

# Final Statement

Complaint submitted by

Project Sepik and Jubilee Australia Research Centre on behalf of  
Sepik River communities

against

PanAust Limited

3 October 2023

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## Executive summary

1. In December 2021, the Australian National Contact Point for Responsible Business Conduct (**AusNCP**) received a complaint from Project Sepik and Jubilee Australia Research Centre (**the notifiers**) representing communities in Papua New Guinea, regarding the activities of PanAust Ltd (**the enterprise**). The complaint alleges that, through its subsidiary in Papua New Guinea, the enterprise's proposals to develop the 'Sepik Development Project', a mine and related infrastructure project, do not comply with the OECD Guidelines for Multinational Enterprises (**OECD Guidelines**).
2. The AusNCP conducted an initial assessment, accepted the complaint and offered the parties 'good offices' (consistent with the OECD Guidelines) to endeavour to resolve the issues. The enterprise declined to engage in the good offices and so the matter went to examination under the AusNCP's Procedures. Between December 2022 and May 2023, both parties provided submissions and materials, and an AusNCP independent examiner examined these materials and the relevant OECD Guidelines.
3. The independent examiner considers most of the enterprise's actions identified in the complaint were not inconsistent with the OECD Guidelines. That is explained in the statement, which is summarised below.
  - 3.1. It appears from the material available to the AusNCP that extensive consultation and engagement in relation to the Sepik Development Project is underway with communities in Papua New Guinea (see paragraph 12 below). This is being conducted by the enterprise and Papua New Guinea Government agencies, and those agencies are currently considering the enterprise's proposals, potential community impacts, and whether they should proceed (see paragraphs 58 and 60 below). That process is subject to Papua New Guinea law and court oversight (see paragraph 78 below). Many factual matters, which are contested by the parties in this AusNCP complaint, will be determined by the Papua New Guinea processes (see paragraphs 45 and 94 below). It would be inappropriate for those to be subject to determinations in this statement (see paragraphs 57 - 58 below).
  - 3.2. It is, however, apparent that the proposed project entails significant impacts on Indigenous groups, such that those groups' free, prior, informed consent (**FPIC**) will be necessary for the enterprise to proceed with the project (see paragraph 97 below). FPIC will be needed from those groups, which *could* include some of the communities identified by the notifiers, and FPIC is not simply evidenced or achieved by a government's grant of all necessary permits or licences (see paragraph 99 below). It is not evident that the position of the notifiers and those they represent in relation to the project means FPIC cannot exist for the project (see paragraph 97 below). The enterprise acknowledges it will need to obtain FPIC from some communities, because of the expected impacts, for the project to proceed (see paragraph 88 below).
  - 3.3. The OECD Guidelines address FPIC and stakeholder engagement. There is overlap as well as an important distinction between these two concepts. The expectations regarding FPIC are more extensive, but they apply only to those Indigenous groups which will be significantly impacted by a project, not to every stakeholder (see paragraph 97 below). The notifiers are stakeholders in the enterprise's project. Civil society and non-government organisations

which have substantiated interests in a matter, have an important role in the implementation of the OECD Guidelines (see paragraph 52 below).

- 3.4. The presence, or absence, of FPIC cannot be determined simply by one party's assertion that they are Indigenous and what their opinion is. Instead, it depends on: (a) an objective understanding of the physical impacts; (b) a subjective understanding of the cultural impacts referenced to the relevant Indigenous culture and credibly substantiated within that; (c) consideration of whether either of those types of impacts are of such significance that FPIC would be required; and (d) the relevant group's views after appropriate engagement (see paragraphs 88-89 below).
  - 3.5. It has not been possible through this examination to determine the extent of impact on the parties involved in this complaint, and whether their FPIC is required (see paragraphs 90 and 102 below). Equally, the fact of an enterprise's inconsistencies with some expectations of the OECD Guidelines about stakeholder engagement does not preclude FPIC from ever being achieved (see paragraph 92 below). The enterprise's Stakeholder Engagement Plan addressed where FPIC is not able to be obtained, and a role for compensation. Offering compensation as an alternative to obtaining FPIC would be inconsistent with the OECD Guidelines (see paragraph 99 below).
  - 3.6. Various aspects of the complaint raised by the notifiers were not substantiated in the examination including: the security presence at meetings prevented effective engagement (see paragraph 109 below), the enterprise's inadequately addressing broader Sepik River communities in its engagement (see paragraph 95 below) and the possible use of 'marine tailings' (see paragraph 62.2 below).
4. The independent examiner makes the following recommendations.
    - 4.1. The notifiers and the enterprise should: (a) review their interaction in light of the matters covered in this statement and consider the role and use of meaningful engagement as expected by the OECD Guidelines and detailed in various OECD due diligence guidance documents; and (b) consider and make use of the 2022 toolkit of the Voluntary Principles Initiative if dealing with any issues about the role and use of security personnel (see paragraph 119 below).
    - 4.2. The enterprise should review the totality of community engagement in relation to the project - by the Government of Papua New Guinea and itself - and ensure that, for any Indigenous group from which FPIC is required, that engagement occurs in a language easily understood by that group (see paragraph 96 below). This may mean more languages than Tok Pisin or English.
    - 4.3. The enterprise should review its internal company procedures regarding FPIC to ensure consistency with international standards, particularly that compensation is not understood as an alternative to FPIC (see paragraph 99 below).
    - 4.4. The enterprise's future stakeholder engagement in relation to the project should: (a) include the notifiers (see paragraphs 53 and 110 below), (b) consider the views from the Haus Tambaran they represent (see paragraph 104 below), (c) disseminate the dam break analysis (see paragraph 73 below), and (d) address the full lifetime of the dam and any

facilities which are expected to continue even after any mine has finished (see paragraph 61 below).

- 4.5. The notifiers should consider using the grievance mechanism established by the enterprise to raise their concerns (see paragraph 108 below).
5. This statement has been prepared with reference to the 2011 version of the OECD Guidelines and the 2022 version of the AusNCP complaint procedures. The recommendations are also consistent with the 2023 version of the OECD Guidelines. This statement is published by the AusNCP and is available on the AusNCP website at [www.ausncp.gov.au](http://www.ausncp.gov.au).

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# Background

## Parties and process

6. On 9 December 2021, the notifiers lodged a complaint with the AusNCP about a proposed mining and energy development in Papua New Guinea called the 'Sepik Development Project' (the **complaint**). The project is being developed by the enterprise through a subsidiary company called Frieda River Limited.
7. The enterprise explained to the AusNCP that its management team is responsible for the day-to-day management of Frieda River Limited. This means, for most purposes of the OECD Guidelines, the enterprise is responsible for and synonymous with Frieda River Limited.<sup>1</sup> The remainder of this statement will use 'the enterprise' to refer to both entities, unless specifically indicated otherwise.
8. The notifiers are two non-government organisations: an association incorporated in Papua New Guinea (called Project Sepik Inc) and an Australian-based, non-profit, research centre (Jubilee Australia Research Centre). The notifiers described that they 'jointly manage the "Save the Sepik" campaign, which aims to protect the Sepik River from the impacts of the Frieda River Mine' which is part of the Sepik Development Project. The notifiers explained the complaint was 'on behalf of 2,638 Indigenous residents of 64 villages along the Sepik River' (which the complaint identified as 'the complainants').
9. In summary, the complaint alleges the enterprise's actions have breached the OECD Guidelines chapters about disclosure, human rights and the environment. The notifiers alleged that the enterprise:
  - 9.1. inadequately addressed the environmental risks and likely impacts of the project on the Sepik River and its environment;
  - 9.2. has failed to uphold the complainants' right as affected Indigenous communities to give FPIC to the Project; and
  - 9.3. has not adequately disclosed information and project risks to stakeholders.
10. The enterprise is a private company registered in Australia. Its management is based in Australia and Laos, and its ultimate ownership (since 2015) is the Chinese state-owned entity Guangdong Rising Holding Group Co Ltd. The enterprise is a mining company and identifies its 'flagship project' as the Phu Kham copper-gold mine in Laos, which has been operating since 2007.
  - 10.1. The enterprise, in response to the complaint, says its 'track record, and focus on sustainability and socio economic development, is best evidenced through the consistent recognition and awards... received in Laos and internationally'. The enterprise informed the AusNCP of its deep commitment to sustainability, its employees, the environment and the communities in which it works and that it 'is applying the same industry-leading

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<sup>1</sup> Organisation for Economic Cooperation and Development (OECD) (2011), *OECD Guidelines for Multinational Enterprises*, OECD Publishing, Ch II [4], [5], <http://dx.doi.org/10.1787/9789264115415-en>. (OECD Guidelines)

sustainability and ESG standards to the Sepik Development Project, consistent with the OECD Guidelines’.

10.2. The enterprise explained the following, in its engagement with the AusNCP.

*In addition to the OECD Guidelines for Multinational Enterprises, PanAust acts in accordance with the following international standards, amongst others:*

- (1) the International Finance Corporation Performance Standards on Environmental and Social Sustainability;*
- (2) the Equator Principles;*
- (3) the Minerals Council of Australia’s Enduring Value – Australian Minerals Industry Framework for Sustainable Development;*
- (4) the International Cyanide Management Code, although FRL does not propose to use cyanide in the Sepik Development Project;*
- (5) the Global Reporting Initiative Standards; and*
- (6) Voluntary Principles on Security and Human Rights. PanAust is a member of the Voluntary Principles Initiative.*

...

*The preceding obligations and standards have been operationalised and incorporated by PanAust ... All PanAust personnel are required to comply with these standards, and related procedures, and over and above the requirement to comply with the applicable legislative regime in Papua New Guinea. These standards are subject to periodic review and enforcement in the event of breach.<sup>2</sup>*

11. The enterprise and the notifiers were known to each other before the AusNCP complaint. Regarding the Sepik Development Project, the notifiers explained they shared their concerns and the views of the community through publication of two reports (*The River is Not Ours* (2019) and *The Sukundimi Walks Before Me* (2021)) and have spoken to media outlets about these. In May 2020, Project Sepik published the ‘Supreme Sukundimi Declaration’, stated to represent approximately 78,000 people across 28 Haus Tambarans (traditional meeting and workshop buildings) in villages along the Sepik River, which calls for a total ban on the mine. Representatives from Project Sepik and Jubilee Australia Research Centre and PanAust met in October 2019 and had further contact after the complaint was lodged with the AusNCP. Neither party identified that this contact, since the complaint was lodged with the AusNCP, as relevant to determining this complaint.

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<sup>2</sup> Similar approaches are evident in PanAust’s public *Sustainability Policy*, which says ‘As a minimum, we will meet applicable legal requirements in our host countries, the PanAust Sustainability Standards and other Company commitments such as the Mineral Council of Australia’s Enduring Value Framework, the International Council on Mining and Metals Sustainable Development Framework:’ PanAust, (November 2021), *Sustainability Policy*, accessed 12 June 2023, <https://panaust.com.au/wp-content/uploads/2022/02/PanAust-Sustainability-Policy-English-Nov21.pdf>.

## Proposed project

12. The Sepik Development Project is a proposed copper-gold mine and infrastructure, including hydroelectric power production, in Papua New Guinea. The following summary is drawn from the parties' submissions and materials, and there seems consensus on these points.

12.1. The Sepik River is over 1000km long, in north-western Papua New Guinea. People and communities live along the Sepik River, which is central to the physical and cultural existence of many of them. The communities directly along the river comprise over 170,000 people, including different cultural groups and language groups. Tok Pisin is the most widely spoken language in Papua New Guinea and spoken by most (but not all) people in these areas.

12.2. There has been interest in developing mineral resources in the area since the 1970s, with proposals by various entities. The enterprise became involved in 2014, when it acquired rights from a previous company.

12.3. Relevant to this complaint, in 2018 the enterprise submitted an Environmental Impact Statement (EIS) to the relevant Papua New Guinea Government agency called the Conservation and Environment Protection Authority (CEPA). The EIS is over 15,000 pages. It was made publicly available by CEPA in August 2019, and public comments invited. Since that time, the enterprise has also made the entire EIS available online (on the website of Frieda River Limited), including with an executive summary in Tok Pisin.<sup>3</sup> The EIS covers many aspects, and shows the enterprise is aware of Sepik River communities.

*The residents of the Sepik River corridor are highly dependent on the river for subsistence, income, recreation and cultural activity. The Sepik River is also used as a primary water source for many of the villages with access to its banks. As such, communities throughout the Sepik River corridor have significant interest in the health and water quality of the river, which is vital to their well-being.<sup>4</sup>*

12.4. The notifiers arranged for experts and academics to review the EIS. They produced 10 reports, raising various concerns or questions of the EIS, which the parties referred to as 'the expert reports'. The notifiers submitted these reports to CEPA to consider in its analysis and decision about the EIS.

12.5. The officially designated period for public review of the EIS in Papua New Guinea expired in October 2020. However, CEPA was engaging with communities about the EIS and the enterprise's proposals up to November 2022, explaining that consultations had been extended because of the impacts of COVID.

12.6. Considerable community engagement and consultation about the project has occurred over recent years, undertaken both by the enterprise and Papua New Guinea Government. This is ongoing and is significant in the determination of this complaint. Relevant details are addressed later in this statement.

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<sup>3</sup> The EIS is publicly available at Frieda River, (2018) *Environmental Impact Statement*, accessed 4 June 2023, <https://www.friedariver.com/eis/> (Frieda River EIS).

<sup>4</sup> Frieda River EIS, above n 3, *Appendix 13: Social Impact Assessment*, p viii.

- 12.7. In 2020, various United Nations (UN) officials raised concerns about the project, in written inquiries to the enterprise and the Governments of Australia, China, and Papua New Guinea. Responses were provided from the enterprise and the Australian and Chinese Governments.<sup>5</sup>
- 12.8. The construction and operation is proposed to involve the relocation and resettlement of four villages if the project proceeds.
13. Annex E of this statement contains maps of the relevant area,<sup>6</sup> extracted from the public EIS, showing the location and extent of the proposed developments. The EIS describes the proposed project as having five components, with relevant locations referenced to the maps in Annex E of this statement.
- 13.1. Frieda Copper-Gold Project - establishing and operating an open-pit mine and facilities to produce copper-gold concentrate (Map 2: 'Open pit', 'Spoil dump', 'Quarry/borrow area's, 'Waste dump's, 'Explosives magazine', 'conveyor'), which is expected to operate for over 30 years. An earlier proposal involved the mined product being transported in barges down the Sepik River to the coast. That proposal was revised in 2018 because of concerns arising through stakeholder engagement, including with Sepik River communities. The proposal is now for mined product to be transported along a pipe to the northern coast, rather than on the Sepik River.
- 13.2. Frieda River Hydroelectric Project - the construction and operation of a hydroelectric dam power facility in the Frieda and Nena river valleys downstream of the Frieda Copper-Gold Project (Map 2: 'Integrated storage facility reservoir' and 'embankment', 'powerhouse'). This is intended to generate energy for the Frieda Copper-Gold Project and other users of electricity in the area. The hydroelectric facility is planned to have an operating life over 100 years, preceded by a 5-year construction period.
- 13.3. Integrated Storage Facility – (abbreviated in many documents to 'ISF') is the dam for the Frieda River Hydroelectric Project, which is also proposed to be used for (underwater) storage of waste rock and tailings from the mine. The enterprise says 'using underwater storage of tailings and waste rock ... limits downstream sedimentation and mitigates the potential for the submerged materials to generate acid'.
- 13.4. Sepik Power Grid - the construction and operation of a new 370km electricity transmission line from the Frieda Hydro Facility to the port city of Vanimo on the northern coast of Papua New Guinea (Map 1: 'Northern transmission line'). The enterprise says this 'will produce up to 270 megawatts of excess power per year, [so] the transmission line is also an opportunity to distribute the excess power to users in Papua New Guinea and in Indonesia'.
- 13.5. Sepik Infrastructure Project - comprising the infrastructure needed for the operation of the Frieda Copper-Gold Project and the Frieda Hydro Facility, but also said to be providing infrastructure available for public use. According to the enterprise, this includes upgrading hundreds of kilometres of existing public road, constructing 110 kilometres of new public

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<sup>5</sup> These documents are all publicly available through: Office of the United Nations High Commissioner for Human Rights (OHCHR), (n.d.), *Communication report and Search*, <https://spcommreports.ohchr.org/Tmsearch/TMDocuments>, accessed 27 May 2023. Relevant extracts and observations are contained later in this statement.

<sup>6</sup> See Annex E to this statement, paragraph 132.

road, mining access roads, upgrading Green River Airport and Vanimo Ocean Port (Map 1 and Map 2: various locations). There will be freight being barged up and downstream along the Sepik River (Map 1: 'Barge corridor') for the first three years of the six to seven year construction phase, before roads being completed between relevant locations.

14. From the parties' material and descriptions, the notifiers represent people from many communities on the Sepik River, the closest of which is about 50 km from the proposed facilities described above. The notifiers' concerns, and those they represent, are that if the project proceeds:

- 14.1. Transport barges will use the Sepik River during construction;

- 14.2. Increased sediment from construction will raise the riverbed, causing flooding and damaging villages and gardens (the notifiers say 'during construction of the mine, washoff from the construction waste heap will ... deposit... sediment and raising riverbed levels by as much as three metres in parts of the Frieda River. ... lead[ing] to overbank flow and deposit sediment on the floodplain, rendering villages on the Frieda River floodplain uninhabitable and their gardens unproductive for some time');

- 14.3. The river will have increased toxins from the mine's operation and long into the future; and

- 14.4. The potential failure of the dam would have catastrophic impact.

15. The enterprise says the project 'is expected to provide regional benefits to Papua New Guinea in the form of employment, major infrastructure improvements and an investment of capital. In so doing, the Sepik Development Project supports Papua New Guinea's Development Strategic Plan 2010 – 2030, a core part of which is the creation of a road corridor, parallel to the Indonesian border, from Vanimo to the south coast of Papua New Guinea. This will open up new development, trade, industries and farming opportunities along the corridor and the interior of Papua New Guinea'. In 2018, the Minister for Foreign Affairs and Trade of Papua New Guinea was reported as stating that 'nation-building projects will enhance APEC economic partnerships including the Frieda River Gold & Copper Mine Project [and] will also boost bilateral and regional trade and investment that will directly change the lives of our people forever'.

16. The enterprise informed the AusNCP, in responding to the complaint, that 'no on-the-ground exploration, mining or development activities are currently being undertaken, nor will be undertaken for a number of years'. The enterprise's 'Statement of Facts' provided to the AusNCP, and thus shared with the notifiers, stated the following.

*... PanAust does not claim to have obtained FPIC from landholders at this time (as required by PanAust's own policies, and consistent with the OECD Guidelines). ... However, PanAust has been undertaking stakeholder engagement with the ultimate aim of satisfying all legislative and policy requirements, including the requirement to seek FPIC from relevant affected landholders – before development commences.*

17. Much of this complaint concerns the enterprise's engagement with communities about the project. The notifiers described the enterprise's engagement as essentially to inform people of what will occur and that at no time has there been a consultation effort that is genuinely seeking to obtain consent. In the EIS, the enterprise provided detailed and public documentation of the stakeholder engagement which has been undertaken. A summary of that, relevant to this complaint, is provided

in Annex E of this statement.<sup>7</sup> The public EIS describes many aspects in that community engagement, which appear to be issues which have been raised in this complaint, with examples including the following, as reported in in the enterprise’s EIS.

*Potential for the failure of ISF [dam] embankment wall. There is scepticism around the ability to build a structure that will be strong enough to hold the force and weight of the water.*

*Can the Project guarantee that 'waste' will not leak through the walls of the dam and into the groundwater.*

*Who will look after the ISF once the mine is closed? Assumptions were that once the company and government has made its money, they will not care about looking after the dam and it would deteriorate.<sup>8</sup>*

## Origins of AusNCP complaint

18. The notifiers described their consultation leading to lodging the complaint with the AusNCP. They informed the AusNCP of the following.

18.1. In 2019 and 2020, the notifiers visited ‘25 villages along the Sepik River and participated in dialogue about the Frieda River Mine. [and that] The heads of 28 Haus Tambarans, representing 28 villages, signed The Supreme Sukundimi Declaration,<sup>9</sup> which articulates their village’s opposition to the Frieda River Mine’.

18.2. In early 2021, the notifiers held ‘a week-long follow up workshop in Korogu village, with an estimated 120 clan and spiritual leaders representing 49 clans along the Sepik River’ which ‘discussed the option of the community bringing a complaint to the OECD National Contact Point. Following discussions, the assembled clan leaders agreed on the outline of the complaint’.

18.3. In late 2021, the notifiers visited villages along the Sepik River ‘to discuss the proposed complaint to the OECD NCP and [to provide] a summary of the complaint’. The notifiers invited ‘interested villagers over 18 to sign a form if they wished to be represented in the complaint [and that] 2,638 residents from 64 villages along the river agreed to be represented by Project Sepik and Jubilee Australia in the complaint’.

This process is discussed later in this statement, in addressing the enterprise’s criticisms of the notifiers.

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<sup>7</sup> See Annex E to this statement, Map 3 and paragraphs 134 – 137.

<sup>8</sup> Frieda River, EIS, above n 3, *Chapter 4 Stakeholder Engagement*, pp 4 – 35.

<sup>9</sup> Save the Sepik, 29 May 2020, *Supreme Sukundimi Declaration*, accessed 3 June 2023, <http://savethesepik.org/the-supreme-sukundimi-declaration/>. This is expressed as the decision of ‘a coalition of Chiefs from selected Haus Tambarans.’

## AusNCP proceedings

19. The complaint was managed by AusNCP independent examiners, in accordance with the AusNCP procedures.<sup>10</sup> The complaint was assessed against the six mandatory criteria in the AusNCP procedures, after both parties had the opportunity to provide submissions. The AusNCP's initial assessment was published in July 2022 and, in summary, provided as follows.

19.1. The admissibility criteria were sufficiently met for the purposes of Initial Assessment. There were, however, two aspects requiring further attention, to inform the potential and scope of any good offices. These concerned the notifier's position and proposals within and outside the NCP process, and the process regarding the EIS underway in Papua New Guinea.

19.2. The AusNCP invited both parties to provide the other with further detail, to inform how any good offices might proceed. The enterprise was encouraged to address whether, and how, the concerns raised by the complainants are being addressed consistently with the OECD Guidelines. The notifiers were encouraged to confirm that their complainants wish to genuinely engage in the procedures with a view to finding a solution to the issues raised in accordance with the OECD Guidelines.

20. In accordance with the initial assessment, the parties were offered good offices to be conducted by an AusNCP independent examiner. That commenced with a preparation stage, to determine whether the parties could agree a framework for their engagement. The notifiers provided confirmation to the AusNCP that the complainants wished to genuinely engage in the procedures with a view to finding a solution to the issues raised in accordance with the OECD Guidelines. The enterprise declined to participate in the good offices.

21. As the enterprise did not proceed with good offices, the complaint progressed to examination under the AusNCP procedures. This was conducted by a different AusNCP examiner to the one responsible for the good offices, and no information from the good offices stage formed part of the examination to ensure the confidentiality of that stage.

## Examination

22. The process for examination was agreed with the parties in November 2022. This process was developed in response to both parties wanting prompt consideration and that the proceedings not to extend with numerous rounds of submissions and responses. The process for the examination, as agreed with the parties, was this.

22.1. The parties would first provide the examiner any material they consider relevant to the complaint (and the enterprise's actions' consistency with the OECD Guidelines), in addition to the complaint/material provided for initial assessment. The AusNCP would share these materials with the other party.

22.2. After having the opportunity to review these materials, the parties would then provide the examiner with submissions about the complaint and whether the enterprise's actions were consistent with the OECD Guidelines. Wherever relevant, these submissions should refer to

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<sup>10</sup> Australian National Contact Point (AusNCP), *Complaint Procedures*, AusNCP, Australian Government, 2022, <https://ausncp.gov.au/index.php/complaints/ausncp-procedures>. (AusNCP Procedures)

the materials that have previously been provided. These submissions would also be provided to the other party.

- 22.3. If there is any public information which the examiner considers relevant, and which neither party has raised, this material will be brought to the attention of both parties.
23. The enterprise raised concerns about confidentiality of material provided as part of the examination. The examiner worked with both parties, and each made commitments regarding the information shared through the AusNCP process. They agreed that information shared (and which is not already public, separate to the AusNCP process) will be kept confidential, including following the conclusion of the complaint unless otherwise agreed by the parties.<sup>11</sup>
24. The dates for the parties' provision of material, and subsequent submissions, were set with the agreement of the parties as to what was feasible for them. These dates were subsequently extended, at the request of (and agreement by) the parties. This also included time and arrangements for translation of recordings from public meetings which had occurred in Papua New Guinea unconnected to the AusNCP complaint process, to be prepared and available to both parties, so they could raise anything from those transcripts they considered relevant for the AusNCP examination. The parties' materials were provided and exchanged in December 2022, and their submissions in March 2023.
25. The enterprise then sent further submissions, contrary to the earlier agreed procedure.<sup>12</sup> The examiner did not consider these but, to ensure procedural fairness, gave both parties the opportunity for further submissions. Parts of the examiner's communication are extracted,<sup>13</sup> for transparency, because each party provided further submissions but also raised concerns with the examiner's process. The enterprise contended this had inappropriately reframed some issues; and the notifiers said the earlier submissions should have been staggered so each party responded to the other and queried the examiner's non-reliance on anything contested in the experts' reports. These concerns have been carefully considered and are addressed in the reasoning below. Fundamentally, however, the examiner is satisfied that each party had sufficient opportunity to provide the materials/information they considered relevant (to whether the enterprise's actions were consistent with the OECD Guidelines), review the other sides' material, and then make submissions.
26. In total, the independent examiner received hundreds of documents in materials and, in submissions - the notifiers provided over 40 pages (and 25,000 words) and the enterprise over 130 pages (and 70,000 words). The parties' submissions included numerous assertions of relevant events and their characterisation of what the OECD Guidelines required. These have all been read and considered carefully, but not each is necessary to be reflected in this Final Statement. The examiner thanks the parties for their detailed materials and submissions.

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<sup>11</sup> Consistent with the AusNCP Procedures, *Ibid*, [10.2]-[10.3].

<sup>12</sup> The enterprise asserted it had been denied procedural fairness (addressed below in paragraph 48) and matters in submissions had not been substantiated (addressed below in paragraphs 29-31).

<sup>13</sup> See Annex E to this statement, paragraph 140.

27. Each party sought fundamentally opposite outcomes as the conclusion of the examination, and included some assumptions that were neither evident on the materials provided to the AusNCP nor a requirement of the OECD Guidelines. The notifiers' submission was this.

*[T]he Independent Examiner ... recommend that PanAust and its subsidiaries:*

*(a) pause all further Project development*

*(b) engage in good faith consultations, consistently with FPIC principles at an international standard, including by ensuring:*

*i) all potentially affected communities, including the Complainants, are consulted,*

*ii) participation of an independent third party, and*

*iii) provision of detailed information about potential project risks, including provision of the dam break analysis, to all potentially affected communities, including the Complainants.*

*(c) commit to discontinuing its current plans for the Project if FPIC is not forthcoming from all affected communities, including the Complainants; and*

*(d) take all possible measures to ensure that the affected communities do not face reprisals, including from company employees, contractors or government officials, for filing this complaint.*

28. PanAust's submission was this.

*[T]he Independent Examiner make the following determinations in the final statement:*

*(1) Dismiss the Complaint.*

*(2) Make no findings that PanAust has failed to satisfy the OECD Guidelines.*

*(3) Make no recommendations of conduct and/or activities PanAust should engage in to satisfy the OECD Guidelines.*

*(4) Make observations regarding the Notifiers' conduct in providing deliberately inaccurate information to the NCP, and maintaining a media campaign which includes making unsubstantiated allegations of criminal conduct, clearly misinforming the public and encouraging violence.*

*(5) Make observations that the Notifiers' conduct is not consistent with a genuine engagement in these procedures.*

*(6) Make such further and other observations and recommendations concerning the Notifiers' conduct the Independent Examiner deems fit.*

29. The parties' material and submissions involve fundamental disagreements. In many places, this means there are no agreed/accepted facts, nor an easy and objective way of ascertaining these. The examiner has taken the following approach in reviewing these materials and making decisions.

29.1. The parties had the opportunity to provide all the material they considered relevant (to whether the enterprise's actions were consistent with the OECD Guidelines), to examine the material which the other side provided, and then make submissions.

- 29.2. Where facts or events are not contested between the parties, or can be objectively verified, these are simply included as part of this statement.
- 29.3. There is no formal ‘onus’ arrangement under the AusNCP Procedures. Where either party has raised an issue, provided credible material, and the other side has not significantly addressed that (beyond denials or rejections), this informed the examiner’s analysis and conclusions on that issue. Equally, where a party has simply made assertions but provided no material substantiating those, that was given less weight.
30. The AusNCP examination process, particularly here where it is determined ‘on the papers’, must be cautious in making determinations on matters in another country where:
- 30.1. There are government assessment procedures currently underway in that country considering some of the issues contested between the parties to the NCP complaint;
- 30.2. The factual basis on which an AusNCP determination would rest is not objectively established and is contested between the parties; and
- 30.3. The relevant government authorities will be making decisions in near future, including about environmental arrangements and community agreements, before any development might proceed.
31. For some of these contested aspects, the processes in Papua New Guinea are much better suited to making factual determinations. Relevant stakeholders there – the notifiers and others - have the opportunity to be directly involved; it will be in locations and languages more likely accessible to them; and the decision-makers can more comprehensively make findings on disputed matters.
32. Throughout the AusNCP process, the enterprise contested the notifiers’ role and representativeness. The enterprise questioned this at initial assessment, it was a stated reason the enterprise did not participate in good offices, and the enterprise maintained this position during the examination stage. The enterprise’s concerns included that ‘the identity of the Complainants [2,638 Indigenous residents of 64 villages along the Sepik River] remains unknown... and the Notifiers do not have a mandate from the Complainants to support the remedy requested, namely, a commitment to obtain FPIC of affected communities’.
33. The notifiers’ consultation process (see paragraph 18 above) had already been explained to the enterprise. As part of their materials for the examination, the notifiers provided further documents detailing their engagement process. These materials (with the exception of individual’s names and signatures) were shared, through the AusNCP process, with the enterprise. The enterprise was also informed that an AusNCP examiner had considered the materials (including the signature pages) and was satisfied the notifiers had an appropriate interest to raise the complaint and seek the enterprise’s engagement.
34. PanAust declined to engage in good offices. That is its choice because good offices under the OECD Guidelines only proceed with the agreement of both parties. But, by not engaging in the opportunity to understand and engage on issues of concern to the enterprise, that reduces the weight of the enterprise’s subsequent argument that some issues are improperly evidenced or substantiated. Good offices provided the opportunity for the enterprise to engage and better understand any

aspects it considered ambiguous or unclear in the notifiers' concerns. The enterprise cannot now dismiss every ambiguity by asserting that the notifiers have insufficiently established these.

35. A draft of this final statement was provided, for comment, to the AusNCP's Governance and Advisory Board and then to the parties. All comments were considered by the examiner, in finalising this statement, with the decision remaining the examiner's responsibility.

## Application of the OECD Guidelines

### Relevant OECD Guidelines

36. The OECD Guidelines have been updated during the course of this complaint. The updated Guidelines became public on 8 June 2023,<sup>14</sup> after the parties' submissions had been made and when this final statement was being completed. This complaint and examination has been handled and assessed in accordance with the 2011 version of the OECD Guidelines.

37. The complaint has three bases, that the enterprise:

37.1. has not sufficiently addressed foreseeable environment impacts (breaching OECD Guidelines ch VI) in its proposals and neither has it provided sufficient public information,

37.2. has not respected human rights (breaching ch IV) in acting inconsistently with FPIC requirements, and

37.3. provided insufficient disclosure of material matters (breaching ch III), particularly regarding information about the dam's planning and assessment.

38. The enterprise referenced the 2021 AusNCP statement in *ANZ – Friends of the Earth*<sup>15</sup> as informing the scope of the AusNCP's examination here and suggested that whether an enterprise acted in accordance with the OECD Guidelines 'is measured against the OECD Guidelines alone'.<sup>16</sup> There is a significant difference between these cases. The ANZ case was examining expectations about climate change which, as that statement detailed, were limited in the OECD Guidelines' text.<sup>17</sup> The case here is examining expectations about human rights, which are clearly and extensively identified in the OECD Guidelines' text. Most relevant here, that enterprises 'should avoid infringing on the human

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<sup>14</sup> Organisation for Economic Cooperation and Development (OECD) (2023) *Guidelines for Multinational Enterprises on Responsible Business Conduct*, OECD Publishing, <https://doi.org/10.1787/81f92357-en> (OECD Guidelines, 2023 Edition).

<sup>15</sup> AusNCP, *Final Statement, Complaint by Friends of the Earth, Egan, Dodds and Simons regarding ANZ Group*, Australian Government, 2021, [https://ausncp.gov.au/sites/default/files/2021-12/AusNCP\\_Final\\_Statement\\_Friends\\_of\\_Earth\\_0.pdf](https://ausncp.gov.au/sites/default/files/2021-12/AusNCP_Final_Statement_Friends_of_Earth_0.pdf) (ANZ Statement).

<sup>16</sup> PanAust submitted that 'Further, "[w]hile OECD and other publications can assist in understanding the Guidelines and their application", whether an enterprise acted in accordance with the OECD Guidelines is measured against the Guidelines alone', and referenced [40] of the ANZ statement, *Ibid*, but that statement did not use the word 'alone'.

<sup>17</sup> ANZ statement, above n 14, [36]-[41], [64], [74]-[75]. In 2023, the OECD Guidelines were updated and include more expectations regarding climate change, for example, Preface, [1], Ch VI, Commentaries, [33], [37], [38], [66], [70], [76]-[80].

rights of others ... [and] avoid causing or contributing to adverse human rights impacts'.<sup>18</sup> To understand what the OECD Guidelines encompass in terms like 'human rights', 'infringing' or 'impacts' necessarily and appropriately involves reference to other documents from the OECD and other bodies.

39. Most relevant, in understanding the OECD Guidelines' requirements here (and thus determining the consistency of the enterprise's actions), is the OECD's 2017 *Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractives Sector*<sup>19</sup> (OECD extractives guidance). That contains an annexure specifically addressing 'Engaging with indigenous peoples'. The OECD also issued a 2018 *Due Diligence Guidance for Responsible Business Conduct*<sup>20</sup> (OECD RBC guidance). Relevant parts of each are discussed further below.

## OECD Guidelines 'specific instance' process

40. This complaint concerns an Australian registered company, ultimately owned by a Chinese state-owned entity, and its development proposals in Papua New Guinea. The allegations in this complaint were raised by UN officials in their communication with the governments of all three countries, and responses received from two of those governments. It is important to distinguish between this examination process and governmental responsibilities.
41. The OECD Guidelines are recommendations made by the governments of adhering countries to multinational enterprises operating in or from their territories.<sup>21</sup> Those adhering governments have recently agreed to a set of principles and policy recommendations articulating how they can support and enable responsible business conduct and establish or maintain an appropriate legal and regulatory framework that implements and effectively enforces the areas covered by the OECD Guidelines and other standards of responsible business conduct.<sup>22</sup> The OECD has also published *Guiding Principles for Durable Extractive Contracts* which reference the OECD Guidelines, and note that 'durable extractive contracts balance the legitimate interests of host governments, investors, and communities, with due account taken, where relevant, of the specific rights of affected indigenous peoples recognised under applicable international and/or national law'.<sup>23</sup>
42. This significance, or use, of the OECD Guidelines by governments is not the subject of this examination and statement. Rather, the aspect of the OECD Guidelines relevant here is the 'specific instance' process, known in the AusNCP procedures as the complaint process.<sup>24</sup> This is one function

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<sup>18</sup> OECD Guidelines, above n 1, Ch IV, [1], [2].

<sup>19</sup> OECD, *OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractives Sector*, (2017), <http://mneguidelines.oecd.org/stakeholder-engagement-extractive-industries.htm>. (OECD extractives guidance)

<sup>20</sup> OECD, *OECD Due Diligence Guidance for Responsible Business Conduct*, (2018), <https://www.oecd.org/investment/due-diligence-guidance-for-responsible-business-conduct.htm> (OECD RBC guidance).

<sup>21</sup> The OECD Guidelines apply to all 38 OECD countries and 13 non-OECD countries that have adhered to the Declaration. A current list of adherents is available at: OECD, *OECD Declaration and Decisions on International Investment and Multinational Enterprises*, accessed 18 April 2023, <https://www.oecd.org/investment/mne/oecddeclarationanddecisions.htm> (accessed 18 April 2023).

<sup>22</sup> See Annex E of this statement, paragraphs 138-139.

<sup>23</sup> OECD, *Guiding Principles for Durable Extractive Contracts* (2020), OECD Development Centre, [https://www.oecd.org/dev/Guiding\\_Principles\\_for\\_durable\\_extractive\\_contracts.pdf](https://www.oecd.org/dev/Guiding_Principles_for_durable_extractive_contracts.pdf). Quote from principle II; reference to the OECD Guidelines in commentary [24].

<sup>24</sup> AusNCP Procedures, above n 10, [1.1].

of an NCP, under the OECD Guidelines: ‘to contribute to the resolution of issues that arise relating to implementation of the OECD Guidelines’.<sup>25</sup> Where a complaint has not resolved through good offices, the NCP must make a public statement which describes the issues raised and make recommendations (where appropriate) on the implementation of the OECD Guidelines and why agreement could not be reached.<sup>26</sup> Under the AusNCP Procedures, the final statement in cases such as this, can also include determinations on whether the company’s actions were consistent with the OECD Guidelines.<sup>27</sup>

43. The AusNCP examination and statement is not making determinations about compliance with another country’s law. Nor is it critiquing any government’s regulatory practices. The focus is on the conduct of companies, but the OECD Guidelines’ expectations of a company can only be determined in the context within which that company is operating. A company must ensure it conducts appropriate human rights due diligence in line with the OECD Guidelines. In some instances, this might occur through complying with relevant legal or governmental processes, however in other circumstances it may involve going beyond those domestic standards in order to comply with the Guidelines and associated international requirements. Where resourcing or other factors mean local populations are more vulnerable to human rights impacts, inevitably more is required of companies to ensure their operations respect human rights in that context. Companies are expected to ensure consistency with the OECD Guidelines (and its incorporation of relevant international standards) even if that is not mandatory under local law.<sup>28</sup>
44. In response to the UN inquiries about the project, the Governments of Australia and China both referred to the importance of businesses respecting human rights in their operations.<sup>29</sup> Public statements by government and companies are useful and significant, but not determinative. In particular, the OECD Guidelines emphasise the importance of engagement and understanding *of the affected parties*.<sup>30</sup> Thus, affected parties’ information and positions should be considered directly, and not solely through the interpretation and explanation of government officers or company reports. That is a necessary part of the AusNCP examination process.
45. Local law and processes can, however, require or provide various actions which can contribute to a company acting consistently with what is expected by the OECD Guidelines. Relevant here, the enterprise explained the following in relation to future engagement and requirements in Papua New Guinea, some of which are addressed later in this statement.

*The following activities remain to be completed before the Sepik Development Project obtains all the required permits to commence operations. Each of these activities are in the process of being progressed (this list is not exhaustive):*

*(1) The granting of an Environmental Permit for the Sepik Development Project.*

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<sup>25</sup> OECD Guidelines, above n 1, I C.

<sup>26</sup> OECD Guidelines, above n 1, I C 3(d).

<sup>27</sup> AusNCP Procedures, above n 10, [6.1].

<sup>28</sup> For example, OECD Guidelines, above n 1, Ch 1 [2]; OECD Extractives Guidance, above n 18, 14.

<sup>29</sup> The correspondence is available at: OHCHR, *Communication and Report Search*, above n 5.

<sup>30</sup> OECD Guidelines, above n1, ch II, A [14]; Commentary [2], [8], [25]; OECD RBC guidance, above n 19, pp 18 – 19.

(2) *The negotiation of a Mining Development Contract with the State which is supported by an act of Parliament with respect to the Sepik Development Project.*

(3) *The convening (by the Minister) and successful completion of a Development Forum.*

(4) *The signing of a Memorandum of Agreement (Project Agreement Document).*

(5) *The negotiation of a Compensation Agreement with landowners of lease areas.*

## Determinations on consistency with OECD Guidelines

### Preliminary issues

46. Three preliminary issues require attention before examining whether the enterprise's actions were consistent with the Guidelines: (a) good faith, (b) procedural fairness and due process, and (c) distinguishing 'rights holders' and 'stakeholders' under the OECD Guidelines.

47. Both parties alleged the other has not acted in good faith. The examiner considered these allegations carefully and concluded neither party's engagement with the AusNCP during the examination prevented the effective operation of the AusNCP processes.<sup>31</sup> The examiner makes the following observations, which may assist the parties and also broader understanding and application of 'good faith' and the OECD Guidelines.

47.1. Good faith expectations, in relation to a specific instance, focus on interaction *within the NCP procedure*. It is not about what a party may be doing elsewhere separate to their engagement in the NCP process. There are also good faith aspects about stakeholder engagement, which are addressed later in this statement.

47.2. Good faith, in a specific instance, involves: 'responding in a timely fashion, maintaining confidentiality where appropriate, refraining from misrepresenting the process and from threatening or taking reprisals against parties involved in the procedure, and genuinely engaging in the procedures with a view to finding a solution to the issues raised in accordance with the OECD Guidelines'.<sup>32</sup> In this examination, each parties' engagement with the AusNCP was within the scope of their entitlements under the OECD Guidelines.

47.3. The fact an NCP complaint is underway does not mean the parties involved cannot engage with others (including government, third parties, or the public) about issues in the complaint, provided that occurs within the above parameters of 'good faith'.<sup>33</sup>

47.4. If parties are engaged in an NCP 'good offices', then good faith obligations will usually be more extensive during that stage. That depends on the particular scope and modalities agreed by

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<sup>31</sup> OECD Guidelines, above n 1, [21]: where a party 'is unwilling to engage or to participate in good faith' the NCP's statement can 'make recommendations as appropriate.' The examiner does not consider recommendations necessary on this aspect.

<sup>32</sup> OECD Guidelines, above n 1, Commentary [21].

<sup>33</sup> OECD, *Guide for National Contact Points on Confidentiality and Campaigning when handling Specific Instances* (2020), pp 6 -11, <https://mneguidelines.oecd.org/Guide-for-NCPs-on-Confidentiality-and-campaigning-when-handling-specific-instances.pdf>.

the parties and, as the enterprise did not wish to engage in good offices, this is inapplicable here.

48. The enterprise claimed it had been deprived procedural fairness and due process because the human rights aspect of the complaint made against it kept changing, in the notifiers' submissions and also in the examiner's framing of the issues and request for submissions. These concerns are overstated. Many of the instances which the enterprise identified were simply paraphrasing or summarising an earlier point. The fundamental issue arises from the parties' differences about the operation of FPIC. However, to ensure the enterprise has no concern about unfair process, the issues here will be as expressed in the notifiers' complaint in December 2021. That was provided to the enterprise and the enterprise had opportunity to provide any relevant material and submissions as to whether it had acted consistently with the OECD Guidelines. The notifiers' case is this.

*PanAust, through its involvement in the Frieda River Project, has breached the OECD Guidelines ... By failing to respect the human rights of the Affected Communities, specifically their right to give Free, Prior and Informed Consent to development that affects them ...*

*PanAust, through its involvement in the Frieda River Project, has not undertaken meaningful consultations and has not obtained free, prior, and informed consent from the complainant landowners and project affected communities ...*

*The Complainants self-identify as Indigenous peoples of the Sepik River region. ... The Project has the potential to significantly impact the lands and waterways over which the Complainants hold customary ownership rights, as well as sacred sites that form part of their cultural heritage.*

*... PanAust has held a number of awareness campaigns with Sepik river communities. ... These awareness campaigns were not genuinely consultative, and were not conducted to an international standard of good faith consultations with the object of obtaining FPIC ...*

*Indeed, many Sepik communities feel that, given their longstanding opposition to the project, that even participating in such awareness campaigns could be construed as giving consent for something that they strongly oppose. Feeling that their previous concerns had not been heard and that awareness campaigns were therefore tokenistic, several communities refused to participate in the more recent ones. In some cases, communities blocked the company and its party from entry.*

*...[N]one of the above consultations represented good faith consultations with the object of obtaining FPIC free, prior and informed consent, but were more awareness tours which did not address the concerns of the communities or provide the critical information relevant to them, including the dam break analysis.*

49. The notifiers, in their material and submissions, provided further detail of these assertions. But the basic question, which both parties understood and addressed, is: what do the OECD Guidelines require of FPIC in these circumstances and has that been met?
50. The last preliminary issue concerns the distinction between stakeholders and rights holders. These terms are explained in the OECD extractives and RBC guidance documents.

*[S]takeholders are persons or groups who are or could be directly or indirectly affected by a project or activity. From a due diligence perspective priority should be given to those stakeholders for whom the risk of adverse impacts is greatest or the potential adverse impact is severe or could become irremediable.<sup>34</sup>*

*Stakeholders are persons or groups who have interests that could be affected by an enterprise's activities. Examples of stakeholders include workers, workers' representatives, trade unions (including Global Unions) community members, civil society organisations, investors and professional industry and trade associations.<sup>35</sup>*

*All people have human rights and thus all stakeholders as individuals are "rights-holders". However, not all stakeholders will have their human rights put at risk or impacted by an extractive project or its associated activities. It is important to identify human rights risks related to extractive activities among stakeholders and recognise such stakeholders as "rights-holders" in the context of engagement activities. For example, individuals living in a community whose only local water source may be polluted by an extractive operation may be rights-holders. ... In addition to individual human rights, certain groups such as indigenous and tribal peoples can have collective rights and consequently the group itself may be considered a rights-holder. Identifying rights-holders is the first step to ensure that human rights are recognised and respected.<sup>36</sup>*

*Meaningful engagement with relevant stakeholders is important throughout the due diligence process. In particular, when the enterprise may cause or contribute to ...an adverse impact, engagement with impacted or potentially impacted stakeholders and rightsholders will be important. For example, depending on the nature of the adverse impact being addressed, this could include participating in and sharing results of on-site assessments, developing risk mitigation measures, ongoing monitoring and designing of grievance mechanisms.<sup>37</sup>*

51. The enterprise's Stakeholder Engagement Plan identifies that project stakeholders include 'downstream communities resident along or reliant upon the Sepik River'. The notifiers represent many persons in those communities.
52. There is an important role for civil society and non government organisations in the implementation of the OECD Guidelines, and their engagement with companies about that. This is seen in the OECD due diligence guidance documents extracted above. It is reinforced in the OECD's guidance on initial assessments,<sup>38</sup> in many NCP decisions, and also in the IFC's 2007 publication about stakeholder engagement.<sup>39</sup> The initial assessment decided the notifiers had suitable interest to raise their issues. The notifiers are stakeholders in the enterprise's project. Whether they are also a rights holder (and

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<sup>34</sup> OECD extractives guidance, above n 19, 19.

<sup>35</sup> OECD RBC guidance, above n 19, 18.

<sup>36</sup> OECD extractives guidance, above n 19, 19, 20.

<sup>37</sup> OECD extractives guidance, above n 19, 19.

<sup>38</sup> OECD, *Guide for National Contact Points in the Initial Assessment of Specific Instances*, (2019), p. 6 'Parties Interest', <https://mneguidelines.oecd.org/Guide-for-National-Contact-Points-on-the-Initial-Assessment-of-Specific-Instances.pdf>.

<sup>39</sup> IFC, 'Stakeholder Engagement', International Finance Corporation, Washington, 2007 accessed 13 Jun 2023. [www.ifc.org/stakeholderengagement](http://www.ifc.org/stakeholderengagement) (accessed 13 June 2023).

what rights they may have, relevant to this complaint) is addressed later, but they are undeniably a stakeholder.

53. The OECD Guidelines expect companies to engage with stakeholders. Chapter 2 says companies should engage with relevant stakeholders to provide meaningful opportunities for their views to be taken into account regarding planning and decision-making for activities that might significantly impact local communities.<sup>40</sup> The notifiers did not specifically assert that the enterprise acted inconsistently with this expectation, but the notifiers did contest the enterprise's engagement as insufficient as part of the complaints concerning human rights, environment and disclosure. Stakeholder engagement is considered there.

## Environment

54. This examination deals with the environmental claims first because this involves questions of dam risk and information, which are relevant to some aspects of the other complaints regarding human rights and disclosure.
55. The notifiers' claims about inconsistency with the OECD Guidelines' environmental expectations allege insufficient information (the enterprise not responding to Project Sepik's scientific reports, and not providing further information which the enterprise holds) and inadequate avoidance/mitigation of impacts (arrangements for future of dam, potential 'marine tailings'). Framing these within the OECD Guidelines, there are essentially three aspects to the environmental complaint, being whether the enterprise:
- 55.1. has adequately assessed and addressed relevant impacts, given the OECD Guidelines' expectation that companies should assess and address foreseeable environmental, health and safety-related impacts associated with their processes to avoiding or, when unavoidable, mitigating these;<sup>41</sup>
  - 55.2. meets the OECD Guidelines' expectation of the 'precautionary principle', in not using the lack of full scientific certainty as a reason for postponing cost-effective measures to prevent such damage;<sup>42</sup> and
  - 55.3. has produced proposals consistent with the OECD Guidelines' expectation that companies maintain contingency plans for preventing, mitigating, and controlling serious environmental and health damage from their operations, including accidents and emergencies.<sup>43</sup>
56. Another relevant aspect of the OECD Guidelines here is the provision of information to people potentially affected by a company's plans or operations.

*Enterprises should ... Taking into account concerns about cost, business confidentiality, and the protection of intellectual property rights: a) provide the public ... with adequate,*

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<sup>40</sup> OECD Guidelines, above n 1, ch 2, [14], commentary [25]: Effective stakeholder engagement is characterised by two-way communication, depends on the good faith of the participants on both sides, and is also responsive and on-going; OECD RBC Guidance, above n 17, 49.

<sup>41</sup> OECD Guidelines, above n 1, Ch VI, [3].

<sup>42</sup> OECD Guidelines, above n 1, Ch VI, [4].

<sup>43</sup> OECD Guidelines, above n 1, Ch VI, [5].

*measurable and verifiable (where applicable) and timely information on the potential environment, health and safety impacts of the activities of the enterprise... and b) engage in adequate and timely communication and consultation with the communities directly affected by the environmental, health and safety policies of the enterprise and by their implementation.<sup>44</sup>*

57. An AusNCP determination of most of the environmental and disclosure aspects of this complaint would require making some assessment or conclusions about the extent of risk and impact of dam failure. That would be necessary in order to determine whether the enterprise has ‘adequately’ assessed and addressed ‘foreseeable environmental and safety-related impacts’, has contingency planning for ‘serious environmental and health damage’, or the information provided is ‘adequate’ regarding potential impacts. The parties fundamentally disagree about the basics on which any such determination could be made.

57.1. The notifiers have submitted their ten expert Reports to CEPA to use in consideration of the enterprise’s EIS. The notifiers explained, in their April 2023 submission, that their aim in submitting the expert reports to the AusNCP ‘was not to bring a debate about specific scientific claims of the EIS... [but] rather, to show that the scientific integrity of the EIS has been challenged by experts in the field’. The notifiers raised peoples’ concerns about the dam, and referred international standards and practices regarding the dam.

57.2. The enterprise’s EIS, and explanation of this examination, contend they have provided extensive information on the dam risks and how the enterprise has properly addressed these.<sup>45</sup> This includes additional seismic studies, independent peer reviews by industry experts, and the dam break analysis, which the enterprise has provided to CEPA. The enterprise’s position is that not supplying ‘these documents to the public does not mean that PanAust has failed to assess the environmental risks’.

58. The independent examiner understands that the governmental and legal processes in Papua New Guinea will analyse and make decisions on the enterprise’s proposals about technical issues of dam planning, construction and use. It would be inappropriate for the AusNCP to make findings on these because: (1) they are still being determined through Papua New Guinea processes (see paragraphs 30–31 above), (2) the lack of agreed facts between the parties here, and (3) the notifiers’ explanation they did not provide the expert reports to the AusNCP to debate the EIS’ specific scientific claims. This AusNCP statement cannot, therefore, make any rational assessment of whether the enterprise’s proposals have sufficiently addressed all foreseeable impacts associated with the dam. There are, however, other aspects in the parties’ materials and submissions which do not depend on conclusions about dam risk. Observations on these are made under the three aspects of the complaint made by the notifiers.

#### *Assess and address foreseeable environmental, health, and safety-related impacts*

59. The ‘risk’ of dam failure is not something which the enterprise has avoided or hidden. As the notifiers acknowledge, the enterprise’s public EIS specifically addressed dam failure as a

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<sup>44</sup> Ibid, [2].

<sup>45</sup> The Frieda River EIS, above n 3, contains information regarding dam risks and mitigation in the Executive Summary, and also in Chapters 5. *Description of the Proposed Development*, 8. *Physical and Biological Impact Assessment*, 9. *Socio-Economic Impact Assessment*, 10. *Cumulative Impact Assessment* and 11. *Extreme Natural Hazards and Incidental Events*.

catastrophic environmental and social risk which could directly affect up to 30 villages and cause loss of life and substantial environmental degradation. The enterprise's EIS, with its details on dam construction and impact, shows how the company considers it has addressed those risks. The CEPA consultation meetings also cover dam risks, and indicated the government is obtaining its own independent analysis, in addition to that provided by the enterprise and the notifiers' ten expert reports.

60. Where there are significant impacts, which would be subject to a decision of a competent authority, the OECD Guidelines expect a company to prepare an appropriate environmental impact assessment.<sup>46</sup> The EIS provided by the enterprise is extensive. The EIS is being assessed by CEPA, who have the benefit of all the material provided by the enterprise *and also by the notifiers*, together with CEPA's own analysis. CEPA will assess and decide on the potential impacts and whether these have or can be sufficiently addressed. As explained earlier, there is no basis for the AusNCP to determine whether the enterprise's actions, in assessing and addressing foreseeable impacts from the proposed mine and infrastructure, have been inconsistent with OECD Guidelines ch VI, [3].
61. One aspect requiring additional attention is the planning and proposed arrangements regarding future use/control of any dam after any mining has finished. The relevant OECD Guideline's expectation concerns 'impacts associated with the processes *over their full life cycle* with a view to avoiding or, when unavoidable, mitigating them'.<sup>47</sup> If the Government of Papua New Guinea's assessment and decision-making about the dam does not address its full life cycle (which is currently proposed at 100 years), then additional action would be required of the enterprise to ensure compliance with the OECD Guidelines.
62. There are two aspects raised by the notifiers regarding environmental aspects which are not appropriate to determine.
- 62.1. The notifier's December 2021 complaint referred to a tentative listing for world heritage status. The notifiers provided no further information on this during the examination, after having had the opportunity to do so. The notifiers nevertheless maintained in their submissions that much of the infrastructure was in an area 'tentatively listed' for world heritage status. Given the lack of information, this is not an aspect which has been considered in this examination. The examiner does, however, bring both parties' attention to the position of the International Council of Mining and Metals (and its members) 'not to explore or mine in World Heritage Sites and continue to encourage other industries to do the same ...[and] to respect all protected areas, and design and operate any overlapping or adjacent mines in a manner which does not compromise their biodiversity value'.<sup>48</sup>
- 62.2. Potential marine tailings is not an issue relevant to this determination. The notifiers suggested there may be a future change where tailings would be piped to the coast for disposal at sea. The examination revealed no credible basis that will occur. The EIS, and all the enterprise's information publicly and to this examination, show the only proposal for tailings is underwater storage in the dam. The enterprise stated, in its response during the examination, that it

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<sup>46</sup> OECD Guidelines, above n 1, Ch VI, [3].

<sup>47</sup> OECD Guidelines, above n 1, Ch VI, [3] (emphasis added).

<sup>48</sup> International Council on Mining and Metals, *World Heritage Sites and Legally Designated Areas*, accessed 4 June 2023, <https://www.icmm.com/en-gb/our-work/environmental-resilience/nature/world-heritage-sites>.

would be 'technically infeasible to transport the volume of tailings and waste rock generated from the operation via pipeline to the coast'. If marine tailings were ever to be considered in future for this project, that would be a completely new proposal requiring new consultation. It is not an aspect which has been considered in this examination.

#### *Compliance with precautionary principle*

63. The 'precautionary principle' aspect has limited relevance to the matters raised in this complaint. The enterprise is correct in its submissions that a lack of scientific certainty does not, of itself, represent a violation of the precautionary principle, but rather means the enterprise must exercise precaution. The fact there may be different scientific conclusions is not the issue – the OECD Guidelines expectation is that the enterprise would 'not use the lack of full scientific certainty as a reason for postponing cost-effective measures to prevent or minimise such damage'.

64. A determination on this would require some clarity on 'measures to prevent or minimise such damage'. This returns to questions of dam construction and use, which (as explained above) this statement is not addressing. Accordingly, this statement makes no finding on whether the enterprise has acted inconsistently with OECD Guidelines ch VI, [4].

#### *Contingency planning for damage from operations, including accidents and emergencies*

65. This aspect is similar to the above (about assessing and addressing foreseeable impacts). The enterprise stated that it has developed the key elements of an emergency response plan for a partial or complete failure of the Storage Facility, and this is in compliance with applicable standards. Any determination of whether the enterprise's current proposals have fulfilled the OECD Guidelines' expectations on contingency planning would depend on factual conclusions on dam risk and impact. Relevant matters are being assessed by CEPA at this time, and its decision will inevitably consider what planning and proposals exist to address damage from operations, including accidents and emergencies. There is nothing to indicate the enterprise has acted inconsistently with OECD Guidelines ch VI, [5].

#### *Providing the public with adequate information on potential impacts*

66. The enterprise gave considerable detail about its engagement and awareness raising concerning the project. An earlier proposal, to barge mined product along the Sepik River, was revised in 2018 because of concerns about impacts which arose through stakeholder engagement. The revised plan involves the mined product being transported by pipe, far from the Sepik River. The enterprise explained, in its materials that this change, which reduced impacts, also reduced benefits and that is still an issue under debate.

*[T]he change in Sepik Development Project scope also resulted in a change to the benefits that the Sepik River communities would receive, which has caused further negative feedback being provided through the Joint Provincial Consultative Committee (JPCC). The issue of Sepik River community benefits from the Sepik Development Project remains a key issue for Sepik River community engagement.*

67. Separately to the enterprise's engagement, CEPA has also been conducting consultation and awareness meetings, to obtain peoples' views on the EIS and the enterprise's proposals, to inform the Government's decisions on the proposals. The parties arranged for the transcript of one of these

recent meetings to be translated and provided to the AusNCP. This enabled the examiner to better understand an example of CEPA's engagement about the enterprise's proposals. This is relevant because government activities and decisions can constitute some of the matters which the enterprise must ensure are present, according to OECD Guidelines expectations. Relevant here - the provision of information by CEPA must be considered as part of understanding what the enterprise may need to address regarding environment or disclosure.

68. The examiner made a summary of relevant aspects from the CEPA consultation meeting, while maintaining anonymity so as not to identify individuals or other sensitivities.<sup>49</sup> The meeting was at a village along the Sepik River, far from the proposed mine and dam. The notifiers' report of these consultation meetings has some inconsistencies with the transcript,<sup>50</sup> which cautions the examiner from relying on the notifiers' report. The transcript of the recording indicated those attending were addressed regarding concerns with the dam, that the notifiers will also be engaging with people, and also that CEPA was obtaining further independent analysis of the dam itself.
69. The parties disagree about further information and material which the enterprise holds regarding potential dam failure, and whether the OECD Guidelines expect that information should be provided or further published. This focussed on a report termed a 'dam break analysis'.
- 69.1. The notifiers contend the enterprise's not providing them with the dam break analysis 'represents a significant failure in environmental risk disclosure'.
- 69.2. The enterprise's submissions said the study modelled a theoretical dam break scenario to ensure that appropriate factors of safety have been incorporated into the design. The enterprise explained it is 'not an assessment of the likelihood or probability of a dam break [but] models what the impacts would be if a dam were to fail', to contribute to ongoing risk assessment and management. The enterprise indicated the dam break analysis had been provided to relevant Papua New Guinea Government officials, but contended there is no requirement for the enterprise to publish technical documents and nor is it industry practice to disclose them.
70. One reason the enterprise gave, for not providing the 'dam break analysis', is that it may not be understood by people. PanAust contended that publicly releasing this would be 'not helpful for community stakeholder consultation processes'.<sup>51</sup> The OECD Guidelines' commentary provides a different perspective.

*Information about the activities of enterprises ... and associated environmental impacts is an important vehicle for building confidence with the public. This ... is most effective when*

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<sup>49</sup> See Annex E to this statement, paragraph 153.

<sup>50</sup> Examples can be found in Annex E to this statement, paragraph 152.

<sup>51</sup> The Enterprise's submission stated: 'The release of a technical report on dam failure consequences, which was created for the purpose of determining design standards and does not include analysis of the likelihood of failure, would be likely to misinform readers of the actual risk. ... While technical documents, such as the dam break analysis, have been provided to the government in Papua New Guinea, they are not required to be provided to the public. ... This is because technical documents, such as a dam break analysis that does not assess the likelihood or probability of failure, are not helpful for community stakeholder consultation processes. However, the lack of a legal requirement to disclose technical documents does not negate the requirement to accurately disclose and seek feedback on project risks, including the likelihood and impact of a dam failure, which PanAust will continue to do during its stakeholder engagement'.

*information is provided in a transparent manner and when it encourages active consultation with stakeholders such as ... local communities and with the public-at-large so as to promote a climate of long-term trust and understanding on environmental issues of mutual interest. Reporting and communication are particularly appropriate where ... at risk environmental assets are at stake.*<sup>52</sup>

71. The dam break analysis was not provided by the enterprise as part of the examination. This precluded the examiner from making any decision whether its non-publication/provision was significant. The OECD Guidelines expect the enterprise to provide the public with adequate and verifiable information on potential safety impacts of its activities (Ch VI, [2], see paragraph 56 above). It may be the case that the enterprise has already provided information sufficient to address that expectation, and that the dam break analysis provides nothing further. The examiner is unable to make that determination.
72. What is evident however, from the enterprise's material, is that peoples' concerns about dam failure have existed and been known from when this project was first proposed. The recent disasters concerning tailings dams in Brazil – which the enterprise acknowledged and said have been addressed in their designs and planning here – understandably increases concerns. The CEPA consultations show these concerns remain. The dam is planned to remain long after the enterprise and its mine have finished. The enterprise's explanation was that it used the dam break analysis to inform planning and contribute to ongoing risk assessment and management. If that is the case, it is not apparent why that cannot be explained, and made available, to the relevant communities who could be affected by a dam break.
73. The OECD Guidelines specify that, in considering what information should be provided, this should take into account concerns about cost, business confidentiality, and the protection of intellectual property rights. The enterprise did not identify any of these three concerns against providing the dam break analysis. Regarding the dam-break analysis, therefore, it is not apparent that the enterprise's actions are consistent with OECD Guidelines ch VI, [2] which expects the enterprise to provide the public with adequate information on the potential environment and safety impacts of its activities. With consultations still continuing, the examiner encourages the enterprise to disclose the dam break analysis to relevant communities, with accompanying supplementary analysis if needed.
74. The notifiers asserted some significance to their understanding that some CEPA consultation meetings referred to neither the concerns in the notifiers expert reports nor the existence of a dam break analysis. That fact that CEPA may not have informed people of every report or analysis which exists regarding the dam does not, of itself, constitute a failure of the enterprise to meet the OECD Guidelines.

## Human rights

75. The notifiers submitted that 'FPIC is central to our allegation that the enterprise has not complied with Ch IV of the OECD Guidelines'. The notifiers' human rights complaint essentially frames two FPIC concerns:

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<sup>52</sup> OECD Guidelines, above n 1, commentary [65].

75.1. the enterprise has not obtained FPIC because of the manner in which it has engaged and its purported objectives of engagement, and

75.2. the enterprise needs to obtain FPIC because ‘of the profound impact that the tailings dam will have on Sepik River communities ... where the Project poses significant threats to human life and ecology (such as, where there will be a dam break)’ and adequate information has not been provided to the notifiers and the people they represent.

76. The parties made lengthy submissions detailing their understanding of FPIC and the situation here. Neither party contends that the enterprise has yet obtained FPIC. The notifiers suggest the enterprise cannot obtain FPIC (summarised in paragraph 75). That is an assertion of a future possible outcome, and thus not something which this final statement can logically determine as a ‘finding’. But this final statement can provide observations on many of the parties’ arguments, to assist in understanding how the OECD Guidelines apply. These cover three aspects of FPIC relevant here: its sources, content (including when and what it requires) and application in this case.

#### *Sources of FPIC*

77. FPIC is part of international human rights which the OECD Guidelines expect companies to respect, including United Nations instruments elaborating the rights of Indigenous peoples.<sup>53</sup> The UN Declaration on the Rights of Indigenous People<sup>54</sup> (**UNDRIP**) is therefore relevant in understanding ‘human rights’ here, as are other international law standards and materials regarding Indigenous rights.<sup>55</sup> The International Labour Organization’s Convention 169 expressly includes FPIC, requiring consent where there will be relocation or legislative or administrative measures which may directly affect the Indigenous or tribal peoples concerned.<sup>56</sup> FPIC is also necessary to comply with other international human rights standards even where it is not explicitly featured in their text.<sup>57</sup> OECD due diligence guidance documents and previous NCP decisions have also drawn on FPIC understandings in the *Convention on Biological Diversity* and its *Akwé: Kon OECD Guidelines about cultural, environmental and social impact assessments*.<sup>58</sup>

78. Papua New Guinea has domestic legal obligations which both parties identified as relevant in understanding FPIC. The OECD Guidelines state that ‘obeying domestic laws is the first obligation of

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<sup>53</sup> OECD Guidelines, above n 1, commentary [40]: ‘[E]nterprises should respect the human rights of individuals belonging to specific groups or populations ... where they may have adverse human rights impacts on them. In this connection, United Nations instruments have elaborated further on the rights of indigenous peoples.’

<sup>54</sup> UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, New York, 2007 accessed 27 Jul 2009. [www.un-documents.net/a61r295.htm](http://www.un-documents.net/a61r295.htm). (UNDRIP)

<sup>55</sup> The OECD Guidelines follow the United Nations Guiding Principles on Business and Human Rights (UNGPs) in explaining ‘reference should be made at a minimum to the internationally recognised human rights expressed in ... the Universal Declaration of Human Rights ... the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights’: OECD Guidelines, above n 1, Commentary [39].

<sup>56</sup> See summary in Annex E to this statement, paragraph 148.

<sup>57</sup> See references summarised in Annex E, paragraph 149.

<sup>58</sup> For example, Norwegian National Contact Point, *Final Statement, Complaint from the Future in our Hands (FIOH) Against Intex Resources ASA and the Mindoro Nickel Project*, Norwegian Government, 2011, p 11, 47 – 48, [https://files.nettsteder.regjeringen.no/wpuploads01/blogs.dir/263/files/2013/12/intex\\_fivh\\_final.pdf](https://files.nettsteder.regjeringen.no/wpuploads01/blogs.dir/263/files/2013/12/intex_fivh_final.pdf) (Intex Resources final statement); OECD, (2016), OECD, *OECD-FAO Guidance for Responsible Agricultural Supply Chains*, p. 76, <http://mneguidelines.oecd.org/rbc-agriculture-supply-chains.htm>.

enterprises’,<sup>59</sup> and so expect the enterprise to comply with Papua New Guinea legal requirements. There are three relevant aspects of Papua New Guinea law arising from the parties’ materials and submissions.

78.1. Consultation and agreement is required under various laws and procedures in Papua New Guinea.<sup>60</sup> Before a mining lease can be granted, the Government must convene a ‘Development Forum’, comprising a fair hearing of the views of landholders of the land subject to the application, as well as the developer and relevant government bodies.<sup>61</sup> Under Papua New Guinea law, ‘landholders’ includes people with customary title.<sup>62</sup>

78.2. Separate from this process, the environmental protection laws and procedures involve consultation, protect customary rights to water, and prohibit an EIS from progressing unless ‘all reasonable steps will be taken to minimise environmental harm which may result from the carrying out of the activity’.<sup>63</sup>

78.3. These laws operate within the Papua New Guinea constitutional requirement that ‘consultation must be meaningful and allow for a genuine interchange and consideration of views’. That is relied on and reinforced by the courts in Papua New Guinea. Both parties referred to various cases where the Papua New Guinea Courts explained the requirements of these various provisions. This includes a 2017 decision that developers should ‘enter into meaningful discussions and negotiations with [landowners] and get their free and informed consent or approval before entering, occupying and using their land’.<sup>64</sup>

79. There are also internationally agreed and industry-developed documents which assist in understanding what FPIC encompasses.

79.1. The annexure ‘Engaging with indigenous peoples’ in the OECD extractives guidance explains the operation of FPIC in different contexts. The OECD RBC guidance explains meaningful stakeholder engagement is important throughout the due diligence process and that ‘in some cases, stakeholder engagement or consultation is a right in and of itself’<sup>65</sup> referencing the UNDRIP and ILO 169 provisions detailed above. These OECD documents are broadly similar to the UN Guiding Principles on Business and Human Rights<sup>66</sup> (UNPGs) which should also inform company actions and decisions.<sup>67</sup>

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<sup>59</sup> OECD Guidelines, above n 1, Ch I, [2].

<sup>60</sup> Relevant laws are noted in Annex E to this statement, paragraphs 144-145.

<sup>61</sup> Papua New Guinea Parliament, *Mining Act 1992*, accessed 3 Jun 2023, [http://www.paclii.org/pg/legis/consol\\_act/ma199281/](http://www.paclii.org/pg/legis/consol_act/ma199281/) (Mining Act).

<sup>62</sup> *Ibid*, s 2.

<sup>63</sup> Papua New Guinea Parliament, *Environment Act 2000*, ss 4, 6 (objects and consultation), 38 (consultation and activity likely to harm), 56, 58 (all reasonable steps to minimise environmental harm) and 79 (customary rights in water) accessed 3 Jun 2023, [http://www.paclii.org/pg/legis/consol\\_act/toc-E.html](http://www.paclii.org/pg/legis/consol_act/toc-E.html) (Environment Act).

<sup>64</sup> Relevant cases are noted in Annex E to this statement, paragraph 145.

<sup>65</sup> OECD RBC guidance, above n 20, 50.

<sup>66</sup> United Nations, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework* (Annex to UN doc A/HRC/17/31) (UNPGs).

<sup>67</sup> The UNPGs’, above n53, relevance to due-diligence and Indigenous people is indicated in OECD extractives guide, 15 & 75-76; Intex Resources final statement, above n 56, p 47.

79.2. Performance standards of the International Finance Corporation, such as Performance Standard 7: Indigenous Peoples<sup>68</sup> are relevant and were referenced by both parties here.

79.3. The 2015 *Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains*<sup>69</sup> (**Chinese due diligence guidelines**) use the UNGPs and the OECD's *Due Diligence Guidance on Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* as their basis.<sup>70</sup> The Chinese due diligence guidelines 'apply to all Chinese companies which are extracting... mineral resources and their related products and are engaged at any point in the supply chain of mineral resources'.<sup>71</sup> The Chinese due diligence guidelines recommend these companies conduct risk-based supply chain due diligence, with one of these risks indicating attention to FPIC:

*Extracting or sourcing resources from land where the free, prior and informed consent of local communities and indigenous peoples has not been obtained, including those for which the extractor holds a legal title, lease, concession, or license.*<sup>72</sup>

#### Content of FPIC

80. FPIC obligations on a nation state under international law, and on a government under domestic law, do not directly impose expectations of a company under the OECD Guidelines.<sup>73</sup> Thus, it does not follow that court decisions about Indigenous rights and state duties in other contexts<sup>74</sup> automatically create the identical expectation of a company operating in Papua New Guinea. What is important for companies, however, is being aware if a nation has not fulfilled *the state's international law obligations* regarding FPIC to any extent in granting a permit/licence. In such a case, for the company to rely on that permit/licence may require additional action from the company to ensure any FPIC deficiency is addressed,<sup>75</sup> to ensure the company's obligation to respect human rights. This is apparent from the OECD Guidelines,<sup>76</sup> as well as various guidance for companies from the OECD<sup>77</sup> and elsewhere.<sup>78</sup>

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<sup>68</sup> IFC, 'Performance Standard 7: Indigenous Peoples', World Bank Group, Washington DC, 2012 accessed 11 Sep 2020. [https://www.ifc.org/wps/wcm/connect/topics\\_ext\\_content/ifc\\_external\\_corporate\\_site/sustainability-at-ifc/policies-standards/performance-standards/ps7](https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/policies-standards/performance-standards/ps7) (IFC standard 7).

<sup>69</sup> China Chamber of Commerce of Metals, Minerals and Chemicals Importers & Exporters (CCCIMC), 'Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains', Beijing, 2 December 2015 accessed 29 March 2023, <https://mneguidelines.oecd.org/chinese-due-diligence-guidelines-for-responsible-mineral-supply-chains.htm> (Chinese Due Diligence Guidelines).

<sup>70</sup> Ibid, p 3.

<sup>71</sup> Ibid, p 10.

<sup>72</sup> Ibid, [5.2.1.4].

<sup>73</sup> The difference between states and company obligations is evident in the 2018 advice of the Expert Mechanism on the Rights of Indigenous Peoples: 'Advice No. 11 on indigenous peoples and free, prior and informed consent', 10 August 2018, annex to UN doc A/HRC/39/62, [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/39/62](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/39/62) (EMRIP advice).

<sup>74</sup> The notifiers referred to decisions of courts in Colombia, Ecuador, and the Inter-American human rights system.

<sup>75</sup> See Annex E to this statement, paragraph 146 for further explanation.

<sup>76</sup> OECD Guidelines, above n 1, Ch I, [2].

<sup>77</sup> For example, OECD extractives guidance, above n 19, 96-97.

<sup>78</sup> For example, IFC standard 7, above n 68, para's [14], [15] & [22]; CCCIMC, Chinese Due Diligence Guidelines, above n 69, [5.2.1.4].

81. The essence and extent of FPIC depends on the particular circumstances.

81.1. Some actions are expressly prohibited without FPIC, including relocation from, and storing hazardous materials on, Indigenous lands or territories.<sup>79</sup>

81.2. UNDRIP states that nations should 'consult and cooperate in good faith with the indigenous peoples concerned' to obtain their FPIC before approving projects which affect Indigenous territories or resources 'particularly in connection with the development, utilization or exploitation of mineral, water or other resources'.<sup>80</sup>

81.3. There is, however, a legal difference between provisions in UNDRIP and those in human rights treaties (and committee decisions, observations and comments explaining the treaty obligations). The latter provides greater detail as to FPIC's operation. These show that some developments have been adjudged contrary to FPIC because of a group's opposition in the context of significant impacts or inadequate consultation.<sup>81</sup> There are, however, also cases where developments have been considered consistent with FPIC - even in the absence of group consent - because of the accommodation which had occurred, or the minimal impact.<sup>82</sup>

81.4. The human rights case guidance about how significant impacts need to be, to necessitate FPIC, includes: developments threatening the way of life and culture of an Indigenous group; impacts amounting to a denial of the right to enjoy cultural rights in that region; endangering the very survival of the community and its members; and substantially compromising or interfering with culturally significant activities.<sup>83</sup> These are, obviously, context specific. An interference with a river in one country and community may not constitute a significant human rights issue for the surrounding community *if* their needs and interests are not dependent on that river. In another situation, the identical activity can amount to a threat to an Indigenous group's way of life and culture, and be contrary to international human rights standards to progress without that group's FPIC, because of the importance and necessity of the river.

81.5. Redress is expected for some actions which occurred without FPIC, including (a) taking cultural, intellectual, religious and spiritual property,<sup>84</sup> and (b) taking or impacting traditional lands, territories and resources.<sup>85</sup> This redress provision addresses how to deal with past events. It is not an alternative that obtaining future FPIC can be bypassed by simply promising and providing redress.

82. These laws, standards and cases show an emphasis on the importance of process (the extent of consultation and its object) not just outcome (consent or its absence). Consultation or engagement seeking FPIC must be inclusive, both *geographically* (ensuring everyone who may be affected by the

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<sup>79</sup> UNDRIP, above n 54, articles 10 and 29(2).

<sup>80</sup> UNDRIP, above n 54, article 32(2).

<sup>81</sup> Examples noted in Annex E to this statement, paragraph 141.

<sup>82</sup> Examples noted in Annex E to this statement, paragraphs 142 - 143.

<sup>83</sup> Examples noted in Annex E, paragraph 147.

<sup>84</sup> UNDRIP, above n 54, article 11(2).

<sup>85</sup> UNDRIP, above n 54, article 28.

project's entire footprint has meaningful opportunity to be involved)<sup>86</sup> but also *internally* (ensuring views *within* the community are effectively engaged, including women).<sup>87</sup> Consultation or engagement seeking FPIC must occur in a way that ensures Indigenous peoples' understanding and engagement. This requires the party undertaking the consultation to understand the context,<sup>88</sup> and then accommodate matters such as language, timing, governance and representation.<sup>89</sup> In some instances, this may require attention to resources so those affected can properly engage.<sup>90</sup> Any FPIC reached between a company and Indigenous group should be formally documented.<sup>91</sup>

83. The crux of much FPIC standards and analysis is what occurs where there is a lack of consent or a refusal to engage. This is addressed in the OECD extractives guidance.

*In cases where their consent is not forthcoming or where indigenous peoples refuse to engage... where proceeding with projects will cause adverse impacts to indigenous peoples an enterprise should take the necessary steps to cease or prevent such impacts.*

*If... consent is required to proceed with an activity, and the agreed process has not arrived at consent, activities should not proceed unless FPIC is subsequently forthcoming.*

*...[A] project ... governed by IFC Performance Standards should not proceed, regardless of any authorisation by the State, if relocation of indigenous populations is required and FPIC has not been obtained from them.<sup>92</sup>*

84. This reveals a distinction between a state's obligations, and a company's expectations, where an impact on a group is so significant that FPIC is required. Regarding the state: the generally accepted understanding is that the government could proceed even without that group's FPIC *if* that is necessary and proportionate for the state's securing the human rights of others.<sup>93</sup> This is not the same for a company. These extracts are unequivocal – for a company to proceed in such a case would not be consistent with the OECD Guidelines. Consistency could only be achieved by reducing the impacts (to below the 'significant' threshold requiring FPIC) or ceasing the activity.

85. FPIC is not necessarily required before any government permission but the process toward FPIC must have been started, and FPIC must exist before the final government permission (ie. that the project can proceed) and also before there is any significant impact.<sup>94</sup> The process of seeking FPIC is iterative rather than a one-off discussion.<sup>95</sup> This suggests a corollary that, where consent has been refused, that does not determine the matter forever. It would, however, be contrary to FPIC's importance for a company or government to then continuously re-ask and engage, particularly given

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<sup>86</sup> For example, Intex Resources final statement, above n 56, pp 5-6; Australian National Contact Point, *Final Statement, Complaint by Andrew Starkey and Robert Starkey regarding ElectraNet Pty Ltd*, AusNCP, 2021, [34]. (ElectraNet final statement).

<sup>87</sup> OECD extractives guidance, above n 19, p 95; EMRIP advice, above n 73, [11].

<sup>88</sup> For which the OECD extractives guidance recommends 'consult[ing] with indigenous peoples themselves and experts on the particular indigenous group,' above n 18, p 92.

<sup>89</sup> For example, OECD extractives guidance, above n 19, p97; UNDRIP, above n 54, art 18-19; EMRIP advice, above n 73, [7].

<sup>90</sup> OECD extractives guidance, above n 19, p 95; EMRIP advice, above n 73, [9] –[10].

<sup>91</sup> OECD extractives guidance, above n 19, pp 97-98.

<sup>92</sup> OECD extractives guidance, above n 19, p 98.

<sup>93</sup> Relevant standards noted in Annex E to this statement, [146].

<sup>94</sup> OECD extractives guidance, above n 19, p 97; EMRIP advice, above n 73, [6].

<sup>95</sup> Ibid.

the OECD extractives guidance explicitly addresses what occurs in situations where consent is refused or there is non-engagement. As the FPIC processes in this case is still underway, and in light of the conclusions of this examination, it is not appropriate to consider this aspect further.<sup>96</sup>

86. FPIC is a right of an Indigenous *group*, not of individuals.<sup>97</sup> So the fact some persons assert their agreement, or refusal, is not determinative of a group's position. Individuals are, however, important to consider in two respects. First, to be aware if a group decision has excluded whole sections of a community who will be impacted, such as women and children,<sup>98</sup> and to seek to address those shortcomings. Second, to consider individual impacts which may exist separately from group rights (like FPIC or enjoyment of culture).<sup>99</sup>

#### *Application of FPIC in this case*

87. The human rights aspect of the complaint concerns FPIC and the enterprise's actions in that regard. This aspect of the complaint did not raise consideration of impacts on individuals' human rights (potential impacts on individuals is an aspect in the environmental complaint, which was addressed above).

88. As noted earlier (paragraph 16 above) the enterprise does not claim to have obtained FPIC at this time but considers FPIC as necessary for the enterprise's own policies and consistency with the OECD Guidelines. FPIC is part of international human rights which the OECD Guidelines expect companies to respect (paragraph 77 above). The enterprise informed the AusNCP that it 'has been undertaking stakeholder engagement with the ultimate aim of satisfying all legislative and policy requirements, including the requirement to seek FPIC from relevant affected landholders – before development commences'. The examiner's assessment, and conclusions, have been made in express reliance on that statement and commitment by the enterprise.

89. The presence, or absence, of FPIC (summarised in paragraphs 77-86 above) cannot be determined simply by one party's assertion that they are Indigenous and what their opinion is. Instead, it depends on:

89.1. an objective understanding of the physical impacts;

89.2. a subjective understanding of the cultural impacts - referenced to the relevant Indigenous culture and credibly substantiated within that;

89.3. consideration of whether either of those types of impacts are of such significance that FPIC would be required (see 81.4 above); and

89.4. the relevant group's views after appropriate engagement.

90. Most of these matters cannot be determined in this examination process. The parties contest the physical impacts on the Sepik River communities which the notifiers represent. The notifiers

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<sup>96</sup> One example in Australia is legislation that an Indigenous refusal of consent to mineral exploration means no further application can be made within five years, *Aboriginal Land Rights (Northern Territory) Act 1976*, ss 41 and 48. The Examiner is not suggesting this is what is required by the OECD Guidelines, but merely an example.

<sup>97</sup> See summary in Annex E to this statement, paragraph 151.

<sup>98</sup> OECD extractives guidance, above n 19, p 95.

<sup>99</sup> *Ibid*, [93].

asserted a cultural importance of the Sepik River but provided limited information substantiating that in their material and emphasised the necessity for FPIC arising from the potential failure of the dam. The engagement with the groups is still ongoing.

91. In summary, regarding the essence of the notifiers' complaint concerning FPIC, the examination has determined the following (the reasons for which are explained in subsequent paragraphs).

91.1. The manner and purported objectives of the enterprise's engagement is not such that FPIC from relevant communities is precluded. That is – the enterprise's actions to date are not inconsistent with it obtaining any necessary FPIC in the future.

91.2. The enterprise will need to obtain FPIC from various communities if it is to proceed with the proposed project because of the significance of the impacts on them. However, there was not enough information provided to the examiner in the context of this complaint to determine that FPIC is needed from the notifiers or the Sepik River communities they represent.

92. The enterprise's engagement to date does not prevent FPIC from being obtained in the future from relevant communities. The enterprise is currently engaging with Sepik communities and Papua New Guinea Government agencies about its proposals. The independent examiner understands this engagement is continuing. Both parties referred to, and understand that, Papua New Guinea law requires agreement from affected communities. The enterprise does not contend such agreement has been achieved yet. There is no material (nor assertion) that the enterprise will not comply with Papua New Guinea legal requirements, and the enterprise has also indicated that it will comply with Papua New Guinea legal requirements.

93. Not every action required for consistency with the OECD Guidelines must be taken by the enterprise itself. As explained earlier, government activities can contribute to ensuring the relevant expectations are fulfilled. CEPA is undertaking consultations about the enterprise's EIS. Those meetings and processes must be considered in any assessment of whether affected stakeholders have the necessary information and entitlements expected by the OECD Guidelines.

94. It appears CEPA and the enterprise are undertaking various actions which are consistent with progressing toward FPIC. This statement, however, makes no conclusion on the efficacy of the consultation meetings, particularly whether they currently enable FPIC from those involved. There are several reasons for this.

94.1. The parties provided significantly contrasting explanations and analysis of those meetings, and there is no independent, public information to consider of relevance to these differences.

94.2. The Papua New Guinea law requires that meaningful consultation occur, and the parties identified examples of court oversight of those requirements. The consultation and engagement activities are still being conducted by CEPA and the enterprise.

94.3. The notifiers provided a report about the CEPA consultation meetings but, as noted above (paragraph 68), the independent examiner has reservations about relying on that report.

95. The notifiers characterised the enterprise's engagement as effectively informing people, rather than seeking FPIC. The notifiers allege this was inconsistent with stakeholder engagement expected in

the OECD Guidelines and, particularly here, prevented FPIC because that requires engagement in order to obtain FPIC (ie. the aim/objective must be to seek FPIC). The notifiers' claims here have not been substantiated. The enterprise's engagement is demonstrably more fulsome than the notifiers' descriptions. Parts of the proposed project were changed as a result of that engagement (see paragraph 13.1 above). While the enterprise may not be seeking FPIC from every stakeholder, that is not an expectation of the OECD Guidelines. FPIC is only required from Indigenous groups who will be significantly impacted (to the extent identified in paragraph 81.4 above).

96. There is, however, one aspect of future engagement which the enterprise should consider regarding FPIC, and that concerns language. Informed consent requires engagement in a manner and language which the relevant community can understand. In both parties' material, there is information explaining that Tok Pisin language may not be understood in some areas. The enterprise's material acknowledged the project area involved different cultures and languages. That would suggest that FPIC would require effective engagement within each of those cultures and languages. The importance of engagement in locally understood language was also raised with CEPA, evidenced in the transcript provided to the AusNCP. It may be that more languages than Tok Pisin and English is needed for the understanding and engagement to obtain FPIC. The enterprise explained to the AusNCP that 'where Tok Pisin is not the language in the community being consulted, volunteer interpreters from the local village are used to translate discussions into the local dialect'. This final statement has elsewhere noted where the enterprise has provided written/audio material in Tok Pisin, and it is not evident the enterprise provided this material in any other language (see paragraphs 12.3 and 136.2). Where FPIC is required from a group, and if English and Tok Pisin is not understood by that group, neither of these measures (volunteer interpreters and written materials in Tok Pisin / English) would be sufficient to enable FPIC.
97. The next issue is whether the enterprise requires FPIC (as explained in paragraphs 77-86 above) at all, and from the communities represented by the notifiers. From the materials presented in this examination, it is clear that if the proposed Sepik Development Project proceeds, it would have such significant impacts on *some* Indigenous groups that their FPIC is required. This includes those Indigenous groups which: would be relocated, have their lands/resources inundated by the dam, have hazardous materials stored on their land, or suffer impacts threatening their cultural existence. It is not evident that FPIC would necessarily be required for persons toward the mouth of the Sepik River, because the significance of the impacts at that area are unclear from the parties' materials. At some point the impacts will become 'significant' necessitating FPIC before they occur (per paragraph 81.4). That could arise where the location is close to the proposed mine/dam/facilities, or because of the threat to cultural existence. The notifiers did not present material to this examination substantiating that the communities they identified would be affected to the degree necessitating FPIC. Some of those communities on the Sepik river *could* be affected to that degree but it has not been possible to determine that in this examination.
98. The enterprise's Stakeholder Engagement Plan states that it 'fulfils the ... legislative requirements of Papua New Guinea, international standards including the IFC Environmental and Social Performance Standards ... and the OECD Guidelines'. It is not correct that the plan 'fulfils' these requirements. A plan can be important and useful, but consistency with the OECD Guidelines depends on what company actually does; not just what it plans. The enterprise explained its more specific objectives where FPIC arises.

(1) Carry out human rights due diligence to identify indigenous peoples impacted by business activities and whether Free, Prior, Informed Consent (FPIC) is required under domestic and international law;

(2) If FPIC is required by certain indigenous peoples, to engage with the affected indigenous peoples with a view of agreeing on a consultation process for working towards seeking FPIC; and

(3) Ensure that relevant stakeholders are provided with a meaningful opportunity for their views to be taken into account in relation to planning and decision making for the project.

...

*PanAust recognises that FPIC can be considered both a process and an outcome and where FPIC is not able to be obtained despite best practice endeavours by all parties, it will ensure that impacts are mitigated appropriately including through just, fair and equitable compensation payments and any other requirements of its host State.*

99. That last sentence is not consistent with relevant international standards, and thus the expectations of the OECD Guidelines. If FPIC is not achieved when required (eg. where a proposed activity would significantly impact an Indigenous group) then the OECD Guidelines (and IFC Standards) expect the company should not proceed. That cannot be ‘mitigated’ through compensation (see paragraphs 81.5 and 84 above). FPIC is not simply evidenced or achieved by a government’s grant of all necessary permits or licences. The FPIC must be obtained from the impacted groups. This is not only an expectation of the OECD Guidelines, but of the IFC standards, with which the enterprise has indicated it will comply.

100. The mine is opposed by the notifiers and those they represent.<sup>100</sup> The enterprise alleged the following.

*[S]ince 2018, the people in these villages have been effectively cut-off from FRL [PanAust’s subsidiary company which is undertaking the project] and the Government of Papua New Guinea’s [GoPNG] technical personnel ...[and] The Complainant has ensured it is the sole source of information for many of these villages. ... We query what material was presented to the people, how it was understood by the people, and what the people’s consent amounts to. Since the Complainant has insulated several villages from receiving Project and GoPNG*

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<sup>100</sup> In the December 2021 complaint, the notifiers stated: ‘PanAust Limited has breached their right to give or refuse their Free, Prior and Informed Consent (FPIC) to development that affects them. ... [T]he Complainants have repeatedly expressed their opposition to the Project. ... [A]n important part of the right to self-determination for Indigenous communities is the ability to nominate representative governance structures that States and organisations must seek consent from. The Indigenous people of the Sepik River regions cannot be considered to have provided any form of consent while the Haus Tambarans have explicitly withheld their consent. Where a development threatens to significantly impact the culture and environment of Indigenous peoples, their affirmative consent is required. ...’.

In their March 2023 submissions, the notifiers stated: ‘Project Sepik and the complainants it represents (and likely many other affected communities) were given insufficient information about the Project... In circumstances where the Project poses significant threats to human life and ecology (such as, where there will be a dam break), adequate information and a FPIC process that conveys the seriousness of the risks to the Sepik communities is imperative.’

*updates, there is a very strong likelihood that these people would not be aware that the CEPA process is ongoing ...*

101. The parties differed on the implications of statements against the Sepik Development Project,<sup>101</sup> including in the Supreme Sukundimi Declaration. The notifiers correctly emphasised that consultation should occur in a culturally sensitive manner and respect Indigenous protocols and decision-making. The enterprise is correct that FPIC is not rendered impossible simply by the notifiers' statement against the mine.
102. This does not mean that FPIC must be obtained from the two notifiers which lodged the complaint. An NCP's acceptance of a complaint and offering good offices does not automatically equate or qualify the notifier as Indigenous parties from whom FPIC may be required in certain instances. The notifiers' assertion of why FPIC was necessary from them and their representatives was presented in the examination as arising from the potential dam failure. It is not evident, on the information available to the AusNCP, that the notifiers and the Sepik River communities they represent would be impacted to the extent that their FPIC is necessary for the project to proceed (see paragraph 97).
103. However, this complaint and examination process has demonstrated the extent of the consultation and concerns of many Haus Tambaran and communicated by the notifiers. The enterprise contended that the 'Haus Tambaran tradition cannot be used as an indicia of authority or traditional decision making along the entirety of the river', and that as a consequence, the enterprise and CEPA consult more widely. That may be appropriate, but it does not mean the views coming through many Haus Tambaran should be ignored. The enterprise acknowledged an importance of Haus Tambaran in their submissions.

*[E]ngagement activities with local communities and stakeholders were undertaken in a culturally appropriate manner [which] usually required ... pre-visits are made to village leaders in traditional Haus Tambaran or other appropriate 'spirit houses' in advance to seek permission to hold a meeting with the villagers. By doing this, PanAust demonstrates its respect for local customs and leadership structures while ensuring that women, non-leaders and youth are represented at village consultations.*

104. The enterprise should, therefore, carefully consider the Supreme Sukundimi Declaration as an expression emanating from many people involved in Haus Tambaran (the exact number of people is uncertain but also irrelevant). These are people who will be affected if the project proceeds. It has not been possible, through the examination process, to determine the significance of the impacts on those people and whether their specific FPIC would be needed (see paragraph 97). As noted earlier, this statement does not engage with the dam's construction and risk (see paragraph 58). Accordingly, it cannot determine that FPIC is necessary from Sepik River communities due to the risk of dam breaks. In short, to use the earlier categorisation, it is not possible here to determine whether they are rights holders or stakeholders. But even if the notifiers may not be FPIC 'rights holders' does not mean they are not stakeholders. The OECD Guidelines still expect the enterprise's engagement with Sepik Communities, as any stakeholder who may be impacted by the proposals.

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<sup>101</sup> The notifiers' March 2023 submissions stated: '*PanAust has not received free, prior and informed consent for the Project ... [T]he Project, due to its large scale, extractive nature and the extent of its potential negative impacts on the Sepik River and the livelihoods of Sepik communities, is one in which obtaining consent is mandatory*', and the outcomes they requested were extracted in paragraph 27 above.

105. This statement briefly addresses some other submissions of the parties. These observations may assist in narrowing the differences between the parties in any future engagement.
- 105.1. The notifiers alleged the enterprise’s engagement has focussed on the mine site and inadequately addressed the broader Sepik River communities. This was not substantiated. The downstream impacts are specifically noted in the enterprise’s EIS, and that also described the extent of engagement the enterprise has made with communities along the length of the Sepik River.<sup>102</sup> The transcript of the CEPA consultation meeting was from a Sepik River community far from the proposed minesite and shows CEPA explaining the necessity of going ‘to every village to obtain their views’. The OECD extractives guidance recommends that ‘priority should be given to those stakeholders for whom the risk of adverse impacts is greatest or the potential adverse impact is severe or could become irreparable’. The potential adverse impact is greatest at the proposed mine site, dam and energy facilities. So if the enterprise’s engagement priority is there, that is consistent with the OECD Guidelines.
- 105.2. It is not correct that FPIC must be obtained from everyone relevant before any application process for development can begin (see paragraph 85 above). The information and engagement necessary for FPIC may only become known *as part of* that application and assessment processes. Particularly where the proposal is for many decades (construction and mining here is expected for over 30 years and the hydro power facility for 100 years) FPIC has ongoing relevance, as the enterprise has noted.
- 105.3. The notifiers’ submissions also alleged many villages, and some provincial governments, have opposed or rejected the proposed mine. This AusNCP statement need not determine the veracity of those claims, because no formal conclusion is made on FPIC. But the enterprise may wish to carefully consider the notifiers’ submissions in this regard – if they are correct they indicate considerable concern and opposition to the project.
106. In addition to FPIC, there are two aspects around human rights which arose in the parties’ materials and submissions: grievance mechanisms and security. Both are relevant to the parties’ future engagement.
107. The enterprise has established a grievance mechanism. This was detailed in the information which the enterprise provided the examination in December 2022, including their explanation that it is consistent with IFC standards and Equator Principles, developed with local stakeholders, and has been operating since 2018. PanAust explained the mechanism was developed after consultation with local landowning communities, and explained its operation.

*[The grievance] mechanism concept was originally received with scepticism as a formal documented process was new and perceived to remove the community’s ability to use their village hierarchy and dispute resolution process to engage with the Sepik Development Project. However ... after further explanations as to the purpose and operation of the Grievance Mechanism, local communities in the area of the Sepik Development Project have embraced the approach. The majority of the received grievances relate to landholder compensation.*

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<sup>102</sup> See maps and summary in Annex E to this statement, paragraphs 104 – 106.

108. The notifiers did not respond to any of this in the enterprise’s materials, and so the examiner has proceeded on the basis it is a fair explanation of the grievance mechanism. The enterprise stated that it ‘does not impose geographic limits around the individuals and communities which may make Grievance Mechanism applications’. The only issue raised by the notifier submissions was the assertion that the grievance mechanism was set up only for the community in the area of the proposed mining lease. In the circumstances, no material was provided to the AusNCP to substantiate that the grievance mechanism was inappropriate. The grievance mechanism may provide a more practical way for the notifiers to continue to engage with the enterprise regarding their concerns. That will depend on the extent to which the grievance mechanism accords with the UNGP’s effectiveness criteria for non-judicial grievance mechanisms (Guiding Principle 31). Neither party addressed the grievance mechanism in detail so no further assessment is undertaken here.<sup>103</sup>
109. In relation to security - both parties raised issues of security personnel and threats to safety. The actions of security personnel can have implications for engagement and therefore FPIC. The notifiers complaint noted that people should not suffer reprisals, and that coercion would prevent FPIC. Both those statements are correct but there was nothing in the materials which substantiated that the enterprise has acted improperly in this regard. Given both sides have raised concerns about threats and security, it is not unreasonable that there may be security at meetings. The transcript indicated that people were told eight police officers were present. No comment was recorded in the transcript about this, and many people still raised concerns about the proposed mine, with some rejecting it completely. The police presence did not prevent some people’s engagement nor opposition to the proposed project. During the examination, the enterprise stated it acts in accordance with the Voluntary Principles on Security and Human Rights, and is a member of the Voluntary Principles Initiative. It should be expected, therefore, that the enterprise’s future actions will be informed by the 2022 toolkit<sup>104</sup> of the Voluntary Principles initiative, which usefully addresses issues such as vetting and training of security, reporting, grievance mechanisms, and denouncing violence. That will also contribute to consistency with the 2023 version of the Guidelines, which have greater clarification regarding reprisals against parties who raise concerns about development impacts.<sup>105</sup>
110. The enterprise sought to explain its non-engagement with the notifiers by questioning their representativeness as not speaking on behalf of *all* communities affected. The enterprise included these concerns in its December materials shared with the notifiers, stating that it and the Papua New Guinea Government do not conduct community engagement sessions in ‘Haus Tambaran, due to the exclusion of women, children and men who are not village leaders from those meeting places’. The notifiers responded that ‘culturally (even to this present day), the husband or the male individual would consult his family first, especially his wife or mother for their knowledge. Then he would go out and speak on behalf of his clan in the Haus Tambaran’. There may be some basis to the enterprise’s concern that the notifiers and their selected Haus Tambarans are not entirely representative. However, while the notifiers may not represent *everyone*, they cogently and demonstrably represent *some* people who will be affected by the enterprise’s proposals.

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<sup>103</sup> UNGPs, above n 53, Guiding Principle 31.

<sup>104</sup> Geneva Centre for Security and Governance et al., 2022, *Addressing Security and Human Rights Challenges in Complex Environments*, International Committee of the Red Cross, Geneva Centre for Security Sector Governance, accessed 8 March 2023, <https://www.voluntaryprinciples.org/resource/addressing-challenges-in-complex-environments-toolkit/>.

<sup>105</sup> OECD Guidelines, 2023 Edition, n 13 above, Ch II A [10]; commentary [14].

They are stakeholders of the company, and the OECD Guidelines expect companies to engage with stakeholders (see paragraphs 50-53 above).

111. In summary, the notifiers' assertion that the enterprise's actions regarding FPIC are inconsistent with OECD Guidelines has not been made out. There are, however, various aspects in the enterprise's future stakeholder engagement which will help ensure consistency with the OECD Guidelines. This includes attention to the enterprise's Stakeholder Engagement Plan and the suggestion that compensation may be an alternative to FPIC (see paragraph 99 above). These are summarised in the Recommendations section, below.

## Disclosure

112. The notifiers' complaint regarding disclosure is that the enterprise has failed to comply with the OECD Guidelines' disclosure requirements, in relation to the dam. The notifiers alleged this is evident from the enterprise's absence of response to the 10 expert reports, non-provision of dam break analysis, and not providing them with technical reports regarding seismicity assessments nor with the outcomes of the enterprise's 'international expert peer review.'
113. These aspects have been addressed in the examination of the human rights and environmental complaints:
  - 113.1. whether the information to communities precludes their informed consent has been addressed in the examination of the human rights and FPIC issues (see paragraphs 92-104);
  - 113.2. the implications of information about dams and risks have been addressed in the examination on the environmental aspects (see paragraphs 55-61); and
  - 113.3. the non-provision of the dam-break analysis was addressed in paragraphs 69-73.

## Conclusion

114. The notifiers' fundamental complaint is that acts and omissions in the enterprise's community engagement has breached the OECD Guidelines. This examination makes no determination that the enterprise has acted inconsistently with the OECD Guidelines. From the information provided, it appears extensive consultation and engagement is underway with communities in Papua New Guinea. This is being conducted by the enterprise and Papua New Guinea Government agencies, and those agencies are currently considering the enterprise's proposals and whether they should proceed. That process is subject to Papua New Guinea law and court oversight. Many factual matters, which are contested by the parties in this AusNCP complaint, will be determined by the Papua New Guinea processes. Relevant community agreements, consistent with the OECD Guidelines, *could* eventuate through those processes. It would, therefore, be inappropriate for the AusNCP to make a statement, now, that those agreements cannot occur in the future.
115. The parties have, however, provided many contentions about what the OECD Guidelines do (and do not) require, and the significance of the enterprise's actions to date under the OECD Guidelines. This statement has examined many of the issues raised by the parties and provided observations (above) and recommendations (below) aimed to improve observance of the OECD Guidelines. The recommendations aimed to improve future observance of the OECD Guidelines are consistent with the 2023 edition of the OECD Guidelines as well as with the 2011 edition of the OECD Guidelines.
116. In essence, the notifiers' complaint and submissions conflated issues about FPIC and stakeholder engagement. There is overlap between these two, in what the OECD Guidelines expect, but there is also an important distinction. The expectations regarding FPIC are more extensive but apply only to those Indigenous groups which will be significantly impacted (per paragraph 81.4 above), not to every stakeholder. Equally, inconsistency with some expectations regarding stakeholder engagement does not mean FPIC can never be achieved.
117. What is apparent is that the scale and impact of what the enterprise is proposing - particularly the resettlement of some Indigenous communities, storage of hazardous materials on their territory, and significant changes to their land and water - means that FPIC of those communities must be obtained before those impacts occur. That means FPIC consistent with international standards, and that is not simply obtained or documented by receiving relevant government permits. It is not evident, on the information available to the AusNCP (see paragraphs 90 and 97 above), that the notifiers and the Sepik River communities they represent would be impacted to the extent that their FPIC is necessary for the project to proceed (that is, to the degree described in paragraph 81.4 above). The enterprise's Stakeholder Engagement Plan addressed where FPIC is not able to be obtained, and a role for compensation. Offering compensation as an alternative to obtaining FPIC would be inconsistent with the OECD Guidelines (see paragraphs 98-99 above).
118. That no determination is made here, with deference to the ongoing process in Papua New Guinea, may raise the question: why was that not decided at initial assessment? NCP initial assessments are not meant to involve detailed investigation and determinations. Instead, the objective of an initial assessment is to determine whether the issues raised merit further examination, and it can assist in identifying issues for framing meditation or good offices.<sup>106</sup> Domestic regulatory procedures are a relevant consideration which NCPs consider during initial assessments (e.g.

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<sup>106</sup> OECD, Guide for National Contacts Points on the Initial Assessment, above n 38, 5.

applicable law, parallel proceedings, and whether good offices would further the OECD Guidelines). Current or completed domestic procedures, involving the parties in an NCP complaint, may encompass all that could validly be within an OECD Guidelines specific instance/complaint. That can lead to a complaint being refused at initial assessment.<sup>107</sup> However, where the domestic procedures do not clearly 'cover the field', this leaves issues appropriate for good offices. That was the case here, as explained in the AusNCP's initial assessment. When the enterprise refused to participate in good offices here, the matter proceeded to examination.

## Recommendations

119. It is evident that the enterprise and the notifiers do not have meaningful engagement as that is understood by the OECD Guidelines, which emphasises ongoing engagement that is two-way, conducted in good faith and responsive.<sup>108</sup> The independent examiner recommends both parties:
  - 119.1. review their interaction in light of the matters covered in this statement, and consider the role and use of meaningful engagement as expected by the OECD Guidelines and detailed in various OECD due diligence guidance documents (see paragraphs 39 and 50 above); and
  - 119.2. consider and make use of the 2022 toolkit of Voluntary Principles Initiative, if dealing with any issues about the role and use of security personnel (see paragraph 109 above).
120. To aid the enterprise's consistency with the expectations in the OECD Guidelines, the following additional recommendations are made to enterprise.
  - 120.1. The enterprise should review the totality of community engagement in relation to the project - by the Government of Papua New Guinea and by the enterprise - and ensure that, for any Indigenous group from which FPIC is required, that engagement occurs in a language easily understood by that group. This may mean more languages than Tok Pisin or English (see paragraph 96).
  - 120.2. The enterprise should review its internal company procedures regarding FPIC to ensure consistency with international standards (particularly that compensation is not understood as an alternative to FPIC, see paragraph 99).
  - 120.3. The enterprise's future stakeholder engagement in relation to the project should: (a) include the notifiers (paragraph 110), (b) consider the views from the Haus Tambaran they work with (paragraph 104), (c) disseminate the dam break analysis (paragraph 73), and (d) address the full lifetime of the dam and any facilities which are expected to continue even after any the enterprise mine has finished (paragraph 61).
121. The following additional recommendation is made to the notifiers: they should consider using the grievance mechanism established by the enterprise to raise their concerns, if that grievance mechanism accords with the UNGPs effectiveness criteria (see paragraph 108).

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<sup>107</sup> For example, AusNCP, *Final Statement, Complaint by Port Hedland Community Progress Association regarding BHP*, Australian Government, 2021, [https://ausncp.gov.au/sites/default/files/2021-09/AusNCP\\_Final\\_Statement\\_Port\\_Heland.pdf](https://ausncp.gov.au/sites/default/files/2021-09/AusNCP_Final_Statement_Port_Heland.pdf).

<sup>108</sup> OECD Guidelines, above n 1, ch 2, [14] and Ch II commentary, [25].

122. The AusNCP will follow up on these recommendations 12 months after the publication of this statement.

**John Southalan**

Independent Examiner

Australian National Contact Point for Responsible Business Conduct

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# Annexes

## Annex A: Schedule of events

Submission	Date
<ul style="list-style-type: none"><li>Complaint submitted to the AusNCP by the notifiers</li></ul>	9 December 2021
<ul style="list-style-type: none"><li>AusNCP acknowledged complaint received</li></ul>	9 December 2021
<ul style="list-style-type: none"><li>Enterprise and AusNCP Governance and Advisory Board (the Board) notified of the complaint provided with a copy of the submission</li></ul>	9 December 2021
<ul style="list-style-type: none"><li>Enterprise acknowledged receipt of the complaint</li></ul>	13 December 2021
<ul style="list-style-type: none"><li>AusNCP Secretariat met with enterprise representatives to provide an overview of the AusNCP complaint process</li></ul>	14 December 2021
<ul style="list-style-type: none"><li>OECD notified of the complaint</li></ul>	20 January 2022
Initial assessment	
<ul style="list-style-type: none"><li>AusNCP Secretariat invited the enterprise to provide a submission to inform the initial assessment by 21 January 2022</li></ul>	21 December 2021
<ul style="list-style-type: none"><li>AusNCP Secretariat invited to notifiers to provide further information to inform the initial assessment by 21 January 2022</li></ul>	21 December 2021
<ul style="list-style-type: none"><li>Enterprise provided a submission to inform the initial assessment</li></ul>	14 January 2022
<ul style="list-style-type: none"><li>Notifiers provided further information to inform the initial assessment</li></ul>	21 January 2022
<ul style="list-style-type: none"><li>Complaint allocated to Independent Examiner John Southalan</li></ul>	25 January 2022
<ul style="list-style-type: none"><li>Draft initial assessment provided to the Board for comment by 6 May 2022</li></ul>	11 April 2022
<ul style="list-style-type: none"><li>AusNCP Secretariat provided an update on the complaint's status to the parties to the complaint</li></ul>	13 April 2022
<ul style="list-style-type: none"><li>Independent examiner received all comments from the Board</li></ul>	9 May 2022
<ul style="list-style-type: none"><li>Draft initial assessment, offering the AusNCP's good offices, was provided to the parties to the complaint for comment by 23 June 2022</li></ul>	2 June 2022
<ul style="list-style-type: none"><li>Notifiers responded to the AusNCP's request for comment on draft initial assessment, indicating availability to engage in good offices from August 2022</li></ul>	17 June 2022
<ul style="list-style-type: none"><li>Enterprise responded to the AusNCP's request for comment on draft initial assessment, indicating it was open to the good offices process</li></ul>	21 June 2022
<ul style="list-style-type: none"><li>Embargoed initial assessment sent to the Board and parties</li></ul>	11 July 2022
<ul style="list-style-type: none"><li>Initial Assessment published on the AusNCP's website and reported to the OECD</li></ul>	25 July 2022
Good offices	
<ul style="list-style-type: none"><li>Complaint allocated to Independent Examiner Shiv Martin</li></ul>	25 July 2022
<ul style="list-style-type: none"><li>AusNCP invited the notifiers to an introductory video call with the independent examiner</li></ul>	25 July 2022
<ul style="list-style-type: none"><li>AusNCP invited the enterprise to an introductory video call with the independent examiner</li></ul>	1 August 2022

- Independent examiner held an introductory call with the notifiers to discuss the good offices process 9 August 2022
- Independent examiner held an introductory call with the enterprise to discuss the good offices process. Enterprise representatives indicated they no longer wished to engage in the AusNCP's good offices process. 9 September 2022
- Enterprise informed the AusNCP in writing that it has declined the offer of good offices 13 September 2022
- AusNCP advised the notifiers of the enterprise's decision to decline good offices 14 September 2022
- AusNCP advised the notifiers and the enterprise that the complaint had been allocated to Independent Examiner John Southalan to conduct the examination and final statement phase and offered the parties separate meetings to discuss how this phase would be conducted 14 October 2022

### Examination and final statement

- AusNCP Secretariat and the independent examiner met with the enterprise to discuss the final statement process 19 October 2022
- AusNCP Secretariat and the independent examiner met with the notifiers to discuss the final statement process 24 October 2022
- Independent examiner advised parties of the proposed steps and timeframes for the examination and final statement 28 October 2022
- Independent examiner invited both parties to provide additional materials by 2 December 2022 and submissions by 23 December 2022 to inform the examination 4 November 2022
- Independent examiner granted an extension for both parties to provide materials (16 December 2022) and submissions (16 January 2023) 30 November 2022
- Independent examiner provided each party with the other's materials for consideration 21 December 2022
- Independent examiner liaised with the parties on content and timeframe for submissions 21 December 2022 – 22 February 2023
- Independent examiner advised the parties they had until 8 March to provide submissions 22 February 2023
- Notifier and enterprise provided their submissions to the AusNCP. 8 March 2023
- Independent examiner provided each party with the other's submission 17 March 2023
- Independent examiner invited the parties to provide further submissions in response to submissions provided on 8 March by 26 April. 5 April 2023
- Independent examiner granted an extension for both parties to provide their further submissions by 5 May 13 April 2023
- Enterprise and notifier provided their further submissions to the AusNCP 5 May 2023
- Draft final statement provided to the Governance and Advisory Board for comment by 25 July 3 July 2023
- Draft final statement provided to the parties for comment 14 August 2023
- AusNCP provided an embargoed copy of the final statement to the parties and the Board 26 September 2023
- Final Statement published on [www.ausncp.gov.au](http://www.ausncp.gov.au) and reported to the OECD 3 October 2023

## Annex B: Publications and Bibliography

### AusNCP publications

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## Annex C: Institutional arrangements

123. The Australian Government is committed to promoting the use of the OECD Guidelines for Multinational Enterprises (OECD Guidelines) and implementing them effectively and consistently. Through business cooperation and support, the OECD Guidelines can positively influence business conduct and ultimately economic, environmental and social progress.
124. The OECD Guidelines are recommendations on responsible business conduct addressed by governments, including Australia, to multinational enterprises. They provide voluntary principles and standards for responsible business conduct consistent with applicable laws and internationally recognised standards. Companies operating in Australia and Australian companies operating overseas are expected to act in accordance with the principles set out in the OECD Guidelines and to perform to the standards they recommend. In countries where domestic laws and regulations conflict with the principles and standards of the OECD Guidelines, enterprises should seek ways to honour such principles and standards to the fullest extent, which does not place them in violation of domestic law.
125. Importantly, while Australia is an adhering country to the OECD Guidelines and the OECD Guidelines have been endorsed within the OECD international forum, they are not a substitute for, nor do they override, Australian or international law. They represent standards of behaviour that supplement Australian law and therefore do not create conflicting legal requirements.
126. The OECD Guidelines can be seen as:
- A useful aid to business in developing their own code of conduct. They are not aimed at replacing or preventing companies from developing their own codes.
  - Complementary to other business, national and international initiatives on corporate responsibility, including domestic and international law in specific areas such as human rights and bribery. For example, the human rights chapter in the OECD Guidelines as well as other key concepts align with the [United Nations Guiding Principles on Business and Human Rights](#).
  - Providing an informal structure for resolving issues that may arise in relation to implementation of the OECD Guidelines in complaints.

## Annex D: Governance

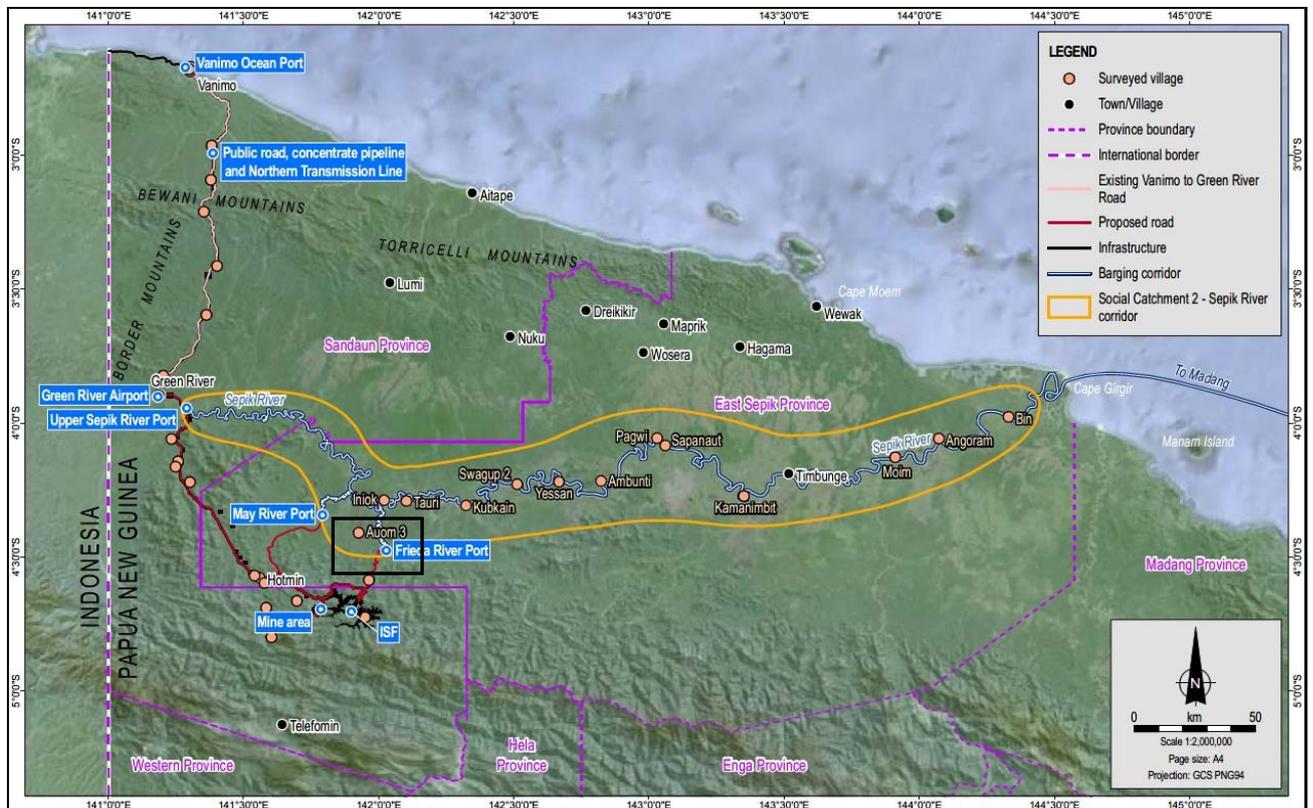
127. Governments adhering to the OECD Guidelines have flexibility in organising their National Contact Points for Responsible Business Conduct (NCPs). NCPs are expected to meet core effectiveness criteria, by operating in a manner that is visible, accessible, transparent, accountable, impartial and equitable, predictable, and compatible with the OECD Guidelines. NCPs are also expected to seek the active support of social partners, other stakeholders and relevant government agencies.
128. Accordingly, the OECD Guidelines stipulate that:
- NCPs will be composed, organised and sufficiently resourced to provide an effective basis for dealing with the broad range of issues covered by the OECD Guidelines, have access to expertise on all relevant aspects of the NCP mandate, and operate in an impartial manner and maintain an adequate level of accountability to the adhering government.
  - NCPs can use different forms of organisation to meet the effectiveness criteria and maintain stakeholder confidence.
  - Governments are encouraged to include representatives of the business community, worker organisations, civil society and other non-governmental organisations in advisory or oversight bodies to assist the NCP in its tasks and contribute to the effectiveness of the OECD Guidelines.
129. The [AusNCP Governance and Advisory Board](#) (AusNCP Board) includes representatives from Australian Government agencies, business, civil society and unions. The AusNCP Board provides independent expert advice and assistance to the AusNCP and the Independent Examiners on complaints handling. Board members use their networks, events and publications to promote responsible business conduct standards under the OECD Guidelines and the AusNCP services. The AusNCP Board is consulted on all AusNCP statements.
130. The AusNCP Board helps to ensure that the AusNCP meets the effectiveness criteria of the OECD Guidelines. AusNCP Board Members may be called on to conduct procedural reviews of AusNCP complaints and may be consulted on various operational and administrative matters as needed.
131. From September 2019, all new cases are managed by Independent Examiners, who are supported by the AusNCP Secretariat and the AusNCP Board.

## Annex E: Additional material and analysis

### *PanAust maps and description of community engagement*

132. These are three maps of the relevant area, showing the location and extent of the proposed developments. The first map is of a broader area, with the black rectangle (added by the AusNCP examiner) showing the approximate location of the second map. The long, yellow, oval shaped line in Map 1 indicates the Sepik River corridor. The notifiers explain the principal communities they represent are in that area. The notifiers state the Supreme Sukundimi Declaration represents people in villages from Swagup in the upper Sepik to the river mouth (at the sea). The third map identifies villages where the enterprise has undertaken stakeholder engagement.

**Map 1: North-west Papua New Guinea, showing location of Sepik Development Project<sup>109</sup>**



<sup>109</sup> Extracted from Frieda River EIS, above n 3, *Appendix 13: Social Impact Assessment*, p 23.





134. In the EIS, the enterprise provided details and public documentation of the stakeholder engagement which has been undertaken. This describes not only the activities but also summarises outcomes. Relevant to this complaint (issues from, or concerning Sepik River communities) the description of the engagement included the following issues:
- 134.1. concerns by communities adjacent to the Sepik rivers, who are reliant on subsistence fishing, about aquatic impacts including poisoning of fish and crocodiles and jeopardising human health and livelihoods;
  - 134.2. potential siltation and sedimentation impacts during construction;
  - 134.3. riverine barging operations potentially disturbing fish and crocodile habitat and breeding grounds, thereby affecting food availability and livelihoods, and potentially increasing riverbank erosion;
  - 134.4. potential mine-related impacts on water uses, such as drinking and washing, jeopardising human health; and concerns relating to accidental discharge of oil or other pollutants into the Sepik River by river craft;
  - 134.5. ‘concerns raised by Sepik River communities included impacts to the Sepik culture, through potential impacts on the Sepik River itself’;
  - 134.6. various and repeated concerns about the dam, including: potential for the failure of the embankment wall, what guarantees will be put in place to ensure it does not fail, potential pollution in the Frieda and/or Sepik rivers.
135. The EIS stated that ‘many of the issues raised and questions posed were similar across communities and primarily relate to the importance of the Sepik River to the wellbeing of these communities’. The EIS summarised the engagement with Sepik River communities, that they ‘strongly expressed the feeling that they stood little to gain and a lot to lose from the Project, particularly if the river was used for the transport of copper-gold concentrate and supplies’.<sup>112</sup> The summary of the engagement in 2016 specifically notes many aspects which have subsequently been raised in this complaint.

*Potential for the failure of ISF [dam] embankment wall. There is scepticism around the ability to build a structure that will be strong enough to hold the force and weight of the water.*

*Can the Project guarantee that 'waste' will not leak through the walls of the dam and into the groundwater.*

*Who will look after the ISF once the mine is closed? Assumptions were that once the company and government has made its money, they will not care about looking after the dam and it would deteriorate.<sup>113</sup>*

136. Much of the above summaries are from activities which PanAust described as part of its ‘Sepik Awareness Program’ or SAP. The notifiers submission to the AusNCP said ‘there is no public record

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<sup>112</sup> Ibid, pp 4-37.

<sup>113</sup> Ibid, pp 4-35.

of what happened at SAP meetings and thus no evidence that this was meaningful consultation of the kind required by FPIC'. The enterprise's EIS, which is publicly available, provides considerable detail about the SAP meetings.<sup>114</sup> The EIS describes these meetings with communities along the Sepik River, including 'the exchange of information on the Sepik Development Project, potential environmental and social impacts and benefits and providing answers to questions raised'. The EIS shows the enterprise's engagement included the following.

- 136.1. March 2011 meetings with 10 communities in the upper Sepik region.
  - 136.2. A 'tok save' (radio broadcast in Tok Pisin) on local radio to inform communities of forthcoming meetings.
  - 136.3. May 2011 presentations to 14 communities in the middle Sepik River region.
  - 136.4. July 2011 presentations to communities in the lower stretch and middle Sepik River (including 'tok save' provided on local radio to inform communities of forthcoming meetings).
  - 136.5. July-August 2015, sessions in 41 villages along the Sepik River (estimated that more than 7,000 people attended these sessions and 'one of the main issues that was raised related to the strength of the Storage Facility dam or "ISF dam", and what guarantees will be put in place to ensure that it does not fail, and further information of the tailings dam at the enterprise's mines in Laos. Answers were given by the consultation team to issues and concerns raised by the communities. Key answers that were given regarded the quality of the water and the integrity of the Storage Facility dam').
  - 136.6. September 2016, sessions across approximately 42 villages, small and nearby hamlets (estimated that more than 4,400 people attended) and 'One of the key issues raised related to whether the Sepik Development Project can guarantee that 'waste' will not leak through the walls of the dam and into the groundwater and relating to the potential failure of the Storage Facility'.
  - 136.7. Statistics were collected regarding community support for the Sepik Development Project, during the 2016 program, 50 communities were supportive, 6 were not supportive and 5 were neutral.
  - 136.8. August-October 2018, engagement sessions with communities in the infrastructure corridor and the Sepik River, delivered to approximately 97 key villages and hamlets and approximately 7,366 people. The aims of these sessions 'were to update communities on the Sepik Development Project progress, present the environmental and social impacts in advance of the submissions of the Current EIS and provide villagers with a chance to raise concerns'.
137. The enterprise also detailed other engagement and consultations, including with government and communities in other areas of the project (not in the Sepik River areas). These are not directly relevant to this complaint and therefore not summarised in this statement.

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<sup>114</sup> Ibid, pp 4-16 and 4-21.

*OECD recommendation and declaration regarding responsible business conduct*

138. In December 2022, the governments adopted the *Recommendation on the Role of Government in Promoting Responsible Business Conduct*.<sup>115</sup> This included the following recommendations to adhering governments.

II. ... [D]evelop and review legal and other regulatory frameworks to enable RBC [responsible business conduct] and support the continued implementation and effective enforcement of these frameworks by:

1. Putting in place or maintaining an appropriate legal and regulatory framework that is continuously implemented and effectively enforced in the areas covered by the OECD Guidelines ... Adherents should periodically assess the relevant legal and regulatory frameworks in place and address any gaps and other challenges, including in enforcement and access to remedy.

...

4. Aligning with ... OECD Due Diligence Guidance when developing new policies, laws, or regulations, including secondary rules, legislative guidance, or sectoral policies. This will be particularly important for policies, laws, or regulations seeking to promote responsible global supply chains...

VI. ...[P]romote access to remedy by: 1. Taking appropriate measures so that those affected by non-observance of RBC standards by companies operating in or from their territories have access to effective judicial or non-judicial remedy mechanisms. ...

VII...[C]oordinate their policies and activities relevant to RBC, including by:

1. Promoting coherence across domestic government agencies and bodies to facilitate alignment and synergies between policies and practices relevant to RBC ...

2. Supporting NCPs in fostering policy coherence. This should include informing government agencies and bodies of NCP statements and reports related to specific instances when those specific instances are relevant to the agency's or body's policies and programmes.

3. Collaborating internationally, for example through relevant international and regional organisations and multi-lateral development banks, to promote policy coherence on RBC at the international level in line with the OECD Guidelines ...

139. This recommendation was given greater legal status, in April 2023, through its incorporation in the *Declaration on Promoting and Enabling Responsible Business Conduct in the Global Economy*.<sup>116</sup> The declaration encouraged governments to implement the Recommendation and noted that policy coherence at the national and international level can foster alignment and harmonisation of industry and government, with international standards on responsible business conduct.

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<sup>115</sup> OECD, 'Recommendation on the Role of Government in Promoting Responsible Business Conduct', Organisation for Economic Co-operation & Development, 2022 accessed 7 March 2023, <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0486>.

<sup>116</sup> OECD, *Declaration on Promoting and Enabling Responsible Business Conduct in the Global Economy*, Organisation for Economic Cooperation and Development, (2023), accessed 17 March 2023, <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0489>.

### Examiner's email to parties

140. Extract from examiner's 5 April 2023 email to parties (see statement paragraph 25).

*As the parties have previously been informed, the AusNCP Complaint Procedures state that 'Information that cannot be shared between the parties (in some form) will not be able to form part of the Examiner's consideration of the case': 10.2.*

*I will not be considering anything in the 31 March email sent by PanAust.*

*I am, however, now providing both parties the opportunity to address anything arising from the 8 March submissions.*

*To assist the parties in determining how they wish to proceed, I also outline below some preliminary observations and considerations I have already made, from the material and submissions provided.*

- Both sides had the opportunity to provide materials they consider relevant to these matters, and to consider the other sides' materials. Assertions made in the subsequent submissions which are not evidenced in the previous materials (and which are contradicted by the other side) will be given little weight.*
- The complaint has three bases, that PanAust: (1) has not respected human rights (breaching ch IV) in acting inconsistently with FPIC requirements, (2) has not sufficiently addressed foreseeable environment impacts (breaching ch VI) in its proposals nor provided sufficient information, and (3) provided insufficient disclosure of material matters (breaching ch III) which largely replicates and reinforces the concerns raised in the previous two grounds.*
- This examination will focus on the requirements in the OECD Guidelines regarding these three areas, and what is the material demonstrating whether PanAust's 'actions were consistent with the OECD Guidelines' in these three areas.*
- The contents and analysis in the ten expert reports submitted by Project Sepik to CEPA are contested between the parties. These are currently being considered by the relevant authorities in Papua New Guinea as part of their assessment and decisions. Any matters within those reports which is contested between the parties in their March submissions will not be relied upon in my Examination and statement.*

### Laws and cases

141. Examples of cases where developments have been adjudged contrary to FPIC because of a group's opposition in the context of significant impacts or inadequate consultation (see statement paragraph 81.3):

141.1. The Committee on the Elimination of Racial Discrimination decision in *Ågren -v- Sweden*.<sup>117</sup>

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<sup>117</sup> *Ågren -v- Sweden*, decision of the Committee on the Elimination of Racial Discrimination (CERD), 18 November 2020 UN doc CERD/C/102/D/54/2013, <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsk1o%2fr406%2f%2>

- 141.2. The Human Rights Committee decision in *Poma Poma -v- Peru*.<sup>118</sup>
- 141.3. The Norway NCP statement regarding *Intex Resources*.<sup>119</sup>
- 141.4. The Inter-American Court of Human Rights decisions in *Saramaka -v- Suriname*.<sup>120</sup>
- 141.5. The Inter-American Court of Human Rights decision in *Kichwa -v- Ecuador*.<sup>121</sup>
142. Examples of cases where developments have been considered consistent with FPIC - even in the absence of group or individuals' consent - because of the accommodation which had occurred, the minimal impact, or broader agreement (see statement paragraph 81.3):
- 142.1. The AusNCP statement regarding ElectraNet.<sup>122</sup>
- 142.2. The Swedish NCP statement regarding Statkraft SCA Vind AB.<sup>123</sup>
- 142.3. The Human Rights Committee decision in *Kitok -v- Sweden*.<sup>124</sup>
- 142.4. The Human Rights Committee decision in *Länsman -v- Finland*.<sup>125</sup>
- 142.5. The Human Rights Committee decision in *Mahuika -v- New Zealand*.<sup>126</sup>

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<sup>118</sup> *Poma Poma -v- Peru*, decision of the Human Rights Committee (CCPR), 27 March 2009, UN doc CCPR/C/95/D/1457/2006,

<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsvpiiwkDHeBnDsdUIOrYcq03rq%2b3gbkjkja8MknBksJ4VVTgA8KEfXE4aHxPwOIWZ2dOm1KsPhwoyweVjMMAlwMJW5T%2fdzI4GyMxEGLv%2fgstS%2bYGTUE%2b1DLHe9hr9ZdQ%3d%3d>.

<sup>119</sup> Norwegian National Contact Point, *Intex Resources Final Statement*, above n 56.

<sup>120</sup> *Saramaka People -v- Suriname*, decision of the Inter-American Court of Human Rights, 28 November 2007, [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_172\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf); *Saramaka People -v- Suriname*, decision of Inter-American Court of Human Rights interpretation of November 2007 judgment, 12 August 2008, [www.corteidh.or.cr/docs/casos/articulos/seriec\\_185\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_185_ing.pdf).

<sup>121</sup> *Kichwa Indigenous Peoples of Sarayaku -v- Ecuador*, decision of the Inter-American Court of Human Rights, 27 June 2012, [http://corteidh.or.cr/docs/casos/articulos/seriec\\_245\\_ing.pdf](http://corteidh.or.cr/docs/casos/articulos/seriec_245_ing.pdf).

<sup>122</sup> ElectraNet final statement, above n 84, 37 – 38, 58, 60.

<sup>123</sup> Swedish National Contact Point, *Final Statement Jijnjevaerie Saami village – Statkraft SCA Vind AB*, Swedish National Contact Point, Swedish Government, 2016, <https://www.government.se/contentassets/b08309e008a84c39aa491b0451cea50d/final-statement-jijnjevaerie-saami-village--statkraft-sca-vind-ab-ssvab-norway-and-sweden-oecd-ncp.pdf>.

<sup>124</sup> *Kitok -v- Sweden*, decision of CCPR, 27 July 1988 UN doc CCPR/C/33/D/197/1985, [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Download.aspx?symbolNo=CCPR%2fC%2f33%2fD%2f197%2f1985&Lang=en](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Download.aspx?symbolNo=CCPR%2fC%2f33%2fD%2f197%2f1985&Lang=en).

<sup>125</sup> *Länsman -v- Finland*, decision of CCPR, 8 November 1994 UN doc CCPR/C/52/D/511/1992, [www.unhcr.ch/tbs/doc.nsf/%28Symbol%29/7e86ee6323192d2f802566e30034e775?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/%28Symbol%29/7e86ee6323192d2f802566e30034e775?Opendocument).

<sup>126</sup> *Mahuika -v- New Zealand*, decision of CCPR, 27 October 2000 UN doc CCPR/C/70/D/547/1993, <http://juris.ohchr.org/Search/Details/897>.

143. The Examiner acknowledges the last three decisions all preceded the 2007 adoption of UNDRIP. However those earlier decisions are still cited as relevant authorities in understanding Indigenous consent.<sup>127</sup>
144. Papua New Guinea laws relevant to FPIC (see statement paragraph 78.1), as identified by the parties, include the following.
- 144.1. section 3 of the *Mining Act 1992*,<sup>128</sup>
  - 144.2. section 5 of the *Land Act 1996*,<sup>129</sup>
  - 144.3. The *Environment Act 2000*,<sup>130</sup> and
  - 144.4. The 1975 Constitution,<sup>131</sup> including s255 which states ‘where a law provides for consultation between persons or bodies, or persons and bodies, the consultation must be meaningful and allow for a genuine interchange and consideration of views’.
145. Papua New Guinea court decisions and principles relevant to FPIC (see statement paragraph 78.3) include the following
- 145.1. Constitutional requirements are relied on and reinforced by the courts.<sup>132</sup>
  - 145.2. Both parties referred to various cases where the Papua New Guinea Courts explained the requirements of these various provisions.<sup>133</sup>
  - 145.3. This included a 2017 decision of a unanimous Supreme Court, which confirmed findings of trespass and damage against a resources company for misuse of customary land, and emphasising that developers and government must first determine customary ownership and then seek consent.

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<sup>127</sup> For example, *Poma Poma -v- Peru*, above n 118, [7.4].

<sup>128</sup> *Mining Act*, above n 59.

<sup>129</sup> *Land Act 1996*, Papua New Guinea National Parliament [http://www.pacii.org/pg/legis/consol\\_act/la199648/](http://www.pacii.org/pg/legis/consol_act/la199648/).

<sup>130</sup> *Environment Act*, above n 61.

<sup>131</sup> *Constitution of The Independent State of Papua New Guinea*, 1975

[http://www.pacii.org/pg/legis/consol\\_act/cotisopng534/](http://www.pacii.org/pg/legis/consol_act/cotisopng534/).

<sup>132</sup> For example, *Saonu -v- Mori* decision of the National Court of Justice 20 September 2021 [2021] PGNC 384 <http://www.pacii.org/cgi-bin/sinodisp/pg/cases/PGNC/2021/384.html>. At [55], Kandakasi DCJ stated: ‘Only through a full disclosure of all relevant information about a project in a language that is easy to read and understand can there be a meaningful consultation .... A proper consultation or review process necessarily for the purposes of s. 255 of the Constitution ... requires therefore a two-way dialogue with interchange of information and views in clearly understandable language instead of a one-way dissemination of selective information only or not at all in complicated technical or difficult language. ...[A]ll three arms of government, the National and Provincial and Local-level Governments need to consult with local landowners and or communities who stand to be affected and other relevant stakeholders.’

<sup>133</sup> These included the cases *Bernard -v- Duban* [2016] PGNC 121 and *Kawira -v- Bone* [2017] PGNC 164 as reinforcing the requirement of ‘free and informed consent’ of customary landowners when identifying and registering incorporated land groups for the purpose of natural resource development/exploitation; *Maniwa -v- Malijiwi* [2014] PGNC 25 held that projects which would have permanent and long-term effect on their land require ‘genuine and meaningful consultation with the landowners must be carried out among the landowners’.

*[N]o land is ... vacant and ownerless in PNG. ... The duty is therefore, upon the State or any other person which may include foreign investors or developers who wish to enter any land in PNG and more so customary land, to first make it their business to ascertain who the true and correct owners are. Once they have done that, they would then be in a better position to enter into meaningful discussions and negotiations with them and get their free and informed consent or approval before entering, occupying and using their land. ...[T]he State and any developer have an obligation to properly identify and organise the customary landowning group that owns any land they might be interested in, as part of their obtaining their social license to operate.<sup>134</sup>*

146. In some circumstances for a company to ensure its actions respect human rights this may require action, in addition to reliance on a government permit/licence, to ensure FPIC is addressed consistently with the OECD Guidelines (see statement paragraph 80).

146.1. The Guidelines supplement domestic laws. If any domestic law actually prohibits particular actions expected by the Guidelines, then an enterprise is not required to undertake those actions. Usually, however the Guidelines can be met in a way that does not contravene domestic law:

*[T]he Guidelines extend beyond the law in many cases, ...[and] enterprises should seek ways to honour such principles and standards to the fullest extent which does not place them in violation of domestic law.<sup>135</sup>*

146.2. This dynamic is particularly relevant to issues of Indigenous impact arising where domestic laws are often identified as inconsistent with international legal standards.<sup>136</sup> Many enterprises negotiate and make agreements with Indigenous groups, beyond the legal minimums required in domestic law, which is a way to address FPIC expectations in international standards and the Guidelines.

147. The case guidance which exists about ‘significant’ impacts, necessitating FPIC (see statement paragraph 81.4), includes:

147.1. developments threatening the way of life and culture of an Indigenous group;<sup>137</sup>

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<sup>134</sup> *Rimbunan Hijau Ltd -v- Enei* decision of Supreme Court of Justice [2017] PGSC 36 (25 September 2017) <http://www.paclii.org/pg/cases/PGSC/2017/36.html>.

<sup>135</sup> OECD Guidelines, above n 1, Ch I, [2]; UNGPs, above n 66, Principle 23, which states to similar effect: ‘In all contexts, business enterprises should: (a) Comply with all applicable laws and respect internationally recognized human rights, wherever they operate; [and] (b) Seek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements’.

<sup>136</sup> See, for example, the documents in below footnotes 142 and 144; CERD, Decision 2(55), UN doc A/54/18 IIC, 16 August 1999, p 10; CERD, Decision 2(54), UN doc A/54/18, IIA, 18 March 1999, [7] – [9], [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Download.aspx?symbolno=A%2F54%2F18%28SUPP%29&Lang=en](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Download.aspx?symbolno=A%2F54%2F18%28SUPP%29&Lang=en); Human Rights Committee, *Concluding Observations: Australia*, UN doc A/55/40, 24 July 2000, [507] – [510], [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Download.aspx?symbolno=A%2F55%2F40%5BVOL.%5D\(SUPP\)&Lang=en](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Download.aspx?symbolno=A%2F55%2F40%5BVOL.%5D(SUPP)&Lang=en).

<sup>137</sup> *Chief Bernard Ominayak -v- Canada* decision of CCPR, 26 March 1990 UN doc CCPR/C/38/D/167/1984 [www.unhcr.org/refworld/docid/4721c5b42.html](http://www.unhcr.org/refworld/docid/4721c5b42.html).

- 147.2. impacts amounting to a denial of the right to enjoy cultural rights in that region;<sup>138</sup>
- 147.3. endangering the very survival of the community and its members;<sup>139</sup>
- 147.4. substantially compromising or interfering with culturally significant activities;<sup>140</sup> and
- 147.5. is summarised in the advice by the Expert Mechanism on the Rights of Indigenous Peoples that ‘States should prevent measures or projects that may cause significant harm to indigenous people’.<sup>141</sup>
148. International Labour Organization Convention 169<sup>142</sup> is the only treaty which expressly includes FPIC (see statement paragraph 77) requiring consent where:
- 148.1. there will be relocation<sup>143</sup> or
- 148.2. legislative or administrative measures which may directly affect the Indigenous or tribal peoples concerned.<sup>144</sup>
149. FPIC has been understood as necessary to comply other international human rights standards even where it is not explicitly featured in their text. For example:
- 149.1. regarding the *International Covenant on Economic, Social and Cultural Rights*,<sup>145</sup> state parties should ‘enter into effective consultations with indigenous communities before granting concessions for the economic exploitation of the lands and territories traditionally occupied or used by them’;<sup>146</sup>

<sup>138</sup> *Länsmän -v- Finland*, above n 121; see also *Länsmän -v- Finland* decision of CCPR, 22 November 1996 UN doc CCPR/C/58/D/671/1995 [10.3] <https://juris.ohchr.org/casedetails/743/en-US>, and *Länsmän -v- Finland* decision of CCPR, 17 March 2005 UN doc CCPR/C/83/D/1023/2001 [10.1]-[10.3] <https://juris.ohchr.org/Search/Details/1157>.

<sup>139</sup> *Poma Poma -v- Peru*, above n 114, [7.6].

<sup>140</sup> *Ibid*; *Mahuika -v- New Zealand*, above n 122, [9.5] ‘the acceptability of measures that affect or interfere with the culturally significant economic activities of a minority depends on whether the members of the minority in question have had opportunity to participate in the decision-making process in relation to these measures.’

<sup>141</sup> EMRIP, above n 71, [33].

<sup>142</sup> International Labour Organisation, *Convention concerning Indigenous and Tribal Peoples in Independent Countries*, Geneva, 1989 accessed 16 Sep 2009. [www.ilo.org/ilolex/cgi-lex/convde.pl?C169](http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169) (ILO 169). This Convention is relevant to OECD Guidelines expectations, see Norwegian National Contact Point, Intex Resources final statement, above n 56, pp 21-23.

<sup>143</sup> ILO 169, above n 138, article 16.

<sup>144</sup> *Ibid*, articles 6 and 16.

<sup>145</sup> UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, United Nations, Geneva, 1966 [www.un-documents.net/icescr.htm](http://www.un-documents.net/icescr.htm).

<sup>146</sup> For example, Committee on Economic, Social and Cultural Rights (CESCR), *Concluding observations: Argentina*, 1 November 2018 UN doc E/C.12/ARG/CO/4 p 3 [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolNo=E%2FC.12%2FARG%2FCO%2F4&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolNo=E%2FC.12%2FARG%2FCO%2F4&Lang=en). See, to similar effect: CESCR, *Concluding observations: Peru*, 30 May 2012 UN doc E/C.12/PER/CO/2-4, [23], <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmIBEDzFEovLCuW3vnSFp3hzwHJoc3FQ%2B%2Bmr0PCFYpQV3qk5T52%2BXN4Ts69DsItRD0SNsbd5z8itBR1edhAK4s2Kgz3FWxwtAu2yfdBONWidFjOkocWcFRvqj> and CESCR, *Concluding observations: El Salvador*, 19 June 2014 UN doc E/C.12/SLV/CO/3-5 [27]

- 149.2. regarding *International Convention on the Elimination of All Forms of Racial Discrimination*<sup>147</sup> state parties should ‘consult the indigenous people concerned and cooperate with them through their own representative institutions, in order to obtain their free and informed consent, before approving any project that affects their lands, territories or other resources, in particular with regard to the development, use or exploitation of mineral...or other resources.’<sup>148</sup>
150. The generally accepted understanding is that a government could proceed even without FPIC if that is necessary and proportionate for the state’s securing the human rights of others (see statement paragraph 84). This arises from UNDRIP art 46(2), and also confirmed in the following three materials (which the Examiner acknowledges are not international legal standards):
- 150.1. The 2018 study of the UN’s Expert Mechanism on the Rights of Indigenous Peoples on ‘Free, prior and informed consent: a human rights-based approach’.<sup>149</sup>
- 150.2. The 2013 report of the Special Rapporteur on the rights of indigenous peoples about ‘Extractive Industries and Indigenous Peoples’.<sup>150</sup>
- 150.3. The 2018 analysis of Dr Mauro Barelli on ‘Free, Prior and Informed Consent in the United Nations Declaration on the Rights of Indigenous Peoples’.<sup>151</sup>
151. FPIC is a right of an Indigenous group not individuals (see statement paragraph 86).
- 151.1. The FPIC provisions in UNDRIP are expressed as the right of ‘indigenous peoples,’<sup>152</sup> not as the right of an individual, and emphasises the primacy of the group regarding the responsibilities of individuals.<sup>153</sup>
- 151.2. UNDRIP differentiates between the rights of ‘individuals’ and ‘Indigenous peoples.’ Individual rights under UNDRIP concern issues which are enjoyed or exercised by a person

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<https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW%2FH%2F4vptEr4hUabmo93cgAjuk%2Be%2FTjLcP54Ww%2FB11TCG6EB2ho9sBjXjzJGxpygdFju10BRCHjuzKeke6acT1U0vLTAET8ayYsS6XOr1uzYd>.

<sup>147</sup> UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, New York, 1965, [www.un-documents.net/icerd.htm](http://www.un-documents.net/icerd.htm) .

<sup>148</sup> CERD, *Concluding observations: Cameroon*, 30 March 2010 UN doc CERD/C/CMR/CO/15-18 p5 <https://undocs.org/Home/Mobile?FinalSymbol=CERD%2FC%2FCMR%2FCO%2F15-18&Language=E&DeviceType=Desktop&LangRequested=False>. See, to similar effect: CERD, *Concluding observations: the Philippines*, 23 May 2023 UN doc CERD/C/PHL/CO/21-25, [14], <https://uhri.ohchr.org/en/document/fdfa47c5-dc8b-417c-a7de-a3dec7d65795>; CERD, *Concluding observations: United States of America*, 21 September 2022, UN doc CERD/C/USA/CO/10-12, [50], <https://uhri.ohchr.org/en/document/133396dd-9f5b-43ae-8926-28144f817762>.

<sup>149</sup> EMRIP, above n 71, [38].

<sup>150</sup> Human Rights Council, *Extractive Industries and Indigenous Peoples*, 1 July 2013 UN doc A/HRC/24/41, [33], [34], [38], <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G13/152/49/pdf/G1315249.pdf?OpenElement> .

<sup>151</sup> Barelli, ‘Free, Prior and Informed Consent in the United Nations Declaration on the Rights of Indigenous Peoples Articles 10, 19, 29(2) and 32(2)’, Oxford University Press, Oxford, 2018, pp 253 and 269.

<sup>152</sup> UNDRIP, above n 52, articles 10, 11, 19, 28, 29, 32. All FPIC rights in UNDRIP, are expressed as the rights of ‘Indigenous **peoples**’ (emphasis added) meaning an Indigenous group.

<sup>153</sup> UNDRIP, above n 52, article 9 ‘[I]ndividuals have the right to belong to an Indigenous community...in accordance with the traditions and customs of the community;’ UNDRIP, above n 52, article 35 ‘Indigenous peoples have the right to determine the responsibilities of individuals to their communities.’

(not a group), emphasising that Indigenous individuals should not be discriminated against. The only mentions in UNDRIP of individual rights are these:

- Indigenous individuals should not be discriminated against in health services (art 24), work conditions (art 17.3), education (art 14.2), or from being Indigenous (arts 2 and 9);
- rights to ‘life, physical and mental integrity, liberty and security of person’ (art 7(1));
- ‘Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture’ (art 8(1));
- access to education in own culture/language (art 14(3));
- to enjoy international labour law standards of international or domestic law (art 17(1));
- right to nationality (art 6) and to ‘obtain citizenship of the States in which they live’ (art 33);
- right ‘to effective remedies for all infringements of their individual and collective rights’ (art 40); and
- UNDRIP rights ‘equally guaranteed to male and female Indigenous individuals’ (art 44).

151.3. The Human Rights Committee (which examines compliance with the International Covenant on Civil and Political Rights or ICCPR) examined a complaint by some Indigenous people against a nationwide negotiation and settlement of Indigenous fishing rights and arrangements in New Zealand.<sup>154</sup> The Committee ruled the ICCPR rights had not been breached, largely because of the comprehensive negotiations and approval involving the broader Maori population.<sup>155</sup>

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<sup>154</sup> *Mahuika -v- NZL*, above n 126.

<sup>155</sup> *Ibid.* Key aspects of the Committee’s reasoning in *Mahuika -v- NZL* included the following (emphasis added).

[9.6] ... [T]he State party [New Zealand Government] undertook a complicated process of consultation in order to secure broad Maori support to a nation-wide settlement and regulation of fishing activities. Maori communities and national Maori organizations were consulted and their proposals did affect the design of the arrangement. ... The Committee has noted the authors’ claims that they and the majority of members of their tribes did not agree with the Settlement and that they claim that their rights as members of the Maori minority have been overridden. In such circumstances, where the right of individuals to enjoy their own culture is in conflict with the exercise of parallel rights by other members of the minority group, or of the minority as a whole, the Committee may consider whether the limitation in issue is in the interests of all members of the minority and whether there is reasonable and objective justification for its application to the individuals who claim to be adversely affected.

[9.8] **In the consultation process, special attention was paid to the cultural and religious significance of fishing for the Maori, ... [T]he State party has, by engaging itself in the process of broad consultation before proceeding to legislate, and by paying specific attention to the sustainability of Maori fishing activities, taken the necessary steps to ensure that the ...Settlement and its enactment through legislation, ... are compatible with article 27 [of the ICCPR, regarding protection of culture]**

151.4. The IFC's Performance Standard, and related commentary, regarding Indigenous Peoples addresses the complexity of group FPIC. This indicates FPIC can exist occur even where there may be some internal disagreement.<sup>156</sup>

*CEPA consultation meetings*

152. Comparison of statements in the notifiers report of CEPA consultation meetings with the transcript of a CEPA consultation meeting (see statement paragraph 68).

notifier Report	CEPA consultation transcript
<p>'The people were asked to give consent'</p> <p>'CEPA did not indicate... a purpose of seeking to engage in a genuine consultation process'</p>	<p>CEPA official said 'The National Government process, in accordance with the Environment Act, states that the Environment department must consult and seek people's opinions on large projects that may impact them', and 'we are continuing our engagement program this year to compile a report based on your input. Your views will form a report that will be accompanied by independent peer reviewer reports that will be submitted to the Environment Council. The Environment Council is an independent body that consists of independent senior citizens. ... They will look at the dam design and impacts, and a decision will be made. The Council will recommend to the Minister whether or not to approve'.</p> <p>Local government official said 'Today, you are free to speak your mind ... so speak freely about your concerns about the river and how you live, bathe, feed and use the river'.</p> <p>Central government official said 'it is your democratic right to express your views. ... The government wants to gauge your understanding of the impacts of the project and your responses to it. You must express yourselves'.</p> <p>The transcript did not include the word 'consent'.</p>
<p>'[Unanimous opposition to the mine was expressed at ... Pagwi'</p> <p>'Many people who stood up and responded to CEPA's presentation were against the mine. Everyone else said NO'.</p>	<p>Many people did speak against the project, but this was not unanimous.</p> <p>One community participant said 'in support of mining'</p> <p>Another community participant said 'I am of the view that mining can happen only if the government can manage and save the Sepik River people from mining impacts'.</p>
<p>'The presentations generally followed the same structure' and 'At the Marienberg</p>	<p>At the Pagwi meeting, the CEPA official talked about ongoing dam analysis, and said 'the assessment of the hydro dam</p>

<sup>156</sup> IFC Performance Standard 7, above n 66, [10]. The IFC Performance Standard requires a process of engagement with affected Indigenous groups which 'includes stakeholder analysis and engagement planning, disclosure of information, consultation, and participation, in a culturally appropriate manner. In addition, this process will... Provide sufficient time for Indigenous Peoples' decision-making processes. **Internal decision making processes are generally but not always collective in nature. There may be internal dissent, and decisions may be challenged by some in the community.** The consultation process should be sensitive to such dynamics and allow sufficient time for internal decision making processes to reach conclusions that are considered legitimate by the majority of the concerned participants.'...[P]rocesses should ensure the meaningful participation of Indigenous Peoples in decision-making, focusing on achieving agreement while not conferring veto rights to individuals or sub-groups'.

notifier Report	CEPA consultation transcript
<p>consultation... CEPA assured attendees that the dam was completely safe and would not break. CEPA did not provide any further information or justify its position with evidence’.</p>	<p>structure. Like you, we are also concerned. The proposal seems feasible, but there is still work to be done. Additional geotechnical drilling needs to occur to acquire more data to support the study of the large dam. ... If additional data suggests that the current proposal needs to be adjusted, adjustments will be made’.</p> <p>The CEPA official also explained they had engaged independent experts CEPA who ‘undertook field visits, tested samples, and looked at land formation, geology, and dam structure against earthquakes’.</p> <p>It seems unlikely, and illogical, that CEPA would state this in one meeting but, at another meeting, the significantly different message asserted in the notifiers report.</p>
<p>‘This recording demonstrates that only English and Tok Pisin were spoken’.</p>	<p>The transcript features Tok Pisin and English and at, various times, speakers are transcribed as ‘[speaks in local vernacular]’</p>

153. Examiner’s summary of transcript of CEPA consultation meeting (see paragraph 68 above).

- The meeting involved representatives from local government, CEPA, and academic experts (as observers). Organisers of the meeting explained to attendees that there were others present including an enterprise representative (who they said would not be speaking) and 8 police officers.
- The organisers explained that people will also hear about mining impacts from an NGO awareness programme, and that programme has been visiting other villages in the area.
- Organisers acknowledged and reminded people of serious impacts from previous mining operations in Papua New Guinea including OK Tedi and Bougainville. Organisers said changes in mining and environmental regulation have since occurred, for greater protection and community involvement in regulation of mining.
- CEPA explained they had to go to each village and obtain their views, because of the legal requirements and importance for that. They also explained what would occur after the meeting: ‘Your views will form a report that will be accompanied by independent peer reviewer reports that will be submitted to the Environment Council. The Environment Council is an independent body that consists of independent senior citizens. They are not employees of a department. The Environment Council will meet to assess all the reports put before them. They will look at the dam design and impacts, and a decision will be made. The Council will recommend to the Minister whether or not to approve. The Environment Council process is still a long way off. We are at the consulting stage. That’s why we’re here.’
- CEPA explained this proposal is for a very large project: ‘Frieda covers a vast footprint area, unlike other projects in Papua New Guinea that I have visited within a program of similar scope. Simberi Mine has only five villages. Only a handful in Lihir, about 2 or 3 villages. As for Frieda, it starts at Telefomin in West Sepik and ends at Angoram in East Sepik. This is a large footprint over a larger area’. CEPA explained an earlier proposal had been submitted but CEPA had raised concerns about river impacts, and that had been revised and resulted in the current EIS.

- CEPA explained the EIS is a long and technical document, and that CEPA had engaged independent experts to provide peer review and independent assessment to CEPA. CEPA identified these as the Snowy Mountain Engineering Company (described as ‘experts in building dams, wharves, airports and roads’) and Hydrobiology (who ‘specialize in the environment of terrestrial and aquatic biodiversity’). CEPA explained these experts ‘undertook field visits, tested samples, and looked at land formation, geology, and dam structure against earthquakes ...[and] looked at samples taken along the river and in the forest near the location where the mine would be’. CEPA has received reports from these experts.
- CEPA explained two provincial governments had also engaged independent experts to provide their advice, and these reports have also been provided to CEPA.
- CEPA explained the four main components of the project, and emphasised these covered different areas, with some being airport and energy infrastructure elsewhere but that ‘The Sepik River people are concerned about the mine and dam’.
- CEPA explained that if the project preceded it would be required to undertake monitoring ‘along the Sepik River to Kopa’.
- CEPA talked about the dam, explaining it was proposed for waste storage and also providing hydroelectricity. CEPA explained that one ongoing activity was ‘the assessment of the hydro dam structure. Like you, we are also concerned. The proposal seems feasible, but there is still work to be done. Additional geotechnical drilling needs to occur to acquire more data to support the study of the large dam. If additional data suggests that the current proposal needs to be adjusted, adjustments will be made. Otherwise, the current proposal still stands’.
- People were invited and encouraged to talk about the EIS and the mining proposal, and likely impacts. Organisers emphasised that it was important to hear from youth because they would be the people who would be living with any project in the future.
- CEPA stated: ‘There is a misconception that the project will do direct riverine disposal. That is incorrect. If the company had proposed to dump its waste into the river directly, a decision would have already been made in Port Moresby to say No. I wouldn’t be here before you. We [government/CEPA] will not let this affect the lives of our people’.
- There were many different views recorded by people in the meeting, about the proposal. Many identified concerns about the dam and potential for pollution, which could harm the environment and people’s lives who are dependent on the river, as well as fears if the dam breaks. Many people indicated they do not want the mine to proceed. Others said that they considered the mine would be acceptable with proper regulation and monitoring to avoid spills and impacts, and also compensation for any losses.