POLICY BRIEF

Strengthening FPIC for Inclusive Mining Decisions

Domesticating the free, prior and informed consent (FPIC) requirements in land and mining legal frameworks in South Africa

This policy brief calls for the enactment of Interim Protection of Informal Land Rights Act of 1996 (IPILRA) regulations for obtaining consent, emphasising the importance of meaningful consultation with the relevant and affected parties in South Africa's extractive sector. The brief stems from the Rallying Efforts to Accelerate Progress in Africa project, implemented by Corruption Watch in collaboration with Transparency International and aimed at addressing social inequalities in mining host communities in South Africa. Between 2021 and 2022 Corruption Watch conducted 7 665 online surveys through Vodacom, to assess community consultation and involvement in decision-making throughout the mining lifecycle. The results revealed that half of the 7 665 respondents were unaware of or did not participate in consultation meetings with local mining companies, often due to a lack of awareness or because meetings were held only with community leaders, excluding broader community input.

1. Introduction

The development of mineral resources is widely viewed as a key stimulator for the economic success of many countries, as it promises to reduce poverty, socio-economic inequality, unemployment, and other social ills – especially in remote rural areas.

As such, it may prove impossible to engage in a conversation about mineral resource extraction in a South African context without the topics of mineral beneficiation, wealth gap, communal land rights, tenure security, and consultation and consent emerging as key enablers of a stable extractive sector. Contemporary discourse on this matter in South Africa gravitates toward understanding the driving forces behind the deepening socio-economic inequalities and growing wealth gap between the mining-affected communities (i.e., land rights holders) that suffer the impacts of extractive activities, and the capitalist owners of the means of production in the sector (i.e., mine companies or 'investors') that continually become enriched. While concerted efforts are being made by the State and non-state actors to devise the equitable and sustainable approach catering for all the diverging interests involved, there seems to be very little to no improvement on the ground.

There are still many cases of mining-affected communities being displaced, their properties bulldozed to the ground and their land dispossessed, all these to make way for mining operations.

Maditlhokwa Community *Click or scan QR code to watch now.*

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Many factors account for this unfortunate state of affairs, and these include the State's perceived pro-investor, anti-poor attitude as well as a general lack of both political will and deliberate intention to protect the rights and interests of mining-affected communities. Commentators on this topic and related matters find substantial fault with the country's inadequate land and mining policy framework and its exclusionary effect on the affected communities. For instance, in 2018 the South African Human Rights Commission (SAHRC) released a damning report on the social, environmental, and economic impacts of mining industry developments on vulnerable communities across the country.[1] Similarly, non-profit organisations such as Corruption Watch and others have also documented substantial evidence of the extractive sector's exclusionary and impoverishing impacts on affected communities.[2]

Against this background, this brief considers a number of amendments that prove necessary to strengthen the country's land and mining policies which promote the active involvement of rural communities in the decision-making processes. In particular, the focus is on exposing the gaps in these policies and how they cultivate the ground for the perceived exclusionary patterns in decision-making around mining. In the next section, the brief provides a snapshot context of indigenous and/or customary land rights and mining activities in South Africa, as to how this relationship has been over the years but more so recently. The brief then proceeds to highlight the different levels of engagement (consultation and consent) required by two different pieces of legislation (IPILRA and the Mineral and Petroleum Resources Development Act of 2002, or MPRDA).[3] It is in this section where the concept of free, prior, and informed consent (FPIC) is discussed. Lastly, the brief will make recommendations on how the much-needed consent regulations should look, once developed. The brief deliberately omits a historical background section for this has been adequately dealt with elsewhere.[4]

Newcastle Community

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2. Customary land rights and mining activities

An issue of contemporary significance is the effect of extractive activities on customary communities, among other socio-economic impacts. The relevance of this issue is the special characteristic attributed to customary and/or indigenous communities, who are viewed internationally as different and therefore subject to differentiated treatment based on their unique culture, identity, and political and social systems. In other words, each community must be engaged in the manner that is uniquely tailored in line with the special character of such a community.

1. SAHRC National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa (2018) at 16.
2. See at least these four reports: Corruption Watch Beneficial Ownership Transparency in South Africa's Mining Sector (2022); The Extractives Industries Transparency Initiative and South Africa (2022); Improving Transparency & Accountability in the Flow of Benefits to Mining Communities (2021); Legal Review: Distribution of Mining Equity to Community Trust (2021).
3. Mineral and Petroleum Resources Development Act 28 of 2002 and Interim Protection of Informal Land Rights Act 31 of 1996.
4. See among others A Claassens & B Boyle 'A promise betrayed: Policies and practice renew the rural dispossession of land, rights and prospects' (2015) Policy Brief 124, Governance of Africa's Resources Programme; A Claassens & B Cousins (eds) Land, Power and Custom: Controversies generated by South Africa's Communal Land Rights Act (2013); W Beinart, R Kingwill & G Capps (eds) Land, law and the Chiefs in Rural South Africa (2021); W Wilcomb & H Smith 'Customary communities as 'peoples' and their customary tenure as 'culture': What we can do with the Endorois decision' (2011) African Human Rights Law Journal 422, 425; G Mudimu 'Meaningful consultations and informal land rights' Corruption Watch (2024).

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Indigenous people require land for their subsistence and they often have a special spiritual connection with their customarily and/or communally owned and occupied territories.[5] It is for this reason that various instruments have been devised to give these communities rights over land and the right to actively participate in decision-making processes about issues which may affect them and their relationship with their communal land – especially the extractive developments that often require vast tracts of land and relocation of people, homesteads, graves, and livestock. At international level, these instruments include the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) of 2007, which gave the issues of customary communities sufficient coverage in international law. The UNDRIP's most relevant provision for present purposes is its undeterred affirmation that State and non-state actors should obtain free, prior, and informed consent from customary/indigenous communities about development projects that could potentially affect their lands and livelihoods. The notable strength of this instrument is its retrospective effect that provides that "indigenous peoples have a right to redress for lands that have been taken or used in the past without their consent."[6] At a country level, the relevant instrument is the IPILRA which protects tenure security of people who occupy and use land under communal and/or customary land tenure. This legislation was introduced in 1996 as a 'holding measure or safety net' for vulnerable land use and occupation right holders while a comprehensive law was to be developed. Despite this, the IPILRA is still a temporary measure subjected to annual renewal – almost three decades later – and this on its own is one problem that continues to threaten tenure security of millions of South Africans living in the former homelands where most mining operations take place.

Similarly, the courts have made sufficient efforts to protect customary land rights of vulnerable communities whenever approached to do that. This is clearly demonstrable from several groundbreaking judgments about consultation, consent, and related matters that have been delivered over the past decade. In a paper prepared for Corruption Watch, Claassens provides a detailed discussion of these judgments, especially those dealing with existing flaws in processes of consultation and consent with rural land rights holders in customary areas.[7] These include the Bengwenyama[8] decision that found that the consultation process is often treated as a mere tick-box exercise by mining companies and how this fails to meet the MPRDA requirements. The courts in Maledu[9] and Baleni,[10] dealt with the interface between the IPILRA and MPRDA in relation to the requirement of consent.[11] The court in Ingonyama Trust[12] dealt with leases that holders of IPILRA and customary rights were forced to enter into in KwaZulu-Natal. These judgments resemble the truest picture of the relationship between mining-affected communities and mining companies in South Africa, especially the latter decision for its important implications pertaining to consent, and from whom and how it must be obtained in respect of the three categories of IPILRA rights (i.e., occupation, use, and access). Interestingly, two of these groundbreaking judgments are of the Constitutional Court which override earlier judgments by the lower courts that had undermined the rights of the holders of informal land rights in customary communities.[13]

5. E/CN.4/Sub.2/2001/21, Prevention of Discrimination and Protection of Indigenous Peoples and Minorities, Indigenous Peoples and their Relationship to Land, Final working paper prepared by the Special Rapporteur, Mrs. Erica-Irene A. Daes, Commission on Human Rights, 11 June 2001 at 9.
6. Article 28 of UNDRIP.
7. A Claassens 'The Maledu judgment, IPILRA, and the MPRDA: The implications for policies that elevate elite interests over the Constitution' Corruption Watch (2024) at 11.
8. Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others 2011 (4) SA 113 (CC).
9. Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another 2019 (2) SA 1 (CC).
10. Baleni and Others v Minister of Mineral Resources and Others 2019 (2) SA 453 (GP).
11. Noting that where communities fall under the protection of the IPLIRA, their consent is required in order for mining operations to commence.
12. Council for the Advancement of the South African Constitution and Others v Ingonyama Trust and Others 2022 (1) SA 251 (KZP)
13. See note 8 & 9 above.

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3. Consent (IPILRA) vs Consultation (MPRDA): An Overview

The legal framework in South Africa provides for two contrasting levels of engagement with customary communities in the decision-making processes for mining developments. While the communities are rightly insisting that prior consent be sought first before any development affecting them may proceed, the government and mining companies insist, notwithstanding the judgments of the Constitutional Court, that it is simply consultation that is needed. Consent and consultation are different in substance, for the former requires much more beyond the latter by affording the affected community the dignity of choice. Consultation is not an alternative to consent, but it constitutes 'the most crucial component of a consent process'. The seemingly tricky part is that both these concepts are statutorily provided, in often overlapping contexts. The first instrument, the MPRDA, requires a simple consultation with the interested and affected parties that stand to be affected by the proposed mining operations. The MPRDA was not enacted to address tenure security and does not mention consent, but consultation. It requires the applicant (i.e. mining company) to engage in consultation as a precursor step in the application for a prospecting and mining right. This position remains the same regardless of the stages of a process – whether before, during, or after extraction. The Department of Mineral Resources and Energy (DMRE) developed the Consultation Guideline[14] with a view to clarify the process that must be followed by applicants. The Consultation Guideline is not without concerns, notably that it is not binding, it does not refer to compliance with IPILRA or its consent requirement, it lacks adequate specificity, and still falls short of addressing the serious gaps in MPRDA consultation-related provisions, especially section 10 thereof.[15] Furthermore, the Consultation Guideline does not assist in any way in addressing the existing concerns, such as lack of accountability measures for mining companies when they fail to comply with the SLPs, or insufficient timeframes within which notice is furnished and be acted upon (i.e. 30 days; 21 days) – timeframes which are clearly not realistic considering the internal stakeholder engagement and consultation that must take place within the affected communities before they can make a collective decision to give or withhold consent. Given the piecemeal state of the Consultation Guideline, academic commentators and NPOs such as MACUA have called for incorporation of the FPIC principle in the IPILRA and MPRDA principal legislation alternatively, regulations alike.

The second instrument, the IPILRA, regulates tenure security of people who occupy and use land under customary law by requiring that consent be sought if any of their informal rights to or interests in land may be deprived. Thus, IPILRA renders consent a precondition to any development or mining operations. It is therefore clear that these two statutes provide for two different and somewhat conflicting standards, one mere *consultation* and the other *consent*. This tension is still very much alive with no definitive answers, except for the groundbreaking judgments mentioned earlier. The two statues are pulling in different directions, serving different interests.

Matshansundu Community
(between Eshowe and Melmorth)

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14. DMRE Guideline for Consultation with Communities and Interested and Affected Parties, developed in terms of Sections 10(1)(b), 16(4)(b), 22(4)(b), 27(5)(b) and 39 of the MPRDA. I must indicate that I was involved in the process that led to the development of this Guideline, i.e., was invited to make a presentation on the draft guidelines at the DMRE head office in Pretoria, and all my recommendations were adopted.
15. s10 MPRDA.

However, the prior consent requirement under the IPILRA seems to be dominating the binary when one looks at the recent judgments of the Constitutional Court on the matter. Even so, there remains a desperate need for regulations on prior consent to be developed, to supplement IPILRA by clarifying how consent should be obtained and from whom it should be sought. This is not a complicated task at all, considering that in 1998 the Department of Land Affairs developed a procedural model and measures intended to ensure that consent of those affected is properly obtained in instances where developments interfered with their land rights in a manner that is depriving.[16] This procedural model was intended to later feed into the IPILRA regulations, but were unfortunately neglected in 1999 following the appointment of a new Minister. That said, there is a historical point of reference from which lessons can be drawn in the process of developing the IPILRA regulations.

In the next section, the brief turns to deal with the FPIC.

4. The Incorporation of the FPIC

The FPIC is a very dynamic yet critical mechanism protecting customary communities by ensuring their right to have a say in decision-making processes concerning their lands, territories, and resources. The principle entails four interrelated aspects which must always be observed to reach an agreement between the involved parties on any intended project affecting communities. Through this mechanism, community consent must be obtained in a manner that is 'free' from any form of coercion, undue pressure, or intimidation from anyone, including the State and private entities. This is particularly relevant in South Africa where traditional and community leaders are often coerced, intimidated, and manipulated to sign consent-granting forms to give consent for developments in customary areas as if they are a community and not merely members or leaders thereof. As held in Sustaining the Wild Coast decision, traditional authorities do not stand on behalf of communities.[17] The opposite is true as well, for chiefs often collude voluntarily with the State and mining companies to sign mining deals without community participation and consent.[18] It is also important for the consent to be sought and obtained 'prior' to any development on communal land, and that sufficient time is given for adequate consideration by an affected community. As indicated above, the existing Consultation Guideline does not provide sufficient time for a community to consider and apply its mind on the matter. Timeframes are incredibly short for careful consideration and wide consultation to take place both within and with the community. Access to all the relevant information about the proposed developments is also a critical aspect for the community to make an 'informed' choice i.e. to give or deny consent. For this to happen, the extractive company must fully disclose its planned activities in the manner and language acceptable to the affected community. The last element is 'consent' itself which requires the community to have a choice over whether and how their development path should proceed.

Mohlohlo Community, Limpopo

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16. A Claassens 'The Maledu judgement, IPILRA, and the MPRDA: The implications for policies that elevate elite interests over the Constitution' Corruption Watch (2024) at 6.
17. See Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others 2022 (6) SA (ECMk) at para 92 where the High Court held that "the top-down approach whereby kings or monarchs were consulted on the basis that they spoke for all their subjects is a thing of the past which finds no space in a constitutional democracy. There is no law, and none was pointed to, authorising traditional authorities to represent their communities in consultations."
18. S Mnwana 'Chiefs, land and distributive struggles on the platinum belt – South Africa' in M Buthelezi, D Skosana & B Vale Traditional Leaders in a Democracy: Resources, respect and resistance (2018) at 128-152.

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Certain consideration that would likely encourage communities to give their consent is if, for instance, there is a clear description of benefits and development opportunities that the project brings for the community. If these are absent, communities often resort to violent means by protesting and boycotting the operations as their voice is not being heard.

Despite its benefits and suitability, the FPIC has some blind spots which may render its implementation a bit challenging if not carefully considered in the regulations. For instance, based on my own observation, one of the most noticeable sticking points is the power imbalance that is involved. The mining companies obviously enjoy abundance of economic and financial resources that enable them access to the best technical and legal support against poor, remote, and marginalised communities that cannot afford and leverage the same kind of services. The negative implication of this persisting power imbalance is that it erodes equal bargaining powers, thus rendering the negotiations vulnerable to being dominated by and skewed on the side of mining companies.[19] The other sticking points include the lack of clarity as to the exact role of the DMRE and the extent to which that involvement goes. Over the years, the DMRE has abdicated its regulatory role and failed to hold errant mining companies accountable, another reason why the industry practice has deteriorated to the levels it has. It is suggested that the State will have to actively fulfil its regulatory and monitoring role in the process and leave discussions around mining affected community and the mining company. If negotiations do not result in the company obtaining consent (because the community had said 'no'), that should be the end of it and the company may have to withdraw from the project. This is a challenging position for the industry, unfortunately.

The other point as identified by Tomlinson involves the question of who has the necessary standing and legitimacy to give or withhold the consent on behalf of and in the name of a particular indigenous community.[20] The FPIC regulations will have to carefully clarify this question and provide guidance for the industry. While communities must be able to decide through their legitimate representative structures – and in accordance with their customary law decision-making processes – at times it turns out that there is an internal disagreement among community members or between the community and its traditional leadership on whether to give or refuse consent – quite an established trend in South Africa.[21] The regulations must be alive to these issues and one way of addressing them is by putting into place some sort of threshold for consent i.e. whether it should be the consent of the majority of community members or the whole community, depending on what that particular community views as its best practice for collective decision-making. These questions may be hard to answer in the abstract because they are often context-specific. Failing to be wary of these issues and others in developing the IPILRA regulations may have a polarising effect on the relationship between companies, communities, the State, and other actors; and may also paralyse decision-making and escalate external conflicts over lands and resources.

5. Recommendations

1. The government, through the Department of Rural Development and Land Reform, should recommit to upholding consent requirement from those directly affected by extractive operations (as opposed to their traditional or community leaders), and such consent should resemble FPIC principle and standards. One way of ensuring this is to fast-track the development of regulations to IPILRA and rendering IPILRA a permanent legislation as opposed to being subjected to annual renewal by the relevant Minister.

19. The mining company is responsible for paying for the legal representative of the community, and it is the community that gets to choose their representative, but this does not allay the power imbalance effect that taints the equal bargaining scale between the two.
20. Tomlinson K "Indigenous rights and extractive resource projects: negotiations over the policy and implementation of FPIC" (2019) 23(5) The International Journal of Human Rights 880- 897.
21. J Ubink & J Pickering 'The mine, the community, and the chief-mining governance and community representation in conditions of legal pluralism' (2024) 56(2) Legal Pluralism and Critical Social Analysis at 245.

2. The much-needed regulations to IPILRA must draw reference from international best practice (soft law) instruments such as IFC Performance Standards and its Guidance Note 5. This instrument has meaningful lessons for South Africa on matters of land acquisition, involuntary resettlement and displacement, livelihood restoration, and adequate compensation, tenure security, consultation, and consent. It is believed that once developed in this manner, the regulations would likely address the alarming rate of displacements, impoverishment, land dispossessions, and tenure insecurity, among other concerns.

3. The relevant MPRDA regulations and consultation guidelines must be revised to align with international best practice once adapted to the anticipated IPILRA regulations. In so doing, this will promote the spirit, purport, and object of the fundamental rights and interest of mining communities. One key area of improvement in the MPRDA regulations and guidelines is the short timeframes for consultation processes. Practical insights suggest that the currently prescribed timeframes are not adequate and sufficient for a thorough and meaningful consultation to occur within the communities themselves, and between the State, companies, and communities. It is recommended that at least a 60-day period of consultation should be introduced as opposed to the current 30-day. The proposed timeframe should be applicable during pre- and post-mining consultation processes to address the strongly-held concerns of communities around what happens not only before the operations, but after them as well (i.e. mine rehabilitation, livelihood restorations etc).

4. There is a need for a stronger collaboration between the DMRE and the Department of Rural Development and Land Reform. As the regulator, the DMRE must, as a matter of urgency, ensure mineral right applicants comply with other legislation such as IPILRA and its requirements as a condition of license. It is hoped that this is likely to address the widespread tendency among mining companies that MPRDA is the only legislation that matters and should be complied with. The existence of a mineral right does not itself extinguish the rights mining communities have on surface land. It is strongly recommended that during their term, the Portfolio Committees on Land and Mineral Resources in the seventh Parliament should engage directly with the concerned departments in a joint platform, to interrogate challenges experienced by mineral right applicants – this can be highlighted in a report to be used in framing future discussions with other stakeholders.

5. What is required is a co-ordinated and strategic approach to extractives regulation that rallies the efforts and strengths of State actors, the private sector (beyond mining companies), civil society, and mining affected communities – embodying the principle of unity in diversity. Civil society groups (CSGs)[22] have a role to play in exerting pressure on Parliament and the DMRE to develop, champion, and implement these important reforms to the IPILRA and MPRDA, particularly the speedy development and adoption of IPILRA regulations. The private sector, largely through industry bodies, should also ensure adherence to sound principles of doing business that factor in the cost to the environment and communities when considering mining projects. Similarly, State actors have the duty to capacitate and equip mining communities with the knowledge of their rights. CSGs may, subject to their limited resources, assist through co-ordinated civic education, strategic advocacy, and outreach programmes. A community that is equipped with knowledge of its rights and is supported in the exercise of its rights, is unlikely to permit an errant mining company to violate, dispossess, and disenfranchise it.

22. CBOs, activists, civil society formations both formal and informal.

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