ALEX BALUYUT/WORLD BANK

CONCLUSIONS AND RECOMMENDATIONS

ACKNOWLEDGING THE RISKS

The cases demonstrate that many businesses have not fully appreciated the risks entailed in failing to obtain community consent. The business risks of imposing a large-scale project on a host community without its consent are multiple and profound, and can potentially threaten the project's financial viability. A few lessons are particularly evident:

- Community opposition can arise from impacts that are generated at any stage in the project cycle. As a result, FPIC must be ongoing and iterative if it is to be an effective risk management strategy.
- Addressing the risks of community opposition before the project begins is likely to be much more successful and cost-effective than responding to community opposition later on.
- Other stakeholders—such as shareholders, financiers, and host governments—can also have their financial interests adversely affected by conflicts that result from the failure to obtain consent. This implies that these parties have an independent fiduciary interest in ensuring that consent is achieved and maintained in the projects that they support.
- Mere engagement or consultation may not be sufficient to fully address these risks. Consultations that do not resolve a community's reasons for opposition or achieve consent will provide little assurance against potentially costly and disruptive conflict.

Due to community opposition, Esquel, Yanacocha (Cerro Quilish), and Samut Prakarn each suffered lengthy construction delays. The development of Cerro Quilish has been postponed indefinitely, while the sponsors of Esquel and Samut Prakarn are grappling with how to reconfigure their projects to garner public approval years after they were expected to come online. Conversely, Malampaya was able to proceed on an expedited construction schedule by reaching mutually acceptable agreements regarding site selection and construction impacts early in the planning process.

Community resistance often has collateral impacts on the sponsor beyond the specific project under dispute. Meridian Gold, the sponsor of Esquel, saw its stock price fall precipitously and was required to write off most of the property's development value. Newmont and the IFC, the lead sponsor and key financier of Yanacocha, have suffered reputational harm due to their handling of community concerns. This has complicated Newmont's efforts to win approval for projects in other communities. In contrast, Shell enjoyed a significant public relations boost for its handling of Malampaya.

Community opposition can arise at any stage of the project cycle. In particular, sponsors should not treat consent given at the outset of a project as a kind of blanket immunity from subsequent opposition. In practice, the sponsor's relationship with the community, like its relationship with other stakeholders, must be attended to throughout the project cycle. Communities should not be expected to consent to the project in its totality. Rather, they should accept specified impacts over a given phase of development and be fully notified up front of cumulative project impacts. When unexpected impacts arise, or when the next set of critical project decisions is to be made, public expectations and concerns must continue to be addressed.

Project financial stakeholders other than the project sponsor can also be adversely affected by public resistance. For example:

- Shareholders may be at significant risk when relatively undiversified companies encounter community opposition. Meridian's shareholders, for example, incurred substantial losses when the financial markets factored public opposition to the Esquel project into Meridian's share price.
- Government entities that expect to reap taxes, royalties, or user fees generated by the project also have interests at risk. Cerro Quilish, for example, would have generated significant tax payments for the Government of Peru.
- Institutions that provide limited-recourse financing to projects may bear even greater risks that the projects they finance will fail to meet their financial projections due to community opposition. These lenders rely primarily on the revenues generated by the project for repayment and as security for their exposure.[210] Samut Prakarn was financed in part by US $230 million in loans from the Asian Development Bank, but the loan was guaranteed by the Thai government. Since Samut Prakarn has not been brought online, and has yet to earn any revenues, these sovereign guarantees are the sole basis of debt repayment.

Moreover, as the example of the mining sector in Peru illustrates, conflict at one project can adversely influence the political dynamic at nearby projects. As a result, project sponsors and their financial supporters may bear the risks of conflicts that arise in projects that are not directly related to their own. And governments that lack the capacity or political will to ensure that conflicts do not spin out of control and metastasize may find that their efforts to promote investment are undermined by a grassroots backlash.

The business risks of community opposition cannot be fully mitigated through consultation. In many of the projects we examined, the sponsor or a key financier professed to have a firm commitment to community consultations as part of its established due diligence procedures. In most of the cases, some kind of consultations with the affected communities were undertaken—though in Esquel and Samut Prakarn, consultations were of such inferior quality as to be little more than a gesture. But with the exception of Malampaya, these consultations were not successful in averting conflict or in securing popular consent for the project. These cases suggest that even if consultations are well run, they are unlikely to be an effective risk mitigation strategy unless they invoke the FPIC process. This is because consultations require only that sponsors listen to external perspectives on the project. They do not change the basic decision-making paradigm giving project sponsors and public authorities the power to make decisions without popular assent. Only by relinquishing some measure of control over decision making can a project sponsor expect to achieve politically durable agreements.

Finally, the cases suggest that the host government has an important role to play in creating the enabling conditions that can help facilitate mutually agreeable outcomes. In Samut Prakarn and the mining sector of Peru, inadequate public participation procedures and weak regulatory and enforcement regimes contributed to the disastrous outcomes. Conversely, the more rigorous participation requirements in the Philippines helped to create an environment in which Shell's community engagement efforts could produce mutually beneficial negotiated agreements.

Given the costs and risks associated with the failure to secure FPIC, obtaining FPIC from host communities can be an indispensable risk mitigation strategy for large-scale projects. Moreover, if, as these examples suggest, the ability to discern and accommodate community preferences is a key determinant of project success, project sponsors that develop the ability to do it well will enjoy a strong competitive advantage over their industry peers. These companies may be able to reduce project costs below their competitors' costs, or develop projects that would be too risky for a sponsor with a less sophisticated understanding of how to achieve community support.

The case studies suggest six principles that may assist project proponents in crafting and implementing consent procedures that will mitigate the business risks associated with local opposition:

Information. Affected communities should be provided sufficient information in local languages regarding the proposed project. Project proponents should work with communities to understand the types of information the communities need to make informed decisions, and must allow sufficient time for communities to review and discuss information provided to them.

Inclusiveness. All interested community members should be allowed and encouraged to take part in the FPIC process, including stakeholders affected by indirect or cumulative impacts.

Dialogue. Dialogue within an FPIC process should be formalized, continue throughout the lifetime of a project, and include government and local stakeholder representatives.

Legal recognition. FPIC should be formally recognized through binding negotiated agreements. There should be a sufficient period of time for community decision making prior to project commencement.

Monitoring and evaluation. Opportunities for appropriate and independent community monitoring should be put in place. Monitoring and evaluation should be supported by independent grievance processes to ensure that community concerns are addressed throughout a project's lifetime.

Corporate buy-in. Project proponents should view FPIC as an inherent and necessary cost of project development. Where appropriate, developers should find constructive ways to channel funds to communities to maintain the integrity of the process and the independence of the community's role.

Community involvement and consent work best in a setting where the host country government recognizes these concerns as a matter of law or policy. Project proponents should work with governments to gain their endorsement and involvement in the FPIC process. To fully protect their legal rights and interests, proponents should develop with communities further procedures based on local conditions.

HOW KEY ACTORS CAN HELP

Each stakeholder should take specific, affirmative steps to ensure that the FPIC of project-affected parties is secured before and during project operations. Most importantly, project sponsors and financiers should incorporate community consent procedures and requirements into their project and investment decision making, planning, and operations, and host governments should incorporate such procedures and requirements into their permitting processes. These are the things the following actors can do:

Project Sponsors

- Develop clear, binding operational policies and procedures for disclosing information and securing FPIC. These policies and procedures should provide for an ongoing, iterative process of communication and negotiation throughout the entire planning and project cycles.
- Ensure that community consent is achieved before project construction begins and is maintained at each stage of project decision making.
- Adopt FPIC procedures that result in culturally appropriate, legally enforceable negotiated agreements that address the full range of issues of concern to host communities, and that can be renegotiated if necessary as the project evolves.
- Adjust planning, assessment, and decision-making timelines and procedures to allow for full local involvement and community input. Sponsors should recognize that communications and transportation difficulties, iterative community consensus building processes, or other logistical demands of incorporating an FPIC principle may increase the time and resources necessary for project decision making.
- Fully disclose to investors and potential investors the financially material risks of community opposition to projects.

Project Financiers and Investors

- Mitigate the risks of community opposition by assessing, as part of due diligence procedures, (1) host community preferences; (2) whether project sponsors have the capacity to successfully engage communities in FPIC processes, and the commitment not to proceed if consent is not achieved; and (3) whether other critical enabling conditions for FPIC exist, such as the capacity of the host country to implement and enforce negotiated agreements.
- Request independent third-party audits to ensure that project sponsors have achieved community consent.[211]
- Refrain from supporting projects that do not have the consent of the host community, or that raise significant concerns that the sponsor will not be able to maintain consent over time.

Host Governments

- Develop legislation and implementing regulations that incorporate clear FPIC procedures and requirements into all stages of the planning and permitting process.
- Develop the capacity to help orchestrate and enforce negotiated outcomes of FPIC processes with the support of the international donor community.
- Ensure that all affected citizens, including those who are critical of the project, have the right to freely express their views.

Corporate Lenders and Shareholders

- Mitigate risks by assessing the company's community consent procedures as part of due diligence procedures.

Public Securities Regulators

- Issue specific guidance requiring project sponsors to disclose the risks and adverse impacts of community opposition as part of their obligation to disclose financially material information.
- Bring enforcement actions against companies that do not comply with their disclosure obligations.

Financial Equity Research Analysts

- Consider how community opposition to important projects, and the sponsor's ability and commitment to address community concerns, may affect the sponsor's stock price and volatility.

International Development Donors

- Incorporate FPIC considerations into financial analyses of companies and sectors with a high risk of community consent concerns (for example, mining).
- Assist host governments to expand their capacity to implement and enforce FPIC procedures.

The United Nations

- Fully endorse and adopt by consensus the draft U.N. Declaration on the Rights of Indigenous Peoples, which recognizes the right to free, prior, and informed consent.