

TOOL 10

Good faith negotiation

Good faith negotiation is a particular form of negotiation that seeks to establish where points of disagreement and agreement lie, and what options are available for resolving disagreements in a balanced way. It primarily focuses on establishing a relationship of mutual respect between negotiation parties (like companies and indigenous communities) and removing any negotiating power imbalances. This tool provides guidance to companies wanting to facilitate good faith negotiations when engaging and negotiating with indigenous communities.

STEP 1

Understand the concept of good faith negotiation

Negotiation in good faith is a bilateral (or sometimes multilateral) process, which requires the commitment and participation of each of the parties. "Good faith" is a legal term that has been invoked in courts deciding on particular contractual disputes. Good faith negotiation requires that all parties respect each other's decision-making processes and appreciate their constraints. In broad terms, good faith negotiation involves all parties being willing to:⁴⁸

- engage in negotiation and meet at reasonable times and frequency
- provide information needed for informed negotiation and explore key issues of importance
- agree mutually acceptable procedures for negotiation that include sufficient time for decision making
- compromise in pursuit of reaching a formal and documented agreement.⁴⁹

What constitutes good faith negotiation must be considered in the context of the particular circumstances, including the rights, interests and perspectives of the relevant Indigenous Peoples and mining companies. It is important to also note that good faith negotiation strategies are an essential prerequisite to gaining FPIC and sustaining it through the project life cycle.

⁴⁸ IFC Performance Standards, Guidance Note 7 Indigenous Peoples.

⁴⁹ ICMM, Indigenous Peoples and Mining Position Statement, London, ICMM, 2013, footnote 3, adapted from IFC Guidance Note 7.

STEP 2

Build knowledge and capacity of indigenous communities where necessary

In some cases, indigenous groups may have little or no previous experience with mining and mining companies, and may lack the resources to support extended involvement in negotiation processes. In this instance, companies should be prepared to provide support to help build community capacity for good faith negotiation and redress power imbalances. However, where a community lacks access to information that would enable them to assess whether an offer was reasonable or not, it should be made clear to the groups in question that they are under no obligation to accept such offers of support.

Types of support companies may provide indigenous communities can include:

- providing funding to indigenous groups to employ independent expert advice, covering travel and meetings costs
- funding legal and negotiations training
- underwriting the cost of hiring a lead facilitator (a common practice in Australia and some other countries).

Such support should be on a "no-strings attached" basis and be provided through arm's-length processes (eg by allowing a community to choose advisers rather than having to use those provided by the company) to avoid any suggestion that companies may have inappropriately sought to influence the outcomes of negotiations.