



'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).¹ 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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¹ 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'.² 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.³ 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

² Recognizing that most guidance suggests that consent and associated processes should be determined locally.

³ 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.

human rights' as defined by the UN GPs, and is thus not an explicit element of the corporate responsibility to 'respect'.⁴ Nonetheless, companies and industry bodies associate with the convention via reference in corporate position statements, corporate policy frameworks and a range of guidance notes (Voss and Greenspan, 2012). Such association with the convention is particularly relevant to a discussion of 'FPIC by extension' where companies are operating in non-ratifying states, or in jurisdictions that have ratified but have not successfully enshrined requirements of ILO 169 into domestic law.⁵ These developments readily begin to draw the mining industry into a 'beyond compliance' FPIC discourse.

In seeking to understand the industry's approach to FPIC beyond indigenous peoples, one should consider the ICMM's Position Statement on *Indigenous Peoples and Mining* (ICMM, 2013). Briefly, the ICMM's position statement requires members to: undertake meaningful engagement with potentially impacted indigenous peoples, understand and respect indigenous peoples rights through baseline and impact assessment studies; ensure meaningful participation in decision-making processes; agree what would constitute 'consent' in specific circumstances; and seek to achieve it through dialog and collaboration with responsible authorities. While this sets out a minimum set of requirements for application to indigenous people, it is the following overview statement that suggests that 'FPIC by extension' is acceptable: *'Where both indigenous and non-indigenous peoples are likely to be impacted, members may choose to extend the commitments embodied in this position statement to non-indigenous people'*. A recent Oxfam America study suggests that extractive companies are starting to incorporate notions of 'consent' and equivalent terms into CSR policy, and do not always attach these commitments to indigenous peoples (Voss and Greenspan, 2012). The Oxfam study also confirms the abovementioned association phenomenon, and documents a number of instances where reference to 'consent' is made directly alongside commitments to respect human rights. These examples provide an early indication of an apparent willingness of some parts of the industry to consider 'FPIC by extension' as part of a policy-level convergence between FPIC and the business and human rights discourse.

The second point of discursive convergence stems from the rise and incorporation of community development discourse into mining policy. The importance of 'social inclusion', community 'empowerment' and 'participation' has assumed a normative position in a broad range of industry policy frameworks (Prospectors and Developers Association of Canada (PDAC), 2014; International Council on Mining and Metals (ICMM), 2010; Minerals Council of Australia (MCA), 2005; Mining Association of Canada (MAC), 2005). In fact, 'freedom of expression' and 'participation' are also established in international human rights law where, separately from 'consent', individuals and indigenous peoples have the right to oppose and actively express opinion or opposition about extractive projects (Anaya, 2013). The focus on local-level participation also aligns with the 'subsidiarity principle', whereby decisions about development ought to be made as close to the local level as possible. This principle is embedded in the Brundtland (1987) definition of sustainable development (SD),

to which much of the mining industry has so publicly subscribed. From one vantage point, mining industry endorsement of FPIC beyond pure legal requirement can be read as part of the natural and (naturally) incremental evolution of the sector's thinking on meaningful community engagement. Aside from ongoing deliberations about 'power of veto', parts of the industry are moving beyond conceptual debates about whether FPIC is a valid concept, and are engaging in multi-stakeholder discussions about how it might be operationalized, including affected persons.

A key rationale for the industry's adoption of FPIC in policy is 'risk management' (Buxton and Wilson, 2013; Campbell, 2012; Lehr and Smith, 2010). Under a risk management framework it is the tripartite elements of: clarity of 'consent'; an agreed approach to impact management and benefit distribution; and a defined process for handling 'grievance' that addresses the risk of instability and unpredictability. FPIC also implies a more tangible CSR product compared to informal notions of social approval, such as the much coveted 'social license'.⁶ In order for the FPIC proposition to deliver on its potential, a complex suite of 'conditionalities' must be met, including: a functional regulatory framework, freedom from coercion, a serviceable land tenure system, parties that are willing to engage in a public process about land access and economic participation (Buxton and Wilson, 2013; Mahanty and McDermott, 2013; Campbell, 2012; Voss and Greenspan, 2012; Szawblowski, 2011; Lehr and Smith, 2010; Colchester and Ferrari 2007; The Environment Law Institute, 2004).

For mining companies to comprehend how FPIC might be operationalized in practice, they must understand the socio-political context and characterize its associated conditionalities. Failing to do so would put projects – and communities – at great risk. This would be the case, for example, if a company assumed or attributed freedoms that did not exist in a given context by asking people to participate in a process that exposed them to the risk of retribution or other forms of repression or reprisal (either by the state or within their own communities). We suggest that in some contexts and under certain circumstances, the social risks of entering into a FPIC process will outweigh the risk to business. This rather perverse outcome becomes a concern given that the mining industry's functions and processes for identifying and integrating socio-political knowledge into mainstream business are still poor relative to the strength of its other disciplines (e.g. mining, minerals processing, financial, legal, health, safety and environmental management). Processes for improving the social knowledge base in critical areas have not been realized, despite their potential to diagnose issues relating to land and conflict, as well as barriers to the meaningful participation of project affected peoples. For instance, human rights due diligence is in its infancy (Harrison, 2013), social impact assessment is yet to provide a stable base for industry decision-making (Esteves et al., 2012), and the organizational function that has carriage of key aspects of FPIC largely exists on the periphery of mining industry practice (Kemp and Owen, 2013; Owen and Kemp, 2013).⁷

Much of the industry still struggles to understand the social risk that mining poses to people and their lands, let alone the risks associated with introducing what will be in most cases a new and

⁴ The 'commentary' under UN GP 12 does indicate, however, that: 'Depending on circumstances, business enterprises may need to consider additional standards. For instance, enterprises should respect the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them'. This suggests that an additional set of instruments, such as the UN DRIP, may indeed be relevant in certain circumstances. It must be noted that the UN GPs are themselves still a form of 'soft law' and therefore still essentially 'voluntary'.

⁵ ILO 169 does not require FPIC per se, but consultation with indigenous peoples. There are certainly those who suggest that the way the term 'consultation' as used in ILO 169 overlaps with the concept of 'consent'.

⁶ See Owen and Kemp (2013) for a critique of this concept.

⁷ The notion of 'human rights due diligence' has gained prominence under Professor John Ruggie's *Protect, Respect and Remedy* framework for business and human rights (2008). The social dimensions of conventional due diligence processes, such as those undertaken for an acquisition or major capital investment, are not well canvassed in current debates about mining and social performance. These conventional due diligence processes remain relatively 'hidden', presumably due to the commercial-in-confidence nature of associated transactions. We image that FPIC will no doubt be incorporated into these processes in the future. How FPIC is accounted for in the full range of due diligence processes will become an important forward consideration.

highly conditional socio-political FPIC process. Others are similarly concerned that FPIC is a problematic proposition in practice. Colchester and Ferrari (2007, p. 20) suggest that insisting on the right to FPIC can create new vulnerabilities and a 'blind alley' for recognition of indigenous rights, with Szawblowski (2011, p. 127) observing that in the extractives sector 'it is not clear that FPIC holds the emancipatory promise wished for'. There are a range of factors necessary for ensuring that context and circumstances are conducive to operationalizing FPIC. Unless there is a radical recalibration of the industry's approach to the social dimensions in mining, FPIC may well become an instrument of social risk rather than an instrument for reforming the way the industry conceives and values its relationships.

Despite what we see to be the importance of a deep and historical engagement with the social dimensions of FPIC in mining, we observe a broader discourse that is focused on the legal, compliance and communicative aspects of FPIC.⁸ Within the current debate there is insufficient attention paid to the socio-logical and socio-historical dimensions that determine the industry's relationship with indigenous and other project-affected people. We explore the social risk of pursuing FPIC when much of the industry has failed to demonstrate its capacity to engage with and respond to social and political context. We draw on a select number of 'foundation works' from social historians, anthropologists and applied political scientists who have engaged a range of 'rights' and 'relational' issues. We concur with Szawblowski's (2011) call for critical implementation research in relation to FPIC in practice, but see a more pressing need for a robust set of frameworks and concepts for navigating basic social issues related to fundamental aspects of community relations in mining.

Conditional imperatives

The previous section noted trends and major definitional categories emerging from the current literature on mining and FPIC. The dynamic intersection of international law and safeguards, national legislation, local systems of custom and land entitlement, together with corporate policy frameworks, project approaches and the involvement of other actors such as independent facilitators, NGOs and representative bodies, ensures that any single definition of FPIC will struggle under the weight of complexity. Individual case examples demonstrate the inherent difficulties of holding these factors in tension, especially while attempting to preserve the integrity of the FPIC framework.⁹ However one may seek to define the concept, the underlying structure of the framework confirms the highly conditional nature of the FPIC proposition, which we detail in Table 1.

Consistent with this literature, we now identify and discuss what we consider to be four core challenges relating to scope and operational potential of the FPIC proposition. While the presumed strength of FPIC is its prioritization of local needs and interests, the test for FPIC will not only be its utility in highly conducive contexts, but in those socio-political environments where the state has been unable to effectively protect and safeguard the human rights, and particularly land rights, of its citizens.

Table 1
List of conditions conducive to FPIC.

Element	Conducive conditions
Support for human rights	Formal, customary and enacted demonstration of support for human rights; recognition of diverse and locally defined sets of rights and entitlement
Negotiation framework	Transparency; willingness and freedom to engage in 'good faith' negotiation
Parties	Ability to discern parties that should be involved in an FPIC process
Relationship	Defined relationships, trust between parties and/or the process
Power dynamics	Equalising strategies and systems in place to offset potential disparities
Knowledge	Advanced knowledge of FPIC its associated rights and conditionalities, with a willingness to enable other parties that do not possess a priori knowledge
Capacity	Capacity to convey, receive and analyze information as it applies to previous, present or future impediments to human rights and development

Condition 1: structural compatibility

The operability of FPIC relies on a certain level of structural 'compatibility' with the host context and culture.¹⁰ This is noted in contemporary literature and guidance notes, although its significance is somewhat understated. Where incompatibilities are present, companies are encouraged to take a 'cautious' approach, and engage with states about the importance of consultation and consent processes (Buxton and Wilson, 2013; Campbell, 2012; Lehr and Smith, 2010). This guidance seems to lead to a belief that FPIC is possible in nation states governed by authoritative or single party regimes. In Vietnam and the Lao PDR for example, neither indigenous nor collective land rights are recognized, and the approach to remedy oscillates between customary modes of conflict resolution and party controls for political dissent (Morris-Jung and Roth, 2010; Baird and Shoemaker, 2007; Dang, 2006; Evrard and Goudineau, 2004). In these contexts, without major intervention, modifications to the FPIC framework could be such that the underlying principles are difficult, if not impossible, to apply.

In a strongly incompatible scenario, the articulation of indigenous or community consent or refusal is likely to be considered partial or void by political elites or the dominant class, unless a FPIC process is somehow excised from 'normal politics'. FPIC could be attempted, for example, as a one-off exercise, with one community for the purpose of securing a single project approval. An isolated and instrumental application of FPIC, however, runs the risk of subverting established political processes without providing structural support for the broader recognition of rights, and as a consequence does not guarantee community approval for the company with any more certainty than it respects the broader human rights concerns of people. Colchester and Ferrari (2007) suggest that FPIC actions need to be part of a wider political process to aid in the defense of indigenous rights and livelihoods. Aside from when they are furthering their own commercial interests, foreign-owned mining companies are usually reticent to engage in host country politics, particularly where it may be perceived as a threat to state sovereignty.

Finally, some people may fear reprisal from participating in a FPIC process knowing the state would be unlikely to endorse such a process. In some contexts it is not possible to engage openly

⁸ To take one specific example, the BSR publication (Campbell, 2012, p. 14) for example suggests that in applying FPIC where legislation is absent or gaps exist, a corporation should conduct due diligence on the relevant international and national legal frameworks and standards and consider FPIC as part of its approach to overall approach to risk management and integrate FPIC into engagement plans. The emphasis on social aspects is minimal.

⁹ See for example, Voss and Greenspan (2012) for cases from Peru and Bolivia; Environmental Law Institute (2004) for cases from Peru, Canada and the United States.

¹⁰ Here we are putting aside the question of FPIC's compatibility with mining industry culture and market context, and focusing on externalities.

about human rights, let alone FPIC. Recent history is replete with examples of citizen dissent being quashed by the state (Paige, 1975; Wolf, 1969; Thompson, 1966). Where oppressive politics are a present and dominant factor, operationalizing FPIC by extension would require nothing short of political revolution, not the introduction of an isolated consent process pre-figured to secure mineral production rights and permission to profit.

Condition 2: clear process and representation

Representation poses several problems for FPIC. How an FPIC process defines or qualifies communities and engages with representative leaders and/or bodies will be a major determinant of its overall success. International standards suggest that representation and levels of participation are best determined by communities themselves, according to their traditional decision-making processes (Anaya, 2011, 2013; ICMM, 2010). Challenges can emerge, however, where these processes exclude large subsections of a community, such as women or youth. In other instances, traditional processes may have broken down, or diluted as a result of colonization, or other historical processes. In the extractive industries, the negotiation of community development agreements (or benefit sharing/land use agreements) has raised similar sets of issues; namely – on what basis should a community or individual representatives be included or excluded, what level of participation and representation is required to give each party confidence in the agreement-making process (and the final product), how does the process handle disagreement and how is non-participation represented and weighed (O'Faircheallaigh, 2012; Brereton et al., 2011)?¹¹

The point here is that these are not new problems. The industry's slow and inconsistent progress to enter into agreements other than where they are legally required is itself a significant threat to the operationalization of FPIC. Involvement of non-industry actors to facilitate engagement may provide higher levels of assurance of process and outcome, however, engagement of any kind will face similar challenges. If the objective of a FPIC process is to reach a clear decision of 'consent' or 'refusal', there must be a mechanism through which to determine what counts as consent, and how much of it is needed in order to proceed to the next step.¹² One residual question that is rarely addressed refers to minority or dissenting positions (Nadeau and Blais, 1993); how are these to be interpreted and incorporated into ongoing considerations after a determining decision has been reached?

In the case of a mining project, for example, how far beyond what is considered to be the immediate mining footprint would a FPIC process extend? What are the limits and how are they going to be defined if parameters are not defined, or even ill-defined, by the state? At what points in the life of a project does consent need to be revisited? Are grants of consent reversible, and under what circumstances? The geographic definition of impact depends very much on what issues the process will take as its focus. For example, communities living close to a regional center (or soon to be regional center) may not register as immediately impacted by virtue of the mine's presence, but could feel a greater level of socio-economic impact through in-migration and inflation at a

later stage (Davies and Head, 1995; Steel, 2013).¹³ Given the overall complexity of mining and mining related impacts, and the dual condition of 'informed' and 'consent', the early and extensive identification of issues and interests would appear to be pivotal if FPIC is to be an inclusive and workable paradigm. At a minimum this will require the industry to avoid a formulaic, tick-box variety of proponent conducted SIAs, and move toward new approaches with high standards of professional expertise and strong roles for project-affected communities and (O'Faircheallaigh and Gibson, 2010).

Condition 3: adequate allocation of resources

Depending on the final configuration, level of commitment, and rigor, FPIC will require substantial inputs to ensure its effectiveness (at best) and or relevance (at least) in any given context. In its most optimistic form, FPIC assumes comprehensive protection of human rights by responsive and capable states; with citizens who understand the scope and content of their rights, and who are willing and able to assert and exercise those rights. These assumptions are, in essence, pre-conditions for a full application of the framework. To date the framework has found its most ready fit in Australia and Canada where, curiously enough, legislation does not align entirely with international law but where there are processes for recognition of indigenous rights by the nation state.¹⁴ Other states, such as Chile, Peru, Ecuador, Bolivia, the Philippines and Papua New Guinea, recognize both customary and/or indigenous rights to land and require processes of consultation and/or consent, but implementation has been problematic. However, even under more favorable circumstances (such as those listed above), the implementation of FPIC requires additional monitoring, the establishment of a rights-compatible remedy processes, in addition to a serious injection of resources to support the practical demands for training and capacity building, technical supervision, multi-stakeholder engagement and coordination (among a host others).

Where the legislative and political structure of the host country is less compatible with the principles and functional requirements of FPIC, the workload, and indeed the resources required to address power imbalances and social risk, is far greater. Where funds originate, who furnishes them, through what mechanisms, when and for what purpose are important points of agreement, quite aside from agreement about the nature of 'consent'. The range of resources required in any given context is likely to be significant, and may require, for example, provision of support for dissenting groups, improvement of state-based or corporate processes, or the appointment of independent facilitators or monitors. Each particular context will no doubt have its own narrative of trust and tension, and in each case care will be needed to ensure that the nature and level of resourcing is appropriate and agreeable to all parties. Where third parties become involved, trust in a facilitated process will in part depend on the credibility or familiarity of the facilitating actor. The requirement for trust may end up proving to be more essential than a demand for neutrality, where in the case of the latter, this person or persons could be viewed as unknown, and therefore untrustworthy. Resourcing decisions are a critical condition that will influence levels of trust and determine the effectiveness and applicability of any FPIC process.

Condition 4: equitable distribution of risk and liability

Socio-political issues can hold up or shut down extractive industry projects. In fact, recent research suggests that this now

¹¹ Identifying and calculating the intricacies of collective consent, and their intersection with the state is a long standing problem in political and economic theory. While the FPIC framework will not need to resolve these debates at a universal level, the process of obtaining, measuring and assuring the quality of consent will nonetheless need to be considered at the local level if 'agreement', 'consent' or 'refusal' are to be regarded as legitimate outcomes.

¹² For our purposes we do not assume that the next point will automatically result in consent. If the FPIC process is to be complete, the various parties will need to determine how a veto or refusal decision will be incorporated.

¹³ Trans-boundary issues are of increasing concern where people are affected outside the jurisdictional catchment area, and extraterritorial remedies are not in place.

¹⁴ Notably, these states initially voted against UN DRIP in the General Assembly.

occurs at more than double the rate of technical delays (Cattaneo, 2009). Individual companies can demonstrate progress in CSR and sustainable development at the policy level. But otherwise, there is a certain inertia associated with the mining industry's approach to social performance in practice (International Institute of Environment and Development (IIED), 2012). While there are a number of complex issues at play, recent cases such as the high profile Marikana massacre in South Africa, the suspended Minas Conga project in Peru and the abandoned Lanjigarh bauxite mining project in India, highlight the fact that there significant costs to bear and risks to shoulder in the process of mineral development (Franks et al., 2014).

Thus far, we have suggested 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, that the parties involved in pursuing FPIC in mining will need to take positive and deliberate steps to address the full range of challenges. This will inevitably involve liabilities. We suggest that the distribution of risk and liability should be equitable amongst those with the capacity to bear them. History shows that unless the full scope and depth of associated social risks are understood and attended to, it is the most vulnerable who will inevitably carry the greatest burden.

In a modern welfare state, mine-affected communities may be supported through interventions designed to relieve particular pressures, or even mitigate risks. But what happens when safeguards and safety nets are not provided? What role should other parties play in achieving FPIC in less than ideal circumstances? Lenders and insurers are a driving force behind the growth of the global mining industry and the ascendance of the FPIC agenda, as are international NGOs, few of which have resources to spare on complex, private sector implementation challenges. What is the role of these actors if consent processes fail and conflict ensues after companies have sunk their capital and exited the field? As a largely 'untested' concept in the mining industry, powerful actors must agree upon an equitable distribution of risk and liability as a condition of pursuing any FPIC process.

FPIC and social complexity

In the previous section we outlined four present challenges and conditions implied by FPIC. For the most part, these challenges reflect long standing and seemingly intractable issues. At this stage in the article readers may be expecting a rejection of the FPIC model, and or in its place an alternative. We might also have provided a practical, 'step-wise' pathway for successful operationalization of the FPIC proposition. This would be premature. From our perspective, the viability of the FPIC proposition is dependent on the presupposition that the industry, and other actors, have the knowledge systems in place for applying the framework. Our position is that in order for the FPIC framework to be both useful and internally coherent, the users of the framework must be capable of identifying, analyzing and incorporating diverse types of sociological, socio-historical and anthropological data into decision-making frameworks.

This section of the article introduces three concepts from the social science literature as means of expanding the analytic scope of the existing debate about FPIC and mining. These concepts have been selected on the grounds that they are directly relevant for understanding themes that are (or should be) of perennial interest to the extractives sector: namely: notions of rights and entitlement, risk and change, land and labor relations, and social conflict. The discussions will assist FPIC practitioners in more accurately characterizing complex social issues, and in identifying root causes

and patterns that sit within the many and multifaceted challenges encountered in the context of mining. That many of the works referenced in this section were written on related topics but on matters other than mining should be seen as an advantage – they illuminate key concepts, broaden the intellectual horizon and deepen the base of social knowledge on mining and company-community relations.

Embedded goods and entitlements

In this section we draw upon the work of philosophers, economists and social anthropologists. The two authors that we are interested in are Amartya Sen and Karl Polanyi, who in different but related ways demonstrate the deeply contextual nature of seemingly common sets of taken for granted rights and entitlements. For the purposes of this article our interest in Sen and Polanyi is limited to explaining some of the fundamental dependencies that exist between people and resources (even those as basic as food stuffs). These insights into the composition and functioning of social networks serve as critical reminders for the mining and extractives sectors, because while this knowledge may be second nature, or even 'old-hat' for social scientists, the sophistication and conceptual clarity of these debates is not always prominent in the resource industry. The relevance to FPIC is that relational dependencies may go unnoticed – or worse – that the outcomes of a consent process damage or undermine pre-existing entitlement networks.

According to Nobel Prize winner Amartya Sen, and using access to food as the example, people rely upon different sets of entitlements in order to avoid starvation. This approach, elegantly described in *Poverty and Famines: An Essay on Entitlement and Deprivation* (1981), places the cause of starvation on entitlement failures, and not as many would have it, on the supply or general availability of food. For Sen, individuals have bundles of entitlements, or 'entitlement bundles', which can be exchanged, for among other things, food. In his essay Sen describes four well known sources of entitlements such as: (i) production based; (ii) trade-based; (iii) own-labor; and (iv) inheritance and transfer. The first three of these categories rely largely on the use of a person's own labor, that is to grow one's own food, to earn money that would be exchanged for food, or labor in direct exchange for food. The fourth category relies on a person being given food by others.

These examples have focused on food alone, however, the relevance of the entitlement approach is not limited to the provisioning of one (albeit very necessary) good. While the first three categories listed in the above paragraph all refer to an individual converting their labor into a good, they should not be viewed as any less relationship-dependent than the fourth example, where the benefit of the social network appears to be more obvious. All entitlements, whether food or land or employment or trade, depend on the willingness of others to recognize, uphold and service those entitlements. Entitlement failures result not only from a supply of goods and services, but from the straining of social relationships and networks. In terms of FPIC, mining industry actors must be aware that if consent is given for certain assets, a range of other entitlements may be affected. Secondary loss of entitlement may need to be accounted for, or at the very least recognized in discussions about FPIC.

The work of Karl Polanyi has been central in establishing the relational foundation of important social institutions, such as markets and governance systems. The much used phrase 'all economies are embedded in social relations' from Polanyi's (1944) *The Great Transformation* highlights a simple fact; that transactions of any kind are reliant in some fundamental way, upon relationships with others (if only to complete the transaction). Using Polanyi's schema, understanding the configuration

and working of markets, for instance, requires an analysis of the social relationships which are involved and depend upon that system of organization. Through his widely acclaimed study of economic history, Polanyi's work demonstrates both the strengths and vulnerabilities attached to entitlements within deeply embedded economic systems.

Where mining and embedded systems typically intersect is around land. The impact of this inter-sectionality is most evident where people are physically and/or economically displaced from their land.¹⁵ Resettlement activity often raises vital questions about the difference between forgone value and replacement value, with increasing sensitivity to the important role of social networks and their effect on livelihoods and entitlements.¹⁶ These considerations do not come as readily to the fore when talking about the impact and presence of resource extraction projects more generally, despite the expansive and enduring effects on land tenure, systems of traditional authority, basic demography, natural resource use, economic provisioning, among many others.

The relevance for FPIC is nothing short of immediate. Granting consent or assertions of refusal need to be thoroughly contextualized if the decision by the local population is to be appropriately understood. In the same way that FPIC requires accurate and timely information to be provided to local stakeholders, one should assume that resource developers will acquire for themselves both the knowledge and the tools needed to understand the context they are intending to alter, and operate within. This alone represents a major challenge for the industry, which for decades has not been able to effectively integrate or utilize social science methods into its core planning frameworks.

Risk aversion and change

The previous section emphasized the importance of understanding how notions of entitlement can inform FPIC processes, and how failing to account for 'entitlement bundles' can create social risk for mine-affected communities. In this section, we highlight the value of James C. Scott's work for understanding how mining companies might build on their understanding of subsistence economics and drivers of social resistance. In his groundbreaking 1976 book *The Moral Economy of the Peasant: Rebellion and Subsistence in Southeast Asia*, Scott focuses on patron-client relations in colonial Burma and Vietnam. While this period may seem irrelevant to mining and community relations, Scott's work is instructive from the vantage point of understanding the dynamics that unfold when a foreign actor induces change in an existing social order. For the mining industry, understanding the nature and character of social change in fact holds great relevance not only for FPIC processes, but of social performance more generally.

The first concept that Scott introduces is the notion of the 'subsistence ethic'; which is not simply a cultural phenomenon, but a mechanism for survival in predominantly agrarian societies. Scott shows how disruptions to land tenure, and shifts from land ownership, to tenancy or waged labor can rupture social relations and plunge already vulnerable people into dearth. Demonstrating how relations of exchange under a patronage system provide certain protections, Scott's work demonstrates the durability of such systems, largely due to the insurances provided in years of hardship. In the context of universal human rights and notions of 'consent', these established relations can easily be read as exploitative, while at the same time fulfilling the right to subsist and

adhering to peasant norms of reciprocity and 'decent relations'. This is central to mine-community relations from a number of perspectives, foremost amongst which are insights into the social risks associated with disruption, however, exploitative the existing social order might appear to outsiders. Scott's work also suggests that the pre-existing social order will influence the relationship that rights holders will seek with a company if FPIC is indeed provided for industrial activities.

An additional insight into the workings of pre-existing social order can be gleaned from Scott's examination of colonial tax regimes. In Scott's example, the imposition of tax levies to support the colonial administration proved to be both onerous from the vantage point of quantity and with respect to the pressures placed on peasant communities in meeting their subsistence requirements. Commenting on the colonial tax system Scott notes its highly bureaucratized nature as compared with the more relational and seasonal character of the traditional feudal order that peasants were accustomed to working under. Scott argues that while both the colonial regime and the patron-client system placed weighty demands on the peasantry, a major cause of resistance and rebellion was the colonial disregard for existing ways of life. In Scott's view, the feudal system may well have depended on its ability to extract resources from the villages, but its relative success was founded upon a dynamic system of reciprocal rights and obligations in which tenants and landlords were inextricably bound to one another.

The implication of this insight for FPIC in mining is that consent-granting processes should be considered as involving more than a transaction in which one party transfers permission to the other. Instead, the granting of consent for something as significant as the right to exploit natural resources ought to be regarded as constituting a major obligation on the part of the developer. The relationships that may result in consent being granted will no doubt be the very same relationships that are utilized to assert expectations or other assumed rights. Scott's work reminds us that in the process of exploitation, relationships also matter, not just the act of granting or withholding consent.

Land and conflict

In this third section, we invoke several key pieces of what we consider to be foundation literature on land relations and conflict. As our starting point we quote Paige (1996) on land reform to illustrate the overarching significance of changes to land and land tenure – an inevitable process in any mining context. According to Paige (1996, p. 127):

The causes as well as the consequences of land reform are revolutionary. Land reform is not really reform at all. In an agrarian society, land reform is a revolutionary act because it redistributes the major source of wealth, social standing, and political power.

The wide-ranging effects of changes to land and land relationships do not always register in corporate assessment, planning and negotiation frameworks; often because 'land tenure' is generally considered to be the responsibility of the nation state, and beyond the bounds of 'corporate responsibility'. The issue with land is that its physical or tangible properties are often over-emphasized and that social factors can, and often do, remain dormant for long periods of time; that is, until conflict seemingly 'erupts'. Having failed to read the sub-surface social dynamics, companies are often 'blindsided' by land-related conflict.¹⁷ On the issue of land, we

¹⁵ Noting company does not need to resettle people in order to adversely affect land relations and the overall working and security of entitlement bundles.

¹⁶ See Cernea (2000) and the risk of social disarticulation.

¹⁷ Sub-surface issues are those aspects of a particular social order that are not immediately observable, either because they are complex and multifaceted and

would therefore concur with scholars who position land as a central construct in mine-community relations (e.g. [Bebbington et al., 2008](#); [Macintyre, 2007](#); [Hilson, 2002](#)). Through Paige, we suggest that land acquisition for mining can be, conceived as a 'radical recalibration of relations' and responded to as such; in other words, with the full weight and significance that a company might attribute to a major crisis.

On the surface, as [Ballard and Banks \(2003, p. 300\)](#) explain in *Resource Wars: The Anthropology of Mining* 'land condenses a host of social relationships for which territory serves as a form of shorthand reference'. Rather than use land as a shorthand reference, the lesson from scholars such as Paige is that land holds great value as an entry-point for uncovering underlying dynamics around change, belief, relationships and the functioning of social order. While mining companies and communities might both take the liberty of using land as a shorthand reference, one can safely assume that most are not referencing the same types of sub-surface complexities when doing so.

Aside from both land tenure and mining ventures being akin to major social institutions in their own right, there is an element in considerations about land that are not easily recognized by mining companies (or markets more generally). An example provided by [Tregarthen et al. \(1978\)](#) reveals the difficulties of using market-based analysis to effectively identify and measure nonmarket factors. In their case study they explore the hypothetical example of a grazing community in the resource rich area of Watkins, Colorado. The major question posed by Tregarthen et al. was how to calculate nonmarket factors in the absence of an established price mechanism. As they put it: that:

Ranching provides two services to society – beef production and the preservation of open space. The price system provides signals concerning the value of beef but not of the open land.¹⁸

The point we are extracting from Tregarthen et al. is not the need for a meaningful measure of compensation if mining goes ahead, but the immediate problem of negotiating a consent process based on incompatible value systems. What value, for instance, is information if its underlying assumptions and concepts do not resonate with the people receive it? A critical question for FPIC, therefore, is the extent to which FPIC processes are able to mediate value propositions associated with 'priceless' resources and landscapes, and whether alternative or hybrid value systems are available so that more dominant valuation methods are not automatically assumed or applied.

A second area of focus in this section is the importance of understanding conflict and its role in the changing and balancing of social order. In his work *Custom and Conflict in Africa* (1955) the anthropologist Max Gluckman outlined six paradoxes associated with conflict phenomena to help us conceive of conflict as productive and 'natural'. The value of this seminal work is its grounded illustration of the dependencies that exist between conflict and order within the context of the 'total social structure'. One example provided by Gluckman is the role of marriage

in moderating the severity of conflict between clans; another describes the range of vulnerabilities that exist between Kings and their subjects, most notably the high expectations and subsequent disappointments that come with authority and rule (in his chapter *Frailty in Authority*). Patterns of low, medium and high levels of conflict produce and re-reproduce a variety of social order outcomes.

For readers who may be less familiar with Gluckman and other foundation works, the contribution is in defining the function of conflict in relation to the workings of society as a whole. Gluckman's use of paradox is to problematize what appears to be a contradiction in terms; that is how 'custom' (as a stabilizing concept) and 'conflict' (as a de-stabilizing concept) operate inter-dependently to create and re-create complex networks of social relations. Rather than seeing conflict as an unnatural and destructive force, Gluckman makes the counter-claim: whatever the short-term effects, conflict provides stability over the long-run. These arguments are relevant to the mining sector for three obvious reasons: first, that conflict is and will continue to be a constant force, both in the existing social context and between company and community, and should be characterized and accounted for from the outset of mining activities; second, that the social change induced by mining is often justified on the basis of an overall long-run benefit, which the industry struggles to demonstrate; and third, that the interdependencies that exist between different sets of social forces need to be considered when examining the potential (and possibilities inherent within) social risk.

Scholarly debates about social change are in constant flux. Within this spectrum of ideas, there are key works that remain pivotal, and which provide us with valuable insights and reminders of that which is important in relations between companies and communities. The use of multiple frameworks, particularly given the diverse contexts and issues confronting the industry, is essential for enabling the industry to detect and comprehend different perspectives. In this vein, the concepts above represent but a sample of approaches available to social specialists and others within the mining industry. We have presented ideas centered on entitlements, change and land relations, which we regard as base concepts for the industry as it engages the challenge of operationalizing FPIC.¹⁹

Conclusion

What we have not done in this article is take issue with the notion of FPIC itself: an aggregate concept with foundations in international human rights law designed to 'level the playing field', and a counter to the multifaceted and enduring forms of marginalization and oppression of indigenous and 'situated' peoples ([Szawblowski, 2011](#)). Instead, we have focused on FPIC's application in mining contexts; a problem that surfaces when FPIC's complex set of conditionalities are brought into frame. Again, we have not used the existence of these conditionalities as means of rejecting the FPIC proposition. Rather, we have argued that a much deeper knowledge base is a prerequisite for the effective implementation of FPIC. Given that 'land' and 'labor relations' and natural resource 'use' and 'ownership' often sit at the core of company-community relations – and many other relationships of inequality throughout history – we have suggested including a more expansive set of social science concepts and

(footnote continued)

therefore 'hard to read', or obscured from general view ([Bebbington and Bury, 2013](#)).

¹⁸ In this paper the authors develop a proposition for incorporating nonmarket values into a cost-benefit analysis system, whereby the various parties would agree to a set rate per land unit (or even unit of production) to account for the loss of social or esthetic goods. They argue: (1978, p. 357) 'Some object in principle to any attempt to measure a quality as subjective as, for example, esthetic costs. Can we put a price tag on a ravaged landscape? The answer is that we not only can, we must. Given some estimate of other benefits and costs, a decision always implies some valuation of esthetic factors, whether they are included explicitly in the analysis or not. Selecting a value of zero (or infinity) on grounds that beauty lies in the eye of the beholder, rather than in a column of a ledger, makes little sense'.

¹⁹ We also acknowledge the need for the extractives sector to similarly engage with foundation literature in other important debates, such as, for example, those that relate to gender and cultural heritage, as means of building the knowledge foundations implied by its espoused goals and objectives.

readings into this debate. This includes contemporary literature that has made 'global mining' its focus, in addition to literature from cognate fields. Historical patterns in both arenas provide insights into those social and economic issues that the industry so often struggles to understand and integrate into its decision-making processes. A deeper knowledge base may enable industry actors to respond in more constructive ways than its own more recent history suggests it is capable of.

We readily acknowledged that a 'reading' strategy will appear unoriginal, even unproductive, to industry. However, it is our belief that the 'executive summary' and 'case vignette' approach to knowledge building and decision-making on complex social issues must be broken. This approach is inadequate given the increasing levels of complexity confronting the field. What we are suggesting, in its place, is a far more substantive engagement with sociological and socio-historical context, including a more comprehensive characterization of the conditionalities relating to FPIC in particular circumstances. In this vein, we have highlighted a small selection of key works that relate to many of the industry's real and present challenges. While these (and many similar) works might be familiar to those social and political scientists working to influence the mining industry, we are concerned that the surface-level merits of FPIC will blind those who are less familiar with this knowledge base. A commitment to FPIC should be accompanied by a commitment to re-thinking industry engagement with and application of social knowledge.²⁰ The general pattern of social performance from across the industry suggests that this is an outstanding task, which needs to be taken as something a priority.

We will no doubt be asked by whether this agenda should be a task for corporate decision-makers, external advisers, mine managers, specialist 'social' practitioners or non-industry actors. As we have suggested elsewhere (Owen and Kemp, 2014), social professionals within industry increase their internal influence when they understand the geological, technical, production and financial aspects of mining, and have commensurate resources to respond to social complexity. Equally, it has become necessary for mine managers and other industry decision-makers to grasp concepts of land, entitlement and customary rights, social exchange and networks, conventions of reciprocity, and patterns of grievance and conflict. There are too few industry leaders who are conversant with these concepts. Those who are tend to be considered 'exemplary', rather than typical of the field. This suggests a more permissive space for scholars and social specialists to push against accusations of being too 'academic', and encourage industry to build its knowledge base of sub-surface social issues. All actors must ensure that the 'above ground' is similarly well prepared so that FPIC is not 'forced' in contexts that are not able to provide safeguards for the most vulnerable.

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²⁰ There are a number of important ethical dimensions to the corporate use of social knowledge that have not been addressed in this article. See Partridge et al. (2011) for a sense of emerging debates from the field of anthropology.

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