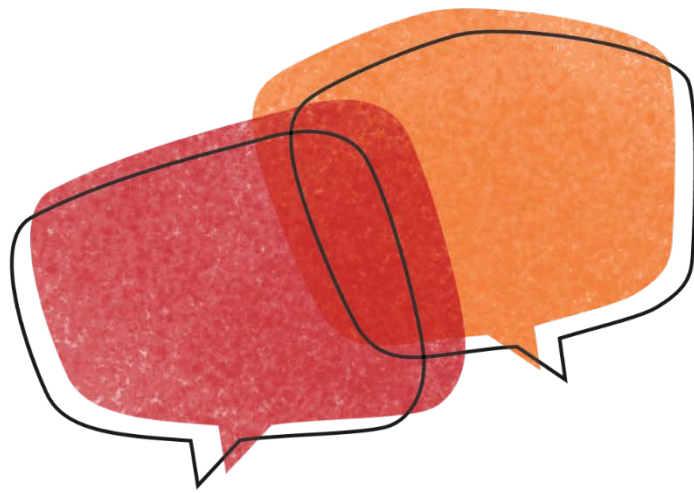


# Free, prior and informed consent (FPIC) within a human rights framework: Lessons from a Suriname case study

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## FPIC SOLUTIONS DIALOGUE

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

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## Preface

Free, prior and informed Consent (FPIC) is a mechanism that safeguards the individual and collective rights of indigenous and tribal peoples, including their land and resource rights and their right to self-determination. Leading natural resource companies and industry associations have committed to FPIC in their policies or other guidance documents. Civil society is tracking policy developments and progress towards implementation, including in reports by Oxfam and Human Rights Watch.

In 2012, RESOLVE, Newmont, BG Group, Oxfam and other companies and civil society organizations established the FPIC Solutions Dialogue for this purpose – to learn from site-based experience, work together on test cases, and develop guidance and tools to help operationalize FPIC in practice. With a focus on implementation, Newmont offered the experience at its Merian Mine in Suriname as an opportunity to gain new insights, identify lessons, and improve practice.

RESOLVE, with input from Newmont, planned this project on the understanding that exploration and community engagement was initiated more than 10 years earlier, and that the company's approach had evolved since that time. RESOLVE convened an Expert Advisory Panel to look at issues relevant to operationalizing FPIC at Merian. The Panel reviewed materials, talked with Newmont representatives, and visited the site. We worked with the company to understand the site context, and visited several local communities to hear their views and concerns regarding the Merian Mine and their experience of engaging with the company.

The report's primary purpose is to serve as a resource for Dialogue members, Newmont, and the others interested in operationalizing FPIC. It is a snapshot, not an exhaustive, in-depth analysis. The report's strength lies in its ability to draw on the different experiences and orientations of the panelists – law, social science, human rights, advocacy, policy, and community engagement.

The Panel worked closely with Newmont but had independence with regard to findings. While the Panel agreed in full on its findings and recommendations, on occasion panelists had different viewpoints, resulting in useful debate. Deanna Kemp is owed a debt of gratitude for her willingness to take the lead pen, and present the ideas we shared in our drafts and discussions.

It was an honor to work together as a Panel, and with those who participated from Newmont, the Pamaka Negotiating Committee established by Pamaka leaders, and community members who welcomed us during our visit. The Panel is also grateful to our local translation team, who helped us to listen and learn.

Lessons from the report have been, and will continue to be, discussed with members of FPIC Solutions Dialogue. RESOLVE is hopeful that the information provided in the report – positive examples and challenges – will stimulate discussion among Dialogue members that leads to the development of additional guidance for companies, communities and governments.



Stephen D'Esposito  
**President, RESOLVE**  
*April, 2017*

FPIC Solutions Dialogue website: <http://solutions-network.org/site-fpic/>

## **Panel Chair**

Stephen D'Esposito, RESOLVE

## **Expert Advisory Panel**

Prof. James Anaya, University of Colorado Law School

Jessica Evans, Human Rights Watch

Prof. Deanna Kemp, Sustainable Minerals Institute, University of Queensland

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## **Panel Secretariat**

Meg Perry, RESOLVE

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### **Annex 1: The international human rights framework**

## 1 Introduction

The Merian mine is located in Suriname, in 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.<sup>1</sup> The mine is owned by the Suriname Gold Project CV, a Surinamese 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 NV ("Staatsolie Maatschappij"), is a limited partner.<sup>2</sup> 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.<sup>3</sup> The Panel considers FPIC to be a mechanism to safeguard indigenous and tribal peoples' human rights, including their rights over traditionally used and occupied lands and resources. 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".<sup>4</sup> Newmont does not claim to have obtained the FPIC of the Pamaka at Merian. There is no precedent for a large-scale resource developer obtaining FPIC for resource development from a Maroon tribe in Suriname. Against this backdrop, Newmont

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

<sup>2</sup> 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.

<sup>3</sup> 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, James Anaya, on extractive industries affecting indigenous peoples and other issues related to business and human rights," A/HRC/FBHR/2012/CRP.1, 29 November 2012.

<sup>4</sup> See: <http://sustainabilityreport.newmont.com/2015/economics-and-social-performance/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:

- Newmont has committed to respect human rights and particularly the social, economic and cultural rights of indigenous peoples since at least 2006.<sup>5</sup> In 2014, Newmont committed to work to obtain the consent of indigenous peoples when operating on their traditionally-owned or customarily-used lands.<sup>6</sup>
- 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.
- 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.
- It is apparent that the Government granted the company exploration and mining licenses on Maroon customary lands, contrary to its human rights obligations. The Government did not ensure effective consultations with Maroon tribes prior to granting the licenses, as required by international standards.<sup>7</sup>
- To enable the advancement of the Merian project, the Government of Suriname evicted some Pamaka people from customary land. Pamaka artisanal and small-scale ("informal") miners and other groups had been mining within the Right of Exploration.<sup>8</sup>

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<sup>5</sup> Newmont, *Social Responsibility Policy*, 2006. Newmont is a founding member of the International Council on Mining (ICMM), established in 2001, and through its membership has committed to "respect human rights and the interests, cultures, customs and values of employees and communities affected by our activities" since 2003 (ICMM, *10 Principles on Sustainable Development*, Principle 3).

<sup>6</sup> Newmont's commitment to "work to obtain the consent of indigenous peoples" aligns with the ICMM's (2013) *Position Statement on Mining and Indigenous Peoples*. See: <http://www.icmm.com/publications/pdfs/position-statements/5433.pdf>

<sup>7</sup> Under domestic law in Suriname, as in most other jurisdictions, sub-surface minerals are the property of the state, which grants developers approval to explore and mine what the state classifies as domain land. Nevertheless, under international human rights law, as explained in this report at pages 3-5, states have an obligation to consult with indigenous and tribal peoples, with the objective of obtaining their consent, for extractive projects that affect them, regardless of subsurface ownership. While the Government of Suriname granted exploration licenses before a judgment of the Inter-American Court of Human Rights (*Saramaka v. Suriname*) established domestic law and practice in Suriname to be inconsistent with this international standard, its granting of the exploitation licenses came after the Court's judgment.

<sup>8</sup> There are various forms of informal mining in the area, from rudimentary to highly mechanized.

- Surgold, acting as managing partner of Suriname Gold Project, has entered into a formal Cooperation Agreement with the Pamaka, through their traditional authority, to provide a general set of development benefits, and to monitor environmental impacts for the life-of-mine and beyond closure.
- The Suriname Gold Project has a 500,000 hectare “Area of Interest” within which the Merian project is located, and has aspirations to extend beyond the Merian mine and develop other mining projects in the Guyana Shield.<sup>9</sup>
- A feasibility study for the development of the nearby Sabajo deposit is underway. The Sabajo Right of Exploration is located within the project’s Area of Interest and has been an active informal mining area for some time. Newmont told the Panel that it is in the process of understanding whether Sabajo is located on Maroon customary land.
- In the process of finalizing the report, Newmont advised the Panel that disputes over claims to customary land had begun to emerge in the project’s Area of Interest.

This report presents the Panel’s observations following discussions with the company, a rapid review of available documentation, and engagement with a limited sample of stakeholders related to the Merian mine. It is not a comprehensive human rights or social performance assessment of the company’s approach to FPIC in Suriname. The Panel’s report was produced on a basis of consensus amongst the Panel members. The Panel had editorial control over the report during this process.

The report describes the Panel and its process (Section 2), provides relevant background information (Section 3), outlines the mine’s approach to community engagement (Section 4), and presents Panel observations on the operationalization of FPIC elements at Merian (Section 5). Panel recommendations for Newmont (Section 6) and the industry more broadly (Section 7) are offered before concluding (Section 8).

## **2 The Panel**

The Panel is chaired by Stephen D’Esposito, President of RESOLVE. As an independent, non-profit organization, RESOLVE specializes in conflict resolution and consensus building. In consultation with Newmont, RESOLVE appointed three Panel members on the basis of their diverse perspectives, and their individual expertise and capacity.

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<sup>9</sup> The Area of Interest was established in November 2013, with the signing of the Mineral Agreement. Newmont has a “right of first refusal” for conducting exploration in this area.

The three Expert Advisory Panel members are:

- Professor James Anaya, Dean of the University of Colorado Law School and former United Nations Special Rapporteur on the Rights of Indigenous Peoples.
- Jessica Evans, a human rights lawyer, Senior Business and Human Rights Researcher at the non-government organization, Human Rights Watch<sup>10</sup>
- 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. It was 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 FPIC 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 about the Merian case in a public report, and engaging in a broader dialogue about lessons learned. This included engagement with RESOLVE's FPIC Solutions Dialogue, a multi-stakeholder initiative focused on the practical application of FPIC in extractive industries.<sup>11</sup>

## **2.1 The Panel's approach to FPIC within a human rights framework**

The Panel understands the concept of FPIC as residing within a broader human rights framework. Annex 1 provides an overview of the framework to which the Panel refers. Without reference to internationally affirmed human rights, FPIC could be inaccurately seen as equivalent to the general concept of "good engagement". Indigenous and tribal peoples' rights over lands and resources, which have widely been affirmed as human rights, are necessary to their survival. The Panel considers FPIC to be a mechanism that safeguards the individual and collective rights of indigenous and tribal peoples, including their land and resource rights and their right to self-determination. This means that neither consultation nor consent can be viewed as outcomes in and of themselves, nor can consultation and consent be seen as stand-alone rights. While negotiation of FPIC provides a means for indigenous and tribal peoples to exercise their human rights, it does not represent the full scope of those rights.

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<sup>10</sup> Jessica Evans undertook this work in a voluntary capacity and neither she nor Human Rights Watch received any money from Newmont or RESOLVE.

<sup>11</sup> See: <http://solutions-network.org/site-fpic/other-initiatives/>



To obtain FPIC, “consent” must be secured through an agreed process of good faith consultation and cooperation with indigenous and tribal peoples through their own representative institutions. The process should be grounded in a recognition that the indigenous and/or tribal peoples are customary landowners. The minimum conditions that are required to secure consent include that it is “free” from all forms of coercion, undue influence or pressure, provided “prior” to a decision or action being taken that affects human rights, and offered on the basis that affected peoples are “informed” of their rights and the impacts of decisions or actions on those rights. FPIC is not only a question of process, but also of outcome, and is obtained only when terms are fully respectful of land, resource and other implicated rights.

That FPIC is a mechanism to safeguard indigenous and tribal peoples’ individual and collective rights is established in international case law directly relevant to Suriname. The Inter-American Court of Human Rights (“the Inter-American Court”) has affirmed the collective rights of the indigenous and tribal peoples of Suriname, including collective rights over lands and natural resources, on the basis of the human rights guarantees provided by the American Convention on Human Rights. The three judgments affirming these rights include: *Moiwana Village v. Suriname*<sup>12</sup> of 2005; *Saramaka v. Suriname*<sup>13</sup> of 2007; and *Kaliña and Lokono Peoples v. Suriname*<sup>14</sup> of 2014.

The *Saramaka* case of 2007 holds particular relevance for Merian. The *Saramaka* is one of the largest Maroon tribes, comprising an estimated 42 percent of Maroon peoples in Suriname. In the mid-1990s, the Government of Suriname granted timber and mining concessions in *Saramaka* territories without consulting their traditional authorities. The *Saramaka* took their case to the Inter-American Court. Building upon its jurisprudence in the previous, landmark case of *Awas Tingni v. Nicaragua*, the Court affirmed the collective rights of the *Saramaka* and ordered the Government of Suriname to recognize those rights. The government has not yet complied with the substantive elements of the Court’s judgments, including those parts requiring the demarcation and titling of the tribal communities’ lands and the development of a law or procedure to carry out that process.

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<sup>12</sup> *Moiwana Village v. Suriname*, Judgment of 15 June 2005, Inter-Am Ct. H.R., (Ser. C) No. 124 (2005).

<sup>13</sup> *Saramaka People v. Suriname*, Judgment of 28 November 2007, Inter-Am Ct. H.R., (Ser. C) No. 172 (2007).

<sup>14</sup> *Kaliña and Lokono Peoples v. Suriname*, Judgment of 15 November 2015, Inter-Am Ct. H.R., (Ser. C) No. 309 (2015).

That said, according to the Inter-American Court and the Committee on the Elimination of All Forms of Racial Discrimination, the Government of Suriname has committed to develop a protocol reflecting the principle of FPIC.<sup>15</sup>

The Inter-American Court has determined that Maroon tribes in Suriname have rights in relation to traditionally occupied and used lands and resources equivalent to indigenous peoples in the Americas. Through its rulings, the Court has made clear that FPIC is one safeguard which can contribute to respect for the rights of indigenous and tribal peoples. According to the Court, human rights safeguards include:

- good faith consultations with indigenous and tribal peoples with respect to projects that may affect their human rights and their FPIC for projects that significantly impact their traditional territories
- environmental and social assessments that consider indigenous and tribal peoples' human rights
- mitigation measures to avoid or minimize adverse impacts on the exercise of those rights
- compensation, restoration and benefit-sharing for loss of and impact upon indigenous and tribal peoples' land and resource rights.

Measures to mitigate power imbalances and address the marginalized positions of indigenous and tribal peoples that exist in many jurisdictions are essential for these safeguards to be meaningful.

The duty under international law to respect, protect, and fulfill indigenous and tribal peoples' rights, including by implementing the FPIC safeguard, is one that resides with the state. Businesses have a parallel responsibility to respect human rights, including the rights of indigenous and tribal peoples. In order to respect human rights in accordance with their human rights responsibilities and policy commitments, companies must employ due diligence, independently to what the state does or does not do, to ensure that their actions do not cause or in any way contribute to the infringement of indigenous and tribal peoples' human rights, including rights over lands and resources. See *UN Guiding Principles on Business and Human Rights*, discussed in Annex 1. Without in any way undermining the state's own responsibility to safeguard indigenous and tribal peoples' rights, due diligence will ordinarily entail companies endeavoring to engage in their own consultations with indigenous and tribal peoples to ensure respect for their rights and FPIC.

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<sup>15</sup> Kaliña and Lokono Peoples v. Suriname, paras. 204, 210; Committee on the Elimination of All Forms of Racial Discrimination, "Concluding observations on the combined thirteenth to fifteenth periodic reports of Suriname," September 25, 2015, para. 25, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/217/81/PDF/G1521781.pdf?OpenElement>.

## 2.2 Activities of the Panel

This report is based on a rapid analysis of documents, discussions with key informants, and observations during a brief field visit to Suriname between 14 and 18 June 2016.<sup>16</sup>

Documents were sourced from the company, expert consultants, and from public and academic sources. Ahead of their visit to Suriname, Panel members engaged with company personnel familiar with the site context. During its visit, the Panel held discussions in Paramaribo with senior company representatives, a government representative, company consultants, and representatives of the Pamaka traditional authority. On site at Merian, the Panel met with community relations staff, site managers, and a group of local employees.

While in Suriname, the Panel visited three Pamaka communities along the Marowijne River, including Langatabiki, Loka Loka and Kriki Mofu.<sup>17</sup> Langatabiki is the village nearest to the mine and the seat of the Pamaka's tribal chief. Access to villages was via local, motorized watercraft as there is no direct road access. In two of the villages, meetings were held with a group of discussants that included the village captain. A spiritual leader was present at the third location. Time constraints did not allow the Panel to have informal conversations with community members beyond these discussions. Two impromptu meetings occurred, firstly with a group of women in Loka Loka and also with some artisanal and small-scale ("informal") miners at a local business located on the access road from the site. As village-level meetings were held in open spaces, other people were able to observe these discussions.

All interviews were conducted with the support of freelance interpreters who had not previously worked for the company. Newmont personnel accompanied the Panel to villages, but were not present during group discussions. Time pressures restricted the Panel's ability to visit other Pamaka and non-Pamaka communities. For example, the Panel did not visit the town of Moengo, communities along the transportation corridor, or other Maroon and indigenous communities along the Marowijne River. Given the brief time spent in the field, the report is based on an impressionistic understanding of the local context.

## 3 Background context

The focus of the Panel's work is to understand Newmont's approach to community engagement and FPIC within a human rights framework at the Merian mine and to make recommendations for how Newmont can enhance its respect of human rights. The Panel's task is not to provide an analysis of the social context or a full account of engagement and

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<sup>16</sup> Newmont provided funding to RESOLVE for convening the Panel project. RESOLVE offered Panel members an honorarium for their participation in the project. Jessica Evans declined the honorarium that Newmont made available to Panel members through RESOLVE.

<sup>17</sup> The Pamaka have established village settlements on islands in the river (*tabikis*) or on the riverbanks.

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 basic timeline 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-owned company Staatsolie Maatschappij Suriname NV holds the remaining 25 percent as a limited partner. Merian is located in the Guyana Shield, on the eastern part of Suriname's interior, close to the French Guyana border, and on Maroon ancestral lands.

Merian is one of Suriname's largest and most recent industrial projects.<sup>18</sup> After 10 years of project exploration, evaluation and planning, Merian was approved by the Government of Suriname in 2013. Construction began in 2014. During the writing of this report, the mine commenced commercial production and was employing 1143 people, 214 of whom are Pamakan (approximately 19 percent of the total workforce). The mining complex includes three open pits, a processing plant, waste rock disposal areas, a tailings storage facility and related infrastructure. With gold reserves estimated at 5.1 million ounces, Newmont expects the project to produce an average of 400,000 to 500,000 ounces per year in the first five years. The current estimated life of mine is 11 to 13 years.

Newmont contracted an external consultant to complete the feasibility study for Merian. Project construction was contracted to Canadian mining services contractor, G Mining. Surgold has ultimate responsibility for all activities associated with the project including oversight and leadership for community engagement and external relations during the construction period. The Merian project was completed on time, and more than USD 150 million or nearly 20 percent below its initial development capital budget.

### **3.2 Maroon peoples, the Pamaka and the mine**

Maroon peoples are descendants of African slaves who escaped Dutch colonial rule more than three centuries ago and who established communities along rivers in the jungle of Suriname's interior.<sup>19</sup> After more than a half-century of guerrilla warfare, in the 1760s a number of Maroon tribes signed treaties with the Dutch colonial government. In doing so,

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<sup>18</sup> According to The World Bank, Suriname's economy is characterized by strong dependence on exports of extractives. Alumina, bauxite, gold and oil have historically made up three-quarters of total exports and have accounted for a large proportion of government revenue. See: <http://www.worldbank.org/en/country/suriname/overview>

<sup>19</sup> Kambel, E. and MacKay, F. (1999) *The Rights of Indigenous Peoples and Maroons in Suriname*, The Forest Peoples Program and International Working Group of Indigenous Affairs: Copenhagen, p.16.

they were among the first peoples of the Americas to gain independence from colonial control. These treaties enabled Maroon peoples to live a relatively independent existence well into the twentieth century.<sup>20</sup> The Panel notes that not all Maroon tribes were formed at the same time, or agree on claims to land.

In the mid-1980s under Suriname's de facto military regime, some Maroons fought the National Army in what is known as "the interior war", during which time they became victims of state-led massacres, violence and repression. A decade of conflict had a serious detrimental effect on the social infrastructure of the interior and today they are amongst the poorest members of Suriname society.<sup>21</sup> Having occupied land in the interior of the country for almost three centuries, Maroons maintain culturally distinct languages, institutions, rituals, laws, and customs. As tribal peoples, Maroons enjoy the same rights as indigenous peoples under international law, according the Inter-American Court of Human Rights.

According to census data, Maroons comprise approximately 22 percent of Suriname's population, and their population is increasing at a faster rate than other demographic groups.<sup>22</sup> The Pamaka is one of the smaller tribes, representing five percent of the Maroon population. About half of all Surinamese Maroons live on their tribal lands, with limited support from the state by way of services or infrastructure. The rest of the Maroon population lives in other parts of the country or abroad, including in French Guyana and the Netherlands. Many Maroons left Suriname during the interior war (1986-1992). Others left as economic migrants, many of whom send remittances to family members who continue to reside in Suriname.

There are approximately 1200 people in the Merian project's area of influence, most of whom are Pamakan, living in kin or family groups where matrilineal descent is the dominant principle of social organization. As with other Maroon tribes, the Pamaka are organized into clans, with families falling into various lineage groups. All six of Suriname's Maroon tribes maintain their own distinct form of traditional administration and a self-governing authority. The highest traditional authority is the *Granman*, or the tribal chief, with a supporting cabinet of Captains and spiritual leaders. The Panel was advised that the Pamaka's incumbent Granman suffers from a range of complex health issues and does not reside in the area. The *krutu*, or village assembly, is the primary locus of decision-making. The Captains and Head Captains are tasked with carrying forward and externally representing decisions taken during the *krutu*.

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<sup>20</sup> There is no record of the Pamaka having signed a Treaty with the Government of Suriname.

<sup>21</sup> See: <http://minorityrights.org/minorities/maroons/>

<sup>22</sup> Price, R. (2013) Research Note: The Maroon population explosion: Suriname and Guyane. *New West Indian Guide*, 87, p. 323-327.

The Pamaka’s main livelihood activities include hunting, foraging, shifting cultivation, fishing and informal mining.<sup>23</sup> The Pamaka have a history of informal mining and in 2011, approximately 20 percent of Pamaka households in the project area were involved in this activity as a main source of livelihood.<sup>24</sup> Informal mining activities on Maroon territory are somewhat regulated by traditional governance structures and established social norms, though significant political and financial interests from Paramaribo add complexity.<sup>25</sup> Informal mining activities have grown in scale in recent years and now involve the use of heavy machinery. The Panel observed widespread and significant adverse environmental impacts from informal mining in the project area, including landscape degradation and river siltation. Environmental studies confirm that the use of mercury in informal gold processing is widespread throughout the country’s interior, where informal mining activities occur.<sup>26</sup> The use of mercury for gold processing poses significant environmental, safety and health risks.<sup>27</sup>

### 3.3 Summary timeline

Points of interest in the timeline of the Merian project are listed in Table 1. The timeline commences with the discovery of gold, and covers project permitting, construction and commissioning.

**Table 1: Timeline of key events relating to the Merian mine**

Year	Event
2001	<ul style="list-style-type: none"> <li>• Suralco, a subsidiary of Alcoa, obtained A Right of Exploration for gold.</li> </ul>
2003	<ul style="list-style-type: none"> <li>• Drilling confirmed a gold deposit at Gowtu Bergi.</li> <li>• The International Council of Mining and Metals (ICMM), of which Newmont is a founding member, published 10 Principles on Sustainable Development, which include a commitment to respect human rights.</li> </ul>
2004	<ul style="list-style-type: none"> <li>• Newmont and Alcoa entered into joint venture and establish “Surgold”.</li> <li>• Right of Exploration for Merian transferred to Surgold.</li> </ul>
2006	<ul style="list-style-type: none"> <li>• Newmont published its Social Responsibility Policy.</li> </ul>
2007	<ul style="list-style-type: none"> <li>• Surgold applied for a Right of Exploitation for Merian (i.e. a mining concession).</li> </ul>
2008	<ul style="list-style-type: none"> <li>• Surgold commenced negotiations with the Government of Suriname for a Mineral Agreement for the Merian project.</li> </ul>
2009	<ul style="list-style-type: none"> <li>• Rapid influx of many additional informal miners into the Gowtu Bergi area.</li> </ul>

<sup>23</sup> See:

[http://s1.q4cdn.com/259923520/files/doc\\_downloads/south\\_america/merian/assessment/Merian-Project-Final-ESIA-Volume-I\\_0.pdf](http://s1.q4cdn.com/259923520/files/doc_downloads/south_america/merian/assessment/Merian-Project-Final-ESIA-Volume-I_0.pdf)

<sup>24</sup> Social Solutions (2016) Small-scale gold mining in and around the Merian ROE: Socioeconomic survey of the Pamaka gold miners. Company-commissioned report.

<sup>25</sup> Information from the household survey conducted in 2011 as part of the ESIA. *Ibid.* This was reinforced in the Panel’s discussions with Pamaka community members.

<sup>26</sup> Heemskerk, M. (2001) Maroon gold miners and mining risks in the Suriname Amazon, *Cultural Survival Quarterly*, 25.1 (Spring). See: <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/suriname/maroon-gold-miners-and-mining-risks-suriname-amazo>

<sup>27</sup> See: <http://www.who.int/mediacentre/factsheets/fs361/en/>

2010	<ul style="list-style-type: none"> <li>• President Bouterse replaced President Venetian, in accordance with the National Assembly's vote.<sup>28</sup></li> <li>• Newmont restarted negotiations for a Mineral Agreement with the new government.</li> </ul>
2011	<ul style="list-style-type: none"> <li>• Suriname's Gold Commission evicted informal miners from Gowtu Bergi in the presence of police and military.</li> <li>• Surgold appointed G Mining to conduct feasibility study and manage construction.</li> <li>• Feasibility studies commence.</li> <li>• Environmental and Social Impact Assessment (ESIA) commissioned and conducted.</li> </ul>
2013	<ul style="list-style-type: none"> <li>• Pamaka traditional authority appointed a Negotiating Committee to negotiate with Surgold.</li> <li>• Surgold and the Pamaka community signed the Letter of Intent.</li> <li>• Suriname's National Assembly approved the Mineral Agreement for Merian.</li> <li>• Surgold and the Government of Suriname signed Mineral Agreement.</li> <li>• Suriname's Ministry of Natural Resources approved the ESIA.</li> <li>• ICM Mining and Indigenous Peoples Position statement published.</li> </ul>
2014	<ul style="list-style-type: none"> <li>• Newmont purchased Alcoa's remaining interest in Surgold.</li> <li>• Newmont Board of Directors approved funding for the Merian Project.</li> <li>• Government of Suriname granted Surgold the Right of Exploitation for Merian.</li> <li>• Construction activities commenced, with G Mining as construction manager.</li> <li>• The Government of Suriname exercised its option to participate in the project through a 25 percent fully-funded equity share.</li> </ul>
2015	<ul style="list-style-type: none"> <li>• Suriname's Gold Commission evicted remaining informal miners from within the exclusion zone, in the presence of police and military.</li> <li>• Pamaka staged peaceful demonstration by blocking a public road used to access the Merian site.</li> <li>• A trainer working for the private security firm that provides services to Surgold shot and wounded two small-scale miners.</li> <li>• Newmont's Indigenous Peoples standard published.</li> </ul>
2016	<ul style="list-style-type: none"> <li>• Newmont commissioned Merian Expert Advisory Panel, convened by RESOLVE.</li> <li>• Surgold and the Pamaka signed a Cooperation Agreement.</li> <li>• Project construction completed.</li> <li>• Surgold's name was changed from "Suriname Gold Company, LLC" to "Newmont Suriname, LLC".</li> <li>• Legal formalities for creation of the Community Development Foundation completed and Board of Directors appointed.</li> <li>• Commercial production at Merian commenced.</li> </ul>
2017	<ul style="list-style-type: none"> <li>• Newmont advised the Panel that disputes over claims to customary land had begun to emerge in the project's Area of Interest.</li> </ul>

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<sup>28</sup> The National Assembly vote followed a peaceful general election in which there were no reported instances of intimidation of voters or any other serious irregularities, according to the Organization of American States election observation mission:

[https://www.oas.org/es/sap/docs/deco/2010/SURINAME\\_%20MAY25\\_%202010\\_e.pdf](https://www.oas.org/es/sap/docs/deco/2010/SURINAME_%20MAY25_%202010_e.pdf)

### 3.4 Relevant community-related incidents

In 2011, the Bouterse government evicted Pamaka and non-Pamaka informal miners from a location called *Gowtu Bergi*, or “Gold Hill”, which was Surgold’s main exploration and development target within the Right of Exploration for Merian. While Surgold applied for a Right of Exploitation for the development and mining of Gowtu Bergi and other gold deposits in 2007, Surgold had not committed to developing the resource at the time of the eviction. The 2011 eviction involved hundreds of miners, many of whom had recently migrated to the area, mainly from Brazil, but also from Guyana, French Guyana and other parts of Suriname. In characterizing the in-migration that occurred during this period, a senior company representative described a “gold rush” and explained that the buoyant gold price, combined with a reduced government presence, led to an unprecedented level of in-migration beyond what either the government or the traditional Pamaka authorities had previously had to manage.

While the influx was unprecedented, Gowtu Bergi was one of several established informal mining locations in the area. It was also the most prospective, with visible and easily accessible gold. When Alcoa began exploration in 2001, the government of President Venetian provided support to control informal miners to keep these areas available for exploration by Suralco. As the influx of informal miners into Gowtu Bergi peaked in 2010, Surgold lost government support on this issue. Company representatives told the Panel that in early 2010 they met with the President but were unable to raise awareness about the severity of the situation. According to Company representatives, the government was reluctant to intervene due to the potential conflict this could have created before the May 2010 elections. In a 2010 press release, Surgold stated that it suspended exploration activities due to law and order issues and safety concerns. Fatalities from informal mining were reported in Suriname’s media in the months preceding the eviction.<sup>29</sup>

A new government agency established by the incoming President Bouterse undertook the 2011 eviction of informal miners from Gowtu Bergi. The Bouterse government established Suriname’s Ordering Goudsector (known as “OGS”), the Planning Commission for the Gold Sector, to manage the country’s informal gold mining sector. Under the previous government, the removal of informal mining was delegated to the national police and military. The Bouterse government required the Commission to negotiate with informal miners rather than using physical force to enact evictions. Thus, while the 2011 eviction was undertaken in the presence of the national police and the military, they did not carry it out. The eviction process took a number of months. An exclusion zone was subsequently established within Surgold’s Right of Exploration area to demarcate land designated for

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<sup>29</sup> See for example: <http://www.stabroeknews.com/2010/archives/11/22/seven-die-in-suriname-mine-collapse/>



development of the project.<sup>30</sup> In exchange for moving miners from Gowtu Bergi, the President personally guaranteed the Pamaka an alternative mine site, which would be recognized as a legitimate artisanal mining area.

In 2012, Surgold agreed to a request by the Bouterse government to relinquish a 5000 hectare portion of its Right of Exploration area to create a mining reserve for Pamaka informal miners. However, the reserve was not as prospective as Gowtu Bergi and only a handful of miners now work in this area. Surgold representatives explained to the Panel that they had since identified other potential mining locations, but that the matter of formalizing mining at a new site had not been resolved. The company also explained that Gowtu Bergi is a unique geological occurrence within the Right of Exploration for Merian and that the likelihood of identifying an area of equal prospectivity, and which could be made available for informal mining, was low.

In 2015, informal miners entered the exclusion zone established in 2011. According to the company, these miners had been working outside the southern border of the exclusion zone for several years. The Gold Commission evicted the miners. Several months later, a group of informal miners and others from Langatabiki blockaded the public road used to access the Merian site. The protest lasted four days and appeared to be related to Pamaka grievances concerning land dispossession, the loss of livelihood due to eviction from Gowtu Bergi, and the unresolved issue of an alternative mining location. The roadblock was lifted when the company agreed to hold talks with the Pamaka Negotiating Committee (see below). Since the 2015 eviction and the road blockade, there have been several smaller movements into the exclusion zone by informal miners. On 29 July 2015, a trainer working for the private security firm that provides services to Surgold shot and wounded two small-scale miners who entered the Merian site.<sup>31</sup>

According to senior Newmont representatives, the company did not instruct the Government of Suriname to evict informal miners from Gowtu Bergi, and later from within the exclusion zone. Company representatives explained that Surgold works closely with the government, reports encroachments of informal miners into the project area, and that it is the government's duty to enforce evictions when the company reports encroachments. The government notified Surgold in advance of the 2011 and 2015 evictions. Newmont representatives stated that the company did not coordinate with or assist the government in the eviction. The company did respond to requests by the government to provide low boys (i.e. heavy transport equipment) to facilitate the removal of informal mining equipment that had been operating in Gowtu Bergi before the evictions. Newmont provided training on the *Voluntary Principles on Security and Human Rights* to public and private

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<sup>30</sup> Informal mining on Pamaka territory continued in the southern portion of the Right of Exploration area.

<sup>31</sup> See: [http://sustainabilityreport.newmont.com/2015/\\_pdf2print/pdfs/newmont-beyond-the-mine-sustainability-report-2015.pdf](http://sustainabilityreport.newmont.com/2015/_pdf2print/pdfs/newmont-beyond-the-mine-sustainability-report-2015.pdf)

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.<sup>32</sup> 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, and engagement with the traditional authority structure. Engagement with informal miners (Pamakan and non-Pamakan) was reportedly always difficult because they do not have an agreed leader or representative.

Surgold was required to prepare an Environmental and Social Impact Assessment ("ESIA") as part of the formal approval process. In 2011, Surgold commissioned an international environmental consulting firm to conduct an integrated ESIA. According to the final study document, the methodology included engagement with local communities, including the Pamaka. Field studies involved the use of qualitative research methods, such as participatory rural appraisal techniques, focus group discussions, resource mapping, and transect analysis, combined with quantitative methods, including a household survey. Company representatives said that the Pamaka participated in the scoping, screening and assessment phases of the ESIA. This included identification of potential project impacts and discussion of proposed mitigation plans.

In August 2013, Surgold and the Pamaka signed a "Letter of Intent". Surgold provided funds to the Pamaka for an anthropologist to assist them in their discussions with the company.<sup>33</sup> The document is a preliminary agreement to the eventual more detailed Cooperation Agreement and provides a public acknowledgement that Surgold recognizes that the

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<sup>32</sup> See: <http://www.newmont.com/operations-and-projects/south-america/merian-suriname/community/default.aspx>

<sup>33</sup> Under this arrangement, the Negotiating Committee selected and appointed the anthropologist, and Surgold settled the accounts.

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.<sup>34</sup>

## 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 local 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 *Gran 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.<sup>35</sup>

The Cooperation Agreement was negotiated by the Pamaka Negotiating Committee (the “Negotiating Committee” or “Committee”), a body appointed by the Pamaka traditional authority in 2013 to negotiate the terms of the agreement with the company.<sup>36</sup> The Negotiating Committee was not intended to replace the traditional authority of the Pamaka. Instead, it was established to work closely with the traditional leaders and to convey their wishes and objections concerning the proposed development benefits and related economic activities. A *Gran Krutu* was held to introduce members of the Committee to the Pamaka community when they were first appointed.

The Negotiating Committee comprised seven Pamakan individuals, including two female representatives. The Panel confirmed that the company and the Committee met on a regular basis, typically at Surgold’s office or hotels in Paramaribo. Surgold rented a separate office and provided a computer and office supplies for the Committee to enable them to meet independently from the company. Meetings between Surgold and the Committee were not immediately focused on negotiating the Cooperation Agreement. Initially, the

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<sup>34</sup> The Mineral Agreement was signed on 22 November 2013 and the Letter of Intent on 30 August 2013.

<sup>35</sup> A *Gran Krutu* is a large community gathering central for decision-making.

<sup>36</sup> The Pamaka Negotiating Committee is also referred to as the “POC”.

meetings provided a forum for discussing and resolving community concerns, issues and incidents during the project exploration and construction phases. Recognizing the ongoing imbalance in access to resources and the need to progress towards a good faith negotiation, in early 2015, the company suggested that the Committee retain independent legal representation. The Committee accepted this offer and appointed two lawyers to act on their behalf.<sup>37</sup>

Surgold continued to make funds available to the Negotiating Committee for the anthropologist and lawyers during the negotiation for the Community Agreement, and added to this funding for a community development consultant. The community development consultant worked with the Committee and the Pamaka community to conduct village-level needs analysis to inform negotiations about the type of development projects that should be contemplated under the Cooperation Agreement. Committee members explained to the Panel that their work also involved disseminating information to the broader community. This was described as a challenging task. Most members of the Committee were employed in Paramaribo and had limited availability, and, furthermore, had limited prior experience with mining. Members of the Negotiating Committee also explained to the Panel that the transient nature of the local Pamaka population exacerbated the difficult task of community engagement.<sup>38</sup>

#### **4.3 Status of the Community Development Foundation**

By October 2016, Merian had commenced commercial production and Surgold had completed legal formalities to establish the Community Development Foundation, as contemplated by the Mineral Agreement. The Foundation's Board had been appointed, comprising two representatives each from the Government of Suriname, Surgold and the Pamaka. The Pamaka Negotiating Committee's formal role ceased with the signing of the Cooperation Agreement.<sup>39</sup> Company representatives said that they were focused on the establishment of the Foundation to ensure that tangible broad-based benefits started to flow to the community. The financial contribution and disbursement procedures were in the process of being agreed.<sup>40</sup> The Mineral Agreement states that the company must provide funding on an annual basis. At the time of writing, the community was said to have been finalizing the village-level plans as a basis of securing support for sustainable development projects within Pamaka communities.

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<sup>37</sup> As with the arrangement with the anthropologist, the Negotiating Committee was the client, and Surgold settled the accounts.

<sup>38</sup> The porous border between Suriname and French Guyana through the Marowijine River adds to the population's transient and transnational character.

<sup>39</sup> The Cooperation Agreement provides for an "Executing Body" appointed by the Traditional Authority.

<sup>40</sup> Company representatives said that the company had paid USD 50,000 of seed funding in 2016.

## **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 re-state 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-making 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 represents the Panel’s reflections on these issues. Recommendations are provided in the following section.

### **5.1 Engaging the Pamaka as landowners**

The Panel’s first point of consideration is the ambiguity of the company’s approach to the Pamaka’s status as customary land owners. The assertion of land ownership according to their customary land tenure is the foundation upon which Maroon tribes have sought to engage with outsiders.<sup>41</sup> How the company views the Pamaka’s claim to land ownership determines the basis upon which negotiation occurs. If the company accepts that the Pamaka have land rights, then the Pamaka become visible as landowners with economic interests with whom the company must engage. Customary land ownership would have provided justification for the Pamaka to negotiate a stronger front-end, benefit-sharing arrangement, such as an equity stake in the project.<sup>42</sup> While consent agreements do not require the negotiation of an equity stake, and benefit-sharing can take many forms, land ownership provides a more robust framework for meaningful benefit-sharing in a major resource project.

The Panel recognizes that while the principle of customary land ownership may be straightforward, the practicalities are more complex. An obvious point of complexity is that the state does not formally recognize the land and resource rights of Maroon tribes. Further, there is some dispute between Maroon peoples regarding which tribes have rights over certain parcels of land. Practical difficulties arise in light of the government’s inaction on the Inter-American Court’s orders to recognize and secure Maroon customary land tenure. To date, the government has not sought to demarcate land or provide legislative or administrative protections of land rights, as mandated by the Court. It is against this backdrop that the Panel observes a level of ambiguity in how Surgold approaches the question of land rights. At a general level, the company has demonstrated an awareness of

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<sup>41</sup> The Panel focused on matters pertaining to surface rights and has not considered whether the Pamaka has a claim to sub-surface mineral rights.

<sup>42</sup> In two of the community meetings, Pamaka leaders told the Panel if they had had the power and opportunity to negotiate with the company, they would have wished to negotiate an equity stake in the project. That the Pamaka are interested in such an arrangement would have to be verified through direct engagement.

customary ownership and declared that Merian is operating on Pamaka land. However, in practical terms, the company has operated and negotiated as if it is operating on state land, not traditionally held Maroon lands. Regardless of the uncertainties surrounding tribal ownership of land, it is incumbent on any company to exercise due diligence to consult affected, or potentially affected, tribal peoples prior to developing any land to which the tribes lay claim.

When companies recognize customary land ownership, the nature of consent agreements are stronger because the terms become tied to those rights. This moves beyond achieving good relations with local people and applying the principles of FPIC to the degree that a company chooses. At Merian, recognition of customary land ownership could facilitate a form of consent premised on the full extent of the Pamaka's land rights. In the Panel's view, while the Cooperation Agreement did include preferential employment and procurement for the Pamaka, infrastructure improvement and maintenance, a complaints and grievance mechanism, community development funding, and several other benefits, it did not go far enough to create a truly equitable benefit-sharing agreement that reflects customary ownership interests of the Pamaka. Instead, it constitutes what could be described as a 'good neighbor agreement'; that is, a general set of development benefits that any local community would be in a position to secure. The Pamaka may have consented to community development projects on their territories, but they did not have an opportunity to consent to resource development, or to negotiate to secure tangible benefits from the project in exchange for access to their land holding.

In the Panel's view, the Community Development Foundation provides for a modest transfer of funds to the Pamaka and does not reflect what would likely emerge from a negotiation grounded in a recognition of the Pamaka's land and resource rights. This modest transfer is inadequate to fully compensate for the Merian mine if Pamaka ownership (even if only surface ownership) of the land used by the mine is genuinely conceded. The company's desire to apply FPIC principles may have guided community engagement at Merian. However, the process was not meaningful from a substantive land rights perspective.

#### **Summary points**

- At Merian, the company has shown a commitment to community engagement.
- The Pamaka may have consented to community development projects on their territories, but they did not have an opportunity to consent to resource development, or to negotiate to secure tangible benefits from the project in exchange for access to their land holding.
- It is incumbent on developers to exercise due diligence to consult affected, or potentially affected, indigenous and tribal peoples prior to developing any land to which the tribes lay claim.
- In the Panel's view, negotiating on the basis of land ownership would have provided the Pamaka with a more economically robust, front-end compensation and benefit-sharing arrangement.

- While Newmont has a policy at the corporate level, Surgold has not developed a clear strategy for operationalizing its recognition of indigenous and tribal peoples' human rights, including land and resource rights.

## 5.2 Working at the interface of large and small-scale mining

Newmont is actively engaged on several complex issues associated with the widespread occurrence of informal mining in the region. At the time of writing, the company was finalizing a comprehensive strategy on artisanal and small-scale mining, and updating its environmental baseline to assess the impact of informal mining on the local ecosystem, including water quality and the prevalence of mercury. The company is working with a local expert to develop mercury-free small-scale mining technologies. The company is also in discussion with a civil society group and an international agency to help address these issues.<sup>43</sup>

While Newmont is engaged on the environmental dimensions of informal mining, the Panel notes a number of gaps in the company's understanding of the social and human rights dimensions of these activities. These gaps are contemplated below and primarily relate to land and resource rights, and the Pamaka's status as customary landowners. Landowners in Suriname are entitled to compensation and restoration for loss of land for resource development. As Maroon and indigenous peoples are not formally recognized by the state as holding collective property rights, the Pamaka were not compensated for the economic loss associated with restricting their access to informal mining areas when the government dispossessed them of their land. Nor were individuals compensated for the economic loss that they may have suffered when they were involuntarily displaced.

The company's incomplete knowledge about land relations and associated livelihoods has a significant bearing on its understanding of the social impact of land dispossession and displacement of the Pamaka, and others, from Gowtu Bergi and other customary land holdings. For example, Newmont does not hold comprehensive data on:

- how many of those evicted in 2011 were Maroon, and from which tribe
- which groups held customary ownership over Gowtu Bergi at the time of the eviction
- who was exercising traditional land use rights at the time of the eviction
- the nature of those rights including lease arrangements, rents and remittance arrangements
- the nature of the relationships established between landowners and in-migrants

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<sup>43</sup> Surgold stated that it is working with Sticing UNASAT on mercury-free technology, as well as engaging with the Artisanal Gold Council to explore opportunities to pilot different approaches in this context. The company also indicated that work is ongoing with Conservation International to consider biodiversity offset options to regenerate growth in areas disturbed and contaminated by artisanal and small-scale mining.

- the nature and composition of the informal mining economy, and the associated impact on livelihoods of Pamaka, members of other Maroon tribes, and others
- 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 cannot make informed planning decisions. Conducting livelihood restoration without an empirical or evidence-based understanding of the practicalities of past loss means that future interventions may be ineffective, or even inappropriate. Furthermore, without accurate social data, Newmont will be unable to assess whether its livelihood programs have any restorative effect.

Also missing from the company’s institutional knowledge base is an understanding of the land tenure arrangements associated with the alternative informal mining sites. Newmont is actively assessing alternative sites on the basis of mineralization. Information about land tenure is essential to avoid disrupting the land and resource rights of other groups, and to avoid generating conflict within and/or between tribes, clans and sub-clans.

**Summary points**

- The Panel observed widespread and significant adverse environmental impacts from informal mining in the project area, including landscape degradation and river siltation.
- The Panel notes a number of gaps in the company’s understanding of the social and human rights dimensions relating to the Pamaka’s and other Maroon tribes’ land and resource rights, and their status as customary landowners.
- Newmont is working to address some of the environmental dimensions of informal mining in the project area.

**5.3 Building the social knowledge base**

The Panel observes that the social knowledge base for Merian is not sufficient. The site was unable to furnish the Panel with a comprehensive characterization of the social context, including studies describing the Pamaka’s kinship structure, their multiple points of connection to land, their collective livelihood systems, or the processes for determining and allocating entitlements with the Pamaka’s customary land tenure system.<sup>44</sup> A basic household survey was undertaken in 2011 for the purposes of project approval. This data source is not in active use and has not been supplemented or updated. In the absence of

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<sup>44</sup> The Panel notes that there are often confidentiality issues to navigate in commissioning studies of this nature. Companies must respect that some information cannot be shared, such as sacred knowledge and information relating to particular customary matters.



accurate records for population, land ownership and patterns of use and inheritance, the company is unable to understand the full extent of its impact on the land and resource rights of the Pamaka and other Maroon tribes.

The Inter-American Court of Human Rights has confirmed that, alongside FPIC, an environmental and social impact assessment that identifies impacts to indigenous and tribal peoples' rights is an essential mechanism for safeguarding the human rights of Maroon peoples in the context of resource development in Suriname. The assessment of human rights impacts is also a fundamental requirement of the UN Guiding Principles on Business and Human Rights. Where projects are to be established on tribal lands, companies should demonstrate a comprehensive knowledge of the social, political and cultural context. Commissioned studies, including those undertaken as part of an ESIA, should address human rights issues and impacts and support both the company and tribal peoples in their negotiations over resource development.<sup>45</sup> These studies should consider women's rights, including the intersection between gender and other factors such as race, poverty, age and disability, and the extent to which the site might either improve or exacerbate access to basic services, livelihood opportunities, or otherwise impact different groups of people, including women.

Newmont states that greenfield opportunities in new jurisdictions require a thorough understanding of the social and political landscape in order to effectively manage risks.<sup>46</sup> Impact assessments help to identify the severity of risks for different groups of people, appropriate avoidance, mitigation and compensation measures, and to communicate these matters with the relevant parties. The Panel notes that Newmont has only recently introduced requirements to include human rights as part of impact assessment studies. Nonetheless, Surgold has not operationalized fundamental social impact assessment data collected during the exploration and project approval phase. The data collected during these studies is not stored in a manner that is readily available for use at the site and has not been incorporated into site-level plans or management systems. Without a comprehensive social knowledge base, sharing information with local people about impacts and discussing the effectiveness of control measures is unlikely to be comprehensive.

The Panel engaged with several company representatives who held knowledge of different aspects of the social context and who could describe the social organizing structures of the Pamaka. However, this knowledge appeared to be individually held, and not systematically

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<sup>45</sup> Newmont had commissioned a human rights impact assessment (HRIA) for the Merian mine. This study considered the human rights and vulnerability-related risks for different groups of people. The Panel requested to see the HRIA, in either draft or final form, on several occasions. At the time of writing, Newmont advised that the study was in the final stages of completion, but was not available to the Panel.

<sup>46</sup> See: <http://sustainabilityreport.newmont.com/2014/docs/newmont-beyond-the-mine-sustainability-report-2014.pdf>, p.9.

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 decision-makers.

#### **Summary points**

- The quality and form of Merian’s social knowledge base is not commensurate with the complexity of its operating context.
- Social knowledge is held by individuals, and shared through informal means. Studies are either not held centrally (for ease of reference), or not held at all by the company.
- In the absence of robust and accessible knowledge, the basis for understanding the project’s impact on the Pamaka and other Maroon tribes’ land and resource rights is difficult to determine.

#### **5.4 Ensuring equal access to information**

A key supposition of FPIC is that affected people understand as much about their own rights and the implications of the proposed project as do developers and regulators. The Panel asked members of the Negotiating Committee whether they had access to the information they needed during agreement negotiations. Members described an open exchange of information between parties. At the same time, the Committee indicated that more information was required. The Committee had requested access to other Newmont mine sites to learn about experiences from elsewhere. Additionally, the Panel heard that general members of the Pamaka community had requested site visits to see firsthand the progress being made with construction at Merian. The company had promised to fulfill these requests, but this did not occur. In a meeting with the Panel, Committee members asked the Panel for examples of company-community agreements from other contexts. These requests indicate an interest in accessing additional information about company-community agreement processes.

The Panel also received questions from members of the community about matters relating to employment, local business development, environmental impacts, the alternative informal mine site, and the Merian project more generally. The Panel met with a group of Surgold employees, for example, most of whom were Pamakan. Many indicated a similar desire for information about the project, its potential impacts, and its benefits for their communities. On occasion community members commented about the limited availability of information about matters of concern to them, and the reliability of information provided by the company. One of the Village Captains, echoed by others in the discussion,

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 Pamaka with whom the Panel engaged during its short visit indicated that they accepted the Cooperation Agreement as the outcome of negotiations by the designated representatives of the Pamaka traditional authority. However, there was limited awareness of what the agreement included, and what it offered in terms of safeguards and opportunities for development. Some people indicated that the intensity and style of company-community engagement changed after the Mineral Agreement had been signed. Once the project entered the construction phase, people indicated that the company's engagement shifted to the Negotiating Committee and the Captains, rather than general members of the community. Some people indicated that prior to this, community engagement extended to the household level, and was more inclusive of women and youth.<sup>47</sup>

Surgold managers highlighted challenges associated with ensuring access to information, and with realizing community engagement more generally. Aside from the challenges presented by logistics and the transient nature of the Pamaka community, a number of internal, organizational issues were raised with the Panel. These issues were associated with the transitions through project approval, construction and operations, and the different priorities of these respective teams. The on-site community relations team reported that there were limited resources available to them to span their work across routine engagement, issues management, analytical work and studies, and longer-term strategic planning.

**Summary points**

- Members of the Pamaka Negotiating Committee described an open exchange of information between parties during engagement and agreement negotiations.
- Issues associated with accessing information about issues of concern and from independent sources were raised with the Panel.
- There were reports that Merian's village-level community engagement effort diminished during the construction period.
- Merian's community relations team does not appear to have the necessary resources to meet Surgold's stated objective of engaging and negotiating with the Pamaka based on the principles of FPIC.

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<sup>47</sup> According to company sources, this would have been the period of engagement for the ESIA and when Surgold had a more active program of engagement, before the project entered the construction period.

## 5.5 Addressing women's rights

Respect for women's rights is integral to the corporate responsibility to respect human rights.<sup>48</sup> 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 or tribal, 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.<sup>49</sup> Further, unless the problem of discrimination against women is recognized and actively addressed, indigenous and tribal women risk missing out on benefits that are negotiated within an FPIC process or a development agreement.

In 2015, the UN Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz, stated that land and appropriation, for example, is not gender neutral and that indigenous women's rights interact with violations of collective land rights. In analyzing the situation of indigenous women globally, the Special Rapporteur highlights that:

“The loss of land and exclusion of women can create vulnerability to abuse and violence, such as sexual violence, exploitation and trafficking.

Additionally, the secondary effects of violations of land rights, such as loss of livelihood and ill health, often disproportionately impact women in their roles of caregivers and guardians of the local environment.”<sup>50</sup>

In 2010, the UN Office of the Special Adviser on Gender Issues and Advancement of Women and the Secretariat of the UN Permanent Forum on Indigenous Issues developed a joint brief on gender and indigenous peoples.<sup>51</sup> The brief notes that in recent years, women human rights advocates have worked to emphasize the indivisibility of human rights and, in particular, to reassert the inter-relationships between cultural rights and women's human

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<sup>48</sup> See United Nations Declaration on the Rights of Indigenous Peoples, art. 44, “All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals”; ILO Conv. No 169, art. 3; and the Convention on the Elimination of all Forms of Discrimination Against Women.

<sup>49</sup> Keenan, et al. (2014) Company-community agreements, gender and development, *Journal of Business Ethics* 135 (4): 607-615; Inter-American Commission on Human Rights, *Indigenous Peoples, Communities of African Descent, Extractive Industries*, 31 December 2015, <http://www.oas.org/en/iachr/reports/pdfs/ExtractiveIndustries2016.pdf>: p. 168.

<sup>50</sup> See: <http://unsr.vtaulicorpuz.org/site/images/docs/annual/2015-annual-hrc-a-hrc-30-41-en.pdf>

<sup>51</sup> This document was compiled by the UN Permanent Forum on Indigenous Issues, which provides expert advice and recommendations on indigenous issues. See: <https://www.un.org/development/desa/indigenouspeoples/unpfii-sessions-2.html>. Other relevant instruments include the Convention on the Elimination of All Forms of Discrimination Against Women.

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.<sup>52</sup> 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 three Pamakan women in leadership positions, including a Captain, a member of the Negotiating Committee, and a "land 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.

However, there were other indications that Surgold needs to work with Pamaka authorities to strengthen its approach to gender inclusion. During one of the community-level discussions, for instance, a female Captain explained that in the past, she was invited to community meetings with the company. However, in recent years, she said she was no longer invited to meetings and the company tended to engage the male Captains. She emphasized that the land is communally owned, that the impacts of mining will affect everyone, that the youth and future generations had the most to lose, and that due process should be followed, in line with agreed protocols of engagement.

Other Pamakan women expressed frustration that their access to information about the project's potential adverse impacts and benefits had diminished, and that they were less able to voice their opinion about the project than was the case previously. As noted above, women said that the company's past engagement practice had been more inclusive (although they did not suggest that it had previously been sufficient). The issue of women's access to information was also raised by a female member of the Negotiating Committee who explained that women's information needs were often different to men's, and that women in the community did not always have access to the information they needed, in a form that they could understand.

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<sup>52</sup> UN Expert Mechanism on the rights of indigenous peoples similarly emphasized: "women have the right to equality in the exercise of the right of indigenous peoples to participate in both internal and external decision-making processes and institutions." *Final study on indigenous peoples and the right to participate in decision-making*, May 26, 2011, para. 36. See also Inter-American Commission on Human Rights, *Indigenous Peoples, Communities of African Descent, Extractive Industries*, 31 December 2015, <http://www.oas.org/en/iachr/reports/pdfs/ExtractiveIndustries2016.pdf>: pp. 167-8.

As highlighted above, the company's social knowledge base is not sufficient. There are also deficiencies when it comes to analyzing differential impacts on women, girls, and other community members that face multiple forms of marginalization. This deficiency heightens the risk of the company unknowingly causing, contributing to, or exacerbating abuses of women's rights. The company has the opportunity and responsibility to reinforce the leadership roles of women within the Pamaka traditional authority structure and to ensure that its approach is inclusive of women, and is considerate of issues of social exclusion.

#### **Summary points**

- The traditional authority structure of the Pamaka provides opportunities for women to participate as general members of the community, leaders, and representatives.
- Some Pamakan women expressed frustration that their access to information about the project's potential adverse impacts and benefits was inadequate and had diminished over time.
- The company has not adequately analyzed differential impacts of the project on women, girls, and other community members that face multiple forms of marginalization.
- There are opportunities for the site to ensure that its approach is inclusive of women, while being respectful of Pamaka authority structures, and that it considers issues of social exclusion.

## **6 Recommendations for the Merian mine**

As noted above, Newmont is operating in a context where there was no opportunity for the Pamaka to consent to developing the Merian mine on customary lands: the state granted the company the right to explore and exploit sub-surface minerals in the absence of conducting meaningful consultation with, or obtaining consent from, the customary land owners; and the Government of Suriname dispossessed some Pamaka of their customary land, which included Gowtu Bergi, to make way for the mine. Against this backdrop, Newmont 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.

In the Panel's view, Newmont has not conducted the requisite studies to understand the negative implications associated with this dispossession, and has not provided adequate compensation or benefit-sharing, on the basis of a recognition of land and resource rights. In these circumstances – noting that Newmont sought to apply FPIC principles at Merian but does not claim to have obtained FPIC from the Pamaka – Newmont requested advice from the Panel about how to better align its community engagement practices with the principles of FPIC within a human rights framework in the future. The Panel encourages Newmont to consider the following specific recommendations:

1. Negotiate with the Maroon traditional authority structures agreements that recognize and reflect the customary ownership and use of the land on which Merian is operating, in accordance with the judgments of the Inter-American Court of Human Rights, even if the government continues to fail to fully implement those judgments. While the Panel recognizes the complexities of such a situation, working towards a rights-based, benefit-sharing agreement with the Maroon peoples presents an opportunity for constructive dialogue with the government about the need to respect Maroon rights. Such an approach moves beyond the procedures historically employed in similar contexts in the region, positioning Newmont to be a leader in its alignment with international standards.
2. Work to encourage, incentivise and assist the Government of Suriname to recognize and secure the land and resource rights of the Maroon tribes in accordance with the judgments of the Inter-American Court of Human Rights.
3. Continue to engage with Maroon traditional authority structures, through mutually agreed mechanisms and processes, and in doing so:
  - a. fulfil commitments to assist the community to access information about agreement processes from other mining contexts
  - b. ensure that engagement processes and mechanisms reinforce the role and status of women in the traditional authority and other decision-making structures.
4. Continue to provide the Pamaka traditional authority and its delegate bodies with access to independent legal advice and other expertise that addresses the inherent power imbalances between the Maroons, the Government of Suriname and Newmont. Extend this support to other Maroon tribes whose lands and resources are impacted by Newmont's activities. This should include:
  - a. financing independent lawyers chosen by traditional authorities to assist them in all aspects of engagement and negotiations with Newmont and its subsidiary
  - b. financing specialists (such as anthropologists and geographers) chosen by the Maroon traditional authorities to work with them to map their customary land ownership. This is all the more important in contexts where there is debate over customary ownership.
  - c. provision of independent scientific advice about environmental matters of concern and/or an independent review of the ESIA
  - d. facilitation of contact between the Maroon traditional authorities and indigenous representative bodies from other contexts (e.g. Ghana, Australia or Canada).

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 sub-groups 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. cumulative impacts of mining, including the environmental and health risks associated with informal mining.
6. Ensure that company decision-makers have access to relevant information and resources to engage the Maroons in a manner that supports the principles of FPIC. This includes:
  - a. social data and information about indigenous and tribal land and resource rights
  - b. a comprehensive understanding of the human rights impacts of the Merian mine, including impacts on land and resource use, and differential impacts on women, girls, and other community members that face multiple forms of marginalization
  - c. a knowledge management system that enables the collection, monitoring and use of social data to support rights-respectful planning, decision-making and remedy processes.
7. Ensure that social baseline and impact assessment studies that may be commissioned are not for exclusive use by the company. Parties should negotiate joint access to studies as a basis for future engagements and negotiations. The Panel encourages Newmont to work with Maroon traditional authorities to agree on shared processes for the collection of information pertaining to land tenure systems and associated resource rights.
8. Ensure that Newmont and Sargold personnel understand the relevance and significance of the company's policy commitments, the international human rights framework, and relevant case law.



9. Encourage the review of judgments of the Inter-American Court and ensure that, even in the absence of obtaining FPIC, the company understands and considers other safeguards, including:
  - a. above mentioned studies about indigenous and tribal land and resource rights
  - b. mitigation measures for identified human rights risks and impacts
  - c. future benefit-sharing arrangements that are based on a practical recognition of indigenous and tribal land and resource rights.
  
10. To the question of whether Newmont could obtain FPIC for future significant decisions at Merian in the absence of FPIC for project development, it is the Panel's view that, by definition, consent in retrospect does not constitute FPIC. The Panel does consider it possible, however, for the company to retrospectively address its prior impact on indigenous and tribal land and resource rights, as a basis for working to obtain FPIC for future significant decisions. Under these conditions, FPIC would be conditional on remedying those issues associated with past practice and negotiating on the basis of the land and resource rights. Only Maroon peoples can determine whether these conditions would provide an adequate basis for entering into FPIC negotiations for future significant decisions.

## **7 Additional guidance for industry**

Drawing on the lessons of Merian, the following set of recommendations provides general guidance for resource developers working to obtain FPIC.

1. FPIC is a mechanism that safeguards indigenous and tribal peoples' rights, including land and resource rights. While states are ultimately responsible for ensuring protection of indigenous and tribal peoples' rights, companies should independently exercise due diligence and ensure that they do not themselves infringe or contribute to infringement of indigenous and tribal people's rights. The operationalization of FPIC within a human rights framework by corporate actors is part of the exercise of this due diligence.
2. In exercising due diligence, companies should identify situations where indigenous or tribal peoples' claims to customary land are uncertain or subject to dispute prior to undertaking any activities on that land. Companies may play a role in facilitating resolution of these matters. For example, as recommended above, companies can finance specialists (such as anthropologists and geographers) chosen by traditional authorities to work with those authorities to map their customary land ownership. Companies should not conduct or advance mining-related activities until such matters are understood and a process for resolution agreed between the indigenous or tribal peoples.

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 and tribal peoples have the power and ability to bargain with a resource developer on the basis of their customary rights, even in contexts where those rights are not fully recognized by the state. The outcome of negotiations and the terms of consent must include meaningful arrangements for impact mitigation, compensation and reasonable benefit-sharing that account for indigenous and tribal peoples' land and resource rights.
4. Women have the right to equality in the exercise of the right of indigenous and tribal peoples to participate in both internal and external decision-making processes and institutions. Companies should, in cooperation with indigenous and tribal leaders, foster the participation of women throughout FPIC processes, while respecting the indigenous and tribal peoples own authority structures.
5. The Inter-American Commission on Human Rights has identified that governments "usually relate directly with members of boards of directors of indigenous peoples or their representatives, the majority of whom are men, despite the fact that these members of boards of directors or representatives may not have an express mandate from their general or community assemblies to adopt decisions of special importance."<sup>53</sup> Companies should work with indigenous and tribal peoples to understand their traditional decision making processes, and assure themselves that community decisions are consistent with those processes. While working to understand traditional decision-making processes, companies must accept that communities will not share certain information with the company, such as sacred knowledge and information relating to particular customary matters.
6. Resource developers must have the requisite knowledge and resources to work to obtain FPIC. Developers must prepare by:
  - a. acquiring knowledge about the operating context, including claims to customary land ownership, and associated land tenure systems
  - b. conducting comprehensive social baseline and impact assessment studies that identify human rights issues
  - c. including a gender analysis and impact assessment as part of the above

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<sup>53</sup> Inter-American Commission on Human Rights, *Indigenous Peoples, Communities of African Descent, Extractive Industries*, 31 December 2015, <http://www.oas.org/en/iachr/reports/pdfs/ExtractiveIndustries2016.pdf>: pp. 167-8.

- d. incorporating this knowledge into corporate 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 of 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 welcomed the opportunity to consider matters relating to FPIC within a human rights framework at the Merian mine in Suriname. Newmont's initiation of the Panel, participation in the Panel process and the release of this report provides valuable insight for the industry more broadly and demonstrates Newmont's commitment to a deeper consideration of the complexities involved. In the robust exchanges during the preparation of this report, the parties enriched their understanding of the complex social and human

rights dynamics associated with working to obtain FPIC in jurisdictions where the 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 of 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 from their customary lands.

A central point that the Panel has sought to communicate is that indigenous and tribal peoples' ability to negotiate with a company (or a state) is a function of the broader set of human rights that support FPIC. Consent that is based on collective land and resource rights provides a robust economic framework for negotiating with indigenous and tribal peoples. This could include, for example, equity shares, royalty payments, community development funds or trusts wholly owned and governed by the community and of an amount commensurate with recognition of customary land as an economic asset, and other strategies to achieve wealth transfer over time.<sup>54</sup> Without recognizing customary land as an economic asset, the transfer of wealth tends to be at the discretion of corporate actors. While discretionary community development initiatives are important (and if well-conceived, can build the capacity of indigenous and tribal peoples to exercise their human rights) they tend to position landowners as passive recipients with needs, rather than positioning them as active partners in resource development with economic assets and rights.

Finally, there is the question of how a company works to obtain FPIC when the option to develop the resource has already been taken. FPIC implies a continuing relationship of negotiation and consent subsequent to an initial approval. FPIC for ongoing decisions in the absence of indigenous and tribal peoples having the opportunity to consent to resource development in earlier phases, and negotiate an economic exchange on the basis of land ownership, does not constitute FPIC within a human rights framework. The Panel

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<sup>54</sup> For a discussion of genuine partnership and sharing of benefits with indigenous and tribal peoples in the context of resource extraction see chapter IV, paras. 75-77 in: 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, James Anaya, on extractive industries affecting indigenous peoples and other issues related to business and human rights," A/HRC/FBHR/2012/CRP.1, 29 November 2012.

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 most 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.<sup>55</sup>

#### State duties

The above-listed 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.<sup>56</sup>

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.<sup>57</sup> In order to realize indigenous land and

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<sup>55</sup> 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, James Anaya, on extractive industries affecting indigenous peoples and other issues related to business and human rights,” A/HRC/FBHR/2012/CRP.1, 29 November 2012.

<sup>56</sup> International Covenant on Economic, Social and Cultural Rights, adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force January 3, 1976, arts 1, 11, and 15. See also CESCR General Comment 21; International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, arts. 1(1), 27; UN Human Rights Committee, General Comment No. 23: Article 27 (The rights of minorities), April 8, 1992, para. 7; UN Committee on the Elimination of Racial Discrimination, General Recommendation XXIII (Indigenous Peoples), August 18, 1997; International Labour Organization Convention No. 169 on Indigenous and Tribal Peoples.

<sup>57</sup> UNDRIP, art. 26, 32(1).

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.<sup>58</sup>

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.<sup>59</sup> This duty should be understood as a safeguard mechanism against measures that may affect indigenous and tribal peoples' internationally recognized human rights.<sup>60</sup> 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 the 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:

- (i) the state duty to protect human rights
- (ii) the independent corporate responsibility to respect human rights
- (iii) the need for a remedy for victims of business-related human rights abuses.<sup>61</sup>

Newmont formally recognized the Guiding Principles within its corporate policy framework in 2014, though it has committed to respect human rights since 2003. As part of their responsibility to respect human rights, which exists independently of state obligations, businesses must carry out due diligence to ensure that their activities do not infringe or

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<sup>58</sup> UNDRIP, art. 26.

<sup>59</sup> UNDRIP, art. 32(2); ILO Convention 169.

<sup>60</sup> *Saramaka v. Suriname*, Inter-American Court of Human Rights, 28 November 2007, paras. 129-137; A/HRC/18/35, para. 82.

<sup>61</sup> The Guiding Principles on Business and Human Rights. See also, UN Special Rapporteur on the rights of indigenous peoples, James Anaya, "Extractive Industries and Indigenous Peoples," A/HRC/24/41, July 1, 2013, <http://unsr.jamesanaya.org/docs/annual/2013-hrc-annual-report-en.pdf>, p. 21; UN Special Rapporteur on the rights of indigenous peoples, James Anaya, "Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development," A/HRC/12/34, July 15, 2009, <http://unsr.jamesanaya.org/PDFs/Annual2009.pdf>.

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.<sup>62</sup> 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 by engaging with indigenous and tribal peoples in association with FPIC processes.

International financial institutions and industry groups also recognize the responsibility of businesses to respect indigenous and tribal peoples' rights. Notably, in 2012, the International Finance Corporation ("IFC") strengthened its requirements relating to engagement with indigenous and tribal peoples. IFC clients are required to identify the nature and degree of expected economic, social, cultural, and environmental impacts of their projects on indigenous and tribal peoples, to avoid adverse impacts and, where they are unavoidable, to minimize, restore, and/or compensate for them.<sup>63</sup> Recognizing that indigenous and tribal peoples may be particularly vulnerable to the loss of, alienation from, or exploitation of their land and access to natural and cultural resources, the IFC requires its clients to obtain the FPIC of affected indigenous and tribal peoples if the client proposes to:

- (i) locate a project or commercially develop natural resources on lands traditionally owned by, or under the customary use of, indigenous and tribal peoples, and where adverse impacts can be expected
- (ii) relocate an indigenous community, or
- (iii) embark on a project that may have unavoidable, significant impacts on critical cultural heritage of indigenous and tribal peoples.

Newmont recognizes the IFC Environmental and Social Performance Standards as a key point of reference within its Sustainability and Stakeholder Engagement Policy. The policy also includes an explicit commitment to build constructive relationships with indigenous and tribal peoples and recognize their social, economic, and cultural heritage.

The International Council on Mining and Metals ("ICMM"), the mining industry's international industry body, of which Newmont is a founding member, has recognized that "mining and metals companies have a responsibility to respect the human rights of the

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<sup>62</sup> UN Special Rapporteur on the rights of indigenous peoples, James Anaya, "Report of the Special Rapporteur on the rights of indigenous peoples," A/HRC/21/47, July 6, 2012, para. 83. The commentary to principle 11 of the Guiding Principles also clarifies that the corporate responsibility to respect human rights "exists independently of States' abilities and/or willingness to fulfill their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights."

<sup>63</sup> IFC, Performance Standard 7, [http://www.ifc.org/wps/wcm/connect/115482804a0255db96fbffd1a5d13d27/PS\\_English\\_2012\\_Full-Document.pdf?MOD=AJPERES](http://www.ifc.org/wps/wcm/connect/115482804a0255db96fbffd1a5d13d27/PS_English_2012_Full-Document.pdf?MOD=AJPERES). The IFC's 2006 Performance Standard on indigenous peoples required "free, prior, informed consultation."



communities that they affect and the people they employ.”<sup>64</sup> As part of its 2013 Position Statement on Indigenous Peoples and Mining, the ICMM has outlined measures that its members have committed to in order to ensure respect of indigenous and tribal 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.”<sup>65</sup> ICMM members are not committed to applying this retrospectively to projects in advanced planning or operations, as is the case of the Merian project.<sup>66</sup>

### Judgments of the Inter-American Court of Human Rights

The Inter-American Court of Human Rights (“the Inter-American Court”) has specifically affirmed the collective rights of the indigenous and tribal peoples of Suriname, including collective rights over lands and natural resources, as guaranteed by the American Convention on Human Rights. The three judgments affirming these rights include: *Moiwana Village v. Suriname*<sup>67</sup> of 2005; *Saramaka v. Suriname*<sup>68</sup> of 2007; and *Kaliña and Lokono Peoples v. Suriname*<sup>69</sup> of 2014.

In the case of *Moiwana village v. Suriname*, the Inter-American Court found that Suriname violated Article 21 of the American Convention on Human Rights protecting the right to property, and ordered Suriname to adopt legislative, administrative, and other measures necessary to ensure *Moiwana* property rights over traditional territories from which they were expelled, as well as to provide for the use and enjoyment of these territories and to create “an effective mechanism for the delimitation, demarcation and titling of said traditional territories.”<sup>70</sup>

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<sup>64</sup> See: <http://www.icmm.com/en-gb/society-and-the-economy/mining-and-communities/human-rights>

<sup>65</sup> ICMM, Indigenous Peoples and Mining Position Statement, May 2013, <http://www.icmm.com/en-gb/members/member-commitments/position-statements/indigenous-peoples-and-mining-position-statement>. The ICMM’s 2013 position statement replaces an earlier position statement from 2008.

<sup>66</sup> See: <http://www.icmm.com/publications/pdfs/5433.pdf>. ICMM members were expected to implement the commitments in the position statement by May 2015. The commitments do not apply to projects that had started the approvals and permitting processes at the time of the adoption of the position statement.

<sup>67</sup> *Moiwana Village v. Suriname*, Judgment of 15 June 2005, Inter-Am Ct. H.R., (Ser. C) No. 124 (2005).

<sup>68</sup> *Saramaka People v. Suriname*, Judgment of 28 November 2007, Inter-Am Ct. H.R., (Ser. C) No. 172 (2007).

<sup>69</sup> *Kaliña and Lokono Peoples v. Suriname*, Judgment of 15 November 2015, Inter-Am Ct. H.R., (Ser. C) No. 309 (2015).

<sup>70</sup> *Moiwana*, para. 209.

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.<sup>71</sup> 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.<sup>72</sup> Notably, the Court further ordered Suriname to “adopt legislative, administrative and other measures necessary to recognize and ensure 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,”<sup>73</sup> and to grant the Saramaka peoples legal recognition as a collective juridical body.<sup>74</sup>

In *Kaliña and Lokono Peoples v. Suriname*, the most recent of the cases, the Inter-American Court again observed institutional impediments to, and abuses of, indigenous peoples’ collective property rights. The Court, in response to Suriname’s continued failure to recognize the juridical personality of indigenous peoples, ordered Suriname, among other measures, to: grant legal recognition of the collective juridical personality of the Kaliña and Lokono peoples; adopt measures to protect the territory in which both peoples exercise communal ownership; establish how the territorial rights of the Kaliña and Lokono peoples will be protected in cases where the land claimed is owned by the State or third parties; and take steps to delimit, demarcate, and grant both peoples collective title to the lands and territories they have traditionally occupied and used.<sup>75</sup>

The Inter-American Court’s judgments in these cases establish international legal responsibility on the part of the Government of Suriname with regard to indigenous and tribal peoples under the American Convention on Human Rights.<sup>76</sup> Suriname has not yet complied with the most substantive elements of the Court’s judgments, including those parts requiring the demarcation and titling of the tribal communities’ lands and the development of a law or procedure to carry out that process. In failing to comply with the Court’s requirements in these cases, the Government of Suriname continues to deny

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<sup>71</sup> See for e.g. *Case of Mayagna (Sumo) Awas Tingni Community. v. Nicaragua*, 79 Inter-Am. C.H.R. Ser. C (2001);

*Case of the Indigenous Community Yakye Axa v. Paraguay*, 125 Ser. C (2005); *Sawhoyamaya Indigenous Community v. Paraguay*, 146 Inter-Am. Ct. H.R. Ser. C (2006).

<sup>72</sup> *Saramaka*, para. 214(5)(7).

<sup>73</sup> *Id.*, para. 214(8).

<sup>74</sup> *Id.*, para. 214(6).

<sup>75</sup> *Kaliña and Lokono*, para. 329(5)(6)(7).

<sup>76</sup> While the cases relate to specific tribal communities, the principles affirming indigenous land and resource rights apply generally to all the indigenous and tribal peoples of Suriname.

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 a 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.<sup>77</sup> 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.

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<sup>77</sup> 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.