

Mining and Indigenous Peoples Issues Review



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International Council on Mining and Metals

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Foreword

Successful mining and metals operations require the support of the communities in which they operate now, and in the future, to ensure continued access to land and resources. Relationships between mining and metals operations and their local communities, including Indigenous communities, should be founded on respect, meaningful engagement and mutual benefit. Often these relationships are complex. This is particularly the case in relationships with Indigenous communities, which have characteristics that set them apart from the wider community, such as distinct systems of decision-making, social and political institutions, and wealth generation and distribution mechanisms. In addition, their cultures are often closely associated with natural resources.

ICMM members have committed themselves to implementing ten sustainable development principles and to measuring their performance against them. Two of these principles are directly related to local communities, including Indigenous communities: *“upholding fundamental human rights and respecting cultures, customs and values in dealing with employees and others who are affected by our activities”* and *“contributing to the social, economic and institutional development of the communities in which we operate.”*

In seeking to implement these principles, ICMM commissioned Jo Render, an expert on indigenous peoples, to carry out this independent review of the issues surrounding Indigenous peoples and mining and metals operations. The review’s main objectives are to facilitate more meaningful industry engagement in these areas and improve management of the relationships. The review process included a survey of a diverse range of industry representatives, many of whom were from ICMM member organisations.

We are encouraged by the high level of convergence in the issues identified by industry, Indigenous peoples and other stakeholders. The challenge now is how we address the issues and find solutions. The review identifies a number of possible follow-up activities, including the potential benefits of focused dialogue between ICMM members and others. We will consider how we can best address the various issues and options raised and would welcome suggestions from readers of this review on priorities. The review also clearly shows that industry cannot solve the issues alone. Indigenous peoples, governments and other stakeholders all have a role to play with mining and metals companies in ensuring that contributions to sustainable communities are realised. We hope that this review contributes to successful and constructive dialogue.

Paul Mitchell
Secretary General
International Council on Mining and Metal

Executive Summary

Introduction

This review provides a brief overview of Indigenous peoples issues faced by the mining industry as it seeks to gain access to land, carry out exploration and, if successful, develop and manage a mining operation. It aims to provide guidance on possible options in this area for the International Council on Mining and Metals (ICMM) and the mining industry to contribute to. The review was commissioned by ICMM under the direction of its Community and Social Development Task Force.

At the core of this review are results from a survey of ICMM corporate and association members on how they currently define the issues, the challenges they continue to face and the solutions available to them. Ten of the 15 member companies and four member associations participated in the survey; respondents included personnel with international policy responsibilities as well as country- or site-level managers and exploration personnel. Most of the comments from industry focused on experiences in Australia, Canada, Chile, Indonesia, Papua New Guinea, Peru, South Africa, Tanzania and the United States.

The results of the industry survey are compared to how other stakeholders define the issues, with priority given to Indigenous peoples and their organisations, but also more generally to development institutions and practitioners, nongovernmental organisations (NGOs), national governments and investors.

Background

While Indigenous peoples have diverse histories, cultures and interactions with the mining sector, some important commonalities help set the stage for discussion of the issues identified by industry and various stakeholder groups.

Based on historical political relationships, Indigenous peoples generally represent the most socially and economically marginalised populations around the world. This is experienced in, for example, the lack of or diminished access to formal political processes and decision-making structures, justice and basic social services, including health and education.

This has led to concerted efforts at both the national and the international level to redress this situation through recognition of Indigenous peoples' rights. At the national level, more than two dozen countries now have formal recognition of Indigenous peoples' rights established at varying levels in the legal framework. This formal recognition often includes some measure of self-government, landownership, land access, resource rights and the protection of cultural heritage. There are sustained efforts in a number of fora to ensure that such rights are more firmly acknowledged at the international level.

Individual companies have responded in varying ways to these concerns, including, for example, explicit policy measures toward Indigenous peoples, and formal and informal agreements and partnerships with Indigenous communities and organisations local to operations.

Contextual Issues

Given this background, industry respondents, Indigenous peoples, NGOs, development practitioners and some governments and development institutions identified several common challenges that shape the relationships between mining

companies and Indigenous peoples. These 'contextual' concerns act as key drivers in defining issues that come into play at the operations stages of the relationship between companies and Indigenous communities.

Historical lack of trust – Given the historical relationships with Indigenous peoples, trust is hard to come by when working in an Indigenous context, and this lack of trust is reinforced by tangible reminders of bad practice. Industry respondents mentioned particular problems around orphaned and closed mine sites that had not been rehabilitated, as well as health and social concerns around older operations. Acknowledged issues included the negative impacts of large-scale in-migration, disruptive changes in economic and cultural relationships within and between Indigenous communities and ongoing Indigenous community fears in areas that have experienced environmental degradation. Indigenous peoples also pointed to a lack of national government willingness to stop or mitigate these practices. As a result, Indigenous peoples express disbelief when responding to project proposals or government statements promising improved practices and better regulations.

National governments – For many Indigenous peoples and organisations, the foundation of many of their concerns is their relationship with national governments. Industry respondents, Indigenous peoples, NGOs and some development institutions highlight the following concerns:

- political agendas that view Indigenous peoples as an obstacle to national development;
- economic mechanisms that funnel benefits from mining to national or provincial centres;
- decisions that limit resources to fundamental social services and local capacity;
- lack of coordination among different governmental branches on these issues; and
- an unwillingness by governments to uphold rights even when they are recognised in national law.

Land rights – Indigenous peoples' ancestral territory has been described as a physical representation of their culture, their spirituality and their identity. The land often represents the source of food, medicine, clothing and shelter and provides the base for self-government and economies. It is also under increasing pressure not only from mining but from other commercial interests as well, including petroleum, natural gas, logging, ranching, large-scale agriculture, hydropower, tourism and even conservation and bioprospecting efforts. Therefore there has been tremendous effort to regain or increase security in formal recognition of Indigenous land rights.

For industry respondents, secure access to land and mineral resources is the immediate objective and the foundation for business development in the mining industry and is therefore of the highest concern. Land rights often are the critical starting point for deciding who must be engaged and at what stage. While the survey respondents tended not to disagree with Indigenous land rights, managing these rights is described as complex and labour- and time-intensive for companies, regardless of geographic region.

Resolving issues of land rights and land access has thus far been highly difficult for both Indigenous peoples and companies, and proposed solutions from industry have met with scepticism. Reflecting the lack of trust in these relationships, efforts by industry to streamline land access legislation is often perceived as a threat to Indigenous land rights.

Broad industry recognition and support – All industry respondents said that they have solid support from their companies for their work, but as one respondent put it, there is still a problem in getting more industry colleagues ‘to take Indigenous peoples seriously’. Industry is not the only sector that suffers from this – governments, financial institutions and even NGOs and philanthropists are grappling with the same problem. The pervasiveness of this attitude is noticed by Indigenous peoples and their organisations.

Local Issues: Process and Outcomes

Two fairly broad issue areas attracted the largest number of industry reactions within the survey: building positive, mutually beneficial relationships (community engagement in an Indigenous context) and creating long-term, effective sustainable development opportunities (community development in an Indigenous context).

Successful community engagement in an Indigenous context was broadly recognised as critical to achieving a legal licence to operate in many areas and a social licence to operate in all areas, and it is integral to maintaining company reputation. Indigenous peoples base their concerns regarding engagement practices on one fundamental principle: effective participation in the decisions that affect their lives.

There is concern from both industry respondents and Indigenous peoples about how well industry is putting this principle into operation in its engagement practices.

Areas of concern include:

- determining the appropriate partner(s) for engagement;
- determining and working with Indigenous decision-making structures;
- understanding and respecting cultural considerations in the relationship;
- devising effective research and impact assessment processes;
- devising effective communication methods and managing expectations; and
- mitigating or managing conflict.

Due to both its relationship to the desired outcome of the engagement process and its recent prominence in the Extractive Industries Review, industry representatives and others highlight the ongoing debate around the term ‘free, prior and informed consent’ (FPIC). While a number of industry respondents acknowledged the importance of the notion of community ‘support’ or ‘consent’, many claimed that they did not fully understand how other stakeholders were defining FPIC. This lack of common understanding has resulted in heated debate, and several initiatives are exploring this issue further.

Community development in an Indigenous context, and the notion of what ‘sustainable development’ looks like to different actors, was also one of the highest ranking areas of concern for industry. There are increasing calls from Indigenous peoples, NGOs and development practitioners for a more equitable sharing of the benefits of development projects. While there is some effort among companies to address this, there is little guidance on how to design effective, long-term community development programmes with Indigenous peoples. Hampering efforts in this regard are national governments that are either absent or ineffective, as well as differing definitions of ‘development’ among company personnel, Indigenous peoples and other stakeholders.

There is an additional level of complexity experienced by companies that operate in areas where the ‘local community’ includes both Indigenous and non-Indigenous

peoples. While both groups may have similar interests in terms of the desire for development opportunities, there are some differences. Because of their ancestral connection to their territory and their own customs and laws, Indigenous peoples have less flexibility when it comes to decisions regarding their ancestral lands. When companies operate on ancestral lands, there is often a call for consideration with regard to the benefits that accrue from projects in these territories. For companies, this has led to some frustration in trying to balance the interests of different groups.

Gaps, Barriers and Stumbling Blocks

Two ‘issue gaps’ – areas of high concern for Indigenous peoples and some other stakeholders that generally did not receive much attention from industry respondents – were identified as of particular importance in the relationship between the mining sector and Indigenous peoples: resettlement and the environment.

Industry respondents in general did not highlight resettlement as an area of concern because they were not having to deal with it at the time of this study. For those few who are, and for Indigenous peoples, resettlement remains highly problematic because of ancestral attachments to the land. Resettlement in this context moves from being logistically difficult to a worst-case scenario. While some resettlement guidelines from development institutions try to mitigate these impacts, many still allow for involuntary resettlement, which makes this an active point of debate between Indigenous peoples (as well as their supporters) and these institutions.

With regard to the environment, many industry respondents tended to point to environmental concerns as being directed by external sources, such as various NGO activists. Yet a growing level of activism by Indigenous peoples and their organisations with regard to the environment seems to counter this perception. Increasingly, Indigenous peoples, NGOs and development practitioners are placing greater emphasis on Indigenous participation in environmental assessment processes and building local capacity for land use planning, resource management and environmental monitoring.

Industry respondents also identified several factors that they believed acted as barriers or stumbling blocks in their ability to manage the issues outlined in this review. These included:

National governments – Industry seems to agree with Indigenous peoples and many other stakeholders on this issue, but industry is also perceived as being unwilling to engage governments directly on common areas of concern.

The rest of the industry – The behaviour of other companies with regard to Indigenous peoples has directly affected business concerns by increasing negotiation time frames and community requests for companies to clean up messes left behind.

Staff expertise – Industry personnel generally believe that they are left to figure out a way forward on their own. While many noted an increasing number of consultants and training initiatives available to provide services, these are seen as stop-gap measures, in place because mainstream professional education has not yet begun to fill this need.

Indigenous community capacity – Industry respondents and Indigenous peoples raise concerns that communities, unless they have already been through some

experience with mining, are ill equipped to take on the added burdens of managing both the engagement process and the outcomes.

Industry character – There is a fundamental problem in finding platforms for action within the private sector. Some company respondents described a hesitancy to ‘stick my head above the parapet’, while others talked more of the drive to keep good practice inside the company, hoping for some competitive advantage. Survey respondents felt that both attitudes have impeded efforts to improve practice on a broader scale.

Summary of Issues

There is a great deal of convergence between the industry respondents and Indigenous peoples regarding issue areas and challenges. The differences lie in how each side approaches the issue and possible solutions. For example, with land rights, industry respondents emphasised the desire to simplify and shorten legal and administrative processes, while Indigenous peoples and their advocates emphasise securing long-term rights and control. Other areas of divergence include approaches to decision-making processes and community development, among others.

The distinction on emphasis and priorities in any particular local context is harder to grasp in a broad survey. Indigenous peoples have consistently emphasised the desire and the right to determine costs and benefits according to their own values and to be part of decision-making regarding mining projects in their territories from the earliest possible stage. This concept of ‘meaningful participation’ underscores all the issues identified by Indigenous peoples.

Existing Initiatives and Programmes

ICMM and its members might consider joining in a few national and international initiatives and programmes on these issues. In terms of building relationships with Indigenous peoples at the international level, there are the annual meetings of the United Nations Permanent Forum on Indigenous Issues and the Working Group on Indigenous Populations (of the Office of the High Commissioner for Human Rights). One ICMM member has attended these on a regular basis. There are also opportunities for industry to engage on issues ranging from FPIC to community consultation, research and World Bank standards.

Conclusions

Industry and Indigenous peoples are effectively without a coordinated method or forum at the international level to come to a mutual understanding of the issues of critical importance via open dialogue and to build the capacity of their members through a sharing of experiences from a variety of perspectives.

Several possible follow-up activities to this review were identified, focusing on ways industry can work directly with Indigenous peoples to design national or international plans of action that would be based on a common understanding of the issues and potential solutions:

- Based on the experience of the industry respondents, undertake an in-depth exploration of Indigenous community engagement and consent processes,

which could provide the basis for effectively engaging with existing initiatives on FPIC.

- Participate in an international dialogue between the industry and Indigenous peoples to explore more broadly the areas for common action. This concept could also be directed at the national level.

Create professional networking opportunities, which would allow for a broader learning effort through available venues (such as national associations) but which could also be leveraged to increase knowledge and skills at the international level, as well as initiating the evaluation of existing university and professional curricula for industry personnel.

1. Introduction

This review aims to provide an overview of the various issues concerning Indigenous peoples¹ that the mining industry faces as it seeks to gain access to land, carry out exploration and, if that is successful, develop and manage a mining operation. The goal here is to provide guidance on possible options in this area for the International Council on Mining and Metals (ICMM) and the mining industry. The review was commissioned by ICMM under the direction of its Community and Social Development Task Force.

To meet this goal of providing guidance, the review covered the following key aspects of the relationship between Indigenous peoples and mining:

- *Issues identification* – Survey ICMM members and key national industry bodies for their views on current and future Indigenous issues in their geographic areas of interest. Obtain an indication from these organisations of the implications and significance of these issues for industry. Ascertain whether and how they are actively having input on these issues. Also include an assessment of their capacity and resources to manage the issues.
- *Indigenous peoples and the local community* – Explore the relationship between Indigenous peoples and other (i.e. non-Indigenous) local community opportunities and concerns, the interrelationship between original inhabitants and currently resident peoples and the situations where the opportunities or concerns may be the same or in conflict.
- *Existing and planned initiatives* – Undertake a literature and Web-based study covering international and key national Indigenous peoples organisations (government as well as nongovernmental organisations (NGOs)), relevant non-Indigenous NGOs and government departments and agencies (national and state or provincial levels) to ascertain issues and determine current and planned programmes or initiatives and their objectives and timetables. Include initiatives of the United Nations, the World Bank, the International Finance Corporation (IFC) and other relevant international organisations.
- *Stakeholder engagement* – Identify the main parties (Indigenous and non-Indigenous) that have had or are having input into programmes and initiatives. Establish the mechanisms through which interested parties (including the resource industry) can provide input.
- *Legislative trends* – Establish any geographic or legislative factors that may influence the ultimate outcome of these programmes and initiatives.
- *Convergence of interests* – Indicate any significant trends and commonality of issues in different fora.

The local situations that industry works within vary widely. In some situations, the 'local community' may be completely Indigenous and include only one or a few Indigenous groups. In other cases, companies may find a mix of several Indigenous peoples, some of whom may not share the same language. Still others may include both Indigenous and non-Indigenous peoples. Finally, some areas are under claim by Indigenous peoples although the majority of the inhabitants are non-Indigenous. The population size may be fewer than 100 or more than 100,000. (For the purposes of this report, the terms 'community' and 'communities' refer only to Indigenous communities, not other local communities, unless otherwise specified.)

¹ A note on terminology. Many different words and phrases are used to describe people who have an ancestral connection to a particular territory. In Canada and Australia, many use the term 'Aboriginal'. In the United States, the most common term is 'Native American'. Internationally, the most commonly used term is 'Indigenous'. Editorial standards also differ, but to distinguish discussions regarding Indigenous peoples and associated topics (Indigenous lands, Indigenous businesses and so on), the term is often capitalised. For editorial simplicity, this paper uses 'Indigenous'.

Members of ICMM expressed interest in this review for several reasons. For some companies, a substantial part of their business operations currently rest in or near Indigenous peoples' territories, often in countries that recognise distinct rights for Indigenous peoples. This includes Australia, Canada, the United States and parts of South America and the Asia-Pacific region. In addition, a substantial part of their exploration interests are in increasingly remote territories, where the likelihood of interaction with Indigenous peoples is high.

Another interest came to light during interviews with ICMM members: some industry respondents hope to gain a better understanding of what they sense is a growing international Indigenous peoples movement that is actively working to define the issues and operational guidelines affecting industry behaviour and that remains somewhat enigmatic and inaccessible.

Methodology

At the core of this review are the results from a survey of ICMM corporate and association members on how they currently define the issues, the challenges they continue to face and the solutions available to them. As an initial focus, all 15 of ICMM's corporate members and 17 of the association members were asked to participate.² Ten member companies and four member associations responded. On the recommendation of ICMM member respondents, one other company and two non-member sub-national associations were also included. In total, therefore, there were 38 respondents from 17 companies or associations. Respondents included personnel with international policy responsibilities as well as country- or site-level managers and exploration personnel.

Experiences in nine countries were discussed by the respondents in varying measures: Australia, Canada, Chile, Indonesia, Papua New Guinea, Peru, South Africa, Tanzania and the United States. Four other countries were mentioned by industry respondents but discussed to a much lesser extent: Brazil, Colombia, Mozambique and the Philippines.

This report does not include all the issues raised by each individual or group. This is not to discount any of the views expressed, but rather to try and highlight the issues that drew the most attention from those surveyed. As a rule, the ICMM working group on this project recommended focusing on issues that were highlighted by at least 30 per cent of the individual respondents. A complete list of the issue areas that were explored in the surveys is included in Appendix A. Chatham House rules on non-attribution of statements by organisations and individuals were followed.

The results of the industry survey described in this report are compared with how others define the issues, with the priority being placed on Indigenous peoples and their organisations, but also more generally development institutions (the World Bank and other development banks and agencies), development practitioners, NGOs, national governments and investors. These non-industry views were gathered from a variety of sources, primarily literature and Web-based research, but also individual conversations where possible.

² The Terms of Reference for this project focused on attracting participation from national industry bodies. These 17 association members were chosen in consultation with the ICMM secretariat staff and project working group.

General Comments on the Findings

The organisation of this report was to great extent determined by how respondents tended to discuss a very long list of interrelated issues, although all those who participated in the survey admitted it was hard to break issues out into distinct categories.

Originally one goal was to see if any trends in the definition of issues could be identified based on certain factors, such as geographic location of operations or the position of the respondent within the company. While a few trends were indeed noted based on national contexts, it turned out that there was a much greater similarity across industry respondents than expected.

The survey also attempted to determine which issues were current and which ones could be labelled as 'emerging'. These distinctions were also lost, however, for two main reasons. First, many industry respondents did not distinguish between the two or would not designate any particular issue as 'emerging'; the general focus was very much on the here and now. Second, any distinctions made were very individualised. For example, while one industry respondent from Canada determined local economic development to be a current issue, another from the same country considered it to be an emerging issue. Another example would be the debate around 'free, prior and informed consent' (FPIC): respondents from Peru had been dealing with this subject for several years, while those from Canada and Australia had mixed levels of experience with this issue.

This report therefore reflects on issues based on some convergence of interests from a number of different national contexts, which perhaps is the best way to start discussions from a global industry perspective.

Attempting to distill key lessons from diverse respondents is heavily influenced by how the respondents and other stakeholders define an issue related to working with Indigenous peoples. Chapter 2 offers a brief overview of how Indigenous peoples and their concerns have come to be distinguished as separate from those of other local communities. While Indigenous peoples are very diverse in their histories, cultures and interactions with the mining sector, some important commonalities help set the stage for the discussion that follows.

As mentioned, most of the respondents spent the majority of time in describing daily challenges – what they do and how they do it on a daily basis. Yet several common challenges seemed to permeate the relationships between mining companies and Indigenous peoples and to shape the relationships from beginning to end. These 'contextual' concerns, described in Chapter 3, are those that act as key drivers in defining the 'what' and the 'how'. The issues or drivers that rose to the fore include the historical lack of trust between some Indigenous peoples and industry, the actions (or inaction) of national governments, land rights and what some see as the industry's lack of understanding or concern about Indigenous peoples in general.

Chapter 4 reviews the daily operational complexities in relationships between Indigenous peoples and companies. Almost all industry respondents as well as Indigenous peoples, NGOs and development practitioners say these operational concerns are at the heart of developing mutually beneficial, respectful relationships: community engagement practices within an Indigenous context, effective communications, cross-cultural awareness, participative decision-making, effective Indigenous community development and so on. As part of this discussion, different

perspectives on the concept of free, prior and informed consent are reviewed.

The interviews and literature searches made it clear that there were a few gaps between issues identified by industry on a wide scale and those identified by Indigenous peoples and others. Also, in their reflections on existing challenges and their abilities to manage them, industry respondents provided some insight into their capacity to effectively meet the challenges they had outlined. Chapter 5 provides a brief overview of these gaps, barriers and stumbling blocks.

Chapter 6 provides an 'issues map' that gives a more graphical representation of how the definitions of the issues by different stakeholders converge. Chapter 7 briefly describes some existing initiatives that ICMM and its members may wish to become involved in, and Chapter 8 offers some other options for engagement.

2. Background

Part of the challenge in this project – and for the mining sector in general in developing a coherent approach to ‘Indigenous issues’ – is the broad diversity of situations in which the issues of concern arise. The United Nations estimates that some 300 million Indigenous peoples live in more than 70 countries around the world. Indigenous ancestral territories range from the Arctic Circle, inhabited almost exclusively by Inuit and Saami peoples, to the Mapuche in southern Chile and the San in South Africa. Their societies represent thousands of the world’s remaining languages and cultures. In some countries, based on birthrate numbers, they may also represent the fastest-growing population segment.³

In countries such as Bolivia and Guatemala, Indigenous peoples represent the majority, while in others they represent a very small minority. In the United States, for example, where certain Native American tribes are some of the largest landowners in the country, the Native American population as a whole represents about 1.5 per cent of the total population. In Australia, Indigenous peoples represent approximately 2.5 per cent of the population; in the Philippines, about 8 per cent. Some nation-states contain hundreds of distinct peoples and language groups, while others contain only a few major groupings.⁴

Indigenous peoples survive and thrive in urban areas, in semi-rural areas and in some of the most remote lands on the planet. Most sources indicate that the majority of Indigenous peoples still exist in rural areas, often very remote, and that their livelihoods are primarily derived from subsistence-based activities such as hunting, fishing, gathering and small-scale herding and farming. Their primary health care systems rely to a great extent on traditional medicine.

The diversity of Indigenous experience with extractive industries can perhaps be framed by the two extreme poles. Different organisations have different numbers, but international agencies, including the United Nations, acknowledge that there are still today about 30 ‘uncontacted’ peoples in countries such as Brazil, Peru and Papua New Guinea, known only through anthropological evidence and stories. Other peoples have had limited contact but live in voluntary isolation from the societies around them.⁵ The well-being of such peoples has attracted recent attention through the debate over the Camisea gas pipeline project in Peru, which intersects protected territories of the Nanti, Machiguenga and Nahua peoples.⁶

In contrast, some Indigenous peoples actively seek out ‘western-style’ economic opportunities, such as the increasing number of Aboriginal contracting businesses springing up around the mining industry in Canada and Australia. At perhaps the extreme end of this group is the Southern Ute tribe in the United States, who recently purchased a Native Hawai’ian natural gas business for \$123 million and whose net worth figures at more than \$1.5 billion, due mostly to tribal leasing of its coal bed methane reserves.⁷

³ One of the difficulties in giving statistics such as these, although they are often cited by many different sources, is the problem of accurate measurement. Difficulties arise both from definitional differences between countries and from limitations in will and capacity among all countries to track Indigenous populations. One of the earliest mandates of the UN Permanent Forum on Indigenous Issues is to help devise more effective, ongoing data gathering regarding Indigenous peoples around the world.

⁴ Ogunwole 2002; Australian Government, Department of Foreign Affairs and Trade 2004; National Statistics Office, Philippines 2004.

⁵ See www.un.org/events/tenstories/story.asp?storyID=200, last accessed July 31, 2004.

⁶ See Kostishack 2004.

⁷ Newsom 2003.

Within this diversity, there are many different Indigenous perspectives on mining. Some people have practised artisanal mining as part of their cultures for centuries; others have had no exposure to it at any scale. Some support mining activity in their territory, others are firmly against it, and still others have not decided on this issue.

The Question of Definitions

Over the past 30 years or so, there has been increasing effort by international institutions such as the United Nations to better understand Indigenous societies and their particular circumstances around the world. In 1971, the U.N. Subcommission on the Prevention of Discrimination and Protection of Minorities appointed José Martínez Cobo as Special Rapporteur. In 1981, Cobo began production of a multi-volume work that became a watershed initiative for the global Indigenous peoples' rights movement.⁸

As a definition, Cobo used the following to describe the kinds of populations that were to be considered in his work:

Indigenous communities, peoples and nations are those which having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop, and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.

Many other definitions are still used at both national and international levels, and there are even differences among various U.N. agencies.⁹ One problem is that each definition has been partially shaped by the agenda of the institution devising it. A definition often used by Indigenous organisations working internationally is that of the International Labour Organization's Convention 169 on Indigenous and Tribal Populations:

Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

The ILO Convention 169 definition also emphasises self-identification as a fundamental criterion.

National definitions and those used by Indigenous peoples themselves vary widely and are based on more particular experiences, but they have in common many of

⁸ Cobo 1981.

⁹ See Appendix B for some of these definitions.

the criteria just mentioned:

- an ancestral connection with a particular territory; and
- languages, customs and institutions that are different from other segments of society, that to a large extent are deeply rooted in their relationship to their land and that are retained today.

Some countries do not yet formally recognise Indigenous peoples separately from other groups. Geographically, this seems to be prevalent in Africa, where political leaders have chosen to focus on policy directions that seek to build national unity, with the fear that recognising distinct rights for certain groups will provoke internal conflicts. This is also in recognition that African states – although they may have thrown off the yoke of external colonising forces – were left with political boundaries and systems that effectively granted control to only a handful of groups within their boundaries rather than systems that re-established self-government at the local level. According to industry respondents working in Africa, this political situation creates for them a ‘very sensitive’ local context with respect to identifying issues as ‘Indigenous’.

A recent report published jointly by the African Commission for Human and Peoples’ Rights and the International Working Group on Indigenous Affairs seeks to engage with the debate about Indigenous peoples more effectively and firmly recommends that the way forward is not to deny their existence within Africa but to better understand the contexts in which they live and the challenges they continue to face. The report includes mention of various peoples across the continent – the San of southern Africa, the Pygmy/Batwa of Central Africa, the Hadzabe of Tanzania, the Maasai and Ogiek of Kenya and the Amazigh peoples of northern Africa, among many others.¹⁰ This latest development may in turn help the mining industry find a path forward regarding their relationships with Indigenous peoples in Africa.

Two Approaches to the Issues at Hand

Different stakeholders use two separate but related approaches when discussing Indigenous peoples as distinct from other groups:

- socio-economic and political marginalisation based on historical colonisation as well as present-day economic and political processes, which now must be rectified if the objectives of sustainable development are to be realised at the local level; and
- rights based on both the fundamental concept of self-determination and the historical occupation and use of territory, commonly known as ‘aboriginal’ or ‘native’ title – that is, Indigenous peoples’ historical relationship to their ancestral territories sets them apart not only culturally but also legally.

Regarding the issue of marginalisation, Indigenous peoples, some governments, U.N. agencies, development agencies, NGOs and others point to the fundamental concerns raised by José Martínez Cobo beginning in 1981, which have since been clarified and reiterated. Studies have shown that while there is increasing improvement in Indigenous peoples’ political, social and economic circumstances in some countries, the large majority of Indigenous peoples still live with the ‘discrimination, oppression, and exploitation’ described by Cobo, and these conditions are not limited to countries usually labelled ‘developing’. Various studies in Australia, Canada and the United States indicate that some of these

¹⁰ African Commission on Human and Peoples’ Rights 2004. Also see Stavenhagen 2002. Cameroon constitutionally recognises the rights of Indigenous peoples within its borders. Other African countries that include some other limited recognition of particular groups or languages include Ethiopia, Uganda, South Africa, and Namibia.

same conditions continue to this day for many Indigenous peoples within their borders.¹¹

The specific issues of concern that continue to be raised by Indigenous peoples, their organisations, development institutions and NGOs include:

- lack of or diminished access to formal political processes and decision-making structures – in some countries, this may go so far as to be an outright denial of citizenship;¹²
- lack of or diminished access to justice;
- lack of or diminished access to basic social services, including health and education;
- lack of access to decision-making processes;
- lack of legal recognition of landownership, or the ongoing dispossession of land;
- lack of acceptance or integration of customary decision-making structures by state systems;
- lack of access to economic systems, such as access to capital, and concomitant high levels of poverty; and
- high levels of discrimination and prejudice from other sectors of society.

It is widely acknowledged that, because of these processes, the benefits of 'development' projects tended to flow away from Indigenous communities affected by those projects and instead towards provincial or national centres. Even before the 2003 report of the Extractive Industries Review of the World Bank Group, studies indicated that these projects not only did not benefit Indigenous groups, they often worked to increase poverty and cultural disintegration.¹³

To address this situation, there has been an increasingly organised movement to push national governments for both recognition and active implementation of Indigenous peoples' rights. Recognition has occurred in many different ways, starting with the signing of treaties with colonial administrators centuries ago. Since that time, dozens of nations have put into place some form of legal protection for their lands, livelihoods, customs and resources.¹⁴ Rights recognised by national governments vary, but typically include some measure of self-government, landownership (either individually or collectively), land access, resource rights and the protection of cultural heritage. Land and resource rights may be formally recognised by treaty or land claim settlements with the national

¹¹ The studies within these industrial countries generally focus attention on issues of high levels of poverty, high levels of discrimination on a wide scale (for example, in access to credit, housing, education, and so on), low levels of available social services, high levels of incarceration with concomitant problems in accessing justice systems and so on. For example, see *Royal Commission on Aboriginal Peoples* 1996 and the United Nations Committee on the Elimination of Racial Discrimination 2002, which expressed concern that the process to address the many problems highlighted by the Royal Commission had not yet been completed in 2002; also see United Nations Committee on the Elimination of Racial Discrimination 2000.

¹² There are various ways in which problems with access to justice and citizenship have been described. Examples include Moroccan law, which prohibits the inclusion of children with Amazigh names in the registry of births; Nepalese law, which prohibits any Indigenous person from holding office in the judiciary; and Cameroon, which has been denounced for not providing the Batwa with citizenship identification papers. See Stavenhagen 2004a, Alarcón 2004, Forest Peoples Programme 2000.

¹³ See, for example, World Commission on Dams 2000; Stavenhagen 2003; Psacharopoulos and Patrinos 1994.

¹⁴ Because of the complexity of the legal frameworks that govern these issues at national levels, there is no simple compendium of all countries that provide some protection. The subject matter can fall under everything from land distribution and property to natural resource exploitation, environmental conservation statutes, cultural heritage protection and so on. At a minimum, 17 countries have ratified ILO Convention 169 – Argentina, Bolivia, Brazil, Colombia, Costa Rica, Denmark, Dominica, Ecuador, Fiji, Guatemala, Honduras, Mexico, Netherlands, Norway, Paraguay, Peru and Venezuela – as well as those countries that are known to have laws or policies distinguishing Indigenous peoples, such as Australia, Bangladesh, Cambodia, Cameroon, Canada, Chile, Guyana, India, Japan, Malaysia, New Zealand, Nicaragua, Russia, Taiwan, Thailand and the United States.

government, or they may be interred in national legal frameworks through recognition of customary law at the local level.

For many countries, however, recognition of Indigenous peoples' rights has been a fairly recent occurrence. The ratification of ILO Convention 169 by 17 countries only occurred during the last 10–15 years. Implementing and securing these rights on a daily basis is still a struggle in many nations.

Two international processes may push this rights-based approach more broadly over the next few years. Within the U.N. system and as an integral part of the first U.N. International Decade on Indigenous Peoples (1995–2004), a Draft Declaration on the Rights of Indigenous Peoples is currently being debated. And within the Organization of American States, a Proposed American Declaration on the Rights of Indigenous Peoples is being formulated. Both these processes, unlike the one that led to ILO Convention 169, are actively including a broad range of Indigenous participants, and both documents at the moment fundamentally delineate stronger rights over lands and resources.¹⁵

For these reasons, and in part due to the growing strength behind Indigenous peoples' efforts to have their rights recognised more firmly, the United Nations established a Permanent Forum on Indigenous Issues in 2000. Along with conducting its own programme of work, the forum provides a coordinating point between the many different U.N. agencies on key issues of relevance to Indigenous peoples. It works in coordination with the Working Group on Indigenous Populations, a programme under the auspices of the Office of the High Commissioner for Human Rights (UNHCHR) that advocates for the rights of Indigenous peoples and investigates abuses of these rights.

Indigenous peoples also vigorously advocate at the international level in a number of international fora, convening in caucuses at almost every major intergovernmental or interagency meeting. They were actively involved in the workings of the World Commission on Dams and the development of both the Forest Stewardship Council and the Marine Stewardship Council. They have participated in the various bodies of the Convention on Biological Diversity and the World Intellectual Property Organization and have worked to shape the messages and programmes of the World Trade Organization, the Asia-Pacific Economic Cooperation, the World Summit on Sustainable Development, the World Parks Congress and so on.

Increasing efforts by Indigenous peoples and support organisations to articulate the linkages between socio-economic development and the status of their rights and levels of empowerment have begun to erode distinctions between agencies and their approaches to the concerns of Indigenous peoples. Institutions such as the World Bank, the Asian Development Bank and the Inter-American Development Bank now have Indigenous peoples' policies in place or in review and are beginning to adopt what has been called a 'rights-based approach' to development.

¹⁵ International Labour Organization Convention 169: Concerning Indigenous and Tribal Peoples in Independent Countries (1991), at www.unhchr.ch/html/menu3/b/62.htm; United Nations Draft Declaration on the Rights of Indigenous Peoples, E/CN.4/Sub.2/1994/2/Add.1 (1994), at www1.umn.edu/humanrts/instree/declra.htm; Proposed American Declaration on the Rights of Indigenous Peoples (1997), at www.cidh.oas.org/Indigenous.htm.

3. Contextual Concerns

The concerns described in Chapter 2 regarding the historical and present-day circumstances of Indigenous peoples set the stage for the first set of issues that seem to gain consensus among industry respondents and other stakeholders surveyed for this review. Based on industry responses to the survey, four issue areas define and shape industry interactions with most if not all Indigenous peoples and therefore seem to have a wide range of effects on operations in Indigenous territories:

- historical lack of trust;
- national governments;
- land rights and tenure; and
- broad industry recognition and support.

Individual companies have responded in varying ways to these concerns, including, for example, explicit policy measures toward Indigenous peoples, and formal and informal agreements and partnerships with Indigenous communities and organisations local to operations.

Historical Lack of Trust

All stakeholders maintain that the road to sustainable development at the local level can only be achieved through building respectful, mutually beneficial long-term relationships between companies and Indigenous peoples. This can only be done by building trust, and trust is hard to come by in the context described in the preceding chapter. This lack of trust was highlighted by industry respondents more often for areas where mining is perceived to have been intimately connected to past government practices and even colonisation, such as South America and the Philippines. But past negative experiences with the mining industry were also mentioned in responses from Canada, Australia and the United States.

Industry respondents spoke of uphill battles to develop positive relationships. A few mentioned experiences where Indigenous communities have chosen to close their doors to extractive operations. Others spoke of months or years of fundamental communications initiatives even prior to any formal negotiations. Tangible reminders of bad practices make it more difficult to build trust. Industry respondents mentioned particular problems around orphaned and closed mine sites that had not been rehabilitated, as well as legacy concerns around uranium mining in North America.

Industry respondents also spoke of health and social concerns around older operations. Some of the problems highlighted by both industry respondents and others (primarily development institutions and NGOs) included the negative impacts of large-scale in-migration into mining areas, disruptive changes in economic and cultural relationships between communities as well as among community members and ongoing community fears in areas that have experienced chemical spills or other kinds of environmental degradation.

In recent international declarations specifically regarding mining, Indigenous peoples' workshops and caucuses have gone so far as to demand not only a recognition of their rights and a commitment to improved business practice, but also a moratorium on new mining concessions until closed and older existing mine operations are cleaned up.¹⁶

¹⁶ See, for example, Forest Peoples Programme 2003.

In certain national contexts, the relationship between mining and Indigenous peoples continues to be very tense. One example is the development of the Philippines' National Minerals Policy. The government, minerals industries, the public and civil society organisations have been engaged in debate over this for more than a year, involving not only heated exchanges but also lawsuits. Although the debate has not been solely focused on Indigenous peoples' concerns, Indigenous peoples' organisations have been very vocal in the discussions on a range of issues.

In discussions and writings on their concerns, Indigenous peoples have reflected widely not just on large-scale mining operations, but in general on various natural resource initiatives (hydropower, logging, petroleum and so on) as well as on past negative practices and the lack of government willingness to stop or mitigate them. When responding to project proposals or government promises of improved practices and better regulations, they have often pointed to previously exploited land and simply said 'I don't believe you'. These reflections are not always specifically directed at previously mined land, but the impact on company and community relationships remains the same. Concerns regarding the negative impact of development projects have also been the bases for some of the requests by Indigenous peoples for assistance to the Special Rapporteur on the rights of Indigenous peoples, Rodolfo Stavenhagen.¹⁷

This lack of trust has led some NGOs to call for third-party monitoring of company-community negotiations and ongoing relationships,¹⁸ although this suggestion is not always welcomed by Indigenous peoples. For Indigenous communities that have achieved a measure of confidence and recognition in representing themselves with different actors, the involvement of third parties has occasionally been viewed as an intrusion.

National Governments

For many Indigenous peoples and organisations, the foundation of many of their concerns is their relationship with national governments and their ability to regain or retain some level of decision-making over their lives and livelihoods. National governments were pointed to by industry respondents as well as some development institutions, NGOs and investors as a critical actor, and one that often makes relationships between companies and Indigenous communities more difficult. These concerns were raised not just about governments of developing countries.

Ongoing areas of concern include:

- political agendas that view Indigenous peoples as an obstacle to national development and a drain on resources;
- economic mechanisms that funnel benefits from mining to national or provincial centres without redistribution back down to the community level;
- policies and budgetary decisions that limit resources to fundamental social services and local capacity;
- a lack of coordination among different governmental branches on these issues; and
- an unwillingness to uphold rights even where they are recognised in national law.

¹⁷ See, for example, Stavenhagen 2003.

¹⁸ See, for example, www.oxfam.org.au/campaigns/mining/ombudsman/2002/appendix/one/heard.html.

Industry respondents spoke often of challenges in having to encourage governments to keep minimum levels of resources flowing to Indigenous territories and institutions. Some mentioned specific instances where services were pulled out when industry operations began producing, with the assumption that the company would then take on the burden. Others mentioned the lack of government support or involvement in helping to resolve conflict or disagreements on, for example, land claims. A few respondents raised concerns over what seemed to be arbitrary decisions by governments in defining who is Indigenous within their borders and near areas of potential mining activity, thereby determining whom the company engages with. Several respondents mentioned concerns over the effectiveness and willingness of national governments to distribute financial benefits from mining back to Indigenous peoples.

Land Rights and Tenure

Land rights and tenure are near the top of the list in importance for both Indigenous peoples and companies, for these are at the root of many past conflicts between Indigenous peoples, national governments and mining companies, as well as the critical point of engagement.

Land rights lie at the heart of many Indigenous peoples' concerns. Their ancestral territory has been described as a physical representation of their culture, their spirituality and their identity. For those still living on such lands, the territory often represents the source of food, medicine, clothing and shelter. Indigenous peoples' lands also provide the base for their self-government and economies. It is their primary asset. And given the natural resources that exist within Indigenous territories, it can be a substantial asset.

Depending on the geographic region, Indigenous peoples' land and their rights to it are under increasing pressure from both government and commercial interests, including mining, petroleum, natural gas, logging, ranching, large-scale agriculture, hydropower, tourism and even conservation and bioprospecting efforts.

According to many industry respondents, secure access to land and mineral resources is the immediate objective and the foundation for business development in the mining industry, and therefore of the highest concern. Land rights often are the critical starting point for deciding who must be engaged and at what stage. But the question of land rights in Indigenous territories is notoriously complex and is labour- and time-intensive for companies, regardless of geographic region.

In countries where land rights are governed by customary law, such as Papua New Guinea, negotiations take place with each traditional owner, which may be an individual, a family clan or a more complex group. 'Ownership' per se may not entail the same rights for each group for each piece of land – there may be overlapping use rights across group boundaries. In addition, these use rights and group boundaries may be disputed between different owners, a problem that tends to rise when potential commercial activity enters the picture. In countries such as Peru or Venezuela, which have sought to formalise these landownership patterns with titles, the boundaries may eventually be clearer, but the customary use of the land and rights to shared resources may not.

Understanding concepts of resource use and ownership in these situations is also tremendously complex, and according to industry respondents a lack of knowledge in this regard has sometimes led to a reopening of land use

agreements and renegotiation of compensation with Indigenous communities.

As complicated as customary law processes are, however, industry respondents describe them as a simple fact of doing business in these countries – it is difficult, but not impossible. These experiences are contrasted with those in Canada, Australia, the Philippines, New Zealand and, to a lesser extent, the United States, where there are hundreds of active claims and treaty processes in the courts as a result of judicial decisions or new legislation. These effectively place formal title in question in some areas, sometimes for years and even decades. Between these delays and the cumbersome mechanisms designed to resolve disputes, industry respondents report that moving through these processes has proved to be costly and time-consuming for all involved. Comments on the difficulties of working with the legal framework were particularly evident in the responses from Australia.

In terms of achieving some mutually beneficial outcomes for land access by industry, the most extreme case at the moment seems to be Brazil: the government has closed off all Indigenous territories to mining applications, which now must be approved by the national congress. The Congress is considering two bills to move the administrative processing of claims forward more effectively, and there has been Indigenous input into the design of at least one bill, but nothing has been voted on to date.¹⁹

Industry respondents for the most part did not object to Indigenous land rights, but there was significant concern in those situations where land rights are actively disputed without any kind of administrative procedure to guide them in the absence of a land claim decision. One case study noted a situation where the expectation of some formal guidance or assistance from government did not materialise, to the disappointment of both the Indigenous peoples involved and the company.²⁰

There seem to be two different opinions on the best way to move forward in these situations. One group thinks that in order to respect Indigenous community attachment to land and to still meet their own objectives, wherever possible the best approach is to simply recognise an Indigenous claim to land and negotiate directly with the affected peoples, whether land rights are formally recognised by the national government or not. Some felt that if done correctly, this does not interrupt any existing formal claim in legal process, and it moves the relationship forward. Many often saw this as a pragmatic solution to getting around overly bureaucratic and conflictual legal procedures.

The second group includes people who are more comfortable in the security of formal governmental processes and who would wait for a determination by the government. A few mentioned the possibility of working with governments to streamline the legal framework to make it easier for companies to gain access to land.

Indigenous peoples as well as some NGOs and development practitioners expressed some caution about either of these suggestions, because they can be seen as industry attempts to circumvent the securing of land rights by Indigenous peoples. Some Indigenous peoples prefer formal governmental recognition of aboriginal title – not simply for a single negotiation, but for other concerns over

¹⁹ Leitão n.d.

²⁰ Zandvliet and Fraser 2002.

reclaiming ancestral territory, strengthening their cultural identity, creating a more secure base for future negotiations and so on. The recognition of formal title provides more lasting security for their rights and the basis for recognition by outsiders of their decision-making role in proposed projects. In this light, suggestions to shut down, fast-track or otherwise interrupt claims processes in order to make mining permitting easier have been strongly protested in both Canada and New Zealand, being seen as an effort by either government or other interests to limit the rights of Indigenous peoples. Any perceived linkages between industry and the development of national mining laws are seen as collusion between powerful interests working against Indigenous peoples.

Many Indigenous peoples' organisations and NGOs have focused their attention on achieving formal recognition of Indigenous land rights and the rights to resources on their lands in efforts to manage these different land pressures and maintain an economic base that can be leveraged. This concern has begun receiving increased attention from various development agencies and financial institutions because of the importance of secure land tenure in community development initiatives. During the revision of the World Bank's Indigenous Peoples Policy, stronger provisions for government recognition of customary land rights as a condition for project loans has received high attention both from stakeholder consultations as well as internal Bank staff. One trend noted in South America, partly because of the conditions in ILO Convention 169, is a more concentrated effort towards demarcating and formally titling Indigenous territories.

A final point of consideration regarding land rights is the increasing call by Indigenous organisations and advocates to find ways to ensure that even when Indigenous peoples agree to development projects, landownership is not turned over fully to other interests. This may mean lease arrangements or alternative options to buy back or otherwise reclaim land once the activity has been completed and the land has been rehabilitated.

Broad Industry Recognition and Support

A final note on context that was brought up by Indigenous peoples, some industry respondents, NGOs and development practitioners is a hurdle that many said is probably the most difficult to resolve – a barrier to progress that underlies many of the issues just described as well as those discussed later. All industry respondents said that they have solid support from their companies for their work, but, as one person put it, there is still a problem in getting more industry colleagues 'to take Indigenous peoples seriously'. Another individual described it as working with 'the bubble': a local manager told him that his work is everything inside 'the bubble' and that Indigenous peoples' concerns and relationship-building are someone else's area of responsibility. Industry is not the only sector that suffers from this – governments, financial institutions and even NGOs and philanthropists are grappling with the same problem. It may be why most discussions with and declarations from Indigenous peoples on any issue, not just mining, start with the request (or demand) for 'respect'.

Industry efforts to try and deal with this include organisation-wide cross-cultural awareness programmes in many of the companies surveyed in this report. Based on industry responses, the bulk of this work seems to be focused on Australia at the moment, however, perhaps aided by national drivers such as the Reconciliation process, the Queensland Aboriginal Cultural Heritage Act 2003 and more than 10 years of experience in grappling with the Native Title Act of 1993.

4. Local Issues: Reflections on Both Process and Outcomes

Two fairly broad issue areas attracted the largest number of industry reactions within the survey:

- building positive, mutually beneficial relationships (community engagement in an Indigenous context); and
- creating long-term, effective sustainable development opportunities (community development in an Indigenous context).

For industry respondents, these general topics encompassed many sub-issues at the operational level.

Community Engagement in an Indigenous Context

Based on the aggregate number of responses, community engagement in an Indigenous context, broadly speaking, is an issue area where almost all industry respondents have challenges. For many, practices and communications in this area were of the highest concern. One respondent described it as the 'bread and butter' of the industry; others noted the critical nature of community engagement in achieving a legal licence to operate in many areas and a social licence to operate in all areas. It is integral to maintaining company reputation.

Indigenous peoples have articulated their concerns regarding engagement practices as based on one basic principle: effective participation in the decisions that affect their lives. Operating on this principle on a day-to-day basis can take several different forms:

- *Respect for Indigenous customary institutions and governance structures* – This includes learning about and involving different structures within each group, as well as structures that work to govern inter-group relationships, at the very beginning of project exploration and throughout the life of the mining activity.
- *Respect for Indigenous peoples' lives and priorities* – This involves accommodating to some extent longer discussion periods and decision-making processes, as well as learning how the proposed project may be interacting with other pressures and activities within the affected communities.
- *Respect for Indigenous peoples' knowledge of their land and the local environment* – This means involving traditional knowledge holders in the earliest stage of project design, assessment and implementation.
- *Respect for Indigenous peoples' responsibilities towards their land and their members* – This involves providing them with all the information necessary, in a form that is accessible and in a time frame that is realistic for the local situation, so that they can make informed decisions about the relative costs and benefits associated with a project. This also means their effective involvement in various aspects of project design and implementation.
- *Understanding Indigenous peoples' particular situations and their capacity to interact with companies* – Quite often Indigenous peoples have very limited resources and so will need assistance if they are to undergo extensive, intensive technical discussions and negotiations. Most have little or no experience with mining projects or large-scale commercial projects in general and have limited access to education systems that could assist in their learning process.

Even in light of some growing agreement between industry and Indigenous peoples on the principles, there is an ongoing industry concern about doing it well and about whether they can achieve measures and methods of engagement that

will stand the test of time. Indigenous peoples and NGOs raise the same concern, although with significant scepticism about how widespread good industry practices actually are. Industry respondents gave the following examples of the daily challenges on this front.

Determining Engagement Partners – Reflecting back on Indigenous peoples' relationship to their ancestral territories and the challenges of land rights in these situations, industry respondents were very concerned about finding effective methods for determining whom to engage with and at what point during project development. It appears that the burden is on the company in most situations to answer these questions, and it depends to some extent on the capacity of the affected Indigenous people to make their case to the company. Relying on conventional administrative procedures that may be available in other local contexts is often impossible – the procedures, with a few exceptions, do not exist. Some respondents looked for assistance from governments and did not find it; others expressed concerns when governments became involved, which increased tensions between the company and affected Indigenous communities.

Determining and Working With Indigenous Decision-Making Structures – As noted earlier, in areas where land is governed by customary law and where customary ownership lies with families or clans, companies may need to engage with dozens, if not hundreds, of groups. In countries where an elected council structure has been imposed, initial engagement may mean not only formal discussions with the administrative body, but then consultations with hereditary or other customary leaders, while maintaining respect for all the different decision-making entities. Depending on the country context, these different leadership structures may be accepted and work together or the imposed structure may be rejected by the Indigenous peoples. In Canada and the United States, which operate statutorily with elected band or tribal councils as well as customary systems, the dynamics of the relationships can change on a daily basis. In Australia, an administrative framework has been in place for only about four years, and industry respondents there expressed a great deal of frustration in trying to work through the processes of using statutory Representative Bodies under the Native Title regime.

Respecting Cultural Considerations – In respecting the diversity of cultural practices with regard to decision-making, the engagement process with Indigenous peoples has meant trying to reconcile longer timelines and larger community relations budgets to accommodate complex local decision-making processes, and all in an industry that characterises itself as being driven by changeable market forces and tight time frames. Indigenous peoples and those who work with them (either facilitators or NGOs) tell of high levels of frustration, as individuals involved in early contacts seem to be there one day and gone the next. Also, company personnel are often perceived to be rushing towards agreement before Indigenous people feel comfortable in making a decision.

Overcoming Cultural Misunderstandings – Industry respondents also spoke of concerns in having to bridge cultural gaps in some fundamental areas of understanding. For example, one respondent told of dealing with some Indigenous community members who showed up at the company to be compensated for land – but this was a year after the company originally purchased the lands from the traditional owners. In its original assessment of the landownership situation, the company had failed to understand that the land was used collectively in a rotational manner among different community members. It

had compensated some members, but not all the users. There are still concerns at the company about whether all the community members now fully understand that the land has been sold and is no longer in their possession.

Devising Effective Research and Impact Assessment – Indigenous peoples, NGOs and some development practitioners often question some company practices of not thinking of the early phases of research (such as risk and impact assessment) as part of the engagement process. These experiences reflect on some company practices of not allowing for effective Indigenous community participation until the assessments and project design are complete. A few industry respondents mentioned this concern, but most focused instead on whether the research and assessment processes were effective. Many pointed to the deep cultural gaps just mentioned. There was ongoing concern expressed by respondents from all geographic areas about whether they are asking the right questions and interacting with the appropriate people at the community level.

There is increasing concern from Indigenous peoples about whether impact assessment processes can adequately bring to light all of their concerns regarding potential cultural impact. While many industry respondents spoke about cultural sites, such as ancestral burial grounds, there are also other kinds of sacred sites that are a part of the physical landscape that will be affected, albeit perhaps not as physically obvious to an outsider. These may be sacred areas where ancestors and other spirits reside, where births happen, where traditional medicine is collected and so on. It may also involve not just tangible places, but also spiritual uses and cultural rules, such as the way certain kinds of groundwater must be handled in certain cultures. While some countries have legislation requiring a greater attention to these details, such as Australia's Queensland Aboriginal Heritage Act of 2003, generally the legislation does not give adequate guidance on how to engage with an Indigenous community to appropriately describe and document these concerns.

Devising Effective Communication Methods – While many of these questions are also applicable to situations in which Indigenous peoples are not involved (many industry respondents highlighted efforts to get out of the model of information-push, and more into two-way flows of communication and feedback), the Indigenous context seemed to call for more creative methods of communication than are typically at hand in most company contexts. Differing languages and cultural concepts, as well as the lack of applicability for conventional methods such as written reports, Internet use, faxes and so on in many of these contexts, has meant greater reliance on face-to-face methods. Even then, adjustments must be made to what many industry personnel think of when designing a business meeting. Individual respondents told of company efforts to extend information sharing and meeting time, to ensure that more time is spent going to Indigenous peoples rather than asking them to come to capital cities, to provide resources to bring remote communities together for discussions and information-sharing, to adjust the style of conversation to the local customs and so on.

Managing Expectations and Effective Information – Industry concerns for how to get the engagement process right were often related to concerns about effectively managing expectations, especially in an Indigenous context where a mining project may be viewed as the way out of poverty but may also be looked on with suspicion due to historical circumstances. These concerns arose as early as the first phases of exploration. Respondents explained the difficulty of explaining

effectively not only the proposed project but also the industry itself, how it works and how this might shape potential benefits flowing from it, if successful. They said that this step is often missing in many communications efforts. Even in countries such as Canada, where the mining industry has a relatively long history in Indigenous territories, a recent survey of Indigenous peoples by the Canadian Aboriginal Minerals Association indicated a need for more and better information on the industry as a whole.²¹

Mitigating or Managing Conflict – The other key area needing more effective engagement and communications methods was preventing or mitigating potential local conflicts, either within or between Indigenous groups. One negative outcome of mining in Indigenous territories highlighted by some industry respondents, Indigenous peoples and NGOs has been the exacerbation of intra-community or inter-clan divisions, often brought on by mining company practices. Practices mentioned by industry respondents included the use of payments to individuals to gain support or the distribution of benefits favouring certain groups over others. In some sense, these practices were described as ways in which financial benefits were used as proxies for broad-based participative engagement techniques.

It was understood by most respondents that even when changing these practices, conflicts will still arise as a natural part of any community life. Nevertheless, industry is still left with the challenge of learning about and helping to implement more culturally appropriate conflict resolution practices so that these situations in some way can be co-managed by Indigenous peoples and the company.

Indigenous organisations, NGOs and development agencies have also highlighted the importance of the engagement process, but perhaps with less emphasis on the agreement-making stage and more emphasis on coming to some mutual understanding and level of respect for how Indigenous peoples work, respecting their cultures, customs and priorities and finding ways to integrate their concerns throughout the life of the relationship. To borrow a term from Canadian aboriginal people, they seek ‘meaningful consultation’ throughout the entire life of the project. These outcomes are given just as high a priority as the actual tangible benefits negotiated in a written agreement.

In this light, some Indigenous organisations reflect on the industry’s focus – some industry respondents called it a fixation – on legal agreements. While many NGOs and other Indigenous advocates see legally binding agreements as a step forward in helping to secure Indigenous interests in an environment that has historically been negative, Indigenous peoples who have gone through the experience note that often industry personnel seem to believe this is the final outcome of engagement rather than a waypoint of the relationship. After signing the agreement, some groups have witnessed a downturn in the level of contact they have with the company.

Community Consent

Based on comments from the industry respondents, there seems to be fundamental agreement among industry respondents that Indigenous community ‘support’, broadly defined, is a primary objective of community engagement processes and provides the social licence to operate. Some respondents pointed out that the concept of sustainable development cannot be acted on if the community does not want you there. However, this understanding did not go so

²¹ H. Matthews, personal communication, July 2004.

far as to provide any consensus among the respondents on 'free, prior and informed consent'.

When asked about the term 'consent,' industry respondents believed that in countries where land rights or title have been more or less established, some kind of consent is required, regardless of whether there is a specific statute laying out procedures on how to gain it. They cited several examples of this:

- Papua New Guinea, Indonesia and Peru – in order to purchase the land from traditional owners, industry must come to some kind of mutual agreement with the landowners.
- Philippines – 'prior informed consent' is required at least at the exploration stage (Mining Law of 1995, Indigenous Peoples Rights Act of 1997).
- Australia – Under the Northern Territory Aboriginal Land Rights Act of 1976, consent is required at the exploration stage.
- Canada – in areas where land settlements have been achieved (on reserves, as well as in Nunavut and a few other areas), consent is required. Where land settlements have not been finalised but there is the 'right to consult', government permitting officers ask if consent has been achieved.
- United States – on Native American reservations and trust lands, where the tribes often have not only surface rights but also mineral rights, tribal council approval is required.

In areas where land rights are unsettled, there was the general understanding that in order to come to agreement with the affected Indigenous peoples, some kind of affirmation of the project by those affected is still needed in order to achieve a social licence to operate. While some industry respondents freely used the term 'consent', others talked about 'support'. In situations where there was a commercial opportunity but not clear Indigenous community consent or support, respondents told of decisions to walk away. The cases of Tambogrande and Esquel were often mentioned as examples of what happens if mining attempts to proceed without community consent or support – and of what industry should be working to avoid.

Respondents were asked about the concept of 'free, prior and informed consent', a criterion that is increasingly being demanded as a standard on development projects by Indigenous peoples and NGOs:

- A few maintained that FPIC is a direct challenge to national sovereignty.
- A few believed it roughly equated their conception of community consent and the social licence to operate, but they still had operational concerns.
- A few said they had not heard the term used.
- A few said that they could not respond because, although they had heard of the term, they were not sure how it is being defined by other stakeholders.

FPIC was a major topic in the recent Extractive Industries Review and also arose in the 2004 sessions of the United Nations Permanent Forum on Indigenous Issues and the UNHCHR Working Group on Indigenous Populations. Variations of this wording are found in ILO Convention 169 and the two draft declarations on Indigenous rights.²² It is also a subject of active litigation within the Inter-American Court, which decided against the government of Nicaragua in charges that the

²² International Labour Organization Convention 169, United Nations Draft Declaration on the Rights of Indigenous Peoples and Proposed American Declaration on the Rights of Indigenous Peoples, op. cit. note 15.

government had violated the right to consent and land demarcation when it granted a logging concession within the territory of Awas Tingni.²³ FPIC has already been enshrined in the good practice guidelines from the World Commission on Dams and the Forest Stewardship Council, as well as within the Inter-American Development Bank's operational policy on resettlement.²⁴ For many of the stakeholders (Indigenous peoples, development institutions, NGOs and some investors), FPIC has become the focal point of the discussion with regard to any kind of activity in Indigenous territories.

Given the industry responses just noted, however, there seems to be some question as to whether the concept of FPIC as articulated by various stakeholders in any way equates to how companies currently think about Indigenous community consent or support and the social licence to operate.

One problem is that, with the strength of the debate over the past several years, FPIC has been advocated in a number of different ways:

- The demand to apply the principles of FPIC has been directed towards national governments, on one hand, and towards international institutions (such as the World Bank) and private-sector actors, on the other.
- FPIC has been applied to both Indigenous peoples and to local communities more generally.
- FPIC has been defined both inclusively (as a process in which Indigenous peoples or local communities are part of a mix of actors that must be involved in decision-making processes) and exclusively (when affected Indigenous peoples or communities have the final right of refusal).
- The use of FPIC has been demanded both on the basis of being a right (especially with regard to Indigenous peoples) and as an operating principle under the broad rubric of corporate social responsibility.

For Indigenous peoples, their organisations, NGOs, legal scholars and some development practitioners, the call for FPIC is based on the concepts of Indigenous peoples' right of self-determination and self-government. ILO Convention 169 summarises this concept as follows:

*The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.*²⁵

Indigenous peoples' demand for the recognition of the right to free, prior and informed consent arises from the negative histories described earlier and conceptually is seen as the foundation for their empowerment as 'peoples' with collective institutions and decision-making authority, as well as active and effective members of their broader national societies.

²³ For information on the Awas Tingni case, see the Indian Law Resource Center at www.indianlaw.org.

²⁴ See the World Commission on Dams at www.dams.org, the Forest Stewardship Council at www.fsc.org and the Inter-American Development Bank's operational policy on involuntary resettlement at enet.iadb.org/idbdocswebservice/idbdocsInternet/IADBPublicDoc.aspx?docnum=362109.

²⁵ ILO Convention 169, Article 7.1.

While FPIC is not debated as heatedly in countries where governments already acknowledge levels of self-government over resources to Indigenous peoples, some countries see FPIC as a possible threat, if affected Indigenous peoples refuse certain projects, to their ability to direct commercial exploitation of natural resources towards national development goals. FPIC has become the crux of a debate that juxtaposes concepts of sovereignty that empower governments with the right and the duty to manage concerns within their borders with concepts of sovereignty that limit powers of national governments to benefit some of their population to the detriment of others. The scenarios used in forming positions also create problems and further disagreement. For example, those arguing for full government control often assume that the affected communities will reject mining projects (and this has not always been the case when they have had some level of decision-making power), and some people assume that with decision-making power comes full control over the distribution of benefits, which also has not been the case. The debate around FPIC has therefore become politically polarised.

Those seeking further clarity from a legal standpoint do not receive much help. Scholars specialising in Indigenous peoples' rights find support for their arguments from the same international conventions as the specialists who support more traditional interpretations of national sovereignty.²⁶ These conventions were developed during the 1950s and 1960s, when much of Africa and Asia were being decolonised under the principles that they, as nations and peoples, had the right to self-government and to sovereignty over their resources.

As mentioned, FPIC has not been conceptualised consistently by different advocates or by the national legal frameworks that already recognise levels of Indigenous self-government and the right of consent. Antoanella-Iulia Motoc and the Tebtebba Foundation recently came up with the following formulation (see Appendix C for other definitions):

[Free] *Indigenous peoples are not coerced, pressured or intimidated in their choices of development;*

[Prior] *Their consent is sought and freely given prior to the start of development activities;*

[Informed] *Indigenous peoples have full information about the scope and impacts of the proposed development activities on their lands, resources and well-being;*

[Consent] *Their choice to give or withhold consent over developments affecting them is respected and upheld.²⁷*

In the Final Report of the Extractive Industries Review (EIR), FPIC was described as follows:

Free prior and informed consent should not be understood as a one-off, yes-no vote or as a veto power for a single person or group. Rather, it is a process by which indigenous peoples, local communities, government, and companies may come to mutual agreements in a forum that gives affected communities enough

²⁶ See, for example, UN General Assembly Resolution 1803 (XVII) of 14 December 1962,

'Permanent Sovereignty over Natural Resources.' See also Daes 2003.

²⁷ Motoc and Tebtebba Foundation 2004.

leverage to negotiate conditions under which they may proceed and an outcome leaving the community clearly better off. Companies have to make the offer attractive enough for host communities to prefer that the project happen and negotiate agreements on how the project can take place and therefore give the company a 'social license' to operate.²⁸

Even this latter, much more inclusive approach to the term 'consent' was cause for some governments to request that the wording be changed in the management response to the EIR report. The final formulation that was accepted by the Board of Directors on August 4, 2004, was 'free prior and informed consultation with affected communities that leads to the affected community's broad acceptance of the project'. The term was also framed as being applicable to both Indigenous and non-Indigenous affected communities. The World Bank Group must now begin the process of formulating exactly what that means operationally and how a community's 'broad acceptance of the project' is to be achieved and measured.

Industry respondents and others have raised various questions about the difficulty of putting the concept of FPIC into operation:

- Is FPIC to be applied just to Indigenous peoples or to all 'local communities'?
- In complex local situations where there are different communities and decision-making structures, which ones are to be included in the consent process, and who determines this?
- How is it to be specifically defined in operational terms, so that it can be evaluated (that is, when do you know that you have it, and when do you know that you have lost it)?
- Who would evaluate whether FPIC has been achieved?
- Does it refer only to recognised decision-making structures? What if the rest of the community is of a different opinion than the governing body?
- At what stages must consent be sought? Just exploration, or through different stages of project life?
- What aspects of the project are to be open for community decision-making?
- What operational parameters does the industry work under if the affected communities refuse to support the project, and yet the national government decides to move forward?
- What are the ramifications for the industry if certain companies move forward without community support?

While it has not been directed solely at the mining industry, the call for recognition of FPIC as at least an operational guideline, if not a legal right, has reached almost all corners of global discussions regarding Indigenous peoples and their territories. Yet at this time, for industry, there seem to be more questions than answers.²⁹

Community Development in an Indigenous Context

In terms of aggregate numbers, concerns about effective local economic development in an Indigenous context ranked among the highest for industry respondents, next to effective engagement. One respondent put it bluntly: there is

²⁸ Salim 2003, Volume 1, p. 65.

²⁹ Some helpful and fairly recent explorations of the topic of free, prior and informed consent are available. See for example, Bass et al. 2004; Mackay forthcoming.

no reason for Indigenous peoples to accept a mining project if they are not going to see some net positive impact. Indigenous peoples, NGOs, development institutions and some governments would agree. Along with calls for the recognition of land rights and for participation in decision-making processes, equitable sharing in the benefits of any development projects in Indigenous territories ranks as one of the major concerns of Indigenous peoples, NGOs and development practitioners.

As noted earlier, there seems to be a general understanding among most industry respondents that relying on national governments to redistribute benefits from extractive industries has not been effective. Even where a few governments have designed national-level mechanisms, such as funds for Indigenous development, these mechanisms have fallen victim to national budget priorities. Regardless of the mineral wealth that comes from their territories, Indigenous peoples still suffer from the socio-economic marginalisation that has characterised their situation for generations.

That said, however, there is a great deal of practice, discussion and debate among industry respondents, Indigenous peoples, NGOs, development institutions and some governments as to what constitutes equitable benefit sharing, or even sustainable development, in an Indigenous context. These 'big picture' kinds of questions are then complicated by concerns about the appropriate role of private-sector actors in national contexts where governments are either unwilling or unable to provide the foundation for the well-being of Indigenous peoples within their borders.

Current Industry Contributions to Local Development – As background, many industry respondents pointed to the context described earlier in this report. In general, local development in an Indigenous context means starting with little of the conventional inputs into what a western-style industry defines as development – little in the way of cash economy, subsistence-level livelihoods for some but not even all, little or no infrastructure, little or no access to health care or conventional education services, no access to finance capital and so on. Where poverty is endemic, Indigenous peoples experience high rates of diseases such as diabetes, malaria and TB, as well as chronic malnutrition. Where high levels of poverty prevail, the accompanying social ills of substance abuse and domestic violence may also exist. In these situations, the major question from industry seemed to be, 'Where do you start?'

As a basic approach to contributing to local Indigenous development, industry respondents described:

- employment, along with education and training to help community members be employable;
- small business development and local contracting related to the mining operation;
- support of basic education and health care; and
- infrastructure development.

The issues of employment and employability were of concern with almost every industry respondent surveyed. It was perceived to be one of the critical components of Indigenous development and one that all companies in some way had committed to. However, again, this fundamental contribution to development raised critical dilemmas regarding how to set targets (merit-based or numbers) and then how to achieve them. Even the basics of training became problematic in

areas where training programmes require at least a certain grade level and the local educational systems could not provide this foundation. Other questions regarding employment were the high expectations in some areas for jobs when there were not enough to go around.

Depending on the context and the results of negotiations, industry respondents described rising levels of direct cash transfers, often into some sort of trust mechanism that could then be used for community-designed programmes. To some extent these cash settlements were also viewed as offsets to national-level financial mechanisms that did not work to distribute income at the local level.

There have been some additions to the list of development inputs, based on lessons learned, and these seemed to be company-specific:

- increased attention to supporting small business development in non-mining related activity;
- financial literacy and financial management to assist Indigenous communities in handling the increased cash flow and business opportunities; and
- leadership training for community organisations and Indigenous governments unfamiliar with working with a large commercial enterprise, to aid in community development planning efforts as well as conflict resolution.

For some companies, however, there is deep concern about whether they are being effective in helping Indigenous economies to develop, especially in remote areas where economies are subsistence-based, depend on natural resources and rely heavily on family and clan relationships as distribution mechanisms for benefits. Many were concerned about whether they are focusing too heavily on compensation rather than development, or whether they have the right tools to measure actual development outcomes and not just inputs. Many were concerned about whether the limitations of mine life and inevitable mine closure were being adequately planned for at every site. Finally, with the concentration of effort on finding ways to fit Indigenous community members into the mining operation or related business opportunities, there was significant concern expressed by some about whether these investments were truly driven towards increasing independence, realising that in many areas, once a mine closes there may be no more mining activity for some time.

A Different Perspective on 'Development' – While a number of stakeholders from the different groups investigated (industry, Indigenous peoples, NGOs and development institutions) acknowledged the positive potential of these kinds of local investment programmes, a much broader outlook on the idea of sustainable development in an Indigenous context is now being promoted by several Indigenous organisations, NGOs and some development practitioners. This was touched on by only a few industry respondents. To some extent, it requires turning on its head the model mentioned above, which focuses attention on how to fit Indigenous peoples into a commercial mining operation, and looking instead at how a commercial mining operation can fit into Indigenous life. It also requires looking at the local Indigenous context not for all the problems that are experienced but for the positive aspects that Indigenous peoples want to retain and strengthen.

This broader outlook takes more consideration of cultural definitions of sustainable development and well-being – definitions that are only partly driven by economic factors. Indigenous peoples who have some experience with mining have

acknowledged that these potential economic benefits may have cultural costs that must be considered. These broader considerations are often brought up by critics of the mining industry and other large-scale commercial enterprises in Indigenous territories, which moves discussions away from a focus on economic development and towards a focus on human development.

A study on community-based monitoring in Canada may help illustrate these points. As part of the West Kitikmeot Slave Study (WKSS), First Nations with some experience with the mining industry were asked to define indicators of community health and well-being.³⁰ These indicators fell into three broad categories:

Self- Government	Cultural Preservation	Healing
<p><i>Togetherness</i></p> <ul style="list-style-type: none"> • Number of volunteers at public events • Level of respectful communications among people • Number of questions asked at public meetings <p><i>Economic Development</i></p> <ul style="list-style-type: none"> • Number of jobs and job opportunities • Number of developments, impacts on the environment • Number of agreements giving local control <p><i>Youth Participation</i></p> <ul style="list-style-type: none"> • Level of resources devoted to youth and youth activities • Level of participation in local meetings • Goals for education and employment <p><i>Infrastructure and Services</i></p> <ul style="list-style-type: none"> • Number of safe and healthy places to play/hang out • Housing availability/ conditions • Quality of local services <p><i>Effectiveness of the Leadership</i></p> <ul style="list-style-type: none"> • Number of public meetings and home visits • Decision-making • Number of meetings attended 	<p><i>Cultural Education</i></p> <ul style="list-style-type: none"> • Success of cultural programmes • Number of opportunities for education of youth • Amount of time spent by youth with elders <p><i>Land Use</i></p> <ul style="list-style-type: none"> • Number of people involved in traditional harvesting and land use • Level of respect shown during land use • Number of organised on-land events and activities <p><i>Language (Chipewyan)</i></p> <ul style="list-style-type: none"> • Level of use of language during public meetings • Number of opportunities for language learning • Number of families who speak Chipewyan at home <p><i>Traditional Knowledge and Skills</i></p> <ul style="list-style-type: none"> • Number of opportunities for sharing traditional knowledge • Level of understanding of respect • Number of people holding traditional knowledge and skills 	<p><i>Family Well-Being</i></p> <ul style="list-style-type: none"> • Level of participation in educational health programmes • Number of parents attending child and youth activities • Number of organised family activities <p><i>Child Wellness</i></p> <ul style="list-style-type: none"> • Number of children laughing, sharing, respecting others • Number of children able to meet short- and long-term goals <p><i>Healing Services</i></p> <ul style="list-style-type: none"> • Level of diversity of available healing programmes • Response level to requests for service • Participant success rate in health programmes <p><i>Individual Wellness</i></p> <ul style="list-style-type: none"> • Level of traditional food consumption • Number of people reporting symptoms of emotional, spiritual and mental health • Incidents of cancer and tuberculosis

³⁰ Parlee and Marlowe 2001, p. 35.

While not all Indigenous peoples would identify the same indicators, many have said that cultural considerations and the strengthening and reviving of their cultures are just as important as economic benefits. They have also pointed out how interactions with large-scale commercial enterprises, often owned and managed by non-Indigenous peoples, have affected Indigenous cultures negatively. One of the more common examples is the dual nature of increased infrastructure in Indigenous territories. New roads may mean access to potential markets and social services for local people, but it can also mean increased in-migration by other populations, which in turn places greater pressures on the land, its resources and group relationships. As a result, some Indigenous peoples with concerns about these impacts have negotiated for limiting the number of roads and other access points.

Others point to the advent of jobs in the mining sector and the concomitant decreasing ability to maintain subsistence hunting, fishing and other practices; the decreasing use of native languages; changes in inter-generational relationships; and so on. As one industry respondent reflected on these kinds of questions, he noted that an Indigenous person had asked if, by taking a job at the mine, he would have to become a 'white man'. A major question therefore remains about whether there are ways to gain economic benefits and increase options and opportunities while minimising these potential negative impacts to culture and environment.

In comparing the list of company inputs to development with the kinds of concerns raised by the WKSS study, the inputs directly help meet community needs in some obvious areas. Some inputs may indirectly work to meet some of the needs. But there are still many areas of concern identified by the communities that may be either unaffected or potentially negatively affected. These are the sorts of concerns often raised by Indigenous organisations and NGOs, concerns that are receiving some greater attention by development practitioners. The Inter-American Development Bank has taken up the term 'development with identity', which was coined in Bolivia some time ago, while others use such terms as 'culturally appropriate' or 'community-led' development.

Some ways in which individual companies are taking on these considerations is to work, as much as possible, in local languages; to provide cross-cultural training, sometimes asking local people to design and implement the training; to modify employment regimes to accommodate hunting and fishing seasons; and to modify transport routes and methods to accommodate key natural areas for plant or wildlife. Community advisory panels or other dialogue mechanisms are instituted to provide continuous feedback loops to discuss common areas of concern.

Some individual companies or industry personnel are moving towards increasing efforts to look at non-mining-related opportunities, and these seem to be situations in which companies have broadened their engagement efforts beyond the need for reaching community support of a particular mining project. More participative engagement processes over the longer term reinforce more community-led development approaches and therefore some experimentation in development initiatives that are not related to mining.

Even while these more community-led models of development are becoming more common, there is still some concern about whether they can effectively mesh with large-scale commercial enterprises such as mines and, if so, how to help the

affected Indigenous peoples achieve their development goals. Development in an Indigenous context is a question that even development practitioners with decades of experience struggle to define and evaluate.³¹

Working in Areas with Both Indigenous and Non-Indigenous Peoples

For situations in which a company may need to consider both Indigenous and non-Indigenous interests, some of the points made earlier still hold. While both groups may have similar interests in terms of the desire for development opportunities, security of land tenure and the ability to provide for their families, there are some differences.

- Indigenous peoples will focus their efforts on securing and retaining tenure to their ancestral lands, not just land in general. This may significantly restrict ways in which they will be willing to accommodate activities in these territories, whereas non-Indigenous populations in the area may have greater flexibility.
- Because of this ancestral attachment and the spiritual and cultural significance of the land, there will be more calls to accommodate special concerns about land and resource use and about the protection of specific areas.
- There will in general be a greater emphasis on retaining and strengthening customary collective structures, including landownership and decision-making, and on recognition of the role of these customary structures in decision-making within the territory.

Indigenous peoples also argue for some consideration as the traditional landowners with regard to the benefits that accrue from projects in their territories. This particular matter is cause of frustration for a few of the industry respondents in terms of balancing conflicting or competing interests. As industry seeks to fill jobs with the most qualified personnel, Indigenous peoples are at an automatic disadvantage. Seeing 'outsiders' gain jobs and drive by them in company trucks can serve to reinforce their disaffection with the company and non-Indigenous society in general. Yet investing heavily in education and training and then providing jobs solely or disproportionately for Indigenous members of the community can also raise tensions between groups and may act to widen rather than reduce divisions between Indigenous and non-Indigenous peoples.

³¹ The Asian Development Bank recently undertook a multi-country research effort to look into this question. The country studies and final project report, along with workshop proceedings, are on the ADB Web site at www.adb.org/Publications/subject.asp?id=126, last accessed August 4, 2004. For further exploration of both engagement and development approaches, see also International Council of Mining and the Environment 1999.

5. Gaps, Barriers and Stumbling Blocks

Issue Gaps

Two areas of high concern for many stakeholders in the consideration of Indigenous peoples' relationships with the mining sector did not receive much attention from industry respondents in the survey: resettlement and the environment.

Resettlement – For the most part, respondents did not discuss resettlement either because they were not dealing with it at the time, so it simply was not an issue or a challenge, or because they defined it as a concern that was not specific to their relationships with Indigenous peoples. The few who did raise it were in sync with the concerns of Indigenous peoples, some development practitioners and NGOs. Indigenous peoples' attachment not just to land but to their ancestral land creates dynamics that make resettlement more worrisome and complex, and, for some, a worst-case scenario.

Many are aware of the complexities and danger points involved in resettling people. Various studies have shown that for marginalised groups, the dislocation caused by resettlement has generally led to a worsening of their condition, not an improvement. For Indigenous peoples, experiences show that resettlement has led to:

- dispossession of ancestral lands and the loss of land rights;
- loss of cultural integrity and the breakdown of family and governance structures;
- loss of spiritual systems and knowledge systems; and
- loss of identity and collective unity.³²

These findings have prompted most international institutions to develop guidelines regarding resettlement activity. For natural resource–dependent peoples, the challenge is significant as attempts are made not to socially engineer the move and cause further dislocation. For institutions such as development banks, this has led to greater attempts to integrate and coordinate policies regarding Indigenous peoples with guidelines on resettlement.

Many NGOs and Indigenous peoples recognise that resettlement as a concept is not necessarily the cause of all the problems just outlined – many Indigenous cultures are migratory and have adapted to changes in location. The focus of concern becomes resettlement programmes that are enacted without the consent of the people involved, without their active participation in the planning processes and without effective compensation for their losses. While some institutional guidelines for resettlement take all these concerns into account, many still allow for involuntary resettlement, which is an active point of debate between Indigenous peoples and their supporters and these institutions.

Environment – There is a gap between how industry respondents perceive the linkages between Indigenous peoples' issues and environmental issues, and how others perceive them. A few industry respondents felt that debate and conflict over environmental issues in Indigenous territories was being driven by external actors, not by Indigenous peoples. Some stated that they perceived Indigenous peoples to be more interested in economic concerns than the environment. These views, however, do not seem to capture how Indigenous peoples and their organisations have tried to shape the dialogue on mining and environmental practices in Indigenous community contexts.

³² For an overview, see Robinson 2003.

There are cases where NGOs and Indigenous communities have not seen eye to eye on environmental issues. Where environmental conservation efforts seek to exert authority over ancestral lands or Indigenous decision-making processes, they have been rejected by the Indigenous peoples affected. Large conservation NGOs have been in the limelight recently for their lack of consideration for Indigenous land rights in attempts to cordon off protected areas and prevent or limit human interference with them.³³

But there are just as many cases where Indigenous peoples either deliberately create alliances with environmental NGOs or build their own capacity to press their causes regarding activities that they believe are antithetical to their conceptions of stewardship of the environment and protection of their land and resource base. Some of the longer-standing Indigenous organisations working regionally or internationally are those with missions of both social and environmental integrity of Indigenous lands.³⁴

At new operational sites, Indigenous organisations also point to the disjuncture between how industry actors deal with these two streams of concerns – separating environmental issues into one technical basket and Indigenous issues into another one – and how Indigenous peoples and NGOs have historically merged the two. Indigenous organisations and NGOs have argued that disaggregating these concerns fundamentally limits the ability of institutions, commercial or otherwise, to fully grasp the notion of impact on Indigenous peoples. This in turn means they will have only limited success in attempts to formulate ways to manage impacts successfully. There is a growing interest among Indigenous peoples, some NGOs, development institutions and some governments in building local-level capacity for land use planning, resource management and environmental monitoring. This was minimally touched on by industry respondents in this survey.

Barriers and Stumbling Blocks

Industry respondents identified several factors that they believed limited their ability to manage the issues outlined in this review.

National Governments – National governments and legal frameworks can be problematic and frustrating to both parties, whether the point of contention is the definition of Indigenous peoples, the protection or recognition of their lands and resources or basic commitments to their welfare and effective participation. Indigenous peoples' organisations and political movements, development banks and activists have made commitments to engage governments on these matters and will continue to do so for as long as it takes Indigenous peoples to gain some security. Apart from a few companies who have taken on a more active role in public policy advocacy in certain national contexts, however, the mining industry is generally perceived to be standing in the back of the room, and this is noticed by many. While there may be a historic reticence among the private sector to engage governments openly on such concerns, this barrier would seem to be an ongoing nick in the industry's reputation.

The Rest of the Industry – A few industry respondents see the behaviour of the rest of the industry on these issues as a critical factor in the ability of ICMM's

³³ See Chapin 2004.

³⁴ For example, see www.amazonalliance.org, www.coica.org and www.ienearth.org.

members to move forward in building positive relationships with Indigenous peoples on a global basis. Companies that choose to move forward in a less responsible manner with Indigenous peoples in effect make it harder for others to build the kind of trust that most of the industry respondents in this survey claimed was critical for project success. Based on industry responses, these other companies have also directly affected business concerns by increasing negotiation time frames along with community requests for clean-up efforts of messes left behind.

One factor brought up by industry associations is the ability of smaller companies to take on the level of engagement and development efforts that are increasingly being expected of the industry. Besides the general fast time frames that many juniors operate within, a concern has been raised that these companies simply will not have the financial resources to be tied up in lengthy engagement processes.

Staff Expertise – As noted earlier, many people in the industry who are responsible for engaging with and maintaining relationships with Indigenous peoples perceive that they are having to figure all this out on their own. Comments to this effect were especially prevalent when talking about development planning and outcomes, which begins to cross professional lines of expertise into areas not generally found in the mining sector. While many noted an increasing number of consultants and training initiatives available to provide services, especially in Canada and Australia, industry respondents generally maintained that this was a stop-gap measure, put in place because mainstream professional education has not yet begun to fill this need.

To give a sense of the areas of specialisation increasingly being required at some stage during a mining operation, the following list was compiled simply from the concerns raised by industry respondents:

- Ethnography, anthropology, sociology, ethnobiology (research/Indigenous cultures)
- Legal/land rights
- Legal/customary law
- Legal/Indigenous peoples' rights
- Government relations
- Cross-cultural communications/training
- Conflict management and resolution
- Cultural assessment, protection, preservation
- Community engagement, customary decision-making and negotiations
- Participative impact assessment
- Integrated social and environmental assessment
- Indigenous employment and training
- Community economic development
- Small business development
- Social services design and delivery
- Community planning
- Community health, counselling
- Community capacity-building, organisational and leadership development
- Land use planning, resource management

All these areas of specialisation are in addition to having to know the mining industry and mining operations at various stages. A few individual company initiatives are springing up to try to deal with some of the areas thought to be 'core business', through increasing accessibility to a network of both company and

external expertise or initiating research projects on specific issue areas such as Indigenous economic development. And some association-based initiatives are under way in Canada and Australia (described in the next chapter). Others spoke of drawing on opportunities to partner with NGOs or development agencies to help build or supply expertise.

But several respondents noted that, as an industry, mining does not have a secure supply of such people and currently cannot rely on existing educational programmes for even some of the core skills that they would not want to rely on consultants for. One respondent noted that there are no incentives to attract and keep people in these positions – those who stay do so because of their personal commitment and interests.

Indigenous Community Capacity – As industry respondents spoke of the engagement and development processes they were involved in, some mentioned concomitant concerns over the stresses experienced by Indigenous communities as they moved through various stages of mine life. Even where Indigenous institutions are strong, the feeling was that for the most part – unless they had already been through some experience with mining – they would be ill equipped to take on the added burden of engaging with and managing relationships with a large mining operation. The kinds of capacity-building mentioned by industry respondents included small business development, community planning, financial management and numeracy, economic development and legal and negotiations training.

The issue of community capacity has been of high concern for many Indigenous organisations and support NGOs for several years, and the list of skills and knowledge-building that is being developed with NGOs is perhaps longer than that of some industry respondents. With a few exceptions, it often reflects the same areas of concern as company staff expertise:

- Legal/land rights
- Legal/Indigenous peoples' rights
- Territorial mapping, demarcation
- Government relations
- Cross-cultural communications, training
- Company engagement, company decision-making
- Mining industry knowledge
- Negotiations
- Conflict resolution
- Cultural assessment, protection, preservation
- Social and environmental impact assessment
- Environmental training and monitoring
- Land use planning and resource management
- Community planning
- Leadership and organisational development
- Community economic development
- Financial management, trust management
- Small business development
- Community health, counselling

Again, as with industry, there is no single source for Indigenous peoples needing help to increase their skills and knowledge base. While there are programmes currently in use, they are ad hoc in terms of availability and are of varying quality. Their greatest limitation is simply their dependence on philanthropic dollars, which

ebb and flow depending on the financial health of donor agencies and their current agendas and interest areas.

Industry Character – A final point, again raised by a few respondents but one that may be worth emphasizing, is the basic character of finding platforms for action within the private sector. Some company respondents described a hesitancy to ‘stick my head above the parapet’, hoping someone else would do it first on sensitive issues such as Indigenous peoples. Others talked more fundamentally, especially in terms of improving internal expertise, of the drive to keep everything inside the company, hoping for some competitive advantage. Respondents felt that both attitudes seem to be preventing or slowing the industry from effectively capturing what they say they need, which is greater effectiveness.

6. Summary of Issues

The Table on the next page summarises the issues identified during the survey when looked at from different perspectives. Areas of general convergence between industry and Indigenous peoples, where each party would identify the topic as an area of concern, are marked in the middle. Areas of divergence or differences in definition or emphasis appear on either side.

There is a great deal of convergence between industry and Indigenous peoples regarding identification of issue areas and challenges, but this is also using fairly broad definitions of the issues. As noted in previous chapters, most of the differences occur in how each side or actor approaches the issue and possible solutions. To reiterate, with land rights, industry respondents emphasised the desire to simplify and shorten legal and administrative processes, while Indigenous peoples and their advocates emphasise securing long-term rights and control and view efforts to shorten administrative processes as efforts to minimise their control.

This distinction on emphasis and priority in any particular local context is a matter that is harder to grasp in a broad survey. Yet this may be where much of the debate lies as each side of the relationship seeks to balance its own costs and benefits. What Indigenous peoples have emphasised consistently is the desire and the right to determine those costs and benefits according to their own values and to be a part of the decision-making regarding mining projects in their territories from the earliest possible stage. This concept of meaningful participation underscores all the issues identified by Indigenous peoples.

Industry	Convergence	Indigenous Peoples
Secure access Simplify processes	<u>Context:</u> Historical lack of trust National governments Land rights Industry respect	Secure long-term rights Secure control/authority
Efficient mechanisms/methods	<u>Community Engagement:</u> Determine partners Determine decision-making structures Respecting cultural considerations Overcoming cultural misunderstandings Research and impact assessment Communication methods Managing expectations/information Managing conflict	Participative methods
Community consent or 'social licence to operate'	Community support	Free, prior, informed consent
Mining-related jobs and contracts	<u>Community Development:</u> Increasing wealth/balancing distribution Employment Infrastructure development Support social services (education, healthcare) Small business development Sustainability/post closure	'Equitable benefit sharing' Community-driven projects/alternative development Balancing cultural impacts
Balancing interests with non-Indigenous populations	Resettlement	Redressing imbalances/marginalisation
Capacity of smaller companies	Other industry members/practices Company capacity/staff expertise Community capacity Industry character/reticence	Environment/resource management

7. Existing Initiatives and Programmes

It quickly became apparent during research for this report that involvement with the Extractive Industries Review had diverted energy and resources from some of the ongoing programmes that were perhaps of most direct relevance to improving the relationship between the mining industry and Indigenous peoples. Of course, in further research of development bank loans to certain countries of interest, there may be areas where programme funding will be designated to relevant areas of concern, such as access to education, thereby creating room for engagement with national governments and affected Indigenous peoples. But information on that potential is simply not available at this time.

Given that Indigenous peoples and their organisations emphasise direct engagement in defining initiatives that affect them, the focus here is on identifying initiatives that encourage such direct engagement to come to terms with the issues highlighted in this report. Also, given the nature of ICMM as an international association, emphasis is placed on finding international opportunities. The following is a snapshot of current initiatives and programmes that ICMM and its members may wish to become involved in. These should be considered in conjunction with the options described in Chapter 8, including those that might encourage discussion of how to engage with Indigenous peoples on the entire range of issues identified here.

General Relationship-Building

Both the UN Permanent Forum on Indigenous Issues and the UNHCHR Working Group on Indigenous Populations can be good gauges of issues that are of high interest to Indigenous peoples globally, and they can provide opportunities for industry to build its own knowledge base as well as develop the ground for stronger relationships with Indigenous organisations. At this time, it appears that only one ICMM member has been involved in these fora. This could be broadened to at least include regular liaison with the ICMM Secretariat and, if possible, with individual ICMM members. To help understand the purposes and general workings of these institutions, ICMM could arrange for the organisations to provide a briefing session to members interested in attending. Industry attendees may also wish to contact, where possible, Indigenous organisations from their countries of operations that may be attending these two groups regularly.

UN Permanent Forum on Indigenous Issues – The Permanent Forum is generally interested in building relationships with the private sector, although given how recently the forum was formed, this topic has not been on the high priority list. The annual meeting is held in mid-May of each year at the United Nations in New York. Registration processes usually start in January-February.

UNHCHR Working Group on Indigenous Populations – The annual meeting is held in mid-July every year. Registration usually begins in March.

Participatory Research

International Development Research Centre (IDRC) – The IDRC is a public corporation created by the Parliament of Canada in 1970 to help developing countries use science and technology to find practical, long-term solutions to social, economic and environmental problems. The Mining Policy Research Initiative (MPRI) was created in 1998 by IDRC. Its general objectives are:

- to support applied and participatory research on issues related to mining and sustainable development in mining regions and communities of Latin America and the Caribbean;
- to foster collaboration among different stakeholders in the sector, both within the region and with other regions, especially Canada; and
- to improve the generation, access and use of relevant information on the subject in the region.

Projects the MPRI has supported include one managed by the North-South Institute on Indigenous consultation, multistakeholder policy forums in Peru and negotiations training in Bolivia. Over the years it has supported a number of programme areas that include or focus on the concerns of Indigenous peoples. MPRI may be valuable for its institutional capacity to foster a collaborative project within the South American region on any or all of the issues brought out in this report. As with the UN programmes, a first contact may be through the ICMM Secretariat to investigate opportunities, but engagement would most likely be driven by ICMM corporate and association members in the region.

Indigenous Community Engagement and Consent

There are a few opportunities for engaging directly with Indigenous organisations on the subject of consultation practices and consent, but Chapter 8 provides some suggestions on how to complement or leverage engagement with these programmes.

UN Permanent Forum on Indigenous Issues – In mid-January 2005, the Permanent Forum held an international workshop on operationally defining FPIC with regard to Indigenous peoples. This workshop was focused on intergovernmental organisations in particular, and participation was limited to Indigenous organisations, members of the Forum, U.N. agencies, and governments. It examined inter-agency policy frameworks and special issues such as gender, traditional knowledge, natural resources, health and relocation. It also discussed examples of application of FPIC at the national and international level, including legislation, project planning, and evaluation.

UNHCHR Working Group on Indigenous Populations – The Working Group recommended that a legal commentary on FPIC be prepared for its 2005 session, which will place this topic on the agenda for discussion. While it is unlikely that the report will be open to industry input, it may be useful for the ICMM Secretariat to contact the author of the report, the Tebtebba Foundation. The Secretariat could investigate the possibility of industry input into the discussion, potentially coming directly out of the Permanent Forum workshop in January.

North-South Institute – The Institute has a project currently going into its second phase: Exploring Indigenous Perspectives on Consultation and Engagement within the Mining Sector of Latin America, the Caribbean and Canada. The general objective of Phase II (2003–06) is to use the results of Phase I to open dialogue with other actors with a view to catalyzing concrete changes in current government and corporate policies and practice so these more appropriately reflect and respect Indigenous Peoples' processes, aspirations and rights. Current partners include the Amerindian Peoples Association of Guyana and the National Organization of Indigenous Peoples of Colombia. The project hopes to expand to Suriname and to Peru or Ecuador. There is also a Canadian technical exchange component with the Assembly of First Nations.

At this time, the primary focus of the project is building the capacity of Indigenous partners before engaging with other actors. When these groups are ready, however, ICMM and its members could play a bridging role in helping to find company operations in their focus countries, and perhaps help to expand the learning to both the national-level industry associations and to ICMM members outside of those countries.

World Bank Group – Discussions with various World Bank Group staff have indicated that there will now need to be some concentrated effort given to operationalising the concept of ‘free prior and informed consultation’. Given the newness of the decision on the language, however, there has not yet been an announcement about how this will be done or by whom. While ICMM and its members most likely have their own contacts within the World Bank, the Indigenous Peoples unit could be added to this list. The unit will now be working to complete the process of revising the Indigenous Peoples operational policy and guidebook and will be tracking efforts on how operational language is developed.

Standard-Setting/Evaluation

IFC Safeguards Policy Review – The consultation draft of the revised IFC Policy on Social and Environmental Sustainability and Performance Standards (formerly the Safeguards policy) has been released for comment, and the review process will continue through early 2005. It has integrated the revised language from the World Bank board decision on the EIR outcomes with regard to free prior and informed consultation and has developed draft performance standards on Indigenous peoples as well as on community engagement, impact assessment and cultural heritage. Along with both ICMM and company input in general into these performance standards, industry respondents who participated in the survey could review and comment on these draft standards.

Indigenous Local Development

IFC/Environmental Business Group – While still in the concept stage, there is some interest from the IFC in developing the small-business capacity of Indigenous communities in areas where there are IFC-financed projects, and the organisation is looking for client input and support. At this time, the pillars of the initiative are to provide the enabling environment for these enterprises, including access to finance capital and relevant expertise – for example, from existing successful Indigenous business leaders. This may provide a network of business expertise for ICMM company members to tap as they develop community-based initiatives.

Industry-Focused Initiatives

ICMM members are already involved in several initiatives, which hold potential for cross-learning if the lessons are shared through ICMM as well as potential for modelling efforts in other geographic regions.

Canadian Aboriginal Minerals Association –

- The association is developing an Aboriginal Mining Tool Kit in partnership with the Mining Association of Canada and the Prospectors & Developers

Association of Canada. The idea for this came out of an Aboriginal–Mining Industry Round Table workshop between Canadian First Nations and the Mining Association of Canada held in Alberta in March 2004. The kit will provide useful information and guidance to Canadian Aboriginal communities on the mining industry and on opportunities for participation during all stages of development, from exploration to closure and reclamation. It will highlight examples of Aboriginal participation in mining currently taking place across Canada and provide contact information for industry and Aboriginal leaders involved in mining. It will also outline in detail the regulatory process to ensure that Aboriginal people are well informed of the opportunities to address and influence the economic, social and environmental issues associated with new mine development.

This kind of initiative, while Canada-specific in terms of some of the content being delivered, may be a useful model for other national-level industry associations working to address a concern raised by industry respondents: the need for finding ways to better explain the industry to Indigenous peoples.³⁵

- The association's Annual Conference is focused on dialogue between Indigenous peoples and industry representatives, information sharing and skills development. While small, it generally attracts both Canadian and international participants and presenters. ICMM and its members are encouraged to attend, but it may also provide an ongoing, existing forum for ICMM and its members to discuss the issues raised in this report and to build their own initiatives.

Minerals Council of Australia – The council currently has multiple projects in various stages of development, including the following:

- Agreement-Making Resource, designed to improve the capacity of companies to reach mutually beneficial outcomes, which will include guidelines on negotiating with aboriginal peoples, examples of actual agreements and their scope and a resource library.
- Agreement/Treaty Database (with University of Melbourne), designed to provide an information resource for those interested in comparing texts of different kinds of agreements, treaties and conventions with aboriginal peoples in different countries.
- Indigenous Facilitation and Mediation Project (with the Australian Institute for Aboriginal and Torres Strait Islander Studies), designed to improve conflict management within and between Indigenous communities and between communities and the organisations or companies engaging with them.
- Indigenous Governance Project (with the Australian Indigenous Leadership Centre and Reconciliation Australia), designed to improve Indigenous corporate and cultural governance capacity (based on the Harvard Project in the United States).
- Social Competencies in the Minerals Industry (with the Australian Centre for Mining and Environmental Research), designed to develop models for cross-

³⁵ There are many other efforts and programmes around the world, sponsored by NGOs, that offer support to Indigenous peoples and their organizations. Although not listed here, it may prove valuable to ICMM members to compile a resource list of such organizations.

cultural understanding and community-based business development with a focus on economic independence and sustainability post-closure.

Mining Certification Evaluation Project – This research project aims to evaluate whether independent, third-party certification of environmental, social and economic performance could be applied to mine sites. Components of the draft criteria include segments on Indigenous peoples. It has attracted the support and participation of BHP Billiton, CSIRO, Newmont, Placer Dome, Rio Tinto, WMC Resources and WWF-Australia. Late in 2004, the project completed Phase 2 – field trials on the draft principles and criteria. Given the interest of industry respondents in evaluating performance, it would be useful to have results from this project shared widely with ICMM member companies and associations.

Peru – The Mining Dialogue Group, originally sponsored by the Canadian International Development Agency, is a national-level multistakeholder forum designed originally to provide a space for the expression of differing viewpoints on matters related to the mining industry. It is guided by a three-person steering committee whose members are from civil society, government and industry. It meets monthly, and while usually it avoids trying to come to final agreement on any matter, discussions within the group contributed to the recent revision of the mining law.

Prospectors & Developers Association of Canada – The online web-based learning tool Environmental Excellence in Exploration (E3) has moved from subscription base to free access and is available at www.e3mining.com. Designed specifically with exploration initiatives and junior companies in mind, E3 has an extensive section on Community Engagement practices.

8. Conclusions

In 1999, the International Council on Metals and the Environment produced a set of case studies on mining and Indigenous peoples that highlighted best-practice benchmarks for engagement. As noted in its introduction:

*Much more needs to be done. The benchmarks set out in these case studies are more the exception than the norm in the mining industry. In addition, expectations are building for mining companies to take a much more comprehensive approach to sustainable development. A key challenge will be for them to integrate principles of sustainable development into their relations with Indigenous people in such a way as to contribute to meaningful outcomes for Indigenous communities.*³⁶

Based on reactions documented within the Extractive Industries Review, as well as during the Mining, Minerals and Sustainable Development process, there is still widespread concern that the kinds of practices reported by industry respondents remain the exception. Thus while the different actors researched in this study may identify similar concerns, it is still widely felt that the industry is not yet managing the issues in a way that meets the expectations of Indigenous peoples. Based on input from the industry respondents in this review, there is also widespread industry concern about whether companies currently have the capacity to improve the situation on a broad scale.

As seen by the list of initiatives and programmes in Chapter 7, the coverage of issues of mutual concern for the mining industry and Indigenous peoples is rather ad hoc in treatment and scope. This is partly due to the nature of the participants; each side of the debate has many different actors with different approaches and priorities to each issue described in this report. It is also partly due to issues of capacity of coordinating institutions.

This leaves the industry and Indigenous peoples without a coordinated method or forum at an international level to come to a mutual understanding of the issues of critical importance via open dialogue and to build the capacity of their members through sharing experiences from a variety of perspectives.

In December 2001, the UNHCHR Working Group on Indigenous Populations hosted a workshop on extractive industries and Indigenous peoples that recommended:

- a collection and review of existing policies, practices and agreements between Indigenous peoples and companies;
- further workshops and dialogue between companies, governments and Indigenous peoples; and
- the joint elaboration of a framework for consultation, benefit-sharing and conflict resolution.³⁷

While fairly practical in nature, these recommendations were never acted on. Some of the work already being undertaken in either industry or non-industry-based initiatives begins to address some of the steps listed, but this leaves an opportunity for ICMM to propose concrete follow-up action on a broader scale. The opportunities mentioned in this chapter could be taken either alone or in conjunction with the initiatives outlined in Chapter 7.

³⁶ Hill 1999, p. ix.

³⁷ Working Group on Indigenous Populations 2002.

Industry Experiences with Indigenous Community Engagement or Consent

It is obvious from global debate that free, prior and informed consent (FPIC) will continue to garner attention from many different actors and industries. While a few initiatives are already looking at this issue, some were not designed to consider industry input from an operational perspective, and it may be a stretch for these programmes to be reconfigured even if the organisers were willing.

Based on the rich experiences discussed by industry respondents, it may be worthwhile to engage in a deeper exercise focused on documenting engagement and consent practices currently being used by ICMM member companies, examining the local and legal contexts in which they are implemented and coming up with an honest appraisal of challenges faced. A starting point may be to take one of the definitions of FPIC or the World Bank wording of 'free prior and informed consultation with affected communities that leads to the affected community's broad acceptance of the project' and then to build an operational, grassroots approach to what the mining industry is currently accomplishing in its relationships with Indigenous peoples.

Because of the level of scepticism shown towards the industry, it does not seem feasible to rely on older case studies or to pick a few from such widespread experience. A broad effort, with study teams that include Indigenous peoples and sceptics, would go a long way towards building the basis for an effective dialogue.

These studies could then provide the basis for engaging in one or more existing initiatives from an informed ICMM-wide position or for launching a new initiative that ICMM helps to lead. Regardless of the approach taken, this step would also begin the process of mutual learning across geographic and company boundaries that many of the respondents asked for.

Mining and Indigenous Peoples Dialogue

There is great scepticism of initiatives that are proposed and developed by industry without the input of Indigenous peoples. What many Indigenous organisations and NGOs look to are the kinds of initiatives designed with Indigenous peoples from the start, such as the national-level action agenda arising from the Aboriginal–Mining Industry Round Table held in Alberta in March 2004. Each of the action points outlined by the UNHCHR workshop in December 2001 can be effectively discussed at the national level with the assistance of national industry associations and could lead to far-reaching, jointly designed action plans that address the many issues covered in this report. In this way, the issues and options can be tailored specifically to national contexts.

A second phase of global work, one that may be focused initially on FPIC but that could also start from a broader perspective, would be for ICMM to be involved in re-invigorating the recommendations from the December 2001 UNHCHR workshop, building a forum to focus on the relationships between the mining industry and Indigenous peoples. As with the Canadian experience, this could provide an opportunity to jointly identify key areas of work that can then be taken forward. One difficulty in this case is that there is no natural convener of Indigenous peoples that has global scope within the NGO sector. While there are many that operate internationally, most of them have fairly distinct areas of operation and expertise, distinct missions and to some extent different constituencies.

United Nations bodies can provide convening capacity at a global level: the UN Permanent Forum on Indigenous Issues and the UNHCHR Working Group on Indigenous Populations. Both agencies have convening power with Indigenous peoples and organisations, and they also hold their trust. On the negative side, both agencies are part of a fairly large bureaucracy that has formal procedures. Neither one may have the style and flexibility conducive to the kinds of discussions that ICMM may wish. Several other possibilities could be explored, however, including the Ethical Globalization Initiative founded by Mary Robinson and the Fund for Peace Business and Human Rights Roundtable in Washington.

Each of the industry respondents who participated in this review has Indigenous contacts; at the most basic level, being able to bring together these individuals from both industry and Indigenous communities to share experiences outside their local contexts would be extremely valuable. But because of its value in helping to educate others in industry and Indigenous organisations, broader participation is encouraged.

Creating a Professional Network

ICMM and its association members, particularly national associations that can cut across different aspects of the mining sectors, could help establish a professional network of industry personnel with current responsibilities for relationships with Indigenous peoples. The core of this new network could be the industry respondents who participated in this survey. An initial meeting at either a future ICMM meeting or at a national association meeting could start the sharing of resources, knowledge and skills that so many participants have called for. The individuals involved in this survey, both from companies and from national associations, are an incredibly diverse, dedicated and enthusiastic group of people, and this enthusiasm should be captured and encouraged within ICMM.

At its initial stages, such a network could strengthen the skills and knowledge bases of the individuals involved. But it could be leveraged to begin to examine the concern brought up by so many industry respondents: the feeling that the only way they can learn how to create successful relationships with Indigenous peoples is through their own trial and error. The network could begin the process of identifying existing learning venues, through national or international industry meetings (annual association conferences, mines ministers meetings and so on), and of evaluating existing educational curricula at the university and professional level.

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www.minesandcommunities.org/Country/png2.htm

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International Labour Organization Convention 169: Concerning Indigenous and Tribal Peoples in Independent Countries (1991).
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Inter-American Development Bank, Indigenous Peoples Policy Framework.

www.iadb.org/sds/IND/site_401_e.htm

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Latin America and the Caribbean, Databank on Indigenous Legislation (in Spanish). www.iadb.org/sds/IND/site_3152_e.htm

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Australia, (Northern Territory) Aboriginal Land Rights Act 1976.

www.austlii.edu.au/au/legis/cth/consol_act/alrta1976444/

Australia, Native Title Act, 1993.

www.austlii.edu.au/au/legis/cth/consol_act/nta1993147/

United States (various legislation), Department of the Interior.

www.doi.gov/bureau-indian-affairs.html

Canada, Indian Act, 1985. laws.justice.gc.ca/en/l-5/

New Zealand, Treaty of Waitangi, 1840. www.treatyofwaitangi.govt.nz/

New Zealand, Crown Minerals Amendment Act 1997,

crownminerals.med.govt.nz/minerals/legislation/land.html

Organisation/Resource Links

It is impossible to capture the amount of resources available – human, institutional, and published – on extractive industries and Indigenous peoples issues. The following web links, and the reports and articles included therein, have been used in the preparation of this report. Those marked with an asterisk (*) have bodies of web-published reports and articles relevant to Indigenous peoples and mining.

Aboriginal and Torres Strait Islander Commission (ATSIC). www.atsic.gov.au/

Alaska Federation of Natives (US). www.nativefederation.org/flash.html

Amazon Alliance. www.amazonalliance.org

Amerindian Peoples Association (Guyana). www.sdn.org.gy/apa/

Asian Development Bank, Indigenous Peoples Unit.
www.adb.org/IndigenousPeoples/default.asp

Assembly of First Nations (Canada). www.afn.ca

*Australian Institute of Aboriginal and Torres Straits Islander Studies.

Native Title Research Unit, Issues Papers.
www.aiatsis.gov.au/rsrch/ntru/ntru_issuesprsr.htm

Research Discussion Papers Series.
www.aiatsis.gov.au/rsrch/rsrch_dp/discussion_papers.htm

Bank Information Center, Indigenous Peoples.
www.bicusa.org/bicusa/issues/indigenous_peoples/index.php

Black Mesa Indigenous Support (US). www.blackmesais.org/water_coal.htm

Canadian Arctic Resources Committee. www.carc.org

Centro de Derechos Economicos y Sociales (CDES). www.cdes.org

Confederación de Pueblos Indígenas de Bolivia (CIDOB). www.cidob-bo.org

Confederacion Nacionalidades Indigenas de Ecuador (CONAIE). conaie.org/

Cooperacion (Peru). www.cooperacion.org.pe/

Coordenação das Organizações Indígenas da Amazônia (COIAB).
www.coiab.com.br

Coordinadora Nacional de Comunidades del Peru Afectadas por la Minería.
www.conacami.org

Coordinator of Indigenous Organizations of the Amazon Basin (COICA).
www.coica.org

Council of Energy Resource Tribes (US). www.certreearth.org

Council of Yukon First Nations (Canada). www.cyfn.ca/

*Cultural Survival. www.cs.org

First Peoples Worldwide. www.firstpeoples.org

*Forest Peoples Programme. www.forestpeoples.org

Government of Nunavut (Canada). www.gov.nu.ca/Nunavut/

Indian and Northern Affairs Canada. www.ainc-inac.gc.ca

Indian Law Resource Center. www.indianlaw.org

Indigenous Environmental Network. www.ienearth.org

Instituto Socioambiental (Brazil). www.socioambiental.org/website/home_html

Inter-American Development Bank, Indigenous Peoples and Community Development Unit. www.iadb.org/sds/IND/index_ind_e.htm

International Alliance of Indigenous Tribal Peoples of Tropical Forests. www.international-alliance.org

International Development Research Centre, Environment and Natural Resource Management. network.idrc.ca/en/ev-43438-201-1-DO_TOPIC.html

International Indian Treaty Council, www.treatycouncil.org

International Work Group for Indigenous Affairs. www.iwgia.org

Inuit Tapiriit Kanatami (Canada). www.tapirisat.ca/english/main.htm

Makivik Corporation (Canada). www.makivik.org/eng/

Metis National Council (Canada). www.metisnation.ca/

*Mines and Communities. www.minesandcommunities.org

*Mining Policy Research Initiative (Latin America and the Caribbean) www.iipm-mpri.org/index.cfm?lang=eng

National Congress of American Indians (US). www.ncai.org

National Tribal Justice Resource Center (US). www.tribalresourcecenter.org

Native American Rights Fund (US). www.narf.org/intro/index.html

Navajo Nation (US). www.navajo.org/

*Oxfam America. Oil, Gas, and Mining Campaign. www.oxfamamerica.org/advocacy/art2605.html

*Oxfam Community Aid Abroad, Mining Campaign. www.oxfam.org.au/campaigns/mining/

Russian Association of Indigenous Peoples of the North (RAIPON). www.raipon.org

Te Puni Kokiri (New Zealand). www.tpk.govt.nz/

Tebtebba Foundation. www.tebtebba.org

UNCTAD Mineral Resources Forum. www.natural-resources.org/minerals/development/indigp/indigp.htm

UN Mining, Environment, and Development. www.natural-resources.org/minerals/CD/social.htm

UN Permanent Forum. www.un.org/esa/socdev/unpfii/

UNHCHR Working Group on Indigenous Populations.
www.unhchr.ch/indigenous/groups-01.htm

Union of British Columbia Indian Chiefs. www.ubcic.bc.ca

*University of Melbourne, Indigenous Studies Program, Agreements, Treaties and Negotiated Settlements Project. www.atns.net.au/

University of Waikato, Maori Sustainable Economic Development Program (New Zealand). wms-soros.mngt.waikato.ac.nz/NR/exeres/FDB3FE83-77EA-431F-A598-403095008950.htm

Western Shoshone Defense Project (US). www.wsdp.org/

Working Group of Indigenous Minorities in Southern Africa (WIMSA).
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World Bank Group, Indigenous Peoples Unit,
Inweb18.worldbank.org/ESSD/sdvext.nsf/63ByDocName/AboutUs

Appendices

Appendix A: Survey Methodology

The following topic areas formed the basis for a telephone survey of respondents from ICMM member companies and associations. The topic areas were compiled based on the author's previous experience with the concerns of the mining industry and Indigenous peoples, which has included conversations with industry, Indigenous community members and Indigenous activists, as well as other stakeholders and analysts. Each respondent was asked primarily to just reflect on the topic areas they believed were most important, rather than working with formally phrased questions. These topic areas were intentionally left somewhat vague, with the expectation that the respondents would more clearly define how they viewed the issue or challenge based on individual experiences.

An example would be the topic area of land rights. Some discussions in other fora on this topic have been fairly simplistic – do Indigenous peoples have land rights, yes or no? Or, are Indigenous land rights a good thing or bad thing for industry? The responses to the survey for this paper actually provided a much more nuanced definition of the challenges faced by industry with regard to land rights.

Those topics highlighted are those on which at least 30 per cent of respondents expressed some views. Those in italics were not on the original list of topic areas but came directly from discussions with industry respondents.

Macro-Level Context:

Negative history

Culture clashes

Conflict zones

Endemic poverty

Prejudice/racism

Operations-Level:

Lack of information/new areas

Impact assessment processes

Communications

Engagement practices and local decision-making

Free prior informed consent

Permitting regulations and practices

Land rights, title, tenure (*land access*)

Mineral rights

Resource management

Local economic planning, investment

Managing expectations

Cultural considerations, protection and preservation

Community capacity (education, governance, leadership)

Community health and safety – may include food security, traditional medicine

Local relationships – mixed communities, in-migration

Conflict avoidance, resolution, security concerns (*including intra-group, non-violent*)

Resettlement/relocations

Employees – tech. training, cross-cultural training, operational considerations, discrimination

Staff expertise

Legacy concerns

Small-scale miners
Use of intermediaries
Cost of good practice
Internal company support

External Drivers/Stakeholders:

Access to capital – public sources (regional and international development banks)
Access to capital – private investors
International law and conventions – OAS, UN, ILO, CBD (compliance and liability)
National legal/regulatory frameworks
National governments – political, economic and social agendas
NGOs/social movements
NGOs/CSR
Development partners and preferences – UNDP, government agencies, NGOs
Public perception/reputation
Competitors/industry colleagues

Respondents were also asked to consider the following questions:

1. Which issues currently rank highest in importance for your organisation?
 - Site specifically/operations level
 - Geographically
 - Company-wide
2. Which issues would you identify to be emerging issues for your organisation?
 - Site specifically/operations level
 - Geographically
 - Company-wide
3. Of these issues, which issues do you feel are most significant for the industry as a whole, and why?
4. Based on your knowledge of these concerns more generally, which issues are currently not of high significance for your company but you would judge them to be significant for the industry as a whole, and why?
5. What kinds of solutions has your organisation attempted to implement for the issues identified? How would you rate their level of success?
6. Have you experienced any barriers to implementing these solutions? If so, please describe.
7. Which issues continue without available solution?
8. What kinds of broader initiatives are you currently involved in or generally aware of with regard to Indigenous peoples?

The large majority of respondents answered site or country-specifically, and any kinds of possible trends that could be identified geographically are included in the main report. Most respondents did not distinguish between current and emerging issues or did not identify any emerging issues. The large majority said they were not involved with any programme or initiatives outside of those driven at the company site level.

Appendix B: Definitions of ‘Indigenous’

This is not suggested to be a comprehensive list, but rather to give some sense of the language used to define a diverse array of situations and contexts.

José Martínez Cobo, UN Special Rapporteur, ‘Study on the Problem of Discrimination against Indigenous Populations’, 1981:

Indigenous communities, peoples and nations are those which having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop, and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.

Erica Irene Daes, UN Special Rapporteur, ‘Supplementary Report of the Special Rapporteur on the Protection of the Heritage of Indigenous Peoples’, 1996:

In summary, the factors which modern international organisations and legal experts (including indigenous legal experts and members of the academic family) have considered relevant to understanding the concept of ‘indigenous’ include:

- a. priority in time with respect the occupation and use of a specific territory;
- b. the voluntary perpetuation of cultural distinctiveness, which may include aspects of language, social organisation, religion and spiritual values, modes of production, laws and institutions;
- c. self-identification, as well as recognition by other groups, or by State authorities, as a distinct collectivity;
- d. and an experience of subjugation, exclusion or discrimination, whether or not these conditions persist.

ILO Convention 169

Article 1

1. This Convention applies to:

- (a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
- (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.

Philippines, Department Administrative Order, No. 96-20, Section 2.1,
'Implementing Rules and Regulations for Executive Order 247':

a homogeneous society identified by self-ascription and ascription by others which has continuously lived as a community on communally bounded and defined territory, sharing common bonds of language, customs, traditions and other distinctive cultural traits, and which through resistance to the political, social and cultural inroads of colonisation, became historically differentiated from the majority of Filipinos.

Andean Pact, Decision 391

Indigenous, Afro-American and local communities are human groups whose social, cultural and economic conditions distinguish them from other sectors of the national community, who are governed totally or partially by their own customs or traditions or special legislation, and who, regardless of their legal status, conserve their own social, economic, cultural and political institutions or parts thereof.

World Bank, Operation Policy 4.10 (under revision)

this policy identifies indigenous peoples in particular geographic areas by the presence, in varying degrees, of some of the following distinctive characteristics:

- a. close attachment to ancestral territories and the natural resources in them;
- b. presence of customary social and political institutions;
- c. economic systems primarily oriented to subsistence production;
- d. an indigenous language, often different from the predominant language; and
- e. self-identification and identification by others as members of a distinct cultural group.

Inter-American Development Bank, Operational Policy Framework

The policy would include a definition of indigenous peoples based on the ILO Convention No. 169 on Tribal and Indigenous Peoples in Independent Countries, Article 1, as applicable to the borrowing member countries of the Bank, and other international agreements and jurisprudence.

Accordingly, for purposes of the policy, indigenous peoples would be defined as meeting three criteria:

- a. they are descendants of populations inhabiting the region at the time of the conquest or colonization;
- b. irrespective of their legal status or current residence, they retain some or all of their own social, economic, cultural and political institutions and practices; and
- c. they recognize themselves as belonging to indigenous or pre-colonial peoples or cultures.

Appendix C: Exploring FPIC Definitions

World Commission on Dams, 2001

Free, prior and informed consent (PIC) of indigenous and tribal peoples is conceived as more than a one-time contractual event – it involves a continuous, iterative process of communication and negotiation spanning the entire planning and project cycles (see Chapter 8, policy principle 1.4). Progress to each stage in the cycle – options assessment including priority setting and selection of preferred options, and preparation, implementation and operation of the selected option – should be guided by the agreement of the potentially affected indigenous and tribal peoples.

Indigenous and tribal peoples are not homogeneous entities. PIC should be broadly representative and inclusive. The manner of expressing consent will be guided by customary laws and practices of the indigenous and tribal peoples and by national laws. Effective participation requires an appropriate choice of community representatives and a process of discussion and negotiation within the community that runs parallel to the discussion and negotiation between the community and external actors. At the beginning of the process, the indigenous and tribal peoples will tell the stakeholder forum how they will express their consent to decisions including endorsement of key decisions (Guideline 1).

An independent dispute resolution mechanism to arrive at a mutually acceptable agreement should be established with the participation and agreement of the stakeholder forum, including the indigenous and tribal peoples, at the beginning of any process. It is inappropriate to set rigid guidelines or frameworks, as these must be negotiated as the process proceeds.

Dams and Development: A New Framework for Decision-Making.
Chapter 9, *Criteria and Guidelines*, p. 281.
www.damsreport.org/docs/report/wcdch9.pdf

Extractive Industries Review, 2003

Free prior and informed consent should not be understood as a one-off, yes-no vote or as a veto power for a single person or group. Rather, it is a process by which indigenous peoples, local communities, government, and companies may come to mutual agreements in a forum that gives affected communities enough leverage to negotiate conditions under which they may proceed and an outcome leaving the community clearly better off. Companies have to make the offer attractive enough for host communities to prefer that the project happen and negotiate agreements on how the project can take place and therefore give the company a 'social license' to operate.

Striking a Better Balance. Final Report, Extractive Industries Review, Volume 1, p. 65.

UNHCHR Working Group on Indigenous Populations, 2004

- (a) Indigenous peoples are not coerced, pressured or intimidated in their choices of development;
- (b) That their consent is sought and freely given prior to the start of development activities;
- (c) That indigenous peoples have full information about the scope and impacts of the proposed development activities on their lands, resources and well-being;
- (d) That their choice to give or withhold consent over developments affecting them is respected and upheld.

Operational notes:

Free: It is a general principle of law that consent is not valid if obtained through coercion or manipulation. While no legislative measure is foolproof, mechanisms need to be established to verify that consent has been freely obtained.

Prior: To be meaningful, informed consent must be sought sufficiently in advance of any authorization by the State or third parties or commencement of activities by a company that affect indigenous peoples and their lands, territories and resources.

Informed: A procedure based on the principle of free, prior and informed consent must involve consultation and participation by indigenous peoples, which includes the full and legally accurate disclosure of information concerning the proposed development in a form which is both accessible and understandable to the affected indigenous people(s)/communities regarding, inter alia:

- The nature, size and scope of the proposed development or activity;
- The duration of the development (including the construction phase) or the activity;
- The locality of areas that will be affected;
- A preliminary assessment of the likely impact of the development;
- The reasons/purpose for the development;
- Personnel likely to be involved in both construction and operational phases (including local people, research institutes, sponsors, commercial interests and partners – as possible third parties and beneficiaries) of the development process;
- Specific procedures the development or activity would entail;
- Potential risks involved (e.g. entry into sacred areas, environmental pollution, partial destruction of a significant site, disturbance of a breeding ground);
- The full implications that can realistically be foreseen (e.g. commercial, economic, environmental, cultural);
- Conditions for third-party involvement;
- Provision of misleading or false information should result in a penalty or denial of consent for the proposed development to proceed.

Consent: This involves consultation about and meaningful participation in all aspects of assessment, planning, implementation, monitoring and closure of a project. As such, consultation and meaningful participation are fundamental components of a consent process. There may also be negotiation involved to reach agreement on the proposal as a whole,

certain components thereof, or conditions that may be attached to the operationalization of the principle of free, prior and informed consent. At all times, indigenous peoples have the right to participate through their own freely chosen representatives and to identify the persons, communities or other entities that may require special measures in relation to consultation and participation. They also have the right to secure and use the services of any advisers, including legal counsel of their choice.

Indigenous peoples need to specify which entity will express consent on behalf of the affected people(s)/communities. This may vary depending on the activity in question. For example, the traditional authorities of a particular community may, under the relevant customary law, be the entity to give or withhold consent. In other cases, it may be the indigenous people(s) as a whole or a combination of entities.

The consent process should also be time bound so as to ensure that the affected people(s)/communities have enough time to understand information received, to request additional information or clarification, to seek advice, and to determine or negotiate conditions, as well as to ensure that the process does not serve as an undue impediment for the proponent seeking consent. The appropriate amount of time needed may vary depending on the number of affected persons, communities or peoples, the complexity of the proposed activity, the amount of information provided or requested, etc. Whatever the amount of time needed, a pre-determined and clearly understood deadline is critical.

Prior informed consent must be based on specific activities for which consent has been granted. While prior informed consent may initially be granted for one set of activities, any intended change of activities will require a new appeal for prior informed consent.

Finally, the successful operationalization of the principle of free, prior and informed consent is dependent on clear recognition and protection of indigenous peoples' rights, particularly to lands, territories and resources traditionally owned or otherwise occupied and used. Without full recognition of indigenous peoples' territorial rights, the principle will not provide the protection it is designed to provide.

Preliminary working paper on the principle of free, prior and informed consent of indigenous peoples in relation to development affecting their lands and natural resources. Submitted to the UNHCHR Working Group on Indigenous Populations, Antoanella-Iulia Motoc and Tebtebba Foundation, 8 July 2004. E/CN.4/Sub.2/AC.4/2004/4

Oxfam Australia/Community Aid Abroad

- Mining companies must respect the right of all community members, and especially indigenous communities, that may be impacted by a project to free, fair and prior informed consent to exploration and mining projects
- Sufficient, accurate, and detailed information about a proposed project must be provided to all members of affected communities in an appropriate manner and language, in order that they are able to give informed consent or dissent to any mining activity or exploration. This should include the

submission of a proposal detailing: information about the company and its business activities; a description of the land that will be affected by the proposal; an outline of the proposed exploration or mining activity; how long the mine will be in operation; any alternatives considered; mitigation, remediation and avoidance measures and strategies that will be utilised; how sacred sites, the environment and other such related factors are to be affected and protected; what social services are to be provided; expected social, economic, health, cultural and gender impacts; how negative social impacts on female and male community members and disadvantaged or vulnerable groups can be avoided or addressed; and strategies for mine closure.

- Communities must be able to seek information from sources other than the mining company regarding the potential impacts of the proposed exploration and mine on their lives. Where possible, this should include facilitating both female and male community representatives to visit operations of a similar nature and scale elsewhere, to freely discuss the impacts with local people.
- Communities should have access to independent technical and legal advisors that can assist them in the interpretation of all information.
- Communities must have a right to reject an exploration or mining proposal after a reasonable period of negotiation. The regime established under Part IV of the Aboriginal Land Rights) Act 1976 (Northern Territory) provides an example of how negotiation can be timed.
- Communities should have access to full information as to the identities and policies of the financiers and shareholders of the proposed project. This information should be updated throughout the life of the project as required.
- Communities should have access to full information from companies as to how the revenue generated by a project is to be paid and to whom. Mining companies should provide annual reports to community members detailing all revenue and other payments made in respect of the project.
- Companies should publicly disclose all revenue and other payments made in respect of a project in order to ensure transparency and accountability in the use of extractives revenues and combat corruption and misappropriation of funds.
- Companies must carry out open and transparent consultations with both men and women in affected communities from the outset of any proposed activity (e.g. exploration or mining) and use decision-making processes that are participatory, representative, and fair. All community members have a right to participate in negotiations and decision making concerning project proposals and on-going operations.
- Negotiations with communities regarding exploration or mining should take a cautious approach to representation and internal decision making processes. The following factors should be considered:

The proponent should not under any circumstances attempt to impose on communities any arbitrary time lines and project-driven decision making processes.

Different types of decision-making processes may be needed for different types of communities, depending on their customary governance structures and the degree of diversity in the communities affected. However, companies should ensure that such community decision-making processes respect the human rights of all community members – and do not further marginalise men, women, youth, the elderly and groups that may traditionally be denied social power due to ethnicity, religion, class or caste. In cases where women or other groups are being excluded from these decision making processes, advice should be sought through consultation with local women or these groups, about what would be appropriate ways of ensuring that their views are also heard and their rights protected. Gender equality in decision making should always be sought.

Decision making processes should recognise that companies have more power than communities in terms of access to technical, legal and financial information. Companies should endeavour to lessen these inequalities by ensuring communities have access to independent technical and legal advisers that are selected and appointed by the communities in conjunction with civil society support organisations.

Decision making processes should include all communities who could be affected by any proposed operation; not just those with recognised landownership. For example, down-stream communities who may be affected by a mine operation should also be involved in decision making processes.

Negotiations should be over permission for a company to explore or mine on land, rather than over transfer of landownership to the company.

- Where agreements are reached with mining companies, community representatives should have the right to enter into disjunctive agreements, that is, agreements that clearly distinguish between consent to explore as distinct from consent to commence mining operations. Such agreements should include: all terms and conditions agreed to in relation to the exploration or mining operation; payments for the use of land; compensation for the loss of amenity; restrictions on where and how the company can operate; services and amenities to be provided; access to jobs, training, contract work and so forth. Companies must recognise that men and women may have very different needs and interests in this process and that both should be fully considered and represented in any agreements.
- Communities that lack the required knowledge about contractual agreements and their rights should be provided with ongoing independent training and technical advice in order to ensure that they are fully aware of their rights and of the contractual arrangements they are entering into.
- A joint monitoring committee consisting of government, affected community men and women, independent experts and organisations, and civil society, that are not appointed by the company, should be established to monitor the implementation of the company's operation and its compliance with the terms and conditions of all agreements throughout the life of the project. Company representatives will play a vital role servicing the monitoring committee information and implementing its recommendations, but where

possible, they should not be represented on the committee, as it is their actions that are being verified and monitored. Where this is impossible, company representatives should be a minority on the committee. The monitoring committee should be required to report to the community in an appropriate manner and language and publicly release all findings and reports. The inclusion of government officials on the committee should not be a substitute for them fulfilling their role as regulators.

‘Benchmarks for the mining industry.’

www.oxfam.org.au/campaigns/mining/ombudsman/2002/appendix/one/heard.html

Indigenous Peoples Rights Act 1997, Philippines

Free and Prior Informed Consent – as used in this Act shall mean the consensus of all members of the ICCs/IPs to; be determined in accordance with their respective customary laws and practices, free from any external manipulation, interference and coercion, and obtained after fully disclosing the intent and scope of the activity, in a language and process understandable to the community.

About the author

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Front cover photos courtesy of Newmont Mining, Anglo American and WMC. Clockwise from top left: public consultation at the Yanacocha mine, Peru; local craft market supported by Anglo American's Fundación Nuestra Señora del Pilar, Colombia; Yanacocha representatives participating at an IFC-sponsored dialogue table, Peru; aqueduct at indigenous community sponsored by Anglo American's Fundación Nuestra Señora del Pilar, Colombia; process technician operating a digital control system and monitoring a WMC operation, Australia; and, schoolchildren from local community near WMC's Phosphate Hill, Australia.

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