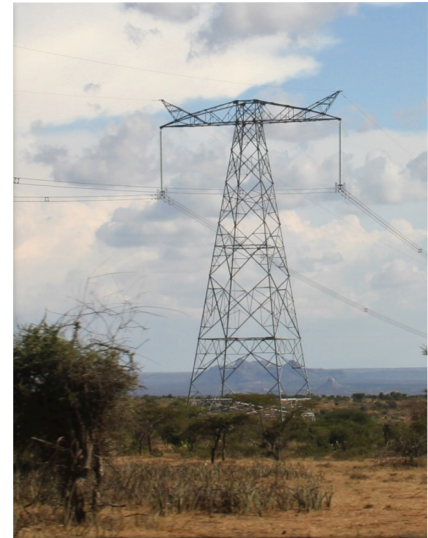


# INDIGENOUS NEGOTIATIONS RESOURCE GUIDE



**CONSERVATION  
INTERNATIONAL**



CENTER FOR COMMUNITIES & CONSERVATION  
OCTOBER 2021

VINCE MCELHINNY, MINNIE DEGAWAN, PATRICIA DUNNE, ALLI CRUZ

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This Resource Guide draws heavily on lived experiences by Indigenous Peoples and CI recognizes them as primary authors of the central lessons of the approach to negotiations presented in this publication.

The Center for Communities & Conservation Center works to integrate human well-being and rights into conservation through more effective and equitable engagements with Indigenous Peoples and Local Communities.

Conservation International is a non-profit organization founded in 1987 with programs and partners in over 30 countries. CI's mission is "Building upon a strong foundation of science, partnership and field demonstration, CI empowers societies to responsibly and sustainably care for nature, our global biodiversity, for the well-being of humanity."

# Indigenous Negotiations Resource Guide

Vince McElhinny, Minnie Degawan, Patricia Dunne, Alli Cruz





## How to use this Resource Guide

This Resource Guide is a tool for Indigenous communities to operationalize their right to FPIC and to effectively engage in negotiations when they choose to do so. The Guide includes a collection of best practices, lessons learned, and case studies to assist Indigenous negotiators at all stages of a negotiation. Chapters describe the technical aspects of negotiated agreements, while emphasizing a community's right to decide throughout all stages of a negotiation. Some negotiators may benefit from reading the complete Guide. For others, certain chapters will be more relevant, depending on the stage of a negotiation, a community's experience with previous negotiations, the strength of a community's traditional governance processes, or the sector with which the community is engaging in negotiations. The format of the Guide is intended to assist readers to find the most relevant content. Each chapter begins with a summary of key points covered in that chapter. While readers may begin with the chapters most relevant for their case, they may find it helpful to review the chapter summaries from previous chapters.

The Resource Guide consists of twelve chapters subdivided into four sections:

1. Negotiation Background (Chapters 1-2)
2. Preliminary Work (Chapters 3-6)
3. Preparing to Negotiate (Chapters 7-8)
4. Negotiation and Monitoring (Chapter 9-12)

### *Who is the Guide for?*

The primary audience for this Resource Guide is all Indigenous, aboriginal and traditional communities that want to know more about effectively negotiating equitable benefit-sharing mechanisms. The intent is for the content to be available to all community members, and not only community leaders. Making these concepts accessible to community members, including those who cannot read English, will require that others explain the concepts, enabling community-wide engagement.

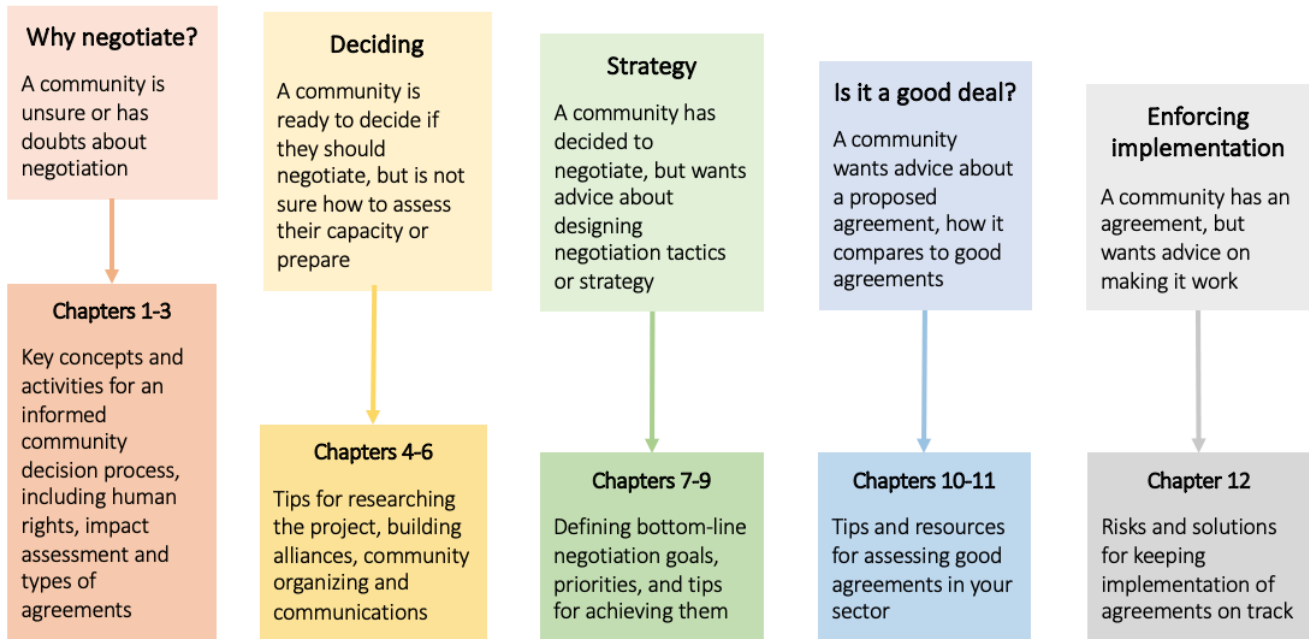
### *Making the decision to negotiate*

The Guide is designed to help communities consider and make their own informed choices, rather than having decisions made by advisors, the project proponent, or the government. It provides technical and strategic resources for those communities that move forward with negotiations, while respecting the choice of those that opt for other strategies.

### *Accessing Indigenous negotiation expertise through the Pungor Advisors Network*

The Guide emphasizes the importance of building strategic alliances. To complement the training of community-level negotiators, a global network of experienced, Indigenous experts is being built to provide strategic advice on negotiating topics including legal, technical, political, and organizational issues, and cross-cultural practices and tactics. This Pungor Advisors Network serves as a sounding board for questions that communities may have as they consider their options or design their strategy and can be consulted by contacting the Center for Communities and Conservation (CCC) at Conservation International.

## Starting Points for Using the Guide



## Abbreviations

|        |  |
|--------|--|
| CBD    | Convention on Biological Diversity                             |
| CCIA   | Community Controlled Impact Assessment                         |
| CERD   | Committee on the Elimination of Racial Discrimination          |
| GRM    | Grievance Redress Mechanism                                    |
| EMP    | Environmental Management Plan                                  |
| ESIAs  | Environmental and Social Impact Assessments                    |
| FPIC   | Free, Prior and Informed Consent                               |
| IA     | Impact Assessment  |
| IBA    | Impact Benefit Agreement                                       |
| ICC    | Impact Compensation Contract                                   |
| ICMM   | International Council on Mining and Metals                     |
| IFC    | International Finance Corporation                              |
| LCDS   | Low Carbon Development Strategy                                |
| LOI    | Letter of Intent   |
| MoU    | Memorandum of Understanding                                    |
| PDAC   | Prospectors and Developers Association of Canada               |
| REDD+  | Reducing Emissions from Deforestation and Forest Degradation + |
| SIA    | Social Impact Assessment                                       |
| UNDRIP | United Nations Declaration on the Rights of Indigenous Peoples |

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## 1. INTRODUCTION

Despite legal protection for the right to benefit from activities like mining, agriculture, ecotourism and conservation, many Indigenous Peoples have been excluded from the real benefits of projects and programs that take place on their titled and traditional lands. Historically, companies and other project proponents have provided inadequate benefits or compensation in exchange for the mineral, forest, carbon and other wealth within the traditional territories of the world's Indigenous Peoples. Indigenous Peoples have also been excluded from compensation for the negative impacts of development activities on their waters, lands, resources, livelihoods, people and cultures.

Indigenous Peoples own or have tenure rights over at least 25% of the world's land surface, including approximately 40% of terrestrial protected areas and 37% of ecologically intact landscapes (see Figure 1). Forests managed by Indigenous Peoples are critical for global climate mitigation, as they contain at least 24% of the total carbon stored above-ground in tropical forests. In the marine realm, 12% of the most biodiverse marine areas in the world and 20% of coral reefs are under IPLC management. For these reasons, communities are more frequently being approached by companies and developers who are interested in the resources in their lands.

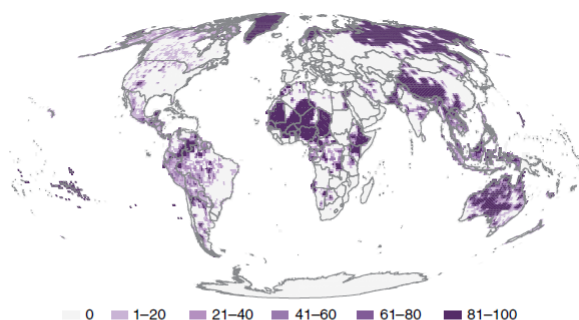


Figure 1 Global map of lands managed and/or controlled by Indigenous Peoples (Garnet et al. 2018)

The perception among some Indigenous communities that Indigenous societies did not engage in negotiations prior to the entry of cash economies in their territories has driven many Indigenous organizations to pursue advocacy campaigns when faced with a threat rather than exploring negotiations as a viable means for exercising Indigenous rights. Yet, Indigenous Peoples have a rich tradition of negotiations with their neighbors for the use of common resources such as water, land for grazing and hunting and common forests. Even prior to the establishment of formal governments and national laws, Indigenous Peoples had established their own systems of governance, including a mechanism for conflict resolution.

While this experience may be different from negotiating with outside entities who do not share a common bond with the land (such as companies, government or NGOs), there are lessons to be learned from traditional negotiation and problem-solving mechanisms. Community values of collective decision making and transparency form the bedrock for successful negotiations.

Negotiated agreements can offer a vehicle for local participation and delivery of community benefits. The process of negotiating involves reaching an agreement that meets a community's bottom-line goals and protects community interests. The process emphasizes respect for rights and getting the consent of the community at all stages. It is meant to achieve the best outcome with the least loss for the community.

When handled effectively, negotiating can be an effective tool for Indigenous Peoples to achieve their goals and build community solidarity. Negotiations can be a process of educating both sides and may result in altered relations. However, negotiation does not mean an agreement must be reached. If the proposed agreement doesn't result in a desired

outcome for the community, or the project proponent does not meet their commitments, the community can withdraw from the process. A community can also consider the possibility of negotiating and, even before a negotiation begins, choose not to proceed.

Across the world, Indigenous Peoples are negotiating legally binding agreements that establish new standards for fair benefit sharing, for full, effective participation in project design and implementation, and that reinforce Indigenous rights. These agreements have changed what it means to provide consent, and in turn, the meaning of fulfillment of Indigenous rights.

There are many lessons from existing negotiated agreements that can inform communities who are considering whether negotiation is an approach for them. These lessons also provide examples for communities who are preparing or actively engaging in negotiations with outside actors. Many of these lessons come from the extractive industries where there is a growing body of case studies and agreements that can inform strategies for negotiation. These lessons can be extended to negotiations with other sectors, such as infrastructure (roads, dams, etc.), tourism, and conservation.

## About this Guide

The objective of this Guide is to share strategic insights on negotiation from multiple sectors and regions. The Guide focuses on universal negotiation skills that can benefit Indigenous Peoples generally, irrespective of local context or sector. This document builds on important work that has introduced negotiations training to communities in Canada and Australia engaged with the mining sector (Gibson and O’Faircheallaigh 2015, O’Faircheallaigh 2015, Namati and Columbia Center for Sustainable Investment 2016). The Guide extends these lessons to the Global South and to sectors

beyond mining where FPIC requirements are leading to an increase in negotiations.

The focus of the Guide is the right to negotiate fair and binding agreements, whose implementation gets enforced. The Guide intends to raise awareness and strengthen the capacity to exercise the right to negotiate, extending the sort of agreement-making that has become commonplace in Australia and Canada to Indigenous lands, waters and territory that may lack the same institutional standing and legal tenure security as that which exists for Indigenous Peoples in Australia, particularly in terms of a right to negotiate that is rooted in statutory native title rights. In addition, the Guide seeks to extend insights to sectors beyond mining, oil and gas, including:

- land-use zoning and impact mitigation programs for large infrastructure investments
- Reduced Emissions through Deforestation and Degradation (REDD+) Emissions Reduction Purchase Agreements (ERPAs) or other carbon trading contracts
- payments for ecosystem service programs and other related types of conservation agreements
- large-scale agriculture

Transferring lessons from successful Indigenous negotiations can also demonstrate that in benefitting Indigenous Peoples, well negotiated agreements can also benefit others who depend on nature.

*The Indigenous Negotiations Training Program* is a collaboration between Conservation International (CI), Oxfam and Rainforest Foundation US. A crucial component of this program is the advice shared through a global network of leading Indigenous experts and mentors. This global network aims to strengthen the capacity of Indigenous negotiators to collaborate and access the body of knowledge and strategic insights from effective negotiations. The Resource Guide arose in consultation with this global network.

It is the authors' hope that efforts to build an Indigenous Negotiations Training Program will provide for greater direct exchange between expert Indigenous negotiators, as well as a network that facilitates the transfer of expertise and resources to community-level efforts to defend collective rights to lands and waters under pressure from the extraction and transport of natural resources.

### Factors of success

A series of workshops organized in 2017-2019 informs the Guide's approach to negotiation, which prioritizes skills and capacities that are accessible within most Indigenous communities. A review of successful agreements shows that most have been achieved by Indigenous negotiators trained and supported by well-organized, informed, and unified communities with access to technical knowledge, strategic influence, and powerful alliances. This Resource Guide focuses on *the development and mobilization of known success factors* when communities effectively negotiate for equitable and sustainable deals (shown in Figure 2) including:

- **Internal political capacity** based on a solid understanding of human rights, robust and legitimate representation, effective group communication, the ability to generate clear goals, unity of purpose in preparing to negotiate, mediate and manage conflict to reach a working consensus before and during negotiations, and participatory monitoring, reporting and enforcement of agreements;
- **External political capacity**, including the ability to develop an accurate understanding of the goals

and strategies of other negotiation parties, form political alliances, exploit legal opportunities created by international recognition of Indigenous rights, and formulate effective media strategies;

- **Technical expertise** to design strategy and shape negotiation demands based on the legal form and substantive content of negotiated agreements, assessing potential impacts, leveling the informational playing field, and building awareness and ability to exercise rights to negotiate under existing laws and policies;
- The effective **operation and support of regional organizations** to help make financial, human and technical resources available and enhance political leverage.

Combined, these negotiation capacities provide Indigenous Peoples the tools to consider negotiation as one approach among others for advocating for their rights. **Not having one or more of these enabling factors in place does not mean that effective negotiation is not possible or advisable.** Having as many in place as possible does, however, significantly increase the likelihood that desirable outcomes may be achieved.

**Case studies** that illustrate these key success factors for negotiation outcomes are described throughout the text. These case studies were adapted from published sources as indicated, as well as written case studies prepared by experienced Indigenous negotiators.

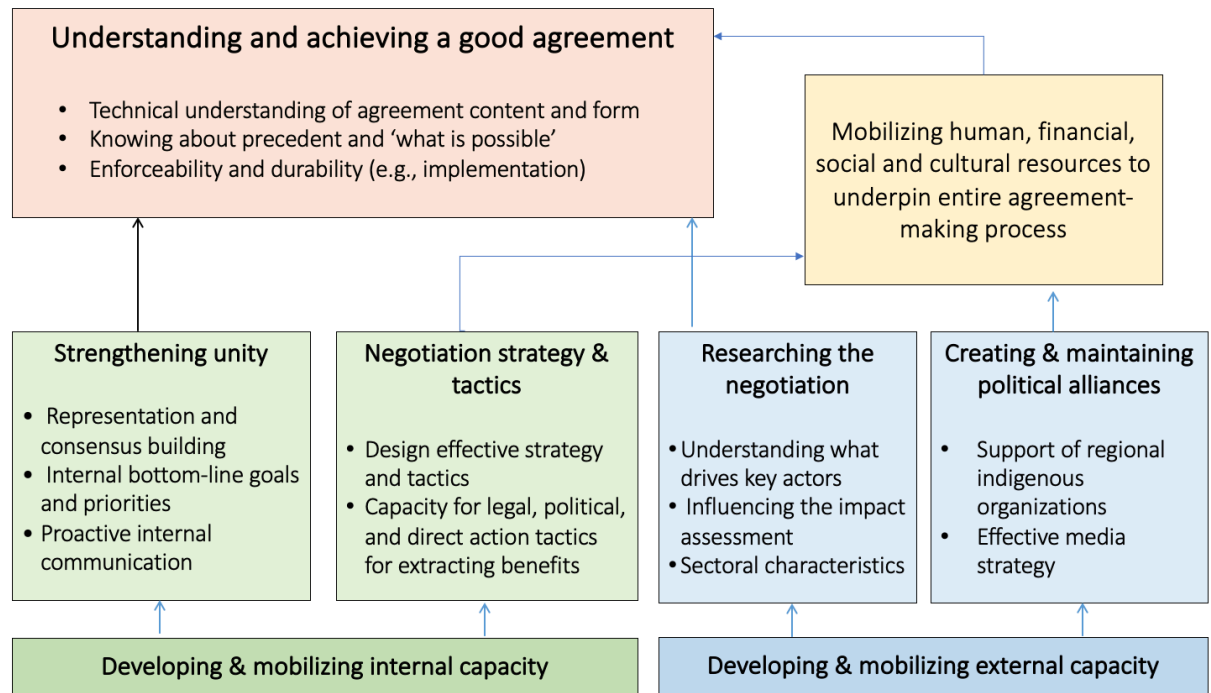


Figure 2 Factors of success for Indigenous negotiation

## 2. RIGHTS AS THE BASIS FOR NEGOTIATION

### Chapter summary

- To effectively negotiate, communities (and project proponents) need to understand the international and national contexts of rights and safeguards.
- FPIC is a collective human right of Indigenous Peoples to give or withhold their consent prior to the start of any activity that may affect their rights, land, resources, territories, livelihoods, and food security.
- Negotiation is about protecting Indigenous rights, and can be a way in which FPIC is expressed in a concrete way.
- Communities decide on whether negotiation is right for them.

---

*Negotiation is never over rights. Rights are endowed upon birth and can never be given away.  
Negotiation is about maximizing a share of the benefits and minimizing impact for the  
community.*

---

### Understanding human rights

Indigenous Peoples' rights arise from the historical relationships between them and their lands and territories – a history that has been marked by constant struggle to defend against dispossession and violation of land rights. Collective land rights form the basis of many other rights, including the right to practice culture, the right to self-determination, and the right to Free, Prior and Informed Consent (FPIC) (UNDRIP 2007).

Maintaining security or winning recognition of collective land and resource rights remains the primary Indigenous goal in any negotiation. It is critical that both Indigenous Peoples at the community level and key public and private stakeholders with influence over development be informed about the context and practice of Indigenous rights. Without this understanding, weak agreements can lock in future restrictions on community natural resource access rights and lack commensurate protections or benefit sharing (O'Faircheallaigh 2017).

### International context

International law recognizes Indigenous Peoples' Free, Prior and Informed Consent (FPIC) – their right to give or withhold consent to projects affecting their lands and resources. FPIC is a collective right of Indigenous Peoples that is rooted in their relationship to resources from ancestral lands. FPIC is central not only to the economic and social well-being of Indigenous People, but also to their survival. FPIC is understood as a right of Indigenous Peoples on the basis of their unique experience of long-standing discrimination and dispossession of lands and resources and, in turn, the violation of many other human rights by settler populations. Box 2.1 provides further detail about FPIC.

The World Bank, the Inter-American Development Bank, and the Green Climate Fund, among a growing list of global development finance institutions, have explicitly recognized the principle of FPIC as a cornerstone of their respective safeguard policy requirements. Similarly, corporate actors (such as Rio Tinto, BHP, and Shell) have made similar policy commitments or have signed project agreements that uphold FPIC principles. The requirement to obtain FPIC for mining, hydrocarbon, infrastructure,

and natural resource management projects, while often fragile commitments, create opportunities for Indigenous Peoples to negotiate agreements determining benefit and impact sharing. Trends indicate that these opportunities are growing rapidly in developing countries (O’Faircheallaigh 2017).

Major obstacles exist to full and meaningful FPIC in practice. Even where FPIC is part of a policy or law, there is no guarantee that an entity engaging with Indigenous Peoples and their land will respect these rights. As an example, though FPIC has been recognized in Canada, the Canadian government continues to apply Canadian policy that requires consultation in place of consent. FPIC practice varies in Canadian jurisdictions that have negotiated stronger rules.

#### National context

With respect to human rights, understanding the national context is critical, but extremely varied. Communities considering or engaging in negotiations should ensure that they have a full

understanding of the national legal frameworks that impact their rights, as well as the political and social issues that may influence a negotiation. Communities needing guidance related to their national context should consider consulting with other communities that have engaged with similar issues, hiring external legal counsel, or engaging organizations and other actors who might be able to provide assistance.

The context for land rights represents a critical aspect of the national negotiating context. Often, negotiations happen under conditions where little tenure security has been given to Indigenous Peoples and struggle was necessary to get and keep the rights that they now hold. For instance, under former Indigenous President Evo Morales, Bolivia approved a constitutional reform that included FPIC as a right of all peoples. In practice though, FPIC has depended more on the capacity of Indigenous Peoples to exercise this right. The 2009 proposal to build a road through the Isiboro Secure Indigenous Territory and National Park against the majority

#### **Box 2.1 Free, Prior and Informed Consent (FPIC)**

FPIC is a collective human right of Indigenous Peoples to give or withhold their consent prior to the start of any activity that may affect their rights, land, resources, territories, livelihoods, and food security. This means that FPIC processes:

- Do not accept imposed deadlines, use of coercion or manipulation;
- Have clear and acceptable mechanisms for participation in decision-making processes and a clear consultation plan that identifies the points for consent;
- Use culturally appropriate mechanisms to ensure participation;
- Provide timely information in the right forms and right language
- Build community awareness through training in human rights law, development options, and environmental assessment;
- Provide communities time to gather information on their own and to analyze and understand that information;
- Use a staged process that allows plenty of time to consult;
- Provide for costs of consultation and allow for the “no” option at all stages of negotiation;
- Refuse negotiation until satisfied that complete information has been provided; and
- Develop community members’ own indicators of impact.

Consent to any decision or agreement should come only from the authorities that Indigenous People have freely chosen to represent them. Decisions should respect customary laws and take into account the concerns and interests of all community members including women and men, young and old.

*Source:* Colchester and Ferrari 2007, Colchester and MacKay 2004



Indigenous opposition resulted in a conflict that led to the deaths of several Indigenous activists and had broad geopolitical implications for the government of Evo Morales. The government delayed the project, but continues to pursue the road despite clear and proven violations of FPIC in several attempts at consultation (Reyes-García et al. 2020).

The existence of customary land rights improves the negotiation capacity of certain groups, but it is not a prerequisite. In some cases, the negotiation of an impact and benefit agreement (IBA) can hasten the recognition of collective land title for Indigenous groups.

Project proponents are often beholden to the national legal frameworks of the country in which the project is located. For example, a mining company that is based in Canada and operating a mine in Brazil may be required to follow the laws and regulations of Brazil. In cases where the legal framework of the project host country is not favorable for the community, and the community has issues with the way the project is being run, it may be beneficial for the community to consider the national context in the project proponent's home country. The community may want to assess whether working with environmental or other social interest groups in that country could be beneficial in applying social and political pressure to get the project proponent to change their approach.

Even under national law, the right to negotiate may be limited. The landmark Native Title Act in Australia does not give Aboriginal landowners a veto over exploration or mining, nor does it guarantee them access to statutory royalties. Rather it gives them a limited opportunity to sit down and negotiate with developers. The opportunity to reach an agreement is limited in two ways. There is a time constraint, within which an agreement must be reached. Also, the developer can, if negotiations do not produce agreement, seek government approval of their proposed project. Nevertheless, good agreements have been achieved despite these limitations, in part

due to the capacity of Aboriginal groups to mobilize and make demands – a capacity that was instrumental in the establishment of statutory land rights in the first place. In achieving favorable agreements even within a restrictive legal context, this example illustrates that the legal context in which agreements are made is not the decisive factor in their quality – other factors, including in this case the community's capacity for political mobilization, can be just as or more determinative.

Appendix 1 provides a list of more in-depth resources on topics of human rights particularly relevant to Indigenous Peoples.

### Why negotiate?

Negotiations can be a formal avenue for recognizing and exercising Indigenous rights. **Indigenous negotiation capacity can help communities mitigate harmful impacts and maximize potential benefits of projects.** Negotiations provide tangible avenues through which rights are recognized throughout the life of a project, such as through benefit-sharing agreements, joint decision-making processes, and specific measures to avoid or address negative impacts. A well-negotiated agreement provides a means for addressing whether commitments to communities have been met, allows regular review of the relationships between communities and project proponents, and can be a means of providing resources for communities to achieve some level of equity with project proponents.

Negotiation is a leadership capacity that Indigenous Peoples routinely make use of, in order to make sure the principles of the UN Declaration on the Rights of Indigenous Peoples can be implemented. The Pungor of the Cordillera region in the Philippines (see Box 2.2), the Aini reciprocity exchange principle among highland Andean Indigenous Peoples, and countless other similar practices illustrate that negotiations are well known to Indigenous Peoples.

Companies and governments are beginning to recognize that there is a cost associated with not negotiating. Conflicts related to poorly consulted projects are increasing, leading to significantly higher risk of delay, cost overruns, or cancellation.

A recent study in the Andean region of Latin America counted 296 environmental conflicts that were reported in the EJAAtlas (see [ejatlas.org](http://ejatlas.org)) as of 2017, including 122 in Colombia, 58 in Ecuador, 76 in Peru and 40 in Bolivia (Pérez-Rincón, Morales and Martínez-Alier 2019). The authors show that top sectors for environmental conflict were mining (111, 37.6%), fossil fuels (61, 20.6%), biomass and land use (45, 15.2%), water management (38, 12.8%), and infrastructure (15, 5.1%) as shown in Figure 3.

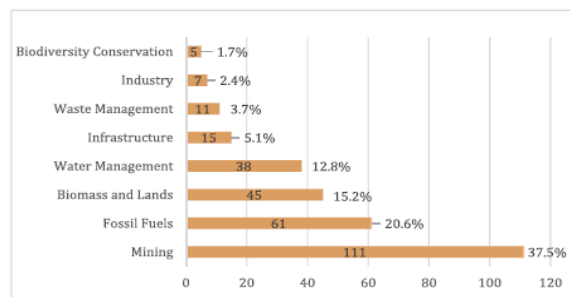


Figure 3 Andean environmental conflicts, 2014 – 2018 (Pérez-Rincón, Morales and Martínez-Alier 2019). Bars represent number of environmental conflicts reported in the EJAAtlas.

A recent IDB evaluation of projects in Latin America showed that poor project planning has had negative outcomes for developers. In a sample of 200 conflict-related infrastructure projects across six sectors, 36 were cancelled, 162 were delayed, and 116 faced cost overruns. Conflict resulted from deficient planning, reduced community access to resources, lack of community benefits, inadequate consultation, and grievances that had been reported by communities but not resolved. In their assessment, energy and waste projects experienced the most conflict (Watkins et al. 2018).

These kinds of losses are consistent with findings about the costs of failed stakeholder engagement in the extractives sector, as demonstrated by the Dakota Access Pipeline (DAPL) in the USA. The costs incurred by the owners and operators of failing to take account of Indigenous Peoples’ rights in the early planning of DAPL have been estimated at \$7.5 billion, but could be higher depending on the terms of confidential contracts. Banks that financed DAPL have reportedly incurred an additional \$4.4 billion in costs in the form of account closures, not including costs related to reputational damage. Further, losses of at least \$38 million have reportedly been incurred by taxpayers and other local stakeholders. It has been noted that “social costs accumulate not only to investors but also to local communities, to states, to taxpayers, and to tribal governments. ... Many times, these communities are those with the fewest resources.”<sup>1</sup> Avoiding these costs, which can be lasting, is one factor that drives project proponents to negotiate agreements with communities (Davis and Franks 2011).

When project proponents are not seeking negotiated agreements, communities can use research to illustrate risks and persuade a project proponent to partner with communities to provide infrastructure and labor, to avoid protests, and to protect their larger, often global, reputation.

#### FPIC and negotiation

Communities do not have to choose between FPIC and negotiating. FPIC is a right of all Indigenous Peoples and some public and private development actors are codifying FPIC into their requirements for implementing projects. Negotiation is one way to exercise the right of FPIC. The two concepts work together.

Any decision to negotiate should be based on a thoughtful, deliberate and inclusive consideration by

<sup>1</sup> First Peoples Worldwide/University of Colorado (2018) “Social Cost and Material Loss: the Dakota Access Pipeline”. Available at

[https://www.colorado.edu/program/fpw/sites/default/files/attached-files/social\\_cost\\_and\\_material\\_loss\\_0.pdf](https://www.colorado.edu/program/fpw/sites/default/files/attached-files/social_cost_and_material_loss_0.pdf).

the community of whether agreed objectives can be achieved through negotiation. Negotiation is more likely to support FPIC when communities are able to reach common agreement regarding their collective interests and views toward the project and proceed on the basis of conditioning any consent on the

achievement of those defined interests in a way that is meaningful and enforceable. Electing to negotiate does not foreclose the community's right to decide to advocate against the proposed project as an alternative way to pursue FPIC should collective interests not be achievable through negotiation.

### **Box 2.2 The bodong as an example of Indigenous negotiations – Cordillera region, Philippines**

For the *binodngan* tribes of the Cordillera, Philippines, negotiation is an integral part of territorial defense. The *binodngan* communities are those that practice *bodong* (peace pact), an agreement between two communities negotiated after a tribal war, usually a dispute over resource use, has erupted between their communities.

Tribes have defined boundaries but some resources, such as water, cut across territories. The use of shared resources is governed by agreements negotiated in the past. There are rites to renew peace pacts and these occasions are opportunities to review agreements, impart lessons and make amendments (when necessary). The meetings are hosted alternately by the communities whose responsibility it is to ensure that all are fed and housed comfortably.

When an occurrence disturbs the community, the *fetad* (a call to arms) is sounded. The *pangat* (chief) calls upon the *mingor* (warriors) to initiate defensive actions while calling on the *pungor* (peace pact holders) for advice. The *pungor* has the responsibility to know which agreement was breached and the punishment for such a breach. The entire community is informed of the situation and a meeting is held. Often the first action taken is to send the *pungor* to dialogue with the other tribe to learn the circumstances surrounding the offense and what action has been taken by the other tribe.

In past times, tribal wars could last for months or years until both sides felt that there was more to be gained through discussion. In more recent times, due to the many peace pact agreements between tribes, it is easier to resolve issues. Often what is needed is to agree on the interpretation of the agreed recourse stated in the *bodong*. The *pungor*, if there was a previous agreement, needs to know the circumstances surrounding the offense. S/he needs to know how the other tribe is dealing with the breach and if they think it is sufficient they will demand symbolic actions that demonstrates remorse. The *pungor* can then go back and relay these to the tribe. If there is no agreement on who, what, how the breach happened, both tribes would agree that they are at war. The *pungor* is allowed to go back to the community to relay this and the *mingor* will take over. The *pungor* will continue to discuss with the other side and see if a peaceful solution can be found. All proposals will be brought back to the *ili* (community) for discussion. The role of the *pangat* is to ensure that the interests of the *ili* is protected, resource rights if not increased should not be limited by any agreement. The *pungor*, on the other hand, seeks to come to an agreement that would be acceptable to both communities with the least number of lives or resources lost.

Prior to any agreement being reached, both sides will also inform other communities that they have peace pacts with – this is to ensure that there will be no misinformation of the agreements reached. This part of the negotiations is often tricky because a community with an ongoing dispute with one of the parties might see any agreement as a threat. This is where multiple *pungors* are needed to explain the nuances of different agreements.

Agreements are comprehensive and can cover various aspects of community life, including the agricultural calendar. They can prescribe hunting times for each community, as well as the number of trees that can be felled. Penalties for offenses are also specified, including the age of animals to be used as payments. All these are to be remembered by the *pungor* in oral form. Agreements are marked with celebrations by both communities where the members are informed of the terms of the agreement. Representatives of other communities are invited to these celebrations as witnesses.

*Box 2.2 continues*

### Box 2.2 continued

For one to become a *pungor*, s/he has to exhibit some basic qualifications: courage to seek dialogue with the enemy; integrity to keep to agreements and not misinterpret them; ability to speak the language of the other party to understand the deeper meaning or context of different terms and knowledge of the community needs. A *pungor* recognizes that the *pangat* represents the community and must get his/her mandate from him. A number of *pungors* are women, as it has long been recognized that women play important roles in peacebuilding. (A *mingor*, on the other hand, until the late 1970s has always been male. It was only after a number of women joined the armed movement and claimed the right to be recognized as *mingor* that some women are now remembered as such.)

Often a *pungor* is married to someone outside the tribe or the child of such a union, kinship links are important factors in identifying a *pungor*. A single *pungor* can hold more than one peace pact, but it also carries a heavy burden on the family as it requires days of being away from the community.

The Cordillera Indigenous Peoples movement learned and built on this model and expanded the scope of the *bodong* to encompass not just two communities. During the struggles against the WB-funded Chico dam, the Cellophil logging consortium and martial law, the peoples of the Cordillera forged a *bodong* among themselves to fight a common enemy. This pan-Cordillera peace pact is embodied in the formation of the Cordillera Peoples Alliance (CPA) and has at its center objective the defense of the Cordillera ancestral domain. The constitution and by-laws of the CPA can be considered as a negotiated agreement for peace by the different peoples of the region. So, in fact, negotiations are part and parcel of Indigenous life.

### 3. THE PROJECT CYCLE, AGREEMENT TYPES AND IMPACT ASSESSMENT

#### Chapter summary

- Agreements between project proponents and affected communities have universal features as well as sector-specific differences.
- A community should seek to negotiate as early as possible in the project cycle before critical design decisions narrow the space for negotiation.
- Communities should understand the legal and operational aspects of proponent-led impact assessments.
- Control over impact assessments is a critical early negotiation tactic.
- Community-controlled impact assessments offer valuable alternatives that are complementary to legislated ESIA's.

#### Negotiation readiness assessment

- *At what stage of the project cycle is the proposed project? What decisions have already been made regarding the proposed project?*
- *What are the national laws that relate to contracts (i.e., length, renewal, etc.)?*
- *What are the typical features of agreements in the project's sector?*
- *What are the plans for Environmental and Social Impact Assessment? Who is responsible, what processes must be followed, what accountability mechanisms are in place?*
- *What are the potential impacts (i.e., lifestyle, cultural, community, quality of life, health, etc.) of the proposed project on the community?*
- *What opportunities does the community have for influencing and/or controlling the impact assessment process?*

#### The project cycle

The project life cycle usually includes a series of stages, each with important entry points for influence. The common stages to a project cycle are:

- **Early exploration** – Leading to and following concession or leasing contract signing, may involve seismic testing.
- **Advanced exploration** – Confirmed find site investigation, biophysical tests, prospecting, resource analysis, digging, drilling for extractives.
- **Design** – Regional or site-specific environmental and social impact assessment (ESIA),

consultation, leads to approval of license to operate.

- **Approval, construction, procurement** – Financing approval, management plan (operating license), site work begins, purchase of major equipment and project components, site supervision.
- **Operations** – Based on annual targets for many types of operation (production, extraction, conservation), annual supervision or reviews.
- **Closure** – End of contract evaluation, rehabilitation and transfer of property.

The project stages may vary, depending on the project, but generally follow a similar sequence. Most often, community engagement with a project

proponent happens well into the design stage of the project cycle, after significant decisions, such as the concession location, production parameters or scope of resource use, have already been made. Usually engagement begins when permit or operating license approval requires some type of consultation. Good research can help a community move engagement earlier in the project cycle, where they have greater leverage.

**In general, a community has greater scope to negotiate earlier in the project cycle.** If many decisions regarding a project's location, size, and technology have already been made, the scope for negotiation is reduced and the opportunity to negotiate community priorities may be more difficult. However, earlier in the project cycle before these decisions have been made it may be difficult for the project proponent to engage in serious negotiations on impact and benefit sharing. Table 3.1 outlines key decisions in each stage of the project cycle from site selection to full-scale operations. Importantly, the decision may be made to suspend or terminate a project during any phase in the project cycle.

A project proponent selects the location for a project based a variety of factors including the presence of a key resource, the most inexpensive way to travel between a resource site and a processor or buyer, resettlement of affected families, climate or soil quality, and access to markets, among others. A project proponent may decide not to invest further or continue with a project because of factors such as political or social risk. The initial project siting

decision often involves no direct relations between the project proponent and communities.

Most mineral exploration projects invest significant funds into exploration – some 99.9 percent of explored sites never become full-scale mines (Gibson and O'Faircheallaigh 2015). A typical road project can take up to five years in assessing the optimal design or route before seeking a permit. Similarly, hydropower projects can take up to a decade to prepare the preliminary finance and engineering plans. REDD+ preparation (readiness) in most tropical forest countries has taken a decade of analysis, consultation and monitoring before the country is able to sign an Emissions Reduction Purchase Agreement (ERPA).

Negotiated impact and benefit agreements between communities and project proponents can be short or long term.<sup>2</sup> In some countries, the law limits contract duration and restricts how often a contract may be renewed. For capital-intensive projects, the contract tends to be longer (10-50 years). However, for agriculture, commercial farming leases of land with the state can also be just as long. For community-investor contracts, the contract duration depends on the type of activity. The FAO indicates that for short-term crops, such as vegetables and field crops, the contracts are based on an annual or seasonal harvest. Crops such as tea, coffee, sugar cane, cocoa and livestock production may require contracts of a longer duration. In order to justify longer-term investments, producers will generally prefer a longer contract duration (FAO 2015, p. 195).

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<sup>2</sup> The benefit sharing agreement can be only one of several contracts that are linked (e.g., land use concession, financing,

tax/royalty obligation, etc.). These contracts should be assessed together.

**Table 3.1** Project life cycle for different sectors

| Project cycle stage by sector   | Initial early exploration, location decision       | Advanced exploration, discovery, planning, appraisal, ownership transfer            | Project design, feasibility, business plan, ESIA, consultation            | Approval tendering, operations procurement, construction, planting | Operations, production & maintenance  | Closure – exit, decommission, rehabilitation |
|---|--|---|---|--|---|--|
| Mining <sup>3</sup>   | 1-5 years  | 2-5 years   | 2-4 years   | 4-6 years  | 2-60 years  | 1-5 years                                    |
| Oil & Gas <sup>4</sup>  | 1-5 years  | 4-10 years  | 4-10 years  |  | 20-50 years   | 2-10 years                                   |
| Infrastructure (roads, hydro, wind) <sup>5</sup>  | 1-10 years   |   | 1-3 years   | 1-5 years  | 10-40 years   | 1-2 years                                    |
| Agriculture <sup>6</sup>  | 3 mos.-1 year                                      | 3-6 mos.  | 3 mos.-1 year   |  | 3 mos.-50 years   |  |
| Terrestrial and Marine Protected Areas <sup>7</sup> , Forest Concessions and Plantations <sup>8</sup> , REDD+ ERPA <sup>9</sup> | Initial planning, proposed method<br><br>1-2 years | Develop project management plan, Design Document (PDD), FPIC, etc.<br><br>1-3 years | Auditor due diligence, Validation, ERPA negotiation<br><br>3 mo. – 1 year | Registration operations, verification,<br><br>1-2 years            | Management plan implementation, Operations, Verification, Issuance, payment for results<br><br>5-10 year cycles<br><br>3-30 years | Depends on investor objectives.              |

<sup>3</sup> Gibson and O’Faircheallaigh, IBA Toolkit (2015)

<sup>4</sup> Peter D. Cameron and Michael C. Stanley (2017) Oil, Gas & Mining: A Sourcebook for Understanding Extractive Infrastructure. World Bank

<sup>5</sup> CSF <https://www.conservation-strategy.org/what-we-do/infrastructure>

<sup>6</sup> UNIDROIT/FAO/ IFAD Legal Guide on Contract Farming; FAO & IISD. 2018. *Model agreement for responsible contract farming: with commentary*. Rome, FAO. 68 pp. Licence: CC BY-NC-SA 3.0 IGO.

<sup>7</sup> Thomas, Lee and Middleton, Julie, (2003). *Guidelines for Management Planning of Protected Areas*. IUCN Gland, Switzerland and Cambridge, UK.

<sup>8</sup> FAO, Three Guidelines for Forest Management Planning, <http://www.fao.org/3/w8212e/w8212e07.htm>.

<sup>9</sup> Forest Carbon Partnership Facility, Carbon Fund Methodological Framework, <https://www.forestcarbonpartnership.org/carbon-fund-methodological-framework>; VERRA Climate, Communities and Biodiversity Standards – The VCS Project Cycle (2016), [https://verra.org/wp-content/uploads/2016/05/FactSheet-PROJECT-CYCLE-2013-FINAL\\_0.pdf](https://verra.org/wp-content/uploads/2016/05/FactSheet-PROJECT-CYCLE-2013-FINAL_0.pdf);

### *Agreement making and the project life cycle*

Agreements may be designed to cover a project from the point at which a project proponent is seeking approval to proceed with development, up to the point where project activity ceases, a project is closed and the resource site is rehabilitated. In reality, agreements are often negotiated for only one phase of a project, for instance exploration in the case of hydrocarbons. In such a case, the agreement's provisions (for example in relation to benefit sharing) may be considerably more limited than those in operational stages of the project. Agreements may be, and have been, negotiated well into a project's life, because for instance of a change in company policy or because investors require an agreement with Indigenous communities to be in place before a major project expansion occurs.

These agreements, which often fall into the category of contracts or land concessions, can be short or long term. They are not as comprehensive as a fully negotiated IBA. In some countries, the law limits contract duration and restricts how often a contract may be renewed. For capital-intensive projects, the contract tends to be longer (10-50 years). For agriculture, commercial farming leases of land with the state can also be just as long. For community-investor contracts, the contract duration depends on the type of activity. Regardless of the contract duration, the social and environmental effects of a project may endure between 10-60 years, and can be irreversible.

### Types of agreements

Agreements can take different forms across different sectors. For extractives, an agreement might be called an **Impact and Benefit Sharing Agreement**. For REDD+, it might be called an **Emission Reduction Purchase Agreement (ERPA) or a Benefit-Sharing Plan**. A national park will have a **Protected Area Management Plan** (IUCN 2013; Borrini-Feyerabend et al. 2013). For a road or transport project, it might be called an **Environmental and Social Impact Management Plan**

**or Framework** (IFC Performance Standard 1, 2012). For the agriculture sector, the East African Community has explored the legal framework for model contracts (FAO and IISD 2018).

Despite differences between agreements in each of these sectors, there are some important common aspects. Most agreements tend to be collective in nature. For some types of investment, such as small-scale gold mining, agreements can be between groups of individual households and small- to medium-sized enterprises. More detail about types of agreements, and what makes some better than others, is included in Chapter 10.

### Impact and Benefit Agreements (IBAs)

Regardless of the name, at the heart of each type of agreement is impact and benefit sharing. This Guide uses the term **Impact and Benefit Agreement (IBA)** to refer to similar agreements across a range of sectors. An IBA is usually a contract made between a community and a project proponent or government agency. In some cases, the IBA can be negotiated between the community and a proxy agency (NGO, project developer) for the project proponent. The existence of an IBA should mean that a community has considered the conditions under which a project will go ahead. It is important that an IBA sets out, among other things, the benefits that a community will receive from the project, compensation for negative impacts, and the different ways community members will be involved throughout the life of the project, including in monitoring impacts and the execution of the agreement itself.

IBAs:

- Are **legally binding agreements** negotiated between Indigenous communities and state authorities or private sector developers;
- Include **community consent**, typically to the granting of interests in land that will allow infrastructure or extractive activities to proceed;



- Contain provisions to ensure that a **community shares in project benefits** and that **negative impacts are avoided or mitigated**;
- Typically **cover the entire life of a project**, including closure and rehabilitation;
- Are routine in Australia and Canada, **growing quickly in developing countries**, and moving beyond extractives.
- **Are an adaptable mechanism** that can be shaped to specific contexts (e.g., mineral exploration versus extraction).

See Appendix 2 for a list of key elements in an impact and benefit-sharing agreement.

### Impact assessments

Assessment of the project’s potential impacts is critical step and has a significant impact in terms of a project’s legal context. Research is needed to understand who will be responsible for conducting the impact assessment (IA) and what role the community can play in the IA design and execution. What do laws on impact assessment require? How much community influence is possible and how might communities negotiate for greater control over the impact assessment or carry out their own?

Safeguard policies seeking to avoid, reduce, manage or offset adverse effects on the environment and provide appropriate protections for people routinely require environmental and social impact assessment (ESIA) by any project developer to meet license/permit requirements. Impact assessments are processes that enable the identification of social and environmental risks or impacts.<sup>10</sup> ESIA practice is rooted in an understanding of cultural, historical, political, and environmental contexts of the project. Risks refer to the potential environmental and social

costs, benefits, constraints associated with the project. Impacts typically refer to adverse outcomes that can’t be fully mitigated.<sup>11</sup> Impact assessments are an important part of safeguard requirements of any extractive, infrastructure, or conservation project, and can serve as critical opportunities for communities to influence the design and implementation of a project, as well as provide leverage in a negotiation.<sup>12</sup>

ESIA procedures are often defined by national law and carried out by consultants on behalf of the project proponent. The ESIA seeks to identify direct and indirect impacts of the proposed project, how these impacts will affect vulnerable people, and what actions are necessary to avoid or minimize the impacts. In theory, one of the possible actions if the impacts are too detrimental is the “no project” option, although in practice this option is rarely considered.

ESIAs vary in quality in terms of the scope of social impact evidence gathered and the level of participation by affected peoples. Too often, ESIAs are top-down processes, skewed to justify the project and minimize the cost of risk management actions. There is an overreliance on recycled, government-produced, quantitative data that are often not reflective of community values or knowledge. For these reasons, the data used to create ESIAs and the results of an ESIA are often of little use to communities preparing for negotiations.

<sup>10</sup> Risks are defined as adverse impacts that are potentially avoidable or reducible through appropriate mitigation. Impacts are actual outcomes after mitigation.

<sup>11</sup> from *Comprehensive Guide for SIA*

<sup>12</sup> Safeguard policy requirements extend beyond ESIA, typically consisting of a suite of consultation, disclosure, due diligence, mitigation and accountability measures that minimize risks and impacts, while improving social and environmental benefits. For more detail on safeguards, see for example, CI-ESMF.

Understanding impact assessments, and ideally involvement in assessment preparation, is important for identifying:

- what actions need to be taken to maximize positive impacts and minimize negative outcomes for the community;
- if/how a negotiated agreement can help the community in this regard; and
- what project impacts are likely to affect the community's capacity to negotiate and implement an agreement and to take advantage of it once it is signed?

#### *Environmental and Social Impact Assessment*

An environmental and social impact assessment (ESIA) includes an assessment of the impact of planned project activities on the environment and people, including impacts on biodiversity, vegetation and ecology, water, and air. An ESIA may include negative impacts and potential positive contributions to the natural environment and human well-being. Environmental and social impacts are almost always interconnected. The objective of an EIA is to identify the potential risks of a project and possible measures for eliminating, mitigating or, as a last resort, compensating for those risks. Over 100 countries have legal requirements mandating an ESIA, and, in cases where there is no national legal requirement, there may be indirect mandates for an ESIA if a project is supported by development banks such as the World Bank or similar funders (from *Environmental Impact Assessment Training Manual*).<sup>13</sup>

#### *Social Impact Assessment*

Where impacts on people and/or human rights, both positive and negative, of a proposed project are pronounced, for example, resettlement or cultural impacts, ESIA's can take a specifically social focus. Social impact assessments (SIAs) can inform the

design of approaches and mechanisms to mitigate or eliminate adverse effects for communities and other actors and can cover topics ranging from complex stakeholder engagement to equitable benefit sharing. Even projects that aim to deliver social benefits involve potential risks that include corruption, elite capture, inequality, disruption of cultural values or sense of place, and mismanagement – all of which can contribute to conflict if not anticipated and addressed. Ideally, a well-designed and implemented SIA process can facilitate greater social inclusion and participation in the design and implementation stages of the project (Comprehensive Guide for SIA 2006; Vanclay 2020).

Social impacts may include:

- Lifestyle impacts – changes to the way people behave, family cohesion, social networks
- Cultural impacts – impacts to shared customs, obligations, values, language, religious beliefs, traditional and Indigenous knowledge systems, cultural assets
- Community impacts – impacts to governance, infrastructure, social cohesion, intergenerational ties, traditional livelihoods, population
- Quality of life impacts – impacts to sense of place and self, aesthetics and heritage, perception of belonging, security and livability, aspirations for the future, income disparity
- Health impacts – impacts to mental, physical and social well-being

#### *Negotiating for influence in Environmental and Social Impact Assessments*

While ESIA's are almost always a requirement for obtaining an operating license, they tend to minimize the importance of Indigenous culture, traditional activities, resource or land rights and title

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<sup>13</sup> For more information on the EIA process see <https://www.iisd.org/learning/eia/wp-content/uploads/2016/06/EIA-Manual.pdf>

or exclude the views of people who might be negatively affected. The agenda for negotiation can be significantly narrowed or distorted by a weak ESIA, which is unfortunately more than a rare occurrence. Communities cannot simply assume that their priorities or concerns will be adequately represented in a proponent-led ESIA.

ESIAs are typically paid for and conducted by the project proponent. Historically, Indigenous groups have often not had a meaningful voice in impact assessment. Even more rare has been any Indigenous role in decision making on major projects. Indigenous groups have been left outside of regulatory processes, allowed to provide only a narrow range of *inputs* to the process — largely in the form of baseline traditional knowledge and traditional use information — without having any meaningful control or influence over the process itself, or the *outputs* in the form of decisions about whether projects go ahead and under what conditions or rules.

At a minimum, communities should understand who is responsible for the ESIA, what policies and procedures must be followed, and what accountability or regulations for the ESIA quality are applicable. Communities will need to understand the national legal context pertaining to the project, for both the country where a project is located and the country where the project proponent is based. Understanding how permitting or licensing as well as disbursement or funding approval clearance decisions are made at different stages of the project cycle is crucial for exercising leverage.

For projects that have strong safeguard requirements, such as for consultation or resettlement, evidence demonstrating that the assessment standard has not been adequately met can trigger independent audits or reviews that can slow or stop a project until a decision on safeguard policy compliance is given. The use of accountability mechanisms can improve the assessment process. The ESIA process may also be the basis for litigation

in the national courts. If a mandated consultation procedure for Indigenous Peoples is not followed during the ESIA, the assessment's validity can be challenged. Expertise may be needed to strengthen community understanding of the ESIA process and the related accountability mechanisms. However, as with all technical advice, key negotiation decisions should remain under the authority of communities, not advisors.

There are opportunities for significant influence by the community in the impact assessment process. In negotiations between Indigenous communities and extractive companies where more favorable outcomes for communities were achieved, the communities negotiated for their own ESIA early on and oversaw or carried out the assessment themselves, which ran in parallel to and informed the statutory ESIA. Gaining control over some type of community-led ESIA is one of the earliest stages of negotiation. Community-led impact assessments offer a powerful alternative to government mandated (statutory) impact assessments, and are becoming a more frequent demand in the context of negotiations to help balance the information playing field.

#### *Community Controlled Impact Assessment (CCIA)*

Too often Indigenous communities don't get to control the statutory ESIA, but rather run their own in parallel, using this as input into negotiations. The community can conduct its own, separate assessment, or as a second-best option may co-manage impact reviews with the government or co-develop them with the project proponent. Any of these modalities of CCIA ensures adequate community participation and the establishment of clear goals for negotiation. Such community controlled impact assessments are becoming more common (see Box 3.1).

### Box 3.1 Indigenous-led impact assessment



The Firelight Group highlights important lessons from three recent Indigenous-led IAs:

- Nations have effectively controlled or managed their own IA processes, ensuring substantial, enforceable changes in projects as a result of the review.
- Effective Indigenous-led impact assessment includes a clear process for defining how consent will be given.
- Indigenous groups should determine as early as possible whether they will work with the proponent, with the government, with other Indigenous groups, or on their own.
- Engaging or shadowing the legislated process allows for gathering information from that process to inform the Indigenous-led process, consent decisions, and condition setting.
- Every Indigenous-led impact assessment requires substantial investment of time and effort to maintain relationships.
- Every case draws from a mix of funds from the proponent, government, and from the nation itself.
- Indigenous-led reviews ensure Indigenous knowledge, language and law are reflected in the assessment.
- IA reviews can be mandated within existing agreements if a project is expanded or extended.
- For intercommunity cohesion, setting substantial time aside for internal caucus dialogue, and considering how to maintain or build unity is critical.

Source: Gibson, Hoogeveen, and MacDonald (2018)

CCIAs allow the community to collectively decide what is most important, what must be protected at any cost, and what areas are open to compromise. With these community objectives clearly defined, CCIA examines impacts that are priorities for the community and identifies ways to deal with them. These measures are consistent with the traditional practices, are guided by Indigenous law and norms and have direct community involvement. Great importance is placed on identifying the ways that various interest groups within the community will be impacted differently. Through CCIA, communities can ask what *they want* impacts to be, not just what they think they will be. Genuine project alternatives are more likely to be considered under CCIA. CCIA is also a way to disseminate information about the project and provides an entry point for developing a common vision and strengthening unity, which can lead to a decision not to negotiate at all.

An Indigenous-led approach to impact assessment does not limit the space for participation in and use of findings from state-sanctioned processes. Indigenous-led impact assessments can benefit from shadowing the legislated impact assessment process, reinforcing the broad definition of culture, language, and way of life that make Indigenous-led impact assessment attractive but have not done well under most existing legislated systems.

There are key differences between a proponent-led (statutory) and community-led impact assessment process. Under legislated impact assessment systems, there is more emphasis on the project proponent as the primary data provider, based on legal frameworks and worldview that exclude or ignore Indigenous knowledge, norms and values. There is less emphasis on intergenerational equity consideration of the without project scenario.

In contrast, CCIAs are overseen by an elected Indigenous council or representative body, based on terms developed and endorsed by the community, and conducted by a team comprised of impact assessment specialists selected by the community.

As a result, a CCIA transfers greater authority to the Indigenous community over the use of technical advice and access to information about the project and project sponsor. A CCIA also demonstrates a desired consultation and communication protocol, emphasizes the iterative nature of the impact assessment process, and suggests documentation of results based on culturally relevant indicators. There is more focus on oral discussion of issues and less on exclusively paper-driven process steps. By affording a central place to Indigenous community interests and understandings that are often missed by proponent driven impact assessments, CCIAs ensure traditional authority and knowledge, as well as community aspirations and concerns, are appropriately recognized and accommodated (O’Faircheallaigh 2017).

Indigenous-led impact assessment and close engagement leads to real project changes and unique mitigation options. Some examples include:

- The Voisey’s Bay Nickel Company in Labrador, Canada provided the Innu Nation with \$500,000 to determine the Innu people’s goals and objectives over a six-month consultation process.
- The Tâîchô Nation used corporate and federal government funds to conduct its consultation activities with constituents in advance of negotiations for IBAs for the EKATI and Diavik diamond mines (Northwest Territories, Canada).
- The Squamish Nation (British Columbia, Canada) negotiated to protect cultural space, and to reject a technology that would have led to harm that was not acceptable (sea water cooling of the LNG plant).
- The Tłjchq Government review (Northwest Territories, Canada) led to the setting of a culture camp, from which traditional knowledge research would be conducted for the life of the project.

- Woodside LNG (Western Australia) provided \$18 million for consultation and Indigenous-led impact assessment.

As projects change over time, through expansion, extension, or closure, the assessed impacts and mitigation effectiveness assumptions made prior to the project being approved should be reviewed as the basis for any future negotiations that are triggered by agreements. For projects like these that are likely to change, provisions for retrospective impact assessment may be valuable to build into long-term benefit agreements (see Chapter 11).

Some legal frameworks are changing to support Indigenous- and/or community-led impact assessments. Court rulings such as the landmark title case of the Tsilhqot’in in British Columbia (*Tsilhqot’in Nation vs. British Columbia, 2007*) highlight the growing power of Indigenous communities in relation to land and resource use decision making (see Box 3.2). Most recently, the Canadian federal government has approved new legislation for the *Canadian Impact Assessment Act 2019*, giving elevated status and recognition for Indigenous-based impact assessment and decision making alongside the federally legislated process. This federal government recognition of the legitimacy of parallel Indigenous-led impact assessment suggests the need for better guidance and tools for those choosing to follow this path (Gibson, Hoogeveen, and MacDonald 2018).

The First Nations Major Projects Coalition (FNMPC) was established in October 2015 by 25 First Nations leaders of Western Canada that have chosen to work together to proactively influence major resource projects that are proposed for their territories. The FNMPC have put forward their own compilation of member-developed principles, criteria, and

### Box 3.2 Winning Aboriginal Title - the Tsilhqot'in

Today the Tsilhqot'in are known as the only nation in Canadian history to win Aboriginal Title to lands outside of a reserve. The Tsilhqot'in people comprised a nation which consisted of six First Nation communities: Esdilagh (Alexandria), Tsi Del Del (Alexis Creek), Tl'esqox (Toosey), Tl'etingox-t'in (Anaham), Xení Gwet'in (Nemiah Valley), and Yunesit'in (Stone) Bands.

Led by Chief Roger William of the Xení Gwet'in community, the Tsilhqot'in Nation sued the provincial government in a case which lasted 25 years. In June 2014, the Supreme Court of Canada granted a declaration of Aboriginal title to the Tsilhqot'in Nation for almost 1,900 square kilometres, some but not all of their traditional lands.

The ruling acknowledged Indigenous nations can claim occupancy and control over their ancestral land beyond specific settlement sites and provided more clarity on Aboriginal title and set out the parameters for government "incursion" into land under Aboriginal title.

As the first declaration of Aboriginal title in Canada, the case was a landmark victory for the Tsilhqot'in Nation and Aboriginal communities in general. In the same year, the community was successful in fending off Taseko Mines, a mining company that had proposed to develop a gold and copper mine in an area of cultural and spiritual significance to the people within Nemiah Valley.

Past Tsilhqot'in resistance to a road contributed to their relative isolation and deepened Tsilhqot'in dependence on natural resources, which strengthened these ties as a foundation of cultural identity. The ability to unify around these deeply held values enabled the groups to sustain the legal and extralegal actions needed to win land title and keep mining out.

After 25 years of fighting for Title Rights, they still have a fight on their hands. Key parts of the title agreement are still being worked out. The Tsilhqot'in are fighting to restrict contamination by downstream mines sitting outside their newly titled ancestral territory that dump untreated tailing ponds water into the Fraser river.

Source: Kunkel 2020; Lavoie 2021.

expectations to guide assessment of environmental effects of major projects.<sup>14</sup>

Certain funders, including multilateral banks, are increasingly pushing for an expanded role for Indigenous Peoples in impact assessment. The Dedicated Grant Mechanism (DGM) Peru Saweto project funded by the Forest Investment Program through the World Bank offers a good example of an Indigenous co-managed impact assessment.<sup>15</sup> The 2015 SIA was conducted by Bank-funded consultants, but with robust Indigenous participation in the design and execution, organized by the two national Amazonian Indigenous organizations: Interethnic Association for the Development of the Peruvian Forest (AIDSEP) and Confederation of Amazon Nationalities of Peru (CONAP).

Finally, CCIA findings and supporting research can be used by the project proponent as part of their required ESIA submissions. For instance, in the mid-1990s the Canadian company Alcan funded a community-controlled SIA. Alcan used the report produced by the community as the SIA component of the environmental impact statement that they were required to provide to the government.

#### *Cultural heritage or archaeological assessments of long-term settlement*

For some communities who may be affected by a project, land tenure or land occupation rights may not be well established. The community may be the primary land user or landowner in the proposed development area for traditional harvesting, but lack treaty rights or title specifically identifying the area as traditional territory. There may be an outstanding land claim by the group over the territory, or the archaeological records are unknown in support of

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<sup>14</sup> FNMPC (2015) A MAJOR PROJECT ASSESSMENT STANDARD

<sup>15</sup> World Bank, Evaluación Socio Cultural y Lineamientos para Pueblos Indígenas en el Manual Operativo del Mecanismo

the group's use of the area since antiquity (e.g., prehistory, pre-Columbian era).

In this case, conducting an assessment to fill in knowledge gaps of the land use and settlement history of the territory in question can strengthen a community's legal standing in a negotiation context (see Box 3.3). Such an assessment can integrate existing archaeological evidence, ethnographic information on Indigenous knowledge and ethnohistory. If the archeological record is not well established, a well-designed study to systematize existing oral history of known settlement and ceremonial sites, complemented by expert archaeological research, could support the group's use of the area since prehistory.

Where the long-term settlement dynamics are not documented, excavation and co-production of this restored history will require access to professional archaeologists, working in close coordination with community elders, and with support from the wider community. The participation of community members is critical in ensuring that traditional knowledge and oral history of the region is documented. Co-creation of this knowledge means balanced responsibility between Indigenous and non-Indigenous investigators and writers, which typically involves a diverse research team, and participatory workshops aimed to share the information through different media (e.g., community school booklets, videos).

As with all assessment of sacred sites and traditional knowledge, careful attention to restricting public access to sensitive information requires an effective communication plan. If it suits their interest, community members may also prioritize sharing knowledge of their archaeological sites to foster local tourism business. Protocols are essential in

### **Box 3.3 Enriching collective history through cultural impact assessment**

In Bolivia, a gas well installation revealed a cemetery of Guarani graves that were damaged by excavation. Archaeologists were hired to determine the historical significance of the cultural site and provide advice on the mitigation of damage caused during construction. The investigation indicated that Guarani ancestors had settled the area for nearly 3000 years (circa 2000 B.P-1000 A.D.). The full analysis of the cemetery helped document an important historical fact that was not known to the community, the company or the government. The company funded the careful analysis by trained archaeologists to recover the wider knowledge of the community's prehistory. The study showed that the Guarani occupation over several millennia had resisted multiple efforts to displace them, including those by the Inca empire.

These insights not only solidified the group's land claims, but also enriched their collective history of struggle. This informed the community's negotiation over impact and benefit sharing and sensitized the company and the national government on how the reburial of remains could be conducted in a culturally appropriate manner.

*Source:* El Cementerio Prehispánico de Incahuasi: Una Mirada desde la Vertiente Oriental de los Andes del Sur (2019)

advance of any study to safeguard the community's control over their own tangible and intangible cultural heritage.

#### *Cost of impact assessments*

Effective intra-community consultation and information dissemination about a proposed development is time-consuming and can be expensive from the perspective of a small Indigenous community. In Australia the cost of studies ranges from \$100,000 to \$500,000, depending on the scale

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Dedicado Específico (MDE) para los Pueblos Indígenas y Comunidades Locales del Perú, Consultant Report prepared by Sara Mateo - Alfredo Gaviria - Sergio Arbaiza (March 2015)

of the project, the number of communities affected, and availability of funding. To put these numbers in context, an entry-level (small) metallic mine in Canada cannot be developed for a capital cost lower than about \$200 million. A large-scale mine will typically tip the scales above \$800 million, or about 1,600 times the cost of a \$500,000 study.<sup>16</sup> As described in Chapter 11, impact assessments for a \$25-50 million carbon purchase agreement or protected area project can cost \$50-\$150 thousand before approval, with recurring verification costs of \$25-50 thousand per year.

### *Conducting impact assessments*

Most impact assessments start by establishing a baseline condition for a project to compare future impacts, which includes assessing topics outlined in Table 3.2. Any impact assessment should clearly identify as precisely as possible who within and where the community will be impacted. This can only be known after consultation with the community itself. In addition, the community identifies what valued resources, practices or assets are most important to protect. Which of these resources are most resilient, or vulnerable? How does any impact scenario align with a community vision for its own development or Indigenous life plan? What local capacity exists to manage or minimize impacts as well as take advantage of opportunities created by the project?

For example, how a proposed project may lead to a change in the local population is one of the most important and complex impacts to understand. It is typically assumed that increased economic activity will bring with it population growth and all of the adverse and beneficial impacts on small communities that come with it. The phenomenon of in-migration of small-scale farming or mining in the wake of improved transport infrastructure is a well-

documented risk in tropical forest regions. This is a legitimate concern for Indigenous Peoples.

However, it is also increasingly possible that the construction of a highway, or hydropower facility, or remote oil and gas wells and even some modern mining operations will bring little permanent population and in some cases may trigger flight from smaller communities to larger regional centers. This can occur when increased wages make living in larger communities viable, when social divisions emerge in smaller communities, or when it makes sense to move because of travel logistics. The outcome can be depopulation of smaller communities, often of its brightest stars and leaders of the future.

The process of impact assessment for large transport projects (see Box 3.4) involves consultation with communities along the proposed route. Positive and negative effects on livelihoods and nature can include connectivity with markets, health and education services, increase in traffic accidents and change in access to natural resources. Poorly planned roads have caused devastating harm to tropical forests and forest-dependent peoples. Roads also bring an influx of workers and travelers, creating economic opportunity but also threats to human rights and social stability. IA for roads should anticipate and provide mitigation measures for both direct and indirect effects beyond the short term. In practice, major roads are often broken into shorter segments to avoid proper consideration of the wider, cumulative impacts.

Affected communities are therefore encouraged to build coalitions that span the full length over the road to ensure the IA reflects the range of impacts and options that need to interact within a larger programmatic approach to sustainable development.

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<sup>16</sup> Gibson and O'Faircheallaigh (2015) IBA Community Toolkit, pg. 91.



**Table 3.2** Impact assessment topics, critical questions and information sources

| Area of focus  | Critical questions  | Sources of information  | Considerations   |
|--|---|---|--|
| Existing economic, cultural, and social conditions in the community                    | <p>Is the proposed project credible?</p> <p>Can the project coexist with community cultural practices?</p>  | Archival research   | Important to use many sources of data to ensure everyone's voices are heard  |
| Likely project impacts   | <p>Is the proposed project desirable for the community in its current form?</p> <p>What are the health impacts?</p> <p>What effects will the project have on cultural practices, like hunting or fishing, or a sense of place?</p> <p>How will local population change?</p>   | <p>Public meetings</p> <p>Site visits</p> <p>Comparison to other similar project assessments, and evaluations</p> | This is the focus of most ESIA's for major projects. The process of conducting an ESIA can be expensive for a community, but may be worth the cost |
| Options to maximize positive impacts & minimize negative impacts                       | <p>What size and type of benefits package can the proposed project support?</p> <p>What would be the effect of inequality between those who might benefit versus those who might lose?</p> <p>What impact reduction measures (from reduced scale to location) will the ensure other project objectives.</p> <p>What is the past effectiveness of proposed benefit sharing or risk mitigation measures</p> | <p>Interviews, comparison with similar projects</p> <p>Site visits to similar projects</p>                        | <p>Important to have messages for both incentives and penalties</p> <p>Are the views of men and women adequately known?</p>                        |
| Identifying how a negotiated agreement might assist with impacts                       | <p>What sort of package is required to make the project desirable for the community?</p> <p>What is known about other agreements for similar projects?</p>  | Focus groups  | Build the business case for an agreement   |
| Identifying alternative solutions to the problem, or size, location, sequence choices. | <p>What are the project alternatives?</p> <p>What are the costs?</p>  | <p>Surveys</p> <p>Financial analysis</p> <p>Legal analysis</p>  | May involve access to sector-specific technical expertise  |

Source: IBA Community Toolkit (2015, p. 92)

### **Box 3.4. Assessing and negotiating impacts of a tropical forest highway – Brazil BR-163**

The extension of transport infrastructure, often in response to local development needs, represents one of main threats to protecting large areas of relatively pristine forest. Poorly planned transport infrastructure undermines the tenure rights of Indigenous peoples and local communities to these same territories, lands and waters by expanding the agricultural frontier and driving unmanaged migration to the areas that lack adequate forest governance.

Research shows that 80% of deforestation in the Amazon occurs within 30 kilometers of a paved road (Barber et al. 2014). One recent study of 75 planned Amazon road projects, the expected impacts of these projects will negatively impact the environment, and for nearly half - economic losses would outweigh any gains. Canceling economically unjustified projects would avoid 1.1 million hectares of deforestation and US\$ 7.6 billion in wasted funding for development projects (Vilela et al. 2020).

An emblematic example is the paving of the 1800 km federal highway BR-163, the Cuiabá-Santarém highway, which cuts through the central area of the Amazon rainforest, connecting the soybean fields of northern Mato Grosso with the international port of Santarém on the banks of the Amazon River. The recently completed road is projected to cut transport costs by 20% and double the amount of soy transported along this corridor by 2025. By driving greater migration into the region opened by BR-163, the road has increased pressure on nearby Indigenous lands and protected areas.

In anticipation of the potential increase in deforestation and land conflict between Indigenous peoples and gold miners, illegal loggers and land grabbers, a coalition of Brazilian CSOs led a multi-year community-led impact assessment and management plan related to the planned paving of BR-163. The consultation process to design the plan that started in 2001 had four objectives: 1. Characterizing the area affected by the road (understanding its historical context and socio-economic dynamics); 2. Build and strengthen alliances in the affected region to identify the main economic actors and their demands; 3. Develop tools and information exchange mechanisms to promote dialogue and education about the future land uses; 4. Defining action strategies (respect territories, engage and empower local institutions, systematize proposals).

The Plan for Sustainable BR-163 reflected a wide consensus negotiated between diverse actors: communities, small, medium and large business, federal, state and local governments, Indigenous peoples, civil society and social movement organizations behind a single proposal for government action. The plan proposed an ecological-economic zoning arrangement that balanced infrastructure, conservation, social inclusion and production goals. The Br-163 Plan went beyond a set of measures to mitigate socio-environmental impacts and aimed to achieve an integrated vision of the future of the region, built jointly by civil society, government and the private sector.

Some lessons for the four-year process highlighted the importance of investing in capacity building for civil society to assess impact as step toward effective negotiation with the federal government and other stakeholders to adopt the plan, fund it, and involve civil society in the implementation. Only some of the elements of the plan were implemented. Factors behind the lack of full implementation included a failure to produce a complete budget for the plan and an implementation schedule, the lack of completely unified front in negotiations with the federal government, and shifts in the federal government alliances that weakened civil society influence.

*Source:* McGrath, Alencar and Costa (2010)

## 4. COMMUNITY UNITY



Credit: Rini Templeton, <https://riniart.com/gallery.html>

### Chapter summary

- Unity of purpose at the community level, achieved through careful, prior organizing, is critical for defining common objectives and sustaining these objectives under pressure.
- Building and maintaining a community's unified position is a continuous activity and requires significant time and effort, but a number of techniques are available to both strengthen and ensure continued unity.
- "Divide and conquer" tactics are commonly used to weaken a community's resolve in negotiation. A strong sense of internal unity is essential to defending against this tactic.

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*Strong alliances with external actors is a key factor for increasing a community's bargaining power in negotiation and the likelihood of successful outcomes. One of the strongest assets a community can have when entering into negotiations is to be united around a common negotiation position.*

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## Negotiation readiness assessment

- *What is the community's vision or visions for the outcome of the negotiation?*
- *To what extent is the community unified in the desired outcome(s) of the negotiation?*
- *What experiences and lessons can the community draw on in maintaining unity?*
- *How is internal governance structured? How can decision-making processes surrounding the negotiation respond to traditional governance practices?*
- *What mechanisms are in place or need to be established to ensure communication about the negotiation is effectively disseminated?*
- *What steps can the community take to strengthen and maintain unity?*
- *Which external partners and allies might the community draw on to improve its negotiating position?*

The question of whether or not a community is unified in its desired outcome for the negotiation, and around the objectives of that outcome, is important to the community's potential for success in any negotiation. Any negotiation will test a community's unity, and many failed negotiations have involved effective "divide and conquer" tactics by project proponents. The internal and external assets and weak points of a community should be thoroughly assessed before entering into any negotiation, both to anticipate and to overcome unity-breaking tactics that communities are likely to encounter.

### The importance of unity

*One stick can be easily broken, but a bundle of sticks together is difficult to break.*

-Credited to Tecumseh

Perhaps the most powerful predictors for the success of a negotiation are a community's clarity of purpose and its ability to plan collectively and stay united behind its shared goals. Presenting a united front will make it more likely that a community or group of communities can achieve their common vision and desired outcomes.

- Unity helps to prevent the use of tactics where the project proponent can seek to influence one or a small number of community members to

make decisions on behalf of the whole. For example, in a community without unity of purpose, the community chief may be co-opted or bribed by the proponent to sign a damaging agreement and open the land up to exploitation, even if the rest of the community doesn't agree. Co-optation does not always happen only to leaders—a small segment of a community can move to discredit the leader if they feel their interests are not being addressed.

- Unity supports the community to address and manage the internal conflict that can arise in communities faced with the additional stress of navigating negotiations processes. Taking the time to address negotiation-related internal conflicts before they escalate and undermine the external negotiation is critical.
- Unity makes the negotiating team more agile. Because there is a shared understanding of the desired outcomes from the negotiation, the negotiating team can make decisions more quickly – without needing to bring everyone in the community together to discuss every decision point in the negotiation process.
- Unity enables collective action. If the negotiation process starts heading in a direction the community feels is undesirable, united communities can pull together to implement other strategies that may enhance their bargaining power and get negotiations back on

track. These strategies can include direct action, litigation, or the forging of new political alliances.

- Negotiating with a unified community can create increased confidence in negotiation outcomes. Companies can be confident that all community members want what is being negotiated, making it more likely that, once implemented, the project won't lose time or progress on in-fighting or protests.

Community unity with respect to a proposed project and how it should be assessed does not demand unanimity of support or opposition to a project at any point in time, but rather intra-community consensus — or as close as possible to it — that at minimum the process is legitimate.

In cases where only one united group is engaged, cultural values and local priorities may be consistently shared. This unity becomes more difficult when culturally diverse communities are pulled together to form one negotiating body. Where there are complex negotiating bodies with a broad set of Indigenous groups and communities involved, it can be very difficult to ensure and maintain unity, particularly for complex projects that require intense impact assessments and alliance building. Intercommunity cohesion, in cases where neighboring Indigenous communities, nations or councils are involved, may be more difficult to maintain than when there is only one community involved. In such cases, constant communication is essential. Clear protocols for addressing concerns should be in place so groups do not feel left out of the process.

Intercommunity cohesion can be a source of strength when preparing to negotiate. The absence of an agreement between communities can also be a source of conflict under pressure by investors to decide on the terms of a poorly defined agreement. Case studies of unity or lack of it in negotiations are included in Box 4.1.

### Assessing unity

Some questions to consider when assessing community unity include:

- In considering the proposed project, is the community currently unified or fractured?
- Have recent experiences tested this unity? (How, what was learned?)
- Is the decision-making process around the negotiations appropriately responsive to traditional decision-making authorities and practices?
- Does the current leadership have the trust of the people?
- How well are grievances or complaints addressed? What is the process by which grievances/questions are brought to the attention of leadership?
- How well are all groups included in key decisions?
- How are these processes recorded or preserved for future reference?
- What can be done to further strengthen unity?

The community might also conduct some form of “negotiation readiness assessment” to determine whether they are ready to take on this type of responsibility and where capacity building may be necessary.

## Box 4.1 Case studies of unity

### The Zapotec Ikoote peoples and Mareña Wind Power, Mexico

Wherever more than one community is involved in a negotiation, particularly close attention must be paid to internal unity issues from the outset. This was the case in the *Istmo de Tehuantepec* in Oaxaca, Mexico when the Mareña Renovables company approached the Interamerican Development Bank (IDB) in 2009 to propose building a 400 MW wind farm on Indigenous land. Indigenous communities contested land ownership over the site proposed for the construction of over 100 towers.

The IDB-funded social assessment failed to fully investigate this conflict or the collusion between the company and some communities favoring the project. The flawed assessment served to heighten suspicions by withholding critical project design information from affected communities during the consultation. These and other due diligence errors by the IDB contributed to increased conflict between Indigenous groups. Opponents of the Mareña wind project perceived the IDB missteps as intentional tactics to further divide them.

The Zapotec Ikoote peoples who opposed the project were well organized to defend against years of social exclusion and human rights violations. Able to unify around the defense of land rights, the Ikoote managed to block the project, arguing it would affect their fishing, farming and sacred spaces. The wind project has had a negative impact that continues to stoke conflict in the region.

*Source:* IDB ICIM Compliance Investigation Report (2014)

### The Karen of Yang Kham Nu, Thailand

Yang Kham Nu is a small forest community (about 185 ha) located in the hills of Northern Thailand, home to Indigenous Peoples called the Karen, who settled in the area over 100 years ago. Yang Kham Nu experienced early success with resistance to a proposed hydropower project. This early success was decisive for lowering the cost of unity in later negotiations between the community and the government about the demarcation of a nearby national park.

In 1990, the Thai government proposed a dam on the Kok River that would have flooded not only Yang Kham Nu, but up to 40 nearby villages as well. In Yang Kham Nu village, local leaders were selected who led the community to define a bottom-line position and to prepare for government tactics to confuse people into supporting the dam. Leaders convened two times a month in rotating locations among the affected villages to discuss potential impacts and to explore potential for alliances, not only between villages but also with external supporters like NGOs. Solidarity among the villagers was built and sustained during these meetings, which carried on for several years. The community also built relationships with other impacted communities, as well as with external actors and NGO groups like Indigenous Peoples Foundation (IPF) and Asian Indigenous Peoples Pact (AIPPO), which strengthened their ability to advocate for themselves on a higher level.

In 1992, the Prime Minister traveled to Chiang Rai to sign the final approval papers for the dam. The community representatives planned a protest action. Under the guise of welcoming the minister with flowers, they instead surrounded him and physically prevented him from signing any documents. In the face of this display of mass discontent, the Prime Minister conceded to villager protests, and the dam was not built.

In 2016, Yang Kham Nu community lands were again threatened by a government development proposal. In this case, the government was delineating the boundaries for Lam Nam Kok National Park, a new national park intended to preserve the scenery along the Kok River. The land area of Yang Kham Nu village was included in the original plans for the park,

### Case studies of unity, continued

meaning the government would take possession of the community land and the Yang Kham Nu villagers would be forced to resettle. Due to their past history of uniting against a threat to their lands, the Yang Kham Nu villagers were able to quickly unify against the delineation, organizing protests and mobilizing allies in support of their position. The boundaries of Lam Nam Kok National Park were redefined and ultimately did not overlap with community lands.

*Source:* Community interviews, January 2019

### The Maasai of Laikipia County, Kenya

The Maasai of Kenya and northern Tanzania are pastoralist peoples, relying largely on cattle for livelihoods. In Kenya, Maasai communities are located on collectively held lands known as “group ranches.” Lewuaso is a community of Maasai located on Kojia group ranch in Kenya’s Laikipia County, on the banks of the Ewaso Ngiro River. The community lands were recently bisected by a 650-mile, \$1.25 million high voltage power line. The line runs from the Kenya-Ethiopia border to outside of Nairobi, and is financed by actors including the World Bank and the African Development Bank.

In negotiating the placement of the power line on their lands, the community had agreed to give up land to make way for the transmission line, but did not fully understand all of the implications of this decision. Communication between community members (between leaders and the community, between men and women, and more) as well as with external allies was not working well. The community lacked information about the potential costs and benefits of the power line and knew very little about the project before surveyors appeared on their land. The results of early consultations were not fed back to the community. Within households, the ways in which benefits would be shared was not well communicated. All of these communication problems served to erode trust between community members, weakening internal organization and ultimately leading to signing over the land in exchange for a small lump sum. The compensation for lost grazing land was far below that offered to neighboring communities, and disagreements over the use of the payment further divided the community.

*Source:* IMPACT and community interviews 2018

## How to build unity

Unity is built on the identity of the community as a whole. Indigenous Peoples have in-built processes for strengthening unity, which include group hunting and fishing expeditions, reciprocity exchanges, potlatch, rite of passage ceremonies, assemblies and meetings, song, dream, dance and storytelling and oral history (Berkes 2012). Common elements of these traditional unity-building practices include a recognition or celebration of a shared geography, of common ancestors, or of a reliance on shared resources.

Strong community unity can be difficult to build and to maintain. Robust community representative

structures, clearly defined community goals, and clear mechanisms of management for internal conflict (rather than denying or hiding conflict) can go a long way in building and maintaining lasting unity.

### *Consider all voices and equity among voices.*

Communities can negotiate for their interests as a united group – this does not mean that all the members of the community hold the same interests and opinions. Communities are never homogeneous groups. It is important that there are open and equitable dialogue processes established before any negotiation with outside parties begins to ensure that the community can feel like a coherent group and more easily make decisions. A Community

Controlled Impact Assessment (CCIA, as discussed in Chapter 3) can be useful in surfacing and documenting varying community interests.

Including representatives of different groups or perspectives within a community acknowledges the diversity that may not be appreciated as a strength in building unity and negotiating effectively. Diverse perspectives on the pros or cons of a particular project are rooted in the multi-layered, past, present and future relationships to the land and resources, articulated through existing decision-making processes. For example, men and women have different relationships with natural resources that may not be equally valued. Creating space to consider both perspectives will ensure available knowledge and advice is not overlooked when defining a community's priorities and identifying the many roles needed to implement a negotiation strategy. Inclusion of all perspectives on the potential impacts or benefits of a project strengthens unity, which is the basis for mobilizing support, minimizing internal conflict, engaging effectively with other parties, and avoiding co-optation. The structures need to ensure ongoing participation and keep negotiators to their mandate. Existing structures can be used, or the community can create new ones if required.

Examples of such structures include the Kimberly Land Council (KLC), an Aboriginal Australian organization set up in 1978. The KLC is comprised of two representatives (one man, one woman) from each of the 24 land-owning groups in the Kimberly region.

Communities can develop a set of steps, including key decisions and who makes them, in advance of entering into a negotiations process.

- Determine the appropriate constituency for a decision-making body, appropriate to the cultural decision-making processes.

- Make sure to map out and communicate in advance how community members will have an opportunity to engage in the process.
- Carefully consider engaging community members on how to structure the process. Community buy-in to the process will be critical to its legitimacy.

*Assess internal governance and how it reinforces unity.* Communities should review their internal governance or decision-making processes and consider how these processes work to reinforce unity. Negotiations over the use or control of lands and natural resources of a community will undoubtedly include conversations with high-stakes outcomes – the decisions made in negotiation can impact a community's economic, social and environmental well-being for generations to come. Reviewing the internal governance structure should lead the community to ask questions like:

- Who is the political leader of the community? Who is the spiritual leader of the community? How do these leaders share power? What decisions is each leader responsible for? Who would participate in a negotiation?
- Who manages the communal funds of the community? Are the community's monetary resources managed by one person or several people? How are decisions made about how the money is spent?
- How are conflicts within the community resolved? Are the procedures clear for registering and deciding on a problem raised by a member of the community? Have recent conflicts been addressed or resolved to the satisfaction of relevant stakeholders?
- How has the community acted, or what decisions have they made, in the past when facing similar situations? Are there lessons from those experiences that the community can draw on now? (For example, how did the community select its negotiators? How did it handle budget management for the negotiation?)



If clear and satisfying answers are not available for these questions, or if the answers to these questions seem to suggest these processes are not unifying the community, further assessment and initiatives to strengthen the community's internal governance could be beneficial to the negotiation outcome.

Indigenous groups that have completed land-use plans may benefit from having already established geographically delineated acceptable land use. This prior work can increase leverage and internal cohesion when areas that require enhanced protection are put at risk. They are also a sign that the community has the internal cohesion and historical precedent to run a detailed planning process and come to a communally acceptable solution.

*Building unity through remembering a history of struggle.* Unity is often strengthened through learning from past experience and remembering how community negotiation capacity is acquired over decades and through multiple stages where that capacity is tested, refined and strengthened. **When it comes to strengthening unity, history matters. Building unity among communities can often draw from past experiences of migration, settlement, conflict, survival and other key moments where people have come together to achieve a significant milestone in their life story.** Recalling both successes and failures, and transmitting these lessons and achievements to the next generation of leaders in the community, can be a way to strengthen unity, particularly among the youth. The unity of a community is strengthened and tested through their responses to threats—it does not happen in a vacuum. While communal ceremonies, hunting expeditions or rites of passage may be the building blocks for fostering unity, the strongest foundations are laid when communities face a common threat.

For communities looking to establish or reaffirm their unified vision ahead of a negotiation, Box 4.5, at the end of this chapter, includes an activity that

can help communities move through this process. This visioning, history tracing and storytelling exercise can be used by a community to understand their past, their present, the anticipated future if things were to continue on a “business as usual” basis, and their desired future. Understanding these can help a community determine what is important in a negotiation.

*Communication.* Another important component of building and maintaining unity is the community's capacity for effective communication, and the ability to maintain communication across the community for the duration of the negotiation cycle, including when the project is being implemented.

Internal governance and Indigenous law are not always well understood by outsiders. Some explanation of Indigenous laws, norms, and cultural decision-making processes may be necessary to ensure that these principles and procedures are accepted by all parties to the negotiation as ways of making decisions. Many Indigenous Peoples are reluctant to share in writing their laws, norms, or assessment criteria. Careful consideration can be given to what aspects of internal governance should be kept internal and what can be shared. An internal assessment (Ch. 3) can also help define the key aspects of customary decision-making processes that must be communicated and understood by those outside of the community.

Planning for internal and external communications will be discussed further in Chapters 7 and 8.

### *“Divide and conquer” tactics*

“Divide and rule” or “divide and conquer” tactics are commonly used by project proponents to weaken a community's resolve in the negotiating process. But strong community unity is the most effective defense against these tactics. Project proponents may attempt to divide and conquer communities by negotiating separate agreements with each Indigenous community (or family clan, tribe,

organization) individually and require confidentiality from each community. This means that the communities may have incomplete information or inconsistent information about the project and may receive uneven compensation or bear disproportionate burdens. Indigenous communities should ensure that they are able to share information amongst themselves when negotiating IBAs.

A community may also want to consider in advance establishing or reinforcing procedures to counteract “divide and conquer” tactics. As an example, there are cases in negotiation where proponents may approach community leaders or other influential community members and try to influence them to make a decision in the negotiation in exchange for individual favor or compensation. This decision is made without consulting the community as a whole. Internally unified communities are able to counteract these tactics by establishing or reinforcing ahead of time any community decision-making procedures that require communal decision making.

Examples of rules that a community could create or may already have in place to combat “divide and conquer” tactics include:

- Prohibiting community leaders, influential figures, or small groups of members from meeting with project proponent representatives without the broader community present.
- Forbidding any community member from making a decision about community land or resources without taking the decision back for discussion with the community as a whole. If it does not already exist, a quorum (a certain percentage of the total population participating in votes or meetings to make them valid) should be established for community votes or meetings.
- Requiring a supermajority or consensus approval for decisions that impact community lands or resources.

- Ensuring that both men and women are equally informed and have a role in all strategy decisions. Unity is key to have the backing of your community (achieved through patient prior organizing) when a community makes the decision to take direct action.

### Strengthening unity with external partners

Forging strong alliances with external actors is a key factor for increasing a community’s bargaining power in negotiation and, ultimately, increasing the community’s likelihood of successful outcomes. Dialogue, diplomacy and alliance building are critical abilities for effective negotiation. While it may seem relatively simple to identify obvious allies, Indigenous experience suggests that building alliances and maintaining them over the long term is not easy.

External alliances are of particular significance for Indigenous negotiators seeking to negotiate agreements in sectors other than extractives. State agencies whose interests may run counter to Indigenous interests often play a central role in a number of these sectors (land development, forestry, infrastructure projects, REDD+), and so building political alliances is especially urgent. Identifying the interests and modes of operation of potential non-Indigenous allies is important to ensure that alliances support, and do not undermine, Indigenous strategies. This can require analysis, such as power analysis. In addition, research is needed to understand characteristics of the sector in which the project proponent operates. This can be a greater challenge in non-extractive sectors where much less information may be publicly available and cross-national networks are not as well developed.

Communities may already have alliances with or choose to partner with groups who can provide benefit to them in negotiations – these groups can include other Indigenous communities, regional- or national-level Indigenous organizations, non-profits

or civil society organizations, academic institutions, advocacy groups, or others. Communities can utilize alliances for a wide variety of resources and support, including:

- Technical and/or financial support
- Information on
  - Project proponent or industry/sector
  - Resources for effective negotiation tactics
  - Precedent – What agreements has the project proponent made in the past? What have other Indigenous communities faced with similar negotiations been able to negotiate in the past?
  - Proponent operations – Has the project proponent had safety accidents or been fined for environmental damages previously? This information could be used as leverage for greater protections for communities in negotiation.
- Advocacy support
  - Promoting their cause with others. This support becomes especially important if communities decide not to negotiate but the project proponent does not respect this decision.
  - Accessing media contacts to gain favorable media coverage or counter unfavorable coverage.

#### *Alliances with strong regional Indigenous organizations*

According to extensive research on agreement-making between extractive companies and Aboriginal and Indigenous Peoples in Australia and Canada, positive outcomes for communities negotiating with extractive industries are “clearly and closely associated” with the presence of strong regional Indigenous organizations (O’Faircheallaigh

2016). Having an ally that has prior history with a sector (e.g., metals mining, hydro-electric dams, gas or oil pipelines, REDD+ benefit sharing) increases the sectoral knowledge and community interest and ability to identify issues to help focus the negotiation preparatory activities and strategy design (see Box 4.2)

Communities should assess the potential benefits and costs of reliance on alliances with Indigenous regional organizations to support the negotiation effort. Alliances with regional Indigenous Peoples Organizations (IPOs) are beneficial in ensuring that Indigenous values and interests are clear and do not require translation for non-Indigenous allies. Regional IPOs can help reinforce links between Indigenous groups. Where these ties are weak, project proponents have an advantage in seeking to

#### **Box 4.2 Building strategic networks**

Building and sustaining networks are critical for accessing information about projects, potential strategies, and the interests and priorities of community members. An example of two actors working together to share expertise comes from the Kimberley region of Western Australia. In 2007, a group of James Bay Cree leaders and advisors traveled to the Kimberly and were hosted by the regional land organization, the Kimberley Land Council Aboriginal Corporation (KLC). The KLC had gained experience assisting communities in negotiating a series of mining agreements. The James Bay Cree group were just about to embark on their first negotiation with a mining company and were looking to learn more about mining agreements. They brought their extensive experience in negotiating self-government agreements, an area where the KLC had limited experience but planned to become more active. The Cree and senior KLC staff spent a week travelling through the Kimberley region and meeting with Aboriginal leaders and negotiators. This was a unique opportunity to share expertise and experiences across a wide range of matters, including fundamental issues regarding Aboriginal governance and political strategies for dealing with companies and governments.

*Source:* IBA Community toolkit, 2015 pg. 13

isolate communities and force bilateral negotiations. Where horizontal ties are strong, communities can share strategic information and coordinate strategies. In some cases, such ties enable a unified position to be enforced in any community-investor agreement.

*Benefits and pitfalls of external alliances.* Managing complex relationships with external allies involves finding the right balance between accepting help and expertise that may be crucial to negotiation success, while at the same time ensuring that the community retains ultimate control over all decisions in the negotiation process. Often regional or national organizations have their own agendas, which have to be very clear to the community. While the short-term agenda may coincide with community interests, larger organizations may have long-term agendas that either support or harm the negotiating community/ies. Whether these agendas align must be discussed. Another consideration is the reputational risks (perceived or real) associated with large IPOs. Communities often get caught up in the conflict between governments and large IPOs.

Support from regional IPOs should not come at the expense of decision-making authority within the community. In weighing the decision of whether or not to enter into negotiations, communities should take stock of their current allies, and consider potential new alliances that could benefit them, including the costs versus benefits of alliance maintenance or forging new alliances (See Box 4.3).

*Role of legal advisors.* Expertise in national or international law is frequently needed for negotiating agreements with project proponents. Communities often recruit for this expertise externally, but should do so carefully, thinking broadly about where to find such expertise. As an alternative to relying on CVs, one possibility is talking to other IP groups and asking for recommended experts. In seeking and selecting legal advisors, communities should prioritize technical over cultural expertise – the community are experts in their own

#### **Box 4.3 Internal unity for managing external alliances**

There can be power imbalances within a coalition that includes Indigenous Peoples. Unity safeguards against dominant allies. In Australia, historical alliances existed between Aboriginal peoples and environmental NGOs. Aboriginal peoples have opposed many extractives projects, often in alliance with environmental groups. As IPs exercise rights and more control over mining (and benefit distribution), NGO ally views towards mining have changed. If IPs decide to support the project, some environmental groups have acted to influence internal politics within Aboriginal decision making spaces. In one case, the community had reached a consensus decision to support the project after which NGOs aligned themselves with the 15% who were not in favor and tried to split the Indigenous vote, declaring that affected people were only truly Indigenous Peoples if they were against the project, which caused huge, costly conflict within the community. Where non-Indigenous NGOs abandon an alliance is an issue regardless of internal unity. Where NGOs play ‘internal politics’ and try to divide and conquer Indigenous groups that don’t fully align with NGO interests is where internal unity comes into play.

*Source:* O’Neill, L., 2019. ‘The Bindunbur “Bombshell”: The True Traditional Owners of James Price Point and the Politics of the Anti-Gas Protest’, University of New South Wales Law Journal 42(2): 597-617.

cultural considerations, and can teach those to an outsider, so technical expertise in this instance is more important. It is imperative that communities maintain a *clear* line between advice and decision making. While communities should take or leave the advice of legal or financial counsel in making the key decisions, it is paramount to invite independent and candid input. A community should value rather than discourage transparent debate, even when it challenges the prevailing views. In some circumstances, it can be important to have an outside advisor to provide inputs to a community’s internal decision-making process. This can be useful particularly when the outside advisor shares input that is not in agreement with what some persons in

the community may want to hear. In the end, the community will make a better decision if the process is inclusive of and tested by diverse points of view.

#### *Role of third parties (mediators or external processes)*

Third parties in negotiations can include operators of independent complaint mechanisms, mediators, business associations, and certain government agencies. In contexts where there is little leverage with the project proponent, appeals to an independent arbiter can provide space for certain procedural rights to be recognized. Just as frequently, third-party processes like institutional grievance redress mechanisms can end up delaying or failing to provide genuine remedy, serving instead to protect the interests of corporations or the state.<sup>17</sup> In some contexts, third parties may not add value, but instead weaken community power. Generally, third-party processes like grievance mechanisms can provide a useful independent source of leverage where governance is weak, but should not be expected to replace the internal capacity of communities and regional IPOs to secure their rights directly through negotiations with project proponents or the government (see Box 4.4).

#### *The role of NGOs*

While consent can only be provided by Indigenous communities themselves, negotiations often afford a role for NGOs as strategic allies. Beyond investing in Indigenous negotiating capacity, NGOs can provide technical support to enhance Indigenous communities' understanding of the content and form of the agreement. Indigenous groups should use NGO technical support to enhance their ability to participate in negotiation, rather than allowing the technicalities of complex agreement documents to be handled solely by professional negotiators. Technical advice needs to be communicated within

the community so that Indigenous negotiators, and also importantly Indigenous leaders and constituencies, understand why agreements should take certain forms. This is important to maintain unity and broad support for the negotiation effort.

Some issues to consider for assessing and strengthening external allies include:

- How much strategic capacity and access to expertise can an alliance with regional organizations provide?
- What political alliances with regional IPOs exist or can be created?
- How can alliances with regional IPOs help to facilitate effective media relationships?
- Could alliances provide access to technical expertise on the form and substance of the agreement or on the project proponent?
- What access to financial and technical resources to support negotiations might be available, including from the project proponent or the government?
- Do alliances enhance the capacity to make “credible threats” of direct political action, including strategic use of legal and administrative provisions (blocking permits) to delay and or stall projects, which can make things difficult for project proponents?
- What external ‘structural constraints,’ laws or institutions that might undermine Indigenous negotiation positions, exist and can be changed? Achieving greater recognition of Indigenous rights is critical here.

For communities who have made the decision to negotiate, Chapters 7 and 9 of this Guide will further consider how communities can utilize existing and newly created alliances to their advantage in negotiations.

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<sup>17</sup> See SOMO [Glass Half Full: The State of Accountability in Development Finance](https://www.somo.nl/glass-half-full-2/), SOMO et al. (2016) Available at <https://www.somo.nl/glass-half-full-2/>

#### **Box 4.4 Challenges of leveraging alliances with a third-party accountability mechanism, Cambodia**

In Ratanakiri province in eastern Cambodia, a rubber concession holder has been accused of illegally clearing the sacred land of some 2000 Indigenous families. The negotiation between displaced Indigenous forest users and a Vietnamese real estate, mining and agribusiness company (Hoang Anh Gia Lai, HAGL) had extra leverage provided by a complaint to the IFC's Compliance Advisor Ombudsman (CAO) in 2014, opening space for exchange, investigation and negotiation between the parties. The dispute began after HAGL illegally obtained community agricultural land to produce rubber, clearing forest that communities rely on for their economic, social and cultural needs. With landholdings covering an estimated 5 % of the total province, HAGL has been accused of harming the community.

After the complaint was made, the IFC CAO was able to ensure a level of public accountability, transparency and consultation between parties that would have been unlikely in the weak governance context of the Cambodian countryside. The CAO presence provided continuity in the dialogue process, offset some of the meeting costs, and most importantly, kept IFC decision makers informed of the progress. As long as a company cares about preserving IFC funding, or the social license to operate that comes with this funding, leverage provided by accountability mechanisms like the CAO can improve a community's bargaining position.

In the HAGL case in Cambodia, local Indigenous communities invested heavily in preparing for negotiation through intensively building capacity, researching, and strengthening alliances. Knowledge of the IFC CAO mediation process was important for leverage. However, building and maintaining unity between affected communities over the five-year negotiation process required continuous organizing, including the need for a local translator that could speak 11 dialects.

The affected Indigenous communities selected three representatives from each affected village to negotiate on their behalf. Capacity building for negotiations also began in 2015, for both the company and the communities – the company received training on Indigenous Peoples' rights, as well as how to participate in equitable negotiations. The communities received training in negotiation skills, technical calculations such as the value of lost land, and mapping. From 2016 to 2018, the communities and company engaged in negotiations. Five rounds of negotiation took place over these years, with the impacted Indigenous communities receiving incrementally more back from the company with each successive round. After the first negotiation stage, 5 affected villages had been excluded from the concession area, and the lifespan of the rubber plantation had been reduced from 90 years to 50. By the end of the fifth and final round of negotiation, the company agreed to participate in negotiation at a village by village level, so that all impacted communities could negotiate for themselves with the company.

In their negotiations with HAGL and the company's financial backer, affected communities achieved a promise to repatriate both rubber lands and ancestral mountains back to Indigenous communities, an additional gift of 30 hectares of land for impacted communities, and the creation of 14 maps delineating over 700 ha community managed sacred lands. These achievements required significant investments of time and effort to coordinate with external allies, become educated about the company and its shareholding structure, and the formal channels through which they could contest the company's actions.

Despite these efforts, HAGL temporarily withdrew from the IFC mediated negotiations in 2019 and a year later cleared sacred forest that was scheduled to be returned to the communities. With the Cambodian government failing to act to return the requested land, the negotiation process is ongoing. Clearly, while the CAO has played an important mediator role, by itself the third party leverage has been insufficient to deliver on community demands.

*Source:* Highlander Association; IFC CAO.

#### Box 4.5 Visioning, history tracing and storytelling exercise

One exercise that communities may choose to complete to strengthen unity and improve their negotiating position is a community “visioning” exercise. Through this exercise, community members reflect on their past and how it connects to the community’s current status, as well as where they’d like to see the community progress into the future. If all or most of the community’s members can contribute ideas to this vision of the future, then all or most of the community will feel a sense of “ownership” and commitment to realizing the vision. Realization of this vision can then drive the negotiation process.

To begin, community members describe what life was like in their community in the past (30-50 years/1-2 generations past):

- What were the lands like?
- What natural resources were present? What was the community’s relationship to them?
- How abundant were the resources? How long did it take to gather them?
- What were community relationships like in the past?
- What cultural activities took place? How did the community make natural resource management decisions? How did people treat each other?

Ensure that everyone has a chance to share their thoughts in this discussion – community elders will have much to contribute, but younger people can share the stories they heard from their grandparents and older relatives. Make sure the thoughts shared are recorded in some way.

After this reflection on the past, ask community members to now consider what life is like in the community today.

- How are the lands being used and managed now?
- Has there been a change in the availability of resources or how they are used?
- What are community relationships like now?
- How do members feel about the current situation in the community? What is working well? What could use improvement?

Ensure that these thoughts are also recorded.

Next, ask community members to consider the community’s future. If things continue as they are today, what will the lands, natural resources and community relations be like 30-50 years from now, for the grandchildren and youngest members of the community?

- How healthy will the local environment be?
- How available or abundant will lands and resources be?
- Where will people get their food, water, building materials, medicine, etc.?
- How will people interact and live together?
- What will people’s livelihoods be?
- Will people be carrying on the customary cultures and practices?
- How do you feel about this kind of situation?

It may take some time for people to be forthright about their thoughts on the future – allow them the time they need to really “see” the vision of the community’s likely future. Be sure to record these thoughts as they are shared.

For the final step in the visioning exercise, ask community members to again envision the future of the community. This time, however, allow them to dream about how they would like the future to be for the grandchildren and youngest members of the community, 30 to 50 years from now. Ask them to envision an ideal future for the community.

#### Box 4.5, continued

- What does the community look like? What does the landscape look like?
- How do people live and work together?
- How are decisions made about the lands and natural resources?

In considering a future vision that includes potential future investments by outside actors, additional questions could include:

- What companies operate in the community? Who owns the companies? What do the companies do?
- What kinds of jobs does the project proponent provide? Who is employed, and what skills are the employees gaining?
- Does the project proponent pay taxes, rent or royalties to the community?
- How have the project proponent's operations impacted the community?
- What improvements to infrastructure has the project proponent made?
- How have the project proponent's operations impacted the environment?

Conclude the visioning exercise by developing a plan for the community to begin moving toward this ideal future vision. What are some actions that can start happening today that would bring the community closer to this vision for the future? Questions to ask in the development of this action plan could include:

- What are the top three (3) priorities for action the community can take this year?
- What kinds of action can special groups take?
- What can women do? What can men do? What actions can youth or elders take?
- What allies or resources from outside the community could be reached out to for help?

Through the development of this common vision, and laying out an action plan to achieve it, a community benefits in many ways. The first is through the agreement on common priorities – despite the diversity of needs and opinions that are always present within communities, a community-planning process can help communities decide together on what is best for the community's future. Through the visioning process, the community can work through differences and come to productive compromises. Laying out the community vision and an action plan to follow also provides clear and practical steps for working toward a better future. It helps community members decide how best to allocate limited resources like time, money and skills to achieve the vision.

When it comes to considering negotiation with outside parties, a community united behind a clear action plan has the potential to see greater success in negotiation. Through the visioning process, the community will already have an agreed upon understanding of what is and is not negotiable for them in any negotiation process. If access to clean drinking water is a priority identified in the community's vision of the future, the community will enter into negotiation with the understanding that commercial activity near any bodies of water in the territory should be a "non-negotiable" item – or something the community will not consider – but that commercial activities in lands that will not or will minimally impact water quality is something that can be negotiated.

Especially when linked with maps, land-use plans, and strong community protocols for how investment decisions can be made, an action plan makes clear to potential project proponents that the community has its own priorities and vision for the future, and that any negotiated agreements between the project proponent and community will need to take these into account.



## 5. RESEARCHING THE OPPORTUNITY TO NEGOTIATE

### Chapter summary

- Research is a critical component of designing an effective strategy for negotiation.
- Research is an ongoing activity during the negotiation process, both informing the decision to negotiate, and then shaping any strategy that follows.
- Research topics include the negotiation context, the project context, the project itself and the project proponent.
- Decide on what kind of data you will need in the short, medium and long term. Make a plan to manage, file and store incoming data. Decide who will have access to data, and how confidentiality will be maintained. Create a data management plan.

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*Research is often necessary for Indigenous communities to consider whether or not to negotiate. Research, and managing the resulting information, are also requirements for designing an effective negotiation strategy.*

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### Negotiation readiness assessment

- *What information does the community have regarding the proposed project, the project's proponents, the commodity's investment chain, and the negotiation process?*
- *What information does the community need regarding the proposed project, the project's proponents, the commodity's investment chain, and the negotiation process? Who has this information/ where might this information be obtained?*
- *Where will the community store the data that it gathers about the project and the negotiation? Who will manage it? Who will have access to it? How will confidentiality be maintained?*
- *What expertise does the community have regarding the proposed project, research topics related to the negotiation, and data analysis? What expertise will they need to seek externally?*
- *What processes will the community put in place to manage external consultants?*

### Why research?

Information, in all negotiations, is power. One of the biggest disadvantages for Indigenous Peoples in a negotiation is the imbalance in access to strategic information. In these cases, the "Informed" part of FPIC often fails because the project proponent shares only the information about the proposed project that they determine to be important, or may actively work to hide important details about the project or the investment. Active and timely

research by communities throughout the negotiations process can correct this imbalance.

Research requirements typically include gathering information related to the project, the proponent, and the commodity or service being produced. Prioritizing what information to collect at what time and where the information can be found can be daunting. However, information gathering can often be prioritized around specific themes, such as the

project proponent's history with Indigenous Peoples, resources available to support the community's negotiating team, legal and policy frameworks, any precedent agreements for similar projects, and possible impacts and benefits from the project.

## Researching the project proponent

Understanding the opportunity or risks related to any project first involves research on the project proponent, which can be a private company, a public agency, or a non-governmental actor. For all cases, investigating the motivations, the culture, the history, financial health, market constraints, investment structure, and many other factors about the project proponent is essential. Table 5.1, found at the end of this chapter, outlines important questions to consider with respect to the project proponent and where information might be found to provide answers.

### *Decision making*

One of the most basic questions is who has decision-making power in the company, government agency or non-governmental entity? And how much power do these individuals hold? While power is often concentrated within private companies, public projects are often more accountable to a variety of stakeholders. Understanding how decisions are made and where authority to make decisions rests within the project proponent institution provides a roadmap to ensure that efforts to influence focus on the right actors, and later on, that any negotiation is held with decision makers.

### *Reputation*

Another central aspect of research focuses on how important the proponent's reputation is to them. Reputational risk can be an important source of community leverage during a negotiation. Understanding this question is often associated with tracing the actor's track record of prior engagement with affected communities or Indigenous Peoples. Has the proponent acted respectfully toward

Indigenous Peoples in the past? Have they issued any statements to that effect? How have they responded to past problems or media attention?

A related aspect of research assesses how dependent the project proponent is on the project, both financially and politically. As with reputation, dependence can vary with the size of the proponent. Smaller companies or weaker government agencies have less flexibility to grant Indigenous demands, but at the same time, are more dependent on a successful negotiated outcome for the project to move forward. Larger investors may have greater independence, but also more ability to pay.

Dependence also hinges on how extensive and costly the early stages of project development have been or will be. Typical mining projects can cost hundreds of millions of dollars in exploration before the mine is developed. REDD+ carbon credit project proponents often have to invest considerable resources before an emissions reduction purchase agreement with a benefit-sharing plan is negotiated and signed. Research on financial dependence helps inform the community about what the project proponent can afford with respect to benefit and burden sharing and reveal sources of leverage (see Box 5.1).

Key questions to address in the early research phase include:

- What are the project proponent's motivations, culture, financial and political context? What is their dependence on the project? What are the same for other parties in the negotiation?
- What are the project proponent's advantages? What information/resources do they have that the community does not?
- What are potential pressure points that could affect the project proponent? For example, in what ways might their reputation be at stake with this project?
- What is the project proponent's history in negotiations?

- What is the project proponent's track record with Indigenous Peoples and human rights?
- What does the project proponent know about the community? How have they responded to community requests?
- What can the project proponent afford?

#### **Box 5.1 Researching the company: HAGL Rubber Concession, Cambodia**

In Rattanakiri province of Cambodia, Indigenous communities banded together and used their alliances with local NGOs to take on a 47,000 hectare rubber plantation that threatened their claims to their lands. The communities relied on their alliances with one another and with external allies to lodge a grievance against the company through the International Finance Corporation (IFC) Compliance Advisor Ombudsman (CAO) office in 2014. A 2008 government concession to HAGL displaced 1,400 families. NGO-supported research on company shareholding revealed a delicate fact that communities used as leverage against the company. Research on company ownership revealed financial ties to the IFC and helped substantiate the complaint and eventually bring the company to the negotiating table. The CAO complaint was upheld and followed by a mediated negotiation in 2015-2016. Discovery of the investment by IFC indirectly to HAGL through a private investment company ensured that communities would have access to the IFC's mediation service, which has kept HAGL at the negotiation table – even after the IFC client divested from HAGL. This in turn kept IFC's government shareholders interested in the case. Tracing the investment ties that a company may have can provide important sources of negotiating leverage.

*Source:* Highlander Association and Inclusive Development International

#### *The project*

Understanding the various components of the project is critical to a successful negotiation. This includes considering:

- How large is the proposed project going to be? How long will it last? What kinds of construction/infrastructure will go along with it?
- How is the commodity processed? Where is it shipped to? What is it used for? What factors determine the commodity's value? Can the value change over time?
- Have other agreements already been made within this sector that could inform this negotiation? Have other agreements been made between communities and this project proponent that could be looked at before negotiating?
- What is the potential for profits from this project? What potential benefits might come to the community?
- What are the national legal requirements that might impact or influence all of the above?

#### *Investment chain*

An investment chain refers to the many different types of actors that are involved in making a project possible, and the ways in which they are connected through agreements, financing, and other means. Research into the investment chain within which the project sits is an important potential source of leverage for negotiation. Figure 4 shows some of the actors that might exist in an investment chain.<sup>18</sup> At the heart of the chain – referred to as the midstream part of the chain – is the business that manages the project. This part of the chain is usually physically visible and is where the companies and communities interact and where decisions about land use and access are made by the government, business and in some cases, local communities. When agreements can't be reached, or local communities are not involved in decision making, it is also the place where

<sup>18</sup> This section taken from IDI and IIED (2015) p. 16.

conflict over land and resources may arise. Contractors are also found at this part of the investment chain. They are paid by the business managing the project to carry out services or provide inputs for their operations.

At the upstream end of the chain are parent companies, and then further upstream are investors

and lenders. At the downstream end of the chain are buyers, such as retailers, manufacturers or commodity traders, who purchase the products that are grown or processed by the project. Further downstream are everyday consumers of the products that contain ingredients produced by the project.

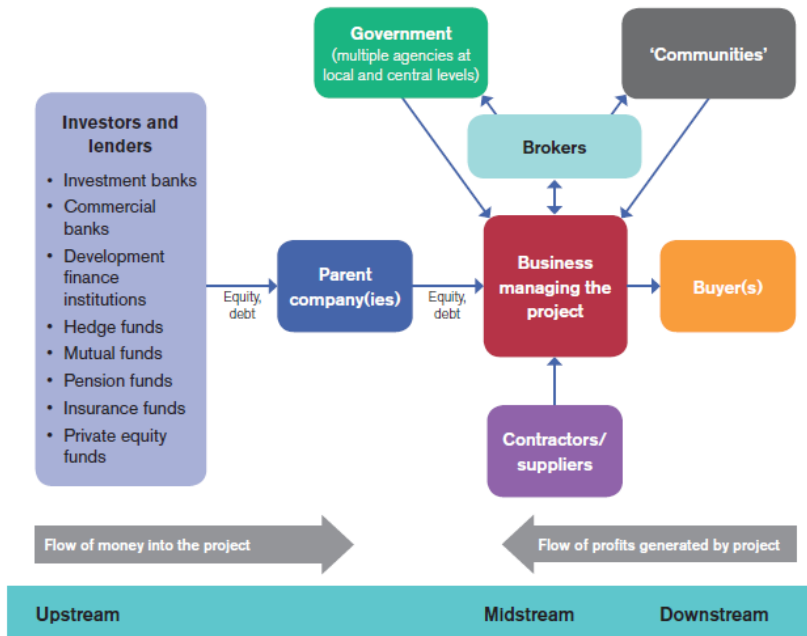


Figure 4 Sample investment chain showing upstream, midstream and downstream actors and relationships between actors (Source: IDI and IIED 2015)

## Researching the legal and institutional context

Equally important to understanding the project proponent is understanding the legal and institutional context within which negotiation will take place. Researching the legal context for Indigenous rights will involve understanding the laws on paper, as well as the track record of regulatory institutions in implementing those laws. How effective or reliable are the regulatory agencies of the sector? What are the stages of the permit or licensing process, and how are decisions made?

Increasingly, project developers have to obtain some type of **social license to operate**. The form in which

the social license is obtained varies, but often this is a space for community influence. A social license to operate is a perception by the community and other stakeholders of the acceptability of a project proponent and its local operations. The willingness of a project proponent to undertake corporate social responsibility (CSR) initiatives in relation to any social group depends, in large measure, on the capacity of that group to pose a threat to its social license to operate. The capacity of groups to threaten the reputation of corporations is a “crucial lever.” Where agreements bind Indigenous groups to support corporate activities and silence them through confidentiality provisions, they have substantially surrendered their ability to threaten a company’s

social license to operate (Gibson and O’Faircheallaigh 2015).

Research should include the international context for Indigenous rights. Has the country signed onto relevant international human rights conventions, like the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)? For emerging issues, like payments for ecosystem services and carbon rights in particular, the legislative rules are changing at both the international level and the national and even subnational level. For negotiations regarding impact and benefit agreements in the natural resource management sector, such as those that define the price to be paid for removing a ton of carbon dioxide through avoided deforestation, careful analysis of existing agreements and national legislation is crucial. However, even then, for commodities that have yet to be traded in a mature market, such analysis will only provide partial evidence for the possible costs and benefits of entering into a long-term contract that may restrict a community’s access and use of their lands and resources. See Chapter 11 for further detail about natural resource management sector agreements.

For commodities in the agriculture sector that threaten to encroach onto IP territories or negatively impact their livelihoods, such as soy, beef, sugar, coffee and palm oil, the relevant legal framework might include emerging standards, both voluntary and binding, that signal to downstream buyers that a product has met certain environmental or social requirements. Understanding how these certification or review processes work for specific commodities, including how responsive producers and intermediaries are to reporting on performance relative to these standards, presents an important source of leverage for affected communities. However, voluntary self-policing alone is rarely the

most effective way to defend against encroachment by agribusiness investment on Indigenous lands.

Transport, hydropower, and water storage infrastructure is often subject to national or international safeguard requirements upon which project finance is conditional. Understanding the safeguard requirements for major investors in the project can provide important additional opportunity for influencing the project design process or remedying problems during operation.

Free, Prior and Informed consent (FPIC), to take one example, is becoming a safeguard requirement for many projects with significant impacts for Indigenous Peoples. From the World Bank to leading private companies, development actors are including FPIC in their safeguard policies. Significant gaps remain for FPIC to enable the protection of Indigenous rights. One of most important indicators of how far public and private safeguards still have to go to ensure the adequate provision of FPIC is how rarely the process is triggered. This gap points to safeguard policy loopholes in assessing eligibility that fail to make clear the circumstances when FPIC is required.

Where safeguards calls for FPIC to be “established through **good faith negotiation** between the Borrower and the Project-Affected Communities of Indigenous Peoples,” such policies lack the necessary detail to ensure Indigenous Peoples are able to negotiate effectively.<sup>19</sup> Attention to applicable safeguard requirements that seek FPIC can provide critical leverage at key moments in the negotiation (see Box 5.2).

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<sup>19</sup> Interamerican Development Bank, ESPF, PS7. World Bank ESF ESS7 also calls for FPIC through good-faith negotiations.

### Box 5.2 Filling gaps in FPIC safeguard procedures

Good faith negotiation leading to FPIC requires explicit process guarantees that:

- Provide Indigenous-led processes to establish Indigenous community needs and priorities for negotiation;
- Support community participation in preparing for and undertaking negotiations;
- Support community negotiators to engage project proponents;
- Provide access to dedicated and accountable technical expertise to support communities in conducting complex negotiations, in part by building understanding of the concerns of the other parties to the negotiation;
- Build understanding of the economics of proposed projects and the potential impacts;
- Support the design of revenue sharing and compensation provisions that will meet community needs while recognizing commercial realities;
- Allow the design of effective impact mitigation and implementation measures; and
- Enable agreements that are sufficiently specific and binding to be capable of enforcement, yet flexible enough to adjust to changing circumstances.

Negotiation process requirements should address safeguard supervision challenges, including:

- Providing resources for Indigenous Peoples to conduct community-controlled impact assessments to ensure cultural heritage, traditional knowledge and values are adequately reflected;
- Ensuring the availability of resources for effective supervision of projects affecting Indigenous Peoples, including through the use of appropriate social science and legal expertise;
- Clarifying what action can be taken if project implementors do not agree with 'corrective measures', or what time frames this might involve;
- Direct involvement of Indigenous Peoples in monitoring compliance with agreements during project implementation;
- Specifying mechanisms to provide resources for implementation failures or remedy for adverse impacts, and that involve immediate and automatic responses to such failures;
- Assigning Indigenous Peoples themselves to a leading role in identifying implementation failures and in taking action to have them addressed;
- Providing Indigenous Peoples direct access to the judicial system to enforce project developer obligations.

#### *Governance conditions*

Beyond researching relevant laws, policies and regulations, research is needed to assess governance conditions. Governance relates to the capacity of institutions involved in project planning, development and execution to 1) read the relevant signals from society that should inform project design; 2) make planning decisions based on balancing competing interests; 3) effectively carry out a plan; and 4) ensure compliance with relevant standards or rules (Urvashi Narain 2010).

Research should assess the extent to which existing rules favor Indigenous interests, both in terms of their definition on paper, as well as the capacity or political will of key actors to execute their responsibilities under such rules. Often, honest assessment of the gap separating legal duties and the implementation track record is crucial for assessing the opportunity for negotiation and designing an appropriate strategy. Some important considerations related to governance include:

- Does an existing contractual agreement/relationship exist between the project proponent and the government?
- Have prior negotiations or agreements been entered and, if so, has the project proponent delivered on prior commitments?
- Are the relevant laws, policies and regulations generally enforced?
- Are the project proponent and government willing to support, or at least not actively oppose, reaching a negotiated agreement?
- Are the project proponent and government willing to support the undertaking of a parallel Indigenous-led impact assessment?

## Data management

Information needs for negotiation vary in the short, medium, and long term. Research and data management plans should be flexible enough to allow periodic reassessments of needs and data availability throughout the process and should effectively record and organize information for easy retrieval later.

### *Data storage considerations*

The longer the negotiations process takes, the more information there will be. Developing protocols early on for storing correspondence, assessment reports, rulings, and research files will ensure that negotiating teams can access critical information when needed. Key considerations for data storage include:

### *Lead data manager*

- Appoint a single lead to oversee data storage throughout the negotiations process.
- Ideally, this individual should not be the lead negotiator as negotiators frequently have other responsibilities that may make consistent archiving of data difficult.
- If more than one community organization is involved in the negotiations, it is best to designate one organization to house and manage information, with one individual overseeing this responsibility to ensure that a

coherent, comprehensive, and accessible archive is maintained.

- An index of key terms and rationale used for archiving materials should be kept up-to-date and available to facilitate easy access to documents, as well as ensure continuity in the event of personnel changes.

### *Consultants*

- Consultants may be very helpful to assist with research and analysis, particularly on technical topics.
- Consultants should never be the primary manager of data related to the negotiations, as they frequently move on to other projects, making future access difficult or impossible.
- When hired, consultants should be given a protocol on how research files, correspondence, and all negotiations-related data are to be cataloged and managed.

### *General*

- Every effort should be made to ensure that information is organized and managed by the community negotiating team. A thorough assessment of the capacity of the negotiating team to carry out this function is important.
- Funds and resources to address data or personnel gaps may be available from NGOs, government, or corporate entities.
- Critical documents, such as impact assessments and terms of reference, should be digital as well as hardcopy for easy access.
- All digital files should be backed-up, preferably to cloud-based storage as well as an offline, external hard drive.

### *Data access & confidentiality considerations*

Access protocols are important for maintaining confidentiality of sensitive data and ensuring that negotiations team members are not overwhelmed with excess information. Once an archive is established, a data management plan should be created. This plan should detail who has access to which data and appropriate restrictions, such as

passwords and/or varying levels of access should be applied.

In addition to access protocols, the negotiations team will need to concretely define which types of data may be sensitive as early as possible. Examples of sensitive data may include information about community politics, negotiating positions and strategies, funding, and cultural heritage. These should be explicitly defined and examples provided in the data management plan. All consultants should be briefed on managing potentially sensitive information and given a copy of the data management protocol. Consultants should indicate to the negotiating team any data they collect that may include confidential or sensitive material (Gibson & O’Fairchaellaigh 2015).

*Data analysis considerations*

Data analysis is critical for helping to sift through information and identify what is most relevant for

supporting the community’s negotiating position. It is critical to evaluate the skills and expertise of the community with regard to data and analysis. Where gaps are identified, such as with very technical information, outside consultants may need to be hired to assist. Community members should be involved and trained, whenever possible, to lead or assist with data analysis since their understanding of the local context and the position of the community will exceed that of an outside expert. Some elements of the negotiations process, such as undertaking an Impact Benefit Agreement, or an Environmental and Social Impact Assessment, can be treated as on-the-job training opportunities for community members. Including training in consultants’ contracts can build community capacity and lessen the need to rely on outside expertise later in the negotiations process or when facing future threats.

**Table 5.1** Negotiation information needs and sources, by topic

| If you’re looking for information on...   |   |   |
|---|---|---|
| PROJECT AND COMMODITY   |   |   |
| This could include aspects like:  | You could find information from:  | Additionally, be sure to ask:   |
| <ul style="list-style-type: none"> <li>• Geology of the project site (incl. resource grade, level of impurities)</li> <li>• Project scope (size of project site, duration of project)</li> <li>• Anticipated economic impacts</li> <li>• Extraction, construction, processing or monitoring technology type</li> <li>• Project costs and risks (incl. vulnerability to market change/delay)</li> <li>• Net present value and internal rate of return (IRR)</li> <li>• Market/demand for the resources produced</li> </ul> | <ul style="list-style-type: none"> <li>• Feasibility and environmental impact assessment studies</li> <li>• Project proponent materials and websites</li> <li>• Information filings (sedar.com)</li> <li>• Other environmental assessments of similar projects</li> <li>• Development description report included with development permit applications</li> <li>• Information provided by the project proponent under confidentiality agreements</li> </ul> | <ul style="list-style-type: none"> <li>• What could cause key project vulnerabilities?</li> <li>• Will this project be very profitable, or is it on the margins? (This can affect vulnerability to early closure or outright project failure.)</li> <li>• Has the project proponent been accurate in portraying the resource?</li> <li>• What is the IRR? (IRR is often generally anywhere from 10% to more than 20%. The higher the rate of return, the more the community can ask for in financial benefits. )</li> <li>• What are the likely markets for this product?</li> <li>• What is the projected price for the resources produced? Has this price been stable?</li> </ul> |



|  |   |  |
|--|---|--|
| If you're looking for information on...  |   |  |
| <b>ACCESS TO RESOURCE LOCATION AND LAND</b>  |   |  |
| This could include aspects like:   | You could find information from:  | Additionally, be sure to ask:  |
| <ul style="list-style-type: none"> <li>• Overlapping rights of the government and communities</li> <li>• Outstanding land rights disputes between communities</li> <li>• Associated infrastructure and other developments needed in order for project to proceed, such as roads or power lines</li> <li>• Geographic barriers to development</li> <li>• Legal or political barriers to development (laws protecting endangered species or cultural heritage sites, for example)</li> </ul> | <ul style="list-style-type: none"> <li>• Social impact assessments or cumulative impact assessments</li> <li>• Public records of land or property acquisition</li> <li>• Legal analysis, recent injunctions</li> <li>• Spatial analysis of resource use or event monitoring by NGOs</li> <li>• Analysis by community representatives</li> </ul> | <ul style="list-style-type: none"> <li>• What is the share of resources in question that are owned by or are associated with land owned by Indigenous Peoples?</li> <li>• How do we control access to the land/resource area? Do we issue permits, leases, etc.?</li> <li>• Will new roads or other structures be required in order to access the land/resource area?</li> </ul>   |
| If you're looking for information on...  |   |  |
| <b>ENVIRONMENTAL LIABILITIES AND IMPACTS</b>   |   |  |
| This includes aspects like:  | You could find information from:  | Additionally, be sure to ask:  |
| <ul style="list-style-type: none"> <li>• Water, air and soil (impacts to its quality and availability)</li> <li>• Animals (habitat loss or migration restrictions, for example)</li> <li>• Change in ecosystem services</li> <li>• Vulnerability to natural disasters or climate change</li> </ul>   | <ul style="list-style-type: none"> <li>• Feasibility and environmental impact assessment studies</li> <li>• Technical reviews of any studies completed for feasibility and environmental impact assessment studies</li> </ul>   | <ul style="list-style-type: none"> <li>• What are the gaps in baseline estimates of natural resource availability? Can these gaps be filled?</li> <li>• What might be impacted by the development?</li> <li>• Are there critical sites, or species, that may need to be protected from development?</li> <li>• What level of dependence to communities have on these resources</li> </ul>  |
| If you're looking for information on...  |   |  |
| <b>SOCIAL, CULTURAL AND ECONOMIC IMPACTS</b>   |   |  |
| This includes aspects like:  | You could find information from:  | Additionally, be sure to ask:  |
| <ul style="list-style-type: none"> <li>• Labor market and demand for workers on the project</li> <li>• Skill profiles needed to work on the project</li> <li>• Cultural meaning of the region (heritage sites, oral history of the region, etc.)</li> <li>• Inventory of business capacity</li> <li>• Taxation issues (Will workers have to pay income tax?)</li> </ul>  | <ul style="list-style-type: none"> <li>• Feasibility and environmental impact assessment studies</li> <li>• Community-led Impact self-assessment</li> <li>• Government assessment</li> </ul>  | <ul style="list-style-type: none"> <li>• How many people might be available to work? Or are all employable people already employed?</li> <li>• What cultural places or values might be impacted?</li> <li>• What is important to the community to build or preserve?</li> <li>• What businesses might be developed? What business opportunities exist?</li> <li>• Will workers be impacted by taxation if they work on the project?</li> </ul> |

|  |  |   |
|--|--|---|
| If you're looking for information on...  |  |   |
| <b>THE PROJECT PROPONENT</b>   |  |   |
| This includes aspects like:  | You could find information from:   | Additionally, be sure to ask:   |
| <ul style="list-style-type: none"> <li>• Career trajectory, background of CEO and Board of Directors</li> <li>• History of community relations with developer or project proponent</li> <li>• Relationship to shareholders</li> <li>• Corporate financial records, incl. project financing</li> <li>• Structure of the corporation—relationships or existence of subsidiaries and holding companies</li> <li>• Historical behavior of project proponent, esp. with Indigenous communities</li> <li>• Adherence to guidelines and standards (e.g., IFC, WB, Global Reporting Initiative, etc.)</li> </ul> | <ul style="list-style-type: none"> <li>• Press releases</li> <li>• Corporate website</li> <li>• Other communities who've worked with or been affected by the project proponent</li> <li>• Corporate annual reports</li> <li>• Annual industry association meetings</li> <li>• Impact assessment journals and professional meetings</li> <li>• Corporate consultation</li> <li>• Watchdog organizations, EJAtlas.org; MiningWatch.ca; internationalrivers.org;</li> <li>• Past interactions with the community</li> </ul> | <ul style="list-style-type: none"> <li>• Who is the project proponent's current point person for the project?</li> <li>• What has the history of this project proponent been?</li> <li>• What kind of entity are they?</li> <li>• Does the project proponent have financing in place?</li> <li>• How does the site-based staff and operations relate to the parent company?</li> <li>• How have they negotiated with Indigenous People in the past?</li> <li>• What are the guidelines that the project proponent adheres to? Can they be used to strengthen the community position?</li> </ul> |
| If you're looking for information on...  |  |   |
| <b>THE PROJECT INVESTMENT CHAIN</b>  |  |   |
| This includes aspects like:  | You could find information from:   | Additionally, be sure to ask:   |
| <ul style="list-style-type: none"> <li>• Investors, lenders, and shareholders in the project, both upstream and downstream</li> <li>• Investor-State contract, which may limit or increase the community's bargaining power with the investor</li> <li>• Certification requirements for the commodity or product (pending or existing)</li> <li>• Pressure points for advocacy within the investment chain (certification reviews)</li> <li>• Access to information and leverage through public accountability mechanisms</li> </ul>   | <ul style="list-style-type: none"> <li>• Company or government websites and annual reports</li> <li>• Investor websites</li> <li>• Social media platforms for key project personnel</li> <li>• Commodity CSR roundtables</li> <li>• Business databases and watchdog NGO resources</li> <li>• Stock exchanges</li> <li>• Business news reporting</li> <li>• National transparency law disclosure requests (FOIA)</li> </ul>   | <ul style="list-style-type: none"> <li>• What recent public announcements about the project in the news?</li> <li>• Does the project get mentioned in a proponent annual report?</li> <li>• Does the project have known public financing?</li> <li>• Is the project included in an MDB/DFI project website?</li> <li>• Will the project sell its service/product to a downstream buyer that has reporting standards?</li> </ul>   |
| If you're looking for information on...  |  |   |
| <b>RESOURCES TO SUPPORT THE COMMUNITY'S NEGOTIATION EFFORT</b>   |  |   |
| This includes aspects like:  | You could find information from:   | Additionally, be sure to ask:   |
| <ul style="list-style-type: none"> <li>• Information to fill key knowledge gaps</li> <li>• Funding</li> <li>• Current human resources</li> </ul>   | <ul style="list-style-type: none"> <li>• Government departments, specialists, or technical experts</li> <li>• Other community negotiators or advisors with similar experience</li> </ul>   | <ul style="list-style-type: none"> <li>• What funds and resources can be directed our way?</li> <li>• What are the expenses we should anticipate?</li> </ul>  |

|  |  |  |
|--|--|--|
|  | <ul style="list-style-type: none"><li>• Some academic or non-governmental institutions may provide financial support or pro bono expertise</li><li>• Dialogue with project proponent</li><li>• Internal assessment</li></ul> |  |
|--|--|--|

\*Adapted from Gibson, Ginger and Ciaran O’Faircheallaigh (2015) IBA Community Toolkit, Gordon Foundation, pp. 74-77. Please see their resource for a full overview of potential necessary information and sources.<sup>20</sup>

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<sup>20</sup> [http://gordonfoundation.ca/app/uploads/2017/03/IBA\\_toolkit\\_web\\_Sept\\_2015\\_low\\_res\\_0.pdf](http://gordonfoundation.ca/app/uploads/2017/03/IBA_toolkit_web_Sept_2015_low_res_0.pdf).

## 6. THE DECISION TO NEGOTIATE

### Chapter summary

- Assessing bargaining capacity should consider existing and new alliances, expected timetable for negotiations and related budgetary needs.
- The decision to negotiate should be based on clearly determined objectives and the development of a strong negotiating position.
- An assessment of the objective situation should be made to weigh threats and opportunities.
- The decision to negotiate or to pursue some alternative strategy is made by the community.

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*Negotiation is never the only decision available to Indigenous communities faced with development proposals, even when negotiation looks like the only option. Indigenous communities always have a deliberate decision to make regarding whether or not they should engage in negotiation, and this decision needs to be carefully considered with input from everyone affected.*

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### Negotiation readiness assessment

- *What alternatives does the community have to a negotiated agreement?*
- *Is negotiation in the best interests of the community?*
- *What are the risks to the community if it enters into a negotiation? How can these be addressed? Is negotiation worth the risk?*
- *What is the negotiation timetable expected to be? Does a shortened or lengthened timetable better suit the needs of the community?*

#### Negotiation budgets

- *Who is expected to cover the costs of the negotiation?*
- *What are the range of costs the community expects to incur?*
- *What internal and external resources does the community have to cover costs?*

#### Assessing bargaining power

- *How sufficient is the community's knowledge of the proposed project?*
- *What additional information or expertise might the community obtain to better position themselves in the negotiation?*
- *What additional resources can the community bring on to better position themselves in the negotiation?*

# Voisey's Bay Nickel Mine IBA Negotiation Timeline

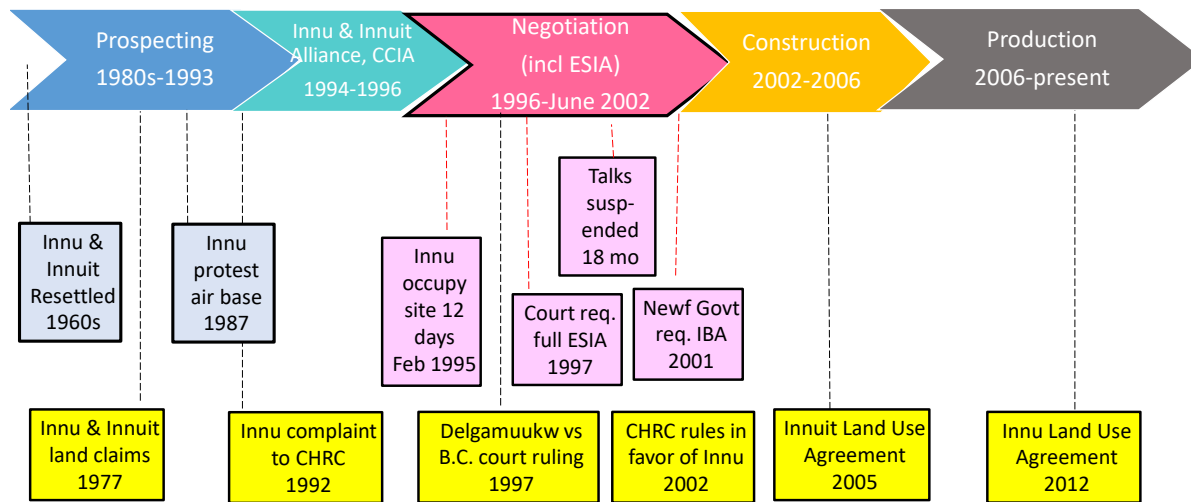


Figure 5 Negotiation timeline for Voisey's Bay nickel mine

## Negotiation timetables

When deciding to negotiate, an important question is how long the process might last. Estimating the expected duration of a negotiation process involves assessing contributing factors that include the nature of the project and of the community affected by it, and any legal proceedings that may also be included as part of the process. All of these factors impact the length of the negotiations process, and the negotiation time frame itself is part of what has to be formally negotiated. For Indigenous People, extending the timeline can be an important negotiation priority, as project proponents are often pressuring communities to negotiate quickly. But negotiation should never be just one consultative moment, nor can it be rushed under artificial pressure to provide rapid consent. In thinking about negotiation time frames, consider the time needed to set up structures for alliances and communication, as well as the factors that may influence the time frame of the other side too (elections, contract deadlines, public commitments, etc.).

Figure 5 shows a timeline of the six-year negotiation between Canadian mining company, Inco Ltd., and the Innu and Innuit peoples. This example highlights common stages in the preparation, negotiation and implementation process.

## Preliminary assessment of a negotiation budget

Financial stress can quickly compromise the carefully built unity of a community engaging in negotiations. Being fully informed and realistic from the very beginning about the financial realities of a negotiation process can help avoid this stress and protect community unity as a negotiation asset. There is no predetermined guideline for budgeting for negotiation – each budget will vary depending on the situation and factors involved. When considering what activities to budget for during the negotiations process, communities should consider costing out expenses including:

- Who pays for the negotiation process?
- What does effective negotiation cost?

- What are the costs of effective monitoring and enforcement?

Specific budgeted costs may typically need to consider:

- Costs to sustain the negotiating team such as food, travel or lodging expenses for the negotiators, any compensation for negotiators, and any additional expenses that allow them to meet regularly over the full course of the negotiation;
- Access to expertise;
- Access to research or experts with legal, technical, economic and/or negotiation expertise;
- Costs for field visits for consultation;
- Meeting venues, refreshments, transportation and per diems for those traveling to meetings, etc.;
- Information management and dissemination;
- Printing and distribution of key documents;
- Costs for radio programs, newsletters, signboards, or other methods of communicating negotiation progress to the community;
- Cost of maintaining and operating a community grievance mechanism;
- Maintenance of a website, comment box, or other system for filing grievances;
- Compensation for staff responding to grievances filed;
- Other travel costs;
- To visit allies, experts, and other travel as needed;
- Translation and transcription fees;
- If necessary, to ensure that the information provided is accessible to community members;

Most Indigenous communities will be unable to adequately fund the substantial cost of a thorough negotiations process on their own. External sources available to communities looking to fund negotiations include:

- Multilateral institutions.
- NGOs/CSOs: Some non-governmental and civil society organizations may be willing to provide financial (as well as technical) support to communities looking to fund negotiations, but usually these organizations will not be able or interested to fund the full process.
- Academic institutions: Some communities may be able to turn to their partnerships with academic institutions to receive support during a negotiations process. It is typically more likely for academic institutions to provide “in kind” support in the form of technical expertise and information, rather than financial support.
- Government: Governments may have funds available to support communities in a negotiations process. The Canadian federal government, for example, has in the past supported consultation and negotiation for Indigenous communities facing outside development. Each government differs in their ability or willingness to provide financial support for negotiations – external allies can help communities navigate the processes for accessing these funds.
- Project proponents: Project proponents themselves are the most likely source of funding a community will have available to them in preparing for a negotiation. Proponents fund negotiation for a number of reasons:
  - Initial framework agreements between a community and a project proponent may call for the proponent to fund community engagement.
  - Funding communities to negotiate can move the process of negotiation along more quickly, as adequately resourced communities have the information and capacity they need to make decisions more quickly.
  - In areas where there is a requirement for companies to carry out environmental and social impact

assessment as part of the negotiation process, community controlled assessments funded by the project proponent can be used to fulfill reporting requirements.

Not all project proponents are equally willing to provide funds to support negotiations. For those hesitant to provide funding, reminders that supporting community engagement can save them time and money in the long run can be persuasive. Supporting communities in negotiation costs a very small portion of overall project budget for the funder, but results in huge upsides including community support and buy-in for the project and a more effective project plan.

As highlighted in the IBA Toolkit (2015), communities should be aware that relying on funds provided by project proponents for engaging in negotiation comes with risks such as:

- A project proponent may try to influence the community's choice of advisors by agreeing to fund particular advisors and refusing to release funds for others. Proponent-selected advisors may not have the community's best interests in mind.
- Communities that are reliant on funding from the project proponent may face financial pressure to "stand down" in their demands. In cases where negotiations run into deadlock, the proponent may threaten to withdraw funding from the community negotiating team until the community accepts their demands.
- A project proponent can undermine the community negotiating team's ability to meet, or to retain the necessary expertise and staff for negotiations, by withholding resources to travel.

This is especially problematic for negotiating teams spread across large geographic distances.

Communities that choose to accept funding from a project proponent can mitigate many of these risks. One strategy is to arrange to receive all financial support from the project proponent in advance of the negotiation. This way, the project proponent can't restrict funding in the middle of the process. It is also a good idea for communities to set aside an "emergency fund" to access if the proponent does decide to cut off access to funding entirely (IBA Toolkit 2015, p. 85).

### Assessing community bargaining power

The negotiation readiness questions at the beginning of each chapter provide an overview of the issues raised so far to assess bargaining power and readiness for negotiations.

In their IBA Toolkit, Gibson and O'Faircheallaigh outline a path for communities to improve their bargaining position before negotiations as illustrated in Figure 6. Based on acquired knowledge about the project and how it might impact the community, the authors highlight that "there are two key factors for maximizing the bargaining position: the innate power available from the status of the land and its legal context, and the power that can be gained through strong unity, focused goals, and engagement such as direct action, strategic alliances with other Aboriginal groups or NGOs, and use of the media" (IBA Toolkit 2015, p. 107).

Most of the time, self-assessed bargaining power is somewhere between the weak and strong ends of the spectrum, and may involve both weak and strong elements within a combination of factors.

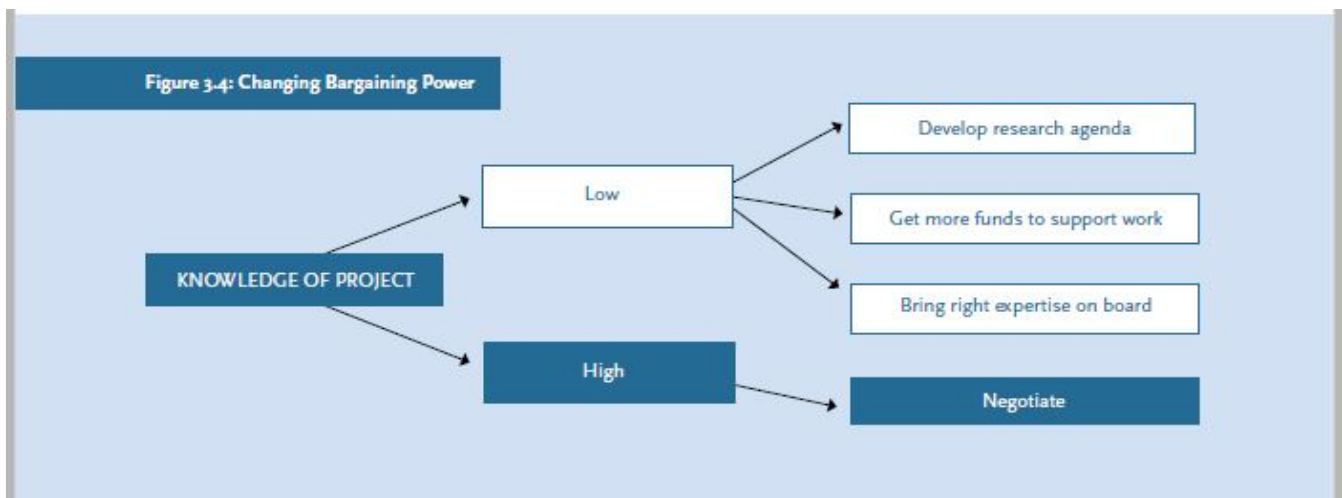


Figure 6 Changing bargaining power

### Making the decision to negotiate or not

After preliminary research and considering the concepts and questions covered so far in this Guide, the community may feel prepared to decide whether or not to enter into negotiations. Some of the exercises in the Guide provide an indication of how ready or united a community may be for negotiations. Communities who determine themselves to have high bargaining power and strong leverage may find the decision to enter into negotiations an easy one. For these communities, the next steps (outlined in the following chapters) are to develop a negotiation strategy and prepare to negotiate.

For communities who have worked their way through this process and find themselves with questions about internal capacity, communities who may be divided or lack clear goals, or those who may be unsure about allies or with little access to financial resources, there is less bargaining power and potentially more uncertainty around the decision. For these communities, more time may be needed to work through differences, conduct additional research, define bottom-line objectives, and solidify alliances.

### Deciding not to negotiate

The decision to forgo negotiations is a legitimate, and sometimes more effective, choice. The political context may not allow for a fair agreement. Or entering into a negotiations process may exacerbate risks to the community. As will be illustrated in the chapters that follow, evidence has shown that a weak agreement can be worse than no agreement at all. This is often an avoidable outcome despite pressure to accept a flawed process that may give up rights.

Other strategies may be more appropriate if conditions are not favorable to a mutually agreeable outcome. Much of what has been discussed in the preceding chapters may serve to inform strategies to say no to a proposed project. There are several actions to consider under this scenario.

*Document lack of consent* It is important not to assume other stakeholders understand the community decision. The community needs to make clear the rationale and unmet conditions that prevent negotiations from proceeding. Most important is the stated withholding of consent, particularly in cases where FPIC safeguards are required.



If the project proponent moves forward anyway (without consent), there are multiple options that depend on the context and community internal strength:

*Engagement with grievance redress mechanisms (GRMs)* Increasingly project proponents are responsible for ensuring that project affected people have access to a grievance mechanism that is culturally appropriate, not cost prohibitive to use, and accountable. Filing complaints at the project-level or at the funding institution level may enhance community influence in a project's funders decision to delay or withhold additional funds, especially if unaddressed or unsatisfied stakeholder complaints are documented. Working through national, corporate or international complaint mechanisms can also serve to raise the visibility of the community position. Pro bono technical counsel is often available to draft, submit and monitor grievances to most effectively leverage these mechanisms. GRMs can potentially offer leverage over a negotiation process by keeping the project proponent engaged from concern about reputation or loss of finance. However, GRMs rarely provide short-term remedies to any violation of rights.<sup>21</sup>

*Advocacy and lobbying* are often necessary to explain the community's position to a strategic audience (e.g., decision makers or actors with leverage over decision makers) and to reframe the context for negotiation. Campaigns to advocate a community's position can influence recognition of rights, proper execution of responsibilities by state agencies (permits, licenses, impact assessment, consultation), and cost-benefit calculations by actors that may disagree with a community's position. Well-researched and targeted advocacy toward banks providing finance to a project proponent, insurers covering a proponent's operations, shareholders who may be able to influence

proponent's decisions, or other stakeholders who may have some form of influence can help to increase pressure on a project proponent to respond to community concerns. Effective alliances, including with the media, are often crucial to effective advocacy. Advocacy can be loud and public or quiet and private, depending on the context. With regard to influence and access to strategic information, careful lobbying of insiders at institutions who may be privately in support of communities may be more effective than public campaigns aimed at shaming project proponents.

*Litigation* Significant court decisions exist in most countries for establishing the nature of Indigenous rights, particularly the duty to consult, the duty to accommodate for potential adverse impacts, land rights and the reaching or fulfillment of contracts. Often these decisions are set out in the country's constitution, or legal cases that interpret the provision of those rights. Countries may also be signatories to UN human rights conventions. The community may consult with a lawyer and choose to file a court case against the project proponent and associated institutions and actors. In some contexts, even the threat of strategic litigation can influence the project and proponent. However, where the judicial system is weak, even supreme court decisions favoring Indigenous rights may not be implemented. The costs and benefits of strategic litigation should be fully assessed before proceeding. And this is why in building alliances, it would be good to look at the legal community for possible allies. There is a growing number of lawyers' groups interested in environmental issues and they can provide support.

*Direct action* can include protests, marches, picket lines, sit-ins, boycotts, and other forms of civil disobedience designed to publicize the community's grievances and, in some circumstances, aimed at

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<sup>21</sup> OHCHR (2021) Unpublished research on IAMs showed that only a very small percentage (typically 1-3%) of 257 IAM

compliance reviews led to verifiable, substantive remedy for the complainants.

halting or delaying project proponent operations. Community safety and security considerations should be thoroughly assessed and planned for prior to undertaking any direct action efforts as they may create significant risks for community members, including imprisonment, criminal charges, and harassment or violence by security forces. Such actions should remain nonviolent and only be taken as a last resort, after exhausting legal options. Direct action is most effective when it can be sustained,

and otherwise complemented by other strategic engagement activities to maintain any gains achieved. The budget, time and communication aspects of direct action should be carefully considered.

#### Deciding to negotiate

The following chapters explore the next steps for communities who decide to enter into a negotiations process.

## 7. PREPARING FOR NEGOTIATION

### Chapter summary

Preparation for negotiation includes steps to:

- Define the internal decision-making process.
- Affirm the community's bottom-line priorities for the negotiation outcome.
- Define a core internal team, including the negotiators, as well as other key community members with specific expertise. Establishing decision making structures is an important step before sitting down at the negotiation table. Give clear guidance to consultants on how you want information analyzed, presented and brought back to the negotiating team and community.
- Prepare a plan for communicating about negotiations within the community. Transparent, accountable communication within the community decision-making structure is essential for maintaining unity during the negotiation process.
- Define negotiation strategy reviewing past precedents and project proponent objectives. Review additional research and data needs to support the strategy. Develop a long-term strategic research plan and know how your community goals fit in.
- Develop a budget for the negotiation process and assess community fundraising needs to support the negotiation process. Seek funds from the project proponent, the government, and/or other sources.
- Develop scenarios and the actions that the community can take when such scenarios happen; for instance, if the company unleashes armed guards what should the community response be?

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*After deciding to pursue negotiation, a community works to put themselves in the best possible position to shape the proposed project by avoiding or minimizing the negative impacts, ensuring a fair share of the benefits and strengthening rights.*

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## Negotiation readiness assessment

### Community decision-making processes

- *How will decisions about the negotiation be reached? By whom?*
- *How will differences of opinion be resolved?*
- *How and in what forms will information be made available to community members? To external actors?*

### Affirming desired outcomes

- *What are the range of potential benefits that the community might access?*
- *Which benefits are the community's priorities?*
- *What is the community's position on potential negative impacts?*

### Defining the negotiation team and their roles

- *What roles are needed within the negotiation team?*
- *Who will fill each role? What attributes do they have that will enable them to be effective negotiators? What skills or expertise might they obtain or strengthen to be more effective negotiators?*
- *How will the negotiation team be held accountable to the community?*
- *What external advisors does the negotiation team need? Who can fill these roles?*

### Internal communication

- *How will the community be informed and consulted regarding decisions during the negotiation?*

## Clarifying community decision-making processes

A community's decision to pursue negotiation begins a new process of preparation. Communities who follow through on all the steps necessary in preparing for negotiation set themselves up for success during the future negotiation process.

After deciding to negotiate, communities may want to agree upon and document a set of "rules," "bylaws," or "protocols" relevant to negotiation decision-making and share these in a format accessible to all members of the community. Related to internal decision-making processes within the community, important considerations include:

**Who will make the decision about who can use community lands?** Whether a process is newly created or an existing process reinforced, the community needs to make clear to itself and to

others who is involved in decision making. How are women, youth, elders, for example, included in decision making?

**How will differences of opinion be resolved?** It is important that all community members have a clear understanding of how differences of opinion will be resolved, and that this process is recorded clearly. A community may choose to keep the resolution process private, or to turn to external counselors, advocates or government officials. Traditional or customary practices may be used to find resolution, or non-traditional methods could be used.

**What validates the community's decision?** The community needs to decide what validates a vote taken by some or all of the members to reach decisions. Will a decision made by vote be considered valid if it is decided by a simple majority (51% or more)? Or is a super majority (66% or more)

or consensus vote (100%) necessary? **How will the negotiating team be held accountable?** What is the process by which the negotiating team reports back to the community and incorporates community feedback moving forward? For example, does the negotiating team report back to community leadership first, or is there a larger representative body that the negotiations team reports to? How can the community ensure that the negotiating team makes decisions that rests on the support of the full community?

**What information about internal processes will be shared externally?** Some elements of internal governance will be shared with the public, while certain issues might remain private for strategic reasons. If the community is working to address areas of internal weakness, a communication protocol may keep information about areas of weakness confidential within the community.

Ideally, communities will already have examined their internal governance processes before making the decision to enter into negotiations, and the process for establishing and recording bylaws simply means documenting these processes clearly and posting them in a manner accessible to various stakeholders. A discussion of community representative structures is found in Box 7.1.

### *Gender*

Representation of women within Indigenous decision-making processes may not always resemble or align with expectations drawn from non-Indigenous institutions or processes. An informed understanding of how Indigenous decision-making structures represent the views of women is necessary to assess how gender barriers could undermine effective negotiations. Such barriers may occur when women are largely or entirely excluded from the public sphere, meaning that their skills, knowledge and capacity for community engagement and political mobilization cannot be used to support the negotiation effort. Tension around gender roles can also weaken community cohesion, further

### **Box 7.1 Strong community representative structures**

Assessing internal capacity starts with ensuring a solid representative structure. Positive qualities of such structures include: 1) capacity to follow FPIC principles in reaching decisions, 2) ability to mobilize negotiation support (often a community's greatest resource), 3) ability to avoid or minimize internal conflict, 4) avoiding co-optation, 5) engaging effectively with others involved (companies, governments, etc.).

A given in Indigenous contexts is that land is a foundation of any representative structure. To take one specific example, a negotiation in Queensland, Australia for a bauxite mine involved Rio Tinto. The mine had existed for 40 years, but was planning to expand by moving into a new area. Rio Tinto was going to have to move into the traditional lands of a greatly feared people.

To engage the affected communities, Rio Tinto introduced a structure involving community councils. Not tied in any way to land – the basis for voting was residence, not land ownership. This structure was motivated by long-standing relationships between mayors of these communities and mine owners.

A second structure was created by the communities themselves to engage in negotiations. The underlying principle was that the structure was controlled by traditional land owners. Each community set up a steering committee, and every member had to include traditional land owners. Although the council structures were dominated by men, when people set up their own committees, they were dominated by women. The committees also included the mayor, representatives from women's groups, elders and educators. They created this separate committee, dominated by land owners but including representatives from other structures. Representatives from the various steering committees met every 3 months to make major decisions.

Strong internal decision-making structure rooted in land ownership will benefit the design of the most suitable representative bodies for negotiation. If you can use existing structures, great, if not, devise something else.

*Source: O'Faircheallaigh (2017)*

undermining negotiation capacity and effort. In contrast, women are the preferred negotiator in certain cultures due to their ability to manage conflict. Difficulty in engaging Indigenous women negotiators has also indicated cultural barriers among non-Indigenous negotiating parties. Research shows the critical role that Indigenous women have played in mining negotiations in Australia and Canada, both as active participants and in shaping negotiation agendas and outcomes (O'Faircheallaigh 2011, Indigenous Women and Mining Agreement Negotiations) (see Box 7.2).

### Affirming desired community outcomes

At the most basic level, Indigenous communities enter into negotiations with project proponents to minimize the negative impacts and maximize access to benefits in exchange for the use of their lands and natural resources. Communities should decide what outcomes they would like to see from negotiation, building on insights gained through community-led impact assessment (Chapter 3) or a community visioning plan (Chapter 4). Affirming these priorities is fundamental to guiding any negotiation strategy.

Potential outcomes a community might include in the negotiation plan can range from establishing an off-limits region of their territory to prioritizing the range or type of benefits from the project itself. Often, these non-negotiable outcomes relate to being treated with the respect and dignity of a true partner, rather than a beneficiary.

In some cases, the community position will be very clear and leave no room for compromise. For example, if the community has decided that it will not accept a project if it involves the use of a particular lake, then this is the only position that can be put on the table. In other cases, there will need to be some compromise to reach an agreement. Similar restrictive positions can often occur in relation to financial payments, which insist on a minimum level of compensation but are flexible in the way in which that level is achieved. In these

### Box 7.2 Gender and social equity in negotiation strategy

Although the inclination might be to think of an Indigenous community as a homogeneous block united by common interests, successful capacity building addresses differences within the community.

In Peru, women divide their time between domestic and other responsibilities. Participation in negotiations training can become an added burden for women, unless their domestic responsibilities can be delegated to others or otherwise taken care of. Gender sensitive negotiations training will consider how a community shares the distribution of women's additional responsibilities, to enable women's participation. A participant from a CI negotiations training shared that "In negotiations with the government, they chose 30 leaders to represent us, and they were all men. We had to negotiate to get 10 women, and that didn't cost extra, that just made sure women were participating. We must do all we can to ensure women's participation."

In Australia, benefit-sharing mechanisms must be tuned to gender equity. If benefits are monetary, then women do share in them. When benefits center around job generation, less so. There is knowledge of only one agreement that divided 50-50 the benefit for cultural activities to men and women.

In the Lewuaso, Kenya example (Box 4.1), women from the community were asked if they benefited from the royalties paid to build the high voltage power line. The women answered "yes" in unison. But when one of the workshop participants, a Maasai woman from Tanzania, went to the women one-by-one and put the same question to them, the women told her that their husbands kept the portion of royalties that was supposed to come to them or to be spent on their children.

*Sources:* Kenya (2018), Thailand (2019) and Global (2017) Scoping Negotiation Training Workshop Reports

cases, a clear bargaining position will need to be put on the table that may be more ambitious than expectations in certain areas that leave room for eventual compromise. As one Maasai negotiator explained this tactic, “if you want a goal, start by asking for a camel.” It is important not to make demands that are unrealistic given what is known about the project since this may lead the project proponent to adopt an entrenched position around a low offer or even walk away from the negotiations.

Some examples of possible negotiation outcomes, which are further explored in Chapter 10 (Good Agreements), include:

- **Payments tied to the use of land and natural resources.** A variety of collective compensation options are discussed in Chapter 10. Beyond the one-time lump sum payment, these include royalties, a fixed share of annual profits, or equity ownership in the project itself.
- **Infrastructure investments,** such as improvements to local access roads or trails, ports, community buildings, or communication technology.
- **Access to jobs and job training** within the project. This can be specific to a certain number of community members, or specific subgroups such as youth or disabled individuals.
- **Supply contracts for community-owned businesses,** such as for community farmers to provide food to project proponent employees.
- **Community involvement in the management of required environmental remediation efforts** paid for by the project proponent to clean up or offset environmental damage from project operations.
- **Direct community involvement in the management of required cultural heritage protection measures** paid for by the project proponent such as buffer zone management around sacred sites.

The context of every proposed project and landscape will differ, as will the presences and needs of each community. Communities should consider negotiating for whatever they believe will best help them achieve their desired future vision.

### Selecting the negotiating team and defining negotiator roles

Because it is impractical for every member of the community to sit at the negotiating table when it comes time to discuss with the project proponent, a negotiating team must be selected to represent the community’s interests. Specific composition of the negotiating team will vary, depending on the context and the group.

One common model is to form a larger steering committee with diverse representation from among the community, and then a smaller negotiating team of skilled individuals that acts under the direction of the steering committee. The steering committee can act as a conduit to the wider community, with smaller subgroups designed to handle specific issues.

#### *Size*

A negotiating team should always consist of more than one person, to protect against any potential for corruption or bribery. The exact number of negotiating team members will vary by context and it is up to the community to clearly define the roles and responsibilities of each member of the team.

#### *Representation*

Members of the negotiating team should be selected to represent the composition of the community, and should include the perspectives of women, youth, minority groups and other relevant groups.

#### *“Shadow” team*

The roles of key members of the negotiating team may change during the negotiation process. A negotiations “shadow team” acts as alternates to the main negotiating team members, available to step into the roles of the main team members either

temporarily or on a long-term basis. If possible, training for such a shadow team is advisable, and the shadow team should closely follow the negotiations process so that they are up to date with any developments and able to step in smoothly.

#### *Attributes of effective negotiators*

Every community will have a different system for evaluating the strength of negotiators. In general, negotiating teams should be gender balanced, and should have clearly defined accountability such that rather than making final decisions they are presenting options to enable informed decisions by the community as a whole. In selecting candidates for a strong negotiating team, consider members who have the following characteristics:

- Proud or strong community members who will firmly hold the community's best interests at heart, even in the face of resistance by the project proponent or others.
- Skilled communicators and listeners. Good negotiators have strong relationships within the community and can listen to community members, bringing them into negotiations at appropriate times if necessary.
- People who can confidently ask for clarification when information is unclear.
- Well-organized people who can keep others on track and on time, as well as keep careful notes on negotiation proceedings to share with the community.
- Calm and patient facilitators who can help to manage group dynamics in a meeting and keep teams unified.

The process of selecting members of the negotiating team can be specific to each cultural context. For some communities, negotiating team members will be selected by vote, while in other contexts, appointment by political leadership or selection by community elders may be more appropriate.

#### *Roles and responsibilities*

Once members of the negotiating team have been selected, their roles and responsibilities need to be clearly defined. Key roles within the negotiating team include a:

- Lead negotiator, responsible for organizing the team, leading negotiations, speaking in sessions and leading the process of reporting back to the community.
- Secretary, responsible for keeping records of meetings and facilitating communication between all relevant negotiating parties.
- Budget manager, oversees expenditures during the negotiation process and ensures funds are available to support negotiations to their conclusion.

Conducting negotiations can be very challenging if only because of the quantity of technical material and language that must be processed in a very short time. The negotiating team will need research capacity to review material throughout the process and the ability to translate technical language and concepts so that they are easily understood by all community members. This helps to ensure that community members do not feel excluded from decisions. Other roles beyond these may be necessary amongst the negotiating team, and other skills available amongst the selected negotiators may call for the creation of new and different roles.

After working through internal structures and desired outcomes in advance of the negotiation, internal guidance may be provided to the negotiating team to help ensure that defined roles are understood and the conditions for an agreement that meets community expectations are clear. The process of defining these ground rules for the negotiating team is an important preparatory step by the community (See Box 7.3 for the example of the Innu and Inuit negotiating team).



### *External advisors*

Third-party experts can play important roles as advisors to the negotiating team, remembering that **any consultant works for the community** (not the other way around). External lawyers, environmental experts, economists, financial analysts, and human rights experts can help to address any power differential between a community and a project proponent and help to ensure more equitable agreements. However, third-party experts are often expensive, making them inaccessible to most negotiating communities. Project proponents or governments will sometimes offer to pay for community access to such experts during a negotiation, but communities should be aware of the risks involved in accepting such assistance (see Chapter 6). Companies and governments often select a consultant with whom they may have active contracts, raising questions about their independence.

Communities can offset the risk of project proponent interference by demanding to know about possible conflicts of interest related to a proposed expert, or choosing third-party experts themselves. Communities must be alert to whether the expert is providing information that is in the community's best interest.

Non-Indigenous members of the negotiating team can play various roles, such as supporting tasks like specific research or specific alliance building, or playing a role at the negotiation table. The roles of non-Indigenous members of a negotiating team depend on local factors, including the availability of skilled negotiators in the community, available budget, the complexity of the negotiation process and the way the project proponent may organize their own team. One consideration for selecting expert advisors is how they interact with the community. From the IBA Community Toolkit (2015):

*If the expert treats people in the communities as their equal, takes time to explain things in plain language, and does not always agree with the community*

*representatives, they are probably going to work well with the community and help negotiate a good outcome. If an expert delivers huge and unwieldy documents, speaks as though community members are not capable of understanding or with overly technical jargon... or behaves as though they are always in agreement, odds are low that they will serve the community well.*

### *Internal communications*

The chief responsibility of the negotiating team is taking the proceedings and options from the negotiation back to the community and communicating the proceedings clearly, in an effort to allow the community as a whole to make an informed decision. A plan for communicating internally within the community is an important preparatory step for negotiation. Several guidelines can help to shape this component of a communications plan (IBA Toolkit 2015, pp. 92-93):

*Involve the whole community* in the initial decision to negotiate. This way community members will have already discussed the proposed project and its implications and the decision to negotiate will be understood by all. When community members begin receiving information after decisions have already been made, this can lead to confusion and mistrust.

*Clearly define a consistent process* for how and when the community will be informed about and consulted on the negotiation process. Understanding when community members will receive and provide feedback is crucial for maintaining unity.

*Remind community members of the importance of maintaining confidentiality* and keeping community discussions or disagreement within the community. Evidence of infighting can weaken a community's bargaining position.

*Consider culturally appropriate ways of sharing information* in addition to formats like email or reports. These could include public meetings or

presentations, house-to-house visits, community radio programs, use of notice boards, or visual communications tools like video or dance.

*Distill the most important points for presentation to the community* so that members can focus on the information or decision at hand. While members of the negotiating team may need certain information for effective negotiation, the entire community may not need this same level of information.

*Develop and share a plan for voicing community concerns*, whether formal or informal. If informal, communicate to community members how to follow up on the status of their concern if it is not satisfactorily addressed.

### Defining negotiation strategy

Depending on the research completed in earlier stages, further research may be necessary to inform the negotiation strategy. Some level of independent research capacity is required to verify project proponent claims at all stages of the negotiation. Continuous research capacity is a form of community surveillance and monitoring that deserves special attention and investment.

#### *Understanding and building on past precedents*

Prior negotiations by the project proponent or other entities in the sector provide a baseline for any related negotiation. What can be learned from other existing agreements in the sector, or from policy statements by the project proponent? Knowledge of these types of agreements can inform the negotiation strategy.

Research should investigate the project proponent's track record of delivering on commitments. Does the proponent demonstrate goodwill in negotiating fair terms and implementing agreements? Existing agreements may be difficult to acquire, but reaching out to other Indigenous communities can often overcome this obstacle. For this purpose, the Pungor Advisors Network is designed to facilitate knowledge exchange between Indigenous negotiators (see Box

7.3). If actual agreements cannot be obtained, communities should be able to acquire information about the main terms or text of an agreement. The implementation status of existing agreements and satisfaction with outcomes is also relevant to consider:

- Did the project proponent deliver on commitments? If not, what happened?
- What does the community say about what they would do the same or differently next time?
- Does the other community have suggestions for negotiations or outcomes? For implementation?

It is important for the community to acquire detailed knowledge of project proponent FPIC commitments in practice and of how prior agreements may have reinforced or challenged these precedents when applied to past negotiations. Some private companies have effectively acknowledged the principle of FPIC in deciding not to proceed with investments in the absence of support from Indigenous landowners. For example, in 2005 Rio Tinto signed an agreement with the Aboriginal traditional owners of land containing the Jabiluka uranium deposit and decided not to develop except with their consent. Other leading international mining and hydrocarbon companies, Royal Dutch

#### **Box 7.3 Activating the Pungor Network**

The Pungor Advisors Network is a team of Indigenous leaders with extensive experience in negotiations with their own communities or communities that their organizations represent. They have agreed to serve as negotiations advisors that can provide advice to Indigenous communities facing negotiations with external actors, as well as connect them with communities in other regions to share knowledge and experiences. Pungor is a Kalinga term meaning "peace-pact holder." Where communities have questions about the negotiation process, are searching for precedents for demands they are considering, or advice on whether to engage in negotiations or not, this network can be a useful resource. Contact the authors of this guide for help in finding an advisor.

Shell, Anglo American Corporation of South Africa Ltd. and BHP Billiton Ltd., are reported to have made similar decisions in relation to specific projects that have informed IBAs with Indigenous partners.

#### *Understanding what the other side can afford and what they want most*

Does the project proponent have the financial capacity to fund the programs or processes required? Are funds in place to manage this work? The financial capacity of the project proponent or others to fund research or negotiation processes can influence preparedness. This type of research may require technical skills or investigative capacity that

the community must contract or access through partnerships. Research may show how an agreement can benefit the project proponent and reduce risk. It can also highlight problems that may result for the project proponent for failure to comply with legal obligations to consult or mitigate impacts. CCIAAs (see Chapter 3) can help a community define the full range of costs and benefits, including how to communicate what the community values most and how that might translate into culturally appropriate benefits. Research may also indicate that education and capacity building are needed to prepare for the negotiation. See the example of the Nak'azdli First Nation, British Columbia in Box 7.4.

#### **Box 7.4 Educating the community and project proponent - Nak'azdli, British Columbia**

The Nak'azdli First Nation of British Columbia have employed different methods to engage multiple extractives projects affecting their territory and waters. When faced with the prospect of a planned mining project that would affect their lands, the Nak'azdli took action, researching the project sponsor and the project.

The community learned early on in the process that the company was not knowledgeable about Indigenous customs. Despite the perception that the company had little awareness of the community's interests, the community decided to engage with the company to build a relationship. This required patience, as well as having tough discussions with First Nations neighbors. Members of the community focused on negotiating collective versus individual payments and privileged the directly impacted families. Communication is critical in the long term to reduce asymmetries in access to information, especially since it takes a long time to get negotiations to happen. There was a 7 year gap between first talks with the company and actually negotiating.

During this time, a different pipeline project was proposed, which the community opposed as a threat to their life plan. They were able to successfully block the pipeline in 2016, after a 12-year campaign. Members of the community went out with information about the project and were then asked if they worked for the company because they knew so much about the project. Many community members had never had an opportunity to hear so much information before. The process of communication is long and constant.

Because of these prior experiences, the community was better prepared to consider the opportunities and benefits of a liquid natural gas (LNG) project proposed on their lands in later years. They succeeded in reducing the number of LNG project proposals from 12 to the 2 now in preparation. The strategy was guided by long-term priorities. Community elders reminded the community "where we were, where we are and where we want to be, in order to help define what is in the best interest of our community." They also collected a lot of information through an *Aboriginal Interest in Use Study* to support community arguments related to the actual cost of doing business in IP territory, and made the company pay for the study. If the agreement needed to be renegotiated, the community was able to have that clause included. They also were able to negotiate removal of clauses that prevented them from ever speaking poorly of the company or taking them to court. "Our negotiation structure was not to demand everything at once, but also to not lose our rights. "

*Source:* Interview, Anne-Marie Sam, Nak'azdli Councilor, First Nations Women Advocating Responsible Mining (FNWARM)

Understanding what the priorities of the negotiating partner requires dialogue with the project proponent decision makers and in places that facilitate clear communication. Community-arranged meetings with proponent representatives “on the land” helps to build relationships based on mutual respect and allows proponent representatives to see what the nation is trying to protect.

Building strong relationships with “change agents” or staff within the project proponent who can facilitate positive change internally can lead to effective influence. Communities should try to incentivize people with the relevant power, expertise, and experience to be present at key meetings. Company and government leaders can take a personal role in negotiations at the outset, but tend to withdraw from direct engagement later. Strategy should consider how to keep company or government authorities engaged and present. Power mapping exercises, mentioned in Chapters 3 and 5, may indicate beneficial relationships for the community to develop (programmatic or budgetary decision-makers) or diversionary relationships to avoid too much investment (community relations, CSR).

Based on research, the community should be aware and prepared to leverage key time-sensitive events that limit project proponent’s choices. These events might include commitments to third parties (such as a deadline for delivering an impact assessment to the government or a progress report to shareholders at an upcoming meeting), upcoming elections where a shift in the balance of power could effect the project, seasonal access to regions affected by weather, environmental permitting processes and other time-sensitive legal processes.

#### *Stages of negotiation*

To the extent possible, negotiations should be planned in a logical sequence of stages. These stages may reflect the specific project cycle. For example, the consultation that may be a requirement before a

project proponent is issued a government operating permit may dictate a specific strategy that then changes once the permit has been issued. Negotiation over new projects may involve different stages from negotiation over expansion or closure of existing projects. Negotiation stages can also follow the structure of a framework agreement detailing a sequence of issues that will be addressed in a specific order.

Beyond a substantive sequence of issues, negotiations often progress toward the final and toughest stages. Frequently a project proponent holds key strategic information in reserve which it can draw on, and too frequently the Indigenous side has used its strongest leverage in the negotiation already.

Preparation for negotiations by Indigenous groups should also plan to hold strategic resources in reserve to have the options of exercising similar leverage at this time. For example, a project proponent may intentionally introduce topics later in the negotiation process that they know will require community effort to research their options when they might be running low on discretionary budget. Communities may want to establish contingency funding for such situations. Other effective tactics at this late stage to minimize this risk are only possible if good planning and discipline has provided the resources that such tactics require. For example, walking away from the negotiation table in response to a breakdown in discussions may require reserves to sustain the walk out over months (see Negotiation Tactics in Chapter 9).

#### *Time requirements*

There is no typical time frame for negotiations. For the project proponent the timeline may follow a project cycle, between 5-20 years, where the negotiation often occurs during the design stage or earlier. For a community, a company or a government, factors that influence the negotiation stages are likely to be different so the timetable is part of what has to be formally negotiated. A

carefully assessed negotiation timetable considers the decision-making needs of the community alongside the decision-making needs of the project proponent, as well as regulatory needs (such as minimum disclosure, consultation, due diligence, permitting and financing approval requirements). Certain multilateral funders require that a final project proposal be submitted many months in advance of a scheduled board meeting to be eligible for approval. Understanding the related decision points in the project cycle may help to maximize leverage, while balancing competing needs. It can be strategic to avoid undue pressure on the community's time frame while exerting pressure on the time constraints of the project proponent (see Box 7.5 for more on negotiation timetables).

For Indigenous People, extending the timeline is often an important negotiation priority. An important point, analogous to FPIC best practice, is that negotiation not be reduced to only one consultative moment. Think about the factors that may influence the time frame of the other side too, to use this information to your advantage.

A key consideration is avoiding a worst-case scenario of rushed and uninformed negotiations, resulting for instance from poor negotiation preparation, lack of Indigenous group experience, pressures from government and the speed of permitting, multiple Indigenous groups and multiple projects in the region, few internal resources, or intra-community tensions about the project (IBA Community Toolkit 2015, pg. 124)

#### *Budget and resources*

Building on preliminary estimates done in Chapter 5, a more formal budget plan is essential for any negotiation strategy. Additional funds or other resources to support negotiations, in addition to any funding from the project proponent, can come from sources such as governments or private foundations. A community can also seek legal advisors or researchers who are willing to undertake voluntary “pro bono” work if project proponent funding is

#### **Box 7.5 Negotiation timetables**

The length of negotiations can vary significantly depending on the sector, legal context, and the project. For example:

The Cape York Land Council – Comalco Negotiation: Preparation began in 1995-96, after which a negotiation deadlock stalled the process between 1996-99. This was followed by a second push between 1999-2001 that produced an agreement in 2002.

In Voisey's Bay, negotiations lasted 6 years (1996-2002), and land rights agreements followed. The Labrador Inuit Association (LIA) 5,200 members did not sign and ratify a final agreement until 2005. The Innu Nation's 2,400 members did not sign a final agreement until 2012.

Other mining IBAs vary significantly, the Troilus agreement was negotiated in four days, the EKATI agreement in 90 days, the Musselwhite agreement in three years, and the Cominco-NANA agreement took nine months.

In Ratanakiri province in Cambodia, a negotiation with HAGL over a rubber plantation land grab has involved maintaining communication between communities over a 10-year negotiation and agreement implementation monitoring process.

The Costa Rica Emissions Reduction Purchase Agreement (ERPA) process began in 2008 and had nearly a decade of readiness activities as one negotiation stage, followed by three years of negotiation with the Carbon Fund, which by 2020 had not yet concluded.

*Sources:* IBA Toolkit; O'Faircheallaigh (2015); Highlander Association; World Bank FCPF.

exhausted. University-based advisors, for instance, may be in a position to continue to support a community through a difficult period in negotiations, even if the community does not have the funds to pay them, or faces delays in obtaining funds.

Budgets usually need to cover:

- The cost of hiring legal, technical, economic, and negotiating expertise.
- Fieldwork for socioeconomic work and consultation.
- Travel costs.
- Information management and dissemination (printing and distribution of key documents).
- Consultation activities, such as renting meeting rooms, the cost of refreshments, per diems for anyone who will need them.
- Research, analysis, and team preparation for the negotiations.
- Translation and transcription fees.
- Public outreach costs (e.g., production of a focused newsletter, public service announcements, etc.).

It is advisable to be conservative in estimating what a negotiation will cost, and then rigorous in monitoring and controlling expenditures, especially early in the process when it may appear that funds are more than sufficient. This will help reduce the

possibility of running out of funds as negotiations enter their final and crucial stages, when insufficient funds can undermine the community's negotiating position. For this reason, it is important that a member of the negotiating team holds budget management responsibility. For the negotiating team, typical budget responsibilities are to:

- Managing an expenditure plan, including periodic adjustments that the community has endorsed;
- Keep track of funding sources, amounts, reporting and accounting requirements, deadlines for applying for funds (if applicable), availability of funds, and any limitations on the use of funds established by the provider;
- Establish a clear and transparent accounting and reporting system, especially a system for approving, accounting for and justifying expenditures;
- Identify overall budget requirements early and maintain a working budget; and
- Keep funds for negotiations separately allocated and managed.

## 8. ESTABLISHING THE RULES OF THE NEGOTIATION

### Chapter summary

- Managing meetings involves clear definition of roles and responsibilities.
- Meeting schedule, venue, and arrangements should be designed to balance the interests and preferences of both sides.
- Shaping the agenda for negotiations involves prior consideration of what the order and pace of issues are to be addressed within specific time and other context conditions.
- Establish a communication plan. Define how information will be communicated. Establish a single point of contact. Never let a single individual meet alone with the proponent to discuss the issues. Always bring at least another person or note takers.

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*Negotiations may benefit from prior agreement on the rules of engagement – how the two sides will talk to each other. These ‘framework’ agreements ensure process guarantees for how negotiation will happen, but provide no guarantee of a positive outcome*

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### Framework agreements

Before jumping into negotiations, it can be beneficial to outline procedural rules to regulate the negotiation process. In some contexts, communities have developed a precursor agreement, memorandum of understanding or consultation protocol that set ground rules for how work may proceed on Indigenous lands. These ‘framework agreements’ serve to manage expectations by making the operating context for any negotiation more predictable on issues of disclosure, language spoken, meeting frequency and place, and agenda setting. Defining these procedural rules up front can reduce any surprises that shortchange the Indigenous negotiators. Such frameworks often become part of the final impact and benefit agreement.

Clarifying aspects of the community’s internal governance with the project proponent is important for establishing effective rules of engagement. If the existing legal framework fails to adequately identify or recognize the community’s customary leaders, for

example, the development of a terms of reference for a framework agreement that establishes these and other rules for engagement for the negotiation may be needed. Once matters are agreed upon, they should be recorded in a negotiations plan that can be referenced throughout the negotiation process.

#### *The location of meetings*

Scheduling meetings is one of the first things that needs to be agreed on by the community and project proponent negotiators. The location in which a negotiation takes place can affect the power dynamics between the two negotiating parties. A community should press for negotiations to occur in a space where they feel comfortable, and which is easily accessible to the negotiating team and other community members. In an ideal situation, a neutral location is chosen for negotiation, within or near the community.

The **venue of the meetings** can re-enforce subtle power relations – taking community negotiators away from their base and bringing them to project proponent property can have a disempowering

effect. Holding negotiations within the community can be beneficial as it makes it easier to refer to actual examples of impacts or benefits but this can also be a drain on community resources. Another consideration is **distance of the venue from the community** and how the community negotiators will reach the venue. Even the physical arrangements of the meeting place should be considered. If members of a negotiating team are not comfortable in closed spaces, for example, this could result in them wanting to finish negotiating quickly just to be able to get out.

Whenever possible, negotiations should be held in a **neutral venue** where both sides are comfortable. Often, government spaces are not the preferred venues. Government is often viewed as supporting project proponents, and holding negotiations in government spaces can reinforce the power relations that favor the project proponent. Communities should be prepared to offer a list of possible venues that they find acceptable.

#### *Negotiations timeline*

Negotiators should consider how much time each meeting will take, the frequency of meetings, and the protocol for preparing for negotiation sessions. The community should always require more than one negotiation meeting to ensure that their negotiating team has time to bring information and decisions back to the community. When will negotiations begin? When are they expected to conclude? One condition for Indigenous negotiators is allowing for sufficient consultation between negotiators and the community at key moments. Another consideration is having information in advance, with sufficient time to process and use the information, particularly for longer documents.

#### *Language*

An item to agree on early in the process is **language**. Clear communication is integral to the success of any negotiations process. For parties who speak different languages, the question of the language to be used in conducting negotiations can be tricky.

Ideally for communities, negotiations would be held in the community's native language, with interpreters available to translate for the project proponent. If the project proponent requires that negotiations take place in English or the national language, the community should have the ability to choose their translator and ensure that 1) interpreters are fluent in both the negotiating language and the community's language and 2) interpreters are able to interpret the proceedings in a clear and simple enough manner to be understood by everyone on the community negotiating team. **Note:** Never assume that the other side can not speak and understand the local language.

Other considerations to discuss include:

- Definition of key principles, concepts and values that parties will adhere to.
- Who will negotiate on behalf of each of the parties? Introduce the community's team of negotiators to the project proponent. Also be sure to get the names and positions of negotiators representing the project proponent.
- How will the parties communicate regarding logistics over the course of the negotiation? How should community members contact the project proponent if they need to communicate? Who from the community will be authorized to speak with the proponent on the community's behalf about practical issues, including scheduling, and how will the project proponent contact the community?
- An information-sharing protocol.
- How negotiation-related activity costs will be funded.
- Confidentiality clauses.
- Structure of negotiations (define priority areas).
- Representation
  - Control over Environmental Risk Management
  - Communication
  - Compensation
  - Employment



- Tenure security
- Business development
- Access to/Transfer of facilities
- Culture and cultural heritage
- Gender/social equity
- Vetting and signing of agreements (how consent will be given).

Framework agreements can apply to an exploration stage of a project and can be a simplified version of a full-scale IBA when uncertainty exists about whether a project will proceed into the operation stage. These agreements may also be more detailed and serve as confidence-building measures that enable a negotiation process to follow. See Box 8.1 on the Munduruku Consultation Protocol. This example highlights the innovative models that are being piloted in the Global South that may be adapted for project negotiations.

A negotiations agenda describes the range of issues that will be addressed and, sometimes, the order in which they will be discussed. At the outset of negotiating, it is important that the negotiating team puts the key interests of the community on the table. The other party may put forward agendas that are intended to divert attention from what the community wants to discuss. For instance, the project proponent might prioritize discussion of employment protocols instead of addressing issues related to access to resources first. Meeting agendas (narrowly defined by both sides to tackle specific parts of the wider negotiation agenda) should be designed by both sides together.

One tactic is to address relatively easy issues first as this can create a spirit of goodwill and can build trust. This can work if the negotiators are able to ensure that the next meeting agenda items will be the primary issues of the community. The problem with this tactic is that it can lull the proponent negotiators into a false sense of complacency and they may be shocked when harder issues come up for discussion. The opposite approach can be to start with the

difficult issues first, which can be challenging if there is little established trust between the parties. Starting with difficult issues can be beneficial if time is limited.

Another option is to start with principles on different topics, noting that details will be further discussed at succeeding meetings. For example, regarding the principle of keeping off of sacred areas – if both sides agree to such a principle, the next step would be to agree on how to identify such areas.

Meeting agendas should be agreed on and shared prior to actual meetings. Negotiators should never enter a meeting room without being clear on what is to be discussed. The community negotiators should be guided in jointly creating this agenda with the other party based on the agreed-upon objectives set by the community. In considering the meeting agenda, recognize that the project proponent will work to adjust the agenda to benefit their own interests.

### Communicating about negotiations

It is critical that the community negotiating team maintain careful records as negotiations proceed. All significant communication with the project proponent (including phone calls and text messages) should be carefully documented. All documents that are exchanged, including draft documents, should be retained and filed.

The community negotiating team should participate in shaping the communications section of the negotiated agreement. The principles and expectations for communication moving forward after reaching an agreement can be tested during the negotiation process itself (these can also be part of a framework agreement). Some communications issues to be decided with the project proponent prior to, during, and after negotiations may include:

### Box 8.1 Framework Agreements – Munduruku Consultation Protocol

Some 13,000 Munduruku Indigenous people live in more than 120 villages along the Tapajós River basin, one of the main tributaries on the right bank of the Amazon River in Brazil. The Munduruku people from the region live in three designated Indigenous lands (Sai Cinza, Munduruku and Kayabi) and are fighting for the designation of the Daje Kapap Eypi territory (Sawré Muybu Indigenous Land). The act of designation represents the state's formal recognition of the territory's traditional occupation by Indigenous people. Since 2012, they have battled against the federal government plans to install seven hydroelectric plants in the Tapajós River basin, a development that threatens their territory and way of life. Overall, some 43 large hydroelectric dams and 102 smaller ones are planned along the whole of the Tapajós, Teles Pires and Juruena River valley, impacting Munduruku territory.

To defend their lands, the Munduruku developed a Consultation Protocol (begun in Brazil by the Wajãpi Indigenous people, in Amapá), in which they told the government how they want to be consulted. The Consultation Protocol emphasizes that they want to be consulted in their own territory, in villages of their choosing, and gathered in meetings with the participation of Munduruku people from all regions of the Tapajós. They also clarify that the decisions are to be made after a long debate, which shall take as long as necessary to achieve unanimous consent among the people.

*“We, the Munduruku people, want to listen to what the government has to say to us. But we do not want made-up information. In order for the Munduruku people to be able to decide, we need to know what is, in fact, happening. And the government needs to listen to us.”*

The protocol ensures that the agenda for discussion and the means of conducting the consultation take the Munduruku's way of thinking into account, focused on the community demands rather than just the problems of the *pariwat* (the word in the Munduruku language referring to non-Indigenous people). It defines how Munduruku will coordinate the meetings, as they have their own participatory systems, which ensures the participation of children, young people and the elderly. The protocol demands respect for their conception of time and their social dynamics, and, finally, they claim the final word on the proposed measure.

The Munduruku delivered their consultation protocol to the Brazilian government in 2015 and informed a lawsuit by the Federal Public Prosecutor (MPF) that temporarily delayed the construction of the São Manoel dam on the Teles Pires river which flows into the Tapajós. Despite efforts by the Bolsonaro government to proceed with construction of São Manoel, the project future remains uncertain. Through direct action and advocacy, the Munduruku have resisted this dam and three others that are now being built and will trigger impacts that threaten their well-being.

During the occupation of dam work sites, the Munduruku have made a series of concrete demands that are focused on impact and benefit sharing. One is a request that their “robbed urns” – sacred urns that were removed during the construction of the São Manoel dam — be taken to “a place where no Pariwat [white person] has access,” with their shamans accompanying the journey. It would set a legal precedent for the Indians to get the urns returned because, according to Brazilian law, the urns are archaeological relics, belonging to the national state, and should go to an appropriate museum. Another demand is for the hydroelectric companies to create a “Munduruku Fund” for four specific projects. One is for the creation of an Indigenous university and another is for increased protection of their remaining sacred sites. The struggles for self-determination by the Munduruku continue, however the innovative measures to define consultation and consent as well as appropriate protections and benefits have had wider influence as consultation protocols have been replicated and adapted by others.

*Sources:* Oliveria R., Losekann C. (2015); Branford and Torres (2017)

## Shaping the negotiations agenda

- Principles for communication and reasonable expectations for responses;
- Establishment of liaison positions or formation of committees that meet at certain intervals to manage communications (including duties of a liaison officer, if appointed);
- A formal process for communication (e.g., the parties will meet four times a year with two of the meetings in the community);
- What information is to be exchanged, how often, and how gaps in knowledge will be addressed;
- The process and guidelines for sharing confidential or sensitive information;
- Record keeping and reporting during communication events, such as internal and external updates on the progress of negotiations;
- Expectations for community consultation, locations, and timelines of consultation by project proponent with communities during the negotiation;
- Financing and management of committee or liaison position.

Indigenous negotiators may face pressure to accept full confidentiality during negotiations. Any such demand by the project proponent in principle forces a community to give up rights. An alternative to full confidentiality is selective assessment and mapping of areas where external communication will be controlled for the duration of the negotiation. There should never be an agreement to have only one party publicly communicating negotiation developments. It is in the community's interest to retain the right to communicate with the media about negotiations, particularly in the case where the other side fails to negotiate fairly.

Media activity and relations with media contacts should be carefully managed to make sure that the project proponent is not externally communicating its own version of the process. A role for monitoring relevant media activity should be assigned within the negotiating team or to a supporting member of the community. A community should have its own proactive communication strategy within agreed confidentiality constraints to get its own message out. The communications strategy should utilize all appropriate forms of outreach, with support where needed to ensure tools are used effectively (see Box 8.2).

### Box 8.2 Relationships with the media

The AmaMpondo peoples of the Eastern Cape province of South Africa have been resisting a proposed titanium mine on their lands since the mid-2000s. In 2007, the AmaMpondo created the Amadiba Crisis Committee (ACC) as a formal body to organize the resistance to the mining project. Sophisticated relationships with media outlets have benefited the ACC as they seek to uphold their right to say “no” to the project. When an impasse with the mining company arose during negotiations, the ACC invited news agencies and publishing houses to visit their lands to discuss the case first hand, and fed the media houses a steady stream of updates and information on the case. This relationship with the media elevated the Amadiba Crisis Committee plight to wider audiences and generated support for the community's cause. It is an important illustration that media, if engaged in the right ways, can be a useful ally to Indigenous communities in negotiations. For communities who may not have as much experience working with the media, capacity building must deliver specific information on how these beneficial engagements can be developed.

*Source:* Africa Regional Workshop on Indigenous Negotiations (2018)

## 9. NEGOTIATION TACTICS

### Chapter summary

- Reaching negotiated agreements is about compromise, but human rights are not to be negotiated. Communities must be aware of their rights and assert these at all stages of negotiation.
- Negotiating tactics by the project proponent may be intended to distract, but consistently reviewing and affirming the position of the community will ensure negotiators remain guided by defined objectives.
- Managing meetings involves defining roles and meeting schedule, venue, and arrangements must not be designed to balance the interests and preferences of both sides.
- Managing offers will require patience and preparation regarding core demands and knowledge of benefit options (see Chapter 10).
- Access to education and health services are rights. These are often included as benefits in agreements but this should not be the case.

### Approaches to negotiation

When preparing to negotiate, it is critical to review available technical information, study lessons learned from other agreements, and negotiate clauses that can deliver what the community wants. There are different approaches to negotiation, which occur along a spectrum. Which model to use will depend on different factors, such as time available and the level of preparation by the negotiating team.

On the spectrum of different negotiation models, one is the **collaborative** model of negotiation, which means finding areas where agreement can be reached without compromising principles. This model requires taking the time to listen to the other negotiating party and to spend time exploring all possible options for the negotiation.

Another model on the spectrum of negotiation is the **positional** model, which is often the starting point when communities do not fully trust the other side. This model is when a community puts their position on the table with a “take-it-or-leave-it” attitude. This model is often used when there is little time to discuss all issues and the goal is to maximize the community’s share of benefits. This model may

result in weaker agreements since not all scenarios are studied and also reinforces the mindset of win or lose, rather than looking for win-win solutions, and can lead to loss of credibility for a community.

When using a positional model, it is key that negotiators are aware of the community’s primary goal and their aspirations. A tactic can be to present the aspirational (very high level) demand of the community first, to establish that this is the position of the community (for example, full land rights recognized). The other side will be left with the option of presenting what they can offer short of the aspirational point, and this is when the community can achieve their objectives. It is important that the negotiators know when the discussions are no longer viable and be ready to walk out. Knowing the absolute minimum that the community can agree to, when this is no longer on the table the negotiators should walk away.

It is important to note that a collaborative model of negotiations and a positional model of negotiations are two points along a spectrum, rather than opposed approaches. The right negotiations model for a community may fall anywhere along this spectrum – the community’s relationship and their level of trust with the other negotiating party will

typically help them determine their best negotiating model. It is also possible, and often wise, to employ different negotiating models throughout different points of the negotiation process. If multiple communities are negotiating together as a block, they may be able to employ different negotiation models in a complementary fashion.

For any negotiation approach, communities need to be prepared to use and deal with the possible tactics that will be deployed against them, such as:

- *Delaying tactics* – Project proponent negotiators may find reasons to delay presenting a counter offer. Companies may delay meetings to take advantage of more favorable context factors, such as a change in government. This tactic is effective against a community that is pressed for time and resources. Communities may also consider using this tactic when they need more time to make effective decisions or want to ensure their position is understood by the project proponent, opting for direct action or legal tactics can re-establish a more constructive negotiation process.
- *Bracketing* – Bracketing means setting things aside for further negotiation, possibly at a later time in the negotiation process. Project proponent negotiators may not cover the full range of issues raised by the community, attempting to focus on a few issues as the most important to be discussed. Alternatively, project proponent negotiators may embrace the diversionary tactic of highlighting “false priorities.” This is when the project proponent negotiators bring up issues that have not been raised by the community, or issues that are secondary to the community’s main priorities, and lift these up as more important than they actually are and then make concessions to address these.
- *Limited authority* – Project proponent negotiators may use one actor against another, for instance, saying that their hands are tied

because the government has regulations that should be followed (“good cop-bad cop”).

- *Provocation and personal insults* – Provocation or personal insults may be used to discredit negotiators.
- *Take it or leave it offers* – Project proponent negotiators may present a one-time limited offer, saying there can be no discussion just yes or no to the offer.
- *Split the difference swindle* – In tough moments of hard bargaining, project proponents may ask for a compromise that splits the difference between the opposing positions. When a very low starting offer is presented, this outcome may still be far from the community’s minimum required offer – even with the proposed incremental change. This is why it is important that the community negotiators should never be the first to offer a monetary value, nor accept the first monetary value offered.

This chapter provides effective tactics to counter these types of efforts to weaken a community’s position.

## Managing meetings

*Negotiator roles.* The negotiating team will need clarity on their roles during meetings. This is important to avoid confusion that a project proponent can take advantage of. Some key roles related to negotiation meetings include:

- Organizing and taking notes including documenting the process and keeping track of all documents that are being shared and agreed on;
- Serving as a technical resource and looking at offers from the project proponent;
- Talking with the project proponent and bringing information back to the communities – there may need to be some negotiators who do the hard talking, while others are in a support role;

- Tracking and providing updates on spending, available funds, and fundraising actions, with control over budget allocation.

*Principle of equivalency.* Knowing, in advance, who will represent the project proponent in negotiations will enable the community negotiating team to decide who should be present from the community. Knowing the positions of proponent negotiators within the proponent’s organization can provide insight into what the agenda is likely to be. Indigenous negotiating teams should meet with members of the project proponent negotiating team with comparable levels of decision-making authority and proponent negotiators should not outnumber Indigenous negotiators. If the head of the project proponent will be present during initial meetings, the community chief may be present as well but it is best if the chief’s presence in actual negotiations is limited. This allows the negotiators the possibility of asking for time to consult with community leaders.

*Documentation.* Every meeting should be documented with detailed notes. Detailed notes may be needed in the future to remind the parties of what they agreed to. The community should take its own notes, without relying on the records of the other side as documentation can serve as protection for the negotiating team. Careful filing of notes ensures that they can be found when needed. Where matters agreed upon during one meeting are significant to the negotiations, it is advisable to follow up with a letter to the other party communicating in writing your understanding of the position reached. Copies of such letters should always be kept in the community.

*Transparency.* The community must at all times be informed of developments, including the schedule of future meetings. Holding briefing and debriefing meetings before and after each meeting with the project proponent is good practice. A briefing meeting takes place *before*, so that everyone is clear on the plan and clear on their roles. A debriefing

meeting takes place *after*, to be clear on what was offered, what worked well and what didn’t, so adjustments in the approach can be made if needed. Sometimes these meetings will take longer than the negotiation sessions themselves, but they are very important and must be planned for when scheduling formal negotiation meetings.

## Managing offers

Negotiations mean giving and receiving, so sometime during the process there will be offers – either monetary or other types (services, projects). It is best for community negotiators to “hold the pen” and take charge of drafting agreements, rather than responding to offers of the project proponent.

Depending on the nature of an offer, there are different options for responding. If an offer is poor or unacceptable, the team can ignore it. Or the team can respond with a set of principles to guide negotiations, so that the project proponent is no longer trying to control the agenda by advancing a weak offer. For offers worth considering, negotiators should ask for time to consult the community and carefully consider. The negotiating team should never accept an offer when first made. Offers that sound too good to be true often turn out not to be in the best interest of the community. It is best to ask for time to consider every offer.

On the issue of money – while not discussing a specific amount, negotiators can agree on a range of compensation forms, including funds for training of community members to enable them to qualify for jobs or for alternative livelihoods, etc. Community negotiators must be mindful of the risks related to making a demand for a specific amount of money without first considering potential payment option objectives. Community negotiators should not accept an offer of any amount of money or how funds fit into the larger negotiating agenda during the first meeting. Community negotiators should also study the art of making counteroffers, informed by research about what the proponent has already

conceded or is able to pay, so as to preserve the credibility of the process. More detail on assessment of compensation offers is provided in Chapter 10.

### Tactics inside negotiating rooms<sup>22</sup>

**Never argue with each other at the negotiating table.** An Indigenous negotiating team and the wider community should never show disunity to the project proponent. If things start to fall apart, negotiators can stop a negotiation meeting and take time for a private meeting within the community to address conflicts privately.

**Going to the balcony/taking short breaks.** When the discussions become heated or overly complicated, it will serve the negotiating team if they ask for a break. Taking these short breaks can allow the team to calm themselves and to refocus (see Box 9.1).

#### Box 9.1 Using breaks in negotiations

During the negotiations over the text of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), short negotiation breaks were important for a number of reasons. Taking breaks during the negotiation gave the Indigenous Peoples representatives the time to meet some of the government representatives and discuss with them some of the finer details of the draft Declaration. These informal meetings were essential in strengthening interpersonal relationships between negotiating sides, humanizing both parties and breaking the “monolithic” image of the States versus Indigenous Peoples.

Breaks from the negotiations process also allow time for conflict and tense situations to defuse. In negotiations with companies or project proponents, breaks should be used to consolidate the community position or get feedback on the negotiating strategy. They also can allow time to assess offers that have been presented, or to discuss and potentially reassess the “bottom line” position. It’s important to expect that if one side is planning to use negotiation breaks to their advantage, the other side is probably planning the same.

**Walking out.** The decision to walk out should only be taken when all other options have been exhausted and the consequences have been considered. Using this tactic repeatedly will undermine the credibility of the negotiators and weaken their negotiating power. Walking out can be a powerful tactic when used at the right time, and when the community is fully involved. Its potency is further enhanced when accompanied by a well-managed media campaign. A walk-out maybe considered when the other side is not negotiating fairly and has, for example:

- Blatantly disregarded elements of a previously agreed on framework agreement or protocol
- Attempted to negotiate with members other than the designated group in an effort to weaken community unity
- Broken major commitments made earlier during the negotiations
- Persistently displayed a lack of willingness to work towards agreement

It is important that the basis for a walk-out be clearly communicated to the other party to allow for the possibility of resuming talks. The basis for continuing negotiations should also be communicated clearly. Walking out and returning to the negotiating table must be thoughtfully calculated with clear goals. The negotiating team must be sure that the community supports this decision and that it will not lead to division in the community. It is also important that the whole negotiation team agrees to walk out, as it will considerably weaken the position of the whole team if only one member walks out and the rest of the team remain at the table. See Box 9.2 for the example of PhilCarbon Wind power negotiations in the Philippines.

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<sup>22</sup> This section is from IBA Toolkit 2010 pp. 114-15

### **Box 9.2 Walking Away from Negotiations – Sagada, Philippines**

The company PhilCarbon proposed a 15 MW windfarm to be built near Sagada, a small town composed of majority Kankanaey-Igorots in the Philippine Cordillera region. The Indigenous Peoples Rights Act (IPRA) requires FPIC from the community for projects that affect them. Sagada has strong capacity to defend resource and land rights, and is governed by traditional decision-making structures, with a Council of Elders (dap-ay) working in tandem with elected and Church leaders as a coordinated governance structure.

The Sagada-Besao windfarm would have been the first in a mountainous area in the country. PhilCarbon managed to get prominent members of the Sagada and Besao community as shareholders. The National Commission on Indigenous Peoples (NCIP) facilitated the community meetings with PhilCarbon, first to socialize the project concept and then to get the community to consent. The company representatives emphasized only the benefits of the project. Local NGOs provided technical experts to outline the possible adverse environmental impacts, including to the watershed and biodiversity. Benefit sharing was also discussed, including possible access to subsidized electricity, royalties from energy production sales, and employment opportunities.

The community established a multi-disciplinary team to serve as lead negotiators, but whole community and Council of Elders were also present. The latter gave indications of preferences through body language. The community's attitude changed dramatically when the company suggested that youth could be paid to serve as guards to the toilets that they would build for tourists to use when they would come to view the windmills. The company suggested that the community could benefit "from doing nothing," which was insulting to the community. With the Elders signaling the decision to walk out from the negotiations, discussions ended abruptly and broke down after that. The project was never built, illustrating that benefit sharing for communities matters little if not respectful of the cultural and social principles of engagement.

*Source:* AIPP Negotiations Workshop Booklet (2019)

*Role of power figures.* Knowing who to bring into negotiations at specific times is an important tactic. While elders have a special role and authority to bring to the table, they are often not readily available, particularly if travel is required, and in many cases would opt out of attending except when absolutely necessary. When discussing very technical matters, the presence of elders who may not understand the technicalities could also be counter-productive.

In lieu of elders, consider bringing community representatives who are most directly affected by the specific issue under discussion to provide testimonies relevant to the agenda item. For example, when discussions about access to water resources are discussed, mothers can best describe the importance of ensuring that the community has accessible water, not just for irrigating fields but, critically, for household use. Having the appropriate gender balance on the negotiating team ensures that these tactics are available and that critical input is not lost at key moments in the negotiation.

*Removing harmful people.* In the case where community negotiators show bad behavior or prove to be unhelpful, it is important that the team is able to quickly assess and decide whether to remove the individual from the negotiating team. Not all "bad behavior" is bad for negotiations. A negotiator behaving forcefully and appearing inflexible can sometimes work to the benefit of the community, but only if there are others who can balance this behavior by appearing more calm or less outspoken. Sometimes, project proponents include people in their teams whose sole purpose is rattling the community negotiators.

*Maintaining relationships.* Successful negotiations need strong relationships between the two sides. If an agreement is reached, it is only the start of a process likely to last for many years. A good relationship built on mutual respect should be built early on. How the relationship between the parties develops during the negotiation process has a major



effect on success in implementing the agreement. Both the community negotiating team and the project proponent have a part to play. Education is sometimes needed to demystify stereotypes. A spirit of joint problem solving may also help. Continued engagement, even during difficult moments, can reveal important potential allies and entry points that are not easy to see at first. Sometimes it helps to bring project officials into the community, or to a site of particular importance to Indigenous Peoples. When project proponents see what is at stake—and why it is so important to the community—they may change their position on an issue.

See Table 9.1 for some considerations when managing negotiations.

### Tactics outside of negotiation rooms

Outside the negotiation room, a great deal of work is needed to prepare for upcoming meetings. Activities include monitoring the negotiation budget, following up on tasks from the previous meetings, fundraising, and others as discussed below. The community must remain united in their vision and maintain control within the negotiations process. It is the responsibility of the negotiating team to keep the community updated as a way of maintaining internal unity, no matter the tactics employed by the opposing side. Even when there is little or no progress in the negotiations, updates are important. If negotiations are happening at a very quick pace, negotiators can ask for a break to be able to communicate back to the community.

Negotiation can be supplemented by other forms of engagement and action, such as the use of broader legislation, litigation, political mobilization, etc. These tactics are often part of a combined strategy and used together can enhance the community's bargaining position, particularly under conditions that are less favorable.

Once a framework agreement is in place, there are usually restrictions on the community's freedom of action, for example, an MoU may state that negotiations are not to be discussed with the media. But this is not to say that nothing can be done to influence negotiations. Engagement in negotiations should never prevent a community from exercising non-violent political expression, which is a human right. **A good agreement never gives up rights or settles** for provisions of less significance than existing regulatory requirements. Some framework agreements attempt to close down this option as a condition for entering into negotiations. These tactics can be expected, but should be resisted.

More generally, a community can continue to form alliances, raise its profile in the media both nationally and globally, cooperate with other groups in environmental assessment processes, and engage in litigation or direct action in relation to other proposed developments. All of these actions emphasize to project proponent negotiators the strength of the community and the costs likely to be imposed on the project proponent if it does not reach agreement, strengthening the community's bargaining position.

**Table 9.1** Considerations when managing negotiations

| DO  | DON'T   |
|---|---|
| Remain united, regardless of the issue or the hurdles that emerge in the negotiations process. Debates and disagreements within the community or within the negotiations team may arise, but should be kept private. Debriefings are important opportunities for resolving internal conflicts, as are breaks in the negotiations process. | Never show disunity to the other side. Never argue with someone or disagree with someone from your team in front of the project proponent.  |
| Always demonstrate respectful protocol in meetings. For example, if you always shake hands with people you respect in your culture, shake hands with everyone in the room. Remain respectful, respect begets respect.   | Never make personal insults or disregard your own cultural protocols in a negotiation.  |
| Take the time needed to be well prepared and keep all interested parties informed. Keep other parties advised of progress.  | Don't let yourself be rushed by the other side. Hasty decisions are often bad decisions.  |
| Make a plan for the meeting and stick to it. If things are going off track or if you think it would be good to change the plan, take a break and talk about it.   | Never change course midstream and move to a topic you don't have agreement on among the negotiating team.   |
| Agree on who will speak on issues (often the lead negotiator) and about the issues to be discussed.   | Don't let speakers who have not been briefed or who may not be able to target discussion to the topic at hand have the floor.   |
| Make sure the positions put forward have been carefully thought out. If the project proponent brings new material to the table, don't react until there is time to consider it together.  | Don't talk about not fully developed ideas or proposals that the project proponent brings forward. When in doubt, ask more questions.   |
| Make sure proposals are understood, ask questions if need be, then consider the proposals in private with the negotiating team. If anyone doesn't understand something, or feels uncomfortable, ask for a break and talk about it.  | Don't respond immediately if the project proponent or government puts an offer on the table, whether you think it is good or bad. Don't make snap decisions without consulting the community. |
| Be clear about the roles that different people have and support people in the roles they have been given.   | If someone has been told to play a friendly role, don't pull them into an argument.   |
| It may be effective for people's roles to change over time.   | Don't leave someone who is ineffective in their role in that position. Change them to a new position, or remove them altogether.  |
| Take notes on every meeting, and always have more than one person in a meeting.   | Don't let anyone meet alone with the project proponent.   |
| Listen carefully to what people on the other side say and watch them carefully.   | Don't 'turn off' because you don't like what negotiators from the opposing party are saying.  |

|  |  |
|--|--|
| <p>Look out for any disagreements on the other side. It may mean that the project proponent has not worked out exactly what it wants, which may provide you with an opportunity to encourage project proponent negotiators in a direction that is positive for the community.</p>                                      | <p>Don't ignore disagreement amongst negotiators from the opposing party. Consider what it could mean for your position or negotiation strategy.</p> |
| <p>Always have a debriefing session after each negotiation. Bring up anything anyone noticed during the meeting. Even small things can be important so make sure you bring up anything you notice. Keep notes of the discussion. Review notes from the previous negotiation session in preparing for the next one.</p> | <p>Don't miss debriefing sessions or fail to hold them after each negotiation.</p>   |

*Strategic allies*

At crucial moments in any negotiation, strategic alliances can provide resources, information and political clout. The project proponent may use delay tactics, motivated by knowledge of resource constraints faced by the community. Delays could force the community to make concessions if unable to afford prolonged negotiations. Careful budget estimates can reduce this risk, but strong alliances can also help ensure additional resources flow when community funds are depleted.

Before, during and after negotiations, regional allies strengthen the negotiating team by providing strategic knowledge about the project proponent (such as its liabilities and priorities) and the project (like information about precedent-setting agreements in the sector, the project's dependence on external factors, or public perceptions about the project). Regional allies may have a greater research capacity than most communities. The backing of a more powerful regional network can be decisive if direct actions (political mobilization) are taken to influence the negotiation. This backing can take the form of public support when the community engages in direct action, pro bono legal support when strategic litigation is initiated or threatened, and accessing media relationships to amplify coverage of the community perspective or demands.

Sustaining alliances means the community must continue to engage with its partners and keep them appropriately informed of developments with

regards to the issues being negotiated. It harms alliances when the community accepts a project proponent's demand and then does not inform its allies. At the same time, the community should manage alliances to preserve control over the negotiation process, insisting on a level of freedom to make key decisions without pressure or conditions imposed by external allies.

*Engaging the media*

The media can be both an asset and a liability for Indigenous communities involved in negotiation. In some parts of the world, Indigenous communities working to negotiate the use of their lands and resources are vilified in the media as troublesome or as opponents to progress. But Indigenous communities can also leverage a relationship with the media to improve their bargaining position, especially when the community and project proponent are deadlocked in negotiation.

Utilizing the media to explain the community's concerns to a wider audience can help raise awareness of the community's position and create pressure for project proponents to address the community's demands. Communities can work through the media to call out the bad behavior not only of the project proponent or government backing the proposed project, but also any of the actors involved in the investment chain, including parent corporations, multilateral institutions, insurers covering the project proponent's operations, and more. A focused and planned media

strategy can be an important influencing factor in changing the outcomes of any negotiation.

Formulating effective media strategies requires substantial skill, for instance in understanding which sorts of stories are likely to attract and retain media attention, and how long-term relations can be built with media outlets and journalists which can be mobilized quickly when the need to do so arises. In some circumstances effective use of direct action will be an important component of a media strategy, as well as a means of putting pressure on state or company interests that are forcing negotiators to use delay or diversion tactics.

Social media constitutes a potentially powerful tool that could be utilized by Indigenous groups to connect with civil society and to supplement conventional media, or help substitute for an independent media where it does not exist. Capacity to utilize social media may vary across the Global South, in part because of technical and geographical issues. Especially in remote areas, access to phone networks and the internet may be severely limited, with the result that Indigenous leaders or spokespersons can only utilize social media platforms when they visit regional centers or capital cities. This is a significant barrier to effective use of social media which requires constant presence and reinforcement of messages, an ability to monitor and quickly respond to material from other sources, and a capacity to achieve immediacy in terms of events that one wishes to publicize. As an example of the latter, the impact of showing government officials removing Indigenous People from their homes is considerably greater when it can be posted to social media as it is happening or immediately afterwards (Kenya Pungor Training Report 2019).

#### *Direct action*

Occasionally, community pressure is needed when negotiations stall. Communities can come together to mobilize and put political or social pressure on project proponents to come back to the negotiating table or to keep the negotiations on track and

happening in good faith. This kind of mobilization can take many forms, depending on the context:

- If the proponent has made public commitments, press them on social license issues through direct contact with board members or the chair of the board. This type of strategy is often undertaken only when all other strategies have been exhausted.
- Key work sites (roads, supply lines, pipeline valves) have been the target of protests to temporarily shut down operations until the proponent changes their bargaining tactics.
- Media campaigns target policy makers and government regulators to influence permitting, licensing or funding decisions.
- One Indigenous community set up a summer and winter camp near an advanced exploration site, to observe the site and establish a continuous presence. This emphasized to the project proponent the significance of the site.
- Buy shares in the companies, allowing the nation to submit questions in shareholder meetings. Investors are wary about the risk of damaging issues being raised in these meetings.

Political mobilization and dialogue at the negotiation table are not either/or choices. In most effective negotiations, both types of action are essential elements of a successful strategy. See Boxes 9.3-9.5 for examples of how effective agreements have demonstrated that this capacity is often an essential factor in determining the outcome.

### **Box 9.3 Direct Action – The Innu (Labrador, Canada)**

The Voisey's Bay nickel project began in the early 1990's when significant deposits of nickel, copper, and cobalt were discovered within the traditional lands of the Innu and Inuit Peoples of Labrador, Canada. The negotiation lasted from 1996 – 2001, when Impact and Benefit Agreements were signed between the Innu Nation and the Labrador Inuit Association (LIA) and Inco, Ltd, the company that had acquired the mine. During the pre-negotiations and negotiations stages there were key moments in which the parties hit an impasse and the negotiation process came to a halt. It was direct action on the part of the Innu Nation and the LIA that ultimately brought the parties back to the negotiating table and allowed the process to advance. For example, during the pre-negotiations phase, the company promised to keep the Innu Nation and the LIA informed about progress on the project. When the company failed to do so, the Innu Nation issued an eviction notice and 100 Innu protestors occupied the company's exploration camp, putting a stop to all project activities for 12 days. The delay cost the company money, but also established the seriousness of the Innu's demands and helped galvanize Innu solidarity in their response to the project. The threat to stop or slow project development or operations that this direct action demonstrated put significant pressure on the company to move forward with the negotiations process. It also attracted significant media attention, which was key for creating opportunities for the Innu and Inuit to build strategic alliances with external actors.

*Source: O'Faircheallaigh 2016. The Voisey's Bay nickel project. In Negotiations in the Indigenous World: Aboriginal Peoples and the Extractive Industry in Australia and Canada. Routledge: 174-199.*

### **Box 9.4 Capacity for Political Mobilization - The Binongan (Cordillera, Philippines)**

The Binongan Indigenous peoples of the Cordillera region have been engaged in small scale artisanal mining for many generations. Since the 1970s, elders in the communities have needed to struggle against outside mining and development interests that would seek to cut off communities from this small-scale mining and other income generating and culturally significant practices. In 1998, Olympic Pacific Metals, a Canadian mining company, entered the region and the Philippine government granted them a mining concession on Mt. Capcapo, with is ancestral land.

As Indigenous communities had not granted their permission for this drilling to take place, the drilling was a clear violation of their rights to FPIC. The people united together to oppose the mining, as they knew large scale mining could do irreparable damage to their environment. Starting in 2008, the communities began to conduct their own community consultations with all impacted groups. The reiterated their collective opposition to the mines. Military forces began to back the mining operations, and many IP leaders were labeled as terrorists. In response, the Indigenous communities revitalized their ritual systems of justice, performing ritual ceremonies that reaffirm their collective tenure of the lands and uniting them in their position. Elders and leaders came out with a strong statement against the mines. The mining company eventually withdrew all operations from the area. Broader support was also generated through developing an "action alert" that was circulated by Mines and Communities (MAC), an international group, and the Philippines IP Links (PIPLinks). The group helped in collecting signatures to a petition opposing the mine, and collecting small payments to support the struggle.

*Source: Jill Cariño, AIPP - Asia Regional Exchange on Indigenous Experiences in Negotiations*

### Box 9.5 Cofán Negotiation Tactics, Ecuador

The Cofán people live in 13 communities, having secured collective title to roughly 400,000 ha of their once vast territory in the northeast Amazon region of Ecuador. The first oil well was installed in 1967 in Cofán territory, leading to the loss of ancestral land, contamination of much of the remaining lands and waters, and triggering a chain of conflicts that endure today. Due to these devastating impacts, the Cofán resolved not to negotiate with the oil companies, a position which lasted for more than three decades. In 1987 the Cofán closed the Texaco drilling platform in the community of Dureno and in 1998, 300 Cofán mobilized to close an operating oil well now operated by State run PetroEcuador in the same community, to protest ongoing encroachment on their lands.

Between 2008-2012 the Cofán decided to change their position on negotiation with oil companies. To protect the Cofán cultural identity, they opened dialogue with then President Correa, who wanted to reopen the Dureno well and conduct seismic studies for more oil exploration on Cofán territory.

For the Cofán, negotiation was never an isolated strategy, but supported by other parallel actions. The Cofán are plaintiffs in an ongoing lawsuit against Chevron for contamination in Lago Agrio, in which \$9.5 billion in damages was awarded to affected communities. The Cofán have also effectively pursued legal and lobbying efforts to secure collective land titles to much of their ancestral lands – with the most recent land title legalizing Cofán ownership of 137,500 ha, and recognizing customary regulatory management practice. The Cofán have also successfully removed illegal mining from their lands.

Entering into the proposed dialogue with PetroAmazonas (the State oil company) required considerable rebuilding of trust. It took various assemblies to decide to negotiate. The Cofán decided to negotiate in groups, but also with the whole community present to confront divide and conquer strategies that were used unsuccessfully by the company. The Cofán have applied the law, but not the written laws of Ecuador, rather the ancestral laws of the COFAN people. In negotiation, for us it is tit for tat. ‘They give, then we give.’

Key demands in the first stage of negotiation included compensation, the remediation of pollution caused by oil extraction, recovery of lost territory and restitution for the loss of life of defenders of the Cofán territory. The Cofán stressed a range of benefits be given to the community, including scholarships for the youth, also public health benefits, as well as investment in social and economic development, and business contracts. Compensation was to buy trucks, which were then rented back to PetroAmazonas, with income placed into a community fund. While the negotiation did benefit the community, the Cofán remain cautious with oil companies and are prepared to use all available tools to pursue their objectives.

*Source:* Roberto Aguinda, President of A’I Cofán Organization (NOA’IKE), Cofán Federation, Ecuador, 2017 Scoping Workshop; Cepek (2017) Life in Oil.

### *Conflict and security risk management*

In some cases, political mobilization has contributed to retaliation by the government or project proponent against communities that resist development projects, for instance by denying them access to essential services or freezing their financial assets (see Box 9.6). Indigenous People have especially felt the effects of violence and extra-judicial retaliation for the defense of their lands and rights.

Planning for negotiation in contexts of weak governance or where there is a legacy of conflict calls for internal safety and security protocols to monitor and respond to risks. Community health, safety and security safeguards are now widely applied in contexts where the risk of political violence or conflict justifies precautionary measures. Resources for assessing conflict risks and designing conflict management protocols are becoming more widely available.

In some contexts, legacy conflicts or unresolved investigation of past human rights violations may be a roadblock to effective negotiations. These may need to be addressed as a part of precursor agreement. External advice may be required for the project proponent to develop and monitor a security management plan to ensure compliance with health, safety and security safeguards.<sup>23</sup>

Possible tactics to consider if security threats to community negotiators are viewed as significant risk include a review of security management, current and future screening of all security personnel, human rights trainings, and the adoption of new security protocols. Verification of these measures can be carried out by an independent expert on

#### **Box 9.6 Safety and security risks assessment: IFC and Dinant Corporation**

In December 2008 the International Finance Corporation (IFC) approved a USD 30 million loan for palm oil development in the Bajo Aguán valley, in Honduras, an area dominated by a protracted land conflict after several failed attempts at agrarian reform. Accused of land grabs, IFC's client, Corporación Dinant was allegedly involved with forced evictions, armed attacks, torture, killings, and disappearances of peasants and Indigenous community members, either through private security guards or with the support of public security forces, with apparent impunity over a number of years. A highly critical CAO audit found multiple instances of non-compliance with IFC Performance Standards (PS's) related to the 2008 loan.

It was not until April 2014 that the IFC and Dinant fully accepted that human rights risks associated with the Dinant loan were fundamentally underestimated, that mitigation measures failed to prevent and may have contributed to the violence surrounding the project, and that supervision missions had failed to shed light on these shortcomings and bring Dinant into compliance.

Under growing reputational risk, the IFC declared full responsibility for these problems. Public pressure forced the IFC to acknowledge the need for meaningful security and grievance management protocols for navigating corporate-community relations, including Dinant and broader regional investment interests. In particular, the CAO found no indication that the IFC supervised its client's safeguard obligations: (a) to investigate credible allegations of abusive acts of security personnel; or (b) that the use of force by security personnel would not be sanctioned other than for "preventative and defensive purposes in proportion to the nature and extent of the threat."

*Source:* IFC CAO Audit, Dinant (2013)

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23 See IFC Performance Standards and the Voluntary Principles on Security and Human Rights, for example, resources related to Corporación Dinant's E&S Action Plan," at: [http://www.ifc.org/wps/wcm/connect/region\\_ext\\_content/re](http://www.ifc.org/wps/wcm/connect/region_ext_content/re)

[gions/latin%20america%20and%20the%20caribbean/strategy/corporacion\\_dinant](http://www.ifc.org/wps/wcm/connect/region_ext_content/re_gions/latin%20america%20and%20the%20caribbean/strategy/corporacion_dinant)

human rights and security protocols, as well as by local communities.

Especially in fragile and conflictive contexts, it is important to pay attention to security for community members participating in negotiations. This may involve design of a safety and security plan that is shared with the government or company that indicates actions to take if risks materialize. These activities should inform the overall preparation for negotiations, including the communication strategy.

#### *Legal options*

Understanding and being prepared to use legal options is a critical part of any negotiation strategy. Preparation requires reviewing and building on earlier assessments of the legal framework, gaining knowledge of national or international precedents, and securing alliances or advisory services. The legal framework of any agreement is context-specific and usually requires professional advice.

Litigation can generate an incentive for the project proponent to come to the table but should not be undertaken lightly as it can make returning to negotiation difficult. As one example, a community can time litigation to coincide with a proponent's permit renewal phase, or remind the proponent that they will need permit renewals in the future. This involves employing all tools in the regulatory system to exert pressure on the project proponent (IBA Community Toolkit 2015, p. 88).

Comparative research has shown that use of court litigation related to a range of laws, including laws of more general application (for example environmental law) is important in allowing Indigenous Peoples to overcome the bargaining disadvantage they often face in dealing with large corporations and state authorities.

Litigation can take a long time to deliver results. Failure by governments to adhere to the rule of law constitutes a major barrier to effective use of negotiations to advance Indigenous interests.

Government failure to observe the rule of law does not always involve refusal to obey court orders (see example of the Khoi San, CGKR, Box 9.7). Use of legal options may involve government acting in ways that damage livelihoods without informing affected Indigenous Peoples, or failing to provide information on proposed developments. As noted above, litigation may also trigger violation of the human rights of individuals who protest against government actions (O'Faircheallaigh 2019)

#### **Box 9.7 Strategic litigation – Central Kalahari Game Reserve, Botswana**

In some contexts, the use of litigation is affected by assumptions regarding adherence to the rule of law. In Botswana, the Khoi San people have faced a series of violent evictions from their ancestral lands in the Central Kalahari Game Reserve (CKGR) region beginning in the early 2000s. A 2006 decision by the Botswanan High Court ruled this eviction unconstitutional and affirmed the Sans' right to return to the CKGR, but claimed the government of Botswana is not compelled to provide healthcare, education, access to water or hunting licenses to CKGR inhabitants, in effect limiting their ability to return.

Botswana's Court of Appeal has directed the Botswana government to permit the Khoi San to return to their ancestral lands, and to reissue game licenses to them. Yet the government has refused to accept this direction. In some cases, refusal to comply with the law may result from corruption, in others from a pro-development ideology combined with a lack of regard for Indigenous rights and interests.

Negotiations between the San and the Government of Botswana for recognition of their land rights and provision of services is ongoing. Two lessons come from the story of the San: 1) a final agreement isn't always a fair agreement and 2) litigation is only one tool, but it is important for Indigenous communities to build solidarity, especially to enable a small community to extend their influence when compliance with the law is delayed.

*Source:* Africa Regional Workshop on Indigenous Negotiations (2018)



## 10. GOOD AGREEMENTS

### Chapter summary

- A good agreement never gives up rights or settles for provisions of less significance than existing regulatory requirements. A bad agreement can be worse than none at all.
- Agreements have different names in different sectors.
- Key substantive provisions can obtain the maximum benefits for the community and minimize any costs it must bear.
- The chapter highlights typical features of any agreement, including definitions, the types of legal clauses as well as the professional advice that might be needed to design these parts.
- The choice of the right financial model depends on the community's capacity to bear risk and assessment of the economic structure of particular projects and of the markets in which they operate.
- A seven-dimension rating system for strong and weak agreements illustrates how agreements might be more specific and detailed in support of achieving good outcomes.
- Resources for understanding existing agreements.

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*Negotiations are successful for Indigenous Peoples when the resulting agreement reflects what the community wants and is fully implemented. Since Indigenous communities may not want the same things, successful negotiations can lead to agreements that are very different.*

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This chapter focuses on the structure and content of good agreements, with examples from different sectors. We discuss ways to avoid the pitfalls of weak agreements and to limit the project proponent using procedural requirements and project design options. Borrowing from analysis of agreements in the extractives sector (O'Faircheallaigh 2015), the chapter suggests how these measures might be used to assess impact and benefit sharing agreements in other sectors (natural resource management, REDD+ infrastructure, agriculture/land acquisition). The focus here is on collective or community-scale agreements that recognize the collective rights of Indigenous Peoples.

Provisions for agreements are constantly changing. This discussion outlines the issues covered by some IBAs and some approaches in dealing with them,

rather than suggesting a specific template that must be followed to obtain positive results. Not all scenarios are covered here, and the chapter includes references for further information.

### Types of agreements

There are a range of options in terms of the substantive components of agreements, especially in sectors other than extractives where fewer precedents may be available. Agreements can have features that are customized for the sectors and the of project proponents. The names and content of agreements in each sector may vary, however some of the central elements are universally important. Table 10.1 lists the typical agreements for each sector by their common names and suggest sources for further information on them.

**Table 10.1** Types of agreements (not exhaustive)

| Sector  | Name of agreement  | Examples and references  |
|---|--|--|
| Mining sector   | <ul style="list-style-type: none"> <li>• Impact and Benefit Sharing Agreement (IBA)</li> <li>• Resource Contract</li> <li>• Community Development Agreement (CDA)</li> </ul>   | <ul style="list-style-type: none"> <li>• <a href="https://www.atns.net.au/subjectmatter.asp?subjectmatterid=20">https://www.atns.net.au/subjectmatter.asp?subjectmatterid=20</a></li> <li>• <a href="http://www.cbern.ca/naskapi/e-library-project/impact-and-benefit-agreements-ibas/">http://www.cbern.ca/naskapi/e-library-project/impact-and-benefit-agreements-ibas/</a></li> <li>• <a href="https://resourcecontracts.org/">https://resourcecontracts.org/</a></li> <li>• <a href="#">EITI</a></li> </ul>  |
| Oil & Gas sector  | <ul style="list-style-type: none"> <li>• Production Sharing Agreement</li> <li>• Cash Transfer Program</li> <li>• Sovereign Wealth Fund</li> </ul>   | <ul style="list-style-type: none"> <li>• World Bank (2017) Oil, Gas and Mining Sourcebook</li> <li>• Natural Resource Governance Initiative (2019) National Oil Company Database<br/><a href="https://resourcegovernance.org/analysis-tools/publications/national-oil-company-database">https://resourcegovernance.org/analysis-tools/publications/national-oil-company-database</a></li> <li>• Extractive Industries Transparency Initiative (EITI)<br/><a href="https://eiti.org/">https://eiti.org/</a></li> <li>• Publish What you Pay <a href="https://www.pwyp.org/">https://www.pwyp.org/</a></li> <li>• Open Contracting Partnership <a href="https://www.open-contracting.org/">https://www.open-contracting.org/</a></li> </ul>  |
| REDD+ or Payments for Environmental Services program                        | <ul style="list-style-type: none"> <li>• Emissions Reduction Purchase Agreement (ERPA)</li> <li>• Benefit – Sharing Plan</li> <li>• Project Development Agreement (carbon and non-carbon)</li> <li>• Forest Management Contract</li> <li>• Conservation Agreement</li> </ul> | <ul style="list-style-type: none"> <li>• Forest Carbon Partnership Facility (FCPF) Carbon Fund (ERPA) General Conditions -<br/><a href="https://www.forestcarbonpartnership.org/erpa-general-conditions">https://www.forestcarbonpartnership.org/erpa-general-conditions</a></li> <li>• <a href="https://www.forestcarbonpartnership.org/carbon-fund-dashboard">https://www.forestcarbonpartnership.org/carbon-fund-dashboard</a></li> <li>• Verra – Voluntary Carbon Market Verified Project -<br/><a href="https://registry.verra.org/">https://registry.verra.org/</a></li> <li>• Green Climate Fund (GCF) – REDD+ Pilot Projects<br/><a href="https://www.greenclimate.fund/redd#redd-results-based-payments-pilot">https://www.greenclimate.fund/redd#redd-results-based-payments-pilot</a></li> <li>• Payments for Environmental Services</li> </ul> |
| Protected Areas   | <ul style="list-style-type: none"> <li>• Co-management or co-governance plan</li> <li>• Recognition and Settlement Agreement (Australia)</li> <li>• Forest management contract</li> </ul>  | <ul style="list-style-type: none"> <li>• IUCN World Database on Protected Areas -<br/><a href="https://www.iucn.org/theme/protected-areas/our-work/world-database-protected-areas">https://www.iucn.org/theme/protected-areas/our-work/world-database-protected-areas</a></li> <li>• <a href="https://www.niaa.gov.au/Indigenous-affairs/environment/Indigenous-protected-areas-ipas">https://www.niaa.gov.au/Indigenous-affairs/environment/Indigenous-protected-areas-ipas</a></li> </ul>  |
| Infrastructure (roads, hydropower, water & sanitation, energy transmission) | Loan contracts, often with Environmental and Social Safeguard Implementation Plans (i.e., resettlement plan; Indigenous Peoples plan, stakeholder  | <ul style="list-style-type: none"> <li>• MDB Project Databases:</li> <li>• World Bank - <a href="https://projects.worldbank.org/en/projects-operations/project-search">https://projects.worldbank.org/en/projects-operations/project-search</a></li> <li>• International Finance Corporation -<br/><a href="https://disclosures.ifc.org/#/enterpriseSearchResultsHome/*">https://disclosures.ifc.org/#/enterpriseSearchResultsHome/*</a></li> </ul>  |

|                               |   |   |
|-------------------------------|---|---|
|                               | engagement plan, gender action plan, etc.)<br><br>(Energy) Power purchase agreement         | <ul style="list-style-type: none"> <li>• InterAmerican Development Bank - <a href="https://www.iadb.org/en/projects">https://www.iadb.org/en/projects</a></li> <li>• EBRD - <a href="https://www.ebrd.com/project-finder">https://www.ebrd.com/project-finder</a></li> <li>• EIB – European Investment Bank - <a href="https://www.eib.org/en/projects/index.htm">https://www.eib.org/en/projects/index.htm</a></li> <li>• Asian Development Bank – <a href="https://www.adb.org/projects">https://www.adb.org/projects</a></li> <li>• African Development Bank - <a href="https://www.afdb.org/en/documents/projects-operations">https://www.afdb.org/en/documents/projects-operations</a></li> <li>• Asia Infrastructure Investment Bank - <a href="https://www.aiib.org/en/projects/approved/index.html">https://www.aiib.org/en/projects/approved/index.html</a></li> </ul> |
| Agriculture, Land Acquisition | <ul style="list-style-type: none"> <li>• Contract Farming Lease Agreement</li> </ul>        | <ul style="list-style-type: none"> <li>• UN FAO Legal Guide on Contract Farming <a href="https://www.unidroit.org/english/guides/2015contractfarming/cf-guide-2015-e.pdf">https://www.unidroit.org/english/guides/2015contractfarming/cf-guide-2015-e.pdf</a></li> <li>• <a href="https://www.unidroit.org/english/documents/2019/study80b/190601-alic-zero-draft.pdf">https://www.unidroit.org/english/documents/2019/study80b/190601-alic-zero-draft.pdf</a></li> <li>• FAO Contract Farming and the Law - <a href="http://www.fao.org/3/a-i7581e.pdf">http://www.fao.org/3/a-i7581e.pdf</a></li> <li>• ICCA <a href="https://www.iccaconsortium.org/?s=agreement">https://www.iccaconsortium.org/?s=agreement</a></li> <li>• Open Contracts <a href="https://openlandcontracts.org/">https://openlandcontracts.org/</a></li> </ul>   |
| All sectors                   | <ul style="list-style-type: none"> <li>• Free, Prior and Informed Consent (FPIC)</li> </ul> | <ul style="list-style-type: none"> <li>• UNDRIP</li> <li>• CI FPIC Guidelines</li> </ul>  |

Negotiators may need extensive knowledge in technical and substantive aspects of agreements and, in particular, to understand how to ensure that the *form* of an agreement increases the likelihood of its implementation and, if necessary, its enforcement. While outside experts may be needed to support Indigenous negotiators in some technical discussions, it is important to prevent the ‘technicalities’ of complex agreement documents becoming the preserve of professional consultants employed by Indigenous groups.

To maintain unity and broad support for the negotiation effort, negotiators should help community members understand why agreements take certain forms and have specific content to meet defined objectives. Negotiators should present varied and innovative approaches to benefit sharing

and impact avoidance or minimization to community members.

Columbia University’s Center on Sustainable Investment (CSI) provides an online collection of contracts negotiated between local communities, investors and host governments seeking to use their land and resources.<sup>24</sup>

### Basics of good agreements

**A good agreement never gives up rights.** Consent is a critical part of an agreement because it highlights what the Indigenous community promises to do, or not to do, in return for the benefits it will receive under an agreement. In practice, agreements have ranged from granting consent for specific, time-bound and conditional activities required for a particular project, to open-ended support for

<sup>24</sup> Available at [opencommunitycontracts.org](http://opencommunitycontracts.org)

anything a project proponent wants to do. Clauses requiring a Indigenous community not to oppose a project can seriously restrict the community's freedom of action. Providing unlimited support can limit a community's independence and ability to protect its interests, for example by preventing it from participating in environmental impact assessments or dealing with environmental groups that oppose a project.

Agreements do not replace the government's responsibility to fulfill the community's rights, such as their right to access to healthcare, housing, education and so on. Access to these essential services is a human right and cannot and should only be included in a negotiation when certain conditions are met that ensure such rights are not diminished. Some agreements avoid these risks by adding provisions that strengthen the same rights in several ways, either by improving and not replacing government services or providing communities greater control over government services.

Access to these rights should never be contingent upon the implementation of an agreement – if rights are included as a benefit in an agreement, and the community doesn't meet certain requirements of the agreement, the project proponent shouldn't be allowed to take away that access.

**Any agreement will consist of legal clauses. Legal assistance will be needed to support any negotiation.** Table 10.2 provides a list of the legal provisions often included in agreements. Some of these will be described in this chapter, and a fuller explanation of others can be found in the IBA Toolkit. After reviewing these, the negotiating team can use this table to discuss the relevance and importance of individual issues and provisions with the community.

**Agreement language should clearly and precisely spell out obligations.** Avoid loose terms such as “when technically or financially possible” or “if feasible” or “where reasonable.” If “slippery” words like these are suggested, the negotiating team

should push for more concrete and exact replacement language.

**Understand reference agreements.** The importance of a thorough researching of prior agreements relevant to a negotiation (by the same project proponent or in the same sector), as well as the requirements under government policy, cannot be overstated. The starting point for designing any new agreement is often linked to the following types of reference agreements, which may be included in the preamble to a new agreement:

- References to agreements previously held by the project proponent and the community;
- References to related processes, such as treaty or other land claims settlement negotiations, court cases, assessments or legal actions;
- References to government policies that underpin its commitments in the agreement;
- References to relevant international conventions or treaties of which the project proponent may be a signatory.

**Definitions of terms can have important implications for the future.** The way a project is described can enable or limit what a community may renegotiate in the future. For example, if new mineral discoveries are made in a mining project, or if a road or dam system is expanded, the terminology used in the original agreement may have an impact on what the community can renegotiate given these new scenarios. For this reason, communities should take careful note of the way terms are defined when drafting agreements. Examples of specific terms that should be carefully defined include:

- Timing: When will different phases of a project's activity take place?
- Production intensity: In what specific units will production be measured?
- Management plans: Who will determine the application of a production approach, including the technology used and the performance indicators?

- Duration: How long will the project last? This can typically be based on estimated reserves or carrying capacity.
- Anticipating future needs: What future needs might the project have, including future infrastructure or expanded land use development?

Terms like these might all be carefully defined, and if they change there may be scope for amendment or renegotiation. Communities should be careful that the language in the agreement confines the project to the scope they are comfortable with, so as to avoid the potential for project development beyond what is anticipated or desired.

### Common agreement components

#### **Dispute Resolution/Grievance Redress Mechanism.**

Any agreement should provide a clear procedure for how disputes will be dealt with and by whom. These measures should be set up early (before the final agreement is reached) and follow global best practice, ensuring any process for registering and addressing disputes is fair, accessible, transparent, accountable and efficient. Any Grievance Redress Mechanism (GRM) should meet national standards and involve alternatives when conflicts cannot be immediately resolved (escalation procedures). GRM independence means that the process will be objective and unbiased and will not privilege the interests of the company or government. It is important to recognize and incorporate existing traditional problem solving and dispute resolution practices within a GRM.

More information is now available on project-level GRM, much less is known about GRM performance (Kemp and Owen, 2017). Many project proponents misrepresent the absence of any reported or registered grievances as success, when often it indicates that the GRM may not be working well. Outreach and communication about the availability of a GRM and the public reporting of grievances registered and how these were addressed is key.

**Confidentiality Clauses.** Communities and project proponents may both have an interest in restricting the information contained in a negotiated agreement. Project proponents may want to prevent disclosure of agreement details. Likewise, disclosure beyond the community depends on multiple factors. For communities, consent generally requires that the final agreement is shared with all community members. It may also be inadvisable for Indigenous groups to accept broad confidentiality provisions in a negotiation protocol, as this may prevent mobilization of the media and of political allies during the negotiation process.

**Contract Law Obligations.** As a legally binding contract, certain clauses define and ensure the enforceability of an agreement. Common areas that are defined in this part of an agreement include Duration and Parties, Term, Assignment, Unforeseen Circumstances or Force Majeure, Notice, Change in Law, Waiver, Severability, Review, Amendment, Suspension or Termination of Operations, among others (see IBA Toolkit, 2015 pgs. 133-136 for more detail on some of these clauses).

**Table 10.2** Checklist of agreement legal provisions

| <b>Topic area</b>                                  | <b>Relevance to the community</b> |
|--|-----------------------------------|
| Background information, preamble or objectives     |                                   |
| Parties  |                                   |
| Definitions and interpretations                    |                                   |
| Definition of project area                         |                                   |
| Principles and goals                               |                                   |
| Consent and consultation                           |                                   |
| Independent legal advice                           |                                   |
| Liability for expenses                             |                                   |
| Commencement and expiration                        |                                   |
| Warranties and authorities and succession          |                                   |
| Dispute resolution                                 |                                   |
| Confidentiality                                    |                                   |
| Enforceability                                     |                                   |
| Assignment: sale or transfer of project or company |                                   |
| What happens if project does not proceed           |                                   |
| Unforeseen circumstances and force majeure         |                                   |
| Suspension of agreement or operations              |                                   |
| Notice   |                                   |
| Amendment  |                                   |
| Change in law                                      |                                   |
| Waiver   |                                   |
| Severability                                       |                                   |
| Indemnity  |                                   |
| Non-employment or relationship of parties          |                                   |
| Attorneys  |                                   |
| Counterparts                                       |                                   |
| Execution of agreement                             |                                   |
| Further action                                     |                                   |
| Review   |                                   |

*Adapted from Table 4.3, IBA Community Toolkit*

**Natural resource management sector.** Agreements in the natural resource management sector require careful assessment of potential costs and benefits. What makes a good agreement in the natural resource management sector may be determined less by existing legal frameworks as most are relatively new (payments for ecosystem services or environmental offset regulations) or have yet to be fully negotiated (Paris climate change agreement, Article 6). For more on agreements in this sector, see Chapter 11.

**Communication.** This section defines the rules for how the parties will talk to each other, including the frequency and timing of meetings, how meetings will be financed, how information will be shared (or not – confidentiality), and how records will be kept. Communication should reflect any preexisting consultation protocol.

**Community access to sacred sites and safety issues.** During the operation of a project or a natural resource management process, access to community land may be restricted. This section defines limits on community access. For example, a community may request an annual fishing expedition to an area that is otherwise restricted under the agreement, and this section establishes the rules under which this activity is carried out. Not all access requests may be authorized under the agreement, which is why a community-led impact assessment should identify issues that may prevent community access to valued natural resources.

### Financial payments

Usually a project proponent agrees to pay some of the profit from a project to the community. The rationale for payments to the community may need to be spelled out. Two common rationales include: 1) reimbursement for social, economic and other impacts caused by the project to the community and 2) economic return to the community from project-generated revenue as owners of the land.

Payments can take a variety of forms, including fixed payments to individuals or groups, royalties based on profits, royalties based on the value of production, royalties based on the volume of outputs, and equity interest. Good financial and accounting advice can help a community make the best choice of revenue-sharing model, in terms of assessing greatest benefit and risk and keeping an eye on the financial claims of the project proponent.

#### *Pre-production payments*

Payments may be made before production begins. Payment may be given in return for the community's consent to a project, such as signing an agreement with the investor. Or payment may be made as the project achieves specified milestones such as the grant of a mining lease or commencement of production. Such payments typically take the form of fixed monetary amounts, which can vary substantially depending on the size of the project and the bargaining power of the parties. In Australia, for example, pre-productions payments have varied in the last decade from as little as A\$50,000 for smaller mining projects to more than A\$10 million for a proposed multi-billion dollar Liquefied Natural Gas (LNG) project (O'Faircheallaigh 2021). Little risk or uncertainty is attached to such payments for the communities involved, as they occur even if the project fails to commence operations.

It is not unusual for projects to be cancelled or indefinitely delayed after a community has signed a benefits agreement. For example, the Aurukun bauxite deposit in far north Queensland was discovered by Pechiney in the 1970s, and has since been taken over by a succession of owners including Chalco (the Chinese state aluminum company) and Glencore. It is still undeveloped.

It is important for communities to obtain some benefit regardless of whether development proceeds because they incur significant costs in dealing with proposed projects. These include the human and financial resources committed to negotiating an IBA and more generally to dealing

with project proponents and government agencies; the negative cultural and environmental impacts of exploration activity; and the divisive social effects of proposed projects, with community members often taking conflicting views of a proposed development.

#### *Government royalty sharing*

Where there is a settled land claim that includes ownership of surface or subsurface resources, Indigenous Peoples may be entitled to royalties from either the project proponent or the government. Such payments may be specified in the IBA or separately through project payment and land management regimes. In Canada, modern land claim treaties usually set out a specific formula for revenue sharing tied to government revenues receipts, ranging from 7.5 to 50 percent.

#### *Model of financial payments*

There are a number of financial models to consider. They range from fixed lump-sum payments (low risk) to equity ownership in the project (high risk). The choice depends on careful consideration of the pros and cons for each particular context and the communities own circumstances related to risk aversion.

A community's risk profile will be affected by the way in which revenue from an IBA is or will be used and the variety of alternative revenue sources available to it. For example, a community that will rely on income from a project to pay for basic services in areas such as health, housing or education and has few alternative sources of income may be highly risk averse and focus on most reliable forms of benefit. This is especially so where maintenance of funding over several years (for instance for a scholarship program to help at-risk youth stay at school) is essential to the success of a program. On the other hand a community that has a diverse range of reliable income sources to meet its basic needs, for

instance an existing mine, as well as long-term agreements with government for funding of education and health services, may choose to focus on the less certain sources of income, which, if they eventuate, will yield a large return (O'Faircheallaigh 2021).

There is a recent trend to combine a number of these models in individual agreements since there are advantages and disadvantages associated with each model.<sup>25</sup>

**Subsoil resource rights.** Legal ownership of subsoil resource rights (minerals, hydrocarbons, or stored carbon) is an important factor for defining payment models. If these rights are not clear, benefit flows may be subject to future conflicts. Unsettled land claims further complicate this issue in many countries. Careful attention to ownership rights of subsoil resources is critical to ensure benefits are fair and not subject to corruption or legal uncertainty.

**Fixed cash payments.** This option usually provides a negotiated sum at defined periods for the duration of the agreement (e.g., annually). A significant disadvantage to these types of payments is that they do not adjust to the scale of the profit or production of a project. If a project turns out to be much more profitable than was anticipated or if the price of the commodity increases, there is no mechanism for receiving higher payments.

**Royalty-based on volume of output.** One alternative is to charge a fixed sum (e.g., dollars per unit) on each unit (mineral, kW of electricity, traffic volume, barrel of oil, number of axels of a vehicle using a road, tons of CO<sub>2</sub> emissions avoided) produced by a project. The (relative) predictability of output-based fixed payments has the advantage that it facilitates community planning, as long-term commitments can be made to developing infrastructure and

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<sup>25</sup> See IBA Community Toolkit, Table 4.4 page 146, which summarizes the advantages and disadvantages of each model.



services with a reasonable level of confidence that a steady income stream will be available to support them, given that payments do not fall even if mineral prices decline. Another advantage of this approach is that if the project proponent significantly increases production, the community receives more revenue. If future project expansion is likely, this type of payment ensures that benefits reflect changes over time. It is also worth noting that if no payments are made this is because no production is occurring, which in turn means that impacts on land and people are likely to be much less than if production was taking place.

The disadvantage of this approach is that while payments may adjust with inflation (changes in the local consumer price index, CPI), the community does not benefit if commodity prices rise more rapidly than CPI.

**Royalty-based on value of the output.** This type of payment is a percentage of the project revenue – or sales value of what is produced by the project. The payment amount is determined by multiplying the volume of output by the price received by the project proponent per unit sold. This is a riskier alternative because the base price of any product can change. Given that commodity prices can be unstable even over short periods of time, revenue can vary considerably. Falling commodity prices usually reflect a fall in demand which may result in cuts to the volume of minerals produced, further reducing revenue. Also, a project proponent can disguise the actual value of the output through its control over operating costs. Higher operating costs can reduce this type of payment, but lower operating costs may not increase it. (See Box 10.1.)

**Profit-based royalty payments.** Profits are the funds that remain after a project proponent has deducted, from its revenues, costs that include a range of operating and capital charges, including taxes. Royalties are often set as a percentage charge on profits.

### Box 10.1 Benefits based on project sales revenue

Revenue-based payments have the benefit that community income increases as the value of resources extracted from its territory rises, but of course if prices fall so does community income. The risks involved are well-illustrated by the experience of the Gagudju Association, which received revenue-based royalties from the Ranger uranium mine in Australia's Northern Territory. After a sharp decline in uranium prices and consequent cuts in Ranger's output in the early 1990s, the Association's income fell by 50 percent in one year. Gagudju had taken out bank loans to finance investments in tourism based on its projected royalty income, and when this collapsed it could not service its loans and was forced to sell its flagship hotel at a significant loss.

*Source: O'Faircheallaigh (2021)*

This type of project payment allows a community to benefit from rising prices and any cost savings that are made by project operators through increased efficiency. If the project reduces operating costs, profits can increase, and the community can share in those additional profits. However, not all projects are profitable right away or ever, and this method of payment could leave a community with a long wait before benefits begin to flow, and actual benefits could be less than a fixed payment. Moreover, some projects use accounting techniques to disguise true profitability and minimize royalty payments (O'Faircheallaigh 2021). For some examples for profit sharing arrangements, see Box 10.2.

**Equity.** Communities can take equity in a project, becoming its part owner and thereby entitled to the dividends that flow to shareholders. Dividends constitute the income flow to equity shareholders after portions of net profit has been used to repay the capital component of any project loans, to provide working capital, to build up reserves. Dividends constitute the less certain of all forms of community benefit because they constitute, in effect, the 'last call' on project revenues. Care must be taken in how an equity arrangement is structured.

For example, joint venture arrangements with the project developer may be designed so as to allow the latter to siphon off profits through management fees or interest charged on 'carried equity' until such time as it is repaid from revenues. However, where a project involves a significant degree of risk, which reduces the 'cost of entry' to the project for the original investors, and generates high profits, dividends can generate very substantial returns. These result both from the income stream paid to shareholders and from the possibility of selling a portion of the community's equity at a capital gain once the project's profitability has been established.

Communities can also benefit when equity shares can be sold at a higher price if the project does well. Provision may be made for Indigenous representation on the project proponent's board of directors when there is an equity interest in the project proponent. The risks are similar to profit sharing, in that dividends only get paid after a project becomes profitable. The advantage is that the community may gain a seat at the main decision-making table and gain valuable information about the sector, the project proponent and the project to strengthen its own interests.

The record of Indigenous equity participation in extractive projects is not very encouraging. This partly reflects the fact that it is usually only financially feasible for a community to negotiate a significant equity stake in small or medium companies which have one or two projects. Such companies are susceptible to takeover by larger rivals especially if they have brought, or are likely to bring, a new project to fruition. This occurred with both the companies in which Aboriginal traditional owners from the Kimberley region of Western Australia negotiated an equity stake in the late 2000s. There is an immediate benefit to Indigenous shareholders in a takeover situation as they receive payment for their equity, but they are denied the opportunity to secure an ongoing income flow from dividends. If a community has accepted a lower

royalty in return for equity, this constitutes a particularly negative outcome (O'Faircheallaigh 2021).

#### **Box 10.2 Risks of profit sharing**

Profit sharing can be highly dependent on the capacity to negotiate highly risky sector dynamics. Oil and gas industry profits are in decline and likely will continue to decrease for the foreseeable future. In 2016, the Government of Guyana signed an agreement with ExxonMobil, China National Offshore Oil Company and Hess ("ENH"), a consortium of oil and gas companies, to develop a large, offshore oil and gas concession. ENH and Guyana share "profit oil" on the basis of a 50-50 split. Profit oil equals the gross revenue from the sale of production volume (barrels of oil) minus recoverable costs and taxes. ENH negotiated guaranteed payment of annual recoverable costs are capped at 75% of revenues, which include all development costs, operating expenses, estimated cost of future abandonment, interest and parent company expenses. This means exploration costs in search of new discoveries in a completely separate part of the block can be recovered from production in another part of the block with revenue-producing oil wells. Guyana also agreed to pay the ENH national income taxes. The relatively low price of oil is another determinant in the amount of revenue Guyana receives. In the end, Guyana is left with only 14.5% of gross revenue and in theory only after the development costs are satisfied does its portion of gross revenue rise to 40%.

*Source:* Sanzillo, IEEFA (2020)

#### *Combined approaches that maximize benefit*

One approach, applied in IBAs for the Voisey's Bay nickel mine in Labrador, uses a "two-tier" system. The Aboriginal communities are guaranteed a set level of income each year, regardless of the nickel price. But if the nickel price goes above the originally forecasted level, the community receives additional payments in the form of a percentage royalty of nickel income earned by the mine's operator.

Another approach involves a "stepwise" royalty with higher royalty rates applying as prices climb higher. This approach is used for one gold mine in the

Kimberley region of Western Australia. For example, while the gold price is below \$USD 800 an ounce, the royalty might be 1 percent of revenues. When it is between \$800 and \$1,000 an ounce, the royalty might be 1.25 percent; if the price rises to between \$1,000 and \$1,250 an ounce, the royalty might be 1.5 percent of revenues, and so on.

A third approach, from a negotiation in Queensland, uses a formula to ensure that the royalty rate increases in line with every increase in the metal price, rather than waiting until the next “price step” is reached before an increase in the royalty rate applies.

#### *Deciding on the right financial model*

The negotiating team will need to consider the right financial model based on the community needs and the cost structure and feasibility of the project generating the benefits. The right financial model depends on the economic structure of particular projects and of the markets in which they operate. Another key issue is the community’s capacity to bear risk, or whether the community is willing or able to forgo short-term benefits for longer-term benefits.

For example, an Indigenous community that is in urgent need of resources to develop basic governing structures to support its engagement with the non-Indigenous world may place a premium on getting pre-production or output-based payments that are certain and arrive early in project life. This community may feel that the benefits potentially available from revenue- or profit-based royalties are unlikely to be realized, and that such payments may prove divisive, if the community does not first have in place robust governance structures to ensure accountability, transparency and effective financial management. Similarly, if a community is faced with an urgent need, for instance for funds to address an imminent health crisis, then relying on a dividend flow that may take many years to eventuate is not advisable. On the other hand it may make sense for a community already receiving income from an

operating project which is due to close after a decade to forego immediate or short-term income from pre-production or output-based payments from a new mine in return for substantial revenue- or profit-based royalties that will take some years to eventuate. The community’s ability to reduce a developer’s tax burden in the early years of project life may allow it to negotiate a substantial share of revenue and profits in later years (O’Faircheallaigh 2021).

This choice could affect the type of benefit-sharing arrangement. The negotiating team will need to do some research looking at price trends, demand, and supply curves for the commodity or project in question. It may also be useful to look at previous similar developments and run scenarios of how much wealth would have been created for the community given different royalty types.

#### *Use of financial payments*

The payment of large sums of money can itself cause negative impacts if people start to fight over their right to that money. It is important to think about how to use and share financial payments (for individual or community needs; short-term vs. long-term needs) before the agreement is signed. To help resolve these choices, some groups have chosen to address the issue within their agreements which can have two benefits. First, this requires that the issue of how payments will be used *must* be resolved before the agreement is signed and payments commence. Second, because amending an agreement usually requires the consent of the community, it ensures that community decisions on how to use payments cannot be subverted by individuals or groups in the community for short-term political benefit or personal gain.

**Payments to individuals** are the most simple to administer but have significant disadvantages, including requiring a definition of who beneficiaries of a project are, which runs the risk of leaving people out. Other disadvantages could include ineffective use or misuse of funds, and social conflict.

**Services and infrastructure.** Payments are sometimes used for local services or infrastructure. Using funds in this way often occurs because of deficiencies in services provided by government or because there is no funding at all for Indigenous priorities. There are risks in using payments to fund services like health and education that may replace the duty of the state. Funds for services should only be used to significantly improve and or complement acceptable levels of existing public services, to which communities are already entitled as a right.

**Business development.** Payments can be used as capital to establish business enterprises. These can be contracted by the project operator, employing Indigenous People, and can help create a new and real economy that is controlled by local business people.

**Portfolio investment.** For some communities, payments can be invested in ways that help ensure longer term returns on negotiated benefits. The Trust funds can be established that are managed by the community (or with assistance from external advisors) to provide for a steady stream of revenue over a period of time. The design of these funding mechanisms depends on the short or longer term time horizons of the community. Typically, such portfolio investments can include blue chip shares, real estate, and government bonds (all of which combine to reduce the level of risk and increase the level of financial return).

## Rating the quality of agreements

What is a good agreement? That depends on what matters most to a community. O’Faircheallaigh (2015) has categorized seven broad recurring categories within mining agreements that are of greatest interest to Indigenous Peoples. These seven

areas help to demonstrate the difference between good and bad agreements by rating the strength and weakness of provisions in existing agreements.<sup>26</sup> It is the aggregate outcome across all seven areas that will determine whether a negotiation is successful or not.

Here we summarize this rating system to suggest how it might be adapted to assess ongoing negotiations with the project proponent, specifically to identify and prioritize negotiation goals that fulfill the community’s objectives. Communities can take these rating criteria as a starting point for considering offers or defining similarly strong provisions for agreements in other sectors.

Each of the seven agreement areas is rated according to a numerical scale. A higher number tends to indicate a stronger overall provision with respect to the likely interests of Indigenous Peoples. However, scores can be negative (worse than the status quo) to reflect the risk of giving up rights. The purpose of this rating exercise is not only to inform comparison of strong and weak agreements, but also to provide ideas for informing specific components that might be considered a priority in an impact and benefit agreement.

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<sup>26</sup> This typology is explained in detail in Chapter 4 of O’Faircheallaigh (2015) *Negotiations in the Indigenous World*, based on detailed analysis of 45 agreements between Aboriginal peoples and mining companies in Australia. Here we borrow

from this analysis to suggest how the same categorization approach can be more widely applied to agreement provisions in other sectors. Permission to reprint sections from O’Faircheallaigh (2015) Chapter 4 was obtained from Routledge.

## Environmental management

Environmental management is about giving the community influence over the design and operation of the project (site selection, size, future growth). If the law is not strong enough to protect the environment from negative project impacts, an agreement can commit the project proponent to follow higher standards (industry best practices or those from their home country). These measures should address the entire project cycle, including requirements for decommissioning and rehabilitation. In some cases, agreements transfer the project's facilities or infrastructure (buildings, roads, ports, bridges) to the community after the project closes.

Good agreements provide a role, sometimes a powerful role, for Indigenous Peoples in defining, monitoring and managing environmental issues and impacts. Table 10.3 shows a scale for environmental management provisions between -1 (provisions that may limit Indigenous rights) to a maximum score of 6 for the strongest agreements, which provide Indigenous parties unilateral authority to deal with

environmental concerns or problems associated with a project. In many contexts, Indigenous People have existing rights related to environmental management: the right to object to a project, to get a different impact assessment, to sue for damages. If any of these existing rights is restricted, having an agreement can place Indigenous Peoples in a weaker position than not having an agreement.

Points at the lower end of the scale provide little effective Indigenous participation and would be considered 'poor' outcomes. The stronger provisions (4-6) all reflect different levels of involvement and decision-making roles for Indigenous parties in implementing the agreement's environmental management provisions. Unilateral action in the strongest provision can mean suspending project operations until a problem is addressed, which gives Indigenous Peoples the power to act independently to protect their lands if harm is being done. In good agreements, these responsibilities are not delegated to others, but carried out by the communities in partnership with the project proponent.

**Table 10.3** Scale for assessing agreement provisions for environmental management

|    |   |
|----|---|
| -1 | Provisions that limit Indigenous Peoples rights   |
| 0  | No provisions   |
| 1  | Project proponent commits to Indigenous parties to comply with environmental legislation  |
| 2  | Project proponent undertakes to consult with affected Indigenous People   |
| 3  | Indigenous parties have a right to access, and independently evaluate, information on environmental management systems and issues         |
| 4  | Indigenous parties may suggest ways of enhancing environmental management systems, and project operator must address their suggestions    |
| 5  | Joint decision making on some or all environmental management issues  |
| 6  | Indigenous parties <b>have the capacity to act unilaterally to deal</b> with environmental concerns or problems associated with a project |

## Land use, land access and land rights

For many Indigenous groups, the goal of a negotiated agreement is to have native title or ancestral title recognized by the project proponent. In some cases, an agreement facilitates the transfer to Indigenous Peoples of tenure to claimed or contested lands by the government as a party to the agreement, or as a consequence facilitated by the agreement. Agreements should never dilute existing collective land rights and, if possible, should strengthen those rights. Table 10.4 identifies a range

of weak agreements (-5 to 0) that surrender, extinguish, restrict, suspend or otherwise pose barriers for realization of existing or potential land rights for Indigenous Peoples. Stronger agreements (3-5) include provisions that recognize Indigenous rights, create pathways or commitments for securing collective tenure or confers those rights concretely. An agreement may contain multiple, somewhat conflicting, provisions regarding land. Careful analysis of the trade-offs of such provisions is needed to assess the aggregate outcome in this area.

**Table 10.4** Scale for assessing agreement provisions related to Indigenous rights or interests in land

|    |   |
|----|---|
| -5 | Provisions that have the general effect of extinguishing or requiring the surrender of existing rights or interests in the land   |
| -4 | Provisions that extinguish or require surrender of specific rights or interests in land (e.g., rights in minerals or in areas on which infrastructure is constructed)   |
| -3 | Provisions that define Indigenous rights or interests in a narrow or restricted manner (e.g., by defining native title rights more narrowly than might occur under the common law)  |
| -2 | The exercise of Indigenous rights or interests is suspended or restricted during project life   |
| -1 | There is no immediate effect on Indigenous rights or interests, but non-Indigenous parties reserve the right to oppose any future application for legal recognition of Indigenous title   |
| 0  | There are no provisions in relation to Indigenous rights and interests in the land  |
| 1  | While no recognition of Indigenous rights or interests is made or proposed, there is an explicit statement that the agreement is not intended to extinguish any rights or interests that do exist   |
| 2  | Project proponent/parties undertake not to oppose any future recognition of Indigenous title  |
| 3  | There is no recognition of Indigenous rights or interests under European or (equivalent) law, but Indigenous People are recognized as having rights or interests under Indigenous law and custom, recognition which may hold symbolic value for Indigenous People |
| 4  | Project proponent or government makes positive commitments in relation to a future recognition of rights or interests to Indigenous parties   |
| 5  | The agreement has the effect of recognizing or conferring Indigenous rights or interests in land, by effecting a transfer of interests in land from project proponent or government to the Indigenous parties   |

## Cultural heritage protection

The protection and intergenerational transmission of culture can be ensured through agreement measures to protect places, practices and knowledge that are important to Indigenous Peoples. To avoid or minimize any risks, whether from the intrusion of large number of outside workers or the encroachment or access to sacred places, strong social safeguard measures should be in place to protect cultural heritage. An agreement can limit where project staff are allowed to go on Indigenous territory (no-go areas), and under which community rules. Similarly, this part of an agreement can make clear that Indigenous Peoples will be able to go where they need to for food, ceremonies, hunting or gathering.

Table 10.5 compares weak agreements (1-2) that permit damage to sites of cultural importance and provide little to no power to Indigenous groups to prevent it. Limited mitigation measures are given

that do not change the course of project development. The strongest protections (4-5) involve a strict unqualified or clearly conditioned prohibition on damage to a cultural site.

Any of these provisions in Table 10.5, O’Faircheallaigh points out, are dependent on the authority and support provided to Indigenous Peoples to have their own knowledge of sacred sites recognized and applied to judgments of significant risk. Autonomy in exercising this authority to determine what is culturally significant also requires resources and protocols for protected this knowledge (determining what to share), including community-run patrols. This authority may even give Indigenous Peoples the power to temporarily stop project activities if significant areas are threatened. These support factors are critical for strengthening an Indigenous-led system for cultural heritage protection that ensures agreement provisions can be implemented in a meaningful way (see Box 10.3).

**Table 10.5** Scale for assessing agreement provisions related to protection of cultural heritage

|   |   |
|---|---|
| 1 | Sites or areas of significance may be damaged or destroyed by project development without any reference to Indigenous Peoples   |
| 2 | Sites or areas of significance may be damaged or destroyed, and Indigenous parties only have an opportunity to mitigate the impact of the damage, for example, by removing artifacts or conducting ceremonies                         |
| 3 | The project proponent must “minimize” damage, to the extent that this is consistent with commercial requirements, for example by rerouting infrastructure to avoid areas of significance  |
| 4 | The project proponent must avoid damage, except where to do so would make it impossible to proceed with the project (for instance where a major site is co-located with the project area to be developed or converted by the project) |
| 5 | There is an unqualified requirement to avoid damage   |

### Box 10.3 Juukan Gorge, Western Australia – Weak Agreements on Cultural Heritage Rights

In May 2020, Rio Tinto destroyed ancient rock shelters at the Juukan Gorge with dynamite while carrying out work to expand its iron ore operation in Australia's Pilbara region, in Western Australia. Juukan Gorge's shelters are a 46,000-year-old sacred site of the [Puutu Kunti Kurrama and Pinikura](#) Aboriginal people (PKKP), 75 times older than Machu Picchu. Artifacts included a 4,000-year-old plaited human hair with genetic links to the present-day traditional owners. The tragic loss triggered a federal inquiry and led to the dismissal of Rio's CEO and several other executives.

Only days later, BHP was planning to destroy forty Aboriginal cultural sites as part of an expansion of their own \$4.5 billion South Flank mine, also in the Pilbara. BHP would likely have gone ahead if the media had not disclosed a letter from the affected Banjima Native Title Holders that revealed that BHP Billiton was aware of traditional owner opposition to proposed destruction of culturally significant sites.

The PKKP and Banjima people both have benefit-sharing agreements with Rio Tinto and BHP respectively, that failed to protect this invaluable cultural heritage. The agreements allow for waiver that is provided for under Section 18 in Western Australia (WA) State Legislation that permits mining concession holders to destroy cultural heritage without consent of Aboriginal peoples. Other IBAs at similar mines have stronger protections for cultural heritage. The Argyle Diamond Mine agreement, also in Western Australia, has an IBA between Rio Tinto and the Kimberly Land Council, which includes a clause that any cultural heritage waiver requested by the company requires the consent of the Traditional Owners.

The main problem in both cases, among many others, is the inadequacy of state and federal legislation in protecting cultural heritage. **Weak agreements** also contributed to damage to sites of cultural importance by providing little to no power to Indigenous groups to prevent damage. The **strongest agreements** involve a strict unqualified or clearly conditioned prohibition on damage to a cultural site. Strong provisions such as these are necessary to protect and ensure intergenerational transmission of culture rooted in places, practices and knowledge that are important to Indigenous Peoples. To avoid or minimize risks, whether from the intrusion of a large number of outside workers or the encroachment or access to sacred places, strong social safeguards measures should be in place to protect cultural heritage.

Good agreements also acknowledge authority and provide support to Indigenous Peoples to have their own knowledge of sacred sites recognized and applied to judgments of significant risk. Autonomy in exercising this authority to determine what is culturally significant also requires resources and protocols for protecting this knowledge (determining what to share), including community-run patrols. This authority may even give Indigenous peoples the power to temporarily stop project activities if significant areas are threatened. These support factors are critical for strengthening an Indigenous-led system for cultural heritage protection that ensures agreement provisions can be implemented in a meaningful way.

*Source:* Australia Parliament (2020) Inquiry into the destruction of 46,000-year-old caves at the Juukan Gorge in the Pilbara region of Western Australia.



## Employment and training

Depending on the type of investment, employment of community members in jobs created by the project can be a significant benefit. Project proponents will have to plan for a workforce, so after careful assessment of the project's likely employment needs, jobs and training should be a key demand of communities and should be clearly provided by project proponents in negotiated agreements. Extractives sector projects generally create fewer new jobs, but tend to pay well above the national average wage. Indigenous employment in higher-paying jobs can help develop skills and support local service and retail jobs indirectly. However, Indigenous Peoples face numerous barriers to achieving a share of employment in projects due to several factors:

- Lack of skills and experience among Indigenous Peoples, particularly with respect to senior positions, given the absence of opportunity to acquire or develop those skills in the local labor market
- Lack of training opportunities
- Racism toward Indigenous Peoples by project proponent officials
- Alienation, loneliness and cultural isolation in work that may be far from the community and may conflict with customary practices, contributing to Indigenous Peoples not finishing training programs
- Unwillingness among Indigenous Peoples to transition from traditional livelihood activities to project related employment

Evidence suggests that general commitments by project proponents to maximize opportunities for Indigenous employment tend to be ineffective unless commitments are supported by specific initiatives and resources directed at overcoming these barriers. Good agreements typically include a labor force plan with milestones in the form of targets such as favoring the hire of or explicitly hiring community members, early notice commitments, training programs. Indigenous community members

should be paid at the same rate as employees brought in from outside the community. Table 10.6 rates employment and training provisions as stronger if they include elements to address specific barriers. Weak agreements include no provisions, while stronger ones include 5 or 6.

In the Voisey's Bay agreement, hiring preference is given first to members of the Labrador Inuit Association and the Innu Nation residing in the two communities closest to the project, then to residents of other Inuit or Innu communities, then Inuit or Innu residing elsewhere in Labrador, and finally Inuit or Innu residing in Newfoundland.

Rolling targets involve increasing Indigenous employment and training over time, creating incentives for meeting these targets, and providing automatic adjustment mechanisms if they are not met. Targets can be evaluated and reset, for example every three years. Failure to achieve the goal can require the project proponent to progressively increase spending on employment and training programs beyond a base level specified in the agreement.

*Measures for employment of women.* Indigenous women face additional barriers when it comes to project employment. There can be strong stigmas against employment of women in non-traditional jobs. Sexist attitudes of non-Indigenous and Indigenous men can cause women to feel unwelcome and make it difficult for them to engage in project-related work. Where sites are remote, women can also have a very hard time securing childcare. As a result, there may need to be specific measures in place to guarantee that female workers will be able to access to jobs. These measures can include:

- Employment targets for Indigenous women, especially in non-traditional jobs;
- Specific training initiatives designed for women;
- Measures to ensure the security and safety of women in work camps;

- Gender sensitivity training and anti-harassment policies;
- Reporting requirements on employment and training by gender, particularly for Indigenous women;
- Provisions for childcare and flexibility in hours to accommodate family needs (e.g., medical and dentist appointments, sick children);
- Specific training and scholarships to facilitate entry of women into areas dominated by men;
- Gender-based analysis during environmental and social impact assessments;

**Table 10.6** Scale for assessing agreement provisions for employment and training

|   |   |
|---|---|
| 1 | General vague commitment to maximize opportunities for employment and training  |
| 2 | Specified resources are committed to E&T (\$ targets or number of apprenticeships or trainings)   |
| 3 | Concrete goals are specified for E&T, for specific and rising proportions of Indigenous employees, plus sanctions and incentives are created for achievement or non-achievement of these goals.   |
| 4 | An explicit statement of preference is made in favor of Indigenous employment for those who are suitably qualified or capable of becoming so, and resources are committed to ensuring that such people (both men and women) are made aware of employment opportunities.   |
| 5 | An explicit development component is included, by setting out a staged progression through levels of skill and responsibility for Indigenous employees and trainees, with specific targets and support for women.   |
| 6 | Measures are required to make the workplace conducive to recruitment and retention of Indigenous workers. These might include cross-cultural awareness training for non-Indigenous employees and supervisors; gender sensitivity training including workplace safety for all; adjustment to rosters or rotation schedules to acknowledge cultural and household obligations, initiatives to retain trainees and their families. |

*Adapted from O’Faircheallaigh (2015)*

## Business development

Most Indigenous communities and enterprises face significant constraints in pursuing business opportunities created by project development. This can be result from a lack of relevant skills and the way that contracts are bid that leave Indigenous businesses at a competitive disadvantage. Good agreements level the playing field by providing opportunities for Indigenous communities to provide goods and services to the project. This could

include giving preferential access to contracts from Indigenous businesses to provide food or other materials and services to the project. The project should list in advance what will be needed or purchased (a procurement plan), so that communities can have time to build the skills that are needed to take advantage of these business opportunities. Table 10.7 lists the possible provisions that would separate weak from strong agreements in terms of commitments to business development.

**Table 10.7** Scale for assessing agreement provisions for Indigenous business development

|   |  |
|---|--|
| 1 | General commitment is made by the project proponent to promote Indigenous business opportunities   |
| 2 | Initiatives designed to minimize transaction costs for Indigenous businesses; for example, by providing information on upcoming contracts in a form and within a time frame that facilitates tendering; ‘unbundling’ large contracts into smaller contracts that are more easily managed by Indigenous businesses; offering contracts to Indigenous businesses on a ‘cost plus margin’ basis, as an alternative to competitive tenders.  |
| 3 | Initiatives designed to overcome scarcity of relevant expertise; for example, giving Indigenous enterprises access to the business expertise of staff employed by the project proponent; funding Indigenous People to undertake business management training, possibly by providing them with preferential access to relevant public programs; providing expertise through joint ventures between the project proponent and Indigenous businesses during their start-up phase. |
| 4 | Initiatives designed to overcome scarcity of business capital, for example by providing ‘bankable’ long-term contracts to Indigenous enterprises to assist them in obtaining finance from commercial lenders; giving Indigenous businesses preferential access to government start-up loans for new businesses; providing expertise through joint ventures between the project proponent and Indigenous businesses during their start-up phase.                                |
| 5 | Initiatives designed to overcome disadvantages of Indigenous enterprises relative to large well-established non-Indigenous businesses or NGOs, for example, a preference clause for competitive Indigenous businesses; specification of a margin in favor of Indigenous businesses in assessing tenders (e.g., an Indigenous business tendering at no more than 10% above the lowest bid is awarded the contract).   |

### Agreement implementation measures

In Chapter 12, we discuss in detail the issues related to effective implementation of agreements, but concerns and challenges related to implementation should be part of the negotiation itself. Communities must consider and negotiate for enforcement of agreements in advance of implementation. Measures to consider can include ground rules for communication, financial instruments to incentivize or penalize non-compliance, legal clauses, grievance mechanisms, and anticipation of changes in the external context.

Gibson and O’Faircheallaigh (2015) identify eight factors internal to agreements that are known to contribute to their successful implementation, and consequently the effectiveness of an IBA:

- clear goals
- institutional structures for implementation
- clear allocation of responsibilities
- adequate resources
- penalties and incentives for compliance
- monitoring
- review mechanisms
- capacity for amendment

Table 10.8 ranks provisions for ensuring agreement implementation. Weak agreements make few commitments beyond a financial or human resource allocation to general implementation. Stronger provisions (4-5) clarify specific responsibilities and resources for Indigenous Peoples to participate directly in the monitoring of implementation and decide whether commitments have been met.

**Table 10.8** Scale for assessing agreement for implementation-related provisions

|   |   |
|---|---|
| 1 | Allocation of human and financial resources specifically to the task of implementation  |
| 2 | Creation of structures (such as monitoring and management committees) whose primary purpose is implementation of agreements   |
| 3 | Establishment of processes that require senior managers in each signatory organization to focus on implementation on a systematic and regular basis   |
| 4 | Clear and explicit statements of each other’s obligations, with specific incentives for parties to fulfill these obligations and/or credible and appropriate sanctions or penalties for non-interference                          |
| 5 | Regular and systematic monitoring of relevant activities and initiatives to provide reliable information on the extent of implementation or non-implementation  |
| 6 | Periodic and adequately resourced review processes to establish whether specific measures are creating the outcomes anticipated by the parties and to address implementation failures, where necessary by amendment of agreements |

Figure 7 illustrates how these scores aggregate for specific “good” agreements in the Australian mining sector. The high scores for multiple dimensions of an agreement show that such commitments have been won in practice by effective negotiations and that,

typically, if an agreement is strong in one or two areas, it tends to be strong (or weak) across the board in all areas. In that sense, there may be a lower than expected tradeoff between social and environmental goals.

|     | Legis-<br>lation | Environ-<br>-ment | Employ<br>&<br>Train'g | \$       | Cul. Her.<br>Protec-<br>tion | Busi-<br>ness<br>Develop | Imple-<br>ment |
|-----|------------------|-------------------|------------------------|----------|------------------------------|--------------------------|----------------|
| 34. | ALRA             | 4                 | 4                      | 3.05%    | 5                            | 4                        | 5              |
| 35. | QMRA             | 4                 | 5                      | 2.5%     | 3                            | 3                        | 3              |
| 36. | Policy           | 4                 | 3                      | 2%       | 3                            | 4                        | 5              |
| 37. | Policy           | 4                 | 6                      | 2.25%    | 5                            | 4                        | 2              |
| 38. | NTA              | 4                 | 5                      | 0.4%     | 4/5                          | 4                        | 2/3            |
| 39. | NTA              | 4                 | 4                      | 1.5%-2%  | 4                            | 5                        | 5              |
|     |                  |                   |                        |          |                              |                          |                |
| 40. | ALRA             | 5                 | 3                      | 2%       | 3                            | 3                        | 2              |
| 41. | ALRA             | 5                 | 5                      | 3.05%    | 5                            | 4                        | 4              |
| 42. | QMRA             | 5                 | 6                      | 3%       | 5                            | 0                        | 2              |
| 43. | NTA              | 5                 | 4                      | 0.5%     | 3/4                          | 4                        | 4              |
| 44. | NTA              | 5                 | 5                      | 2%       | 5                            | 3                        | 2              |
| 45. | NTA              | 6                 | 5                      | 1.6-2.5% | 4/5                          | 4                        | 3              |

Figure 7 Ratings of the top agreements between Aboriginal peoples and mining companies in Australia (Source: O’Faircheallaigh 2017)

# 11. NATURAL RESOURCE MANAGEMENT SECTOR AGREEMENTS

## Chapter summary

- This chapter reviews the specific forms of agreements in the natural resource sector, including protected area agreements, payments for environmental services and REDD+ (also called Natural Climate Solutions, NCS or Emissions Reductions, ER) Benefit-Sharing Plans, among others.
- These agreements have some similarities, but exhibit important differences from IBAs.
- It is important to understand each of the core ER project costs and how these are calculated. Communities have a right to know the details of project costs, including the underlying uncertainty about the future that influences cost assumptions.
- The price of carbon that is captured by forest, mangroves and soil is currently undervalued. As long as carbon prices remain low, many ER agreements may not deliver the benefits that should flow to communities for sustainable forest management. Communities should know when to walk away from unrealistic benefit-sharing schemes.
- Payment models from IBAs in the extractives sector can be applied to ER project agreements.
- A good agreement is when there are fewer layers between the donor and the community. This highlights the importance of assessing which jobs or services funded under an ER project belong in the community.

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*Negotiating agreements about natural resource management is often controversial within Indigenous communities and speaks to the complex cultural relations that people have with resources. The proposal to buy and sell carbon credits requires careful explanation and assessment of the costs and benefits within the community to determine if this approach is culturally appropriate or acceptable.*

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This chapter discusses agreements in the natural resource management (NRM) sector with a focus on carbon project agreements. These are agreements that involve land, water, air and the essential services that they provide.

Nature is capable of providing over one-third of the solution to climate change (see Figure 8). “Natural Climate Solutions” (NCS) fall into three major categories: a) protecting existing forests; b) restoring deforested and degraded forests; c) improving management of working lands (the largest and least understood dimension of NCS).

More than 200,000 terrestrial protected areas and 18,000 marine protected areas cover over 20% of the planet’s lands and waters.<sup>27</sup> Worldwide there are nearly 500 local projects to reforest or reduce emissions from deforestation and forest degradation (REDD+), with many countries developing larger national REDD+ programs as climate negotiators define the rules for global trading of carbon credits.<sup>28</sup>

Delivering on nature’s contribution to halting climate change is not possible without the cooperation of Indigenous Peoples. Ownership rights to a large

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<sup>27</sup> IUCN 2021

<sup>28</sup> Wunder et al. 2020

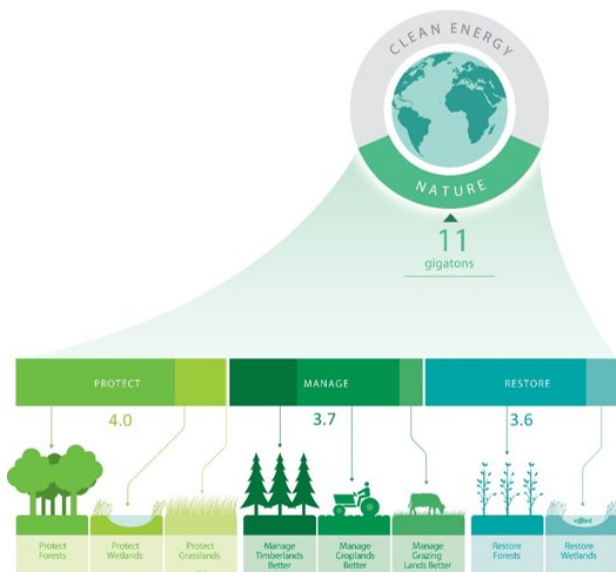


Figure 8 Nature's contribution to reversing climate change (Source: Griscom et al. 2017, Griscom et al. 2020)

share of the world's tropical forests, peatlands, mangroves, coastal waters and oceans are in the hands of Indigenous Peoples. Much of the global carbon and biodiversity and other natural capital providing ecosystem services are found in these areas. Like any valued item, investors are approaching Indigenous Peoples to negotiate agreements to buy the carbon, protect the water, and preserve biodiversity.

Many Indigenous People view their relationship with nature as a responsibility that requires no payment. For example, upstream communities are expected to ensure that water sources and water ways are kept clean and free of obstructions so that communities downstream can have clean water. This is viewed as a responsibility with no expectation of being paid. It is part of the obligation of the community that arises from the fact that they have the privilege of "hosting" the water source.

The explanation of monetary or non-monetary benefits that are based on the limited access to natural resources or the buying and selling of carbon or water rights can be foreign and controversial concepts. For some Indigenous Peoples, the notion of benefitting financially from protecting or selling nature's value may conflict with basic and deeply

held principles that define identity and the complex and reciprocal bond between the community and nature – a bond that has ensured the enduring conservation of their lands, territories and waters.

As in the prior chapters, any proposed negotiation of an agreement involving natural resources calls for careful analysis by the community and informed internal dialogue. Additionally, the perspectives of surrounding communities need to be sought as air and water are shared by all, unlike mineral resources. For this reason, collective benefits (rather than individual payments) are most consistent with the shared use of natural resources.

As with all chapters in this volume, attention to natural resource agreements is intended to inform any community decision to negotiate or not, rather than to promote a particular outcome.

With these considerations in mind, the chapter focuses on the differences and similarities between agreements in the natural resources and extractive sectors. Emission Reduction (ER) agreements and REDD+ project benefit-sharing agreements are used interchangeably to refer to project-level agreements. Protected area agreements, conservation agreements and PES schemes share important similarities with ER initiatives. Elements of good ER agreements are therefore more widely applicable across the natural resource sector.

When considering a good agreement in the natural resource sector, some important questions to consider include:

- What are the full range of costs and who pays for these costs?
- What are the full range of benefits, and who is entitled to share in these benefits?
- How is the ER agreement between investor and community related to other agreements needed to buy/sell carbon credits?

- What level of certainty is there about the estimates of costs and benefits?
- Do these estimates seem fair?
- What are the alternatives to a proposed cost and benefit sharing arrangement?

## Comparing ER agreements and IBAs

This chapter provides a preliminary comparison of IBAs in the extractives sector with emerging ER agreements for REDD+ projects or programs, with parallels for Payment for Environmental Services (PES), protected area agreements and ecotourism contracts.<sup>29</sup> Given the evolution of natural resource management sector agreements, the focus here is mostly on possible applications of compensation models. This requires careful assessment of potential costs and benefits. Other aspects of good agreements covered in Chapter 10 also apply.

What makes a good agreement in the NRM sector may be determined less by existing legal frameworks, as most are relatively new (payments for ecosystem services or environmental offset regulations, ecotourism contracts). The final form of many of these agreements will depend on yet-to-be fully negotiated climate change rules (Paris Agreement, Article 6, which will define rules for trading carbon credits for Reducing Emissions through Deforestation and Degradation, or REDD+). A carbon credit is a permit that allows the actor purchasing the credit, often a polluting company or government, to hold it to offset emission of a certain amount of carbon dioxide or other greenhouse gas. One credit permits the emission of one ton of carbon dioxide (see Box 11.1).

Estimating the benefits and costs of fair ER agreements is complicated by the absence of rules

### Box 11.1 Emerging rules for carbon credit trading

Benefit sharing in national carbon Emission Reduction Purchase Agreements (ERPAs) is an emerging area for Indigenous negotiations. ERPAs are contracts between governments and the buyers of carbon credits to compensate stakeholders for activities that contribute to emissions reductions. Contracts can range from \$USD 20-100 million. ERPAs set the stage for larger carbon trading transactions after the Paris Climate Agreement becomes operational and countries seek to fulfill their commitments. Gaps in knowledge about good practice design of benefit-sharing programs prevent Indigenous Peoples from competing equally with other actors for benefits from carbon benefit sales. The ratio of benefits allocated to REDD+ stakeholders across scales (national, subnational, community) varies significantly across and within REDD+ countries.

In the Democratic Republic of Congo, the forests of Mai-Ndombe are rich in precious wood and home to threatened species, like the bonobo, as well as 70,000 Indigenous Batwa (Pygmies) who depend on forest resources but often lack secure land rights. The Mai-Ndombe holds significant reserves of diamond, oil, nickel, uranium and other minerals and is threatened by logging.

With World Bank support, the DRC has negotiated of a national ERPA to protect the Mai-Ndombe, which includes a benefit sharing plan that provides payments received for ERs purchases from Mai Ndombe. The ERPA includes a benefit sharing plan that requires 2% of all resources from purchases of carbon credits will go to Indigenous peoples. In case of a 100% performance scenario and an ERPA value of US\$50 million (11 million tCO<sub>2</sub> \* US\$ 5/tCO<sub>2</sub>), the 2% incentive amount would be US\$ 1.1 million over 5 years. This allocation represents between US\$ 0.3 to 2.2 million over 5 years depending on the Program's performance. The private sector, by comparison, takes 30% of negotiated benefits a despite having possibly contribute more to DRC's overall emissions.

*Source:* World Bank Forest Carbon Partnership Facility, Draft ERPA Benefit-Sharing Plan for Mai-Ndombe

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<sup>29</sup> Based on analysis by C. O'Faircheallaigh (2021) Revenue-sharing arrangements between Indigenous Peoples and extractive companies:

Lessons for profit sharing in the context of REDD+. A Discussion Paper for Conservation International.



governing commercial trading of carbon credits. As a result, the costs of carbon emissions are currently undervalued. Although carbon credits typically sell for less than US\$10/ton, the U.S. government estimates that carbon emissions should cost US\$51/ton,<sup>30</sup> and climate scientists argue that the price should be much higher to truly reflect the costs of climate change to society.<sup>31</sup> A key message of this chapter is that unless the price of carbon reflects the true value, most ER agreements unfairly diminish the true benefits that should flow to communities for sustainable forest management. Communities may have other reasons to value ER agreements that are confined to a low carbon price, but should be aware of the reduced amount and range of possible financial benefits that come with such agreements.

One similarity between IBAs and ER Agreements is the justification of pre-payments prior to an agreement. In extractive industries, pre-production payments result from the fact that while impacts begin as soon as a project is proposed, a significant proportion of projects do not move forward in implementation or survive for long.

The same points may apply to Emission Reduction initiatives. There is often a need to develop the capacity of individuals and communities to undertake the work required to achieve and maintain emission reductions, to establish benefit management systems, and to create incentives for the behaviors that will eventually bring in revenue from sale of carbon credits or by demonstrating progress towards conservation goals. REDD+ agreements are increasingly justifying pre-payments as recognition of legacy investments by Indigenous

Peoples to keep the forest standing prior to the project.

In extractive industry agreements, pre-production payments do not constitute an advance that must be deducted from later production- or revenue-based agreements, as is the case in some REDD+ agreements. They are rather stand-alone payments that have their own justification in compensating for the impacts of pre-production activities and the value to the developer of community support and cooperation in bringing a project to fruition. A similar recognition of these pre-project costs may be justified for ER agreements.

A second similarity is that participants in ER initiatives face uncertainty and risk in the same way as communities signing IBAs with extractive firms. All share uncertainty regarding future prices in international markets, for minerals in one case, for carbon credits in the other. Participants in Emission Reduction initiatives face additional risks, including the withdrawal of funding by governments, non-government organizations or investors, or the action or inaction of other stakeholders who influence conservation outcomes and emission levels.<sup>32</sup>

One key difference between Emission Reduction agreements and IBAs in other sectors is the lack of clarity in the former that communities participating in REDD+ programs should receive net benefits beyond the costs involved in the operation of a program and in sustaining the resource that supports emissions reductions. IBAs in the extractives sector are more clear on the need to deliver net benefits.

An important distinction in this regard is how benefits are defined in ER versus EI agreements. For

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<sup>30</sup> <https://www.scientificamerican.com/article/cost-of-carbon-pollution-pegged-at-51-a-ton/>

<sup>31</sup> The average traded price for a carbon credit in 2018 was about \$3 per ton of CO<sub>2</sub>. Ecosystem Marketplace (2019) Financing Emission Reductions for the Future: State of Voluntary Carbon Market for 2019.

<https://app.hubspot.com/documents/3298623/view/63001900?accessId=eb4b1a>

<sup>32</sup> The 13 case studies used by the World Bank in its 2019 study *Benefit Sharing at Scale* provide numerous illustrations of the impact of all these sources of risk and uncertainty.

extractives IBAs, wages or contracts that reimburse services provided by communities are not considered as benefits, but rather an exchange of fees for services. Because these costs must be invested in the project for it to function and are not available to the community to allocate as it wishes, these transactions are not treated strictly in IBAs as benefits. Surplus revenue (after costs are covered) that is shared with the community as a part of negotiated arrangement is considered as a benefit.

This is not the case in many ER projects, where monetary and non-monetary benefits can include wages for farm or forestry labor, equipment, inputs and fees for services that are necessary for the community to do the work to maintain the carbon stock. This distinction is important for strategic approaches to negotiation of benefits within ER initiatives<sup>33</sup>, as the discussion of financial models illustrates later in this chapter.

A second key difference involves recognition that the community, rather than the investor, is producing the “commodity” for sale. Hence the *behavior* of communities is a primary focus of Emission Reduction initiatives.<sup>34</sup> Reduction of carbon dioxide emissions requires the recipients of benefits to, for example, continue existing management practices that preserve forests, or change the way in which they use forest resources, practice agriculture or manage land. IBAs for extractive projects generally require provision of consent at a single point in time and do not require changes in behavior thereafter. Benefits in IBAs are not offered as an incentive for recipients to maintain existing behavior or change future behavior, but as a reward or compensation for allowing an extractive company to undertake specified activities that affect communities.

In Emission Reduction initiatives, a key issue is to monitor and verify that the desired behavioral

change has occurred and is having the expected effect. Payment of benefits is largely based on observed outcomes at the community level, which must be verified. Because the ER results require the coordinated action or inaction of multiple parties, verification of community compliance with the terms of the agreement is complex.

Matters in extractive industry IBAs are much simpler. Typically, the only requirement is for the beneficiary community to refrain from blocking development or disrupting operations, and to cooperate with the project developer in obtaining relevant regulatory approvals. The beneficiary community is the only relevant actor and it is a simple matter to verify commitments under the IBA.

Uncertainty related to attribution of outcomes may also be a difference between ER agreements and IBAs, which emphasizes the quality of monitoring and enforcement provisions. The potential displacement of emissions outside of a relatively small program area, and the methods used to monitor results across the jurisdiction, make it difficult to attribute quantified emission reductions to individual land units.<sup>35</sup> In an extractive industry IBA the attribution of outcomes is simple, as the identity of the Indigenous entity giving its consent is well defined and transparent.

### Estimating costs and benefits of ER agreements

At the project level, corporate investors may offset their emissions by purchasing carbon credits that are certified and sold by communities. Certification is based on community compliance with contractual land-use obligations that are monitored and reported by independent intermediaries. Benefits are performance-based, linked to commitments outlined in a conservation agreement and/or

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<sup>33</sup> O’Faircheallaigh 2021

<sup>34</sup> WWF 2021, p. 32

<sup>35</sup> World Bank, 2019

requiring an investment plan for the use of monetary benefits received.

Investors in carbon credits are careful to consider the future purchase price when entering into agreements negotiating the purchase of carbon credits with governments or communities. A community should consider how future trends will affect the value of their carbon. In addition, there are often several intermediaries that get paid for services related to the sale of these credits.

A fundamental problem estimating operating costs for REDD+ activities is that these costs vary widely in their methodology and assumptions. Also the economic, political and social contexts in which REDD+ activities occur are highly diverse.<sup>36</sup> About half of the emissions covered by carbon pricing initiatives are still priced below US\$10/tCO<sub>2</sub>e.<sup>37</sup> For many projects, the public sector has already absorbed significant cost in establishing them, so true costs are underestimated. Whether there is significant surplus available for a community to share in, or none at all, often depends on the selling price for carbon credits. At prices below \$10/ton, there is often little surplus revenue to share.

Excluding what might be considered monetary or non-monetary benefits, the operating costs for an ER project can be as much as 50% of the value of the carbon credit revenue (see Table 11.1).<sup>38</sup> The size and location of a REDD+ project can influence the costs significantly. Smaller and more remote projects tend to have higher administrative costs.

Also, we are focusing here on ER project costs and benefits, rather than ER programs (which may cover many ER projects). While the cost structure for projects and programs is similar, the management of ER programs has unique institutional costs that we are not addressing here.<sup>39</sup>

For most ER agreements, the community must have accurate information about all aspects of the current and projected future value of the carbon price to assess whether a benefit-sharing agreement is favorable to them.<sup>40</sup>

This section on the typical costs of an ER projects is intended to demystify what is often not well explained or justified to communities when consent is requested by a project proponent. It is important to understand each of the core ER project costs and to be able to question how these were calculated. Communities have a right to know the details of project costs, including the underlying uncertainty about the future that influences these cost assumptions. Knowledge of the costs of these activities may encourage or strengthen community demands to carry out some or many of these tasks themselves, thereby increasing their share of the overall carbon revenue. Only then can the fairness of these costs when compared to the proposed benefits be properly assessed and FPIC be satisfied.

Typical ER project costs are summarized in Table 11.1, which separates typical ER project expenses into four categories.<sup>41</sup>

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<sup>36</sup> See for example Conservation International 2019; Luttrell et al. 2018; Nantongo and Vatn 2019; Olsen and Bishop 2009

<sup>37</sup> World Bank 2019

<sup>38</sup> This figure includes all operating costs except ER monetary and non-monetary benefits as REDD+ proponents define them (jobs, training, inputs).

<sup>39</sup> Institutional costs can include i) developing policies and regulations for a REDD+ framework; ii) institutional and/or legal reforms; iii) strengthening land tenure (e.g., via reform); and iv) building an enabling policy environment. This includes expenditures associated with training, research, policy design,

legal and regulatory processes, law enforcement as well as national stakeholder consultations and decision making. These are typically costs incurred by government to ensure an enabling legal and regulatory environment, address governance and reduce unregulated and/or illegal forest use.

<sup>40</sup> This is particularly true for agreements that have profit sharing payment models, see next section on choosing the right financial model.

<sup>41</sup> These cost ranges are broad estimates based on actual REDD+ project cost structures and the REDD+ literature. See Merger et al., 2012; FCPF 2016;

**Table 11.1** Standard costs of an emission reduction project

| ER project development costs   | Subcategories   | Cost range <sup>42</sup> |
|--|---|--------------------------|
| Contingency (%)  | Incentives, penalties, insurance  |                          |
| <b>PROJECT ESTABLISHMENT</b>   |   | 1-10%                    |
| <ul style="list-style-type: none"> <li>Stakeholder Consultation Process;</li> <li>Feasibility studies &amp; Technical Analysis;</li> <li>Project safeguards</li> <li>Methodology Development;</li> <li>PDD development;</li> <li>Validation &amp; Registration;</li> <li>Carbon, Biodiversity and E&amp;S Management, Monitoring Plans;</li> <li>Communication Plans;</li> <li>Early Action Pre-payments;</li> </ul> | Stakeholder engagement, surveys, field trips, community mapping, communications engagement, co-design of project strategies, environment and social safeguards, capacity building workshops; climate change and finance training. Community life plans, conservation agreements and FPIC. |                          |
|  | Baseline Determination, GHG/Carbon stocks assessment and ground truthing (field measurements), Satellite imagery, Scenario modeling,  |                          |
|  | Costs associated with development of new methodology or refinement of existing methodology  |                          |
|  | Develop the project description and submission to the carbon registry, any registration fees, make registry updates. <sup>43</sup>  |                          |
|  | Aggregate costs associated with Project Design Document (PDD) drafting and project registration   |                          |
|  | PDD validation, contract validation expert, verification fee and related field costs  |                          |
|  | Gender rights strategy, Indigenous rights strategy, agreement on benefit sharing  |                          |
|  | Early action pre-payments for legacy investments in forest conservation   |                          |
| <b>IMPLEMENTATION COSTS (these begin from first year of implementation)</b>  |   | 55-70%                   |
| <ul style="list-style-type: none"> <li>Benefits with respect to sustainable livelihoods,</li> <li>Support for protection and restoration activities;</li> <li>Infrastructure and equipment;</li> <li>Continued community engagement, capacity building;</li> <li>Implementation of management and monitoring plans;</li> <li>Research;</li> <li>Communication.</li> </ul>  | Sustainable livelihood costs, and specific component broken down as per individual project  |                          |
|  | Enforcement & patrolling, policy changes, additional staffing, firebreak maintenance  |                          |
|  | restoration, planting, inputs etc., as per project activity, as defined by project requirements   |                          |
|  | Park or conservation area boundary demarcation activities, rangers equipment, monitoring systems, associated maintenance costs  |                          |
|  | Rangers training, equipment, monitoring systems etc.  |                          |
|  | Maintenance costs for equipment & Infrastructure  |                          |
|  | Park or conservation Area Boundary Demarcation  |                          |
|  | Continuous training and workshops, consensus building activities etc., community life plan workshops,   |                          |
|  | Biodiversity monitoring, social impact monitoring   |                          |
|  | Revision of management plans, costs of Adaptive management plans, community life plans  |                          |

<sup>42</sup> Depending on project context, including size, location and carbon density, these cost ranges reflect indicative weights in the overall project cost structure.

<sup>43</sup> Verra

| CARBON VERIFICATION AND TRANSACTION COSTS   |  | 20-25% |
|---|--|--------|
| <ul style="list-style-type: none"> <li>• Technical costs associated with monitoring, verification, reporting (MRV)</li> <li>• ER issuance costs,</li> <li>• Brokerage or sales fees,</li> <li>• Government taxes</li> </ul> | Technical costs associated with project verification, classification of satellite imaging, mapping, update of data bases and other technical analysis for verification readiness |        |
|   | Costs of project verification, typically by independent third party, but with community participation  |        |
|   | Fee charged by registration authority to conduct verification and draft verification reports, associated field costs for authority on-site visits                                |        |
|   | Cost of carbon registry issuance (notice of eligibility for sale)  |        |
| PROJECT OR PROGRAM ADMINISTRATION COSTS   |  | 5-10%  |
| Program administration costs, including staffing, office, travel, overhead.   | Salary for project developer core technical staff and consultants  |        |
|   | Travel costs for project development, management, and supervision.   |        |
|   | Rent, utilities and related office expenses  |        |

*Project establishment.* The costs to establish a project can be included as implementation costs, however they are separated out here to highlight the costs prior to an agreement. Project establishment costs include the identification, analysis and engagement of various stakeholders interests and expectations from the project. The project feasibility analysis involves a preliminary desk review to estimate the amount of carbon in the forest or mangroves, and estimate how much CO<sub>2</sub>e emissions could be reduced by a successful project.

A key cost is the development of a project design, including the carbon, environment and social management and monitoring plans and a benefit-sharing arrangement. All of these draft documents are consulted with project stakeholders.

A key step in negotiating ER projects happens in this stage. For approval of REDD+ projects affecting Indigenous Peoples, FPIC is required and the costs of FPIC are therefore covered here. Projects may recognize the communities prior forest conservation efforts, and early action pre-payments are

negotiated (see next section for more on early action payments).

**Project establishment costs may represent 1-10% of total REDD+ project costs.**

*Project implementation costs.* Implementation costs are defined as the costs and investments required to implement a REDD+ project or program and avoid or minimize displacement of emissions to other regions or sectors (leakage). These costs can include:<sup>44</sup> i) the cost of guarding a forest to prevent illegal logging; ii) managing a forest sustainably; iii) intensifying agriculture or pasture; or iv) improving energy efficiency in household cooking methods. For example, equipment, seed capital for tree nurseries, fertilizers, training in agroforestry or fire management, patrol technology, wages, and ongoing community consultation can all be implementation costs.

For activities such as park surveillance and protection, support of government forest agency park guards are also costs that are covered.

<sup>44</sup> See FCPF REDD+ Manual and Cost Estimate Tool (2016)

All of these costs are intended to provide alternatives to people avoiding unsustainable collection of fuelwood or non-timber forest products and production of charcoal (such as by providing alternative income-generating activities).<sup>45</sup> Depending on the scale of the cost assessment, the implementation costs may also include national-level costs including: program implementation, agricultural technical support services, investment in agricultural inputs and other activities directly related to reduce emissions from deforestation and forest degradation.

Most importantly, implementation costs typically include the cost of providing both monetary and non-monetary ER benefits. Addressed further in the next section, the provision of a benefit package for ER projects can be 50% of all implementation costs. Implementation costs are by far the largest part of total project costs, and can range from 55-70%, excluding project administration.

*Carbon verification and transaction costs.* Carbon verification and transaction costs are expenditures that are required to issue, register and sell a carbon credit involving actions to find and negotiate with carbon credit buyers as well as engaging with market regulators or payment scheme administrators (e.g., in national fund-based mechanisms). Verification and transaction costs are typically considered separate from implementation costs, since by themselves they do not reduce deforestation or forest degradation.

These costs include measurement, monitoring, independent verification and reporting of the project's performance, such as actual deforestation, benefit sharing and safeguards compliance. Some costs of designing the system to perform these tasks may be covered in part by the project, but these systemic costs are typically born by the government

(see project or program administration costs, below). Taxes and insurance are additional costs related to ER credit sales. Once ER credits are sold, the costs of contract management and enforcement are included here.

**Carbon and transaction costs are typically between 20-25% of total REDD+ project costs.**

*Project or program administration costs.* For REDD+ projects, the project developer can be a private actor, NGO or government agency. Administration costs involve the salary and benefits for core technical and administrative staff that are developing and managing the project. These costs can include office and travel expenses for the core team.

Project or program administration costs can be included as part of implementation costs or separated out as an independent element. These costs can range from 5-10% of total REDD+ project costs.

*Assessing benefits from ER projects.* International climate change negotiations include rules that govern the provision of incentives for land use that results in carbon emission reductions and in turn should be funded through "results-based finance." For Indigenous Peoples, the rules around negotiating contracts for REDD+ are complex because they require agreement among diverse stakeholders and must respect the rights of landowners and other stakeholders who contributed to the emission reductions. Results-based finance is being negotiated for national REDD+ programs covering many communities and other actors. At the project level, multiple actors are also involved. The focus of the contract is how incentives and benefits flow to stakeholders in return for adhering to new

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<sup>45</sup> These are often referred to as opportunity costs, or the value of the preferred, current use of the natural resource that would change.

restrictions on access to those resources, which is generally referred to as benefit sharing.

In Emissions Reduction initiatives, the mechanisms used typically involve a 'benefits plan' or similar instrument which is agreed between multiple parties including: the entity providing funds, which may be an international financial institution, a national government, or an investor; the coordinator of the program; and relevant regulatory authorities.

This multi-stakeholder structure of ER programs presents one of most important challenges for Indigenous People in negotiation of carbon credit

agreements. Many intermediary levels can separate the carbon buyer from the community landowners.

Figure 9 identifies the different roles and actors that may be involved in a REDD+ project or Payment for Environmental Services program. When organizations are well-structured and have adequate capacity with relevant technical expertise, benefits are delivered to beneficiaries more efficiently.<sup>46</sup> The more actors that need to be involved, the less investment reaches the community directly. A good agreement is when there are fewer layers between the donor and the community.

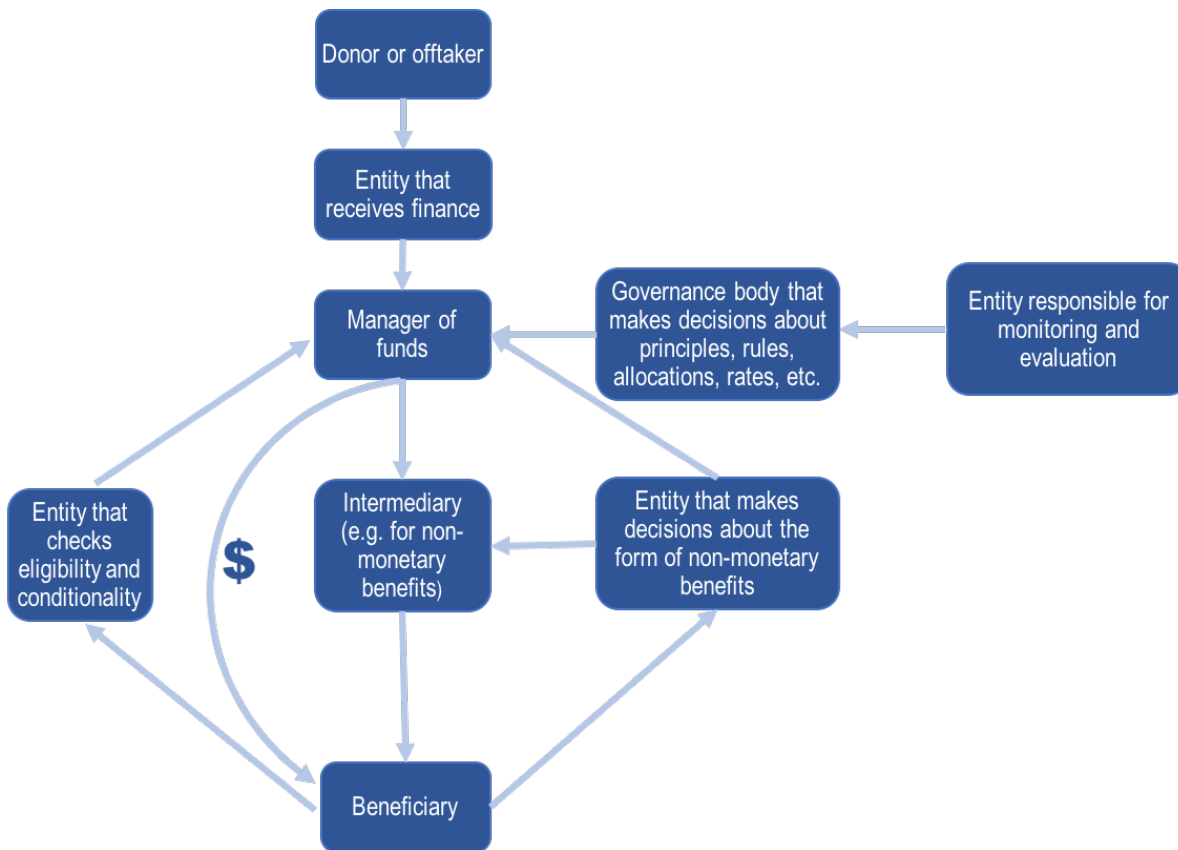


Figure 9 Roles involved in REDD+ or PES type benefit-sharing models (Source: Durbin et al. 2019, pgs. 54-55)

<sup>46</sup> Durbin et al. 2019, pg. 55. The authors emphasize that well organized communities can play multiple roles in this arrangement.

As conditions change to enable greater direct negotiation of agreements between communities and private investors, the existing multistakeholder negotiation arrangements attempt to deliver fair benefits to landowners and communities. Significant criticism of REDD+ often points to the unmet promise of this approach to date.

### Deciding on the right financial model

This section suggests an alternative way to propose benefit sharing in ER agreements that takes lessons from extractive industry IBAs, particularly where agreements are based on production of commercially traded minerals whose price is expected to change.

The lack of clarity in defining carbon benefits leaves considerable room for innovation in the negotiation of ER agreements. Most REDD+ benefit-sharing plans provide for annual payments to communities based on some negotiated share of overall carbon credit revenue. Payments may be uniform or vary according to the number of credits sold. Lessons from IBAs negotiated in the extractives sector, summarized in Chapter 10, suggest that other payment options are possible.

Benefit-sharing may consider the potential future increase in carbon prices and the additional revenue this might generate in defining the right financial model. However, payment mechanisms that are based on the price of carbon credits, such as profit sharing, equity and royalties indexed to revenue, carry risk that communities may not want to bear. As communities consider the types of monetary payment options in negotiated ER agreements, careful internal community dialogue is needed to assess how the risks of these options match up with local needs and interests.

This alternative flow of economic resources for an ER project is outlined in Table 11.2, with each option having different levels of risk (certainty).

*Pre-payments.* This approach pays greater attention to investor willingness to make a pre-production payment on signing an agreement with a community, due in part to recognition of the work of beneficiary communities in preserving the carbon in earlier years. Modest pre-payments provide the community some guaranteed return, create incentives, and help defray opportunity costs. This practice is well established in the extractive industries and the amount involved can be based on the scale of the planned Emissions Reduction project as well as the duration and significance of a community's 'legacy investments'.

A pre-production payment can be used to build community capacity for carbon reduction activity, including through purchase of equipment and consumables that need to be available at the start of production, and to provide a concrete indication to community members of the potential benefits of participating in the ER program.

*Payments based on production output.* A second payment option is a modest output-based royalty (**Row A** in Table 11.2) paid by the investor on each ton of reduced CO<sub>2</sub> emissions yielded by the project or program, which would generate a reasonably predictable and reliable income for the community. These payments might be linked to expected changes in risk for the community. For example, in a REDD+ benefit-sharing plan, communities might argue that future threats could increase as conservation takes hold while land-use pressure grows. Therefore, the future royalty payment should increase to reflect the greater level of effort needed to avoid emissions under this scenario.

*Royalty payments based on sales revenue.* A royalty payment could be based on gross sales revenue (Table 11.2, **Row C**) or a percentage of total revenue from sale of carbon credits before costs are deducted. This option is a less reliable and more variable flow of benefits, due to the changing price of carbon.



*Payment as a share of net profits after cost deductions.* Gross profits (E) are the net revenue from carbon credit sales after deducting operating costs. These costs include the community's cost of undertaking and maintaining carbon reduction activity (D1, implementation), and the cost of verifying and documenting the outcomes of this activity (D2, carbon transaction). The surplus or net profit (G) after payment of taxes (F) would accrue to the investor or investors.

*Equity share.* A community could also negotiate to take equity (Table 11.2, Row H) in a stand-alone venture, jointly owned with the investor, to undertake the Emission Reduction project or program; or alternatively negotiate an option to take up an equity stake in the program once the financial viability of the program is established. An equity stake in the project would provide the community a share of the net profits. As few REDD+ projects have been demonstrated to generate profits, this option is risky since it is based on the expectation that carbon prices will increase.

These choices for financial compensation from REDD+ involve different levels of risk for the community. The options are summarized in Table 11.2.

Communities will likely require independent financial counsel to determine which option is best for them. Some agreements have combined payment options and this can be a useful way to guarantee benefit flow but also to access future benefits that may depend on carbon price increases. Indigenous Peoples should have knowledge of the opportunities and risks of each option before deciding.

Finally, all of these payment options do not require communities to give up wages for employment, training opportunities or inputs and equipment for forestry nurseries, more effective agriculture or patrolling. These remain necessary costs for the project to succeed and will be covered under implementation costs.

**Table 11.2** ER project benefit options

| Operating project, economic components                      | Form of payment to community  | Comment   | Certainty    |              |
|---|---|---|--------------|--------------|
| Pre-production payment by investor on signing of agreement. | Size of payment related to the expected output (tons of carbon credits) | Provide funding for community capacity building to undertake project and for any advance outlays on equipment, consumables etc. required for start of project | MORE CERTAIN |              |
| (A) Volume of carbon credits sold                           | \$ per ton  | Modest payment to guarantee community some return, create incentive, help defray opportunity cost   |              |              |
| (B) Unit price  |   | Highly uncertain and variable   |              |              |
| (C) Revenue from sale of carbon credits = A X B             | % of revenue  | Payment to community varies with carbon price   |              |              |
| (D1) Community operating costs                              | Reimbursement for project labor and services                            | E.g. equipment, seed capital for tree nurseries, fertilizers, patrol technology, wages, community consultation etc.   |              |              |
| (D2) Cost of independent validation                         |   |   |              |              |
| (E) Gross profit = C – (D1 + D2)                            |   |   |              |              |
| (F) State taxation  |   |   |              |              |
| (G) Net Profit = E-F  |   |   |              |              |
| (H) Dividends to shareholders                               |   | Equity option for community to take up shareholding when project established  |              | LESS CERTAIN |

**How might such an approach operate in practice in relation to REDD+ projects?** Table 11.3 provides a hypothetical example using amounts and percentages applied in calculating community payments and benefits that are arbitrary and selected purely by way of illustration. This example assumes that an Indigenous community and an investor sign an agreement for a project that will generate one million tons of carbon credits per year over a 15-30 year project life. The table suggests how the potential benefits of a carbon project will change depending on the sale price of carbon. The sales price of carbon varies between \$USD4, \$6 and \$10 per ton. The estimated operating costs of \$4 per ton do not change and are based on experience with recent projects.

Table 11.3 illustrates how the approach outlined in general terms in Table 11.2 would work in this case, with community benefits indicated in red bold text. The community would receive a pre-production payment of \$500,000 (50c per ton of annual expected carbon offsets output) from the investor on signing the agreement. They would also receive a 4 percent royalty on gross revenue, which would constitute a first charge against sales revenue. It is assumed that 5% of revenue is allocated for long-term investment in maintaining carbon storage, and that the remaining surplus is allocated 66%:34% between the investor and the community.

The sale price of carbon determines whether the project generates genuine benefits for the community. At a carbon price of \$4 a ton the project is not viable, and would lose money even if the community did not extract any benefits. With a carbon price of \$6 a ton, the project would only generate a small surplus if the community did not extract any benefits. These two examples resemble many actual carbon projects that may not seem as attractive once the costs and benefits are known.

With carbon sales prices at \$4-\$6/ton, experience in the context of extractive industry agreements suggests that Indigenous communities would almost certainly conclude that the project should not proceed as it is not capable of generating significant community benefits, especially given the social and economic costs associated with extractive activity. It could be argued that in some contexts communities might still decide to support an Emissions Reduction project that could not generate cash benefits for them, because the activities involved at least create significant benefits (for example forest protection). However any such conclusion should be based on a careful economic analysis of these 'positive externalities' relative to the total costs incurred by the community in supporting the project concerned.

Given the cost assumption made in Table 11.3, at a carbon price of US\$12 a ton the project would be capable of generating all of the community benefits contemplated in Table 11.2 (pre-production payment, royalty and a share of profits). The total benefits to communities, beyond the jobs, training and inputs that are part of project costs, would be significant.

In summary, communities should strive to know the full range of cost and benefit options for agreements in the natural resource sector. Only by assessing the potential costs and benefits can negotiation priorities be defined, including whether to engage in negotiations at all.

#### *Order of payment*

Table 11.3 underscores another important principle in REDD+ benefit sharing – order of payment. The significance of pre-payments and royalties on gross revenue suggest that communities can negotiate preference in how project costs are paid. This hierarchical sequence of REDD+ project benefit sharing is illustrated in Figure 9. The flow of funds indicates the order in which costs are typically paid, with project operating costs, including carbon verification, coming first.

**Table 11.3** Allocation of revenue from hypothetical REDD+ project funded by private capital

| Operating project, economic components  | Carbon price \$4/ton | Carbon price \$6/ton | Carbon price \$10/ton |
|---|----------------------|----------------------|-----------------------|
| Pre-production payment by investor to community on signing of agreement   | \$500,000            | \$500,000            | \$500,000             |
| Volume of carbon credits sold   | 1,000,000            | 1,000,000            | 1,000,000             |
| Gross revenue from sale of carbon credits   | \$4,000,000          | \$6,000,000          | \$10,000,000          |
| 4% community royalty on gross revenue   | \$160,000            | \$240,000            | \$400,000             |
| Total costs, including community operating and governance cost, cost of independent valuation, marketing costs (D1 + D2 in Table 3) | \$5,000,000          | \$5,000,000          | \$5,000,000           |
| Investment in maintaining carbon storage (5% of revenue)  | \$200,000            | \$300,000            | \$500,000             |
| Surplus (loss) in Year 1  | (\$1,700,000)        | (\$40,000)           | \$3,600,000           |
| Investor allocation from surplus (66%)  | \$0                  | \$0                  | \$2,376,000           |
| Community allocation from surplus (34%)   | \$0                  | \$0                  | \$1,224,000           |

From a contract negotiations perspective, REDD+ projects or ER program negotiations suggest areas where Indigenous interests can be strengthened by securing guarantees for higher priority given to paying community benefits earlier in the sequence. A REDD+ Benefit-Sharing Plan typically indicates a sales revenue flow that takes much longer than predicted to materialize. From a community perspective, risk and benefit sharing for carbon credit sales can be structured more equitably in the agreement based on performance of all actors. For example, sales targets can be negotiated with marketing agents to link payment with performance, with fees adjusted based on whether sales targets are met.

*Benefits beyond compensation and training*

ER agreements provide more than just monetary benefits. For good agreements, communities should explore the full range of benefits, including employment, business development training and contracts, land tenure security, cultural heritage protection, involvement in environmental management of impacts and robust monitoring and enforcement of agreement implementation. As indicated in Figure 10, ER projects require many functions that are delegated to third parties, including the project developer or consultants. These jobs include project design, impact

assessment, capacity building, technical service provision, equipment or input provision, legal counsel, research, financial management, project management, contract management, benefit distribution, land-use surveillance or enforcement, registration, marketing and selling credits.

The community should not assume that these services cannot be provided by community members themselves. Rather, the community may negotiate for the right to decide on the provider of those services.

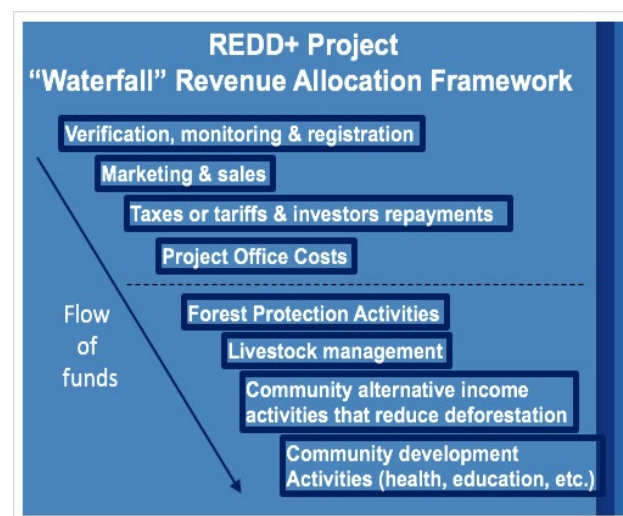


Figure 10 REDD+ revenue allocation framework

Similarly, communities can decide if improvement of land tenure or culture heritage protections are conditions of any ER agreement, as some voluntary projects have tried (see Box 11.2).

Finally, the agreement on a benefit-sharing plan must not exclude the role of communities in all aspects of monitoring compliance regarding the main agreement with the investor, as well as any ancillary agreements on which the benefit-sharing agreement depends. For example, ER agreements often have a nested structure in which vertical agreements between community and project developer are contingent upon horizontal agreements between the same project developer and the investor buying the carbon credits, or between the investor and the government to certify the validity of the credits. The community can negotiate a role in monitoring the other agreements on which the benefit sharing from carbon revenue depends. This wider role for communities in the overall supervision of ER agreement compliance would also be funded with project resources.

### Box 11.2 Keo Seima REDD+ Project

The Seima REDD+ project undertook Voluntary Carbon Standard (VCS) and Climate, Community and Biodiversity (CCB) certification over a period of about eight years (2008–2016). FPIC was implemented for the 161,000 ha Seima REDD+ project to comply with voluntary market standards. Wildlife Conservation Society (WCS), a U.S.-based NGO, is the project developer for the Seima project.

Some of the 20 villages (2,600 families) participating in the project were of *Bunong* ethnicity and live in remote, forested areas, leading largely subsistence livelihoods. Other villagers live closer to the buffer zones, with good road and market access for cash crops, and tended to be affected by rapid Khmer in-migration. With this complex mix of forest resource users scattered across a vast forest landscape, the project managers implemented FPIC through a series of village-level agreements.

From its early days, the Seima project incorporated practical support for indigenous communal title (ICT) claims in the area, under the Cambodian Land Law. WCS has supported the first ICT awarded to a Bunong community, with others in process.

For the project proponents, ICT was considered a way to secure forests and support conservation-friendly land use in the buffer zone, so raised community expectations that potential REDD+ project would secure ICT.

However, from the perspective of the REDD+ verification auditor, the presence of areas under potential or existing indigenous title can be considered a threat to project “permanence,” since communities could seek to use land in ways other than stated in the project document.

Even though WCS would continue its support for communal titling, the ICT areas were removed from the REDD+ project to satisfy the validator. The REDD+ project ultimately sold \$US 3 million in carbon credits and generated benefits for communities. However, given the limitations from the certification process on how REDD+ benefits can be used by communities, the experience raised questions about the ability of REDD+ to deal with situations of mixed or contested tenure in Cambodia.

*Source:* WCS 2015/2021; Milne and Mahanty 2019; Evans 2012.

## 12. IMPLEMENTING AGREEMENTS AND MAINTAINING RELATIONSHIPS

### Chapter summary

- This chapter reviews the obstacles/challenges of agreement implementation and some of the strategies to minimize risks and overcome obstacles.
- Agreements can be structured with clear goals to ensure adequate monitoring and enforcement, including that communities have the mechanisms to ensure compliance.
- Highest standards for agreement implementation focus on securing an adequately resourced review processes, specific targets, clear penalties and incentives for implementation failures, including amendment.
- Pay special attention to strengthening internal factors, including strong, culturally appropriate monitoring teams that are well-resourced and have clear responsibilities to motivate project proponent compliance.
- External factors for implementation success, which are outside the control of the community, can be anticipated and mitigated.
- Agreements can be used to build strong relationships through continuous communication and trust-building activities.

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*The implementation process is a time where relationships and trust between the community and project proponent can be strengthened. Communities should prepare for implementation as a new stage of organizing, communication, and vigilance. Implementation resource needs should also carefully assessed and provided for.*

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### Monitoring and enforcing agreements

Ideally, a negotiated agreement should include specific instructions for how the agreement will be reviewed and maintained over time. Implementation monitoring cannot be expected to occur as an add-on activity. Monitoring arrangements can be designed in several ways:

- Joint monitoring with the project proponent
- Independent monitoring
- Government regulatory agency monitoring

All monitoring plans:

- Can be specified within the agreement (e.g., representation from both parties, scope of responsibility, information access, culturally appropriate);

- Should consider a paid monitoring officer and anticipate other staffing needs;
- Involve champions of the agreement from the community and the project proponent;
- Ideally, an agreement should provide training and funding for supporting community-based monitoring.

Based on the priorities set forth in the agreement, an integrated monitoring system can be designed and implemented by the community. Encompassing both socioeconomic monitoring, on-site ecological monitoring, and Earth Observation/remote sensing monitoring methods, the system can support accountable implementation of negotiated agreements, covering direct access to project lands, payments to communities, employment, education and training, business development, health, and impacts to cultural heritage, as well as the ecological

impacts of the project, including deforestation and forest degradation, poaching, etc. The community-led monitoring system can provide an alert monitoring system for land-use violations. For nature-based enterprise, monitoring systems can incorporate business plan performance and market systems diagnostic indicators related to the impacts of both natural resource management and changes in livelihoods on human wellbeing and human rights.

The community should not give up rights to use strategic communication and direct action to pressure the project proponent in instances where agreement implementation fails. Adequate grievance redress processes should work to resolve most non-compliance events, but when this recourse has been tried and solutions are slow or unsatisfactory, the community may choose to turn to other mechanisms. The community should assign responsibilities to exercise local capacity to mobilize pressure if there is non-compliance with the agreement. Specific attention is needed within the agreement to preserve these rights. (See Box 12.1).

#### **Box 12.1 Attawapiskat First Nation and DeBeers: capacity to pressure agreement implementation**

A good agreement will build in enforcement measures to ensure the compliance of both parties. However, as with the negotiation process, implementation failures require communities to have the capacity to mobilize pressure if commitments are not honored. For DeBeers Canada's Victor mine, supply lines were disrupted by an 18-day roadblock in February 2009 staged by members of the Attawapiskat First Nation. The protest developed because some community members felt DeBeers Canada was not living up to the terms of the IBA. Though not explicitly a subject of negotiations, it was expected that local incidence of substance abuse, domestic violence, and other social ills would be reduced as average community incomes grew via mine-related employment. Four years after IBA ratification, these social issues were still evident.

*Source:* Bradshaw, Fidler and Wright 2016

## Supporting implementation within the agreement

Measures to manage implementation risks should be addressed as part of the negotiation strategy (see Box 12.2).

#### **Box 12.2 Implementation lessons from 40 Canadian and Australian agreements with IPs**

A review of 40 Canadian and Australian agreements highlighted several points that communities should ensure that their agreements address, including:

**Resources:** Ensure sufficient resources are set aside for implementation. Only seven agreements (less than 20%, four in Canada, three in Australia) allocate any resources to the task of implementation.

**Dedicated committee:** Ensure sufficient resources are set aside for committee use. Only five of the 38 agreements provided any resources to support the operations of such committees, other than by requiring the project operator to pay for meeting costs.

**Non-ambiguous goals:** Ensure that goals are clear and specific, as well as measurable. Few agreements contain goals that are specific and unambiguous.

**Enforceability:** Ensure the agreement spells out specific penalties or sanctions for parties that fail to uphold their end of the agreement. None of the agreements provide for penalties or sanctions for failure to honor specific commitments made by the parties, other than through an (often implicit) right of the aggrieved party to take court action for breach of the agreement.

**Review:** Ensure that the agreement has specific provisions under which the agreement can be formally reviewed. Less than half of the agreements (17 of the 38) include any provision allowing for a formal review of their terms.

*Source:* O'Faircheallaigh (2002)

*Set clear goals for implementation* Precision and clarity in the way that goals and intended outcomes are stated in the agreement is critical for ensuring smooth implementation. Avoid slippery language like “if possible”, “as appropriate”, “take all reasonable steps”, “technically and financially feasible.” Where there is ambiguity, call for precise language or clarification to set boundaries for interpretation.

*Identify specific responsibilities* Clearly state who is responsible for doing what, and make sure that the responsible person or organization has the authority required. It is essential to have both project proponent and community champions of the agreement.

*Ensure adequate funds and other resources needed for monitoring* Make sure detailed plans and funding for monitoring impacts of the project and implementation of the agreement are built into the agreement, with agreed targets. Funds should be dedicated to building community capacity for implementation and monitoring and establishing robust dispute resolution mechanisms, among other things (see Box 12.3 on designing an agreement implementation budget).

*Define penalties and incentives* The agreement should include penalties, such as fines, if conditions are not met by the project proponent, and incentives (rewards) if conditions are met. For example, employment or business development targets, if not met, can automatically increase.

*Define a clear process for amendment* Make sure that parties can change some important parts of the agreement over time. Amendment procedures can be useful in some cases such as delay in the project’s start time or project expansion. The outcome of a cumulative impact analysis of new planned projects nearby that could affect the communities indirectly, or put stress on the agreement, can also be a justification for future review. Define a clear review and amendment process for these areas of the

agreement. Amendments can be important for a few reasons:

- the relationship between the project proponent and the community is dynamic, which can result in unanticipated situations that need to be addressed;
- the body of knowledge, understanding, and approaches to IBAs are frequently changing;
- the alternative to amendment, dispute resolution, is expensive and disruptive.

### Box 12.3 Implementation budget

Indigenous communities should identify their human resource needs for agreement administration and management in as much detail as possible. Significant human and other resources needs may include:

- Staff time to:
  - coordinate with other parties on overall implementation
  - cover general implementation of the agreement
  - cover management and committee meetings
  - manage employment provisions from the agreement
  - manage the financial and accounting aspects of the agreement
  - coordinate community communication and participation
  - review the negotiated agreement, as well as to prepare record keeping and reporting
- Costs of community participation (e.g. elder honoraria, meeting costs)
- Supply costs, including office space or equipment costs
- Travel costs to oversee implementation
- Consultant fees for technical advice including accounting, tax, and legal advice
- Consultant fees for assessments and studies, etc.

If the project is major in scope, it is unrealistic to expect that a community will have the ready capacity to absorb these kinds of costs. Plans for budgeting for implementation should be a part of the overall negotiation.

Source: Woodward and Company (2008)

*Build in periodic reviews* FPIC is an iterative process and renewed consent is required when the original terms of an agreement change. It is good practice to build in periodic, planned reviews of an agreement. Scheduled reviews provide certainty and predictability for dealing with challenges that emerge. There should be provisions built into the agreement for flexibility. This could include clauses to review and update an agreement when terms in other negotiated agreements in the same sector are more favorable. See Box 12.4 for the example of the Dja Dja Wurrung in Victoria, Australia.

For the same reasons that a defined agreement process is needed, a revised impact assessment may also be appropriate, particularly when the impacts of a project are not well understood. Implementation

may involve a scheduled provision for a retrospective or updated impact assessment, with community participation or leadership and funding, at a defined time or if certain impact thresholds are surpassed.

As illustrated in the Dja Dja Wurrung Recognition and Settlement Agreement (Box 12.4), protected area joint management agreements can go as far as to define change management targets for park service staff to better understand Indigenous land management practices and how to engage with Indigenous park rangers.

*Plan for alternative possibilities* Expectations about implementation may not be met if the project doesn't start on time, is delayed or closed for an

#### **Box 12.4 Dja Dja Wurrung Aboriginal Protected Area agreement review process**

On March 28, 2013, the state of Victoria, Australia signed a Recognition and Settlement Agreement (RSA). The RSA negotiation began in 1998 and was delayed until the state passed the Traditional Owner Settlement Act in 2010. The RSA enabled the agreement to settle native title claims and provides for acknowledgement of Aboriginal rights through the negotiation of complementary joint management land use activity agreement. The RSA transfers six state and national parks and reserves (approximately 47,000 hectares) to Aboriginal title to be jointly managed by the Dja Dja Wurrung Management Board and the state government in perpetuity. This part of the agreement ensures several important implementation clauses that recognize the novelty of this agreement and the need to update some areas based on learning in the sector and within the agreement implementation process itself:

- An automatic 5-year independent review process
- Parity (upward harmonization) between the agreement and any other state-level agreements that have been recently negotiated and have stronger provisions
- Support and training for Aboriginal park rangers, including \$900,000 over the first four years to assist in settlement obligations;
- Provisions for meaningful partnership in joint management, including adequate communication, implementation funds, and clear RSA targets in areas of economic development
- Includes a change management plan regarding accountability of Parks Victoria staff (performance development plans for park employees);
- Long-term goal of transition from joint management to sole Aboriginal management

Parks governance at the state level has also evolved to integrate these Aboriginal co-management agreements. A project control mechanism was established with representation of the 13 Aboriginal organizations, which meets quarterly to discuss priorities and monitors change management in the natural resource management system. This mechanism involves traditional owners at the highest decision-making level to trouble shoot problems and facilitate coordination between various agencies (e.g., health and education, as well as environment)

Source: Dja Dja Wurrung Clans Corporation



extended period, or if low commodity prices or other factors reduce operating margins. While some protections against these problems can be built into agreements through the type of royalty chosen and provisions for minimum annual payments, problems with project viability will minimize the upside potential for revenue streams to support implementation, may affect the ability to meet employment and training goals, and can interfere with the priority given to implementation of the IBA. These types of risks can be mitigated through compensation arrangements (minimum payment), as in the case of Voisey's Bay, where the agreement provides for a fixed series of payments to provide an adequate transition in the context of a premature, unplanned closure of the project.

*Plan for turnover* Agreements are often possible due to the cultivated support of insider champions within the project proponent or the government. Over time, these individuals can leave the organization, producing a loss of institutional familiarity with the agreement and leaving in doubt the recognition and same level of commitment to the agreement implementation by new leaders or project staff. Turnover of project staff and community leadership is common, underscoring the importance of investment in strong relationships between the community and the proponent. Transitions should be planned for to avoid losing vital knowledge. The implementation plans should provide for mentorship, job shadowing, succession planning, cross-training and required orientation training for new project staff to understand the history of the negotiation and the importance of meeting the agreement obligations. Funding for such employee training should be built into the agreement budget. Indigenous groups can design policies or organizational procedures that describe the relationships and protocols in place. This can ensure there is continuity built in for new staff.

## Factors external to the agreement

There are many factors outside of the agreement that can affect implementation. While it may not be possible to control these wider issues or manage them through the design of an agreement, external factors should be recognized as possible barriers to implementation. The parties can agree to work jointly to minimize the negative effects of external factors on implementation. Some general external factors that can impact implementation are discussed below.

*Invest in trust-building activities* Build the support of key political actors, like the environmental licensing agency or the government agency with oversight of Indigenous Peoples issues. Make sure that they live up to their agreement monitoring and enforcement obligations.

*Human rights risks* Conditions for the respect of human rights can shift or change entirely. Changes in the human rights context may be triggered by the project proponent (see Box 9.6), the government, or criminal activity. Indigenous negotiators may be singled out for retaliation, harassment, arrest or worse. Agreements can include commitments by the project proponent to take mitigation actions in response to any rights violations. These actions can include issuing public statements made by project proponent leadership, carrying out an independent investigation, engaging national or international human rights bodies, taking legal action or reinforcing protections for community members. These actions and the conditions that would call for their initiation should be provided for in advance.

*Change in policy or government* Elections, resulting in changes in personnel in government institutions, can raise challenges to maintaining the relationships that agreement implementation requires. Elections can also lead to policy shifts that may erode the basis for an existing agreement or ongoing negotiation.

For example, new administrations can dismantle legislation or institutions critical to effective implementation of agreements.

*Rivalry between government departments* Multiple government departments may have some degree of responsibility for various implementation aspects of a project including impact monitoring, development planning/zoning, training, or education. In these cases, government disagreements over jurisdiction

**Box 12.5 National funding Socio-Bosque Program, Ecuador**

Beginning in 2008, the Government of Ecuador has provided incentives for forest conservation through the Socio-Bosque program. Initially, the program used scale payments of US\$30/hectare annually to landowners to conserve their forest lands, for up to 50 hectares of forest land enrolled. To encourage farmers with smaller forest land areas to participate, the incentives were increased to US\$60/hectare annually for private landholders with fewer than 20 hectares of land overall, not just forest.

The Socio-Bosque program (SBP) supports agreements with a term of 20 years, which are automatically renewed if the landholder does not opt out. However, SBP beneficiaries are required to protect and conserve the area included in their contract (i.e., maintain intact forest cover) and therefore have fewer opportunities to generate additional revenue from the standing forest assets.

In 2015, payments through the Socio-Bosque program were temporarily delayed and were not reinstated until 2017. The Ministry of Environment explained that the delay was the result of fluctuations in the price of oil that impacted state revenues. These budgetary uncertainties and payment delays can impact the level of trust that people have in participating in the programs as it leads them to question the long-term value of taking part and the commitment of government to maintain the stated level of benefits.

*Source:* Etchart et al. (2020)

and influence can interfere with the effective implementation of an agreement.

*Political agency* Agreements often include stand-alone chapters dedicated to the procedures and performance metrics by which the agreement will be implemented. Certain implementation mechanisms, such as monitoring committees, often fail to recognize Indigenous political agency and may be designed by non-Indigenous people and be modeled on similar structures used for other projects or in different contexts (for example, involving only elected versus traditional leaders, or exclude key people whose expertise may be needed). These well-intentioned measures may not take shape in the way intended or have the intended effect because they have no organizational fit with local cultural values and governance norms. The result is a failure to engage with Indigenous political actors to achieve a mutually acceptable approach to implementation issues, a lack of transparency, an exclusion of Indigenous People from decision making, and a less effective relationship.

*Lack of information on agreements and related policy and legislation* To fill procedural gaps in existing policy and clarify responsibilities, some Indigenous groups have created their own policies related to extractive industries, conservation, agriculture and other development activities (see Box 12.6 on Taku River Tlingit First Nation Mining Policy). Also, if more than one project is operating or is likely to operate in the region, there may be a need to develop programs and procedures for managing licenses or research applications, engaging in environmental monitoring, or other issues (see Box 12.7 on Inuit Research Policy). Further, the community may need to engage in legal and regulatory processes as changes occur in the region or nationally, and staff and capacity may need to be developed in order to do so.

## Box 12.6 Taku River Tlingit First Nation (British Columbia) creates mining policy

In British Columbia, the Taku River Tlingit First Nation has created a “Mining Policy”. This creates a framework for mineral exploration and development, and provide guidance to developers on how they should consult and engage in the specific regions. This flyer outlines the process that they undertook to collect oral and written stories from elders and apply them to create policies that followed their traditional ways of protecting their territories.

The flyer features a logo at the top left with a sun, water, and land, and the text 'The RELAW Project REVITALIZING INDIGENOUS LAW FOR LAND, AIR & WATER'. Below the logo, the main headline reads 'Taku River Tlingits are defining their own laws!' in large, bold, red letters. To the right is a photograph of four people standing in a field. Below the photo is a box titled 'Our Team' listing 'Shawna Smith & K'èdukà Jack - TRTFN RELAW Team' and 'Gavin Smith & Maxine Matilpi - West Coast Environmental Law'. The main body of text explains the project's goal: 'Taku River Tlingit people have always defined our own laws through oral tradition. We are working with West Coast Environmental Law to utilize Tlingit stories to create legal tools that will empower us to advocate for our way of life and protection of our land.' It lists the project's objectives and provides contact information for the TRT Lands and Resources Department.

**The RELAW Project**  
REVITALIZING INDIGENOUS LAW  
FOR LAND, AIR & WATER

# Taku River Tlingits are defining their own laws!

**Our Team**  
Shawna Smith & K'èdukà Jack – TRTFN RELAW Team  
Gavin Smith & Maxine Matilpi – West Coast Environmental Law

**Taku River Tlingit** people have always defined our own laws through oral tradition. We are working with **West Coast Environmental Law** to utilize **Tlingit stories** to create legal tools that will empower us to advocate for our way of life and protection of our land.

During this one year project the **RELAW Team** will:

- Research **TRTFN Indigenous Law** through reviewing written and **oral stories** from new and existing interviews with Elders and community members.
- Analyze and summarize all the research, creating tools that can be used to communicate our Environmental Law with other governments and companies.
- Apply our Indigenous Laws to the creation of a **TRT wildlife management policy** to ensure that we are following our traditional ways in protecting our land and resources.

How can you be involved with **RELAW**?

- Participate in the family meetings and RELAW community events over the next year;
- Elders will be interviewed as part of the research;
- Contact **K'èdukà and Shawna** with questions or feedback.

*Supported & Advised by:*

**INDIGENOUS LAW RESEARCH UNIT**  
UNIVERSITY OF BRITISH COLUMBIA

**WEST COAST environmental law**

**TRT Lands and Resources Department**  
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250-651-7451 x 3

Source: <http://trtfn.yikesite.com/downloads/mining.policy.pdf>

### Box 12.7 National Inuit research strategy

Inuit Tapiriit Kanatami (ITK) is the national representational organization for the 65,000 Inuit in Canada. This includes 53 communities and encompasses roughly 35 percent of Canada's landmass and 50 percent of its coastline. The ITK represents the rights and interests of Inuit at the national level through a democratic governance structure that represents all Inuit regions, and advocates for policies, programs, and services that address issues facing Inuit people.

In 2018, ITK launched the National Inuit Strategy on Research (NISR). This strategy seeks to address the frequently exploitative relationship between researchers and Inuit communities in which researchers conduct their work to benefit their own careers and institutions without the input of the Inuit people. This policy document targets governments and research institutions, and is intended to support Inuit self-determination in research by investing in enhanced capacity for Inuit-led research. The National Inuit Strategy on Research (NISR) outlines the coordinated actions required to improve the way Inuit Nunangat research is governed, resourced, conducted, and shared. The strategy builds upon the important strides taken by Inuit towards self-determination in research by offering solutions to challenges Inuit people have grappled with for decades. It envisions research being utilized as a building block for strong public policies, programs, and initiatives that support optimal outcomes for Inuit that in turn benefit all stakeholders.

Source: Inuit Tapiriit Kanatami (ITK) National Inuit Research Strategy. [https://www.itk.ca/wp-content/uploads/2018/04/ITK\\_NISR-Report\\_English\\_low\\_res.pdf](https://www.itk.ca/wp-content/uploads/2018/04/ITK_NISR-Report_English_low_res.pdf)

### Maintaining relationships

Often communities and project proponents can pay close attention to agreements in the first few years of operation, but then steadily decrease their attention to implementation as the project becomes well established or towards closure. Attention to key

areas helps maintain agreements as living documents, with adaptations made as needed.

*Keep communication alive.* Communication channels need to be consistently reinforced so that informal contacts and formal meetings are taking place. For example, some communities invite project staff out to the land for annual canoe trips, hunts, and other community gatherings to familiarize senior staff with their culture.

*Build strong relations* between people with similar responsibilities within the project proponent and the community, for example between employment and training officers of the project proponent and community liaison officers, or between project proponent environmental staff and community environmental monitors.

*Maintain careful records* of meetings, discussions, correspondence, reports, and data. Use data for adaptive management. A key issue involves collecting data and figuring out how to use it. For example, data on safety, wellness, hiring, and promotion are often collected but not effectively used to make changes. Collection of reliable and appropriate data is one matter, but following up on it is critical.

*Commit to quick and ongoing action* on issues that arise before they become disputes. A fundamental goal of the agreement should be to solve problems as early as possible through effective communication and early warning systems. It is important to support this goal with training in dispute management for employees.

*If disputes occur*, companies and communities should train their personnel to view them as a source of valuable information that can lead to improved operations, reduced risk, and a supportive relationship within the community.

## APPENDIX 1: RESOURCES

### Minerals and Mining – Agreements, Treaties and Negotiated Settlements

<https://www.atns.net.au/subjectmatter.asp?subjectmatterid=20>

**Indigenous Leadership Initiative (Guardians initiative):** [www.ilinationhood.ca](http://www.ilinationhood.ca)

### National/BC Regional First Nations Leadership Groups

Assembly of First Nations (AFN): <http://www.afn.ca/>

BC Assembly of First Nations (BCAFN): <http://www.bcafn.ca/>

Union of BC Indian Chiefs (UBCIC): <http://www.ubcic.bc.ca/>

BC First Nations Summit (FNS): <http://www.fns.bc.ca/>

BC First Nations Energy and Mining Council: <http://www.fnemc.ca/>

### BC Tribal Councils/Governments

Carrier Sekani Tribal Council: <http://www.carriersekani.ca/>

Kaska Dena Council: <http://www.kaskadenacouncil.com/>

North Shuswap Tribal Council: <http://northernshuswaptribalcouncil.com/>

Tahltan Central Council: <http://www.tahltan.org/>

Tsilhqot'in National Government:

[http://www.tsilhqotin.ca/PDFs/Press%20Releases/2014\\_10\\_03\\_Dasiqox\\_TP\\_NR.pdf](http://www.tsilhqotin.ca/PDFs/Press%20Releases/2014_10_03_Dasiqox_TP_NR.pdf)

### Links to FNWARM Members' First Nations

Dease Lake First Nation: <http://www.kaskadenacouncil.com/kaska-nations/dease-river-first-nation>

Lake Babine Nation: <http://www.lakebabine.com/>

Naka'zdli First Nation: <http://www.nakazdli.ca/>

Takla Lake First Nation: <http://www.taklafn.ca/>

Taku River Tlingit First Nation: <http://trtfn.yikesite.com/>

Xeni Gwet'in First Nation: <http://www.xenigwetin.ca/>

Xat'sull (Soda Creek) First Nation: <http://www.xatsull.com/>

### Mining Tool Kits

Fair Mining Collaborative: <http://www.fairmining.ca/>

Gordon Foundation: <http://gordonfoundation.ca/north/iba-community-toolkit>

### Groups Supporting BC FN Mining and Rights Issues

Amnesty International Canada: <http://www.amnesty.ca/>

EcoJustice: <http://www.ecojustice.ca/>

Friends of the Nemiah Valley: <http://fonv.ca/>

MiningWatch: <http://www.miningwatch.ca/>

Sierra Club of BC: <http://www.sierraclub.bc.ca/>

West Coast Environmental Law: <http://wcel.org/>

Wilderness Committee: <https://wildernesscommittee.org/>

**A Comprehensive Guide for Social Impact Assessment**, 2006. UN Centre for Good Governance.

<http://unpan1.un.org/intradoc/groups/public/documents/cgg/unpan026197.pdf>

### Models and Case Studies of Indigenous-led Impact Assessment

- Co-Managed Processes—Government-to-Government - CASE STUDY 1: Review by Tłıchǫ of the NICO Project, Northwest Territories
- Co-Developed Model—Proponent with Indigenous Party - CASE STUDY 2: Review by Glencore and Inuit of the Sivumut Project, Quebec
- Independent Indigenous Impact Assessment - CASE STUDY 3: Review by Squamish Nation of Woodfbre LNG Project, B.C.

### **Open Land Contracts**

Online repository of agriculture, forestry and other land-based investment contracts to understand the key terms and implications of large-scale deals. <https://openlandcontracts.org/>

### **Accountability Mechanisms**

Independent Accountability Mechanism Network (IAMNet) <http://independentaccountabilitymechanism.net/>. IAMnet is a virtual network of dedicated practitioners who contribute to the regular exchange of ideas and assist with institutional capacity building in accountability and compliance as components of corporate governance.

OECD Guidelines for Multinational Enterprises <https://www.oecd.org/corporate/mne/>

Bank Information Center <https://bankinformationcenter.org/>

Inclusive Development International. <https://www.inclusivedevelopment.net/>

### **Advocacy/Lobbying - Indigenous Peoples' Networks**

Tebtebba <https://www.tebtebba.org/>

Asia Indigenous Peoples Pact (AIPP) <https://aippnet.org/>

Coordinadora de las Organizaciones Indígenas de la Cuenca Amazónica (COICA) <https://coica.org.ec/>

Indigenous Peoples of Africa Co-ordinating Committee (IPACC) <https://www.ipacc.org.za/>

### **Litigation**

Indian Law Resource Center <https://indianlaw.org/>

Accountability Counsel <https://www.accountabilitycounsel.org/>

Environmental Law Alliance Worldwide (ELAW) <https://www.elaw.org/>

Namati <https://namati.org/>

Comisión Interamericana de Derechos Humanos (CIDH) <http://www.oas.org/es/cidh/default.asp>

## Direct Action

Munduruku Consultation Protocol <https://amazonwatch.org/assets/files/2014-12-14-munduruku-consultation-protocol.pdf>

DAR Report on Consultation Protocols <https://dar.org.pe/>

Tina River Benefit Sharing Plan <https://www.tina-hydro.com/community-benefit-sharing-project/>

IFC CAO HAGL Report [http://www.cao-ombudsman.org/cases/case\\_detail.aspx?id=212](http://www.cao-ombudsman.org/cases/case_detail.aspx?id=212)

IFC CAO Dinant Compliance Audit [http://www.cao-ombudsman.org/documents/DinantAuditCAORefC-I-R9-Y12-F161\\_ENG.pdf](http://www.cao-ombudsman.org/documents/DinantAuditCAORefC-I-R9-Y12-F161_ENG.pdf)

## APPENDIX 2: DRAFT CHECKLIST OF KEY ELEMENTS IN AN IMPACT AND BENEFIT SHARING AGREEMENT

- A. Preconditions for Negotiation
  - 1. Relationship Building
  - 2. Negotiation Framework
  - 3. Capacity Funding for Negotiations
  - 4. Will the BSA be Legally Binding?
- B. The Parties
  - 1. First Nation Parties
    - Customary Law*
    - Representative Bodies*
    - More Than One First Nation*
    - Band-Held Corporations*
  - 2. Government Parties
  - 3. Corporate and Other Parties
- C. Background and Foundational Principles
- D. Definitions
- E. Agreement Purpose
  - 1. Certainty
  - 2. Non-Derogation of Aboriginal Rights
- F. Administration and Implementation Costs
- G. Communications
  - 1. Communications
  - 2. Information Requirements and Reporting
- H. Decision-Making
  - Consultation
  - Collaborative Management
  - Joint Management
  - Categorizations of Decisions
- I. Environmental Protection and Maintenance of Traditional Activities
  - 1. Relationship to Legal Regulations
  - 2. Relationship to Environmental Assessment Processes
  - 3. Environmental Standards and Monitoring
    - Standard Setting*
    - Monitoring and Response*
  - 4. Maintenance of Traditional Use
  - 5. Application to Third Party Contractors
- J. Financial Accommodation, Compensation and Revenue-sharing
  - 1. Legal and Policy Context
  - 2. Accommodation From Government
  - 3. Benefit Sharing From Companies
- K. Business and Employment Benefits
  - 1. Business Opportunities
    - Equity Provisions*



*Service and Supply Contract Opportunities*

2. Employment Opportunities

L. Community Benefits and Resources

M. Lands and Assets

1. Land Acquisition

2. Licenses, Permits and Leases

N. Term of BSA

O. Evaluation and Amendment

P. Enforceability and Dispute Resolution

Penalties and Incentives

Q. Confidentiality

R. Standard Contract Clauses

S. Signing Authority and Ratification

## GLOSSARY OF KEY TERMS FOR INDIGENOUS NEGOTIATION

**ABORIGINAL:** A common, collective name for referring to Indigenous People in Canada or Australia. In this resource guide, the terms *Aboriginal* and *Indigenous* (the more common international term) are used interchangeably, and meant to be inclusive of all Indigenous People.

**ACCESS AND BENEFIT AGREEMENTS:** Access and Benefit-Sharing Agreements or Benefits Agreements are often negotiated at exploration stages. In certain countries, ABAs have specific requirements set out in legislation or land claim agreements.

**AGREEMENT IN PRINCIPLE:** A verbal or written agreement to proceed in a mutually beneficial manner, normally as an early indication of desire to work toward a formal agreement (see also *MoU*). Written agreements may or may NOT be legally binding.

**ANNUAL PROFITS OR LOSSES:** How much money a company makes or loses, after the company has paid its expenses, over the period of a year. The details may be provided in a financial statement.

**BROWNFIELD:** Exploration involving searching for new deposits, or extension of existing deposits, in areas where mining is already underway or has already been completed (see also *greenfield*).

**CAPITAL COSTS:** The costs of establishing or expanding a project, including equipment and building costs, and of replacing equipment (as opposed to ongoing operating costs, such as wages and consumable supplies).

**COMMODITY:** Substances, such as metals, palm oil, electricity or carbon that can be sold or exchanged in a marketplace.

**CONSULTATION:** Processes that provide meaningful information about projects to Indigenous People, and record their responses, which may or may not be acted upon by companies or government.

**CLAUSE:** A section or paragraph in a contract.

**COMMUNITY:** A group of individuals, families, and households who collectively live within or have strong historical ties to a specific territory with definable boundaries and who are governed by a shared set of either state or customary governance structures.

**COMPANY:** An entity that engages in business. This guide deals with companies and investors that carry out natural resource projects—particularly agricultural or forestry projects—but it may be also be relevant in the case of companies that carry out projects. The terms “company” and “investor” and “project proponent” are used interchangeably throughout the guide. See also the definition for “Investor.”

**CONTRACT:** When two or more parties (people, communities, or organizations) promise to do something in exchange for a valuable benefit, this can form a contract, which is “legally binding.” Parties that enter into a contract have rights and obligations under the contract. Typically, the steps or process that must be followed in order for a contract to be valid are described in a country’s laws. Valid contracts will create “enforceable legal rights.”

**CONTRACT AREA:** The area of land that the contract covers. Business activities may take place on this land.

**COMMUNITY–INVESTOR CONTRACT:** A contract entered into by a community and a company or investor to agree to the terms on which a company may use the community’s lands and resources.

**EA or EIA:** Environmental assessment (or environmental impact assessment) is the assessment of project impacts on the environment. There are many levels of assessment, as described in Chapter 3.

**ENFORCEABLE LEGAL RIGHTS:** Rights that are recognized and protected by the law. In some places, enforceable legal rights explicitly include customary rights that arise out of customary law. Enforceable legal rights can also be created through a contract. All parties to the contract must respect these legal rights. If a party to the contract does not respect these rights, it can be ordered to do so by a court.

**ENVIRONMENTAL AND SOCIAL MANAGEMENT FRAMEWORK (ESMF):** An ESMF explains how a common set of safeguard standards will apply to project activities that may not yet be fully specified or may be implemented in multiple geographies, whether communities, subregions, or countries that may fall under possibly different legal or political jurisdictions, or through a funding mechanism for which the specific locations or activities have not yet been defined.

**FEASIBILITY:** Analysis to determine whether a proposal will be possible and profitable.

**FRAMEWORK AGREEMENT:** Identifies and describes in detail the procedures by which both parties will engage in a good-faith negotiation that leads to a comprehensive agreement covering all benefits and costs, as well as roles and responsibilities and the arrangements for implementing and monitoring these processes.

**GREENFIELD:** Exploration involves searching for mineral deposits in areas that have had little or no previous exploration or mining (see also *brownfield*).

**GRIEVANCE MECHANISM:** A process for individual community members to communicate and seek remedies for complaints or grievances they have regarding the project's negative impacts or the conduct of the company or its employees.

**HUMAN RIGHTS IMPACT ASSESSMENT:** A study that analyzes the potential or actual human rights impacts of a project and provides recommendations to respond to those impacts.

**IMPACT ASSESSMENT:** A process of evaluating the impacts on a proposed project or development.

**IMPACT AND BENEFIT AGREEMENT (IBA):** a contractual agreement between an Indigenous community or entity and a resource development company, such as a mining company.

**INUIT IMPACT AND BENEFIT AGREEMENT (IIBA):** a contractual agreement between an Aboriginal community or entity and a resource development company, such as a mining company. IIBAs are commonly used in parks and protected areas.

**INDIGENOUS-LED IMPACT ASSESSMENT:** A process that is completed prior to any approvals or consent being provided for a proposed project, which is designed and conducted with meaningful input and an adequate degree of control by Indigenous parties — on their own terms and with their approval. The Indigenous parties are involved in the scoping, data collection, assessment, management planning, and decision-making about a project.

**INDIGENOUS PROTECTED AREA:** IPAs are areas of land and sea managed by Indigenous communities as protected areas for biodiversity.

**INFRASTRUCTURE:** The basic facilities such as roads, ports, power and water supplies needed for the functioning of a project. Physical structures and systems necessary for a business, city, or village to operate, such as buildings, roads, water piping or wells, communications towers, and electrical systems. Social infrastructure refers to structures and systems used for social services, such as schools and health clinics.

**INVESTMENT ACTIVITIES:** Activities that are carried out for an investment project with the intention of making a profit.

**INVESTMENT PROJECT:** A project undertaken by a company or investor with the intention of making a profit.

**INVESTOR:** A person or entity that puts money into businesses or investment projects. This guide deals with investors that carry out natural resource projects—particularly agricultural or forestry projects—but may also be relevant in the case of investors that carry out extractives or infrastructure projects. The terms “Company” and “Investor” are used interchangeably throughout the guide. See also the definition for “company.”

**JOINT VENTURE:** A partnership or conglomerate, often formed to share risk or expertise in relation to a particular project.

**JURISDICTION:** The territorial range of authority or control.

**LEASE:** A contract in which one party transfers land or property to another party, or the use of that land and property, for a specific period of time, usually in return for periodic payments called “rent.”

**LEGACY:** In mining, this often means that there continues to be environmental damage from an mine that is now closed.

**LICENSE:** Permission, generally provided by the government, to carry out a specific activity. Very similar to “Permit.”

**NEGOTIATOR:** Person involved in a back-and-forth communication designed to reach an agreement between two or more parties.

**NEGOTIATION:** Two or more people or parties who come together with the goal of reaching an agreement. Each side presents what they want, which is discussed until a compromise is reached.

**MOU:** A memorandum of Understanding often sets out the principles for two or more parties to work together for mutual benefit, such as between a community and project proponent prior to the negotiation of a formal IBA.

**MONITORING:** To regularly check how a project is operating and its positive and negative effects. This can be done to see if the company is complying with the law or with a community-investor contract. Monitoring can include different types of research, including testing water or soil for pollution, interviewing community members about their experiences, or checking company paperwork to make sure the government or company is complying with certain obligations, such as sharing revenue. Monitoring can be done by the government, the community, the company, or other actors.

**PARTY:** A person, community, or organization that enters into a contract with other persons or organizations.

**PERMIT PERMISSION:** Generally provided by the government, to carry out a specific activity. Very similar to “License.”

**PROFIT-SHARING:** For the purposes of this guide, an arrangement in which the community receives a direct

share of a company’s profits from the project. Profits are the money the company earns from the project minus how much the company has spent on the project.

**PROPONENT:** In the case of environmental assessment or impact assessment, the proponent is the company or group of companies that are proposing a development project.

**RECLAMATION:** Restoration of mined land to a state as close as possible to its original contour, use or condition.

**REHABILITATE OR RESTORE:** Process used to repair the impacts of a project on the environment.

**ROYALTY:** For the purpose of this guide, a royalty is a payment given to the community that is based on the amount of goods produced by the company’s project. The payment may be a percentage of the value of the goods produced (for example, 10% of the value of goods produced), or it may be a payment for every unit of good produced (for example, \$10 per ton of good produced).

**REDD+:** Reduced Carbon Emissions though Deforestation and Degradation

**SINGLE WINDOW:** A facility that allows parties involved in environmental impact assessment to lodge standardized information and documents with a single entry point to fulfill all related regulatory requirements.

**SOCIAL IMPACT ASSESSMENT:** A study that analyzes the potential and/or actual social impacts of a project, and that recommends measures to respond to those impacts.

**STAKEHOLDER:** Any party that has an interest (“stake”) in a project.

**SUBSIDIARY:** A company that is owned and controlled (in part or in full) by another company. For instance, a multinational company may establish and register a subsidiary company in the country where a project will take place, so that the subsidiary company can assume all rights and responsibilities relating to the project.

**SUPERMAJORITY VOTE:** A vote in which two-thirds (66%) of the electorate vote in favor of the decision (in contrast

to a simple majority vote, in which decisions can be made with only 51% of the vote in favor).

TAILINGS: Material disposed of from a mill after most of the valuable minerals have been extracted.

TENURE RIGHTS: Customary or formal legal rights to land and the natural resources on that land.

TERM: The period of time during which a contract is operative (in effect). Sometimes this is called the "duration" of the contract.

VALUED COMPONENTS: Valued components have been included in proponent led environmental assessment processes to define the core values that will be reviewed and scoped into a study.

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## About the Guide

Since 2017, Conservation International, Oxfam and Rainforest Foundation US have collaborated to develop an **Indigenous Negotiations Training of Trainers Program**. In our outreach to design this Resource Guide, we have observed over and over again how negotiations capacity among Indigenous Peoples is one crucial tool for ensuring the proper stewardship and equitably shared benefits of the planet's most valued lands, territories, waters and biodiversity. This outreach to partners has been met with clear interest for CI to work with partners in developing a resource to further support Indigenous negotiation.

The Resource Guide draws heavily on lived experiences by Indigenous Peoples and CI recognizes them as primary authors of the central lessons of the approach to negotiation. The approach draws on a legacy of diverse negotiation expertise that Indigenous Peoples trace back to their ancestral origins. This legacy informs current traditions of cooperation, reciprocity, and fairness that are vital to Indigenous priorities for sustainable development. We draw as well from CI's collective experience and learning in collaboration with Indigenous Peoples over three decades.

This effort began with learning from experiences in the extractive industries sector and the guide borrows heavily from pioneering analysis and training materials designed explicitly for the mining sector. Indeed, this guide has benefitted from the guidance of Ciaran O'Faircheallaigh from the outset.

The methodology presented here moves beyond the mining IBA Toolkit by focusing on other sectors and legal contexts in the Global South. The objective is to adapt, transfer and integrate the significant learning and achievements of Indigenous negotiated agreements in Australia, Canada and elsewhere with the equally significant and rapidly changing experiences of FPIC and negotiations in Asia Pacific, Africa, Latin America and the Caribbean. We extend the scope of negotiations to natural resource management (REDD+ emissions reduction contracts, payments for environmental services, ecotourism), transport and energy infrastructure and agriculture (social and environmental management plans/programs; resettlement plans/frameworks, leasing, concessions).

This Resource Guide reflects ongoing learning about how future efforts by CI and others to support Indigenous negotiation might best respond to the interests and needs of CI's partners, building on the knowledge and achievements that have been generously shared in the work leading to this guide. The efforts to use the Resource Guide in building an Indigenous Peoples and Local Communities Negotiations program will strive to facilitate greater direct exchange between expert Indigenous negotiators, as well as a network that facilitates the transfer of expertise and resources to community-level efforts to defend collective rights to lands and waters under pressure from the extraction and transport of natural resources.

As a rights-based organization, CI respects the autonomy of Indigenous partners to manage natural resources in ways that meet their own principles and priorities for human well-being and fulfilling life plans. CI is committed to the integration of human rights in all that we do. CI observes Indigenous leaders negotiating every day for transformative change that protects nature and defends fundamental human rights. CI's conservation objectives require partnership with Indigenous women and men who are strong negotiators to succeed in our shared purpose of conserving the nature for the benefit of people. CI seeks innovative partnerships with Indigenous Peoples that protect the lands, waters and resources over which Indigenous Peoples exercise traditional rights. Well-negotiated agreements that can secure these values is central to the design and implementation of any conservation strategy.



The views expressed in this Guide are intended to reflect the inputs of a wide range of Indigenous organizations, but not necessarily the institutional positions of any named organization. This Guide and the materials produced within are open access and may be cited as:

McElhinny, V., M. Degawan, P. Dunne, A. Cruz. October 2021. Indigenous Negotiations Resource Guide. Arlington, VA: Conservation International.

These materials are intended to contribute to a growing program on capacity building for Indigenous negotiations. As a step forward in this process, we hope the Guide provides a useful resource and the means for future collaboration.

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