FPIC, ICMM and CSR: Alphabet Soup or a Sea Change?

Abstract

The paper considers the International Council on Mining and Metals (ICMM) May 2013 Position Statement on Indigenous Peoples and Mining (the "Position Statement"). In particular the paper examines the Position Statements' treatment of the Free, Prior and Informed Consent (FPIC) principle as contained in the UN Declaration on the Rights of Indigenous People (UNDRIP) with an especial emphasis on the Position Statements' approach to the "consent" requirement.

This examination is both contextual and textual. Contextually the paper discusses the role and relevance of industry codes of practice such as the Position Statement as well as contemporary notions of Corporate Social Responsibility and the extent to which, and mechanisms by which, such codes are considered "binding" by corporations in the absence of legislative obligation. Textually the paper will consider the specific treatment of the consent requirement as outlined in the Position Statement with a focus upon the apparent ambiguity around whether a project can proceed consistently with the Position Statement but in spite of the absence of indigenous consent to it. Analysis of this issue will have regard to a range of publicists' views on the consent aspect of FPIC .

The paper concludes by considering the prospects for pursuing indigenous aspirations such as FPIC through the range of opportunities that the evolution of the scope and importance of CSR obligations in the private sector has created. Particular note is made of instances where an industry COP is given statutory force through legislative referential incorporation.

Introduction

This paper has two main objectives. The first is to explore the consideration of the notion of Free Prior and Informed Consent (FPIC) in the International Council on Mining and Metals (ICMM) May 2013 Position Statement on *Indigenous Peoples and Mining* ("the Position Statement"). The second, perhaps more general, objective is to consider the extent to which the phenomenon of the development of industry codes of practice (COP), such as contained in the ICMM Position Statement but also including standards emanating from international investment agencies, represent a significant but underexploited opportunity to Australia's indigenous peoples.

To achieve these objectives the paper proceeds in four stages after this introduction. The first stage gives some background to the ICMM and the Position Statement before proceeding to examine the treatment of the FPIC "consent" requirement in the text of the ICMM Position Statement. The second stage looks more broadly at consideration of the "consent" issue in the work of other organisations, particularly that of the World Bank

Group (WBG) and its International Finance Corporation (IFC) the United Nations Department of Economic and Social Affairs, (UNDESA), the United Nations Development Group (UNDG) and the United Nations Permanent Forum on Indigenous Issues (UNPFII). It suggests the jurisprudence from these sources should be used in the interpretation of the ICMM Position Statement.

The third stage of the paper attempts to draw in the broader objective of considering the significance of non-legal instruments such as industry COP (as illustrated by the ICMM) and the WBG Operational Policies. The paper notes that the growing importance of notions of Corporate Social Responsibility (CSR) particularly to transnational corporations suggests that such non-legal instruments may become a more regular feature in the domestic political agenda.

The final stage of the paper concludes by suggesting that in light of these factors there may be significant benefit in encouraging greater Indigenous representative involvement both in the development and implementation of CSR grounded non-legal instruments. This involvement, the paper concludes may facilitate not only the desired objectives of instruments such as industry COP, but may also assist in the achievement of Indigenous aspirations that may otherwise be not immediately attainable in the domestic environment.

The ICMM and the function of the Position Statement

The ICMM is an international industry association comprising 22 mining and metals companies and 33 national and regional mining associations and global commodity associations.[1] The ICMM was established to address core sustainable development challenges. It is headquartered in London. ICMM corporate members include: Anglo-American, BHP-Billiton, Freeport, Mitsubishi Materials, Newmont, and Rio Tinto. The Minerals Council of Australia (MCA) is a member national association. To be eligible for membership corporations must implement a Sustainable Development Framework that incorporates ten key principles and six positions statements. The ICMM conducts annual third party verified assessment of member corporations' progress against the commitments contained in the Framework. The results of the annual assessment are published (and publically available).

The ten principles contained in the Framework can be summarised as follows:

1. Implement and maintain ethical business practices and sound systems of corporate governance.
2. Integrate sustainable development considerations within the corporate decision-making process.

[1] The information contained in the following section is primarily taken from the ICMM's own website: http://www.icmm.com/about-us/about-us and linked pages. Accessed on 27 May 2014.

3. Uphold fundamental human rights and respect cultures, customs and values in dealings with employees and others who are affected by our activities.
4. Implement risk management strategies based on valid data and sound science.
5. Seek continual improvement of our health and safety performance.
6. Seek continual improvement of our environmental performance.
7. Contribute to conservation of biodiversity and integrated approaches to land use planning.
8. Facilitate and encourage responsible product design, use, re-use, recycling and disposal of our products.
9. Contribute to the social, economic and institutional development of the communities in which we operate.
10. Implement effective and transparent engagement, communication and independently verified reporting arrangements with our stakeholders.

The Position Statements are intended to provide greater clarity to matters contained in the Principles. They go to matters such as: Climate Change, Mercury Risk Management, Protected Areas and Indigenous Peoples. The Indigenous Peoples and Mining Position statement is said to clarify Principles 3, 6 and 9.

Before moving to consider the treatment of FPIC in the Indigenous Peoples and Mining Position Statement it is worth just briefly noting that the ICMM (and the MCA) do not have universal membership coverage within their industry. Rather membership is limited to the large, high profile, international, mining houses. In the Australian context a similar distinction could be drawn between the MCA membership of approximately 60 which produce 85% of the country's mineral output and the in excess of 120 members of the (Australian) Association of Mining and Exploration Companies. The distinction will be revisited later.

The (Indigenous Peoples and Mining) Position Statement and FPIC

The Position Statement is described setting out ICMM members' "approach to engaging with Indigenous Peoples and to free, prior and informed consent"[2]. The Position Statement describes FPIC as "a process and an outcome". The *process* is summarised as ensuring decisions are: made freely without coercion or manipulation; involve sufficient time; and, are on the basis of full information. "The *outcome* is that Indigenous Peoples can give or withhold their consent to a project…"[3] The requirements of the Position Statement are expected to be implemented by May 2015 but do not apply to projects that have started the

[2] Position Statement, Page 1.
[3] *id*.

approvals process at the time of adoption of the Position Statement (May 2013).[4] Aside from these preliminary comments the Position Statement contains six "Recognition Statements" and six "Commitments".

The content of both Recognition Statement and Commitments is laudable and represents a serious attempt to implement much of the content of the UN Declaration of the Rights Indigenous Peoples (UNDRIP) into the working of private sector agents. These comments apply equally to those aspects of the Position Statement that go to the consent component of FPIC. The purpose of this paper is not to lambast the ICMM for these attempts but merely to attempt to facilitate a better understanding of the implementation of FPIC in a practical setting. With this noted, this paper will focus only on those aspects dealing with the consent requirement. Essentially these are found in Recognitions Statements 4 and 5 and also Commitments 4 and 5. Reproducing (at least portions of) the text of these provisions is necessary in order to analyse them.

Recognition Statements 4 and 5[5]

4. Successful mining and metals projects require the support of a range of interested and affected parties. This includes both the formal legal and regulatory approvals granted by governments and the broad support of a company's host communities. …*States have the right to make decisions on the development of resources according to applicable national laws*, including those laws implementing host country obligations under international law. Some countries have made an explicit consent provision under national or sub-national laws. In most countries however, "neither Indigenous Peoples nor any other population group have the right to veto development projects that affect them", *so FPIC should be regarded as a "principle to be respected to the greatest degree possible in development planning and implementation*". (Emphasis added)[6]

5. States also have an important role to play in the process of engaging with Indigenous Peoples. *They may be involved in determining which communities should be considered indigenous, in shaping the process for achieving FPIC and in determining how this relates to regulated processes for ensuring community participation in decision making*. Given their role in balancing the rights and interests of Indigenous Peoples with the wider population, states may also play an important role in supporting the resolution of disagreements that may arise between Indigenous Peoples and companies in the pursuit of FPIC. (Emphasis added)[7]

[4] Position Statement, fn 4.
[5] Position Statement, Page 3.
[6] The remarks in quotations are referenced to the UN Department of Economic and Social Affairs, *Resource Kit on Indigenous Peoples Issues* (2008).
[7] The remarks in quotations are referenced to the UN Department of Economic and Social Affairs, *Resource Kit on Indigenous Peoples Issues* (2008).

Commitments 4 and 5[8]

4. *Work to obtain the consent of indigenous communities* for new projects (and changes to existing projects) that are located on lands traditionally owned by or under customary use of

Indigenous Peoples...These processes should neither confer veto rights to individuals or sub-groups nor require unanimous support from potentially impacted Indigenous Peoples (unless legally mandated). Consent processes should not require companies to agree to aspects not under their control.

5. Collaborate with the responsible authorities to achieve outcomes consistent with the commitments in this position statement, in situations where government is responsible for managing Indigenous Peoples' interests in a way that limits company involvement. *Where a host government requires members to follow processes that have been designed to achieve the outcomes sought through this position statement, ICMM members will not be expected to establish parallel processes.*

There are two (inter-related) issues arising from these provisions. The first is that, in the preambulary text it is accepted that the "outcome" of FPIC consent is absolute: that is it can be given or withheld. However, in Recognition Statement 4 and Commitment 4 while the giving of consent may be absolute, the consequence of the withholding of consent is not. This is because FPIC has become a principle to be respected "to the greatest degree possible" the Commitment is "to work towards it" as opposed to "not proceeding without it".

The second issue is the role of the (national) State. The first point to note here is that the Position Statement accepts that the State has the right to develop resources in accordance with its (FPIC embracing or not) national laws. Further even in the observance of FPIC (to the extent it is not trumped by the State right to develop resources), the State may have a role in identifying relevant parties and in shaping and regulating processes. If these processes are "designed to achieve" FPIC, the ICMM member is absolved of independent accountability in the event the design fails. These issues warrant consideration in some greater detail.

To commence with the "aspirational FPIC" point: the authority cited in this regard is the UNDESA, *Resource Kit on Indigenous Peoples Issues* (2008) ("Resource Kit"). The Resource Kit is "designed to provide United Nations Country Teams with guidance as to how to engage with indigenous peoples and include their perspectives in development processes".[9] The relevant section of the Resource Kit (pp 13 - 18) identifies the text of UNDRIP Art 19 and 26 as establishing a right of Indigenous Peoples to the resources of their lands and the

[8] Position Statement, Page 4.
[9] *Resource Kit*¸ p 1.

ability for those peoples to give or withhold consent to the development of those resources. It also notes the view of the UNDG that:

> In the case of state owned sub-surface resources on indigenous peoples' lands, indigenous peoples still have the right to free, prior and informed consent for the exploration and exploitation of those resources and have the right to any benefit-sharing arrangements.[10]

It continues by discussing increasing adoption of the principles by States and the views of the UNPFII which are clearly that an FPIC consent is absolute. The Resource Kit does note that international development (e.g. World Bank, Asian Development Bank) agencies acknowledge the special ties of Indigenous Peoples to their land but suggest that the World Bank Group (WBG) only requires "special considerations" of this matter. Reference is made to WBG Operating Procedure 4.10 (OP 4.10) in this regard. OP4.10 requires investments in development programs financed by the WBG only proceed if affected indigenous peoples have engaged in a process of "free prior and informed *consultation*" with the borrower. This is described as "FPICon."

The adoption by the WBG of the FPICon standard as opposed to FPIC was condemned by many Indigenous Peoples' organisations.[11] Critics suggest it represents a watering down of FPIC.[12] This may be true. Certainly a recommendation contained in the review that led to OP 4.10 that FPIC was the appropriate standard[13] was not adopted in favour of the FPICon approach. However the WBG still requires that borrowers engage in FPICon "resulting in broad community support."[14] The notion of broad community support is not defined.[15] Interestingly, the WBG International Finance Corporation (IFC) addresses the issue as part of its *2012 Performance Standards on Environmental and Social Sustainability*. Performance Standard 7 relates to Indigenous Peoples. There is a guidance note in relation to this Standard. Performance Standard 7 (at paragraph 12) requires "evidence of agreement" between the (IFC) client and affected [Indigenous] communities. The Guidance Note at GN 33 specifically incorporates FPIC (not FPICon) and identifies that FPIC does not require unanimity and that there may be differing views on aspects of a proposal but concludes: "[t]hus an FPIC agreement captures the Affected Communities' broad agreement on the legitimacy of the engagement process *and the decisions made*" (emphasis added).

Thus, while the WBG's FPICon may be a less stringent standard than the UNDRIP FPIC, it still requires the broad "agreement" or "support" of affected Indigenous communities.

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[10] UNDG, *Guidelines on Indigenous Peoples' Issues 2008, p 18.*

[11] MacKay F, "The Draft World Bank Operational Policy 4.10 on Indigenous Peoples: Progress or More of the Same?', *Arizona Journal of International and Comparative Law*, Vol 25, No 1,2005 at p 86.

[12] *Ibid*. p 89.

[13] *The Final Report of the Extractive Industries Review: Striking a Better Balance*, (2004) at 21, 50 and 60.

[14] *Ibid.* at 7, 9. And OP 4.10 at paragraphs 1, 6(c), 10 and 11. (See also Mackay F, supra n 10, at p 81).

[15] Mackay F, supra n 10, at p 84.

It is then in light of this discourse that the full paragraph in the *Resource Kit* to which the Position Statement refers should be appreciated. That paragraph reads:

> It should be noted that the FPIC process may include the option of withholding consent. It should also be noted that, in most countries, neither indigenous nor any other population group actually have the right to veto development projects that affect them. The concept of free prior and informed consent is therefore a goal to be pursued and a principle to be respected to the greatest degree possible in development planning and implementation.[16]

With the greatest of respect, taken in context, this paragraph out of a guide for UN Country Teams on how to involve indigenous peoples in development processes does ***not*** provide the ICMM with a legitimate basis to reduce FPIC to an "aspiration".

What then of the second issue coming out of the Position Statement: the role of the State? In many respects one may be inclined to feel some sympathy for the position of the ICMM in this regard. It could be seen as merely acknowledging the state of the law in the jurisdictions within which its members operate and those laws are based on the notion of state sovereignty and (generally) ownership of natural resources.

The same issue was debated in the WBG in relation to OP 4.10. There it was argued that to require FPIC would infringe state sovereignty.[17] It is unclear how requiring an FPICon requirement on a nation state that does not embody this concept in its internal law differs in principle from requiring an FPIC proper process in order to access WBG assistance. The question of state sovereignty in the inter-relation between domestic law and international law is well travelled. The fundamental principle is that domestic law (including sub-national law) cannot be invoked as a justification for failure to perform a treaty (or other international legal) obligation.[18]

From this principle of international law flows the responsibility of private corporations to respect fundamental human rights norms, even absent an obligation under the local laws of the place of operation to do so. In fact, acceptance of this principle is becoming common-place. A high profile transnational corporation is unlikely to justify (for example) employment (directly) of child labour, causing massive environmental degradation, the manufacture of internationally prohibited weaponry on the basis that the laws of the place of operation permit these activities. These notions underlie instruments such as the UN *Guiding Principles on Human Rights*[19] ("Guiding Principles"). The commentary on Principle 11 in Part II ("The Corporate Responsibility to Protect Human Rights") puts the matter quite succinctly:

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[16] *Resource Kit* at p 18.
[17] Mackay F, supra n 10, at p 79.
[18] *Pacta sunt servada*: Vienna Convention on the law of Treaties 1969 1155 NTSS 331, art 26 and 27. The matter is discussed in Mackay F, supra n 10, at p 80.
[19] UN Human Rights, Office of the High Commissioner, UN, Geneva and New York 2011.

> The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights.[20]

Thus it can be appreciated that, at least as an ethical proposition, there should be no distinction drawn in application of FPIC *even absent national laws giving effect to the principle.* Indeed if reliance on the text of national laws provided sufficient guidance for ICMM members on ethical behaviour there would be no need for the Position Statement or even ICMM.

From this perspective the reliance in the Position Statement on the notion of "just following the local law" is unsupportable and contradictory. However this conclusion has introduced the notion of corporate ethical behaviour. The final stage of this discussion turns to consider this matter in the context of Indigenous Peoples' aspirations.

Corporate Social Responsibility - CSR

The notion of Corporate Social Responsibility (CSR), its content and its motivational basis is of increasing interest to academics, civil society and of course to corporations themselves. O'Faircheallaigh[21] suggests there have been three approaches identified. The first sees CSR essentially as a ruse, a public relations exercise designed to reduce unwelcome regulatory incursions and negative public scrutiny. The second sees "CSR as a holistic and long-term view of what is required to allow a company to survive and to continue to generate wealth into the future."[22] The third sees CSR as a duty or ethical obligation owed to society even in the absence of any short or long term benefit to the corporation. In practice no one approach is likely to be correct to the exclusion of the others. Whatever the correct approach(es) to CSR are, certainly the notion of a responsibility to engage in ethical corporate behaviour is increasingly expected of particularly transnational corporations. A number of reasons may exist for this. Transnational corporations are at greater risk of exposure to litigation in jurisdictions that have more stringent environmental/human rights standards than the country of operation (BHP and the OK Tedi mine and Union Carbide in Bhopal being just two prominent examples). Also, transnational corporations being generally larger enterprises are more likely to be subject to public (media) scrutiny. Third, transnationals, operating in an international environment are more likely to be assessed against a standard of *international* human rights (or environmental) norms.

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[20] Guiding Principles at p 13.

[21] O'Faircheallaigh, C in O'Faircheallaigh, C and Ali, S, *Earth Matters: Indigenous Peoples, the Extractive Industries and Corporate Social Responsibility*, Greenleaf Publishing, Sheffield, 2008 at page 2.

[22] *id.*

As noted at the outset of this paper and in the preceding section the very existence of the ICMM and the Position Statement is a manifestation of the concern (for whatever reason) of transnational extractive industry corporations to address issues of sustainability in mining.

Equator Principles

One consequence of the development of CSR should be particularly highlighted. Mention of the WBG and its private investment arm, the IFC, has already been made. As noted this international development agency has adopted a requirement for satisfaction of principles of environmental and social sustainability into its lending assessments. The introduction of the "Equator Principles" reflects a similar development in the strictly private financing environment. The Equator Principles (EP) are described as "a risk management framework…for determining, assessing and managing environmental and social risk in projects…"[23] 79 financial institutions in 35 countries (representing 70% of Internal Project Finance debt in emerging markets) subscribe to the EP.[24]

The following excerpt from the current Equator Principles III document explains their purpose and effect:

> We believe that adoption of and adherence to the Equator Principles offers significant benefits to us, our clients, and local stakeholders through our clients' engagement with locally Affected Communities. We therefore recognise that our role as financiers affords us opportunities to promote responsible environmental stewardship and socially responsible development, including fulfilling our responsibility to respect human rights by undertaking due diligence[1] in accordance with the Equator Principles.
>
> The Equator Principles are intended to serve as a common baseline and framework. We commit to implementing the Equator Principles in our internal environmental and social policies, procedures and standards for financing Projects. We will not provide Project Finance or Project-Related Corporate Loans to Projects where the client will not, or is unable to, comply with the Equator Principles.[25]

In short unless a project can satisfy the EP risk management framework then a subscribing Equator Principle Financial Institution (EPFI) should not make project finance. Australia's "big four" banks and well known merchant banks such as ABN Amro, ING and Citigroup are EPFI's. However, notably the application of the EP differs dependent upon whether the project is a "Designated" or "Non-Designated" Country. Designated Countries are those that are deemed "to have robust environmental and social governance, legislation systems and

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[23] Equator Principles Association , *About the Equator Principles*, website: http://www.equator-principles.com/index.php/about-ep/about-ep accessed on 28 May 2014.
[24] *id.*
[25] Equator Principles Association, Equator Principles June 2013.

institutional capacity designed to protect their people and the natural environment.[26]" Australia, the US, EU Countries, Chile, Canada and New Zealand are Designated Countries. In these countries national laws are deemed to meet the necessary EP environmental and social risk, identification, assessment and management frame-work. In Non-Designated Countries the IFC Performance Standards are utilised.

The current Equator Principles (EP III) took effect from 1 January 2014. EP III updated a number of the requirements contained in the previous version (EP II). One of these (in line with the current IFC Performance Standards referred to above) was a shift from requirement for FPICon to FPIC.

It appears therefore that the EP Association has reached the rather bizarre situation of imposing a higher standard on Non-Designated Countries (where there will now be an FPIC requirement for project finance) than that applied to Designated Countries where domestic law is deemed adequate despite not in fact satisfy the international human right norm requirements the EP are intended to advance. In the context of the international North-South development dialogue the suggestion that developing countries should be subject to more stringent human rights requirements than developed countries is unlikely to be maintainable in the long-term

This (domestically) frustrating anomaly should not detract attention from the key proposition around CSR. That proposition is that increasingly especially transnational corporations are either voluntarily accepting or being forced by finance institutions into accepting incorporation of human rights standards that include FPIC into project planning. Further, that this acceptance is occurring ahead of incorporation of FPIC into domestic law. The final stage of this paper considers how this proposition may inform action around Australian Indigenous Peoples' aspirations regarding the domestic application of FPIC and whether these actions may act as a guide for achieving broader aspirations.

Conclusion

This paper contains two propositions that may inform further actions. The first is that the ICMM's equivocation around FPIC is ultimately unsupportable and contradictory. The second is that the position of EP III regarding the (non) application of FPIC to Designated Countries is not maintainable in the long-term. If these propositions are correct then a situation could develop where a transnational ICMM member engaged in a large scale mineral development project that required considerable project finance would, through choice or necessity, be obliged to satisfy FPIC.

By contrast a smaller less scrupulous operator, prepared merely to satisfy the requirements of local law could secure monopoly rights over a prospective location, even if only with the

[26]Equator Principles Association, *Designated Countries*, website: http://www.equator-principles.com/index.php/designated-countries accessed on 28 May 2014.

intent to on-sell those rights at some later stage. This scenario would put the ICMM member at a considerable disadvantage, or at best facing significantly increased costs. The problem for the ICMM member is that they do not have a 'level playing field.' By exploiting the divergence between domestic law and international expectation the less scrupulous operator has secured an advantage over the ICMM member. The only option for the ICMM member in this scenario is to level the playing field by eliminating the divergence. In this case the ICMM member should actively seek to have the international standard (FPIC), by which they are expected to abide, incorporated into domestic law. The *action* then suggested by this discussion is to encourage ICMM members (and other similar large producers) to adopt this analysis. This, rather surprising, result suggests also that greater attention to the expectations raised by CSR obligations may provide a more (or at least further) fertile ground for advancing Australian Indigenous political aspirations than the traditional legislative focus. This attention to CSR would ideally be not simply reactive, such as seizing the opportunities created by instruments such as the Position Statement, but a much more pro-active intervention into similar CSR inspired COP in the context of other industry sectors.