



# 'Free prior and informed consent', social complexity and the mining industry: Establishing a knowledge base



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## ABSTRACT

'Free prior and informed consent' (FPIC) has emerged as an influential theme in contemporary debates about mining and development. This paper considers the social knowledge base required to actualize the notion of FPIC in particular mining contexts. FPIC introduces heightened social performance requirements at a time where many mining companies are still grappling with the fundamentals of their corporate social responsibilities (CSR). The authors critically review the character of the current FPIC debate as it relates to mining, and outline four conditional factors required to safeguard against social risk. They posit that such risk could be exacerbated by mining companies that fail to comprehensively account for social context and conditionalities. Given the industry's broad-based discursive engagement with FPIC, there is an urgent need to extend the current debate beyond legal application and engage with other, equally important, base concepts from the social sciences for the operationalization of FPIC.

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## Introduction

The emergence of large-scale resource extraction has profound consequences for a myriad of actors. In terms of prominence, companies seeking to develop new projects, and the communities who would 'host' those projects, are considered to sit at the forefront of activity. States, in addition to securing a balance between corporate and citizen rights, face the challenge of creating and fostering conditions for sustainable and diversified economic growth if they are to avoid the so-called 'resource curse'. Traditionally, resource curse debates have focused on the economic prospects of the 'nation', while at the local level, discussion has centered on the formation of 'resource enclaves' (Auty, 2006; Cardoso and Faletto, 1979). Research into the experiences of host communities indicates a pattern whereby social risk accrues most acutely among those people living nearest to mining activities (Littlewood, 2013; Saha et al., 2011).<sup>1</sup> It has been clear for some time that the market system is unable to account for and regulate the kind of dynamic social and human rights risk associated with large scale development projects, and that new deliberate efforts

are required to ensure that social risk is identified, understood and responded to by those parties involved in mining development.

There is significant debate about how best to 'regulate' corporate responsibilities in mining and whether 'solutions' should be entered into voluntarily, or mandated by the rule of law and enforced by the state (Schiavi and Solomon, 2007). Where there is tension over responsibility for managing social impacts, expressions of discontent readily emerge. Across different parts of the world, indigenous and land-connected peoples, workers, and other social actors have resisted the transformations and disruptions wrought by mining. The pressure of social protest and resistance has, in some instances, served to reconfigure regulatory regimes and company-state-community relations (O'Faircheallaigh, 2012; Bebbington and Bury, 2009). In this article, we engage the FPIC proposition as an emerging driver of industry reform, including where companies enter into an FPIC process required under national legislation, or do so voluntarily as a part of CSR policy. Like others, we offer caution in terms of the 'degree of difficulty' that the FPIC proposition presents (Szawblowski, 2011); but do not suggest that this as a reason not to proceed with a FPIC process. The article highlights the need for a discourse that extends beyond legal applicability, to one that better engages the sociological and socio-historical complexities embodied in a FPIC proposition.

The 'base' concept of FPIC has itself been driven by the global indigenous movement and is tied to concepts of autonomy and self-determination (Sawyer and Gomez, 2012). In this respect, FPIC's origins sit outside of conventional mining discourse, but nonetheless relate to many of those individual and collective human rights that are relevant in the context of mineral extraction,

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<sup>1</sup> Our definition of social risk relates to the risk that operations and mining activities pose to local and project-affected people and communities, and their human rights. This is fundamentally different to the traditional conception of mining-related risk, which would suggest risk to business, operations or production.

including: indigenous land rights, recognition of and respect for culture, the right to economic participation, to a livelihood, to a clean environment and so forth. The call for application of FPIC in mining stems from a set of legacy issues whereby natural resource extraction is identified as a major source of abuse of the rights of indigenous peoples worldwide. In his report to the United Nations (UN) Human Rights Council, the Special Rapporteur on the Rights of Indigenous Peoples, states that:

In its prevailing form, the model for advancing with natural resource extraction within the territories of indigenous peoples appears to run counter to the self-determination of indigenous peoples in the political, social and economic spheres (Anaya, 2011, p. 82).

In addition to its origins in the domain of indigenous people's rights, FPIC intersects with other emerging and prominent discourses in mining, namely: 'business and human rights' and 'participation in development'. At the intersection of these discourses, we note the elevation of FPIC as a discursive driver for reform within the resource sector in recognition of the legacies of the past and the ongoing attachment of indigenous peoples to their traditional lands, territories and resources (Anaya, 2011). The status of FPIC as a regulatory influence in mining is multifarious. FPIC is at once the subject of community protest where it is thought to have been denied or manipulated; mandated by law by a small but increasing number of states; required by a range of standards-setting organizations such as the International Finance Corporation (2011) through its influential Environmental and Social Performance Standard 7 on Indigenous Peoples; and being voluntarily endorsed by industry as a matter of CSR policy. This latter application is subject to much scrutiny as the industry navigates a cautious 'commit yet contain' position. Across this range of engagements, the debate is trending towards the operability of FPIC; that is, application beyond idealized notions of how consent processes might work in the context of mining and towards how FPIC might be practiced. Whatever the status of the debate within academic and industry forums, the FPIC agenda continues to be pursued with purpose and determination by indigenous people in many parts of the globe.

Presently there is no singular or universally accepted definition of FPIC, no agreement on what a FPIC process must entail, and no functional clarity about what constitutes 'consent'.<sup>2</sup> In the paragraphs that follow, we engage FPIC at a conceptual level, and draw a distinction between what we see as the legal and compliance-driven definitions on the one hand, and a voluntary form of policy on the other. This voluntary form extends the usage in two ways; firstly, beyond legal applicability and towards FPIC as a policy principle or 'general rule' when mining takes place within indigenous territory (Anaya, 2011, 2013); and secondly, beyond indigenous peoples and towards broad-based community consent. In this article, we refer to this voluntary form as 'FPIC by extension'; that is, beyond status-dependent forms of FPIC that are restricted to recognized groups, and towards a broader application.<sup>3</sup> The ability to cleave such distinctions reflects fundamental challenges in the concept and in its applicability to different contexts and conditions. And while differentiating between legal and voluntary forms is helpful for the purposes of understanding the discourse, recent developments demonstrate a recognition by industry of at

least three pressing practice challenges, including the need to: (i) address the unequal playing field on which indigenous people (or customary land holders) and developers negotiate on benefits and impacts; (ii), align industry practice with the business and human rights agenda; and (iii) build a global framework for integrating locally held notions of rights and entitlement with internationally defined norms and social safeguards surrounding the spread and dynamic presence of capital.

Against this background, we consider the risks and benefits of operationalizing the FPIC proposition, including in less than ideal circumstances. In our consideration of context, we recognize that for mining companies there are internal and external dimensions to this debate and note that the 'internal' dimensions of CSR policy are often overlooked (Kemp and Owen, 2013; Rajak, 2011; Welker, 2009; Ballard and Banks, 2003). We also introduce a body of literature that rarely features in contemporary debates about the social aspects of mining. The aim in this article is to broaden the current debate by highlighting some of the complex sociological dimensions implied by FPIC and mining. There is increasing recognition that of all the disciplines required for 'responsible mining' it is the social discipline that is the weakest. Given the socio-historical and political intricacies implied by the FPIC proposition, operationalization of the framework will require heightened capability and performativity in the very domain that has yet to reach its potential in mining. Unless there is a radical reconfiguration of the industry's approach to the social aspects of mining, underperformance could serve to widen the gap between CSR policy and practice, and potentially exacerbate those same issues that generate social risk.

### Discursive convergence: indigenous peoples, human rights and principles of participation

The UN *Guiding Principles (GPs) on Business and Human Rights* (2011) have been endorsed by the International Council on Mining and Metals (ICMM), its members, and a range of other non-member companies. In order to discharge the corporate responsibility to 'respect' human rights, companies have integrated (or have indicated their intention to incorporate) requirements from the UN GPs into corporate policy and procedure. Although the UN GPs make no formal reference to indigenous rights or FPIC, corporate commitments in the arena of business and human rights have nonetheless facilitated FPIC's ascendance as a potential mechanism of industry reform. For otherwise committed companies to deny indigenous or land-connected peoples a pivotal role in development decisions readily provokes the accusation that companies are avoiding the corporate responsibility to respect human rights, and are instead seeking to assert a right to dispossess (Bebbington and Bury, 2013). This is certainly a workable advocacy platform, and encourages industry to extend the application of FPIC beyond the 'base' concept.

Corporate commitment to the UN GPs is but one arena that suggests discursive and policy convergence between FPIC and human rights, and the emergence of 'FPIC by extension'. Several global companies have indicated 'support for' or 'alignment with' the UN *Declaration on the Rights of Indigenous Peoples (DRIP)* (UN, 2007). This declaration sets out individual and collective rights of indigenous people and specifically calls upon states to obtain FPIC for projects that affect indigenous people's lands or territories. As a policy platform, corporate support of UN DRIP is voluntary, and it is not referenced in the UN GPs. Likewise industry engagement with other instruments of international law, such as the *International Labor Organization's (ILO, 1991) Indigenous and Tribal Peoples Convention 169* is also relevant. The convention sits outside the suite of eight core ILO Conventions that comprise 'internationally recognized

<sup>2</sup> Recognizing that most guidance suggests that consent and associated processes should be determined locally.

<sup>3</sup> Goodland (2004) for example suggests that an FPIC process should be grounded in the degree to which livelihood and culture are dependent on customary lands, rather than application being strictly tied to indigeneity. See also Hanna and Vanclay (2013) and Voss and Greenspan (2012) for statements advocating the extension of FPIC beyond application to indigenous peoples.

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