

Finding Common Ground

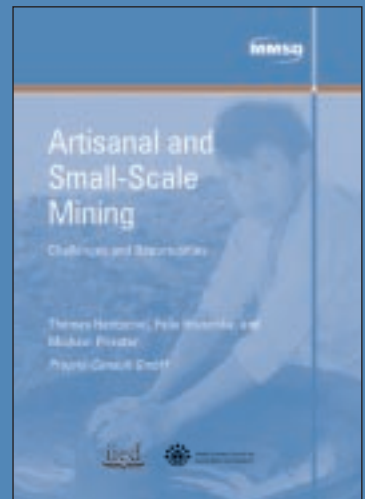
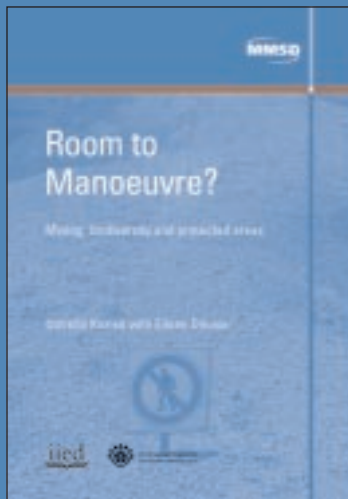
Indigenous Peoples and their Association
with the Mining Sector

A Report based on the work of the Mining
Minerals and Sustainable Development Project
at the International Institute for Environment
and Development



Breaking New Ground is the final report of the Mining, Minerals, and Sustainable Development Project (MMSD), an independent two-year process of consultation and research that aimed to understand how to maximise the contribution of the mining and minerals sector to sustainable development at the global, regional, national, and local levels. *Breaking New Ground* contains proposals for global change in the mining and minerals sector.

Order No. 9084IIED
ISBN 1 85383 907 8 (Earthscan)
US\$35.00



Breaking New Ground and the other outputs of the MMSD project can be viewed at www.iied.org/mmsd.



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London, 2003

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ISBN 1 84369 469 7

Printed by Russell Press Ltd, Nottingham, UK

Designed by Piers Aitman, www.piersaitman.co.uk

Picture credits: IIED/Earthscan

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Acknowledgements

IIED would like to thank all the authors of this report for their assistance with its production. Several of them have gone well beyond the effort expected in such a process. We gratefully acknowledge the work of MMSD's regional partners and all those individuals whose engagement with the project – through workshops, comments, or suggestions – helped to make its work on mining and indigenous peoples a successful endeavour. Within the MMSD team, special thanks are due to Project Director Luke Danielson, to Frank McShane, MMSD stakeholder engagement coordinator, and to Andrea Steel who worked to build the project's analysis and engagement on mining and indigenous peoples.

Preface

This report originated in the work of the Mining, Minerals and Sustainable Development Project (MMSD). MMSD was a two-year participatory research initiative designed to evaluate the role of the minerals, mining, and metals sector in the transition to sustainable development.

MMSD was based at the International Institute for Environment and Development (IIED) in London. IIED is a non-governmental sustainable development organization with more than 30 years experience of promoting environmental and social change. The MMSD project was funded by over 40 industry and non-industry sponsors through the World Business Council for Sustainable Development (WBCSD). Further information on the project is available at www.iied.org/mmsd and in MMSD's final report, *Breaking New Ground* (Earthscan, 2002).

The objective of MMSD was to bring together, on a global scale, the key stakeholders associated with the mining sector in different regions in order to contribute to a discourse about the key challenges that face the sector today. Contributions came from industry corporations, labour unions, governments, communities, and civil society.

These discussions and the other work of the project are reflected in *Breaking New Ground*, the reports of four regional partner organizations around the world, national reports, the commissioned work of experts in their field, the reports of numerous workshops held throughout the two years of the project, and countless comments and contributions received from various other sources.

This report contains an overview of MMSD's analysis and engagement on the relationship between indigenous peoples and the mining and minerals sector, together with edited versions of three research reports commissioned to address different aspects of that relationship. Critically important contributions to the project's work in this area came from two workshops on indigenous peoples, mining, minerals and sustainable development held in Ecuador and Australia. In addition, the MMSD

Latin American regional process organized a further series of workshops in Bolivia, Chile, Peru and Ecuador as part of overall process of stakeholder engagement. All of these workshops attracted wide-ranging participation of indigenous peoples. Readers of this report are strongly encouraged to visit the project website where full reports of these workshops can be downloaded as pdf files (www.iied.org/mmsd/activities/indigenous_people.html). The recommendations of these workshops are among the most important outcomes of MMSD's work in this area. They anticipate continued forward dialogue. With the conclusion of the MMSD project, it is vital that others step forward to do just that.

Foreword

Luke Danielson, MMSD Project Director

The historical experience of indigenous peoples with the mining and minerals industries is not generally a happy one. Far from serving as a motor for development of indigenous communities, the drive to find and produce minerals was a principal motive for invasion of indigenous territories. Other enormous impacts of European colonial expansion included the spread of diseases to which local people had little immunity, the enslavement of indigenous populations, the destruction of cultures, and the unravelling of the complex relationships with the natural environment that provide physical and spiritual sustenance for many peoples.

The post-colonial era has not seen a marked improvement in the status of indigenous peoples or their relationships to the minerals industry in many parts of the world. The era of globalization and the ‘opening’ of economies under liberal mining and investment codes has led to exploration and investment by multinationals in areas that previously had little or no mining interest. Strengthened property rights of mining concessionaires, moves towards ‘automatic’ permit approval, and streamlined decision-making have all attracted mineral investment. But where there has not been parallel attention to the legal status and rights of indigenous communities, the result has been to increase rather than decrease conflict. Success stories of sustainable development of indigenous communities based on mineral investment may exist, but they are the exception rather than the rule.

Governing majorities in many former colonies have seen mineral resources as a national asset to be used for the benefit of the nation as a whole, and particularly for the strengthening of the central state. In practice this has often meant denial of the very existence of indigenous groups and of their distinct cultures and relationships to the natural environment. Even where policies have fallen short of these extremes, they have too often featured highly centralized decision-making by central governments, lack of any meaningful participation by affected indigenous

groups in decisions relating to mineral development on their territories, and the failure of local indigenous communities to receive any share of the taxes, royalties, or other benefits that may flow from exploitation of mineral resources. These problems may in some cases have been exacerbated by the 1990s wave of ‘reform’ of mineral codes.

The diversity of indigenous communities, national regimes, and other factors make it very hard to reach overall policy prescriptions that apply effectively to everyone and everywhere. Certainly, the results of the Mining, Minerals and Sustainable Development (MMSD) Project fall far short of any set of universal prescriptions. At best, they are a beginning of a very necessary dialogue.

Perhaps these observations, based on the MMSD experience, can indicate a way forward.

- There are many thousands of indigenous cultures and communities worldwide. They have different levels of interaction with other cultures, different levels of development, and different objectives. They also have different experiences with mining and mineral development. While many indigenous communities see mining as a threat to be resisted, in some indigenous communities mining is the principal livelihood, and in others people see mineral development as the path to a better future. *There is no single indigenous experience with mining and minerals; the experience is quite diverse.*
- In part because the indigenous role in mineral development has been so poorly recognized by national governments, advocates for the rights of indigenous communities have sought recognition at the international level, through treaties such as International Labour Organization Convention 169 or through guidelines promulgated by institutions such as the World Bank. National governments have often resisted international pressure to conform as an imposition on national sovereignty. *A significant issue is building effective understanding at the national level of the legitimate rights, distinct cultures, and need for self-determination of indigenous communities within a framework acceptable to national governments.*
- At the international level, some stakeholders are better organized than others to advocate for their interests. While indigenous organizations have made considerable progress in recent years, there is still a great multiplicity of such organizations, only some of which are focused heavily on mining and minerals development. There are many indigenous spokespersons, some of whom have been selected through open processes that legitimate them as

representatives of a broad spectrum of indigenous opinion, some of whom speak for individual communities, and some of whom speak only for themselves. There is an even greater variety of non-indigenous organizations that claim, with varying degrees of legitimacy, to speak on behalf of indigenous interests. *More effective advocacy for indigenous interests with governments and non-indigenous organizations generally will require considerable work internally among indigenous organizations to produce a more identifiable leadership with a clearer mandate.*

- Mining and mineral development pose immense risks to indigenous communities and the natural ecosystems with which they are closely related. These include but are hardly limited to risks to culture, loss of territory, exposure to introduced diseases, loss of traditional livelihoods, and loss of control to outsiders. Where there are few or no benefits to the indigenous community, because these all flow to national government authorities or for some other reason, it is hardly irrational for these communities to question or resist. *It would be surprising if indigenous or any other communities would welcome a form of development from which they stood to lose much and from which they will gain little.*
- Two key issues are closely related: control over development on indigenous lands and benefits from development. Indigenous communities want to be able to say whether, how, at what pace, with what kind of safeguards, and what kind of management development will occur. If development does occur, they want to share in the benefits in ways that are meaningful to them. Where indigenous communities have neither any control nor any share of the benefits, they are unlikely to welcome development. *'Consultation' of indigenous communities is probably insufficient in most circumstances; a community that has no ability to say 'no' cannot really say 'yes'.*
- The debate over the principle of 'prior informed consent freely given' may be somewhat off track until and unless it can be clearly defined in practice. Which communities are entitled to this right, what kind of groundwork needs to be done to make consent 'informed', when and how we know that consent has been given, whether majority approval is sufficient, whether consent can be withdrawn once given, and a host of other serious and practical issues need to be discussed openly and resolved if the principle of 'prior informed consent' is to gain wider acceptance. *Endorsing 'prior informed consent' while being unwilling to talk about what it means in practice is not progress.*
- In most cases, it is unrealistic to expect that national government will be

willing to abandon any and all control and any and all benefits from development simply because it occurs on indigenous land. Application of national environmental laws, national legislation on protected areas, national tax laws, and other provisions will often have some role in development even where indigenous communities are given broad rights over development on their lands. *Both indigenous peoples and national government have a role to play, and attempting to deny either a role will probably generate conflict.*

- Where there is an underlying unresolved conflict between national government and indigenous communities, companies wanting to explore or mine on territory claimed, occupied, or used by indigenous groups will be entering into a very difficult process. They must clearly recognize that simply complying with national law will not produce an accepted and stable result, but may instead be a recipe for conflict. *While national law must be respected, companies must often be willing to go beyond its requirements if they are to build successful relationships with indigenous communities.*
- Companies tend to be in a hurry and to operate on the principle that ‘time is money’. Indigenous communities generally work on a very different time scale. Trying to press most indigenous communities for quick answers in the interest of loan deadlines, project schedules, and the like generally produces poor results. It is likely to undermine the legitimacy of the negotiation with the community, create resentment, and be the source of conflict in the longer term. *Building successful relationships with indigenous communities requires a willingness to commit the time to work at the pace of the community.*
- Successful examples of interaction between mining companies and indigenous communities are characterized by mutual respect, by working at the pace of the community, and by accepting the idea that the community has a substantial degree of control over the outcome. It is not surprising that most of these examples come from countries that are increasing both the formal legal recognition that they give to indigenous territories and indigenous control over mineral development. *Indigenous peoples are more likely to accept mineral development as part of their future if they have secure legal ownership of mineral resources and recognized rights to ensure that the development occurs in a manner acceptable to them.*

Successful dialogue is extraordinarily difficult to build on these issues, for a variety of reasons. These begin with the context and manner of the dialogue: the language in which it occurs, where it takes place, its pace, and a host of other issues. It includes the issue of who participates – companies have traditionally

wanted to ordain someone as a ‘chief’ or leader with whom they could negotiate and have in the process done great violence to the real traditions and power relationships of indigenous communities. But companies are hardly alone in this: some governments have followed the same path, as occasionally have environmental organizations resisting mineral development and some self-proclaimed ‘world indigenous leaders’ arising from within indigenous communities themselves.

Successful dialogue also requires the absence of threats: if the message is ‘agree to what we want through dialogue or we will go ahead anyway’, the dialogue is not likely to get anywhere positive. Companies that are willing, where appropriate, to commit that they will not develop specific projects that affect indigenous or aboriginal peoples without their consent, and that make it clear they will honour that commitment, make a tremendous contribution to authentic dialogue.

No one is exempt from the forces of change. For good or for ill, the world in this era of global communication and global markets has embarked on a rapid process of change perhaps unprecedented in our collective experience. Indigenous and aboriginal peoples face the same breathtaking challenges everyone else does, but they face other issues as well, including the challenge of cultural survival. In this arena, as perhaps in no other, the gap between past performance and what is necessary for sustainable development challenges all involved.

Contributors

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1

MMSD Dialogue on Indigenous Peoples and the Mining Sector

Luke Danielson and Frank McShane

The mining and minerals sector, while vital to society, has been extensively criticized for its past practices in labour relations, environmental protection, community relations and corruption, among others. The final report of the Mining, Minerals and Sustainable Development (MMSD) Project, *Breaking New Ground*, highlights the challenges facing the sector during the move towards a sustainable world economy. (Sector here means all those actors associated with mining, minerals, and metals development, processing, and end use; it includes industry but also labour, government entities concerned with one or another aspect of industry, communities economically dependent on the minerals cycle, and civil society organizations – essentially all those affected by or focused on minerals activities.) Where possible, *Breaking New Ground* attempts to differentiate between the ‘best bet’ opportunities that could be adopted in the short term and the longer term, and the more difficult challenges that must be resolved through extensive negotiation with the wider society.

In few areas has the criticism been more pointed and justifiable than in the industry’s relations with indigenous or aboriginal communities. In many cases indigenous cultures and communities have been marginalized, exploited, and excluded from decision-making about natural resource extraction that affects their lands, livelihoods, and cultures. In the worst of these cases, indigenous communities have been uprooted, impoverished, or subjected to violent repression. The history of adversity between mining and indigenous societies is a long one. Thus the dialogue on the association of indigenous peoples with the mining sector was a key component of MMSD. The various elements of that work are brought together in this report.

1.1 Sustainable Development and Cultural Diversity

Human diversity may be as important for our survival as the continued existence of coherent ecosystems and the natural environment to which we are so intimately tied. As we struggle jointly to address the predicament of the modern world – unjust disparity, overconsumption, polluting technologies and practices, destruction of the natural resource base, and so on – modern science and technology may provide some, but only some, of the answers. As many questions must be asked of ourselves, about our mode of living and our ability to explore change, as must be asked of science. Often the most productive answers about our societies come by reference to others and their histories, cultures, and ways of living. Viewed in this way, the maintenance of cultural diversity is as much self-interested common sense as it is moral responsibility.

In discussion of the diverse cultures and societies of the world, one group that is itself internally diverse has particular prominence – indigenous peoples. At a conservative estimate, and depending on how people define themselves (see Chapter 2), according to the United Nations there are about 300 million indigenous people spread across every part of the globe. Estimates of this vary greatly, however; the International Work Group for Indigenous Affairs, for example, places the number at about 210 million (IGWIA 1999). The key features that distinguish indigenous peoples from other elements of society have been summarized as follows:

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 the 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.

José Martínez Cobo (cited in IWGIA no date)

Despite the diversity of indigenous societies, there are often remarkable similarities, not least of all in their histories of contact with other, often dominant and colonizing cultures. Most often, indigenous peoples have lived far from the urban centres of these societies, yet have been exploited and marginalized by them.

The tendency of industrializing society to expand, moving ever outwards from industrial and commercial centres in the search for new resources of minerals,

timber, agriculture, and land for settlement, has invariably brought contact with indigenous peoples. In some cases, these dominant societies have sought to assimilate indigenous peoples and acculturate them to their ways; in others they sought simply to push them aside. Indigenous peoples have resisted, often for centuries, these attempts to weaken or eradicate their cultures.

Unsurprisingly, this history has built a relationship of mistrust and suspicion of others that continues today. In many places marginalization of indigenous peoples continues – claims to ancestral lands go unrecognized, and indigenous peoples often have unequal access to the resources that the state provides, including education and health care. In other cases they may be denied even the most basic rights to practice their cultures and traditions.

In the past, mining has been associated with injustices to indigenous peoples. Even where mining has not been the primary cause of a grievance, attempts to exploit deposits that lie within indigenous territories and with the sanction of a hostile state are regarded at best as unwelcome. In other cases mining has been a primary cause of antagonism with indigenous cultures, with mines established against the wishes of local indigenous societies and in complete disregard of them. Given the history of colonization and the association of mining with past environmental and social disruption, it is not surprising that any proposal to build a mine in areas populated by indigenous peoples is today often greeted with suspicion, fear, and resistance.

Yet indigenous peoples are not generally antagonistic to the idea of development. Maintaining culture and tradition does not exclude the achievement of good health care, high standards of education, decent housing, meaningful employment, and the growth of local businesses that are the markers of economic development. When these fundamentals are established in a form that is culturally appropriate and according to the wishes of the indigenous societies involved, they can create a stronger basis for community cohesiveness and may perhaps improve cultural continuity. Mining can help indigenous peoples achieve these things, which is why many indigenous communities accept that mining may have a role to play in their futures.

The international community, governments, and companies have long recognized the need for improved practices around mining on indigenous territories. Several imperatives come to mind that could help demonstrate that the dialogue of change is more than posturing.

The first is developers' observance of the basic and fundamental rights that are outlined in international agreements such as the UN Declaration on Human Rights.

The second is the recognition of the special circumstances of indigenous communities expressed, for example, in the UN Draft Declaration on the Rights of Indigenous Peoples. This includes respect for the principle of prior informed consent freely given and arrived at democratically at the local level. The third imperative is the acceptance that indigenous people need to be involved from the initial stages of any plan to mine on indigenous territory and to have the ability to influence such plans. The fourth is the need to foster the participation of indigenous peoples in the resolution of environmental, social, legal, and economic issues related to mining projects. The fifth is the need to provide the impetus and resources to create indigenously controlled development projects that have the potential to last beyond the life of any mine as well as to give indigenous communities autonomy over their own affairs. If indigenous people receive no development benefits from mining, it is hard to imagine why they would greet mining with any enthusiasm.

The larger mining companies have now travelled a long way in integrating the principles of corporate social responsibility into their codes of corporate practice at mine sites. Such programs call for consultation with and accountability to local communities (Bagasao 1998). Companies also undertake to provide opportunities for partnerships with the local community for the provision of services and business opportunities, as well as the more prosaic undertakings to provide employment, infrastructure, and services to those near a mine. The result has been, for example, the increased involvement of mining companies in community affairs, funding of business development cooperatives, the provision of infrastructure and services to the community, and the setting up of trust funds and encouragement for communities to organize themselves to participate in the resolution of mining issues.

However, the changes arising from revisions of corporate and government policies towards indigenous communities have not satisfied some of them that they will fare any better from mining than indigenous peoples have done in the past. Positive pronouncements at corporate headquarters may not translate into meaningful action at the project level. In some cases, corporate practice at the site of a project has not reflected understandings agreed through dialogue, leaving communities frustrated and disappointed. In other cases the frustration has been with governmental processes that circumvent meaningful engagement with indigenous communities.

Nevertheless, in general the mining sector has recently demonstrated a greater openness to changing the pattern of interactions between miners and indigenous communities. MMSD hoped to reinforce and contribute to this shift in attitude.

The concept of sustainable development provides an opportunity to refashion relationships between indigenous peoples and others in a way that derives value from mining for all concerned.

Overview of MMSD Project Work

1.2

MMSD set as its goal to engage as broad a cross-spectrum of indigenous organizations and individuals as possible, to gather their views, to reflect these in the various reports and publications of the project, and to offer some suggestions on the implications of these diverse opinions for the sector. Ultimately, the aim was to move the debate on sustainable development towards positive actions and in a direction that would be of most benefit to the most people.

The diversity and number of indigenous peoples and organizations with an interest in mining-related issues is enormous and there was no effective way for the project to consult with every indigenous constituency in a meaningful way. No one else had ever succeeded in doing so, and such a consultation for a project of this nature was not a realistic goal. Within the limits of resources and time, it was felt that a focused series of papers and workshops could deliver the best results.

It must also be noted that some indigenous organizations and activists rejected MMSD and refused to participate on a variety of grounds. Some argued that MMSD did not stem from the grassroots and therefore could not produce an unbiased and independent appraisal of the issues. Others simply did not believe that dialogue that included mining companies was in their best interest. Sometimes it was hard to know who spoke for whom: when non-indigenous spokespeople speak ‘on behalf of’ indigenous groups, it is often unclear whom they are representing.

Nevertheless, the attendance of people at two workshops was of a quality and depth of experience that allowed a very earnest and open discussion of the issues. The breadth of topics and views raised there, while neither exhaustive nor entirely representative, did add substantially to the debate and provided some very useful reference points for action.

Commissioned Work

1.2.1

Three pieces of work were commissioned to frame some of the elements of the debate. (See Chapters 2, 3, and 4.) These were intended both as thought pieces to galvanize discussion at workshops and as stand-alone reports on important subjects related to the central initiative.

The **MMSD Indigenous Peoples Initiative Baseline Study** (Chapter 2) was designed to describe broadly the key issues relating to indigenous people and mining and to identify gaps in current thinking and practice. MMSD was pleased to collaborate with Professor Theodore (Ted) Downing, who undertook the work and led a team of experts that included Dr Jerry Moles, who has more than 30 years of experience with these issues; Dr Ian Macintosh, Managing Director of *Cultural Survival Quarterly*; and Carmen Garcia-Downing, who has worked for many years with Ted as an indigenous specialist. The team went well beyond the terms of reference and produced some genuinely ground-breaking work about the encounter between indigenous peoples and others.

Dr Marcos Orellana wrote a thought-provoking review on **Indigenous Peoples, Mining, and International Law** (Chapter 3). To paraphrase Dr Orellana, his overview of the evolution of international legal theory and of the emergence of human rights standards reveals indigenous peoples on the way to recovering their international legal personality.

Janeth Warden-Fernandez's report on **Indigenous Communities and National Laws** (Chapter 4) makes comparisons between the circumstance of indigenous peoples with respect to minerals development under different national and legal jurisdictions. She concludes that, in the absence of binding law, relationships can only improve where good-faith negotiations are held with indigenous peoples who are recognized as empowered to negotiate resource use on their territory, and therefore by implication to receive some share of the benefits derived from that activity.

1.2.2 Workshops and Workshop Reports

Two complementary workshops were held. Attendees and participants were not invited as representatives of any particular group (unless specifically mandated to do so) but instead as individuals speaking from their own wide range of experiences and knowledge of these issues. All attendees came under the terms set out in MMSD's Principles of Engagement, developed at the outset of the project and reprinted in the project's final report.

Preparatory Workshop on Indigenous Peoples and Relationships with the Mining Sector, Quito, Ecuador, 27–28 September 2001

This workshop was hosted by the MMSD Project and run in cooperation with MMSD's Latin American regional partner, the International Development Research

Centre's Mining Policy Research Initiative, and with the national coordinator in Ecuador, Ambiente y Sociedad.

After speaking with advisors among indigenous peoples' groups and others who work with these issues, it was decided that the first workshop should be restricted to indigenous peoples and those working directly with them. This meant, for example, that no company representatives would be invited. The approach was intended to provide a space for indigenous participants to meet prior to the second workshop and to talk together about the key issues they would like to raise with other stakeholders. Based on suggestions from others, some themes were proposed for the workshop but the format was flexible and open to change in accordance with the preferences of attendees.

The workshop objectives were:

- to analyse and discuss the issues related to sustainable development and the mining sector from an indigenous perspective – more specifically, to identify and set priorities on critical issues at the global level from both a national and a regional standpoint;
- to identify the achievements and progress already made in strengthening indigenous peoples' relationship with the mining sector; and
- to identify mechanisms for dialogue that would document the specific concerns of indigenous peoples and the mining sector for presentation in forums with key stakeholders, including governments, non-governmental organizations, and the mining industry.

Workshop on Indigenous Peoples and Mining, Minerals, and Sustainable Development Perth, Australia, 4–6 February 2002

This meeting was hosted by the MMSD Project and AMEEF (MMSD's Australian partner). Key areas of discussion focused on indigenous peoples' rights in relation to minerals exploration and mining on indigenous lands; on the need to develop industry and communities' capacity for engagement; and on the development of lasting positive relations between mining companies and indigenous communities. More than 68 experts attended the meeting, from mining companies, governments, non-governmental organizations, indigenous peoples organizations, and the academic world. Attendees came from Australia, Canada, Chile, Ecuador, Indonesia, Kyrgyzstan, Panama, Papua New Guinea, Peru, the Philippines, Switzerland, and Zambia.

The keynote speech was presented by Dr Mick Dodson, Australia's first Aboriginal and Torres Strait Islander Social Justice Commissioner and a prominent

advocate on land rights and other issues affecting Aboriginal and Torres Strait Islander peoples. Dr Dodson was a member of the MMSD Assurance Group.

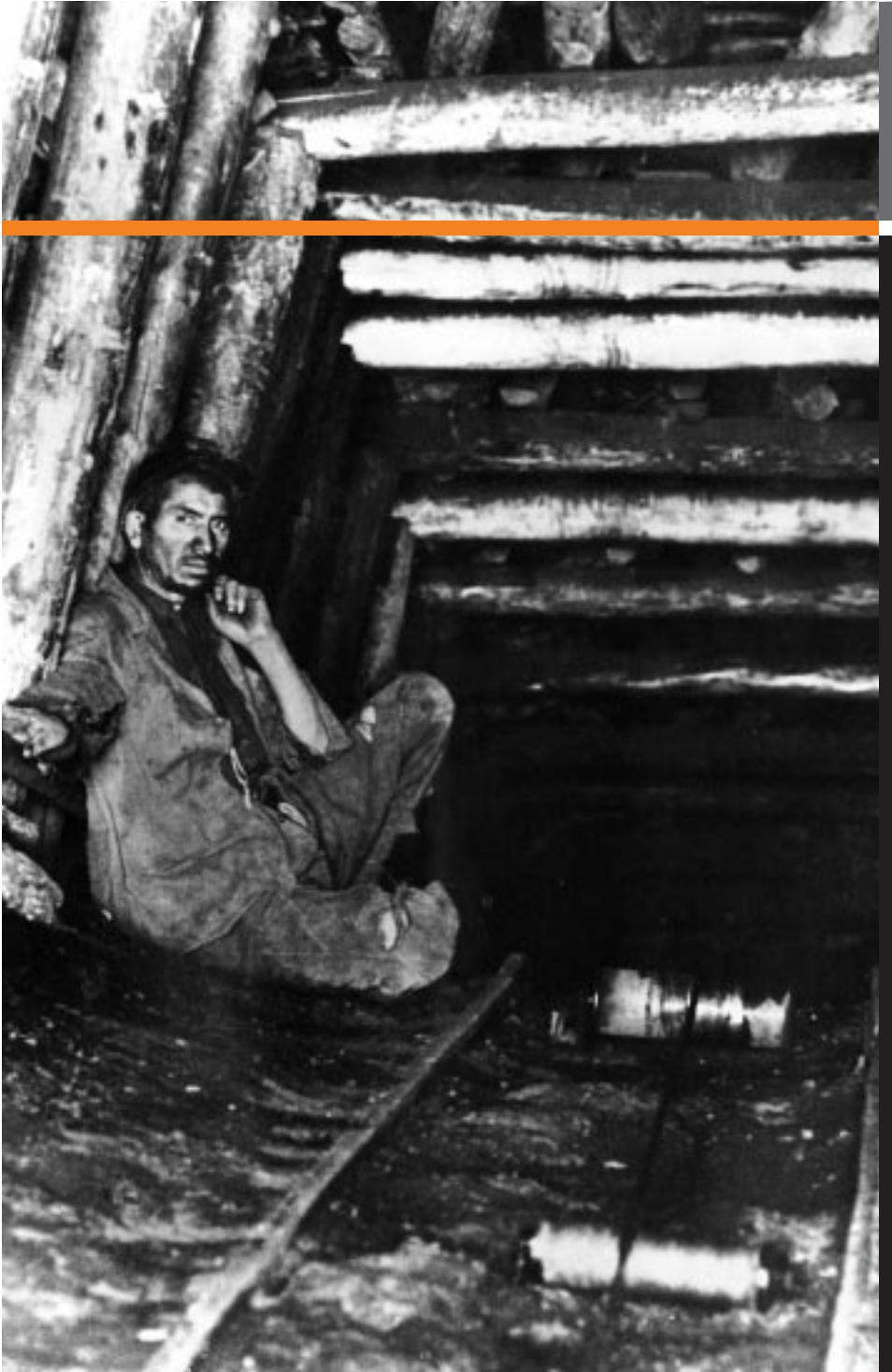
The workshop was organized around panels, plenaries, and small group discussions. A session reserved for indigenous participants took place on 6 February. The central themes of the workshop were:

- *Building Rights*: The assertion here is that it is not possible to talk about sustainable development and its capacity to transform the relationship between indigenous peoples and the mining sector without reference to human rights.
- *Building Capacities*: The capacity needs of companies, governments, and communities need to be explored in order to facilitate more equitable stakeholder engagement.
- *Building Relationships*: While the mining industry is aware of the legal requirements relating to human rights, it is now looking for ways to move beyond current legal frameworks. The need to identify best practices in relation to agreements between mining companies and indigenous peoples is therefore a fruitful area for discussion.

The workshop reports for both Quito and Perth are available at www.iied.org/mmsd/activities/indigenous_people.html.

1.2.3 Regional Initiatives and Reports

MMSD's regional partners also embarked on their own regionally specific coverage of indigenous issues. Work was commissioned both to contribute to the regional reports and to serve as stand-alone reports on local circumstances and actions. Minutes of the workshops that took place with indigenous peoples as part of MMSD South America's participation process are available in Spanish at www.iied.org/mmsd/activities/indigenous_people.html.



2 Mining and Indigenous Peoples: Stakeholder Strategies and Tactics

Theodore E. Downing, Carmen Garcia-Downing, Jerry Moles and Ian McIntosh

An unknown but significant percentage of the world's remaining unexploited ores attractive for modern commercial exploitation lie under indigenous lands. For the mining industry, the key issue is how to gain access and develop these deposits. In sharp contrast, for indigenous peoples encounters with mining raises three broader sustainability issues. What rights do indigenous peoples have when mining companies desire the minerals beneath the land they occupy and use? What obligations do mine owners or investors have to the indigenous peoples living on or near land that is to be explored or mined? What strategic issues should be 'on the table' so that indigenous peoples and mining or mineral companies can determine whether or not they can work out a mutually satisfactory deal?

The Encounter

2.1

The outcomes of encounters between mining and indigenous peoples are uncertain. Mining may empower indigenous peoples by providing opportunities to realize their goals, by alleviating poverty and providing community and individual amenities, by creating training and employment opportunities, and by providing a share of project benefits. More commonly, mining may threaten their sovereignty and pose multiple impoverishment risks. If all or any part of the group is involuntarily resettled, the risk of multidimensional impoverishment increases greatly (Mathur 2001, Govt. of India 1993, Sonnengberg and Munster 2001, Downing 2002).

Neither outcome is inevitable. Whether indigenous peoples are impoverished or empowered depends on what happens during a sequence of interactions that can be

called ‘the encounter’. This includes many parties or stakeholders, including mining companies, governments, financiers, non-governmental organizations (NGOs), and the affected indigenous groups.

An encounter has four dimensions. The first is stakeholders’ perceptions, presuppositions about one another and desired outcomes. The second involves the stakeholders’ capacities to sustain or resist negotiations. The third consists of socio-economic and environmental risks to the sustainability of the indigenous peoples. And the fourth dimension – the main focus of this chapter – involves stakeholder strategies and tactics for dealing with one another during an encounter.

2.1.1 Stakeholder expectations

Stakeholders enter an encounter with distinct views about one another’s identities and motives. These views include a) who is or is not indigenous, b) presuppositions about one another’s culture, and c) one’s own and the others’ desired outcomes.

Who are indigenous people?

From the onset, stakeholders may hold different beliefs regarding who is indigenous. This question is of considerable significance to both indigenous and non-indigenous stakeholders. Financial obligations for impacts are likely to be incurred and a key issue here is who and who is not eligible to make a claim.

Indigenous communities vary greatly. Living in areas ranging from the Arctic north to the humid and dry tropics, indigenous peoples have devised many ways to reproduce themselves within a culturally managed, ecological setting. Each community has evolved its own methods of gaining sustenance, protecting its resource base, maintaining community organizations, and dealing with external threats. Indigenous social organization, just as indigenous knowledge, is fundamental to indigenous cultural survival. So also is their identity.

The term ‘indigenous’ describes many peoples, but few describe themselves as such. Indigenous peoples usually call themselves by names in their own language that translate as the ‘people of the land’ or ‘people of a place’ or ‘people of X’, where X refers to some critical natural resource that sustains or symbolically represents them.

One seemingly objective way to unravel who is ‘indigenous’ is to turn to emerging international criteria, such as definitions set forth by the International Labour Organization (ILO) in the Indigenous and Tribal Peoples Convention 169,

the World Bank in its indigenous people's policy (OD 4.20), the World Council of Indigenous Peoples, the Rio Declaration on Environment and Development, the International Convention on the Elimination of All Forms of Racial Discrimination, Rio Agenda 21, the Organization of American States (OAS) Declaration on the Rights of Indigenous Peoples, the UN Draft Declaration on the Rights of Indigenous Peoples, or the UN Convention on Biological Diversity.

Definitions of indigenous peoples agree on three broad points: attachment to ancestral lands or territory and the natural resources contained therein, customary social and political institutions, and self-identification as a group. The last of these, self-identification, is given considerable weight.

There is no unanimity as to whether other criteria – including sharing a common language or the presence of a subsistence economy – should be a part of the definition of indigenous peoples. From an operational perspective, a language-based definition of indigenous peoples risks denying benefits to indigenous children because they do not speak their parents' language. Use of this criterion is a formula for divisiveness and conflict.

Particular care should also be exercised to avoid the misleading and obfuscating use of economic criteria for defining a cultural group. The World Bank's definition of indigenous peoples includes having a subsistence economy. No other major institution takes this approach. This criterion confuses the culture of poverty with a peoples' cultural identity, leading to the erroneous proposition that if indigenous peoples gain wealth or education, they become non-indigenous. With the emergence of modern technologically based societies, members of some indigenous groups have developed capacities to participate beyond their home communities as attorneys, legislators, businesspeople, and so on and serve as advocates for their peoples.

Stakeholders' presuppositions

In addition to these views, indigenous peoples, mining enterprises, governments, development agencies, NGOs, and others enter an encounter with notions about each other's motives, cultures, and rights. These are usually presuppositions – seldom spoken, presumed 'truths' that are based on past experience, cultural stereotypes, or descriptions from diverse sources, including non-written, verbally transmitted ones. If incorrect – and they frequently are – they may obstruct or misdirect negotiations.

The content of non-indigenous presuppositions varies from encounter to encounter, but six particularly troublesome ones resurface in project after project:

- Indigenous peoples who are in the way of mining should passively sacrifice themselves and their culture in the national interest or the greater common good.
- The financial risks facing local peoples are insignificant relative to the risks taken by industry, financiers, and developers.
- Cultural differences between indigenous peoples and the outside world will ultimately disappear, removing the need to worry about development-induced cultural changes.
- Undesired project impacts are indirect – and not the responsibility of the mining company or government. (Implicit in this presupposition is the notion that indigenous people must be responsible for dealing with negative impacts from a given project).
- The extent of an economic or social impact is directly proportionate to the linear distance from the mine or associated infrastructure.
- Infrastructure impacts affect only individuals, not social groups, communities, or cultures.

All six of these presuppositions are false (Hyndman 1994, Downing and McIntosh 1999).

The most significant presupposition held by indigenous peoples is that their inalienable rights to their lands and resources override subsequent claims by conquering or dominant societies. Indigenous people can be expected to hold firm to their perceived rights to determine their priorities: a) on their land, b) on their own terms, and c) within their own timeframe. Furthermore, they believe that they are part of the land (Rogers 2000). Land is not a distinct marketable commodity, save for internal transfers of use rights (which could be market transactions) to other members of the group – who are equally part of the land. And indigenous land – its mountains, rocks, rivers, and specific places – may hold religious and ceremonial significance comparable to the significance that the great religions place on Jerusalem or Mecca. Ethnographic surveys often reveal that land markets are socially circumscribed, with very low levels of market transfers among indigenous peoples to outsiders and with around 10–15% of the land parcels being transferred through sales as opposed to inheritance (Downing 1972).

Non-indigenous stakeholders are likely to misunderstand indigenous people's attachment to the land. They tend to approach the encounter as primarily an economic transaction in which the loss of land and resources is compensated for

with cash payments or some potential employment, with possibly short-term material benefits. In contrast, the indigenous struggle is not simply to own real estate but also to protect a culturally defined landscape. Land is not a marketable commodity. The loss of land may mean, to them, that their entire culture is threatened, including their ways of being and doing, their shared expectations, and their shared understandings of the nature of their environments and their pasts, presents, and futures. Anthropological research and decades of work on this problem by groups such as Cultural Survival lend support to indigenous concerns.

History is essential to the way in which indigenous peoples navigate an encounter. But while some people have clear knowledge of the potential of mining to empower or impoverish their communities, others have no experience. In this case, the demands of mining are interpreted as comparable to previous claims and forced takings of their resources by outsiders. Historically, such encounters have wrought havoc, and in some cases extermination, of indigenous peoples. Yet non-indigenous promoters of a mining endeavour (owners, investors, negotiators, and on-site representatives) may have little or no interest in indigenous peoples or their historical struggles.

Indigenous and non-indigenous peoples work on different time frames. The indigenous time frame may not match the multiple clocks ticking during an encounter. To the indigenous communities, exerting their will over the outcome of a mining venture is more important than the time it takes to complete a successful negotiation. To the mining company, fixed and variable costs, returns made to investors, and loan payments must all be considered. Investment demands that projects are permitted in the shortest possible time at the least possible cost. Likewise, governments are concerned about receiving their timely share of taxes, fees, and expected accommodations. And financiers expect timely repayment and return on their investments.

Desired outcomes

Mining companies, along with their investors and supporters, are clear about their desired outcome: minerals discovered and then taken out of the ground in a form acceptable to buyers or for further processing. To reach this outcome, they need unfettered use and access to the mineral resources of indigenous lands. Non-indigenous stakeholders may also seek other non-mining-related outcomes that influence their actions during the encounter. They may foresee cultural or economic futures for indigenous peoples reflecting the outsider's culture and values. Chew and Greer reported that even when mining companies and other business interests in Australia prepare impact assessment studies of social and environmental effects,

the perspectives of local Aboriginals and Torres Strait Islanders are likely to be ignored (Chew and Greer 1997, Howitt 1995). Desired outcomes will influence how options are evaluated. While these outcomes may not reflect any formal government or company policy, leaders and staff often assume moral authority over indigenous peoples, whom they may see as poorly informed, needy, or inferior peoples in need of charitable assistance.

Just like non-indigenous peoples, indigenous peoples want tomorrow to be better than today – with ‘better’ being defined by them in a culturally appropriate manner. Outcomes are linked to on-going struggles for support, services, sovereignty, or self-determination. Indigenous peoples use distinct processes for decision-making that often make it difficult to determine their desired outcomes. They reach an agreement after divergent points of views have been expressed, discussed, incorporated, or rejected. Consequently, it is not uncommon for indigenous peoples to hold divergent views as to the nature of the threats to their communities and the desirability of certain outcomes of the mining encounter. There may be no community consensus about what potential alternatives are available or possible. And it is not uncommon for these views to evolve in the light of new information or discussions. Thus indigenous peoples frequently enter into encounters without a clear and concise idea of their position or preferred outcomes on a particular endeavour, even though they hold a clear view on their preferred outcomes for their culture.

Frequently it is difficult to determine who speaks for the group, making it difficult to reach binding agreements. This proves especially challenging to non-indigenous groups in dealing with communities without a hierarchical, corporate structure with clearly defined and accepted decision-making processes. If decisions are to be reached, lengthy deliberations are often required. Costly, time-consuming conflict is almost assured if the non-indigenous stakeholder unilaterally designates a spokesperson in order to move things along.

2.1.2 Capacities to sustain or resist

A second dimension of an encounter is indigenous culture’s capacity to sustain or resist a prolonged engagement with mining interests and their allies. A stakeholder’s capacity to sustain or resist a negotiation is determined by knowledge, organization, resources, and time needed to reach a consensus or agreement on a plan of action. Non-indigenous stakeholders hold considerable advantages over indigenous ones. This includes not only access to capital but also knowledge about the potential market value of indigenous resources, legal representation, and political influence. Outsiders can read ethnographic works and interview cultural

experts. In contrast, indigenous peoples are rarely trained in the culture and economics of the other stakeholders they meet during an encounter.

How long an indigenous group can resist depends not only on the internal capacity of the group but also on the ability of mining promoters to forge strategic alliances with government and other non-indigenous stakeholders. Conversely, indigenous peoples may increase their capacity through alliances with NGOs and other sympathetic interest communities, such as religious, labour, academic, and environmental organizations.

Sustainability risks

2.1.3

An encounter's socio-economic and environmental risks may also threaten the sustainability of indigenous peoples. Some risks are associated with the physical activities of mining. Others may destroy a people's ability to accumulate, maintain, enhance, and transfer wealth to future generations.

Construction and operational risks are well known. Workmen come to indigenous communities and engage in a number of practices against which the local people have no defence – including robbery, rape, consumption of alcohol, and even murder. With the opening of roads and the movement of machinery, animals and people are frequently injured and on occasion killed. Avoiding and preventing these potential risks is a necessary first step for any company working on or near the lands of indigenous peoples. If unavoidable, then restoration and reconstruction must be immediate and mandatory.

In the case of environmental risks, the degradation of vegetation cover, soil contamination, reduced water quality and quantity, and loss of biodiversity often reduce or eliminate an indigenous community's livelihoods – its capacity to provide for itself – and limit the capacity of landscapes to maintain them. Environmental changes are often cumulative and delayed, and the consequences may not be anticipated or understood by indigenous communities or even by mining companies and governments. Indeed, where there are difficult and unknown issues, it may be in the interest of these actors not to point them out. The risks are greatly exacerbated if the group is faced with mining-induced displacement or resettlement (Downing 2002).

Indigenous wealth and impoverishment risks

Less obvious are the impacts of mining on indigenous wealth. All stages of the mining process – from the earliest days of planning and consultation, exploration, and exploitation through decommissioning – may disrupt the accumulation and intergenerational transfer of indigenous wealth.

Those unfamiliar with indigenous culture may mistakenly believe that mining poses minimal risks since indigenous peoples have little income or wealth to lose and high unemployment. Promoters argue that the local income from mining might break the unending chain of poverty. They argue that both the mining industry and governments have fulfilled their obligations once indigenous peoples are compensated for the market value of lost lands, material goods, and public facilities.

Earned incomes represent only a small portion of indigenous wealth. The wealth that supports the sustainability of their culture is found in institutions, environmental knowledge, and resources, especially land embellished with cultural meaning. It includes access to common resources, local prestige, culturally appropriate housing, food security, social support, and identity. Indigenous peoples invest vast amounts of time and resources perpetuating their culture, institutions, and social support systems. Their cultures provide members with a well-travelled map of where they came from and what is likely to happen today, tomorrow, next week, and next season (Downing 1996, Moles 2001). This cultural map is localized, reflecting generations of experience, and is not readily transferable to another landscape. Such wealth yields tangible returns.

Lest there be any doubt as to the value of indigenous wealth to sustainability, indigenous peoples have flourished for generations, often in highly marginal environments that are incapable of sustaining non-indigenous life ways without substantial injections of external capital, energy, and technology. Indigenous sustainability is based on protecting environmental and resource endowments. Indigenous peoples protect their resources and draw on the fruits of the land, much like drawing on the interest from an account without touching its principal.

The risks to sustainability have been documented over the last 50 years from impacts of infrastructure projects on indigenous peoples. They include landlessness, homelessness, loss of income (from traditional sources), loss of access to communal resources vital to their survival, cultural destabilization, food insecurity, health degradation, marginalization, corrosion of sovereignty, disruption of social organization and traditional leadership, spiritual uncertainty, restriction of civil and human rights, limitation of the capacity to participate in the broader society, and threats from environmental disasters.

More precisely, we find that indigenous wealth may simultaneously be threatened from eight directions. Mining and negotiation activities may break the

ebb and flow of social and economic life. Second, the encounter may make excessive demands on the time and capacity of the local people and their traditional leaders. It may disrupt educational activities, both traditional and formal. Fourth, it may exacerbate factionalism resulting from inadequate consultation. Quite often, it may also disrupt the leadership structure or improper legitimization of individuals as ‘authorities.’ It may undermine civil rights and traditional decision-making by ignoring prior informed consent. The encounter is also likely to drawdown on limited financial resources. Finally, the very symbolic structure that offers the ‘why we do it’ of a culture may be shaken if sacred sites are desecrated.

These spiritual ties that bind indigenous peoples to specific landscapes create a special problem, especially when the disturbed or destroyed landscape is a ceremonial or worship place or viewed as a bequest from ancestors or spiritual powers. The loss of the solace once found with traditional practice can leave indigenous people adrift and prey to the unscrupulous. When fundamental beliefs are challenged, the ability of a group to sustain itself is threatened.

It should now be easier to understand why it is not easy to compensate indigenous peoples for their loss of wealth. Remedial actions require stepping beyond monetary compensation. Reviewing the push for full compensation, the former Senior Social Policy Advisor of the World Bank recently concluded that even perfect compensation assessment and conveyance would still be insufficient for achieving the policy objective of restoration and improvement. The means of compensation are not commensurate with the goals of restoration. The very principle of ‘only compensation’ is faulty (Cernea 2000, 2001).

In contrast to only compensation for lost land, restoration of indigenous wealth is a more realistic criterion to judge benefits to indigenous communities. Restoration means full compensation to cover the market values of lost wealth, including lost social and environmental services. Restorative actions might include a long-term sequence of non-monetary steps, institution building, training, environmental restoration, and extended financial arrangements to ensure that people retain or regain their ability to accumulate wealth. The effectiveness of these efforts, judged from the perspective of indigenous sustainability, rests on whether the project leads to an accumulation of indigenous wealth – within the broader definition of wealth. And the effectiveness of all restorative and mitigating actions will be, in the end, judged by a key question: are the indigenous peoples giving more than they receive? If so, they are subsidizing the mining project – which is morally and economically outrageous.

Aware that the distribution of these economic benefits may be short lived limited, some companies have instituted programs to stimulate small indigenous-owned businesses (Cameco in Saskatchewan, Red Dog in Alaska, and WMC Resources in Australia). Such economic outreach efforts are important, but the remedy provided may not address underlying impoverishment and sustainability threats.

Development-induced displacement and resettlement

Mining-induced displacement and resettlement significantly increase the risks of impoverishing local populations, threatening their livelihoods and truncating their chances for sustainable development or even survival (Cernea 1999, 2000, 2001; Pandey 1998; Fernandes 1994; Downing 1996 and 2002; Government of India 1993). Societies that have endured for hundreds if not thousands of years can quickly unravel and disintegrate under the pressures of forced displacement.

Avoidance of this catastrophic outcome demands detailed planning and the allocation of adequate financial and human resources. Integral to any successful resettlement outcome is the use of skilled development-induced resettlement specialists (see www.displacement.net for examples of professional profiles of resettlement specialists).

Extensive development knowledge and scientific research show that rehabilitation and restoration (R&R) of livelihoods is more likely when all potential impoverishment risks are identified early and arrangements are made to mitigate or avoid them. R&R is also more likely with the informed, timely, widespread, and active participation of project-affected peoples. Involuntary resettlement is a socio-economic, not an engineering issue. The chances of risk mitigation and restoration are increased when stand-alone financing is provided for the displacement, since this removes the conflict of interest that tempts companies to view displacement as an unnecessary social service rather than a necessary cost.

Loss of sovereignty

One of the primary causes of indigenous resistance to mining is the potential loss of sovereignty. Sovereignty refers to the acknowledgement by government of the collective rights of indigenous peoples to their traditional territories and heritage. It does not necessarily infer a desire for a separate state.

Among indigenous, just as among non-indigenous peoples, sovereignty is a sacred concept, like freedom and justice. It refers not only to land and sea rights but also to political and economic self-reliance and the right to determine

the extent of cultural distinctiveness (d'Erico 1998). Threats to group sovereignty may come in many ways, especially through the loss of human and civil rights and the capacity to pass along a culture, including its wealth, to subsequent generations.

Mining frequently disrupts indigenous life ways and institutions, threatening a peoples' sovereignty. Indigenous peoples pursue their sovereign rights as coequal members of the community of nations within nations. For example, the US Supreme Court recognized early in the nineteenth century that the relationship between Indian tribes and the federal government is 'perhaps unlike that of any other two people in existence'. This special relationship is not based on race but on the inherent sovereignty of Native American people, especially their rights of self-governance and self-determination.

Land and a people's relationship to it are fundamental in 'indigenous sovereignty' struggles. A small body of international indigenous law has emerged to recognize the inherent rights of indigenous peoples to their land and heritage. International charters and organizations such as the Inter-American Commission on Human Rights, the UN Human Rights Committee, and ILO 169 recognize that indigenous lands and their resources are critical to the survival of indigenous peoples (Anaya 2000). A successful negotiation is more likely to take place when title to the land has been confirmed in state law (Ali 2001). When title is unclear, resistance or negotiation strategies are the ones most likely to secure indigenous claims. The US government has recognized the significance of this issue in law when it notes that 'Indian people will struggle – will never surrender – their desire to control their relationships both among themselves and with non-Indian governments, organizations and persons' (US Congress Pub. L. 93-638, 1975).

Another dimension remains. Peter d'Erico (1998) recognizes the spiritual, land-based origin of sovereignty:

Ultimately it is land – and a people's relationship to the land – that is at issue in 'indigenous sovereignty' struggles. To know that 'sovereignty' is a legal-theological concept allows us to understand these struggles as spiritual projects, involving questions about who 'we' are as beings among beings, peoples among peoples. Sovereignty arises from within a people as their unique expression of themselves as a people. It is not produced by court decrees or government grants, but by the actual ability of a people to sustain themselves in a particular place. This is self-determination.

2.2 Stakeholder Strategies and Tactics

The probability that indigenous peoples will persist as distinct cultures increases if impoverishment and sovereignty risks are avoided or at least mitigated. Likewise, stakeholder costs and conflicts are reduced when indigenous issues are addressed strategically early in the project preparation. By strategy, we mean that a stakeholder has procedures for planning and guiding operations towards desired outcomes (goals) *before* an encounter. In contrast, tactics are manoeuvres used to gain advantage or success *during* an encounter. This section offers a typology of strategies used by governments, companies, international financial intermediaries, NGOs, and indigenous peoples as stakeholders in an encounter (Figure 1).

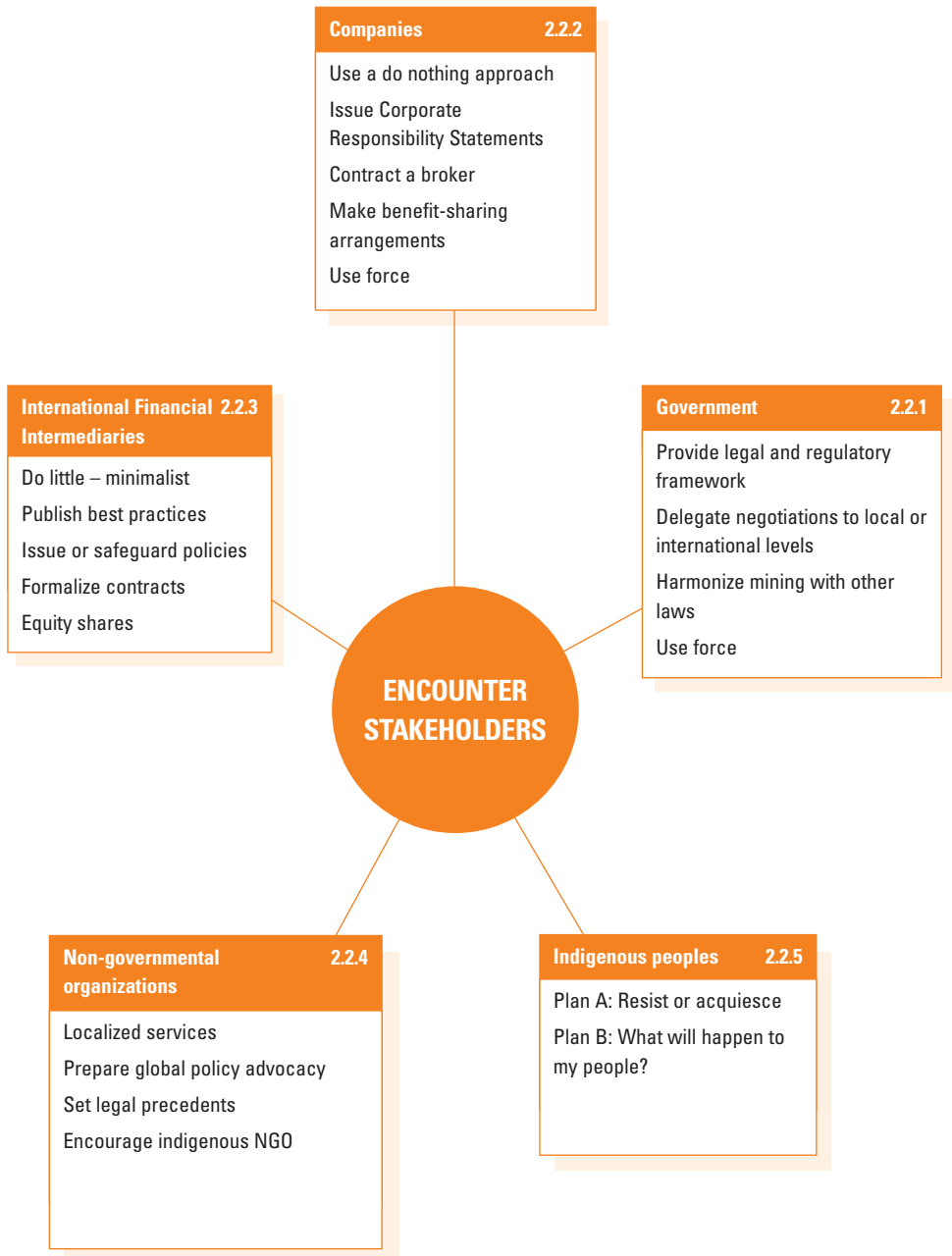
2.1.2 Government Strategies and Tactics

National legal frameworks define the rights and obligations of stakeholders during an encounter. The relevant legal frameworks pertain to eminent domain, the rights of indigenous peoples, mining provisions, and environmental protection laws. These frameworks frequently are inconsistent and contradictory, opening the door to appeals and political arrangements.

Most governments reserve the right to transfer sub-surface or other natural resources or take land under the doctrine of eminent domain. This proves problematic for indigenous peoples – especially those with unsettled claims to land (NRTEE 2001). Indigenous claims to reparations under the doctrine of eminent domain are challenged by communal stewardship, weakly articulated land markets, poorly delineated aboriginal boundaries, lack of deeds, and non-recognition of the surface/subsurface distinction.

Exploration and exploitation may take place at the expense of some groups or individuals in the name of common good, usually with the proviso that landowners are fairly compensated. Indigenous lands may or may not be recognized as eligible for the compensation, being considered vacant or government lands. Compensation for takings is restricted to the value of the land – which may be difficult to determine given that land markets are weakly developed in indigenous communities and that access to impartial justice for those who dispute company valuations may be unavailable. The doctrine of eminent domain incorrectly assumes the elasticity of land, ignoring its spiritual and emotional value to an indigenous community.

TABLE 1 Overview of Stakeholder Strategies



Legal and regulatory frameworks

In developing countries, trade liberalization and the need to increase foreign exchanges are leading to major revisions in mining laws. Simultaneously, a growing concern for world peace and human rights has encouraged greater formalization of the legal rights of indigenous peoples (Handelsman 2001). Concern for peoples and populations identified as indigenous is now a part of a broader focus on peoples who suffer the legacy of colonization. New and revised indigenous laws have been passed, legal challenges raised (Cody 2001, Kirsch 2001), and new, albeit weak institutions formed to protect indigenous rights (Anaya 2000). The pace of the transformation varies.

More concrete laws are being passed in the Americas and in industrial countries with strong democratic traditions in which native peoples have pushed hardest for their rights (Anaya 2001). In some countries, indigenous rights are subsumed under environmental laws. ILO 169 has been ratified by Perú, Paraguay, Norway, the Netherlands, Mexico, Honduras, Guatemala, Fiji, Ecuador, Denmark, Costa Rica, Colombia, Bolivia, and Argentina and in the recent court victory for Amerindians in Nicaragua (see Section 2.2.3). In developing countries, most of these laws and the formation of related regulatory agencies took place within the past two decades.

Viewed in terms of their impact on indigenous peoples' rights during an encounter, the revisions sometimes move contradictory directions. In some cases, the legal reforms are placing the sustainability of indigenous communities under proximate threat. In the Philippine Mining Act of 1995, international mining interests are permitted to assume full control of their local subsidiaries (in contrast to a previous requirement of 60% Filipino ownership). The act assigned companies an Easement Right, allowing them to evict indigenous peoples. Mineral lands are also exempted from the issuance of ancestral land claims and ancestral domain claims (Bastida 2001, Tartlet 2001). In the wake of this change, Corpuz reports that hundreds of mining applications have been filed in the Philippines, covering around 13 million hectares of indigenous lands (Third World Network 1997). Taking the lands applied for and including existing and already approved mining operation areas, 45% of the entire 30-million-hectare land area of the Philippines is now under mining applications and operations. In the heavily indigenous Cordillera region alone, the applications cover more than half the region (1.1 million hectares).

In other situations, the redrafting of mining laws appears to have slightly strengthened the rights of those in the way by more clearly defining the obligations

of mining companies to indigenous populations. In India, new regulations are superseding The Coal Bearing Areas Act of 1957, expanding national obligations to those who are displaced or otherwise have their livelihoods threatened by India's voracious demand for its only traditional energy source.

Better scenarios are found in the Northern Territory in Australia, where some Aborigines have obtained the important legal power of prior informed consent, including the right to detailed information on proposed blocks, avoidance of sacred sites and places of significance, and the right to veto development projects on their lands. The new Aboriginal Lands Rights Act has extended Aboriginal control beyond surface rights to include all minerals in about half the Northern Territories. This is an improvement over the Native Title Act that covers the remainder of the Northern Territories only extends Aboriginal rights to six feet below the surface. Under the new act, indigenous peoples receive roughly 14% of net profits, while under the Native Title Act, the returns from mining range from 2% to 7% of net profits. Nonetheless, Aborigines do not have the right to enter into agreements with a company to 'develop' their lands. They can only expect full consultation when representative indigenous organizations, as recognized by the government, set up a meeting with mining decision-makers.

Lack of harmonization

Indigenous peoples and mining promoters may anticipate prolonged legal battles in countries where reformed mining, indigenous, environmental, and land tenure laws are not yet harmonized. Whether this is due to a desire to properly exercise fiduciary obligations to indigenous peoples, the mining industry, or the environment or simply due to traditional intra-governmental scrapping, the stage is set for prolonged conflicts. The conflicts can continue to consume local and national resources long after mining has stopped and the company is gone. In the case of Navajo uranium mining, for example, damages done in the 1940s have been drawn out for over 60 years.

Harmonization conflicts are surfacing in national Supreme Courts. In the fall of 2001, a clash between the relatively new Philippine Indigenous Peoples Rights Act and the rights of the state to subsurface mineral resources reached the Supreme Court of Justice. Proponents of resource extraction narrowly lost their claim that the new indigenous peoples' law deprives the state of ownership over lands of the public domain and minerals and other natural resources, therein violating the Regalian Doctrine embodied in Section 2, Article XII of the Philippine Constitution (Mordeno 2001).

A possible first step to avoid these prolonged appeals and conflicts appears to be taking place in Panama. As part of the process of reforming its mining law (Codigo Recursos Mineros de Panama), the Inter-American Development Bank (IDB) has contracted for local indigenous technical assistance to ensure that the rights of indigenous peoples are respected. This proactive step might lead to a harmonization of laws, overcoming the common conflicts between the indigenous and mining legal frameworks (Acosta 2002).

Delegation of negotiations to local or international levels

There is another strategy. Governments may also delegate decisions on a conflict-filled encounter to another local level or an international mediator. During 1995, the OAS was invited by the Suriname Government to broker a tripartite agreement among the government, Canadian mining companies, and the Maroon community of Nieuw Koffiekamp. The negotiations were inconclusive, a sticking point being the refusal by the government and the companies to treat the Saramaka Maroons as legitimate landowners, in line with the 1992 Peace Accord, as the OAS had suggested (Forest Peoples Programme 1996).

Use of force – state and company combined

With large revenues at stake, some governments opt to vacate indigenous claims through the use of judiciary procedures and force. In the Guyana region of Venezuela, for example, the government faced the choice of evicting miners or indigenous peoples. Indigenous peoples were reported to have violently tried to block wildcat and multinational corporate mining from taking place on their land. Laws allowing lands to be set aside for the indigenous inhabitants were not enforced (ICE no date). The unacceptable solution appears to take place in legal systems that do not recognize indigenous concepts and customary land laws. In the Philippines Cordillera, reports are that the Igorot have been evicted from their ancestral lands. Local protests by the Cordillera Resource Centre for Indigenous Peoples have been answered with military force (FIVAS 1996).

Violence directed at indigenous peoples can either originate directly with the state or consist of the state's failure to act effectively to prevent violence orchestrated by company security forces, local paramilitaries, or 'unknown parties'.

Company Strategies and Tactics

2.2.2

Strategies and tactics for dealing with indigenous peoples rank low on corporate agendas. Warhurst (1998) surveyed the social policies of 69 companies, including the top 50 mining companies rated by market capital, the *Financial Times*, and members of the International Council on Metals and the Environment. (See Table 1). The resulting profile is damning. Less than a fifth of the 38 companies that responded considered mitigate social risks associated with their activities. Only a small number of respondents (13%) considered the precautionary principle a means of minimizing risk (see precautionary principle – section 2.8) and just 5% undertook social impact assessments related to indigenous peoples or integrated such assessments into their operations. Only two companies had a specific indigenous people’s policy (Zambia Consolidated Copper Mines and Normandy Mining Ltd of Australia).

The capacity of companies to deal with social (including indigenous policy) issues is equally disappointing. Only WMC Ltd employed anthropologists or social scientists, and just 8% of companies had offices or personnel dedicated to indigenous affairs or social issues. The survey identified the fact that companies were reluctant to set up a compensation system for affected communities (only 13% did so) or to negotiate with communities over land rights issues beyond the law (also done by just 13%). With only a single data point, 1998, it is not possible to ascertain whether things are improving – although it does appear that some changes are under way. (See PricewaterhouseCoopers 2001; though this survey does show a higher level of appreciation of the importance of social and economic impacts on communities, it does not go into the same level of detail as the Warhurst study on specifically indigenous concerns). There is an urgent need to redo the Warhurst survey.

Globally, our research identified six broad patterns of organizational and financial arrangements being used by companies during encounters.

Corporate belly-flopping

The least defensible but all too common approach is to do nothing and just react to situations as they emerge during an encounter. (A fair number of companies refer to this as ‘trying to fly below the radar’). We call this the corporate belly-flop strategy, where a company dives into an encounter. Arguments such as ‘that’s life’ or that ‘people always get harmed when development takes place’, that ‘cultures were going to disappear anyway’, or that ‘the company is only responsible for direct impacts’ (with ‘direct’ being self-defined to avoid obligations) are

TABLE 1 Social Responsibility Survey of Major Mining Companies

Social action or response	Companies (number)	Share of total (%)
Willingness expressed to employ local community members	14	37
Commitment shown to employment of local communities and indigenous peoples by providing education and training	12	32
Propose to improve social performance	10	26
Willingness expressed to employ indigenous peoples	9	24
Education for community regarding culture and activities of company and possible impacts	9	24
Identification of social risks and opportunities	7	18
Education of employees regarding local community culture/values	7	18
Integrate social policy within corporate management	6	16
Contribution of skills or funding to local charities	6	16
Take a precautionary approach to operations to minimize risk	5	13
Commitment to discuss and negotiate with community over 'land rights' issues beyond demands of the law	5	13
Compensation system for affected communities	5	13
Collaboration with U.N., World Bank, ILO, and WHO efforts for sustainable development	4	11
Have a dedicated Dept./Office/Representative for social issues	3	8
Have a dedicated office/personnel for indigenous affairs	3	8
Cooperation with local NGOs	3	8
Co-operation with and contribution to government development programmes	3	8
Specific indigenous peoples policy	2	5
Employ community members as liaison officers	2	5
Undertake Social Impact Assessments (SIAs), detailing traditional economic activities, social structure, religious activities, skills, land use sacred areas, etc.	2	5
Undertake SIAs from the outset of the project	2	5
Integrate SIAs within operations	2	5
Employ environmental scientists/researchers	1	3
Employ anthropologists/social scientists	1	3
Adherence to ILO Convention 169 (Rights of Indigenous Peoples)	0	0

**38 of 69 companies reporting. Adapted from Warhurst 1998.*

unsubstantiated rationalizations used by the promoters of mining to avoid facing moral and ethical responsibilities. This reactive approach almost assures prolonged confrontations, ad hoc costly agreements, and exposure of the company ledgers to undisclosed liabilities and risks.

Minimalist

Using the minimalist strategy, a company argues that the national and local laws, particularly environmental, indigenous peoples, and mining laws, delimit their responsibilities to the local peoples. PT Freeport, for example, took the minimalist approach when responding to accusations that it was undermining the livelihood of the Amungme and Komoro people. The company claimed that it respected the Papuan indigenous peoples' close relationship to their lands, especially ancestral lands. But it argued that the land within PT-FI's Contract of Work Area was, like almost all land in Indonesia, *tanah negara* (state-owned land). Furthermore, they argued that the land that they used had been 'released' by five legal *hak ulayat* releases and that 'recognition' had been paid to the community.

Corporate responsibility statements and beyond

Over the past decade, more and more companies have released corporate responsibility statements (CRSs), detailing their environmental and community responsibilities (for a sample, see csrforum.com). CRSs are usually broad statements of principle that are published in annual reports rather than in languages of indigenous peoples living near projects. Critics feel that CRSs reflect a monologue, a company talking to itself, rather than dialogues or negotiations with indigenous peoples about specific responsibilities.

From the indigenous peoples' perspective, a broad CRS is a 'trust me' statement, but it does not foretell company actions. Demonstrated commitment increases where organizational arrangements are put in place and open channels of communication are established with the community. Some CRSs are limited to a specific project and do not reflect corporate strategies towards other indigenous peoples who are 'in the way' of mining (Jerve and Grieg 1998). By not adopting a pan-indigenous corporate policy, a company is indicating that it intends to set different standards for different encounters.

Companies may also hire agents to generate positive publicity on the value of the mine to the local indigenous peoples. Publicity alone may improve public perception, but it has nothing to do with avoiding or mitigating on-the-ground risks and can be considered exploitative (Mineral Policy Institute 1998).

At least one company is adding performance benchmarks to its CRS. BHP Billiton has established specific management standards designed to ensure that the company's presence provides lasting benefits and causes as little disruption to the rights of indigenous peoples as possible (BHP Billiton 2001). The standards include performance expectations for all operations that are reported in its annual reports. The targets include ensuring that none of the company's activities transgress the UN Declaration of Human Rights and making a modest aggregate contribution of 1% of pretax profits, including in-kind support, to community programs calculated on a three-year rolling average. This percentage is not based on any risk assessment and may be below replacement value.

Contract a broker

Mining companies, governments, and other non-indigenous stakeholders seek consultants to help them with technical and environmental issues. This practice is notably less common when dealing with indigenous issues. Warhurst's survey of 38 major mining corporations discovered that only 3 had dedicated offices or staff to social issues and that none employed professional social scientists (Warhurst 1998).

Unless a company has specific expertise in indigenous development, management is wise to avoid its inherent conflict of interest and not take on the role of brokering arrangements between themselves and indigenous peoples. For centuries, specialists known by anthropologists as 'cultural brokers' have been used or hired to bridge the cultural gaps between indigenous peoples and outsiders. Several options are open. The most inappropriate option is to contract environmental specialists to deal with indigenous issues. The training and skills of an environmental scientist does not include expertise in indigenous development.

A second option is to hire local bicultural individuals to serve as community liaison officers. Precautions must be taken. It is tempting for companies to assume that their hired people are leaders or even designated spokespersons for the indigenous community. Neither fish nor fowl, community liaisons move back and forth between two worlds – and may be trusted by neither or may even use their roles corruptly. Local community liaisons are most valuable for their educational and communication role – leading each side to understand the other – without interfering in the decision-making process. Third, companies may also turn to NGOs, assuming they have the capacity to communicate with indigenous peoples (which is discussed later). A fourth option for the 'contract a broker' strategy is to hire a consultancy firm to broker a deal with indigenous peoples. In Guyana, for example, the Canadian firm CANARC contracted with a consultancy firm, SEMCO, to broker a deal with the local Caribs whose small-scale gold mines were being threatened with closure.

Benefit-sharing arrangements

Over the past decade, benefit-sharing arrangements (BSAs) have become an increasingly popular approach for dealing with the impact of mining on indigenous peoples. BSAs might include training programs, with or without employment opportunities; support for the development of small business enterprises primarily to subcontract with the mining company; formation of benevolent or development foundations (some of which are company- controlled, with others controlled by indigenous people). BSA might also include indirect transfers to indigenous peoples, such as benefits-sharing arrangements with government agencies in which a negotiated percentage of profits flow back into the indigenous communities (Hemmati 2000).

Foundations are double-edge swords. They may prove to be instruments for colonization and control, especially when the control of funds is vested in the company. Or they may provide valuable laboratories for building the governing and development capacities of indigenous peoples (Downing 1996).

Mining companies are in the business of mining, not the development of indigenous peoples. Without a risk analysis that anticipates the social and economic impacts, establishing the level of support and needs of indigenous peoples is a major problem. If a BSA only mitigates the damages inflicted by the company on the indigenous peoples, then it is merely offering compensation for local damages – not a benefit. A more conscientious approach steps beyond the minimum and offers indigenous peoples opportunities for local training or employment (Red Dog in Alaska, for example, and Golden Bear Mine in British Columbia).

Use of force

Given all the alternative ways to approach an encounter, it is unacceptable that mining companies turn to the use of force by their employees or surrogates. Surrogates may include contractors, private security firms, government police or military forces, or less ‘deniable’ third parties such as ‘security consultants.’ In conflict-prone developing countries, government security forces are unable to provide security for the staff and installations of mining companies. The companies have felt obliged to engage private security firms for protection. From the company’s perspective, security is solely for defensive purposes, and the needs and conduct of the companies are entirely legitimate. Force is usually exercised in response to what are announced as ‘illegal actions’ by the indigenous peoples including trespass. Trespass is most difficult for indigenous peoples to understand, especially when land is not considered private property.

A sampling of the violence is sufficient to highlight the continuing use of this option (Aoul et al. 2000). In Indonesia, a Dayak in Indonesian Borneo was shot by a BRIMOB security guard (ENS 2002; www.mpi.org.au/indon/eng_kalteng.html). The Indonesian Human Rights Commission confirmed gross human rights violations against Amungme and Nduga villages and in the region of the Grasberg copper and gold mine, further to the east (www.survival.org.uk/indo1.htm). Local peoples have testified against TVI Pacific, a Canadian firm mining in the Philippines. In India, police fired on demonstrators against Utkal Alumina (www.moles.org/ProjectUnderground/drillbits/6_01/do.html). Reports of violence against local indigenous peoples at the Freeport McMoRan mine have been reported by the Australian Council for Overseas Aid and the Catholic Church of Jayapura (www.corpwatch.org/trac/feature/humanrts/cases/in-ziman.html). And these are hardly the only such incidents.

Internationally, actions are being proposed to reduce violence. The United Kingdom Mission to the United Nations noted that the conduct of firms employed for security has on occasion fallen short of internationally recognized human rights standards. In December 2000, the mission announced voluntary guidelines on overseas security provisions during mining operations (United Nations UK Mission 2000). These are designed to promote and protect human rights during mining and energy company operations.

2.2.3 Strategies and Tactics of International financial intermediaries

The World Bank and the regional multilateral development banks invest about US\$11 billion in mining, making them stakeholders in indigenous peoples/mining encounters. In addition, national risk insurance agencies, such as the US Overseas Private Investment Corporation, assume some of a company's risks when operating in developing countries. The multilateral financiers leverage is greater than their modest contributions. Approval by the financier's environmental departments may reassure hesitant syndicated investors, especially commercial banks, that the impact of a given project on indigenous peoples has been properly assessed and that mitigation plans meet the multilateral lenders' safeguard policies.

Multilateral financiers and risk insurance groups are experimenting with at least six strategies and tactics. The first and increasingly rare option is to do very little – comparable to the minimalist approach of companies. A slightly more invasive approach involves publishing non-legally binding guidelines for best practices (see www.ifc.org, www.worldbank.org, ADB 1994). In October 2001, the World Bank began a year-long review to create guidelines for investments in

oil, gas, and other extractive industries. Initiating the review, the Bank argued that mining can be compatible with the Bank's 'overall mission of poverty reduction and the promotion of sustainable development'. Other commentators disagree. Third, the World Bank Group and its private-sector arm, the International Finance Corporation, have crafted operational 'safeguard' policies regarding steps their clients must take to avoid harm to indigenous peoples and their environment. Ideally, these steps should be completed before loan approval. Fourth, the intermediaries may impose actionable contractual conditions as part of their loan agreement with a company. Fifth, the lender may gain a voice by holding a small equity position in their client's company. The last two options increase lender access to the site and allow a lender to influence management decisions in a way comparable to any other minority shareholder. Finally, the financial intermediaries may voluntarily submit themselves to internal or external compliance reviews or inspection panels to judge how well they comply with the policies they may have established. A significant question is how these institutions react when violations are alleged to have occurred at a site before the current owner applies for financial assistance.

Safeguard policies define the lender's view of the risks and responsibilities of projects to indigenous peoples (www.worldbank.org). For those concerned about indigenous rights, the policies are beginning to recognize the unique circumstances of indigenous peoples. Currently, they are too narrowly focused on compensation for damages rather than on indigenous development as defined by the people (see Section 2.2.4). The indigenous people's policy at the World Bank is undergoing revisions that may either strengthen or weaken this strategy.

From the perspective of indigenous peoples, two of these approaches pose special problems. Currently, co-financing and conditional loans are not disclosed by the lender and the borrower. Companies are concerned that the agreements they sign with a lender may reveal trade secrets. Such secrecy leaves national governments and the agencies responsible for indigenous peoples ignorant of the terms of agreement. Further, such agreements may be de facto considered violations of the human rights of indigenous peoples and an affront not only to their sovereignty but also to the government agencies holding fiduciary responsibility for their welfare.

This problem is easily handled. Both the government and indigenous peoples are primarily concerned about any part of the loan agreement that externalizes costs (or benefits) to the indigenous peoples or to the government. Externalization of costs may threaten indigenous sustainability through changes in their livelihoods, environment, or sovereignty. These clauses do not routinely involve trade or financial secrets. Borrowers or underwriters or lenders might be persuaded to

disclose those components of the agreement, but – given the mistrust and amount of money involved – ground rules and arbitration would be necessary to avoid disagreement over what constitutes an impact.

2.2.4 Non-governmental organization strategies and tactics

Indigenous peoples have found sympathetic ears among NGOs, especially where they have few or no avenues to air grievances. Scores of NGOs are focusing on the issue of mining and local communities (see www.minewatch.org, www.moles.org, www.caa.org.au).

NGOs show great diversity of objectives and organizational capacities. Some local organizations focus on particular mining projects. Others assume broader, global policy objectives. Their positions range from militant resistance to uncritical promotion of mining interests. Both globally and locally, NGOs routinely gain strength by forming alliances.

NGOs also deploy a wide range of strategies and tactics, including national and international lobbying, civil disobedience, serving as information clearinghouses, coalition building, and community outreach. Others options include referrals to other support groups and resources, meetings with the institutional financiers of mining, hosting conferences, organizing resistance campaigns, and subcontracting to assist in indigenous development or cross-cultural brokerage to interested stakeholders. Controversy and conflicts occasionally arise when NGOs speak out or raise funds on behalf of indigenous peoples without their consent.

Localized services to indigenous communities

NGOs may offer indigenous communities a wide range of services including fund-raising, on-the-ground research, legal representation, monitoring of environmental and social compliance, and capacity building (negotiating skills, for example, or organizational management and consulting on risks, such as evaluation of health threats). The types and qualities of NGO services vary. Some employ professional staff while others depend on volunteers.

Global policy advocacy

An NGO may pull together a cluster of strategies into a campaign. Campaigns are a coordinated set of actions designed to influence policy or change the course of particular encounters. Campaigns often take on global dimensions; especially since internet communication has permitted NGOs with limited resources to communicate as easily as large corporations (e.g., Mining Watch Canada,

www.miningwatch.ca; Oxfam Australia, www.caa.org.au/index.html; Project Underground, www.moles.org; and the Indigenous Environmental Network, www.ienearth.org/mining_campaign.html#project). Recently, Project Underground and the Indigenous Environmental Network formed the Indigenous Mining Campaign Project to support indigenous peoples in developing strategies ‘against the spiritual, cultural, economic, social, and environmental impacts of mining and oil extraction’.

Global NGOs are attempting to change the due diligence policies used by financiers and insurance underwriters when they invest in mining. Oxfam, the Center for International Environmental Law, and the Bank Information Center, for example, are attempting to lay down a global standard in their dialogues with the World Bank and regional development banks. This effort extends NGO activities into the areas of human rights, indigenous peoples, cultural sustainability, and mining. Of note are the UN instrumentalities and conventions to protect the Earth’s biological, linguistic, and cultural diversity. A recurring concern has been the promotion of consultation, self-determination, group rights, and protection of indigenous cultural patrimony. In the absence of industry action, Community Aid Abroad in Australia has established its own ombudsman code of conduct for mining companies working with indigenous communities (Oxfam 2001), which in 2001 provided detailed reviews of seven cases of mining companies’ overseas operations in the Asian-Pacific Region. There have also been demands for standards, benchmarks, and accountability of mining companies within their home countries for the overseas treatment of indigenous peoples.

Setting Legal Precedents

While there have been a series of failed legal actions against oil and mining companies (Freeport McMoRan, BHP, and Texaco) by NGOs, the Indian Law Resource Center scored a landmark victory by challenging another extractive industry that may set a precedent for the mining sector. On September 17, 2001, the Inter-American Court of Human Rights ruled that the government of Nicaragua violated the human rights of the Mayagna Indigenous community of Awas Tingni. The community had been attempting to protect its lands and resources from exploitation by a Korean logging company. The logging company was rumoured to also be considering mining. When the Nicaraguan legal system failed to address the community concerns, the Indian Law Resources Center (ILRC) filed a petition before the Inter-American Commission on Human Rights against the government of Nicaragua. The ILCR claimed the Nicaraguan government was violating

international law by ignoring traditional land ownership in granting the logging concession without informed participation of locally affected communities. In 2001, Nicaragua was ordered to demarcate the traditional lands of the Awas Tingni community and establish new legal mechanisms to demarcate the traditional lands of all Nicaraguan indigenous communities. James Anaya, a lead attorney involved in this case, concluded that ‘the precedent applies directly to all states in the Americas that are parties to the American Convention on Human Rights and, indirectly, to all other countries where indigenous people live’ (Elton 2001).

In a similar vein, NGOs have also filed formal complaints to regulatory agencies on behalf of the interests of indigenous communities. For example, the Mineral Policy Institute and the Australian Conservation Foundation filed an official complaint to the Australian Securities Commission against the world’s largest mining corporation, Rio Tinto, alleging that the company management misled shareholders over environmental and human rights impacts at its Freeport mine.

Indigenous NGOs

Some indigenous peoples have formed their own NGOs. Most are localized, focusing on issues specific to their ethnic groups. Others are national and regional. Only handfuls are global and pan-tribal. At the local level, these organizations may not necessarily be formally incorporated. Rather, they may be informal drawing upon part-time, unpaid volunteers working to build the capacity of their peoples. When mining occurs within their spheres of interest, these non-militant indigenous ‘NGOs’ spring into action, using their special abilities to mobilize and advocate for indigenous peoples. Increasingly, non-indigenous global NGOs have found it useful to form alliances or encourage the development of localized indigenous NGOs. International NGOs such as Cultural Survival Inc. have supported the formation of indigenous NGOs for over 30 years, as has a small department inside the World Bank. At least one government has tried to offer resources to such groups in the hope of developing indigenous development plans (Cultural Survival Quarterly winter 2000, www.bloorstreet.com/300block/aborintl.htm#3, and lanic.utexas.edu/la/region/indigenous).

2.2.3 Indigenous Peoples’ Strategies and Tactics

From the preceding review, it is evident that indigenous peoples have limited strategic and tactical options. Laws are ill-defined and often skewed against them. They lack resources to carry out a prolonged legal battle. And they face a tangled national bureaucratic maze where their voices of appeals are seldom, if ever heard.

Facing this situation, indigenous peoples may find their only options are to either resistance or acquiescence. Both options we call Plan A (Downing and Garcia-Downing 2001). Known resistance strategies and tactics include – violence, civil disobedience, appeals to NGOs, religious groups or to any other organization that will listen. Resistance strategies may attract sympathetic support from outside groups whose primary interest may not be the cultural survival of the affected peoples. To win a battle in what, for them, is a much larger war, advocates are likely to understate or overstate the mining project’s potential impacts. On the other hand, acquiescence means acceptance of any arrangement the mining companies and/or governments may bring to the table.

A people’s chances for cultural survival increase when they develop their own Plan B to deal with a proposed project. A good Plan B answers the all-important question, ‘if this particular project is approved, rejected, or modified, what will happen to my people?’

An indigenous Plan B may be developed concurrently with Plan A. A good Plan B should have at least eight components (Downing and Garcia-Downing 2001):

1. examination and explanation of the project’s economic and legal aspects to the community in a way they will understand;
2. full assessment of the project’s risks and mitigation actions, including, threats to sustainable livelihood, employment loss, disruption of productive systems, environmental and health risks and socio-cultural disarticulation;
3. budgeting and organization of actions to mitigate each risk;
4. determination, by the people, of how the project fits within their cultural vision;
5. arrangements of institutional and financial steps that assure the project’s benefits are opportunely and transparently allocated to the indigenous peoples;
6. equitable distribution of benefits and costs through a common community-defined process;
7. development of new alternative resources to provide a sustainable livelihood to replace those lost;
8. preparation of strategies for negotiating with the project promoters, financiers, government, and other key stakeholders, with negotiations focused on benefit-sharing arrangements over and above risk mitigation; and
9. formalization of negotiated arrangements with legally binding instruments.

These nine elements empower indigenous people in an encounter.

Indigenous Plan Bs have proved successful (Hermission 1999, Castaneda 1992, Moles 2001). The Tahltan of British Columbia in western Canada issued a declaration of their sovereign rights to their land, including a section to be retained for their exclusive use in perpetuity. The Tahltan not only were determined to maintain control of their land, but also took control of the mining company equipment when formal agreements were not opportunely ratified. They affirmed that all questions concerning their lands and resources would be settled by treaty with the province and federal governments (Natural Resources Canada 1990). The Tribal Council also issued a resource development policy statement, with protection of the natural environment as the first requirement for development. The Tahltan National Development Corporation (TNDC) was formed as an umbrella organization to promote large-scale business ventures serving the mining operation and taking advantage of other opportunities. The Tahltan Training Centre was established and continues to train students in new skills needed by regional employers.

Working under their Plan B, a cooperative mining company is working with the Tahltan – Golden Bear Project (Chevron Minerals Limited and North American Metals (B.C.)) – and support from the Canadian government significantly increased. At the end of the 1990 fiscal year, the TNDC employed 82 people (90% were Tahltan) and paid approximately CDN\$2.1 million in wages.

The cost of a Plan B is small compared with an industry's preparation costs for a project. The duration of the planning, however, may be longer. The capacity of tribal groups to prepare a participatory Plan B varies. Some have only a handful of tribal members with secondary school education. Other groups have the capacity to prepare a Plan B with minimal external technical assistance (Castaneda 1992). Most lack legal representation. Non-indigenous project promoters demonstrate confidence in the virtues of their proposed endeavour and good will towards the indigenous community when they are willing to underwrite the costs of Plan B.

Alternatively, organizations active in Plan A should be willing to stand behind their commitment to indigenous peoples and pay some of the costs associated with Plan B. Non-indigenous NGO stakeholders may demonstrate their support for the community by their willingness to donate time and technical assistance.

The costs of preparing Plan B should be provided without obligating indigenous peoples. To trade underwriting the costs of preparing Plan B for access to land or promised eternal resistance is a ruse, comparable to paying for a doctor with one's life.

As with any other project component, accelerating the schedule for preparation of Plan B dramatically accelerates its costs. Mining promoters' access to capital is opportunistic, often making project timelines brutally short. Consequently, people may be pushed to make decisions within a timeframe too brief for consensual agreements. Pressures to speed up the process should be folded back on the promoters.

A good Plan B is a plan for cultural survival through empowerment, not a plan for surrender. A viable Plan B may be more important than a good Plan A. A willingness to prepare a Plan B indicates confidence and a desire to move beyond unequivocal support of or resistance to a project. A well-executed Plan B will alter project financing, making clear the differences between payment for damages, risk mitigation, and benefit-sharing arrangements. It may not end factionalism, but it focuses discussions away from exhausting arguments and onto very specific topics.

Plan B builds respect by redefining the project owners' and financiers' relationships with the indigenous peoples. The act of taking control – producing and ultimately implementing their Plan B – is a significant step towards self-determination. And, most important, by laying out a project's full social and economic dimensions, a good Plan B influences whether or not Plan A ever takes place.

Trends and countertrends

2.3

A strategy for dealing with indigenous peoples ranks low on the priorities of non-indigenous stakeholders. It is not illegal in most places for mining to harm indigenous peoples. Non-indigenous stakeholders are not obliged to take any proactive steps to help indigenous peoples. And apart from harm that might come to securing financing from certain lenders or protecting company reputation and image, the business case for doing the right thing seems thin. It will come as no surprise, therefore, that few stakeholders, including indigenous peoples themselves, have well-articulated strategies to reduce the known threats that mining poses to the sustainability of indigenous peoples.

Mining companies trudge through different, but not uncharted, territories and legal frameworks. The rules of the game change from place to place – even within the same country. There are no industry-wide social standards and faint concern for risk assessment, social development, or indigenous cultures. International legal frameworks are routinely ignored. NGO and development bank policy are treated more like guidelines than legally binding agreements, reducing their effectiveness to

regulate an encounter. Tactical rather than strategic thinking dominates. As encounters mature, strategies and tactics shift, especially in cases of prolonged conflicts. These shifts seem to correspond to the revelation of undisclosed risks as the project matures (Cook 2001).

Our review also reveals that indigenous peoples are not treated as legitimate 'stakeholders' in an encounter, in the full and participatory meaning of the word. In places where indigenous peoples have gained stronger legal rights, and particularly where their ownership rights over minerals are recognized, such as in Australia, Canada, and the United States, more progress is being made.

In developing countries, it is a different story. Indigenous peoples are almost never afforded the right to timely, prior informed consent. Non-indigenous stakeholders cut deals and make arrangements for the use of indigenous peoples' lands without their participation or knowledge. Indigenous peoples become stakeholders when they have the right of prior informed consent (PIC). The issue is not simply whether or not indigenous communities have the power of veto over development, but whether they have a voice and vote in determining the use of their resources and destiny as peoples (Downing and Moles 2001). PIC is technically challenging but possible – since technical concepts must be presented to an often non-technical culture. PIC does not, in and of itself, give people the power to consider options for their destiny because many indigenous groups have no experience in evaluating such material. If planning is done, it is externalized and done for, not by, the peoples (Whiteman and Mamem 2001). Such a situation limits communities to being informed, empowered, and giving or not giving their consent. Such an outcome hardly leads to commitment or ownership of a plan. For many, the lack of PIC or top-down PIC without active participation of the people echoes the recurrent theme – loss of sovereignty. A negative feedback loop can begin in which the lack of capacity or PIC of the group leads to a mistaken rejection of a viable alternative.

At this point, our review shows that stakeholders are experimenting with a variety of organizational and financial arrangements. Traditional alliances between government and the mining industry continue to dominate encounters, fortified by antiquated doctrines of compensation and eminent domain. New rearrangements are appearing, some favourable, others not. These trends include:

- Global initiatives to encourage free trade are resulting in a rewriting of mining laws – sometimes to the detriment of indigenous rights (e.g., in the Philippines). In contrast, an IDB has an initiative to bring indigenous peoples into the redrafting process and clarify their rights within mining codes.

- The traditional role of government is changing, whereby it facilitates indigenous, industry, and sometimes NGO partnerships. For example, beginning in 2001–02 the Australian government provided about A\$1 million over a four-year period in grants to promote mutually beneficial partnerships between the mining industry and Aboriginal communities for training, employment, and business opportunities.
- Non-governmental coalitions and alliances also are increasing their outreach and advocacy. Such is the case in the Africa-Canada Partnership, an NGO alliance that focuses on human rights abuses in African mines (see www.partnershipafricacanada.org).
- Financiers and risk insurance underwriters are expanding their alliances with the private sector. They are stepping beyond the banker/borrower relationship and they are assuming an active, minority equity position on mining investments (see www.ifc.org for a listing of the International Finance Corporation holdings).

In contrast, attempts to form indigenous coalitions beyond the local level face serious linguistic, cultural, and financial obstacles. Occasional conferences, such as the two workshops organized by the Mining, Minerals and Sustainable Development Project and the Mining Watch Canada and Canadian Consortium for International Social Development workshop, revealed the commonalities in encounters (Rogers 2000). None of these forums claim to be representative. Nor is there any financial support to assure their sustainability. The problem of how to conduct global indigenous consultations haunts sectors apart from mining, as well (Posey 1999).

As alliances grow, so does the potential for conflicts of interests between stakeholders. There are many of these. One obvious conflict is between a government's fiduciary responsibilities to local indigenous peoples and its desires for revenues as a business partner. In the Cordillera Blanca range of the Andes, local people argue that the Peruvian government has not addressed their concerns over water because it is part owner of the Antamina mine. A comparable problem emerges in Papua New Guinea (PNG), where the government owns 30% of the Ok Tedi OTML. PNG's apparent resolution was to reserve 2.5% of its share for local landowners and another 12.5% on behalf of the people of the Western Province, and to retain the rest for itself. In 2001, the PNG passed legislation giving BHP immunity from future liabilities for the environmental damages of its Ok Tedi mine, with BHP moving a 52% share of the mine into a development trust fund (Multinational Monitor 2002).

2.4 Precautionary Principle for Mining Near Indigenous Lands

At this point, avoidance of indigenous questions increases the risk of human rights complaints or costly downstream litigation. A few decades ago, it might have been fair to argue that increased awareness of the issues might lead to more sustainable encounters between indigenous peoples and mining, but not now. Indigenous peoples are now aware of the risks to sustainability posed by mines developed near or on their lands. And thanks to increased literacy, high-speed communication, and active NGOs, even remote indigenous groups are becoming aware of the risks. Company claims that a few unskilled jobs or training will offset these risks is being challenged.

Indigenous peoples and the international community have placed empowerment high on the agenda. In this emerging arena, empowerment is understood to mean that the indigenous people gain the capacity and ability to control the impact of a mining project on their culture and livelihood. This empowerment stands over and above compensation for mining related damages. Empowerment is not training people for non-existing employment. It is not gift-giving. It is not an agreement for the company to assume the costs of government welfare. And it is not outside reformers promoting what they feel are alternative lifestyles for indigenous peoples.

Empowerment begins with tolerance and compassion. And from the perspective of sustainable development, empowerment means that indigenous peoples do not diminish but rather improve their livelihoods and enhance their cultures. The probability of an empowered, sustainable outcome increases as each of 15 elements is brought into an encounter:

1. Sovereignty is respected and strengthened.
2. The rights and access to indigenous land and nature are secured.
3. At the beginning, both indigenous and non-indigenous stakeholders' presuppositions about one another are aligned with fact.
4. The desired outcomes of the encounter for indigenous peoples emerge from meaningful, prior informed consent and participation.
5. Non-indigenous stakeholders fully and opportunely disclose to the indigenous group their plans, agreements, and financial arrangements related to the group in their language and in a culturally appropriate manner.

6. The non-indigenous stakeholders identify and disclose all the risks of a proposed mining endeavour. Full risk assessment means identification of not only of the threats posed by the loss of land but also the full range of anticipated social, economic, and environmental impacts.
7. Prompt unambiguous institutional and financial arrangements are made to mitigate each risk.
8. Benefit-sharing arrangements are made that step beyond compensation for damages.
9. Indigenous peoples, as an informed group, have the right to approve, reject, or modify decisions affecting their livelihoods, resources, and cultural futures.
10. Should restoration of a disturbed habitat prove impossible, the non-indigenous stakeholders should make provisions for an improved habitat that supports a lifestyle acceptable to the affected indigenous peoples.
11. Basic human and civil rights are protected, as specified in international conventions.
12. The focus of the encounter is on protecting indigenous wealth, especially social relations that guide the sustainable use of their natural resources.
13. Financial and institutional arrangements are forged that bridge the discrepancy between the multigenerational time frame of indigenous peoples and the short time frame of a mining project.
14. A guarantor is established to assure compliance with and funding of any negotiated and mutually satisfactory agreements.
15. Indigenous people should not subsidize mining.

The more elements incorporated in the encounter, the greater the chances for a sustainable outcome. The vision of President K.R. Narayanan of India is a wise guide for future encounters:

Let it not be said of India that this great Republic in a hurry to develop itself is devastating the green mother earth and uprooting our tribal populations. We can show the world that there is room for everybody to live in this country of tolerance and compassion.

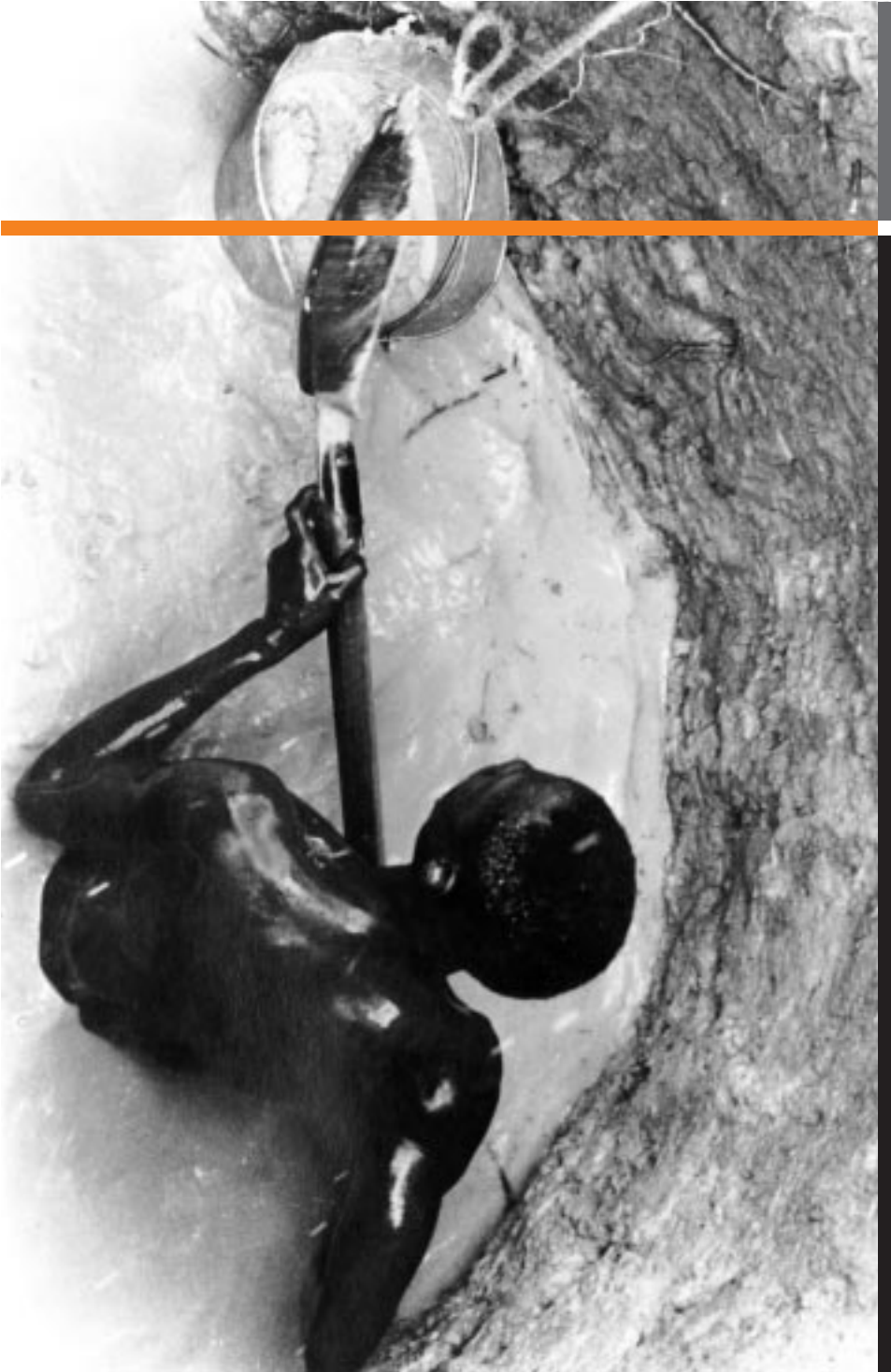
Address to India on Republic Day, January 25, 2001

Given the uncertainties of an encounter, the prudent approach is not only to identify, avoid, and mitigate risks but also to focus on benefits over and above

compensation and rehabilitation for damages. Unquestionably, the prudent approach demands long-term commitments, innovative solutions, financial and institutional guarantees, and the use of professionals experienced in the issues of social development and indigenous peoples. It also requires continual monitoring by technically competent, independent observers of these indicators, providing all stakeholders with opportunities to take corrective actions.

In light of the history of encounters between stakeholders in this field, it would make sense to extend the environmental precautionary principle approved at the Earth Summit in Rio to the impact of mining on indigenous peoples. Thus a Precautionary Principle for Mining in or near Indigenous Peoples would read:

Non-indigenous stakeholders in mining shall use the precautionary approach to protect the indigenous peoples and the environment that supports them. Mining cannot take place without their prior informed consent and participation in their self-defined indigenous development. Where there are threats of serious or irreversible damage, scientific and economic uncertainty shall not be used as a reason to postpone cost-effective measures to avoid and mitigate risks to indigenous livelihoods and cultures.



3

Indigenous Peoples, Mining, and International Law

Marcos A. Orellana

This chapter outlines the major points being discussed in different fora that are working on the issue of indigenous peoples and land rights. Its purpose is to highlight the main thrust of the discussion as well as those issues that remain contested. Although many issues are still unresolved, including the prominent question of defining who is indigenous, this review makes it clear that indigenous peoples are on their way to recovering their international legal personality.

Historical Evolution

3.1

When Columbus arrived in the ‘New World’, existing legal doctrines were strained by the first contact with indigenous peoples in the Americas. In the enterprise of conquest and domination, two dimensions must be clearly separated: legal discourse and the lure for gold and other resources. Although these two are inextricably interrelated, they followed different paths, which explains the divergence between normative theory and on-the-ground history.

International natural law

3.1.1

When Europeans arrived in Northern Africa and the Americas, a highly sophisticated legal dialogue between the Pope and the Kings justified the enterprise of conquest. Several Papal bulls (formal proclamations by the Pope) allowed protection of the local indigenous populations and the spread of Christianity and civilization among them, giving the Portuguese an effective monopoly over their newly established colonies in Northern Africa.

These bulls built on centuries of legal and philosophical debate – from the crusades through the question of investitures to the status of Indians in the ‘New World’.

Early in the Spanish history of conquest, this last topic burdened the Council of Burgos, which tried to resolve whether it was legal to enslave Indians in the name of Christianity. The Dominican friars who had travelled to the Indies provided overwhelming evidence of the brutality that Spanish conquerors unleashed on local indigenous populations. Demographic deterioration occurred through maltreatment, enslavement, suicide, punishment for resistance, warfare, malnutrition due to destruction of the natural environment, and outright extermination (Daes 2001). The entire population of the Americas decreased by 95% in the century and a half following the first encounter (Stavenhagen 1991).

Francisco de Vittoria extended natural law reasoning to the international plane, arguing that all nations and all peoples of the earth were bound by the *ius gentium*. According to his theory, indigenous peoples had true dominion over their lands and could not be dispossessed without just cause. This principle, which is often quoted as Vittoria’s great contribution to the land rights of indigenous peoples, is offset, however, by his justifications for Spanish conquest: Vittoria argued that according to natural law, which he believed was binding on all peoples, Spaniards had the right to send missionaries, to trade, and to use communal Indian lands. Where Indians placed obstacles to the exercise of these international natural law rights, Spaniards would be justified in resorting to arms to defend their natural law rights.

3.1.2 Doctrines of dispossession

In other regions of the world, international legal arguments followed different paths. For example, in Australia and other places, the legal doctrine of *terra nullius* was invoked to appropriate indigenous lands. According to this Roman law theory, lands that had no owner could be appropriated by nations manifesting such intention. Thus a fictional representation of the world came about: lands were regarded empty or abandoned in spite of indigenous occupancy.

The *terra nullius* doctrine was apparently set aside by the International Court of Justice (ICJ) in the 1975 Western Sahara Case, where the Court seemed to acknowledge the existence of a theory of international land tenure based on a non-European conception of title. In fact, the Court found that:

it clear that the nomadism of the great majority of the peoples of Western Sahara at the time of its colonization gave rise to certain ties of a

legal character...The tribes, in their migrations, had grazing pastures, cultivated lands, and wells or water-holes in both territories, and their burial grounds in one or other territory. These basic elements of nomads' way of life...were in some measure the subject of tribal rights, and their use was in general regulated by customs.

(ICJ Western Sahara Advisory Opinion, paras. 75-83).

Nevertheless, despite finding that there were 'legal ties of allegiance' and 'some rights relating to the land', the ICJ still applied the European notion of acquisition of title as the exclusive criterion.

Another legal theory used to deprive indigenous peoples of their lands was that of discovery. In the context of European legal thought, a territory belonged to the nation that discovered it. Like *terra nullius*, this theory ignored previous occupancy of the land. Discovery, however, received only limited recognition by international adjudicatory bodies, which usually required that discovery as a symbolic act be followed by effective occupation.

Treaties with indigenous peoples

3.1.3

The enterprise of conquest followed by Europeans in the 'New World' also took legal shape through international treaties concluded with local peoples. At least three modalities must be singled out among the multitude of treaties. First, certain treaties provided for cession of indigenous lands to nations or even individuals. Second, some treaties contemplated the creation of a dual regime, granting the colonial power rights and duties relating to external government, but retaining indigenous autonomy over lands and affairs. Third, some treaties settled borders or frontiers between the conquerors and indigenous peoples, and thus demarcated spheres of sovereignty and jurisdiction.

These three categories had different legal impacts. Some treaties had the effect of depriving indigenous peoples of their lands and external self-determination. According to these legal arrangements, indigenous peoples either ceded their lands or became subject to the government of the occupying power, thus losing their international personality. In contrast, treaties that settled boundaries had the effect of recognizing international personality for indigenous communities. In fact, in the legal practice of the European powers of the time, these boundary treaties were given equal status with other treaties. They provide further evidence that indigenous peoples were subjects of international law during the fifteenth to eighteenth centuries.

3.1.4 Nineteenth century: the new international society

During the nineteenth century, European nation-states that had recently consolidated entered into a new stage in the progressive development of their laws and customs. The new sovereigns emphasized the consensual dimensions of international law, whereby the will and recognition of the state was the principal source of law. Indeed, in struggling to set past theories aside, during the nineteenth century international law was regarded as the law existing between civilized nations – that is, Christian European states. International law would admit as international subjects only European states and entities recognized by them. Accordingly, indigenous peoples were not recognized as sovereigns or civilized by the European states and were thus marginalized.

The Cayuga Indians Arbitration of 1926 between the UK and the US shows this shift of the international legal system towards the exclusion of indigenous peoples. The tribunal concluded that the Cayuga Nation and the Cayuga as individuals had no status under international law. But it still held that general principles of equity, fair dealing, and justice recognized by international law established that the Cayuga in Canada were entitled to receive the annuity covenanted with the State of New York in a 1795 treaty. And in October 2001, a US District Court in New York decided to award the Cayuga Nation US\$247.9 million for its land claims against the State of New York.

3.1.5 Twentieth century: decolonization and the new international economic order

The political and legal principle of self-determination triggered a radical transformation in the international political landscape, leading to the creation of a multitude of new states. The principle of *uti possidetis juris* held sway, whereby the international boundaries of newly independent states followed former colonial administrative borders. Clearly, this provided the new states with an accessible source of legitimacy and stability in the definition of their boundaries, thereby preventing conflict between them as well as intervention by the colonial powers. At the same time, the principle transplanted the inequitable structures of colonial domination onto the indigenous occupants of lands, whose territories were again artificially separated by alien frontiers.

The ICJ has ignored indigenous title to land in several cases, including its 1994 decision on the Territorial Dispute between Libya and Chad over a tract of territory believed to contain uranium deposits. Another clear example of the application of the *uti possidetis juris* is the Gulf of Fonseca case, where El Salvador drew the Chamber's attention to the potential conflict between claims based on Spanish

documents and those on earlier rights of Indian Poblaciones. The Chamber held that '[i]t was the administrative boundaries between the Spanish colonial administrative units, not the boundaries between the Indian settlements as such, that were transformed by the operation of the *uti possidetis juris* into international boundaries in 1821'.

The New International Economic Order (NIEO) sought to radically transform the old international regime based on colonial domination, on natural resource plunder, and on inequitable production and consumption patterns into a more fair and just world order. In the NIEO, developing nations would exercise complete sovereignty over their natural resources as a means of recovering the wealth that the powerful 'empires' had been exploiting within their boundaries. Consequently, the emphasis of the NIEO was placed on achieving external economic independence, recuperating control over economic wealth, and implementing development schemes.

However, the consequences that these restructuring processes brought about, particularly as they affected vulnerable local communities within the territories of new states, are not to be overlooked. Culturally distinct groups from the dominant society 'expropriated' the natural resources on which their whole civilization had been erected in centuries past. The NIEO was explicit: natural resources would now belong to the state, not to traditional users. This new reality obviously created a conflict between the dominant society and marginalized groups and ultimately between the state and customary holders of native title to the natural resources.

Emergence of International Human Rights Standards

3.2

The emergence of human rights standards and supervisory machinery has transformed the structures of the international legal system. The sovereignty of the state has been qualified by the duty to protect and promote the rights of its citizens, now an issue of common concern to the international community and thus beyond the exclusive jurisdiction of the state.

Right to existence

3.2.1

The right to exist of peoples has been elevated to the category of *ius cogens* in international law, whereby no international treaty may detract from the obligation incumbent on all members of the international community to prevent and punish the crime of genocide. Further, genocide has been recognized as an international crime subject to universal jurisdiction to prosecute the perpetrators.

The 1948 International Convention on the Prevention and Punishment of the Crime of Genocide, passed unanimously by the UN General Assembly, established the elements of the crime of genocide. Its definitions were then reproduced verbatim by the 1998 Rome Statute of the International Criminal Court, whose preamble recognizes that the cultures of all peoples are pieced together in a shared heritage and that this delicate mosaic may be shattered at any time. In the interpretation of the elements of the crime of genocide, regard must be taken to these ideas; as the ICJ stated in the 1951 case concerning reservations to the genocide convention, the principles underlying the convention are those recognized by civilized nations as binding on states, even without conventional obligation.

It has been often said that the genocide convention deals only with the physical destruction of groups and not with cultural genocide or ethnocide; further, the convention requires specific intent to eliminate the group as such, in whole or in part. These two elements have been under question during the last few decades. It has been suggested that the cultural and physical dimensions of existence cannot be separated in the case of indigenous peoples, given the religious and material integration between them and their environment. Further, the ‘direct intent’ scienter standard (a defendant’s guilty knowledge) has also been challenged as excessively narrow to encompass deliberate acts of environmental destruction that hide behind the rhetoric of development and economic growth. On this point, it has been suggested that the ‘aims and effect’ standard would afford greater protection to indigenous peoples and their lands.

A peoples’ right to exist also means that they cannot be deprived of their means of subsistence. This norm has been included in universal UN human rights conventions. In the case of indigenous peoples, it has been argued that the right to their means of subsistence encompasses and protects their rivers, forests, seas, and other sources of livelihoods. Consequently, mining operations that pollute the rivers, open roads into the forests, and destroy local ecosystems would violate this fundamental human rights standard.

3.2.2 Right to self-determination

The debate over the contours and applicability of the right to self-determination for indigenous peoples remains the most contested issue in the discussion of the UN Draft Declaration on the Rights of Indigenous Peoples. In that debate, two dimensions of this right have been clearly delineated: one external – the right to international personality or to secede from existing states – and the other internal – the right to autonomy over local affairs and government, including land and natural resources.

From an international legal perspective, self-determination is a collective right vested on all peoples, which has been recognized by both the International Covenant on Economic, Social, and Cultural Rights and the International Covenant on Civil and Political Rights. Common Article I paragraph I proclaims that ‘All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development’.

It has been much discussed whether self-determination applies beyond the colonial context. It must be stressed that the formulation of the principle of self-determination in the United Nations Charter occurs in the context of the objectives of the organization rather than decolonization. It must also be noted that UN General Assembly declarations and resolutions that address the issue of decolonization emphasize that the right to self-determination should not be used to disrupt the unity of the state or its territorial integrity.

Right to non-discrimination

3.2.3

The right to equality and non-discrimination lies at the heart of international human rights law. Accordingly, racism is condemned in all its forms, a theme that was explored exhaustively at the 2001 Durban World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance. The conference affirmed the importance attached to the values of solidarity, respect, tolerance, and multiculturalism and recognized that indigenous peoples have been victims of discrimination for centuries. The conference also recognized the special relationship that indigenous peoples have with the land as the basis for their spiritual, physical, and cultural existence.

The International Convention on the Elimination of All Forms of Racial Discrimination (CERD) deals specifically with the problem of discrimination, and the Committee that supervises this work has received communications alleging violation of this right. Such is the case with Australia’s 1998 Native Title Amendment Act, which allowed unilateral government extinguishment of native land rights. The Committee maintained that this violated Australia’s international responsibilities and urged the government to suspend the act’s implementation. Significantly, the Committee affirmed that indigenous peoples’ land rights are recognized in international law, and that the international community now understands that doctrines of dispossession are illegitimate and racist.

3.2.4 United Nations universal human rights conventions

The seminal 1949 Universal Declaration on Human Rights, passed unanimously by the UN General Assembly and now accepted as international customary law, gave rise to the 1966 International Covenant on Economic, Social, and Cultural Rights and the 1966 International Covenant on Civil and Political Rights (ICCPR). Both instruments contain provisions that may be interpreted to ensure protection to indigenous peoples' land rights, such as the right to religion, family, and cultural integrity.

For several decades, it was argued that only civil and political rights belonged to the category of human rights, while economic, social, and cultural rights were social aspirations. The 1993 Vienna World Conference on Human Rights refuted this by categorically affirming the interdependence of all human rights. In other words, the rhetoric of development and economic growth may not be used to justify violations and systematic denial of human rights, even in their cultural or political dimensions. Recently, the debate has further expanded to encompass third-generation solidarity rights, which are those vested in peoples, such as the rights to a healthy environment, to peace, and to self-determination, and which require solidarity at all levels of society for effective implementation.

The ICCPR formulation of the right to cultural integrity deserves special mention; it provides that persons belonging to ethnic minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language. The United Nations Human Rights Committee (HRC) is the treaty-based body entrusted with oversight of the ICCPR, including complaints against countries that have ratified the ICCPR First Optional Protocol alleging violation of protected rights. The HRC has stated in its General Comment on Article 27 that this provision extends to economic activity where the activity is an essential element in the culture of an ethnic community. The committee has further stated that:

[c]ulture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. The enjoyment of these rights may require positive measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.

Examining a petition submitted by the Lubicon Lake Band of Cree, the HRC concluded that Canada had violated Article 27 by allowing the provincial government of Alberta to grant leases for oil and gas exploration and timber

development within the ancestral territory of the Lubicon Lake Band. The Committee also found that the natural resource development activity compounded historical inequities to threaten the way of life and culture of the Lubicon Lake Band.

In the Lansman cases, the Human Rights Committee addressed the specifics of mining projects in indigenous peoples' lands. It noted that:

economic activities must, in order to comply with article 27, be carried out in a way that the authors continue to benefit from reindeer husbandry. Furthermore, if the mining activities in the Angeli area were to be approved on a large scale and significantly expanded by those companies to which exploitation permits have been issued, then this may constitute a violation of the author's rights under article 27, in particular of their right to enjoy their own culture. The State party is under a duty to bear this in mind when either extending existing contracts or granting new ones.

Inter-American human rights system

3.2.5

The Inter-American human rights system evolved over the latter half of the twentieth century to afford protection to indigenous peoples' rights to property, rights to family, and right to judicial protection, among others. In the implementation of substantive standards contained in the 1947 American Declaration of the Rights and Duties of Man and in the 1969 American Convention on Human Rights, the Inter-American Commission on Human Rights (IACHR) has played a fundamental role.

Since it was established in 1959, the IACHR has contributed to the protection and promotion for the rights of indigenous peoples through on-site visits, country reports, friendly settlements, and individual petitions. The IACHR has produced several special reports that focus on the human rights situation of indigenous peoples in member countries, including Colombia (1993, 1997), Guatemala (1993), Ecuador (1997), Brazil (1997), Mexico (1998), and Peru (2000) as well as the situation of the Miskitos in Nicaragua (1984) and the Communities of Peoples in Resistance in Guatemala.

In its 1997 Report on the Situation of Human Rights in Ecuador, for example, the IACHR observed that the continued use of traditional systems for the control and use of territory are essential to the survival of indigenous peoples, as well as to their individual and collective well-being. Further, the IACHR observed that control over the land includes the capacity for providing the resources that sustain life and the geographical space necessary for the cultural and social reproduction of indigenous peoples.

The IACHR has further elaborated a doctrine on the right to property in cases involving indigenous peoples' rights to lands. In 1998, it submitted the *Awas Tingni* case to the Inter-American Court of Human Rights, alleging that Nicaragua had violated the indigenous community's right to property over their ancestral lands by granting a logging concession to a Korean timber corporation. In 2001, the court considered that an evolutionary interpretation of international human rights instruments was warranted and found that the convention protects the right to property of the members of indigenous communities over their communal lands. The court found that Nicaragua violated the convention by failing to demarcate indigenous lands and by granting concessions for the exploitation of resources within them.

The IACHR has also elaborated a doctrine on collective rights, which affords indigenous communities group rights over their lands. In this regard, the IACHR has taken the approach that individual and collective rights are not opposed but rather are part of the principle of full and effective enjoyment of human rights. This approach has inspired the draft declaration on the rights of indigenous peoples prepared by the IACHR for the Organization of American States (OAS), after extensive consultations with indigenous peoples, and particularly those articles that deal with cultural, political, and economic rights. This draft declaration is currently under discussion by OAS political organs.

3.3 International Institutions

3.3.1 United Nations

The United Nations first focused its attention formally on the problems of indigenous peoples in its work against racism and discrimination. Indigenous peoples began lobbying the United Nations through non-governmental organizations such as the World Council of Indigenous Peoples and the International Indian Treaty Council during the 1970s. Responding to the legitimacy of their demands and to studies initiated by the Sub-Commission on Prevention of Discrimination and Protection of Minorities, in 1982 the United Nations Economic and Social Council (ECOSOC) established a working group and charged it with elaborating a Declaration on the Rights of Indigenous Populations. In 1993, the Sub-Commission Working Group produced a draft declaration, which is now being considered by the United Nations Human Rights Commission.

The draft declaration builds on a decade of consultations with indigenous peoples who have voiced their concerns during the annual meeting of the working

group in Geneva and in other forums. It formulates an array of collective rights, such as the right to maintain and develop distinct cultural identities and the right to participate fully in the affairs of the metropolitan state. The draft declaration also contains several provisions safeguarding indigenous peoples' land rights, such as '[i]ndigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied and used'.

The declaration is categorical in its protection of indigenous peoples' right to remain on their lands. It explicitly states that, 'indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free and informed consent of the indigenous peoples concerned'. Yet the draft declaration remains a soft-law instrument, which provides evidence of emerging customary norms and duties.

The UN Sub-Commission has also produced several thematic reports on particular aspects of indigenous peoples' relations with the contemporary world order. The seminal report by Special Rapporteur José Martínez Cobo of Ecuador on *The Problem of Discrimination against Indigenous Populations* was completed in 1984. He addressed the human rights issues raised by mining in indigenous peoples lands by stating that:

Where possible within the prevailing legal system, the resources of the subsoil of indigenous land also must be regarded as the exclusive property of indigenous communities. Where this is rendered impossible by the fact that the deposits in the subsoil are the preserve of the State, the state must...allow full participation by indigenous communities in respect of: the granting of exploration and exploitation licenses; the profits generated by such operations; the procedures for determining damage caused and compensation payable to indigenous communities as a result of the exploitation of the resources of the subsoil of indigenous land and in the consideration of all consequences of such exploration and exploitation activities.

No mining whatsoever should be allowed on indigenous land without first negotiating an agreement with the indigenous peoples who will be affected by the mining, guaranteeing them a fair share of the revenue that may be obtained.

(Martínez Cobo, 1984, paras 543-4)

Subsequent studies focused on treaties entered into by indigenous peoples, on their cultural heritage, and on their right to permanent sovereignty over their

natural resources. In 2001, the final working paper on *Indigenous Peoples and their Relationship to Land* was presented by Special Rapporteur Irene Daes. The UN Human Rights Commission has taken note of these studies, and in 2001 appointed Rodolfo Stavenhagen for a three-year period as Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples.

After a series of meetings and discussion in the context of the Decade of Indigenous Peoples, in 2000 ECOSOC established the Permanent Forum on Indigenous Issues. This is expected to provide advice and recommendations to ECOSOC on indigenous issues relating to economic and social development, culture, the environment, education, health, and human rights. The Permanent Forum is also expected to raise awareness and to prepare and disseminate information on indigenous issues. The Forum will be composed of 16 experts (8 nominated by governments and 8 by the President of the ECOSOC) and is expected to meet for 10 days each year.

3.3.2 International Labour Organization

Convention 169 of the International Labour Organization (ILO) is the only international treaty dealing with indigenous peoples and land rights. This instrument, which was concluded in 1989, contains several procedural and substantive safeguards for indigenous peoples' rights over their lands, including, for example, Article 15: 'the rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded'. Further, property rights are specifically protected by the treaty, which provides that the rights of ownership and possession of the peoples concerned over the lands that they traditionally occupy shall be recognized. It also includes the obligation of states to consult with indigenous peoples even when natural resources remain under state ownership.

ILO 169 thus ensures indigenous peoples' control over their lands, legal status, and development. It further guarantees their environment from harmful alien interference and provides for internal structures of community organization. The implementation of these minimum international standards by national constitutions and domestic legislation in a large number of countries is evidence of emerging norms of international customary law.

Article 24 of the ILO Constitution provides that a national or international employers' or workers' organization may submit a 'representation' to the ILO on the grounds that a member state has failed to observe or has not satisfactorily ensured the application of a ratified convention. A tripartite committee will examine the representation and submit a report to the Governing Body for

adoption, which may require the government to take specific measures to resolve the problem. This dispute settlement machinery has forged constructive alliances between workers' unions and indigenous peoples, with the latter providing evidence on a state's failure to comply with its international obligations. Cases have been brought on issues of indigenous peoples' lands by organizations from Denmark, Mexico, Bolivia, Colombia, Ecuador, and Peru.

Finally, the ILO undertakes technical cooperation programs that promote the active participation of indigenous and tribal peoples at all levels of project implementation and decision-making, from design to evaluation. Other technical cooperation activities address the living and working conditions of indigenous peoples. These characteristics of the programs are thus varied and tailored to the specific needs of the communities under focus, and they have been implemented in South and Southeast Asia, Africa, and the Americas.

United Nations Development Programme

3.3.3

The United Nations Development Programme, UNDP promotes programs for sustainable human development and administers a number of special-purpose funds. Its engagement with indigenous peoples is extensive and has involved small grants programs as well as regional and national ones. These have focused on poverty eradication, environmental conservation, conflict prevention and resolution, and cultural revitalization. Besides actual funding of projects, UNDP has also opened forums where indigenous peoples have been invited to discuss issues of policy, such as the Civil Society Organization Advisory Committee and the Executive Board meetings.

The Indigenous Knowledge Programme is another important initiative of UNDP; its goals are participation of indigenous peoples in international conferences and process of their concern, conservation of indigenous knowledge through research on customary laws and traditional resource rights, and allocation of funding for indigenous self-help initiatives that address poverty reduction and organization-building at community level. This program has funded two projects in Asia and one in South America.

World Bank

3.3.4

The World Bank exercises important influence in the development of international standards, either by filling the regulatory vacuum of borrowing countries or by pushing the implementation of what then crystallize as customary norms. In 1982 the Bank issued Operational Manual Statement 2.34 to protect the

interests of ‘indigenous groups’ in Bank-financed development interventions. In 1991, it issued a revised Operational Directive (OD) 4.20, which intended to expand the emphasis from protection towards participation in and benefits from Bank-financed development projects.

The Bank has recently engaged in a wide review of all its ODs in an effort to clarify existing binding safeguards policies, which would ultimately lead to greater compliance. The process of transforming OD 4.20 into Operational Policy (OP) 4.10 has involved global and regional consultations with relevant stakeholders. In spite of this, the draft OP 4.10 did not include many of the most important recommendations made by indigenous peoples in the first round of consultations, including the right to prior and informed consent, indigenous monitoring of Bank projects, and fair ‘mitigation’ requirements. Other concerns raised by indigenous peoples throughout the consultation process concerning the new draft policy include these:

- Requirements concerning indigenous land and resource issues are not clear.
- Provisions for legal protections are now optional instead of mandatory.
- Provisions for peoples affected by protected areas are unclear.
- The policy allows for involuntary resettlement of indigenous peoples.
- The policy does not meet existing international human rights standards.

Further, the draft OP contained provisions dealing specifically with mining in indigenous peoples’ lands:

Commercial Use of Lands and Resources. When Bank-assisted projects involve the commercial exploitation of natural resources (including forests, mineral, and hydrocarbon resources) on lands owned, or customarily used by indigenous groups, the Borrower:

(a) informs these groups of their rights to such resources under statutory and customary law; (b) informs them of the potential impacts of such projects on their livelihoods, environments and use of natural resources; (c) consults them at an early stage on the development of the project, and involves them in decisions which affect them; and (d) provides them with opportunities to derive benefits from the project.

As in all projects which affect indigenous groups, adverse impacts upon them are avoided or minimized, and benefits should be culturally appropriate.

The extent to which the draft OP 4.10 affords greater protection to indigenous peoples remains open to question. Rather, it seems that the article on commercial use of land does not meet existing land tenure standards, as it could be used to justify forced resettlement of indigenous communities from their ancestral lands in exchange for inadequate compensation for harm and loss of livelihoods. Further, opportunities to derive benefits from intended development may be negligible when contrasted with potential material and cultural loss.



4

Indigenous Communities and National Laws

Janeth Warden-Fernandez

The development of natural resources is seen as an essential prerequisite for the economic growth of many countries. The accelerating development of natural resources throughout the world, triggered by the liberalization of international markets, technological advances, and the promise of finding more opportunities in places hitherto untouched, has led investors to focus on more remote areas. (The term ‘remote’ is used here to mean mainly outside the influence of large urban and industrial centres). In many cases such areas are located within the homelands of the indigenous peoples of the target countries, in which they have survived in their traditional way while preserving their cultural identity. The main factors that contributed to this survival were undoubtedly the remoteness of these lands and the fact that they were considered by modern industry to be economically relatively unattractive.

Under such circumstances, development precipitates conflicts because of diverging interests:

- the interest of the state in obtaining more revenue and economic activity by increasing the development of natural resources through the investment of private capital;
- the interest of the investor to do business and earn a profit; and
- the interest of indigenous communities, which goes beyond traditional economic considerations.

Indigenous communities’ relationship with the land is deep-seated and frequently based on religious beliefs that form part of their heritage. It is difficult for western societies to comprehend the strong connection between indigenous

peoples, their land, and its resources. This cultural chasm can often be bridged only with difficulty.

In the case of exploration and mining, development can conflict with the rights of indigenous peoples, especially those related to their native titles and the management of their lands, leading in many cases to stagnation of mining ventures until problems have been resolved. This stagnation can have an adverse impact on the economic growth of a country as a whole. The opposition from indigenous communities to this type of development is certainly understandable, as in the past the exploitation of mineral resources has provided substantial profits for governments and mining companies who ignored the fact that the resources were located on lands of indigenous peoples, who generally did not receive any of these benefits. However, there is now a focus on how to create adequate instruments to permit mineral activity under conditions that will contribute to the global transition towards sustainable development.

Within this context, and with the aim of avoiding conflicts in the course of the development of mineral resources, the important question is: What will be the best, fairest, and most equitable approach that respects all the interests involved? To help answer this question, this chapter provides an overview of the different legal approaches related to the recognition and affirmation of the existence of indigenous rights in countries and regions with a history of colonization.

4.1 Indigenous Rights and Mining Activities by Region

The effect of mining activities on indigenous communities and the community and socio-economic impacts in general are an issue of considerable contemporary importance, as documented in *Breaking New Ground*, the final report of the Mining, Minerals and Sustainable Development Project. Indigenous communities are viewed internationally as being different and therefore subject to special treatment. Indigenous peoples have considered themselves different from the new community moving into their territory and have generally persisted with the desire to preserve their own culture, their ethnic identity, and their political and social systems (Chubb 1997).

The colonizer, conqueror, or invader was generally motivated by the acquisition of new terrain, which therefore – in the view of the legal system they brought with them – usually negated the rights of indigenous communities. In the last two decades, however, international bodies have drafted instruments that give the indigenous community rights over land and the right to participate in the decision-

making process about different issues that affect them, especially those related to the development and management of natural resources (see Chapter 3).

There is clearly increasing global awareness concerning the recognition of indigenous rights. In the case of the development of natural resources, especially mineral resources, this issue is of great importance. Mining companies are interested in finding good projects in which they can invest to obtain a profit. In order to realize this aim, companies initially selected the most promising areas in Australasia and the Americas, and to some extent in Africa. All these new countries were and still are inhabited by indigenous communities who have different perceptions of the development of their lands, which were their traditional property. This potential conflict of interests imposed the burden on host states of resolving the impasse, since security of tenure is a key issue in investment decision-making for mining projects.

When deciding to invest in mineral development, it is of vital importance to know who owns the resources. With the exception of the United States, and a few other countries or with respect to specified minerals, mineral ownership is generally vested in the state. In Latin American countries with a tradition of civil law and a regalian system, the state has unrestricted and exclusive dominion or proprietary rights over mines and minerals. (In a regalian system, the state is the original owner of the minerals without consideration of who owns the surface of the land; in contrast, in the accession system the owner of the land is the owner of the mine as well.) In civil law countries, proprietorship over land does not extend to the ownership of the minerals in the subsurface.

In countries with a common law tradition, the owner of the land generally owns the minerals located in the subsurface *usque ad caelos usque ad inferos* (Walde 1988). In the case of mineral resources located in indigenous lands, the development of such wealth can generate conflicts and in some cases violence because it puts the material view held by the western cultures, and the legal system they have developed, in direct confrontation with the indigenous view, which does not generally recognize or accept the surface-subsurface distinction and which often gives a central place to religious or spiritual attachments that may not be known or understood by outsiders.

What is needed are tools that would provide for a process that leads to an equitable development of the mineral resources of indigenous lands, where appropriate, through the participation of these communities in decision-making over potential mining projects and the distribution of the resulting wealth in a fair and equitable way. Indigenous communities should have the right to free, prior and

informed consent The only way to guarantee that a mining venture supports sustainable development is through the participation of all the key stakeholders in the decision-making process – governments, mining companies, and communities, including indigenous communities, where their rights are affected. (For a detailed account of the characteristics, roles, interests, and objectives of the stakeholders in mining projects, see Ostensson 2000.)

4.1.1 Australia

The mining industry is very important to the Australian economy. Australia is a major producer and exporter of key metals and minerals, including gold, coal, iron ore, base metals, and alumina. Due to the vast size of the country, the industry has extensively developed an essential infrastructure that has brought progress to isolated locations. Since last century, the ownership of minerals in Australia has been vested in the Crown.

Western Australia, Queensland, and the Northern Territory, which provide more than 85% of Australia's total mineral production, also have the largest proportion of potential claimable land, such as vacant Crown Land. Recently debates about native title claims have had a marked negative impact on the mining industry, particularly on account of unclear legislation and the impetus that the native title issue has had in international fora.

In Australia, indigenous rights are not enshrined in the Constitution; they largely arise and are protected under common law. In this role, common law is an evolving legal system. Because Australia shares origins with other common law countries with a comparable history of colonization, its courts also draw on the experiences of Canada, New Zealand, and the United States.

When English settlers arrived in 1788, they regarded the Aborigines who occupied Australia for over 40,000 years as primitive. There was no advanced system of government, and the indigenous population lacked a well-organized social system. Subsequently the European settlers did not initially recognize the sovereignty of the Aborigines. No treaty or agreements were signed. In other words, the Australian indigenous people were ignored (Wells and Doyle 1997) and Australia was considered as *terra nullius* (see Chapter 3). As a consequence, the Crown acquired complete sovereignty over Australian territory and the absolute property right over the entire land (Barberis 1998). Between then and the early 1980s, Aboriginal communities were granted some statutory rights related to lands, which they use for hunting or ceremonial purposes and occasionally to construct dwellings. From the middle of the last century onwards, Aboriginal reserves were

established for the use and benefit of the indigenous communities. The land was shared with Aboriginal communities without the existence of a clearly defined legal regime that recognized their rights.

In 1982 the *Mabo* case was initiated over the claims to lands of the Murray Islanders. The High Court of Australia in 1992 found sufficient evidence to decide that these lands were the property of the indigenous community before the British settlement and consequently the concept of land ownership survived the annexation of Australia to the British Crown and its assertion of sovereignty. The decision rejected the position that declared 'Australia a vacant uninhabited land belonging to no-one – *terra nullius*', because this was not the case, since indigenous people were living there first. The *Mabo* decision was applied initially only to the Murray Islands, not to mainland Australia.

For Aboriginal people, the *Mabo* decision was just recognition of the injustice perpetrated when the colonists arrived and deprived them of their freedom, culture, and religious beliefs, which greatly diminished the self-determination rights of their community. This principle of self-determination is upheld by the Australian indigenous communities, founded on the fact that the British colonists arrived only 200 years ago, by which time the Aborigines had already been living there for thousands of years, with 'total control over their lives'. The various indigenous rights are channelled through the self-determination principle. These have been classified into three main categories: '*autonomy rights*: which focus upon the right of Indigenous Peoples to determine the way in which they live and control their social, economic and political system; '*identity rights*: which are related to the right to exist as distinct peoples with a distinct culture; and '*territory and resource rights*: which encompass such things as land entitlements, the right to the resources of that land, and the use of those resources' (Wells and Doyle 1997).

Mabo was also seen as a success because it was based on laws that the colonists brought with them and was not a 'political favour'. The decision led to the filing of many claims – some of them unfounded – with an obvious negative consequence for the mining industry. In Western Australia in 1998, the areas under native titles claims amounted to 82% of the entire state and included 98% of the mineral titles applied for. These claims also cover the Eastern Goldfields, where the majority of the gold and nickel mining operations are concentrated (Western Australia 1998).

In 1993, the Native Title Act (NTA) was promulgated. It upheld the *Mabo* decision and set forth the rights of the Aborigines in some specific cases to rule their own land under their traditional form of law and custom. The NTA provides for the claimant of native title the right to negotiate. This right is additional to the rights of

native title claimants and will be used before any decision is taken which recognizes their title at common law. Noting that native title is a ‘pre-existing title to land’, the Native Title Act sets out processes through which native title can be recognized.

In December of 1996 the High Court of Australia, through the *Wik* decision, restated the fundamental principles of its decision on *Mabo* regarding the existence and recognition of native title at common law and reaffirmed that native title was ‘not a common law tenure but rather an interest in land that was capable of coexisting with other interests in land’ (Tehan 1997). Nevertheless, the substance of the interest in land was not specified, although the decision made it clear that the scope of native title derived from the traditions and customs exercised by the aboriginal communities before the European settlers arrived and that each case needed individual consideration on its own merits.

The *Wik* decision was the first to establish that, if there is a conflict between pastoral leases’ rights and native title rights, the former will prevail. Native title rights are subordinated to those of pastoral leaseholders, but the grant of a pastoral lease does not extinguish all native title rights. As a consequence of the *Wik* decision, many exploration and mining tenements were in danger of being declared invalid because they had been granted on the assumption that the granting of pastoral leases had extinguished native title and that therefore there was no need to comply with the mechanisms established by the NTA. The grant of mining tenements on pastoral leases from 1st January of 1994 should have gone through the NTA’s ‘right to negotiate’ process.

In response to the *Wik* decision, the Commonwealth Government issued a ‘10-Point Plan’, which set out ten principles for amendment of the NTA. The subsequent Native Title Amendment Act 1998 (NTAA) provided for the validation of potentially invalid acts that created interests in land between the commencement of the NTA (1 January 1994) and the *Wik* Decision (23 December 1996). (For a detailed study of this, see *Australians for Native Title and Reconciliation* (ACT), at www.antar.org.au).

In August 2002, another important decision was delivered by the Australian High Court. This decision, known as the *Ward* decision, ruled that:

- Rights under native title can be individually extinguished by governmental actions, such as the granting of mining leases.
- A series of partial extinguishments can fully extinguish native title.
- When the interests and rights granted by a mining lease conflict with those derived from native title, the rights and interests under the mining lease will prevail.

- Confirmed that any native title to minerals was extinguished by the mining legislation promulgated by the State

(For a detailed analysis of this decision see Special Edition: *Native Title after Ward*, 21-3 AMPLA 2002).

Through the initiative of the Commonwealth Minister for Industry, Science and Research, the Indigenous Communities/Mining Industry Regional Partnerships Programme was recently initiated, which is funded through a budget of A\$1.2 million over four years, starting in 2001. This resulted from the recognition of a cultural change in the relations between the mining companies and the indigenous communities and the need for a long term-partnership between these stakeholders. The government provides support for the indigenous communities through building capacity and the development of commercial enterprises. The mining companies participating in such programmes commit to:

- provide jobs for indigenous people;
- provide pre-employment training;
- provide skills and career development for indigenous employees;
- offer business opportunities to the local communities; and
- facilitate opportunities for investment by indigenous businesses.

In response to the *Mabo* decision, since 1995 Rio Tinto has started to promote a new relationship with the Aboriginal and Torres Strait Islander People, with the aim of assisting them to achieve ‘economic independence through employment, business development and training’. Rio Tinto’s Aboriginal and Torres Strait Islander People’s Policy states that:

(www.isr.gov.au/resources/indigenouspartnerships/overview)

In all exploration and development in Australia, Rio Tinto will consider Aboriginal and Torres Strait Islander people’s issues:

Where there are traditional or historical connections to particular land and water, Rio Tinto will engage with Aboriginal and Torres Strait Islander stakeholders and their representatives to find mutually advantageous outcomes.

Outcomes beneficial to Aboriginal and Torres Strait Islander people will result from listening to them.

Economic independence through direct employment, business development and training are among the advantages that Rio Tinto will offer. We will give strong

support to activities that are sustainable after Rio Tinto has left an area.

This policy is based on recognition and respect. Rio Tinto recognizes that Aboriginal and Torres Islander people in Australia:

- *Have been disadvantaged and dispossessed*
- *Have a special connection to the land and waters*
- *Have native title rights recognized by law.*

Rio Tinto respects Aboriginal and Torres Strait Islander people's:

- *Cultural diversity*
- *Aspirations for self-sufficiency*
- *Interest in land management*

Rio Tinto has signed more than 30 mine development and exploration land access agreements that in many cases have taken place outside the native title process. Worth mentioning in this context is the Yandicoogina Land Use Agreement signed in 1997 with the Gumala Aboriginal Corporation, for the development of Hamersley Iron's Yandicoogina iron ore project in the Pilbara region of Western Australia. Through this project Rio Tinto has provided training and education programmes for the Aboriginal community, helped to build up their businesses, and given them employment. This new programme involves the traditional landowners in township matters, environmental work, and heritage and culture protection. In 2000 Hamersley Iron signed a Memorandum of Understanding with the community of Eastern Guruma, in which the terms of negotiation for an Indigenous Land Use Agreement covering 10,000 square kilometres have been stipulated. (For a detailed account of the most important development agreements concluded by Rio Tinto, see Cameron and Correa, 2002).

There are many other cases in Australia of successful partnership programmes between major mining companies and indigenous communities, such as those of Anglo Coal Australia Pty Ltd, Airon Energy Limited, BHP Iron Ore, Normandy Mining Limited, Pasminco Century Mine, and WMC Resources Ltd. Nevertheless, despite the willingness showed by major mining companies to engage with indigenous communities in the development of mineral resources, there is still much to be done to find a mechanism that addresses all the conflicting interests to avoid the spread of stagnation in the mining industry.

New Zealand

4.1.2

The situation in New Zealand is different from Australia for many reasons, including the size of the country and the fact that the Maori community owns only 5% of the total land area. Furthermore, mining activities are not of great importance to the national economy. Moreover, New Zealand differs from Australia in that the preservation of the Maori culture was recognized as an objective at the outset of the European occupation. Therefore these indigenous peoples had a say in the political decision-making process in New Zealand. The legal instrument through which Maori rights were recognized is the Treaty of Waitangi, which was signed in 1840 by a large representative proportion of the indigenous population and the British government. This important document validates the transfer of the sovereignty of the New Zealand territories to the British Crown. In the case of New Zealand, the colonization scenario represented a complete departure from the existing models. Through the adoption of the Waitangi Treaty, the Maoris obtained the same rights and duties of citizenship as the British people.

The most important point here is that the colonization of New Zealand was apparently lawful in relation to the transfer of land. The ‘principle of legality’ was recognized. (The Waitangi Treaty introduced the exclusive right of pre-emption or purchase of land by the Crown, as the legal instrument for extinguishing Maori Customary Title.) However, it seems that the real implementation of the principles set forth by the Waitangi Treaty was not achieved until 1975 with the promulgation of the Waitangi Act. This set up a Waitangi Tribunal that is empowered to make recommendations to the government about any claim submitted to it. Its work is complementary to that of the courts, although the tribunal’s decisions are not binding. One very important point is that the claims heard must be against the Crown and not against private owners. This would be unsatisfactory as it stands, because there are claims to lands that are now private property.

The ownership of sub-soil minerals by the Crown in New Zealand is not as exclusive as in Australia. There are private property rights to the sub-soil. Before 1913 the mineral rights on land belonged to the owner of the private property. During the colonial era, the theory was that the development of natural resources would bring advantages to all the members of the community.

There are two theories that explain the origin of the governments implanted over the British colonies. One is the theory of ‘Divine Right of Kings’ and the other is that promoted by scholars, that the origin comes from the ‘consent of the communities’. The latter, for obvious reasons, is now the commonly accepted

interpretation and the only one that still survives. Accordingly, a *sine qua non* for British Crown sovereignty was that the indigenous communities' consent to the new legal order. By that time the clearly prevailing belief was that the official acquisition of tribal consent was a condition of the constitutionality of British Government within the colonies. An express consent was a pre-requisite to British annexation. Within this context, the Treaty of Waitangi is seen as a materialization of the approach of the contractual theory and the foundation of British sovereignty over the Maori community.

Despite the apparent success in the treatment of the indigenous peoples of New Zealand through the signing of the Waitangi Treaty in 1840, controversies related to the interpretation of both versions (Maori and English) still exist. This is attributable to the large cultural gap between the Maoris and the Europeans and the difficulty encountered in 1840 in translating the indigenous language, especially in the absence of a written form. It is hard to know what rights, in reality, the Maori community thought it was transferring to the colonizers. Many debates and scholarly interpretations have been produced since, oriented towards attaining a conclusive determination of the differences and common ground of both parties. Recently the Waitangi Tribunal and the Court of Appeal, after recognizing some of the Principles of the Treaty, stated that these must be interpreted in a dynamic sense.

The new legislation, the Resource Management Act and the Crown Minerals Act, that came into force in October 1991 took into account the provisions of the Waitangi Treaty. The Resource Management Act states the obligation to 'recognise and provide for the relationship of Maoris to their ancestral land, water, sites, *wahi tapu* and other *taonga* (or treasures)...Have particular regard to *kaitiakitanga* (guardianship of resources) and take into account the principles of the Treaty' (Ingram 1994). In consequence, to initiate any kind of mineral resource development, the developer has to negotiate with the landowner, who cannot refuse access for minimum impact developments. In the case of land belonging to the community, the Maoris have the right to refuse access if it is considered sacred by the tribe. The refusal of access can occur during any stage of the mineral development activity, but the Minister can overturn the decision if he or she considers the proposal to be in the public interest.

4.1.3 Canada

Indigenous rights in Canada are protected by the Constitution, and there is a long history of treaties between indigenous communities and the government. The recognition of the indigenous rights was not so late as in Australia, but also not as early as in New Zealand, where it was brought about at the beginning of colonization.

In 1763, the Royal Proclamation issued by King George II of Great Britain stipulated that a portion of land that remained vacant (without the presence of settlers) in possession of the indigenous people must be reserved for them. However, it was also stated that the indigenous peoples could transfer their rights to the Crown. After this, a series of Treaties were signed between the colonists and the indigenous communities while the new settlers expanded across the country. But what is the basis of legitimacy of the Crown's sovereignty over Canadian territory? Decisions of the Supreme Court of Canada asserted that the Crown assumed sovereignty over the territory of Canada by conquest or discovery.

In 1973, an important decision was taken by the Supreme Court of Canada in the case of *Calder vs. Attorney-General of British Columbia*, in which it was agreed by the majority of the Justices that Native title existed at law and continued to exist unless it had been validly extinguished (Isaac 1995). After this decision, the federal government began a comprehensive land claim process to settle aboriginal titles over land that remained in the possession of aboriginal people. The government has signed several agreements with the indigenous communities. Within these Modern Land Claim Settlements, the indigenous people waive their rights to issue future land claims in exchange for participation in the management of the land with respect to all the issues concerned with this process, such as environmental protection, tax regime, compensation, employment, and so on.

The Nunavut Land Agreement, signed in 1993 after 17 years of negotiation, is a model for transfer of title and management of lands and natural resources from indigenous peoples to the Crown. It is one of the most important agreements because the compromise it contains seems to be relatively fair and equitable for both parties. Whether it proves so in practice remains to be seen. It covers an extensive area in the northwest of Canada (355,000 square kilometres, including water and marine areas). Through this agreement, the Inuit Tribe 'cede, release and surrender' all their rights, titles, and interest in, and to lands and waters to the Federal Crown, in exchange for financial compensation, participation in the development of their lands, and the establishment of a special code for regulating Inuit lands.

Notwithstanding this history of treaties, land claim settlements, and the constitutional protection of indigenous rights, there is still scope for conflict in Canada. Firstly because, not all the indigenous peoples have signed treaties and, secondly, there are substantial tracts of land with un-extinguished aboriginal title that could be subject of claims. Furthermore, the Federal Indian Act – the most important legal framework for indigenous peoples, which endorses the holding of Indian status, the band councils (local government), and the rules for the

management and administration of Indian Reserves – does not apply to all indigenous groups. For instance, the Inuit of northern Canada do not have reserves and are therefore not affected by the Indian Act. The Metis group, like the Inuits, have no reserves and also have not signed any treaty. Their native rights are therefore subject to the Legislation of the Province (Barton 1993).

4.1.4 Latin America

Far-reaching mining and investment reforms in Latin America have placed some countries among the leaders in attracting investment, and also stimulated their economic growth. Recent surveys have shown that during the last five or six years the Latin American region has received more private exploration investment than any other region, and it now attracts more than 30% of the global exploration budget.

When Spaniards arrived in Latin America 500 years ago, the indigenous communities already had a relatively advanced mining industry. In fact, few new discoveries of alluvial gold were made under the Spaniards during the colonial era. The difference was that for the indigenous populations the resources extracted had a spiritual and religious value, not a monetary one. The Spanish Conquerors brought to the ‘New World’ the concept of mineral wealth. At the time of the conquest in 1492, some 75 million people were living in those lands, mainly in the highlands of the Andes and the lands located between northern Central America and Central Mexico. It is believed that more than half of the indigenous population perished in less than 50 years. By 1592, probably no more than a quarter survived.

In most cases, the Spanish and Portuguese conquerors adjudicated the ownership of the land by occupation, since there was no legal title that verified the entitlement of the indigenous people (Nesti 1999). It is suggested that in Latin America indigenous peoples have different kinds of titles that support their traditional rights over the lands they occupy. Some are communal land titles, which originated in colonial times. Others are based on the material possession of the land without the need of a written title. A third category is the title obtained as compensation for injustice and discrimination. There have been different approaches related to land ownership in accordance with the era in which they evolved (Plant and Hvalkof 2001).

The colonial period was characterized by the implementation of coercive regimes in which the indigenous communities were required to work in a determined area to produce a taxable surplus. After the conquest, the Spanish colonizers vested the property of the native lands in the Spanish Crown. Before

independence, some indigenous communities managed to buy lands from the Crown. This produced the so-called indigenous community. In the case of the inhabitants of the lowlands, they did not receive special protection or recognition of any rights, since the terrain they were living in was of little interest to the colonizers. These zones were consigned to the missionaries, who organized the communities within reserves.

With independence, individual forms of land property were promoted. Since the indigenous communities were people with little education, land ownership became concentrated in a few hands. Indigenous people were given small pieces of land for their subsistence in exchange for cheap labour. This approach caused conflicts that gave way to the creation of special *resguardos* that have their own political and social organization.

During the twentieth century, many changes occurred related to indigenous property rights over lands. Initially the collective ownership of indigenous lands was recognized with the prohibition of sale, mortgage, division, or prescription. Policies varied across Latin America. Around the 1940s, there was a growing concern about the marginalization of indigenous people, which led to the development of policies of integration. During the 1950s–1970s, many Latin American countries enacted agrarian reforms to promote better management of the lands. In some cases indigenous peoples received lands that were not suited to agriculture, leading to poverty. In the lowlands, colonization increased through farming and larger commercial enterprises, which produced a need to regularize the lands. Brazil promulgated the Indian Statute in 1973, in which the demarcation of the indigenous lands was stipulated, with a period of five years to carry out this task. During this period, the titling of the Amazonian lands was initiated. Peru recognized the inalienable collective ownership of the Amazonian Indians over their lands in 1974 through its Native Communities Act. In Colombia, the titling started in the 1980s and in Ecuador and Bolivia, in the 1990s.

One issue that has affected the regularization of lands is the concept of property with a social function that imposes limitations on the type of development undertaken. Within this context the states are empowered to decide which economic activity is the one that will have precedence in the use of land. The use is left to market forces. Plant and Hvalkof indicate the following approaches in indigenous land tenure:

- The *protective approach*, which is based on the indigenous right to be protected against extraneous impacts and market forces – within this approach, the majority of Latin American legislation stipulates that

indigenous lands are inalienable, imprescriptible and not subject to mortgage.

- The *rights-based approach*, which recognizes the indigenous ownership over the land and its resources within a multicultural state -- this approach is in line with the recognition of the traditional ownership of the lands before the conquest, the native title to land. It is comparable to the Australian approach, in which, as a part of the reconciliation for past injustices, the indigenous rights to the lands are recognized and affirmed.
- The *environmentally or ecologically determined approach*, which states the special capacity of indigenous communities to live and develop lands located in ecologically sensitive areas – this approach emphasizes the fact that from time immemorial indigenous communities have been living in ecologically sensitive areas without causing adverse impacts. Indigenous peoples generally use the land with the intention of preserving it for future generations. Perhaps they have a better idea of sustainable development than western societies.

The recent trend in Latin America is the recognition and affirmation of indigenous rights. It has been pointed out that ‘a new Latin American Constitutionalism firmly recognizes an increasing number of Latin American republics as multiethnic and multicultural societies and often provides special protection for indigenous lands and resources’ (Plant and Hvalkof 2001). During the last decade, Argentina, Bolivia, Brazil, Colombia, Ecuador, Guatemala, Mexico, Nicaragua, Panama, Paraguay, and Peru have recognized the rights of indigenous communities in their national constitutions. Countries such as Argentina and Chile also enacted new national laws specifically related to indigenous communities (Crain, no date).

The Colombian legislation pertaining to the recognition of indigenous rights and the management of traditional lands is considered to be one of the most advanced in Latin America. Before any mineral development commences in traditional lands there, indigenous communities must be consulted. The Colombian Constitution of 1991 in its Title I–Fundamental Principles reaffirms that the state is a Unitary Republic, decentralized, with territorial entities autonomous, democratic, participative, and pluralist. It states the recognition and protection of ethnic and cultural diversity. The Constitution recognizes the *resguardos* as territorial entities with equal rights to those of other territorial entities.

Colombia has gone even further, by regulating mining activities within terrains belonging to indigenous communities. The Mining Code of 2001 contains special norms for the exploration and exploitation of mineral resources in indigenous

lands. The code stipulates the obligation of mining titleholders to carry out their activities in such a way that they do not cause adverse impacts on ethnic groups located in the areas of the concession. It also contemplates the following:

- the obligation of the mining authority to delimit the mining areas inside indigenous territories;
- the obligation to consult with indigenous communities before the initiation of any prospecting or exploration activity;
- indigenous communities' preference for the granting of mining titles over third parties;
- concessions granted to the indigenous community as a whole, not individual members;
- a ban against mining activity in terrain considered by the indigenous authorities as sacred or with special social, cultural, or economic significance; and
- royalties and other income generated by the mining activity in indigenous lands directed to infrastructure and services that benefit the indigenous communities.

The new Ecuadorian Political Constitution of 1998 has some similarity to the Colombian one. Article 1 states that Ecuador is a multicultural and multiethnic state. It reaffirms in Article 83 that the indigenous communities are part of the Ecuadorian state. It also enumerates in a comprehensive way the special rights of these communities related to their identity, traditions, native title, conservation of biodiversity, intellectual property, administration of cultural heritage, conservation of languages, and protection of sacred sites as well as animals, plants, minerals, and ecosystems that are special from the traditional point of view. Indigenous communities must participate in decision-making related to the management and development of their lands and resources. Similar to the Colombian prescriptions, the Ecuadorian constitution establishes that the indigenous and Afro-Ecuadorian communities will exist as independent administrative entities. Ecuador has not escaped the indigenous uprising on a national scale. Quito was recently invaded by more than 10,000 indigenous people determined to be heard by the government. Some of their petitions were resolved positively after violent conflicts between the military and the indigenous population. As a result, a 23-point agreement was signed between the government and indigenous organizations.

The Bolivian Political Constitution also recognizes the state as ‘multicultural and multiethnic’. Article 171 recognizes indigenous ownership over the collective lands *tierras comunarias de origen* and guarantees the sustainable use and development of natural resources. It also recognizes indigenous communities as legal entities. According to the International Work Group for Indigenous Affairs, however:

During the year 2000, peasants and indigenous peoples realized that government policies with regard to land distribution and natural resources in practice denied them the territorial rights they had obtained over the previous decade through constitutional and legal reforms. In a context characterized by a diminution of their rights, the only alternative has been mobilization by the people in order to generate spaces for negotiation with government agents through such action (IWGIA 2001).

Argentina is the homeland of approximately 50,000 indigenous people, located from Kollas in the Andean northwest to Guaranis and Tobas in the northeastern lowlands and to Onas in the south of Tierra del Fuego. The Argentinian Constitution of 1994, Article 75, recognizes the preexistence of indigenous communities. It promises to guarantee the indigenous rights to education, self-determination, management of traditional lands, and participation in decision-making concerning the development of their lands. It also guarantees the possession and collective property of the traditional lands, which cannot be sold, transferred, mortgaged, or subject to liens. The participation of indigenous peoples is assured in all matters that can affect them. Due to the Argentinian federal system, the implementation of national laws pertaining to the indigenous communities’ lands rights and their management is confused, since some laws at the provincial level are contrary to national ones. This situation has led to conflicts in the northwest on account of the delays in the regularization of their traditional lands. Recently the Lhaka Honhat Association of Indigenous Communities presented a complaint to the Inter-American Commission on Human Rights against the Argentinian state, due to the lack of environmental impact assessments and in pursuance of the regularization of their traditional lands in the Salta Chaco.

The Peruvian Constitution of 1993 follows a similar pattern to the constitutions just described. It establishes that everyone has the right to his or her ethnic and cultural identity. It also recognizes and protects Peruvians’ ethnic and cultural plurality. The constitution reaffirms the right of the Peruvian people to use their native language. It recognizes indigenous communities as artificial persons and therefore as having legal capacity. Related to the ownership of lands, the new

Peruvian constitution deviated from the previous approach, stipulating that property can be particular, collective, or in another associate form. Within the new prescriptions the indigenous lands are transferable and mortgageable. Indigenous people are free to dispose of their lands.

Nevertheless, despite the wider constitutional and legal recognition in Latin America of indigenous rights, including the right to the management of their traditional lands, there still exists scope for conflict. As indicated, generally the ownership of minerals in these countries is vested in the states. This has generated problems in traditional lands subjected to concessions to carry out mineral prospecting or exploration activities. Normally the conflict is between the indigenous communities and the mining companies, ignoring that the problem also rests with the governments that lack policies for the management of these lands or the infrastructure to implement laws and regulations or monitor compliance. In this respect, ILO Convention 169 stipulates in Article 15(2):

In cases in which the State retains the ownership of mineral or subsurface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages they may sustain as a result of such activities.

Despite the willingness of some mining companies to carry out their activities in line with international standards that are conducive to sustainable development, conflicts still arise since in many cases there is no coherent legislation on all the different issues that arise. There is a lack of proper information about policies and institutions relevant to mining activities (Mate 2002). The main tool to avoid future problems is public consultation with the indigenous communities in which they must be empowered to participate in the management of their lands and in the decision-making process to carry out a particular project.

Another issue that has proved to be important in the granting of titles of indigenous land is the method of demarcation, since some countries are still using manual methods, which are not the most reliable solution. The most modern method, and the one that will avoid confusion, is the satellite Global Positioning System. Since indigenous communities have the best knowledge of the delimitation of their traditional lands, they have played an important role in the demarcation

and titling processes. Examples of this are found in Peru and Ecuador, where communities participated actively in the titling, demarcation, and mapping of their terrains. The participation of the indigenous communities during these processes is of vital importance, since it contributes to the understanding of the indigenous system of land management.

In conclusion, countries in Latin America, which have a considerable proportion of indigenous peoples, are in the process of regularizing their rights, including those related to traditional lands. This goal will be achieved with the willingness and cooperation of the two other main stakeholders – the state and the mining companies. The large mining companies are already implementing the consultation and participation of the communities that can be affected by their projects prior to their initiation.

4.2 Summary of Regional Developments

With economic globalization and the liberalization of markets, all the countries endowed with mineral resources are competing to attract private investment. They see the development of their natural resources as the key to the growth of their economies. Countries with indigenous communities are in the international limelight because of the global awareness of the need to protect indigenous rights. Therefore in the delineation of their policies, these countries must take into account the need to address the protection of those indigenous rights that have already received recognition in the international arena. Also, governments must offer systems through which their laws can be implemented.

Arguably the treatment of indigenous rights issues in Australia, which until recently denied indigenous participation in the development of the nation's natural resources on a just and equitable basis, was the least just of the three British colonial systems analyzed. This is a contemporary issue in Australia and much remains to be done to achieve a fair solution. The recognition and protection of indigenous rights are not enshrined in the Constitution and therefore depend generally upon common law. The conflict of interests between Aboriginal rights and the development of natural resources must be addressed as a matter of urgency. This issue has already had a negative impact on the mineral industry during a vulnerable phase of low prices in metal commodity markets, resulting in a downgrading of Australia's perceived attraction for exploration and an outflow of funds to more competitive countries.

The Treaty of Waitangi in New Zealand in 1840 was hailed as a virtuous model agreement ahead of its time, as it safeguarded the interests of indigenous peoples,

upholding their equality with the European settlers. However, a conflict related to its interpretation still exists, leaving the recognition of the rights of the indigenous peoples in the hands of the courts.

In Canada, where the rights of indigenous peoples were largely protected from an early stage in the country's colonial history, the courts have provided a successful mechanism through which indigenous people have secured their rights. Furthermore, these rights and the treaties' principles are enshrined in the constitution, and modern land agreements have proved to be a workable system because they recognize and implement rights. Nevertheless, vast terrains in Canada are still subject to native title claims because their indigenous owners never signed any treaty. Therefore a more rapid strategy is needed to fast track the settlement of conflicts arising in relation to the development of natural resources located in these territories.

In Latin America, the issue is not the recognition of indigenous rights, which have been enshrined recently within the constitutions of some countries, but the provision of straightforward regulations to implement national laws. Also, in countries with two-tier systems, such as Argentina and Brazil, coherence and consistency between central and provincial laws must be achieved in order to avoid erroneous interpretations that lead to social conflicts.

In the delineation of mining policies related to land use, countries with indigenous communities should take into account the following, among other issues:

- the customary laws of these communities, in which an equitable balance must be found, allowing for the ethnic diversity of the communities involved;
- the distribution of the wealth generated by the mining activities within the communities concerned;
- training by governments, in conjunction with mining companies offered to indigenous peoples compatible with their new activities, which will generate social capital that will compensate for eventual mine closure and will prevent the need for relocation of these communities within unfamiliar settings;
- clear delimitation of indigenous land claims;
- transparent procedures for indigenous land regularization; and
- the establishment of administrative rules and procedures related to information sharing and consultation.

The best way to resolve conflicts arising during the development of natural resources, especially in the mineral sector, could be the signing of specific comprehensive agreements between governments, developers, and indigenous peoples who have interests in a project. This type of special agreement will encapsulate all the rules that deal with the use of land, environmental protection, employment, taxation, and so on while establishing all the obligations and rights of the parties involved. With these agreements, all parties will have security in areas of potential conflict. The government and the indigenous communities would know that the investors will comply with their obligations, while the investors would know that a contract will have the necessary stability. The most important point is that the country will maintain its international image, because these agreements will reflect an equilibrium that harmonizes the interests of the states, the developers or investors, and the indigenous peoples as traditional owners of the lands.

Any negotiation between stakeholders must be conducted within an environment of authentic goodwill, mutual respect, and readiness to compromise interests. This negotiation must have as a final goal the achievement of fair, just, and equitable agreements that can be of mutual lasting benefit and can avoid the costs and delays associated with long judicial processes while promoting sustainable development.

ANNEX 1: RECOMMENDATIONS ON INDIGENOUS PEOPLES FROM BREAKING NEW GROUND

The probability of a sustainable outcome increases as each of the following 14 elements is put in play during an encounter [between native peoples and minerals companies].

- Sovereignty is respected and strengthened.
- The rights and access to indigenous land and nature are secured.
- At the beginning, both indigenous and non-indigenous stakeholders' presuppositions about each other are aligned with fact.
- The desired outcomes of the encounter for indigenous peoples emerge from meaningful, informed participation.
- Non-indigenous stakeholders fully and opportunely disclose to the indigenous group their plans, agreements, and financial arrangements, related to the indigenous group in a culturally appropriate manner and language.
- Likewise, the non-indigenous stakeholders identify and disclose all the risks of a proposed mining endeavour. Full risk assessment means not only of the threats posed by the loss of land but also the full range of social, economic, and environmental impacts.
- Prompt unambiguous institutional and financial arrangements are made to mitigate each risk.
- Benefit-sharing arrangements are made that step beyond compensation for damages.
- Indigenous peoples, as an informed group, have the right to approve, reject or modify decisions affecting their livelihoods, resources and cultural futures.
- Should restoration of a disturbed habitat prove impossible, then the non-indigenous stakeholders make provisions for an improved habitat that supports a lifestyle acceptable to indigenous peoples.
- Basic human and civil rights are protected, as specified in international conventions.

- The focus of an encounter is on protecting indigenous wealth, especially the social relations that guide the sustainable use of natural resources.
- Financial and institutional arrangements are forged that bridge the discrepancy between the multigenerational time frame of indigenous peoples and the short time frame of mining.
- A guarantor is established to assure compliance with and funding of any negotiated and mutually satisfactory agreements.

Given the uncertainties and extreme risks, it is perhaps best to extend the environmental precautionary principle approved in Rio to the impact of mining on indigenous peoples. A Precautionary Principle for Mining in or near Indigenous Peoples might read:

Non-indigenous stakeholders in mining shall use the precautionary approach to protect the indigenous peoples and the environment that supports them. Mining cannot take place without respect for the principle of prior informed consent and participation in their self-defined indigenous development. Where there are threats of serious or irreversible damage, scientific and economic uncertainty shall not be used to postpone cost-effective measures to avoid and mitigate risks and to prevent harm to indigenous livelihoods and cultures (See Chapter 2 of *Finding Common Ground*)".

Breaking New Ground, pp.157-158

In two workshops held by MMSD on indigenous people and mining, it was suggested that an international indigenous peoples organization be established to share experience and strategically advise, direct, and monitor industry performance in the arena of indigenous relations. With the help of governments and the international community, this organization could oversee development and implementation of a set of core principles on relationships with indigenous people. Leadership from existing indigenous organizations will be necessary if this new group is to succeed. Its value would in part depend on inclusiveness and the ability to attract a wide range of indigenous organizations with disparate views. It should also build on the networks established through the efforts of other groups.

Breaking New Ground, p.396

Indigenous land claims deserve special consideration in this process [i.e. the process of setting laws and policies that offer better opportunities for avoiding and resolving conflicts during land negotiations]. Failure to resolve land claims creates significant tensions and often causes affected communities to be suspicious of any activity that requires use of or access to

indigenous territories. Governments and companies could make considerable progress by maintaining respect for the principle of prior informed consent freely given. For companies, this would mean behaving as if consent is required to gain access to indigenous lands even when this is not the case in law; this is a prelude to free and fair negotiation on land access issues. For governments, it does not mean that they would subordinate all sovereign national interests to local concerns, but rather that indigenous communities should be recognized as having clear rights within the territories they occupy. The extent of indigenous territories needs to be clearly defined for the security of traditional peoples, and open dialogue needs to be maintained on these issues. Other actors such as the NGO community can assist with these process.

Breaking New Ground, p.402

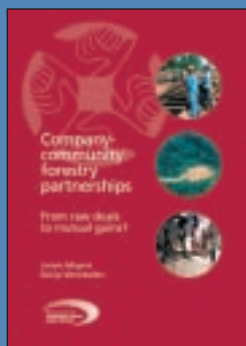
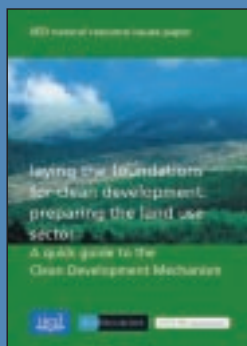
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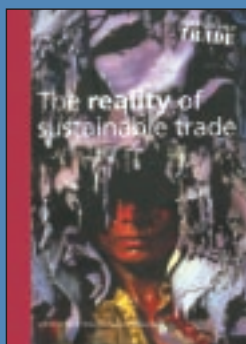
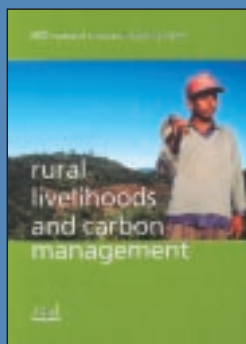
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This report contains an overview of the Mining, Minerals and Sustainable Development (MMSD) project's analysis and engagement on the relationship between indigenous peoples and the mining and minerals sector. Along with an overview of relevant MMSD work, the report includes edited versions of three research reports commissioned by MMSD to address different aspects of that relationship. These address the status of indigenous peoples in relation to mining and minerals under international and national legal systems, and assess the overall issues, challenges and dynamics associated with encounters between indigenous peoples and the mining and minerals sector.

ISBN 1 84369 469 7

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