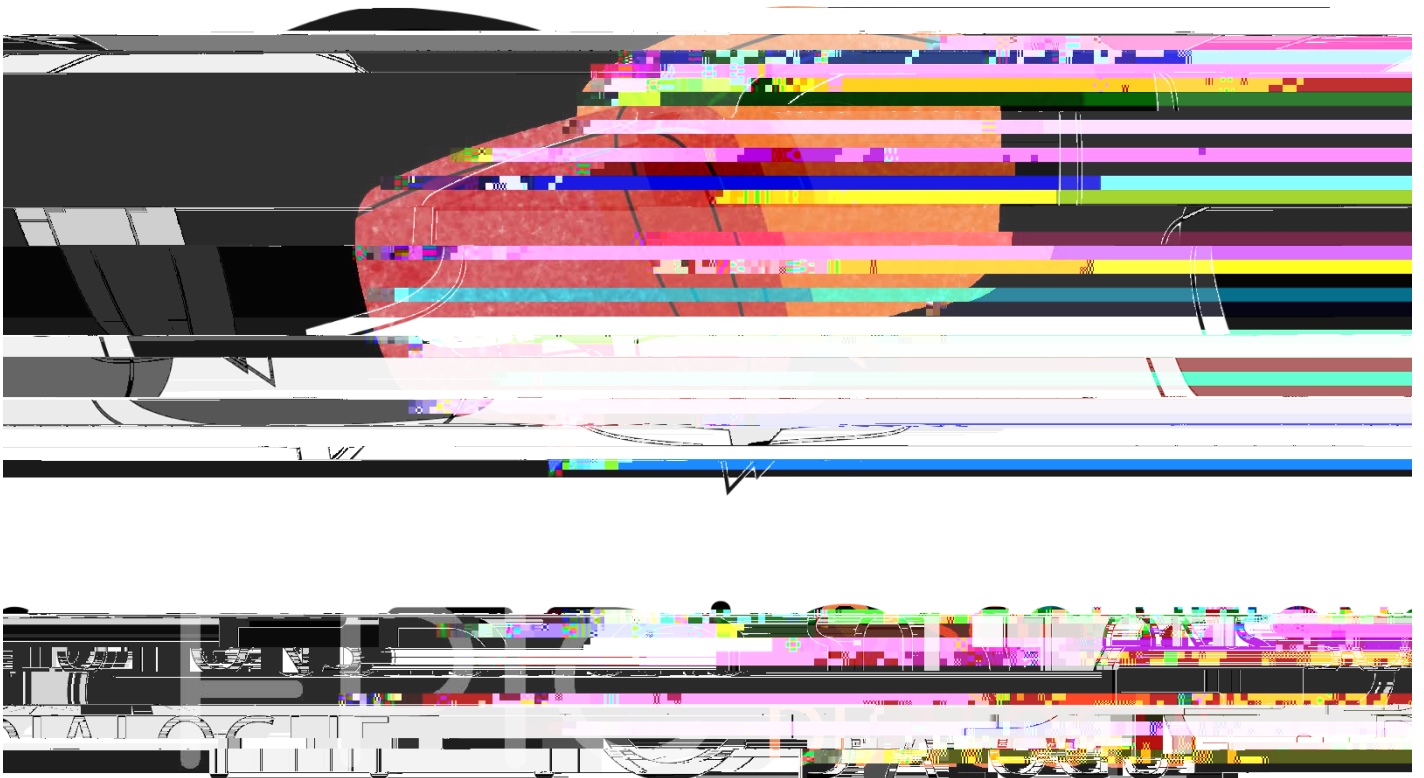


Free, prior and informed consent (FPIC) within a human rights framework : Lessons from a Suriname case study



A report on lessons learned from the Merian Mine prepared by an Expert Advisory Panel , organized by RESOLVE

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1 Introduction

The Merian mine is located in Suriname in the northeast South America and on the traditional lands of Maroon peoples. The Pamaka, one of the country's six Maroon tribes, claims customary ownership of the land on which the Merian mine is located. The mine is owned by the Suriname Gold Project CV, a Suriname limited partnership, in which the Suriname Gold Company LLC ("Surgold"), a wholly owned subsidiary of Newmont Mining Corporation ("Newmont"), is the managing partner and the Suriname government-owned oil company Staatsolie Maatschappij Suriname ("Staatsolie Maatschappij") is a limited partner.² Through its wholly owned subsidiary Surgold, Newmont owns 75 percent of the project, and through Staatsolie Maatschappij, the Government of Suriname indirectly owns a 25 percent fully-funded share.

In February 2016, Newmont commissioned RESOLVE to convene the Merian Expert Advisory Panel (the "Panel") to consider matters relating to free, prior and informed consent ("FPIC") within a human rights framework at Merian. Natural resource development and extraction can affect a vast array of indigenous and tribal peoples' human rights, including land and resource rights, rights to culture, and rights to health. The Panel considers FPIC to be a mechanism to safeguard indigenous and tribal peoples' human rights, including their rights over traditionally used and occupied land and resource. At the same time, the operationalization of FPIC by state and corporate actors provides a framework through which to recognize and respect those rights.

The mining industry's engagement with indigenous and tribal peoples is evolving. There is broad agreement within the industry about the corporate responsibility to respect human rights and the need to work towards obtaining FPIC when mining occurs on lands traditionally owned or customarily used by indigenous or tribal peoples. The practical realities of implementation, however, are not straightforward. Newmont states that its approach to company-community engagement and negotiation at Merian is based on the principles of FPIC.³ Newmont does not claim to have obtained the FPIC of the Pamaka Merian. There is no precedent for large-scale resource development obtaining FPIC for resource development from a Maroon tribe in Suriname. Against this backdrop, Newmont

¹ These six tribes include the Saramaka, Pamaka, Ndyuka (Aukan), Kwinti, Aluku (Boni), and the Matawai.

² Surgold's name was changed from "Suriname Gold Company, LLC" to "Newmont Suriname, LLC" on 7 September 2016, while the Panel was writing this report.

³ See: UN Special Rapporteur on the rights of indigenous peoples, James Anaya, "Compilation of the conclusions and recommendations of the Special Rapporteur on the rights of indigenous peoples,

invited the Panel to review its on-the-ground practices at Merian and provide advice about how the company can better align with FPIC principles in the future.

The following factors are important background considerations in this case

- x Newmont has committed to respect human rights and particularly the social, economic and cultural rights of indigenous peoples since at least 2002. In 2014, Newmont committed to work to obtain the consent of indigenous peoples when operating on their traditionally owned or customarily used lands.⁶
- x Planning and development of the Merian mine pre-dates Newmont's specific FPIC policy commitments, which do not demand retrospective application or application to projects in advanced stages of permitting or development.
- x The Government of Suriname does not formally recognize the customary land and resource rights of any Maroon or indigenous tribes, despite legally binding judgments by the Inter-American Court of Human Rights demanding that it do so and its commitments to implement those judgments
- x It is apparent that the Government granted the company exploration and mining licenses on Maroon customary lands, contrary to its human rights obligation. The Government did not ensure effective consultations with Maroon tribes prior to granting the licenses as required by international standards⁷
- x To enable the advancement of the Merian

x Surgold acting as managing partner of Suriname Gold Project, has entered into a

The three Expert Advisory Panel members are

- x Professor James Anaya, Dean of the University of Colorado Law School and former United Nations Special Rapporteur on the Rights of Indigenous Peoples
- x Jessica Evans, a human rights lawyer, Senior Business and Human Rights Researcher at the nongovernment organization, Human Rights Watch
- x Professor Deanna Kemp, Director of the Centre for Social Responsibility in Mining, part of the Sustainable Minerals Institute at the University of Queensland.

RESOLVE was responsible for the appointment of all members of the Panel. Originally intended that an expert from Suriname and/or a representative from the Pamaka would be appointed to the Panel. While RESOLVE sought advice about additional members, a candidate with the desired experience was not identified. This was a limitation of the process.

The Panel was engaged to undertake two primary tasks. The first was to advise Newmont on community engagement practices that support its operationalization of FPIG within a human rights framework at the Merian mine. The Panel's second task was to contribute to building knowledge and understanding of relevant human rights standards in extractive industries by documenting their observations and recommendations.

That said, according to the Inter-American Court and the Committee on the Elimination of

2.2 Activities of the Panel

This report is based on rapid analysis of documents, discussions with key informants, and

negotiation processes with the Pamaka people. This said, some understanding of the background context is needed to understand the company's relationship with the Pamaka and the challenges involved. This section provides information about the mine and its interaction with the Pamaka. A baseline of key events is provided, followed by a description of relevant company-community incidents.

3.1 The Merian mine

Merian is a large-scale gold mine that is operated by Newmont's wholly owned subsidiary, "Surgold". Surgold holds a 75 percent share in the project and the government

2010

x President

3.4 Relevant community-related incidents

security personnel in 2015. Company representatives said that they engaged the government in a de-brief after the 2015 eviction.

4 Community engagement and principles of FPIC at Merian

This section describes what the Panel learned about the company's efforts to engage the Pamaka community and establish constructive relationships based on mutual understanding and trust. It outlines key points of engagement with the Pamaka during the project approval period, and during negotiations over the Cooperation Agreement, which was signed in June 2016. Surgold states that their engagement and negotiation with the Pamaka was based on principles of FPIC.

4.1 Engagement processes and mechanisms

Newmont states that it has engaged in building constructive relationships with the Pamaka since 2004 and aims to generate long-term, sustainable social and economic benefits for the Pamaka and the people of Suriname more broadly.³² In line with this objective, Surgold appointed community relations specialists in the exploration phase. Company personnel explained that prior to project approval and construction, the approach to community engagement was focused on broad-based consultation at the village and household level.

company is “operating on the ancestral lands of the Pamaka Community”. Within the Letter of Intent, the Pamaka confirm that they “support Surgold’s right to explore for and extract gold at the Merian Project as granted by the Government of Suriname”. The letter states that the parties will work together in a mutually beneficial way to manage impacts and maximize the value of each other’s presence in the area. The letter refers to the future establishment of a Community Development Fund and was signed three months prior to the signing of the Mineral Agreement for Merian.³⁴

4.2 Negotiating the Cooperation Agreement

In June 2016, Surgold and Pamaka representatives finalized the negotiation of a “Cooperation Agreement” to define each party’s roles and responsibilities for those matters contemplated in the Letter of Intent. The Merian mine was, by this stage, in advanced stages of construction. The agreement refers to the implementation of specific programs including infrastructure improvement and maintenance, preferential employment and procurement, participatory environmental monitoring, community health and safety, and informal mining. The agreement also refers to establishing a complaints and grievance mechanism, communication and information sharing, and outlines the parameters for the creation of a Pamaka Community Development Foundation. The Panel spoke to several company and community representatives who had attended a *Graan Krutu* event at Langatabiki at which the Pamaka’s four Head Captains signed the agreement in the presence of the Minister for Regional Development and Minister for Natural Resources.³⁵ Mwt

5 Panel observations on the operationalization of FPIC at Merian

This section details some of the challenges that the Panel observed in terms of the efforts made by Surgold and Newmont to operationalize elements of FPIC. It is important to restate that Surgold does not claim to have obtained FPIC at Merian, nor is it pursuing an FPIC process. Rather, Surgold states that its engagement and agreement taking processes are “based on the principles of FPIC”. Newmont is interested in understanding where gaps exist in its current practice and what might be required to obtain FPIC should it develop another project on Maroon territory in the future. The discussion that follows presents the Panel’s reflections on these issues. Recommendations are provided in the following section. |

- x the nature and composition of the informal mining economy, and the associated impact on livelihoods of Pamaka, members of other Maroon tribes, others
- x the effect on individuals, households, and the Pamaka more broadly of losing access to Gowtu Bergi and other customary land holdings.

During its visit to Merian, the Panel learned that Newmont was considering a livelihood restoration program to address the economic displacement of Pamaka from their traditional lands. However, in the absence of knowledge of customary land tenure and livelihood systems, the company

captured, or institutionalized. Verbal communication appeared to represent the primary mode of knowledge transfer. The informal nature of this knowledge and its mode of transfer pose a risk to all parties. There is a significant likelihood that important knowledge was lost as the project moved from exploration, through feasibility and construction, and into operation, increasing the likelihood that performance gaps emerge. Finally, limited knowledge about social performance management systems amongst the site-based community relations team exacerbates issues associated with mobilizing social knowledge for influencing senior decisionmakers.

Summary points

- x The quality and form of Merian's social knowledge base is not commensurate with the complexity of its operating context.
- x Social knowledge is held by individuals, and shared through informal means. Studies are either not held centrally (ease of reference) or not held at all.

emphasized the importance of independent information particularly regarding environmental matters. The Panel's observations suggest that information and engagement systems need to be strengthened.

Most Pamakawith

5.5 Addressing women's rights

Respect for women's rights is integral to the corporate responsibility to respect human rights.⁴⁸ This is particularly important in the context of mining within or near the customary lands of indigenous or tribal peoples. Indigenous and tribal women face multiple forms of discrimination. They are often discriminated against because they are indigenous, and because of their gender. They can be increasingly vulnerable to human rights abuses when they live in poverty. Around the world, research shows that the introduction of large scale mining can adversely affect indigenous and tribal women, often in distinct and disproportionate ways when compared to indigenous and tribal men.⁴⁹ Further, unless the problem of discrimination against women is recognized and m16(t w)1(c)8(64.1(o)27i)4(r)l Tw 9.1v

rights. It explains that indigenous and tribal culture is not static, that efforts must be made to ensure that social change supports women's rights and interests. The brief also states that indigenous women's participation should be mandatory in consultation and decision making processes about natural resource management. The brief recommends that gender analysis should form an essential part of the impact assessment process. The Inter-American Court judgments also support the view that participation and gender impact assessments offer a safeguard for indigenous and tribal women's human rights.

The Panel observed that the traditional authority structure of the Pamaka provides opportunities for women to participate as general members of the community, leaders, and representatives. The Panel met through Pamakan women in leadership positions, including a Captain, a member of the Negotiating Committee, and a head boss who was also a business owner. The Panel observed some women voicing opinions, concerns, and aspirations for the future to their male counterparts, other members of the community, and the Panel. This provides an indication that the company had included some women in some engagement processes.

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1. Negotiate with the

5. Engage the traditional authority structures about how Newmont can improve its approach to community engagement without undermining traditional authority structures. Ideally this engagement would be:

a. broad-based, inclusive and considerate of the needs of subgroups of the community, including women and youth

b. comprehensive including information about:

i. human rights and the company's human rights responsibilities and commitments

ii. agreement processes, terms and outcomes

iii. impacts of Merian and future project developments on the Maroon and their individual and collective rights

iv.

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3. To obtain FPIC within a human rights framework, indigenous and tribal peoples' consent must be on terms that recognize and substantively account for their customary land and resource rights, and other affected rights. This would include affirmation that indigenous

- d. incorporating this knowledge into management systems so that impacts and risks can be tracked and managed
 - e. ensuring internal alignment and awareness of corporate policy commitments including implications for specific operating contexts.
7. A company that is not adequately prepared is not in a position to inform regulators, indigenous and tribal peoples or itself about the impacts that a project will have on indigenous and tribal peoples' rights. Neither will it be in a position to avoid conflict where there are matters for dispute, develop mitigation measures for known impacts or negotiate a benefit-sharing arrangement that is based on a genuine recognition of indigenous and tribal peoples' rights. The Panel urges a greater industry recognition of the symbiosis between:
- a. a resource developer being informed of the social context and the individual and collective land and resource rights of indigenous and tribal peoples
 - b. the developer's ability to generate information about the impacts and risks that a project might have on that social context and the rights of indigenous and tribal peoples.
8. Resource developers should approach the construction phase as a period of human rights risk. This approach would:
- a. enable the industry to develop risk mitigation measures for what is a well-known challenge to social performance, early in the mine lifecycle
 - b. support the "front end loading" of efforts to ensure that studies are available for the operational phase of the project
 - c. secure the necessary timing, allocation of resources and allocation of effort that is consistent with industry standards and FPIC principles
9. From the outset of a resource development project, consider how indigenous and tribal peoples can become partners in resource development and achieve a greater transfer of wealth based on recognition of their customary ownership of the lands in question.

8 Conclusion

The Panel welcomes the opportunity of w 6(to)2(ms)16(ti 47 >>Bdus) cn recog st14s il0()10(mat)-

rights dynamics associated with working to obtain FPIC in jurisdictions where broader conditions are not rights-compatible. The Panel provided a number of general recommendations for the industry at large. As a next step, these recommendations, alongside the findings of this report, will be discussed at RESOLVE's FPIC Solutions Dialogue.

The Panel also outlined a number of specific measures to improve community engagement and human rights performance at the Merian mine. Some of these constitute measures to remediate past practice and respond to identified gaps. For example, there is a need to address the issue of the incomplete state social baseline data and impact assessments that identify human rights issues. The Panel recommends that these studies be completed, and that the data and findings of these studies be shared with the Maroon tribes and incorporated into site-level strategies, plans and management systems at Merian. The Panel also encourages the site to use these studies as a basis for understanding the ramifications associated with the dispossession of some Maroon people.

encourages remedial action in instances where human rights compatible consent was previously not obtained and where parties agree that a remedy is possible. It is the Panel's view that in some instances, remedying past practice may be the only basis upon which FPIC for future decisions can be negotiated.

Annex 1

The international human rights framework

Natural resource development and extraction can affect a vast array of indigenous and tribal peoples' human rights. The substantive rights that are often implicated when mining and extractive industries operate within or near indigenous or tribal territories include their land and resource rights, rights to culture, and rights to health.⁵⁵

State duties

The abovementioned rights are grounded in binding international and regional human rights treaties, and explicitly articulated in the United Nations Declaration on the Rights of Indigenous Peoples. While these rights are enunciated in the Declaration, they stem from existing international law. Indigenous land and resource rights are rooted in the right to property, which is affirmed in the American Convention on Human Rights, to which Suriname is a party. Additionally, they are integral elements of the right to culture, the right to self-determination and the right to an adequate standard of living, protected by the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, treaties that also have been ratified by Suriname. Also relevant in affirming the now global standard of indigenous land and resource rights is International Labour Organization Convention No. 169 on Indigenous and Tribal Peoples.⁵⁶

The Declaration on the Rights of Indigenous Peoples states that they have the rights to "own, use, develop, and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use," and to determine their own development priorities and strategies.⁵⁷ In order to realize indigenous land and

resource rights, states are required to give legal recognition and protection to these lands, territories, and resources, with due respect to the customs, traditions, and land tenure systems of the indigenous and/or tribal peoples concerned.⁵⁸

As part of their obligation to protect indigenous and tribal peoples' rights, states have a duty to consult and cooperate with indigenous and tribal peoples through their own representative institutions in order to obtain their free and informed consent prior to approving any project affecting their lands or territories and other resources.⁵⁹ This duty should be understood as a safeguard mechanism against measures that may affect indigenous and tribal peoples' internationally recognized human rights. Human rights impact assessments that include a full analysis of indigenous and tribal peoples' rights are another safeguard, with accompanying measures to mitigate adverse rights impacts or compensate them for such impacts in accordance with international standards.

Corporate responsibility frameworks

While the obligation to respect, protect, and fulfill human rights lies with governments, businesses have a parallel responsibility to respect human rights, including rights of indigenous and tribal peoples. In the *Protect, Respect and Remedy* framework (2008), Professor John Ruggie, former UN Secretary-General's Special Representative for Business and Human Rights, elaborated on the basis for the international human rights obligations and responsibilities pertaining to business. This framework was consolidated into a set of Guiding Principles on Business and Human Rights endorsed by the UN Human Rights Council in 2011. The framework and principles set out:

contribute to the infringement of the rights of indigenous and tribal peoples that are internationally recognized, particularly in contexts where the reach and application of domestic laws insufficiently safeguard those rights. Typically, the exercise of such due diligence by companies seeking to develop or extract resources within indigenous or tribal peoples' territories will be facilitated by companies themselves engaging with indigenous and tribal peoples in association with FPIC processes.

International financial institutions and industry groups require (Tjns005Tingybb36(anic)4(at)-4(it)-engagement with indigenous and tribal peoples. IFC clients are required to identify (anic)4 nature and degree of expected economic, social, cultural, and environmental acts of the projects and identify (ee9(1-2(f)-ie)-p3w) Is

communities that they affect and the people they employ.⁶⁴ As part of its 2013 Position Statement on Indigenous Peoples and Mining, the ICMM outlined measures that its members have committed to in order to ensure respect of indigenous and peoples' rights. This includes a commitment to "work to obtain the consent of indigenous communities for new projects (and changes to existing projects) that are located on lands traditionally owned by or under customary use of indigenous peoples and are likely to have significant adverse impacts on indigenous peoples, including where relocation and/or significant adverse impacts on critical cultural heritage are likely to occur."⁶⁵ ICMM members are not committed to applying this retrospectively to projects in advanced planning or operation, as is the case of the Merian project.

Building upon its earlier jurisprudence, in the case of *Saramaka v. Suriname*, the Inter American Court recognized the rights of Maroon Saramaka communities to lands and resources on the basis of their traditional tenure, again in accordance with the property right protections in Article 21 of the American Convention of Human Rights. The Court ordered Suriname, through meaningful consultations, to “delimit, demarcate, and grant collective title” over Saramaka traditional territory in accordance with their customary laws; and to adopt legislative, administrative, and other measures necessary to legally recognize this collective title.⁷² Notably, the Court further ordered Suriname to “adopt legislative, administrative and other measures necessary to recognize and affirm the right of the Saramaka people, [...] when necessary, to give or withhold their free, informed and prior consent, with regards to development or investment projects that may affect their territory,”⁷³ jonsfb

indigenous and tribal peoples in Suriname enjoyment of their individual and collective rights, in violation of international law. The Inter-American Court's judgments address the legal responsibility of the state of Suriname and do not directly establish the legal responsibility of the private actors involved. In the Kaliña and Lokono case, however, the Court admonished that private companies have responsibility to respect human rights, including the rights of indigenous and tribal peoples, in analyzing the legal responsibility of Suriname in relation to the relevant corporate conduct.⁷⁷ Moreover, the judgments set forth an authoritative assessment of the content of the land and resource rights of the Maroon peoples under international human rights law. Therefore, companies that also act inconsistently with the Inter-American Court's recognition of Maroon land and resource rights themselves infringe or contribute to the infringement of those rights, contrary to the UN Guiding Principles on Business and Human Rights.

⁷⁷ In Kaliña and Lokono, the Court referred to the UN Guiding Principles on Business and Human Rights and noted that the "Special Representative of the Secretary-General of the United Nations on the issue of human rights and transnational corporations and other business enterprises has indicated that businesses must respect the human rights of ... indigenous and tribal peoples, and pay special attention when such rights are violated." Para. 225.