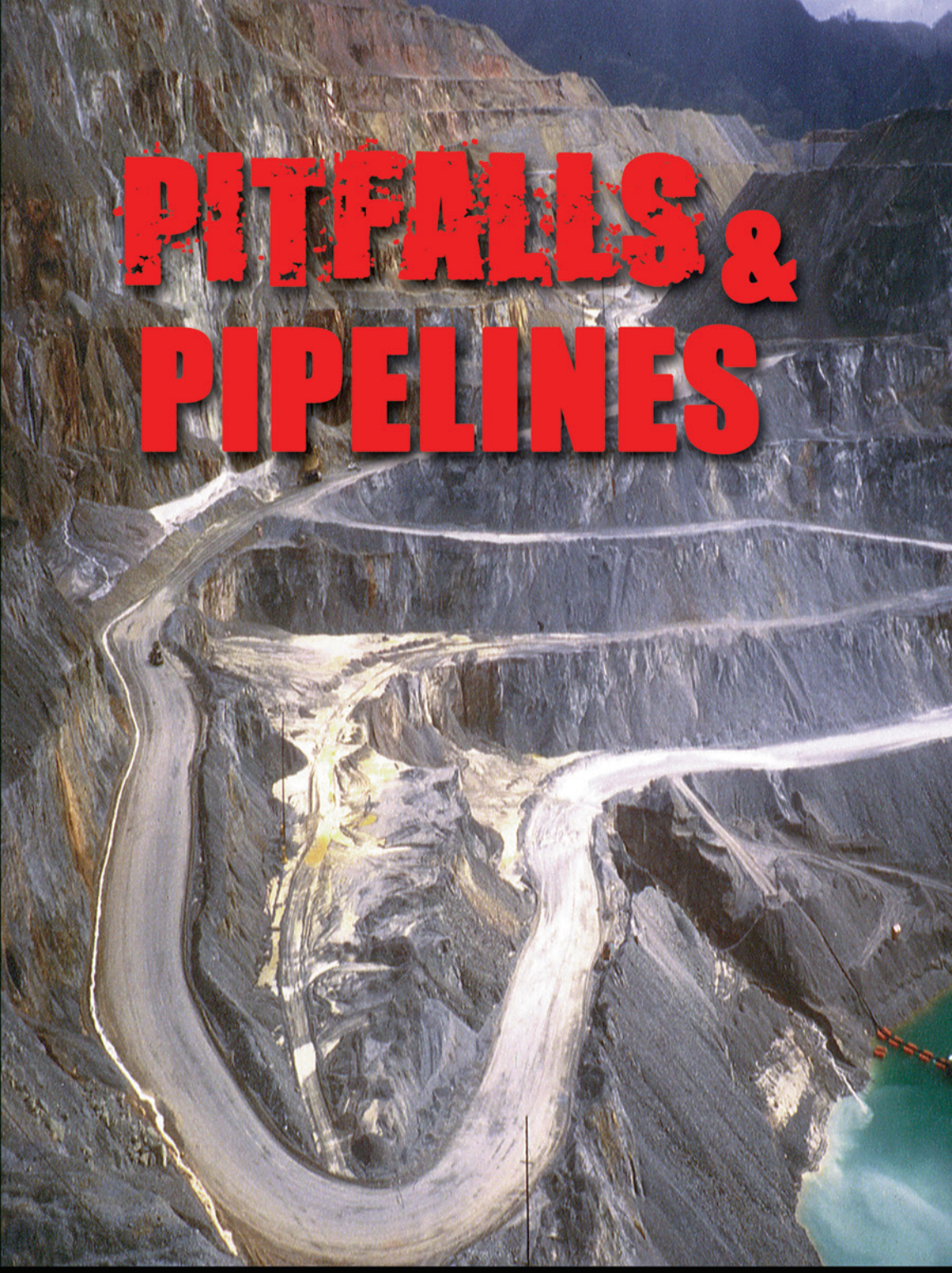

PITFALLS & PIPELINES

Indigenous Peoples and Extractive Industries

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Indigenous Peoples and Extractive Industries

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Acronyms

ACCCE	American Coalition for Clean Coal Electricity
ACHPR	African Commission on Human and People's Rights
AGM	Annual General Meeting
AMD	Acid Mine Drainage
CAFTA	Central American Free Trade Agreement
CAO	Compliance Advisory Ombudsman (for IFC)
CCS	Carbon Capture and Storage
CEC	Central Empowered Committee (of India's Supreme Court)
CEDAW	Committee on the Elimination of Discrimination against Women
CEO	Chief Executive Officer
CERD	Committee for the Elimination of all Forms of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CIF	Commodity Index Fund
CSR	Corporate Social Responsibility
ECA	Export Credit Agency
ECOSOC	Economic and Social Council
EIA	Environmental Impact Assessment
EIR	Extractive Industries Review
EITI	Extractive Industries Transparency Initiative
EPA	Environmental Protection Agency (USA)
ERA	Energy Resources of Australia Ltd.
ESIA	Environmental and Social Impact Assessment
ETF	Exchange Traded Fund

FLNKS	Kanak Socialist Front for National Liberation
FPIC	Free, Prior and Informed Consent
IACHR	Inter-American Commission on Human Rights (IACHR)
IBA	Impact and Benefit Agreement
ICMM	International Council on Mining and Metals
IEA	International Energy Agency
IFC	International Finance Corporation (part of the World Bank Group)
ILO	International Labor Organization
IPIECA	International Petroleum Industry Environmental Conservation Association
IPRA	Indigenous Peoples Rights Act
ISO	International Organization for Standardization
IUCN	International Union for the Conservation of Nature
LNG	Liquid Natural Gas
MIGA	Multilateral Investment Guarantee Agency (part of the World Bank Group)
MOSOP	Movement for the Survival of the Ogoni People
NCP	National Contact Point (of the OECD Guidelines for Multinational Enterprises)
NGO	Non-Governmental Organization
OAS	Organization of American States
OECD	Organization for Economic Cooperation and Development
OHCHR	Office of the High Commissioner for Human Rights
PFCs	Perfluorocarbons
PRI	Principles for Responsible Investment
PwC	PricewaterhouseCoopers
REDD	Reducing Emissions from Deforestation and Forest Degradation in Developing Countries
RSPO	Roundtable on Sustainable Palm Oil

SLN	Société le Nickel
SMSP	Société Minière du Pacifique Sud
UN	United Nations
UNDRIP	UN Declaration on the Rights of Indigenous Peoples
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNEMRIP	United Nations Expert Mechanism on the Rights of Indigenous Peoples
UNHCHR	United Nations High Commissioner for Human Rights
UNPFII	United Nations Permanent Forum on Indigenous Issues
UPR	(United Nations) Universal Periodic Review
WTO	World Trade Organization

Glossary

Acid Mine Drainage	The outflow of acidic water from mines (aka acid rock drainage).
Alluvial mining	Mining from the sediment of rivers (aka placer mining, although placer refers to beach sand and gravel mining).
Artisanal mining	Subsistence or smaller-scale mining, often part of the informal labor sector (aka small-scale mining).
Block caving	Automated underground mining where the ore is allowed to collapse before being collected.
Brownfield	Land previously used for industrial purposes. In the case of mining refers to the expansion or rehabilitation of mines.
Community engagement	A process in which a proponent builds and maintains constructive relationships with local communities impacted over the life of a project.
Conventional oil	Petroleum produced from oil wells.
Creditor	A person or institution to whom money is owed (those who lend money to the company).
Dredge mining	Mining with the use of dredges, and although you can get dry dredging—for instance with minerals sands—it generally refers to excavation from rivers, coastlines, wetlands or specially-flooded lagoons.
Equity	Financial ownership of a business by a shareholder.
Fracking	Hydraulic fracturing is the propagation of fractures in a rock layer, as a result of the action of a pressurized fluid (aka hydraulic fracturing).
Greenfield	Land where there has been no previous development.
Indigenous peoples	There is no agreed definition of indigenous peoples, with self-definition being a key part. A working definition is to peoples and nations who have a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, and consider themselves distinct from other sectors of the societies now prevailing on those territories.

Local community	A group of people living near a project who are potentially impacted by a proposed project.
Overburden	The rock and soil that lies above an ore body, which is removed during surface mining (aka waste rock or spoil).
Mountaintop removal	A form of surface mining that involves the mining of the summit or summit ridge of a mountain, in search of coal seams.
Parent company	A corporation that owns enough voting shares in another firm to control its management and operations.
Private company	A corporation which does not sell shares to the public.
Public company	A corporation which is "publicly listed" on a stock exchange, and as such owned by shareholders.
Sovereign Wealth Fund	A state-owned investment fund, or entity that is commonly established from balance of payments surpluses, official foreign currency operations, the proceeds of privatizations, governmental transfer payments, fiscal surpluses, and/or receipts resulting from resource exports.
Shareholder	An individual or institution that legally owns equity (a share of stock) in a corporation (aka stockholder).
Stakeholder	A broad group of people and organizations with an interest in a proposed project.
Subsidiary company	A corporation completely or partly owned, and partly or wholly controlled by another company that owns more than 50% of its shares.
Surface mining	A type of mining in which overburden is removed. It is the opposite of underground mining (aka open-pit, strip or open-cast mining).
Tar sands extraction	Extraction of petroleum from loose sand or partially consolidated sandstone material, which is a type of unconventional petroleum deposit (aka oil sands or bituminous sands extraction).
Unconventional oil	Petroleum produced or extracted using techniques other than the conventional (oil well) method.
Underground mining	Mining by digging tunnels or shafts into the earth to reach buried ore deposits (aka sub-surface mining).
Usucapion	The right to property is legally held by uninterrupted possession for a certain term.
Usufructuary	A right to benefit from property that is held in common ownership or that may be titled to others.

Foreword

The extractive industry (mining, oil and gas extraction) and its impacts on indigenous peoples is a historical and continuing problem. The International Labor Organization paid its attention, for the first time, to indigenous peoples in the early 1950s when some researchers came up with reports of slave-like labor conditions of indigenous miners in Bolivia. Up to now, at the international arena, when indigenous peoples make their interventions, there are always cases of how extractive industries displaced indigenous peoples from their territories or destroyed their communities. What is more disheartening are the ceaseless reports of continuing violence and grave human rights violations against indigenous peoples in communities where oil, gas or mineral extraction is taking place.

This is the main reason why, as the Chairperson of the UN Permanent Forum on Indigenous Issues together with other Forum members, we pushed for a recommendation at the Seventh Session (2008) that extractive industries be a subject of an expert workshop before the Forum's Eight Session (2009). For this to materialize, we had to agree that there would be no budgetary implications for the UN. This meant that we would have to raise the money on our own to do this. If we pushed that this be funded by the UN, there was a high risk that the Finance office of the UN would not approve this and such a workshop would not see the light of day.

Fortunately, there were donors and UN entities who willingly contributed. We owe our thanks to The Christensen Fund, the Norwegian Agency for Development Cooperation

(Norad) and International Fund for Agricultural Development (IFAD) who provided the main bulk of the funding for this expert workshop and the international conference to happen. Other donors and an advocate organization also supported these processes and the book publication. These include the Evangelischer Entwicklüngsdienst (EED) of Germany, Catholic Agency for Overseas Development (CAFOD) and the International Work Group on Indigenous Affairs (IWGIA).

Since Tebtebba was the organization who raised the funds and organized the expert workshop, we took advantage of this opportunity to organize the "International Conference on Extractive Industries and Indigenous Peoples" before the expert workshop. Many indigenous leaders and activists, as well as support groups, expressed their desire for such an event because the last time a similar process was organized was 13 years ago. Since then, many developments took place in terms of changes in the ways extractive industries operate and the responses taken by indigenous peoples. Significantly also, in 2007 the UN General Assembly adopted the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).

This conference aimed to take stock of what the current situations are in relation to the state of the industry, especially in terms of its relations with indigenous peoples, and the responses and strategies adopted by indigenous peoples. It will be chance to assess what the trends are in terms of their resistance or engagement. If there are partnerships forged with mining, oil or gas companies what came out of these?

The results of this conference were fed into the UNPFII Expert Workshop. The Expert Workshop included not just representatives of indigenous peoples and their support groups but also government representatives, experts, some members of the UNPFII, and representatives of UN agencies, funds and donor bodies. This book includes the Final Report of the Workshop (UN Doc. E/C.19/2009/CRP. 8), which was adopted by all of us, members of the Forum, in our Eighth Session in 2009.

For so long, many indigenous peoples in almost all parts of the world have resisted the entry of extractive industries. This resistance, however, also resulted into gross and massive viola-

tions of their rights to their lands, territories and resources and to self-determination. It is also because of this that many of the last remaining oil, gas and minerals are still found in indigenous lands and waters.

Since globalization has been further facilitated with the entrenchment of the neo-liberal ideology or what is commonly referred to as the Washington Consensus, the liberalization of the entry of mining, oil and gas corporations into indigenous territories was made possible by most states, both developed and developing. More private capital, including speculative investments, compared to public money are put into the extractive industries. Thus, it is more difficult to make the extractive corporations and their investors more accountable. The needs of so-called emerging economies, like China, India, Brazil, for more metals and minerals, oil and gas, to feed their rapid industrialization is also having impacts on indigenous peoples.

Many indigenous peoples have employed everything within their means to address this issue, but what have been done so far can never be enough. They have and continue to take actions ranging from barricading to stop operations, strikes, filing temporary restraining orders (TROs) against companies, filing civil and criminal cases, using international complaints and grievance mechanisms, campaigning in countries where the corporations have headquarters or where their investors are, to taking up arms, among others. The demand that companies should get their free, prior and informed consent (FPIC) before they enter their communities remains as a priority in their approaches.

I am hoping that the stories, analysis and recommendations, which are contained in this book, will be able to help indigenous peoples strengthen further their struggles to assert their rights and empower themselves. I also hope it will help enlighten extractive industry corporations, investors, insurance companies, and state actors to understand better what indigenous peoples are asking for. Obviously, more dialogues and conflict resolution processes have to be done between indigenous peoples on the one hand, and the state and the extractive industry corporations on the other. I strongly believe

that sustainable development cannot be achieved if extractive corporations continue business as usual.

The role of the state from the global, national to the local levels in terms of regulating the behavior of corporations needs to be strengthened. Unfortunately, what we see is more collusion between the state and the extractive industries to extract the last remaining resources, many of which are in indigenous peoples' territories. This book is a cry for help.

I look forward to more processes between indigenous peoples and between them and their support groups—whether from civil society organizations, academia, churches, as well as with UN agencies, funds, programs and bodies—to tackle this problématique. It behooves all of us to take to heart and to act with passion to stop actions of the private sector and the state, which dehumanizes and marginalizes those who want to make the world more livable for the future generations.

Victoria Tauli-Corpuz
Executive Director, Tebtebba
Former Chairperson (2005-2009)
UN Permanent Forum on Indigenous Issues

Introduction

The genesis of this book is in the "International Conference on Extractive Industries and Indigenous Peoples," which took place in Manila, Philippines on March 23-25, 2009—referred to from now on as the 2009 Manila Conference. It draws on the core inputs to that meeting, and its key appendix is the Manila Declaration, which was agreed there.

The context for that meeting follows in the second part of this introduction. It provides an explanation of the history of indigenous activities around the issue of extractive industries, and sets out what the meeting itself was trying to achieve.

Although the book draws on sources from that conference, it seeks to do more than just report it. The aim of the book is to build on the conference input to inform—and by doing that, empower—indigenous activists, indigenous community leaders and their supporters on the issues around the extractive industries. The book aims to educate this prime readership of the background to, and latest developments in, how indigenous communities relate to the extractive industries. It covers a comprehensive range of subjects. At times some of the input—especially from experts commentators—is reasonably technical, but the hope is that it will be of use to interested indigenous parties.

The book follows the general format of the 2009 Manila Conference agenda. As such it is split into two parts, with concluding observations. Part 1 provides a summary of the questions raised by indigenous peoples facing extractive projects. Part 2 seeks to explore how indigenous peoples are respond-

ing to those issues identified, working up from local struggles to the international arena. In doing so it pays particular attention to review legal strategies and complaint mechanisms.

Part 1 starts with a chapter, which is a general introduction to the extractive industries. It covers the environmental, and then the social and cultural impacts of the extractive industries on indigenous peoples. It is illustrated by a number of case studies, which explore these issues in greater detail, including one by Abigail Anongos of the Cordillera Peoples Alliance exploring the gender impact of mining on indigenous women.

The section then seeks to explore two topics in more detail. Chapter 1.2 is a paper written by Roger Moody, who is an experienced international researcher and campaigner who has focused on the issue of mining, especially as it relates to indigenous peoples. It analyzes the situation of global mining finance after 2008 financial crisis. Although the situation in the global economy remains fluid, Mr. Moody casts doubt on a resumed commodities boom. The situation, however, in China, and to a lesser extent, India is key to this analysis. The chapter also summarizes some of the more complex investment tools that have contributed to the recent global credit crisis, and are evolving to—temporarily—inflate investment in commodities.

Chapter 1.3, written by Geoff Nettleton, Coordinator of Indigenous Peoples Links (PIPLinks), reviews the connections between mining and climate change, particularly as they impact upon indigenous peoples. It focuses on the frequently underestimated role of coal in climate change. The chapter investigates mining's contribution to global warming, before reviewing the impact that climate change will have on mining—and those unfortunate enough to be living near climate change-affected mines. Finally, it examines the arguments around uranium's contribution to climate change and to indigenous peoples.

As noted, the second part reviews the responses of affected indigenous peoples to the issues raised in the first chapter of this book. In doing so it becomes more of a handbook reviewing what communities should be aware of, and what actions can be taken.

In order to provide structure the issues are broken down into chapters, although in practice it is somewhat artificial to separate them out. For instance, using a multinational company's own grievance procedure is often a direct challenge to the company, yet at the same time it is obviously engaging with an international complaints mechanism (albeit a company specific one), which then also requires organization at the local level. Many more of these actions can co-exist together. For example, a call for international support could assist in supporting a local struggle by popularizing the issue in the media, as well as mobilize a direct challenge to the company, via urgent actions, and provide expert or financial support for legal challenges or the filing of complaints. In fact, most indigenous communities will use a wide range of these various strategies. In order to easily assemble the key points together, however, Part 2 works with the following categories as chapters.

Chapter 2.1 reviews actions taken at the local level by affected communities. Obviously for indigenous peoples' communities all initial activities will be "local," but the chapter acts as a starting point for exploring what needs to be considered at the community level in responding to a large-scale extractive project. It then addresses networking, noting how such local actions often lead to wider alliances. The chapter also considers the concept of No Go Zones, with a box by Robert Goodland, an environmental scientist specializing in economic development. It is also illustrated by case studies on local activism from the Philippines and Nigeria, the latter provided by Legborsi Saro Pyagbara, of MOSOP.

Chapter 2.2 then moves on to cover networking, which consolidates the work of affected communities at a regional, national or international level. It looks at legislation covering both indigenous rights and the extractive industries, as well as dealing with human rights concerns at the national level. It includes two detailed case studies covering Australia by Brian Wyatt of the National Native Title Council, and Kanaky-New Caledonia by Sarimin J. Boengkih, Agence Kanak de Développement.

In Chapter 2.3, there is a consideration of direct challenges to the companies or those investing in them. It reviews

the basic structures of companies, and the opportunities for intervention, with both private and public investments. The case studies cover campaigning around Vedanta in India, and Rio Tinto in Australia.

Chapter 2.4 considers the issues around direct negotiations and engagement with companies. It looks at what the often-used term "best practice" means in these circumstances, both from an indigenous and a non-indigenous perspective. Case studies that review these concepts are taken from Kanaky-New Caledonia and Bolivia.

Chapter 2.5 is written by Dr. Stuart Kirsch, Professor of Anthropology at the University of Michigan, who worked for many years on the Ok Tedi copper and gold mine in Papua New Guinea. It is a review of the responses of the mining industry to campaign criticism. Indigenous strategies for dealing with the extractive industries have been evolving over decades, but in the same manner, the companies have also been developing their own strategies in an ongoing "arms race" for control of indigenous resources. This chapter examines corporate strategies that seek to disempower indigenous communities, including the industry's creation of new concepts such as "sustainable mining."

Legal challenges are then considered in Chapter 2.6, working up from cases in local courts to what regional and then international options there may be, especially for legal action in the home country of a multinational. The accompanying case study is based on the presentation at the 2009 Manila Conference by Julie Cavanaugh-Bill, a lawyer who represented the Western Shoshone Defense Project in their various legal actions. This is followed in Chapter 2.7 by a review of international processes and complaints mechanisms, divided between the UN Human Rights Mechanisms and a number of voluntary mechanisms, some of which are provided by financiers and some by the companies themselves. It is accompanied by a technical paper from Asier Martínez de Bringas, then Professor of Constitutional Law at the University of Girona, Spain, which was presented at the 2009 Manila Conference, and examines the extra-territorial possibilities to apply ILO Convention 109.

The final chapter of the section, Chapter 2.8, reviews the importance of the concept of free, prior and informed consent (FPIC) to indigenous peoples in relation to the extractive industries. It summarizes where FPIC has appeared in earlier chapters, before considering other relevant issues and general observations in considering that the correct implementation of FPIC needs to be the starting point for all relationships between indigenous peoples, the state and extractive industry companies.

In terms of the overall book, we are grateful to all of those who produced expert papers and case studies. The case studies are primarily drawn from the 2009 Manila Conference, but include other inputs if they seemed more relevant. Also, not all of the indigenous participants to that meeting presented papers, so this book also seeks to synthesize much of the information that was shared by different participants in panels or plenary sessions. We realize that the methodology used in putting this together may mean that some of the individual voices from the conference have been lost. We hope that by synthesizing, we have in general made their voices stronger. But of course any editorial statement summarizing points may not represent all voices from the conference, and any errors in transcription or opinion are, of course, down to the editor alone.

Historical Context to the Book

Indigenous peoples' territories in almost all parts of the world are richly endowed with minerals, oil and gas. This endowment, however, has become a curse to many indigenous peoples because this has attracted and continues to attract extractive industry corporations to their territories. The activities of these corporations have led to the worst forms of environmental degradation, human rights violations and land dispossession. Environmental degradation comes in the form of erosion of biological diversity, pollution of soil, air and water, and destruction of whole ecological systems, and other

environmental impacts. Human rights violations range from violations of indigenous peoples' right to self-determination (which includes the right to determine one's economic, social and cultural development); rights to lands, territories and resources; displacement; and violations of the most basic civil and political rights including killings, arbitrary arrests and detention, torture, arson, and forced relocation.

Consequently, cultural diversity has also been grossly eroded because of the destruction of biological diversity and lands upon which affected indigenous cultures are based, and the influx of settler populations whose numbers overwhelm the indigenous populations. Since modernization and industrialization is the main framework of states and extractive industries, inevitably these destroy and undermine the traditional livelihoods of indigenous peoples and the sustainable use of their natural resources and ecosystems. Corporations enter into indigenous peoples' territories with the promise of development by providing jobs, new infrastructure and payment of governmental taxes. Such promises have, however, remained largely unfulfilled and many communities face increased poverty through loss of their own livelihoods and increased conflict.

In recognition of this, a first global "Mining and Indigenous Peoples Consultation" was held in London in May 1996. The meeting was hosted by the World Council of Churches and this developed the "Indigenous Peoples' Declaration on Mining," which reiterated that indigenous peoples should be empowered to make decisions on whether mining should take place in their communities or not. It also pinpointed hot spots, which at that time, were high profile conflicts between indigenous peoples' communities and corporations.

Despite this work, 13 years after that conference was held, the situation had grown worse. A growing number of complaints and cases related to all extractive industries, and not just mining, had been filed by indigenous peoples and their support networks against extractive corporations and states in courts of various countries and at various intergovernmental bodies like the Committee on the Elimination of Racial Discrimination and the Inter-American Court of Human Rights.

On the positive side, the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) was adopted by the General Assembly in 13 September 2007 after more than 20 years of drafting. This latest addition to international human rights law provides a key instrument for indigenous peoples to exercise their rights in relation to extractive industries. Since 2007, however, the extractive industries sector has remained one area resistant to significant shifts to recognize and adequately respect indigenous peoples' rights.

The International Conference on Extractive Industries and Indigenous Peoples

In every session of the UN Permanent Forum on Indigenous Issues (UNPFII), since it was created in 2002, indigenous peoples have presented reports on how extractive industries corporations have caused environmental degradation, cultural ethnocide, and gross human rights violations. At the 7th Session of the Forum, which was held from 22 April to 2 May 2008, a recommendation was adopted, which aimed to respond to this issue. Paragraph 72 of the Permanent Forum's Report of the 7th Session (E/2008/43) stated:

> *The Permanent Forum decides to authorize a three-day international expert group workshop on indigenous peoples' rights, corporate accountability and the extractive industries, and requests that the results of the meeting be reported to the Forum at its eighth session, in 2009. The report of that workshop can feed into the eighteenth and nineteenth sessions of the Commission on Sustainable Development, which will address the themes of mining, chemicals, waste management and sustainable consumption and production patterns, and contribute to the review by the eighteenth session of the Commission.*

Indigenous peoples' representatives agreed that this expert workshop call was necessary and timely, and therefore proposed the holding of an international conference of indigenous peoples on the issue of extractive industries be convened immediately before the International Expert Group Workshop. The two meetings therefore both took place in Manila in March 2009 under the chairmanship of Victoria Tauli-Corpuz, the then Chairperson of the UNPFII.

The three main objectives to the conference were:

1. To examine the social, cultural, economic, and environmental impacts of extractive industries (oil, gas and mining) on indigenous peoples and their lands, and to analyze how the rights of indigenous peoples as contained in the UNDRIP are respected or violated. This involves sharing the various responses and actions taken by indigenous peoples affected by the extractive industries, and the lessons learned from these;
2. To make recommendations to States, the UNPFII, the Inter-Agency Support Group for Indigenous Peoples and other multilateral bodies on the roles they can play in ensuring that the extractive industries adhere to international standards on human rights of indigenous peoples and standards of corporate accountability;
3. To establish a continuing mechanism for coordination and solidarity among indigenous peoples affected by extractive industries.

The 2009 Manila Conference was organized by Tebtebba (Indigenous Peoples' International Centre for Policy Research and Education) and an international advisory committee, with financial support from The Christensen Fund (TCF), the Norwegian Agency for Development Cooperation (Norad), Evangelischer Entwicklüngsdienst (EED) of Germany, Third World Network (TWN), and the Catholic Agency for Overseas Development (CAFOD). It was attended by 100 indigenous peoples and support organizations from 35 countries around the world.

A wide range of presentations was made, with detailed and enthusiastic sharing of experiences. There were a number of expert interventions, as well as shared panels and workshops.

The six panels covered the impacts of extractive industries on indigenous peoples and their responses; free, prior and informed consent; conflict situations; indigenous women and extractive industries; roles played by bilateral donors and other multilateral bodies; good practices and extractive industries.

The main output of the conference was the Manila Declaration, which has become a widely-quoted expression of the continuing grave concerns of indigenous peoples at the impacts of these industries upon them. It remains a major influence on the participants and the wider indigenous movement. An international indigenous network, the Indigenous Peoples' Global Network on Extractive Industries, was formed and has continued to operate since the conference; particularly in sharing information and coordinating responses to international developments were possible. Positive steps have been taken, but the practical challenges seem to grow.

Since the conference, and following many of its recommendations, the UNPFII, the UN Special Rapporteur on the Rights of Indigenous Peoples and the UN Expert Mechanism on the Rights of Indigenous Peoples have focused their attention on the unresolved problems generated for indigenous peoples by the extractive industries.

We trust that this book will serve to add to, and develop, the ongoing debate, and the emerging Extractive Industries network.

Thanks

We are grateful to Tebtebba for making this possible, and to all of the contributors and conference participants. We are also grateful to The Christensen Fund, EED of Germany, and the International Work Group on Indigenous Affairs (IWGIA) for supporting this publication.

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Andy Whitmore
Editor

Extractive Industries and Indigenous Peoples: Issues and Impacts

PART

1

Chapter 1.1

Overview of Impacts of Extractive Industries on Indigenous Peoples

Of particular concern are the long-term devastating effects of mining operations on the livelihood of indigenous peoples and their environment. These activities are often carried out without their prior, free and informed consent, as the law stipulates. Communities resist development projects that destroy their traditional economy, community structures and cultural values, a process described as 'development aggression.' Indigenous resistance and protest are frequently countered by military force involving numerous human rights abuses, such as arbitrary detention, persecution, killings of community representatives, coercion, torture, demolition of houses, destruction of property, rape, and forced recruitment by the armed forces, the police or the so-called paramilitaries.

- Rodolfo Stavenhagen,
Former UN Special Rapporteur
on the Rights of Indigenous Peoples[1]

The surviving lands of indigenous peoples include many of the most vulnerable and threatened ecosystems on our planet. Indigenous peoples have always made clear that they are culturally, spiritually, and economically interlinked with those lands. They, however, continue to suffer abuse of their rights, because of the desecration of these ecosystems that they hold sacred. Nowhere is this more keenly felt than with regard to the extractive industries.

While indigenous peoples welcome genuine efforts from the extractive industries to respect human rights and raise environmental standards around projects, there is also a serious concern that modern large-scale mining, oil and gas projects cannot be squared with their own visions for their self-determined development. Although for instance the mining industry has recently created the phrase "sustainable mining," it misrepresents the fundamental nature of mining, which is founded on the primary extraction of a non-renewable resource from the earth.

The "low-hanging fruit" in terms of mineral and fossil fuel deposits have already been plucked. Increasingly, for mining the global trend is for the exploitation of lower grade ore bodies, which leads to a need for mining projects to increase in scale, and extend over wider—and often virgin, or "greenfield," territories. For oil and gas, increasing prices and new technologies, such as tar sands and "fracking" (hydraulic fracturing), have opened up whole new areas to commercial production.[2] A further push is driven by companies seeking resources outside of the control of National Oil Companies (i.e., state entities), which account for some three-quarters of the world's oil and gas production.[3]

On top of these expanding impacts, there has also been an increase for demand for minerals and fossil fuels. In the last 10 years alone, iron ore production has increased by 180 percent, cobalt by 165 percent and coal by 44 percent, while the oil multinational Exxon estimates global energy demand will rise 35 percent between 2005 and 2030.[4] Demand for metals that feed sustainable energy and/or new technology needs, such as lithium and certain rare earth elements, has similarly grown. This has led the Gaia Foundation, in their recent report, to

call the effect of this rush for control of commodities a new wave of land grabbing by the extractive industries.[5]

Set against this expansion, the veteran researcher on mining, Roger Moody, notes that the territories of indigenous peoples "host the majority of reserves and resources currently targeted by companies and governments." It is estimated that by 2020 up to 70 percent of copper production will take place in territories claimed by indigenous peoples.[6] In 2009 the European Commission recorded that approximately 70 percent of uranium used in nuclear reactors is sourced from the homelands of indigenous peoples worldwide.[7] At the 2009 Manila Conference, in his presentation Mr Moody explained that he had made original estimates that between 50 to 80 percent of all mineral resources that were being targeted by mining companies would be on the lands claimed by indigenous peoples. This had since proved true. He further noted that the trend was continuing with the increased production and territorial expansion of the industry, and was particularly notable in Africa, but also increasingly obvious in the former Soviet Union, Mongolia, Latin America, and Asia.[8]

This unsustainable land grab therefore seems to be on a collision course with the lands and territories of indigenous peoples, and the results have to date been mostly negative, to the point where this widespread expropriation of indigenous land for extractive projects has come to be termed "development aggression" by indigenous peoples.[9] Research conducted by Prof. John Ruggie, the former UN Special Representative on Business and Human Rights, concluded that "the extractive sector—oil, gas, and mining—utterly dominates" the number of human rights abuses reported to him as part of his research.[10] The UN Special Rapporteur on the Rights of Indigenous Peoples, Prof. James Anaya, has frequently highlighted this issue and announced that he will focus his research on the issue in the next three years. He noted that responses of indigenous peoples to his initial questionnaire on the extractive industries "were dominated by a great deal of scepticism and, in many cases, outright rejection, of the possibility of benefiting from extractive or development projects in their traditional territories. The vast majority of indigenous

peoples' responses... rather emphasized a common perception of disenfranchisement, ignorance of their rights and concerns on the part of States and businesses enterprises, and constant life insecurity in the face of encroaching extractive activities."[11]

The rest of this chapter seeks to map out some of the main concerns. First it explains a little more about the extractive industries themselves, and then reviews the environmental impacts of those industries on indigenous peoples, then the social impacts.

1.1.1 What are the Extractive Industries?

The extractive industries are concerned with the physical extraction of non-renewable raw materials from the earth, via mining, quarrying, dredging or drilling. Logging, large-scale hydro and monoculture are sometimes included in the definition, but in general are not because they dealing with resources that can regenerate.

Mining tends to be split into hard rock mining, mainly for metallic minerals, and soft rock mining for minerals such as salt or tar sands. The term "minerals" refers to a variety of materials found in the earth. It includes precious metals (such as gold, silver and platinum) and base metals, which tend to corrode or tarnish on exposure to air (such as iron and copper). There are also industrial minerals, like lime and gypsum, construction materials such as sand and stone, and fuels, such as coal and uranium.

The two main techniques for mining are underground mining and surface mining. The bulk of the world's minerals are extracted via surface mining, and this trend is rapidly increasing. Surface mining is on the whole cheaper, requiring far less labor and construction costs. The advent of new technologies, such as cyanide heap leaching for gold mining, and remote-controlled machinery, have accelerated this trend, while also increasing environmental concerns and leading to large-scale job losses.

Where large-scale underground mining does take place, it is increasingly in the form of block caving, which is a mass-mining method underground that can match the largest surface mines. Essentially large caves are created by machinery and the ore is allowed to collapse before being collected. Block caving is increasingly employed at the bottom of surface mines to continue mining low grade ore, such as at Freeport McMoRan's Grasberg mine in Papua New Guinea.[12]

Surface mines can be strip or open-cast mines, which usually take up the largest surface area in terms of land use. Quarries are generally surface mines, and used for extracting building materials, such as stone, construction aggregate, sand, and gravel. Dredge mining refers to the use of dredges, and although you can get dry dredging—for instance with minerals sands—it generally refers to excavation from rivers, coastlines, wetlands or specially-flooded lagoons. Finally alluvial mining, refers to mining in rivers, and can be larger-scale with suction-pumps, but tends to be associated with small-scale, or artisanal, operations, like panning for gold. A particularly destructive form of strip mining is mountain-top removal mining, which actually removes the tops from mountains to access the coal underneath and then dumps the "overburden" or waste rock, into the adjoining valleys. This effectively destroys whole mountain ranges in the USA where it is practiced.[13]

The oil and gas industries deal in extracting fossil fuels in the form of petroleum and natural gas. In classic terms this involves drilling a hole into the earth with a rig, and the oil or gas flows or is pumped to the surface. The production of conventional oil is in decline, although it now appears that rather than this leading to more sustainable alternatives, we have entered a period where cheap oil is being exhausted. A higher price has led to new strategies for developing non-conventional sources of oil and gas, such as tar sands, shale oil, deep offshore drilling and new geographical frontiers (including the Arctic, where access has been aided by global warming).

This expansion brings with it real concerns for the new technologies being used. Tar sands are oil that is saturated

in loose sand or sandstone, and because of the difficulties in extraction companies operate on a massive scale, which contaminates surrounding water and creates enormous toxic tailing ponds. Hydraulic fracturing, or fracking, for natural gas trapped in shale rock uses huge amounts of water, which is injected into the ground along with up to 600 different chemicals, the majority of which remain underground potentially contaminating nearby groundwater. These new technologies are (literally) breaking new ground, spreading oil and gas production further into indigenous lands, for example Alberta, Canada, or Inuit territory in the Arctic.[14]

Extractive projects tend to follow a set pattern with regard to their stages. In a very simplified format this starts with prospecting/exploration, which can relatively be non-invasive, but may involve widespread drilling of "core samples" and digging of trenches. The company will then create a feasibility study, publishing its results in order to raise money, and may then explore further and create new studies. The next stage is to prepare an impact assessment—normally these days an Environmental and Social Impact Assessment (EIA)—prior to getting full approval to mine. This would normally involve some public consultation on the impacts and benefits, of the project, and community groups should study and critique these assessments. This is often difficult as they are often long and complex. Aside from seeking expert help, however, there are guides to assist on this, with a particularly detailed and useful guide being Environmental Law Alliance Worldwide's *Guidebook for evaluating mining project EIAs*.[15] This is a theme to which we will return in the second part of this chapter.

If approved, the project will then move to full production, which may include site clearance, infrastructure development, initial extraction and processing, and disposal and management of wastes. Depending on the type of project, there will often be a number of different stages, each with their own impacts, and opportunities for intervention, not least with regard to the financing of the project. The life of a project may also be extended over time, as the original reserves are depleted and new exploration is conducted within the company's lease area. This can completely change the nature of the project, e.g., from an underground to a surface mine, or vice versa. Finally,

once the project is over, there will be a period of rehabilitation and reclamation. In theory this should be planned for in advance, with enough money set aside to ensure the area is rehabilitated to as safe an environment as possible. In practice a company may try to maximize profits, and as a result skimp on this phase. As noted in the section below on acid mine drainage, even where rehabilitation takes place there may still be problems with groundwater issues.[16]

Ten Stages of Mining Development

By Richard Thompson[17]

The following is a brief summary of these 10 stages, which may take place during several years of intensive technical and economic, study, analysis, testing, financing, and construction before a mining project becomes a reality. It was prepared to illustrate the potential impact of the different project stages and associated issues on local communities. Given its brevity, it by no means explains all of the detailed work required at each stage to accomplish the establishment of a working mine.

1. **Reconnaissance** – Requires air survey, ground truth, examination of roads, topography, river systems. An evaluation of the potential license area.
2. **Prospecting** – Requires the removal of samples, geochemical investigation of water courses, use of local tracks and roads, marking of survey points.
3. **Exploration 1 (initial drilling)** – Requires machinery on to site, creating work areas and access. It makes noise and dust. People may need to be moved.
4. **Exploration 2 (infill drilling)** – Requires more machinery, much more drilling (several months), with possible disruption of land and community.
5. **Feasibility** – Intrusive activity ceases, but a few officials return from time to conduct social and environmental impact assessments.
6. **Raising Finance** – Origin of mining company dictates sources of funding. Ethical questions arise when origin is from poorly regulated jurisdictions.

7. **Supply Contracts** – These may create further issues, e.g., temptation to create incentives for customs and tax officials to speed import procedures.
8. **Building Mine** – May require full-scale relocation of community, clearance of large areas of vegetation, significant improvements to infrastructure.
9. **Commissioning** – Requires a surge in local labor and some of those are likely to be retained for the life of the mine. Issues relate to pay, conditions, contracts, training.
10. **Production** – Mining has become part of the local community. Issues relate to long-term benefits, community relations, eventually closure.

1.1.2 Environmental Impacts of Extractive Industries on Indigenous Peoples

The major environmental impacts of extractive industries on indigenous peoples tend to fall into the following broad, and interlinked, areas: water and waste, air quality, health and livelihood.

Water and waste: Large-scale mining uses huge quantities of water in its operations, for activities, which include *inter alia* ore separation, washing, dust suppression, slurry transportation, and waste disposal. Water can also be lost to use if it is pumped out of open-pits or mineshafts that are below the water table. Particularly in arid or semi-arid areas, indigenous peoples' access to potable water can be a serious concern. On the ancestral lands of the Western Shoshone in Nevada, the US Geological Survey has found a decline in water tables by as much as 300 meters around some of the state's largest open-pit gold mines.[18] Such a drastic reduction in the water table is likely to lead to deterioration in the local soil quality, through salination.

The processing of tar sands also uses huge amounts of water. The large-scale production in the forests of Alberta, which are home to a number of First Nation peoples, has

been described as "the most destructive project on Earth."[19] The oil lies under boreal forests covering an area the size of England, with four barrels of water required to extract one barrel of oil. The extraction process contaminates the water, and creates enormous toxic tailing ponds. Warner Nazile, a member of the Wet'suwet'en First Nation complained: "It's literally a toxic wasteland—bare ground and black ponds and lakes—tailing ponds—with an awful smell."[20]

People living below the High Andes and other mountain regions, are often heavily dependent on snow or gradual glacier melt, as opposed to rainfall, for their water. Mining activities in high mountains, such as that proposed by Barrick Gold in Pascua Lama, at the border of Chile and Argentina, are blamed for increasing the melting of glaciers and polluting vital water resources and extracting excessive quantities of water primarily for industry use to the detriment of local farmers.[21] In the case of the controversial San Cristóbal silver, lead and zinc mine in Potosí Province, Bolivia, the open-pit mine already uses 50,000 liters of water a day in a region where there is only an average 100 mm of precipitation annually. The mitigation provided by the company, partly owned by Japan's Sumitomo Corporation, is not enough to compensate local indigenous communities, who primarily rely on llama farming, salt harvesting and the production of quinoa grain. Owing to the dramatic reduction of mine-affected springs in South West Potosí, indigenous communities now had to walk their lamas some 55 km for water. These concerns are growing with the proposed advent of large-scale lithium mining in the Salar de Uyuni salt-flats in the Potosí Department.[22] In another example, the Magadi Soda Company, Tata Chemicals, mines and processes soda from the environmentally-sensitive Lake Natron on Maasai lands in Kenya. Water use is estimated at 106,000 liters of fresh water per hour, which outstrips the needs of 40,000 livestock in all of Magadi division. Access to water is a major concern, with the community having become dependent on the company for a rationed water supply.[23]

The volume of waste rock involved, its chemical composition and the addition of often toxic chemical separators frequently result in adverse affects on water quality, despite the

best efforts of companies to contain or purify contaminated water. The water may contain as many as three dozen dangerous chemicals including arsenic, lead, mercury, and processing chemicals such as petroleum by-products, acids and cyanide. Formerly, it was common practice to irresponsibly pour this waste into rivers, lakes and inshore waters. These practices remain legal in some countries, including Papua New Guinea, and are still practised even by international mining companies claiming a responsible image. Overall, mining companies are dumping more than 180 million tons of hazardous mine waste each year into rivers, lakes, and oceans worldwide, threatening vital bodies of water with toxic heavy metals and other chemicals poisonous to humans and wildlife. The amount of mine waste dumped annually is 1.5 times as much as all the municipal waste dumped in U.S. landfills in 2009.[24] This threatens the health of indigenous peoples both in the region of the mine, and often much further downstream.

The most common practice today for the containment of mine waste (tailings) is through the construction of tailings dams, which are then filled with waste materials kept underwater to minimize their contact to oxygen. Independent sources report an average of 2-4 major accidents per year, with no real indication that the frequency of such incidents are improving.[25] When such dams are breached, the threat to life, environment and livelihoods downstream are often catastrophic. Bridges and riverbank structures are eroded and collapse. In some regions of the world—including the Americas and Southeast Asia—climate change is already manifesting in the increased number and increased intensity of hurricanes and typhoons. Such events increase the pressures on tailings dams with construction strength measured based on the ability to withstand infrequent weather extremes. They can also be threatened by seismic activity, poor construction and poor design. Recent incidents, including the fatal alumina tailings spill in Ajka, Hungary in October 2010 that reached the Danube river, show there is no indication that such incidents are no longer happening.[26]

Mine wastes contain many potentially toxic materials, and may become acidic when they come into contact with oxygen,

creating the phenomenon known as Acid Mine Drainage (AMD). The ongoing legacy issues can be cumulatively huge, with noted problems in historical coal and gold mining areas in the USA. They are particularly acute in South Africa, where according to a recent study AMD from nearly 6,000 abandoned mines is acidifying rivers and streams, raising metals levels and killing fish.[27] Another recent study from Canada stresses how in one case a more modern mine may have a mine closure plan to deal with waste for up to 50 years, but actually the effects are likely to be felt over tens of thousands of years.[28]

Upon reaching the sea, mine wastes can cause bleaching and killing of corals by contact with mine chemicals even in diluted form, smothering of corals by silt resulting in the death and migration of fish. Dumping waste into the sea has caused pluming: the release of fine particles into the ocean that choke and drive away sea life and spreads, blanketing large areas of the sea floor. This has recently caused great controversy, for instance, around the Newmont Minahasa Raya gold mine, which dumped 2,000 tons per day of wastes into the tropical, coral-rich waters of Buyat Bay, Indonesia. Concerns have also been raised, and court action taken, on the plans for dumping waste from the Ramu mine in Papua New Guinea.[29]

Air quality: Mining and ore processing often generate high levels of dust. This dust may contain toxic chemical particles, which potentially contaminate the atmosphere around a mine. Unless monitored and controlled the emissions from mining activities and processes may threaten the health and well-being of peoples and the environment.

Dust from mining and particulates from related vehicles create health, cleanliness and agricultural problems for nearby communities. In China, an ethnic Mongolian herder was shot dead in a protest in 2011 against the dust created by the coal trucks near his village, while in Pachuwara in India locals agriculture has been so blighted by coal dust that they have been forced to steal coal from the trucks to survive.[30]

The original Maranao communities, whose land was taken for the limestone quarrying and cement manufacture

operations of Iligan Cement Corporation in the Philippines, live under such a weight of dust that their capacity to grow essential food crops is severely reduced. Limestone quarrying and cement manufacturing choke and damage tree crops as the weight of dust on flowers restricts pollination.[31]

Health: There are a number of direct health impacts from mining. A 2002 Toxic Release Inventory by the US Environmental Protection Agency (EPA), called the TRI Data, documents that gold mines are the largest source of mercury emissions in the tri-state region of Utah, Idaho and Nevada. Overall, TRI reveals the hard rock mining industry is the nation's largest toxic polluter for the eighth year in a row."[32]

Coal mining results in high levels of respiratory illness including silicosis and pneumoconiosis among miners and local communities. Respiratory illness has been shown to increase in surrounding communities, particularly targeting the young and the old.[33] Studies in the coal-affected communities in the US Appalachian regions point to high rates of mortality, and chronic heart, lung and kidney diseases.[34]

Both uranium and asbestos mining have records of association with development of cancers, and both have historical links to the lands of indigenous peoples. The current search for low carbon energy has contributed to the revival of the nuclear industry. Despite health concerns raised, however—most notably by the Fukushima disaster in March 2011—the dangers inherent in mining of uranium to the workers and surrounding communities is too often overlooked.[35]

In the case of tar sands in Alberta, Canada, communities living close to the oil sands production, or downstream on the Athabasca River, are suffering from increased levels of cancer.[36]

Another issue is the increase in the spread of infectious disease brought about by interaction with those immigrating into indigenous territories to work on extractive industry projects. Also waste and chemical materials that find their way into local food systems link with environmental degradation to lead to the loss of traditional livelihoods, which consequently threatens food security and increases the possibility of malnutrition.[37]

1.1.3 Social and Cultural Impacts of Extractive Industries on Indigenous Peoples

The prime social and cultural issues tend to fall into the following interlinked, areas: economic, women and mining, internal conflict, cultural and spiritual impacts, and human rights violations.

Economy: As noted in the introduction, for indigenous peoples their lands and territories are their life. Those ancestral domains are valued not only for the life upon them and the subsistence they provide, but also for the spiritual, cultural and environmental values which define those peoples. Large-scale extraction can jeopardize the very survival of indigenous peoples as distinct cultures that are inextricably connected to the territories they have traditionally inhabited.

Mining activities have devastating impacts on pre-existing indigenous economies. Large-scale mines deprive flora and fauna of food and natural habitat. In hunting communities, there are reports confirming game fleeing from the noise, lights and disruption generated by mining. Livestock animals are recorded to have suffered from poisoning by polluted water and air. Agricultural activities are frequently destroyed during mining. Some mining companies now increasingly engage in "development projects" which attempt to increase in agricultural output. These, however, frequently remain premised on the belief that indigenous practices are backward and need improvement. Such an approach enables the company to claim increased credit for introducing change, yet such changes may actually erode longer-term and more sustainable indigenous food security and traditional agricultural practices.[38]

As later examples will show, forced emigration of indigenous peoples from their traditional lands can take place either because of direct removal or from loss of livelihood caused by resource extraction projects. This obviously negatively impacts on indigenous cultures and social structures, even with adequate compensation—which is not necessarily reported as the case. The UN Special Rapporteur on the Rights

of Indigenous Peoples quotes this migration process as the transition of "ecosystem people" into "ecological refugees," describing the negative effects of the continuous reallocation of a significant number of the Adivasi (indigenous/tribal peoples) of India as a result of large-scale developments projects.[39]

Mining companies emphasize the employment and livelihood opportunities. Yet employment levels in mining are in severe decline, thanks to increasing automation that almost certainly require skilled operators from outside the local area. Employment opportunities for locals are often limited to unskilled short-term labor or security positions. Mining remains as one of the most hazardous industries in which to work, with regard to levels of accidents at work and fatalities in the industry. It should be noted, however, that open-pit mechanization leading to large-scale job losses has meant that with fewer workers, fewer people are killed in mining accidents.[40]

The true potential costs and benefits of mining are seldom understood due to a serious failure to recognize and respect more sustainable livelihood activities that are adversely affected by mining. Many of these activities may be difficult to quantify using the standard tools of economics. The loss of livelihoods in hunting, agriculture, fisheries, small-scale mining and other traditional and alternative modern livelihoods frequently far exceeds the benefit of paid jobs generated in mining. Such livelihood losses are rarely accurately recorded. While the mining companies may report billions of taxes paid to the government, the state has seemingly failed in redistributing the benefits, especially to those directly impacted by the mines. Poverty and poor social services remain endemic, particularly in communities hosting the mines. Research conducted in Benguet province in the Philippines (an area with a large number of indigenous peoples) shows a direct, long-term correlation between poverty and large-scale mining, and a recent article has drawn attention to the poverty of Canadian Aboriginals living next to a De Beers diamond mine in Attawapiskat, northern Ontario.[41]

Gender issues: Indigenous women often have respected and recognized roles in the management of the subsistence economy of indigenous communities. The destruction of

these livelihood options and their partial replacement by paid employment in mining most often filled by skilled male outsiders (with some lesser opportunities for local men) results in a double reduction in the position and status of women. The escalating problems of food security, conflict and lack of opportunities predispose indigenous women to lowered self-esteem. Out-migration, in search for employment and/or an increase in sex work, have become economic options for women, exposing them to more vulnerable situations. Mining camp communities studied reveal increased incidences of gender violence, including rape and trafficking, domestic violence, marital breakdown, infidelity, and sexually transmitted diseases.[42] Stories from Burma reveal that the influx of transient mine workers in the gold rush site in Kachin State, and the lack of economic options for women has led to increasing incidences of sex work, while at Barrick's Porgera mine in Papua New Guinea there have been six recorded incidences between 2008-2010 of the use of gang rape by mine security personnel as a tool of repression.[43]

Internal conflict: There are widespread cases of extractive industries causing a significant deterioration in communal social cohesion and the erosion of traditional authority structures among indigenous peoples. Community members can take opposing positions regarding the perceived benefits of resource extraction, resulting in conflict that, at times, erupts into violence. Social conflict appears to be particularly prevalent when economic benefits are transferred directly to individuals, either in terms of compensation or jobs. It can also exacerbate divisions across generations or, as noted, genders. The risk of corruption and bribery of leaders, or even the setting up of false leaders who are more amenable to accepting projects, is prevalent as are well documented in cases in the Philippines.[44] The World Bank's own Extractive Industries Review emphasized the link between mining and corruption at both the national and local level.[45]

Non-indigenous migration into indigenous territories and its related consequences can also have a negative effect on all indigenous social structures. This can include the direct entry of non-indigenous workers brought in to work on specific

projects, as well as the increased traffic into indigenous lands owing to the construction of roads and other infrastructure. In Colombia, the arrival of extractive industries in indigenous areas has reportedly triggered the infiltration of indigenous territories by drug traffickers and guerrillas, together with the militarization of those territories.[46]

Cultural and spiritual impacts: The result of these influxes and loss of livelihood can be a significant impact on important aspects of indigenous culture, such as a loss of indigenous language and moral values. Additionally, large-scale projects can lead to the destruction of places of cultural and spiritual significance for indigenous peoples, including sacred sites and archaeological ruins. This has been a particular issue for Australian Aboriginal people, where a lack of understanding of their indigenous spirituality, including a culture of secrecy, has resulted in the destruction and damage to important sacred sites.[47]

In New Mexico, USA, the proposed Mt. Taylor uranium mine is planned in an area officially designated as Traditional Cultural Property to the Navajo Nation, the Hopi, the Zuni, and the nearby Laguna and Acoma Pueblos.[48] In the Philippines, it was recorded that the Canadian companyTVI Pacific had caused desecration of the Subanon's sacred mountain, breaking the ritual requirements of the sacred ground. This sacrilege was denied by the company at the time, but subsequently acknowledged only after the damage was done.

Although the Sami in Sweden, Norway, Finland, or Russia are all afforded different levels of rights, their life as reindeer herders is increasingly under threat, despite its cultural importance. Most of the planned extractive industry projects in Northern Europe (mines in Sweden, Norway and Russia and oil and gas in Norway) are located in Sami and will directly impact on reindeer pasture areas, The problem was compounded by the impacts of global warming and challenges to the Sami's legal rights. The cumulative impacts to reindeer herding of various extractive developments, and associated infrastructure, mean an estimated 25 percent of pasture lands have already been lost.[49] The attitude of government and the industry were contributing to the problem. An example of this

was a statement by a Norwegian Parliamentarian in 2008 that "reindeer herders don't have the right to exist," and companies such as Beowulf Mining who claim that they obey the law, yet choose to ignore the opposition of local reindeer herders to their drilling projects.[50]

Human rights violations: Human rights abuses associated directly with the extractive industries have continued at a disturbingly high rate. They include the most serious violations such as murder and wounding, torture, intimidation, militarization, forced displacement, gender violence, and illegal detention. These acts can be perpetrated by state forces, or private security forces and/or paramilitaries. Where opposition is strong, there are clear reports of governments intervening with police and military forces in partisan support of the mining interests. This only leads to a cycle of political instability, violent upheavals and the potential rise of armed rebel groups in indigenous areas, to the point where indigenous peoples can be caught between government and rebel forces, for example, with the Naxalite movement in India or the New Peoples Army in the Philippines.

Attempts by Peruvian indigenous peoples in 2009 to assert their right to say no to unwanted oil, gas and gold exploration within their territories resulted in a clash with government forces at Bagua, which resulted in the death of at least 33 people. This event, that has become known as "Amazon's Tiananmen" continues to reverberate, despite efforts by the government to deal with the demands of indigenous peoples. This has manifested itself in a "Grand National March for the Right to Water and Life" on the Peruvian capital, calling for Newmont's Conga copper and gold mining project (and two others, controlled by Anglo American and Grupo Mexico) to be cancelled.[51]

In Papua New Guinea, mining company security personnel have been accused of shooting at local people as well as burning their houses and using gang rapes at Barrick's Porgera mine. Subsequently, the company acknowledged that forced evictions occurred in violation of international law.[52]

Security forces have repeatedly been accused of serious abuses at Freeport McMoRan's Grasberg mine in West Papua

(Indonesia). These have included the killing of striking local Papuan workers in protests in October 2011, but the mine has brought massive conflict to the area ever since it was created in a deal between the US mining company and the Suharto dictatorship against the will of the local Amungme people in 1967. The ensuing unrest has meant that the company is effectively operating a counter-insurgency policy, to the point where it has been revealed to be paying the state security forces around the mine, including US$14 million to the infamous "Brimob" Police Mobil Brigade.[53]

In the Niger delta, increased conflicts over oil extraction led Shell to withdraw from the area in 1993, after soldiers escorting a Shell contracting firm seriously wounded a mother of five, whose farmland was being expropriated for a new oil pipeline. This led to increasing militarization in order to crush resistance from the local indigenous peoples, the Ogoni. The state campaign of terror led to nine leaders of the Movement for the Survival of the Ogoni People (MOSOP) being executed on 10 November 1995, after a military tribunal. It was reportedly described as "judicial murder" by then British Prime Minister John Major, and continues to be a source of ongoing international legal action.[54]

The Burmese military continue in a culture of impunity to provide military backing for mining expansion. The government had reportedly opened up 18 percent of the Hugawng Valley in Kachin State to mining concessions. As of 2006, there were eight mining companies operating 31 mine sites in the valley. To facilitate such interest, the government had beefed up military forces in the area from 26 battalions in 1994 to 41 battalions at the time of writing.[55]

So having reviewed a serious catalogue of concerns, with indigenous peoples often being portrayed as victims, it is time to move on to look at what indigenous peoples are doing in terms of responding to these challenges.

Artisanal Mining

Although much of this section has concerned itself with the problematic relationship between large-scale extractive projects and indigenous peoples, it should also be noted that mining can be a significant traditional economic activity in some indigenous territories. In these cases indigenous peoples have developed their own artisanal or small-scale mining activities. Such mining is a feasible and sustainable alternative if given the right conditions and incentives. The range of minerals mined by artisan miners is diverse, including gemstones, gold, copper, cobalt, coltan, coal, and other industrial minerals. The World Bank report on artisanal mining provides the urgency to look into this practice as an alternative to large-scale, corporate mining.[56] This study found that artisanal and small-scale mining is practiced in about 50 countries by people who live in the poorest and most remote rural areas, with few employment alternatives. At least 20 million people are engaged in artisanal and small-scale mining and a further 100 million people depend on it for their livelihood; as many as 650,000 women in 12 of the world's poorest countries are engaged in artisanal mining.[57]

In Benguet, Philippines, there is a long history of traditional gold mining by the indigenous Ibaloi people. The distribution of the mining rights is carefully socially controlled and surrounded with ritual observance and gold is subject to some community sharing, much to the frustration of the colonizers who complained the artisanal miners "do not even try to become wealthy, nor do they care to accumulate riches." Much of this was displaced by large-scale mining introduced by the US colonial administration in 1903, and further accelerated when opencast mines started in the late 1980s. These mines removed the gold that had been worked for generation, but also destroyed the fields and farms worked by local women farmers, and desecrated graves. After seven years of open-pit operations, the company permanently closed the site dismissing all workers, except for a few caretakers and security personnel.[58]

Impacts of Extractive Industries to Indigenous Women: Corporate Mining and the Indigenous Women of Benguet, Philippines

By Abigail Anongos, Cordillera Peoples Alliance (CPA)

Introduction

The Cordillera region in Northern Luzon, the Philippines, is home to indigenous peoples collectively known as Igorots. The Cordillera accounts for only six percent of the country's total land area, but hosts at least 25 percent of the country's gold reserves and 39 percent of the copper reserves. Cordillera history is rich with chronicles of how indigenous peoples defended their ancestral domain against foreign occupation, plunder and exploitation. Examples include the celebrated cases of the successful struggles against the Chico Dams and Cellophil logging operations in the 1970s in the provinces of Abra, Kalinga and Mountain Province. Indigenous women figure heavily in both the history, and current practice, of defense of the environment.

Benguet is home to the Ibaloi and Kankana-ey indigenous groups. Rich in mineral resources, Benguet has hosted large-scale mining operations for more than a century, with large-scale mining Philippine companies including Benguet Corporation, Lepanto Consolidated Mining Corporation and Philex mining. The passage of the Philippine Mining Act of 1995 and subsequent programs of mining liberalization further opened up Benguet and other Cordillera provinces for plunder and profit. Some of the latest transnational companies that have mining interests in Benguet include Anvil Mining and Royalco (Australia), Phelps Dodge (USA), Tiger International (Canada), Zjin Mining Group (China), and Metals Exploration and Anglo American (UK).

The Situation Confronting Indigenous Women in Benguet

Large-scale mining has taken much of its toll on the land and people of Itogon and Mankayan. The ancestral lands no longer bear the same richness as before. Corporate mining has adversely affected the traditional practice of agriculture, which is the main source of livelihood and economic activity of indigenous women. It has also displaced small-scale mining, another main source of livelihood for indigenous women, who are involved in the traditional extraction and processing of gold ore.

Throughout the many years of corporate mining in Benguet, indigenous women did not have access to any of its "benefits" like employment, as it is the men who are employed. These men are usually migrants from outside of the community. Because of the displacement of traditional livelihood sources, women are forced to look for other sources of income such as vegetable farming, vending and other odd jobs to augment the family income. The lack of sustainable livelihood opportunities and destruction of the natural resources and environment in their communities have forced indigenous women to scout for odd jobs in Baguio City. Many women have applied as overseas contract workers where they become vulnerable to different forms of abuse.

Environmental destruction, drying up of water sources, collapse of underground tunnels, massive landslides, ground subsidence, and pollution due to mining has burdened indigenous women with additional efforts in looking for alternative food sources and clean water. The burden has fallen on them as they are primarily responsible for maintenance of the household, the family and community health.

In large-scale mines, mineworkers' housing facilities are far from ideal. Bunkhouses are often cramped and crowded and lacking in basic services like electricity and clean water. The very limited sources of clean water as a result of the mining operations have led to disputes and quarrels. With the limited wages of husbands employed by the mine, and non-payment of back wages and benefits by the mining company, it falls upon the women to troubleshoot, stretching the family budget.

Corporate mining has intruded into the sustainable and peaceful way of life in indigenous communities. For indigenous women in particular, the traditional roles and responsibilities of women have become marginalized as the communities became more dependent on the cash-based economy created by mine development. This economic shift also results in outside culture and influences that erode traditional culture, and cultivate anti-social activities like gambling and prostitution. There have also been incidents of drug addiction, incest, wife-swapping and infidelity, including an increasing rate of domestic violence against women.

Indigenous women bear additional burdens of economic dislocation, displacement, land dispossession, deprivation and violation of ancestral land rights due to corporate mining. The intrusion of outside culture brought about by mining has led to the disintegration of indigenous society and culture, manifested in the weakening of traditional values that are important in maintaining and sustaining peace and order in the communities, clans and families.

Nuclear Threat in Mirarr Country, Australia

By Gundjeihmi Aboriginal Corporation[59]

Introduction

The traditional estate of the Mirarr people lies within the bounds of the World Heritage-listed Kakadu National Park in the Northern Territory, Australia. Since uranium was discovered on their country in the 1970s, the Mirarr have been fighting to protect their homelands from mining. Today, Mirarr country encompasses the Ranger and Jabiluka Mineral Leases, the mining town of Jabiru and parts of Kakadu National Park. Uranium mining has operated on Mirarr land for more than 25 years. The Mirarr opposed the establishment of Ranger and continue to resist all activities that pose a threat to their country and culture.

The Mirarr Senior Traditional Owner Yvonne Margarula leads the Mirarr in their fight to protect their country. Yvonne's father, Toby Gangale, opposed plans for uranium exploration and mining on his country in the 1970s. In 1995, the Mirarr clan established the Gundjeihmi Aboriginal Corporation to represent their rights and interests.

In 2005 the Mirarr succeeded in halting the development of the proposed Jabiluka mine by securing the agreement of the mining company (Rio Tinto's Energy Resources of Australia - ERA), the Northern Land Council and Federal Government that no mining at Jabiluka can proceed without the written consent of the Mirarr. This basic right of veto over development took over a decade of Mirarr-lead national and international struggle. (See Chapter 2.3 for this story.)

Ranger Mine: An Unwanted Legacy

Despite this victory, the Mirarr have seen the destruction of their country and the decline of traditional culture from continued mining on their land. The Ranger Uranium Mine was imposed on traditional owners when the 1977 Ranger Uranium Environmental Inquiry acknowledged the Mirarr opposed the mine, but determined that "their opposition should not be allowed to prevail." Mining began at Ranger in 1981. Today it is the second largest uranium mine in the world and in recent years supplied around 10 percent of the global uranium market. It is owned by Energy Resources of Australia (ERA), a subsidiary of Rio Tinto.

The Mirarr remain concerned that uranium from their country will end up as toxic radioactive waste, be diverted into nuclear weapons or be

involved in a nuclear emergency such as the Fukushima crisis. Japanese nuclear utilities are major customers of ERA. It is highly likely that uranium from Kakadu may be in the stricken Japanese reactors. In 2011 Dr Robert Floyd, Director General of the Australian Safeguards and Non-Proliferation Office of the Department of Foreign Affairs and Trade, confirmed that "Australian obligated nuclear material was at the Fukushima Daiichi site."[60] The Mirarr have expressed "deep concern" about this in a recent letter to UN Secretary General Ban Ki-moon.[61]

Recurring water and tailings management problems have plagued the mine over the 30 years of its operation. Hundreds of spills, leaks and license breaches have been recorded since Ranger opened and the mine has contributed to growing social problems in the region. The head of the Australian Federal Government agency that monitors Ranger recently indicated that the Ranger tailings dam is seeping at a rate of around 100,000 l/day. In April 2010 contaminated water was detected downstream of the mine in the Magela Creek near an indigenous community. The mining company ultimately acknowledged that Ranger was the source of this contamination.

In December 2009, a dam burst sending six million liters of contaminated water into the National Park. In March 2004, mine process water was directed into the mine's drinking water system. This resulted in several workers drinking and showering in water containing uranium at concentrations 400 times greater than the maximum permissible drinking level. In February 2011, amid heavy wet season rainfall, heightened scrutiny over water management issues and the tailings dam nearing capacity, ERA suspended uranium processing at Ranger. Processing did not restart until August of that same year.

ERA's ongoing failure to protect the park and the people living and working within it is of enormous concern to the Mirarr.

Pressure Still On: Expansion Proposal for Ranger

In a bid to maintain a foothold in the region, ERA is currently pursuing and expansion proposal for Ranger. In 2009 ERA announced the discovery of an ore body within the Ranger lease area, which they are calling Ranger 3 Deeps. Digging has commenced on an "exploration decline" (or tunnel) towards the ore body from the bottom of the existing Ranger 3 operating pit (the open-pit from which uranium ore is currently being extracted). When completed, this tunnel will be 2 to 4 km long and up to 450 m below

the surface and it would likely run under the Magela Creek, which feeds the Ramsar listed wetlands of Kakadu.

There was no requirement for environmental assessment for this as it is described as "exploration activity." ERA estimates that, if mined, Ranger 3 Deeps would yield 34,000 tons of uranium. The Mirarr have no opportunity to veto mining at Ranger and have made it clear they expect the highest level of environmental assessment and scrutiny to be applied to any new mining activity on their land.

Heap Leaching—Abandoned Before It Started

In 2011 plans for a large "acid heap leach facility" at Ranger were abandoned. The proposal involved spraying sulfuric acid onto heaps of low grade ore and then collecting the resulting slurry for processing into uranium oxide. This method of uranium extraction has never been tested in a wet/dry tropical environment like Kakadu and posed severe contamination threats. The Mirarr were very concerned by this proposal and made their opposition to it clear.

Recommendations

Uranium is a unique mineral with specific properties and risks. As such it requires special attention and scrutiny from state parties, regulators and producers.

As noted in a 2009 European Commission report,[62] the vast majority of uranium exploration, mining and processing occurs on indigenous lands. This fact requires heightened attention to ensuring the necessary preconditions for the realization of free, prior and informed consent are met. There must also be clear and independent verification and dispute resolution processes for all stages of any proposed mining operation.

The waste from uranium mining is dangerous and long lasting. It contains around 85 percent of the original radioactivity of the mined rock. The mining process makes the radioactivity far more available to cause harm to humans than than in its natural state. Combined with the long-lived nature of the radioactivity, this means that significantly greater attention must be given to closure and post-closure planning and management.

The Coal Industry and the Indigenous Peoples of Kemerovo Oblast[63]

By Dmitry Berezhkov, Vice-President, Russian Association of Indigenous Peoples of the North (RAIPON)

Kemerovo Oblast is situated in the southern part of West Siberia. The Oblast is one of the most industrially-developed regions of Russia and has a population of over 2.5 million people. Its economy is based on the coal and smelting industries. The total geological coal resources of Kuznetsky Basin (Kuzbas) are estimated at over 700 billion tons, which amounts to approximately 70 percent of all the coal resources of Russia. The region produces approximately 100 million tons of coal annually, which is around 60 percent of all the coal in Russia. Prior to the economic crisis of 2008, this was around 180 million per year. Over a hundred coal-producing companies are operating in the region.

European countries are the main consumers of Kuzbas coal: the UK, the Netherlands, Germany, Poland, Denmark, as well as China, South Korea and Turkey. In all, coal accounts for over 70 percent of the Oblast's foreign trade. In 2011, around 70 million tons of coal was exported, creating total revenue of approx. US$7 billion. Russia's largest smelting and power-producing companies are also active in the Oblast, including the OJSC Gurievsky Smelting Plant, the OJSC Koks, the OJSC Kuznetskie Ferrosplavy, the OJSC Mechel, the OJSC SUEK and Evraz Holding.

The Indigenous Peoples of the Region

The small number of indigenous peoples that historically populate Kemerovo Oblast are the Shorts and the Teleut. Around 13,000 Shorts live in Russia in all, of which 11,000 live in Kemerovo Oblast. There are approximately 2,500 Teleut living in the Oblast. These Turkic peoples mostly live in the south and southeast of the Oblast, generally in the mountain taiga area, known since the early 1900s as Shoria Mountain. The Shorts' main occupation today is agriculture, including cereal crops, cattle farming and bee farming. They also continue to live according to their traditional livelihoods, however, which includes hunting, fishing and cedar nut harvesting. These indigenous peoples account for only 0.5 percent of Kemerovo Oblast's population. There are no purely Shorts or Teleut settlements in the Oblast—settlements usually have a mixed population. There are, however, several dozen settlements with a dominant Shorts or Teleut population; in most cases, these are very small villages. The Shorts, an ancient nation from South Siberia, were among

the first to learn smith craft and are famous for their blacksmiths. Today, they are a classic example of people suffering from the "resource curse" of modern civilization.

The Coal Industry

The history of the coal industry in Kemerovo Oblast dates back several hundred years; the first coal deposit was discovered close to the town of Kemerovo as early as 1721. The manufacturer Demidov, from the Urals, was the first to show an interest in producing Kuznetsky coal; by the late 1700s, he had already founded several smelting plants there. Coal and smelting enterprises began to emerge in the early 1900s. The establishment of a coal and smelting industrial cluster was dramatically accelerated prior to World War II within the framework of the Siberian Industrial Base Reserve, deep in the country far from the western border. Kemerovo Oblast was established in 1943 to develop the Kuzbas Industrial Cluster. Since then, the industrial basis of Kuzbas has been constantly developing. A slight decline occurred immediately following the break-up of the Soviet Union, with the production crisis and the closure of the coal mines. Since 2000, however, the industries have recovered, especially the coal industry.

The Environmental Situation

The environmental situation in Kemerovo Oblast is bleak according to all experts (including the government's supervisory authorities). The region is explicitly aimed at raw material production. Heavy industry is at the core of the regional economy and it is the main factor that has a negative impact on the environment. According to an evaluation of the Russian Federation Ministry of Natural Resources, the town of Novokuznetsk is among the most polluted in the country.

The report entitled "The Status of the Environment in Kemerovo Oblast in 2011," drafted by the Regional Administration, says that the average atmospheric concentration of specific pollutants in Kemerovo Oblast is 2-3 times the maximum allowable concentrations stipulated by Russian law and, in some cases, up to 18 times. The same report describes river water in areas of industrial activity as "polluted" or "heavily polluted." In some cases, the experts speak of "extremely heavy pollution" of the water.[64]

Kemerovo Oblast features all the main components of extractive industries that are likely to have a negative impact: large-scale industrial production,

a high concentration of industrial facilities in the south-west and south of the region, and an industrial structure that incorporates highly hazardous industries, including natural resource extraction, smelting and chemical production, and electricity production. The development of resource-intensive industries is traditionally associated with high environmental costs. This includes a deterioration in the land due to coal mining; the production of enormous amounts of industrial waste; environmental pollution with emissions and discharges from smelting, chemical, coal-mining, and other industrial enterprises; a reduction in the biodiversity of industrially-developed areas and other negative environmental consequences. The situation is exacerbated by the high concentration of environmentally hazardous enterprises in the relatively small area of the Oblast, as well as the considerable dilapidation of process and treatment equipment.

Impacts on Indigenous Peoples

Industry in Kemerovo Oblast, especially coal mining, has affected and continues to affect the way of life of the Shorts and the Teleut. A description of the scale of the coal mining industry's impact on the indigenous communities can be found in a letter from the Shorts Veniamin Boriskin sent to the Russian Association of Indigenous Peoples of the North (RAIPON) in February 2012, seeking help. He wrote about the problems of a small village called Kazas, situated in Myskovsky town district of Kemerovo Oblast:

> "For decades, the Sibirginsky, Mezhdurechensky and Krasnogorsky strip mines around the village have been extracting coal. Over this time, our forests have been destroyed, the Kazass River has been killed. Area 8 of Mezhdurechensky coal mine and Area 3 of Krasnogorsky coal mine conduct their activities right in the village territory, discharging waste into the Kazass River. On the other, left, bank of the river, there used to be a 'green zone' which the managers promised not to touch. The people also asked them not to touch the Lysaya Mountain (Karagay Nash in the Shor language), which is sacred to the villagers, and the mountain Tachigey. These mountains used to shelter us from the coal mines. But several years ago, Area 8 added a new strip mine, Beregovoy. This mine disregarded all the promises and began activities beyond the Kazass River. A huge territory has already been excavated and they are digging into the back of Tachigey Mountain. In addition, this summer the villagers

> saw an excavator on our sacred mountain. The mines ignore the people of Kazas and continue to tear our land to pieces. The blasting operations are performed so close that we can see the stones flying. They have not reached the village. Yet. Once abundant, the river has grown shallow and silted like a stream. At its deepest, it is only 60 cm, at its shallowest 5-10 cm. When they pump the water from the mines it flows on top of the ice and freezes. And this happens every day. Through the winter, the ice grows so thick that water has to be taken as if from a well, with a bucket on a rope.
>
> Only a few people have stayed in the village. Once a large settlement of 50 houses with large families, it has now died out. The mines have killed a Shorts village that was over 100 years old. The villagers never received anything in exchange for their treasures and have gone silently to their graves. At the edge of the village another has emerged—the cemetery. Today, there are six retired women, one retired man and four families with children in the village.
>
> The village has become unsuitable to live in, the people dream only of modern apartments in town. Can the coal mines, extracting millions of tons of coal from our land, not provide apartments for the remaining people of Kazas village? Or is it the Shorts' fate to die poor and miserable on their land?"

The village of Kazas is part of Chuvashinsky national village council (Selsoviet). In all, 520 Shorts live in six villages in the territory of this Selsoviet and make up 65 percent of its total population. Three coal strip mines operate in the territory: Sibirginsky, Mezhdurechensky and Krasnogorsky. The mines' activities have resulted in the destruction of the Shorts' lands of traditional natural resource use, the rivers are polluted, the forest and wildlife destroyed. The indigenous population has received no compensation either for the destroyed lands or for the impacts on their traditional way of life. One village, Kurya, was totally destroyed in the 1950s and all its population (primarily Shorts) displaced by the town of Novokuznetsk, without compensation.

As the local people reported when construction of Sibirginsky mine began, neither Chuvashka village nor Kazas village was mentioned in the government expert evaluation documents. The town of Myski was specified as the nearest settlement to the mine—at a distance of 20 km. It means that these settlements are not mentioned in the design documentation, and, consequently, their residents seem not to exist at all. Today, Kazas village is surrounded by coal strip mines and coal

production infrastructure, with a railway on one side and, on the other, a contaminated river from which the villagers have to drink. They are asphyxiated all year round because of the coal dust, which literally covers everything. It penetrates into the houses and the people's lungs. It lies in a thick layer on every surface. During large-scale blasting operations, the windows sometimes break in Kazas houses, structures are damaged and demolished, and houses fall into decay.

Since 1994, the Chairman of Chuvashinsky Selsoviet, Egor Bekrenev (the former President of Kemerovo Oblast Indigenous Peoples' Association), has been trying to make the coal companies operating in the territory of Chuvashinsky Selsoviet pay compensation for their exploitation of the mineral resources to Chuvashinsky Selsoviet, which will be used for the social and economic development of Selsoviet. A permanent and planned agreement for the social and economic support of the Shorts' development in this municipality was, however, unfortunately never reached with the coal companies. In addition, taxes from mineral resource extraction in Russia are paid either to the Federal or to the Regional budget. Consequently, the municipality only receives the land tax and indirect payments from the industrial enterprises for operations in the municipal territory (rent of municipal property, part of employees' income tax, etc.) and this accounts for an utterly insignificant share of the overall tax payments, in particular, those from coal mining companies.

The Government's Role

Despite all this, the government's environmental authorities consider that the river water complies with health standards. The villagers emphasize, however, that the water in the river is sometimes cleaner than at other times, and they think samples should be taken when the water is dirty and not the other way around, as the government authorities do. The village has neither a school nor a health center, nor a post office nor even a shop. All this is only available in the neighboring village. The people of Kazas have written many complaints to numerous regional departments, but the situation does not improve. The authorities merely reply that sacrifices have to be made for the sake of regional economic development. At one time, the coal companies even established a checkpoint on the village access road so that their security personnel could stop and inspect private cars, including those belonging to the villagers.

In this context, the interview given by the Governor of Kemerovo Oblast, Aman Tuleyev, to the Chelovek i Trud Magazine is revealing, as are

his other speeches.[65] He says a great deal about the challenges of the region's industrial, social and even cultural development, but virtually nothing about the region's environmental problems. It should also be noted that Kemerovo Oblast Administration signs annual cooperation agreements with the coal companies, which include specific clauses relating to measures for maintaining and developing the territories of traditional natural resource use for the small-numbered indigenous peoples of Kemerovo Oblast. According to many of the Oblast's indigenous residents, however, nobody knows where this money goes.

Conclusion

The extremely complicated environmental situation around the village of Kazas, which has a negative impact on the traditional livelihood of indigenous peoples' communities in the region, is generally quite typical of Kemerovo Oblast. The list of "hot spots" where the situation is most difficult, compiled by activists from Kemerovo Oblast Indigenous Peoples' Association jointly with experts, thus includes 12 more settlements of this kind.

The environmental situation in Kemerovo Oblast is generally one of the most depressing. Any person new to the region arriving in Novokuznetsk will immediately notice the enormous black haze of polluted atmosphere hanging over the city; the only comparable Russian place that comes to mind is Norilsk, where the largest Russian smelter Nornikel is located. The Shorts live in the epicenter of this hell—gradually dying from disease. And, in the meantime, the "coal barons" continue to make billions of dollars selling "black gold."

This is how the coal mining industry is destroying the traditional culture and natural resource management of the Shorts—an ancient people rightfully proud of their rich history and culture who are now being dragged into the whirlpool of the "resource curse."

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Chapter 1.2

Financial Innovations and the Extractive Industries

The following chapter is a paper written by the researcher Roger Moody.[1]

The paper analyzes the situation of global mining finance after 2008's financial crisis.

This is a crucial issue for mine-affected—and potentially mine-affected—communities. In general, Moody casts doubt on any expectation of a resumed minerals boom, based on increased commodities demand. In this respect he pays particular attention to the situation in China, and to a lesser extent India. The social impacts of Chinese investment overseas have been a key concern of many mining activists, and Moody challenges the view that such investment is uniquely destructive. Finally, the author summarizes some of the more complex investment tools that have contributed to the recent global credit crisis, explaining the role of derivatives and Exchange Traded Funds (ETFs).

Is Mining Coming to an End—As We Once Knew It?

In 2008 it seemed that global mining prospects might have been fatally wounded as a result of the gargantuan credit meltdown, triggered by the downfall of U.S. investment bank, Lehman Brothers, in September of that year.

As that *annus horribilis* ended, the minerals industry was saddled with the most significant reduction in equity (share) values in living memory. Extractive companies performed worse that year than those in any other industrial sector represented on the London Stock Exchange (LSE)—the single most important source of big mining capital.[2]

Virtually every mining enterprise listed on other stock exchanges also experienced falls in their market capitalization, while mineral commodities traded at lower prices or volumes than at any time for 10 (and in some cases 20) years. The only exceptions were gold and silver—the former apparently sustaining its historical role as a "store of value" and "safe haven" in hard times or during dramatic fluctuations in dollar exchange rates.[3]

During 2010, some measure of market stability appeared to have returned. Even so, at the beginning of 2011, virtually every major mining company on the planet was still suffering the fallout from what Warren Buffet, then the world's richest man, had provocatively dubbed "the financial nuclear winter." The market value of Chinese extractive companies had fallen the most: China's huge Shenhua Coal and Chalco dived in worth by around a third, while that of India's NMDC (formerly the National Mineral Development Corporation) collapsed by just over 50 percent.

Even those most diversified of global mineral producers, Rio Tinto and BHP Billiton, saw their share prices dip by 2.9 percent and 3.6 percent, respectively. A raft of smaller enterprises (so-called "Juniors") and numerous mining projects, in the meantime, hit the dust.[4]

Nonetheless, it was distinctly naïve to expect the minerals sector as a whole to meekly roll over and die, just because many of its investors had received the fright of their business lives. Mining is a notoriously cyclical industry; and precisely for this reason, its biggest players have devised means of coping with dramatic falls in demand for their output. Because it can take 10 years or more to bring a major project on-stream, such timelines are factored into the "bankable feasibility studies" companies present to investors. So long as banks, private funds, and multilateral investors (such as the World Bank and its private arm, the International Finance Corporation), are persuaded that an improvement in global economic growth is inevitable—if not exactly "around the corner"—they are prepared to wait-out some delays.

But for how long are they prepared to wait? New restraints are continue being imposed on the industry's expansion—whether through domestic legislation, international treaties, or civil society movements. Inevitably there will be increasing costs of extraction, and many companies are already having to meet higher bars on waste disposal and ambient pollution. Pressures on them to pay a far greater proportion of their profits to state, regional, or local governments have markedly mounted in recent years—and will grow further.

I will argue here that, in reality, the minerals industry has done little more than survive since late 2008—though survive it has. Expectations that innovative methods of financing would come to replace the disreputable tools of the recent past have largely not been fulfilled.

Nonetheless, some of those quasi-criminal financial instruments (which engendered the massive illusion of our wealth being secure, when the opposite was true) have emerged under different guises. Newer stratagems have been devised to take even more cash out of our unsuspecting pockets. And behind these are some of the very financial institutions which were responsible for that "financial nuclear winter" (see Box 1 and Box 2).

Above all, those most vital of expectations on which the industry has pinned its fortunes over the past decade, are on the

brink of being dashed. The economic growth rates of China and India have simply failed to meet predictions. The world is awash with surplus coal, iron, copper, or nickel. Although demand for new mined sources of metals and fuels is likely to continue over the longer-term, shifting these stocks profitably into the markets over the short-term is, to say the least, a challenge. And so long as that challenge remains, it would be a foolish investor indeed who put money into mining on the scale which many of them did just a few years ago.

2008-2012: Statistics, Damning Statistics…

Even while many gold and silver prospectors (in both senses of the term) have ridden the recent storm, this has not been true for producers of base and ferrous metals, diamonds, and other minerals—not to mention their workforces.

There are three main methods by which funding is raised to sustain minerals output:

1. Bank loans and other debt financing for projects and general purposes;
2. The issuing of corporate bonds (those made by companies themselves, through a bank or broker), and convertible bonds—ones that can be exchanged for company shares at a later stage;
3. The direct purchase of equity—shares or stock—in a mining or minerals company.

If we now examine recent fluctuations in the use of these financial instruments, we gain a fair idea of the mining industry's financial health, and can make some educated guesses as to what its future holds.

Between 2000 and 2006, direct loans to, and debt financing of, mining involved at least 53 banks (both private and state-owned), insurers and other financial institutions—each providing between US$5 million to $5.7 million in any one year. This resulted in around $178 billion being disbursed to mining companies during that period.

During the same period, the amounts of money arranged, syndicated, or raised in corporate bond issues for specific mining projects, mergers and acquisitions, and general corporate purposes, was significantly higher: falling not far short of $250 billion between the start of the new millennium and 2007. In 2008 alone—until the bankers' credit and credibility crash—919 mining mergers and acquisitions took place, with a combined value of $127 billion.

Corporate bond issues numbered a hundred and fifty in 2009, raising $61 billion—a marked 60 percent increase on 2008, with China responsible for almost a third (32%) of this type of financing.

In 2009, however, despite the number of mergers and acquisition deals slightly increasing (to 1,047), their overall worth had plummeted by over 50 percent, to just $60 billion. Moreover, only two percent of bank loans were used that year to fund new corporate acquisitions, of which China accounted for $16.1 billion (27%).

In contrast, 97 convertible bond issues were made in 2009, raising $14.4 billion—around $2.2 billion more than in 2008 and in the previous year. There were 150 corporate bond issues which raised $61 billion—a marked 60 percent increase on 2008. Once again, China accounted for almost a third (32%) of this type of financing.

Between 2000 and 2006, just over $9 billion was disbursed to mining projects. Strikingly, more than a third of this was spent in 2006 alone. The year 2008 was a record year for project funding, with $7.7 billion deployed on 16 projects.

During 209, however, only 10 project deals achieved "financial closure," at a cost of $5.4 billion; the biggest chunk of which landed in Latin America. Just one project (Antofagasta Copper's Minera Esperanza in Chile) came in at more than a billion dollars.

London-based global accountancy firm Ernst & Young estimated that during the first half of 2010, the volume of completed deals in the mining and metals sector had risen by 20 percent (to 544 transactions) on the same period in 2009; and their overall value increased by 46 percent (to just over $40 billion).[5]

A total of $91 billion was spent by investors on equity (obtaining shares) in mining companies during 2009. Although 118 IPOs (Initial Public Offerings of shares) had been completed the previous year, they raised only $12 billion. On the other hand, secondary share and rights offerings (those made once a company has already been "floated") secured $72 billion in 2009 (compared with $49 billion in 2008); while purchases of "follow up" equity rose slightly, to $77 billion.[6]

Already, in early 2010, Ernst & Young had informed us that "equity will play a greater role in the next wave of growth, with the IPO market starting to recover."[7]

But, although Ernst & Young's own "Mining Eye index" (a weekly tracker of share values of the top 20 London Alternative Investment market [AIM]-listed mining companies)[8] gained 173 percent in 2009, as of March 2010 the index overall was still 40 percent down on the all-time high achieved a year before.[9]

According to the Financial Times' Jonathan Guthrie, shares worth £38.6 billion were raised on London's mining-heavy AIM in 2011, compared with £75 billion in 2007. Moreover, "the tally of AIM-quoted companies has dropped from 1,694 to 1,117 and small-cap shares remain more deeply under water than larger peers"[10]

In 2010, the world's leading minerals trading company, Glencore, purchased assets it sold earlier to Xstrata[11] to help the latter out of debt, and 26 months later, Glencore launched the biggest mining-related IPO in history, valued by investors at around £35 billion.[12]

The most profitable London IPO of 2008-09, by UC-Rusal, the world's premier aluminium conglomerate, however, was jettisoned in favor of a listing on the lower-profile Hong Kong Stock Exchange. The following month, Vedanta Resources—the largest-ever Indian entrant on the London Stock Exchange, back in 2003—announced that it would seek an IPO for its Vedanta Aluminium subsidiary. But it would do so on the Mumbai (Bombay) Stock Exchange, with only a secondary registration in London. To date, no offering has been announced. Many other IPOs have been abandoned or deferred since then—both in London and Hong Kong.

I apologize to the reader for trotting out what might seem to be at times inconclusive figures. But this is the key point: the long-established pretended direct relationship between demand for metals and minerals and their supply, essentially no longer holds. The fixing of a realistic and sustainable market price for these materials has been usurped by a raft of speculative financial "tools."

"Fast Money"

Let's look at this phenomenon in a little more detail. Writing in April 2010, Mark Carnegie, the head of Lazard Australia Private Equity, was in little doubt that:

> *"The current high levels of the equity markets are a by-product of the bond market. People invest in shares as an alternative to earning a fixed rate of return by putting money in a bank or buying longer term investments that pay a fixed rate of interest… The money has to go somewhere, so lots of it is going into the share market…*
>
> *"The real nuttiness in the global capital markets is that our overspending western governments can borrow at such low rates of interest…[I]t is…certain that the ability for the U.S. and other profligate nations to borrow at these rates will end and, when it does, it will be ugly for all capital markets, including shares. As interest rates increase, the investment alternatives to shares become more attractive and so people sell shares to buy bonds and put their money in cash."*[13]

Two years on, and Carnegie's prediction appears not to have been fulfilled—at least in regard to the direction in which minerals-related investment has been flowing. Neither bond nor shares markets have been a preferred destination for "fast" cash, on any scale, that may now be looking for a home. Rather, such money has increasingly gone into metals' Exchange Traded Funds (ETFs) or into derivatives' betting (see Box 1 for more details of this).

Derivative instruments—the trading of options and futures contracts—are widely recognized as being at the root of the post-September 2008 credit collapses. And they have certainly not exited the scene. On the contrary, some of these tools, adopted predominantly for minerals and metals' commodity transactions, have returned. Once again, they threaten to destroy any long-term market recovery, with their inherent mismatch between meeting real human needs for metals and promotion of an illusory demand for raw materials that are not required for that purpose (for a further discussion of this phenomenon, see Box 2).

Labor Woes

Scores of thousands of workplaces have also been sacrificed over the past three years, not only at the pit face but also in construction and automobiles—two industries intrinsically dependent on processed minerals. These workplaces may never be recovered. Without the billion dollar bailout of General Motors by the Obama administration in 2012, many metalworkers' posts would have disappeared forever.

Meanwhile, companies around the world have been replacing unionized workforces by contract laborers who are fated to toil on low pay, without any security of tenure, or basic social security provisions. This attrition was summed up by the global mineworkers federation, ICEM, at the dawn of the new decade:

> *"From Russia to Chile, at Europe's largest zinc deposits in Ireland's County Meath, where 670 were retrenched by Tara Mines, to the hundreds of thousands of migrant miners across the world who are out of work with no place to go, it is workers who are paying the unjust price of capital's failure."*[14]

And this parlous situation has not materially improved over the past 30 months.

On the contrary, in a June 2012 survey, undertaken by the Mining Recruitment Group of global mining company executives, 20 percent stated they have already begun laying-off existing employees, while 24 percent had implemented "company-wide hiring restrictions." Thirty two percent noted a reduction or elimination of incentive pay, while eight percent had cut salaries.

"With drastic cost cutting measures having been implemented and a fear of the availability of capital," according to Mining Recruitment Group, 60 percent of its respondents did not expect to recruit over the following six months. Even the remaining 40 percent, which did plan to do so, primarily sought blue collar, rather than relatively unskilled, workers.[15]

Far From Secure Mining Futures

In an attempt to evaluate the previous 15 months' attrition of the minerals industry, Ernst & Young in 2009 concluded that: "At this point in the cycle, Asian investors [have] emerged as the new buyers, cash-rich and ready to take advantage of the opportunities that abounded as valuations dropped and struggling companies became the target of bargain hunters."[16]

Ernst & Young went on: "The emergence of these new investors, combined with a quick rebound in demand in Asia and prudent spending, allowed the industry to weather the storm of unsustainably low metal prices and emerge into the calm as prices reached more realistic levels." Ernst & Young said it was now banking on China and India, in particular, to "promote a strong seller's market" in the near future, judging that "[t]he events of 2008 have fundamentally changed the way the industry will be financed in future."

A brief examination of China's recent mining-related mergers and acquisitions initially confirmed this prognosis. The regime's mineral-dependant industries have undoubtedly snapped up sizeable chunks of—and a few entire—companies, as those industries benefited from depressed commodity prices prevalent during 2009-2011. Those new "ways" of promoting

investment, mentioned by Ernst & Young, ostensibly aimed at bringing minerals' supply and demand into balance, have yet to be developed, however, let alone deployed.

Relying on China (and to a lesser extent, India) to stimulate new spending, requires that these two huge emerging economies achieve accelerating levels of "growth"—albeit ones which are conventionally-defined, rather than necessarily suiting criteria set by the UNDP's Human Development Index.

China's rate of growth has, however, been progressively accelerating downwards. The state recorded growth in GDP (Gross Domestic Product) of 13 percent in 2007, but this fell to 9.2 percent in 2011. According to a recent forecast, China is likely to have expanded economic growth in the second quarter of 2012 by only 7.6 percent on the previous year—"its weakest performance since the 2008-09 financial crisis."[17]

India's GDP growth rate slipped from a previous high of nine percent to 6.7 percent in 2009. As with its vast Asian neighbor, during the first quarter of 2012 the rate slumped even further, to only 5.3 percent. In the meantime, socio-economic and environmental pressures in both countries, aimed at curbing the amount and extent of new mineral ventures, have been mounting. For example, India's biggest-ever proposed extractive project—by South Korea's POSCO, for an integrated iron-steel venture in Orissa—has had its dimensions cut back, and construction postponed by no fewer than seven years, thanks largely to local and national opposition.[18]

Outrages relating to massive child lead poisoning, and worker fatalities at numerous Chinese coal pits, have led to many abrupt closures. The administrations of both Asian mega-states also acknowledge the urgency of limiting their contributions to adverse climate change, even though India has made far less effort than China to put its money where its mouth is.

While the governments of neither India nor China have paid much regard to the Kyoto Climate Treaty under the 2009 Copenhagen Climate Accord, the Chinese administration undertook to cut between 40 percent and 45 percent of carbon-

dioxide emissions per unit of GDP by 2020. An independent report of November 2011 suggested that, between 2006 and 2010, the country's proportionate reduction in carbon emissions—including those from coal-powered plants—was the largest recorded by any nation in the four years between 2006 and 2010.[19]

The Peoples Republic of China has also set a target of delivering around 15 percent of primary energy from non-fossil fuel within the coming decade, and has been slowly advancing in this direction.[20]

If good intentions are to translate into action, however, many more coal mines will have to close in both countries, and this is not likely to happen—at least in India—for up to another decade.

Investment Conundrums

On the one hand, Ernst & Young's February 2010 report conceded that "[t]raditional investors will be looking for safe options in 2010," while "fewer lower risk projects are now available." On the other hand, somewhat quixotically, it went on to claim that investors would then be willing "to consider acquisitions with greater political risk."

Little evidence of this has been forthcoming. On the contrary, long-betting, mining-dedicated, investment funds—those which place genuine faith in the future of the industry—have largely shirked taking on increased risks. Hedge funds which play the markets "short" have certainly not disappeared from view.

Nonetheless, their distinct role as cash-rich moguls, betting against a rise in share prices, rather than supporting them, has diminished. RAB Capital, not long ago the most significant of these mining-focused funds, found the value of its investments drop drastically by 80 percent to only $1.4 billion in February 2010,[21] and to under $1 billion in May 2011.[22]

Ernst & Young's February 2010 report represented perhaps the best attempt at the time to put an optimistic spin on how the mining industry could "rescue" itself and garner future profits.

According to Ernst & Young[23]:

> *"[T]he changes in available capital will continue to increase the complexity and variety of deal structures, with joint ventures, partial sales and de-mergers becoming common, along with alternative financing arrangements, such as partial equity sales and asset swaps.*
>
> *"Following the decline of the project finance model, we could see a return to individual mines being floated, with the proceeds used for development, and investors sharing in the profits when the mine goes into production. Off-take customers could also emerge as key sources of funding to develop mines, as is already occurring in the junior mining space."*

Thus, asserted Ernst & Young: "Eventually, borrowing will return to historic averages, but from new lenders and more diversified pools of resources. These will include multilateral development agencies, and Middle Eastern and Asian banks."

There is not much evidence that these significant new lenders, or more diversified resources' pools, have been forthcoming. Although Chinese banks appear still to be in the market for further strategic mining investments, we are unlikely to see such transactions brokered at the rate, or to the extent, they were in 2007-2009. India's State Bank (SBI) recently set up a European financing arm in London; however, its only major minerals-related outlay so far has been on the Jharsuguda aluminium smelter, being constructed in Orissa by Vedanta Resources plc.

Certainly some private investors did "respond...to the [recent] crisis with a combination of equity issuance, corporate bonds, assets disposals and inward equity investment from strategic investors" (and this is partly borne out by the figures provided above). While 2009 may have been "a record year for follow-on equity issues and corporate bonds," however, Ernst

& Young's own data paints a far from optimistic picture of innovative strategies being used to attract substantial funding.

Importantly, Ernst & Young itself recognized that

> *"[P]erhaps the most profound effect of the global financial crisis on the metals and mining industry is that the world has lost as much as two years of growth in the supply of scarce resources. The deferral of projects pending financing will lead to a construction bubble that will compete with other lagging fiscal stimulus for resources."*

Now, that did seem to be a reasonable prediction of a crisis that the global minerals industry continues to confront, particularly with regard to China—as I will shortly elaborate.

Ernst & Young told us in early 2010 that "equity will play a greater role in the next wave of growth, with the Initial Public Offering (IPO) market starting to recover in 2010." But what has been the evidence of this so far?

Although Ernst & Young's own "Mining Eye index" (a weekly tracker of the share values of the top 20 AIM-listed mining companies) gained 173 percent in 2009, as of March 2011 the index overall was still 40 percent down on the all-time high achieved a year before.[24]

By the end of 2010, Ernst & Young estimated that the volume of completed deals in the mining and metals sector during the first half of that year was up 20 percent (to 544 transactions) on the same period in 2009, with a 46 percent increase in their overall value (to just over $40 billion).

Ernst & Young also predicted that"[t]he pace of deal activity will continue to accelerate," driven by China and the other Asian economies, envisaging that big, globally-diversified mining companies would "pursue bolt-on acquisitions" for up to another year, especially ones from North America which had "dominated the bigger value deals in the first half of 2010."

The report continues: "While resource security continues to be the driving force behind increased deal activity in the

mining and metals sector, a number of other factors are also helping to fuel transactions—including the improved cash flow and availability of capital to do deals, ongoing industry rationalisation and the desire for greater vertical integration."

Importantly, Ernst & Young judged that equity (selling shares) was still "the preferred source of capital in the sector" and that this pattern would continue for some time to come, due to "the lack of availability of bank debt, particularly among the mid-tier companies."[25]

A year later, the Metals Economics Group also estimated that 2011 non-ferrous exploration budgets would increase by around 50 percent from the 2010 total, signifying a new record, with Latin America as the industry's favourite regional exploration target. Nonetheless, the Group anticipated that the proportion of "overall industry exploration effort committed to long-term project generation" would remain close to historically low levels.[26]

At the same time, PricewaterhouseCoopers (PwC) concluded that, while the first half of 2011 saw 1,379 mining transactions globally, worth a total $71-billion as a result of "volatile equity markets," the value of such deals had shrunk by 49 percent during the third quarter of that year.[27]

This bearish prognosis hadn't materially changed by mid-2012. Only 22 percent of respondents to the Mining Recruitment Group's survey in June thought the mining sector would perform better in the second half of 2012, compared to the first, while another 41 percent suggested its performance was likely to be worse.[28] Nor was the outlook for Asia-Pacific-focussed metals and mining companies substantially less gloomy.

According to a May 2012 report by Standard & Poor's: "A tighter labor supply and likely higher energy prices will pressure the profitability of many commodity producers" in the Asia-Pacific region. Metal producers will also be wrestling with more expensive raw materials… For Asia-Pacific steel and aluminium companies, we forecast a negative outlook…due to a global slowdown and abundant supply."

The global ratings agency did expect that "the credit prospects of producers of copper, high grade minerals sands, seaborne iron ore, and coking coal [would] remain steady," But it believed that thermal coal prices could "further soften," especially "if exports from the U.S. to Asia due to a sluggish domestic market consolidate its momentum." Meanwhile, warned Standard & Poor's: "Further bouts of weakness could also materialize for nickel because of the metal's demand sensitivity to industrial usage and substitution risks."[29]

PwC also recently published a commentary on the chequered state of the industry last year. It asserted that, despite the top 40 mining companies posting record profits (of $133 billion) in 2011, and "generat[ing] record operating cash flows," their market capitalization actually fell by 25 percent. Only six of these companies saw "positive market capitilization movements"—namely, China Shenhua, Ivanhoe Mines, Industriales Penoles, and low-cost gold miners, Goldcorp, Randgold and Yamana Gold. The leading companies' price earnings ratios were also "at one of the lowest levels seen in years." PwC said that Europe's debt crisis and fears of a slowdown in global growth "dominated the markets during the second half of the year," while "mining company share prices were hit particularly hard."[30]

Chinese Syndromes

In 2011, PwC had already anticipated a "drop off" in mining deal making, but predicted it would not cease altogether—placing its faith in China's demand for metals "continu[ing] to drive long-term fundamentals," specifically "in the mining merger and acquisition market."[31]

A decade before, the mining industry had indeed set its cap at the Peoples Republic of China as the world's most vital single market for its ferrous and nonferrous metals, fuel minerals (in particular coal) and a wide range of construction materials.[32] More recently, China has itself become the leading global producer and consumer of gold.

During intervening years, Chinese state-owned enterprises—backed by state banks and sovereign wealth funds, along with private firms—also invested substantially in foreign mining projects. They made important corporate acquisitions—notably in Australia, Peru and Canada.[33]

Underpinning these moves was the regime's core aim of building-up its raw mineral stocks. The state was taking advantage of low costs of acquisition, in order to bulwark domestic requirements, and in anticipation of future rises in domestic demand.

It was a strategy with marked limitations. Financial Times analyst, William MacNamara, warned in 2010 that mining companies have a specific "problem," relating to the tendency of state fiscal managers to "restock" materials at the start of an expected new economic cycle.

According to MacNamara, this could lead to their building-up supplies well beyond their country's existing requirements. During 2009, he said, such restocking was especially evident in China, with the result that its "stimulus-boosted manufacturing helped carry metals prices around the world."[34]

Apparently heeding this warning, by early 2010 China began reining in such spending. Meanwhile, according to MacNamara, there was also "little evidence that restocking is happening in developed countries in the way it once did."[35]

Deutsche Bank analyst, Daniel Brebner, seemed to agree, conjecturing that product manufacturers in general were "holding lower stock levels permanently to avoid being caught out as they were in 2008." Brebner predicted that "...the inventory cycle in the western world will be a shadow of its former self."[36]

This is, however, only part of the story. China acquired full membership of the World Trade Organization (WTO) in 2001, prompting an unprecedented flurry of overseas trade in its finished and semi-finished goods. As a consequence, the treasury accumulated an unsustainably high level of dollar-denominated funds. Some analysts have suggested that this risky dependency has recently driven Beijing's autocracy to promote a shift away from the "Mighty Dollar" to IMF Special

Drawing Rights, back to the gold standard, or even towards promoting a new form of international exchangeable currency based on trading of commodities.

If that's true, it helps explain why, during 2010 and much of 2011, the state created those huge stocks of raw materials it clearly did not require for short-term use. It also adds weight to the argument that we won't see similar excessive accretion of minerals by China for a long time to come—if ever again.[37]

Of equal, if not deeper, concern to the regime is that many Chinese citizens have been spending at levels never seen before, while the vast majority of them have no means or incentive to save. Meanwhile, investment in socially productive sectors at home—such as agriculture and human services—has been dramatically drying up.

For these reasons, the Chinese administration has been assiduously seeking to "de-pressure" the state economy—part of which has involved measures to reduce consumption of coal, shut down numerous small, dangerous coal pits, and "consolidate" steel foundries, in order to cut operating costs, and reduce pollution.

Until recently, these measures have failed to substantially reduce overall domestic demand for mined materials or what they are turned into. On the contrary, China's "rising" middle classes continue demanding more and better housing, and access to consumer items. Nonetheless, the regime has started to limit exports of finished products—notably to Europe and the USA—in order to balance its huge trading deficits. (To an extent this was already happening, thanks to reductions in demand for Chinese processed and manufactured export goods, occasioned by economic crises in importing countries.)

Then, in the first months of 2011, it became clear that the regime was also determined to stem the importation of some metals and coal. In March 2012, the world's third biggest iron ore exporter, BHP Billiton, warned that Chinese demand for iron ore was "likely to flatten out." At the same time, a Barclays Capital economist judged that China had now become "the least supportive factor for copper prices."[38]

The most important single reason for this is not hard to identify. Suddenly, between January and February 2012, China's $27 billion trade surplus turned into a $31 billion deficit—the largest such deficit in 12 years. The announcement triggered a fall in the fortunes of mining and energy companies "almost across the board."[39]

At the heart of the Chinese economic malaise, according to the country's leadership itself, is the recent boom in property prices. This is now seen as a potentially huge, damaging "bubble," which is threatening the country's fiscal stability.[40] And it is not difficult to predict that, if China's property sector is "tamed," then demand for its key "building blocks"—steel, aluminium, cement, aggregates and fossil fuels—will also be significantly curtailed.

China's Rising

Chinese citizens have rushed headlong into investing in real estate and massive infrastructure projects required to service building programmes and expanded transportation. This has placed hundreds of thousands of citizens at risk of losing their land and small businesses, thus triggering mass protests across the country.

At least some of those in Beijing's top power-elite seem to comprehend the urgency of curtailing the state's recent profligacy in mining and metals output, in order to reduce such conflicts—one of which occurred just as this essay was being written.[41]

Not doing so is a recipe for increasing civil strife. At the same time the regime must meet the expectations for greater private ownership of property and access to—often imported—luxury goods of its growing middle class. This dilemma is not restricted to China—but its dimensions are unequalled anywhere else, even in India.

A commentary by economics Professor Martin Hart-Landsberg—albeit now over two years old—drives to the heart of this conundrum.[42] According to Hart-Landsberg:

> *In the first half of 2009, state banks loaned three times more than in the same period in 2008. Approximately half of these loans have gone to finance property and stock speculation, raising incomes at the top while fuelling potentially destructive bubbles.*

Hart-Landsberg pointed out that:

> *Much of the other half has gone to finance the expansion of state industries like steel and cement, which are already suffering from massive overcapacity problems. It is difficult to know how long the Chinese government can sustain this effort. Property and stock bubbles are worsening. Overcapacity problems are driving down prices and the profitability of key state enterprises. Both trends threaten the health of China's already shaky financial system.*

Even more threatening, however, may be

> *…the deepening mass resistance to existing social conditions. The number of public order disturbances continues to grow, jumping from 94,000 in 2006 to 120,000 in 2008, and to 58,000 in the first quarter of 2009 (on pace for a yearly record of 230,000). The nature of labor actions is also changing. In particular, workers are increasingly taking direct action, engaging in regional and industry wide protests, and broadening their demands.*
>
> *"While this development does not yet pose a serious political threat to the Chinese government, it does have the potential to negatively affect foreign investment flows and the country's export competitiveness, the two most important pillars supporting China's growth strategy.*

Hart-Landsberg concluded:

> *The Chinese government's determination to sustain the country's export orientation means that it can do little to respond positively to popular discontent. In fact, quite the opposite is true. In the current period of global turbulence the government finds itself pressured to pursue policies that actually intensify social problems.*

It's still not certain that Beijing's oligarchs have yet learned this vital lesson, although there are indications that, at a local government level, citizen's actions against the depredations of the minerals industry are beginning to succeed.[43]

Is China Neo-colonialist in All But Name?

While some commentators have welcomed the unprecedented spurt in mineral prices, triggered by Chinese demand between 2001 and 2010, other observers are deeply concerned about the negative effects of Chinese ventures on the socio-economic health of smaller mineral-dependent states (especially in Africa). Take, for example, Hanjing Xu of Canadian mining company, Eldorado Gold. He told an investment conference in March 2010 that: "[The Chinese] lack an appreciation for community relations, worker health and safety, and environmental protection."[44]

To what extent then have Chinese foreign mining ventures corrupted politicians in their host countries, displaced their internal labor forces, introduced lower operating standards, and hazarded peoples' livelihoods? Are these companies, in effect, outsourcing social conflicts—ones often triggered by mineral exploitation—partly in order to reduce the intensity and spread of similar confrontations at home?

In November 2009, in an astute examination of Chinese business practices in two vital African mineral producing countries (DR Congo and Gabon), researchers from Stellenbosch University dismissed the concept of a monolithic "Chinese

Inc." that rigidly follows the central Communist Party line. Instead, they claimed, mining companies from the Peoples Republic of China have tried conforming to operational rules set by overseas governments. They have dealt as best they can with unfamiliar social and political norms.

Whether addressing issues of "transparency," corruption, relationships with workers, or cultural disparities, said the researchers, Chinese firms have proved adaptable and quick to learn from their hosts. They are not necessarily more prone than other corporate players to taking or offering bribes. Indeed, they are often at a disadvantage, compared with other foreign companies, some of which have much more relentlessly exploited the continent, and over a far longer period.[45]

Following a similar theme, in May 2012 two non-Chinese researchers also attempted demonstrating that China's bilateral engagements should be seen as "a positive-sum catalyst" for African governments to further their own economies, diversify their foreign relations, and achieve economic "freedom."[46]

No doubt some Chinese extractive companies have been attracted to working offshore specifically in order to externalize environmental and social costs, and thereby avoid the onus of bearing them at home. But the extent of this "proxy pollution" is often exaggerated. When environmental despoliation does occur, it doesn't necessarily result from a consciously-framed political intent to "dump" on communities abroad. One of the most notable instances of alleged damage is one said to have been caused by the Metallurgical Construction Corporation (MCC) in pursuance of its Ramu nickel operations in Papua New Guinea.[47] In this case, the company's intention to jettison potentially toxic tailings into the sea is demonstrably unsound. But it is not unique: Newmont employs a similar waste disposal system at its huge Batu Hijau gold mine in Indonesia; as does Barrick Gold at Porgera in Papua New Guinea itself.

If Professor Hart-Landsberg's analysis is sound, the Chinese leadership's failure to resolve domestic political, social and economic contradictions at home, will weigh more heavily, and on far more poorer people, than any abdication by Chinese companies from implementing better standards abroad.

Conclusion

It would be a rash analyst indeed who claimed they could predict what shape the minerals industry will be in, at the dawn of 2013. Will there be further mergers and acquisitions in order to reduce operating costs and consolidate existing leases?

Will the Chinese government fulfill its aim of reducing excess metals-based consumer exports, and restrain parts of its "over heated" domestic economy? And, is it remotely likely that so many mineworkers around the world—laid on the scrap heap in recent years—will be reemployed?

These are important issues, but not necessarily the most urgent ones to address, especially if you are a poor farmer living in a mineral-rich district, or belong to a community where livelihoods are in grave jeopardy from a proposed mine.

Undoubtedly, many communities will depend on income from some type of mineral extraction, for some time to come. Meanwhile, citizens of "mineral-dependent" states will certain expand their struggles, either to overcome such dependency, or squeeze much greater income from extractive enterprises, before "all the wells run dry."

But, if we have learned one lesson from the past four year's descent into financial chaos, it is surely this: never to trust again those who promise us the world, when the very lineaments of Our Earth have already been stretched to breaking point.

Box 1: Tracking the Trades

Index Tracker funds and Exchange Traded Funds (ETFs) attempt to follow the performance of a stock exchange share index itself, rather than outperform it (as do traditional investment funds). Some trackers buy shares in all the companies that make up the specific index (e.g., FT 100/500, Dow Jones, and S&P 500). Others use complex financial instruments to track what the index does by buying shares in a cross-section of registered companies, such as those in mining.

It is important to note that all the global investment banks, which are heavily invested in mining companies, now use ETFs as a key weapon in their armories.

When markets rise, trackers are among the best "performers." But, during a bear ("sellers") market, trackers begin to slip—though tending to do better than many of the large popular funds favoured by small investors.

Trackers are typically run by very large fund management groups such as the UK-based Fidelity, Scottish Widows, Legal and General, and HSBC. There should be no discrepancy between the underlying value of the units and the price quoted, while any dividends that come from holding the shares in the portfolio are paid at regular intervals to the unit holders. An Index tracking closed-end fund (aka Investment Trust) issues a fixed number of shares, and may also issue subsequent tranches of shares to raise additional capital.

ETFs are the most popular form of index tracking—a hybrid of an open-ended unit trust (where the fund is divided into units which vary in price in direct proportion to the variation in value of the fund's net asset value), and an investment trust.

There are now hundreds of ETFs which enable trading on virtually any stock market "index" in the world, from the NASDAQ and the Malaysian stock market, to Chinese stocks. They have "developed" to the point that clients cannot only put their money into equities but into mineral commodities themselves. This brand of ETFs has moved from investing in precious metals (such as gold, silver and platinum) to speculating on base metals. For its part, JP Morgan (by far the most significant commercial bank involved in granting mining finance) recently proposed launching an ETF based on the acquisition of huge amounts of copper.

This presented the alarming prospect of a "removal of all or substantially all of the [copper] stocks in all of the LME warehouses in the U.S.," according to a U.S. law firm. According to the firm, if permitted, the

move could cause an immediate spike in the cash price for copper, with manufacturers and fabricators having to pass these increases on to their customers.[48]

Of late these Funds have also included supposed "clean energy" and "clean water" portfolios, although some are distinctly dubious. For example, the Power Resources Water Portfolio includes the giant GE (General Electric) group that invests in nuclear power and defence contracts. Unlike mutual funds, trading at prices fixed at the end-of-day, ETFs can be bought and sold instantaneously on major stock exchanges throughout the working day. ETFs may also be sold "short" to profit from falling share values. Unlike individual stocks, U.S.-based ETFs are exempt from the "uptick rule"—one introduced by the SEC to prevent selling of shares at a lower price than that at which they were previously sold.

Box 2: Getting Something from Nothing

"Derivative" is a term simply denoting "something that derives its value from something else." It is the ugliest beast in a murky universe inhabited by creatures ("products") such as CDOs (collaterized debt obligations), CSOs (credit default swaps), CFDs (contracts for difference) and trading in "futures." In March 2010, iron ore became the latest natural resource commodity to join oil, coal and aluminium in this surreal world, as "[b]ankers and brokers gear[ed] up to exploit the new iron ore pricing system by developing a multi-billion dollar derivatives market"[49]

Since 2008, and in the most graphic and egregious manner conceivable, we have seen what this means in practice, in terms of the massive accumulations of concealed, unpaid, unpayable—and even unidentifiable—tranches of debt. Once the value of a material good, such as a ton of iron, a barge of coal, or a brick of gold, is determined—not by current demand and supply, but by a contract for putative delivery at some point in future, we are all at the mercy of speculators.

In theory, there should always be physical stocks of commodities, maintained in a warehouse or on the high seas, to back derivative transactions. But, moving these stocks around, and "dealing" them among a coterie of traders, has come to resemble a highly secretive game of poker—with an added frisson of the players sometimes not even knowing which cards they hold in their own hands. No wonder the game has been widely characterized as "Casino Capitalism." At the time of writing, the

latest example of this type of gross speculation has come from Glencore, now not only one of the world's top mining companies, but its premier metals trader.

The London-based firm was recently accused of "tightening its grip on the global zinc market by moving material to inaccessible locations, forcing industrial users to pay high physical premiums for a metal that is in surplus."[50]

With a reported 60 percent of the world's zinc trade under its control, Glencore is allegedly using warehouses monitored by the London Metal Exchange "to stow away the metal and support [its own] premiums."

William MacNamara presciently spelt out, in the *Financial Times* of 18 February 2010, a truth that has since become even more apparent. That year, he said, had already been marked by volatility that reflects confusion among market participants about what is driving metal prices and whether "market forces" mirror fundamental demand that is capable of being sustained:

> Many analysts see metals prices themselves as unreliable, because of the speculative money embedded in the headline price. The search for 'hard' asset investments amid depreciating currencies and stagnant returns has pushed pension funds, hedge funds and asset managers to increase their holdings in metals such as copper or zinc.

Citigroup issued a similar warning, pointing out that "investment inflows will not necessarily destabilize the entire metals and mining complex, but they introduce volatility and uncertainty… For mining equity investment, it's like building model-foundations on shifting sand dunes."[51]

A month later, Peter Holland of Bloomsbury Minerals Economics reflected the same reality, when commenting that there used to be "a fairly simple mechanism by which LME [London Metal Exchange] prices were kept in dynamic equilibrium: if there was a surplus, stocks rose and prices fell; if there was a deficit, stocks fell and prices rose."[52]

Says Holland, however: "Commodity Index Funds (CIFs) and Exchange Traded Funds (ETFs) have surely added a new dimension to the prices of the raw-materials in which they invest." After 2004, when pension funds began "to pour money into commodities, CIFs and then ETFs certainly did experience a surge in long-only investments"—in other words, they were stimulated by new investment, made on the assumption that market prices would rise because demand was also increasing.

According to Holland, there shortly followed "two crucial periods when

copper and aluminium prices rose sharply *despite* large surpluses and rising stocks: July 2005 to March 2006; and August 2009 to February 2010 [my italics]." Thus, "it looks as if there really may have been introduced a new determinant of prices." Since 2004, "over one million tons of long-only copper futures have been bought and held by investors in CIFs." So, asks Holland: "[H]ow can this not have moved prices?" The shift appeared to defy classic market theory that, when people want something and it's in short supply, it will become more valuable and thus stimulate production. But, when the commodity is in surplus, the opposite should occur.

Holland went on:

> Old-school commodity market analysts used to think in terms of a market balance, which they defined as production minus consumption, with resulting physical stock change and stock levels. In that system of belief, physical stocks were taken to be almost a passive dull burden which weighed down on prices—the more the physical stock sitting on the market's back, the lower stooped the resulting price.

However:

> Brokers saw things a little differently: balancing took place in the futures market not the physical market. If stocks were below the 'pinch point' and prices were backwardated,[53] exchange stocks did not depress prices at all. If stocks were above the "pinch point" and prices were in contango,[54] it was the contango-earning hedge sales of exchange stock owners that depressed prices. In contango markets, exchange stocks were a dynamic, not a passive, force.

This discussion may well seem obscure to the layperson, and it's not necessarily very educative to probe it further. The key point is that such trading—effectively betting on a price that is almost entirely removed from the real movement of supply and demand—is increasingly distorting public—and government—perceptions of our requirements for new supplies of metals, and therefore new mines.

Endnotes

[1] The paper had the original title Extractive Outcomes. It is an expanded version of a presentation made at the 2009 Manila Conference, which was last updated in July 2012. Following the brief for the talk in 2009, it restricts itself to mining rather than including oil and gas.

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[5] Ernst & Young 2010.

[6] See: http://moneytometal.org/index.php/Tables#Table_2:_Value_of_mining_M.26A.E2.80.99s.

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[24] *Mining Journal* 12 March 2010.

[25] Ernst & Young 2010.

[26] *International Mining* 16 September 2011.

[27] "Riders on the Storm." 2011, PricewaterhouseCoopers: London.

[28] Mining Recruitment Group, 2012, "Mining Executive Outlook."

[29] *Mineweb* 4 May 2012.

[30] PricewaterhouseCoopers, 2012, "Mine – The Growing Disconnect."

[31] PricewaterhouseCoopers, 2011, "Riders on the Storm." London.

[32] As of March 2012, China dominated global trade in iron ore (representing 47% of world trade), copper (38%), coal (47%), nickel (36%), lead (44%) and zinc (41%) Source: Mining.com 13 March 2012.

[33] See China overseas articles at http://www.minesandcommunities.org/list.php?r=1075.

[34] W. MacNamara, 2010, "Mining and metal trends radically affected by speculative investments embedded in prices." *Financial Times* 8 February.

[35] *Ibid*.

[36] *Ibid*.

[37] Mines & Communities, 2009, "London Calling revisits Goldilocks - without the bears." 2 November, http://www.minesandcommunities.org/article.php?a=9596.

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[51] W. MacNamara, 2010, "Mining and metal trends radically affected by speculative investments embedded in prices." *Financial Times*, 8 February.

[52] *Mining Journal* 12 March 2010.

[53] The term "backwardation" denotes a market where forward—or future—sales of a commodity are lower than the "spot," i.e., current, price.

[54] The term "contango" relates to a market where the forward—or future—sales of a commodity reach a higher price than the "spot" (the price at which it currently has a buyer).

Chapter 1.3

Indigenous Peoples, Mining and Climate Change

Social issues continue to be the highest risk facing the development of mineral products in every country. The watchwords for the industry are "sustainable development" and 'social license' which while sound in principle, have often been used by opponents of mining to delay or completely halt mining projects.

- Bhere DolBear Mining Investment Report 2009

The following chapter is a paper written by Geoff Nettleton of Indigenous Peoples Links (PIPLinks)[1]

The aim of the paper is to review the links between mining and climate change, particularly as they impact on indigenous peoples. Like the previous paper, and following the brief for the talk in 2009, it restricts itself to mining rather than including oil and gas. The paper itself points out there is, at least in part, good reason for this given the greater focus on oil in

terms of fossil fuels and climate change debates. It seeks to argue the case for the importance of action on coal.

With an eye on indigenous issues, the paper first reviews the issue of climate change, it then investigates mining's contribution to global warming, before reviewing the impact that climate change will have on mining—and those unfortunate enough to be living near climate change affected mines. Finally, it reviews the issue of the arguments around uranium's contribution to climate change, and to indigenous peoples and the impacts threatened by continuing uranium mining.

The mining industry has a two-way relationship with climate change. First, mining has a profound effect on climate change. It is currently a large consumer of carbon-based power in mining and in processing its raw material into useable products. Also the minerals mined, especially coal, contribute to the human impacts on climate through greenhouse gas build up. Second, it is itself impacted by climate change in a number of ways.

1.3.1 A Future of Climate Change

There is now increasingly clear evidence of climate change and global warming. Global warming and related concerns of increases in extreme weather events are progressively recognized by the scientific community, by governments, and even the mining industry, as a major threat to the future of current human society.[2]

Major companies such as BHP Billiton and Rio Tinto have accepted climate change, as has the industry body the International Council on Mining and Metals (ICMM).[3] Pockets of climate change denial, however, continue to exist. Sections of the mining industry—particularly companies with heavy investment in coal mining—have by turns questioned the existence of global warming and/or the role of human activity in generating global warming (see Box 2, Peabody Energy).

Scientists say the build-up of heat-trapping greenhouse gases, especially carbon dioxide and methane, in the atmosphere is already underway and will lead to an average raise in temperature of at least two degrees Celsius during this century, while many others now predict global temperature rise of up to six degrees Celsius over 1990 levels.[4]

The exact effects of such rapid temperature rises are hard to predict but scientists have suggested the following:

- Melting of the polar icecaps, permafrost and glaciers;
- A resulting significant rise in sea level;
- Changes in weather patterns—including increasing droughts, heat waves and more powerful, and possibly unseasonal, storms.[5]

Scientists are struggling to keep up in their predictions with the already visible and alarmingly rapidly developing manifestations of global warming. Some low lying island states, with indigenous populations, in the Pacific and Indian Oceans are fearful for their continued existence even if there are only moderate increases in sea level.

Many coastal regions will also be affected. We can predict that efforts will be made to protect major cities, but less concern is likely to be shown for areas with indigenous populations. An increasing number of scientists are now predicting—within this century—average temperature rises in excess of four degrees Celsius. The subsequent prediction for sea level rises is anything from 9 cm to 880 cm (3-34.6 inches).[6]

1.3.2 Mining's Contribution to Climate Change

Scientists urge strong mitigating measures to cut the generation of greenhouse gases, and thereby limit the predicted negative effects. Most governments are now also committed via their own policies and international agreements to measures attempting to minimize the degree and mitigate the effects of climate change. Some countries are furthermore com-

mitting themselves to radical measures to drastically reduce the output of greenhouse gases. For instance, the United Kingdom in 2008 adopted targets for an 80 percent cut in their carbon dioxide emissions by 2050.[7] Such large cuts are seen as essential to address the scale of the crisis. They cannot, however, be achieved without massive changes to the nature of the current economy.

Therefore business is challenged to respond to the crisis, through cuts in their production of carbon dioxide during their industrial processes and practices in their offices. This can be partially achieved by use of more efficient processes, and even improvements in planning and management systems. For companies, however, whose business is the extraction of increasing amounts of carbon for sale, such as oil, gas and coal, the challenge then is obviously more direct and serious.

An examination of the corporate plans of extractive industry companies and their financing may show commitments to cutting emissions in their head office operations or even cuts in per ton of production emissions. Nonetheless they continue to predict year-on-year significantly increased production and therefore increased emissions, which dwarf the impacts of any of their other initiatives.[8]

Mining and Forests

One of the most serious contributions to carbon dioxide release into the environment during the last century has been as a result of tropical forest destruction. Climate change scientists now stress that the protection of remaining forest is an essential element in guarding against further carbon release. It represents potentially 20 percent of global carbon emissions if forest destruction were to continue. After decades where forest destruction has been encouraged and promoted by governments and financial institutions as a route to financing development, its value as a living resource is finally becoming recognized.[9]

Mining has traditionally been about tunnelling, and this deep mining has placed major demands on forest resources.

Mines, especially underground mines, consume large quantities of timber. Mining concessions were often granted related logging concessions to supply their timber needs. Traditional deep mines used timber for pit props, lining of tunnels and shafts, plant construction, and for the construction of offices and housing. Companies granted logging concessions in this way sometimes developed into full-blown logging operations in their own right.[10]

As noted in Chapter 1.1, however, deep mining is increasingly being superseded by larger-scale operations based on surface mining through strip mining or open-pit operations.[11] The extraction of the mineral requires not just the removal and storage of the large amounts of over-burden, but also the removal and destruction of all standing vegetation. In Indonesia, for example, coal mining has taken place from beneath *protected* forest*s and* indigenous lands.[12] In the Philippines, a nickel laterite mine planned by BHP Billiton would have developed a strip mine on indigenous lands which include some unique montane forest, in eastern Mindanao around Pujada Bay.[13]

When such mining operations are completed, forests are unlikely to be restored. Forest is a complex ecosystem that requires generations of development. The record of mining companies in restoring land to even effective tree cover is at best mixed.[14] The restoration of full forest is a long way off. Land disturbed by mining can suffer from excessive drainage and strong leaching of nutrients particularly in areas of high tropical and seasonal rains. Unless companies persist over years with the watering, maintenance and feeding of replanted trees, even those planted tend to be stunted. Companies may not be enthusiastic to adequately fund the challenges of restoring rich vegetation cover, or if a project changes hands, the new company may not inherit the responsibilities. Few regulatory authorities are willing or able to extract maximum restoration. Tree replanting programs tend to concentrate on fast growing varieties limited in diversity, and often including exotic species with their own environmental problems.[15]

Where they exist, re-vegetation programs also carry potential threats to communities. Requiring mining companies

to invest in tree planting programmes without full recognition of indigenous priority rights is a further threat to indigenous peoples' land rights, as companies have incentives to turn their concessions into lucrative, long-term tree plantations.

The Contribution of Minerals Processing

Coal is the mined mineral that contributes most to global warming. Much of the coal mined is for energy generation, which we will examine shortly. Other parts of the mining industry, however, combine with fossil fuel extraction to increase global warming. It is estimated that mining and minerals processing account for up to 10 percent of world energy consumption.[16] The production of iron and steel is based on the massive extraction of iron ore and a heavy reliance on cheap transport to carry it to the point of smelting and use. Yet it also depends on high energy inputs and the use of coal in production. This high energy demand is true of a wide range of metal ores. Aluminium, copper and steel production alone account for more than seven percent of global energy consumption.[17]

Bauxite, the raw materials for aluminium, is often mined over extensive areas, resulting in significant environmental and social impacts. In addition, however, aluminium production uses more electricity per unit of output than any other industrial operation, apart from uranium hexafluoride production. The process releases about two tons of carbon dioxide for each ton of primary aluminum produced, and another three tons of perfluorocarbons (PFCs), which are extremely potent greenhouse gases; a ton of PFCs is equivalent to the greenhouse potential of 6,500-9,200 tons of carbon. In 1997, PFC emissions from aluminum smelters in Australia, Canada, France, Germany, the United Kingdom, and the United States were equivalent to about 19 million tons of carbon. The good news is at least this is 50 percent less than their emissions in 1990, thanks to improvements in smelter efficiencies.[18]

In 2000 the U.S. Environmental Protection Agency sponsored the Voluntary Aluminium Industrial Partnership, which seeks to reduce emissions of PFCs and other harmful

chemicals during primary aluminium processing. While such initiatives are clearly valuable, they are open to criticism by those who see global warming as a major crisis, rather than a voluntary management option.

Recycling of aluminium, On average, however, requires approximately five percent the energy input of primary production.[19] Recycling of aluminium currently accounts for around only one third of production. It is tragic that large amounts of recyclable aluminium and other minerals are still lost in landfill, while massive investment in primary extraction from greenfield sites continues.

Aluminium smelters, being an energy intensive process, are often associated with hydroelectric dams.[20] Although large hydroelectric projects are often considered as good for climate change, a decade ago the World Bank-sponsored World Commission on Dams concluded with a consensus report severely critical of the record and the potential of such projects to deliver their promised benefits. The report clearly identified the mistreatment of indigenous peoples in hydro projects. Global warming seems to be encouraging the World Bank and others to overturn the Commission' conclusions, turning a blind eye to the negative consequences for the rights of affected indigenous communities.[21]

Fossil Fuel Addiction

While some may think, from current press coverage, that global policy is now already directed to cutting carbon emissions, this is sadly incorrect. For example, 2006 was a historical record year for coal mining in the USA, with a total of 1.161 billion tons mined. According to mining industry projections, the production of coal will continue to increase for at least the next 20 years.[22] All scientific evidence shows that this will seriously contribute to accelerated climate change. In fact, the extraction and consumption of fossil fuels is still currently on the increase. Indeed it is the global recession that has so far done more to cut greenhouse gas emissions than policy reform.

The necessary cuts in greenhouse gas emissions cannot be achieved without significant changes to the nature of the global economy. These seem to be even more difficult to achieve if you consider the domestic pressure in major economies to protect jobs and standards of living during the fallout of the global financial crisis. It can be argued that changes in economy do not have to mean reductions in overall employment—indeed, climate campaign groups specifically advocate investment in new, "green" jobs in industrialized economies.[23] Neither should it necessarily involve huge reductions in energy use. But it does require radical changes in the sources of energy used. Some scientists argue that 95 percent of the world's energy needs could be provided by renewable sources by 2050.[24]

King Coal's Tarnished Crown

And that is where the major industries who are dependent for their very existence on their exploitation of the carbon resources of the world are fighting back. The oil and gas industries are mostly the first to spring to mind when thinking of fossil fuels, but the mining of coal itself is a direct and major contribution to global warming. Coal mining and burning coal for energy remains one of the major engines behind global warming (see Box 2, Coal's contribution to carbon emissions).

Mining for coal can be a double contributor to global warming where it destroys standing forest to clear the way for coal strip mining which, on use, will further contribute to carbon dioxide emissions and the release of even more potent greenhouse gases, including methane. In the USA, 26 percent of energy-related methane release is a direct result of coal mining as it escapes from buried coal strata.[25]

There is a massive contradiction between government and business statements and commitments to fight climate change on the one hand, and their current investment plans on the other. Governments across the world are continuing to encourage industry to spend hundreds of billions of dollars to build new coal-fired power stations in the coming years—notably in the USA, India and China.

In the face of overwhelming evidence of the need to cut greenhouse gas emissions, all the major global coal mining companies continue with projections for annually *increasing* production up to and including 2030.[26] Chinese production—plus increased production from major companies such as BHP Billiton, Rio Tinto and Peabody—all suggest that without external limitations, output—and therefore emissions—will continue to grow for the foreseeable future. It seems that short of strong and enforceable legislation, corporations will continue coal mining despite the clear evidence of its fundamental contribution to global warming.

Much of this expansion would be impossible without government support. The International Energy Agency (IEA) states in a 2010 report that global subsidized consumption of fossil fuels amounted to US$557 billion in 2008, including $40 billion for coal consumption.[27] In June 2010, a draft European Commission document showed that the European Union was considering 12 more years of state aid for coal, even as the Group of 20 (G20) nations prepared to collectively discuss phasing out fossil fuel subsidies.[28] In their report, the IEA suggests that—compared to a baseline in which subsidy rates remain unchanged—global subsidy phase-out would cut global energy demand by 5.8 percent, and energy-related carbon dioxide emissions by 6.9 percent by 2020.[29] The Organisation for Economic Cooperation and Development (OECD) has urged governments to end fossil fuel subsidies, arguing that this could reduce greenhouse gas emissions by 10 percent.[30]

Another way in which the governments of industrialized countries sustain and even encourage coal use is through the carbon trading system, which is practiced in the European Union and encouraged by the Kyoto Protocol. Participating governments have already given large quantities of free carbon permits to companies which use coal to generate electricity. Some of the least acceptable of the permits have been given to steel and aluminium producers. Carbon trading permits can either be used to continue producing high levels of carbon dioxide or traded for cash. In this way, heavily polluting companies can both carry on polluting and profit from enabling others to pollute.[31]

Some of the opposition from forest-based communities to the United Nations Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (UN-REDD Programme),[32] is because this, and other schemes linked to carbon trading and the Clean Development Mechanism,[33] provide opportunities, or even incentives for companies to avoid making meaningful emissions reductions.[34]

Greenpeace estimates that if all the planned coal-fired power stations are built, carbon dioxide emissions from coal would rise 60 percent by 2030.[35] This would have severe negative impacts on any international agreements to tackle climate change. But the global coal industry continues to be able to mobilize finance on behalf of its projects across the world. The World Bank, for instance, according to the Bank Information Centre, saw a 200 percent increase in funding for coal-based initiatives between 2007 and 2009.[36]

Challenges to the Coal Industry Over Climate Change

In many countries, including coal producing countries, there has been an increase in activism against the use of coal in recent years, mainly because of concern about the climate.

Even some governments have joined in the efforts to genuinely reduce coal-related emissions. The Pacific Island state of Micronesia is using existing environmental laws and the United Nations Treaty on Impact Assessments to try to prevent the expansion of a coal-fired plant by a Czech company, CEZ. Its plant at Prunerov in the north of the Czech Republic was, according to Micronesia, the 18th biggest source of greenhouse gases in the European Union, emitting about 40 times more carbon dioxide than the entire Pacific Island federation.[37] Micronesia is made up of many islands including many that are low lying and directly threatened by rising sea levels

Understandably the Pacific Island and Indian Ocean states have been at the forefront of efforts to curb global warming and related sea level rise through international action. UN

bodies, including the former Working Group on Indigenous Populations, have clearly acknowledged and supported the arguments of island states. In practice, however, major industrial states continue with policies and practice that may see some of those island states inundated and their indigenous populations become permanent refugees.

Clean Coal or Dirty Politics?

Some pro-coal bodies, particularly in the USA, have sought to inhibit the imposition of measures to slow global warming.[38] While major companies may pay lip service to the aspirations to prevent global warming and reduce carbon dioxide emissions, practice reveals a different reality. In 2009 for example a lobby group in the USA, Bonner and Associates, was found to have forged a series of letters to representatives in Congress, which claimed to be from different people and some well known NGOs. They even claimed to represent the National Association for the Advancement of Coloured People, which is "the nation's oldest, largest and most widely-recognized grassroots-based civil rights organization,"[39] as well as other well-known civil rights organizations.

The American Coalition for Clean Coal Electricity (ACCCE) is a public relations juggernaut funded by electric utilities, mining corporations, and other coal interests to derail mandatory limits on global warming pollution.[40] It subsequently "acknowledged" paying for Bonner's "outreach." ACCCE was the top lobbyist on climate change and clean energy in 2008, spending $10.5 million on influential lobbyists such as the Podesta Group and Guinn Gillespie. ACCCE has been praised for the "sophistication" of its public message of supporting mandatory emissions limits in theory, while virulently opposing the passage of any actual legislation.

ACCCE has a $20 million budget for online campaigns for "shaping public attitudes" in favor of coal alone. It has run tens of millions of dollars of television and radio adverts, has handed out "clean coal" T-shirts and baseball caps, and even promoted "Frosty the Coalman" carols!

The industry-financed lobbyists in the USA have had considerable negative influence on United States government policy, resulting in years of resistance to the development of a truly international response to the threats from climate change.

The coal, cement and steel industries lobbied directly to weaken international efforts to impose strict limits on carbon emissions at the Copenhagen Summit in 2009. They succeeded in persuading governments to opt for actions aimed at limiting average temperature rises to two degrees Celsius by 2100. This target is viewed by some critics as inadequate in scope or strictness of implementation to avoid some of the worst impacts of climate change.[41]

In attempting to present a clean image of coal, its proponents in both industry and government have made strong claims for an as yet unproven experimental technical fix to be the main provider in reducing the mineral's "carbon footprint." This fix is "Carbon Capture and Storage (CCS)," which it is claimed will catch and safely store the carbon in underground geologic formations to reduce carbon dioxide emissions.[42]

According to many scientists, CCS has not been once proven to work on an industrial scale. According to some it may never be able to do so. Michael Economides, Professor of Chemical and Biomolecular Engineering at the University of Houston, Texas, states that "[G]eologic sequestration of CO2 [is] a profoundly non-feasible option for the management of CO2 emissions." He suggests that there are insufficient geological formations suitable to store the enormous quantities of carbon dioxide, which would be emitted under current energy-use projections.[43] Storage formations may not be located where most needed. Neither is there any guarantee that formations would not rupture, causing stored carbon dioxide to bubble back up to the surface and into the atmosphere.[44]

Yet governments have paved the way for a whole new round of coal-fired power stations based on the promise that, someday, CCS will work. European Union member states will, between now and 2015, allocate about one billion Euros to

between six and twelve CCS "proof-of-concept" projects.[45] The Geological Survey departments in a number of countries, including the USA, UK, Ireland, and the Netherlands, are aggressively assessing the CCS potential of their on-shore and off-shore subsurface geological formations.[46] There are a rapidly growing number of active small-scale sequestration projects being constructed or planned, either as part of enhanced oil recovery efforts or straight proof-of-concept CCS efforts in Algeria, Australia, Canada, the Netherlands, Norway, the UK, and the USA.[47]

In July 2008, a report by the UK Parliamentary Environmental Audit Committee attacked the belief that "dirty coal" will be eradicated in our own lifetimes. Pointing out that "clean coal" can be used as a "fig leaf" to cover technological and economic uncertainties over coal's future, the Committee concluded that, "unless there is a dramatic technological development, coal should be seen as the last resort, even with the promise of carbon capture and storage."[48]

Another means of extending the life of the carbon economy is the processing of coal into a liquid fuel. This is an extremely difficult and dirty process resulting in a product that will, in production and use, deepen the environmental crisis of global warming rather than reduce it.[49]

The prominent US political commentator, Joshua Frank, citing Michael Economides in the magazine *Truthout*, concludes:

> *We ought to bag the idea that coal can be clean altogether. The public investment in clean-coal technology is a fraud and will only serve as a life support system for an industry that must be phased out completely over the course of the next two decades. Putting billions of dollars behind a dead-end theory will not bring about the energy changes our country and climate so drastically need.*[50]

1.3.3 Mining and the Impacts of Climate Change

There are serious considerations about mining impacts that it is predicted will be made worse by more extreme weather and climate change. Some threaten the safety of surrounding communities and may threaten the viability of mining projects as well.

Waste Management: Tailings Dams

The safety of tailings dams is an area of particular concern because of the potential seriousness of breaches.

Mine tailings are these days most commonly held behind tailings dams. Most dams are currently constructed with excavated earth. All are built to a cost calculation based on the risks of dam failure prediction of extremes of future weather. The biggest tailings dam currently in the Philippines is, according to its constructor, Lepanto Consolidated, built on a calculation to withstand a one in 500 year weather event.[51] As there is, however, an increase in extreme weather events due to climate changes, the odds of such an event occurring are increasing. In the past a disturbing number of the more than 3,500 tailings dams said to be in existence globally suffered serious incidents of breach or leakage.[52] For example, according to a partial listing by PIPLinks, in the Philippines there has been a serious incident on average once every two years or more over the last 25 years.[53]

Where heavy unseasonal rains may occur, mine sites are particularly vulnerable to rapid run off sometimes including washing of exposed earth and even toxic materials into river and marine systems. The cost of the safe management of waste containment may have to escalate steeply; even prohibitively. In some regions it may prove necessary to impose no go zones for tailings dams. Zones to be affected may include the typhoon/cyclone zones of Southeast and South Asia and

Central America, Southern USA and the Caribbean. Recent Philippine experience suggests that the eastern coastal region and Sierra Madre Mountain regions of Luzon and the eastern Visayas, which face incoming typhoons, may be particularly vulnerable.[54]

Additionally according to Citigroup, "At higher latitudes, high rainfall may require some operational adjustments, with the integrity of tailings dams being an issue for consideration, and the potential for consequential environmental damage." The analysts also asserted that "critical infrastructure such as ports may be at risk from small sea level rises particularly if combined with storm events."[55]

Other forms of tailings containment may also require a rethink or a ban. Unpredictable weather shifts may also require additional safety measures and expenses in arid and semi-arid regions. Greater weather extremes including flashfloods and wind storms could widely scatter dry heaped mine waste.

In high mountain areas, there have been some recent attempts to manage and divert glaciers or even store mine wastes—including potentially toxic materials—in glaciers. In the Andes and Central Asia, however, global warming has exposed the short-sightedness and irresponsibility of such plans. Melting glaciers are already posing problems of containment of potentially serious pollution.[56]

One resulting issue for the extractive industries is that current or abandoned mines at or near sea level may themselves be subjected to both more extreme weather events and inundation because of rising sea levels. Few such mines have management plans that consider or can adequately protect them from such inundation and such mines may generate new and damaging acid drainage and other environmental problems as ore bodies become exposed to sea water that may have severe impacts. It may require a ban on new mining in low lying coastal zones. Past experiences where sea encroachment can flood open-pit and underground workings shows the serious threat of the activation and release of toxic materials, including the generation of acid drainage effects.[57]

Disruption of Water Tables

Deep mining and drilling have serious impacts on the level and quality of water in the water table. These are particularly pronounced in both mountain and semi-arid areas where both mining and indigenous peoples tend to be concentrated. In Mankayan, Benguet province in northern Philippines, according to Kankana-ey indigenous farmers, Lepanto Consolidated's underground mining has resulted in lowering in the water table and reduced availability for irrigation and farming of surface and near surface water and has left their fields desperately short of water for domestic and agricultural use.[58]

Many mining processes depend on the use of enormous quantities of water for processing, washing and cooling. Clean water is a precious and increasingly scarce resource, yet it is used in vast quantities in mining even in semi-arid and arid regions. The Citigroup analysis of climate change risks to mining suggest "availability of fresh water is critical to most mining and processing operations."[59] In the USA, between 1964 and 2005, Peabody coal has drawn millions of gallons from aquifers under the deserts of the South West that are a main source of drinking water for Navajo people and their livestock. This vital life-giving water was used by Peabody Energy to pump coal in a mixture of gasoline and water in a slurry pipeline operation to transport extracted coal to the Mojave electricity generating station in Laughlin Nevada.

Citigroup warned that "reduced rainfall, higher evaporation, receding glaciers, and shrinking aquifers may reduce water availability. Authorities may become more conscious of ensuring water availability for communities, and of environmental flows." In Chile the combined extraction and pollution of the waters of the Loa River by mining companies Codelco and SQM has resulted in the desert town of Quillagua losing access to most of the river water it has traditionally depended upon. As a result the town is shrivelling and dying.[60]

According to Citigroup, such conflicts will result in increased pressure to prioritize life and sustainability over commercial interests. They predict the result "could reduce

water availability for mining operations, leading to higher costs and cause quality issues (e.g., salinity)," the analysts indicated. "Operations reliant on hydroelectricity may benefit or suffer from higher or lower rainfall, respectively. In some areas, higher rainfall could require modification to tailings operations."

1.3.4 Uranium Revival

The nuclear power industry, and the mining operations for uranium on which it depends, have had increasing difficulty in maintaining credibility and investment. They have been hit by disasters such as the Three Mile Island in the USA, the 1986 Chernobyl in Belarus and—more recently—the Fukushima disaster in Japan. Unfortunately and perversely, however, the general concern over climate change has been taken as an opportunity to revive the fortunes of this most unsustainable of all fuels.

The radioactive fallout from the Chernobyl resulted in significant pollution from radioactive materials. The plume drifted over large parts of the western Soviet Union and Europe. From 1986 to 2000, 350,400 people were evacuated and resettled from the most severely-contaminated areas of Belarus, Russia and Ukraine.[61] According to official post-Soviet data, about 60 percent of the fallout landed in Belarus.[62] Significant radioactive fallout was recorded as far away as Wales and Ireland in the west.

Chernobyl and Fukushima are the only two level seven events ever recorded on the International Nuclear Event Scale. Nuclear power, already among the most expensive forms of power generation, became increasingly feared and opposed. According to *The Japan Times*, the Fukushima nuclear disaster changed the national debate over energy policy almost overnight. "By shattering the government's long-pitched safety myth about nuclear power, the crisis dramatically raised public awareness about energy use and sparked strong anti-nuclear sentiment." A June 2011 *Asahi Shimbun* poll of 1,980

respondents found that 74 percent answered "yes" to whether Japan should gradually decommission all 54 of its reactors and become nuclear free.[63]

The nuclear industry, however, has used the growing concern over carbon-based power generation to try to relaunch nuclear power because of its so-called limited contribution to climate change. This effort has been sustained despite the recurring disasters. Some environmental campaigners, so dismayed by the low rate of progress on reducing carbon dioxide emissions, have revised their own thinking on the necessity for nuclear power.

The claims, however, that uranium is somehow a more sustainable fuel base do not withstand close examination. They depend on claims of improvement in practice that are not subject to critical scrutiny. They are in large part based on ignoring the significant environmental and health costs at the point of production and by selective inclusion and exclusion of data seeking to create a sustainable image of nuclear power.

Uranium Mining and Indigenous Peoples

The history of nuclear power has been one of discrimination and disregard for indigenous peoples. Indigenous lands carry a disproportionately high proportion of uranium mines. The opposition of the Mirarr of the Northern Territories of Australia is documented in the case studies in Chapters 1.1 and 2.3.

Since the end of the Second World War, the growth of the nuclear power industry in the USA has been fuelled from mines largely developed in the US South West, and especially on Navajo lands. The adverse effects on the health of indigenous miners and their families as a result of contact with contaminated clothes has been profound.

Numerous studies have revealed shocking levels of contamination and resultant deaths and ill health. A 1995 report published by American Public Health Association found: "excess mortality rates for lung cancer, pneumoconioses and

other respiratory diseases, and tuberculosis for Navajo uranium miners. Increasing duration of exposure to underground uranium mining was associated with increased mortality risk for all three diseases…"[64]

In areas near uranium mills, residents suffer stomach cancer at rates 15 times those of the national level. In some areas, the frequency gets as high as 200 times the national average.[65] Hundreds of abandoned uranium mines with exposed tailings remain unremediated in the Navajo Nation area posing a contamination hazard.[66] Near the former uranium mills, water contamination and contamination of rocks, which many residents used to build their houses, continue to be problems.

Yet for many years—even while medical studies were revealing heightened rates of cancers and other diseases associated with coming into contact with radioactive material—the Navajo were not fully informed or warned of the dangers they faced. For example, a US Public Health study in 1951 into the dangers of exposure to heightened levels of radon and other radioactive materials failed to inform the subjects of the scope of the study or the dangers involved in exposure.

"The cancer death rate on the reservation—historically much lower than that of the general U.S. population—doubled from the early 1970s to the late 1990s, according to Indian Health Service data. The overall U.S. cancer death rate declined slightly over the same period."[67]

France also continues to actively develop its nuclear power industry, which depends heavily on mining of uranium on Tuareg lands in Niger. Mining and extraction of uranium there is performed by two subsidiaries, formerly of French Cogema, now subsidiaries of French AREVA, which is a majority state-owned corporation. The similar patterns of failures in worker safety are well documented; likewise, inadequate management of radioactive waste materials leading to exposure of both workers and the community.[68]

Other Types of "Nuclear Fallout"

In addition, nuclear bomb testing—made with uranium mined from indigenous lands—has been concentrated on indigenous lands globally. The US weapons testing sites in the South West USA have resulted in irradiation of the soils in this arid and windy region and have—according to the American Cancer Society—resulted in heightened levels of cancers in the surrounding and down-wind regions.[69] The British and French both conducted testing on indigenous lands without permission or consent being given, or in some cases, even informing the traditional land holders and the most adjacent and affected peoples.

And increasingly in the USA, for example, the storage of nuclear waste is being concentrated on indigenous lands, supposedly representing a job creating option for a poor region.[70] The management of radioactive waste further requires the development of a safe secure and globally managed system of storage that must operate without any serious error for millennia to come. Given even the short history of failure and mismanagement, natural and man made disasters associated with the nuclear industry, and that inevitably follows any human sustained effort, this seems the most irresponsible and hopeless of options.

Therefore, for many affected indigenous peoples any revival of the nuclear power industry is a prospect viewed with fear and resignation to the continuation of related illness and death.[71]

1.3.5 Conclusion

Climate change has grave implications for all peoples. It is, however, most likely to have the most adverse effects on those who live already in more extreme and challenging environments. The threats to indigenous peoples from greater extremes of weather and changes in climate are potentially severe. The threats can be severely exacerbated by irresponsible mining activities, both directly and indirectly.

The record of the industry in their disregard for the future is truly alarming. It should be clear that self regulation is not sufficient to provide adequate protection. This is especially true where vital issues like the protection of lives and livelihoods, human rights and environmental protection are concerned.

It will more likely require heavy investment, restrictions on areas of operations, and planning to minimize new mining and maximize alternatives—including recycling, reuse and substitution. Stricter regulation of the mining industry and adequate independent monitoring are essential features for the future.

Box 1: Coal's Contribution to Carbon Emissions

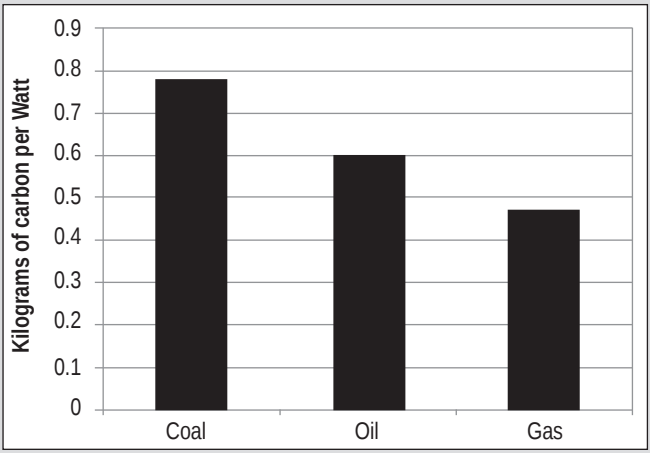
As fossil fuels are burned to produce energy, the carbon in the fuel reacts with oxygen to form carbon dioxide gas (CO2). Most of this is released into the atmosphere. Burning coal (which consists of "free" carbon) produces more carbon dioxide per unit of energy generated than any other fossil fuel. Compared to natural gas (which consists mostly of the carbon-compound methane, CH4), coal releases 66 percent more CO2 per unit of energy generated.

Coal mining also releases methane into the atmosphere. Methane is 20 times more powerful than carbon dioxide as a greenhouse gas.[72] In the USA in 2006, 26 percent of energy-related methane release was a direct result of the mining of buried coal strata.[73] Around the world, about seven percent of annual methane emissions originate from coal mining.[74] This methane could be used to produce energy more efficiently than the coal itself.[75] Methane can theoretically be captured from underground strata before opencast mining takes place, but while this is increasingly spoken of it is, as yet rarely done. It is easier to capture methane from underground mine,s but this too is an underdeveloped methodology.

Coal mining and the burning of coal for energy generation, cement manufacture and steel production have been among the major engines of global warming. This has been the case for more than 200 years of industrialization. Despite increasing understanding of this dangerous legacy, however, coal production and use continues to accelerate. According to the 2010 BP Statistical Review of World Energy,[76] 2009 was the first year since 2002 that coal was not the fastest growing fuel

in the world. This was largely because of the slackening of demand from industrial consumers in the more heavily-industrialized OECD countries as a result of the global economic crisis. Demand in the Asia Pacific region and the Middle East grew by 7.4 percent. China was responsible for 95 percent of that increase and was, overall, the largest producer and consumer of coal in the world, accounting for 46.9 percent of global coal consumption and producing 45.6 percent of global supplies during 2009, according to the BP report. Other producing countries differ widely in the proportion of their coal that they export.

BP noted that coal remains the most abundant fossil fuel by global reserves, and accounted for 29 percent of total energy consumption in 2009—the highest proportion since 1970. The World Coal Institute[77] forecasts that use of coal will rise by 60 percent over the next 20 years. It is estimated that 45 percent of carbon dioxide emissions will in 2030 be linked to coal.[78] While the rhetoric of intergovernmental concern might suggest otherwise, the reality is that both governments and companies have projections extending at least to 2030, which predict and tolerate increasing extraction and consumption of coal.



Comparison of the amount of carbon (as carbon dioxide) released per unit of energy (Watt) generated by coal, oil and natural gas (figure after Archer 2007. Global Warming: Understanding the Forecast. Blackwell Publishing, 194.)

Box 2: Peabody Energy

Parts of the mining industry have, perhaps due to their short term corporate vested interests, been central to the resistance of analysis of the reality of global warming and resistant to actions to address it. These have already been so damaging to development of measures to slow climate change, particularly within the USA. The attitude of the fossil fuels energy industry to the current crisis and their far reaching political influence should be a profound concern for us all.

One example of great concern to indigenous peoples, because of where so many of their mines are situated, is Peabody Energy of the USA. Peabody are one of the members of the American Coalition for Clean Coal Electricity (ACCCE) (see Clean coal or dirty politics? in this chapter). Peabody is highlighted here as an example of those mining corporations that are proceeding with development plans that fly directly in the face of global concerns on climate change. To quote from their website:[79] "Coal is the fastest-growing fuel in the world and Peabody is the world's largest private sector coal company."

In 2008 Peabody demonstrated the strength of its global platform identifying new records in all key financial metrics, such as sales volumes and revenues. They boast of being the:

- Only US based coal company serving major long-term demand epicenters in Asia;
- Having an operating portfolio predominantly of large-scale, low-cost surface operations, making performance less susceptible to geology and safety compliance issues;
- Opportunistically evaluating potential acquisitions amid currently distressed market conditions.

Peabody's list of directors, which includes former Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs John Turner, reveals both the political influence they wield and the close association to capital investment that is spurring the most rapid possible exploitation of the world's non-renewable resources to feed short term profit without regard for rational conservation and shifting to alternatives as the world needs.[80]

Peabody also assert "Long-term coal demand fundamentals remain strong. The International Energy Agency's World Energy Outlook estimates world primary energy will grow 45 percent between 2006 and 2030 with demand for coal rising more than any other fuel, accounting for over a third of the increase in energy use. China and India account for more than half of the incremental energy demand."

Endnotes

[1] This paper was prepared in this version by Geoff Nettleton as an expanded and updated version of a presentation that was made at the International Conference on Extractive Industries and Indigenous Peoples or the 2009 Manila Conference. Subsequently inputs were made to the initial 2009 Manila Conference presentation by many people, especially Kailash Kutwaroo who has previously acted as co-author, and with inputs from Richard Solly, Roger Moody, Mark Muller, Gunter Wippel. Without their inputs this paper would not have been possible. Their contributions and advice have improved the paper enormously. Any remaining limitations, however, are the responsibility of Geoff Nettleton.

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Indigenous Peoples and the Extractive Industries: Responses

PART

2

Chapter 2.1

Local Community Assistance

This chapter explores the actions that indigenous communities can undertake when confronted with extractive industries projects on their doorstep.[1] This chapter tries to be comprehensive in addressing these, and in doing so runs two risks. The first is that it is not complete; but even building on the collective wisdom of the 2009 Manila Conference, that is always likely to be the case. It is hoped these ideas can be built on over time. The second is that it repeats the obvious for experienced activists. This is written primarily as a guide for a community that is initially confronted with the extractive industries. But before considering these actions—following significant concerns raised in the 2009 Manila Conference—we need to address issues of unity and leadership within the community[2] when confronted by an extractive industry project.

2.1.1 Local Actions

Community Unity

As raised in the first part of this book, one of the key problems associated with the extractive industries is social division. Some of this occurs because the nature of extractive projects; some sectors of the indigenous community may benefit, or incur less of the costs, than others. These differences may be concerning land ownership or current livelihoods, intergenerational, or gender-based issues. They also may be over contesting leadership claims, e.g., between formal/informal or traditional/elected leaders. Many of these are based on tensions already within the community, but the advent of external pressures will likely increase the divisions, and lead to internal conflict. Companies can also deliberately play upon these divisions, seeking to make deals with some and excluding those who do not wish to make such deals.

One of the first actions that any affected indigenous community should do is to ensure that the community is as united as possible. Organizing communal meetings, which affirm the shared values of the community and reassert communal or traditional decision making processes, is very useful. It is worthwhile publicly substantiating these, but—where it does not break cultural taboos—often better still to write them down, and get the community to publicly verify them. This makes it undeniable for the company that they are aware of the community position and it can—at the appropriate time—be easily shared with potential allies. This statement can primarily focus on the principles of governance, but will be useful if a company or government later tries to deny knowledge of opposition or undermine that process by seeking to install its own "leaders" or to impose a culturally inappropriate method of decision making. If there are a number of forms of leadership or sectors represented within the community, it is advisable the statement explains how they interrelate, and where

possible, to explain the relative importance of each.[3] This is especially important if a colonial government has imposed its own kind of "tribal" authority. Of course, the community as a whole may later choose to modify these, in the same open and transparent manner, but it is very important to stop secret deals being enacted behind the back of the community. The earlier this can be done, and without the pressure of an impending project, the better.

The Subanon people of the Zamboanga Peninsula, Philippines, provide an example of this type of activity. The Subanon of Mount Canatuan had suffered a long-standing conflict over the entry of Canadian mining company TVI Pacific, where a new leadership, called a Council of Elders, was imposed on the Subanon at the behest of the company after their traditional leadership refused the company entry. The regional Subanon leadership, called the Gukom of the Seven Rivers, had been active in asserting the traditional leadership in the community. Having learned lessons from this experience, the Gukom decided that all the regional Subanon leaders should come together to collectively confirm the traditional leadership structure, and also the customary decision making processes. This was needed despite the fact that the Philippine government has a legal framework insisting on FPIC for mining projects, which should already be taking account of the traditional governance of the Subanon. In some ways, perhaps it was precisely because of this, as the process at Mount Canatuan had been in reality a shameless subversion of Philippine national law. Having seen how the implementation of a law that was meant to protect their interests could undermine them, the Subanon were keen to have a collectively agreed understanding of their traditional governance model to insist any company follow in future situations.[4]

Likewise the Kitchenuhmaykoosib Inninuwug (KI) First Nation of Ontario, Canada, have been engaged in various conflicts in defence of their lands and resources. The attempts of the Canadian company Platinex to explore for platinum and palladium on KI territory, near Big Trout Lake, have been met by concerted resistance. This has included court battles from 2006, and the eventual imprisonment in 2008 of six lead-

ers of the community (including KI Chief Donny Morris) for defying a Court Order to stop protesting. Having exhausted many other courses of action, the KI asserted their own self-determination with the creation of the Kitchenuhmaykoosib Inninuwug Water Declaration and Consultation Protocol. They were passed by a community referendum on 5 July 2011 with the support of 96 percent of ballots cast. They were then brought into force as Indigenous Law by the KI Chief and Council through a Band Council Resolution, along with a spiritual ceremony and blessings of the results. The Protocol insists activities affecting KI's lands and resources must only proceed with KI's FPIC, according to KI's own laws and decision making processes, which are laid out in the protocols.[5]

The United Nations Environment Program has a website, which has gathered together what it calls "community protocols"—effectively a datebase of documents generated by communities to set out how they expect other stakeholders to engage with them. It includes lists of different community or organizational documents, which can serve as a resource for others who want to develop protocols of guidelines.[6]

Education and Organization

As well as getting communal agreement on local governance, it is worth understanding the nature of extractive projects in principle, before any exploration. This is especially the case if it is known the area has been, or is about to be, leased to a company. The more informed debate that can be had internally before dealing with the company directly the better. This is true regardless of any strategy the community comes to. Whether the decision is to negotiate, to resist, or simply to seek more information and advice, then preparations must be made. Again, it is much better done before external actors can exert pressure on the community.

In the 2009 Manila Conference, participants considered the factors in fostering indigenous unity. It was stressed that there are two competing worldviews. The first is an indigenous peoples' view of the earth as a Mother, with humans having a

communal duty of care towards it. The second mainstream economic worldview sees the earth as a resource to be used for individual human consumption.[7] The more that the first viewpoint is at the heart of a community's strategy, the more likely it is to stay unified and achieve its goal.

Another point raised was to prepare for all of the possible outcomes of the struggle and not just the struggle itself. In the case of the Amungme people opposing Freeport McMoran in West Papua/Indonesia, the allocation of money from the company to the community, as a result of their campaigning, ended up causing terrible divisions in the community. In further discussion at this conference, experienced participants shared concerns on how the receiving of royalties or benefits was likely to have the greater negative impact on community unity than campaigning. Prior discussions are essential on whether to accept funds and if so how to communally manage any funds obtained. [8]

Assuming the community insists on its right to free, prior, informed consent—then it is important for the community to mobilize to make sure the informing really is prior to any processes starting. This is especially true if the community plans to resist the project. The further a project progresses, the more difficult it becomes to stop; generally, the more the company invests and builds roads and infrastructure and spends money, the harder a project becomes to stop.[9] The community may hear rumors—based on offers made to individuals or surveyors arriving—which should be followed up as soon as possible.

So the first task is to search out information. Mobilize the community, including looking for people who may have specific skills or knowledge that would aid research. Find out as soon as possible details about the company and the proposed extractive processes. It is useful to know where the company is from, who its other affiliates and shareholders are, as well as the company's history of social and environmental practices. Company websites will have useful information (especially if it is a publicly listed company), and the bigger the company the more the information. There are other activist websites, which will have useful information, and can connect the community

with others who share an interest in the company, including in its home country if it is a multinational (see List of Resources in the Appendix).

Research the legal procedures for company applications, and any legal constraints or company policies that may act as safeguards. If available, get a copy of government maps showing the status of concessions. These can often be found on government websites, but this may involve a visit to a regional government office. Make sure that the officials verify the copy of the request with the date and a signature for future reference.

The next step is to mobilize in the community with the information gathered. Share the information, ideally at an open event, and then start to plan. If the community already has a strong organization then it could take over planning, but if there is none then one should be formed around the issue. A strong local organization is crucial to success. If it only starts with a few concerned individuals, who have a greater concern for community interests over their own, it can build from there. Try to involve all concerned people and sectors in the community, especially community leaders if they are not already involved. Try to take time initially to think through how a new organization will function, ideally preparing a simple group constitution in case of any future conflict, covering what will happen if the company tries to infiltrate and subvert the organization. Any organization will probably end up with a small number of active leaders, but make sure there is good communication, with regular open meetings and that if people live in remote areas there is a method to clearly communicate with them as regularly as possible.

Once these stages are complete, it is time to educate; first within the wider community and then to other potential allies. Copy the materials that have been collected—on the company, processes and laws—and create appropriate education materials from them. Printed materials, such as leaflets and brochures, are useful within the community and with neighboring communities. Pictures are particularly good at conveying the potential impacts of similar extractive processes. These days access to educational films on file-sharing websites can

be a useful tool, which will also allow a community to upload any campaign films. There may be a need for more detailed materials when seeking to persuade local government politicians or decision makers. It is particularly important in any leaflets to outline the rights of communities and the obligations of mining companies, to empower people. Campaign materials should list the procedures the company must follow. It is important to know if companies are legally required to share information and documents with the communities when requested, to hold public forums, and what legal obligations they have with regard to the right to FPIC.

The local media should be utilized as part of any education drive. If the community can create its own newspaper and/or website, then it may do so. But do not ignore building up a relationship with local newspaper(s), community radio and/or local TV station(s). Prioritize any indigenous local media, but do not ignore the mainstream media. It is likely the company will also be courting local media—with a large advertising budget—but build relationships where possible, doing your best to produce and widely circulate regular press releases, interviews or video clips to ensure the message is getting out. A media plan of action is likely to augment any of the strategies the community may choose.

Finally, one activity it is worth prioritizing as early as possible is to create baseline studies in the local environment and the social situation in the community. This may include ensuring that land ownership and usufructory rights are clearly understood and articulated. In the first instance photographs of the potentially impacted area are really easy and can be used as evidence where any damage happens later. It is worth taking water and air samples, which are relatively simple to do, especially with the support of local educational establishments. Also list species that could be affected, particularly if they are culturally or economically important. Participatory community mapping is an excellent way to record these data. There are a number of support organizations that conduct and train communities in community mapping.[10] It is important to obtain solid proof about what could be lost through any project, both in environmental and economic terms. The com-

pany should also conduct its own baseline studies, but it is best if the community has its own—where possible verified—data to challenge the company both in its Environmental Impact Assessment (EIA), but also if there are later incidents of pollution or habitat destruction.

Community Actions

Once educated and empowered, there is an array of possible strategies with regard to a proposed extractive project. Both negotiations and legal actions are covered later (see Chapters 2.4 and 2.7), as are some actions around networking in the next part of this chapter (please see Section 2.1.2).

So assuming the community plans to resist the mine, the first strategy to explore is the idea of a local referendum or vote on natural resource development. There may be a legal provision for this already, but even if this is not accepted by the national government as legally binding, it can carry moral weight and be a good indication of the strength of feeling on a project. It is also an empowering activity, and can stimulate education campaigns and debate on the issue, apart from being a popular way to democratize the decision making process around natural resources.

The idea of referenda became popular in 2002, after over 90 percent of a non-indigenous community in Tambogrande in Peru voted to reject a mining proposal. Since then, the practice of local voting on mining projects has spread to other parts of Peru, and other Latin American countries including Guatemala, Costa Rica, Argentina, Mexico, and Chile. In virtually every case, voters overwhelmingly rejected extractive projects. Referenda are particularly useful where a country has ratified ILO Convention 169, but has not put in place the procedural rules to decide on broad community consent (which may explain its relative popularity in Latin America, the continent with the most countries who have ratified ILO Convention 169).[11]

They have also proved effective in projects with funding from the World Bank's International Finance Corporation

(IFC). The IFC's Policy on Social and Environmental Sustainability requires such financing apply only to projects that have proven "broad community support." In practice, however, this has not always worked out. The IFC provided a US$45 million loan to Glamis Gold for its proposed mine in Sipacapa, Guatemala. Yet the Mayan indigenous community rejected the mine in May 2005 with a 98.5 percent popular vote. Although the IFC's own board of directors criticized the IFC for relying solely on information from the company in deciding on the loan, the IFC did not withdraw from the project, despite the clear lack of "broad community support" established by the referendum.[12]

Then there are various activities a community can undertake, outside of court action, to force the company to deal with community concerns. These activities focus on ensuring that the company has correctly implemented all the rules and permits. These activities should protect the local environment, will create more time to organize, but also by causing delay will cost the company money, and therefore should persuade them to the negotiating table or possibly to leave the area. There will be various stages of licensing that provide opportunities for intervention. The main one will be around the EIA, but make sure that all the relevant documents are fully read at all stages, and seek expert advice.

As noted in Chapter 1.1, there will be opportunities to challenge what is in the EIA. Be particularly aware of what is missing, especially with regard to cultural issues such as sacred sites, or sites of archaeological or cultural significance. As an EIA often requires proof of social acceptance, make ensure that meetings are free and fair so that a lack of such acceptance is clearly noted. In a case in the Philippines, where there were concerns that such a process would be rigged in favor of the company, the community stopped the meetings taking place by blockading the meeting area through sheer weight of numbers. This technically invalidated the process, and presented irrefutable proof that there is no social license to operate.[13] There should be opportunities to lobby government officials to follow up on any omissions or mistakes in the EIA. If there are any illegalities in how the EIA was prepared

or how it is being implemented, take legal action to have the project stopped. Remember, up to the present most mining companies have been able to say whatever was needed in such applications with little fear of being contradicted by anyone. If a community can show the company has made false or misleading statements, it should help to slow or block progress.

Another option is to purchase or assert ownership over land that is critical to the mining project. If there is the chance for the group to legally own even a small part of land in the area where the project is to take place (assuming it doesn't own it already), then this communal ownership will strengthen the hand of the community by forcing the company to deal with it directly. In the case of the opposition to mining in Intag in Ecuador (originally involving Ascendant Copper Corporation but changing hands a number of times later), the community organization DECOIN bought land for communities in the mining area. This land was eventually used by the community most at risk from the project as part of their community ecological tourism project rather than mining.[14]

As noted, utilizing the media to promote your arguments is important. It is useful to ensure that, once activities of any sort start on community land, there is constant monitoring, especially via photographs or video footage. If there are concerns of human rights abuses, it is useful to train organization members in how to record violations, which can often be done with the support of national organizations. It is also useful to create media events, via protests and demonstrations, including "street theatre." A recent example is where more than 1,000 indigenous protesters marched 700 kilometers to Ecuador's capital Quito in March 2012 to protest plans for large-scale mining projects on Shuar lands in the Amazon.[15] These can be local, regional or national demonstrations; all may be useful at different stages of the campaign. Marches and rallies have often been used, escalating all the way up to hunger strikes. Hunger strikes proved very effective in getting the Environment Clearance Certificate of a Norwegian mining company in the Philippines suspended in 2009. The hunger strikers positioned themselves outside the main office of the Department of Environmental Natural Resources in the

capital, forcing the government to finally rescind the permit, subject to investigation.[16]

If all else fails the next level of struggle is direct action, or non-violent civil disobedience. Following the example of rights campaigners, such as Mahatma Gandhi and Martin Luther King, the aim is to bring attention to an ignored issue. Sometimes communities have no option but to set up barricades if they have tried everything, and the bulldozers are approaching. If direct action is being considered, then make sure that all those participating are well briefed and trained, especially to ensure they are not provoked into violence. It is likely to be an action of last resort, as—depending on the government—the repercussions can be severe, and "anti-mining activists" are increasingly being branded as "terrorists," and so facing more extreme legal punishments or becoming susceptible to non-judicial abuses. It may also turn public opinion against the struggle, and the legal costs involved could cripple other activities.

In many circumstances it has the power to unite a community, however, galvanized into an action of last resort. Recent examples of communities raising blockades include attempts by indigenous campesinos in Peru to stop the Minas Conga project, a massive expansion of Newmont's Yanacocha mine back in November 2011 (a stand-off that has fatally escalated since violent dispersals by the authorities). In June 2011, tribal villagers in Orissa in India led a peaceful human barricade against Posco's proposed $12-billion steel plant, which forced the state to stop the land acquisition process.[17] There are a number of examples referred to in this book, including in India and Nigeria, of where opposition to the practices of the extractive industries have been a cause of violent insurrection. It is obviously not within the scope of this book to offer advice on these matters, but of course they stand as a stark warning to companies of the ultimate risk from failing to deal with the demands of local people.

It is also important to consider creating economic alternatives to the extractive industries. The main argument used by the company is likely to be on the provision of jobs and wealth, so work on creating viable, long-term alternatives. In

most places there will already be livelihood projects in place (for instance, based on agriculture, forestry or tourism), which can be expanded. If not, focus on how the community can cooperatively utilize indigenous resources. This can often be done in conjunction with any partner organizations who may specialize in development issues. Alternative economic projects are important, but the companies will probably be able to outspend any such activities, at least in the short term. Therefore, such activities are likely to be more successful where they are already supporting those with valid concerns about extractive projects, or where they can demonstrate they are more sustainable and culturally appropriate. In a 2007 cost-benefit analysis, comparing agro-forestry with mining over different time spans in a project in Nueva Vizcaya in the northern Philippines, economic modelling showed clear benefits for the agro-forestry option after only a short period of time, which continued into the future.[18]

Finally, at the 2009 Manila Conference, some participants raised the fact that many community successes were temporary, and the ability to fully stop a destructive mine or hydrocarbon project through campaigning is so far rare. While the mineral has value and is in the ground there will always be those looking to exploit it. Some victories just mean one company goes away, and is replaced by a new one—or even that the company just changes its name—and then the process starts again. So, while recognizing the importance of indigenous community's mobilizing to decide their own future, the community should prepare for a struggle that may last for many years. It is important that organizations ensure that new, younger, leaders are being trained for succession. It is also important to consider in terms of resources, as any struggle will need funds for materials and expert assistance. The aim should be to build and maintain a resistance based on the community's own resources, ideally through local contributions and fundraising events—which can also have a dual benefit by being educational. Although external grant funding is possible to access and can make it easier to carry out more activities, it is best not to rely on it completely. The influx of large amounts of money can damage a weak organization, in the similar fashion to company money causing social division.

2.1.2 Networking

Alliance building is essential for success. Potential allies can include neighboring communities (indigenous and non-indigenous), environmental, religious and non-governmental organizations, local governments, regional and national politicians.

The 2009 Manila Conference particularly emphasized the importance of exchanges with other indigenous and non-indigenous communities.[19] These neighbors are likely to share many of the concerns of more directly affected communities. In fact, communities who are downstream or downwind of any project may find they get more of the risks of pollution with less of the benefits from the companies (as they may well be considered outside of the immediate affected communities). Indigenous communities who may still be affected, especially with regard to their usufructory rights, should consider lobbying to be included in any FPIC process.

If extractive projects are relatively new to the community, it is especially useful to make links to communities who have already been affected by the same type of project. Invite representatives to speak at local events, sharing their experiences, and where possible, do exchange visits. If possible, also bring in or visit people with indigenous communities or groups that have successfully resisted or negotiated over such projects.

Alliances can also be made with local farmers or fisherman, who stand to lose out over water contamination or shortages. Likewise, government departments with concerns over water of agriculture may also be critical of company plans. The same goes for other livelihoods and government departments that focus on natural resources, including forestry, tourism and wildlife conservation.

Another aspect that was raised in the conference was the importance of an alliance or mutual understanding between the community and mineworkers, if there is already mining nearby and if production starts. Sometimes alliances can be forged with mineworkers. Although they may often initially be

from outside of the area, they should be considered possible allies of the community, and efforts made to understand their concerns and arrive at shared demands.[20]

If it is a possibility, given the country conditions, making links with the local government is also important (assuming they are not the same as the legitimate tribal authority). It is important to educate them about the possible risks of an extractive project, especially in the long-term. It is important to work with government officials as much as possible, keeping them informed about new developments and community meetings. In some countries, local governments have enough power to stop major projects, or at least declare a moratorium, which may be legally contested. While the support of local political leaders is very important, it is possible that politicians will want to manipulate a struggle for their own political ends. Also politicians will tend to be seeking election, so make sure they understand the strength of community feeling, and if they do not listen for any reason, then try to get people elected who are more supportive.

Alliance should be broadened as much as possible, scaling up to the regional, national, and the international. Where possible it is good to work with concerned environmental and human rights groups. Universities can also be fruitful ground to recruit supporters, both from among the students and academics. They can also supply specialists advice or expert testimony. It is also useful to seek out well-respected and/or famous patrons, who can generate positive publicity.

At the 2009 Manila Conference, Punit Minj of the Jharkhand Mines Area Coordination Committee (JMACC) gave a good example of scaling-up resistance through networking by the Adivasi (indigenous/tribal) peoples of Jharkhand, India. He explained that the Adivasi account for some eight percent of India's population, and although they were once self-sufficient in Jharkhand, they have become the victims of mass evictions from their lands to make way for mining. The people believed only a well-organized, mass-resistance could achieve the objective of stopping exploitation and the plunder of their lands and resources. As a result, 42 organizations formed an alliance in 2001 called the Jharkhand Mines Area

Coordination Committee. JMACC initially focused on exposing the myth that these projects would bring development and prosperity to the Adivasi, especially employment, whereas in fact they brought displacement and poverty. As a result of this resistance they managed to stall the construction of 35 large-scale projects up to 2007. During this time there were constant struggles, court cases, arrests, intimidation, and even killings of activists by the police or mining companies. Through struggle and resistance they had been able to develop their strategies and tactics, which had included a focus on the importance of reinvigorating pride in Adivasi culture and identity.[21]

The subject of international networking will be covered in greater depth in Chapter 2.3, but for now it is enough to say that there are a number of different organizations who can assist in broadening support out to the international arena. This is particularly useful when the company in question, or its investors, come from another country. Support groups can provide access to the company head office and/or investors to allow for direct advocacy. Sharing experiences, especially with other indigenous groups, can be particularly useful at the international level. It can also lend support in terms of publicity, letter writing campaigns, funds, and expertise.

No Go Zones

As ideas, such as social license to operate and FPIC, have advanced based on community concerns around the expansion of extractive industries, there has been a parallel progress around the concept of No Go Zones for such projects. Because extractive industries imply long-term impacts on communities and natural resources, some places with mineral potential may be so environmentally or socially sensitive that the risks posed by development in these areas are too high. Several efforts have been made to define criteria and norms for the establishment of No Go Zones, and this debate has included environmental organizations such as the International Union for the Conservation of Nature (IUCN).[22]

In practice, most of the efforts have been focused on defining criteria and rules to protect sensitive ecosystems and to conserve biodiversity, by excluding activities of extractive industries from protected or sensitive

areas of different types. For instance, a dialogue between the IUCN and the industry body, the International Council on Mining and Metals (ICMM), included a commitment on the part of ICMM members to respect World Heritage sites as No Go Zones.[23]

There is an overlap with social issues, however, especially as conservation organizations such as the IUCN has struggled to better understand and work with indigenous peoples. There is a growing consensus among a large group of environmental organizations and social movements on a rough set of criteria for No Go Zones. The following explanation written by Robert Goodland is a good starting point for understanding the justifications for creating No Go Zones:[24]

Five types of socially or environmentally sensitive areas need special consideration in mining regulations.[25] These areas are extremely valuable when intact, and their value would be jeopardized by extractive industries. If the potentially affected communities reject a project on one of these categories of lands, the area would be off-limits to mining. With the community meaningfully informed, and with free prior consent as a precondition for licensing, mining operations should ensure these categories are excluded. The default position is clear: No Go Zones to mining are non-negotiable.

The five main types of areas off limits to mining are: indigenous peoples reserves, conflict zones, fragile watersheds, special biodiversity habitats, and cultural properties.

1. Indigenous Peoples Reserves

Indigenous peoples reserves are defined as areas in which indigenous peoples live, or on which they depend, territories, reserves or usucapion lands (in which the right to property is legally held by uninterrupted possession for a certain term), and ancestral domains of indigenous peoples, tribal people, forest dwellers, and vulnerable ethnic minorities. Experience shows that indigenous peoples cannot be resettled successfully. The World Bank Group concluded that projects should be moved and the indigenous peoples left in peace.

2. Conflict Zones

These zones include areas of overt or simmering social conflict, especially armed conflict. Worldwide, experience shows that mining in such

conflict zones almost invariably exacerbates conflict. Land grabbing, deforestation, and illegal expansion of mining, cattle ranching, and oil palm plantations are fuelled by violence. Though violence against mine workers seems to come from all directions, the problems that beset the world's mines are all driven by the same business model: a partnership between an industry that plunders local communities, and a regime that keeps people from fighting back.[26] The UN is developing guidance on whether projects should go ahead in conflict- prone areas; when is it better to postpone a project, and under what conditions a project might go ahead despite being in a conflict zone.

3. Fragile Watersheds

Areas providing critical water resources, locally or downstream, such as those protecting a dependent project downstream, and riparian ecosystems important for conserving riparian services, as well as watersheds that conserve water for irrigation or intensive agriculture are included. Some countries prohibit mining within 1,000 meters of any source of water. Some nations ban mining in all mountainous zones. As critical sources of water, glacier ecosystems are also especially fragile water-regulating systems, and should be preserved. Areas with active seismicity or geological faults should be avoided for mining because of the risk that toxic lagoons and heaps of mine wastes will rupture or leak. Steep slopes should be protected. Areas prone to landslides, lahars, or mudslides should be off limits. No mining should be permitted in a wide swath either side of possible hurricane or cyclone paths. Areas subject to very high rainfall should also be off limits. All water catchments above or feeding into irrigation systems need conservation. Small islands are no-go zones for industrial mines. Unfortunately, many of the highest-grade metal ore bodies exist in the headwaters of some of the highest and most seismically active regions of the world. Some leaders, such as the present prime minister of Peru,[27] argue that these restrictions would essentially stop mining in some regions.

4. Biodiversity, Habitats, and Wildlands

Areas of high biodiversity and endemism, rare or endangered species, rare habitats, and intactness (e.g., coral reefs, mangroves, tropical rain forest, remaining old growth forests, biological hotspots, wetlands, and wilderness) as defined by IUCN and by Phillips.[28] This category

includes all conservation units, IUCN's Categories I through IV and to a certain extent Categories V and VI, such as national parks, state or provincial parks, UN Biosphere Reserves, UN World Heritage Sites, areas scheduled for inclusion in the national system of conservation units, protected forests, UN Ramsar Convention wetland sites, as well as their buffer zones. Most mangroves and old-growth tropical forests should be included.

5. Cultural Property

Areas of indigenous peoples' religious sites, sacred groves, battlefields, archeological sites, petroglyphs, geoglyphs or rich fossil sites are no go zones for mining. There may be exceptions, for example, when a compensatory offset reserve is purchased by the mining proponent, which is unambiguously bigger in size and richer in contents than the area sought for the mine

An Assertion to Land and Life: The Binongan Struggle against Canadian Mining Giant Olympus, Philippines

By Abigail Anongos, Cordillera Peoples Alliance (CPA)

Introduction

This case study involves the Binongan indigenous peoples in Baay-Licuan in Abra province in the Cordillera region of the Philippines. It analyzes their collective and successful resistance to the persistent efforts of Canadian mining company, Olympus Pacific Minerals, to mine their ancestral lands at Mount Capcapo. They succeeded through organizing around indigenous traditions of consensus building, decision making and struggle. This case also highlights the Binongan indigenous peoples' assertion of their collective right to free, prior and informed consent (FPIC), in the face of intensifying militarization and the tactics of the company to break their will. This is case also illustrates the militarization of indigenous communities to protect large mining interests.

Background

In the Philippines, since the 1997 Indigenous Peoples Rights Act, indigenous communities have the recognized right to FPIC in a legally

recognized ancestral domain. The Binonga's ancestral domain was at Mt. Capcapo, which the indigenous communities have taken care of and developed to give them life and nourish new generations.

As early as 1998, the communities' right to FPIC was violated with the issuance of two Mineral Production Sharing Agreements in their ancestral domain without their FPIC. These agreements were applied for by the local company Jabel, with an associate AMIC. On November 23, 2006, Canadian Olympus Pacific Minerals entered into a Memorandum of Agreement with these two companies. They then started exploratory drilling in the 4,300-hectare mining claim in February 2007, without securing the communities' FPIC. In response, the Binongan indigenous communities started filing petitions against Olympus, asserting the violation of their right to FPIC. Sustained opposition temporarily suspended the exploration and drilling, and prompted the government's National Commission on Indigenous Peoples (NCIP) to call the attention of Olympus to comply with the legal requisite of acquiring the FPIC.

Sustained Opposition and Assertion of Right to FPIC

This led to a series of statutory community consultations that started on April 15, 2008 at Barangay (village) Bolbolalla and took place in all the 11 barangays. In these succeeding consultative assemblies, the Binongan reiterated their collective opposition against Olympus, except for the two barangays of Nalbuan and Bunglo, who voted to accept the project, believing the company's promises of employment and roads.

In support of the community opposition, the Binongan elders led a ritual on April 22 in Mt. Capcapo, where a pig was butchered and its blood spilled on specific parts of the mountain, symbolizing the Binongan's collective ownership of the land. The ritual was also to ward off evil elements, in this case, in the shape of Olympus. On April 24 there was a celebration of Cordillera Day organized by the Cordillera Peoples Alliance (CPA), but locally hosted at the central barangay of Baay-Licuan (Poblacion Licuan). The 3,000-strong gathering signed a declaration supporting the local communities' earlier petitions against Olympus. Binongan elders and leaders also came out with a strong statement in a Unity Pact against Olympus and other large mines, penned in the Binongan tongue.

On May 24, the different sectors of elders, women and youth reiterated their stand against Olympus, with another set of resolutions strongly backing the tide of official petitions sent to the regional and provincial offices of the NCIP.

In the community meetings with Olympus and the NCIP, community leaders rejected this "FPIC process," since they had already refused their consent going back to March 2007 (only a month after the drilling had started). The communities complained that the process initiated by Olympus and the NCIP was disturbing their daily agricultural activities, and was a waste of time because they will not change their position. As such, this second "FPIC process" was an imposition. It contradicted the basic principle, procedure and intent of FPIC, since it did not uphold or respect the communities' previous collective decision. Olympus used the "FPIC process" as a trap to later claim that, through the acceptance of some, it had indeed, secured the communities' FPIC. In fact it had violated it when it had earlier explored and drilled in Capcapo without the necessary permission. On top of this, the process had taken place under a climate of fear and militarization.

Militarized Communities

The background of the meetings is that army "counter-insurgency" operations were happening in the area, ostensibly aimed at the Communist New Peoples Army (NPA). Elements of the 41st Infantry Battalion and the 503rd Infantry Battalion Reconnaissance Company shadowed members of the CPA and their local affiliates who were invited by the community to monitor the FPIC process. They camped under peoples' houses if observers stayed there, following the teams to meetings. In a community assembly in Poblacion on May 29, the military took videos of the community folk. The following day, the soldiers conducted a census and shot videos in Barangay Poblacion without declaring a purpose. They also interrogated households as to the organizations they belonged to. This angered the residents, who prohibited further questioning and demanded to know the purpose of the census, especially as it is not the job of the military to be doing this. Census was also conducted in the militarized barangays of Lenneng and Caoayan.

In June, the military harassed and interrogated the chairperson of local group BALITOK (Baay Licuan Takderan Omnu a Karbengan),[29] Ernesto "Lakay Aggoy" Quinto, who is also a respected elder in his village in Lenneng. He is also the president of the local farmers' association, LEKITIFA (Lenneng Kileng Tingguian Farmers Association). Lakay Aggoy was unjustly accused of being an NPA member, while he continued to assert the legitimacy of BALITOK and LEKITIFA as peaceful civil society organizations.

The same local army units maliciously labelled members of the CPA and their local affiliates as fronts of the armed New Peoples Army. Starting June 1 in Poblacion, the military posted flyers in the rice granaries with a listing of all alleged "terrorist fronts," which included the CPA. This created a climate of fear and terror in the community. Such branding of organizations and community leaders makes them enemies of the state. Human rights groups have attested that in practices, this gives the military a license to attack and violate the rights of civilians and communities, whose activities to defend their ancestral land and resources are just and legitimate.

In yet another desperate attempt to swing the communities' prevailing and official stance to the issues at hand, Olympus started deploying their own "community organizers" to the communities.

Community Resolve

In spite of all this pressure, however, the communities' resolve to protect their ancestral domain temporarily stopped Olympus' attempts to continue its operations in Capcapo. This was done through collective decision making, using traditional methods of democratic consensus building.

The original Mineral Sharing Production Agreements still exist, however, meaning the companies can continue exerting pressure on the communities if the financial conditions are more favorable. The militarization also continued, as Abra province was declared a priority area for the Philippine government's counter-insurgency operations. The CPA has been monitoring ground developments on large mining and military deployment with BALITOK and KASTAN.

The CPA was able to support the communities via capacity building to sustain the communities' assertion of their individual and collective human rights. This comprised activities such as education and training, learning exchanges with other mining affected communities in Benguet province, media work and supportive networking. The international community also supported the communities by responding to the Action Alert CPA circulated, and by sending letters of concern to the Philippine president, concerned government agencies, and the Olympus head office in Canada.

Dreaded Duo

What is clear is that where there are mining operations, there are human rights violations. As in other flashpoint areas of mining struggles in

the Cordillera region, this case shows the tandem of large mining and militarization. The military seem to be there to quell opposition to a state-backed project. The unjust branding and tagging of people's organizations as "terrorist fronts," when they assert their collective rights to self-determination, is effectively state terrorism.

This case also shows that while the Philippines has government agencies and laws that are made to protect and uphold indigenous peoples' rights, this is not a guarantee. As in cases in Benguet and Kalinga provinces, the NCIP created a process to facilitate the entry of the mining companies' and stands accused by communities of manipulating FPIC processes. This is effectively undermining the whole spirit and purpose of the Indigenous Peoples Rights Act.

Lessons

This case underscores the ever-pressing need to empower indigenous communities to defend their right to self-determination to protect their ancestral domains, even under a climate of fear. This is may be easier said than done, but this is what they managed in the far-flung communities of Baay-Licuan, against Olympus. This victory was possible because of the CPA's 25 years of organizing and education work in the Cordillera's indigenous communities, coupled with a strong local organization with a strong leadership. These characteristics are crucial in how community struggle is sustained and strengthened.

The level of consolidation must be sustained through continuing organizing, education, awareness raising, advocacy, and alliance work. Strengthening the communities in terms of legal awareness, para-legal work and human rights is crucial with the persistence of militarization. For the communities themselves, it is vital they continue struggling to defend their ancestral domain, as we can expect instances of manipulation and deceit from the company to break the communities' unity.

Local leaders must sustain their unwavering commitment to defend land and life, and develop new leaders among the younger generation, to ensure that the gains and lessons of the Binongan against Olympus will be sustained and replicated in other indigenous communities in the province.

The Ogoni of Nigeria: Oil and the Peoples' Struggle

By Legborsi Saro Pyagbara, produced in partnership with the Movement for the Survival of the Ogoni People (MOSOP)

The Ogoni Land and People

The Ogoni people are an indigenous minority in southern Nigeria, numbering approximately 500,000. The Ogoni region covers approximately 100,000 square kilometers in the southeast of the Niger delta. Traditionally, the Ogoni have depended on the rural livelihoods of agriculture and fishing. They revere the land on which they live and the rivers that surround them. In the local language, Doonu Kuneke (tradition) means "honoring the land." The land, provider of food, is worshipped as a god, and the planting season is not merely a period of agricultural activity but is a spiritual, religious and social occasion.[30] As elsewhere in Nigeria, land tenure is based on customary laws, which hold land to be community property, over which individuals only have usufructory rights, i.e., only the community may sell or dispose of land.[31]

Oil, Land Tenure and 'Development'

The Niger delta is the source of over 90 percent of the oil, which dominates the Nigerian economy. Oil accounts for over 90 percent of export earnings and some 80 percent of government revenue.[32] But the history of "development" associated with oil exploitation in Nigeria has been troubled from the outset.

For the Ogoni, as for other peoples of the Niger delta—including Ekpeyes, Ibibios, Ijaws, Ikwerres, Ilajes, Itsekiris, and Ogbas—the environmental, social and economic costs of oil exploitation have been high, and very little of the national wealth that their region generates has returned to them.

Oil was first discovered in Nigeria in 1956 at Oloibiri in the present-day Bayelsa state, and in the Ogoni region in 1957 by the Shell Petroleum Development Company (SPDC). A number of oil companies, including Chevron Nigeria Limited, moved into the area and further strikes were made in the 1960s and 1970s. Indigenous communities in Ogoni and other parts of the Niger delta report that as oil exploration and extraction increased, the government ordered them to give up land for oil operations, without consultation, meaningful compensation, or "free and informed consent" being obtained prior to the transfer.[33]

In 1978 a controversial Land Use Decree was passed. It vested ownership and ultimate rights over land in the government and determined that compensation for land would be based on the value of crops on the land at the time of its acquisition, not on the value of the land itself.[34] This decree, incorporated into the Constitution in 1979, facilitated the acquisition of Ogoni and other indigenous peoples' lands by the oil companies.

During the 1970s and 1980s the Ogoni people increasingly saw that government promises of beneficial development associated with oil production were unreliable. This pattern continues: development projects are not completed; local infrastructure is deteriorating.[35]

The high environmental costs of oil exploration and extraction also quickly became apparent, as huge oil spills occurred, drinking water, fishing grounds and farmlands became contaminated, and gas flares caused air pollution.[36] As early as 1970, seven Ogoni chiefs sent a memorandum to Shell and to the military governor of Rivers state complaining of environmental degradation caused by SPDC's operations in the area.[37]

Rising Human Rights Abuses

In 1990, the Ogoni people organized themselves in the Movement for the Survival of the Ogoni People (MOSOP) and drew up the Ogoni Bill of Rights (OBR), which outlined their demands for environmental, social and economic justice. Protests by MOSOP and other groups led the oil companies to boost their spending on "community development" programs, but MOSOP's discussions with indigenous communities confirmed that the projects followed the previous pattern of a lack of consultation from the outset.[38]

By 1993, relations between Ogoni communities, government and SPDC had become so bad that SPDC withdrew temporarily. The breaking point for local communities came on 30 April 1993 when soldiers escorting a Shell contracting firm, WILLBROS, shot and seriously wounded Mrs Karalolo Korgbara, a mother of five, whose farmland was being expropriated for a new oil pipeline.[39]

Human rights abuses increased between 1994 and 1998[40] as the Rivers State Internal Security Task Force sought to crush resistance in Ogoni and across the Niger delta. When nine MOSOP leaders were executed after a military tribunal on 10 November 1995, Nigeria was suspended from the Commonwealth and the European Union imposed sanctions.

A November 2011 report implicates Shell in cases of serious violence in the company's "eastern division" of the Niger delta region from 2000 to 2010. Shell's routine payments to armed militants exacerbated conflicts, and in one case led to the destruction of Rumuekpe town, where it is estimated that at least 60 people were killed. Further, the report notes that Shell continues to rely on Nigerian government forces who have perpetrated systematic human rights abuses against local residents, including unlawful killings, torture and cruel, inhumane and degrading treatment.[41]

Reemergence of the Development Debate

It was only after the death of the President, General Sani Abacha, on 8 June 1998 that the discussion of development and questions of rights to basic healthcare, education, land, and culture reemerged.[42] President Obasanjo's civilian government, inaugurated in May 1999, seemed open to involving civil society in the process of development. Companies such as SPDC reviewed their approaches to community relations. SPDC conducted "Stakeholders' Consultation Workshops" and adopted principles of sustainable development.[43]

Human rights groups including MOSOP, the Niger Delta Human and Environmental Rights Organization, Ijaw National Congress and Environmental Rights Action, however, conclude that little has changed since 1999. MOSOP's assessments of the impact of oil exploitation on Ogoni communities (undertaken 2000–01) reveal a wide gap between the government's political claims and the reality of its new initiatives. The few projects that had reached rural communities perpetuated the pattern of partially completed and abandoned contracts. An independent SPDC-commissioned survey of its projects "completed" in 2000, deemed only 31 percent of the projects to have been successful.[44] The survey and MOSOP researchers have also noted the continuing lack of consultation with local women and men, and their lack of participation in projects.

The absence of even basic infrastructure creates a daily threat to life and livelihoods in the Ogoni region. The views of representatives of Ogoni communities interviewed by MOSOP researchers were consistent with the SPDC-commissioned survey data showing that in areas such as water provision, over 50 percent of projects were deemed non-functional, although these were listed as completed in 2000.[45] This suggests to the communities that the companies do not care about the consequences of

such failures, despite the obvious threats to water supplies from both oil pollution and population pressures.

As regards health, there is a direct correlation between the intensity of oil production and its negative impact on health.[46] When oil operations discharge toxic effluents into rivers and onto farmlands, harmful elements such as mercury and chromium enter the food chain. The discharge of effluents also contaminates underground water and makes it unfit for human consumption; yet this remains the only source of water for local people.[47]

Education at all levels in Nigeria is a cause of widespread concern. Problems are exacerbated in the case of the Ogoni. The environmental degradation of the land upon which the local economy depends erodes the economic power of most Ogoni families, making it doubly difficult for them to put their children through school. Further, the Ogoni are disadvantaged in language education. They do not have the opportunity to study their own language, culture and history.

The reparation of environmental damage is a subject on which the gulf between the Ogoni communities and the oil companies appears to be as wide as ever. While the companies increasingly claim their clean-up operations meet international standards, and some companies have made allegations that acts of sabotage have caused spills, the communities continue to report fraudulent clean-ups, the use of crude pits to bury oil waste, and ongoing damage.[48]

In the absence of effective government regulation or monitoring of oil operations, Ogoni communities face apparently insurmountable barriers in defending their rights. Those who try to assert their land rights face a lengthy legal process in a congested court system. An example is the lawsuit brought by an Ogoni community in Eleme over an oil spill, which occurred in 1970. SPDC has appealed against the judgement requiring it to compensate the community by four billion naira (approximately US$40,000,000) and it is impossible to determine when a judgement will be enforced.

The African Commission on Human and Peoples' Rights, however, issued a decision in October 2001 regarding Communication 155/96 alleging violations of the African Charter on Human and Peoples' Rights by Nigeria against the Ogoni. The Commission found that oil production activities by the government and SPDC had caused serious health and environmental damage, and that there had been inadequate compensation and

consultation with the Ogoni. Recommendations to the government were made, including the need to undertake environmental and social impact assessments, and to compensate the victims of human rights violations linked to the oil operations.

Conclusion

Since oil was discovered in Ogoni in 1958, the Ogoni people have waged an uneven struggle with successive governments that are allied with oil companies. Exploitation of oil resources has failed to take adequate account of the rights of minorities and indigenous communities, or of the environment.

Oil is the basis of the nation's wealth, but the indigenous peoples and minority groups who live in the areas that generate it are impoverished, rather than enriched, by oil extraction. Resources put into development by both the government and the oil companies are failing to effectively reach the minorities and indigenous communities of the Niger delta.

Communities report a lack of consultation about, or participation in, the design of development projects of which they are the supposed beneficiaries. Increasingly, Niger delta communities are exchanging information and ideas on their experiences, and challenging the performance of government and oil companies working to secure the rights of minorities and indigenous peoples.

Endnotes

[1] The content for much of this chapter is drawn from materials and workshops at the 2009 Manila Conference, and the experience of the author, but a large part of the content and much of the framework is drawn from the excellent publication by C. Zorrilla, et al., 2009, "A Guide for Community Organizers." *Global Response*. This publication is worth reading separately for any community seeking to organize on the issue of extractive industries.

[2] Notes taken of workshop plenary, International Conference on Extractive Industries and Indigenous Peoples, March 24 2009, Manila, Philippines.

[3] Comments and advice to communities are always difficult because of unique local situations. Awareness of local conditions is key. It is

common for companies and other outsiders to want to identify and exploit potential divisions in the community and this can rightly make many cautious to share openly on local structures and processes.

[4] Traditional FPIC Process Subanen Final, 22 November 2009, Pagadian City, Philippines – http://www.insidemindanao.com/april2010/SUBANEN%20TRADITIONAL%20FPIC%20PROCESS.doc; Glennie, J., Whitmore, A.Nettleton, G. 2004 Breaking Promises, making profits: Mining in the Philippines, Christian Aid & PIPLinks, pp. 29-41.

[5] Kitchenuhmaykoosib Inninuwug Protocols, 5 July 2011, http://www.scribd.com/doc/60050046/Ki-Protocols; The consulta movement continues... in Northern Ontario!; 18 July 2012, http://www.minesand-communities.org/article.php?a=11053; More information on the case is available at http://kilands.org/learn-more/.

[6] United Nations Environment Programme, Community Protocols for ABS, http://www.unep.org/communityprotocols/resources.asp.

[7] Notes taken of workshop plenary, International Conference on Extractive Industries and Indigenous Peoples, 24 March 2009, Manila, Philippines.

[8] M. Setra, 2009, Presentation to International Conference on Extractive Industries and Indigenous Peoples, 24 March, Manila, Philippines.

[9] A common argument from the industry at early stages of the project cycle is that it is too early to object as the company is not sure whether a resource is economic to exploit. Therefore, the community should let the company enter its land to verify that. The problem is that if a community has genuine concerns about the project, it moves almost imperceptibly from the point where a community can object to one where it has advanced so far that objection is no longer possible.

[10] Organizations that conduct trainings on participatory mapping with indigenous communities include Forest Peoples Programme, Rainforest Foundation and PAFID.

[11] C. Zorrilla, et al., 2009, " A Guide for Community Organizers." *Global Response*, p. 11; Wilson, S. 2002. "A Life Worth More Than Gold." *Washington Post*, 9 June, http://www.minesandcommunities.org/article.php?a=1262.

[12] B. McGee, 2009, "The Community Referendum: Participatory Democracy and the Right to Free, Prior and Informed Consent to Development." *Berkeley Journal of International Law*, 27(2).

[13] In the author's experience, communities opposing projects have tended not to attend such meetings to express their opposition, because they believe that the meetings will be rigged in favor of the company. The case quoted involves the Norwegian company Intex seeking to build a nickel mine on the island of Mindoro in the Philippines.

[14] C. Zorrilla, et al., 2009, "A Guide for Community Organizers." *Global Response*, p. 12.

[15] Ecuador's indigenous anti-mining marchers reach the capital, 22 March 2012, http://www.minesandcommunities.org//article.php?a=11585.

[16] Philippines: Intex Resources' environmental clearance suspended, thanks to hunger strike, 23 November 2009, http://www.minesandcommunities.org/article.php?a=9670.

[17] "Protests and blockades at Yanacocha gold mine, Peru." 25 October 2011, http://www.minesandcommunities.org//article.php?a=11261; India: POSCO protests successful - for now, 28 June 2011, http://www.minesandcommunities.org//article.php?a=11000.

[18] D. Rice and Dr. Arcel Oliva, 2007, "Green Valley: A case study in development." Presented at LRC-KsK Skillshare in Manila, 27 November.

[19] Notes taken of workshop plenary, International Conference on Extractive Industries and Indigenous Peoples, 24 March 2009, Manila, Philippines.

[20] Notes taken of workshop plenary, International Conference on Extractive Industries and Indigenous Peoples, 24 March 2009, Manila, Philippines.

[21] P. Minj, 2009, "Not an inch more of our lands: The strategies, tactics & politics of J.M.A.C.C." Presentation to International Conference on Extractive Industries and Indigenous Peoples, 23 March, Manila, Philippines.

[22] IUCN World Conservation Congress, Amman, 4–11 October 2000, Chapter 2.15, Amman Recommendation 2.82 http://cmsdata.iucn.org/downloads/wcc_2000_en.pdf; International Policy on ICCAs, http://www.iccaforum.org/index.php?option=com_content&view=article&id=95&Itemid=109.

[23] "Good Practice Guidance for Mining and Biodiversity, International Council on Mining and Metals." n.d. http://www.icmm.com/page/1182/good-practice-guidance-for-mining-and-biodiversity.

[24] R. Goodland, 2012, "Responsible Mining: The Key to Profitable Resource Development." *Sustainability 4*, August, www.mdpi.com/journal/sustainability.

[25] Dudley & Stolton. 2002, " IUCN, The Forest Stewardship Council, and the World Ban, Group definitions of sensitive areas and high conservation value areas." See also: "World Heritage and Mining" IUCN/ICME,

[26] M. Chen, 2012, "Unrest in Indonesia's Mines: Local Chaos and Global Injustice." *Huffington Post*, 9 April - http://www.huffingtonpost.com/michelle-chen/unrest-in-indonesias-mines_b_1408221.html.

[27] The president of Peru at the time of writing is Ollanta Humala.

[28] A. Phillips, 2001, "Mining and protected areas." MMSD, www.miningnorth.com/docs/Mining%20and%20Protected%0Areas.pdf.

[29] The Cordillera Peoples Alliance and its provincial chapter in Abra (KASTAN-CPA Abra) headed the formation of BALITOK in order to organize, strengthen and build the capacity of local leaders and communities.

[30] R. Boele, 1995, "Report of the UNPO Mission to Investigate the Situation of the Ogoni of Nigeria." February 17–26, The Hague, UNPO, p. 7.

[31] See K.S.A. Ebeku, 2001, "The Niger delta people: The injustice of the Land Use Act." CEPMLP *Internet Journal*, 914) July–December, www.dundee.ac.uk.

[32] See SPDC, 1998, "The Ogoni issue brief." www.shellnigeria.com.

[33] Draft Declaration on the Rights of Indigenous Peoples, Article 30.

[34] G.U. Ojo, et al. 1996, "Ogoni: Trials and Travails." Lagos, Civil Liberties Organization, pp. 6–8; W. Raji, et al., 2000, "The Boiling Point, Committee for the Defence of Human Rights." p. 161; see also Office of the Senior Special Assistant to the President on Constitutional Matters, Report of the Presidential Committee on the review of the 1999 Constitution, Lagos, 1999, www.pcrconline.org/ The_Report/index.shtml.

[35] Ojo, op. cit., 1999, "The Guardian (London)." 16 September; D. Wheeler, et al., 2001, "Paradoxes and Dilemmas for Aspiring Stakeholder Responsive Firms in the Extractive Sector – Lessons from the Case of Shell and the Ogoni." p. 10.

[36] UNPO, Ogoni, www.unpo.org/member/ogoni/ogoni.html.

[37] K. Saro-Wiwa, 1992, "Genocide in Nigeria: The Ogoni Tragedy." *Port Harcourt*, Saros.

[38] Interview by MOSOP researchers with Chief K. Doobie of Kpean (Ogoni), landlord to Yorla oilfield, operated by SPDC.

[39] K. Saro-Wiwa, 1995, " A Month and a Day: A Detention Diary." *Harmondsworth*, Penguin; Korgbara K., interview for the television documentary The Drilling Fields, Catma Films.

[40] See Human Rights Watch, 1995, "The Ogoni crisis: A case-study of military repression in Southeast Nigeria." New York.

[41] B. Amunwa, 2011, "Counting the Cost: Corporations and Human Rights Abuses in the Niger Delta." Platform.

[42] For example, the Conference on Sustainable Development and Conflict Resolution in the Niger Delta organized by Niger Delta Ethnic Nationalities in Port Harcourt, 4–6 February 1999.

[43] SPDC, People and Environment Report 2000.

[44] SPDC, 2001, "Report of the Stakeholder Review of SPDC Community Development Projects Completed in the Year 2000." March.

[45] The Economist, May 2001.

[46] See A. Ikein, 1990, "The Impact of Oil on a Developing Country: The Case of Nigeria, New York." Praeger.

[47] I-IDEA, Democracy in Nigeria, p. 245.

[48] The Guardian (Nigeria) 20 August 2002.

Chapter 2.2

Challenges at the National Policy Level

Once communities and activists have created national networks, they can move beyond a focus on specific projects, and start to advocate for policy changes at the national level. Although, of course, national networks can support activities around a specific project. Even with this more general policy focus, advocating at the national, or regional, level may still come back to a single project. This may be considered particularly important when local politicians cannot be persuaded to support the cause, especially if they have already found favor with the extractive industry companies. Supportive legislators or officials may be of assistance, in sharing key items of information or conduct inquiries into any wrong-doing. Obviously, if possible, such support should be across political parties, and focused on legislators who are genuinely committed to the cause.

At the national level, advocacy is likely to focus on either the issue of indigenous peoples' rights (which would have a wider impact beyond relations to extractive industries, but would still have relevance to that subject) or advocating on issues around the extractive industries themselves. Sometimes the two will be the same, i.e., when there is legislation on free, prior, informed consent (FPIC), which is an issue both of self-determination but also affects the function of access to mineral resources. Indigenous peoples also have to deal at a national level with the issue of state-sanctioned violence, and the risk of criminalizing legitimate protest.

2.2.1 Advocating for Indigenous Rights and Land

As will be discussed in Chapters 2.7 to 2.9, there have been major advances with regard to indigenous rights in international norms and international or regional court decisions, generally flowing from the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). It is, however, how these advances are implemented—or not—at the national level, which tends to most directly impact upon indigenous peoples. There is frequently a great deal of disparity in that implementation between countries, or indeed even within global regions.

There are a number of states who are often quoted as having a more progressive framework for indigenous peoples. These states include the Philippines, through its 1997 Indigenous Peoples Rights Act (IPRA), which was based on the provisions of the Draft Declaration on the Rights of Indigenous Peoples. The Act recognizes the right of FPIC for indigenous peoples for all activities affecting their lands and territories, specifically including the exploration, development and use of natural resources.[1] Greenland, which is increasingly viewed as an example of an indigenous self-governing state, had "a mutual right of veto" over mining projects in its 1978 Home Rule Act. This Act has been superseded by the Act on Greenland Self-Government, adopted 19 May 2009. This Act transfers

responsibility for the mineral resource area to Greenland's Self-Government authorities.[2] There are also progressive provisions in the Constitutions of Venezuela and the Plurinational State of Bolivia, Colombia's 1993 law recognizing collective rights to territory, and in Australia's Northern Territories, via its 1976 Aboriginal Land Rights Act.[3]

Even where there are enlightened laws, however, how they are implemented is another question. This report carries examples of problems in implementation from many of the countries mentioned above.[4] In the case of the Philippines, a presentation at the 2009 Manila Conference by Rhia Muhi, outlined how seven million hectares, out of the country's total landmass of 30 million hectares, are estimated to be the ancestral domains of indigenous peoples as defined by the 1997 IPRA. Yet indigenous peoples are still among the poorest of the poor in the country. IPRA prescribed the provision of the 1987 Philippine Constitution of indigenous peoples to their ancestral domains, and theoretically all the resources therein. The state, through its 1995 Mining Act, however, claimed ownership, under the Regalian Doctrine, of the subsoil resources. There is an inherent clash between these two principles. Experience shows that attempts at harmonizing IPRA with other laws, always leads to the lower priority being assigned to IPRA. Ms Muhi noted that recent studies found that over 70 percent of the mining and logging operations on indigenous lands were being conducted without their FPIC, regardless of the provisions of IPRA.[5] This was borne out by a joint submission to the UN Committee on the Elimination of all forms of Racial Discrimination (CERD) on the Philippines in 2009. The report was based on widespread consultations among indigenous peoples that raised numerous concerns, and proposed various recommendations, based on the premise that the Philippine state had interpreted IPRA on behalf of corporate interests, as opposed to that of the indigenous peoples it was intended for.[6]

A similar situation, of a clash between expectations and reality has occurred in Peru. In response to a history of increasingly violent protests, the new populist Government of Ollanta Humala, passed the ground-breaking Consultation

with Indigenous Peoples Law in August 2011. Although it does not talk specifically of "consent," the Law makes it mandatory to seek the opinions of affected indigenous communities. It is in effect creating binding legislation to implement Colombia's ratification of ILO Convention 169.[7] If the law was intended to douse the conflicts over resources on indigenous land, it has not been a runaway success. Aside from the violent protests around the Conga project (covered in Chapter 1.1), around 500 Shuar people set up a blockade in October 2011 to stop Canadian mining firm Talisman Energy from exploring in their ancestral lands in the northern Amazon over concerns of contamination. At the same time as these protests, the Peruvian state was proposing new regulations governing the extractive industries in the so-called "untouchable" reserves of indigenous peoples in isolation. This was to allow access to such reserves if there is "a real public need." Although there are attempts at mitigating the negative effects of this, it is clear that provisions to both "protect" and "exploit" the lands of indigenous peoples are being pursued simultaneously.[8]

Another Latin American example of this schizophrenic attitude is the State of Bolivia, which has a large and historically poor indigenous minority, as well as an economy focused on the extractive industries. Under the country's first indigenous President, Evo Morales, there have been huge strides to champion the rights of indigenous peoples and the environment on the international stage, including the drafting of a Universal Declaration on the Rights of Mother Earth. Yet, given the reliance of the state on exploiting its natural resources, there have been complaints from indigenous organizations that attempts at land titling are happening too slowly and that the government has used "dishonest and corrupt prior consultation methods" on some projects. Major concerns are being raised about oil extraction in the Isoboro Sécure National Park and Indigenous Territory (TIPNIS), which—thanks to concerted advocacy—has recently been declared an ecological reserve that is of "fundamental interest to the nation."[9]

As the case study in this chapter shows (see box: Australia—After the Mabo Decision), in Australia there have been big advances with regard to indigenous land rights issues after the famous Mabo court case, including the 1993 Native Title

Act. These were the result of concerted national advocacy, and legal pressure. Yet, there is still a continuing struggle to see the spirit of the Act implemented, especially as under-resourced Land Councils struggle against well-resourced company lawyers. As Brian Wyatt notes in the case study, although much of the legislation is no doubt well intentioned, it has created a paternalistic bureaucracy, which in a number of ways stop Aboriginal people from effectively deciding their own future.

In contrast to Australia, in neighboring New Zealand/Aotearoa, the Maori managed to wrestle a Treaty out of the British colonial powers, the 1840 Treaty of Waitangi. The Treaty ensured the Maori retained possession of their land and resources, which was recognized in the 1865 Native Rights Act. Over time, however, the Maori were still dispossessed of the majority of their land. In the second half of the 20th century, Maori activists fought back, which led to various government initiatives. These included the Waitangi Tribunal (which has been hearing claims against the government for breaches of the Treaty since 1975) and the 1995 Ture Whenhua Maori Act (which established a Maori Land Court and the principle of Maori collective ownership). Finally, in 1995 the Office of Treaty Settlements was created to oversee the process of claim negotiations. There are of course still problems; for instance the Waitangi Tribunal recommendations are not binding, and are therefore often ignored by the government. As if to emphasize the challenges ahead, through the 2004 Public Foreshore and Seabed Act, the government unilaterally extinguished Maori customary right to these areas, until it was repealed in 2011, after much public criticism.[10]

The themes running through these different experiences are that concerted lobbying from indigenous campaigners is bearing fruit at the national level, particularly in terms of realizing long-held ambitions for some form of indigenous, collective land titling. Especially where they are pitted against the wishes of extractive industry companies, however, the practical outcomes can be less positive. The clear message though is that over the longer-term, national struggles continue to gain ground, bolstered by international standard setting, exemplified by the UNDRIP.

2.2.2 Extractive Industries Legislation

As previously noted, legislating for indigenous rights is frequently at odds with legislation governing, and often supporting, the extractive industries. The concerns of government are primarily to maximize revenue. This can be done via a limited focus on how much they can gain from royalties on profits and taxes, but generally is also concerned with creating an enabling environment for extractive companies.

In her 2009 Manila Conference presentation, Mina Setra of AMAN (Indigenous Peoples Alliance of the Archipelago) gave an example of this with regard to the enactment of the 2009 Indonesian Law (no 4/2009) on Coal and Mineral Mining. The law fails to address indigenous peoples' rights and interests, as it allows the government to easily reclassify indigenous and forest lands in order to facilitate the entrance of miners. It also only recognizes direct negative impacts to peoples' lives within the immediately affected area, and only provides for the compensation or filing of lawsuits in cases of conflict. Finally, it also allows for the criminalization of those opposing projects.[11] In January 2012, the government went a step further in the Land Procurement for The Public Interest Law (no. 2 /2012) allowing the government to acquire land from citizens in "the public interest," with no right of appeal, and compensation only available upon proof of certification of ownership, which few indigenous peoples would be able to provide. It is seen as a direct threat to indigenous peoples' rights.[12]

Historically, many states nationalized their mining industries, especially where minerals were essential for development, or for the state's ability to wage war. With the liberalization agenda of the 1980s, many states rewrote their mining laws. They were often assisted in this by the World Bank, whose influence over indebted countries at the time was great. The Bank's message was that transnational mining companies needed reassurance and incentives to invest in mining in developing countries.[13] In 1988, the Bank's Mining Unit invited 45 major mining companies to prescribe how Southern states

should behave towards mining companies, and high up the list was the need to review mining regulations. The next year of codes was launched in the next year.[14] This led to a huge "rush to the bottom" in terms of providing tax breaks and incentives for companies, which is still pretty much the dominant model of development for extractive industries.

It is noteworthy, however, that since the financial crisis, there has been a shift in power relations between companies and governments. Rising commodity prices have seen growing profits for the companies, and questions as to whether the "legal owners" of the resources (i.e., in their view, governments) are receiving enough benefits. Nationalization is still—with a few notable exceptions, such as South Africa and Bolivia[15]—off the agenda. Many countries, however, have been talking about, or actually changing, their mining revenue laws to increase potential revenues. Examples of such countries include ones as diverse as Australia, Brazil, Guatemala, and Mongolia.[16]

Such acts still fit with the overriding concern of states to maximize revenues. The key question that is often asked around extractive industries, however, is how much the nation really benefits from such revenues. The contentious issue of exploitation of oil, gas and minerals often leading to lower than expected levels of national economic growth is known as the "resource curse." It basically revolves around concerns such as a potential deterioration of terms of trade of manufacturing goods against primary commodities and exchange rate appreciation (known collectively as "Dutch disease"), revenue volatility from extraction, the "enclave" nature of the extractive industries, and an increase in corruption, weak governance and conflict.[17]

Whether a country can develop based on its resources seems to depend on a number of interrelated factors. It is clear that some countries are less prone to the resource course than others, with oft-quoted positive examples, including Botswana and Chile (and allegedly in the early days of their development, Australia and the United States).[18] The Oxford University academic Paul Collier has created a Natural Resources Charter, which attempts to debate a set of principles for governments

and societies on how to best harness the opportunities created by extractive resources for development. It provides useful insights and advice, but—as so often in this subject—because of its macro-economic starting point of national benefits, it can underrepresent the concerns of local, especially indigenous, communities.[19]

Also in response to advocacy around these concerns, the World Bank's conducted an independent investigation into the issues in 2003, called the Extractive Industries Review (EIR). It confirmed the importance of corruption, social conflict and poor governance as the main drivers in ensuring that exploiting minerals and hydrocarbons so seldom leads to poverty reduction.

The EIR's final report identified three main conditions that must exist in a country before the Bank should consider supporting extractive projects, in order to contribute to poverty reduction and sustainable development. They are:

- Transparent pro-poor governance, based on the rule of law. This includes the notion that an equitable share of a project's revenues should go to the local community;
- Respect for human rights, including labor rights, women's rights and indigenous peoples' rights to their land and resources;
- Ensure correct social and environmental policies, including banning involuntary resettlement and destructive practices such as the disposal of tailings in rivers, and an obligation for companies' to gain the FPIC of affected communities.[20]

The World Bank officially rejected the report's findings, while asking the bank management to deal with some of the issues arising. It has since done its best to bury the legacy of its own initiative.

The issue raised by the EIR that the Bank felt most comfortable dealing with, however, was around transparency. There has been a growing consensus encouraging governments and companies to publish financial data from the extractive industries in order to reduce corruption. Initiatives,

such as the Extractive Industries Transparency Initiative (EITI), have attempted to create a global standard to promote revenue transparency in member companies.

Although this program to "publish what you pay/receive" is obviously a good thing, it is by itself not necessarily enough to avoid the resource curse.[21] Also issues of transparency should encompass the topic of domestic legislation to improve the accountability of companies in their home countries, and in any tax havens where they may bank their money.[22] As with the Natural Resources Charter, in its macro-economic focus, it can also sometimes overlook, and divert from, the more direct issues of affected communities. A recent report by the UK-based NGO Global Witness, called *Rigged? The Scramble for Africa's Oil, Gas and Minerals* attempts to address this with a useful check-list of actions a community could take to prevent corruption in the awarding of extractive licenses.[23]

On the ground, the situation can still seem to be little affected by this growing consensus on transparency. The discovery of oil deposits in western Uganda in 2006 has been causing tensions in local communities. Senior officials have been accused of seeking bribes in a rush to sign controversial contracts with oil companies, which it is projected could lose the country millions in revenue. In October 2011, parliament approved a motion to compel the government to delay the approval of UK Tullow Oil's sale of its interests, without the relevant national laws in place. In February 2012, however, President Museveni signed a direct agreement with Tullow Oil, allowing them to sell, and paving the way for production. The President failed to tell parliament how much of the revenue would go to the affected local communities (some of whom are indigenous peoples).[24]

Having explored legislation around enabling extractive industries, it should also be noted that there are a number of areas of lawmaking that deal with more general environmental or social protection, or economic alternatives, which can be mobilized. The issue of defining No Go Zones was covered in Chapter 2.1. Although much of the theorizing around No Go Zones is at an international level, it can also be viewed in terms of a national policy of land zoning. Such land zoning could

create restrictions of certain types of land use—including forestry, agricultural production, tourism or lands designated as the ancestral lands of indigenous peoples. The extractive industries could be effectively banned from these designated areas. This is an interesting idea, but of course there is a potential clash here in saying that mining would, through national policy be banned from indigenous lands. It is effectively undermining the right of those indigenous peoples to self-determination, even if it is removing development choices that they would eventually not prefer anyway![25]

Finally, it is clear that any advocacy towards states to get them to legislate for "responsible mining"—including establishing specific policy frameworks that address the sustainability of the mining sector—should refer to indigenous rights, particularly the key provisions of the UN Declaration on the Rights of Indigenous Peoples.

2.2.3 Dealing with State Repression of Protest

As we have seen in Chapter 1.1, legitimate protests against extractive industry projects can far too often lead to the response of rights violations and repression. Although some of this may come from armed company security, more often than not it will be the state, which is behind this (or even in the case of company security, it will the state creating the enabling environment for such abuses to happen).

In his 2009 Manila Conference presentation on Barrick's Porgera Joint Venture mining project in Papua New Guinea, Jeffery Simon[26] explained that in response to the violence (outlined in Chapter 1.1), the state was protecting the mining company and ignoring the wishes of the affected people. The state was supplying police to enforce security at the mine site, particularly special mobile police squads at the time of evictions, and declaring a state of emergency to suppress protest. Specifically in March 2009, the Government of Papua New

Guinea's National Executive Council deployed a joint military and police operation to address "tribal fighting and illegal mining" in the vicinity of Porgera. This "Operation Ipili 09" led to 300 houses belonging to local landowners being destroyed, along with a number of killings. The operation was apparently a response to both requests for relocation by the landowners (given the difficulties of living near the expanding mine) and the company, in order to accommode their mine expansion. The Porgera Alliance made various complaints to the government, but also called on a number of international NGOs to make complaints on its behalf. It has consistently continued to articulate the demands of landowners for relocation and just compensation in spite of the difficulties outlined. [27]

In other cases, such as that of the Freeport McMoRan-operated Grasberg Mine in West Papua/Indonesia, as noted in Chapter 1.1, the company has been effectively paying the army to run a counter-insurgency operation in the area around the mine. Unfortunately, the legitimate opposition of the local people to this huge project—the third largest copper mine in the world—has been caught up in the struggle for Papuan independence from Indonesia. (Of course it could be argued that concerns over the mine have in turn fed the demands for independence.) As some of this is opposition is armed resistance, via the Free Papua Organization (OPM), the abuses that have been meted out by the state to peaceful Papuans have been heinous. In this instance, the response from activists should be on making links to human rights organizations and the training of human rights defenders, as much as is possible in the oppressive situation. Appeals, where possible, to external human rights organizations have proved to be relatively effective, but assistance can only be limited where widespread cases of torture, arbitrary detention, gang rape and extra-judicial killings continue.[28]

One option to consider is to consider inviting in international observers. Companies have to be very careful in the presence of international observers. There are organizations that will send international observers to witness, record and denounce what is going on, thus reducing the likelihood of violent confrontation. Some in-country human rights groups

may have such a program. (Although sadly, in the case above, even "respectable" human rights observer groups are now no longer allowed into West Papua.)[29]

In the similar conflict of the Ogoni people in Nigeria (see case study in Chapter 2.1), which is tied to oil production, the government had ordered the militarization of the area in order to protect production. This included providing Shell with military support, resulting in human rights violations, torture and rape. In his presentation to the 2009 Manila Conference, Legborsi Saro Pyagbara of the Movement for the Survival of the Ogoni People (MOSOP) described the conflict as being two-layered, one between the Ogoni and state, and the other between the Ogoni and Shell. The state had ensured that ownership of lands and mineral resources was removed from the community and passed to the Federal Government. When community agitation followed as a result of this legislation, the government responded with militarization. It was these actions that led to the formation of the Movement for the Survival of the Ogoni People. MOSOP has become a rallying point for the Ogoni, based on non-violent protest, and has spent a great amount of energy in grass-roots meetings and training to consolidate local support against violent repression.[30]

One of the more disturbing contemporary trends has been the attempts to brand legitimate protesters as "terrorists." This stems essentially from the idea of a Western "war on terror," as launched by George Bush after the 9-11 attacks. In February 2011, Wikileaks revealed cables from diplomats—in the U.S., Canada, U.K., Australia, Switzerland, and South Africa—that specifically targeted activists from Bolivia, Peru and Venezuela (although similar examples also exist from India to Indonesia). As a Peruvian journalist noted in 2007, "Whoever opposes mining is seen as a terrorist and anti-patriotic."[31] It is a label that is far too often applied to indigenous communities with concerns over extractive industries, where a perceived lack of patriotism can be dealt with via "anti-terrorist" legislation. The "de-legitimization" of protest may seem an easy option for the state, but of course through trying to extinguish lawful protest, it risks creating violent protest if

other options are removed. The most effective campaigning against this is via universal international condemnation, as attempts to denounce such legislation within a country risks further anti-patriotic labelling.

Overall, it is clear that maintaining peaceful, unified protest against government oppression is, by its very nature, not easy. Communities can appeal to indigenous methods of conflict resolution, seeking reconciliation. They can also look to national and international allies, although in the case any appeal to the "outside," the risks are that it may only increase the claims of treason and therefore increased repression.

Indigenous Women Organize Corporate Mining and the Indigenous Women of Benguet, Philippines

By Abigail Anongos, Cordillera Peoples Alliance (CPA)

Indigenous Women in the Struggle against Corporate Mining in Benguet

The box in Chapter 1.1 set out the adverse impacts faced by indigenous women in relations to mining in the Cordillera region of the Philippines (see Impacts of Extractive Industries to Indigenous Women: Corporate Mining and the Indigenous Women of Benguet, Philippines, p. 22). In the face of these challenges, indigenous women set out to organize themselves. Cordillera Peoples Alliance, through its regional federation of indigenous women, Innabuyog, and its NGO partner CWEARC (Cordillera Women's Education, Action and Research Center), have been assisting in this. Jointly they have been empowering indigenous women through education and information campaigns, mobilizations and direct actions, including the introduction of alternative livelihood opportunities and projects.

Organizing of women in the mines started in the 1980s, among the wives of miners of Benguet Corporation, in response to the problems they faced in the mining camps. Among their issues were poor living conditions in bunkhouses, health and safety concerns and violence against women. The women's organizations also supported the labor union during the workers' strike for just wages and benefits.

In the 1990s, several women's organizations were set up in mining-affected communities in Itogon and Tuba, which all came together under the Begnas Women's Alliance. New women's groups were formed in other mining communities in Benguet, such as in Mankayan, where miners' wives organized themselves into *Tignayan Dagiti Babbai ti Minasan a Lepanto* in 2005. Kankanaey women in Bakun municipality helped organize Bakun Aywanan in 2008, and remain vocal leaders of their organization in the campaign against Australia's Royalco mining.

The first steps in organizing consist of information and education activities for the women to understand their situation in the mines, within the context of Philippine society. Awareness raising is essential in order to motivate the women to organize. Through their organizations, indigenous women planned activities to address the problems identified, which including community protests against large scale mining, privatization of resources like water, and militarization.

Many women became leaders of communities or peoples' organizations, engaging in direct actions with government through mass mobilizations, lobbying and dialogues, including a rice cooperative and pig dispersal project. It is an achievement of the overall Cordillera indigenous peoples' struggle to have empowered the women, who carry major burdens caused by the impacts of large-scale mining operations.

There are many lessons learned from CPA and Innabuyog's long-running work of campaigns and advocacy for indigenous peoples' rights, and women's rights. These include:

a. The continuing need to organize, educate and mobilize women to harness their potential as leaders and important actors in the community;

b. The continuing need to address the particular issues indigenous women face, like the lack of livelihood, basic social services, impacts of mining on food sovereignty, physical security, and health;

c. The need to appreciate and recognize the important role that women play in the defence of land and resources in the community, and;

d. The need to generate support for women from other sectors of society and to build solidarity linkages with other indigenous women in the region, country and abroad.

Challenges and Recommendations in the Continuing Struggle of Indigenous Women

Based on CPA and Innabuyog's long years of organizing, educating and mobilizing indigenous women, the following advocacy recommendations are made to challenge different institutions, development agencies, support organizations and intergovernmental bodies to support the following indigenous peoples' initiatives:

a. Support women's fight women's participation in the struggle for the recognition of their ancestral land rights and for the Philippine government to revoke all mining claims, leases, permits, agreements or other applications which have no legitimate free, prior, informed consent (FPIC);

b. Demand for rehabilitation and just compensation for the damages wrought by the mining operations in the Cordillera, such as Benguet Corporation, Lepanto, Philex, Itogon-Suyoc;

c. Guard against the entry of other mining companies into the Cordillera, including Royalco in Bakun and Anvil in Itogon. It is important that women be actively involved in any FPIC process and in asserting the right to self-determination, in any mining potential project;

d. Form and strengthen organizations of indigenous women in communities threatened by mining operations;

e. Continue education and information campaign among indigenous women in mining affected communities;

f. Ensure greater participation of indigenous women in various meetings, training or activities on extractive industries at the local, national and international levels;

g. Demand for the provision of sufficient social services and support to uplift the welfare of indigenous women and children.

Australia—After the Mabo Decision

By Brian Wyatt, National Native Title Council

You have turned our land into a desolate place.
We stumble along with a half white mind.
Where are we?
What are we?
Not a recognised race.
There is a desert ahead and a desert behind.
…
The tribes are all gone,
The spears are all broken;
Once we had bread here
You gave us stone (p.109)

- Jack Davis, 1992
The Dreamers[32]

The High Court's decision in the Mabo case…has determined that Australian law should not…be 'frozen in an era of racial discrimination.' Its decision in the Mabo case ended the pernicious legal deceit of terra nullius for all of Australia—and for all time. The court described the situation faced by Aboriginal people after European settlement. The court saw a 'conflagration of oppression and conflict, which was, over the following century, to spread across the continent to dispossess, degrade and devastate the Aboriginal people.' They faced 'deprivation of the religious, cultural and economic sustenance which the land provides' and were left as 'intruders in their own homes.'

- Paul Keating, Australian Prime Minister (1991 to 1996)[33]

Australia's Aboriginal and Torres Strait Islander peoples have been fighting for land justice in Australia since colonization. Our nation's narrative has been full of twists and turns that includes many dark and shameful chapters, not the least of which being the systematic dispossession of Aboriginal people from their land. It is only in the last two decades, since the Mabo High Court decision, that Australia has really begun to address this travesty, but many of the positive changes, through legislation as well as national debate, have been marred by undue government tinkering and

interference.

Aboriginal Australians are over-governed by a bureaucracy that is unable or unwilling to allow Aboriginal people to make their own decisions or have control over their own corporations, thereby denying them their right to plan properly and invest in the future for themselves, their families and their communities. At the same time, governments continue to doggedly contest traditional owners' connection to country to settle native title claims, denying them crucial links to their past, their culture and their identity. Paternalism remains alive and well in Australian Indigenous Affairs and it continues to be a source of anger and frustration for many Aboriginal people.

Although Australia's stolen generations eventually received an apology from Prime Minister Rudd, traditional owners continue to seek justice through recognition of their rights to traditional lands.

If we pursue the analogy with Prime Minister Rudd's apology, we should be asking ourselves how the native title system can say sorry to those people who are deemed by the courts to have lost connection to their traditional lands and resources. What we would need is an apology for the Social Darwinism that lives on in our native title jurisprudence. This is a fundamental issue for the resolution of native title claims and it was put very well by Prime Minister Keating in his Redfern speech of 1992. According to Keating, the issue turns on recognition—recognition of who did the dispossessing, who took the traditional land, and who broke the continuities of law and custom.[34]

Back in 1992, we heard that the Mabo ruling marked an historic turning point that would become the basis of a new relationship between indigenous and non-indigenous Australians. Yes it was an historic turning point, and although we've taken a few positive steps since then, opportunities to acknowledge the positive aspects of native title—such as reconciliation and economic opportunity—are still being lost. Everyone is repeating the mantra of "negotiation not litigation," yet there are a large number of native title claims being choked by litigation.

Mabo

In 1992, the Mabo decision[35] determined that indigenous peoples had their own system of law and ownership before European settlement, ultimately recognizing that indigenous communities have native title over their traditional lands. Since then many Federal Court decisions have impacted

significantly on indigenous native title rights and interests as evidenced through the Wik Decision in 1996,[36] resulting in the former Prime Minister John Howard's 10-Point Plan, or Native Title Amendment Act 1998, which placed specific restrictions on native title claims.[37] There have also been a number of significant Court determinations over the last eight years—most notably the 2002 cases of *Yorta Yorta v Victoria*, which refused the native claim of the Yorta Yorta people [38] and *Western Australia v Ward*, which determined that native title rights could be extinguished one by one.[39]

Following the Mabo decision, the Native Title Act was proclaimed in 1993. The Act was a good piece of legislation that allowed for the recognition of native title while validating other forms of land tenure. In essence, the Native Title Act walks a fine line in negotiating competing interests with the common law of Australia.

Since its creation, however, the Act has been amended to the detriment of the rights of indigenous peoples and to the detriment of the Australian community. Perpetual amendments have been made in order to satisfy non-Aboriginal concerns, with none ever having been made to benefit the interests of traditional owners. Unfortunately for traditional owners, seeking the recognition of their native title rights continues to be a tortuous struggle that drags on through years of appeals and counter-appeals in the courts.

The government proclaimed that the Act was a special measure under both the United Nations Convention on the Elimination of All Forms of Racial Discrimination (CERD) and Australia's Racial Discrimination Act 1975. The amendments to the Native Title Act in 1998, however, received strong criticisms from the CERD. These criticisms still require an appropriate response by the Australian government. Recent court rulings also demonstrate the urgent need for the Australian government to address those concerns. Native title was supposed to be an opportunity for the indigenous peoples of Australia to benefit from the wealth of the nation. Should the Native Title Act have been allowed to follow its original intention, things could have been much different.

The intent and spirit of the Act is clearly stated in its preamble:

> It is particularly important to ensure that native title holders are now able to enjoy fully their rights and interests. Their rights and interests under the common law of Australia need to be significantly supplemented… A special procedure needs to be available for the just and proper ascertainment of na tive title rights and interests which will ensure that, if possible, this is done by conciliation, and if not, in a manner that has due regard to their unique character.[40]

Despite this, the practical erosion of native title rights and interests continue to happen. Successive governments develop policies theoretically advocating that indigenous peoples should have the capacity to determine their own futures and consistently argue the need for improved service delivery programs for the health and well-being of Aboriginal people. In practice, this seldom happens.

Yet, the failure of native title legislation and the struggle for self-determination are not mutually exclusive and the Australian government is slowly coming to recognize that a positive outcome for land access is fundamental to the capacity of indigenous peoples for decision making. This is where the native title legislation has facilitated some positive opportunities. In particular it has facilitated an evolving process of engagement between Aboriginal people and the wider community. This is a process that has broadened from a dialogue on land access to include other issues such as health, education, employment, community development, and social capital. It has also allowed a seat at the table with major mining companies for economic opportunities under the “right to negotiate” or “future act” provisions of the Act. Under this provision, native title claimants and native title holders have the right to negotiate over proposed activities or developments, such as major mining developments, that may affect native title.

The right to negotiate does not provide a right for Aboriginal people to veto or stop projects, which in itself is problematic. This is dealt with later under the section on free, prior and informed consent, but we are increasingly seeing organizations, from local community groups to major corporations, negotiating local and regional level agreements with Aboriginal people not only as a successful alternative to the litigation trail through the Federal Court, but to reach agreement on benefits, such as major employment and business development opportunities for local Aborigines.

In this respect, the Act has facilitated the right of indigenous peoples to self-determination as set out under Article 3 of the UN Declaration on the Rights of Indigenous Peoples, in effect that indigenous peoples can freely pursue their economic, social and cultural development. Unfortunately, however, this is now under threat with the development of new policies by the Federal Government. In particular, the government is seeking ways of controlling the flow of monetary benefits to traditional owners, arguing that payments to individuals have been misspent and the benefits of the resources being removed from land are being denied to future generations. While in some cases this may be true, traditional owners groups had been tackling the issue head on and were making some

progress in ensuring that the wider indigenous community were benefiting from the deals being struck. The government, through its actions, was attempting to unduly influence the outcome of agreements. In doing this it was punishing everyone, for the sake a few, which directly undermines the right to self-determination.

Unfortunately, however, self-determination has become the scapegoat in an ongoing debate in Australia between those advocating a rights-based development approach and those preferring to pursue what we came to know under the former Howard government as "practical reconciliation."[41] This debate has been dividing the indigenous leadership, and it has been perpetuated by the conservative media as well as the opposition party. Practical reconciliation in its simplified form is about the Australian government's "closing the gap" policy agenda—the fight for improving health and education outcomes for indigenous communities and moving people away from passive welfare and into the mainstream economy. This is an enormous task and certainly worth supporting. But it must not be done at the expense of people's rights and the right for Aboriginal self-determination.

There is general agreement that self-determination is about the right of indigenous Australians to make decisions on issues relating to them, and to manage their own affairs. But the government is introducing new policies and programs into communities in almost rapid fire succession, and it is being done without the real and effective engagement of indigenous peoples. Indigenous communities are not being listened to and they are suffering the consequences. It is clear that the gap between people's rights and practical reconciliation needs to be closed.

For most indigenous peoples in Australia, there is a belief that it would be impossible to succeed in improving people's lives in such areas as health and education without acknowledging and respecting people's rights. Equally, however, it is impossible to acknowledge and respect people's rights without implementing programs that improve their lives. In essence, the disadvantage gap between indigenous and non-indigenous Australians will not be closed through practical measures without having an equitable system of rights for all citizens.

Clearly, it is time to get back to basics. And the central requirement for getting back to basics is land rights.

Noel Pearson, a leading indigenous activist, said in an address at the Brisbane Writer's Festival that "over the course of the past 20 years, we've made great gains in restoring the land rights of our people, and

Mabo was extremely important in that, as was the Wik Decision."[42] Noel had thought—until the Queensland Wild Rivers Legislation[43] at least—that land rights could be put on the back burner for the time being so that there could be a focus on social issues such as reform in areas such as health, education, housing. As Noel points out, it is important for "our people [to take] responsibility for our lives, rebuilding families, rebuilding the strength in our people and never succumbing to victimhood." Noel believes strongly that the key right of indigenous peoples is the right to take charge, the right of indigenous peoples to take responsibility. The challenge for indigenous peoples at the moment in Australia is how to wrest that right to take responsibility from the state.

Granted, Queensland had gone a long way with land rights, and activists like Noel Pearson believed that an understanding about land had been reached. Unfortunately, however, some of the other Australian states still lag far behind and land rights must remain a key focus. Until the government finally recognizes that land is fundamental to our cultural identity and our cultural sustainability—that it is fundamental to who we are—we will not be able to move forward. And without due recognition of land rights, the development reform that Noel talks about could remain a perpetual challenge that evades resolution.

Unfortunately, therefore, there is still a long way to go to resolve our rights over land.

As the Chief Executive Officer of the Goldfields Land and Sea Council, I attended many meetings where I hear updates and progress reports from bureaucrats about policy changes and legislative reform. We hear all the time about what the government wants to do for Aboriginal people and why this is important or why that is needed. But we are so caught up in the legalese of the Native Title Act and the bureaucratic red tape of policy reform that it is choking us. Bureaucrats should not be resented for doing their jobs—but it is almost as if the Australian government has forgotten that this is about people. The policy changes and legislative reform they put forward directly affects people—they talk as if they have forgotten that it is about indigenous peoples. It is about our lives.

Again—it is time to get back to basics.

If the government is serious about closing the gap between indigenous and non-indigenous peoples then they have to seriously look at the deficiencies of indigenous rights. The link between resolving native title and associated rights, and the broader issues of health and well-being, needs to be recognized and acknowledged. Native title was supposed

to be an opportunity for equity in Australian society and for indigenous peoples to benefit from the wealth of this nation.

Native title is a fundamental element of cultural obligation and identity, it goes to the core of Aboriginal identity, and it has the potential to be one of the key instruments of nation building. Understood rightly, native title recognizes the distinctiveness of cultural rights and at the same time provides indigenous peoples with opportunities to participate in the mainstream national culture and economy.

With the endorsement of UN Declaration on the Rights of Indigenous Peoples (UNDRIP) by the UN General Assembly, which was supported by the Australian government in 2009, there is an opportunity for us all to start advocating for the recognition of our rights.

Provisions within the Declaration open up opportunities for indigenous communities to participate in negotiations that will provide economic benefits for their communities. The original intention of the Native Title Act, as illustrated in its preamble, had the Declaration in mind as it introduced legislation to establish a special fund to assist people to acquire land who would be unable to assert native title rights and interests. The Social Justice Measures, developed in response to the Native Title Act, unite the normative principles of indigenous people's ability to exercise and enjoy fundamental rights and entitlements.[44] Such rights and entitlements include control over social, economic and political systems, land entitlements, resources and the use of those resources. Native title, or rights to land, is about Aboriginal people's rights to the resources and wealth of their own heritage and cultural values. But what about cultural identity and indigenous peoples' place in our nation?

We talk occasionally about changes to the preamble of the Constitution to acknowledge and recognize us as first Australians. But it will take more than just changes to the preamble. We need to enter into a process with government, and also with the broader Australian public, for the recognition of our cultural identity and our recognized place in Australian society.

Noel Pearson also talked about this recently in an article in The Australian newspaper. Noel said that it is critical that "indigenous rights must be reconciled with a united, undifferentiated public citizenship of the Commonwealth of Australia." Article 8 of the UNDRIP states that indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture. Article 11 of the Declaration further states that indigenous peoples have the right to

practice and revitalize their cultural traditions and customs. For Australian aboriginal cultural identity to be recognized, native title must be front and center in any debate. Native title should be the centrifugal force of indigenous affairs—the call to action, if you like, that other developmental reforms flow from.

When Prime Minister Rudd delivered his apology for the suffering inflicted on the families of the stolen generations, he also promised to move the nation forward on a new footing, forging new partnerships and closing the development gaps. Shortly after this, the federal Attorney-General Robert McClelland, the minister responsible for native title, also emphasized the government's intention to do native title business differently. He said that native title has a crucial role to play in the new chapter of Australia's story, although he acknowledged that "we have a long way to go before we realize the full potential that native title can bring."[45] The Attorney-General noted the momentum created by the apology. He made the point that "just as an apology recognizes and acknowledges the past hurt caused by the removal of children, through native title we acknowledge indigenous peoples' ongoing relationship with the land. To bury native title in unnecessary complexity is an affront to that heritage."[46]

At the risk of stating the obvious, *dispossession* is also an affront to that heritage. The current legal arrangements in native title have the effect of obscuring the agents of dispossession and blaming the victims. The former Social Justice Commissioner of the Australian Human Rights Commission, Mr Tom Calma, identified a few key steps that will need to be taken in order to bring Australia into line with its international obligations. Notably, he called for a public inquiry into the issue of compensation available under the Native Title Act, where the jurisprudence has manifestly failed to deliver on the objectives of the legislation. The Social Justice Commissioner's *Native Title Report of 2007* noted that the current understanding of "traditional" law and custom within the native title system would need to be changed.

Aboriginal traditional owner groups who have revitalized their traditions in recent years cannot be recognized as native title holders under Australian law *unless* those traditions have been observed, substantially without interruption, since the assertion of British sovereignty. Leaving aside the possibility that the assertion of British sovereignty might itself count as a substantial interruption, the recommendation of the Social Justice Commissioner is clear: the UN Declaration (Article 11) provides the right to revitalize indigenous cultures, and the Native Title Act will need to be amended accordingly.

Most critically, this would mean shifting the burden of proof. It is totally unacceptable that the onus is only on traditional owners to prove their cultural connection—to prove their own cultural identity—in order to gain recognition of their rights to land.

This is one issue that would need to be subject to a thorough review before we could hope to see native title claims being resolved on just terms. There are a range of other issues to be addressed as well—such as the discriminatory status quo that has native title rights bowing down to every other right in existence. This is an area of reform that we need to push for and it is something that the National Native Title Council in Australia is pushing very hard to achieve.

The government rightly recognizes that the native title system should be seen as an avenue of economic development. Now we need to see some policy and legal imagination that can close the gap between current understandings of economic development and the traditional rights to hunt, fish and gather. If we begin with the assumption that traditional owners have the right to benefit from the exploitation of *all* natural resources in their country, as the UN Declaration asserts, then indigenous economic development will need to be seen in an entirely different light. It would not simply be a matter of enhancing economic rights as they were conceived two centuries ago. We would expect to see a range of options in local settlements that specifically promote non-native title outcomes, benefit-sharing agreements, effective consultations regarding land use, joint environmental management regimes and sustainable development.

The Attorney-General has indicated his intention to work with Minister Macklin[47] to explore how land ownership and management opportunities can be more readily accessed as part of negotiated outcomes in the native title system. Minister Macklin announced that a policy reform package would be developed to look closely at comprehensive settlements together with an Indigenous Economic Development Strategy. The government's native title reform agenda also signalled a shift from the litigation of the past and this is something that we will be working on closely in order to encourage the government to secure significant benefits for traditional owners and their communities.

Unfortunately, part of that reform was about fast tracking land dealings, and we are starting to see what that means now, as a Native Title Amendment Bill for housing and public infrastructure on Aboriginal land was introduced into Parliament in October 2009. We should not fast track anything if it comes at the expense of the rights of traditional owners, in

particular of the right to free, prior and informed consent. Fast tracking land access may work for government and industry, but indigenous governance processes still need to be respected and we have the right to be engaged fully in negotiations—and this means having understood completely the nature of the decision being taken.

Achieving justice and equity for indigenous peoples in Australia is something that traditional owners, industry and government can strive for with the development of economic opportunity through native title. And that means continuing the partnerships that we have already developed through agreements with economic benefits for traditional owners and their communities. The positive benefits from negotiating agreements are not only outcomes that result in tackling key employment deficiencies, but less obvious ones such as engagement, capacity building, and experiencing a level of governance that allows people the right to participate in decisions that will not only affect what happens on their land but also impact on their lives. These positive spin-offs result in less tangible outcomes, but outcomes that are still vitally important; they strengthen indigenous peoples both emotionally and psychologically, resulting in the ability to forge stronger and more constructive and sustainable partnerships with key stakeholders.

We have argued that if you do not resolve native title in a just and meaningful way through negotiation and agreement, you will not succeed in the goal of "closing the gap" between indigenous and non-indigenous Australians. Native title is intrinsically linked to the health, well-being and the economic success of indigenous peoples. The key, however, is engagement. Results will not be seen unless we ensure indigenous peoples are included at all levels of the negotiation, which is the key premise of the principles of free, prior and informed consent. These are principles that provide benefits for industry as well as indigenous peoples. Part of the challenge will be to build and continue to develop alliances and partnership at the regional, as well as the national level. These alliances should involve the Minerals Council of Australia and its members, native title organizations, Aboriginal communities, the government, and NGO service providers.

Conclusion

There has never been a better time for creative thinking in relation to native title in Australia, and the government merely tinkering around the edges of the native title system will not deliver meaningful outcomes for

traditional owners. Nor will it allow Australia to hold its head up on the international stage. How we deal with native title is a fundamental test of who we are as Australians.

Indigenous peoples of Australia have been fighting for rights to land, for acknowledgement of culture and traditions, for economic prosperity, and for a rightful place in their own nation for the last two decades. The tides of history have shown that change is possible, but it shouldn't be this hard. The first Australians have been nurturing and managing country for at least 40,000 years, but it is in the last 200 years that the most lasting damage has been done. Indigenous Australians are perpetually being pushed and pulled through more policy and legislative reform, but the fundamentals for real, lasting change remain frustratingly unchanged. Native title legislation is one of those fundamentals. The burden for proving connection to country rests with traditional owners, who are the least resourced party at the table. Shifting this burden to state parties would be a small change to the legislation, but would have enormous positive ramifications for traditional owners and their communities. Not only would this free indigenous parties from needless litigation, it will finally reflect genuine recognition of traditional owners' rightful place in Australian society.

Nickel mining in Kanaky-New-Caledonia
A Colonial Heritage That Endures Decolonization Processes

By Sarimin J. Boengkih, Agence Kanak de Développement

New Caledonia is located in the South Pacific, about 1,500 kilometers north east of mainland Australia. New Caledonia is a non self-governing territory under French rules—in effect one of Europe's last remaining colonies. The Melanesian Kanak indigenous peoples call the islands Kanaky.

New Caledonia comprises the main island called Grande Terre, the Loyalty Islands (Ouvea, Lifou, Tiga and Mare) to the east, the Belep Islands to the north, and the Isle of Pines to the southeast, as well as a number of small uninhabited coral atolls. Combined, New Caledonia has a total land area of 7,359 square miles (19,100 sq km).

Grande Terre has a rugged central mountain chain descending to flat, dry savannah on the west coast, and wet, tropical forest on the east coast. Surrounding it is the second largest barrier reef in the world, which in turn marks out the largest lagoon in the world, and hosts over 5,000 known species of tropical marine life (5% endemic), including chambered nautilus, dugongs, manta ray, great white sharks, and in season, humpback whales. Six separate zones of this coral reef have been enlisted on the UNESCO World Heritage list.

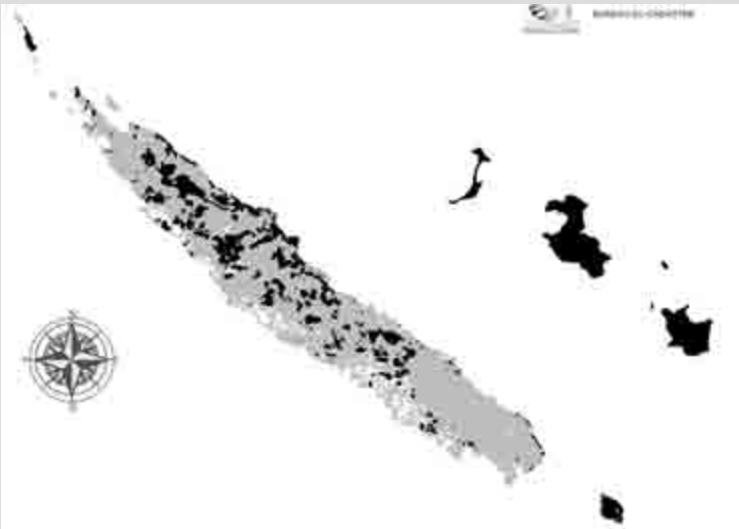
New Caledonia is unique for its biodiversity. Seventy four percent of its 3,000 plant species are endemic, ranking it fourth in the world. There are endangered rare dry forests, mangroves, numerous endemic araucaria (columnar) pines and palms, local birds such as the *kagu*, *notu*, and the tool-using crow.

History of New Caledonia and Kanak Struggles

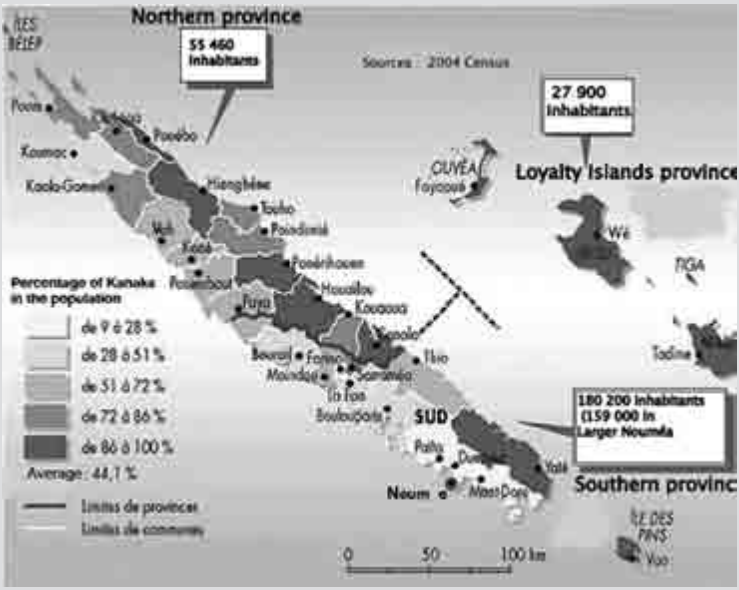
It was James Cook who created the name New Caledonia when he landed on the main island in 1774. There was limited contact between Europeans and Kanaks until the 1840s when whalers, sandalwood traders and missionaries settled. In 1853, New Caledonia was annexed by France, and a decade later, France began sending convicts to the colony. From 1864 until 1897, more than 22,000 French prisoners were deported to New Caledonia. On release, many convicts were forbidden to return to France, or were encouraged to remain in exchange for a plot of land. The colonial administration seized large portions of Kanak lands. With the introduction of cattle and deer, more and more of the local population were relegated to reserves, and many were forced into indentured labor.

The Kanaks responded with uprisings against the colonial administration. In an unsuccessful 1878 revolt, led by Chief Ataï, 200 European and 2,000 Kanaks died, including Ataï himself, who was beheaded. The native code created a segregated pass system limiting Kanak mobility and denying citizenship rights until 1945. Protected to a great degree, however, by missionary intervention and inspired by support for the Allies in the Second World War, Kanaks began a period of gradual renewal.

Following the war, these sacrifices helped justify demands for greater rights. In 1946, New Caledonia became a French Overseas Territory and



A Colonial Heritage: Kanak reserves today



New Caledonia is divided into three autonomous provinces.
Source: 2004 census: a total population of 263 500 of which 44% are indigenous Kanaks.

Kanaks were given French citizenship. Over the next 10 years, the first political party including both European Caledonians and Kanaks, the UC (*Union Calédonienne*), was formed under the slogan “Two colors, one people,” and Kanaks were granted voting rights.

Despite these gains, the Kanaks had lost most of their land to the French settlers and lived on reserves as a marginalized, discriminated group of people. The people have no legal collective or individual title for the land they occupy, as under French law, these customary lands remain the property of the state.

The 1970s witnessed the cultural awareness movement, led by Jean-Marie Tjibaou, and the rise of militant Kanak parties, who by the 1980s, were demanding full independence from France. A majority of European Caledonian voters deserted the Union Caledonienne to join the “Rally for a Caledonia within the Republic.” In the 1980s the independence movement strengthened and swept across the country. Separatists enjoyed a brief period of power, with Tjibaou serving as president of the Government Council from 1982 to 1984. Social programs and land reforms were initiated, but pro-French militia actions, assassinations, and mixed signals

from Paris led to disillusionment. Frustrated by the French government's failure to reform the system, pro-independence parties, under the banner of the Kanak Socialist Front for National Liberation (FLNKS) refused to take part in the 1984 elections and established "The Provisional Government of Kanaky." Over the next four-year period, violence involving factions of the FLNKS, the loyalist RPCR, and French troops resulted in a wave of assassinations and reprisals.

To stop the unrest, the French prime minister and the territory's political leaders signed the Matignon Accord on 26 June 1988. The agreement called for a referendum on independence to be held in 1998. Because Kanaks made up just 45 percent of the population at this time, a key Kanak demand was that only voters meeting strict criteria (10-year residence, among others) would be eligible to vote in the referendum and in provincial assembly elections.

As 1998 approached, the signing parties considered it likely that the independence referendum would fail, and negotiated to produce the 1998 Nouméa Accord. The agreement established New Caledonian citizenship, granted the Territory greater autonomy, and postponed the independence vote until sometime between 2014 and 2018. It also acknowledged Kanak traditional, or "customary" rights and identity, the legitimate presence of European and other ethnic communities, and recognized the need for a more equitable economic balance between the wealthy Southern Province and the majority Kanak Northern and Island Provinces.

Today, the Kanaks participate in the government and enjoy in principle the same rights as the rest of the population. The Customary Senate, which consists of traditional leaders named by their respective communities, is recognized in the French Constitution and has an advisory role. Their economic and social situation, however, remains precarious and a constant influx of immigrants—especially from France—exacerbates the demographic as well as the electoral imbalance.

Mineral Exploitation

For the Kanak people, the main events in recent years relate primarily to mining on the one hand, and access to land on the other. In mineral exploration and the mining industry, as in other areas, the rights of indigenous peoples are still flouted by the dominant society, either through ignorance of these rights or through a desire to maintain the colonial heritage.

Mining areas of New Caledonia in 2004

New Caledonia possesses great mineral wealth, with up to 25 percent of global nickel deposits. Other resources include cobalt, manganese, copper, platinum, gold and gas. Around 90 percent of the value of New Caledonia's exports comes from mining and metallurgical products. There has been nickel mining on New Caledonia for almost one and a half centuries, which has had primacy over agriculture. It was mining that led to the establishment of white colonists, and the mining town of Thio had electricity and running water long before the capital Noumea. The production profited from every European war scare and in the 1880s, New Caledonia briefly enjoyed a virtual world monopoly of nickel production, with processing starting in 1910.

The world price of nickel fluctuates a great deal, and the mining economy has experienced a series of slumps, which revealed the dangers of over-reliance on one productive sector. Canadian producers challenged New Caledonian nickel in the early 1900s, which combined with a down-turn in steel production, led to a global glut, which meant the nickel price fell by a half. The colony's stability now relies on such external factors. Recent world nickel demand, however, has led to plans to construct new mines and processing plants.

There are three major mining companies and five "small miners" operating in New Caledonia. The three majors are Société le Nickel (SLN), a

subsidiary of ERAMET SA (still majority-owned by the French State, despite a partial privatization in 1994); Vale-Inco Nouvelle-Calédonie S.A., a subsidiary of Vale-Inco; and Société des Mines du Pacifique Sud (SMSP), which is majority owned by a New Caledonian state entity, the Northern Province.

Mining has created a legacy of red scars on the landscape, increased water and air pollution, endangered coral reefs, released asbestos fibers, and general encroachment on the island's biodiversity. Authorities and nickel industry officials say publicly that they are committed to safeguarding the environment, but they are under increasing pressure from local ecological, political, and cultural groups to keep their word.

The Kanak people, however, remain the primary victims of the mining industry, having been impoverished and displaced to accommodate the mining companies. The Kanak indigenous peoples have been expelled from their traditional land and parked in reserves, mostly in the deep valleys at the feet of the mountains that will soon be mined for the nickel ore. They have also become a minority in their own country as convict labor gave way to imported labor from Japan, Indonesia and Indochina, as well as France.

A Kanak leader living around Thio laments that:

> "After 137 years of operation, SLN helped ERAMET to become a world-leading producer of nickel, high-performance alloys, while we have lost our traditional lands. Our villages have been destroyed. Our cemeteries and our grandparents graves have disappeared buried under the stones and gravels coming down the valleys. Today, we inherited rivers of rocks to irrigate our yam fields."

Although they fought for France during the two world wars, at the end of the second world war, the Kanaks remained very much second class citizens. A whole framework of administration and police regulated and defined their separate and subordinate status. They were not part of the industrial workforce for this role was taken by Asian immigrants. Those Kanaks who were part of the industrial labor force were generally excluded from social benefit schemes, reserved for whites. The Labor Code restricting child and female labor covered neither Kanaks nor Asian workers. Even the legislation on industrial accidents providing compensation and pension schemes was not applicable to Javanese or Kanaks.

The Kanaks remained a marginal people. They were peasants, excluded from the mining labor force, and denied the opportunity to gain educational

qualifications and professional skills necessary for upward social mobility. For secondary education was still monopolized by the French in this period. By 1953, not a single Kanak had obtained the *baccalauréat*, the principal qualification of French high school students. This failure, on the part of the French, to nurture an indigenous middle class, helps to explain why an independence movement tool so long to appear in New Caledonia. The lack of an indigenous elite until the 1970s made French New Caledonia an anomaly in a largely decolonized world. It also meant they were not able to benefit from a nickel boom in the period 1969-1974. In 1976, few Kanaks were employed in the private sector, while 70 percent of Kanaks were still engaged in subsistence agriculture, with a small cash surplus.

The Kanak Independence Movement and its Effects on the Nickel Industry

The Kanak, who had long seen the profits from natural resources leaving Grande Terre and had become an impoverished minority in their own land, began to express their agitation with the French colonialists. Such conditions fuelled the struggle for independence from France, which started in 1975 and continued in the 1980s with the period of violent confrontations between Kanak activists, led by the FLNKS, and military forces.

The resulting Matignon Accord, also devolved more responsibilities to these regional governments and afforded the underdeveloped Kanak provinces increased funding with which to manage them. The Accord set the stage for economic reorganization in New Caledonia, which began to concentrate more economic authority into the hands of Kanaks. The Northern Province—politically controlled by an elected Kanak majority—created a financial arm to buy the mining company, Société Minière du Pacifique Sud (SMSP) for US$20 million, opening the way to big changes in the existing structure of the nickel industry.

Once under Kanak control, the Société Miniere du Sud Pacifique made astonishing progress under its head, Raphael Pidjot, who, before taking the SMSP post, had been an active independence leader, FLNKS chief of staff, and later a close associate of the late Kanak leader, Jean-Marie Tjibaou. SMSP gained a solid reputation, which gave it the clout to go looking for a partner among the world's leading mining companies. It persuaded Falconbridge, then the world's third largest nickel producer after Norilsk and Inco, to become a junior partner in a processing plant in

the North Province with an annual production capacity of 60,000 tons of nickel in ferronickel.

The subsequent 1998 Noumea Accord, as well as creating a new political environment, also provided for a new mining law, a new mineral resource exploitation plan and a environment law for each province. In 2000, France transferred responsibility over mining to the provinces; the president of the provincial government was given responsibility for applying the regulations.

There are new projects planned. Vale-Inco are developing the ambitious Goro Nickel project in the Southern Province of Grande Terre, which met stiff resistance from the Kanak indigenous population after being initially ignored (see case study in Chapter 2.4). Today, although most of the nickel ore is currently shipped overseas as unrefined ore, new developments plan to export more finished product to the growing metal markets in East Asia. SLN-ERAMET is upgrading it Doniambo smelter to meet this challenge. Also, in 2006 Falconbridge was taken over by the Anglo-Swiss miner Xstrata. There are still local concerns for what this may mean for the project.

But the current financial and economic crisis may yet reverse the past decade's economic growth. If that is true, then the next self-determination referendum may be affected. Even in the recent years of a booming mining industry, however, France still subsidizes the New Caledonian economy. It needs courage to stop this in order to build an independent economy founded on real facts, which may well see more processing and industrialization.

Indigenous Rights Flouted

Are direct foreign interests in New Caledonia compatible with the notion of respect for indigenous rights? The answer would have to be no, with regard to problems with Inco's Goro Nickel Project, and with regard to SLN attitude's towards the Kanak people.

In 2000, when France transferred responsibility for mining to the provinces, it perhaps thought that each provincial government would take indigenous rights into account, as stipulated in the Noumea Accord. This would mean that the principle of free, prior and informed consent would be applied. So far ERAMET-SLN and Goro-Nickel SA, and the President of the Southern Province, remain deaf to this message and show contempt for indigenous peoples' rights.

Endnotes

[1] Indigenous Peoples Rights Act (IPRA), 1997, "Republic Act No 8371."

[2] The Greenland Home Rule Act, 1978, "Act No 577."; Act on Greenland Self-Government, 2009, Although the Inuit make up nearly 90% of the total population of 57,000, and will likely benefit from asserting ever-greater independence from Copenhagen, the loss of a subsidy from Denmark presents some harsh political choices. It has created potential conflict between the national government. Aqqaluk Lynge, an Inuit campaigner who leads the Inuit Circumpolar Council's Greenland branch, does not oppose development, but fears that the interests of local people are too easily neglected, even with the recent political changes. See: "The rights of Arctic peoples - Not a barren country." *The Economist*, 16 July - http://int.piplinks.org/rights-arctic-peoples-not-barren-country.

[3] Venezuela: Ley Organica de Pueblos y comunidades Indígenas Gaceta Official de la Republica Bolivariana De Venezuela 38(344) Caracas 2005 Chapter II Art 11 -19; Constitución Política del Estado de Bolivia, 2009; The University of Texas at Austin School of Law. 1987. "Unfulfilled Promises and Persistent Obstacles to the Realization of the Rights of Afro-Colombians A Report on the Development of Ley 70 of 1993." Submitted to the Inter-American Commission on Human Rights, 18 July; "Australia: Aboriginal Land Rights (Northern Territory) Act - An Act providing for the granting of Traditional Aboriginal Land in the Northern Territory for the benefit of Aboriginals, and for other purposes." (No 191 of 1976), Sect 42.

[4] As one of the drafters of the declaration of Arctic sovereignty, he says his goal is to "make sure that the players in the Arctic area, while talking about the environment, climate change and development, realize we are already there. This is not a barren country."

[5] R. Muhi, 2009, Presentation to International Conference on Extractive Industries and Indigenous Peoples, 24 March, Manila, Philippines.

[6] Alternative Law Groups, et al., 2009, "Discrimination Against Indigenous Peoples in the Philippines: ICERD Shadow Report." August.

[7] Peru's Congress passes Indigenous Peoples' mining consultation law, 30 August 2011, http://www.minesandcommunities.org/article.php?a=11129.

[8] B. Walker, ed. 2012, "State of the World Minorities and Indigenous Peoples." Minority Rights Group, pp. 111-112.

[9] Acuerdo CIDOB y Minstero de Autonomia, http://www.cidob-bo.org/images/2010/cidobminis.pdf; B. Walker, ed. 2012, "State of the World

Minorities and Indigenous Peoples." Minority Rights Group, pp. 92-94.

[10] *Ibid*. pp. 24-25.

[11] M. Setra, 2009, "Cases of Conflicts on Extractive Industries in Indonesia: Indigenous Peoples Views, Actions and Lesson Learned by AMAN." 24 March, Manila, Philippines.

[12] Makarim and S. Taira, 2012, "Indonesia's New Land Procurement Law." March.

[13] W.T. Onorato, P. Fox and J. Strongman, 1997, "World Bank Assistance for Mineral Sector Development and Reform in Member Countries." *World Bank Group*, December.

[14] R. Moody, 2005, *Rocks and Hard Places*. Zed Books.

[15] Bolivia: to nationalise or not? 19 June 2012, www.minesandcommunities.org/article.php?a=11755; South Africa's ANC holds debates on mining tax reforms, 3 July 2012, http://www.minesandcommunities.org/article.php?a=11781.

[16] Australia's mineral resource rent tax passes into law, 27 March 2012, http://www.minesandcommunities.org/article.php?a=11582; Brazil freezes new mine claims pending reforms, 26 June 2012, http://www.minesandcommunities.org/article.php?a=11776; Guatemala seeks 40% stake of all mining companies, 3 July 2012, http://www.minesandcommunities.org/article.php?a=11784; "Mongolia: Resource Nationalists" make June electoral gains." 17 July 2012, http://www.minesandcommunities.org/article.php?a=11810.

[17] M.L. Ross, 2001, "Extractive Sectors and the Poor." *Oxfam America*, October; R. M. Auty, 1998, "Resource Abundance and Economic Development: Improving the Performance of Resource-Rich Countries." *Research for Action* 44, UNU/WIDER.

[18] D. De Ferranti, G. E. Perry, D. Lederman, and W. F. Maloney, 2002, "Natural Resources to the Knowledge Economy." The World Bank; ICMM, 2007, "Resource Endowment initiative." http://www.icmm.com/resource-endowment-initiative; UNCTAD, 2007. "World Investment Report: Transnational Corporations, Extractive,Industries and Development."; Interestingly even in both Botswana and Chile, where significant contributions to revenue and income are noted, the impact on employment is still statistically small (see World Investment Report, 2007, "Transnational Corporations, Extractive Industries and Development." pp. 162-163).

[19] The Natural Resources Charter - http://naturalresourcecharter.org/.

[20] E. Salim, 2003, "Final Report of the Extractive Industries Review, Striking a Better Balance." *World Bank* vol. 1, December.

[21] K.Visser, 2012, "Lessons of Transparency from EITI: A Report for Focus on the Global South." April.

[22] *Ibid*; Extractive Industries Transparency Initiative website – http://eiti.org/eiti; Re home country sign-ups to EITI, Australia has agreed to trial the EITI, but this is primarily because of its own internal mining industry than because it hosts multinationals operating in other countries. http://www.minerals.org.au/news/extractive_industries_transparency_initiative_pilot/.

[23] Global Witness, 2012, "Rigged? The Scramble for Africa's Oil, Gas and Minerals." January.

[24] B. Walker, ed. 2012, "State of the World Minorities and Indigenous Peoples." *Minority Rights Group*, pp. 73-74.

[25] J.V. Garganera, & José de Echave, 2012, Presentations at 11.11.11 workshop on "No Go Zones to Mining." 12 March, Brussels, http://www.worldservicesgroup.com/publications.asp?action=article&artid=4376.

[26] Jeffrey Simon is from the AKALI TANGE Association and Porgera Alliance.

[27] J. Simon, 2009. "Conflict and the State's role: The case of Porgera Papua New Guinea." 24 March, Manila; Philippines; Human Rights Watch. 2011. "Gold's Deadly Dividend." 1 February. http://www.hrw.org/en/reports/2011/02/01/gold-s-costly-dividend; MiningWatch Canada, 2009, "Urgent Appeal related to human rights abuses and potential loss of life as a result of extrajudicial, summary or arbitrary executions." 3 May; Porgera Alliance, 2011, "Landowners in Porgera Demand Urgent Resettlement." October.

[28] M. Setra, 2009, "Cases of Conflicts on Extractive Industries in Indonesia: Indigenous Peoples Views, Actions and Lesson Learned by AMAN." 24 March, Manila, Philippines; C. Zöllner, 2008, "The Grasberg mine and its impacts on the environment and population of Western New Guinea." Mülheim, February; M. Chen, 2012, "Unrest in Indonesia's Mines: Local Chaos and Global Injustice." *Huffington Post*, 9 April.

[29] C. Zorrilla, et al., 2009, "A Guide for Community Organizers." *Global Response*, p. 15.

[30] L.S. Pyagbara, 2009, Presentation to the Manila Conference 24 March, Manila, Philippines.

[31] "Wikileaks reveal Western diplomats target anti-mining activists." 1 March 2011, http://www.minesandcommunities.org//article.php?a=10740.

[32] J. Davis, 1992, "Act One, Scene 9, The Dreamers." *Kullark and The Dreamers,* Currency Press.

[33] House of Representative, 1993, "Commonwealth, Parliamentary Debates." 16 November, 2878 (Paul Keating, Prime Minister).

[34] *Ibid*.

[35] "Mabo v Queensland." No. 2, 1992, 175 CLR 1.

[36] "Wik Peoples v State of Queensland." 1996, 187 CLR 1.

[37] See http://www.australianpolitics.com/issues/aborigines/amended-10-point-plan.shtml and Wikipedia entry on Native Title Amendment Act 1998, http://en.wikipedia.org/wiki/Native_Title_Amendment_Act_1998.

[38] Members of the Yorta Yorta Aboriginal Corporation v Victoria [2002] HCA 58.

[39] "Western Australia v Ward." 2002, 213 CLR 1.

[40] "Native Title Act 1993 (Cth)." Preamble, p. 2.

[41] At a reconciliation convention in May 2000, the government opposed the wording of a proposed "Australian Declaration towards Reconciliation," with the Howard government preferring reference be made to "practical reconciliation" that focuses on health, education, housing and employment, rather than the more symbolic proposal for an apology, a major recommendation from the 1997 "Bringing them Home" Report.

[42] N. Pearson, 2009, "Opening Address." Brisbane Writers Festival, 16 September.

[43] Queensland *Wild Rivers Act 2005* helps ensure that certain rivers in Queensland are protected. While the legislation states that traditional and cultural activities are not affected, indigenous activists, such as Noel Pearson, argue that the legislation inhibits the rights of indigenous peoples to pursue economic development opportunities.

[44] As part of the government's response to the 1992 High Court decision on native title, the Acting Prime Minister sought the formal views of the Aboriginal and Torres Strait Islander Commission on further measures that should be considered to address the dispossession of Aboriginal and Torres Strait Islander peoples. The resulting report formed part of the government's three policy responses, which included a commitment to further social justice measures for Indigenous peoples in acknowledgment of continuing disadvantage and dispossession.

[45] Robert McClelland, 2008, "Commonwealth Attorney General, speech to the Negotiating Native Title Forum." Brisbane, 29 February.

[46] *Ibid*.

[47] Minister Jenny Macklin, Minister for Families, Housing Community Services and Indigenous Affairs.

Chapter 2.3

International Advocacy with Companies and Their Investors

The purpose of this chapter is to review the ways in which communities can challenge extractive industry companies directly, in terms of lobbying the top management, and appealing to their investors. It is possible the company in question may be a national one, but given the multinational nature of the extractive industries it is more likely that corporation—or its parent—will have its headquarters in another country. If not the company itself then the major investors, or project insurers, are likely to be from overseas. Given investment has become increasingly globalized, it makes sense that any response to it should be equally globalized.

Overseas campaigning may initially seem like a drawback, given the difficulty in communication with a foreign country, let alone in a foreign language. It should, however, be viewed as an opportunity. It provides a range of actors to educate and influence with regard to the community's position, and often produces an abundance of allies who can act in solidarity. It

may draw on scarce time and resources, but can also add to them in terms of overseas support and funding. Any struggle is really about levelling the playing field between the corporations, who tend to have the economic and political clout, and indigenous peoples and local communities. A local community can draw on a number of factors to even the imbalance, but access to international organizations and solidarity can be a huge help, especially when the national government is firmly behind the company.[1] This is one reason that the workshops in the 2009 Manila Conference explicitly emphasized this area of work.[2]

Once again it is worth stressing that the activities outlined should not be viewed in isolation. They are an extension of any local and national campaign. Any well-coordinated campaign will also use legal action or international complaint mechanisms, and of course they are most effective when coordinated with a campaign targeted at the company and its investors. (See, for example, the case study of Vedanta in this chapter, which combines concerted campaigns for disinvestment with national court cases and a complaint using the voluntary OECD Guidelines for Multinational Enterprises).

Finally, much of this chapter is focused on actions that are complaints against a company. If the decision has been made to negotiate, points in the next chapter may be more relevant, but it will still be useful to review the information here as it covers how to make direct approaches to the company, and it may be that influencing shareholders, or others financiers, could support a negotiating strategy.

2.3.1 Company Structure and Financing

Before seeking to influence companies it is worth reviewing the ownership of companies and how they are financed.[3]

It is also important to establish the company's form of ownership. This is not something that can be assumed—large, well-known companies may be private, and smaller local com-

panies may be publicly owned. Remember also that companies are bought and sold all the time. A company that was privately owned may be purchased by a public company. Private companies sometimes become public as they grow and develop a need for more capital. Subsidiaries change ownership, and begin operating under new parent companies. It is essential to know who currently owns the company before beginning a campaign.

- Public: A public company is one "publicly listed" or "quoted" on a stock exchange. In this case public does not imply it is owned by the state. It is owned by a group of investors called shareholders, and those shares can be bought and sold by the general public. That share ownership is also referred to as equity, and shares as stocks. The companies have to abide by the rules of the stock market. Typically this means that companies must disclose any information that could affect their value so that everyone can see the information at the same time and no one gets an unfair financial advantage. Therefore information is more easily available on these companies, because they are required to make public reports to the relevant stock exchange on a quarterly and annual basis fully disclosing their financial status and activities.
- Private: A private company does not sell shares to the public, and may be owned by one person or a partnership. Unlike public companies, private companies are not required to disclose information about themselves. Although general information may be easy to find on very large private companies, financial information may be difficult to obtain.
- Subsidiary: Subsidiaries are companies that may appear to operate as independent businesses, but are in fact at least 50 percent owned by a parent corporation. Corporations need only disclose information on their company as a whole, so finding material on their subsidiaries may be as difficult as finding information on private companies. It is likely in a multinational company that a community will be dealing at the local level with a subsidiary.

All companies, regardless of ownership structure, can borrow money. Those who lend money to the company in the form of debt are called creditors. The creditors are mostly banks. They will receive interest on the loan, while shareholders are entitled to receive dividends if the company is in profit. The vast majority of mine financing, however, is from equity.[4]

Remember that some companies may be registered in more than one country and float their stock on several different stock exchanges. A company may also operate under different names in different countries. This is where the research mentioned in Chapter 2.1 becomes so important. Ensuring the full and correct name of a company, and all its associated subsidiaries is particularly important. All of a parent company's subsidiaries should be investigated, as it may provide you with other examples of corporate misbehavior, and other potential allies.

It is more likely that if a community is dealing with a multinational that it will be a public company. Therefore, much of the following text concentrates on public companies. Bear in mind, however, that one of the world's largest natural resource companies, Glencore, was a private company until it "floated" on the London and Hong Kong Stock Exchanges in 2011.[5]

It also provides by far the greatest opportunities for public engagement. Shareholders are the real owners of a public company, and the management—chair, board and chief executive officer (CEO)—are appointed by the shareholders to run the company on their behalf. As such, a community can effectively appeal to the public over a project. Even better, the board and chair are elected by the shareholders at a public Annual General Meeting (AGM) of the company, where they must report on progress and face questions from concerned, voting, shareholders. The opportunities this provides are explored below.

That is the good news on public companies. The "not so good" news, is that in practice the majority of shareholders tend not to be members of the general public (or at least those who own the majority of shares tend not to be, at least directly). In the first place, management will likely own a large "chunk"

of shares in the corporation, especially if it was the creation of the chair or CEO (Chief Executive Officer) before it went public (for instance, in the case of Vedanta).[6] The majority of shares tend to be owned by so-called institutional investors, such as commercial and investment banks, investment and pension funds, or, more recently, governments investing via direct state ownership and/or Sovereign Wealth Funds.

Although this consolidation of shareholding can be seen as a positive, as it consolidates the points of contact for advocacy, in practice it sets up barriers to being able to put arguments across. Professional fund managers often do not have the time or inclination to listen to arguments from communities over individual projects. In the case of banks they will often hold shares in "nominal" accounts for shareholders, aggregating large numbers of small shareholders, who cannot vote or be contacted by a campaigner. When you see "nominee" listed under shareholders, you can virtually write off any hope of individual influence over what are often large shareholdings.

The other issue is that company management, or trust fund managers, will often hide behind a "duty of care." This means that their prime purpose is to return "value," i.e., money, to the shareholders or fundholders. This effectively means that their motives are entirely driven by their financial performance, as opposed to operating with a "conscience" if a community raises ethical issues. All corporate social responsibility should really be seen in this light, i.e., as a means for the company to eventually make more money. Anything else would be a neglect of their duty of care. As such arguments to management, shareholders, investors, insurances and all should all be couched in terms of risks to their investments; to their "bottom line." This is easy enough to do, as not having a social license to operate or the potential for environmental damage are all risks to the bottom line. They can be a risk both directly in terms of lost revenue. They can be a risk indirectly in terms of damage to the corporation's reputation, which can then affect the number of people investing, i.e., the company share price.

Finally it is possible a company will also seek insurance for a project. The project could be insured for a number of dif-

ferent negative outcomes, and it is useful to discover who any insurers are. Even more than investors, an insurance company will be concerned about risks, as it has, quite literally, more to lose than the investors if it has to pay for any insurance claim.

2.3.2 Direct Approaches to the Company and Investors

One of the first questions asked may be why bother with approaching the headquarters of a multinational company? It could be that the community is already in touch with the local office, and dealing with a distant head office seems too daunting or a waste of time. It will be that remote head office, however, which makes the crucial decisions on a project. This is true even if sometimes a company will do its best to make it look like that is not the case, for instance when it wants to avoid legal action in its home country.

The chair or CEO of a company may well claim ignorance of the points that are raised by a community. That could be a ruse, but in a large multinational it is quite possible that all of the facts have not been presented to the head of the company. It is in the interest of the staff person at project or country level to ensure a project goes through, and so it is quite possible that they have not relayed all of your issues to head office (as doing so could negatively affect the chances of the project proceeding). This is where a community can emphasise the risks involved in the project directly to the company management.

If it is in the personal interest of some staff within a company not to fully disclose the risks involved in an extractive project, it is even more likely that a company will be "minimal with the truth" to its investors and creditors. This is true despite any regulations, which insist on full disclosure.[7] That is why it is so important to be communicating with the shareholders and creditors in a company. The extractive industries are generally known as a risky investment.[8] The "owners and loaners" have concrete risks of financial loss if a project goes

wrong. It is likely that a community is able to give them first hand examples of those risks.

If the information is reliable, and the corporation wants to appear responsible, that can lead to favorable changes in staffing or policies. If a company wants to keep a reputation for being a "responsible corporate citizen," it may even withdraw from the project. Of course, you may get a completely irresponsible company with no reputation to speak of. But that in itself can provide its own publicity.

The first stages of this form of advocacy is outlined in the research and networking mentioned in Chapter 2.1. After identifying the key advocacy targets, and which countries they are based in, make contact with potential partners who can support you. You can of course write to the chair of the company yourself, but if you want to have more impact, it is good to seek support. There are likely to be a number of activists groups, networks and NGOs, focusing on issues around the extractive industries in the country in question (including indigenous peoples issues, human rights, environment, transparency, ethical business). There are also organizations working specifically on mining, and to a lesser extent hydrocarbons, in each of the major home countries of the companies. They will either be able to assist directly, or to put you in contact with others who can. In some cases, with the biggest companies, you may even find organizations or networks focused on the single company you are concerned with.[9] (Please refer to List of Resources in the Appendix.)

One of the major exceptions to this is likely to be for Chinese companies, as there seems to be a lack of support organizations within China, especially with a focus on support for those abroad. There has, however, been a slow expansion of capacity in those dealing with Chinese companies, especially given registrations on the Hong Kong Stock Exchange, or where there is non-Chinese investment involved in the company.[10]

One of the first actions you can do, in concert with your local support, is to contact the media in the company's country of origin. Ensure they are copied into all press releases,

denunciations and petitions. This will help get your message across, and amplify the results of any actions.

Next, if possible, ensure community activists invest in shares in the mining company. With the aid of local support groups it should be possible to invest in a small number of shares. These can then be split further to allow as many people as possible individual representation. This will allow the community to write to the management of the company, effectively as one of their "bosses." It will also allow you to attend company shareholders' meetings, particularly the AGM. Shareholders should also be able, subject to the rules of the company, to ask for a complete list of the others shareholders. (A list of the significant shareholders should be available on the company website—or at via the relevant stock exchange or company registrar—but a complete list will probably only be available direct from the company.) The community can then contact the other shareholders, in the role of concerned shareholders.

The AGMs allow any shareholder to publicly quiz the management, and can be used to find out more information on the plans of the company and/or to convey community concerns. An AGM can be the focus of a visit of community members, which can also take in meetings with other investors, government regulators, media and potential supporters or funders. Even if community members cannot attend themselves, local activists can ask questions on behalf of the community. Another tactic is to produce reports, including alternative shareholder reports, to share with the shareholders who attend.[11]

The ultimate shareholder activity would be to table a resolution at the AGM, seeking a vote on your concerns, or possibly proposing your own candidate for the board of the company. This is an ambitious tactic, as it needs a great deal of organization and some initial support from shareholders to reach a "quorum" to allow the proposition to be added to the meeting agenda. It is also likely such a vote would fail at the meeting itself, although the publicity generated is often worth the effort regardless of the final vote.

An example of activist shareholder resolutions are at recent AGMs of the Canadian mining company Goldcorp.

Investors brought a resolution to the 2012 AGM reflecting on the costs of closing Goldcorp's controversial Guatemalan Marlin mine, and calling for greater indigenous involvement in the closure plans. In 2011, activist investors were more ambitious in tabling a resolution calling for a halt to the Marlin mine. Although both resolutions failed, they generated a great deal of education, debate and publicity.[12]

One advantage in the increase in public shareholding over the past decades is that it is bringing new ethical concerns to the investment market. Socially responsible investors, primarily in the guise of ethical investment or pension funds, are taking a more prominent place in the market. The proportion of such "ethical investors" is still small, but they are a potential ally, as are the finance vehicles for churches or cooperatives. For concerned communities it is easier to express your concerns to these investors, and they may be allies in voicing your concerns via letter writing, at AGMs and in company resolutions. Be aware, however, that despite their ethical intentions, they are still likely to focus on the bottom line for their investors, and it is still worth making your arguments in the language of financial risk.

There is even a form of code of conduct for socially responsibly investors, called the United Nations Principles for Responsible Investment (PRI). These were developed by a multistakeholder process including some of the world's largest institutional investors. The PRI are aimed at pension, insurance and institutional investors. The PRI are based on six main principles, which require investors to consider environment, social and corporate governance issue in their management of investment portfolios. In 2011, there were around 950 signatories who pledged to respect the principles. Signing the PRI remains a voluntary commitment to the principles and does not put the signatories under any legal obligation. The only obligation signatories have is to answer the annual questionnaire concerning the measures taken to implement the six principles. Even then the Secretariat has dismissed signatories for failing to uphold even this one condition.[13]

At the time of writing, the "ultimate" ethical investor is the Norwegian Government Pension Fund. This is a state sov-

ereign wealth fund founded in 1990, which the Norwegian government uses to invest its oil money for the future good of the country (in order to fight off the "resource curse"). This fund belongs to the government and is managed by Norway's Central Bank, Norges Bank. In November 2004, the Norwegian government developed ethical guidelines, which the fund management has to abide by concerning its investments. To apply the guidelines, a Council of Ethics was established to investigate the human rights and environmental record of companies, and report back with recommendations to the Finance Ministry.

Its ultimate sanction is disinvestment in specific companies when they are found to have committed flagrant abuses. The Fund has disinvested from the following mining companies: Barrick Gold, DRD Gold, Freeport MacMoRan, Norilsk Nickel, Rio Tinto, and Vedanta Resources. Few campaigners would dispute that such exclusion has been of great value in strengthening the campaign positions of numerous community members struggling against multinationals. It is also noteworthy that Norges Bank (which maintains the Pension Fund) states that it votes on no less than 85,000 resolutions at around 10,000 AGMs every year.[14]

On the subject of what investors can do for the community it is worth considering the options before approaching them. Most investors, even ethical investors, will wish to talk to the company directly to raise community concerns, and to understand the responses. While wishing to assist a community, they will want to understand the situation to assess the risk. Some will see their role as improving the policies of a company, which may not have immediate impact on the project in question. It can also become a long process, which may be useful, but also may not see the immediate results a community is looking for.

It is undeniable, however, that this sort of contact, even from minority ethical investors, is likely to put serious pressure on company management. If a community just wants a company to stop and go away, then these sorts of meetings may draw concessions, but will not be ideal. What the community is likely to want, if its demands are not met, is the sort of disinvestment that the Norwegian Pension Fund engages in.

That may well be the result of advocacy with investors, but do not consider it a likely starting point, especially if the investor will lose money through the sale. The investors may need to be persuaded they will lose more money at a later point, if the project is a disaster or the community campaign is a big success. Also bear in mind that an active campaign, even if does not appear to be influencing current investors, can also work to scare off potential investors.

Examples of the effective use of direct advocacy shared in the 2009 Manila Conference included campaigning with Barrick Gold over the Porgera Joint Venture project. Jeffery Simon of the AKALI TANGE Association and Porgera Alliance highlighted visits of Porgera landowners to New York and Toronto. Evidence around Porgera took center stage in Canadian Parliamentary hearings on a private member's bill, C-300, which was attempting to ensure better regulation of Canadian mining companies through restricted financing for mining companies accused of human rights and environmental abuses.[15] Legborsi Saro Pyagbara[16] drew attention to the long-standing shareholder actions being undertaken in both the UK and the Netherlands, given Shell's joint listing, which has included collaboration with a shareholder activist group leading to two shareholder resolutions, fact finding visits and published information in reports for shareholders.[17]

Another option open to campaigners is to report the company to the relevant stock exchange or company regulators in an effort to have them delisted (i.e., prevented from trading on the exchange). For this strategy to work it is important to record, and produce evidence of, any false or fraudulent information the company may be publishing. The regulatory authority will concentrate on evidence of obvious wrongdoing or illegality, although it is worth researching the rules of the stock exchange to understand the options.[18] Even if the complaint fails, it may provide campaigners in the home country with evidence to pressure the government to implement stronger standards to regulate its extractive companies working overseas.[19]

2.3.3 Government Support and Investment

There may be a number of reasons to focus a campaign on the government in the company's home country. One is that the company may be receiving direct support from the government in question. Another is that it may be receiving more indirect support, via public funding. This form of support comes either through the likes of export credit guarantees or via funding from development banks, such as the World Bank.

Political Support

States can supply political support to companies in a number of ways. As part of the neo-liberal agenda, governments in the "Global North" have long been calling for less developed countries to privatize public companies and drop their support for "protected infant industries." At the same time, those same countries do all they can to promote their own companies as part of a pro-"business agenda." These include promoting corporations engaged in extractive industries.

The Canadian government has been perhaps the most bold in recent years, which is causing a fierce debate on whether this is the correct path to follow. One of its most contentious areas of support has been through its development arm, the Canadian International Development Agency (CIDA), which is directly brokering partnerships between large development organizations and Canadian mining companies.[20] Interestingly, there has also been criticism of CIDA, among others, for funding programs of Canadian indigenous representatives to promote negotiations with mining companies.[21]

The Canadian government, however, is far from alone in this type of support. The Governments of the United Kingdom and Australia are among those who have been criticized for such support, especially through their development departments.[22] It should also be remembered that in the rise of the new BRIC[23] nations, many of the extractive industry interests are much more directly linked to their governments. This is

especially true in the case of China and Brazil where Vale is still in many ways a national company—even after its 1997 privatization—and to a lesser extent India, with companies such as Jindal and Tata.[24]

One of the conduits of government support is via ambassadors who can lend their support to a home country companies. Examples of this include the ambassadors of Canada, Australia, Switzerland, and South Africa, among others.[25] The prize for this must go to the UK, however, and specifically to Richard Ralph, the former UK Ambassador to Peru. While serving as ambassador, he supported the UK company Monterrico Metals, as he had previously supported Mittal when he was ambassador to Romania. At the time in Peru, however, Monterrico was accused of gross human rights abuses (a case which was later submitted to the UK High Court). As if that was not enough, after finishing his time as ambassador, Mr Ralph then became chairman of Monterrico Metals, before he was fined in 2008, for insider dealing associated with the company.[26]

The best campaign response to this direct support is to mobilize the public in the home country, via letter writing campaigns. These can be very effective as a way to raise the profile of a struggle. A concerted public campaign makes it difficult for government officials to gloss over support for an abusive industry. They also draw the attention of the public to a problem they may not be aware of. More importantly, they let company and government officials know that the locals are not alone. International solidarity can also keep local opposition leaders safe by making them more public, thus less vulnerable to human rights abuses. In Ecuador, letter campaigns to Canada helped protect activists and convince the Ecuadoran government to drop charges that were filed against them in the struggle to protect Junin from mining.[27]

Public Funding

With regard to public funding for mining, it comes in a number of flavors. The first is export credit guarantees.

Export credit agencies (ECAs) are public agencies and entities that provide government-backed loans, guarantees and insurance to corporations that are operating in developing countries and emerging markets. Examples of ECAs include the US Ex-Im Bank, Export Development Canada and the UK's Export Credit Guarantee Department. It can be argued that ECAs are operating corporate welfare on a massive scale, as they underwrite around 10 percent of global exports from Northern countries, primarily for private sector projects.[28] ECAs are the largest source of public funding for the fossil fuel and mining sector. From 1994 to 1999, ECAs provided more than US$40 billion in loans and guarantees to oil and gas development projects without any basic environmental requirements or attempts to promote sustainability. Notable examples of projects supported by ECAs include Sakhalin II oil and gas project in Russia and Inco's Goro Nickel Mining project on Kanaky/New Caledonia.[29]

ECAs for the most part have no developmental obligations, yet they account for the single biggest source of debt in the developing world. Most ECAs only recently adopted environmental policies that benchmark against those of the World Bank Group and regional development banks, but they consistently argue against adopting the same level of environmental and social safeguard policies that other international organizations have long accepted as normal, common practice. There is in general very little disclosure from ECAs, so it can be difficult to discover if there is ECA support for a particular project. The international monitor group for ECAs, ECA Watch, may be able to assist in research and also with campaign advice.[30] The International Federation for Human Rights' "Corporate Accountability and Human Rights Abuses'"covers complaints mechanisms to some of the major ECAs.[31]

The other form of public funding for the extractive industries tends to come from the big multilateral development banks. The prime development bank is the World Bank, but others include the African Development Bank, Asian Development Bank, European Bank for Reconstruction and Development, European Investment Bank, and the

Inter-American Development Bank Group. Generally they use taxpayers' money to provide financing for the purpose of development, although their interests can be much more varied. For instance, the World Bank Group includes the International Finance Corporation (IFC), which acts as the private sector arm of the Bank, and the Multilateral Investment Guarantee Agency (MIGA). MIGA provides political risk insurance, effectively guaranteeing foreign direct investments made in developing countries against so-called "political risk." Effectively, this is another form of corporate welfare. MIGA was instrumental in providing political risk insurance to allow finance to be raised for the construction of the much criticized Grasberg mine in West Papua/Indonesia. Once the project was completed, the mine owners—Freeport McMoRan and Rio Tinto—were able to discard the insurance as having done its job, most likely to avoid a long overdue environmental investigation.[32]

As noted in Chapter 2.2, the World Bank has, despite its development mandate, a history of support for the extractive industries, which it failed to correct even when presented with evidence of the questionable development benefits in its own Extractive Industries Review (EIR). Nadia Martinez of US-based Institute for Policy Studies noted the Bank failed "to distinguish its goals and standards from the likes of Halliburton, ExxonMobil, Shell, and other profit-driven institutions."[33] In fact, the year the Bank rejected the EIR's findings, in the first nine months (of 2004), just half a dozen oil, gas and mining investments accounted for no less than 56 percent of all related financial returns to the IFC.[34] It could barely afford to give up such a cash cow.

So the Bank keeps trying to justify such investments. Its latest initiative is called extractives for development (E4D). This is a "knowledge sharing platform" aimed at transforming the extractive industries into a force for development. Speaking in December 2011, Rachel Kyte, the Bank's Vice President for Sustainable Development, admitted that the sector has been blighted by "corruption, rent-seeking, environmental damage, disregard for the rights of local communities, [and] conflict and fragility."[35]

It also has a chequered past in dealing with indigenous peoples. Indigenous organizations and support groups published a set of case studies for the EIR, which emphasized the impacts that extractive industries had upon indigenous peoples.[36] The case studies included impacts on indigenous peoples investment in Coal India Ltd's East Parej Project in Jharkhand, India and the Chad-Cameroon pipeline (which the Bank eventually withdrew support from in 2008), to name but a few.[37] Previous Bank investment included the huge iron ore mine at the centre of Brazil's Grande Carajas project, initiated in 1981, which was widely criticized at the time for its effect on the indigenous peoples of the Amazon.[38]

Nothing much has changed. The IFC is actively considering financing the huge Oyu Tolgoi copper and gold mine in Mongolia, which has already come in for heavy criticism over water issues and its treatment of local herdsmen.[39] This is despite research, such as the November 2011 research report by the Global Development and Environment Institute, which found that the IFC's $45 million loan to Goldcorp for its Marlin mine in Guatemala was not delivering development benefits. The report states that "local benefits are a tiny fraction of total mine revenues and earnings, the bulk of which flow overseas to the company and its shareholders." The project also poses "hazards related to cyanide and heavy metals contamination of water," which "will undermine agricultural livelihoods, impoverishing local communities."[40]

There is at least more transparency with multilateral development banks than ECAs. It will be much easier to find out what, if any, public finance is being invested in a local project. Having said that, it should be noted, however, that whereas the World Bank/IFC lent approximately $1.7 billion in loans in 2005 to oil, gas and mining, the amount of debt financing from the main 53 banks and insurers just to mining alone came to an average of $59 billion per year between 2000-2006.[41] So such funding is far from assured.

The good news—if a project is "lucky" enough to have multilateral bank funding—is that it provides a number of allies and/or potential benefits. In terms of allies, there are NGOs working on specifically on public financing, probably

the most well-known being the US-based Bank Information Center.[42] The multinational development banks also have their own environmental and social standards, forced upon them by NGOs arguing that their developmental role should mean they do less harm. In the case of the World Bank, they are the called the safeguards and sustainability policies, which include a policy specifically on indigenous peoples (known as Operational Policy, or OP, 4.10).[43]

Even though World Bank has this policy it has, to date, failed to include free, prior, informed consent (FPIC) as a requirement in its policies pertaining to indigenous peoples. This is despite its role as a specialized agency of the United Nations and strong recommendation from the EIR, and also one from the earlier World Commission on Dams.[44] The Bank opted to include the significantly lower standard of "Free Prior Informed *Consultation*" resulting in broad community support, although its private sector arm, the IFC in the latest update of its safeguards has felt the need to recognize the UN Declaration on the Rights of Indigenous Peoples, and therefore, FPIC in certain circumstances.[45] Both the European Bank for Reconstruction and Development and the Asian Development Bank, have, in recognition of the UN Declaration, included requirement to obtain FPIC; although the Asian Development Bank includes a definition of consent as "broad community support."[46]

Even with this lower standard, and a cavalier attitude to accepting its human rights responsibilities within its safeguards, the World Bank and IFC safeguards are useful in attempting to hold a Bank-financed project to account. There are even complaints mechanisms: for the IFC and MIGA, this is the Compliance Advisor Ombudsman (CAO); for the Bank, it is the Inspection Panel.[47] In February 2012, of 20 projects with open cases at the CAO, the IFC's accountability mechanism, nearly a third are from extractives projects. They included projects affecting indigenous peoples in the Philippines, Peru and Chad-Cameroon.[48] Again, partner NGOs and networks can advise on these complaint mechanisms, although certainly the CAO has done its best to ensure that making a complaint is straightforward. Advice on complaints to either

the Inspection Panel or the CAO can be read in Section IV of the International Federation for Human Rights' "Corporate Accountability and Human Rights Abuses." The publication also covers other multilateral development banks.[49]

So, although it is not guaranteed, there will be public funding associated with any project; if there is such funding, it is likely to provide new partners and new opportunities for complaints and campaigning.

Vedanta Resources in Orissa

By Roger Moody, Nostromo Research

Vedanta Resources floated on the London Stock Exchange in December 2003 on a prospectus to potential shareholders, which was inadequate—to the point of misrepresentation. Concerns were raised at the time, not least about Anil Agarwal, Vedanta's progenitor, majority shareowner and executive chairman.[50]

Since then the company has gone on to become, by May 2011, the world's 17th largest publicly-listed mining company[51] Meanwhile those early misgivings have been borne out by the company's appalling record of violations and mismanagement in the succeeding years.

Vedanta is indeed an intrinsically "bad actor" (a concept soon to be discussed by the US Securities Exchange Commission as it works on implementing one of the provisions of the Dodd-Frank Act),[52]

In 2007 Norway's Council on Ethics released the results of a two-year examination of Vedanta's operations, primarily those in the Indian state of Orissa (see below). It concluded that "[C]ontinuing to invest in the… company would present an unacceptable risk of contributing to grossly unethical activities."[53]

In response to this indictment, the Norwegian Government Pension Fund sold all its Vedanta shares (valued at around US$13 million). An open invitation had already been extended by the Council to Vedanta to refute its findings and, at any future point, demonstrate a radical improvement in its *modus operandi*, at which time the Council would consider reversing its earlier stance. Vedanta has failed to do so, and the company remains "blacklisted."[54]

Norway is not the only government concerned at allegations of Vedanta's behavior. In the second half of 2010, Agarwal had inked an agreement

(worth around $9.6 billion) with Cairn Energy in order to secure a controlling share of the Scottish oil enterprise's Indian subsidiary. With this deal Vedanta would secure access to India's largest known oilfield in Rajasthan. Although quickly bankrolled by a number of UK and other commercial banks, the arrangement raised fears within India's state-owned oil and gas producer ONGC (itself holding a 30% stake of the field) that it would lose effective control over a prized national resource, and the sacrifice of an equitable share in the project's future royalties.

In view of this, prominent ex-civil servant E.A.S. Sarma (a former adviser on energy to India's government planning commission) wrote to Indian Prime Minister Manmohan Singh, questioning the appropriateness of the takeover. Said Mr Sarma: "Vedanta's track record so far in mining and power sectors has not been satisfactory… To allow that company to get hold of a sizeable share in the equity of the company that controls the extraction of hydrocarbons in Rajasthan and elsewhere may not be desirable."

As a result of this intervention, the Indian Prime Minister's Office called for a review of Vedanta's track record. It was an unusual move on the part of the government. More importantly, in late 2007, India's Supreme Court had heard compelling evidence of contraventions by Vedanta's aluminium subsidiary (VAL) of state forest and environmental regulations at the company's costliest project to date.

The Niyamgiri bauxite deposit lies at the heart of a thickly-forested Kondh tribal area, the mining of which was to be linked to the nearby Lanjigarh alumina refinery, which serves Vedanta's Jharsaguda smelter, 335 km away—all three situated in Orissa. In rejecting Vedanta's application to access Niyamgiri, the judges had paid tribute to the weight of allegations against the company, contained in the Norwegian Council of Ethics report.[55]

Orissa: Breaking More Than One Law

The Niyamgiri mountain is regarded by local tribal inhabitants as Niyam Raja—roughly translated as "Lord of the Law" or "Lord of Dharma": ample testimony to the reverence paid by the Dongria Kondh to a deeply sacred place.[56] Home to around 200 of their villages, the source of their water, food and medicinal plants; it is densely forested and an area of rich biodiversity, as well as being the source of two major rivers.57

The forced evictions of people to make way for the refinery and the threatened evictions over the proposed mine resulted in a massive mobilization of local indigenous peoples. There were protest rallies and demonstrations, including a 17 km-long "human wall." The campaign also reached out to national and international partners, and resulted in a number of legal actions.58

In September 2005, an inquiry by a leading advisory committee to India's Supreme Court (the Central Empowered Committee, or CEC) concluded that *inter alia* Vedanta had "falsified information" to obtain environmental clearances for the alumina refinery under construction on plains below the mountain. The company had also destroyed more than 10 hectares of forest land. The CEC urged the mining venture be rejected on environmental grounds, and also because it would violate the constitutional rights of the Kondh people.[59]

Despite the CEC's forthright recommendation, during the succeeding five years, Vedanta continued battling to clear the mining project. Meanwhile many Khonds rose up in vociferous opposition to what they perceived as an unprecedented threat to their land and livelihoods. The strength of their campaign attracted the backing of leading Indian human rights and environmental NGOs and of international organizations such as Amnesty International and ActionAid.[60]

The UK-based tribal peoples' campaign group, Survival International, submitted in September 2009 a complaint about Vedanta's activities around Lanjigarh to the UK Government's National Contact Point (NCP) for a ruling under guidelines set by the OECD for the conduct of multinational corporations.[61] The NCP ruled that Vedanta "did not respect the rights of the Dongria Kondh"; did not "consider the impact of the construction of the mine on the [tribe's] rights"; and "failed to put in place an adequate and timely consultation mechanism."

The UK government body concluded that a "change in the company's behavior" was "essential." Moreover, it criticized Vedanta for "fail[ing] to provide any evidence during the examination"—despite repeated requests. According to Survival International, this was "the only time a [UK] company has refused to participate in an OECD investigation."[62]

In February 2010, Amnesty International published detailed allegations of the company's social and environmental violations in the Lanjigarh area, which Vedanta has neglected to answer.[63]

In August 2010, a high-level independent report, commissioned by India's Ministry of Environment and Forests, unequivocally rejected the Niyamgiri mining project and also urged a halt to Vedanta's planned sixfold expansion of its Lanjigarh refinery. The report's authors concluded: "The Vedanta Company has consistently violated the FCA, FRA, EPA[64] and the Orissa Forest Act in active collusion with the state officials. Perhaps the most blatant example of it is their act of illegally enclosing and occupying at least 26.123 ha of Village Forest Lands within its refinery, depriving tribal, dalits [lowest-caste] and other rural poor of their rights."[65]

Shortly afterwards, the Ministry of Environment and Forests minister, Jairam Ramesh, went on record to criticize India's Supreme Court for permitting construction of the Lanjigarh refinery in the first place; and he placed a ban on expansion of the refinery.[66]

At the time of writing, Vedanta and its partner, the state-owned Orissa Mining Company, are still trying to overturn this ruling. In 2011, however, further evidence of mismanagement at the refinery has emerged, specifically relating to involuntary and illegal on-site releases of highly alkaline toxic solid wastes, commonly known as "red mud." On several occasions between 2007 and 2009, the Orissa State Pollution Control Board had criticized Vedanta for the poor construction of its red mud pond, issuing three "show cause" notices to the company and ordering that it prevent these wastes entering into the adjacent Vamsadhara river. [67]

On 5 April 2011, part of the pond wall burst open, causing many tons of these wastes to cascade into the river for around three hours. Although a video clearly showing evidence of the violation was swiftly posted on YouTube,[68] the Chief Executive Officer of Vedanta Aluminium denied that there had been any breach of the wall, even suggesting the footage (whose veracity is not in doubt) was part of a "dirty tricks" campaign by those opposed to the mining.

Just six weeks later, on 16 May 2011, the pond wall broke once again, prompting Amnesty International on 1 June to issue a statement drawing attention to what it called a "toxic sludge leak" that "threatens rural communities." Amnesty estimated that "four to five thousand people in twelve villages are threatened by the leaks, which could worsen during heavy monsoon rains."

It maintained that "Local people have protested that they have not been given any information by Vedanta Aluminium or the government about efforts to prevent further leaks… Vedanta Aluminium denies that there were any spills from the red mud pond and has reportedly not repaired

the damaged areas." But Amnesty 'is…not aware of any attempts by the company to assess pollution of land and water caused by the reported leaks, or to clean up any damage that has occurred'.[69]

Recently, too, the Indian National Human Rights Commission identified 3.66 acres of land within the refinery that it said legally belonged to the tribal Khond, as a result of which the local administration registered a case of land-grab against Vedanta.[70]

The Struggle Against Jabiluka, Australia

Submitted by Kirsten Blair on behalf of the Gundjeihmi Aboriginal Corporation

The case study in Chapter 1.1 reviewed the problems of ongoing uranium mining in Mirarr country. The Mirrar, however, were also able to stop development of the large Jabilka deposit.

Mirarr-led Fight Stopped Jabiluka Uranium Mine

While the Ranger mine continues to produce the world's uranium ore and radioactive waste and leak contaminated water into the surrounding National Park, the Jabiluka deposit has never been developed. Federal government policy from the early 1980s until the mid 1990s prevented new uranium mines in Australia, but with the election of a conservative Federal government in 1996, uranium mining was back on the agenda. Rio Tinto's Energy Resources of Australia was keen to push ahead with Jabiluka. The Mirarr remained steadfast in their opposition to further mining on their country and began working with supporters in the environment, peace, anti-nuclear and indigenous movements from across the country and around the world.

- The result was a huge domestic and international campaign against the proposed mine at Jabiluka. The campaign involved: Inquiries by Australia's parliament, legal challenges to the mine;A national speaking tour of traditional owners, a protest camp hosting 5,000 people over eight months (527 of whom were arrested in peaceful protests—including Senior Traditional Owner Yvonne Margarula);
- Large rallies in all major Australian cities;
- A speaking tour in Europe;

- Mobilization of a national and international support base of tens of thousands of people;
- Lobbying to various international bodies, including the United Nations (via UNESCO and the UNHCHR), the European Parliament and the United States Congress.

Yvonne Margarula and the then Executive Officer of the Gundjeihmi Aboriginal Corporation, Jacqui Katona, jointly received the Goldman Environmental Prize in 1999 and in 1998. Yvonne was awarded the Friends of the Earth International Nuclear Free Future Award in recognition of her work on the campaign.
These phenomenal efforts resulted in stopping the Jabiluka mine. The Mirarr signed an agreement with Rio Tinto in 2005 that prevents the mine's development without the written consent of the Traditional Owners.

The Mirarr never accepted the inevitability of mining at Jabiluka, despite constant company, industry and government assurances that the project would go ahead. In their struggle to protect their country and culture, they made Jabiluka a millstone for one of the world's largest resource companies. They have redefined future resource conflicts in Australia and internationally by elevating the rights of indigenous peoples everywhere to determine what happens to their country and their community.

The Mirarr remain clear in their continued opposition to mining at Jabiluka and maintain their long-standing commitment to seeing the area permanently protected and incorporated into Kakadu National Park.

International Support
As noted above, the Mirarr have a long history of interest and support from the international community:

- In January 1998, the European Parliament passed a resolution in support of Mirarr and their struggle against uranium mining on their country. This resolution calls on member states to ban all imports of uranium from mines where the land rights of indigenous peoples are compromised. It also calls for the establishment of an independent study into the imports of EU member states, analyzing the impacts of uranium mining and processing on the health, environment and rights of indigenous people;[71]
- In October 1998, the UNESCO World Heritage Committee sent a high level expert Mission to Kakadu to assess the impacts of uranium mining on the World Heritage values of the national

park. The mission recommended that the mine at Jabiluka should not proceed.[72] Following the Mission's visit, the World Heritage Committee considered the impacts to Kakadu and after heavy lobbying from the Australian government, the Committee failed to list the park as World Heritage "In Danger," but called for ongoing monitoring and action;

- In June 1999, 34 members of the United States Congress signed a petition to President Clinton. The petition urged the President to support the proposed World Heritage "In Danger" listing of Kakadu National Park at the upcoming 1999 Extraordinary Session of the World Heritage Committee and to encourage US representatives at UNESCO to oppose uranium mining within the park;
- A 2009 European Commission report recognizes the significant global inequality resulting from the fact that 70 percent of the world's uranium resources are located within the lands of indigenous peoples, while the consumers of the uranium are in developed countries. This same report also recommended a comprehensive life cycle analysis of all energy costs associated with uranium mining, milling, processing, transport, and decommissioning;[73]
- In August 2010, the International Physicians for the Prevention of Nuclear War World Congress passed a motion calling for an end to uranium mining globally in light of the grave threats it poses to health, human rights and the environment;[74]
- In March 2011, the Australia-New Zealand delegation of the European Parliament visited Australia. The group requested—and received—a briefing from the Mirarr and their representatives about their experience of uranium mining on their lands. As a result of this meeting, members of the delegation have identified the need for increased research into the whole of life cycle costings and implications of uranium mining where uranium is sourced by EU member states.

Endnotes

[1] C. Zorrilla, et al., 2009, "A Guide for Community Organizers." *Global Response*, p. 15.

[2] Notes taken of workshop plenary, International Conference on Extractive Industries and Indigenous Peoples, 24 March 2009, Manila, Philippines.

[3] Much of the information in this section is (mercilessly) summarized from the excellent resource publication, Hilyard, N. and M. Mansley, 2003, "Guide to Financial Markets, Effective Lobbying of Companies and Financial Institutions." The glossary on p. 201 is particularly useful

[4] http://moneytometal.org/index.php/Mining_the_Money#Main_types_of_mining-related_investment.

[5] Mines and Communities, 2011, "Glencore: the monster has landed!" 24 May, http://www.minesandcommunities.org/article.php?a=10916.

[6] The Agarwal family, through their Volcan Trust, hold according to the last company annual report just over 62% of the voting share capital of the company; http://www.vedantaresources.com/the%20board.aspx.

[7] A good example of this is with Xstrata's Tampakan project in the Philippines. As part of a struggle for control of the project, Xstrata produced a prospectus to the shareholders of its junior partner, Indophil, which pointed out all of the risks inherent in the project in order to persuade the Indophil shareholders to sell out to Xstrata at a lower price. It is a surreal moment to see a company that otherwise denies risks in its project suddenly focussing on said risks—Xstrata Copper Bidder's statement, Accept: for each Indophil share you will receive US$1.00, 13 June 2008.

[8] It is interesting that even in the 18th century, Adam Smith had already noted how capricious the benefits of mining were, when he said, "of all those expensive and uncertain projects which bring bankruptcy upon the greater part of the people that engage in them, there is none more ruinous than the search for new silver and gold mines. It is perhaps the most disadvantageous lottery in the world" - A. Smith, 1775, "An inquiry into the nature and causes of the wealth of nations." In *Of Colonies*, Chapter 7, Edinburgh University.

[9] Examples include informal networks working on BHP Billiton, Vale and Xstrata. The "daddy" (or more corrrectly 'mummy') of all of these groups is Partizans, an activist umbrella group has been campaigning since 1978, at the invitation of Australian aboriginal campaigners, against the damage wreaked by Rio Tinto (then RTZ). In the process, it has become one of the leading practitioners of corporate campaigning, shareholder action and disinvestment strategies. Most important, Partizans pioneered the practice of enabling community and workers'

representatives to challenge massive corporate bodies directly on the latter's home ground.

[10] For more information on Chinese support organizations see the Mines & Communities China section http://www.minesandcommunities.org/list.php?r=1075. See also BankTrack and Friends of the Earth China Sustainable Finance Newsletter and BankTrack, 2012, "China Development Bank's overseas investments: An assessment of environmental and social policies and practices." July, http://www.foe.org/news/blog/2012-07-new-report-on-china-development-bank-shows-the-bank.

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[12] Shareholders Say Guatemalans Should Not Have to Pay for Goldcorp's Mess; Mines and Communities, 2012, "Pressure builds on Goldcorp, just before its AGM." 17 May, http://www.minesandcommunities.org/article.php?a=10901.

[13] International Federation for Human Rights (FIDH), 2012, "Corporate Accountability and Human Rights Abuses - A Guide for Victims and NGOs on Recourse Mechanisms." pp. 485-6, http://www.fidh.org/Updated-version-Corporate.

[14] Any individual can put forward his or her opinion concerning the fund or submit questions via the following email address: postmottak@fin.dep.no. See also Norwegian Pension Fund website – http://www.regjeringen.no/en/dep/fin/Selected-topics/the-government-pension-fund.html?id=1441.

[15] J. Simon, 2009, "Conflict and the State's role: The case of Porgera Papua New Guinea." 24 March, Manila; Mines and Communities, 2009, "Barrick accused of gang rapes at Porgera, Papua New Guinea." 30 November, http://www.minesandcommunities.org//article.php?a=9696.

[16] Legborsi Pyagbara is from the Movement for the Survival of the Ogoni People in Nigeria (MOSOP).

[17] L.S. Pyagbara, 2009, Presentation to the Manila Conference 24 March, Manila, Philippines; "Shell in the Niger Delta: A Framework for Change." February 2010.

[18] Mines and Communities, 2009, "Ecuador: Intag to Sue Canadian Stock Exchange and company." 11 March, http://www.minesandcommunities.org//article.php?a=9111.

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Oversight, February 2012 - http://londonminingnetwork.org/docs/lmn-the-case-for-stricter-oversight.pdf.

[20] Mines and Communities, 2012. "Canada's support for controversial mining projects goes a step furth,r." 14 March, http://www.minesandcommunities.org//article.php?a=11554; Mines and Communities, 2012, "Canada's government equates mining with development." 14 February, http://www.minesandcommunities.org//article.php?a=11495.

[21] S. Cuffe, 2012, "Marketing Consent: A journey into the public relations underside of Canada's mining sector." *The Dominion*, 22 August, http://www.dominionpaper.ca/articles/4569.

[22] Mines and Communities, 2007, "South Asia update." 26 January; http://www.minesandcommunities.org//article.php?a=371; RamuWordpress. 2012. "AusAID's neo-colonization agenda extends to SUSTAINABLE MINING." 27 February http://ramumine.wordpress.com/2012/02/27/ausaids-neo-colonization-agenda-extends-to-sustainable-mining/ Ausaid Mining for Development programme, www.ausaid.gov.au/aidissues/mining/.

[23] BRIC is a grouping acronym that refers to the countries of Brazil, Russia, India and China, which are all deemed to be at a similar stage of newly advanced economic development.

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[25] Mines and Communities, 2011, "Peru: Wikileaks, Mining Companies and Embassies." 7 February, http://www.minesandcommunities.org//article.php?a=10692.

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[28] R. Moody, 2005, "The Risks We Run." International Books, pp. 15-16.

[29] Text from ECA Watch website - http://www.eca-watch.org/problems/oil_gas_mining/index.html.

[30] ECA Watch http://www.eca-watch.org/index.html.

[31] International Federation for Human Rights (FIDH), 2012, "Corporate Accountability and Human Rights Abuses - A Guide for Victims and NGOs on Recourse Mechanisms." pp. 466-478 - http://www.fidh.org/Updated-version-Corporate.

[32] R. Moody, 2005, *The Risks We Run*. International Books.

[33] R. Moody, 2005, *Rocks and Hard Places*. Zed Books.

[34] *Ibid*.

[35] "The World Bank and extractives: a rich seam of controversy." 2012. Bretton Woods Project newsletter, 7 February http://www.brettonwoodsproject.org/art-569560.

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[43] World Bank Indigenous Peoples Policy 4.10 http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20553653~menuPK:4564185~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html.

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[48] "The World Bank and extractives: a rich seam of controversy." 2012, Bretton Woods Project newsletter, 7 February, http://www.brettonwoodsproject.org/art-569560.

[49] International Federation for Human Rights (FIDH), 2012, "Corporate Accountability and Human Rights Abuses - A Guide for Victims and NGOs on Recourse Mechanisms." pp. 407-465 - http://www.fidh.org/Updated-version-Corporate.

[50] The catalogue of alleged fraudulent activities, committed by Anil Agarwal's company Sterlite Industries India, until it was incorporated into Vedanta plc in late 2003, is summarized at: Mines and Communities, 2004, "Vedanta - the panto! A London Calling special." 10 January, http://www.minesandcommunities.org/article.php?a=70; Anil Agarwal is in breach of various corporate guidelines as the Chair and the CEO of Vedanta. The Agarwal family, through their Volcan Trust, hold according to the last company annual report just over 62% of the voting share capital of the company; http://www.vedantaresources.com/the%20board.aspx.

[51] Mines and Communities, 2011, "Mines Bigger than Yours! Forbes' rankings surprise." 5 May, http://www.minesandcommunities.org/article.php?a=10891.

[52] On 25 May 2011, the US Securities and Exchange Commission (SEC) 'proposed a rule to deny certain securities offerings from qualifying for exemption from registration if they involve certain "felons and other bad actors": http://www.sec.gov/news/press/2011/2011-115.htm. As of December 2011, the SEC had still not implemented this provision of the Dodd-Frank Act – a supposed deadline of July 2011 for implementation having passed without it being fulfilled.

[53] Norwegian Council of Ethics Recommendation to the Ministry of Finance, 15 May 2007, http://www.regjeringen.no/Upload/FIN/Statens%20pensjonsfond/RecommendationVedanta.pdf; Mines and Communities, 2007, "Norwegian government indicts Vedanta as grossly unethical." 12 November, http://www.minesandcommunities.org/article.php?a=8260.

[54] Personal communication from Norwegian Council of Ethics, August 2010.

[55] Mines and Communities, 2007, "Court between the devil and the deep blue sea." 15 November; In a quixotic decision, the Indian Supreme Court promptly endorsed handing control of the mine project to Vedanta's Indian-registered subsidiary, Sterlite Industries, and the state-owned Orissa Mining Corporation, provided certain conditions were met.

[56] Mines and Communities, 2004, "Niyam Raja: Tribal Villages Bulldozed as the Shadow of Vedanta Looms over One of the Most Sacred Mountains in Orissa." 9 February, http://www.minesandcommunities.org/article.php?a=7777.

[57] S.B. Mullick, 2009, "Save Niyamgiri, Indigenous Peoples Struggle Against Vedanta." Presentation to International Conference on Extractive Industries and Indigenous Peoples, 24 March, Manila, Philippines.

[58] *Ibid*.

[59] Mines and Communities, 2005, "Press Release: SC Committee Says No to Vedanta/Sterlite's Orissa Refinery." 24 September, http://www.minesandcommunities.org/article.php?a=7769; Mines and Communities, 2005, "Central Empowered Committee Report." 21 September, http://www.minesandcommunities.org/article.php?a=7773.

[60] The vociferous presence of Kondh representatives and their Indian and UK supporters at successive London AGMs of the company played a significant role in highlighting its unacceptable activities in Orissa.

[61] "Guilty: UK government blasts Vedanta in unprecedented attack."2009, Survival international press release, 12 September.

[62] Mines and Communities, 2009, "UK government finds Vedanta in major breach of trust." 13 October, http://www.minesandcommunities.org/article.php?a=9543.

[63] Amnesty International, 2010, "Don't Mine Us Out of Existence." http://www.amnesty.org.uk/uploads/documents/doc_20144.pdf; In August 2012, Vedanta attempted to rebut Amnesty's accusations, levelled in both its 2010 and 2011 reports on the Lanjigarh issues, with the publication of "Vedanta's perspective: The Lanjigarh development story." Shortly afterwards, Amnesty International responded with its own "Briefing: Vedanta's Perspective Uncovered: Policies cannot mask practises in Orissa."

[64] India's Forest Conservation Act, Forest Rights Act and Environment Protection Act.

[65] Mines and Communities, 2010, "Indian government committee condemns Vedanta's proposed Nyamgiri mine." 22 August, http://www.minesandcommunities.org/article.php?a=10322.

[66] Mines and Communities, 2010, "A famous battle is won - now to end the war!" 30 August http://www.minesandcommunities.org/article.php?a=10346.

[67] A "show cause notice" allows a person or body corporate the opportunity to provide evidence as to why an administrative action should not be taken against them; "India: toxic sludge leak from Vedanta's red mud pond threatens rural communities." 2011. Amnesty International statement, Delhi, 1 June; Mines and Communities, 2009, "India: Pollution Control Board slaps notice on VAL." 3 August, http://www.minesandcommunities.org/article.php?a=9388.

[68] Alarm for a Future Disaster (video clip) - Accessed 21 August 2012, http://www.youtube.com/watch?v=i_8Tp2skbNM. ()

[69] "India: Toxic sludge leak from Vedanta's red mud pond threatens rural communities." op. cit.

[70] Vedanta, Lanjighar: Developer of Land Grabber (video clip) - Accessed 21 August 2012, http://www.youtube.com/watch?v=cwicLF7s1tE.

[71] The full text can be read at: http://www.mirarr.net/docs/Euro-Parliament.pdf.

[72] Details of all 16 recommendations of the Mission are available at http://www.mirarr.net/heritage.html.

[73] W.E.Falck, 2009, "JRC Scientific and Technical Reports, Towards a Sustainable Front-End of Nuclear Energy Systems." European Commission Joint Research Centre Institute for Energy, p. 8, p. 32.

[74] The full text can be read at: http://www.nuclear-risks.org/fileadmin/user_upload/pdfs/Resolution_Uranium_ban_final.pdf.

Chapter 2.4

Negotiations and Engagement with Companies

This chapter seeks to examine the issues around engaging directly with extractive industry companies. The aim is to share good practice in interactions, which explores the definition of the term, and then viewing the issue from an indigenous and non-indigenous perspective.

2.4.1 What Constitutes Good Practice?

There were not so many volunteers from indigenous peoples who wanted to share their experiences on the application of good practice in a positive light in a session in the 2009 Manila Conference.[1] The final text of the Manila Declaration (see Appendix) makes clear the concerted strength of feeling from conference delegates, which was not channelling a great deal of good practice.

It appears that much of the pressure to focus primarily on promoting "best practice" comes primarily from the industry. The companies would seem to be the main beneficiary from ensuring that agreements are made, and projects move forward. There is also enthusiasm, however, for the idea from governments, donors and international agencies. As such, it may be worth considering if some of the donor energy and funds could be better utilized in community-focused capacity building for indigenous organizations.

The reason there are mainstream indigenous suspicions around this agenda may be because there are many different interpretations of what is meant by "best practice." It seems that the examples of so-called "best practice" for extractive industries tend to be given by the companies themselves. They therefore illustrate best practice from an industry perspective. The case study of Vale-Inco's Goro nickel mine has been cited as best practice by Vale; yet it is clear that indigenous communities are less than satisfied with it as an example of a free negotiation.[2] There are clear examples of cases being talked of as best practice, only to later discover severe problems. Examples of this include the Red Dog mine in Alaska, and the Tintaya roundtable in Peru.[3] It may therefore be worth separating out the different viewpoints on good negotiations.

Before doing so it is worth pointing out that although the idea of community engagement is now fairly widespread, its practical application is neither widespread nor consistent. While governments may require extractive industry companies to implement some type of community engagement in projects, they do not necessarily provide guidance on how to do it. Unless they are allowed to use traditional processes—which rarely happens—communities are less likely to have an idea of how an "engagement process" should work, and can then be dragged along in a dialogue process which is neither participatory or informed.[4]

2.4.1 From an Indigenous Community Perspective

Despite the misgivings raised above, there is definitely a purpose in exploring and understanding good practice. As free, prior, informed consent (FPIC) has become an established norm, it is clear that as well as being about the right to say no, it is also about the right to say yes. The historic problem has been the asymmetrical power balance between the community on one side, and companies—often backed by governments—on the other. So if good practice is about looking at how this power balance can be corrected—by a levelling off in terms of cultural understanding, respect, information and technical knowledge—then it is definitely worthwhile. Therefore, an initial interpretation of good practice from a community perspective is understanding how a true and fair process of FPIC can be undertaken.

Previous experience on negotiations has not necessarily been good. Reviewing former worst practice helps set the parameters of what good practice can be. For instance in the Philippines, where FPIC has been part of the law since the Indigenous Peoples Rights Act in 1997, there have been a mass of abuses. Without wishing to create a handbook for unscrupulous companies, recorded examples include:

- Difficulties in indigenous peoples obtaining legal title or rights in order to qualify for an FPIC process;
- Poor legal or company frameworks that clash with the spirit of FPIC;
- Providing misleading or inadequate information (especially where it is in a language that cannot be understood);
- A lack of, or misleading, advice (even more galling where this comes from government officials who are, in theory, employed to support indigenous peoples);
- Division of tribal land into smaller units in order to determine a minority who will accept a project, and/or implementing a particularly narrow definition of who will be impacted by a project;

- Fragmentation of FPIC process, so that limited impacts (such as exploration) will be subject to consent, but will then give *de facto* consent to much more significant operations;
- "Transferring" a consent to a different company, even where this could significantly alter the project (which effectively allows companies to "buy a consent" that provides immunity from past wrongs);
- Bribery of leaders;
- Misreporting of meetings or misinterpretation of leaders' wishes;
- Creation or recognition of "false leaders" or tribal organizations;
- Intimidation of leaders and/or communities (especially in militarized areas);
- Continual repetition of successive FPIC processes until a community is worn down into giving their consent, a process that is referred to as being "dialogued to death."[5]

These abuses happen despite the law categorically defining FPIC as "the consensus of all members of [indigenous communities] to be determined in accordance with their respective customary laws and practices free from any external manipulation, interference, coercion, and obtained after fully disclosing the intent and scope or the activity, in a language and process understandable to the community."[6] It seems almost superfluous to point out that none of these all too common practices above seem to comply with the spirit of IPRA.

The following is a quote from an Indian activist which effectively illustrates the negative feelings a "forced negotiation" can bring to a community (although it is focused on stakeholders, whereas the community should be viewed as more than that, as rights holders):

> *The meaning of 'stakeholder' got ruined the day it got coined by Rio Tinto, a major mining multinational corporation, to give itself legitimacy and pose its demands of somebody else's land as reasonable. The stakeholder engagement process is purported to be an exchange of information and*

> *views between all parties concerned by one project. In fact, a 'stakeholder engagement process' stands for communities being continually told of companies' plans and invited to modify them. But it does not mean that these communities are permitted to reject the projects per se. It does not mean that they are empowered to present their own development plans.*[7]

So, from an indigenous viewpoint the first element, if it is to be a real unforced negotiation of equals, is that it should entail an understanding of both indigenous culture, which is set within the framework of historical injustice. Therefore it must start with a recognition and respect for indigenous peoples' rights, as codified in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). One of the clear starting points for that recognition is understanding that FPIC is a collective right for indigenous peoples, which is fundamental to indigenous peoples' exercise of their right of self-determination with respect to developments affecting their lands, territories and natural resources.

Article 26 of the UNDRIP clearly states that "Indigenous peoples have the right to own, use, develop and control the lands, territories *and resources* [my emphasis] that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired." Article 32 then notes that "Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources."[8]

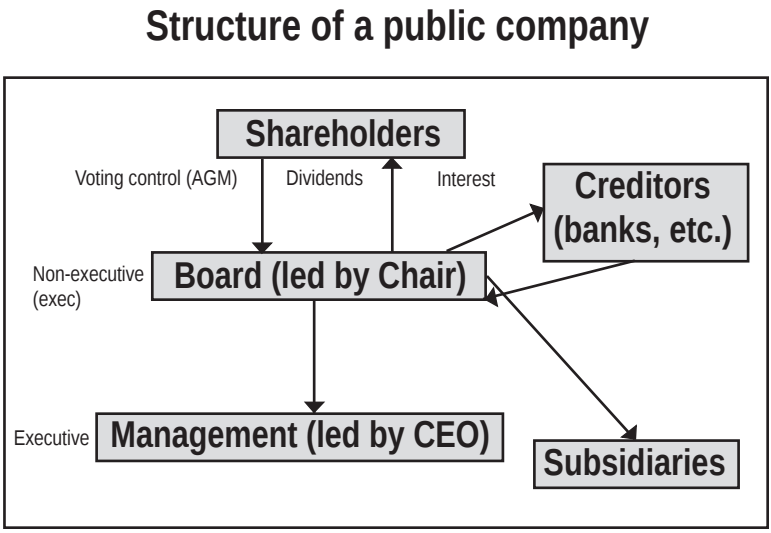
The Human Rights Committee has called upon states to act in accordance with article 1, paragraph 2, of the International Covenant on Civil and Political Rights, emphasizing, in relation to indigenous peoples, that "the right to self-determination requires, *inter alia*, that all peoples must be able to freely dispose of their natural wealth and resources."[9]

FPIC is an inherent right that belongs to members of indigenous peoples by virtue of their belonging to a people with internationally recognized collective rights. FPIC is not

granted as a largesse by governments or companies. A government's failure to issue domestic legislation is no excuse for not recognizing and upholding FPIC. It is not an optional gift that comes with socially responsible corporations. Full local community participation and strict observation of FPIC are the starting point for good practice.

As far as documenting some of the lessons of this from an indigenous perspective, one of the most thorough handbooks is the North-South Institute's Tipping the Power Balance.[10] Although not authored by indigenous peoples, it synthesises over 10 years' work on the issue, and—being based on collaborative research—speaks with authority. It summarizes key lessons, responds to some common misunderstandings, and includes recommendations from affected communities that are a great starting point for affected communities.

Figure 2: Best practice and key triggers for obtaining consent in the mining process



Source: NSI report, p. 26.

From the Non-Indigenous Perspective

There is no shortage of material that has been written on best practice in the extractive industries, coming from either the industry, academics and/or NGOs.

Both the mining industry and the oil and gas industry have produced handbooks in relation to indigenous peoples. In the case of the mining industry, it is the International Council of Mining and Metals (ICMM)'s "Good Practice Guide."[11] For the hydrocarbon industry it is the International Petroleum Industry Environmental Conservation Association (IPIECA)'s "Indigenous Peoples and the oil and gas industry."[12] It is also worth reviewing materials from the company that appears most transparent with its internal engagement policies, which is Anglo American with its "Socio-Economic Assessment Toolbox."[13]

To their credit, these publications have an enlightened rhetoric on issues dealing with indigenous peoples. They claim to have had some indigenous input, they accept a wide-ranging definition of indigenous, and all offer some solid, practical advice on respectful engagement. They stress both the necessity to comply with laws and good business practice, but also stress the competitive advantage for companies in getting good relations with indigenous peoples. They also contain industry examples of good practice, and—in the case of the ICMM—a Position Statement, with set of commitments. For any community facing an extractive project, the respective publication is worth reading to understand the latest industry perspective on the issues. Reading them is a reflection of the credit due to the indigenous movement, that the extractive industries have placed so much of their combined efforts to address the issue. It is of course likewise a reflection of the painful mistakes that have been made, and the leap required to ensure universal application of these fine words.

One of the problems of implementation is that companies have tended to have an essentially "reductionist" attitude to social issues. Despite employing social scientists and anthropologists,[14] the nature of ensuring there is proof of compliance means that a "tick box" exercise is always preferred. One of

the general methods for certification of mining is the Geneva-based International Organisation for Standardisation (ISO). It covers the like of "internal quality management" (ISO 9000) and there is even a standard for social responsibility (ISO 26000), partly thanks to the work of Professor Ruggie, the UN Secretary-General's Special Representative for Business and Human Rights. The ISO however are keen to point out it is guidance and not a requirement.[15] The Initiative for Responsible Mining Assurance is looking at FPIC as one of the themes for which it is aiming to produce a voluntary compliance system.[16] That is an admirable initiative, but it is asking a great deal when what is primarily required for FPIC to work is a sizable change of attitude and understanding within companies. That may well come over time as a result of enlightened materials and training, but it is difficult to underestimate the task in overcoming vast gaps in cultural understanding.[17]

Over the years there have been a number of academic and activist books and guidelines on good practice. One of the leading attempts to summarize the different frameworks, at least in regard to the mining industry, was the 2005 "Framework for Responsible Mining."[18] It covered a whole range of concerns, including a chapter on making sure that benefits accrue to communities and workers. It is a good starting point, although it is in need of an update, given the fast-moving evolution of this area.

One of the more useful handbooks is the World Resources Institute's "Breaking Ground: Engaging Communities in Extractive and Infrastructure Projects."[19] It provides practical advice, and sound arguments for companies to ensure they engage properly with communities. Kirk Herbertson of WRI was able to address the 2009 Manila Conference as the publication was being finalized. He emphasised the report's findings around the seven key Principles for Effective Community Engagement for companies.

These principles were:

1. Prepare communities before engaging (this may involved site visits to similar projects, training on community engagement, participatory mapping and/or access to legal and technical advisers);

2. Determine what level of engagement is needed (based on the idea of informing, then consulting, then negotiating);
3. Integrate community engagement into each phase of the project cycle;
4. Include traditionally excluded stakeholders;
5. Gain free, prior and informed consent;
6. Resolve community grievances through dialogue; and
7. Promote participatory monitoring by local communities.

Spectrum of Community Engagement Approaches

PROCESS →		OUTCOME
NEGOTIATE	Two Way: Joint decision-making on issues that impact a community.	Negotiated agreement and/or free, prior and informed consent.
↑		
CONSULT	Two Way: Proponent seeks input before a decision is taken.	Proponent records input and demonstrates to community how input is incorporated into decision.
↑		
INFORM	One Way: Proponent informs community after decision is taken.	Improved community understanding of the project.

Source: Herbertson, Kirk. 'Engaging Indigenous Communities in Extractive Projects.' Ppt presentation presented during the 2009 Manila Conference.

Much of the emphasis around good practice for indigenous peoples is on production of materials that explore the issue of benefit sharing. These are often encapsulated in Impact and Benefit Agreements (IBAs). IBAs are essentially the contracts made between a community and a company. To get to an IBA it should mean that a community has given consent, and is

now considering the conditions under which a project will go ahead. The majority of practical experience in this tends to come from Canada and Australia.

A toolkit has been created with a focus on the Canadian experience, called "The IBA Community Toolkit."[20] It is a comprehensive guide for what to do once consent has been given, going from preparation to negotiation to implementing agreements. Although it is set in the Canadian context, the majority of the material is generally applicable. If you want a more compact version, however, then go to "Negotiating Impact Benefit Agreements: A practical guide for indigenous peoples in Guyana."[21] As the title suggests it is focused on Guyana, with sections that are specific to the laws of that country, but it does a great job of briefly summarizing complex issues, including useful tables advising on the key issues for a community to consider.

Although it is worth a community reviewing all the material above, the literature effectively adopts similar sets of principles. In brief those principles can be summarized as:

- The importance of preparation. As mentioned in Chapter 2.1, work out what the community wants in terms of development before any negotiation starts, so it can think beyond the simple terms of any agreement. There will often have to be negotiations in order to have negotiations, i.e., time must be spent agreeing process and procedures, especially with regard to who will be represented, and how they will be represented, and how information will be shared with others in the community. Early letters of intent may be signed as long as they are not necessarily consenting to the whole project, but just to the negotiating process.
- That the community has all the necessary advice. Consider what information will be required by the community, and how this can be sourced and re-sourced. This may include technical information, but also what the national and international legal positions are, and what negotiating strategies are available.
- That negotiations are inclusive, with all voices in the community heard. This should not be used to un-

dermine traditional forms of leadership or decision making, but to augment it with the agreement of all. For the community it means creating an inclusive consultation strategy, within the framework of the traditional forms of governance, and considering the impacts on everyone of the disbursements of any benefits. It is worth referring back to the points in Chapter 2.1 in terms of community organization, as community cohesion will be vital for a good outcome.

- That negotiations must be well resourced, and given the necessary time, with jointly agreed timeframes.
- That negotiations are based on mutual respect, both between the parties and for other stakeholders. As important as any agreement at the end will be, the negotiation is a process which allows the development of mutual understanding. It can be used to build a longer-term relationship over the life of a project. Where possible put trial initiatives to the test, and learn from any mistakes.
- That there is full disclosure, to create an open and honest dialogue with mutual understanding of culture, land rights, governance, values, concerns, history and forms of decision making. This will likely be about building cross-cultural understanding on both sides.
- That there must be a mechanism for grievance and resolving disputes, which is confirmed early on in the negotiations. Also consider what exit strategies there are if negotiations start to break down.
- That the community must consider participatory monitoring of the project and the agreement and what will happen after the agreement, and/or the project, comes to end.

At the 2009 Manila Conference, the more positive case study given was from Yana Dordina, presented on behalf of the Batani International Development Fund in Russia. She explained about the fund's mission, history and its work. The goal was to empower indigenous peoples of the North—who are the most vulnerable and impoverished section of the Russian population—through a partnership of indigenous communities, and companies. She cited the positive example

of a project partnership between BP Russia and the Batani Fund on micro-credits, with a total of 14 grants made between 2006-2008, and a 100 percent repayment rate. These credits allowed the indigenous peoples to take advantage of their traditional natural resources in order develop new business projects.[22]

A case study that is often positively cited is the negotiation that took place between Inco, and the local Innu and Inuit people over the huge Voisey's Bay nickel mine in Canada. The Inuit and the Innu made it clear that they had long-term rights and interests that needed to be respected. The Voisey's Bay agreements were possible because the main parties all had a measure of power. The Innu and Inuit organizations won recognition, at least to the extent that they had some important authority over the lands involved. Their consent was needed. Therefore, their interests had to be taken seriously and they had to be included in deliberations and negotiations that helped define the project. As such, they were able to reach beyond agreements on benefit sharing, to insist on a sustainability-centered environmental assessment of the project which was in line with indigenous thinking. This set a national precedent in sustainability-based decision criteria, which obliged the proponent to meet a considerably higher test than usual in environmental assessments. (Although as noted in the cases study on the Goro Nickel project in Kanaky/New Caledonia, it did not necessarily set a precedent in Inco's dealings beyond Canada.)[23]

Finally, it is worth considering that there are a vast number of standards, protocols and voluntary principles that could be applicable to any extractive project. As can be seen from the Framework for Responsible Mining, these include—beyond those already mentioned in the report—the likes of the Kimberly Process on diamonds, the Global Compact, the International Cyanide Management Code, the Voluntary Principles on Security and Human Rights, the Global Sullivan Principles of Corporate Social Responsibility, the Global Reporting Initiative, and UN Convention Against Corruption.[24] Most are voluntary, with a mixed record with regard to accountability, monitoring or consequences for fail-

ing to abide by them. Knowing about them, and knowing if a company has signed up to them, however, may be important in terms of using them as a benchmark or holding the company to account in negotiations. They may even be useful in terms of setting up community participatory monitoring to make sure any standards, as well as local laws, are not breached.

The Situation of the Goro Nickel Mine in Kanaky/New Caledonia based on the presentation of Marina Kahlemu, Rheebu Nuu and a case study from Sarimin J. Boengkih, Agence Kanak de Développement

As referred to in the case study in 2.2, Vale-Inco New Caledonia (formely GoroNickel SA) operates an open-pit mine and processing plant at Goro, on the southern tip of Grande Terre island. The project began despite widespread protests from both environmental activists and affected indigenous Kanaks. It is a large operation, both in terms of the area to be mined, but also because the infrastructure includes a power station, an industrial port and, during the construction phase, a base camp that could accommodate up to 3,000 people.

The project was initially controlled by the Canadian company, Inco. Inco highlighted the benefits of job creation and employment training as two aspects of the project beneficial for New Caledonians (not necessarily the same thing as indigenous Kanaks). The company claimed that the project would supply 800 jobs and 1,500 derivative jobs, 90 percent of which would “likely” be filled by New Caledonians. Goro Nickel’s then management team, however, indicated that Inco has ruled out any favorable hiring policy for Kanaks.

Even the promise of jobs could not quell opposition to the project though. The Kanak population wanted to work but not at any cost. Their primary concern was a respect for the environment, and a respect for their heritage, based on an understanding of the destruction mineral exploitation had brought over the years. Early estimates were that the vast open-pit would spew 10,000 tons of dissolved metals a year into the ocean.

In 2004, the local Kanak population, through Rheebu Nuu, tried to open negotiations with the company. Rheebu Nuu is a Kanak environmental organization, which acted as an umbrella organization for those affected, and had been campaigning on the project since 2001. The affected

Kanaks wanted to sign an Impact and Benefit Agreement (IBA), similar to those the Canadian company Inco had negotiated with First Nations in Canada. Scott Hand, Inco Chief Executive Officer, replied that as Inco could not recognize Kanak indigenous peoples' rights, as France did not. If they did the company would be engaged in politics, rather than mining. This is despite the 1998 Noumea Accord having a provision calling for consultations with the Kanak people on mining projects.

Throughout 2005, Inco continued in its refusal to hear the claims of the Kanak people. As a result opposition increased, both in terms of the demand for an agreement and also highlighting the need for a full environmental study of the impacts. In April 2006, the work site was blocked for several weeks by activists from Rheebu Nuu, who also blockaded Inco's offices. There were violent clashes, and members of Rheebu Nuu were arrested. The Rheebu Nuu committee also initiated various court cases, and even appealed to the French Senate. In June 2006 Rheebu Nuu won a victory challenging the Southern Province's authorization of the project before the Administrative Tribunal of Noumea, which led to the cancellation of the lease. The company, however, failed to stop work, relying on a separate construction permit, which led to further blockades to try to enforce the decision.

In September 2006, the Brazilian company CVRD (which changed its name to Vale) acquired Inco. In December 2006, CVRD announced that the start-up of the project would be delayed in order to review the situation. They started a process that led to a negotiation with the Kanak people. Vale's first act was to change the local Goro-Nickel management team, bringing in people who were more open to accepting a dialogue with indigenous peoples.

Finally, on 27 October 2008, Vale-Inco New Caledonia signed an agreement with Rheebu Nuu, representing the concerned Kanak people, the chieftains of the Southern tip of Grande Terre, and the Customary Senate, the latter representing the indigenous Kanak people as a whole. The agreement agreed to transparency and monitoring of environmental impacts, and measures to mitigate the cultural impacts. Neither the Government of New Caledonia or the French state interfered in the agreement, even though the company recognized the Kanaks as the owners of the land. The Southern Province, who were a partner in the negotiations from the beginning, were eventually unwilling to make a deal with the Kanaks and quit the negotiations.

Marina Kahlemu, in her presentation to the 2009 Manila Conference, concluded with the following recommendations in relation to indigenous peoples' engagement with extractive industries:

1. The impacts of the extractive industries must be considered in their entirety in any planning;
2. While calculating the costs of any extractive industries, the full cost of the activities' "physical footprint" must be integrated into the planning. This includes the losses to terrestrial and marine biodiversity;
3. This "physical footprint" belongs to the government and the indigenous peoples. So they must get a corresponding compensation for any loss caused by extractive industry projects;
4. Any benefits received from exploiting resources must be compatible with all the environmental and social impacts;
5. Before any permission is granted for mining or processing, a full impact study must be undertaken on environmental, social, cultural, and economic concerns. This is necessary to allow the concerned indigenous peoples to make a decision on the costs and benefits;
6. Environmental impact studies must be done initially to determine baseline studies on the state of terrestrial and marine biodiversity. These studies must last at least three years. Traditional knowledge will also have to be considered in any baseline data;
7. An extractive industry project must not only be economically viable, but also viable with regard to social, cultural and environmental issues;
8. An extractive industry project should be accepted only if it fulfills all of these conditions and if its establishment is compatible with respect of the environment as well as the wishes of the indigenous population.

Although this was at times a bitter struggle to force the company to a negotiation, it is considered a great victory. After so many years of struggle, so much energy spent, so much destruction, the Kanak indigenous peoples' rights are recognized by a foreign multinational corporation operating in New Caledonia. Others should now follow this example.

Settlement between Guaraní People and Repsol in Bolivia

Submitted by Sue Carpenter, on behalf of the Assembly of the Guaraní People of Itika Guasu (APG IG)

At the end of December 2010, Repsol Bolivia SA, a subsidiary of the Spanish oil corporation Repsol YPF, and its consortium partners agreed the terms of a settlement with the Assembly of the Guaraní People of Itika Guasu (APG IG), represented by the legal advisory group Equipo Nizkor. The settlement agreement was executed in front of a Public Notary on 29 December 2010 and ended a long-standing conflict between the APG IG and the oil company. The dispute had begun in 1997 when the companies, Chevron and Maxus SA, had unlawfully entered the Original Community Territory owned by the Guaraní peoples of Itika Guasu—legally represented by the APG IG—to carry out exploration activities.

The agreement was signed after a protracted period of intense negotiations with Repsol SA and its fellow consortium partners, BG Bolivia and PAE Bolivia. As a result of the settlement, the Itika Guasu Investment Fund was established with an initial investment of US$14.8 million.[25] The Fund is administered by a so-called Council of Sages, appointed pursuant to traditional Guaraní customs. It is believed to be the first time that an indigenous organization has ever successfully established an indigenous investment fund in Latin America.

The President of Equipo Nizkor, Gregorio Dionis along with members of the organization specializing in international commercial and indigenous law, provided the legal and financial advice, which resulted in the conclusion of the Agreement and the successful establishment of the Itika Guasu Investment Fund. Equipo Nizkor and the APG IG entered into a consulting agreement in 2006 which was extended by the APG IG on 1 December 2010.

The terms of the Fund provide that income generated from its investments be applied to three areas as a matter of priority: health, education and housing. It also allows distributions to Itika Guasu communities for specific projects, which will produce profitable activity. The conduct of such activities was prescribed by the General Assembly of the APG IG during a meeting held in December 2010.

The terms of the settlement agreement set an important precedent in that all of the demands of the APG IG with respect to the oil company were met. These included:

- Legal recognition of: the APGIG as a legal entity, the customs and uses of the Guaraní people of Itika Guasu, their ownership of the Original Community Territory Itika Guasu, international law on indigenous peoples and international human rights law, the existence of, and the the right to compensation for, environmental damage and an agreement to carry out regular, independent environmental audits;
- Effective insurance policies to cover the risk of losses and damage caused by the company;
- Warranties to return the land to its original state by the end of the term of the contract of operation between the company and the Bolivian government.

The president of the APG IG, Never Barrientos, explained:

> We signed (the Agreement) without surrendering any of our rights and obtained full legal recognition of our ownership of the Original Community Territory and of the existence of the APG IG... For at least the last six years we have followed a well-defined legal strategy that has allowed all of those involved to learn not only the value of our own rights, but also how they may be defended in practice. We were told by many that our dream was impossible, and some even claimed in 'authoritative' reports that that breaking off negotiations with Repsol in 2006 was suicidal and that we would never achieve the demands and conditions that we sought at that time. Today we can proudly say that they were mistaken and, fortunately for the future of our children, that the decisions made in our Mburuvicha Assemblies were the right decisions.

He also explained how the right to consultation had been recognized as a full right—not just as an administrative measure—allowing for continuous supervision of the company's activities on Guaraní land and the consortium's duty to respect their traditional customs which will take priority for the purposes of resolving any conflict.

"We have also managed to incorporate into our Agreement with Repsol Bolivia SA the applicable standards of international human rights law, international commercial law and international criminal law; the 169 International Labor Organization Indigenous and Tribal Peoples Convention and the jurisprudence of the Inter-American Court of Human Rights," said Never Barrientos. "In other words, this is not just a formal or rhetorical recognition of our rights. These laws form an integral part of the Agreement, which implies a recognition of all of the rights of indigenous

peoples and our civil liberties. This is the first time that an oil company has signed such an agreement in Bolivia and in Latin America."[26]

The scale of this achievement should be considered in the context of the initial offer made to the Guaraní by Repsol in 2006. Under that proposal, there was no obligation for Repsol to make even a minimum payment by way of compensation, no recognition of the Guaraní land rights, and—by contrast—there was a requirement that the community give Repsol a full release against any past, present and future liabilities. Just as egregious was the requirement that the Guaraní submit proposals for investments to a committee, which included Repsol representatives with an absolute right of veto over any project proposed. In the event that a project was approved, the funds were to be paid directly to the individuals or organization who would manage it and the Guaraní were denied any control over the funds or the selection of the project managers.

This achievement is the result of six years of sustained efforts by APG IG and Equipo Nizkor. Ranged against us have been the corporate legal departments of the various oil majors involved, and the continuing and very public opposition of the Bolivian government. Tactics over that time have included intimidation, culminating in August 2010 in the severe beating of, and the shooting at, one of the community leaders.

The importance of the agreement can hardly be underestimated, and yet it almost did not happen. The opposition coming from the Bolivian government and the local authorities was aggravated when several local and European NGOs, non indigenous organizations known as "social intermediaries," abandoned the Guaraní people of Itika Guasu at the most critical stage of their confrontation with Repsol. These NGOs, "were advising the Guaraní to abandon any legal strategy against Repsol... [A] s the Guaraní of Itika Guasu went their way, engaging in negotiation with Repsol as well as a legal strategy against the company, the intermediaries resisted community authority, sowing local discord even as a viable Guaraní agreement with Repsol evolved."[27]

At the time when the negotiations were about to be resumed, the individuals making up the leadership of the APG IG lacked the most basic means of survival. This situation of "economic strangling" made it very difficult to travel around the communities to explain their legal strategy. It was clear that this situation was part of the overall pressure in order to undermine any possibility of taking decisions autonomously and to stop the Guaraní having their property rights and their right to consultation recognized by the companies.

These obstacles had to be surpassed to overcome the situation and make it possible for the 36 Guaraní communities of Itika Guasu to receive a comprehensive explanation of the issues from the APG IG, and the legal and financial advisers at Equipo Nizkor.

With small and direct financial support from allies, the APG IG's Board could be present in all of the communities that make up the TCO, and hence carry out education activities. These covered the legal strategy being conducted by the Board in the context of the negotiations with the oil companies and the consolidation of the APG IG's territory, the TCO of Itika Guasu. This could be done in an independent manner, without subjection to the environmental and economic development agenda of outside NGOs.

The APG IG's legal strategy has also been endorsed by the Bolivian Constitutional Court. In April 2011, the APG IG was officially notified of the judgement dated 25 October 2010 issued by the Court in the case *SEDECA v APG IG.*[28] SEDECA is a state-owned company in charge of public works that had denounced the APG IG after its president sent an official communication to one of SEDECA's contractors. The communication stated that any work on Guaraní land had to be subject to a free, prior and informed consultation process in accordance with Law 3760 and ILO Convention 169. The Constitutional Court ruled in favor of the APGIG position in a historic judgment in which international indigenous law and its domestic application is used as a basis to ratify the right to ancestral territory, as well as the obligation binding upon the state to carry out a free, prior and informed consultation process regarding any public and/or private project to be executed on TCO land.

The APGIG is clear that the settlement agreement it entered into with the Repsol consortium is unique in Bolivia. It will of course benefit the Guaraní of Itika Guasu specifically but will also serve as a model for other indigenous communities. It is to be hoped that it will serve to guide the conduct of other oil companies in their future activities in that region.

Endnotes

[1] Panel 6: Good Practices and Extractive Industries, International Conference on Extractive Industries and Indigenous Peoples, 24 March 2009, Manila, Philippines. The presentation of Yana Dordina of the Batani International Development Fund in Russia, which is referred to in this chapter, was a good example. Brian Wyatt also covers some in his expanded paper on the Australian experience in Chapter 2.8.

[2] Negotiating Agreements: Indigenous and Company Experience – Presentation of the Case Study from New Caledonia; International Workshop on Natural Resource Companies, Indigenous Peoples and Human Rights, Moscow, 3 December 2008.

[3] Mines & Communities, 2002, "Knowles Takes Red Dog Mine to U.S. Supreme Court." 4 November, http://www.minesandcommunities.org//article.php?a=1569; Mines & Communities, 2005, "Communities and BHP Billiton Sign Ground Breaking Agreement." 15 January, http://www.minesandcommunities.org//article.php?a=4796; Mines & Communities, 2005, "Peru's Tintaya In 'chaos' After Break-in." 24 May, http://www.minesandcommunities.org//article.php?a=4802; Mines & Communities, 2012, "Peru uses emergency rules to end violent protests at Xstrata mine." 29 May, http://www.minesandcommunities.org//article.php?a=11721.

[4] K. Herbertson, Athena R. Ballesteros, R. Goodland and I. Munilla, 2009, "Breaking Ground: Engaging Communities in Extractive and Infrastructure Projects." *World Resources Institute*, p. 4.

[5] J. G. Glennie, Nettleton and A.Whitmore, 2004, "Breaking promises, making profits: Mining in the Philippines." PIPLinks & Christian Aid; Alternative Law Groups, et al., 2009, "Discrimination Against Indigenous Peoples in the Philippines: ICERD Shadow Report." August.

[6] Indigenous Peoples Rights Act (IPRA) Republic Act No 8371 (1997), section 3 (g).

[7] Personal correspondence relayed to the Mines and Communities mailing list; October 2003.

[8] United Nations Declaration on the Rights of Indigenous Peoples, http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.

[9] Human Rights Committee, Guiding Principles on Business and Human Rights, principle 3.

[10] V. Weitzner, 2011, "Tipping the Power Balance: Making free, prior, informed, consent work." March, North-South Institute.

[11] International Council of Mining & Metals, 2010, "Good Practice Guide: Indigenous Peoples and Mining." Guidance 2010-3, http://

www.icmm.com/page/208/indigenous-peoples; There is also the ICMM Community Development Toolkit, July 2012 and J. Render, 2005, "Mining and Indigenous Peoples Issues Review." ICMM.

[12] IPIECA, 2011, "Indigenous Peoples and the oil and gas industry." April - http://www.ipieca.org/publication/indigenous-peoples-and-oil-and-gas-industry-context-issues-and-emerging-good-practice.

[13] Anglo American, 2012, "SEAT Toolbox, Socio-Economic Assessment Toolbox." Version 3 - http://www.angloamerican.com/development/social/seat/.

[14] Although it is obviously a positive factor that company's community relations staff tend to come from the soft sciences, it is still a problem that the company is run by a mix of engineers, geologist and scientists. They will always be in the majority, and it is possible that anthropologists who are employed by companies do not gain the attention they may crave within such an organization.

[15] A. Henriques, 2010, "ISO 26000: A New Standard for Human Rights?" Institute for Business and Human Rights, 23 March, http://www.ihrb.org/commentary/guest/iso_26000_a_new_standard_for_human_rights.html.

[16] Initiative for Responsible Mining Assurance (IRMA) - http://www.responsiblemining.net/.

[17] A good example of this is Monkey Forest, "The PRIMATE Guide to International Standards." 2012 - http://www.fastpencil.com/publications/4181-PRIMATE-Guide-to-International-Social-Standards. It is a great resource for a project proponent in comparing the different different standards, and whether they may apply to a project. It is also an excellent example of how serious social concerns can be reduced to a complex bureaucratic format.

[18] M. Miranda, D. Chambers and C. Coumans, 2005, "Framework for Responsible Mining: A Guide to Evolving Standards." 19 October - http://www.frameworkforresponsiblemining.org/.

[19] K. Herbertson, Athena R. Ballesteros, R. Goodland and I. Munilla, 2009, "Breaking Ground: Engaging Communities in Extractive and Infrastructure Projects." World Resources Institute - http://pdf.wri.org/breaking_ground_engaging_communities.pdf.

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[22] Yana Dordina, 2009, "The Batani International Development Fund." International Conference on Extractive Industries and Indigenous Peoples, 24 March, Manila, Philippines.

[23] R.B. Gibson, 2006, "Sustainability assessment and conflict resolution: Reaching agreement to proceed with the Voisey's Bay nickel mine." *Journal of Cleaner Production*, 14:334-348.

[24] There is a list of guidelines in R. Goodland, 2012, "Responsible Mining: The Key to Profitable Resource Development." *Sustainability 4*, August - www.mdpi.com/journal/sustainability

[25] See: The APG IG Announces the Beginning of the Financial Activity of the Itika Guasu Investment Fund, available at: http://www.derechos.org/nizkor/bolivia/doc/fund.html.

[26] N. Barrientos, 2011, "We are proud of this agreement reached after six years of legal strategy." Ñaurenda, Bolivia, March 23rd. Discourse pronounced by Never barrientos, President of the APG IG, on the occassion of the anniversary pof the APG IG available at: http://www.derechos.org/nizkor/bolivia/doc/apgig14.html.

[27] J. Reynolds, 2011, "In Bolivia, Guarani and allies overcome 'a model of social humiliation." *First Peoples Worldwide*, USA, June 22nd available at: http://www.derechos.org/nizkor/bolivia/doc/convenio5.html

[28] SEDECA, 2010, "Tarija vs Never Barrientos, Presidente de la Asamblea del Pueblo Guaraní Itika Guasu." Sentencia Constitucional 2003/2010-R, Tribunal Constitucional Plurinacional, Sucre, 25 de octubre. Available at: http://www.derechos.org/nizkor/bolivia/doc/apgig17.html (ESL).

Chapter 2.5

Mining Industry Responses to Criticism

Stuart Kirsch

The following chapter is a paper written by the academic Dr. Stuart Kirsch.[1] *The ideas were originally presented at the UN Permanent Forum on Indigenous Issues workshop that followed the 2009 Conference, and then developed here as well as in Cash on the Table, published by SAR press in Santa Fe.*

Dr Kirsch examines the strategies that mining corporations use in order to manage opposition, particularly through the co-option of the language of sustainable development. Through studying them, he analyzes their weaknesses and the potential opportunities for activists in better understanding them.

The relationship between corporations and their critics plays an important role in contemporary capitalism. The popularity of neoliberal economic policies has led the state to

neglect its regulatory responsibilities. The task of monitoring international capital has consequently shifted from the state to NGOs and social movements. Corporations employ a variety of "corporate social technologies" (Rogers 2012) designed to manage these relationships, including discursive forms that borrow or co-opt the language of their critics. Corporations benefit from strategies that persuade or neutralize their critics, but investigation and analysis of these strategies reveals new opportunities for political activism and reform.

Consider the mining industry. For decades, mining companies managed to maintain a low profile. The industry's lack of visibility is related to the way that most metals are sold to other companies rather than directly to consumers. This practice can be contrasted with branding in the petroleum industry in which consumers engage directly with corporations at the pump.[2] The remote location of most mining projects also historically afforded them relative freedom from oversight or interference.

But during the 1990s, sustained critical attention from NGOs and increasingly effective strategies and tactics of resistance by indigenous peoples took the industry by surprise. The widespread nature of these conflicts is another consequence of the spread of neoliberal economic policies, including the promotion of foreign direct investment, which opened up new regions of the world to minerals extraction. Many of these new projects are located in marginal areas in which indigenous peoples have retained control over lands not previously seen to have economic value and where development has historically been limited or absent. Suzana Sawyer (2004) argues that the neoliberal dismantling of the state ironically transforms corporations operating in rural areas into new sites of governmentality and indigenous peoples into transgressive subjects. Activists and NGOs now regularly collaborate with indigenous political movements, exploiting new technologies ranging from the Internet and cell phones to satellite imaging that enable them to monitor corporate activity in approximately real time wherever it occurs (Kirsch 2007).

The unexpected rise of indigenous opposition provoked a "crisis of confidence" in the mining industry (Danielson

2006, 7). At the 1999 World Economic Forum in Davos, and in subsequent meetings in London, executives from the world's largest mining companies met to discuss these issues. They identified their strained relationship with indigenous peoples as their greatest challenge (Mining Journal 2001, 268). They acknowledged that "non-governmental organizations were becoming more powerful and vocal" and that "the rapid transfer of information [about] impacts and regulatory developments" had facilitated NGOs "in driving the agendas…of concern to the mining industry" (Mining Journal 2001, 267-268). They were forced to concede that "despite the industry's best efforts…[their] message had failed to get through, leaving them 'too often on the defensive'" (Mining Journal 2001, 267).

Since the 1990s, the mining industry has devoted increasing attention to its critics. This chapter examines some of the industry's primary strategies in responding to its critics, including discussion of the three phases of corporate response to critique (Benson and Kirsch 2010a). One of the key strategies of corporations is to co-opt the discourse of their critics. For example, mining companies increasingly draw on the language of corporate social responsibility to represent their practices (Rajak 2011). This chapter focuses on how the mining industry promotes itself as sustainable. The corporate oxymoron *sustainable mining* represents the industry's response to criticism of its environmental impacts (Benson and Kirsch 2010b; Kirsch 2010). I show how the concept of sustainability has undergone a progressive shift in definition from its original emphasis on the environment to current use of the term in which profits and development have become paramount, all but obscuring reference to the environment.

Phases of Corporate Response

The initial phase of how corporations respond to critique entails denial that the criticism is valid or that legitimate problems exists (Benson and Kirsch 2010a). The objective is to limit corporate liability for negative externalities, those costs for the

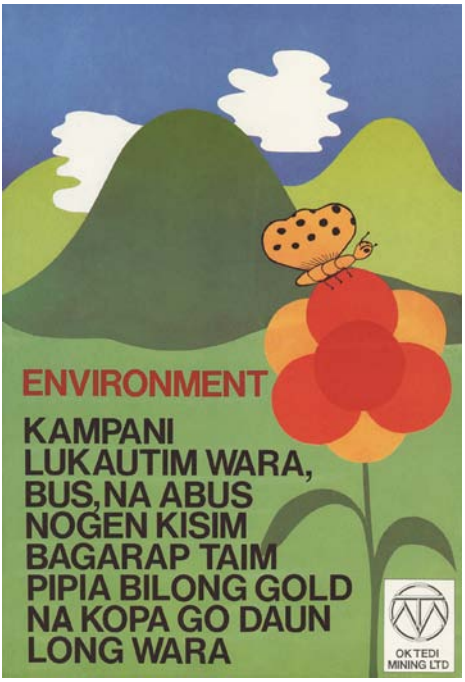
environment, society, or human health that are not taken into account by the project. For example, mining companies rarely pay the full costs of the water they use, including opportunity costs for other users, such as farmers. Mining companies also fail to pay the total economic costs of the pollution that results from mineral extraction. In the United States alone, more than 156 abandoned hard-rock mining sites have been targeted for federal cleanup. This intervention will cost the US government an estimated US$15 billion, which is more than 10 times the annual Superfund budget for all large-scale environmental problems (Office of the Inspector General 2004).[3] Requiring payment for the externalized costs of mining would not only erode profitability but would also mean that many existing mining projects are no longer economically viable. Full disclosure of the environmental legacies of mining could also erode the industry's legitimacy. The desire to avoid accountability for the negative externalities of mining means that the denial that serious problems exist and the refusal to engage with critics is the status quo for the industry.

A key strategy of the phase 1 corporate response to critique is the sowing of doubt about the extent or severity of the negative impacts. This approach was pioneered by the tobacco industry, which for many years argued that the link between smoking and disease had not been scientifically established (Brandt 2007). Until recently, the petroleum industry continued to deny the link between fossil fuel consumption, the accumulation of carbon dioxide, and global climate change. The artificial promotion of uncertainty has become standard practice across a wide range of industries (Davis 2002; Michaels 2008).[4] This frequently includes promotion of counter-science that supports the interests and claims of industry (see Beck 1992, 32).

Consider the following example of a phase 1 response to criticism by Ok Tedi Mining Ltd., which operates a large gold and copper mine in Papua New Guinea. Since the mid-1980s, the mine has discharged more than one billion metric tons of tailings, the finely ground material that remains after the valuable metal has been extracted, and waste rock into the Ok Tedi and Fly Rivers. Pollution from the Ok Tedi Mine has caused extensive deforestation downstream, the collapse

of local fisheries, loss of biodiversity, and potential threats to human health (Kirsch 2006, 2007, 2008). Yet in response to early concerns about the environmental impacts of the project, in the late 1980s the mining company distributed a public relations poster which denied that the mine posed a threat to the environment.

Figure 1: Ok Tedi Mining, Ltd. Public relations poster from the late-1980s.



The Melanesian Tok Pisin text for the poster reads "Environment: The company protects the river, forest and wildlife. No harm will come to you when the waste material from the gold and copper is discharged into the river." A blue sky soars over green fields, an orange butterfly, and an orange and red flower, suggesting that all is well. This reassuring message is contradicted by the following photograph of deforestation on the Ok Tedi River taken by the author in 1996, in which the problems caused by the Ok Tedi mine are abundantly clear.

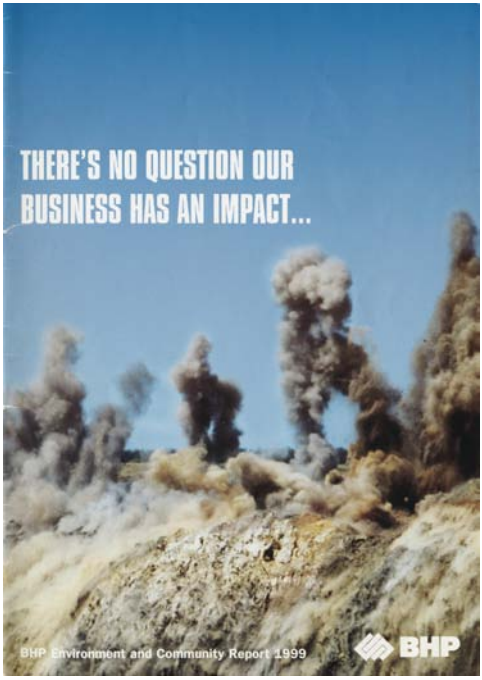
Figure 2: Deforestation along the Ok Tedi River. *(Photo credit: Stuart Kirsch, 1998).*

When problems become too great to deny and the opposition too effective to ignore, companies may shift to a phase 2 corporate response, which involves acknowledgment that problems exist, that something is harmful or defective, and that the critique has some scientific validity or ethical merit. Until the people living downstream from the Ok Tedi Mine filed a lawsuit against the parent company BHP (Broken Hill Proprietary Ltd.), the company actively promoted its image as a responsible steward of the environment. Consider the following advertisement published by BHP in the *Mining Environmental Journal* in February 1997, shortly after the lawsuit against the company was settled out of court, which has the caption "Leaving Our Environment the Same Way We Found It" (see Figure 3). The advertisement depicts BHP's Island Copper Mine in British Columbia, Canada, after mine closure.[5] Like the optimistic cartoon produced by the Ok Tedi Mine (see Figure 1), this image is also deceptive. Although the ad appears to depict a healthy freshwater lake, the mining pit has been filled with ocean water to prevent the development of acid mine drainage (Poling 2002). Like other salt lakes, the water in the mining pit at the Island Copper Mine does not provide support for organic life. The advertisement reflects BHP's pursuit of a phase 1 corporate response to critique that seeks to conceal the company's impact on the environment.

Figure 3: "Leaving Our Environment the Same Way We Found It." *(BHP Advertisement, Mining Environmental Journal, 1997).*

After the out of court settlement of the lawsuit against BHP and the Ok Tedi mine, the company was forced to acknowledge its impacts on the environment. The settlement was initially valued at $500 million in compensation and commitments to tailings containment (Tait 1996, 19; see Banks and Ballard 1997). After the settlement, Ok Tedi Mining Ltd. admitted that the environmental impacts of the project were "far greater and more damaging than predicted" (OTML 1999, 1), leading BHP to conclude that the project was "not compatible with our environmental values" (Economist 1999, 58). The cover of BHP's environment and community report for 1999 conveyed a very different message than the Island Copper advertisement published two years earlier (see Figure 4). Instead of attempting to reassure the public that the company would restore the environment to its original state, BHP acknowledged its impact on the landscape with an image of a coal seam being exploded by dynamite. The caption "There's No Question Our Business Has an Impact" illustrates BHP's shift to a phase 2 corporate response to critique.

Figure 4: "There's No Question Our Business Has An Impact." *(BHP Environment and Community Report, 1999).*



Despite acknowledging that problems exist, phase 2 responses to corporate critique are generally limited to symbolic gestures such as the payment of compensation or small-scale improvements. The goal of these responses is to avoid paying the full cost of eliminating negative impacts. In the Ok Tedi case, the mining company installed a dredge in the lower Ok Tedi River, which lowers the riverbed and reduces flooding and deforestation but removes only 40 percent of the tailings discharged into the river system and 20 percent of the waste material produced by the mine. Meanwhile, deforestation along the river corridor continues to spread downstream and now affects more than 2,000 square kilometers.

Whereas in phase 2 the threats posed to the corporation are limited, a phase 3 corporate response is characterized by crisis management. Phase 3 is defined by the risk that the problems facing a particular corporation or industry will

become financially and socially too great to manage. The threat of catastrophic loss, bankruptcy, industry collapse, or the complete loss of legitimacy motivates corporations to shift to a phase 3 response. These problems force the corporation to actively engage with its critics and participate in the shaping of politics that lead to the regulation and management of industry-related problems. For example, after it was established that exposure to asbestos causes lung cancer and other respiratory ailments, legal action against the industry led to bankruptcy proceedings. Paint manufacturers faced similarly catastrophic costs due to the effects of lead on children's nervous systems. However, the threat of financial insolvency posed by the costs of cleanup and compensation resulted in the negotiation of novel agreements that allowed corporations to continue operating so that they can make partial restitution for the harms they caused. Other costs from asbestos and lead were socialized by their transfer to the government or the individuals affected, including consumers made responsible for cleaning up properties affected by these toxic materials (Brodeur 1985; Warren 2001).

The phase 3 corporate response to critique takes many forms. It can involve the development of certification programs that provide problematic processes of production and consumption with the stamp of public approval (Szablowski 2007). Corporations may also attempt to assimilate their critics within corporate structures by forming partnerships with NGOs or recruiting activists to join corporate boards of directors, reducing their ability and motivation to bring about radical restructuring and change. Conversely, other critics may be portrayed as radical and impractical, a strategy of divide-and-rule that can have disruptive consequences for NGOs and civil society. Another form taken by phase 3 corporate response to criticism is the institution of what has been called "audit culture" (Power 1994; Strathern 2002), the development of regimes of monitoring and accountability that avoid the imposition of significant structural change (Szablowski 2007).

The core of phase 3 corporate response is the strategic management of critique and the establishment of a new status quo. Corporations may also envision the possibility of

competitive advantage and the achievement of a new kind of legitimacy through their participation in regulatory processes. For example, support for the Kimberly Process that restricts the trade of "blood diamonds" from conflict zones in Africa was financially beneficial to De Beers, which controls the lion's share of the world's diamond trade and benefits from the reduction in supply, keeping prices high.

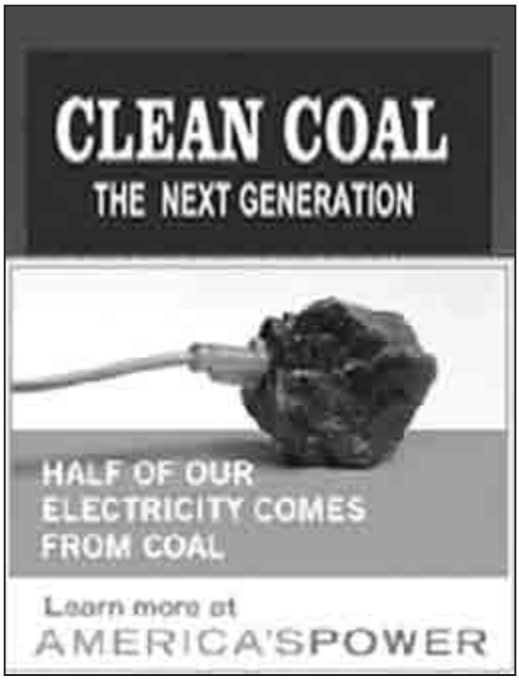
Corporations and industries move back and forth through the different phases of response. Particular corporations within a given industry may respond differently to critique and thus may be located in a different phase than their competitors, and all three phases exist across capitalism at the same moment. In general, phase 1 is the most profitable position for corporations to occupy because they are able to avoid financial liability for costly externalities. Corporations generally resist the move to phase 2 because of the costs added by negotiation with their critics. In some cases, however, it may be strategically advantageous for corporations to move preemptively into a phase 2 posture in order to manage their critics. This strategy is promoted by the public relations industry, which encourages corporations to meet and educate their critics before conflict arises or even the public recognition that a problem exists (see Deegan 2001; Hance, Chess, and Sandman 1990). Corporations can then achieve positive recognition for being responsible corporate citizens without engaging in more confrontational relationships that might require them to modify production or undertake other actions that might reduce their profitability. The phase 3 corporate response to critique is typically the last resort for corporations in which the possibility of collapse, bankruptcy, or illegitimacy threatens the future of the corporation or the industry.

Corporate Oxymorons

One strategy for neutralizing critical discourse is the deployment of corporate oxymorons (Benson and Kirsch 2010b). Such figures of speech seek to disable the critical facili-

ties of the consumer or shareholder with claims that require one to simultaneously subscribe to two contradictory beliefs, what George Orwell (2003) called "doublethink" in his novel *Nineteen Eighty-Four*. A prominent example of a corporate oxymoron is *clean coal*, which is promoted as the solution to the energy crisis even though it does not exist (see Figure 5). Although there are technologies that scrub sulfuric acid from the emissions of power plants that burn coal, no one has devised an economical means of preventing the resulting carbon dioxide, the greenhouse gas most responsible for global climate change, from being released into the atmosphere. Yet the reassuring sound of the corporate oxymoron *clean coal* implies that such technology is already available or at least within reach. The objective is to limit criticism of the coal industry by promoting an illusion: that coal can be used to generate electricity without exacerbating the problems caused by global climate change.[6] The example of clean coal shows how corporate oxymorons seek to conceal harmful practices.

Figure 5: "Clean Coal: The Next Generation" (www.cleancoalusa.org), 2008.



Corporation oxymorons represent a particular type of branding that conveys a political message intended to ease the mind of otherwise critical observers. Pairing a positive cover term with the description of a harmful product or process, such as clean coal or sustainable mining, is a tacit acknowledgment that a problem exists. Corporate oxymorons seek to limit critique through repetition of the conjoined phase, making the terms seem familiar and plausible despite the inherent contradiction. Analysis of corporate oxymorons helps to reveal how corporations seek to manage critique. In the final section of the chapter, I describe how the mining industry promotes the corporate oxymoron *sustainable mining* (Kirsch 2010).

Sustainable Mining

In 1999, the nine largest mining companies decided to respond collectively to the threat from their indigenous and NGO critics (Danielson 2002, 7), resulting in unprecedented collaboration between companies that previously regarded each other as fierce competitors.[7] According to one NGO observer of the process, their goal was to "divert attention away from specific corporate misdeeds by involving the industry… in civil discourse about sustainability and corporate social responsibility" (Moody 2007, 257). The resulting campaign created and promoted the corporate oxymoron of *sustainable mining*.

The concept of sustainability has been publically shaped through a series of multilateral conferences. Pressure from different constituencies has progressively redefined the term so that a key component of its original formulation, the need to protect the environment, has been almost completely obscured. This redefinition permits the concept of sustainability to circulate widely by increasing the number of contexts in which it can be applied, although the resulting changes should not be seen as politically innocent. Contemporary use of the term *sustainability* has its origins in the 1972 United Nations Conference on the Human Environment in Stockholm, which

focused on what was needed "to maintain the earth as a place suitable for human life not only now but for future generations" (Ward and Dubos 1972, cited in Danielson 2002, 19). The emphasis was on human activities that cause environmental degradation, especially pollution due to industrialization (Adam 2001, 55). When the International Union for the Conservation of Nature (IUCN 1980, 1) published the World Conservation Strategy in 1980, it linked concerns about sustainability to the concept of development: "For development to be sustainable, it must take account of social and ecological factors, as well as economic ones; of the living and nonliving resource base; and of the long term as well as short term advantages and disadvantages of alternative actions." This "conservation-centered" approach to development sought to balance economic and environmental concerns (Reed 2002, 206).

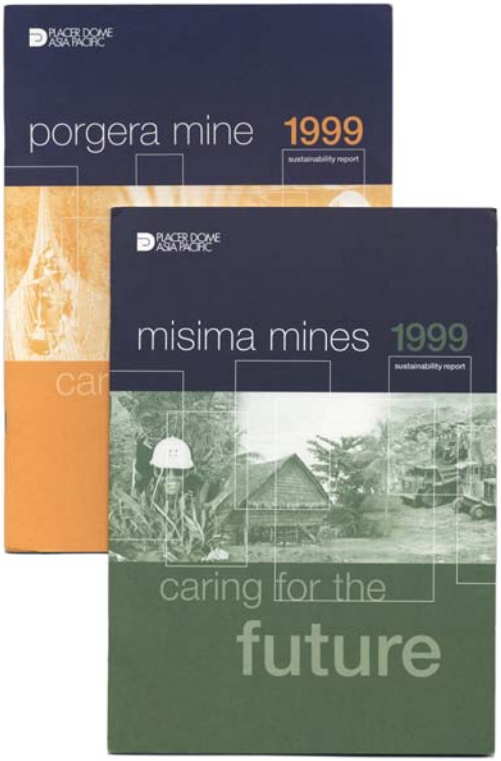
The 1987 World Commission on Environment and Development, now known as the Brundtland Commission, adopted a more "human-centered" approach to these questions (Reed 2002, 206). Responding to concerns that imposing environmental restrictions on southern countries would impede their ability to catch up to the North, the commission placed greater emphasis on meeting the needs of people living in developing countries, including the needs of future generations. The resulting definition of sustainability has been described as "equity-centered" (Reed 2002, 206). The Brundtland Commission formulated the definition that remains in popular parlance, that sustainable development "meets the needs of the present without compromising the ability of future generations to meet their own needs" (Brundtland 1987, 15).

In the 1990s, the discourse of sustainable development underwent further modification. The 1992 UN Conference on Environment and Development in Rio de Janeiro, commonly known as the Earth Summit, promoted a "growth-centered" approach to development while setting aside prior concerns about equity (Reed 2002, 206). It favored the preservation of biodiversity through the protection of small, relatively pristine sites as conservation areas. This trade-off opened the remain-

der of the world to virtually unimpeded development. The mining industry capitalized on the new consensus by funding conservation projects that offset the environmental impacts of new mining projects (BBOP 2009; Shankleman 2010). The mining industry regularly collaborates with many of the world's largest and most influential conservation organizations, including the World Wild Fund for Nature (WWF), Conservation International, and the International Union for the Conservation of Nature (IUCN), displacing earlier alliances between conservationists and indigenous peoples (Kirsch 1997; West 2005).[8]

The corporate oxymoron *sustainable mining* follows the growth-centered approach advanced by the Rio Earth Summit. The concept of sustainability has undergone progressive redefinition that obscures the original reference to ecology, so that the mining industry's use of the term *sustainability* refers primarily to economic variables. The contribution made by particular mining projects to sustainable development is presented in terms of royalties and taxes that can be used to support development and business opportunities projected to continue after mine closure (Crook 2004; Welker 2006). One of the first mining companies to integrate sustainability into corporate audit culture was the Canadian firm Placer Dome, which in 1999 began to issue annual sustainability reports for all of its major projects (see Figure 6).[9] These reports identify the primary objective of sustainability as the capacity "to maintain profitability for the shareholders," although they also seek to "develop closer integration as a partner and contributor to community development" and "to leave an environment that offers no loss of opportunities to future generations after mine closure" (Placer Dome Asia Pacific 2000). Less than a decade later, all of the major mining companies had enacted similar policies on sustainability.

Figure 6: Placer Dome Asia Pacific sustainability reports, 1999.

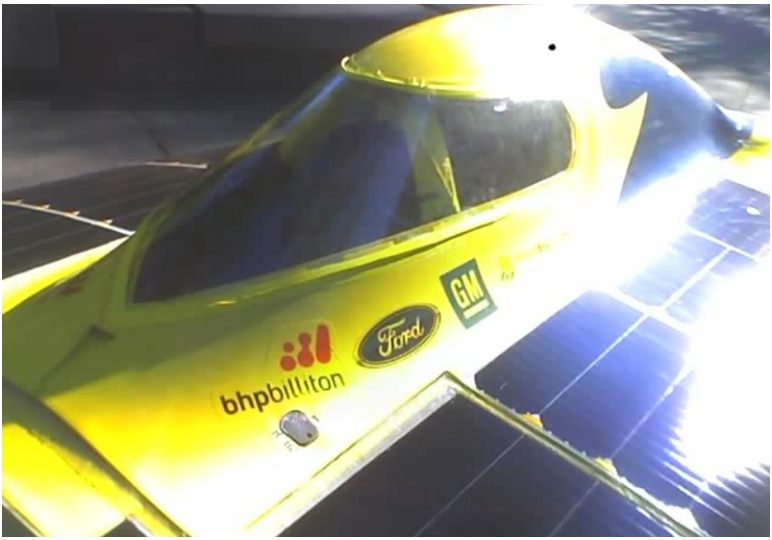


The original definition of *sustainability* focused on the relationship between economy and ecology, although the balance between the two has shifted over time, culminating in the complete elision of references to ecology or biology in the way that the term is now deployed by the mining industry. This process was facilitated by a conceptual shift from strong to weak sustainability (Daly 1996, 76-77; see Danielson 2002, 22). The two competing notions of sustainability differ with respect to the relationship between natural capital and human or manufactured capital. The concept of weak sustainability refers to the argument that natural capital and manufactured capital are interchangeable and that sustainability is achieved when the total value of capital remains constant or increases. According to this formula, a mine that pollutes a river and causes extensive deforestation may be regarded as sustainable

if the profits from the project are successfully converted into manufactured capital with an economic value that equals or exceeds the value of what has been consumed or destroyed in the process. From this perspective, a mine is considered sustainable as long as the "total stock" of capital remains the same or increases. In contrast, strong sustainability acknowledges the interdependence of human economies and the environment without treating them as interchangeable. From this perspective, weak sustainability, to which the mining industry subscribes, is a category error (Daly 1996, 78). The economist Herman Daley (1996, 77) illustrates his critique of weak sustainability by pointing out that the complete replacement of fishing stock (natural capital) with fishing boats (manufactured capital) is a recipe for a tragedy of the commons.

Although the concept of sustainability may previously have been used to critique the environmental impacts of the mining industry, it has now become a means to promote mining. For BHP Billiton (2009) "sustainable development is about ensuring our business remains viable and contributes lasting benefits to society." Despite its responsibility for the environmental disaster downstream from the Ok Tedi Mine, BHP Billiton was appointed to the external advisory board at the University of Michigan's new institute for environmental sustainability (Blumenstyk 2007). The interim director of the institute, a professor of business administration, defended his rationale in inviting BHP Billiton to participate: "'There's no pure company out there,' he says. 'I have no reason to doubt that this company has really screwed a lot of people,' just as nearly every other company is 'unjust to people' at one point or another. 'These organizations are part of the problem, and they're also part of the solution'" (Blumenstyk 2007, A22). Ironically, the logo for the mining company responsible for the Ok Tedi mining disaster is now prominently displayed on the University of Michigan's solar car.

Figure 7: BHP Billiton logo on the University of Michigan solar car. *(Photo credit: Stuart Kirsch, 2007).*



Similarly, the Anglo-Australian mining company Rio Tinto asserts that its "contribution to sustainable development is not just the right thing to do. We also understand that it gives us business reputational benefits that result in greater access to land, human and financial resources" (Rio Tinto 2009). Rio Tinto subsidiary Alcan also sponsors an annual $1 million prize for NGOs working to "advance the goals of economic, environment, and social sustainability" (Rio Tinto 2009). The meaning of *sustainability* increasingly depends on how it is deployed and by whom and no longer has any necessary relationship to the environment.

The mining industry's appropriation of the discourse of sustainability seeks to cover up the fact that there have been few significant reforms in how mining is practiced, or overall reduction of its harmful impacts, as the term *sustainable* might seem to imply.[10] The promotion of mining as a form of sustainable development also makes it more difficult for critics of the industry to increase public recognition of its externalized costs.[11] The appropriation of the discourse of their critics is one of the key strategies used by corporations to conceal harm and neutralize critique.

Conclusion

When corporations are successful in silencing their critics, they are able to promote a sense of resignation about one's ability to make a difference or change the status quo (Benson and Kirsch 2010a). The corporate strategies and tactics described in this chapter and the general feeling of disempowerment and cynicism that pervades contemporary political life are directly linked. Corporations actively cultivate and benefit from the politics of resignation, contributing to the illusion that corporate power is either inevitable or largely immovable. It is possible, however, to pierce the veil that conceals these corporate responses to critique; the examination of how corporations seek to achieve legitimacy and contain liability reveals significant vulnerabilities and contingency. The success of these corporate strategies is by no means certain or guaranteed. Showing how corporations work to conceal the harm they produce provides an opportunity for people to rethink their relationships to corporations. Tracking corporate responses to critique can reveal strategic opportunities for calling corporations to account for their actions, mobilizing political discontent around the evasion of corporate responsibility, and forging stronger standards for legitimacy.

Endnotes

[1] Dr. Stuart Kirsch is a Professor of Anthropology at at University of Michigan, who worked for many years on the Ok Tedi copper and gold mine in Papua New Guinea and is author, among other publications, of *Reverse Anthropology: Indigenous Analysis of Social and Environmental Relations in New Guinea*.

[2] The events following the 2010 BP oil spill in the Gulf of Mexico challenged some of these assumptions. Although outrage against BP was high, consumers had limited means of putting pressure on the company. Boycotting BP gas stations had little impact on the company's bottom line because these stations are independent franchises, and given the fungibility of crude oil, they do not necessarily sell BP gas. More generally, consumers have limited options when it comes to ethically and environmentally sound choices of petroleum companies: Exxon had its *Valdez*, Shell its Niger Delta, Texaco its Ecuadorian oil spill and Chevron-Texaco its refusal to clean it up, BP its Gulf of Mexico, and so forth. Clearly, petroleum companies do not compete for consumers based on their environmental performance.

[3] This figure does not include extensive cleanup at abandoned coal mines in the United States.

4 A recent study attributes public skepticism regarding environmental problems to conservative think tanks that seek to defend corporations against regulation (Jacques, Dunlap, and Freeman 2008). More than 90 percent of conservative think tanks are involved in promoting skepticism about environmental problems, often referring to the scientific research they seek to discredit as "junk science" (Jacques, Dunlap, and Freeman 2008, 349).

[5] Island Copper used controversial submarine tailings disposal to discharge mine wastes directly into the ocean. Submarine tailings disposal is banned in the United States, and only a small number of mines employ this technology, most of which are located in Southeast Asia and the Pacific.

[6] The clean coal campaign has also been the subject of satire (http://greeninc.blogs.nytimes.com/2009/02/26/the-coen-brothers-do-clean-coal/; accessed June 15, 2009); "subvertisements" like this one also challenge corporate oxymorons (Sawyer 2010).

[7] Luke Danielson (2006, 26) notes that "it is hard to identify any industrial sector (with the possible exception of nuclear power) that features such low levels of trust and such a history of division, strife and anger as the extractive industries."

[8] Anthropologist Mac Chapin (2004,18) criticizes these NGOs for "partnering with multinational corporations directly involved in pillaging and destroying forest areas belonging to indigenous peoples."

[9] Placer Dome followed the lawsuit against the Ok Tedi Mine very closely and commissioned these reports not long after the case was settled out of court in 1996. Barrick Gold purchased Placer Dome in 2006.

[10] Andy Whitmore (2006) aptly compares the mining industry's attempt to represent itself as sustainable to the story of the emperor's new clothes.

[11] An interesting example of how corporations manipulate the media can be seen in Chevron's response to the news that the American investigative television program *Sixty Minutes* planned to report on pollution from the oil company's operations in the Ecuadorian Amazon. Chevron hired a former journalist to represent its side of the story and then purchased Google ads to ensure that its website about the lawsuit, including their own fourteen-minute video, would appear at the top of any search as a sponsored link (Stelter 2009).

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Chapter 2.6

Legal Strategy from the Local to the International

A legal challenge to a project can send a powerful message to the company, its shareholders, and the government. It can sometimes stop the project, or at least slow it down considerably, which will give more time to organize. Ideally, it could even could establish a legal precedent for similar situations elsewhere.

Any legal action is likely to be one of two things. It will be either an injunction or court restraining order to stop a project moving forward unless certain conditions are met, or a lawsuit, where a civil action is brought as a result of loss or injury. Obviously there first needs to be good cause for legal action. Likewise, be prepared for it consuming a great deal of resources, both in terms of time and—depending on the type of legal representation—in terms of money.

The starting point for any legal action is likely to be in a local court. Depending on the result there may be appeals

going all the way up to higher courts, and possibly even the national equivalent of a supreme court. If it is clear that for some reason a community cannot get justice at the national level, then it can seek redress in international courts. This chapter reviews options at the regional level, and also to bring a case against a company in its home country.

2.6.1 Local Legal Strategy

The first point is that any legal strategy will almost certainly have to rely on some form of legal advice or support. There are likely to be a number of sources for this, that may include friendly lawyers (who will ideally work on a *pro bono*, i.e., free, basis) paralegal and legal NGOs or, if there are the resources, established law firms. It is possible that support and advice can come from other affected communities or from a national indigenous organization.

There may be any number of reasons why legal action is difficult. These include inadequate national legislation, lack of access to information, the costs of legal proceedings coupled with lack of legal aid, corruption, or the politicization of the judiciary. The latter is a particular problem where there is political pressure for foreign direct investment, regardless of the cost. Remember, however, that even if there is a belief that local courts are so ineffective or corrupt that a case is likely to fail, it is often necessary to prove that all the of national legal remedies have been exhausted before legal action can be brought outside of the country. Besides, it is often worth a try as sometimes it is possible to win against the odds. After all, a judge in the Democratic Republic of the Congo—a jurisdiction hardly known for being robust—did rule that three former executives of Anvil Mining should stand trial "for war crimes" because of the company's complicity in the 2004 Dilukushi massacre (although they were later acquitted).[1]

Given it can be a long, complex and expensive strategy, it is best to consider how any work in this area can be maximized through other means, which will mean integrating it with press

and advocacy work to get maximum impact. On that theme, during his 2009 Manila presentation, Stuart Kirsch explained that it was important not to rely solely on legal mechanisms, as they can limit participation to a small number of people. It was also important that communities should not give over their agency to these legal processes. Rather it was necessary to be patient—but not passive—while cases were in progress and continue to pursue other avenues to put pressure on the mining company.[2]

Any legal strategy should think through all of the potential reasons for judicial action. Carefully study the relevant parts of the constitution and mining legislation, as well as the legal framework on other land uses. One key issue is to review if the company has made procedural mistakes in applying to mine, as then legal action can be taken to nullify their concessions. If that fails, seek an injunction against the mining company and/or the government, based on a statutory or constitutional violation. This could be over violations such as a lack of consultation with the community, or taking property without fair compensation. Failing that, if there are good grounds, a community can sue the government for violation of mining legislation or other laws, or even challenge parts of any mining legislation that clash with the constitution or laws protecting the rights of indigenous peoples.[3]

Court cases at the national level have assisted in recognizing the state's duty to obtain indigenous peoples' free, prior and informed consent. For instance, there was a landmark ruling in Belize in October 2007 in the case of *Maya Villages of Santa Cruz and Conejo v The Attorney General of Belize and the Department of Environment and Natural Resources*. The Supreme Court of Belize referred to the FPIC requirements in both the UN Declaration on the Rights of Indigenous Peoples and Committee for the Elimination of Racial Discrimination's General Comment 23 on Indigenous Peoples. The Court ordered that the state cease and abstain from any acts, including the granting of mining permits and the issuing of regulations concerning resource use, which impacted on the Mayan indigenous communities "unless such acts are pursuant to their informed consent." In 2010 the Court reaffirmed the applica-

bility of its 2007 ruling to all "the Maya villages in the Toledo Districts," which is home to approximately 14,000 Mopan and Q'eqchi speaking Mayan people.[4]

The proposed Tampakan mine in the Philippines is an example of a community challenging national laws governing the extractive industries. The local indigenous peoples, the La Bugal B'laan, filed a case in 1997 against the type of project mining lease, called a Financial or Technical Assistance Agreement. This was the first of the leases to be granted under the new 1995 Mining Act, and it allowed for 100 percent foreign ownership of the mine. The key argument was that this was unconstitutional, as Article 22 of the Constitution called for 60 percent Filipino ownership of foreign joint ventures. Initially, in January 2004, the Supreme Court found in favor of the B'laan. By the end of the year, however, allegedly under political pressure, the Supreme Court reversed its own decision. Although they finally lost, the community did much to expose how little the state, or community, got from this type of mining lease. Anyway, the project is currently stalled on another legal technicality, which is a provincial ban on open-pit mining.[5]

2.6.2 Regional Human Rights Mechanisms

As noted above, if a community wants to pursue legal strategies at the international level, the next option is likely to be elevating the case to a regional human rights system. There are, however, some caveats. The first is that although there are courts at regional level, as these are linked into implementing human rights, there can be a problem with implementation at national level, even where states have signed onto the relevant human rights instrument. In many ways they are similar to some of the human rights complaints mechanisms reviewed in the Chapter 2.7.

The level of protection afforded by these bodies is mixed as well. The Inter-American Court and Commission on Human Rights (IACHR) has led the way in progressive decisions,

but the African Commission on Human and Peoples' Rights (ACHRP) has had one precedent setting decision. There is less relevance, so far, for the European Court on Human Rights, and the Asia region lags behind on regional protective mechanisms.[6]

The Inter-American System of Human Rights

The Organization of American States (OAS) brings together the nations of North, Central and South America, and the Caribbean. It's objective is strengthening cooperation on democratic values and defending common interests. The Inter-American system for the promotion and protection of human rights is part of the OAS structure and is composed of two bodies. These are the IACHR, based in Washington, D.C., USA, and the Inter-American Court of Human Rights, located in San José, Costa Rica. They uphold the American Convention on Human Rights, which followed on the earlier American Declaration of the Rights and Duties of Man.

The Inter-American system of human rights provides recourse to people in the Americas who have suffered violations of their rights by states, which are members of the OAS. Under their obligations to protect individuals' rights, Member States of the OAS have a responsibility to ensure that third parties, such as multinational corporations, do not violate those rights. The states can be held accountable if they fail to do so. The Inter-American Court identified this responsibility in the first case that was submitted to it by stating that "an illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention."[7]

A complaint is initially brought against the state involved to the Commission. If the case brought to the IACHR is against a State Party to the American Convention on Human Rights, the

IACHR applies the Convention to process it. Otherwise, the IACHR applies the American Declaration. If the State Party has ratified other conventions these can also be considered. The Court's role is to enforce and interpret the provisions of the American Convention on Human Rights. Complaints are not made directly to the Court. It is the Commission who potentially forwards cases to the Court if a solution cannot be reached.

In urgent cases, it is possible for victims to request precautionary (or provisional) measures before the IACHR. Contrary to Court cases, this mechanism represents an innovative and fast way for victims to obtain help, if they need protection from serious and irreparable harm imminently. Nevertheless, the Inter-American system is under-staffed and under-resourced, which can cause severe delays in the consideration of complaints.[8]

The Inter-American system of human rights is likely the regional system that has so far shown the greatest potential to address corporate-related human rights violations. It is also the regional organization that has done most to recognize and promote indigenous peoples' rights. In 1989 the General Assembly of the OAS asked the IACHR to prepare a legal instrument on the rights of indigenous populations. The declaration is still in draft form over a decade later, but this is still further than any other region has gone with regard to indigenous peoples.[9]

The Inter-American Court of Human Rights in its first case in 2001, *Mayagna (Sumo) Awas Tingni v Nicaragua* affirmed indigenous peoples' collective right to property. In its judgement, the Court criticized the Nicaraguan government for not demarcating the communal land of the Awas Tingni community, and for granting timber concessions without consulting them. In doing so they accepted that Article 21 of the American Convention on Human Rights, where it mentioned property, should be applied to *communal* property.[10]

Perhaps more importantly the Court has created significant jurisprudence affirming the requirement for FPIC. In the November 2007 case of *Saramaka People v Suriname*, the

Saramaka people's customary lands had been distributed to mining and logging companies without any regard for their rights. The Court's judgement reaffirmed that the property rights of indigenous peoples derive from custom and not from any act of the state, and noted their rights are exercised jointly with the right to self-determination and their right "to freely dispose of their natural wealth and resources." The Court affirmed the right of the Saramaka people to FPIC, making decisions in line with their traditional methods of decision making.[11] Unfortunately, even as the decision is invoked by domestic courts, for example in Peru, the Saramaka have not benefited as the implementation of the judgement has been still stalled.[12]

The Saramaka decision was recently reaffirmed in the Court's ruling in *Sarayaku v Ecuador* in July 2012. The Court found that the Ecuadorian state violated the community's right to be consulted, as well as their community property rights and their cultural identity. This was because a foreign oil company was allowed to encroach on their traditional lands in the early part of this century without consultation. Amnesty International noted "This sentence will have a far-reaching effect on countries across the region—it makes it crystal clear that states bear a responsibility to carry out special consultation processes before engaging in development projects affecting indigenous peoples and their rights."[13]

The IACHR responded to an appeal from affected Mayan communities around Goldcorp's Marlin mine in Guatemala in 2010 by calling for the suspension of mining activities in order to safeguard the health of host communities. Unfortunately the government and the company both ignored the call, but campaigners made full use of the judgement to ensure the company took responsibility for the damage its mine is causing.[14]

The African System of Human Rights Protection

The African Charter on Human and People's Rights is unique because of its wide coverage of civil and political, eco-

nomic, social, cultural, and environmental rights, with a specific provision for recognizing collective rights. The African Charter provided for the creation of the African Commission on Human and Peoples' Rights (ACHRP), a mechanism which in turn led to the establishment of the African Court on Human and Peoples' Rights.

As the only regional human rights instrument to specifically reference peoples' rights, it may be hoped it would be leading the way on indigenous cases. This is not the case though, as African states in general have resisted the idea of particular ethnic groups having specific inherent rights, instead arguing that all native Africans are "indigenous," in the sense of being pre-colonial.[15] This has been countered by the ACHRP, which in 2000 set up the Working Group on Indigenous Populations/Communities in Africa, and in 2006 published a summary of its work on the issue, clarifying—and dispelling some misconceptions around—the definition of indigenous peoples in Africa.[16]

The ACHRP did not take up the chance to address the issues of indigenous peoples' rights when it heard the 2002 case of *The Social and Economic Rights Centre v Nigeria*, concerning the Ogoni and Shell.[17] Although it gave a positive determination in holding the Federal Government of Nigeria in violation of a number of the Charters' articles, it failed to really address the issue of indigenous rights. The fundamental case from the ACHRP, which did affirm the rights of indigenous peoples' to own their customary lands and to FPIC, is the 2010 decision in *Endorois Welfare Council* v *Kenya*. In doing so, the ACHPR referred to both the UN Declaration on the Rights of Indigenous Peoples and the Inter-American Court's Saramaka case in coming to their conclusions.[18]

Communities can directly lodge a complaint with the ACHPR against a State Party for violations of a right guaranteed by the African Charter, which includes a states' duty to protect from harm by non-state actors, such as extractive industry companies. The African Commission has set up a Working Group on Economic, Social and Cultural Rights, which is currently working on a set of guidelines aiming at detailing states' obligations under the Charter. The draft

guidelines do refer to the role of states in protecting human rights from harm by other actors, including private actors.[19] A complaint, however, can only be brought if local remedies have been exhausted. The Commission does not offer legal assistance to complainants. Before submitting its views on a communication, it is possible for the Commission to recommend the state concerned to take provisional measures to avoid irreparable damage being caused to the victim of an alleged violation. As with the Inter-American Court, complaints are forwarded to the African Court by the Commission, rather it being approached directly. Unlike in the Americas, however, African intergovernmental organizations and any individual and NGO with observer status before the Commission may petition directly, as long as the State Party has declared there is such a right in the country in question.[20]

The European System of Human Rights

The Council of Europe, which is based in Strasbourg (France), brings together representatives from the 47 Member States across Europe. The aim of the Council of Europe is to develop common and democratic principles based on the European Convention on Human Rights. Those Member States include the territories of the Saami people and the Russian Federation, which is home to a number of different indigenous peoples.

The Council of Europe is composed of six main bodies. One of these is a judicial body—the European Court of Human Rights. The European Court of Human Rights can only hear complaints against States Parties, which have allegedly violated the European Convention on Human Rights, but its judgements are binding on those states and they are obliged to execute them. The act or omission complained of must have been committed by one or more public authorities in the state(s) concerned. The European Court, however, can rule that a Member State is in violation of the Convention if it fails to protect people under their jurisdiction from the violations of a third party (such as a company).

Any private individual (which could include a group of individuals) may file an application to the ECHR alleging a violation of the rights enshrined in the Convention. Submissions by individual persons, groups of individuals or NGOs are referred to as "individual applications," as opposed to those of State Parties. As with the other mechanisms it is the affected party who makes a complaint, and it can only be done if all available domestic legal remedies have been exhausted.[21]

In addition, there are a number of other mechanisms, including a European Commissioner for Human Rights. This an independent non-judicial institution within the Council of Europe, which plays an important role in the protection of human rights. Although the Commissioner cannot act upon individual complaints, they can draw conclusions and take wider initiatives on the basis of reliable information regarding human rights violations suffered by individuals.[22]

There has to date been no landmark case in the European Court in favor of indigenous peoples' land rights, although a number of cases have made progressive decisions on the protection of minority rights. For instance, in the case of *Handölsdalen Sami Village and Others v Sweden*, the Court effectively supported the Sami villages in the substance over their legal complaint in the dispute over reindeer grazing. It failed, nonetheless, to deal with the key question of whether the Sami's reindeer grazing is a protected property.[23] The Court still has potential in this area, as long as it engages with evolving rights; particularly looking to the jurisprudence of the Inter-American Court.[24]

The Asian Human Rights Situation

Despite being home to the majority of the world's indigenous peoples, there is no equivalent of the developed human rights mechanisms in other regions. This is partly because, as with Africa, at least some of the countries in the region have struggled against the aspirations, or even the existence, of indigenous peoples. Bangladesh amended its Constitution in 2011, but still refused to recognize their indigenous peoples as

indigenous. There are some more enlightened states, at least in terms of rhetoric or legislation. Yet, concerns of national supremacy, a preference for inter-governmental consensus, and a politicization of the debate on human rights has left it low on the regional agenda.

The Association of Southeast Asia Nations (ASEAN) created an ASEAN Intergovernmental Commission on Human Rights in 2009, but it has yet to move much beyond human rights promotion as opposed to protection. The good news is that an early version of the draft ASEAN Human Rights Declaration contained a reference to indigenous peoples, their collective rights and the obligation to obtain FPIC in certain conditions. The bad news, however, is that further drafts are not being transparently shared with civil society, and behind closed doors; it is quite possible that such provisions have been removed.[25]

Given this situation, communities in Asia are likely to look immediately beyond their own countries to the complaints mechanisms in the next chapter (see Chapter 2.7), or to the possibilities of legal action in the home country of the company.

2.6.3 Extraterritorial Legal Action

It the community is dealing with a multinational corporation, it can consider legal action in the home country where the company is registered. This is known as an extraterritorial legal action. It is particularly useful if the community affected by a company's activities have a low chance of obtaining justice in their own country. It may even have some practical advantages. Because the parent company often perpetrates the alleged crime, or at least makes the decisions that lead to the violation, evidence is often located in the company's country of origin. Any court action in the home country should also raise more publicity to highlight the issues, and, if there is a financial settlement made, it is likely to be more generous. Just the threat of a lawsuit can seriously scare current and potential investors.

Practically, however, there remain many serious obstacles to such a course of action. These include:

- Finding the necessary legal advice and support;
- Having to prove that the parent company is responsible and that the courts in the home country have jurisdiction;
- Producing evidence and witnesses; and
- Finding the necessary legal arguments.

It also requires patience, given that most of the cases quoted below have been ongoing for 10 years or more. The assertion that justice delayed is justice denied is particularly true in the extractive industries sector, as litigants may die of mine-related disease or companies may cease to exist before claims are considered. Projects can advance causing irreparable social and environmental damage despite ongoing legal action.

Since the Second World War and the Nuremberg war crimes trials, international law has held that human rights abuses can be prosecuted around the globe, but practically litigants tend to use civil, rather than criminal law, to bring cases, for instance under the Alien Tort Claims Act (ACTA) of 1789, which gives United States courts the jurisdiction to rule on human rights abuses perpetrated against foreign citizens outside the US. This complete extraterritoriality is its big advantage, as it opens up all sorts of possibilities.

In addition to the ACTA, the Torture Victim Protection Act of 1991 is another tool which allows US courts to hear cases involving violations of international law committed against private persons, regardless of nationality, focussing on cases of torture or extrajudicial executions.[26]

Previous ACTA cases include *Beanal v Freeport-McMoran*, which focused on environmental impacts, human rights abuses and cultural genocide at Freeport McMoran's Grasberg mine in West Papau/Indonesia, and *Doe v Unocal* where Burmese villagers sued the oil company Unocal for alleged human rights violations, including forced labor, in the construction of the Yadana gas pipeline project.[27] Well-known current cases include *Alexis Holyweek Sarei v Rio Tinto PLC* over alleged human

rights violations and environmental damage in Bougainville because of Rio Tinto's Panguna mine, and *Kiobel v Shell*, in relation to Shell's support for the violent suppression of the Movement for the Survival of the Ogoni People (MOSOP) in Nigeria.[28]

In fact the Ogoni's legal actions are a good example of what can be gained, but also the pitfalls. To quote an article in the American lawyer, "Shell has been sued so many times over its conduct in Nigeria that its cases offer a laboratory experiment for human rights litigation."[29] In the case of *Wiwa v Shell* there were 13 years of arduous ACTA litigation, which resulted in a US$15.5 million settlement in 2009. As noted above there is also the case of *Kiobel v Shell*, which has been in the US court system for around a decade and is now being heard as a test case of the applicability of the Alien Tort Statute Act to similar overseas company cases in the U.S. Supreme Court. The decision on whether corporations are covered by the Act will be crucial for any future actions.

In defending the ACTA in the case of *Kiobel v Shell*, human Rights chief Navi Pillay said, "governance gaps created by the rising reach and influence of business actors have not been matched by a similar rise in the capacity of societies to manage their impact and ensure accountability for adverse human rights impacts resulting from business activities."[30]

A recent successful legal action by the Ogoni was the case of *Bodo v Shell*. This was a complaint filed by farmers and fishermen from the village of Bodo in the UK High Court over pollution from oil spills. In August 2011, after only four months, Shell's Nigerian subsidiary admitted liability for a pair of oil spills in return for the parent company's dismissal of the suit, paying out an unknown sum (which was estimated to be up to $400 million). It is believed that the simultaneous launch of a well-research report by the United Nations Environment Program, documenting serious contamination in the area, assisted greatly the rapid settlement.[31]

The case taken against UK-based Monterrico Metals is an example of an extraterritorial legal case against a mining company for rights violations. The incident involved a number

of local farmers who were beaten, threatened, hooded, and held captive after being attacked by the police during a march by farmers against the Rio Blanco copper mine in Peru. Two women were sexually abused and five claimants were shot, one losing an eye. The case was taken before the UK High Court, but the company settled for an undisclosed amount before the case came to trial. One of the lawyers involved, Richard Meeran of Leigh Day and Co., noted, "This constitutes a salutary lesson for multinationals operating in developing countries."[32]

Stuart Kirsch in the 2009 Manila Conference, reviewed the lessons learned from the case of the OK Tedi copper and gold mine in Papua New Guinea. By the early 1990s the Ok Tedi River had been declared almost biologically dead following the annual dumping of some 90 million tons of mine waste in the river by the Australian company BHP. In 1994 the people living downstream from the mine took a legal case against BHP in Australia. The Government of Papua New Guinea, allegedly at the behest of BHP, responded by drafting legislation criminalizing the taking of legal action against them in foreign courts.

The Australian court decided that it could not hear a case of damage to property in another country and instead focused on the fact that the mine had violated the peoples' subsistence rights. The case was eventually settled out of court in1996. Mr Kirsch argued that the court's recognition of subsistence rights under common law was an important precedent that could be invoked elsewhere. He also maintained that focusing on subsistence rights was a good approach to addressing impacts of extractive projects, as these rights are based on indigenous practices. He suggested that better mechanisms to compile and circulate relevant legal precedents were necessary. As part of the settlement reached in the OK Tedi case BHP agreed to build tailing facilities, and more than $1billion has been lodged in a trust fund. Most of this money, however, goes to the state, with very little of it reaching the impacted indigenous peoples. In addition, the mining company failed to stop discharging mine wastes into the river and the mine has continued operating—and polluting the river—in order

to deliver these benefits. Another court case in 2000 also failed to stop the mine from polluting the river. Mr Kirsch argued that to protect indigenous peoples' interests, unambiguous language was necessary in court rulings and settlement agreements together with strong enforcement mechanisms. It was also evident from the history of the OK Tedi case that pursuing legal avenues can be very slow and time consuming.[33]

In Ecuador, a historic class action lawsuit against Chevron oil company found favorably for thousands of victims who, 18 years after the trial, should be compensated for damages resulting from the contamination of water by the company, which was fined $9.5 billion. Nevertheless the challenges that lie ahead for the implementation of this decision are numerous, especially as the Hague's Permanent Court of Arbitration has become involved.[34]

Finally, although the focus has been on cases brought against companies, it should be mentioned that increasingly mining companies can take host governments to court or arbitration if they feel they have been wronged. This can have negative consequences for local communities. In El Salvador, Canadian mining company Pacific Rim has been using the investor-state provision of the Central American Free Trade Agreement (CAFTA) since 2009 to seek $100 million in damages from the government for failing to approve an environmental license. Although El Salvador won the main points on the initial case, the case continues on other grounds and the government cannot reclaim its $5 million legal fees.[35] In one of the most egregious cases, US company Doe Run has filed an $800 million suit under the US-Peru Free Trade Agreement against the Peruvian government, alleging that it failed to clean up the town of La Oroya where the company operates a 100 year-old lead smelter. The town is one of the most polluted in the world. The Peruvian government and local civil society organizations argue that Doe Run failed to comply with its environmental clean-up commitments. In 2011 the controlling investment company of Doe Run, Renco Group, filed for international arbitration under the terms of Peru's Free Trade Agreement.[36]

Conclusion

Clearly, legal strategies are important. It is likely, however, that any legal strategy will be part of a larger plan to further the development aims of the community. Legal action has many benefits, not least is it may be one of the few ways to force a state to take action to support a community. But the legal struggles are often hard and long, and even then enforcement or final redress may not come at the end of a ruling. Yet, when seen as another tool for communities to use, with an imaginative mind all options are worth considering.

Just bear in mind that justice can be a rather perverse beast. As an example in December 2007, the Indonesian environmental group, Walhi, failed in its second national court case attempting to get justice for the pollution caused by US mining company Newmont's Buyat Bay mine. Newmont was disposing of its tailings straight into the sea. By coincidence, at the same time American shareholders had succeeded in getting a federal judge to approve a $15 million settlement over whether the company had given full disclosure to shareholders over the same project. At that point in time, the local community who had potentially lost their health and livelihoods failed in their case, but the shareholders who stood to suffer only monetary loss had won. There are times when justice is indeed blind.

The Western Shoshone: An Indigenous Peoples' Resistance in the United States

By Julie Cavanaugh-Bill, Western Shoshone Defense Project[37]

The following presentation focuses on the legal strategy undertaken by the Western Shoshone in the USA, particularly focusing on two Western Shoshone sisters, Carrie and Mary Dann. The basis of the struggle is that US Federal Government currently claims approximately 90 percent of Newe Sogobia (Shoshone land). This claim is premised on the unjust Doctrine on Discovery. This same doctrine continues to underpin US Federal Indian Law and is based on a racial discriminatory premise, which

holds that indigenous peoples are uncivilized, non-Christian and child-like in nature. It was on this basis that the "discovering" European nations held themselves superior to indigenous peoples.

Commencing with the 1863 Treaty of Ruby Valley between the Shoshone and the Federal Government, Ms Cavanaugh-Bill traced the legal history of the Shoshone struggle. Major events in that history included the establishment of the Indian Claims Commission in 1946 and its claim in 1962 (a year after the discovery of mining process that would enable open-pit mining in Shoshone lands) that the Western Shoshone title had been extinguished. She explained that following this, in 1973, a Trespass Action was taken by the government against the Dann sisters. Subsequent to this, in 1978, the Indian Claims Commission made a valuation of Shoshone lands. The Department of the Interior then accepted the Indian Claims Commission money based on its valuation in payment for the Shoshone lands in 1979. The Western Shoshone never accepted payment for their lands. A case was taken to the US Supreme Court, but in a ruling in 1985 it failed to address the violations of the Dann's property rights and, based on a narrow technical argument, upheld the payment transaction between the Indian Claims Commission and the Department of the Interior.

Having exhausted local remedies, the Danns took their case to the Inter-American Commission on Human Rights, which in 2002 found against the U.S. It cited violations of the right to property, the right to due process and the right to equality under the law. This ruling was supported by the Early Warning Urgent Action decision of the Committee on the Elimination of Racial Discrimination (CERD) in 2006 against the US government. The CERD reconfirmed its decision in 2008. The decision addressed protections afforded to sacred sites in the context of mining operations and the rights to culture and health. In 2007, the CERD also made a recommendation to Canada regarding extraterritorial regulation of it mining companies, such as Barrick Gold and others.

Western Shoshone Territory is one of the world's largest gold producing areas with many of the major gold companies, including Barrick, Newmont, and Kennecott/Rio Tinto. There are many other Canadian junior companies who are exploring. Mining in Shoshone lands is governed by the 1872 Mining Law, which applies to all "federal" lands. It is open-pit cyanide heap leach mining with each mine pumping out of up to 70,000 gallons of water per minute. In addition to mining projects, Shoshone lands are also home to nuclear testing and nuclear waste disposal.

Ms Cavanaugh-Bill then addressed one of the major issues being faced by the Shoshone at present, namely the Barrick Gold's Cortez Gold Mine at Mt. Tenabo (also know as Cortez Hills). She explained that the project had led to the rounding up of Shoshone horses and actions for trespass against the Shoshone in their own lands. Dialogues with the Shoshone failed to address the main concerns of the traditional elders in relation to the impacts of mining at Mt Tenabo, a sacred mountain, which Shoshone creation stories say will cause death and destruction if damaged. Instead dialogues had focused on the company's social responsibility programs, under which scholarships were made dependant on the Mt Tenabo mine proceeding.

In November 2007, despite the vocal opposition of the Western Shoshone, and massive international support for their cause, the Bureau of Land Management approved the Mt. Tenabo mine. The impacted Shoshone communities filed a lawsuit seeking an injunction against the project. In the ensuring case, Barrick presented Shoshone witnesses from non-impacted communities to testify in Court in favor of economic benefits and against protection of the Mt Tenabo.

The Western Shoshone lands are also home to hot springs. These springs form part of the Shoshone creation stories and spiritual beliefs. Ms Cavanaugh-Bill illustrated how the recent "geothermal rush" was destroying many of these geysers, with Nevada now described as the next "Saudi Arabia" of Geothermal Energy Development. Despite the importance of these geysers to the Shoshone, however, there had been no Shoshone involvement in decisions pertaining to their usage.

Ms Cavanaugh-Bill argued that large corporations are accountable to the international community and that it is therefore possible to apply pressure on them to influence their behavior. Actions—such as informing shareholders through attendance at company Annual General Meetings, countering public relations exercises by insisting on inherent responsibilities and rights, and targeting consumers through campaigns such as "No Dirty Gold"—could supplement legal action.

In her conclusion Ms Cavanaugh-Bill concentrated on the strategies of resistance used by the Shoshone in their pursuit of justice. She emphasized that these strategies always had a spiritual element to them and had as their central aims the protection of Shoshone lands and Shoshone decision making. Among the core elements of their strategy were the building of alliances together and outreach and education activities.

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Chapter 2.7

International Processes and Complaints Mechanisms

When a community seeks redress on the international stage, there are a number of options outside of the types of pure campaigning actions covered in Chapter 2.3 and the legal action covered in Chapter 2.6. Working alongside legal action, there are also a wealth of different potential complaints mechanisms, which have a wide range of effectiveness. The problem with the vast majority is that they are voluntary, or, in some cases, states and companies treat them as if they were voluntary. There may, however, be potential difficulties or unacceptably high costs or long delays with legal action beyond the nation state, and so these complaint mechanisms may offer a less complicated, or in some cases, the only current chance of redress. They should therefore be considered as part of an integrated strategy.

In general they break down into two areas. The first are various mechanisms associated with United Nations human rights system, as opposed to the regional ones covered in

Chapter 2.6. The second are a whole host of different voluntary mechanisms associated with the companies themselves, some of which are also inspired by the UN. Probably the best known of these voluntary mechanisms is the OECD Guidelines for Multinational Enterprises. As with a legal strategy, it will help to have good advice and partners in the international indigenous movements or international NGOs to assist with any initiative.

2.7.1 UN Human Rights Mechanisms

Indigenous Mechanisms

Various UN human rights bodies have done a great deal to advance the rights of indigenous peoples. This has happened through the intensive lobbying of indigenous peoples themselves, starting with the Haudenosaunee of North America asserting their rights before the UN's predecessor, the League of Nations, in the 1920s. After a gap of some years the American indigenous movement from the US took their concerns to the UN Human Rights Commission, seeking access to its Decolonization Committee. This led in1982 to the UN creating a Working Group on Indigenous Populations, which worked for over 20 years to elaborate human rights standards suited to the particular circumstances of indigenous peoples. Eventually it would also lead to the adoption of the UN Declaration on the Rights of Indigenous Peoples in 2007.[1]

The primary outcome is that there are now three UN bodies that are mandated to deal specifically with indigenous peoples' issues. They are the UN Permanent Forum on Indigenous Issues, the Expert Mechanism on the Rights of Indigenous Peoples and the Special Rapporteur on the Rights of Indigenous Peoples.

The UN Permanent Forum on Indigenous Issues is an advisory body to the Economic and Social Council (ECOSOC).

Created in July 2000, it has a mandate to receive reports from UN bodies and others relating to indigenous peoples issues, conduct workshops, studies and discuss indigenous issues related to economic and social development, culture, the environment, education, health and human rights. Although the role is essentially expert advice and awareness raising, the fact that half the experts on the Forum are in practice nominated by indigenous peoples, and that it is reporting to a high level within the UN system, is a major advance for indigenous lobbying. It also has an important role to ensure that other bodies within the UN fully implement the UN Declaration. The Permanent Forum meets annually for two weeks, normally around the month of May, in New York. Indigenous leaders or activists can attend, as long as they register in advance. Although there is always a set agenda it is possible to raise specific issues in short interventions within the meeting, either as independent submissions or in a joint statement with others. The more a speaker can adapt their points into the agenda and making recommendations relevant to the general topic the more impact it should have. As the meeting is often focused on standard setting, however, it is possible that among the best outcome will be the publicity received from delivering a message at a UN meeting. There will likewise be benefits from the networking that comes with such large gatherings, including the chance to speak at side meetings.[2]

The second UN body is the Expert Mechanism on the Rights of Indigenous Peoples. It was created in 2007, The Expert Mechanism reports direct to the Human Rights Council, with thematic advice on the rights of indigenous peoples as directed by the Council, who also appoint the five experts. Under it's mandate from the Human Rights Council it focuses on producing studies. Recent research has included consideration of aspects of the UN Declaration and specifically on the right to participate in decision making, with focus on extractive industries.[3] The Expert Mechanism meets annually for one week in Geneva, usually around July. It is similar to the Permanent Forum in the opportunities to attend, speak and network, although its agenda is even more focused around the theme of the particular ongoing research.[4]

The third mechanism is the Office of the UN Special Rapporteur on the Rights of Indigenous Peoples. This is part of the UN Special Procedures, and just one of a number of thematic Special Rapporteurs (which will be covered under the next heading). The Special Rapporteur has a mandate to promote good practice, report on the situation of the human rights in countries or specific themes, and to deal with specific cases of alleged violations of the rights of indigenous peoples. The Special Rapporteur's mandate includes the possibility to visit countries, and compile reports on the experience, which provides an opportunity for advocacy. At the time of writing the main thematic area being researched by the current Special Rapporteur, Professor James Anaya is on the extractive industries. In this context, Professor Anaya has highlighted the need for and development of an international norm requiring the consent of indigenous peoples when their property rights, among others, are impacted by natural resource extraction.[5]

It is the last part of the mandate that may prove the most useful, as it allows indigenous communities to make complaints. The complaint can relate to a human rights violation that has already occurred, is ongoing, or which has a high risk of occurring. The process, in general, involves the Special Rapporteur sending a confidential communication to the concerned government requesting information, commenting on the allegation and suggesting that preventive or investigatory action be taken.[6]

There is a UN Voluntary Fund for Indigenous Populations that can be applied to for travel to the Permanent Forum, the Expert Mechanism or other UN meetings (including those mentioned below). It is administered by a Board of Trustees, including indigenous members Its funds are of course limited, but they do fund a significant number of representatives in any year, and one of the criteria is for supporting candidates who have never travelled to that particular UN meeting before.[7]

Charter-Based Human Rights Mechanisms

Outside of the bodies specifically focused on indigenous peoples, there is a large framework of human rights mechanisms that can also be utilized. Within the UN structure, these split into two types of bodies. The first, called Charter-based bodies, are founded on the UN Charter and are currently focused around the Human Rights Council. The second, called Treaty-based bodies, have a mandate to monitor state parties' compliance with their treaty obligations.[8]

The Human Rights Council holds three regular sessions a year in Geneva, and accredited NGOs can attend and input to its normally packed agenda.[9] One of the most practical methods to raise issues with Charter bodies is via the Universal Periodic Review (UPR) of the Human Rights Council. The UPR is a review of the human rights records of all 192 UN Member States once every four years, which started in 2006 and is now on its second cycle of reviews. UPR sessions happen twice a year in Geneva. Civil society groups can submit, either individually or collectively, information to the relevant session of their country. These are often submitted as "shadow reports" to the government's own report. It is also possible to attend and have some input to the UPR sessions, although the general premise of the sessions is for governments to question other governments. Despite this, it is proving an increasingly effective way to raise concerns.[10]

The second set of Charter-based human rights mechanisms are the so-called Special Procedures, which is a general name given to mechanisms set up to research and report back to the Human Rights Council. As noted above, one form of these are the Special Rapporteurs, although there are also UN Working Groups on some mandates (themes). Currently there are a total of 12 country mandates, and 36 thematic mandates. These include themes such as human rights defenders, the right to food, and the right to safe, clean, healthy and sustainable environment.[11] One of the newest is the Working Group on the issue of human rights and transnational corporations and other business enterprises. This has developed out of the UN Guiding Principles on Business and Human Rights, and

has been set up to research the issue and implementing the United Nations "Protect, Respect and Remedy" Framework (the section on voluntary codes explains this further). It plans to hold a forum once a year, which should allow input from the victims of abuses perpetrated by multinational corporations.[12]

Treaty-Based Human Rights Mechanisms

There are 10 Treaty bodies that monitor implementation of the core international human rights treaties. These include relevant mechanisms such as the Committee on Economic, Social and Cultural Rights (CESCR) and the Committee on the Elimination of Discrimination against Women (CEDAW).[13] The CESCR in its recommendations to Ecuador and Colombia asserted that indigenous peoples' consent is required in the context of extractive industry projects.[14] In 2009, the case of *Poma-Poma v Peru* was brought before the Human Rights Committee, using the Optional Protocol International Covenant on Civil and Political Rights (ICCPR). The Human Rights Committee stated that for indigenous participation in decision making to be effective their FPIC was required and that "mere consultation" was inadequate to ensure protection of their rights under Article 27 ICCPR.[15]

With regard to the Treaty bodies, however, the Committee on the Elimination of All Forms of Racial Discrimination (CERD) is a particularly important and relevant structure for indigenous peoples. This is because in its role dealing with racial discrimination, it has clearly defined its responsibility for addressing the rights of indigenous peoples. One of the roles of treaty bodies is clarifying issues around the conventions (treaties) on which they are based, in what are called General Comments. The CERD published its General Comment 23 on Indigenous Peoples. It has many strong statements in it, including the CERD's view that there is a requirement for free, prior, informed consent (FPIC) where rights will be affected, which has been hugely beneficial in establishing FPIC as a global standard.[16]

The CERD meets twice a year in Geneva, and there are three ways it can be useful. It conducts periodic reviews of

states, in a similar fashion to the UPR. The CERD has made a number of recommendations to states in its concluding observations where land rights and extractive industries feature. These include recommendations that states who are home countries of multinational corporations should enact legislation to ensure that those corporations are held accountable for violating the rights of indigenous peoples abroad. On top of this the CERD provides a mechanism for individual complaints, through its Early-Warning Measures and Urgent Procedures. The Early-Warning Measures aim to prevent problematic situations escalating into conflicts, and the Urgent Procedures aim to respond to problems requiring immediate attention to prevent or limit the scale or number of serious violations of the Convention. Finally, citizens of those states that have signed the special protocol of the ICERD are able to file individual complaints and have them judged by CERD with binding decisions.[17]

Carrie Dann, a Western Shoshone Nation elder, after a decision to a submission made to the Committee, affirmed the use of the CERD in relation to their struggle over mining: "The struggle of the Western Shoshone Nation is the struggle of all indigenous peoples. It is not just about abuse of power and economics –- it is about the stripping away of our spirit… The UNCERD decision confirms what the Western Shoshone and other indigenous peoples have been saying for a very long time."[18]

As noted in the case study in Chapter 2.6, however, despite the surprisingly strongly worded recommendations from the CERD in this case, the US government has still failed to take the relevant action to remedy the situation.[19]

International Labor Organization

The International Labor Organization (ILO) is the international organization responsible for drawing up and overseeing international labor standards. The ILO has a tripartite structure involving the participation of workers, employers and governments. In parallel to the processes described

above, the ILO was also creating standards with respect to indigenous peoples. After first developing standards designed to free indigenous peoples from slavery-like conditions, in 1957 the ILO adopted Convention 107 on Indigenous and Tribal Populations,[20] which recognized for the first time in international law that indigenous peoples' land rights derive from custom and are independent of any act of the state which they may, in any case, precede.[21]

The 1957 Convention had an assimilationist intent and was aimed at securing indigenous peoples' rights as an interim protective measure while the plan was to gradually incorporate them into the national mainstream. By the 1980s, it was recognized that this approach was no longer appropriate, considering the developments in international human rights laws and the need recognize the aspirations indigenous peoples had to exercise control over their own development. Therefore in 1989, the ILO adopted a revised Convention on Indigenous and Tribal Peoples (no 169).[22]

ILO Convention 169 is the only international treaty, which is specifically dedicated to indigenous peoples, covering areas such as non-discrimination, special safeguard measures, and the right to decide development priorities. It contains an explicit reference to indigenous peoples' FPIC in the context of relocation. It also recognizes indigenous peoples' right to "decide their own priorities for the process of development" and requires that states consult with them through their representative institution, "with the objective of achieving agreement or consent to the proposed measures."[23] Although its wording is weaker than the 2007 UN Declaration on the Rights of Indigenous Peoples with regard to FPIC in general,[24] it is a legally binding international instrument open to ratification, which means that those countries who have signed it need to ensure they implement its provisions in their own domestic legislation. To date 20 countries have ratified it, which are mostly in Latin America.[25]

Although the focus of the ILO is on labor issues, there are other conventions that could be used to a community's advantage. For instance, the ILO published a guide on how Convention 111 on Discrimination (Employment or

Occupation) could be invoked if traditional livelihoods were under threat from an extractive industry project. The advantage of Convention 111 is that many more countries have ratified it than ILO 169.[26]

The ILO has developed various means of supervising the application of conventions. Governments who have ratified conventions are required to regularly report to the ILO on their implementation. A Committee of Experts can then make observations or direct requests to states. There is a complaint procedure, and special measures, if a state is not complying with a convention. Thanks however to the tripartite nature of the ILO, it is not that easy for a community to invoke, unless there is a friendly trade union who would support, or in the case of the Saami their parliament makes inputs via the Norwegian government.[27]

A good example of this in action is that in March 2010, the ILO also formally requested that Goldcorp's Marlin mine in Guatemala be suspended, along with several other projects in Guatemala, due to the excessive number of complaints the ILO had received from NGOs and local communities. The government initially said that it would not comply with the request even though, as a signatory to ILO Convention 169, they were legally obligated to do so. They eventually conceded they had to comply, but to date have not taken the necessary action.[28]

2.7.2 Voluntary Codes of Multinationals

The mining industry, oil and gas industries—particularly articulated through the industry bodies the International Council on Mining and Metals (ICMM) and International Petroleum Industry Environmental Conservation Association (IPIECA)—have laid great emphasis on voluntary standards and mechanisms. There are a vast and potentially conflicting variety of these standards. Extractive companies are, under pressure, gradually accepting the need to respond, and creating social, environmental and human rights policies. These

often include, especially where the company is a large one, a policy on indigenous peoples. Oxfam America has compiled a review of major mining, oil, and gas company Policies on FPIC and the so-called "social licence to operate," which argues for a growing acceptance of FPIC.[29] Although primarily voluntary, a company can at the least be publicly criticized for breaking its own policies.

The UN has taken a lead in some of these mechanisms. UN Global Compact, launched in July 2000, is an initiative for businesses, which asks them voluntarily to commit to aligning their operations and strategies with ten universally accepted principles in the areas of human rights, labor, environment and anti-corruption. The first two principles ask companies signing up to support and protect internationally proclaimed human rights and to make sure that they are not complicit in human rights abuses. The aims of course sound good, and in its favor, companies that have signed up have been ejected from the Compact for failing to report on their compliance. It has been widely criticized, however, as obstructing the necessary legally-binding regulations to adequately police corporate activities.[30]

The other major initiative in this area from the UN is their 2011 Guiding Principles on Business and Human Rights: Implementing the UN "Protect, Respect and Remedy" Framework, which was produced by Professor John Ruggie. To some extent these build on the UN Global Compact, but attempt to be more universal in application. They stress business' role to respect human rights, while identifying that the state still has the key role of protecting human rights. Under the Framework, companies must avoid infringing human rights and address the adverse impacts of their operations.[31]

As noted above, there are now moves within the UN (via the Working Group on Human Rights and Transnational Corporations), and from numerous commentators, to operationalize the Guiding Principles. One of the areas that activists are concentrating on is the need for companies to conduct due diligence with regard to human rights. Ruggie defines this as the steps and processes by which a company understands, monitors and mitigates its human rights impacts.[32]

Activists argue that companies need to conduct human rights impact assessments, and an increasing number of guidelines on their implementation are being created. It is important to make sure that any impact assessment is independent and that the initiative comes, as far as possible, from the affected community, and the process is as participatory as possible. Even where the company is the main proponent, however, it can still be a useful tool. Goldcorp conducted its own human rights impact assessment at its Marlin mine in Guatemala in response to numerous accusations of wrongdoing by local communities. Even then the report found widespread human rights abuses at the mine, including abuse of the right to consultation, right to property, right to freedom of association and collective bargaining, and failure to create effective grievance mechanisms for its employees and community members.[33]

One of the contentious areas around the extractive industries—especially with regard to human rights—is the potential for conflict, and the use of armed guards to protect projects. Therefore, a number of governments and NGOs have been working on the Voluntary Principles on Security and Human Rights. Both the ICMM and IPIECA are involved in this process, as well as major extractive industry companies (in fact nearly all of the companies participating are from the extractive industries). It contains many provisions to avoid conflict, and what to do if it arises. Given the heinous nature of the abuses involved, however, surely something more than a voluntary code of conduct is required.[34]

Issues of transparency are one of the areas that extractive industry companies generally feel more comfortable addressing, certainly in comparison to human rights. This issue was covered in Chapter 2.2, where the Extractive Industries Transparency Initiative (EITI) was reviewed. It is, however, not the only such scheme. For instance there is the Global Reporting Initiative for sustainable development, which is another multi-stakeholder process that was set up in 1997 to enhance transparency in reports of company's operations and impacts. As Roger Moody however comments in his book *Rocks and Hard Places*, the Global Reporting Initiative "flies on a wing and a prayer, scarcely loftier than previous essays in the same direction and replete with good, but vague, intentions."[35]

The jewellery industry has been particularly concerned with the bad publicity that mining has received over recent years, especially with regard to diamonds and gold. It has sought to address these through such initiatives as the Responsible Jewellery Council, which seeks to certify the trustworthiness of its membership. The Kimberley Process is a certification scheme that was launched in South Africa in 2002 in response to the well-publicized concern over conflict diamonds (so called "blood diamonds") primarily originating from various African countries. It has had some success in its stated goals, but has more recently come close to falling apart, particularly thanks to one of the founders, NGO Global Witness, withdrawing over some blatant disregard for the provisions of the Kimberley Process from some of the government signatories, especially Zimbabwe.[36]

In a similar fashion for gold, there is the voluntary code on cyanide use and the World Gold Council's development of standards in gold manufacture. Also various NGOs have tried to launch their own initiatives, such as Oxfam America and Earthworks' "No Dirty Gold" campaign, which includes the demand for community FPIC. As mentioned in Chapter 2.4, the Initiative for Responsible Mining Assurance (IRMA) seems to be striving harder for a true multi-stakeholder process aiming for certification. This is because in theory it includes a place at the (round)table for those representing directly "affected and indigenous communities" themselves (rather than assuming they will be represented by NGOs). The issue of FPIC is on the agenda, but the process is not particularly transparent and after many years of discussions it appears – as far as it is possible to tell – that no real progress has been made to date.[37]

2.7.3 Financial Complaints Mechanisms

Chapter 2.3 has already reviewed campaigning around both private and public financing for extractive industry projects. The complaint mechanisms that are associated with, particularly public, financial institutions make it important, however, to consider these options again in this chapter.

The most well-known form of public funding for the extractive industries will likely come from the big multilateral development banks, of which the most famous is the World Bank. As noted in Chapter 2.3, if there is World Bank funding for a project then the first thing to do is to contact NGOs who are working specifically on public financing, probably starting with the US-based Bank Information Center, who can give advice and support.[38]

The Office of the Compliance Advisor Ombudsman (CAO) is the independent mechanism that deals with complaints on the World Bank's International Finance Corporation (IFC) and Multilateral Investment Guarantee Agency (MIGA).[39] Because of its role supporting the private sector, the IFC is the arm of the World Bank that communities are most likely to have contact with.[40] Complaints can be made when the IFC or MIGA are failing to apply their own Performance Standards. Any individual, group, or community directly impacted or likely to be impacted by social or environmental impacts of an IFC or MIGA project can file a complaint. More details on how to make a complaint are available in Section IV of the International Federation for Human Rights' "Corporate Accountability and Human Rights Abuses," or at the CAO website, which provides online guides.[41]

The Inspection Panel is the complaints mechanism for the major lending arms of the World Bank (the International Bank for Reconstruction and Development and the International Development Association).[42] As with the CAO, the Panel hears complaints from affected people to determine whether the Bank is complying with its own policies and procedures (including its own operational policies on indigenous peoples).

Complaints can only be made by a "community of persons," but that can be up to two individuals with a common interest. There are a number of conditions, including the need to have raised the issue with local World Bank staff before submitting a complaint. The Panel will then report to the Board of the World Bank, who must respond and indicate how it plans to address the Panel's findings, usually in the form of an action plan, which will be made public. More advice on complaints to the Panel can be read in the International Federation for Human Rights' "Corporate Accountability and Human Rights Abuses."[43]

There are then a number of regional public development banks that could be financing a project, and all have their own specific complaints mechanisms. The Inter-American Development Bank (IDB) has the Independent Consultation and Investigation Mechanism (ICIM), which works around a two-stage process of consultation and compliance review. The IDB publishes comprehensive guidance on this system.[44]

The African Development Bank (AfDB) has put in place an Independent Review Mechanism (IRM) operated by the Compliance Review and Mediation Unit (CRMU). An overview and the Operating Rules and Procedures, which spell out how to complaint, are available on their website.[45] The Asian Development Bank (ADB) has an Accountability Mechanism, which consists of two separate but related functions: a consultation phase under the Office of Special Project Facilitator (OSPF) and a compliance review phase under the Office of the Compliance Review Panel (OCRP). An overview and more details of both are provided by the ADB.[46]

The European Investment Bank (EIB) has a complaint mechanism composed of the EIB Complaints Office and of the European Ombudsman. The former is an internal mechanism, independent from operational activities; the latter is an external and independent mechanism. More details are available at their website.[47] The European Bank for Reconstruction and Development (EBRD) produces a publication describing its so-called Problem Solving Mechanism.[48]

Finally in the public sector, there may be funding associated with government export credit agencies (ECAs),

through government-backed loans, guarantees and insurance to corporations. It is a long-standing complaint that ECAs rarely consider social and environmental standards in their decision making processes. Although this is changing thanks to societal pressure the situation is different depending on the government involved. The International Federation for Human Rights' "Corporate Accountability and Human Rights Abuses" covers complaints mechanisms to some of the major ECAs, namely Export Development Canada (EDC), the USA's Overseas Private Investment Corporation (OPIC) and the UK's Export Credits Guarantee Department (ECGD).[49]

There are mechanisms in the private sector, such as the Principles for Responsible Investment, which is a code of the conduct for socially responsibly investors. Of more potential use for activists are the Equator Principles. These are a set of principles established in 2003 by a number of major banks, who have become known as the Equator Banks. They are essentially a set of 10 voluntary environmental and social standards covering major projects, on issues such as consultation, grievance mechanisms and transparency. The first version of the Principles only applied to projects exceeding US$50 million, and concerned only a dozen international banks. The new version of the Guidelines are based on the safeguards developed by the World Bank's IFC. From January 2012, the Equator Principles refer to the revised IFC Performance Standards adopted in 2011, and therefore to FPIC. The new Principles now apply to investment in all projects exceeding $10 million dollars, funded by 74 banks in 30 countries.[50] A third version of the Principles, which explicitly deal with the issue of FPIC in response to updates from the IFC, are being publicly reviewed at the time of writing.[51]

The problem with the Principles is that, unlike the IFC, they have no independent review or recourse mechanism, and they can be a little vague and limited in their application as well. Still, activists should ensure that any breach of the principles is reported to the financier in question, and behave—to all intents and purposes—as if there is a complaints mechanism.

Direct complaints to private banks who are financing projects should also be possible. The larger ones will have their

own environmental and social policies in place regardless of whether they are an Equator Bank or not. These should be studied and submissions made if any project or company financing seems to contradict such policies. Banks are usually very keen to protect their reputation, and where there may be a particularly bad case, it is worth contacting NGOs, which campaign on private finance, such as BankTrack, to explore if they can assist in "naming and shaming" in such institutions.[52]

2.7.4 Other Complaints Mechanisms

The most widely known voluntary mechanism for complaints are the OECD Guidelines for Multinational Enterprises. The Guidelines constitute recommendations addressed to companies by the OECD member countries, and other signatory states. While the Guidelines are aimed at companies, the relevant states bear the ultimate responsibility to promote their application and ensure that they influence the behaviour of companies operating either inside, or directly out of, their territory. The Guidelines cover a wide range of issues, including labor issues, taxation, the environment, and disclosure. But for communities one of the main benefits is that they cover human rights. Direct reference to human rights in complaints mechanisms is otherwise rare. On top of this, within the Guidelines is a clear procedure to complain if a company fails to respect the Guidelines.[53]

In order to make a complaint, you should approach the National Contact Point (NCP) of the home country of the company involved. Unfortunately, states enjoy a certain degree of flexibility to determine the structure and organization of the NCP in their country. Therefore the Guidelines are implemented with different levels of accomplishment, independence and enthusiasm within different countries. Many NCPs can be under-funded and under-resourced. A community should be able to get advice directly from the NCP, but there is also an NGO who gives advice, including materials and brochures on the Guidelines, called OECD Watch.[54]

There have been a number of problems with the Guidelines as a complaints mechanism. The main one is that they are voluntary in nature. For example, the complaint that was brought to the UK NCP about Vedanta on behalf of indigenous communities in Orissa, India (see case study in Chapter 2.3) was effectively ignored by the company. To date no specific action has been taken by the company with regard to the NCP's request that it now "change its behavior."[55]

There have been times where complaints have been more effective. A complaint was submitted on behalf of the Mangyan communities of the Philippine against Intex Resources, a Norwegian mining company. The Norwegian NCP confirmed breaches of the Guidelines, specifically around inadequate consultations and failure to obtain legally required consent, lack of transparency and failure to adequately assess projects environmental risks. It was particularly important that although the NCP recognized the primacy of national law in regard to indigenous peoples in the Philippines, where there was obvious poor implementation it insisted there were international norms that the company should follow. Although the company has argued against this, the environmental compliance certificate (ECC) for large-scale mining, which had been revoked has at the time of writing not been reinstated.[56]

In May 2011, the OECD updated its Guidelines to raise standards for corporations in the field of international human rights, including those pertaining to indigenous peoples, specifically referencing "United Nations instruments have elaborated further on the rights of indigenous peoples."[57] They are also stronger on human rights, stressing companies should "seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts."[58]

Conclusion

Given the international framework to protect the rights of indigenous peoples in the context of extractive industries, the question becomes how well these are implemented in practice. Despite the proliferation of voluntary standards, serious violations continue to be reported by indigenous peoples from every region of the world.

The seriousness of these violations presents the clear need for enforceable standards and strong sanctions, backed by a legal framework that offer genuine routes to redress. States are often failing to fulfill their international human rights obligations with regard to business, and the scope of the responsibility directly imposed on businesses is only now being better defined. It is shameful that there is no one forum available at the international level to credibly set enforceable regulations or for victims to directly address the responsibility of corporations.

The extraterritorial application of ILO Convention 169 regarding the actions of Spanish multinational Companies, which affect indigenous rights

By Asier Martínez de Bringas[59]

This is an extended version of a paper that was originally presented in Spanish at the 2009 Manila Conference, which has not been updated since then. In this paper, the author argues for an extraterritorial application of International Labor Organization (ILO) Convention No 169, when Spanish transnational corporations are suspect of human rights violations with regard to indigenous peoples. The author argues that the Convention does establish binding legal obligations for the Spanish state, and that the human rights responsibilities could be widened to include other non-state actors, such as Spanish transnational corporations. In doing so, he reviews the international obligations of such multinational companies, then reviews Spanish law with regard to how it covers extraterritorial crimes. He finally presents interlinked arguments for the extraterritorial application of ILO Convention 169 in the Spanish state,

based primarily on the progressive nature of human rights, the nature of the Convention itself, and the commitments that the Spanish state has made.

Introduction

On 15 February 2007, the Spanish state officially ratified ILO Convention No 169 on the rights of indigenous and tribal peoples,[60] which is to date the main international instrument for indigenous rights with binding obligations for those states which have ratified it.

The ratification of this Convention opens important and complex debates around what ratification really means for a state such as the Spanish state, with no indigenous peoples within its borders;[61] in other words, within the scope of its territorial sovereignty and immediate jurisdiction, where the state exerts effective control of its territories and peoples.

The fact that indigenous peoples are the fundamental subject and object of ILO Convention 169 makes us question whether the Convention implies any obligation on the Spanish state, as it is a country that lacks indigenous peoples within its territorial borders; or, does the Convention, due to these circumstances, only possess a moral value for the Spanish state, which could be expressed in the development of practices and policies of solidarity with indigenous peoples and other states, within whose territorial boundaries indigenous peoples can be found?

In this sense, the clearest expression of solidarity would be through policies of development cooperation with countries who have an indigenous population, and through any other foreign policy related to issues affecting these peoples. If this were so, the incidence, intervention and presence of Spanish multinational companies in indigenous territories could not be controlled or regulated by the guarantees of protection of the rights of indigenous peoples granted by the Convention, leaving the activities of these companies uncontrolled. On the other hand, we need to bear in mind the legal possibilities, which the Convention opens for other countries that have indigenous peoples within their territory.

The thesis and fundamental argument the author wishes to defend in this essay is that the Convention does establish legal obligations for the Spanish state as long as it applies to an extraterritorial application of the Convention. The argument is that content and legal obligations established by the Convention are binding on the Spanish state. One of the ways to grant judicial validity to the contents of the Convention

is by appealing for its extraterritorial application. This means that the Convention would have legal obligations outside of the Spanish state borders, for all those Spanish actors—although more specifically Spanish multinational companies—who have some level of activity and intervention within indigenous territories. With the strategy of extraterritorial application of the Convention, the scope of responsibilities in terms of human rights could be widened to include other (Spanish) actors, separate from the state, who, although not acting within Spanish territory, do so in the framework of the possibilities offered by the globalization of capital, in other states and territories, representing and supported by the state itself.

International Law with regard to the responsibility of Multinational Companies (Spanish multinationals)

It is still difficult today to talk about and justify the fact that transnational corporations are considered the subject of rights and obligations and, as a result, responsible for possible violations of human rights. The liability of transnational corporations as a subject who infringe upon these rights is a legal argument, which has not yet been established. The practical application of the criminal responsibilities of corporate entities still generates a lot of problems. These interpretations still require important theoretical elaborations which would allow for a coherent development on the issue, in terms of international law, as much as criminal law. If the attribution of criminal responsibility is difficult and arduous, the level of responsibility as a consequence of the violation of human rights in indigenous territories requires even more qualitative foundations.

The aim of this essay is a legal argument, not an ethical one, in the suggestions it makes and the results it searches for. It aims, therefore, to discuss legal responsibilities, the legal obligation of those who are bound—third parties, multinational companies and states—by the proposal it puts forward: the extraterritorial application of ILO Convention 169. In this sense, it intentionally escapes from the wide spectrum of ethical measures that are currently being proposed on this issue.

The motives behind this legal aim are various. First, the processes of self-regulation by multinational companies have been proposed as measures of replacement, not as complementary measures, to the national and international regulations which already exist. In other words, while multinational companies are voluntarily regulating their areas of action and intervention, this runs in parallel to the existing legal mechanisms, at different levels, which control the actions of actors and subjects regarding human rights. This voluntary, unilateral and

theoretically ethical self-regulation adopted by multinationals, has implied a removal and suspension of the legal regulations which are developed in order to regulate the actions of multinationals. Second, the principle of voluntary self-regulation through the adoption, for example, of social clauses to limit the scope of action of the transnational corporation has entailed, as we have affirmed, a wide deregulation of the existing rules and regulations in terms of human rights. Mechanisms such as corporate social responsibility have resulted in the substitution of existing legal norms by private agreements on the part of businesses, in relation to human rights. The spirit of these regulations lies, as a last resort, on the good will of multinationals to regulate themselves, their effectiveness been subordinate to the needs or necessities of the companies. They have replaced the law—the international law of human rights, among others—with regulations which are not legally binding. In other words, a substitution of public law for private law, which will be applied depending on the good will of the parties involved to adopt an obligation. This has resulted in a serious weakening of the public enforcement capacity over the actions of transnational corporations. Therefore, the public interest, governed until now by law, has been substituted for the private interest: that of the transnational corporations.

Bearing in mind this framework, we will briefly explore the outline of the responsibilities of transnational corporations in the international arena. This way we will be able to better understand the above mentioned difficulties and, from there, the reason behind, and aims of, this essay.

The international regulatory regime, in relation to transnational corporations, is composed of different regulations, guidelines and standards related to each other and disseminated by all the international mandamus. To clarify our perspective, we can differentiate between two types of legal norms relative to multinationals: the first are those orientated to regulate foreign investment, which are of great importance, and which are not always taken into account to evaluate the actual impacts of a project. The second are those which regulate the conduct of multinationals in the development of their commercial activities, those which compromise their activities and work methods. The latter are those that set the behavior of multinational companies in relation to social and environmental impact assessments, an issue which has to be complemented with the analysis of the norms regarding investments as two sides of the same coin.

The regulations regarding investments control the relationships between the home state, the host state and the transnational corporations. Despite the existence of a body of law, which is more clearly identifiable than the one which regulates conduct, there are few instruments in international law which regulate the complete economic relationship, an area in which has the biggest impacts and disputes between the different sides. This would cover, most of the time, a violation of the rights of the people and communities affected by a project. We could say that the legal framework applicable to investments can be found mainly in: a) national legislations; b) a limited set of general standards in international law regarding the protection of investments; c) bilateral treaties of investment between states; d) private agreements between the host state and corporations, which are very opaque in terms of the publicity of conditions and criteria of the investment and of the actions of the corporations.

This precedence shows the scarce development of regulations of these issues in international law, as well as the systematic tendency to private regulations and contracts, which complicates the possibility of supporting and attributing responsibilities to transnational corporations for the violation of human rights. Furthermore, we find ourselves facing the absence of some clear general principles of public international law on this matter. Normally they proceed through so called “state agreements” in which transnational corporations intervene as privileged interlocutors. These processes entail the creation of “stabilizing clauses,” which implicate the annulment or regulation of all of the elements that could pose a conflict or obstacle to the successful development of a project. These may include restrictions on regulations regarding human rights, health and safety at work and the environment. As such they are widely criticized because of the threat to human rights they pose. To this we have to add the tendency to generalize international trade adjudication procedures, as the conflict resolution mechanism, which excludes international human rights law and the possibility of prosecuting for direct violations of rights.

In conclusion, the development of a transnational commercial law behind the back of the demands of public international law has resulted in a regime governing investment, which is radically disjointed from the general standards in terms of the international protection of human rights and the environment; as well as from the parameters of international responsibility which belong to the state in terms of these issues.

In the face of this difficult challenge, legal options have began to emerge in order to slow down, limit or counterpoint the actions of transnational

corporations, and to demand responsibilities for their potential infringements of human rights which derive from these actions. In this context, the claim to consider non-state actors (such as transnational corporations) as subject to international legal obligations is gaining strength.[62]

A quick survey of legal arguments to uphold the argument that transnational corporations are also subjects of obligations within the framework of international human rights law will take us to Articles 28, 29 and 30 of The Universal Declaration of Human Rights. These articles stipulate the necessity to impose collective responsibility in order to achieve the full realization of the rights contained in the Declaration, as well as to consolidate a "social and international order which respects, promotes and develops this order of rights." An extensive and evolutionary interpretation of Article 30 gives us grounds to consider transnational corporations as subjects of legal responsibilities based on the following sentence: "Nothing in this Declaration may be interpreted as implying for any state, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein." An updated interpretation of the concept "group or person," from the point of view of human rights, allows the deduction that legal persons should be considered, especially at this point in time, as subjects of rights and obligations, and therefore, by analogical interpretation, so should transnational corporations. This makes it evident that, in our process of updating the theory, we need to take into account the level of impact and the enormous responsibility that transnational corporations have in terms of the infringement of human rights today.

The subsequent practice of the United Nations, through its General Assembly, was to attempt to institutionalize the use of the term "organs of society" in order to widen the responsibilities in terms of human rights to non-state actors. The instrument that added to this was the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms.[63] This connected with the demands in the Preamble of the Universal Declaration that, although reiterating the primary responsibility of the state in terms of human rights, strongly affirms that individuals, NGOs and other social institutions or bodies, have a mission and a responsibility in the protection of human rights and fundamental freedoms, as well as in the advancement of societies. The Declaration does not exhaustively list the entities, institutions or organisms included in the ambiguous and open notion of "organs of society." Any

legal interpretation, however, should include transnational corporations, given the prominence that these have currently acquired in relation to human rights (or more precisely, in relation to the violation of human rights).

Article 20 of the Declaration reiterates the responsibility of states in terms of human rights, impeding their support or promotion of activities of individuals, groups of individuals, institutions or NGOs, which in any way contradict the Charter of the United Nations. This opens an indirect path, or negative foundation, given that although the main role is not given to transnational corporations, it suggests the intimate triangulation in which all of the activities of transnational corporations are included and made possible: the close and dialectic relationship between the investing state, the host state and the transnational corporation. Thus, the path that allows states to function as enabling platforms for the actions of transnational corporations, whenever this translates into a violation of human rights, is closed. This also settles the concept of the *subsidiary responsibility* of the state for the actions of transnational corporations, which act in its name—developing productive activities of great relevance for state interest—and under the umbrella of its jurisdiction. This is no more than a extension of the obligation of protection which states hold.

The Declaration, therefore, gives us an important clue to enable the consideration of transnational corporations as subjects of responsibilities; it also offers indirect paths, through the special implication and responsibility that states have to prevent violations on the part of transnational corporations, thus affecting the very core of Transnational Commercial Law.

The United Nations Office of the High Commissioner for Human Rights (OHCHR) expresses a similar view in the "Report of the United Nations High Commissioner on Human Rights on the responsibilities of transnational corporations and related business enterprises with regard to human rights."[64]

That report tries to untangle these complex issues, establishing mechanisms in order to detect the space to denounce violations of human rights, which until now, have not been considered by law. For this to happen there has to be a transition from the concept of "responsibilities" to one of "concrete legal obligations." One attempt at this is the proposal of the extraterritorial application of ILO Convention 169 which we have been investigating. The OHCHR has tried to explore further this very argument, to establish the need to assess, in a separate and autonomous manner,

the responsibilities of transnational corporations in relation to their nature and activities. It talks about differentiated "spheres of influence" transnational corporations could exercise, establishing three categories of spheres: responsibility to respect; responsibility to support; responsibility to ensure that they are not accomplices in violations of human rights. This last category reinforces our attempt to establish responsibilities in relation to transnational corporations for their actions in indigenous territories, arguing the corporate complicity in violations of human rights. Therefore, if the criminalization of certain activities implies the categorization of corporate crimes, which exists on certain matters, nothing prevents us doing the same thing in terms of human rights, or the violation of human rights, for concrete actions of transnational corporations. Thus the thick fog, surrounding the issue of transnational corporations as subjects of obligations and responsibilities, is starting to lift.

In the last few years efforts have intensified, on the part of United Nations, to give continuity to these initial, but thought provoking, efforts about the effects of economic and commercial activities by transnational corporations on human rights. In other words, it is creating an analysis of the leading role and responsibility that economical globalization—through actors such as transnational corporations—is having on the infringements of human rights. To advance this, a new mandate was created within the OHCHR on "Human rights and transnational businesses and other businesses enterprises": the United Nations Special Representative of the Secretary General for Business and Human Rights, held by John Ruggie.[65] The Special Representative made public the final report of his investigation of this topic to the Human Rights Council on 3 June 2008.[66] The report aimed to respond to the necessity of creating a new framework of rules, practice and institutions, which define the intersection between business, commercial practice and human rights. The report recognized the peremptory need for such a framework considering that: "markets pose the greatest risks—to society and business itself—when their scope and power far exceed the reach of the institutional underpinnings that allow them to function smoothly."[67] From there he proposed undertaking a diagnosis of the situation of human rights in relation to the actions and dispositions of commercial companies. The methodology consisted in structuring a new categorical framework, based on three clearly defined criteria; the necessity to *protect*, to *respect* and to *remedy* the damages produced by the activities of transnational corporations and other commercial companies.

To be able to comply with the demands proposed by this new conceptual framework, however, a differentiated and autonomous regime of responsibilities was necessary, which enables a better distinction of the subjects responsible for violating rights, as well as the material dimensions of these infringements. In this sense, he talked about the obligation to *protect,* which states have when facing violations of human rights which come from third parties, among which commercial companies are included. He also talked about the *corporate responsibility* that transnational corporations and other commercial companies have in terms of human rights. And, finally, he recognized the necessity to facilitate and *promote access to more effective remedy* for violations of rights, taking into account the different responsibilities of the implicated subjects and the statutes of their implication.

Several conclusions can be derived for our main purpose: the extraterritorial application of the Convention when Spanish transnational corporations are suspect of human rights violations. Firstly, that the report begins to recognize the responsibility of transnational corporations as a result of their actions, establishing, therefore, a content for the concept of corporate responsibility. Secondly, the necessity of fixing a mechanism, a methodology, to break down responsibilities and to establish spheres of responsibility, both autonomous and differentiated, according to its subjects and actions. All this provides clear arguments to understand the responsibilities of transnational corporations for human rights violations, thus justifying the tactical utilization of the extraterritorial applicability of ILO Convention 169 in the case of Spain.

Extraterritoriality in the Spanish legal framework: an analysis of the postulates of the Judiciary Act

An important area of difficulties is related to the nature of extraterritoriality itself. The conflict is already planted within Spanish law when we interrogate the "extraterritoriality of criminal law."[68] The problem there resides within the reasonableness of the obligations, which allow the attribution of criminal competence to a national jurisdictional entity. What a foundation in law demands, however, is that these reasons are in keeping with the Spanish jurisdiction for criminal offences committed outside of its territory and sovereignty. The Spanish state guides itself by the principle of nationality, establishing an enduring link between its nationals and its laws, wherever they are, for the prolongation of the protection of the state over its nationals. From here, the Act of Parliament Governing the Judiciary (Judiciary Act), in Article 23, establishes three obligations

which justify the comprehension of extraterritoriality: a) the nationality of the active perpetrator of the offence (23.2); b) the protection of national interests (23.3); c) the achievement of universal justice (23.4). The first obligation locates the *personal principle*. In other words, it determines who is the active perpetrator of the offence, when it comes to the complementary principle of territoriality. The second is the *real principle or principle of protection,* which relates to the interests to protect. The third narrates *the principle of universal justice,* justified by the principle of universal solidarity, which is embedded within the doctrine of human rights.[69]

These obligations, restrictive and strictly valued in our Judiciary Act, can offer sufficient motives to support the extraterritoriality of Convention 169, as we will see later on in this essay. It would however demand an extensive and open interpretation in which certain types of offences can be identified *with and as* violations of human rights in indigenous territories; in other words, we need to redirect the extraterritoriality of criminal law, dragging it to our own area of interest, to interpret the violations of the human rights contained within the Convention, hence giving foundations to the criteria of extraterritoriality. This would imply redirecting the concept of universal justice, such as is stipulated in the Judiciary Act, to go beyond the rigid valuation established by the Judiciary Act, through an open and additional foundation with the rights of indigenous peoples contained within the Convention, ratified by the Spanish state.

To achieve these aims, it will be necessary to widen the concept of jurisdiction as applied in Spanish law, to allow us, in an unequivocal and objective way, an extraterritorial interpretation of the law, in general, and of the legislation focused on human rights, in particular.[70] The determination of jurisdiction in terms of the spatial connection between a state and its territory is now a longstanding legal tradition: it is that vital space which corresponds to a state, enclosed by rigidly established sovereign borders. Therefore, jurisdiction means sovereign and effective control of national territory. This is the sense used by the International Court of Justice in many decisions where extraterritoriality has been implied, such as in the case of Nicaragua. Or that which international humanitarian law has been using to express a relation of dependence, of effective control of territory, of some parties above others. Or that are established by many human rights treaties and agreements, where the term jurisdiction denotes mainly the power that the state exerts over its territory and inhabitants in a way that, only when the state assumes this power of control, is it plausible to

comply with the obligation to respect and ensure the rights of all people and all groups within its jurisdiction.[71]

From there, to think in a juridical way about extraterritoriality means to propose a different consideration of the jurisdiction, which transcends the mere control of a territorial area.[72] This is the logic of trans-state solidarity, which drives the concept of universal justice contained within our Judicial Act. It is also the progressive logic which drives international human rights law, starting with some of its Conventions and Covenants, such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, applied and exercised through the Committee against Torture, which has implications in any territory under its jurisdiction, establishing a certain legal competence with the states that it will be necessary to distinguish and demarcate before the obligations of this instrument come into play. It is the same for the International Covenant on Economic, Social and Cultural Rights (ICESR), through the Committee on Economic, Social and Cultural Rights (CESCR) in which cooperative extraterritoriality between states constitutes a fundamental starting point to understand all the rights contained in the pact and the way to implement and guarantee them. Extraterritoriality, in terms of cooperative solidarity, understood as "working together," constitutes the basis of interpretation of the (ICESR), such as is derived in Articles such as 2.1, 11, 22 and 23; or the General Observations from the CESCR, such as 2, 8, 12 and 14.[73] Similar reflections could be made of the American Convention of Human Rights and the Convention on the Rights of the Child through its Optional Protocol, in relation to the sale of children, child prostitution and the use of children in pornography.

Material basis for an extraterritorial application of the Convention in the Spanish state

When we talk about a material basis we mean the empowering opinions, which would permit and guarantee an extraterritorial application of the Convention. In this section we will structure what we consider the main arguments to make the thesis we are proposing here plausible.

1. Firstly, it is imperative that we prolong the logic and demands of the *pro homine* principle, such as is understood and applied within the framework of human rights. This urges us to always look for the most favorable and progressive interpretation of the rights, that which can be used in relation with the contexts which we work with; specifically in our case, with

indigenous peoples. In this sense, an evolutionary and open interpretation of the rights of indigenous peoples, and of the contexts in which they are realized in a practical and legal sense—consider the situation of a state such as the Spanish state, which does not have indigenous peoples within its borders—takes us, through the demands of pro homine, to an extraterritorial application of the Convention, with the aim of avoiding it to be meaningless or not implemented in its fundamental content and in the recognition of the most basic rights which the Convention contains. The pro homine principle helps us to give tangible content to the Convention in the face of an absence of material subject and object in the territory of the Spanish state, that is to say, in the face of the absence of indigenous peoples. The necessary mediation, instrumental for making the fundamental elements of the Convention effective, is extraterritoriality. Extraterritoriality works, furthermore, as a procedure, as a formal element necessary for the application of the material content of the Convention.

The pro homine principle allows us to infer some more elements to support the proposal for an extraterritorial application of the Convention. This principle helps us to focus on and situate, in the center of the analysis, *those actors* which today prove enormously problematic in terms of the rights of indigenous peoples. Conducting an analysis of indigenous territorial contexts and rights, we can deduce that transnational corporations emerge as symptomatically problematic actors for the protection, preservation and development of indigenous rights. This diagnosis is much more pertinent today than when the Convention was first drawn up. As a result, propelled by the demands of the pro homine principle, a focus on rights, from an indigenous perspective, such as that assumed in the Convention, would take us to an update of the rights and obligations in relation to these peoples. This implies, logically, the reconsideration of the implicated actors and of the obligations and responsibilities, which are incumbent on them. Therefore, in the face of the ongoing major violations of rights in indigenous territories,[74] and applying the pro homine principle, it is a demand that non-state actors are introduced to the nominee list of subjects who are considered responsible for actions resulting in an infringement of the rights of indigenous persons and communities. There has been a widening of real demands in the field of human rights in relation to indigenous peoples because of the evolutionary and open interpretation of human rights law. Among them is the consideration of transnational corporations as subjects obliged and affected by the rights of indigenous peoples.

Finally, the interpretation of the pro homine principle, from an open and contextual perspective, takes us, furthermore, to a reinterpretation of the contents of Spanish domestic law and, more specifically, the Act of Parliament Governing the Judiciary (Judiciary Act), to be able to adjust our proposal and so that it can come to produce satisfactory results. The Spanish state must take all necessary measures to also prevent violations of human rights committed by non-state actors, of those which the state is responsible in the first and last instance.[75] It also concerns the breaking down of the formal rigidity of the Judiciary Act, increasing the enabling interpretations, which would allow us to operate under the umbrella term of universal justice to proceed with an extraterritorial application of the Convention. Let us clarify.

The Judiciary Act, in Article 23.4, picks up the principle of universal justice in terms of constitutional development of the value of justice recognized within the Spanish Constitution in Article 1.1. This abstract recognition of the value of "justice" is developed and concretely specified by the Judiciary Act in this article, through the recognition of "universal justice," which implies the necessary extraterritorial application of the law. In other words, the possibility of prosecuting offences, recognized as such by Spanish domestic law, outside of Spanish borders. With this it is implicitly recognized that the development of standards in International Human Rights Law complements Spanish domestic legislation and would fit, therefore, with an extraterritorial application of this legislation as demanded by the constitutional value of justice.[76]

In this sense, and as a counterpart for international human rights law, we have available ILO Convention 169, recently ratified by the Spanish state. The Convention, from the moment of its ratification, has legal value and internally binds the Spanish state in terms of the contents of the Convention. The controversial issue is the extent to which it should be internally applied. In this sense the strategy of an extraterritorial application of the Convention is fundamental so as not to produce a vacuum in the protection of the rights of indigenous peoples, as a result of actions by Spanish non-state actors in indigenous territories. The Spanish state is responsible, therefore, for complying with the obligations of the Convention, which demands active intervention in order to meet the obligations to respect, protect, comply with and guarantee its contents, producing, furthermore, *erga omnes* obligations.[77] In order to achieve the aforementioned aim, the extraterritorial application of the Convention in relation to the actions of Spanish transnational corporations is undeniably necessary.

As has already been expressed, Spanish domestic law, through the Judiciary Act in Article 23.4, establishes, abstractly, a connection between offences which are recognized within Spanish criminal law and international human rights law, among whose regulatory body, with a binding character for the Spanish state, the Convention would have to be included. Article 23.4 states:

> "Equally, Spanish jurisdiction would be competent to know the acts committed by Spaniards or foreigners outside of national territory who are susceptible to categorization, according to Spanish criminal law, as one of the following offences: a) *Genocide*; b) Terrorism; c) Piracy or the illicit seizure of airliners; d) Counterfeiting foreign currency; f) Offences related to prostitution and the corruption of minors or disabled people; g) Illegal trafficking of psychotropic, toxic and narcotic drugs; h) Illegal trafficking or smuggling of people, workers or otherwise; i) Those involved in Female Genital Mutilation, where those responsible are found in Spain; j) ***and other which, according to international treaties and agreements, should be persecuted in Spain"***

This connection, which locates the Convention at the core of the law, is made, specifically in Article 23.4, sections a) and j). In those sections genocide is referred to, directly implicating the Convention on the Prevention and Punishment of the Crime of Genocide, an offence, which has structurally and materially affected indigenous peoples, a practice, which has occurred cruelly and widely along the length and breadth of Latin America.

Article 23.4 j) also refers, as a residual and closing clause, to any other offences, which according to international treaties and agreement, should be prosecuted in Spain. This implicates all the standards offered by the international human rights law, in terms of complementing and strengthening Spanish domestic law, especially in terms of the protection and guarantee of human rights.

This is facilitated by the final wording of this clause, when it states "should be persecuted in Spain." It is here that an evolutionary and open interpretation of rights should be situated at the center of the argument. It is precisely as a result of this, the progressive character assumed in texts of human rights in domestic state legislation, that the Spanish state has also ratified the Convention. Its ratification is related to the necessity to give fundamental strength to its contents, which responds perfectly with the maxim of the article when it states "should be persecuted by Spain." In

order to correctly fulfill the value of justice, an extraterritorial application of the Convention becomes necessary, enabled, as we have seen, through an extensive interpretation of the regulations within Spanish domestic law.

The content of Convention 169, through Articles 2, 3, 4 and 34, links up with the already developed requirements of the Judiciary Act. Consequently, there is a complementarity established within Spanish domestic law and international treaties. Article 34 of the Convention works as an interpretative criteria to understand the integration of the Convention within domestic law, supporting itself in the possibilities granted by universal justice. This article demands that the measures adopted by states to make the Convention effective "should be established with flexibility, taking into consideration the conditions of the country." This ratifies the thesis that the author has been setting out in order to support and validate the extraterritorial application of the Convention: on the one hand, the demand for an open and flexible interpretation, enabled and reinforced by the principle pro homine; on the other hand, the analysis of rights based on the contexts, which concern and implicate states. From this point, extraterritoriality is applied as the most important medium through which the demands of Article 34 can be met.

Article 2.1 of the Convention states that governments "shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity." As part of this strategy to comply with the mandate of Article 2.1, extraterritoriality is a necessary mechanism to achieve better and more effective protection and guarantee of indigenous rights.

Article 3.1 states: "Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination." From the point of view adopted throughout this essay, extraterritoriality is understood as an anti-discriminatory element in relation to the totality of indigenous peoples. In other words, it is used as a necessary instrument to limit the impacts of the actions of the Spanish corporations in indigenous territories, a matter which, if not addressed, could be interpreted as a discriminatory element which violates indigenous rights and favours the business interests of corporations.

The active implication of the Spanish state in the limitation and reduction of any form or expression of discrimination is a requirement arising from the Convention. This is even more apparent in Article 3.2: "No form of force or coercion shall be used in violation of the human rights and fundamental freedoms of the peoples concerned, including the rights

contained in this Convention." The lack of limitation in terms of the activities of the Spanish multinationals in indigenous territory constitutes an exertion of force and intolerable violence from a human rights based perspective.

To this we would have to add two further arguments:

1. On the one hand, the obligations which emanate from the Constitution of the ILO, expressed, in relation to our subject matter, in Article 19 (5) (d), in which State Parties under an international labor agreement, "would adopt the measures necessary to make the regulations of said Convention effective." From this statement, together with the text of the Convention, we can deduce that states have legal obligations in relation to it, and that extraterritoriality constitutes an important means to adopt "the necessary measures" to render the regulations of the Convention effective. To contextualize the obligations of the Convention within the specific and concrete situation of each country is a demand which acts as an indicator, as an expression of the main problems which each state encounters in terms of indigenous peoples' rights. It is significant, in this sense, the difficulties which Spanish corporations are having in complying with the demands of the Convention. Consequently, it is the obligation of the state to assume all the necessary measures to achieve effectiveness in terms of the Convention, and extraterritoriality is a means among many.

2. A second argument is related to the practices and positions, which the Spanish state has adopted in relation to indigenous peoples' rights in the international arena. Today, the Convention is no longer the only international text in force regarding indigenous people's rights. In parallel with the ratification of the Convention by the Spanish state, the United Nations Declaration on the Rights of Indigenous Peoples also came into effect, adopted by the General Assembly, with Spain voting for it, and indeed having played an active part in the group of states who sponsored the Declaration. The Declaration recognizes, in Article 42, the special role which the entire international community plays in the promotion and protection of indigenous people's rights in the world, affirming that "The United Nations, its bodies…and specialized agencies…and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration."[78]

Therefore, not only are the obligations of the Spanish state in relation to the Convention ratified, but as a consequence of the Declaration coming into effect, whose articles go significantly deeper than the Convention in terms of indigenous rights, they are energetically reinforced. This same argument, of reinforcement of legal obligations makes the extraterritorial

application of this text even more plausible as a necessary means to comply with the demands of the Declaration as well.

Throughout this analysis the *remedial* character of the Convention, in terms of indigenous rights, becomes clear. It is, precisely, the relative demand of these rights, or the denial of them, which defines the field of application of the regulations relative to indigenous peoples, and more specifically, as we have been establishing, these obligations in relation to the Convention. It is the violations of indigenous peoples' rights, which have summoned us to establish a connection between the proceedings of universal justice and the Universal Declaration on Human Rights. Due to the fact that Convention 169 constitutes the main regulatory instrument relating directly to indigenous peoples' rights, and given the recent ratification of this text by the Spanish state, the author infers the necessity of the extraterritorial application of the Convention as a remedial measure to implement when faced with the violation of rights in indigenous territories by Spanish corporations.

3. Lastly, a final argument which supports the thesis of the extraterritorial application of the Convention would be the progressive integration of human rights into the foreign policy of the Spanish state, as much in a general sense as in relation to indigenous peoples' rights. The efforts made, as well as the deep compromise of the Spanish state in the policies of cooperation with indigenous peoples has been expressed through the *Spanish Strategy* for *Cooperation with Indigenous Peoples* (ECEPI). This is a strategy, which although passed in 2006, was elaborated in parallel to the process of the ratification of the Convention.

The Sectoral Strategy, as the main instrument of planning in relation to all cooperative action aimed at working with indigenous peoples, fully assumes the principles and rights of the Convention, including the right of self identification of indigenous peoples; the recognition of the special link between the indigenous cultures and indigenous land; the right to "self development" and the right to participate in decisions which affect them, within the framework of a "focus based…on the recognition of rights."[79] The Strategy goes further than the Convention in recognizing as a general principle, in line with the UN Declaration on the Rights of Indigenous Peoples, the right to free, prior, informed consent, which "includes the right to reject proposals for projects and activities of development cooperation, or of any other kind, particularly when they affect their land and territory."[80] The Sectoral Strategy actively promotes the rights recognized in the Convention, including the "full and effective" participation of indigenous peoples in decision making processes; the development of capacity of the

authorities of indigenous organizations and institutions, and the protection of indigenous territories and cultures.[81]

Consequently, the Spanish state, in relation to indigenous peoples' rights, has proceeded assuming a structural compromise reflected in different actions as different times, all pointing to the same objective. In the first place, the Spanish state accepted the commitment and the challenge of ratifying ILO Convention 169. Later, it has worked intensively within the framework of the UN for the adoption of the UN Declaration on the Rights of Indigenous Peoples. Finally, it has reflected its commitment in its foreign policy, which has been translated into the elaboration of the *Spanish Strategy* for *Cooperation with Indigenous Peoples*.

Therefore, conscious of the problems which are caused by the presence of Spanish corporations in indigenous territory, and the framework of strategic action which the Spanish state has developed during the last few years, it is necessary to assume the extraterritorial application of international treaties and conventions concerning human rights as a necessary condition in order to be able to implement the aforementioned commitments in terms of human rights and, more specifically, the commitment of the Spanish state to the fulfillment and realization of the rights of indigenous peoples through ILO Convention 169.

Endnotes

[1] United Nations, 2009, State of the World's Indigenous Peoples, ST/ESA/328, pp. 1-2, http://www.galdu.org/govat/doc/sowip.pdf.

[2] UN Permanent Forum on Indigenous Issues – http://social.un.org/index/IndigenousPeoples.aspx; IWGIA, 2003, "The Permanent Forum for Indigenous Peoples: The struggle for a new partnership." http://www.iwgia.org/iwgia_files_publications_files/PermanentForum.pdf.

[3] EMRIP, 2012, "Follow-up report on indigenous peoples and the right to participate in decision-making, with a focus on extractive industries." Report to the twenty first session of the Human Rights Council, 16 August, A/HRC/21/55.

[4] UN Expert Mechanism on the Rights of Indigenous Peoples - http://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/EMRIPIndex.aspx.

[5] S. J. Anaya, 2012, "Report of the Special Rapporteur on the rights of indigenous peoples to the twenty first session of the Human Rights Council." 6 July, A/HRC/21/47, particularly paragraphs 79-81.

[6] UN Special Rapporteur on the Rights of Indigenous Peoples – http://www.ohchr.org/EN/Issues/IPeoples/SRIndigenousPeoples/Pages/

SRIPeoplesIndex.aspx; http://unsr.jamesanaya.org/; IWGIA: The Special Rapporteur, Experiences and Challenges, 2007 - http://www.iwgia.org/iwgia_files_publications_files/UN_Special_Rapporteur.pdf. To contact the Special Rapporteur email: indigenous@ohchr.org.

[7] United Nations Voluntary Fund for Indigenous Populations - http://www.ohchr.org/EN/Issues/IPeoples/IPeoplesFund/Pages/IPeoplesFundIndex.aspx.

[8] UN Human Rights Bodies – http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx; "A good resource for the whole of the UN Human Rights system is the United Nations publication Working with the United Nations Human Rights Programme: A Handbook for Civil Society." 2008 - http://www.ohchr.org/EN/AboutUs/CivilSociety/Pages/Handbook.aspx.

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[10] UN Universal Periodic Review – http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx; FIDH, 2009, "The Universal Periodic Review Handbook." 6 August - http://www.fidh.org/IMG/pdf/UPR_HANDBOOK.pdf.

[11] UN Special Procedures - http://www.ohchr.org/EN/HRBodies/SP/Pages/Themes.aspx.

[12] UN Working Group on the issue of human rights and transnational corporations and other business enterprises - http://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx.

[13] The full list of Treaty bodies is: Human Rights Committee (CCPR), Committee on Economic, Social and Cultural Rights (CESCR), Committee on the Elimination of Racial Discrimination (CERD), Committee on the Elimination of Discrimination against Women (CEDAW), Committee against Torture (CAT), Subcommittee on Prevention of Torture (SPT), Committee on the Rights of the Child (CRC), Committee on Migrant Workers (CMW), Committee on the Rights of Persons with Disabilities (CRPD), Committee on Enforced Disappearances (CED).

[14] CESCR Concluding Observations on Ecuador, 32nd session, 26 April–14 May 2004, E/C.12/1/Add.100, paras 12 and 35; CESCR Concluding Observations on Colombia, 27th session, 12–30 November 2001, E/C.12/1/Add.74, paras 12 and 33, quoted in C. Doyle, 2011, "The Requirement to Obtain FPIC: Natural Evolution or Groundbreaking Development?" Reflections on the UN Declaration on the Rights of Indigenous Peoples, Oxford, p. 7.

[15] Human Rights Committee, *Poma Poma v Peru* (n 55) Paras 7.6 and 7.4.

[16] CERD, General Comment XXIII (n 30). See also CERD, Concluding Observations on Ecuador, 2003, CERD/C/62/CO/2: 'as to the exploita-

tion of subsoil resources located subjacent to the traditional lands of indigenous communities the Committee observes that mere consultation of these communities prior to exploitation falls short of meeting the requirements set out in General Comment XXIII on the Rights of Indigenous Peoples. The Committee therefore recommends that the prior informed consent of these communities be sought', quoted in C. Doyle, 2011, "The Requirement to Obtain FPIC: Natural Evolution or Groundbreaking Development?" Reflections on the UN Declaration on the Rights of Indigenous Peoples, Oxford, p. 7.

[17] http://www2.ohchr.org/english/bodies/cerd/early-warning.htm; recommendations with regard to transnational corporations have been made to Canada, Norway, United States of America & United Kingdom – see for example, Concluding observations to Canada, CERD/C/CAN/CO/18 25 May 2007, para 17.

[18] International Indian Treaty Council, 2008, "Consolidated Indigenous Shadow Report to UNCERD." 8 February.

[19] Update to CERD on Early Warning/Urgent Action 1(68) & Concluding Observations 6 (72) (U.S.), August 2008, http://www.wsdp.org/uploads/5/3/9/0/5390400/aug_2009_cerd_update.pdf.

[20] ILO Convention 107 - http://www.ilo.org/ilolex/english/convdisp1.htm.

[21] G. Bennett, n.d. "Aboriginal Rights in International Law." Occasional Paper No. 37, 1978, Royal Anthropological Institute of Great Britain and Ireland, London.

[22] ILO Convention 169 – http://www.ilo.org/indigenous/Conventions/no169/lang—en/index.htm; See also the training tool box on Convention 169 at http://pro169.org/.

[23] ILO Convention 169 (1989) Art 6. Art 15 requires consultation in the context of exploration or exploitation of subsoil resources.

[24] Article 6 which deals with this issue, except in the case of voluntary displacement, only talks about the duty to consultation, as opposed to consent. Although it talks about consultation with a view to agreement, which implies some consent, it is still viewed as weaker than Article 32 of the UN Declaration.

[25] At the time of writing, the Convention has been ratified by a total of 20 states, the majority Latin American. Today the list of ratifications of the Convention is composed of the following countries: Argentina, Bolivia, Brazil, Central African Republic, Chile, Colombia, Costa Rica, Denmark, Dominica, Ecuador, Fiji, Guatemala, Honduras, Mexico, Nepal, Netherlands, Nicaragua, Norway, Paraguay, Peru, Spain, and Venezuela.

[26] ILO, 2007, "Eliminating discrimination against indigenous and tribal peoples in employment and occupation: A guide to ILO Convention No. 111." http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---

normes/documents/publication/wcms_097727.pdf.

[27] ILO, 2003, "ILO Convention on Indigenous Peoples and Tribal Peoples (No 169): A manual."

[28] Mines & Communities, 2011, "Guatemala: why doesn't the government close Marlin down?" 14 June, http://www.minesandcommunities.org/article.php?a=10987.

[29] Marianne Voss and Emily Greenspan, 2012, "Community Consent Index: Oil, Gas and Mining Company Public Positions on Free, Prior, and Informed Consent (FPIC)." Oxfam America, September, http://www.oxfamamerica.org/files/community-consent-index_final-1.pdf.

[30] The UN Global Compact – www.unglobalcompact.org/AboutTheGC/index.html; Mines & Communities, 2007, "Global Compact fails to stop corporate human rights violations, says ActionAid." 4 July 2007, http://www.minesandcommunities.org//article.php?a=6587; Mines & Communities, 2005, "Three mining multinationals companies are among a dozen companies which allegedly violate the United." 31 October, http://www.minesandcommunities.org//article.php?a=6668.

[31] J. Ruggie, 2011, "Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises." Human Rights Council, A/HRC/17/31, 21 March - http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf.

[32] *Ibid*.

[33] Mines & Communities, 2010, "International rights body calls for suspension of Goldcorp mine." 29 May, http://www.minesandcommunities.org/article.php?a=10136.

[34] The Voluntary Principles on Security+Human Rights - http://www.voluntaryprinciples.org/.

[35] Global Reporting Initiative – https://www.globalreporting.org/Pages/default.aspx; R. Moody, 2007, *Rocks and Hard Places: The Globalization of Mining*. Zed Books.

[36] Mines & Communities, 2011, "The Kimberley Process and its gaping holes." 10 October, http://www.minesandcommunities.org/article.php?a=11234; Mines & Communities, 2011, "Campaign Group pulls out of 'failing' Blood Diamonds scheme." 12 December, http://www.minesandcommunities.org/article.php?a=11361.

[37] World Gold Council, http://www.gold.org/; No Dirty Gold, http://www.nodirtygold.org/home.cfm, Initiative for Responsible Mining Assurance (IRMA), http://www.responsiblemining.net/.

[38] Bank Information Center - http://www.bicusa.org/.

[39] Compliance Advisor Ombudsman – http://www.cao-ombudsman.org/; Compliance Advisor Ombudsman, CAO Operational Guidelines, p. 11, http://www.cao-ombudsman.org/howwework/compliance/documents/

EnglishCAOGuidelines06.08.07Web.pdf.

[40] In February 2012, of 20 projects with open cases at the CAO, the IFC's accountability mechanism, nearly a third were from extractive projects - "The World Bank and extractives: a rich seam of controversy." 2012. Bretton Woods Project newsletter, 7 February, http://www.brettonwoodsproject.org/art-569560.

[41] International Federation for Human Rights (FIDH), 2012, "Corporate Accountability and Human Rights Abuses - A Guide for Victims and NGOs on Recourse Mechanisms." pp. 415-423 – http://www.fidh.org/Updated-version-Corporate; http://www.cao-ombudsman.org/howwework/filecomplaint/.

[42] Inspection Panel http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,menuPK:64132057~pagePK:64130364~piPK:64132056~theSitePK:380794,00.html.

[43] International Federation for Human Rights (FIDH), 2012, "Corporate Accountability and Human Rights Abuses - A Guide for Victims and NGOs on Recourse Mechanisms." pp. 407-414 - http://www.fidh.org/Updated-version-Corporate.

[44] About the ICIM - http://www.iadb.org/en/mici/independent-consultation-and-investigation-mechanism-icim,1752.html.

[45] Independent Review Mechanism - http://www.afdb.org/en/about-us/structure/independent-review-mechanism/; Operating Rules and Procedures - http://www.afdb.org/fileadmin/uploads/afdb/Documents/Compliance-Review/IRM%20Operating%20Rules%20and%20Procedures%20-%2016%20June%202010.pdf.

[46] Accountability Mechanism - http://www.adb.org/site/accountability-mechanism/main.

[47] The EIB Complaints Mechanism - http://www.eib.org/about/cr/complaints/index.htm.

[48] Project Complaint Mechanism: Addressing problems about EBRD-financed projects - http://www.ebrd.com/downloads/integrity/pcm.pdf.

[49] International Federation for Human Rights (FIDH), 2012, "Corporate Accountability and Human Rights Abuses - A Guide for Victims and NGOs on Recourse Mechanisms." pp. 466-478 - http://www.fidh.org/Updated-version-Corporate.

[50] International Federation for Human Rights (FIDH), 2012, "Corporate Accountability and Human Rights Abuses - A Guide for Victims and NGOs on Recourse Mechanisms." pp. 479-484 - http://www.fidh.org/Updated-version-Corporate; A list of participating banks can be viewed at: http://www.equator-principles.com/index.php/members-reporting/members-and-reporting.

[51] Public Release - The Equator Principles (EP III) Draft - http://www.equator-principles.com/index.php/ep3/about-ep3. (accessed 31 August

2012).

[52] BankTrack, http://www.banktrack.org/show/pages/contact_us.

[53] OECD Guidelines for Multinational Enterprises, http://www.oecd.org/investment/investmentpolicy/48004323.pdf.

[54] OECD Watch - http://oecdwatch.org/.

[55] Mines & Communities, 2010, "UK government finds Vedanta in major breach of trust." 13 October, http://www.minesandcommunities.org//article.php?a=9543.

[56] Mines & Communities, 2012, "Philippines: Intex Resources Found in Breach of International Guidelines." 5 December, http://www.minesandcommunities.org//article.php?a=11343.

[57] 2011 Update of the OECD Guidelines for Multinational Enterprises, http://www.oecd.org/investment/investmentpolicy/48004323.pdf.

[58] 2011 Update of the OECD Guidelines for Multinational Enterprises, http://www.oecd.org/investment/investmentpolicy/48004323.pdf.

[59] Professor of Constitutional Law at the University of Girona. He has been Coordinator of the Project for Training Latin American indigenous representatives which the Universidad de Deusto (Bilbao) has jointly conducted with the Office of the High Commissioner for Human Rights in Geneva. He has published many publications about human rights and indigenous peoples' rights.

[60] At the time of writing, the Convention has been ratified by a total of 20 states, the majority Latin American. Today the list of ratifications of the Convention is composed of the following countries: Argentina, Bolivia, Brazil, Central African Republic, Chile, Colombia, Costa Rica, Denmark, Dominica, Ecuador, Fiji, Guatemala, Honduras, Mexico, Nepal, Netherlands, Nicaragua, Norway, Paraguay, Peru, Spain, and Venezuela.

[61] Together with the Spanish State, the Netherlands and two other European states, Norway and Denmark are part of the Convention. The latter two countires each havean indigenous population. For our question, the former two share the problem that we hope to outline because they lack indigenous peoples within their borders and sovereign territories.

[62] P. Alston 2005, p. 15.

[63] Resolution 53/144, 8 March 1999.

[64] E/CN.4/2005/91, 15 February 2005, paragraph 29.

[65] Through Resolution 2005/69, 20 April 2005. Available at: http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2005-69.doc.

[66] "Protect, Respect and Remedy: A Framework for Business and Human Rights." A/HRC/8/5, 7 April 2008. Available at: http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf.

[67] Op. cit., p. 2.

[68] AA.VV. 1989-1990, pp. 1273-1305.; A.M. Sanz Hermida 1999, pp. 125-140; H.H. Jechek 1993.

[69] An assessment, together with the practice, of European states in the application of the principle of universal jurisdiction, from a human rights based focus, can be found in Human Rights Watch, Universal Jurisdiction in Europe. The State of the Art (Vol. 18, num. 5[D]), June 2006. Online: http://www.hrw.org/sites/default/files/reports/ij0606web.pdf.

[70] "Given that the jurisdiction intervenes precisely in presence of violations of law and, consequently, the more this increases, with the obligations and prohibitions imposed on public power, the more the area of possible illegalities expands, given that they are not only those committed by common citizens but also, more and more, those commit by people in positions of power" - L. Ferrajoli 2008, p. 208.

[71] M. Milanovic 2008; A. Parrish 2008.

[72] G. Ress 2002; J. Ross 2004, pp. 23-24; E. C. Gillard 2004, pp. 25-37; M. Happold 2003; R. Wilde 2005; R. Wilde 2007,p. 504-526; J. Cerone 2005; M. Milanovic 2008.

[73] Clearly denoted, in this respect, is General Observation 12, The Right to Adequate Food, Doc. UN E/C.12/1999/5, 12 May 1999, paragraph 20, when it states: "While only States are parties to the Covenant and are thus ultimately accountable for compliance with it, all members of society—individuals, families, local communities, non-governmental organizations, civil society organizations, as well as the private business sector—have responsibilities in the realization of the right to adequate food. "

[74] Compare with the official literature, in the the reports of the Special Rapporteur on the Situation of the Human Rights and Fundamental Freedoms of Indigenous Peoples. From this we can deduce that indigenous peoples are, systematically exposed to infringements of rights, in the different forms as a result of the globalisation of capital. See: http://www2.ohchr.org/spanish/issues/indigenous/rapporteur/.

[75] A. Reinische 2005, p. 79. The Inter-American System of Human Rights is much more explicit and detailed in establishing these international obligations in the state, when talking about the obligation to act with due diligence before, and for actions by, third parties and other non-state actors. It also redefines the obligation on the part of the state, with regard to human rights violations by other actors, to investigate and of redress. As an extension and analogy of the perceived contents in the human rights system of the OAS, which would function as general principles of human rights, we could mention similar principles in other regional arenas, such as the European one, on the protection of human rights.

[76] The sentence of the Constitutional Tribunal -STC 237/2005, imposed against the STS on the 2 February 2003, is where they faced up to, for the first time, in a direct and exhaustive manner, the question of "universal jurisdiction" in the Spanish state. The Constitutional Tribunal establishes a series of general criteria to proceed with the application of the principle of universal jurisdiction in connection with the offence of genocide. It establishes that the application of this principle of universal jurisdiction is conditioned to the existence and location of "links of connections," which can be: the presence of the guilty party, of a genocide offence, in Spanish territory; the Spanish nationality of the victims; or the existence of another direct connection with international interests. In relation to Spanish multinational companies in indigenous territories, the point of direct connection can be found in the Spanish nationality of the companies which operate in these countries; as well as the general interests of the Spanish state, which it can demonstrate towards said territories. These interests are developed and executed in a privileged manner through the actions of Spanish companies. Having demonstrated the existence of some "point of connection," the Constitutional Tribunal proceeds to establish an absolute consideration of the principle of universal jurisdiction, with the only limit being if the perpetrator of the offence hasn't been absolved, pardoned of punished abroad for the same offence. All of this constitutes an invaluable legal argument for an extraterritorial application of the Convention.

[77] As has been incisively established by Clapham "the International Court of Justice asserted in the Barcelona traction case that certain basic human rights give rise to international obligations owed by States to all other States which the Court characterized as *erga omnes* obligations (…) The erga omnes concept explains which human rights violations are capable of giving rise to a separate right for a state to complain about the violating state's breaches of its obligations concerning these basic rights." See A. Clapham 2006, pp. 96-97. In a complementary sense, Professor Cançado Trindade has established that erga omnes obligations refer to and define all entities and individuals, including businesses and commercial societies. See Inter-American Court of Human Rights, *Sarayaku v Ecuador*, 17 June 2005, Opinion of the Judge Cançado Trindade, paragraph 20. Similar to the Inter-American Court of Human Rights, in his Advisory Opinion 18, he establishes: " (…) the States, being, or not, part of a determined international treaty, are obliged to protect those rights of equality and non-discrimination and that this obligation has *erga omnes* effects, not only in terms of State, but also in terms of third and private parties" (our own italics).

[78] DDPI, Art. 42.

[79] ECEPI 2006, pp. 19-20.

[80] *Ibid*., p. 20.

[81] *Ibid*., pp. 23-24.

Chapter 2.8

Importance of Free, Prior and Informed Consent

"To put an end to these dynamics of destruction and violence, the international community—particularly international investors—must, first and foremost, recognize indigenous communities' basic rights to chart their own development paths, to manage their own resources, to pursue their traditional livelihoods and cultures, and to say 'no' to multinational operations on their lands. The failure to respect communities' basic right to 'just say no' exists at the heart of the nexus of human rights violations, environmental degradation and conflict."

- John Rumbiak, West Papuan activist[1]

Having looked at the previous chapters it will be obvious that there is a fundamental thread running through this publication. That is the importance for indigenous peoples of the right of free, prior and informed consent (FPIC) in the

context of extractive industry projects. FPIC is central to indigenous peoples' exercise of their right of self-determination, with respect to developments affecting their lands, territories and natural resources. A short summary of the concept is that it is the right of indigenous peoples to give or withhold their free, prior and informed consent in non-coercive negotiations prior to operations being established and developed on their customary lands.

This evolving human rights norm is essentially the starting point for all potential impacts on indigenous peoples. Although this book reviews many of the contexts it appears in, the fundamental reference point is in the 2007 UN Declaration on the Rights of Indigenous Peoples (UNDRIP). One of the sessions of the 2009 Manila Conference was dedicated to the issue, but FPIC permeated every session and workshop, featuring heavily in the final conference statement, the Manila Declaration.

Reviewing the publication, the issue of FPIC arose in Chapter 2.1, in the discussion of communities creating their own protocols for implementing FPIC, and in the various ways that communities have sought to implement their own versions of FPIC, including referenda and within the context of No Go Zones. In Chapter 2.2, FPIC was raised in the context of where it is present, or not in national legislations, and how it can still be undermined in those circumstances. Chapter 2.3 reviewed the implementation of FPIC by the World Bank and other international financial institutions, as well as how some companies were avoiding fully implementing FPIC in practice.

Chapter 2.4 concentrated on the issue of power imbalances when implementing FPIC, between indigenous communities on one side, and companies and governments on the other. In terms of good practice, it emphasized how an interpretation of best practice from a community perspective is understanding how to create a true and fair process of FPIC. There was also a detailed study of how FPIC can be undermined by both states and companies, even where it exists as part of the national legal framework. It also gave advice on how good negotiations could take place, which—although set in a context of already

having given consent to the project—is still useful in terms of understanding how to engage in an FPIC process.

Chapter 2.6 reviewed how FPIC has increasingly become an international norm through legal cases, both in individual national jurisdictions and via the regional human rights systems. The regional court decisions—especially in *Saramaka v Suriname* and *Endorois* v *Kenya*—have created jurisprudence that establishes that the right to land and FPIC are inherent, regardless of whether indigenous peoples are recognized by the state. They also confirm that decisions need to be made in line with traditional methods of decision making. Finally, in Chapter 2.7 the right to FPIC was established within the UN Human Rights system, relating primarily to ILO Convention 169 and the UNDRIP. Its application has been clarified and strengthened by, among others, the Committee on the Elimination of All Forms of Racial Discrimination (CERD) in its General Comment 23. There was a review of the input of indigenous organizations within the UN system to this evolving standard. Finally, the concept cropped up again with reference to certain campaigns, such as No Dirty Gold, certain voluntary guidelines, like the Equator Principles, and in complaint mechanisms such as the OECD Guidelines for Multinational Enterprises.

Given that so much ground has already been covered, this chapter is not seeking to repeat these points, but will primarily review a few other examples of how the right to FPIC is evolving. It will then explore some final points and conclusions about FPIC, drawing heavily on the discussions at the conference.

2.8.1 Other Precedents Regarding FPIC

Aside from the points raised above, FPIC also arises in other UN processes and bodies. For instance, the Akwe: Kon guidelines for the implementation of Article 8j of the Convention on Biological Diversity recognizes FPIC as being of fundamental importance in the context of the protection

of indigenous peoples' traditional knowledge and intellectual property. The 2011 Convention on Biological Diversity Nagoya Protocol on Access and Benefit Sharing includes the requirement for "prior and informed consent" and seeks to ensure that states give consideration to, and raise awareness of, community protocols.[2]

The UN International Fund for Agricultural Development's 2009 "Engagement with Indigenous Peoples" policy includes FPIC as one of the fundamental principles for its engagement with indigenous peoples. Under the policy, the Fund commits to consider as a criterion for the approval of proposed projects, whether any potentially affected indigenous peoples have given their consent.[3]

Donor governments are also increasingly recognizing the requirement for FPIC in their development strategies. To date Denmark, Spain, Germany, and the European Commission have incorporated the requirement to obtain FPIC within their development cooperation strategies. Given the increasing number of deals being done between donor states and home-country companies, it is always worth considering whether there is development aid money supporting any part of a proposed project.[4]

A review of the extractive sector in relation to other industries shows that the extractive industries are lagging behind others in recognizing FPIC for indigenous peoples.[5] FPIC has been endorsed by various voluntary multi-stakeholder processes in other sectors. The Roundtable on Sustainable Palm Oil (RSPO) has it as a key principle in its 2007 Principles and Criteria for Sustainable Palm Oil Production. The RSPO sponsored training programs, partly organized by indigenous organizations, to understand and implement the principle.[6] Retrospective application of this standard to resolve land disputes has even led oil palm companies (which are owned by the Wilmar Group, that is a member of the RSPO), to return disputed land to communities and compensate them for damages caused.[7] The Round Table for Responsible Soy and the Round Table of Sustainable Biofuels also make reference to it.[8]

FPIC has been a requirement of the certification system of the Forest Stewardship Council, with regard to timber products, dating back to 1994. The scheme is the most widely accepted measure of ethical and environmentally sound forestry. It is also required by the more industry-orientated Programme for the Endorsement of Forest Certification schemes. Both schemes stress the implementation of FPIC relative to international agreements, but the Forest Stewardship Council also now recognizes indigenous peoples who do not have legal recognition of their land and have extended FPIC to cover non-indigenous local communities.[9]

As early as 2000 the World Bank's World Commission on Dams released the strongest guidelines with regard to large-scale hydro dams. These guidelines accepted that indigenous peoples have the right to say "Yes" or "No" to dams on their lands.[10]

Conservation is an area that has advanced rapidly, given an initially poor history in dealing with indigenous peoples. The World Commission on Protected Areas, the International Union for Conservation of Nature and the Worldwide Fund for Nature have all accepted that implementing best practice demands that national parks and nature reserves should only be set up only after an agreement with indigenous peoples has been negotiated, which respects the right to consent.[11]

FPIC became the focus of a dialogue stream of The Forests Dialogue, which covered mitigation around climate change. The aim is to collaboratively integrate FPIC, as part of a legal framework for human rights, in programs for "Reducing Emissions from Deforestation and Forest Degradation (REDD)." There seems to be substantial progress, with the second dialogue on the issue happening in May 2012, in Kinshasa, Democratic Republic of the Congo, making various commitments to protect community rights. Concerns remain, however, over aspects of REDD Plus such as the World Bank Forest Carbon Partnership, which appears to apply the lower standard of interpreting FPIC.[12]

2.8.2 General Observations on the Right to FPIC

This is a good point to review and summarize some key points about FPIC, drawing on observations from the 2009 Manila Conference. Although it has been helpful to review the application of FPIC in a variety of situations, it is worth reiterating that the consensus of current indigenous opinion is based on its presence in the UNDRIP. This is because the 2007 passage by the UN General Assembly of the UNDRIP was a major international advance in the international recognition of indigenous rights. The UNDRIP now sets out the minimum standards for the survival, dignity and well-being of indigenous peoples. One of those is the principle of FPIC, specifically as it appears in Article 32, which notes that:

> Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
>
> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
>
> States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.[13]

The UNDRIP also affirms related rights, including indigenous peoples' right to be represented through their own institutions, to exercise customary law, to the ownership of the lands, territories and natural resources that they traditionally own or otherwise occupy or use, to self-identification; and, more fundamentally, to self-determination.[14]

It is worth summarizing earlier points that the historic failure of mining multinationals to satisfactorily meet FPIC

requirements has been widely documented as resulting in severe and persistent negative consequences for indigenous peoples around the world. Lack of consultation and the failure to seek and obtain consent deny the most basic human right to self-determination and has lead, *inter alia*, to loss of communal lands, livelihoods and food production, disease and ill-health, pollution of waterways and soils, destruction of forests and other biodiversity, desecration of sacred sites, social conflict and loss of life. The session at the 2009 Manila Conference was keen to emphasize the fundamental importance of the realization of indigenous peoples' land and resource ownership rights for FPIC to be realized in a meaningful way.[15]

Conference participants also emphasized the importance of FPIC as a collective right to land and traditional land ownership systems, given that livelihoods such as pastoralism or hunter-gathering were not compatible with private land ownership.

Meaghen Simms of the The North-South Institute presented on the Institute's work with partners, and the Canadian experience, at the 2009 Manila Conference.[16] She concluded that, in their organization's experience, FPIC can only be realized when starting from the premise that "indigenous peoples are not just another stakeholder to be consulted, but rights holders whose identity, autonomy and cultural survival is inextricably linked with their relationship to the land."

In her experience, the realization of FPIC in practice required the strengthening of indigenous peoples' organizations, and governmental capacity to oversee negotiations, as well as convincing mining companies to respect FPIC and indigenous rights. Ms Simms gave Canadian examples, noting how the narrow application of the law (for instance, the application of FPIC only for those with land titles, and even then not requiring it in all cases) was effectively watering down the requirement and leading to increased situations of conflict. Instead of consent the standard was increasingly becoming "consultation" and "accommodation." This was a concern that was echoed throughout the session and, indeed, the conference.

Conference delegates raised the fact that indigenous peoples had already seen decades of failed consultations, manipulation and imposed tribal councils. Now this same practice was continuing under the guise of "corporate social responsibility" and the co-option of the language of FPIC by companies, who hire anthropologists and consultants to come in to manipulate communities. There was a risk that this was resulting in the creation of new divisions in communities, while according greater power to corporations and detracting from the fundamental question of land rights.

A number of participants raised the fact that even where there were laws around consultation, these consultations were not conducted in an appropriate or adequate manner and compensation was often not provided to communities. It was therefore crucial to empower communities on how to use available laws to advocate and lobby for their rights.

Ms Simms gave a specific example of a land claim where consent was incorporated as a binding requirement for entry and access within the context of the Inuit peoples' 1993 Nunavut Final Agreement (NFA). In the context of a planned uranium mine within the NFA territory, however, it appears that consent is only being granted at the "executive level," i.e., by the Designated or Regional Inuit Organization. Meanwhile at the community level there is generally only consultation without the requirement for consent. As a result, issues such as impacts to traditional livelihoods and the compatibility of mining with the worldvision of the people have not been addressed.

Another example provided by Ms Simms of where consent had been entrenched in laws and agreements was the 2002 Yukon Oil and Gas Act and the bilateral agreements that were signed in 2003 between the Government of Yukon and the Kaska Nation, which required consent for all new developments in their territories. Ms Simms pointed out, however, that the context had recently changed in the Yukon with the government attempting to move away from the requirement to obtain consent and objecting to the terminology of FPIC on the grounds that it is perceived as being primarily a veto power.

The issue of FPIC as a veto comes up time and again with the extractive industries. The argument deployed is that FPIC could be the veto of just one individual in a community. It is clear that FPIC is expressed as a collective right, however, manifest in the traditional decision making system of the peoples concerned. How consent is reached within indigenous communities is subject to the norms and traditions of collective decision making. But more importantly, FPIC is inextricably linked to a whole range of rights protected by international law, including rights to self-determination, development, cultural identity, autonomy, and participation. Conflating FPIC simply with a veto right ignores the range of other rights that require the implementation of FPIC in order to be upheld.[17]

Another issue is that too often extractive projects are justified—with an accompanying denial of indigenous rights—under the guise of "national development." The argument is that such "development" supersedes the rights of communities to defend their more sustainable economy and values. This not only ignores the basis of "rights-based development," but it specifically denies the right of indigenous peoples to FPIC. The 1993 Vienna World Conference on Human Rights clearly states that "while development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognized human rights."[18] Oxfam Australia points out that respect for the right of FPIC is not only consistent with the principles of good governance, it is essential to the achievement of the Millennium Development Goals of halving world poverty by 2015.[19] Indigenous peoples are often at great pains to emphasize that they are not anti-development. It is control over development that is the key issue. Their reservations about extractive industry projects on their territories have more to do with unrecognized land rights, the legacies of previous extractive projects, and a lack of evidence that their community will obtain more benefits than costs. An Afro-Colombian leader puts it well by saying that "Free, prior and informed consent should be in the relationship about how we see our right to development… When we say 'no,' we are saying we have different rights to different paths."[20]

In the 2009 Manila Conference, Loreen Jubitana of the Association of Indigenous Village Leaders in Suriname presented a case study of the problems that can come from a situation with little regulation to support community rights.[21] She pointed out that, at the time, Suriname was the only country in the western hemisphere without constitutional recognition of indigenous peoples rights, despite ratifying international agreements such as the Convention on the Elimination of All Forms of Racial Discrimination and the UNDRIP. There was also essentially no existing environmental legal framework. Meanwhile, the current draft Mining Act failed to provide for consultations with indigenous peoples and ignored the recommendations made by the UN Committee on the Elimination of Racial Discrimination to the government.

In this context, BHP Billiton and Alcoa signed a joint venture for exploration in a 2,800 sq km lease area, called the Bakhuys Project. No environmental, social impact assessment (ESIA) was conducted for advanced exploration (which ended in October 2005), and there was no consultation or participation of the communities in relation to the initial memorandum of understanding created by the company and government. In addition, there was no cumulative assessment of the impacts of the mining phase, and communities were not informed prior to the commencement of these ESIAs. Initial communication with chiefs was inadequate, with insufficient advance notice, a lack of information, and inappropriate material. The time provided was too short for information to be processed by the communities. Initial requests by chiefs for information sessions were denied and downstream communities were excluded from processes until mid 2006.

The government informed the communities that they had to discuss their issues with them rather than the companies, while the companies told them that they did not have to adhere to standards, such as FPIC, which were not recognized by the government. Ms Jubitana concluded that it was essential to put the government under more pressure to recognize indigenous peoples' land rights, which are the crux of the issue. While companies had brought the chiefs to mine sites in Colombia and Brazil, they had not shown them the real

impacts of mining. Ms Jubitana pointed that a community has to decide for itself what they want to see in terms of similar processes, and suggested that having exchange visits with other mining impacted indigenous peoples was one way to address the issue.

2.8.3 Conclusion

Extractive industry companies place increasing emphasis on community engagement as part of their corporate responsibility. They however engage with communities in an inconsistent manner and rarely comply with the standards necessary for the respect of indigenous peoples' rights, interests and well-being. Indigenous peoples consider that free, prior and informed consent (FPIC), as embodied in the UNDRIP, is the minimum standard that mining companies should work to. FPIC is now widely recognized by a broad range of international bodies as the standard for engagement with indigenous peoples in the context of large-scale mining operations.[22]

As noted in Chapter 2.3, the most recent advance is that the World Bank's International Finance Corporation (IFC) in May 2011 finally accepted that its safeguard mechanisms adopt the principle of FPIC, informed by the UNDRIP. This will have huge repercussions outside of the IFC's immediate lending as their safeguards form the basis of other guidelines, such as the Equator Bank Principles. While changes in national legislation in various jurisdictions are necessary for widespread adoption of the principle, the absence of such legislation does not prevent mining companies from incorporating it into their policies and practices.

To date the extractive industries have lagged behind in fully accepting FPIC in principle or in practice. Much more needs to be done in the light of sound arguments that it is likely to cost companies more than they save from disregarding FPIC.[23]

Australia—Problems of Implementation of FPIC[24]

By Brian Wyatt, National Native Title Council

> "It's good that we've come to an agreement, but also sad that many of our old people are no longer around to see this. The most important part is that companies have started to recognize the importance of working with our Elders."[25]

Critical to indigenous economic and cultural sustainability is the relationship between indigenous communities and the extractive industries. Australia's place in the global economy has been forged by the resource industry, with natural gas, iron ore, gold, and diamonds among the many minerals adding to the wealth of the nation. For indigenous communities the challenge is getting a fair and equitable share of that wealth. Thanks to the UN Declaration our rights to free, prior and informed consent for access to land is providing a ticket to the mainstream economy.

Unfortunately, in the Australian context, full access to free, prior and informed consent is difficult to achieve because under our Commonwealth laws, there is no the opportunity to take full advantage of free, prior and informed consent. Access to traditional lands through some agreements has been negotiated under FPIC principles, but others only have within certain limits. As much as traditional owner groups push to put it into practice, there is always a line in the sand whereby specific legislation prevents us from seizing the full advantage.

Traditional owners groups have been negotiating agreements with the resources industry successfully for a number of years. There is an emerging problem, however, that needs to be addressed. It has not been caused directly by the recent global financial crisis, but we are certainly starting to experience some of the negative ramifications the crisis is having.

A lot of agreements that have been negotiated by traditional owner groups with mining companies, under the principles of free, prior and informed consent, became increasingly vulnerable during the economic downturn. Not only because of the changing market and less economic opportunity generally, but also because once again indigenous peoples are at the whim of the government's desire to maintain a stable economic climate.

In Australia we had to start understanding that globalization is not a panacea for indigenous peoples—and at the end of the day, some indigenous groups could just find out that they have lost more than

they have gained. In 2007 I presented a paper to the United Nations Permanent Forum on Indigenous Issues Workshop in Salekhard in Siberia. The Workshop was looking at the relationship between mining companies and indigenous communities. At that time, Australia was riding the crest of an economic wave—unemployment was low, mining royalties were helping to grow the wealth of the country, and the mining industry was providing new opportunities for our lives and lifestyle. The only downside in a long list of positives was the high rate of indigenous unemployment. But that had begun to change.

Indigenous unemployment had dropped significantly since 1994, due largely to better relationships between extractive industries and indigenous communities. Companies were after full access to indigenous traditional lands and they were negotiating with traditional owners to get that access. Indigenous peoples, in turn, were starting to take full advantage of the economic opportunities being offered and it had resulted in many and varied agreements.

Later, the UN Declaration on the Rights of Indigenous Peoples had been adopted by the United Nations General Assembly, subsequently supported by the Australian government. Mining companies were negotiating in good faith with indigenous peoples and the benefits for communities were incrementally getting better and better. But more importantly for traditional owners, through the native title processes, economic benefits were finally starting to flow, predominantly due to the promotion of principles such as free, prior and informed consent. Agreements with mining companies had started to include not only monetary payments, but also employment and training opportunities, and in some cases assistance for business or entrepreneurial type development.

For traditional owners the system was finally giving a sense of belonging, a semblance of much sought self-determination—an opportunity to make decisions for their futures and the futures of their children. But also, significantly, the right to make decisions about their land. Things started to take a negative turn, however. The economic downturn meant that those hard negotiated agreements were beginning to fray, and in a significant number of cases, agreements were being left to lapse because companies were being financially affected and people were losing their jobs. Traditional owner groups had dutifully signed on the dotted line of these agreements—but agreements that were signed in good faith were becoming defunct. So what has been the cost to indigenous peoples? Indigenous peoples have paid the ultimate price—in some cases, traditional owners had traded away their rights to land.

Under the Australian Native Title Legislation, the bar to proving that indigenous peoples have a strong connection to their land has been set extremely high, and the hoops that we have to go through are many. As a result the desire to opt out of the litigation process for something less onerous had become very attractive. And that something was negotiation—not only with the government but also with industries that could offer economic benefits. But that meant using native title rights as a bargaining chip for economic gain. We had put that bargaining chip on the roulette table and what had been coming up black was coming up red; that native title chip had become worthless, and for some, there was no chance of winning it back.

Free, prior and informed consent is all very well in an international convention, but the reality is, Australian legislation such as the Native Title Act, does not allow those rights in their full capacity. Under the Native Title Act, traditional owners have what is called the "right to negotiate" for certain activities such as mining to occur on their land. But this right to negotiate is about how that activity proceeds; it does not provide the right to negotiate on whether the activity proceeds or not. In other words, traditional owners do not have the right to veto over mining projects as is implied under free, prior and informed consent—we do not have the right to say "no." Traditional owners have had to negotiate deals for the best terms they could achieve because if they did not negotiate, the mining activity was going to go ahead anyway, regardless of their views.

This reality recently became startlingly clear. The Western Australian government announced that they would resort to compulsory acquisition of land in the Kimberley region if there could not be a Liquid Natural Gas (LNG) agreement reached with the local Aboriginal people for access to land for the development of a LNG processing precinct. This idea had been investigated since the discovery of gas reserves in the Browse Basin several years ago. The precinct could provide hundreds of jobs, millions of investment dollars and a long-term economic diversification for Broome and the West Kimberley Region of Western Australia. Plants in the precinct would process gas from the Browse Basin, located some 400 km offshore. Estimates of the extent of the reserves are around 27.5 trillion cubic feet of gas and 600 million barrels of condensate, with an expected project life of some 40 years. Several resource companies will be involved in the extraction of the gas with individual companies needing a mainland plant in order to process the LNG before exporting to international markets. This would have meant that individual companies would require different sites for the development of their own processing plants.

The project has also presented an opportunity for Kimberley traditional owners to negotiate access to traditional lands. Negotiations continued in earnest over many months to secure an appropriate site to locate the single precinct. Not only do traditional owners want to ensure their cultural lands are protected with minimal damage to the environment, but the project would potentially provide economic opportunities never before seen in the region for local indigenous communities. The area in question has significant cultural and environmental values; it is close to a humpback whale nursery and is considered to be part of a pristine environment that many Australians believe should be preserved.

Until September last year, and probably for the first time in the Western Australian State Government's history, Kimberley traditional owners were negotiating under the true spirit of free, prior and informed consent—including the right to veto any site that they deemed to be culturally unacceptable. Much work had been done and four sites had been short-listed as potentially suitable, subject to social and environmental impact assessments. And then, at the end of 2008, everything changed when a new State Government came to power with different political views. Embarrassed by the loss of a Japanese company to the Northern Territory, which meant fewer royalties for the state, they immediately removed the right to veto for indigenous peoples, announced a preferred site for the precinct, and insisted that agreement be reached for that site by the traditional owners by the end of March 2009, at the time within a three month period.

This in itself was debilitating news, but there were also many debilitating factors with such a short timeframe. It fell during cultural law time where traditional owners have family and cultural obligations and it also fell over the wettest period of the tropical rainy season, which makes it difficult and sometimes even impossible for travel to consultation meetings from remote areas. During this time, rains are so heavy that some indigenous communities get cut off from the rest of the country with roads becoming impassable.

The Kimberley Land Council is the indigenous native title representative body that is tasked with navigating the diverse views within communities and trying to reach an acceptable balance between traditional owners' cultural values and the government's demands. Wayne Bergmann, Chief Executive Officer of the Land Council, was openly critical of the process:

> "Almost all of the major communities in the Kimberley are among the most disadvantaged quarter of all indigenous communities. This was

> the case 20 years ago. Nothing has changed in the last 20 years, or in the year since the Prime Minister gave his apology earlier last year. Onshore processing of natural gas could make a big difference, because it generates economic impacts on a massive scale. Just one project currently being planned is expected, over its 30-plus year life, to generate economic impacts valued at a trillion dollars.
>
> "If we can win a substantial share of this economic activity, it can give us a once-in-a-century opportunity to make a real difference to our lives. It can provide us with jobs, with incomes, with the chance to set up businesses, to send our kids to school. It can generate an income stream that, properly managed, can allow us to invest for our future.
>
> "Kimberley Aboriginal people have been working hard for two years to grasp that opportunity. They cooperated with the Western Australian Government and oil and gas companies to find a suitable site on the Kimberley coast for a central 'hub' where a number of companies could process offshore gas. We have spent months considering sites, ruling out ones that were unacceptable for cultural, environmental or engineering reasons. By late last year they had narrowed the search to three potential sites, and were ready to quickly identify the best available option. In return they expected, and were promised by the former state government, substantial economic participation in gas development, and the right to say no to any sites that would threaten major environmental or cultural damage.
>
> "Now this has all changed. Kimberley Aboriginal people are again threatened, as they were in the 1970s and 1980s, by an approach to development that rides roughshod over their rights and leaves them out in the economic cold."[26]

The State Premier gave the traditional owners a deadline of 31 March 2009 to reach agreement for a site, or the land would be seized through compulsory acquisition. So what this means is if the local people do not give their consent to using the preferred site, the government will take the land anyway. This is clearly not a good example of free, prior and informed consent.

What needs to be stressed is the frailty, not only of some specific agreements, but even the frailty of our power to negotiate. The example outlined above could potentially set a precedent for more compulsory acquisition of traditional lands in order to provide certainty to extractive industries for access to land, and to governments for quicker approvals and economic gain. The reality is that when the going gets tough for

our governments, indigenous peoples will be pushed to the back of the queue. Our rights will once again be subordinated and development at any cost will be the political mantra for governments desperate to maintain economic growth.

What we need to ensure is that there is some certainty in the system for us—and we are trying to push this in Australia. The indigenous voice, however, cannot compete with the noise of the global economy. And I hope that we have not missed an opportunity to change the system during the recent prosperous times. It could be that what governments are experiencing now will scare them into putting in place arrangements that are not in indigenous peoples' interests.

The future challenge for indigenous communities in the development of their land does, however, lie in the realm of participation, understanding and recognition. The UN Declaration on the Rights of Indigenous Peoples clearly provides for indigenous peoples' rights over their traditional lands; Article 11 provides for effective redress for "cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs."

Some of the reasons behind the change in attitude of mining companies in Australia, whether they be local, national or international companies, is that they recognize the need to invest in the communities they are impacting. From a practical perspective, good community relations ensure that projects can progress in a timely and efficient manner and projects can meet the timeframes of government approvals. It assists the company to create a credible reputation to ensure they can compete competitively in a global market. Most importantly, from an indigenous perspective, there would seem to be obvious benefits: by demonstrating good faith toward the people and communities on whose land they operate, they build trust and lasting relationships, which can only be of benefit to their shareholders, while also providing certainty and stability for indigenous communities.

Set out below are a number of specific examples of negotiation that is happening in Australia.

Fortescue Metals Group (FMG)

The Fortescue Metals Group (FMG) is a company operating in the Pilbara region of Western Australia, approximately 1,500 km north of Perth. FMG has been labelled the "New force in iron ore" and they are developing a

US$2 billion operation including a mine site, port facilities and a 260-km rail line to connect the two, being built across land that has significant heritage value to indigenous peoples. It is a highly speculative venture, built on borrowed money and heavily reliant on forward sales of iron ore to the booming China market. It is expected that once they are operating, the mine will produce 45 million tons of iron ore per annum.

FMG is one of many major mining companies operating in the Pilbara. Others include international giants BHP-Billiton and Rio Tinto. Together they are all creating a highly competitive environment for the employment of local indigenous peoples. FMG's vocational and education training program already has 435 job applicants listed on its database and they currently employ 78 indigenous peoples. FMG's goal is to employ more local Aboriginal people than any other company. As well as regular mining jobs, the program will include employment in the areas of landscaping, maintenance, cross cultural training, and rehabilitation on mine closure.

FMG now works closely with the traditional owners to undertake salvage work that includes the removal of artefacts and analysis of grinding patches on sites of significance. The salvage work will give more knowledge on how Aboriginal people lived and used the land over time.

Burrup Peninsula

The Burrup Peninsula, also in the remote Pilbara of Western Australia, is part of the Dampier Archipelago, approximately 1,200 km north of Perth. It is an interesting example of a very large-scale development project (Woodside natural gas processing plant), impacting on an indigenous heritage precinct of major international significance.

At the heart of the archipelago of 42 islands, islets and rocks is the Dampier Rock Art Precinct, which contains thousands of rock carvings and paintings dating back thousands of years and which are extraordinary for their diversity and density. The area also marks the fate of the Yaburara people, who were massacred over an 8-day period in 1868, known as the "Flying Foam Massacre."

The entire area is hugely significant to the local indigenous peoples. In controversial circumstances, a major multi-billion dollar natural gas processing plant on the Burrup Peninsula has already been given the green light by the Western Australian State Government. Meanwhile, the area has been nominated to be listed on the National Heritage List in order to protect the remaining rock art.

The plight of the Burrup Peninsula and the rock art gained intense international interest, which put great pressure on the Australian government to proceed with the listing. A listing will not stop the major gas processing project that has already been approved, and perhaps for that reason, the State Government of Western Australia has gone on the record to say that it would welcome putting the rock art on the National Heritage List.

The State Government of Western Australia negotiated a special agreement with the people with native title claim to the area in January 2003 (the Burrup and Maitland Industrial Estates Agreement Implementation Deed). It was only a "claim." but with the claim came the right to negotiate under the Native Title Act. The agreement provides that in exchange for the peoples' consenting to the surrender and permanent extinguishment of native title to the area, they would receive a number of substantial benefits, which included:

- The grant of freehold title to non-industrial land, which would then be leased back to the state government for 99 years;
- Development of a Management Plan for the area, to be jointly managed by the people and the government, including funding;
- A Visitors/Cultural/Management Centre on the land, worth Aus$5.5 million;
- A Financial compensation package, which includes Aus$5.8 million in up-front payments and then further ongoing annual payments thereafter;
- The state government also agreed to pay a local Employment Service Provider to assist with finding employment for indigenous peoples and identify contracting opportunities.

Of particular interest is that while the benefits the people have achieved were very significant, they were only obtained after they agreed to forfeit completely their lawful rights to native title over their traditional lands. It was a very high price that they had to pay.

Argyle Diamond

The Argyle Diamond Mine in the remote far-north Kimberley Region of Western Australia is an example of a company that has currently developed excellent relations with the indigenous community on whose land this mine sits. Argyle Diamonds is a member of the Rio Tinto Diamonds Product group, the world's largest supplier of diamonds. It

produces about 30 million carats each year from this mine, accounting for about one-quarter of the world's natural diamond production. Argyle is also the world's primary source of rare pink diamonds.

Argyle has 800 employees, with the majority working at the mine site. It commenced mining its main ore body in 1985 and has since produced more than 600 million carats of diamonds, ranging from gem quality to near gem and industrial diamonds. In September 2004, Argyle signed a Participation Agreement with traditional owners of the Miriuwung, Gidja, Malgnin, and Woolah peoples. The Agreement was registered as an Indigenous Land Use Agreement in April 2005, which is a voluntary, formal agreement that binds all parties to particular targets and achievements.

The Participation Agreement recognizes traditional owners as the landlords of the Argyle mining lease, while recognizing Argyle's right to continue its current and future mining operations. The Agreement establishes a long-term relationship between the company and the Traditional Owners, as well as other provisions including:

1. Joint commitment to improve community and social infrastructure for Aboriginal communities in the East Kimberley region;
2. An income stream for the traditional owners, a portion of which will be allocated to fund community development initiatives;
3. Another portion of income will be placed in a Sustainability Fund to be managed by a Traditional Owners' Trust;
4. Support and preference to be given to the employment and training of local Aboriginal people;
5. Assistance with the development of traditional owner business development for the mining sector;
6. Negotiation over land and water management over the life of the mine and rehabilitation;
7. A Site Protection Management Plan for the protection of significant Aboriginal heritage sites.

Not surprisingly the Argyle Diamond agreement is held up as good practice in what can be achieved, not only under the Native Title Act, but also for mining companies to develop strong community relations through such practices as free, prior and informed consent for access to traditional lands.

Conclusion

The future challenges for indigenous communities in deciding what happens with the development of their land lies in the realm of participation, understanding and recognition, based on the UN Declaration of the Rights of Indigenous Peoples.

Increasing indigenous participation in the Australian economy is a significant challenge for all of us. Clearly industry can play a key role in this regard—although we should not forget the rest of the private sector—and Australia has come a long way in the last few years. Indigenous peoples' relationship with industry is a critical one and through negotiations such as native title agreements, communities are beginning to benefit from opportunities in employment, and in a lesser way, with enterprise development.

And we need to grasp everything. We need economic development and sustainability, but, critically, we also need to assure indigenous peoples that their cultural identity is acknowledged and that indigenous cultural sustainability is important for this nation. It is imperative that traditional peoples have full recognition of their cultural rights on land, participate fully and effectively in decision making and consultation processes, and have free, prior and informed consent for all manner of projects.

Endnotes

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Concluding Observations

PART

3

The Four Corners region of the United States is an area of primarily indigenous lands.[1] In 1973 it was officially declared a "National Sacrifice area," owing to the sacrifice that was requested of its indigenous inhabitants to strip its resources of uranium, coal, oil and gas to fuel the US Cold War military machine. The consequences, both in terms of poverty, environmental damage and health issues from the uranium and coal, have been dire.[2] This example of wholly unacceptable and unsustainable development has been repeated in so many different places for indigenous peoples. This publication has established that, despite advances in international human rights law, there is still a gross lack of adequate protective measures for indigenous peoples or their ancestral lands. It has also established that economic, social and environmental sustainability can hardly be seen in the practice of extractive industries, despite the formulation of a concept called "sustainable mining." In most developing countries the natural resource curse remains the rule, not the exception. Indigenous peoples, who are usually the original inhabitants of territories where the extractive industry corporations operate, suffer from this curse.

Extractive industry companies have, either individually or through their industry bodies, conducted various dialogues with different indigenous groups. Access to such discussions, however, had been variable and *ad hoc*. Despite clear expressions in all these discussions of the need for the industry to respect the rights of indigenous peoples contained in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) and ILO Convention 169, including their right to free, prior and informed consent or FPIC, companies have so far failed to do so. This has deepened the significant levels of distrust

between the industry and indigenous peoples and has exacerbated conflicts.

In addition, states and mining companies' failure to respect the right to FPIC have undermined trust in democracy and the resilience of society at large, and has disproportionately harmed indigenous women and indigenous children. Women—in particular indigenous women—are more likely than men to depend for their survival on access to communal land and water. Violence against women and increasing cases of HIV/AIDs have also been documented to increase in some mining estates where prostitution has propagated and alcoholism and machismo encouraged.

Social dislocation of indigenous peoples and resulting conflicts inflict far-reaching social, political and economic costs at national, regional and international levels. These include migration pressure and the use of state and non-state security forces to protect mining infrastructure, which in turn can cause further human rights abuses, further loss of life and the need for mediation and/or legal remedy.

Such impacts continue to be dismissed as "externalities" in conventional cost/benefit analysis. It is gradually being realized, however, that failure to respect the rights of indigenous peoples causes a wider ranging harm. Governments that ignore those rights have to deal with the costs of escalating conflict and lost opportunities from more sustainable development. Companies that fail to address the requirements of FPIC and fail to achieve community consent risk short-, medium- and long-term financial losses. These include stalled project commencement or disrupted production due to local indigenous community opposition; reputational damage undermining their ability to secure or retain host government contracts and project finance or to recruit and retain high-caliber staff; shareholder censure, potentially leading to divestment, litigation or falling foul of regulation by home and host states.

The seriousness of the many reported adverse impacts of extractive industries presents the clear need for enforceable standards and strong sanctions, backed by legal frameworks that offer genuine routes to redress. States are often failing

to fulfill their international human rights obligations with regard to business, and the scope of the responsibility directly imposed on businesses is only now being better defined. As this book has shown, there is no one forum available at the international level to credibly set enforceable regulations or for victims to directly address the responsibility of corporations.

After the successful move of some developed Member States to kill the UN Commission on Transnational Corporations before the Earth Summit in 1992, there was no similar body set up to replace it, except a poor copy like the UN Global Compact. There are other developments such as the adoption by the UN Sub-Commission for the Promotion and Protection of Human Rights in August 2003 of the "Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights." The Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, concluded his work (2005-2011) with the "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework."

In 2011 the UN Human Rights Council established the "**Working Group on the issue of human rights and transnational corporations and other business enterprises.**"[3] Consequently a Forum on Business and Human Rights was established, which will hold its first session from 4-5 December 2012. Both the Working Group and the Forum on Business and Human Rights are expected to discuss how to operationalize the Guiding Principles. The UN Special Rapporteur on Indigenous Peoples' Rights, James Anaya, has devoted several of his reports on extractive industries.

Given the challenges faced, all these would be minimal, but important, starting points. These offer further opportunities for indigenous peoples to express their concerns and press for change and better regulation of the extractive industries.

It is an imperative that indigenous peoples learn more about the relevance of these norms, guidelines, mechanisms and procedures and what experiences led to the creation of

these. Training-workshops should be organized both by relevant UN bodies and programs, human rights organizations and by indigenous peoples' organizations and institutions, which can provide them the knowledge on how to use these to help address their issues related to extractive industry corporations. How to make corporations adhere to minimum international norms and standards on human rights and environment is a cross-cutting mandate of many of these policies and mechanisms.

Obviously, indigenous peoples who have to cope with the day-to-day struggles to simply survive and protect their territories do not have the luxury of understanding, and much less, using all these. This is where support groups (e.g., PIPLinks and indigenous peoples' institutions like Tebtebba) can come in to help them know about the existence of these. Indigenous peoples deserve to know the range of possibilities and options they can use to seek redress for the wrongs committed against them.

3.1 Prospects for the future

This publication, and the 2009 International Conference on Extractive Industries and Indigenous Peoples upon which it is based, have considered a number of themes. In looking to the future, the focus will be on the struggle of indigenous peoples, but it is worth first reviewing the future of the extractive industries. Given the nature of extractive operations, it is clear that these industries cannot be left to direct their own patterns of development. Various stakeholders must, for example, work to minimize overall fossil fuel use and production. Use and production of oil and coal, without any question, has to decrease significantly. Since the recovery and recycling of most metals can lead to a significant reduction in global mining impacts, especially to greenfield mining activities, an emphasis on recycling and substitution are a necessary contribution to a more sustainable world. But the extractive industry alone is unlikely to take such steps while current practices remain

viable and profitable by externalizing many costs onto nearby communities and the environment. Therefore for these activities to continue in anyway that could be considered beneficial, there must be a seismic shift towards recycling and reusing extracted minerals, rather than allow an increasing expansion into new and wider green field areas.

In practice, however, this seems unlikely. And with a growing population, and a growing global middle class, the long-term pressure on the resource-rich lands where indigenous peoples live will be great. The 2009 Manila Conference took place early on in the global financial crisis, and although a lack of credit slowed down the need for minerals slightly, there has still been something of a boom in commodities. Roger Moody, in his essay in this book, casts doubt on whether the engines that have been driving this, namely China, and to a lesser extent India, will keep up their frantic industrialization over the next decade or so.

In the longer term, however, it is clear that population and wealth increase are likely, and will no doubt, lead to further displacement and conflict for indigenous peoples. The words of Naomi Klein, a known social activist and critic of corporate globalization, in this instance seem prescient, when in 2008 (around the start of the crisis) she said: "Nobody should believe the overblown claims that the free market ideology is now dead. Rest assured the ideology will come roaring back when the bailouts are done. The massive debt the public is accumulating to bail out the speculators will then become part of a global budget crisis that will be the rationalization for deep cuts to social programs and for a renewed push to privatize what is left of the public sector. We will also be told that our hopes for a green future are too costly."[4]

There is however definitely cause for hope, and mostly this is in the continued struggle of indigenous peoples, and the framework of international human rights norms that are developing as a result of it. In the 2009 Manila Conference, Roger Moody in his presentation highlighted the role that indigenous peoples had played in leading to the abandonment of certain mining projects. He emphasized the potential significance of the concept of FPIC becoming increasingly

embedded in law over the coming decade. He suggested that if this were to happen, that it could have a transformative impact upon the industry, especially when viewed from the perspective of the continued widespread opposition of many indigenous peoples to these projects in their lands.

In her introduction to the conference, Victoria Tauli-Corpuz, Tebtebba Executive Director and the then UNPFII Chairperson, reviewed the major achievements at the international level in the UN system, which are covered in Chapter 2.7 of this book. She explained that the problems that indigenous peoples face in the context of extractive industries were one of the major reasons why the indigenous movement had worked so hard at the international level to achieve this level of recognition and representation. It is likely these mechanisms will continue to support the efforts of indigenous peoples, both in terms of individual struggles, but also in terms of FPIC being recognized in every country and by every company as the international standard in dealing with all indigenous peoples. This will also mean it being implemented in the spirit in which it was intended. That universal application may not be so far away.

There are positive indicators in terms of international support and solidarity as well. The 2009 Manila Conference finished with reviewing what collective work was required in the future. It was agreed that an international network should be set up. Its mandate would be to:

- Educate indigenous peoples on the impacts of extractive industries;
- Strengthen capacities of local communities facing extractive industries;
- Help generate resources for activities of the network and support local networks;
- Facilitate exchange visits among indigenous peoples affected by extractive industry corporation
- Gather and disseminate data and information to indigenous communities and others involved in promoting the rights of indigenous peoples, and;

Promote FPIC, as expressed in the UNDRIP and ILO Convention 169, as a framework for any engagements of the extractive industry with indigenous peoples

It was agreed that the new network would initially organize from a regional level due to language considerations, and would identify national and regional focal points. A secretariat would be required to coordinate these functions.

The network, the Indigenous Peoples' Global Network on Extractive Industries has formed,[5] with regional focal points agreed, and has met regularly since then formulating a strategy for implementing the ambitious tasks that were set for it. It is hoped that the information contained in this report will serve as the basis for education work, also to be used for sustained policy advocacy campaigns and reform work at the national and global levels, and as a starting point for new research.

The last word, however, should be to ensure that the links between the local, national, regional and global are sustained because we cannot achieve our goals for sustainable development and respect for human rights just at one level. While the big stress should be to focus on strengthening capacities of indigenous peoples at the local level to assert their rights to their lands, resources and territories and their right to self-determination, it is not fair to let them carry the main burden of making corporations behave responsibly. The burden of regulating corporations, whether owned by the state or the private sector lies with the state, the corporations themselves and the multilateral bodies which are responsible for monitoring how state parties are complying with their legal obligations on binding human rights and environment standards.

This report has covered themes from the local to the national to the international, but at its heart is the struggle of communities. In the information and case studies provided, the impetus for action has come from affected communities. The initiatives taken very often rely on the bravery of indigenous leaders and human rights defenders, many of whom sacrificed life and limb. The national and international advances charted in this publication are based on a great deal of

community organizing and networking and courageous local action. The Global Network, which was established to implement the Manila Declaration, commits to sustain its support for local community strengthening and exchange learning visits, ensuring linkages between the local, national, regional and global initiatives, and helping indigenous peoples' use the gains they achieved in establishing norms, mechanisms and procedures within the UN and other multilateral bodies. This provides the greatest hope for the future.

Endnotes

[1] The Four Corners is a region of the United States where the states of Colorado, New Mexico, Arizona, and Utah meet. The indigenous nations present include the Navajo (Dine), Hopi, Ute and Zuni.

[2] R. Moody, 2007, *Rocks and Hard Places,* London: Zed Books; Mines & Communities, 2012, "US uranium mines still imperil Navajo land and people." 11 April, pp. 127-129. http://www.minesandcommunities.org//article.php?a=11613.

[3] One of the members is an indigenous expert, Pavel Sulyandziga, a former member of the UN Permanent Forum on Indigenous Issues.

[4] Quoted in: N. Klein, 2010, "Unions see green light on climate." *Red Pepper*, 11 January, http://www.redpepper.org.uk/Unions-see-green-light-on-climate.

[5] The Indigenous Peoples' Global Network on Extractive Industries had its first meeting in May 2009 during the 8th Session of the UN Permanent Forum on Indigenous Issues in New York. Tebtebba and the network also organized a side event parallel to the sessions to share the results of the 2009 Manila Conference. It has, since then, met annually during the Permanent Forum sessions.

Appendix

Appendix 1: The Manila Declaration

The Manila Declaration of the International Conference on Extractive Industries and Indigenous Peoples

23-25 March 2009

Legend Villas, Metro Manila, Philippines

When all the trees have been cut down,
When all the animals have been hunted,
When all the waters are polluted,
When all the air is unsafe to breathe,
Only then will you discover you cannot eat money.
- Cree prophecy

Treat the earth well, it was not given to you by your parents, it was loaned to you by your children. We do not inherit the Earth from our Ancestors, we borrow it from our Children.

- Chief Seattle

We, Indigenous Peoples and support organizations from 35 countries around the world and representing many more Indigenous Nations, have gathered together in this International Conference on Extractive Industries and Indigenous Peoples. As Indigenous Peoples we have a unique cosmic vision, diversity of languages, histories, spirituality and territories which have existed since time immemorial. However, we now find ourselves within the borders of States which have established norms and laws according to their interests. On account of this situation, we have suffered disproportionately from the impact of extractive industries as our territories are home to over sixty percent of the world's most coveted mineral resources. This has resulted in many problems to our peoples, as it has attracted extractive industry corporations to unsustainably exploit our lands, territories and recourses without our consent. This exploitation has led to the worst forms of, environmental degradation, human rights violations and land dispossession and is contributing to climate change.

Environmental degradation includes, but is not limited to, erosion of our fragile biological diversity, pollution of land, air and water, and destruction of whole ecological systems. Extractive industries, and particularly those relating to fossil fuels, also have significantly contributed to the climate change that is destroying our Mother Earth.

Human rights violations range from violations of Indigenous Peoples' right to self-determination (which includes the right to determine one's own economic, social and cultural development), rights to lands, territories and resources, as well as displacement and violations of the most basic civil and political rights, such as arbitrary arrests and detention, torture, enforced disappearances and killings.

Our cultural diversity has also been grossly eroded because of the destruction of biological diversity and lands, territories and resources by extractive industries upon which our cultures are based. This erosion of our cultural diversity is also a result of the imposition of colonial systems and the settlement of non-Indigenous Peoples. Corporations enter into our territories with the promise of "development" through employ-

ment, infrastructure building and payment of governmental taxes. Despite these promises, there still exists a situation of dire poverty in those living close to extractive industry projects. This situation has fuelled conflicts between Indigenous Peoples and the State and extractive industry corporations, as well as causing divisions within the Indigenous communities themselves.

On May 6-16, 1996, a first "Mining and Indigenous Peoples Conference" held in London produced the "Indigenous Peoples' Declaration on Mining." This declaration highlighted conflicts occurring between our communities and corporations. It reiterated that Indigenous Peoples need to be the decision makers on whether or not mining should take place in their communities and under what conditions this may occur.

Almost 13 years have passed since this conference was held, but overall our situation on the ground has not noticeably improved. The opportunities and threats since the 1996 conference include:

- the welcome adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) by the UN General Assembly on 13 September 2007;
- new UN mechanisms for the protection of the rights of Indigenous Peoples, such as the UN Permanent Forum on Indigenous Issues, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, and the Expert Mechanism on the Rights of Indigenous Peoples;
- a greater interest on the relationship between human rights and corporate behaviour, including the work of the UN Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises;
- the recognition of corporate social responsibility and a claimed willingness on behalf of corporations to negotiate agreements directly with Indigenous Peoples, although so far much of this seems to be more on paper or promises, as opposed to practice;
- the climate change crisis, coming about mainly because

of dependence of the current economy on fossil fuels. These resources are mined on our land and many of our peoples are disproportionately affected by such activities; and

- the global financial crisis, caused by the unregulated liberalisation of finance.

Based on the foregoing observations, we assert that:

- Indigenous Peoples are rights holders, with an inextricable link to their lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired, and should not be treated merely as stakeholders. We have a right to self-determination of our political condition and to freely choose our economic, social and cultural development (UNDRIP Article 3);
- Our rights are inherent and indivisible and seek recognition not only of our full social, cultural and economic rights but also our civil and political rights;
- All doctrines, policies and practices based on the presumed superiority of colonial peoples and worldviews should be condemned;
- We contribute to the diversity and richness of the cultures that make up humanity and believe that we can teach valuable lessons to the rest of the world through our values and world views in how to tread gently upon the earth;
- Destruction of Indigenous Peoples sacred sites and areas of spiritual and cultural significance by extractive industries must stop;
- The vulnerable position of women and youth with regard to the impacts of extractive industries, including loss of livelihoods, violence and impacts on health and well-being must be recognized;
- The development model premised on unsustainable consumption and production, and corporate globalisation, which fuels the entry of extractive industries onto our lands, must be rejected;
- Respect for the preservation of life on earth, and our right to food, must have precedence over extractive industry projects;

- Extractive industry projects must not take precedence over our right to land—regardless of whether our rights are based on legal recognition or usufruct rights;
- There must be an immediate end to the criminalization of community resistance, the violent intimidation, harassment, and murder of our leaders, activists and lawyers, who are working for the defence of our lands and lives;
- Extractive industry projects must not take precedence over the human right to water. Water is especially important in our lives and is sacred to us. In addition the major reserves of fresh water are found in our territories;
- The right to water is a fundamental human right which must be recognized. We therefore condemn the conduct of the World Water Council which demotes the right to water a "basic need";
- Negotiations about climate change should not be conducted by States and international organizations unless there is full and effective participation of Indigenous Peoples. Furthermore, mitigation and adaptation measures related to climate change must be designed and implemented in keeping with Indigenous Peoples' rights;
- The failure to hold extractive industries to account in host and home countries must be addressed and mechanisms for accountability and enforcement must be created immediately; and
- Implementation of interstate infrastructure initiatives—such as the South American Regional Infrastructure Initiative (IIRSA)—that lead to megaprojects on our lands and territories without first obtaining our free prior and informed consent (FPIC) are destructive to our cultures and survival, and a denial of our right to self determination.

Given the above, in order to ensure respect for the rights recognized in the UNDRIP, as well as the ecological integrity of our planet and communities, we call for:

- A stop to the plunder of our lands, territories and resources;

- a moratorium on further extractive industry projects that affect or threaten our communities, until structures and processes are in place that ensure respect for our human rights. The determination of when this has been realized can only be made by those communities whose lives, livelihoods and environment are affected by those projects;
- due process and justice to victims of human rights violations who are resisting extractive industries;
- review of all on-going projects that are approved without respect for our FPIC and self determination rights; and
- compensation and restitution for damages inflicted upon our lands, territories and resources, and the rehabilitation of our degraded environments caused by extractive industry projects that did not obtain our FPIC.

We call on Indigenous Communities and their Supporters:

- To actively participate in the global network of indigenous peoples on extractive industries which was established at this international conference and will be aimed at strengthening the capacities of local organization through sharing of information, education and training programmes, research and advocacy in the defence of our rights;
- To coordinate research on mining companies, processes and investment sources to empower communities, build strategic plans and ensure recognition and respect for our rights;
- To assert their right to control the authorization of projects, and where FPIC has been given, the conduct of extractive activities in indigenous lands and territories through the use of indigenous customary laws;
- To create a mechanism to compile legal precedents from relevant court decisions on Indigenous Peoples and extractive industries;
- To build relationships with non-indigenous groups concerned with the problem of extractive industries, nationally and internationally, to find common ground; and

- To establish an International Day of Action on Extractive Industries and Indigenous Peoples.

We call on Civil Society Organizations:

- to increase their support, and solidarity in a manner that is sensitive to the issues of Indigenous Peoples; and
- especially conservation and other NGOs, not to impose themselves or their views upon us, but respect our legitimate leadership, and also seek the FPIC of communities before intervening; this also applies to academics including anthropologists.

We call on Companies:

- To respect international standards as elaborated on in the normative framework of indigenous peoples rights, especially the minimum standards as set forth in the UNDRIP, ILO Convention 169 and International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which includes in particular, the right to lands, territories and resources and attendant right to FPIC. This also applies to consultants;
- To submit to independent and credible monitoring;
- To be accountable for the environmental disasters, destruction and human rights violations as a result of their operations;
- To employ proven technology and adhere to the precautionary principle at all levels and in each project;
- To recognize the specific vulnerability of indigenous women to the negative impacts involved with extractive industries;
- To respect the traditional knowledge and intellectual property of Indigenous Peoples. This implies not appropriating the language or names of Indigenous Peoples for companies or projects;
- To ensure full transparency in all aspects of their operations, and especially to ensure affected communities have full access to information in forms and languages they can understand; and
- To conduct and implement environmental, social, cultural and human rights impact assessments to the

highest international standards ensuring independent review and participation of indigenous peoples.

We call on Investors:

- To ensure that policies in relation to investments in indigenous territories reflect the rights articulated in the UNDRIP, and that ethical index listings used by them should base their investment recommendations on third party information, as opposed solely to information from the company in which they may invest;
- To ensure access to information and transparency in relation to all investments in extractive industries in indigenous territories; and
- Not to invest in fossil fuel related projects.

We call on States:

- Specifically those States that have not done so yet, to endorse the UNDRIP and ratify International Labor Organization (ILO) 169, and for those States who have to uphold the rights articulated therein;
- To establish, in consultation with Indigenous Peoples, clear mechanisms and procedures at national levels for the implementation of international juridical instruments, specifically the UNDRIP, ILO 169 and ICERD;
- To review laws and policies on extractive industries that are detrimental to Indigenous Peoples, and ensure consistency with the UNDRIP and international instruments protecting Indigenous Peoples rights;
- To recognize and enforce the rights Indigenous Peoples to FPIC as laid out in UNDRIP, in accordance with our customary laws and traditional practices;
- To recognize and ensure the demarcation and titling of our ancestral lands;
- To recognize our customary laws and traditional mechanisms of conflict resolutions;
- To support the efforts of Indigenous Peoples to develop economic alternatives to extractive industries, in order to alleviate the poverty that creates false dependencies on extractive industries;
- To abolish hedge funds and all forms of private equity

that are not transparent and well regulated, and which distort the price of minerals;

- To legislate and regulate thorough processes for independently conducted environmental, social, cultural and human rights impact assessments, with regular monitoring during all of the phases of production and rehabilitation;
- To protect indigenous activists, human rights defenders and lawyers working on human rights issues, and where the State is the violator we demand an end to the violations against our peoples;
- To ban particularly harmful extractive practices, including riverine tailings disposal, gas flaring, effluent discharges, submarine tailings disposal, mountain top removal and large scale open-pit mining. Given the risks posed by climate change, serious re-consideration should be given to the construction of tailings containment in low-lying coastal areas and in areas exposed to increasingly severe weather events; and
- To ensure that their development cooperation policies and programmes respect Indigenous Peoples rights', in particular in the context of extractive industries and our right to FPIC.

We call on the UN Permanent Forum on Indigenous Issues (UNPFII):

- To conduct a study, with the participation of Indigenous Peoples, on the impact of extractive industries on them, by consolidating all recommendations, observations and decisions of UN Treaty and Charter bodies pertaining to the subject and identifying the measures taken by States to adhere with these;
- To elaborate mechanisms and procedures for States to implement the minimum standards set forth in the UNDRIP, including in particular the right to FPIC and to call on other UN procedures, mechanisms, agencies and bodies and other multilateral bodies to do likewise;
- To establish procedures which provide indigenous communities with the opportunity to request the rel-

evant UN agencies to assist them in the monitoring and provision of independent information in FPIC processes;

- To support the proposal that there be an international Mother Earth Day, and encourage all UN agencies, mechanisms and bodies to do likewise;
- To demand the full and effective participation of Indigenous Peoples in all discussions and decisions pertaining to international agreements and conventions that address issues of biological diversity and or climate change;
- To emphasize the need to address the direct and indirect impacts of extractive industry on climate change, including those associated with mitigation measures;
- To emphasize the need for the widespread diffusion of information and critical debate between Indigenous Peoples about the ongoing mechanisms and negotiations relative to carbon trading and the carbon market;
- To request that the Special Representative to the Secretary General on the issue of human rights and transnational corporations and other businesses, John Ruggie, to actively engage with impacted indigenous community through workshops addressing indigenous peoples rights and the extractive industry, and together with other UN procedures, bodies and agencies, promote the enactment of legislation in home states of transnational corporations that provides for extraterritorial jurisdiction in relation to their activities;
- To facilitate dialogue between indigenous peoples, investors, fund managers, extractive industry corporations and consultants;
- To recommend that the World Bank Group and other International Financial Institutions (IFIs) update their operational directives and safeguard policies pertaining to Indigenous Peoples to include the right to FPIC, as required under the UNDRIP. Specifically to recommend to the Asian Development Bank (ADB) that it include the requirement to obtain FPIC in its safeguard policies on Indigenous Peoples environment and resettlement;

- To recommend that the World Bank Group and other IFIs immediately stop funding, promoting and supporting fossil fuel related projects and large scale mining and hydro electric projects on indigenous lands, and provide a set timeline for ending of all such funding;
- To recommend that the World Bank and other IFIs stop influencing the design of national policies in developing countries in a manner that promotes the interests of transnational mining corporations over the rights of indigenous communities;
- To recommend that the World Health Organization consider conducting a study on the impact of cyanide and heavy metals on the right to health of communities impacted by mining;
- To address the urgent need for the genuine recognition of indigenous religious, cultural and spiritual rights, including their sacred sites in the context of extractive projects; and
- To recommend that all bilateral trade agreements should guarantee that Indigenous Peoples' human rights are respected.

Organizational Signatories (as of 11 April 2009)

Aliansi Masyarakat Adat Nusantara/Indigenous Peoples Alliance of the Archipelago (Indonesia)
Cordillera Peoples Alliance (Philippines)
Kanak Agency for Development (New Caledonia)
Centre for Environmental Research and Development (Papua New Guinea)
Western Shoshone Defense Project (USA)
PIPLinks - Indigenous Peoples Links (UK)
Tebtebba (Indigenous Peoples' International Centre for Policy Research and Education)
Centre for Human Rights and Development (Mongolia)
Ecological Society of the Philippines (Philippines)
Indigenous Peoples' Forum of North East India (India)
Almáciga (Spain)
Chin Human Rights Organization (Burma)

Indigenous Knowledge and Peoples Network (Thailand)
Earthkeepers, One Tribe Trading Company (USA)
Asia Indigenous Peoples Pact
Nepal Federation of Indigenous Nationalities (Nepal)
Forest Peoples Programme (UK)
Grand Council of the Crees (Eeyou Istchee), Canada
Wayrakaspi, Peru
Society for New Initiatives and Activities, Italy
Proyecto Andino de Tecnologías Campesinas (PRATEC), Peru
Justice Peace & Integrity of Creation Commission of the Major Religious Superiors of the Philippines, Philippines
Asia Pacific Forum on Women Law and Development (APWLD)
He Oranga mo nga Uri Tuku Iho Trust, New Zealand

Individual Signatories

Mr. Brian Wyatt, (Australia)
Mr. Cathal Doyle, (Ireland)
Ms. Meaghen Simms, the North South Institute (Canada)
Ms. Elisa Canqui Mollo (Bolivia)
Mr. Luis Vittor, Coordinadora Andida de Organizaciónes Indigenas (Peru)
Mr. Yapasuyongu Akuyana, Association for Taiwan Indigenous Peoples' Policies (Taiwan)
Mr. Xavier Kujur (India)
Mr. Prasert Trakansuphakon, IKAP (Thailand)
Ms. Nima Lama Yolmo, NEFIN (Nepal)
Mr. Tado Karlo, Indigenous People's Forum of North East India (India)
Mr. Hezron Ripko, Pokot Educational and Development Programme (Kenya)
Mr. Andrew Korinko Ole Koisamou, Centre for Pastoralists Development (Kenya)
Mr. Nicholas Soikan, MPIDO (Kenya)
Mr. Legborsi Saro Pyagbara, Movement for the Survival of the Ogoni People (Nigeria)
Ms. Maria Uazukuani, Garib Nama Heritage Foundation (South Africa)
Mr. Joseph Stephanus, Garib Nama Cultural Foundation (Namibia)
Ms. Angela Laiser, community Research and Development Services (Tanzania)

Mr. Paul Kadege, Kileto Civil Society Forum (Tanzania)
Mr. Achia Peter Edison, Matheniks Development Forum (Uganda)
Mr. Alexey Mimanzo, RAIPON (Russia)
Ms. Liubov Passar, Association of Indigenous Peoples of Khabarousk Region (Russia)
Ms. Nyurguyana Dordina, Batani International Development Fund for Indigenous Peoples of the North, Siberia and the Far East (Russia)
Mr. Anders Blom, The National Union for Swedish Sami People (Sweden)
Mr. Rabindranath Soren, Jatiya Adivasi Parishad (Bangladesh)
Ms. Chea Sopheap, Indigenous Community Support Organization (Cambodia)
Ms. Chuong Ham, Indigenous Community Support Organization (Cambodia)
Mr. Khan Chontharo, the NGO Forum on Cambodia (Cambodia)
Mr. Kim Sereikith, Development and Partnership in Action (Cambodia)
Mr. Sao Sokul, Organization to Promote Kui Culture (Cambodia)
Mr. Sreunh Mach, Bonung Indigenous Community (Cambodia)
Ms. Dayamani Barla, Adivasi Astitwa Rakcha Maneh (India)
Mr. Priak Ksing Riahtam, St. John Bosco Boy's Higher Secondary school (India)
Mr. Punit Rajkishor Minz, Bindrai Institute for Research study and Action, Mines Monitoring Center (India)
Ms. Rajulamma Chagarla, SAMATA & MM&P (India)
Mr. Samar Basu Mullick, Bindrai Institute for Research study and Action (India)
Mr. Sujarni Alloy, Aliansi Masyarakat Adat Nusantra Kalimantan Barat (Indonesia)
Mr. Mulamin, Aliansi Masyarakat Adat Nusantra South Sumatra (Indonesia)
Ms. Mina Susana Setra, Aliansi Masyarakat Adat Nusantra (Indonesia)
Ms. Paimaneh Hasteh (Iran)
Mr. Khamla Soubandith, Community Knowledge Support Organization (Laos)
Ms. Urantsooj Gombosuren, Centre for Human Rights and Development (Mongolia)

Ms. Abigail Bengwayan, Cordillera People's Alliance (Philippines)
Mr. Ahop Agate, Mangyan Mission (Philippines)
Ms. Lilia Paglinawan, Interfaith Movement for Peace Empowerment & Development Incorporated (Philippines)
Mr. Lucenio Manda, PGB (Philippines)
Mr. Norberto Puasan, Dulangan Federation of Higaonon (Philippines)
Ms. Wilma Tero, Kesalabuukan Tupusumi (Philippines)
Mr. Windel Bolinget, Cordillera People's Alliance (Philippines)
Ms. Isabel Corio, Bangsa Palawan-Philippines Inc. (Philippines)
Ms. Rebecca Bear-Wingfield, Australian Nuclear Free Alliance (Australia)
Ms. Marina Kahlemu, National Council for Indigenous Peoples (New Caledonia)
Mr. Sarimin Boengkih, Kanak Agency for Development (New Caledonia)
Mr. Jeffery Simon, Akali Tange Association Incorporation & Porgera Alliance (Papua New Guinea)
Ms. Matilda Koma, Centre for Environmental Research & Development (Papua New Guinea)
Mr. Martin Velasquez Maliqueo, Confederacion Mapuche (Argentina)
Mr. Erwin Freddy Mamani Machaca, Mision Permanente de Bolivia Ante Las Naciones Unidas (Bolivia)
Mr. Jose Valentin Muiba Guaji, Coordinadora de las Organizaciones Indigenas de la Cuenca Amazonia (Ecuador)
Mr. Waldo Muller, Region Autonoma Norte Raan, Consejo Regional Autonomo (Nicaragua)
Mr. Saul Puerta Peña, Asociacion Interetnica de Desarrollo de la Selva Peruana (Peru)
Ms. Loreen Jubitana, Bureau Indigenous Village Leaders in Suriname, Association of Indigenous village Leaders in Suriname (Suriname)
Ms. Sandra Jack, Taku River Tlingit First Nation (Canada)
Ms. Julie Ann Cavanaugh-Bill, Western Soshone Defence Project (USA)
Mr. Larson Bill, Western Soshone Defence Project (USA)
Mr. Edward Milner, Acacia Productions Ltd. (UK)
Ms. Joan Carling, Asia Indigenous Peoples Pact
Mr. Asier Martinez de Bringas, Almáciga (Spain)

Mr. Marcos Orellana, Center for International Environmental Law (USA)
Ms. Darleen Gela, Amnesty International (Philippines)
Ms. Hazel Galang, Amnesty International (UK)
Mr. Christian Erni, International Work Group for Indigenous Affairs
Ms. Gemma Smith, Life Mosaic (UK)
Mr. Serge Marti, Life Mosaic (UK)
Ms. Rhia Muhi, Legal Rights & Natural Resources Center-Friends of the Earth (Philippines)
Mr. Roger Moody, Mines & Communities (UK)
Ms. Turid Johansen Arnegard, Norad (Norway)
Mr. Andrew Whitmore, PIPLinks (UK)
Mr. Geoff Nettleton, PIPLinks (UK)
Mr. Stuart Kirsch, University of Michigan (USA)
Mr. Ryan (Kirk) Herbertson, World Resources Institute (USA)
Dr. Angelina P. Galang, Miriam College, Philippines
Mr. Jiten Yumnam, Forum for Indigenous Perspectives and Action / Citizens Concern for Dams and Development, India
Dr Michel Pimbert, UK
Mr. Tirso Gonzales, Ecuador
Mr. Jorge Ishizawa, Proyecto Andino de Tecnologías Campesinas (PRATEC), Peru
Fr. Archie Casey SX, Xaverian Missionaries, Philippines
Mr. Josep M. Mallarach, Consultor ambiental, Spain
Mr. Artax Shimray, Indigenous Peoples' Forum of North East India (India)
Mr. Xavier Kujur, Jharkhand Save the Forest Movement (India)
Mr. Nima Lama Yolmo, NEFIN, Nepal
Mr. Peter Swift, Southeast Asia Development Program (USA)
Mr. Eugenio Insigne, National Commission on Indigenous Peoples (Philippines)/ Member, UN Permanent Forum on Indigenous Issues
Mr. Dario Novellino, Centre for Biocultural Diversity (CBCD), University of Kent, UK

Appendix 2:

E/C.19/2009/CRP. 8
4 May 2009
English

Permanent Forum on Indigenous Issues
Eight session
New York, 18 - 19 May 2009

Report of the International Expert Group Meeting on Extractive Industries, Indigenous Peoples' Rights and Corporate Social Responsibility

Permanent Forum on Indigenous Issues
Eighth session
New York, 18 - 29 May 2009

Summary

The present report provides an overview of the issues discussed and recommendations made at the international expert group meeting on Extractive Industries, Indigenous Peoples' Rights and Corporate Social Responsibility, held from 27 to 29 March 2009 in Manila, Philippines.

I. Introduction

1. In addressing the UN Permanent Forum on Indigenous Issues and other UN fora, Indigenous Peoples have consistently expressed the crucial need to address human rights issues related to extractive industries. In response to the continuing call for indigenous representatives from affected communities to come together to share their experiences and to strategize on how to address common problems, during its Seventh Session, the Permanent Forum adopted a recommendation for holding an expert workshop on extractive industries. The International Expert Group Workshop is organized by Tebtebba Foundation in cooperation with the Secretariat of the Permanent Forum on Indigenous Issues. The recommendation which called for this meeting is in paragraph 72 of the Permanent Forum's Report of the 7th Session (E/2008/43), which states:

> *The Permanent Forum decides to authorize a three-day international expert group workshop on indigenous peoples' rights, corporate accountability and the extractive industries, and requests that the results of the meeting be reported to the Forum at its eighth session, in 2009. the report of that workshop can feed into the eighteenth and nineteenth sessions of the Commission on Sustainable Development, which will address the themes of mining, chemicals, waste management and sustainable consumption and production patterns, and contribute to the review by the eighteenth session of the Commission.*

II. Organization of work

A. Attendance

2. The meeting was attended by indigenous experts from the seven indigenous sociocultural regions; members of the Permanent Forum; a member of the Expert Mechanism on the Rights of Indigenous Peoples; representatives of departments, agencies, funds and programmes of the United Nations systems; representatives of other intergovernmental organizations, non-governmental organizations (NGOs), donor and academic institutions; and representatives of Member States. The list of participants is contained in annex I.

B. Documentation

3. The participants had before them a draft programme of work and a background paper. In addition, a number of documents were submitted to the meeting by participants. Meeting documents are available on the website of Tebtebba at: http://www.tebtebba.org and the Permanent Forum at: http://www.un.org/esa/socdev/unpfii/en/EGM_IPCR.html

C. Opening of the meeting

4. At the opening of the meeting, a representative of the Secretariat of the Permanent Forum on Indigenous Issues made an opening statement.

D. Election of officers

5. Ms. Victoria Tauli-Corpuz was elected Chairperson of the workshop and Ms. Paimaneh Hastaie was elected Rapporteur.

E. Adoption of the recommendations

6. On 29 March 2009, the workshop adopted, by consensus, the conclusions and recommendations contained in section III below.

F. Closure of the workshop

7. The meeting was closed after the conclusions and recommendations were adopted in the final meeting, held on 29 March 2009.

III. Narrative, Conclusions and Recommendations

A. Introductory Remarks

8. The Chairperson of the International Expert Group Workshop and introduced the subject of the meeting. She observed that, although there have been substantial developments in the promotion and protection of the human rights of Indigenous Peoples in recent years, Indigenous Peoples around the world have continued to suffer violations of their human rights on a regular basis. This is especially the case in the context of extractive industries, such as mineral, oil and gas extraction, which disproportionately impact Indigenous Peoples. Human rights violations range from violations of Indigenous Peoples' right to self-determination, rights to lands, territories and resources, health and culture, food and water, as well as displacement and violations of the most basic civil and political rights, such as arbitrary arrests and detention, torture, enforced disappearances and killings. Women and youth are often in a particularly vulnerable position with regard to the impacts of extractive industries, including loss of livelihoods, violence and impacts on health and well-being.

9. She gave a brief overview of the International Conference on Extractive Industries and Indigenous Peoples, which was held from 23-25 March 2009. This was attended by representatives of indigenous peoples' organizations and nations, NGOs, donor community, and some members of the academe from 35 countries. This conference discussed links between the global economic crisis, climate change, extractive industries, and the experiences of Indigenous Peoples from all over the world. She reported that a global network on Indigenous Peoples and extractive industries has been established by the conference. The conference also agreed on the Manila Declaration which was formally submitted to the Expert Group Workshop. She thanked the Christensen Fund and the Norwegian Agency for Development Cooperation (NORAD) who were the main funders for the International Conference and the Expert Group Meeting.

10. The call to address the problems faced by Indigenous Peoples in relation to extractive industries had been strengthened by the adoption of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) by the General Assembly in September 2007, which established minimum standards and has provided a new opportunity to establish plans and methods to promote and protect Indigenous Peoples rights.

11. It was recognized that the term "extractive industries" includes transnational corporations, States, public and privately-held corporations, companies and other entities participating in the exploration and extraction of natural resources. In this particular expert group workshop the industries dealt with were oil, gas and mineral extractive industries. Throughout this report, these entities will generally be referred to as "companies" or "corporations" unless specifically noted.

B. The Role of Corporations

12. The right of Indigenous Peoples to self-determination is of fundamental importance in the context of extractive industries and should be the basis for all discussions. In relation to activities on indigenous lands or territories, Indigenous Peoples are rights holders, and not merely stakeholders.

13. According to the provisions of the UNDRIP, extractive industries must not operate on indigenous lands or territories without obtaining the free, prior and informed consent (FPIC) of the relevant communities and Indigenous Peoples. This includes the right to say no to extraction or exploration. FPIC is a right and not an obligation and it is therefore for Indigenous Peoples to determine whether they will engage in discussions or not. FPIC is not a single decision but rather a process that occurs in stages and which can be revoked.

14. It was noted that although corporations, due to pressures and struggles of Indigenous Peoples, were now more willing to consult with communities, efforts fall far short of true free, prior and informed consent. There is a major problem with the lack of full disclosure of information regarding environmental, social, cultural and human rights impacts. One frequently encountered problem was that corporations, in collusion with government authorities, selected indigenous individuals or specific communities with which to negotiate without ensuring that they represented their communities and/or the impacted area. By doing this they divide the indigenous peoples within the communities. Participants expressed frustration that extractive industries often treated benefit-sharing or social programs as charity, rather than a human rights issue.

15. In instances where indigenous communities consent to extractive industry activity, they have a right to a fair share of the benefits from the activities on their lands. These terms should be settled through appropriate negotiations and with the authorities recognized by the indigenous peoples.

16. In negotiating with indigenous communities, some extractive industries have become willing to pay more for their use of indigenous territories. Benefit sharing generally takes one of two forms: either an upfront one-time payment or payment over time of a percentage of profits earned. The latter is far more beneficial to communities, but the former is more common. It was emphasized that, if an indigenous community chose to engage in benefit sharing, it was important to base it on future annual revenues so the community would receive an income for the duration of the extractive activity. As mining is non-renewable and as the impact of mining goes beyond

the term of the project, it is especially important that long-term economic planning is undertaken from the start. Funds should also be alloted for the rehabilitation of the indigenous communities which have been polluted and destroyed by extractive industries operations.

17. Participants expressed concern that, although corporations were now more flexible in terms of benefit sharing, due to pressures and struggles of Indigenous Peoples, there was no increased interest in acknowledging the sovereignty or traditional decision-making of Indigenous Peoples and their rights to their territory or in redressing past human rights abuses. It was as though corporations believed they could solve all problems associated with extractive industries through mere financial compensation. Moreover, payments to indigenous communities often had negative impacts on the community and were divisive. In some instances, corporations created NGOs to implement "development" projects in Indigenous Peoples' communities with the ultimate goal of gaining the support of these communities. However, these processes and the use of financial or "tangible benefits" resources were generally not transparent. When this occurs prior to obtaining consent it is regarded by many as undue influence and even bribery.

18. Participants emphasized that, although the concept of "best practices" or "good practices" is frequently used in the context of extractive industries and Indigenous Peoples, the term remained abstract, as concrete examples were rarely presented. In instances where cases were offered, they were lacking in detail and therefore inadequate for use as examples for emulation by other companies. Further discussion was required to determine the factors that would constitute a good practice.

19. Participants stressed the need for transparency on the part of extractive industries. Although the Extractive Industries Transparency Initiative (EITI) had been established to address this concern, it focuses on financial transparency and does not include transparency with regard to the environmental, social, cultural and economic impacts of extractive industries on Indigenous Peoples. A lack of transparency in these areas facilitated the spreading of misinformation. For example, cor-

porations often argued that they offered economic benefits to indigenous communities in the form of job creation. In fact, extractive industries often result in a net job loss particularly for Indigenous Peoples because they are not offered jobs by the company and their original livelihoods are impacted or lost due to environmental contamination and forced displacement. In addition, those subjected to scrutiny by the initiative are only those who have formally applied to be part of this. There are very few members of this, at present.

20. Extractive industries corporations generally fail to comply with national laws that protect the rights of Indigenous Peoples. It was emphasized that this was occurring on a global basis, regardless of a State's developed or developing status and regardless of a State's industrialized, political or economic status. Participants expressed concern that corporations were even less likely to respect the rights of Indigenous Peoples in countries where the State itself showed little respect for their rights, or where the State maintained close relations with the extractive industries themselves. Additional challenges were faced in situations were domestic laws offered little protection to Indigenous Peoples or, worse, where laws were slanted towards the protection of the interests of extractive industries. Extractive industries were also seen to be complicit in the formulation of policies and laws that diminish the rights of Indigenous Peoples. Most national laws on mineral, oil and gas extraction were made without consultations with Indigenous Peoples and many of those contradict or undermine Indigenous Peoples' rights, in particular the failure to adequately protect spiritual areas commonly referred to as "sacred sites."

21. In considering approaches to motivating extractive industries to respect the human rights of Indigenous Peoples, it is important to analyze the strategies corporations use to respond to their critics. Corporations often initially deny that such criticism has validity. If they encounter social pressure, they may acknowledge that problems exist, but generally response in primarily symbolic ways. It is only when their continued operation is jeopardized that they will accept significant regulation or reform. Moral responsibility was found to be insufficient to

motivate corporations to change their behavior and the need for additional incentives was highlighted. Motivational factors ranged from reputation costs to actual costs associated with litigation, or the introduction of new regulations.

22. In addition to seeking external forms of accountability, corporate structures and law needed to be reformed. Corporate governance was often corrupted and needed to be more devolved and limited liability laws had to be reformed. Similarly, accountability should not cease in the transfer of permits or concession from one company to another. Participants observed that companies often used such transfers to disown blame or responsibility for past acts. FPIC should also be obtained before the transfer of any concessions. In agreements with Indigenous Peoples (Impact Benefit Agreements or Memorandum of Agreements) conditions pertaining to future transfer of mining concessions must be negotiated, clearly stated and explained. Where agreements are not explicit in relation to this, Indigenous communities must have the right to renegotiate the terms of these agreements with the company acquiring the concession.

C. The Role of Indigenous Nations, Governments and Organizations and Civil Society Organizations

23. Participants described actions undertaken to ensure the protection of their human rights in relation to extractive industries and emphasized the importance of combined strategies. These included legal and extra-legal strategies, and efforts at local, national and international levels.

24. At the local and national level, efforts should include educating the public, mobilizing impacted villages and seeking the involvement of all sectors of civil society so that all members can claim ownership of the movement. Extractive industry issues should be linked to other people's issues, including agriculturalists and fisherfolk's rights, worker's rights and women's rights. It was important to build strategic alliances with other advocacy groups that could offer support and contribute to

shaping public opinion. Ensuring strong media coverage was also an important component of successful advocacy.

25. Good practices included the organization of indigenous elders, whose wisdom and role in the struggle for human rights was crucial. Another good practice was the use of unity pacts or agreements between Indigenous Peoples from different communities.

26. The use of international mechanisms was also recommended and could include bringing cases or submitting shadow reports to international treaty bodies. Similarly, the use of laws that establish extra-territorial jurisdiction was encouraged, for example, the Alien Tort Claims Act in the United States.

27. It was emphasized that indigenous communities must develop the content of their advocacy strategies based on their own aspirations. Questions to consider included specific demands to be directed to the extractive industry and government, as well as indigenous alternative models and policy proposals for reforming the industry and the underlying socio-economic framework. In terms of alternative models and policies, Indigenous Peoples should formulate proposals for reforming extractive industries to make them truly serve as an engine for genuine economic development at national and local levels. Even if not legal tools, these could be educational and political tools.

28. The need for training on research and human rights work, as well as leadership training, was emphasized. Such training would maximize the effectiveness of advocacy efforts focused on extractive industries. Participants agreed that more materials and guidelines regarding free, prior and informed consent were needed for indigenous community use. However, guidelines should not be used at the expense of the views and approaches of communities themselves. Ultimately it is for communities to work out what consent means for themselves.

29. Participants noted that, while environmental impact assessments are now required in many countries, these rarely account for the climate change impacts of projects. Also, social impact assessments and human rights impacts assessments are usually neither conducted nor required. This should be

remedied and international standards for social, cultural and human rights impact assessments should be jointly developed with Indigenous Peoples and complied with. It is also important that communities taking part in the assessment work are paid for their costs to participate and that the results are theirs and theirs to control. The information emerging from these assessments should be required as input into FPIC decision-making processes.

30. There is often a misconception that Indigenous Peoples from developed States share in the wealth of their States or are otherwise in a different position than other Indigenous Peoples This was shown generally not to be the case. For example, socio-economic indicators regarding Indigenous Peoples in developed States demonstrated the urgent need for attention to the rights to lands, territories and resources, the right to self-determination and the rights to health, culture and health, as well as issues relating to the criminal justice system and other concerns. The plight of Indigenous Peoples in developed States is, generally, not addressed by the UN, except by the UN Permanent Forum on Indigenous Issues and the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples. It is important to recognize that Indigenous Peoples from these States require international assistance, including capacity building and funding.

31. Indigenous participants expressed concern regarding the use of metals and minerals mined from their lands and territories for weapons of mass destruction, as well as the dumping of toxic byproducts from mining of these products back into the communities. An example is the dumping of radioactive waste materials from nuclear power plants in indigenous peoples territories. The question is how to connect corporate accountability to the use of minerals within the aerospace industry and the military-industrial complex.

32. Indigenous participants discussed their difficulties in getting access to the justice system in their countries to raise their issues related to the environmental damages and injustices they suffer from operations of extractive industries corporations. There is a lack of lawyers who can provide pro-bono

services to them and public law interest groups are very few. As many of them are in dire poverty situations, they cannot pay private lawyers to take up their cases. In addition, bribery and corruption is commonly observed in the judiciary in many countries.

33. There is an increasing number of indigenous peoples' organizations filing complaints, making submissions and shadow reports and using early warning/urgent procedures on issues related to mining and oil extraction before Treaty Bodies like the Committee on the Elimination of all forms of Racial Discrimination (CERD). These efforts are being done jointly with support NGOs. The General Comments of the Treaty Bodies are useful for indigenous peoples to pursue their cases further at the national level. Since the Treaty Bodies ask the relevant States to respond to their comments and recommendations the issue becomes more visible and there are better chances to develop dialogues between States and indigenous peoples.

D. The Role of States

34. States are responsible for ensuring that the UN Declaration on the Rights of Indigenous Peoples and other International Human Rights Instruments and Multilateral Environmental Agreements are effectively complied with, and for promoting and protecting the rights of indigenous peoples with regard to extractive industry corporations. States also have the responsibility to increase their regulatory powers to ensure that extractive industries corporations become more socially and environmentally accountable and responsible.

35. States must ensure that, in accordance with the provisions of the UNDRIP, extractive industries do not operate on indigenous lands or territories without obtaining the free, prior and informed consent (FPIC) of the relevant communities and Indigenous Peoples. This includes the right to say no to extraction or exploration. FPIC is a right and not an obligation and it is therefore for Indigenous Peoples to determine whether they will engage in discussions or not. FPIC is not a single decision but rather a process that occurs in stages and

which can be revoked.

36. Many States maintain contradictory or antiquated laws with regard to indigenous rights and with regard to mineral, oil and gas extraction. Domestic laws, in particular those regarding sacred sites or spiritual areas, the environment, extractive industries, indigenous recognition, governance, consultation, corporate trade and investment laws, should be evaluated and assessed to determine the extent to which they are consistent or contradictory with the human rights of Indigenous Peoples.

37. In some States where constitutional and legislative protection have been afforded to indigenous peoples rights, examples were shared on the roles played by the extractive industries in shaping the associated implementing rules and regulations, for example guidelines related to FPIC. This has led to guidelines which are very insensitive to indigenous peoples cultures and traditional systems of decision-making and made it easier for corporations to manipulate and divide the indigenous communities between themselves.

38. Participants highlighted the gap between governmental rhetoric and laws and actual implementation of these, including specifically with regard to self-determination. Such gaps exist even in States that have progressive laws in place. Participants noted that, in Bolivia, ILO Convention 169 and the UN Declaration are national laws and the right to free, prior and informed consent is enshrined in the constitution. Nonetheless, implementation is not only dependent on the national government, it also depends on local governments and the corporations, themselves. There is strong resistance from some local governments in respecting and protecting the rights of indigenous peoples.

39. Indigenous Peoples face significant barriers in accessing domestic courts. First, most of them barely have resources to ensure their basic survival, much less to bring their cases to court. Secondly, members of the judiciary in many countries are bribed by corporations and are threatened or killed if they rule in favor of indigenous peoples. States have an obligation to provide Indigenous Peoples with better access to justice and maintain and independent judiciary.

40. In terms of home-state responsibility to regulate transnational corporate behavior, it was highlighted that home-states' obligations under international law include the duty to exercise extraterritorial jurisdiction over corporate activities. This includes in particular, the minimum standards set forth in the UN Declaration and obligations set forth in the International Convention on the Elimination of All Forms of Racial Discrimination, The International Covenant and Civil and Political Rights, the Convention on Economic, Social and Cultural Rights, ILO Convention No. 169 and other instruments where applicable. It was noted favorably that the Committee on the Elimination of Racial Discrimination has in two instances issued Specific recommendations to States Parties underscoring their obligations under the Convention with respect to the activities of their corporations outside of their borders.

41. Participants noted that States have demonstrated more interest in protecting corporate interests than the rights Indigenous Peoples. This historic trend has to be reversed. States should show political will and enhance their capacities to protect indigenous activists, human rights defenders and lawyers working on human rights issues. Where the State itself was involved in perpetrating human rights abuses, including through the actions of military or security forces, it must bring abusive practices to an end.

42. Destruction of Indigenous Peoples sacred sites and areas of spiritual and cultural significance by extractive industries has to stop. States-Parties to the UNESCO Convention for the Protection of the World Cultural and Natural Heritage have to address the urgent need for the genuine recognition of indigenous religious, cultural and spiritual rights, including their sacred sites in the context of extractive projects. Indigenous peoples' capacities to lobby for the inclusion of their sacred and spiritual sites as part of the the world's cultural heritage should be enhanced.

E. The Role of the UN and the International Financial Institutions

43. Participants were concerned that in some cases, UN agencies and UN country offices did not adequately promote the rights of Indigenous Peoples. It was urged that UN Country Offices take immediate constructive actions in this regard.

44. UN agencies generally offer technical assistance to governments and rarely to indigenous communities and organizations. UN agencies should expand their technical assistance to include Indigenous Peoples. It was also recommended that a mechanism to support indigenous communities in their negotiations be created.

45. As the impacts of extractive industries are both extremely serious and controversial, sources of credible independent information and assessment are essential to the protection of Indigenous Peoples' rights. UNPFII, the Expert Mechanism on the Rights of Indigenous Peoples, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, and other UN bodies and agencies could help to remedy this by working with Indigenous Peoples to research and document the impacts of mining and other extractive industries. It is also important that the WHO study and document the health impacts of extractive industries on Indigenous Peoples. The UNESCO should also study the roles played by the extractive industries in destroying sacred, cultural, religious, spiritual heritage sites of indigenous peoples and support efforts of indigenous peoples to protect these sites.

46. Indigenous Peoples do not always have access to domestic courts and that the international system could not cope with the existing volume of egregious cases. Given the catastrophic impacts that extractive industries have had on indigenous communities around the world, participants called for a new formal process, such as an ombudsman or an international court system specifically focused on this issue.

47. Participants expressed concern that the Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises

(SRSG) had not engaged adequately in indigenous issues to date. Participants would strongly welcome the SRSG's greater attention to indigenous issues, including his attendance of future sessions of the UNPFII in 2009 and the holding of consultations specifically on the issue of transnational corporations and the human rights of Indigenous Peoples.

48. Participants noted the relevance of ILO Convention No. 111 concerning Discrimination in Respect of Employment and Occupation. This Convention can be utilized to protect the rights of Indigenous Peoples in relation to extractive industries, which often destroy traditional occupations. Other ILO Conventions such as Convention No. 169 on Indigenous and Tribal Peoples should be used by indigenous peoples whose countries have ratified this.

49. Participants noted that while international financial institutions (IFIs) tend to have policies on Indigenous Peoples that can safeguards their rights and interests, particularly in countries that do not have good laws, these policies are not always implemented. Moreover, it is extremely problematic that IFIs have not adopted the requirement for free, prior and informed consent (FPIC). Indeed, IFIs have confused the issue by instead calling for free, prior and informed "consultation," which has no clear meaning and has had problematic results. For example, in some cases, governments have used this as grounds to simply notify indigenous communities of extractive industries projects that would impact them, rather than asking for their consent.

50. Participants expressed concerned that although the World Bank has supported review processes, including its Extractive Industries Review and the World Commission on Dams, that have concluded with recommendations to adopt the requirement of FPIC, it has rejected these conclusions. It was noted, however, that the European Bank for Reconstruction and Development (EBRD) Environmental and Social Policy references the UNDRIP and calls for the free, prior and informed consent (FPIC) of Indigenous Peoples any time an EBRD project affects their interests.

51. Participants expressed concern on the significant increase of money alloted by the International Finance Corporation

(IFC) for extractive industries and hydro-electric dam projects. This poses serious threats to indigenous peoples whose lands and territories are being eyed by the industry for extraction. Hydro-electric dam projects are closely linked to extractive industries because this is the source of energy used by the industry. This development is undermining the pronouncements the World Bank Group in relation to its contribution in addressing climate change. Whatever resources alloted to climate change projects and impacts gained through projects supported by the World Bank Group will be undermined by the bigger loans extended for extractive industries.

52. It was noted that the Asian Development Bank is currently updating its safeguard policy on Indigenous Peoples. While indigenous peoples appreciate the efforts of the ADB to consult with them, the issue of inclusion of the requirement of FPIC in this policy has been strongly advocated by them has been disappointing. The scope of FPIC in the current draft policy is limited and therefore not consistent with the UN Declaration on the Rights of Indigenous Peoples.

53. Opposition to the adoption of FPIC requirements for IFIs often comes from IFI board members, which are the governments that both provide money and receive assistance from the banks. Several of the governments that do not wish to see FPIC implemented nationally are not willing to support it at the IFI level either.

54. One additional obstacle to the requirement of the enforcement of FPIC and the UN Declaration on the Rights of Indigenous Peoples at IFIs is the reality of the financial system right now. In addition to the traditional financial actors, new powerful banks are emerging. These banks do not have standards as strong as the IFIs or are still in the process of developing their standards. As a result, governments can choose which bank to go to – one with standards or one without.

55. IFIs could play an important role in setting international environmental and human rights standards concerning extractive industries. Participants noted that, if IFIs seek to influence the mining laws of states, they should do so in an open and transparent manner, inviting full civil society participation.

F. Recommendations

56. The meeting notes with appreciation the papers submitted and the many constructive recommendations, suggestions and ideas presented by the participants on a variety of subjects, as highlighted in the present report.

The Workshop recommends that extractive industries corporations:

57. Adopt the UN Declaration on the Rights of Indigenous Peoples as a minimum standard;

58. Respect the rights enshrined in the UN Declaration regardless of a host government's acknowledgment of the human rights of Indigenous Peoples or failure to protect these through national law;

59. Fully integrate considerations of human rights and environmental standards in all areas of their work, including staff assessments based on staff records;

60. Recognize the rights of Indigenous Peoples over their lands as the basis for negotiations over proposed extractive industries, as well as the organization of engagement, partnership and sharing of financial benefits. In instances where Indigenous Peoples consent to extractive activities on indigenous land, payments or benefit sharing arrangements should be based on annual reviews throughout the life of the activity. Incomes from any extractive activity must cover all costs associated with closure and restoration and include sufficient funds to provide for potential future liabilities;

61. Where benefit-sharing arrangements are channeled through a foundation or other entity, corporations must ensure that these entitlements remain under the control of the indigenous people;

62. Develop and enforce policies on human rights;

63. Set insurance levels and establish insurance funds in agreement with Indigenous Peoples and at a level appropriate for the risks involved. The duration of the insurance program must match the duration of any impact of the extractive industry activity beyond the term of the project itself;

64. Be accountable to Indigenous Peoples for damages resulting from past extractive activities that affected indigenous lands and livelihoods and provide compensation and restitution for damages inflicted upon the lands, territories and resources of Indigenous Peoples, and the rehabilitation of degraded environments caused by extractive industry projects that did not obtain FPIC;

65. Submit themselves to the jurisdiction of indigenous courts and judicial systemsin whose territories they operate
66. Ensure respect of FPIC including full transparency in all aspects of their operations and stop dividing communities to obtain FPIC.

67. Always regard indigenous communities as having control and ownership of the land and territory, regardless of whether these rights are recognized by the relevant governments or not.

The Workshop recommends that civil society organizations and NGOs;

68. Adopt the UN Declaration on the Rights of Indigenous Peoples as a minimum standard to guide any work that impacts Indigenous Peoples and raise awareness of their staff and management as well as their Governing Bodies on the UNDRIP.

69. Include on their boards and/or advisory groups, where possible, representation by Indigenous Peoples or their organizations;

70. Recognize the existence and impacts of extractive industries on all Indigenous Peoples including those in developed States.

71. Help establish more Public Interest Law Centers and legal funds which indigenous peoples can access when they bring cases against extractive industries in courts or who can help draft contracts which will ensure that benefit-sharing agreements are fair.

72. Provide the information indigenous peoples need in relation to track records and investors of extractive industries.

73. Support campaigns of indigenous peoples on Extractive Industries by facilitating exchanges between indigenous

peoples affected by the same corporations or the same sector, facilitating speaking tours and participation of indigenous peoples in relevant bodies dealing with issues of extractive industries, etc.

74. Developing guides, multi-media awareness-raising and monitoring tools which can be used by indigenous peoples and organizing workshop-seminars on extractive industries.

The Workshop recommended that Indigenous Peoples, Nations and Organizations

75. Build relationships with non-indigenous groups and movements concerned with the problem of extractive industries, nationally and internationally, to find common ground;

76. Strengthen further their work in organizing and raising awareness of their own communities so that they are in much better positions to decide collectively on how to deal with extractive industries.

77. Develop further their capabilities to understand and use existing instruments such as the UN Treaty Bodies and grievance mechanisms of the Multilateral Financial Institutions, e.g., Inspection Panels of the WB and the ADB, the Ombudsman of the IFC, OECD Guidelines for Multinational Enterprises, etc.,

78. Recognize and plan activities accordingly for the summer solstice, June 21st, as World Peace and Prayer Day, honoring sacred sites.

79. Discuss and design their self-determined development and identify the role of extractive industries in this.

The Workshop recommended that States:

80. Endorse the UNDRIP if they have not already done so and, for those States who have, to uphold and implement the rights articulated therein as minimum standards;

81. Ratify ILO Convention 169 if they have not already done so and, for those States who have, to uphold and implement the rights articulated therein;

82. Take steps to secure and guarantee land rights of Indigenous Peoples including by accelerating land titling and ensuring effective resolution of disputes regarding land rights;

83. Review laws and policies and structures on extractive industries that are detrimental to Indigenous Peoples, and ensure consistency with the UNDRIP and other international instruments protecting the rights of Indigenous Peoples. There should be a moratorium on further extractive industry projects that affect or threaten Indigenous Peoples until structures and processes are in place to ensure respect for human rights.

84. Ensure that the legislation governing the granting of concessions includes provisions on consultation and FPIC, in line with international standards and which recognize the right of Indigenous Peoples to say no;

85. Require social, cultural and human right impact assessments to be undertaken for all extractive industries projects impacting Indigenous Peoples. Social impact assessments should be required by law and should be undertaken prior to any phases of any extractive industry project. Social, cultural and human rights impact assessments should be required as input into FPIC decision making processes;

86. All too often FPIC has been reduced in the minds of State officials to a "veto" power. States need to appreciate the cumulative impacts of extractive industries. States should fund research on free, prior and informed consent processes in order to support and promote "informed" decision-making on the part of Indigenous Peoples. Research should make clear that the impacts of refusing to respect FPIC rights in one project can taint all future relationships and negotiations with Indigenous communities, along with creating mounting legal expenses and uncertain access in the context of other sectors.

87. Ensure that consultation processes are undertaken with the informed participation of Indigenous Peoples, organizations and communities that are impacted. The government must respect FPIC and therefore must provide information in a culturally appropriate manner regarding the project before consultations are undertaken.

88. Open themselves up to international monitoring of the implementation of FPIC processes;

89. Effectively regulate the overseas operations of extractive industries, and establish adequate penalties for human rights

and environmental violations, including denial of officially supported export credits and insurance.

90. Promote greater transparency and access to information relating to all areas of extractive industries;

91. Ensure the full participation of Indigenous Peoples in the design, implementation and evaluation of development plans at the national, regional and local levels. Governments must additionally support the efforts of Indigenous communities and their allies to enhance existing livelihoods and develop community-created alternative forms of livelihood and poverty alleviation;

92. Ensure the full and effective participation of Indigenous Peoples in negotiations about climate change and the development of national and international action plans and strategies on climate change. Mitigation and adaptation measures related to climate change must be designed and implemented in keeping with Indigenous Peoples' rights;

93. Mainstream climate change considerations in policy formulation and development planning;

94. In light of current failures of environmental standards, States must advance and more effectively enforce higher standards of environmental protection, including by banning particularly harmful extractive practices;

95. Redress environmental harms affecting Indigenous Peoples as a result of trans-boundary pollution from extractive ventures or from oil and gas pipelines traversing their territory;

96. Protect indigenous activists, human rights defenders and lawyers working on human rights issues, and end any criminalization of the actions of Indigenous Peoples in this regard;

97. In view of the adoption of the UN Declaration and increasing international awareness of the importance of the protection of remaining natural forest and forest soils, governments should adjust their land planning to ensure the protection of indigenous lands and landscapes, particularly zones of remaining forest. States should prioritize the maintenance and of these lands and should prioritize the protection of human

rights and the environment over granting corporate privileges to exploit and degrade such resources.

98. States must ensure transparency and accountability especially in governance institutions and bodies that deal with indigenous people' communities. Cases of alleged corruption must be addressed.

99. Establish a complaints system for the complaints of Indigenous Peoples regarding extractive industries and provide redress and restitution for related harms;

100. Ensure that when FPIC is used in policies, it is used as contained in the UNDRIP, with a requirement of consent.

The Workshop calls upon the Permanent Forum to:

101. Given the catastrophic impacts that extractive industries have had on indigenous communities around the world, the Permanent Forum should promote the establishment of a new UN formal process, such as a special rapporteur, an ombudsman or an international court system specifically focused on this issue. Assessing the effectiveness of the Oxfam Australia's ombudsperson for mining might be useful in this regard;

102. Establish a body to monitor FPIC and to consider complaints of the abuse of FPIC. The body should be comprised of independent figures, including Indigenous Peoples, who enjoy the respect and confidence of indigenous communities;

103. Work with Indigenous Peoples, their organizations and civil society organizations to provide technical assistance to communities, States and companies on the implementation of FPIC. This should promote the capacity-building of Indigenous Peoples and their organizations through training on negotiation, FPIC, leadership, research and human rights;

104. Gather existing materials and guidelines on free, prior and informed consent and make these available on the UNPFII website. UNFPII should further analyze existing guidelines to determine whether there are gaps, which should then be filled through the development of new materials and should study the experience of states and territories with existing legislation pertaining to FPIC. The knowledge on free, prior and informed consent that has resulted from Permanent Forum

sponsored processes should be communicated to Indigenous Peoples in plain-language and culturally appropriate ways so that they can begin to implement FPIC conditions on the ground;

105. Invite Indigenous Peoples to submit information on best and worst practices;

106. Request the International Council on Mining and Metals to provide a list of ten projects that they recommend as best practices. This list should be accompanied by an open invitation for members of the UNPFII body to visit, have access to project sites and files;

107. Request the Global Compact to participate in meetings of the Permanent Forum so they can share examples of good practices received from its members.

108. Advocate for the Extractive Industries Transparency Initiative secretariat in Norway to coordinate an effective strategy to ensure that environmental and social impacts on indigenous communities are considered part of the "transparency" protocols that are to be prepared by governments that are certified under this initiative;

109. Permanent Forum sponsored processes have spurred unparalleled expertise on FPIC and that expertise must be invoked to test and challenge company claims on community engagement. There would need to be safeguards, including investigating comparative examples not just company best practices and revisiting consent cases to ensure that they are ongoing;

110. The UNPFII, the Expert Mechanism on the Rights of Indigenous Peoples, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people and other UN bodies and agencies should work with Indigenous Peoples to research and document the impacts of mining and other extractive industries;

111. Invite the Special Representative of the Secretary General on Business and Human Rights to participate in its sessions, in particular, the 8th Session where the report of this Expert Group Meeting on Extractive Industries will be presented. Encourage him to do special studies on extractive industries

and indigenous peoples and make recommendations on how this issue should be addressed by the UN System and by corporations.

112. Hold expert group meetings at the regional level focused on the rights of Indigenous Peoples in relation to extractive industries;

113. Insist on explicit incorporation of the UNDRIP in the policies of the international financial institutions. IFI policies should not only refer to the UN Declaration, but must also be fully consistent with the provisions of the UN Declaration;

114. Work with Indigenous Peoples and the World Bank Group to monitor implementation of IFI policies on Indigenous Peoples.

115. Recognize the Summer Solstice, June 21st as World Peace and Prayer Day, honoring sacred sites.

116. Request the Special Rapporteurs on the Right to Food and on the Special Rapporteur on the Right to Health to also look into issues raised in during the Expert Group Workshop that are relevant to their mandates.

The Workshop recommends the following to UN agencies, bodies, programmes and funds:

117. The World Health Organization should, with the participation of Indigenous Peoples, conduct a study on the impact of extractive industries on the health of affected indigenous communities including also, but not limited to, attendant plant life, animal and other life, soil, air and water impacts, as well as cultural and spiritual consequences and downstream impacts. In addition, it should require strict implementation of health and environmental standards for both workers and communities.

118. The International Atomic Energy Agency should establish a task force, which includes Indigenous Peoples' participation, to consider the disproportionate, ongoing and future impact of uranium mining and nuclear pollution on indigenous communities worldwide with membership from particularly affected indigenous communities;

119. The ILO should disseminate information concerning the gaps in the application of Convention No. 169 relating

to the activities of extractive industries, including specific examples; and consider taking steps to promote respect for the Convention's principles by the extractive industries operating or seeking to operate in the lands of Indigenous Peoples, through its relevant programmes. It should also look into the situation of indigenous workers in extractive industries as well as disseminate relevant ILO Conventions which indigenous peoples can use, e.g., Convention 111, etc.;

120. UNESCO should undertake studies on how extractive industries are destroying the apiritual, religious, sacred, cultural heritage sites of indigenous peoples and support the efforts of indigenous peoples to protect these. Disseminate more widely the relevant Conventions it has so indigenous peoples and States can do joint projects in terms of protecting heritage sites.

121. UNCTAD should conduct a study on the relationship between bilateral and multilateral investment treaties and the rights of Indigenous Peoples, and ensure that its technical assistance in this area does not undermine the ability of states to implement UNDRIP;

122. UN agencies, IFIs and other multilateral institutions and international groups, including the European Union, should ensure consistency of their Extractive Industries sector programmes with the UNDRIP and their own policies regarding Indigenous Peoples' rights.

123. UN Framework Convention on Climate Change should ensure that mechanisms established to mitigate and adapt to climate change respect the rights of Indigenous Peoples. Since the use of oil, gas and coal is the main contributor to climate change, the States should aim to decrease dependency on fossil fuels and hasten the shift towards the development and use of energy from renewable sources.

124. All UN agencies, bodies, programmes and funds should implement the UNDG Guidelines on Indigenous Issues;

125. All UN agencies, bodies, programmes and funds should make indigenous concerns in industrialized or developed States a focus of reporting and distribution of materials, technology and training.

126. The UNDP's internal committee on indigenous peoples should assess how the UNDP is supporting indigenous peoples in asserting their rights especially in relation to extractive industries and to discuss how the UNDP can further support the self-determined development of indigenous peoples. It should also consider providing technical and financial assistance to indigenous peoples on how to address conflicts and governance issues related to extractive industries as well as implementing their self-determined development.

The Workshop recommends that International Financial Institutions:

127. Recognize and enforce the rights Indigenous Peoples to FPIC as laid out in UNDRIP, as opposed to the weaker approach currently favored by IFIs for "consultation";

128. Review their policies, standards and guidelines to ensure they conform with current minimum international standards and law and embody the UN Declaration;

129. Operate in a transparent manner with regard to all activities that impact Indigenous Peoples; and

130. Provide training to Indigenous Peoples on how to use IFI accountability and grievance mechanisms.

131. Respect the recommendations of the 2004 Extractive Industry Review report, including the withdrawal from funding the oil and gas sectors.

Annex I. List of participants

Indigenous Peoples' Organizations and Bodies

Association of Indigenous Peoples of Khabarousk Region (Russia); Australian Nuclear Free Council and Kokatha Senior Women's Council (Australia); Batani International Development Fund for Indigenous Peoples of the North, Siberia & the Far East (Russia); Center for Environmental Research and Development (Papua New Guinea); Centre

for Human Rights and Development (Mongolia); Centre for Pastoralists Development (Kenya); Confederacion Mapuche (Argentina); Coordinadora Andida de Organizaciónes Indigenas (Peru); Coordinadora de las Organizaciones Indigenas de la Cuenca Amazonica (Ecuador); Cordillera People's Alliance (Philippines); FCUNAE (Ecuador); Galdu Centre for the Rights of Indigenous Peoples (Norway); Indigenous Peoples Alliance of the Archipelago (Indonesia); Kanak Agency for Development (New Caledonia; Movement for the Survival of the Ogoni People (Nigeria); National Native Title Council (Australia); National Union of the Swedish Sami People (Sweden); RAIPON (Russia); Western Shoshone Defense Project (United States)

Institutions and Networks

Business and Human Rights Resource Center (USA); Center for International Environmental Law (USA); College of Social Science, University of the Philippines Baguio (Philippines); Department of Anthropology, University of Michigan (USA); Indigenous Peoples Links (UK); Irish Center for Human Rights (Ireland); North South Institute (Canada); University of Vermont (USA); World Resources Institute (USA)

UN Bodies and Multilateral Financial Institutions

Asian Development Bank; European Commission; Expert Mechanism on the Rights of Indigenous Peoples; International Finance Corporation; International Labor Organization; International Organization for Migration; Secretariat of the UN Permanent Forum on Indigenous Issues; United Nations Development Programme; United Nations Permanent Forum on Indigenous Issues; World Health Organization

Governments

Norway; Philippines

Appendix 3 - List of Resources

DOCUMENTS

Chapter 1.1				
Name of document	Authors/Publishers	Date of publication	URL	Description
Communities, Artisanal and Small-Scale Mining (CASM), Issue Briefing	World Bank	2009	www.artisanalmining.org	Briefing from a World Bank-funded network to improve the social and environment impacts of artisanal mining.
Dirty Metals: Mining, Communities and the Environment	Earthworks and Oxfam America	2004	http://www.nodirtygold.org/dirty_metals_report.cfm	A report explaining the role of metals in day-to-day living, with the consequences of production. It has a focus on gold.
Emperor's new clothes: Sustainable mining?	A. Whitmore	2004	http://www.piplinks.org/system/files/AW+JCP+article+on+%27sustainable+mining%27.pdf	Argument on the subject of "sustainable mining" from a community viewpoint.
Guidebook for evaluating mining project EIAs	Environmental Law Alliance Worldwide (ELAW)	2010	http://www.elaw.org/mining-eia-guidebook	An excellent resource for communities who want to review their own EIAs.
Minerals Extraction and the Environment	R. Moody and Mike Flood, Powerful Information	1997		A review of what communities should know about mining—a good primer, but somewhat out of date.

Opening Pandora's Box: The New Wave of Land Grabbing by the Extractive Industries	Gaia Foundation	2012	http://www.gaiafoundation.org/news/launch-of-the-pandoras-box-report	A recent review of the extractive industries in the context of land-grabbing.
Rocks and Hard Places	R. Moody, Zed Books	2007		A basic overview of the problems with the mining industry.
Troubled Waters, How Mine Waste Dumping is poisoning our oceans, rivers and lakes	Earthworks and MiningWatch Canada	2012	http://www.earthworksaction.org/library/detail/troubled_waters	A study of the impacts of mining with regard to water use and pollution.
Tunnel Vision: Women, Mining and Communities	Oxfam Australia	2002	http://resources.oxfam.org.au/pages/view.php?ref=76&k=	A good, if slightly dated, over-view of gender issues in mining.
Scrapping mining dependence, in State of the World	P. Sampat	2003	http://ecoculture.files.wordpress.com/2010/03/scrapping-mining-dependence-payal-sampat.pdf	An overview of the impacts of mining on the world, although slightly dated.
Breaking new ground: Mining, minerals and sustainable development	L Danielson, IIED	2002	http://www.iied.org/mmsd/finalreport/index.html	Report from an industry-inspired multi-stakeholder process examining the contribution of mining to sustainable development.

Chapter 1.2				
Name of document	**Authors/Publishers**	**Date of publication**	**URL**	**Description**
Campaigners Guide to Financial Markets: effective lobbying of companies and financial institutions	Nicholas Hildyard and Mark Mansley	2001	http://www.thecornerhouse.org.uk/resource/campaigners'-guide-financial-markets	A guide to methods, arguments and resources for lobbying companies.
Corporate Accountability and Human Rights Abuses - A Guide for Victims and NGOs on Recourse Mechanisms (Section IV)	FIDH	Updated 2012	http://www.fidh.org/Updated-version-Corporate	A practical tool for victims and their representatives to seek justice and obtain reparation for victims of human rights abuses involving multinational corporations.
Mining Investors	Mining Watch Canada	2007	http://www.miningwatch.ca/publications/mining-investors-understanding-legal-structure-mining-company-and-identifying-its	A guide to understanding the legal structure of a mining company and identifying its management, shareholders and relationship with the financial markets.
The Risks We Run	R. Moody, International Books			A book investigating political risk insurance, and financial risk in general with mining examples.

Chapter 1.3				
Name of document	**Authors/Publishers**	**Date of publication**	**URL**	**Description**
The Dirty Truth About Coal	Sierra Club	2007	http://www.sierraclub.org/coal/downloads/coalreport.pdf	Report on environmental impacts of coal mining.
Cashing in on Coal	Platform London	2008	http://www.oyalbankofscotland.com/cioc/pdf/cashinginoncoal.pdf	Report from environmental NGOs on financing of coal mining.
Dark Materials: the consequences of clinging to coal	Nostromo Research	2010	http://www.minesandcommunities.org/get.php?atid=36	Report exploring coal addiction and the consequences of clinging to coal.

Chapter 2.1				
Name of document	**Authors/Publishers**	**Date of publication**	**URL**	**Description**
A Guide for Community Organizers	Carlos Zorilla, Global Response	2009		A basic guide for communities confronted with mining.
Responsible Mining: The Key to Profitable Resource Development	R. Goodland, Sustainability	2012	http://www.mdpi.com/journal/sustainability	A review of the issue of sustainable mining, with a section categorizing no go zones.

Chapter 2.2				
Name of document	**Authors/Publishers**	**Date of publication**	**URL**	**Description**
Extractive Sectors and the Poor	M. L. Ross, Oxfam America	2001		A good summary of the issues around the resource curse.
	NRC	Updated 2012	http://naturalresourcecharter.org/	Independent attempt to create principles for harnessing natural resources for development.
Rigged? The Scramble for Africa's Oil, Gas and Minerals	Global Witness	2012	http://www.globalwitness.org/library/rigged-scramble-africas-oil-gas-and-minerals	A report on corruption in African mining industries.
State of the World's Minorities and Indigenous Peoples	Minority Rights Group	2012	http://www.minorityrights.org/11374/state-of-the-worlds-minorities/state-of-the-worlds-minorities-and-indigenous-peoples-2012.html	A summary of the situation of minorities, including indigenous peoples in different countries, with a focus on natural resources.
Striking a Better Balance: Final Report of the Extractive Industries Review	E. Salim, World Bank	2003		Critical review of extractive industries commissioned, and then mostly ignored, by the World Bank.
Extracting Promises: Indigenous Peoples. Extractive Industries & the World Bank, 2003	Tebtebba Foundation & Forest Peoples Programme	2003		Publication produced to influence the World Bank's Extractive Industries Review.

Chapter 2.3				
Name of document	**Authors/Publishers**	**Date of publication**	**URL**	**Description**
A Guide for Community Organizers	Carlos Zorilla, Global Response	2009		
Campaigners Guide to Financial Markets: effective lobbying of companies and financial institutions	Nicholas Hildyard and Mark Mansley	2001	http://www.thecornerhouse.org.uk/resource/campaigners'-guide-financial-markets	A guide to methods, arguments and resources for lobbying companies.
Corporate Accountability and Human Rights Abuses - A Guide for Victims and NGOs on Recourse Mechanisms (Section IV)	FIDH	Updated 2012	http://www.fidh.org/Updated-version-Corporate	A practical tool for victims and their representatives to seek justice and obtain reparation for victims of human rights abuses involving multinational corporations.
Equator Principles	Equator Banks	-	http://www.equator-principles.com	A bank investment framework for determining, assessing and managing environmental and social risk in project finance transactions.
Global Reporting Initiative	GRI	-	https://www.globalreporting.org	Voluntary standards for environmental and social sustainability—few mining companies currently signed up.

Mining Investors	Mining Watch Canada	2007	http://www.miningwatch.ca/publications/mining-investors-understanding-legal-structure-mining-company-and-identifying-its	A guide to understanding the legal structure of a mining company and identifying its management, shareholders and relationship with the financial markets.
UK-Listed Mining Companies and the Case for Stricter Oversight	London Mining Network	2012	http://londonminingnetwork.org/docs/lmn-the-case-for-stricter-oversight.pdf	An advocacy document outlining the case for better regulation of mining companies, with case studies.

Chapter 2.4

Name of document	Authors/Publishers	Date of publication	URL	Description
Advocating for Indigenous Peoples Rights at International and Regional Human Rights Bodies	Nativenet		http://www.uanativenet.com/sites/default/files/Topic%20in%20Depth.International%20Advocacy.pdf	Report from University of Arizona's project with indigenous peoples.
Best Practice Mining in Colombia	R. Goodland	2011		Includes a list of standards to which better mining companies should adhere.
Breaking Ground: Engaging Communities in Extractive and Infrastructure Projects	World Resources Institute	2009	http://pdf.wri.org/breaking_ground_engaging_communities.pdf	Report from a sustainability think tank.

Corporate Accountability and Human Rights Abuses - A Guide for Victims and NGOs on Recourse Mechanisms (Section V)	FIDH	Updated 2012	http://www.fidh.org/Updated-version-Corporate	A practical tool for victims and their representatives to seek justice and obtain reparation for victims of human rights abuses involving multinational corporations.
Framework for Responsible Mining: A Guide to Evolving Standards	CSP2	2005	http://www.frameworkforresponsiblemining.org/	Older document from an NGO-led attempt to agree common ethical standards for the industry.
IBA Community Toolkit: Negotiation and Implementation of Impact and Benefit Agreements	G. Gibson, C. O'Faircheallaigh	2010	http://www.ibacommunitytoolkit.ca/pdf/IBA_toolkit_March_2010_low_resolution.pdf	
Indigenous Peoples and the oil and gas industry: context, issues and emerging good practice	IPIECA	2011	http://www.ipieca.org/publication/indigenous-peoples-and-oil-and-gas-industry-context-issues-and-emerging-good-practice	An industry guide from the oil and gas industry.
International Council of Mining & Metals, Good Practice Guide: Indigenous Peoples and Mining	ICMM	2010	http://www.icmm.com/page/208/indigenous-peoples	Industry-led guidance on engagement. ICMM does not fully support FPIC principles.
Negotiating Impact Benefit Agreements: A practical guide for Indigenous Peoples in Guyana	G. Gibson, M. Simms	2011	ttp://www.nsi-ins.ca/images/documents/iba_guide_nsi_apa_fpp_web.pdf	

PRIMATE Guide to International Social Standards			http://www.fastpencil.com/publications/4181-PRIMATE-Guide-to-International-Social-Standards	Guide from a sustainability and community engagement consultancy.
Tipping the Power Balance: Making free, prior, informed, consent work	North-South Institute	2011	http://www.forestpeoples.org/topics/extractive-industries/publication/2012/new-report-and-briefing-extractive-industries-and-free	Well-researched and detailed report on how FPIC should work.
Chapter 2.5				
Name of document	Authors/Publishers	Date of publication	URL	**Description**
Architecture for Change: An Account of the Mining Minerals and Sustainable Development Project	IIED	2006	http://pubs.iied.org/G00975.html	Assessment of industry engagement in mining sustainability through the MMSD project.
Compensatory Conservation Case Studies	UNDP	2009	http://content.undp.org/go/cms-service/stream/asset/?asset_id=2469112	Case studies from UNDP.
Managing Activism: A Guide to Dealing with Activists and Pressure Groups	Institute of Public Relations	2001		PR industry guide to minimizing the harm to companies from activism.

Chapter 2.6				
Name of document	**Authors/Publishers**	**Date of publication**	**URL**	**Description**
Corporate Accountability and Human Rights Abuses - A Guide for Victims and NGOs on Recourse Mechanisms (Section II)	FIDH	Updated 2012	http://www.fidh.org/Updated-version-Corporate	A practical tool for victims and their representatives to seek justice and obtain reparation for victims of human rights abuses involving multinational corporations.
State of the World's Minorities and Indigenous Peoples	Minority Rights Group	2012	http://www.minorityrights.org/11374/state-of-the-worlds-minorities/state-of-the-worlds-minorities-and-indigenous-peoples-2012.html	A summary of the situation of minorities, including indigenous peoples in different countries, with a focus on natural resources.
Chapter 2.7				
Name of document	**Authors/Publishers**	**Date of publication**	**URL**	**Description**
Community Consent Index: Oil, Gas and Mining Company Public Positions on Free, Prior, and Informed Consent (FPIC)	Marianne Voss and Emily Greenspan, Oxfam America	2012	http://www.oxfamamerica.org/files/community-consent-index_final-1.pdf	Index on industry acceptance of the concept of FPIC.

Corporate Accountability and Human Rights Abuses - A Guide for Victims and NGOs on Recourse Mechanisms (Sections II & IV)	FIDH	Updated 2012	http://www.fidh.org/Updated-version-Corporate	A practical tool for victims and their representatives to seek justice and obtain reparation for victims of human rights abuses involving multinational corporations.
Human Rights, Alternative Dispute Resolution, and the OECD Guidelines for Multinational Enterprises	OECD	2007	http://baseswiki.org/w/images/en/7/79/OECD_Guidelines_MNE_2007.pdf	This briefing note gives an OECD perspective on alternative dispute resolution based on experiences with the specific instances procedure of the OECD Guidelines for Multinational Enterprises.
ILO Convention 169	ILO	1989	http://pro169.org/	Guidance for indigenous and tribal peoples in ILO Convention.
OECD Guidelines for Multinational Enterprises	OECD	Updated 2013	http://www.oecd.org/investment/investmentpolicy/48004323.pdf	Guidelines for corporate behavior—complaints can be raised through a National Contact Point in the company's country of origin.
The Permanent Forum for Indigenous Peoples: The struggle for a new partnership	IWGIA	2003	http://www.iwgia.org/iwgia_files_publications_files/PermanentForum.pdf	Handbook, and review, on the UN Permanent Forum on Indigenous Issues.

The Special Rapporteur, Experiences and Challenges	IWGIA	2007	http://www.iwgia.org/iwgia_files_publications_files/UN_Special_Rapporteur.pdf	Handbook, and revie, on the UN Special Rapporteur on the Rights of Indigenous Peoples,
The Universal Periodic Review Handbook	FIDH	2009	http://www.fidh.org/IMG/pdf/UPR_HANDBOOK.pdf	Guidebook for NGO in how to use the UN's Universal Periodic Review.
The Voluntary Principles on Security+Human Rights	Foley Hogg	Updated 2012	http://www.voluntaryprinciples.org/principles/introduction	Set of principles followed voluntarily by participants with regard to armed security for projects.
UN Global Compact		-	http://www.unglobalcompact.org/	Provides guidance and best practice for companies including on social and human rights issues.
UN Guiding Principles on Business and Human Rights		2011	http://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf	Significant international agreement on the duties of businesses with respect to human rights.
UN's Handbook for Civil Society: Woking with the UN Human Rights Programme	OHCHR	2009	http://www.ohchr.org/EN/AboutUs/CivilSociety/Pages/Handbook.aspx	A basic guide on how to use the UN human rights mechanisms.

Chapter 2.8				
Name of document	**Authors/Publishers**	**Date of publication**	**URL**	**Description**
UN Declaration on the Rights of Indigenous Peoples	UN	2007	http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf	The UN Declaration on the Rights of Indigenous Peoples.
Oxfam Guide to Free, Prior and Informed Consent	Oxfam Australia	2007	http://www.oxfam.org.au/campaigns/mining/ombudsman/consent.html	Detailed report on the meaning and implications of FPIC.
Tipping the Power Balance: Making free, prior, informed, consent work	North-South Institute	2011	http://www.forestpeoples.org/topics/extractive-industries/publication/2012/new-report-and-briefing-extractive-industries-and-free	Well-researched and detailed report on how FPIC should work.
Free, Prior and Informed Consent - Making FPIC work for Forests and Peoples	Forest Peoples Program	2010	http://www.forestpeoples.org/topics/rights-land-natural-resources/publication/2010/free-prior-and-informed-consent-making-fpic-wo	Paper on making FPIC more effective and what companies should be doing.
Community Guide to UNDRIP	Australian Human Rights Commission	2010	http://www.culturalsurvival.org/files/declaration_guide2010.pdf	Guide to enacting UNDRIP with focus on Australia.

ORGANIZATIONS

Name of organization	Contact	URL	Description
African Initiative on Mining, Environment and Society (AIMES)	-	http://apps.twnafrica.org/blog/	African network on mining issues.
Asia Indigenous Peoples Pact (AIPP)	aippmail@aippnet.org	http://www.aippnet.org	A regional indigenous organization committed to the cause of promoting and defending indigenous peoples' rights and human rights.
Almaciga	http://www.almaciga.org/index.php?option=com_content&view=article&id=46&Itemid=48&lang=en	http://www.almaciga.org/	Spanish support organization on indigenous issues.
Bank Information Centre (BIC)	info@bicusa.org	http://www.bicusa.org/en/index.aspx	Partners with civil society to influence World Bank to promote social and economic justice and ecological sustainability.
Bank Track	http://www.banktrack.org/show/pages/contact_us	http://www.banktrack.org/	A global network of civil society organizations and individuals tracking the operations of the private financial sector and its effect on people and the planet.
Bankwatch		http://bankwatch.org/	A Central and Eastern European network with a focus on international finance institutions in the region.

BASES wiki	-	http://baseswiki.org	Dispute resolution resources.
Bretton Woods Project	info@brettonwoodsproject.org	http://www.brettonwoodsproject.org	UK-based NGO challenging the World Bank and IMF.
Business and Human Rights Resources Centre	contact@business-humanrights.org	http://www.business-humanrights.org/	Information on individual companies and human rights and news on corporate accountability.
Business and Human Rights Resources Centre (catalogue of legal cases)	-	http://www.business-humanrights.org/LegalPortal/Home/Completelistofcases	List of legal actions from Business and Human Rights Centre.
Center for International Environmental Law (CIEL)	info@ciel.org	Http://www.ciel.org	A US-based organization which provides legal counsel, policy research, analysis, advocacy, education, training, and capacity building.
CorporateWatch	http://www.corpwatch.org/contactus.php	http://www.corpwatch.org	A US-based research group aiming to hold corporations accountable.
Cultural Survival	http://www.culturalsurvival.org/contact	http://www.culturalsurvival.org/	A US organization which defends the human rights and cultural heritage of indigenous peoples. Runs urgent action campaigns.

Earthworks	info@earthworksaction.org	http://www.earthworksaction.org/	US NGO dedicated to protecting communities and the environment from the impacts of irresponsible mining.
ECA Watch	info@eca-watch.org	www.eca-watch.org/index.html	Campaigns on Export Credit Agencies and their destructive impacts.
Ecumenical Council for Corporate Responsibility (ECCR)	info@eccr.org.uk	http://www.eccr.org.uk/	UK-based faith organization working for responsible investment.
Environmental Law Alliance Worldwide (ELAW)	elawus@elaw.org	http://www.elaw.org/	ELAW helps communities speak out for clean air, clean water, and a healthy planet.
Environmental Defender Law Center (EDLC)	info@edlc.org	http://www.edlc.org	EDLC enlists pro bono lawyers to defend local communities
Extractive Industries Transparency Initiative	secretariat@eiti.org	http://eiti.org/	Organization aimed at increasing transparency in the extractive industries.
FairPensions (the Campaign for Responsible Investment)	info@fairpensions.org.uk	www.fairpensions.org.uk	Campaign to encourage ethical investment by pension funds.
Forests Peoples Programme (FPP)	info@forestpeoples.org	http://www.forestpeoples.org/	An NGO that "works to create political space for forest peoples to secure their rights, control their lands and decide their own futures."

Global Response	http://www.culturalsurvival.org/contact	http://www.culturalsurvival.org/current-projects/global-response	Organization for launching international campaigns to help protect indigenous peoples.
Greenpeace	supporter.services.int@greenpeace.org	http://www.greenpeace.org/international/en/	Environmental campaign group—the link is to their information on climate change.
Hesperian Foundation	hesperian@hesperian.org	http://hesperian.org/	US-based organization that produced health books for communities, including a book on the health problems of mining
Indigenous Peoples' Center for Documentation, Research and Information (DOCIP)	http://www.docip.org/Contact.3.0.html	http://www.docip.org/	Documentation focused on activity in international institutions.
Initiative for Responsible Mining Assurance (IRMA)	-	http://www.responsiblemining.net/	Organization seeking to launch an assurance standard for mining in 2014.
Interfaith Centre on Corporate Responsibility	http://www.iccr.org/contact.php	www.iccr.org	US-based coalition of shareholders promoting social justice through investment.
International Council of Mining and Metals	info@icmm.com	www.icmm.com	Industry organization promoting mining as a sustainable industry.
International Work Group on Indigenous Affairs (IWGIA)	iwgia@iwgia.org	http://www.iwgia.org/	A Scandinavian-based international human rights organization on indigenous affairs.

London Mining Network	info@londonminingnetwork.org	http://www.londonminingnetwork.org	UK-based network seeking to hold UK-mining companies and investment to account
Mineral Policy Institute (MPI)	charles.roche@mpi.org.au	http://eyeonmining.wordpress.com/	An Australian-based NGO working on Australian mining, but with a current focus on mining in Australia and PNG.
Mines and Communities	info@minesandcommunities.org	Http://www.minesandcommunities.org	A global network demanding greater accountability and transparency from the minerals industry.
MiningWatch Canada	info@miningwatch.ca	http://www.miningwatch.ca/	A Canadian initiative to respond to national and international concerns around Canadian mining.
Minority Rights Group	minority.rights@mrgmail.org	http://www.minorityrights.org	Campaigns for rights of minority and indigenous people. Publishes annual report “State of the World's Minorities and Indigenous Peoples.”
Money to Metal	info@minesandcommunities.org	moneytometal.org	A website that tracks finance for mining projects around the world.
Natural Resources Charter	verity.outram@ naturalresourcecharter.org	http://naturalresourcecharter.org/	Independent attempt to create principles for harnessing natural resources for development.
Observatorio de Conflictos Mineros de América Latina (OCMAL)	http://www.conflictosmineros.net/ contactenos	http://www.conflictosmineros.net/	Spanish language organization campaigning on mining in Latin America.

OECD Watch	http://oecdwatch.org/contact-info	http://oecdwatch.org/	Critical NGO monitoring the OECD.
Oxfam America	http://www.oxfamamerica.org/contact-us	http://www.oxfamamerica.org/	Development organization, which has produced materials and supported partners on the issue of extractive industries, including FPIC.
Oxfam Australia	https://www.oxfam.org.au/my/contact_us	https://www.oxfam.org.au/	Development organization, which has produced materials and supported partners on the issue of extractive industries, including FPIC.
PAFID	ddevera@info.com.ph	www.iapad.org/pafid/index.htm	Philippine NGO campaigning for minority groups, focusing on participatory mapping.
Partizans	partizans@gn.apc.org	http://www.minesandcommunities.org/list.php?f=14	UK-based activist group campaigning on Rio Tinto since 1978.
Indigenous Peoples Links (PIPLinks)	comms@piplinks.org	http://www.piplinks.org	An indigenous solidarity organization, with a specific focus on the extractive industries and the Philippines.
Rainforest Foundation	info@rainforestuk.org	http://www.rainforestfoundationuk.org/	Supports people living in and around the world's rainforests, including work on mapping.

Survival International	info@survivalinternational.org	http://www.survivalinternational.org/	Primarily UK-based campaigning membership organization for the rights of indigenous peoples which conducts urgent actions.
Tebtebba	info@tebtebba.org	www.tebtebba.org	An indigenous institution working for the protection, promotion and fulfilment of indigenous peoples' rights. Also known as the Indigenous Peoples' International Centre for Policy Research and Education.
UN Permanent Forum on Indigenous Issues	http://social.un.org/index/IndigenousPeoples/ContactUs.aspx	http://social.un.org/index/IndigenousPeoples.aspx	An advisory body to the Economic and Social Council with a mandate to discuss indigenous issues.
UN Special Rapporteur on the Rights of Indigenous Peoples	indigenous@ohchr.org	http://www.ohchr.org/EN/Issues/IPeoples/SRIndigenousPeoples/Pages/SRIPeoplesIndex.aspx	UN post set up to specifically to promote and uphold rights of indigenous peoples.
United Nations Voluntary Fund for Indigenous Populations	indigenousfunds@ohchr.org	http://www.ohchr.org/EN/Issues/IPeoples/IPeoplesFund/Pages/IPeoplesFundIndex.aspx	Fund established to assist representatives of indigenous communities and organizations to participate in UN processes.
US Social Investment Forum	http://ussif.org/about/contact.cfm	http://ussif.org/	US based organization for ethical investment professionals.

About the Authors

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We, Indigenous Peoples, are rightsholders, with an inextricable link to their lands, territories and resources, which we have traditionally owned, occupied or otherwise used or acquired...
We have a right to self-determination of our political condition and to freely choose our economic, social and cultural development.

- The Manila Declaration
International Conference on Extractive Industries and Indigenous Peoples

To put an end to these dynamics of destruction and violence, the international community—particularly international investors—must...recognize indigenous communities' basic rights to chart their own development paths, to manage their own resources, to pursue their traditional livelihoods and cultures, and to say "no" to multinational operations on their lands. The failure to respect communities' basic right to "just say no" exists at the heart of the nexus of human rights violations, environmental degradation and conflict.

- John Rumbiak, West Papuan activist