



**Commentary on Foley Hoag LLP’s Report for Talisman Energy:
“Implementing a Corporate Free, Prior, and Informed Consent Policy:
Benefits and Recommendations”**

April 29, 2010

Foley Hoag LLP’s report emerged out of a shareholder proposal¹ to Talisman Energy from socially responsible investors Bâtirente and Regroupement pour la Responsabilité Sociale des Entreprises (RRSE). In response to this dialogue, Talisman commissioned Foley Hoag to conduct a feasibility study on the adoption of a corporate policy on free, prior and informed consent (FPIC). In March 2009, Bâtirente and RRSE invited WRI to provide a third party commentary on the report. WRI agreed to participate on an independent and pro bono basis.

In the report, Foley Hoag defines FPIC as “a formalized and documented social license to operate.” FPIC is emerging as an effective way to prevent conflict, empower indigenous peoples, and reduce the harmful impacts of development projects in poor areas. It can help companies and host governments to identify and respect the human rights of indigenous peoples and vulnerable communities, increase the legitimacy of a project in the eyes of local and international stakeholders, and reduce the risks of conflict and reputational damage for project proponents.

We appreciate the opportunity to comment on this report, which will become an important milestone in improving the understanding of FPIC within the extractive industries sector. We commend Foley Hoag for preparing such a thoughtful, well-researched report. In this document, we provide our perspective on the report: its scope, content, and Talisman’s plans for taking this process forward.

Significance of the report

Whether companies commit to “FPIC” or “broad community support” or other categories of community engagement, it is clear that responsible companies recognize the need for indigenous peoples to agree to their presence within their territories. The challenge is to identify what this means for companies on an operational level, and how companies can demonstrate to others that they have gained consent from affected peoples.

This report is an important step in that direction. It demonstrates a concrete approach to analyze and define more clearly how companies can seek and demonstrate consent from indigenous peoples. It is critical that companies, indigenous peoples, and civil society continue dialogue on implementing FPIC, so that companies will become more comfortable with using the term “FPIC,” and so the discussion can move beyond semantic labels. Only through collective dialogue will we be able to develop on-the-ground processes to credibly gain and maintain the consent of indigenous peoples.

¹ After Talisman agreed to a dialogue and feasibility study, the investors withdrew their proposal.

Scope of the report

The report resulted from a multi-stakeholder process that took place over the course of a year. Talisman set the parameters of the research with input from Bâtirente and RRSE. The process, agreed upon with Bâtirente, RRSE, and WRI, enabled Foley Hoag to reach out to a wide variety of stakeholders. Talisman encouraged a process that allowed for frank and open exchange of ideas. As a result, Foley Hoag was able to produce a study that portrays an honest and fair “snapshot” of where FPIC practices currently stand.

As with all studies of this level of complexity, it is impossible to be comprehensive. The report effectively builds the business case for FPIC, by outlining many current best practices for ensuring that companies have the consent of indigenous peoples in a way that is free, prior, and informed. We believe that Talisman would have received additional value from this research had the scope of the report also included:

- Greater outreach to indigenous leaders (Foley Hoag made efforts to do so, but with limited response). In particular, the report could have explored in greater detail how some indigenous peoples already have FPIC decision-making protocols in place.
- Recommendations on how to integrate FPIC into the management systems of a global company such as Talisman.
- A case study that explores local community dynamics, such as the ongoing conflicts between indigenous peoples and companies in Peru.

Content of the report

Building the business case for FPIC

Discussions on FPIC often hit an immediate roadblock when the question arises: “does consent mean that indigenous peoples have a veto?” If a company considers this question in isolation, the value of FPIC may not be apparent. Rather than understanding consent only as a veto right, the report emphasizes how gaining and maintaining FPIC can ensure that the company has a social license to operate throughout the project cycle. When viewed in this way, FPIC can be a cost-saving measure and a safeguard (both for companies and communities) against many of the project’s environmental and social risks. The report effectively builds the business case for FPIC, by considering questions such as:

- How does FPIC fit into community engagement?
- How does FPIC fit into the project cycle?
- Who is responsible for what – the government, company, or community?

The report understandably focuses on the corporate perspective on FPIC. However, it is important to emphasize that from the viewpoint of indigenous peoples, it does not matter whether FPIC makes business sense. From a rights-based perspective, if a company’s activities potentially infringe on indigenous peoples’ rights, FPIC is necessary. It is important for companies to respect this viewpoint. In addition to the recommendations in the report, we recommend that companies

conduct a human rights impact assessment at the onset of the project in order to identify whether they risk infringing on peoples' rights.

Issues that require further discussion

We appreciate how the report dives into depth on complex political, cultural, and legal issues. Given the breadth of this topic, the report understandably leaves some gaps; but it is certainly one of the most comprehensive analyses of FPIC that we have encountered. The report raises several issues that would benefit from further discussion, including:

- **When should a company seek FPIC?** The report recommends that “Talisman should seek consent prior to activities with ‘substantial impacts’ on indigenous peoples in locations where the policy of seeking community agreement based on FPIC principles applies.” The proposed FPIC policy hinges on the meaning of “substantial impacts.” Yet this phrase may have various interpretations: Who determines what impacts are substantial? Is there a body of precedents to guide this determination? How are indigenous peoples involved in the process to determine what is substantial? It is unclear where to draw the line. For example, if health risks exist two kilometers downriver from project facilities, are these risks substantial? If the company locates the pipeline ten meters from a house or crops, in order to avoid resettlement, are these risks substantial? Many indigenous peoples argue that FPIC applies to *any* activities that affect their territory—including villages, hunting and fishing grounds, ancestral lands, and spiritual places.
- **Should a company seek FPIC during the exploration phase?** Talisman’s business model is predicated on exploring in high risk areas, and as a result, several sections of the report consider whether to apply FPIC during the exploration phase. The report acknowledges both sides of this debate, and concludes that FPIC should *not* take place before the exploration phase, except perhaps where relations between the company and indigenous peoples are especially strained. The report argues that in many cases, the exploration phase does not have “substantial impacts” on indigenous peoples, and that negotiating with them before the scope of a proposed project is known can create false expectations. However, as the report notes, many indigenous peoples and NGOs argue that the exploration phase itself can create risks and disrupt the lives of local communities. Furthermore, indigenous peoples may perceive that once exploration begins, they do not have the ability to withhold their consent to a project, thus affecting any consent processes later in the project cycle. As a result, many NGOs advocate that the company *should* seek FPIC before the exploration phase. The debate between these two viewpoints remains heated. The report provides much useful guidance on how to engage indigenous peoples during the exploration phase. However, we believe that Talisman would benefit if the report proposed a set of principles for deciding when to ensure FPIC before exploration, rather than concluding that FPIC is not necessary before this phase.
- **What is an “indigenous people” and who represents them?** One of the most difficult challenges of implementing FPIC is to identify which indigenous peoples to engage, and who represents them. This is also a challenge of community engagement more broadly. If not done carefully, a project can “divide and conquer” communities. Conflict can ensue when some members of a community support the project, while others oppose the project.

The report considers this issue in great depth, and provides many useful recommendations on how to identify community leaders and representatives, how to include women and marginalized groups, and how to ensure that leaders speak on behalf of the people. While this is an important step, we believe that further discussion is merited on issues such as how to identify an “indigenous people,” how to engage in areas such as Peru where local and regional indigenous representatives do not necessarily agree, and how to determine whether a spokesperson is truly representative of the people. Additionally, we believe that neither companies nor individual communities will always be able to effectively identify an “indigenous people” and its leaders on a unilateral basis. As such, we recommend further discussion on how to use independent facilitators to run an FPIC process.

- **How should a company resolve conflicts between its FPIC policy and local laws?** The report finds that companies should comply with local law, but that there is a strong business case to go beyond the law. Difficulties emerge, however, when local law or government officials hinder the opportunities for a company to seek FPIC, e.g. by setting a time limit on consultations, restricting which communities to engage, or failing to recognize the rights of indigenous peoples. The report notes that “If the government forbids any changes to the process, Talisman has no choice but to follow the law.” While the report also provides several recommendations on how to manage relationships with governments, this would benefit from further discussion. Companies would benefit from further guidance on issues such as: (1) performing a gap analysis to identify where the national law or regulation falls in relation to the company’s policy; (2) gaining FPIC from indigenous peoples when the government has already granted concessions without engaging them; (3) withdrawing from a project if a country’s FPIC and indigenous peoples laws are insufficient; (4) withdrawing if the government forbids the company to exceed the laws; and (5) working jointly with other responsible companies to encourage governments to adopt FPIC policies. Companies should consider these issues before beginning any project.

Challenges of moving forward

After finalizing the report, Talisman may take steps to adopt an FPIC policy and implementation guidelines. We anticipate two challenges in moving forward:

- **Will Talisman apply an FPIC policy across all of its operations?** It remains unclear whether Talisman will apply an FPIC policy to its operations in Canada and the United States. At the time that Talisman commissioned the report, neither government had expressed support for FPIC nor endorsed the UN Declaration on the Rights of Indigenous Peoples. Yet this may change soon: Canada recently announced its intention to endorse the UN Declaration, and the United States is reviewing its position.² At the same time, the report describes several examples where mining companies have gone beyond the requirements in Canada to gain FPIC from indigenous peoples. Given the recommendation that Talisman pilot test this policy, there are important lessons to be learned by applying the

² Government of Canada, Speech from the Throne, 3 March 2010, Ottawa, <http://www.speech.gc.ca/eng/media.asp?id=1388>; Remarks by Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, at the UN Permanent Forum on Indigenous Issues, 20 April 2010, <http://usun.state.gov/briefing/statements/2010/140600.htm>.

policy in the United States and Canada. Talisman should seek to apply an FPIC policy globally.

- **Will Talisman apply its FPIC policy to current operations?** The report does not provide recommendations on how Talisman could apply an FPIC policy to operations that are already underway. According to reports by the NGO Amazon Watch, for example, Talisman is operating in the Peruvian Amazon in an area that affects the Achuar indigenous people. Amazon Watch reports that the Achuar have expressed opposition to Talisman's presence, stemming in part from their prior interactions with oil and gas companies. While Talisman may have differing views on whether the Achuar people have provided their FPIC, the report provides a useful framework for moving discussions forward in a constructive manner.

Recommendations

We see this report as a valuable tool for Talisman, as well as other companies and affected communities. The report could serve as the basis for dialogue with communities, NGOs, and other companies. In particular, we recommend that Talisman:

- **Make the report available to local communities** by translating it into relevant languages, posting it on the corporate website, and providing it directly to communities.
- **Use the report as a framework for discussions with local communities and NGOs** that have approached Talisman with concerns.
- **Inform industry groups and associations** about the lessons learned of developing and implementing an FPIC policy.

Finally, we support Foley Hoag's recommendation to review the FPIC policy after three years. Experience with FPIC implementation is growing, and we expect that FPIC will emerge as an industry standard in the coming years. We believe that Talisman has the potential to gain first-mover advantage in this space, and that these efforts will enhance Talisman's competitive advantage as a leader among energy companies.

Contact information

Kirk Herbertson
Associate, Institutions and Governance Program
World Resources Institute
+1 (202) 729-7902
kherbertson@wri.org