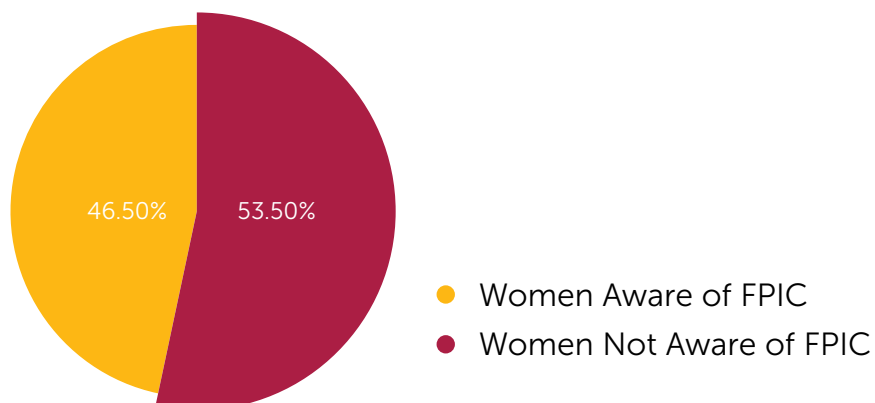
Source: field data 2012

Of the 180 respondents who were aware of FPIC, 48 respondents (26.7%) are from the control community and 132 (73.3%) are from the affected communities. This represents 61.5% of the sample size from the control community and 60.3% of the sample size from the affected communities.

In assessing the gender dimension of knowledge

of FPIC in communities, 54 (46.5%) out of the 116 women and 126 (69.5%) out of 181 of the men, were aware of FPIC. This indicates that only 30% (54) of the 180 respondents who are aware of FPIC are women as compared to 70% (126) men as shown in Figures 19 and 20

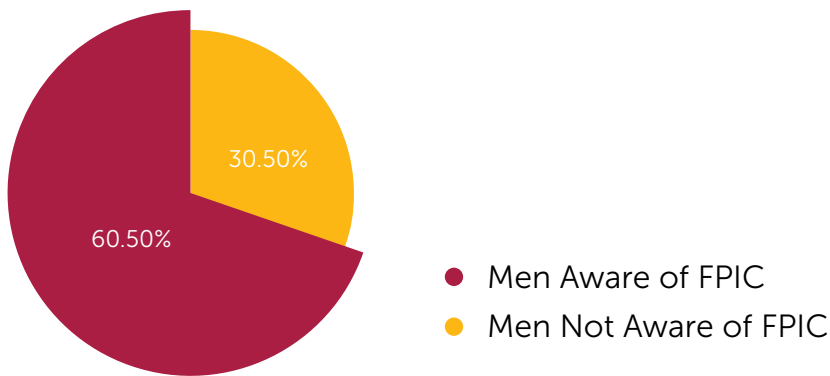
## GENDER DIMENTION OF KNOWLEDGE OF FPIC IN COMMUNITIES (WOMEN)



**Figure 19: Gender Dimension of Knowledge of FPIC in Communities by Women**

Source: field data 2012

## GENDER DIMENTION OF KNOWLEDGE OF FPIC IN COMMUNITY (MEN)

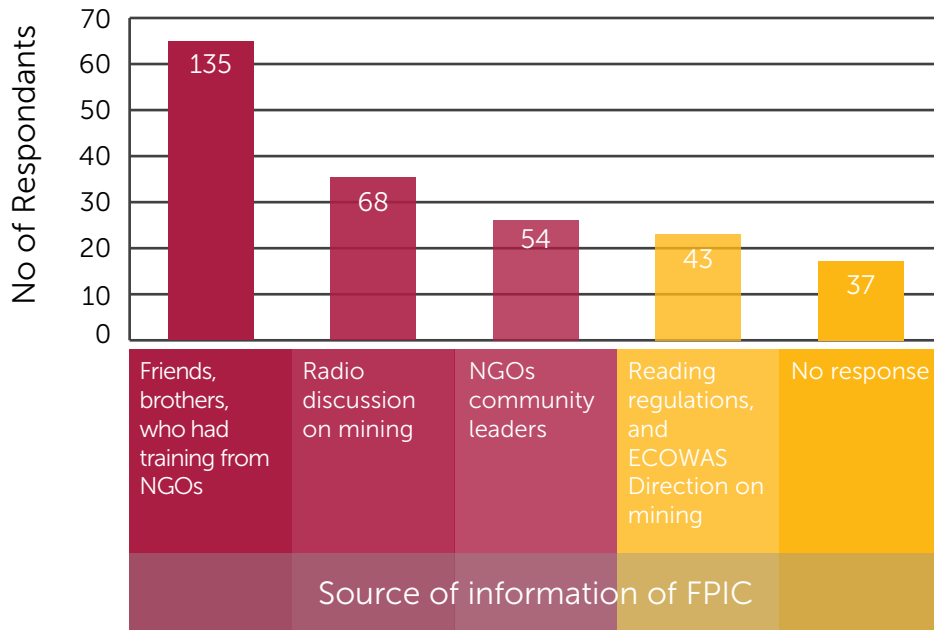


**Figure 20: Gender Dimension of Knowledge of FPIC in Communities by Men**

Source: field data 2012

Further assessment on how respondents aware of FPIC gained their knowledge Figure 21 shows that NGOs are the main source of information on FPIC to communities, either from the NGOs directly (60); from friends and relatives who had training from NGOs (41); and from radio or media discussions on mining and FPIC involving NGOs (50). Although 180 of respondents are aware of FPIC, 20 of them did not provide the source of their knowledge. 9 respondents have actually read the ECOWAS directives on the harmonisation of guiding principles and policies on mining to gain information on FPIC. Some NGOs in Ghana have engaged in community-based training on FPIC which accounts for the increased awareness on FPIC in these mining communities and is confirmed by the study that shows 60% of the 180 respondents said their source of information on FPIC is from NGOs.

## COMMUNITY ACCESS TO INFORMATION ON FPIC



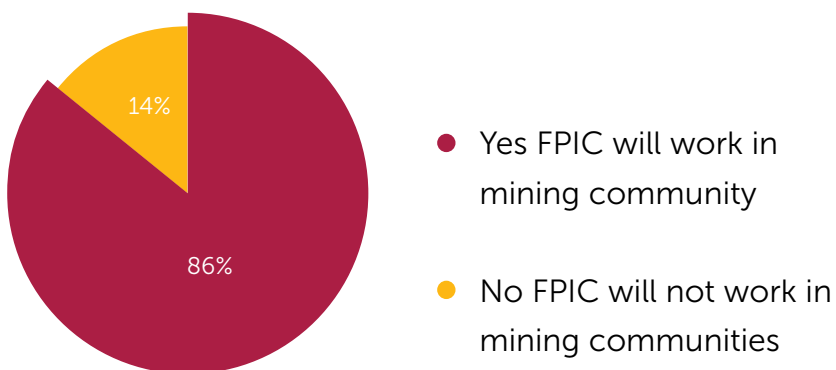
**Figure 21: Community access to information on FPIC**

Source: field data 2012

In investigating the level of importance that community people attach to FPIC, 86% of the 180 respondents from the affected communities said FPIC is necessary and important in mining. 14% of respondents, from the affected communities, thought although FPIC is important, it was too late as companies already have access to community lands. In probing further within the control

community to discover why they think FPIC is important, the respondents indicated that not yet affected communities stand to benefit more from FPIC because they still have the right to protect their properties from mining companies. The study shows that 86% of the respondents believe that FPIC would effectively protect their interests as indicated in Figure 22.

## COMMUNITY BELIEF ON WHETHER FPIC WOULD WORK IN MINING



**Figure 22: Community belief on whether FPIC would work in mining**

Source: field data 2012

In explaining their responses, 74 (41%) of respondents said FPIC will provide communities with information, educate them and help communities to participate efficiently in making the right decisions on their properties and livelihoods. Another 73 (41%) respondents stated that FPIC would help them to understand issues, give their consent and take responsibility for their actions. It will also force the company to operate in an open manner that would promote transparency and bring peace to companies and communities.

Of the 27 respondents who said that FPIC would not work in mining communities, 13 (7% of the total respondents) from the three affected communities explained that mining companies have already paid compensation to affected people for their crops and other properties. The 13 respondents also alleged that the chiefs and elders take monies from the companies and decide what the companies should do in their communities. 12 (7%) of the total respondents who thought FPIC will not work also stated as reasons that mining operations have already begun and their rights have already been violated. Two of the respondents were of the view that government has the right to make decisions on mining and the communities should ensure that decisions are implemented.

217 out of the 297 respondents stated that community people need to protect the environment for future generations by minimising the release of land for mining purposes. They explained further that, if communities are to consent to mining, the affected people should sell their properties or give away their lands based on the prevailing market value so as to reap the full benefits of their properties. The respondents indicated this would minimise conflict. They indicated that affected communities have a right to ensure that mining will not destroy the environment. The commitment of communities to protect the environment from mining company operations is in line with article 41 (k) of the Constitution of the Republic of Ghana. 107 respondents said communities should work to prevent government officials and community

leaders alone from making the wrong decisions on properties that communities value.

In probing community assessment of the limitations of FPIC, 134 (74.4%) of the 180 respondents who have knowledge on FPIC stated that the concept has limitations because it is linked directly to access to information. The 134 respondents stated that government agencies and mining companies refuse to provide the needed information for communities to make informed choices. Respondents claimed that in general, there is limited information on FPIC because they assessed information on the concept not from government or company agents but from NGOs who trained community people. According to them, FPIC being effective would require the government, the mining companies and other stakeholders explaining FPIC to community people as well as making the principles governing FPIC practical. Respondents indicated that communities have a right to understand the principles of FPIC, and for members to be involved at the earlier stage of deciding whether government should grant mining rights to mining companies or otherwise. The respondents claimed that companies generate conflict when they renege on agreements with communities. The 134 respondents claimed that companies introduce division among the communities, and that the communities become divided in their opinions on mining. Government officials who are supposed to protect community interests and rights support mining companies in their violation of the rights of the communities and that limits the implementation of the principle of FPIC. The 54 (30%) of the 180 respondents said there were no limitations to the implementation of FPIC because FPIC according to them will promote peace.

In their concluding remarks, 74 (54.4%) out of 136 respondents who made concluding comments, stated that mining investment would not help them and their future dependents in the protection of their land and their farms. They stated that some of them migrated or settled in the surveyed communities because of land. Again, the respondents indicated

they want to protect water bodies and do not want mining to destroy any of them.

46 out of the 136 respondents (33.8%) called on mining companies to respect mining communities and enter into dialogue with them on issues that are likely to affect their environment and livelihoods. Several respondents complained about brutalities meted out to them by the police and military. The respondents cannot understand why the police and military should continuously harass them but give a lot of protection to the companies and their agents. These claims by respondents support the assessment of the Commission for Human Rights and Administrative Justice (CHRAJ, 2008) that concluded that human rights violation in mining communities is systemic. The respondents stated that the security agencies should instead protect the "weak and blind in knowledge" and not support the companies by meting out violence on the communities.

15 of the respondents (11%) lamented that mining has not brought jobs to the community, and that if the FPIC was implemented, consenting farmers would negotiate for compensation for the destruction of their properties as well as how companies would employ them.

### **The industry**

As noted above, only Newmont Golden Ridge Ltd Akyem answered the questionnaire. Golden Star Resources Ltd, the operators of mines in the Prestea Huni-Valley district, failed to respond though they were given the questionnaire. Several efforts by the research team to elicit a response failed. This portion captures the response of Newmont Gold to some of the issues raised in relation to consultation or FPIC. In its own policies, Newmont commits to secure the FPIC of local communities with regard to land acquisition and resettlement (Voss and Greenspan 2012).

In a multiple choice question on how communities are consulted, Newmont indicates it involves all the people in the community in consultations and

participation regarding mining investment, prior to granting of concession, during EIA process. Further, they claim that after the grant of the concession the consultation processes continues throughout the entire project-cycle. According to them the consultation is organised through a broader stakeholder consultation plan which allows for the stratification of the stakeholders according to characteristics to enable all persons to seek insights and give their concerns. The company claimed that the community's response is always very good. They attributed the response of the community to the approval the company had from community regarding their community relation activities such as the public hearings.

In response to a question of whether the company is aware of FPIC, the response was "yes" and when asked to explain what it entails, the company stated that "it is about communities' right to information on undertakings as per their internal systems which stipulates engagement with all stakeholders' ideas". Newmont believes some of the benefits of FPIC will include sustainability, trust, and reduced tension, and that all stakeholders will feel a part of the project. It however, identified some limitations with the concept. The limitations include; the extent the industry will give out information; the possibility that communities may shirk those responsibilities that come along with their rights; and that the definition of the level of consent is lacking. The company also believes there will be logistical challenges in applying the concept in the consultation and participation process.

When asked if they are enjoined to meet FPIC standards, Newmont indicated they are obligated to meet IFC standards, Newmont's own standards, International Standards Organisation (ISO), standards on participatory monitoring, a Corporate Social Responsibility (CSR) agreement and Akoben (a rating system run by the EPA).

### **Other Stakeholder Understandings of FPIC and Consultation**

There is a low level of knowledge about the FPIC by governmental institutions and agencies involved in the extractive sector, such as the EPA, the Inspectorate Division of Mines and the respective District Assemblies. According to these institutions surveyed, there are existing frameworks for consultations with communities. Even though the full components of the FPIC principles are not adhered to by the relevant institutions in Ghana, there were indications of some levels of consultations with affected communities and stakeholders. According to these institutions, consultation with project affected communities begins when an interested company applies to the Minerals Commission for a license to commence mining operations. The Minerals Commission writes to the relevant District Assembly to publicise the application for a mining license. However, information collected during the research indicates that this form of consultation takes the form of posting of notices of the application at "vantage points" within the project affected communities, including the notice board of the district assembly. The problem with this arrangement is that the notice of application hardly gets disseminated to adequately inform affected persons or communities.

The other opportunity for consultation, according to the institutions, is during the conduct of the EIA where community durbars are organised in order to consult with communities to discuss potential

impact and mitigation measures. The other forms of consultation involve the publication of reports (such as the scoping reports) for perusal by interested parties.

The institutions surveyed further indicated that consultations are centred on various issues. These issues were enumerated to include impact of undertaking on livelihoods and biodiversity; measures targeted at mitigating impacts; viability of proposed site for the undertaking; resettlement of affected individuals and transparency and accountability in managing revenues accrued from payments of royalties. Discussions that border on resettlement of affected individuals, impacts of undertaking on livelihoods and mitigating measures form the main focus of most of the consultations. Themes such as the viability of sites for proposed projects and transparency and accountability with regard to generated revenues comparatively form a smaller part of community consultations. These variations may be due to several reasons. According to the stakeholder agencies and organizations surveyed, one such reason is the fact that the majority of community level stakeholders demonstrate less interest in themes other than resettlement, impacts of undertaking and impact mitigating mechanisms. However, the agendas for these consultations are developed and facilitated mainly by the agency holding the consultations and the issues relevant to them. This situation influences the direction of the consultations.





# SUMMARY, CONCLUSIONS AND RECOMMENDATIONS

## Summary

This chapter provides the summary, conclusions and recommendations of the study. The study investigated the application of the principle of Free Prior and Informed Consent in local and international jurisprudence. The field research portion of the study involved 4 communities, 75 households and 297 respondents.

Ghana and other mineral endowed developing countries are increasing dependence on minerals for poverty reduction and development, which has resulted in conflicts in host communities around social, economic and environmental effects of surface mining. This study has become necessary to access the decision-making processes relating to mineral exploitation.

The growing awareness among host communities, the media and the public on the negative effects of mining operations has translated into a growing demand for strong, justiciable provisions in mining laws to protect the livelihoods of communities and the environment. The principle of FPIC, which exists in international and regional instruments and conventions, has enormous potential to empower vulnerable communities in the decision making process in mineral and hydrocarbon exploitation. FPIC would provide adequate protection of the

rights of host communities, the environment and national interest in an era of unbridled protection of the interest of multinational mining companies in national laws. There are specific provisions on FPIC in the ECOWAS Directive on the Harmonisation of Principles and Guidelines in the Mining Sector, which the government of Ghana has gazetted. The study is intended to come out with the defects that relate to the accessibility and justifiability of FPIC in national and international jurisprudence.

## Conclusions

African Union and ECOWAS enjoin states especially in the extraction of mineral resources to ensure that FPIC of local communities is obtained before mining can take place. To this extent the African commission in the Endorois case stipulates that the FPIC of communities will be validly obtained if such consent is sought in accordance with customary practice of obtaining consent by the affected community. There are traditional decision making processes in Ghana which should be applied in the processes of seeking community consent and social licence for mining projects. The study concluded that the participation of the host communities in decisions on mining was at the lowest level. This is confirmed by the research of Tenkorang and Kuevor (Unpublished) on *Community Participation in Environmental*

*Impact Assessment for Mining Projects in Selected Communities in Ghana*”.

The traditional decision making process in the Ghanaian context takes the form of consensus building which allows the group to be affected by the decisions to assess all the options of an issue. Traditionally the leaders only summarise the option that represents the general view of the group which is then ratified as the group’s decision. Though the traditional decision making process, which is based on consensus building, may seem burdensome, it results in enduring peace and development. This is because the decision reflects the popular will of the people in the community, and the process provides an opportunity for assessment of divergent views and the development of multiple options from different interest segments of society.

It is however a common practice for regulators, mining companies and state agencies to sidestep the traditional decision making process to achieve social acceptance of mining projects. In most cases, these groups of state actors and companies manipulate the traditional decision making process by gaining consent for mining projects from chiefs and traditional rulers without adequate participation of the general community or groups.

A few of the mining companies situate the concept of FPIC within the definition of UNDRIP which calls on States to consult with indigenous peoples through their representative institutions in order to secure their FPIC, “prior to the approval of any project affecting their lands or territories and other resources”. According to UNDRIP, FPIC is particularly in connection with the development, utilisation or exploitation of mineral, water, or other resources. The response from Newmont shows that they see FPIC as community right to information on undertakings as per the internal systems of the industry, which stipulates engagement with all stakeholders. According to Paul (1987), levels of participation are ascending and intricate; from information sharing, consultation, decision-making and initiating actions of parties.

The ECOWAS directive requires respect for the rights of local communities to own, occupy, develop, control, protect, and use their lands, other natural resources, and cultural and intellectual property. Further, if such property has to be taken away from them for the exploitation of the mineral resources, their consent must be obtained and the consent freely given before exploration begins and prior to each subsequent phase of mining and post-mining operations.

As noted earlier, FPIC has evolved as a protection for communities which are often left out of the planning and decision-making processes, especially on large-scale development projects and other land use changes that have devastating impacts on their communities. Although the concept of FPIC originally evolved in relation to indigenous peoples and their respective territories, it is a social safeguard that is also emerging more broadly as a principle of best practice for sustainable development. All communities affected by oil and mining projects must be able to participate in effective decision making and negotiation in processes that affect them – and when they say “no” to a project this should be accounted for..

It is trite knowledge that all lands and resources prior to colonialism and the modern state structure belonged to individuals, families, clans or stools and skins. The post-colonial state introduced the concept of state ownership of land through laid down processes of acquisitions by the state under the State Lands Act 1962. However this process has not extinguished the rights of stools or skins, families and individuals to own land but has introduced the concept of “public lands” which are required to be held by the president in trust for the people. Thus, the Ghanaian Constitution recognises the collective rights of people to own property and grants rights for people to own property either individually or jointly.

In furtherance of this right, section 4 (3) (c) of Ghana Land Policy (1999) states “No interest in or right over any land belonging to an individual, family or

clan can be disposed of or declared stool, skin or traditional council land without consultation with the owner or occupier of the land.” This provision is not fully adhered to by government and the mining companies in the current consultation process adopted by these parties. Often they may seek consent from chiefs or family heads claiming all lands are stool land, thus displacing lawful occupiers of the use of the land. To ensure that this right to property is given meaning, community people that are affected by development projects such as mining projects should not only be consulted but given the opportunity to express their consent freely on whether a project that will affect their lands and has a potential to affect their livelihood, health, safety and culture is implemented.

The ECOWAS directive has been gazetted by Ghana, and the resolution of ACHPR to which Ghana is a party is a human rights instrument that has provided for the right of FPIC of local communities. The concept of FPIC is a right that is practiced and enjoyed by other democracies and will inure to the benefit of Ghanaians. It is therefore arguable that FPIC is enforceable in the domestic courts whether or not domestic legislation has been passed to internalised these instruments.

The above notwithstanding, the ECOWAS directive and the ACHPR resolution also apply to non-state actors and states are to ensure that non state entities (especially extractive companies) recognise the rights of local communities and obtain the FPIC of these communities before undertaking the exploration of mineral resources. Thus it presents a good basis for lobbying for law reforms and internalization of these instruments with the aim of having the right to FPIC explicitly included in all national laws relating to land and its usage.

## Conclusions from the study are as follows:

- Community access to information is very important for effective community participation in decision making in the event

of mining. However, an outcome of the study indicates that only 15 respondents said the government provides community people access to information on mining before mining commences and that government agencies inform communities of mining only when mining companies destroy community properties

- The mining communities surveyed have knowledge about the existence of FPIC and they believe that it has the potential to protect them from many of the violations associated with mining. It was interesting to note that the control community had adequate knowledge on FPIC mainly because they have learnt about the effects of mining on affected areas and would want to protect their rights to ownership of land and rights to livelihoods.
- The study confirms that these communities want to protect farming as a lifelong economic activity.
- Respondents from the survey area indicate that mining communities believe that they have the right to say "No" to mining.
- Among surveyed communities, there is a general absence of communities' voice in investment decisions and choices as host communities do not participate adequately in decisions related to mining.
- Mining communities surveyed perceive mining as not being beneficial to them, which therefore makes FPIC important for them to protect their livelihoods.
- The host communities have acknowledged that the education by NGOs on FPIC equipped them with information on FPIC, which they shared with friends and other communities.
- The host communities are of the opinion that the FPIC is relevant in empowering them to protect their livelihoods.
- There is growing mistrust between mining

communities and their elders in surveyed communities because of the perception that mining companies manipulate traditional rulers to gain consent for mining projects.

- There is limited information flow between companies and/or regulators and communities.
- There is general community unrest in most of the host mining communities surveyed.

## Recommendations

- Government should take immediate steps to commence the processes for the internalisation of the FPIC in the mining laws of Ghana.
- Government should take measures to comply with provisions of the ECOWAS Directives by internalising them into domestic laws on mining and oil and gas.
- Government should respect its obligations under resolution 224 of the African Commission by ensuring that all necessary measures are taken to ensure participation, including the free, prior and informed consent of communities, in decision making related to natural resources governance.
- Government should pass the Right to Information Bill with provisions which reflect the ECOWAS Directives' concept of FPIC.
- Government should expressly incorporate the concept of FPIC in the National Land Policy and all laws regulating land and its usage.
- Government and CSOs should work together to increase awareness on the principles of FPIC by all stakeholders, especially for women, physically challenged and other vulnerable groups.
- Mining and oil and gas communities should advocate for the recognition of FPIC in the country.
- Officials of Environmental Protection Agency, Minerals Commission, Judiciary, Mines Inspectorate, and industry players should be sensitised on FPIC.
- All stakeholders, especially the Executive, Parliament, Minerals Commission, Environmental Protection Agency, the Chamber of Mines and Civil Society must work together in developing a statutory framework which will focus explicitly on the tenets of FPIC to give it credence in Ghana. Specific standards with regards to community consultation and participation, against which adherence to the principles can be measured, must be clearly stipulated in such a framework. Again, this framework must clearly define what constitutes "consent" to remove all forms of ambiguity.
- The public hearing component of the EIA must not be subjected to any conditions. In moving forward, the number of public hearings must be increased from one and must necessarily be a requirement for large scale undertakings within communities.
- There is a need for awareness creation in communities to be impacted by gas facilities on their rights.

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