



# License to Operate

Indigenous Relations and Free Prior and Informed Consent in the Mining Industry

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## Introduction

In August 2011, the International Finance Corporation (IFC) released its revised Sustainability Framework, after 18 months of public consultation. Among the noteworthy revisions is a new requirement that clients obtain the free, prior and informed consent (FPIC) of indigenous communities under certain circumstances, including the exploitation of natural resources on lands traditionally owned by, or under the customary use of, indigenous peoples. The IFC move is the most recent indication of the growing acceptance among multilateral development agencies, NGOs and responsible investors that indigenous people have a right to participate in decisions affecting their land and resources, including the right to say “no” to natural resource development projects.

The mining industry has also participated in the debate over FPIC, although it has been largely reluctant to commit to it due to the prevailing interpretation of FPIC as the right to veto along with the significant challenges and uncertainties surrounding its implementation, including the question of what constitutes consent, who gets to grant or withhold it, and at what stage of mineral development companies should seek consent.

This report describes the emergence and growing acceptance of FPIC, assesses some of the challenges of implementing it, and argues that consent should be conceived as an iterative, multi-layered, ongoing process of consultation, rather than a one-time seal of approval. It also outlines the key tools and practices that companies can implement to consult with and benefit indigenous people, and which can move a relationship in the direction of FPIC. Given the materiality of relationships with indigenous communities to the mining sector, this report also encourages investors to put pressure on companies to implement these tools and to further the debate on FPIC.



# Why Investors Should Care About Indigenous Issues

There are important ethical and financial reasons for which mining companies should ensure the effective management of their relationships with indigenous communities affected by their operation. From an ethical point of view, mining can have a significant impact on these communities. Indigenous people are distinct groups that have strong cultural, economic and spiritual ties to their traditional lands and resources. Mining can affect large areas of land, require the relocation of local communities and create serious long-term environmental impact; mining projects therefore have the potential to significantly affect the livelihood and cultural integrity of indigenous communities.

In addition, indigenous people have been historically discriminated against and excluded from decision-making processes and are often among the most marginalized and vulnerable segments of society. As such, they are less likely to have a voice in the development of mining policies and are often less able to reap the benefits of mining in the form of jobs and business opportunities. While society has moved towards a greater recognition of indigenous rights, regulatory gaps, lack of recognized land titles, lack of political will, weak rule of law and poverty have often prevented indigenous people from fully exercising those rights and have led to conflict with mining and oil and gas companies.<sup>1</sup>

These issues are also financially material to many companies. Poor relations with indigenous communities can result in very tangible regulatory and financial risks for mining companies. Communities can delay or altogether stop mining projects through road blockades, legal actions or permit appeals. Where conflict escalates, communities have in some cases vandalized infrastructure and even taken employees hostage, resulting in repair costs and increased security spending, and affecting companies' ability to attract and retain skilled workers. Where protests have been met with excessive use of force by police or private security, companies have faced human rights lawsuits. Finally, community relations controversies can also affect a company's reputation as well as its access to business partners and financing. The text box below presents just a few of the many examples of companies that have experienced the negative effects of inadequately managed community relations.

In the future, increased competition for land and water caused by population growth, more sophisticated campaigning by many local indigenous communities, and increased encroachment on indigenous land due to declining global mineral reserves will continue to make community relations a key performance area. Sustainalytics regards relationships with indigenous communities as one of the most material issues facing the mining industry.



### Regulatory and Financial Risks Related to Poor Community Relations

- Vedanta's (LSE:VED) proposed bauxite mine in Orissa, India has faced vocal opposition from non-governmental organizations (NGOs) and local indigenous people based on concerns about the mine's potential impact on Niyamgiri Hills, a place of cultural significance to two indigenous tribes. Indigenous people alleged that they were not properly consulted on the project. The controversy led NGOs to file a complaint with the Organization for Economic Cooperation and Development, and some institutional investors to divest from the company. In August 2010, the Indian government did not approve the mine, based on the finding of a government committee that the mine would deprive indigenous people of their rights and shake their faith in the laws of the land. The decision is under appeal.
- In April 2011, the Peruvian government announced that it would not approve Southern Copper's (NYSE:SCCO) Tia Maria project. The decision followed 17 days of violent protests against the project by local residents and clashes with the police, which resulted in three protesters being killed and at least 40 others being injured. Local residents were concerned about the project's potential environmental impact, particularly on fresh water sources, and were calling for a referendum on the mine. A review of the project by the United Nations Office for Project Services found deficiencies in the environmental impact assessment and that the company had underestimated the importance of social participation in the permitting process. In response to this and other violent conflicts that have occurred between oil and mining companies and communities in recent years, in August 2011 the Peruvian Congress passed a law requiring the state to consult with indigenous people in order to reach consent before approving projects that can affect indigenous rights and territories.
- In June 2008, HudBay Minerals Inc. (TSX: HBM) paid approximately USD 468 million to acquire Skye Resources Inc., whose main asset was the Fenix nickel project in Guatemala. According to Hudbay Minerals, the property contained reserves totalling an estimated 41.4 million tonnes, as well as "significant exploration opportunities." However, the project also had a long history of acrimonious relations with local indigenous people, which has been the subject of significant media attention. In December 2010, a local resident filed a CAD 12 million civil lawsuit against Hudbay Minerals, alleging that her husband was killed by the company's private security forces during a protest at the site. In March 2011, 11 women filed a CAD 55 million lawsuit against the company alleging that they were assaulted and gang-raped by security forces during armed evictions near the site in January 2007, before HudBay acquired the property. In February 2011, Guatemala's Constitutional Court recognized the collective property rights of one of the local communities, questioning the legality of the mining permits issued by the government. In August, the same community filed a petition with the Inter-American Commission on Human Rights against Guatemala alleging the violation of rights to property, self-government, due process of law, and judicial protection. In September 2011, Hudbay Minerals sold the property for USD 170 million, stating that the project no longer fits the company's strategy. Hudbay recorded a pre-tax impairment loss of USD 212.7 million in relation to the project. The plaintiffs have stated that the lawsuits against HudBay will continue.

# The Emergence of FPIC

One of the rights often discussed in the context of mineral development is the right of indigenous people to be effectively consulted on projects affecting their traditional land and resources. This is part of the right to self-determination, a cornerstone of two key international instruments covering indigenous rights: Convention 169 of the International Labour Organisation (1989) and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP - 2007). By and large this right has been recognized by governments and many jurisdictions have incorporated provisions to subject mining projects to public consultation at the permitting stage. For example, in Canada, the Crown has a constitutional duty to consult and, where appropriate, accommodate when it contemplates conduct that might adversely impact potential or established aboriginal or treaty rights, which includes permitting mineral development projects. The duty lies with the Crown, but the Crown can, and in practice often does, delegate procedural aspects of consultation to mining companies.

In recent years, NGOs, multilateral development banks and multi-stakeholder initiatives have increasingly helped to raise the bar further, advocating the right of indigenous people to give or withhold free, prior and informed consent to projects that can have substantial impact on their lands. While there is no universally accepted definition of FPIC, in essence, it can be understood as *consent that is given by fully informed indigenous people, without coercion, intimidation or manipulation, before an activity begins and according to their own decision making processes.*

## The United Nations Declaration on the Rights of Indigenous People

- “No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned ...”(Article 10)
- “Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.”(Article 28)
- “States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.” (Article 29)
- “States shall consult and cooperate 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, utilization or exploitation of mineral, water or other resources.” (Article 32)

UNDRIP (2007): <http://www.un.org/esa/socdev/unpfii/en/declaration.html>.



FPIC as an indigenous right derives from ILO Convention 169 and, more recently, the UNDRIP. Convention 169 calls for states to obtain the consent of indigenous communities before resettlement, although if states do not receive indigenous peoples' consent they may relocate them in accordance with national law. The UNDRIP calls for states to obtain FPIC from communities in several instances, including relocation, as well as to consult with indigenous peoples in order to obtain their FPIC before approving projects affecting indigenous land and resources (see **The United Nations Declaration on the Rights of Indigenous People** text box on page 5).<sup>2</sup> The UNDRIP is not legally binding, but is increasingly used by UN specialized agencies and domestic courts to interpret state obligations and, according to legal experts, will likely influence national laws and jurisprudence over time.<sup>3</sup>

FPIC has also been incorporated into a few domestic laws. The Philippines has legislation requiring FPIC for mining projects and regulations dictating the procedures to record consent, although these regulations have been criticized for turning FPIC into a formality that is "no longer based on customary laws."<sup>4</sup> In Canada, the *Yukon Oil and Gas Act (2002)* requires the government to obtain the consent of First Nations before issuing licences authorizing any oil and gas activity in their traditional territory.<sup>5</sup> Finally, the *Australian Aboriginal Land Rights (Northern Territory) Act (1976)* gives aboriginal land owners the right to consent to or veto explorations on their land, as well as the right to negotiate agreements and time frames for such exploration.<sup>6</sup>

Several international development agencies and multi-stakeholder initiatives have also incorporated elements of FPIC into their policies. These include the Inter-American Development Bank (IADB), the European Bank for Reconstruction and Development, the Roundtable on Sustainable Palm Oil, the Roundtable on Sustainable Biofuels, the World Commission of Dams and the Forest Stewardship Council.

But the clearest indication that the concept of FPIC is gaining momentum is its inclusion in the revised Performance Standard #7 of the International Finance Corporation's Sustainability Framework, which was released in August 2011 and will come into effect in January 2012. The new Performance Standard requires IFC clients to obtain the FPIC of indigenous communities under "special circumstances," including mineral resource development projects involving adverse impacts (see the **Performance Standard #7** text box below). As a result of this revision, FPIC will also become part of the policy of the more than 70 banks that are signatories to the Equator Principles (EP).

**Performance Standard #7 of the International Finance Corporation**

The recently revised Performance Standard #7 will come into effect in January 2012. Its terms include:

- “Circumstances Requiring Free, Prior, and Informed Consent  
...If the client proposes to locate a project on, or commercially develop natural resources on lands traditionally owned by, or under the customary use of, Indigenous Peoples, and adverse impacts can be expected...
- Relocation of Indigenous Peoples from Lands and Natural Resources Subject to Traditional Ownership or Under Customary Use ....
- Where significant project impacts on critical cultural heritage are unavoidable, the client will obtain the FPIC of the Affected Communities of Indigenous Peoples...”

Available at: <http://www.ifc.org/ifcext/policyreview.nsf/Content/PerformanceStandard7>.

## FPIC and the Mining Industry

According to a recent study, companies adopting policy commitment to FPIC may experience a number of long-term benefits, including an improved reputation in the eyes of civil society and responsible investors, as well as an enhanced ability to obtain a social license to operate in countries where there is a poor relationship between indigenous people and extractive companies, or between indigenous people and the government. The study found that the regulatory and legal risks of adopting such a policy would be minimal; however access to markets could be affected, depending on the host government’s position on FPIC. Overall, the benefits of such policy may outweigh the substantial challenges of securing consent.<sup>7</sup>

Yet, few mining or oil and gas companies have adopted a formal policy committing to FPIC (see the **Corporate Policies on Free, Prior and Informed Consent** text box on page 8). Others use the language of FPIC in their sustainability reports but have not formally adopted a policy. In practice, some mining companies have implemented FPIC by walking away from projects where they lacked the social license to operate.

The International Council on Mining and Metals’ (ICMM), a key industry association, has also been reluctant to openly commit to FPIC. Its Position Statement on Mining and Indigenous Peoples commits member companies to consult “with Indigenous Peoples in a fair, timely and culturally appropriate way throughout the project cycle...based on honest and open provision of information” in an accessible form, as well as to seek “broad community support for new projects or activities.” The statement also recognizes that “following consultation with local people and relevant authorities, a decision may sometimes be made not to proceed with developments or exploration even if this is legally permitted.” However, according to the ICMM, “a blanket endorsement of the right to FPIC is not currently possible, particularly given the difficulties entailed in applying the concept in practice.”<sup>8</sup>





### Corporate Policies on Free Prior and Informed Consent

- Rio Tinto: “we strive to achieve the FPIC of indigenous people to proceed with developments” (Human Rights Guidance).
- De Beers: “the De Beers Family of Companies is committed to.... Respecting community governance and always seeking a community’s free and informed consent prior to initiating any significant operations that will have a substantial impact on their interests” (Community Policy).
- Talisman Energy: “...in engaging with Communities... Talisman will incorporate the broad principles of Free, Prior and Informed Consent as interpreted below: Free means that Talisman will not engage in, or facilitate coercion when dealing with communities and partners. Prior means that Talisman will always endeavour to engage in a timely, honest and culturally appropriate way with Communities before undertaking significant activities and at appropriate stages throughout the life of a project. Informed means that Talisman will work to build trust and understanding through an open exchange of information that enables knowledgeable decision-making by Communities. Consent means that Talisman will endeavour to obtain and maintain the support and agreement of Communities for its activities, in ways that are respectful and sensitive to local cultural and consultative processes and to the interests of the Community and Talisman” (Global Community Relations Policy).

The industry’s reluctance to openly endorse FPIC may be largely based on fears over the interpretation of FPIC as the right to veto. Yet, some of the concerns raised regarding the challenges surrounding FPIC are real, as companies will be held accountable to their commitment to obtain consent and closely scrutinized on the implementation of an FPIC policy. These challenges derive from differences between corporate and indigenous people’s time frames, complex local politics, a lack of clarity regarding land title and the position taken by many governments regarding indigenous rights. Some of these challenges are discussed on page 9.



# Implementing FPIC: Challenges and Uncertainties

There are numerous challenges surrounding the implementation of FPIC:

## What Constitutes Consent?

There is no consensus on what constitutes consent on the part of affected indigenous communities. Should consent be expressed in the form of a band council resolution? A referendum? An impact and benefit agreement?<sup>9</sup> Can the agreement be signed by community leaders only or does it need to be ratified by constituents? Does consent require unanimity? If unanimity is not required, as the IFC performance standard has stated, what percentage of the population of an indigenous community should agree to a proposed development? Is 50 per cent enough? Furthermore, how do you measure consent throughout the life of a project?

## Prior to What?

Another issue that is the subject of significant ongoing debate is determining the mineral development stage at which companies should seek consent from communities. The policies of Talisman and De Beers refer to consent prior to “significant” and “substantial” activities, respectively, which entails seeking consent before a mine is developed. Likewise, the Inter-American Court of Human Rights has interpreted the UNDRIP as requiring FPIC when a large-scale development project is expected to have a major impact on the property rights of a tribal group.<sup>10</sup>

This contrasts with the view of some indigenous groups and NGOs, who have interpreted “prior” to mean before exploration begins. These groups note that exploration can also have environmental and social impacts and that, by the time a project reaches the permitting stage, it may become difficult for indigenous groups to refuse it. A company may have invested significant amounts of time and resources into exploration, while a government may be actively supportive, putting pressure on affected communities to accept the project.<sup>11</sup> In addition, “negotiating” consent at the exploration stage allows indigenous communities to set forth their own demands in the form of jobs, business opportunities and improved infrastructure, allowing them to better capture the benefits that exploration can bring.



## Whose FPIC?

Determining who is an indigenous or tribal person with rights under ILO Convention 169 and the UNDRIP can be, in and of itself, a challenging process. Rather than adopting a single definition of indigenous people, the UN and the ILO have provided a broad and inclusive list of characteristics, emphasizing self-identification. Furthermore, land title is often not clear, particularly in developing countries, or it does not recognize traditional land ownership. For POSCO, one of the issues under debate, and contributing to significant regulatory delays for its proposed steel plant in Orissa, India, is whether local residents who are opposed to the project qualify as traditional forest dwellers under the 2006 *Forest Rights Act*.

There is also debate about which of the multiple groups that may be affected by a project should have the right to provide consent. Seeking consent from people that need to be relocated or who live inside the mining concession seems relatively straightforward. However, it is not clear if a company should seek the consent of indigenous people living adjacent to or downstream from a mining project and who may be affected by pollution. The UNDRIP refers to consent for any project affecting their lands or territories and “other resources,” which could also include projects polluting their lands. IFC Performance Standard #7, however, refers to projects located on lands traditionally owned by indigenous people, which seems to exclude neighbouring communities. Likewise, while the IFC refers to lands “under the customary use of indigenous people” and would, in theory, include communities that have fishing or hunting rights in the project’s area, in practice, identifying which economic or cultural interests should trigger a consent-seeking process may be challenging.<sup>12</sup>

Finally, identifying legitimate representatives of indigenous people and appropriate decision-making processes can be challenging, as there may be complex governance structures or competing leaders, or the current leaders may be in place as the result of a government-appointed decision-making structure imposed through colonization. Mining companies sometimes side with whichever leader is more supportive of a project, creating further divisions within a community.

## Ensuring that Consent is Free and Informed

The UN Development Group (UNDG) has listed a series of conditions that have to exist in order for consent to be free, prior and informed, including (among others): the absence of coercion, intimidation or manipulation; respect for time requirements of indigenous consultation processes; the provision of information covering the nature, size, scope, duration and consequences of any project; and the seeking of consent sufficiently in advance of commencement or authorization of activities.<sup>13</sup> Other studies point out that consent is only truly free if indigenous communities know their rights and the duties of companies and the state, and if they are clearly informed from the beginning that they have the option to withhold consent.<sup>14</sup>

Free and informed consent also requires a significant investment of time. The ICMM points out that decision-making time frames should take into consideration logistics, local customs, and the time needed to build a trusting relationship. Furthermore, communities may be facing several mining or development projects and its leaders and resources may be pulled in different directions, which can result in them needing more time to interpret the information and provide truly informed consent. Yet, in practice companies and communities often operate with different time frames, as companies are often under pressure from clients, shareholders or governments to develop a mine as soon as possible.<sup>15</sup>

Another significant challenge to ensuring informed consent is whether the community has the capacity to be consulted. The UNDG states that “information should be accurate and in a form that is accessible and understandable, including in a language that the indigenous peoples will fully understand. The format in which information is distributed should take into account the oral traditions of indigenous peoples and their languages.”<sup>16</sup> However, even that may not be sufficient for some communities that do not have experience with mining projects or technical expertise, or whose governance institutions have been negatively affected by discriminatory historical processes. A group of Canadian First Nations recently highlighted the “need to address the unequal bargaining power generally existing between the State/third party developers and indigenous peoples, by ensuring that the peoples concerned have the necessary financial, technical and other assistance to fully and effectively participate at all stages.”<sup>17</sup>

Finally, exercising the right to consent free from coercion can be a challenge in countries with repressive regimes or weak rule of law where opportunities for freedom of assembly and expression are limited or where organizations with extra-legal powers, such as gangs and rebel movements, may intimidate communities into making a particular decision.<sup>18</sup>

## An FPIC Policy Could Exacerbate Tensions between a Company and a Government

Companies adopting a policy on FPIC may face additional challenges in instances where local indigenous communities oppose a project while the government supports it, which is not an uncommon scenario in the mining industry. Some governments support and approve mining projects as a means of encouraging economic development and are less concerned about protecting indigenous rights. Others may be reluctant to apply the principle of FPIC because they see it as undermining their sovereignty.<sup>19</sup> For example, while Canada and the U.S. have endorsed the UNDRIP, they have voiced, on record, their disagreement with the interpretation of FPIC as the right to veto.<sup>20</sup> In this context, implementing a policy seeking FPIC from indigenous communities may create tensions between a company and a government and even restrict market access in some countries.<sup>21</sup>



# Are These Challenges Insurmountable?

Some of the issues discussed above are not new to companies that have implemented strong mechanisms to identify and consult with stakeholders, including indigenous communities. Indeed, the ICMM has discussed many of these challenges in the context of consultation and provided advice on how to address them. The IFC Guidance Notes on Performance Standard #7, which will be released by the end of October 2011, will hopefully provide more clarity on how to address these issues. Other challenges, however, are part of the evolving and fast-paced discussion on FPIC and there will probably not be consensus on the best way to address them for some time to come.

There are several answers to the question of what constitutes consent, as communities have different cultures, decision-making structures and processes. Some experts suggest that the community be involved in determining the process by which it will give or withhold consent, which could also help shape a positive relationship between both parties and empower the community from the start.<sup>22</sup> IFC Performance Standard #7 takes a similar approach by requiring clients to provide documentation of this mutually accepted process.

While this may be a practical solution to prove consent at the loan-approval stage, it becomes clear that FPIC is not meaningful unless it is conceived as an *iterative, multi-layered process through which mining companies and communities agree to different activities at different stages of mineral development and in which consent is sought, measured and maintained throughout a mine's life cycle*. This process needs to begin as early as possible, as failure to consult with communities at the exploration stage can severely damage the relationship in the long run, resulting in regulatory risks or, in the case of junior exploration companies, jeopardizing their ability to sell a property. Some mining companies have entered into memoranda of understanding (MoUs) with indigenous people for their exploration activities, addressing issues such as restricted access to certain indigenous lands, channels of communication and the protection of indigenous artifacts, while leaving room for further consultation on the mining project itself at a later date.



Impact benefit agreements (IBAs) are increasingly held up as one of the best, concrete examples of FPIC. IBAs typically include commitments and targets in the areas of employment, training, business opportunities, revenue or equity sharing, and environmental protection; and they establish clear, formal channels for communication and dispute resolution. There is increased recognition that IBAs can be mutually beneficial: they allow indigenous people to have their concerns about a project addressed, and to benefit economically from mining and/or redefine their relationship with companies by becoming partners; at the same time companies have “a means of securing long-term access to resources, lowering transaction costs and uncertainty, and reducing exposure to disputes and legal action from indigenous groups.”<sup>23</sup> Furthermore, some IBAs are renegotiated periodically throughout the life of a mine, which forces companies to seek and keep community consent beyond the permitting stage.

Companies that have implemented thorough stakeholder mapping mechanisms are not new to the challenge of identifying legitimate community representatives, although this challenge can indeed be significant. The UN Development Group states that “indigenous peoples should specify which representative institutions are entitled to express consent on behalf of the affected peoples or communities.”<sup>24</sup> Furthermore, companies should not rely only on negotiations with traditional decision-making bodies, as they may not include marginalized groups such as women and youth and/or may not necessarily relay all the relevant information to its constituents. Instead, companies should strive to make the consent process as inclusive as possible.

The issue of weak capacity among some indigenous organizations to make informed decisions is still a significant one. Communities sometimes resort to governments or NGOs for funding or independent advice, but NGOs may have their own anti-mining agendas and further complicate the consultation process. The ICMM recommends that companies provide funding to indigenous groups to employ independent expert advice, cover travel and meeting costs, and fund legal and negotiations training.<sup>25</sup>

## The Way Forward

Given the absence of a clear definition of consent and the uncertainties surrounding FPIC implementation, investors may be wondering whether it is realistic to expect companies to adopt a policy on FPIC. At a minimum, mining companies should implement strong tools to identify, consult with, accommodate and benefit indigenous communities (see the **Tools to Consult** text box on page 14). In practice, implementing these tools in a timely fashion will lead to consent in many cases. Conversely, because FPIC should be conceived of as an ongoing, iterative process, rather than a one-time approval, a policy on FPIC cannot be meaningfully implemented if a company does not have many of these tools in place.



### Tools to Consult with, Accommodate and Benefit Indigenous People

Implementation of the following practices will build trust, reduce risk and, in many cases, lead to consent from local indigenous communities:

- Policy on indigenous people and land rights
- Policy committing to avoiding involuntary resettlement
- Allocation of managerial responsibility for indigenous relations
- Stakeholder identification mechanisms
- Consultation conducted at an early stage of mineral development
- Social impact assessments that take into consideration impacts on indigenous culture and communal property rights
- Formal grievance or conflict resolution mechanisms
- Consultation conducted in indigenous language and in a culturally appropriate manner
- Consultation with vulnerable groups (e.g. women, elderly)
- Use of participatory methods and traditional knowledge in baseline studies and monitoring
- Identification and protection of culturally-sensitive areas
- Regular cross-cultural training for employees
- Formal agreements between the company and indigenous peoples at the exploration stage (MoUs)
- Formal agreements between the company and indigenous peoples at the mining stage (IBAs)
- Joint IBA implementation committees
- Programs and targets to provide jobs and business opportunities to indigenous people
- Revenue sharing through royalties, equity or lump sum payments
- Capacity-building initiatives to allow indigenous people to participate in consultation

Yet, according to Sustainalytics' research, mining companies have a long way to go in implementing these tools. Of the 46 largest developed market-based mining companies, which are presumably the companies that have the greatest expertise and financial capacity to develop CSR policies and programs:

- Thirteen have adopted a formal policy on indigenous people and land rights;
- One has a policy commitment to seek FPIC (Rio Tinto);
- Thirteen have implemented strong systems to consult with and benefit indigenous people. Leaders include Rio Tinto, BHP Billiton, Anglo American, OZ Minerals, Xstrata and Teck Resources;
- Seventeen have implemented formal grievance mechanisms;
- Sixteen companies have signed IBAs, but predominantly in Australia and Canada, where these agreements are a legal or *de facto* requirement;
- Twenty do not report any information on their impact on or mechanisms to consult with indigenous people.

The figures above indicate that there is room for mining companies to improve in the area of relations with indigenous communities. Given the growing acceptance of FPIC among international development banks and the active jurisprudence in the area of consultation with indigenous peoples, companies will be increasingly expected to do so. As noted earlier, community relations also represent a significant area of material risk for mining companies. Hence, there is a strong rationale for responsible investors to encourage companies in this process.

Yet, compared to other ESG issues affecting the industry, such as water scarcity, climate change or host-country revenue transparency, FPIC has received relatively little attention from the responsible investment community. In 2008, the Comité Syndical National de Retraite Bâtirente and the Regroupement pour la Responsabilité Sociale des Entreprises (“RRSE”), two Canadian institutional investors, engaged with Talisman Energy on the issue of FPIC. This engagement resulted in the company commissioning a third-party study on the benefits and challenges of adopting a policy on FPIC and later adopting such policy (see **Corporate Policies on Free Prior and Informed Consent** on page 8).<sup>26</sup> Other investors have engaged with companies on the issue of FPIC and contributed to furthering the debate on what constitutes FPIC and how to implement it.<sup>27</sup> Yet these initiatives remain relatively rare.

## Conclusion

FPIC is gaining support among UN agencies, international development banks and NGOs, and it is becoming an important principle in jurisprudence related to indigenous peoples. As a result, mining companies will be under increasing pressure to consult effectively with indigenous people, disclose more information about the impact of their operations on these people, and respect a community’s right to withhold consent.

Yet, as discussed above, there remain significant challenges and uncertainties regarding the implementation of an FPIC policy, which point to the need to view FPIC not as a one-time yes or no vote but rather as an iterative, multi-layered process in which consent is sought, measured and maintained throughout a mine’s life cycle. Although it will take some time to overcome some of these challenges, they should not be the basis for corporate opposition to FPIC. Given the material risk that community opposition generates, mining companies should aspire to implement FPIC and should participate in dialogues and debates to address the challenges and find workable solutions. Equally important, they should, in the meantime, implement policies and programs, such as those described above, to consult with, accommodate and benefit indigenous communities. Doing so will often take companies a long way, if not all the way, toward obtaining FPIC.

Responsible investors can play an important role in moving the adoption of FPIC forward and, more generally, helping to improve corporate relationships with indigenous communities. Through engagement, investors can encourage companies to adopt the policies and programs described above. In the case of companies that have already done so, investors can encourage a commitment to FPIC and to contributing to the debate on its implementation. Such engagement will contribute not only to risk mitigation but also to the alignment of mining industry practices with international norms whose momentum is bound to continue to grow.



# Endnotes

- <sup>1</sup> Inter-American Commission on Human Rights (2009), "Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System." <http://www.cidh.org/countryrep/Indigenous-Lands09/TOC.htm>  
Also see: Due process Law Foundation (2010), "The Right of Indigenous Peoples to Prior Consultation: The Situation in Bolivia, Colombia, Ecuador, and Peru," <http://www.dplf.org/uploads/1302034794.pdf>.
- <sup>2</sup> There is ongoing debate in the legal community as to whether the UNDRIP envisages FPIC as a right or a goal of consultation in the case of projects affecting indigenous lands and resources. In *Saramaka People vs. Suriname* (November 2007), the Inter-American Court of Human Rights concluded that, in the case of large-scale projects with significant impacts, FPIC should be a right. The Constitutional Court in Colombia has also interpreted FPIC in a similar way. According to legal experts, this issue will continue to be tested through the courts. See *Aportes DPLF*, Sept. 2010: <http://www.dplf.org/uploads/1285264789.pdf>.
- <sup>3</sup> Lehr, A. and Smith, G. (2010), "Implementing a Corporate Free, Prior, and Informed Consent Policy: Benefits and challenges." [http://www.foleyhoag.com/NewsCenter/Publications/eBooks/Implementing\\_Informed\\_Consent\\_Policy.aspx](http://www.foleyhoag.com/NewsCenter/Publications/eBooks/Implementing_Informed_Consent_Policy.aspx)  
See also: *Aportes DPLF*, Sept. 2010: <http://www.dplf.org/uploads/1285264789.pdf>.
- <sup>4</sup> Colchester, Marcus (2010), "Free, Prior and Informed Consent Making FPIC work for forests and peoples."
- <sup>5</sup> Oil and Gas Act, R.S.Y. (2002). Retrieved from <http://www.gov.yk.ca/legislation/acts/oiga.pdf>.
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- <sup>20</sup> Statement by Ambassador McNeely to the General Assembly on UNDRIP, New York, Sept. 13, 2007, General Assembly on UNDRIP, New York, Sept. 13, 2007, [http://www.canadainternational.gc.ca/prmny-mponu/canada\\_un-canada\\_onu/statements-declarations/general\\_assembly-assemblee-generale/10373.aspx?lang=eng](http://www.canadainternational.gc.ca/prmny-mponu/canada_un-canada_onu/statements-declarations/general_assembly-assemblee-generale/10373.aspx?lang=eng).  
Also: International Work Groups for Indigenous Affairs. Announcement of U.S. Support for the UNDRIP. Selected Excerpts. Available at <http://www.iwgia.org/sw45422.asp>.
- <sup>21</sup> Lehr, A. and Smith, G., (2010), *Supra* Note 3.
- <sup>22</sup> Lehr, A. and Smith, G., (2010), *Supra* Note 3.
- <sup>23</sup> ICMM (2010), "Good Practice Guide Indigenous Peoples and Mining," P 53., <http://www.icmm.com/library/indigenouseoplesguide>.
- <sup>24</sup> United Nations Development Group, 2008, "Guidelines on Indigenous Peoples Issues." [http://www.ohchr.org/Documents/Publications/UNDG\\_training\\_16EN.pdf](http://www.ohchr.org/Documents/Publications/UNDG_training_16EN.pdf).
- <sup>25</sup> ICMM (2010), "Good Practice Guide Indigenous Peoples and Mining," p.58., <http://www.icmm.com/library/indigenouseoplesguide>.
- <sup>26</sup> The resulting report, Lehr, A. and Smith, G. (2010), "Implementing a Corporate Free, Prior, and Informed Consent Policy: Benefits and Challenges," can be found at: [http://www.foleyhoag.com/NewsCenter/Publications/eBooks/Implementing\\_Informed\\_Consent\\_Policy.aspx](http://www.foleyhoag.com/NewsCenter/Publications/eBooks/Implementing_Informed_Consent_Policy.aspx).
- <sup>27</sup> For example, Northwest Ethical Investment Inc. and Boston Common Asset Management LlcLLC. have engaged with several companies like Eni and Conoco Phillips to encourage them to adopt policies on FPIC and report more information on indigenous issues. See: <http://www.bostoncommonasset.com/press/Active-Investor-Social-Update-2010-4Q.pdf?PHPSESSID=3cf4dbe97081aab28cc9e7fd63b92eb6>;  
<https://www.neiinvestments.com/NEIFiles/PDFs/5.2.1%20Focus%20List%202011/Corporate%20Engagement%20Focus%20List%202011%20EN.pdf>.



## About the Author



### **Irene Sosa, Senior Analyst**

As one of the analysts covering the steel and mining sectors, Irene is responsible for identifying key risks for investors related to poor environmental management systems or strained community relations. She regularly engages with mining companies, non-governmental organizations and local communities, and benchmarks companies against best practices in the sector. Irene is particularly interested in aboriginal relations and water management. Recently, she contributed to the Sustainalytics' report Sustainability and Materiality in the Natural Resources Sector. Irene also wrote the chapter "Responsible Investment Case Studies" in the upcoming book Corporate Social Responsibility & Governance Ecosystems: Canadian Mining in Latin America. Previously she worked for the Canadian Environmental Law Association conducting research on impact and benefit agreements between First Nations and mining companies and facilitating meetings of community representatives impacted by mining internationally.

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Sustainalytics is a leading global provider of environmental, social and governance (ESG) research and analysis for investors and financial institutions. We provide a global perspective, underpinned by nearly 20 years of local experience and expertise in the responsible investment market. Sustainalytics strives to continuously provide high-quality solutions and commits to remain responsive to the current and future needs of our clients. Recently, Sustainalytics was voted Best ESG Research House by IPE/TBLI. Sustainalytics is headquartered in Amsterdam and has offices in Boston, Frankfurt, Madrid, Paris, Timisoara and Toronto; and representatives in Brussels and Copenhagen.

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