

# Consenting adults

Changes to the principle of free, prior and informed consent are changing the way in which firms engage communities

BY MAURICE BRIDGE & ANGUS WONG

**F**REE, prior and informed consent (FPIC) is firmly on the agenda for stakeholders in the extractive industry and, with the latest amendments to the International Finance Corp's (IFC) Performance Standards, the bar has been raised. For the first time, companies will be required to obtain the consent of indigenous people rather than merely consulting them.

While the change to the Performance Standards might seem trivial, especially since the language surrounding it says the need to generate consent will only be required in 'special circumstances', it represents a significant strengthening of the standards with regard to community issues.

It is being celebrated as a victory by some civil society groups. Others, meanwhile, are concerned about the uncertainty that the change has introduced, exactly what 'special circumstances' will trigger the consent requirement and how it might limit project development.

Companies about to invest significant amounts of capital into projects where there is a level of uncertainty about gaining consent, or even going about the FPIC process, may decide to invest in alternative projects which do not involve indigenous communities. That said, industry leaders from banks, mining organisations and companies say the change reflects the direction in which relationships with indigenous people has been moving and that, in most cases, seeking consent early and on a continuing basis is a leading practice.

"The Performance Standards are recognised as the global benchmark for environmental and social risk management," says Peter Moore, senior environmental advisor for Export Development Canada, which applies these standards as an Equator Principles Financial Institution. "Accordingly, revisions to the Performance Standards are likely to result in a shift in public and industry perception around what is considered to be 'best practice'. This, in turn, could result in companies having to re-examine their existing corporate social responsibility (CSR) policies, and practices, to ensure they are aligned with these new standards to continue to maintain their overall social licence to operate."

## RULES OF ENGAGEMENT

The change came to the fore in May when the IFC, the largest global development institution dealing with the private sector in developing countries, updated its Sustainability Framework with the aim of strengthening its commitment to business and human rights, supply chain management and transparency, among other issues.

The IFC said that in the five years since its Framework was adopted, the standards had become a global benchmark for environmental and social performance. For the extractive industry, and miners

in particular, the reach of these changes is extensive.

The IFC Performance Standards are the basis for the Equator Principles; a voluntary environmental and social risk-management framework used by 71 financial institutions throughout the world.

A total of 15 European Development financial institutions and 32 export credit agencies from the Organisation for Economic Co-operation and Development (OECD) refer to the Performance Standards in their operations. In 2008, the European Bank for Reconstruction and Development modelled its own Performance Requirements on them.

The IFC framework spotlights the private sector's responsibility to identify adverse risks and impacts through environmental and social due diligence, as well as to provide effective grievance mechanisms.

Of critical significance is the adoption of the principle of FPIC, which is to be applied to special circumstances in which extractive projects have an impact on indigenous people. This is a shift from the previous stance, in which the IFC called only for free, prior and informed consultation, leading to broad community support.

That position, which resulted from the last time the IFC went through a major review of the standards, raised a number of issues, especially as it was linked to the idea of 'broad community support' – a new idea that people struggled to define.

However, the changes in language are just the most recent moves to make business more accountable. In late 2010, Canada and the US endorsed the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in a way that gave rise to questions about how this might affect resource projects and indigenous groups.

The statements of support represented a policy change for the countries, both of which had voted against the Declaration in 2007, and were the lone hold-outs. Their eventual endorsement seems to imply that any project affecting indigenous people will now be required to seek FPIC; an element contained in several of the Declaration's articles.

**"For the first time, companies will be required to obtain the consent of indigenous people rather than merely consulting them"**

However, some indigenous groups and government critics point to the non-binding nature of UNDRIP and are concerned that, without regulatory amendments to back up the policy shift, the FPIC aspects will not be required or enforced.

"At present, very few countries have enacted laws that provide indigenous peoples with FPIC," says Aidan Davy, senior program director for the International Council on Mining and Metals (ICMM).

"While there is wide consensus on the need for indigenous peoples' involvement in decision making to be free, prior and informed, the issue of consent remains the most contested element of FPIC – and



one which governments are often reluctant to apply, due to concerns that it might undermine their sovereign right to make decisions regarding the development of natural resources."

Mr Davy points out that the legal status of UN conventions varies. They are legally binding only for those states that ratify or accede to them.

## LEGALLY BINDING

International Labour Organization (ILO) Convention No 169 was the first international law to refer to FPIC when it was introduced in 1989. Since then, 20 countries have ratified it and are required to implement its provisions.

Among other things, it specifies that indigenous people should not be removed from land except where necessary, as an exceptional measure, and with their free and informed consent. If consent cannot be obtained, the convention stipulates that relocation should only occur in compliance with due legal process, which, in turn, raises issues about what this process actually constitutes in some countries.

"UN declarations such as UNDRIP have no binding legal effect, so while it is sometimes claimed that UNDRIP specifies legally binding requirements to be applied by all UN member states, in practice this is not the case," says Mr Davy. "The declaration does set out rights that countries should aspire to recognise, guarantee and implement. In that sense, it establishes a framework for discussion and dialogue between indigenous people and states."

Meanwhile, government supporters and some industry stakeholders are concerned that if FPIC is now a requirement, it could raise project costs by delaying project operations and requiring additional resources for negotiations with indigenous people.

But Bob Joseph, president of Vancouver-based Indigenous Corporate Training, which helps



**“Like any relationship, there are difficult stretches you go through”**

companies work with indigenous people, believes consultation leading to consent is not a negotiable issue. “I think it’s an absolute must in the global economy to make sure these principles are lived up to by all nations and states,” he says. “There’s a lot of ground to be made up. FPIC is helping indigenous peoples get back to self-reliance, self-determination and self-government by maintaining cultural identity in the global community.”

Catherine Coumans, research co-ordinator for MiningWatch Canada, a non-government organisation that provides advocacy support to communities affected by mining in Canada and by Canadian mining companies globally, agrees. “Communities affected by mining are too often unaware of their rights, of international standards regarding mining, of the consequences of environmental contamination, of potential health impacts and other long-term development deficits that may be created by mining,” she says.

“Community members who believe they have been harmed by the operations of a mining company, through forced relocation, environmental contamination, loss of food security or violence by security guards, among others, frequently have no access to justice as they live in so-called ‘weak governance zones’ where regulatory and legal institutions are incapable of holding multinational mining companies to account.”

She says voluntary corporate social responsibility (CSR) codes do not provide comprehensive coverage of human rights, and are unevenly and inconsistently applied by the industry. “Communities affected by mining, or face the prospect of hosting a mine, need independent legal and technical expertise at each step of the mining process, need to know their rights and need to have access to

justice if they have been harmed. It is critically important that the home states of mining multinationals regulate the overseas activities of these

companies and provide access to their courts,” adds Ms Coumans.

#### HISTORY OF FPIC

Understanding the different interpretations of FPIC in the extractive industry is critical for all stakeholders. In the extractive industry, FPIC is most commonly applied to projects affecting indigenous people.

As noted, this was the focus of ILO Convention No 169, which called for states to gain free and informed consent before relocating indigenous people. Since then, the right of indigenous people to FPIC has been recognised by a number of organisations, most prominently the UN General Assembly.

In September 2007, UNDRIP required states to obtain free and informed consent before approving all projects affecting indigenous people, not only those involving resettlement.

Although the declaration is considered ‘soft law,’ legal commentators believe it will gain increasing authority over time and will be used to guide the decisions of courts around the world.

“Currently, the few non-judicial grievance mechanisms that are associated with voluntary CSR codes are wholly inadequate with regard to providing sanction and remedy for those who have been harmed by mining,” says Ms Coumans. “Some home states of multinational mining companies are starting to apply regulations (for example, around transparency and governance) but most are not yet using their regulatory capacity to enhance accountability of their multinationals and are not providing access to their courts for those who have been harmed.”

Non-governmental organisations such as the Forest Stewardship Council and the Roundtable on Sustainable Palm Oil have already taken the definition of FPIC a step further by applying it to all of their projects, not just those affecting indigenous people. Many large companies have also included language regarding consent in their policies, public reports and published statements.

Craig Ford, vice-president of sustainability for Canada’s mid-tier Inmet Mining Corp, says extractive companies understand that FPIC is simply something they must manage. “There is a recognition of the time and resources required, both human and financial,” he says. “It can’t be seen as add-on; it must be seen as a core requirement early on, like engineering and environment.”

Inmet has operations in Turkey, Spain and Finland, as well as a substantial development project in Panama, and it is very familiar with the FPIC process.

Mr Ford notes that companies are increasingly acquiring the expertise to deal with FPIC requirements.



Photo: P. Moore

"It's evolving. Five years ago, most companies would not have had the expertise, but now they're developing it. It very much depends on the specific details of a project, where it is located, the in-country skills that exist and the skills of the company."

Photo: G MacDonnell

### WHO GETS TO CONSENT?

There have been numerous interpretations of situations in which FPIC should be applied. Many 'soft laws' and conventions in the past have promoted FPIC for all projects affecting indigenous people, while some organisations and companies go further, taking the stance that FPIC should be sought for all projects, even if they do not involve indigenous people.

Many factors, including national laws, regulatory regimes and public support for a project, have influenced the application of the FPIC process, but Inmet regards this with a broad perspective. "To me, FPIC is a process that, traditionally, has been used in a more narrow sense for indigenous communities, especially for resettlement, but the evolving procedures are now being applied more broadly to communities in general," explains Mr Ford.

"It is a process whereby communities have a voice, or way to engage with a project proponent or government, to allow them to negotiate the benefits or conditions under which a project takes place, so it gives them some power in the process of determining how it proceeds and the benefits they get."

Mr Moore of the EDC says that, since the UN General Assembly publicly endorsed the principle of FPIC through the UN Declaration on the Rights of Indigenous People, there has been considerable discussion over its application to public and private sector projects.

"Despite this long-standing debate, it has only been recently that an emerging consensus has formed among civil society organisations, indigenous groups and international financial institutions that adopting 'FPIC-consent' is accepted as industry best practice. That said, the interpretation of what constitutes FPIC and the identification of a common set of metrics to demonstrate compliance with this principle continues to remain a challenge for all of us.

"Accordingly, it is hoped that the IFC's inclusion of FPIC in the revised Performance Standards, and the adoption of this principle by other international financial institutions, including the European Bank for Reconstruction and Development, will lead to greater clarity and consistency in its implementation," says Mr Moore.

Learning from the experiences of projects in and around indigenous communities, some companies have attempted to apply the principles of FPIC, even though ILO 169 and UNDRIP call for states to take responsibility for it. Companies involved with states for projects often encounter barriers; governments may lack adequate resources or have political limitations that prevent them gaining truly free consent.

In other instances, governments may view the granting of mining concessions that bolster state revenues as a higher priority than applying the principles of FPIC. Some states have argued that an indigenous right to consent runs counter to their national sovereignty; expropriation, with and without compensation, is a commonly held and necessary power of government.

As a result, national laws, local customs and relationships between governments and affected



communities will likely determine whether a company, a state, or some combination of the two should seek FPIC.

### DEFINITIONS OF FPIC AND ITS COMPONENTS

Just as there is no single interpretation of who should seek FPIC and under which circumstances, there is no single agreed-upon definition of FPIC itself. Free and informed are terms that enjoy widespread agreement.

Free is usually defined as freedom from force, intimidation, manipulation, coercion or pressure by any government, company or other outside factor. Meanwhile, informed is usually defined as affected stakeholders having all relevant information about a project in a language and cultural format understandable to all, with enough time to process it.

However, definitions of prior and consent vary from stakeholder to stakeholder. The definition of prior depends on the stakeholder's view of when consent is given. One definition requires prior consent to be gained before a concession is granted, while others call for consent before a significant impact occurs.

Some have called for consent to be given even earlier; during exploration activities, for instance. A broader approach considers factors such as the level of impact, who is soliciting consent, who determines whether the impact of a project is substantial, and the role of the laws of the host country.

Ms Coumans of MiningWatch stresses that these details are sensitive and need to be managed carefully. "First of all, not all communities feel they have the decision-making processes, structures and resources in place to effectively provide or withhold

their consent. If a community itself feels it is not ready to engage in a FPIC process, a company taking FPIC seriously should withdraw until a community says it has the capacity to engage effectively with a mining company.

"In engaging with a community, companies need to not only provide detailed and prior information regarding their proposed exploration or mining activities, including full risk disclosure, but also to ensure the community has independent technical and legal expertise at hand to help them assess this information and weigh their options."

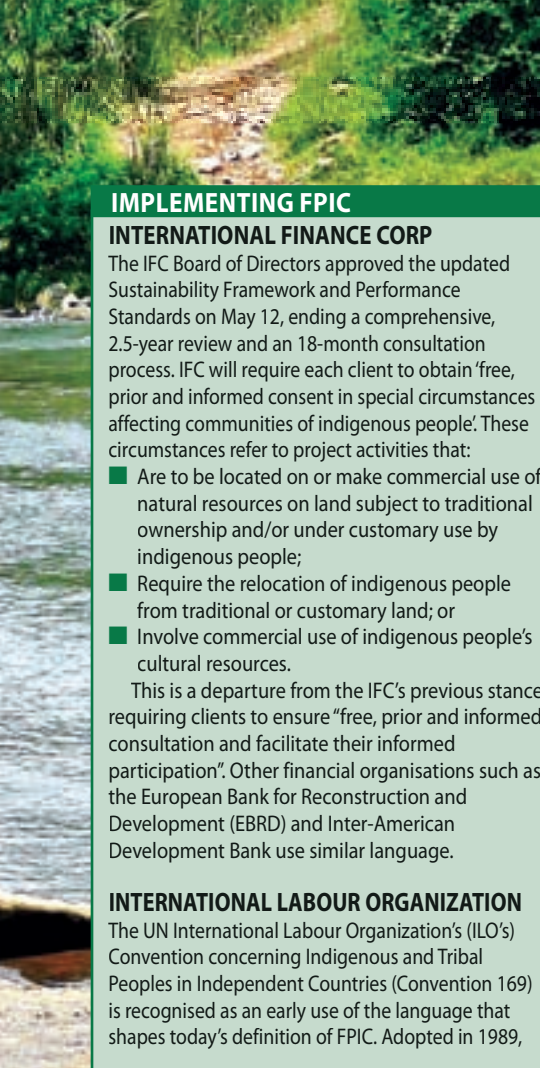
There is wide acceptance that consent means the right to say 'yes' or 'no' to a project, but ILO 169 does not require unanimity among communities. Some commentators say the definition of consent should be determined by the decision-making process of the communities in question.

Mr Joseph views the question of community consent as an opportunity for companies to forge stronger, mutually beneficial relationships with indigenous people by helping to forge a broad and informed consent. "This is where companies can play a strong role in change that needs to happen around the globe," he points out. "We're here to do business, but we want everybody to support what we're doing, not just part of the population.

"We're prepared to work with you to get ratification and a communications process in place. More than 50% plus one isn't enough – it should be 70% plus one, or higher. It's fair for companies to insist on that, and it's in their interest to fund that kind of activity."

Inmet's Mr Ford points out that obtaining FPIC is a long process, which requires patience. "Like any relationship, there are difficult stretches you go through. Sometimes it's one step forward and two steps back, but it's a process of building trust. The thing that FPIC is not meant to be is where a small, vocal minority can stand in the way of the majority.

**"The IFC has generally got things right. It has developed standards that are operational, versus standards that are aspirational"**



## IMPLEMENTING FPIC

### INTERNATIONAL FINANCE CORP

The IFC Board of Directors approved the updated Sustainability Framework and Performance Standards on May 12, ending a comprehensive, 2.5-year review and an 18-month consultation process. IFC will require each client to obtain 'free, prior and informed consent in special circumstances affecting communities of indigenous people'. These circumstances refer to project activities that:

- Are to be located on or make commercial use of natural resources on land subject to traditional ownership and/or under customary use by indigenous people;
- Require the relocation of indigenous people from traditional or customary land; or
- Involve commercial use of indigenous people's cultural resources.

This is a departure from the IFC's previous stance, requiring clients to ensure "free, prior and informed consultation and facilitate their informed participation". Other financial organisations such as the European Bank for Reconstruction and Development (EBRD) and Inter-American Development Bank use similar language.

### INTERNATIONAL LABOUR ORGANIZATION

The UN International Labour Organization's (ILO's) Convention concerning Indigenous and Tribal Peoples in Independent Countries (Convention 169) is recognised as an early use of the language that shapes today's definition of FPIC. Adopted in 1989,

the Convention states that, where the relocation of indigenous people is considered necessary as an exceptional measure, 'such relocation shall take place only with their free and informed consent'.

### UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

The UN Declaration on the Rights of Indigenous Peoples, adopted by General Assembly Resolution in 2007, references FPIC several times, including requiring free, prior and informed consent before taking indigenous people's 'cultural, intellectual, religious and spiritual property'; adopting and implementing legislative measures that may affect them; and for the storage or disposal of hazardous materials on indigenous land.

The two references of FPIC that are most commonly referenced, however, are:

- 'No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned, and after agreement on just and fair compensation and, where possible, with the option of return'; and
- 'States shall consult and co-operate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilisation or exploitation of mineral, water or other resources.'

### ROUNDTABLE ON SUSTAINABLE PALM OIL

The Roundtable on Sustainable Palm Oil (RSPO), with members such as Cadbury, Johnson & Johnson, banks, investors and NGOs, has one of the most liberal uses of FPIC among global organisations, recommending that it be applied for projects affecting all people, not only indigenous people.

This stance is considered best practice and speaks to the trend for FPIC to apply more widely. Specifically, criterion 2.3 of the RSPO Principles and Criteria for Sustainable Palm Oil Production states: 'Use of the land for oil palm does not diminish the legal rights, or customary rights, of other users, without their free, prior and informed consent.'

### TALISMAN ENERGY

Talisman INC was an earlier adaptor of FPIC language in its corporate policies and has been applauded for its stance. In its Global Community Relations Policy, Talisman says: 'Consistent with applicable laws and regulatory requirements and recognising that the authority for free, prior and informed consent is primarily derived from state domestic law, in engaging with communities, Talisman will meet or exceed broadly accepted industry standards for community engagement. Talisman will incorporate the broad principles of free, prior and informed consent.'

Some want to use it as a wedge, and I think a yes/no referendum-type approach has the potential to increase conflict within communities."

However, this raises the question of how to select the decision-making processes to be used. For example, some communities traditionally exclude women from decision making, which some may view as inconsistent with the principles of FPIC.

A recent trend that broadens the application of consent is to view it as a process in which communities can assert approval at any or all stages of a project, whereas in the past it was seen as a one-time decision.

"If a community decides to allow exploration or mining to occur, there should be a binding agreement that sets out the terms of that approval and at what point it expires," says Ms Coumans. "FPIC should be sought and obtained at each major stage of exploration and mining"

Inmet is already well into the process at its Cobre Panama project, and Mr Ford's advice to companies about to embark on a similar journey is simply to get going; the sooner, the better. "You've got to start," he says. "The path looks daunting, but the best thing is to put your foot forward and start walking the path, including challenging groups like anti-mining NGOs, and building trust and respect through that process. It can be daunting if you look at it as all the work you have to do, but you have to make a commitment to early engagement."

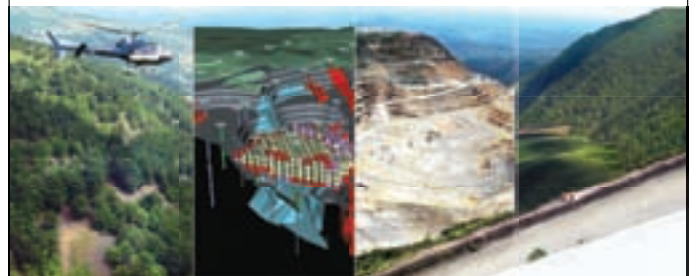
In the long term, extractive companies can expect increasing demand for the application of the principles of FPIC, and not only in situations related to indigenous people. Whether a company should seek FPIC for a specific project, whether it is required to do so, when it should do it and what consent looks like all depend on factors that continue to evolve. Organisations wanting to manage risks related to FPIC, and related potential costs or delays, would do well to track this evolution as part of their earliest due diligence on project feasibility.

The debate over FPIC will continue, but the realisation that the game has changed is sinking in, says an industry observer. "The goal posts are shifting. As a result, we are seeing clients beginning to make commitments that their operations (whether existing or planned future developments) will comply with these new standards, either from day one for new operations or over time for existing operations.

"What this tells me is that the IFC has generally got things right. It has developed standards that are operational, versus standards that are aspirational."

*Maurice Bridge and Angus Wong work for Monkey Forest Consulting, an international social development company that conducts social assessments of extractive companies and projects*

## Cradle to cradle



Exploration, feasibility, due diligence, engineering and operations through to mine closure.

Our global experience gives you expert, integrated solutions on every phase of your mining project.

Same team — start to finish.