

Corporate Readiness and the Human Rights Risks of Applying FPIC in the Global Mining Industry

Deanna KEMP* and John R OWEN**

Keywords: free prior informed consent, mining, risk, social performance

I. INTRODUCTION

As indigenous peoples have sought recognition of their individual and collective rights, the topic of free prior and informed consent (FPIC) has been pushed to the forefront of debates about resource development. According to Professor James Anaya, the former United Nations Special Rapporteur on the Rights of Indigenous Peoples, the importance of FPIC is found 'where the rights implicated are essential to the survival of indigenous peoples and foreseen impacts on the rights are significant'. Anaya argues that for FPIC to have substance 'indigenous consent to those impacts is required, beyond simply being an objective of consultations'.¹ The relevance of FPIC to mining is three-fold: (i) the rights of indigenous and tribal peoples are becoming more firmly recognized in international human rights norms and case law; (ii) mineral exploration and mine expansion activities increasingly occur in locations which affect the land and resource rights of indigenous peoples; and (iii) extractive companies now engage with business and human rights debates, largely due to the UN Guiding Principles on Business and Human Rights.²

In this piece, we provide a brief account of recent developments in the mining sector that confirm this 'push' and consider implications for mining industry practitioners. Advocacy campaigns that have elevated the status of FPIC in mining are a major achievement. As academic practitioners, our concern is that the momentum generated by advocates at the international level may translate into mining companies attempting to operationalize FPIC when they are neither fully committed nor aware of what is required of them. Application of FPIC requires heightened capability in social performance; a domain of practice that remains marginalized within the mining sector, particularly

* Sustainable Minerals Institute, The University of Queensland, Australia [d.kemp@smi.uq.edu.au].

** Honorary Senior Research Fellow, Sustainable Minerals Institute, The University of Queensland, Australia [j.owen@uq.edu.au].

¹ James Anaya, 'Statement of the Special Rapporteur on the rights of indigenous peoples', Human Rights Council (2012), 18 September 2012, available at <http://unsr.jamesanaya.org/statements/statement-of-special-rapporteur-to-the-un-human-rights-council-2012> (accessed 10 July 2016).

² Frequently referenced international human rights norms include the International Labour Organization Convention 169 on Indigenous and Tribal Peoples and the United Nations (UN) Declaration for the Rights of Indigenous Peoples.

on-site at projects and operations.³ Our experience is that industry responses to the ‘FPIC push’ are not yet matched by the required structures, systems or decision-making process needed to support this domain of practice.

Our focus, in this piece, is to explore a series of practice-based issues and questions relating to the application of FPIC in the mining sector. We conclude with a cautionary note about corporate readiness. Any continued push for the advancement of FPIC must take into account both the compatibility of the host context and the ability of corporate actors to practically support the principles of FPIC.

II. POLICY DEVELOPMENTS

FPIC has fast become a key dimension of the mining industry’s commitment to sustainable development. In 2012, the International Finance Corporation (IFC) included FPIC as a requirement in its influential Environmental and Social Performance Standards.⁴ The IFC Standards have become the ‘default’ benchmark for social performance in mining. Likewise, in 2013, the industry’s peak body, the International Council on Mining and Metals (ICMM) updated its Position Statement on Indigenous Peoples and Mining obligating member companies to ‘work to obtain the consent of indigenous peoples’ while ‘respecting internationally recognised human rights’.⁵

In 2015, an Oxfam study recorded increases in FPIC-related policy commitments right across the sector. In addition to supporting the ICMM’s consolidated position, individual member companies that have incorporated FPIC into their policy frameworks include Glencore, Anglo American, Newmont, Barrick Gold, Rio Tinto and BHP Billiton. A number of non-member mid-tier companies, such as Oceana Gold, Pan Aust and Ankor Gold have followed suit. In Oxfam’s view, this ‘race to the top’ is ‘an encouraging development’. For Oxfam, FPIC is a right for indigenous peoples under international law and, beyond this, the ‘gold standard’ for community engagement practice.

There are strong indications that parts of the industry are actively considering how FPIC can be applied on the ground. In 2014, for example, RESOLVE—a United States-based non-profit organization specializing in conflict resolution and consensus building—initiated an FPIC Solutions Dialogue: a multi-stakeholder initiative focused on understanding FPIC in extractive industries and identifying lessons derived from site-based experiences.⁶

Evidence suggests that the ‘FPIC push’ will continue. In March 2016, for example, the Initiative for Responsible Mining Assurance (IRMA)—a global coalition of non-government organizations, companies, communities, and trade unions—completed a second field test of its draft responsibility standard. The preamble to the FPIC chapter of the Standard

³ Deanna Kemp and John Owen, ‘Community Relations and Mining: Core to Business But Not “Core Business”’ (2013) 38 *Resources Policy* 523.

⁴ International Finance Corporation, ‘Performance Standard 7: Indigenous Peoples’, 1 January 2012, http://www.ifc.org/wps/wcm/connect/1ee7038049a79139b845faa8c6a8312a/PS7_English_2012.pdf?MOD=AJPERES (accessed 10 July 2016).

⁵ International Council on Mining and Metals, ‘Indigenous Peoples and Mining: Position Statement’, <https://www.icmm.com/publications/icmm-position-statement-on-indigenous-peoples-and-mining> (accessed 10 July 2016).

⁶ See, <http://solutions-network.org/site-fpic/other-initiatives/>.

states that corporations must demonstrate respect for human rights by obtaining the FPIC of indigenous peoples for projects that affect indigenous peoples' rights.⁷ As the policy landscape advances and performance standards are 'field-tested' it is essential that both the risks and opportunities of applying FPIC are examined in human rights due diligence processes.

III. RISK, INDIGENOUS PEOPLES AND CONDITIONS FOR FPIC

The mining industry's adoption of FPIC is supported by the idea that FPIC can reduce business risk.⁸ From this perspective, FPIC is supposed to improve the operating environment and support the industry in controlling externalities, reducing instability and minimizing the risk of disruption to project development and operations. The appeal of FPIC for industry is based on the assumption that it can simultaneously contain business risks and recognize the rights, needs and interests of indigenous and tribal peoples.⁹

The test is whether FPIC can successfully be applied in jurisdictions where the need for rights recognition is great, but the supporting conditions are weak. For FPIC to safeguard the rights of indigenous peoples and reduce risk for mining companies, a number of pre-conditions must be present, including *inter alia*: a functional regulatory framework, indigenous peoples who can make decisions free from coercion, a serviceable land tenure system, and companies with the capacity to navigate the complexities of applying FPIC.¹⁰ This raises a key question: where conditions are not in place, could the human rights risks of entering into an FPIC process, outweigh its presumed benefits for indigenous peoples?

A. Incompatibility and Volatility

The presence of supporting legal frameworks is a critical factor for whether FPIC can be upheld by a state or conferred through agreements negotiated between companies and indigenous peoples. In Australia, for example, the Native Title Act 1993 provides native title holders and claimants with a procedural 'right to negotiate' over mining projects, but does not grant indigenous peoples a power of veto.¹¹ There are otherwise no material limitations on the degree to which FPIC principles can be reflected in native title agreements.¹² In many countries, the rights of indigenous peoples are either not recognized or not

⁷ Initiative for Responsible Mining Assurance, The IRMA Standard, <http://www.responsiblemining.net/irma-standard/irma-standard-draft-v2.0/> (accessed 10 July 2016).

⁸ Abbi Buxton and Emma Wilson, 'FPIC and the Extractive Industries: A Guide to Applying the Spirit of Free, Prior and Informed Consent in Industrial Projects', International Institute for Environment and Development (2013), <http://pubs.iied.org/pdfs/16530IIED.pdf> (accessed 10 June 2016); Jasmine Campbell, 'Engaging with Free, Prior and Informed Consent', Business for Social Responsibility (2012), http://www.bsr.org/reports/BSR_Engaging_With_FPIC.pdf (accessed 5 June 2016); Amy Lehr and Gare Smith, 'Implementing a Corporate Free, Prior, and Informed Consent Policy: Benefits and Challenges', Foley Hoag (2010), <http://www.foleyhoag.com/publications/ebooks-and-white-papers/2010/may/implementing-a-corporate-free-prior-and-informed-consent-policy> (accessed 3 June 2016).

⁹ See: http://pdf.wri.org/development_without_conflict_fpic.pdf (accessed 29 August 2016).

¹⁰ John Owen and Deanna Kemp, 'Free Prior and Informed Consent, Social Complexity and the Mining Industry: Establishing a Knowledge Base' (2013) 41 *Resources Policy* 91.

¹¹ Native Title Act (Australia) (1993), http://www.austlii.edu.au/au/legis/cth/consol_act/nta1993147/ (accessed 10 July 2016).

¹² Since 1998, Indigenous Land Use Agreements (ILUAs) have provided an alternative for native title groups seeking to negotiate with mining companies. This mechanism is available to groups that have not had native title determined.

supported by domestic law. Where there are strong points of incompatibility between domestic law and FPIC, a one-off, company-supported indigenous consent process could be considered invalid, or viewed as a threat to state sovereignty.¹³

In many contexts, indigenous or tribal peoples cannot engage openly about human rights, or assert a right to FPIC. Several jurisdictions have rejected the veto rights attached to FPIC on the grounds that the state does not recognize indigenous people. The constitution of Papua New Guinea, for example, acknowledges the customary rights of landowners, but in our experience, both the state and developers resist the application of international standards in which landowners would be attributed the status of indigenous peoples.¹⁴ In addition, where oppressive politics are an established fact, operationalizing FPIC for a single mining project exposes indigenous or tribal peoples to the risk of harassment or persecution by the state. Recent case studies in Southeast Asia indicate that some states are either unwilling or incapable of managing dissent around resource development projects. While many states have ratified core human rights treaties, their ability to uphold basic human rights in the context of resource development is an ongoing issue.¹⁵

Without a deliberate and long-term strategy for state engagement, companies could leave indigenous peoples exposed, without any guarantee of future protection. In an industry where commodity prices and market volatility define the industry's approach to project development, what are the practical risks of companies suspending or deserting a community mid-FPIC process? Abandonment, including through divestment, cost-cutting or a reduced commitment to an active FPIC process, could have dire consequences for indigenous people who remain embedded in the politics of place. This is especially challenging when considering the frequency of acquisitions and divestments in the mining sector.¹⁶

B. Representation and Inclusion

How companies engage with indigenous leaders, their representatives and/or other nominated parties is a major determinant of FPIC's risk profile in practice. Experts suggest that indigenous representation and levels of participation are best determined within communities according to their traditional decision-making processes.¹⁷

¹³ Marcus Colchester and Maurizio Ferrari, 'Making FPIC Work: Challenges and Prospects for Indigenous Peoples', Forest Peoples Programme (2007), <http://www.forestpeoples.org/sites/fpp/files/publication/2010/08/fpicsynthesisjun07eng.pdf> (accessed 2 June 2016).

¹⁴ See also Martha Macintyre, 'Informed Consent and Mining Projects: A View from Papua New Guinea', (2007) 80 *Pacific Affairs* 49.

¹⁵ Deanna Kemp and John Owen, 'The reality of remedy in mining and community relations: an anonymous case-study from Southeast Asia' in Mahdev Mohan and Cynthia Morel (eds.), *Business and Human Rights in South East Asia: Risk and the Regulatory Turn* (2015).

¹⁶ In the case of resettlement, see, for example, Serena Lillywhite, Deanna Kemp, and Kathryn Sturman, 'Mining, Resettlement and Lost Livelihoods: Listening to the Voices of Resettled Communities in Mualadzi, Mozambique', Oxfam (2015), https://www.oxfam.org.au/wp-content/uploads/2015/04/mining-resettlement-and-lost-livelihoods_eng_web.pdf (accessed 10 July 2016).

¹⁷ James Anaya, 'Report of the Special Rapporteur on the Rights of Indigenous Peoples: Extractive Industries Operating Within or Near Indigenous Territories', Human Rights Council, (2011) Eighteenth Session, Agenda Item 3, A/HRC/18/35; James Anaya, 'Report of the Special Rapporteur on the Rights of Indigenous Peoples: Extractive Industries and Indigenous Peoples', Human Rights Council (2013), Twenty-fourth Session, Agenda Item 3, A/HRC/24/41.

Challenges emerge where these processes exclude sub-sections of a community seeking to participate. An unqualified pursuit of FPIC has the potential to overlook and even reinforce forms of traditional authority that would not be regarded as 'rights respectful'. Balancing self-interest in achieving FPIC 'compliance' by securing 'consent' from traditional authorities, and not making existing forms of exclusion (even by traditional authorities) more robust is a difficult proposition for companies that are focused on moving to project approval.

Rio Tinto's Argyle diamond mine in Western Australia is a well-documented example of how an incomplete social knowledge base lead to a group of traditional owners being excluded. The Argyle diamond mine is situated on Barramundi Gap, a site of cultural significance to indigenous Miriwung and Gija women. Early anthropological work for the mine did not account for women's cultural sites or knowledge. For years, women attempted to assert their rights and responsibilities over the land where the mine was located. Mine management overlooked this issue for years, to the detriment of the women, their culture and their traditional rights. This situation was eventually remedied, as described by Kym Doohan in *Making Things Come Good* (2008).¹⁸ The example demonstrates the perils of qualifying communities as representatives in the context of an incomplete knowledge base.

Furthermore, industrial, regulatory and local timelines do not always coincide. The long-term benefits of early engagement are not necessarily well understood by project developers, or supported by the state. If the objective of an FPIC process is to determine consent, there must be mechanisms available for agreeing what format consent will take, how to proceed to the next step (e.g., to agree 'conditions' or equity stakes), and what happens in the case of refusal. Rights-holders must be afforded the time and space to resolve difficult questions, such as: how dissenting positions will be interpreted and incorporated into ongoing considerations after an otherwise determining decision by a traditional authority has been reached? In the absence of a working knowledge of indigenous peoples, their ties to land and their representative and kinship structures, customs, and traditions, there is a heightened risk that rights will not be identified, understood or respected.

C. Capacity and Resources

A commitment to uphold the principle of FPIC requires substantial and early inputs from all parties, including indigenous peoples, companies and the state. In its most optimistic form, FPIC assumes comprehensive protection of human rights by modern and functional states. That is, with citizens who understand the scope and content of their rights and who are willing and able to assert and exercise those rights; with corporate actors that are duly diligent in terms of their human rights responsibilities. These assumptions are, in essence, pre-conditions for the effective operationalization of FPIC.

¹⁸ Kim Doohan, *Making things good: relations between Aborigines and miners at Argyle* (2008); see also Kim Doohan, Marcia Langton, Odette Mazel, 'From Paternalism to Partnership: The Good Neighbour Agreement and the Argyle Diamond Mine Indigenous Land Use Agreement in Western Australia' in Marcia Langton and Judy Longbottom (eds.), *Community Futures, Legal Architecture: Foundations for Indigenous Peoples in the Global Mining Boom* (2012).

In their review of the conflict between resettled communities and Anglo Platinum at its Mogalakwena mine in Limpopo, South Africa, Farrell et al (2012) show that the failure by the company to give due consideration to social and human rights risks was the result of management systems and a corporate culture that could not make sense of the social context in which it was operating. Implementation of FPIC requires a knowledge base that is available to operational-level decision-makers and the provision of resources to support the practical demands of FPIC. Our experience is that companies rarely invest the financial and technical resources needed to scope, commission and conduct studies to determine social risk; regardless of whether the risk is directed at people or the project.¹⁹

Where the host country context is less compatible with the principles and functional requirements of FPIC, the human and financial resources required to address inherent power imbalances is far greater. However, issues arise in terms of what is an appropriate allocation to address these imbalances, and which party is best placed to provide the resources. For example, in the context of a low-capacity jurisdiction, a mining company may be willing to allocate resources to support an FPIC process. It is likely, however, that a company-resourced FPIC process will invite criticism over the privatization of rights and remedies; as has occurred with project-level, non-judicial grievance mechanisms.²⁰ When responsibilities to support and protect human rights-related responsibilities are seen as privatized, questions arise about the nature of ‘consent’ and the degree to which we can be assured that it was given ‘freely’.

In our experience, the range of human and financial resources required to support complex engagement and negotiation processes with indigenous peoples varies. This investment often requires, for example, provision of support for dissenting groups, access to technical knowledge and experts, improvement of state or corporate engagement processes, the appointment of independent facilitators to resolve conflict between parties and external monitors to document intent, and impact of an FPIC process, including unintended consequences. Each context has its own narrative of trust and tension, and in the context of FPIC, great care is needed to ensure that the nature and level of resourcing and associated governance arrangements are commensurate with the risks involved.

D. Distribution of Risk and Liability

Conflict and community grievances can hold up or shut down extractive industry projects. In fact, recent research suggests that this occurs at more than double the rate of technical delays. Individual mining companies may seek to demonstrate progress towards FPIC and ‘respect’ for human rights at the policy level, but the industry’s preparedness to invest and support improvements in its community relations function—particularly during the project development and early operational phase—is an enduring problem. While community relations performance does feature as a central

¹⁹ Deanna Kemp, Sandy Worden, and John Owen, ‘Differentiated social risk: Rebound dynamics and sustainability performance in mining’ (forthcoming).

²⁰ Catherine Coumans and Patricia Feeney, ‘Privatized Remedy and Human Rights: Re-thinking Project-Level Grievance Mechanisms’, Third Annual UN Forum on Business and Human Rights (2014), <http://accessfacility.org/sites/default/files/MiningWatch%20Canada%20%26%20RAID%20-%20Privatized%20Remedy%20and%20Human%20Rights%3B%20Re-thinking%20Project-Level%20Grievance%20Mechanisms.pdf> (accessed 10 July 2016).

concern in policy level discussions about FPIC, it is our experience that a lack of early investment is a barrier for advancing practice over the life of an operation.

We suggest that where there is incompatibility in context, where modes and mechanisms for representation and participation are unclear, and where there is an inadequate or incommensurate allocation of resources relative to the complexities at hand, there could be heightened social risks for indigenous peoples. This would inevitably involve liabilities. To avoid externalizing these negative effects, risks and liabilities should be distributed amongst those who benefit the most from the project. Unless the scope and depth of human rights risks of mining are understood and attended to by those driving large-scale mineral development, our concern is that indigenous peoples could be unnecessarily exposed to additional project risks and liabilities.

IV. CONCLUSION

Calls for business to respect human rights are abundant. Applied research that examines the dynamics FPIC in mining industry practice, on the other hand, is scarce. It is for this reason that we highlight prescient risks associated with the global mining industry's attempts to apply FPIC in practice. It is a fact that not all nation states are able to guarantee the protection of human rights, or that all mining companies undertake the necessary due diligence to respect human rights. Advancing FPIC when industry capacity to translate aspiration into action is weak could result in risks for indigenous peoples. Until the industry's social performance structures, systems and decision-making processes adapt to the heightened demands of FPIC, its application could become a new source of mining-related risk for indigenous and tribal peoples.