

Indigenous

# Perspectives

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The Myth of Sustainable  
and Responsible Mining

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by the Tebtebba Foundation

No. 1 Roman Ayson Road

2600 Baguio City

Philippines

Tel: (63) 74 4447703

Fax: (63) 74 4439459

E-mail: [tebtebba@skyinet.net](mailto:tebtebba@skyinet.net)

Website: [www.tebtebba.org](http://www.tebtebba.org)

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PHOTO: Open Pit Mining in Itogon, Benguet Province, Northern Philippines

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# ***Indigenous Perspectives***

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## Foreword

Major initiatives have been taken by the mining industry in the past decade. Most notable was the effort to influence national governments to privatize and liberalize their mining industries. The most recent one is the Global Mining Initiative, which is well organized, well funded and dangerous.

These initiatives can best be understood in the context of what besets the mining industry. Gone are the days when mining was a very lucrative and stable investment. Gone too are the days when companies could easily fool mining-affected communities with promises of benefits from their mining operation and of restoring mined-out areas to their original state, or even better. These unfulfilled promises have frustrated and angered community people. The hard reality is that mining corporations simply exhaust the mineral resources and leave behind a legacy of environmental devastation, economic dislocation and grave social problems. The burden of dealing with these is left solely to the community.

The mining industry's indifference and insensitivity have led to a groundswell of community protests. It has galvanized strong anti-mining sentiments among affected communities, which have been expressed in calls ranging from "stop ongoing mining operations" to a "moratorium in opening up new mining areas" and, in the extreme, a "total ban on mining." This has led to national, regional and international alliances of mining-affected communities, strongly supported by socially oriented non-governmental organizations and institutions.

The manifestation of neo-liberalism in the mining industry is seen in the revision of mining codes in more than 70 countries, which has further fanned the antagonism against the industry. The new mining codes were formulated by national governments with prodding from well-organized lobbies by major big mining corporations and multinational financial institutions. This led to the privatization of state-controlled mining companies and the creation of laws and mechanisms which allow the free flow of foreign investments in mining. Foreign mining companies took control of local mining corporations. Environmental laws were relaxed as Southern countries competed for badly needed foreign investments. This resulted in the opening up of new areas for mining, particularly in indigenous peoples' territories. Some successes have been achieved against the intrusion of mining corporations in several com-

munities. Despite this, the threat of encroachment still exists, as the laws to allow them to do so are in place.

Aside from the mining industry's indifference and insensitivity, some world-wide developments have contributed to the escalation of protests from the community to the international level. The mining industry has been under attack since the Earth Summit in Rio in 1992. The awareness that the Rio Summit has created is an important development. It raised the environmental awareness of development NGOs and peoples' movements. It also raised the awareness of environmental NGOs on development issues. In many countries, the Environmental Compliance Certificate (ECC) became an important instrument for community people in their fight against mining corporations.

The indigenous peoples' widespread assertion of their rights, especially to land and natural resources, provided a more militant color to the mining campaigns. The principle of Free and Prior Informed Consent (FPIC) was another important tool used by the communities.

Lawsuits against big mining corporations, such as Freeport, Placer Dome and BHP, were filed and corporate accountability became a key demand of mining activists. The mining industry was slowly being isolated and confidence in mining investments significantly waned. The Busang fraud incident in Indonesia led to the further erosion of confidence in investing in the industry. Major disasters, such as cyanide spills and the breakage of tailings dams, and human rights violations committed by big multinational mining corporations (Rio Tinto, Placer Dome and Freeport) painted a very bad image of the industry. The sustained community struggles prevented the industry from becoming more profitable and limited their areas of operation.

Compounding the problem was the fall of prices of metals. This was due to the worldwide recession that kept to a low level the demand for metals. Several big mining corporations closed down some of their branches and subsidiaries and streamlined their operations. Many mining projects were shelved, cancelled, or postponed, as companies waited for metal prices to go up. Mining corporations have been very selective in opening up new projects, selecting only those that will be profitable.

Meanwhile, mergers and acquisitions occurred in the industry. The big ones such as Rio Tinto, Anglo-American, Placer Dome, BHP, Newmont, Phelps Dodge etc. stayed dominant. But for them to continue "business as usual", they needed new sources of funding for their mining projects and solve the

swelling resistance to their mining operations.

It is within this context that ten major multinational mining corporations have banded together to launch a new initiative: the Global Mining Initiative (GMI). The main objective is to gain and bring back public trust, confidence and credibility in the industry so that mining investments will once again pour in and multilateral financial institutions will be induced to provide more loans for mining operations.

To attain this main objective, the GMI presents a new paradigm of “Sustainable and Responsible Mining”. Clearly this is an effort to greenwash the industry. It includes a two-year action program called the Mines, Minerals and Sustainable Development (MMSD) project.

One clear approach used is the cooptation of strong community leaders and their allies through so-called dialogues and participatory processes. The MMSD program will culminate at the World Summit on Sustainable Development (WSSD) in Johannesburg, South Africa, with a presentation of a research output that would absolve their wrongdoing in the past.

It is not a coincidence that the World Bank and the United Nations have called for a review of the extractive industry. It is not also a mere coincidence that the World Bank and the Asian Development Bank have made a review of their policy on indigenous peoples. All of these happened in the year 2001. Changes in policies seemed to favor the industry more rather than uphold the basic rights of affected people. As shown by the World Bank’s review of its Operational Policy on Indigenous Peoples, it is biased more towards exclusion of a free and prior informed consent provision from its revised policy.

This aggressive public relations salvo by the mining industry is a source of worry for mining-affected communities and their allies. In 2001 regional and international conferences were held to assess and analyze the Global Mining Initiative and the MMSD project and see what these mean for affected communities. The challenge confronting mining-affected communities and their allies can be summarized thus:

- The mining industry, to a certain level, has tightened its ranks and is confronting community opposition in a more organized way. It has placed massive resources in this image-building exercise.
- Where in the past, it used blatant confrontational tactics, it now combines this with dialogue and “participatory” processes.

- The concept of “Sustainable and Responsible Mining” is being promoted in the WSSD process.
- The various fora held in 2001 by mining-affected communities and their allies provided opportunities to strengthen and broaden the movement against big commercial mining. There is wide unity on the need to engage in the WSSD processes and to preempt the attempt by the mining industry to cloud the realities of its unsustainable production systems and practices.

This issue of Indigenous Perspectives focuses on mining with the hope that a better understanding of recent developments in the industry will take place and campaigns will be better informed and strengthened. ♦

# INDIGENOUS PEOPLES, NATURAL RESOURCE EXTRACTIVE CORPORATIONS AND HUMAN RIGHTS\*

By Joji Carino

*\*Overview Paper prepared for a workshop on 'Indigenous Peoples, Private Sector Natural Resource, Energy and Mining Companies and Human Rights' organised by the Sub-Commission on the Promotion and Protection of Human Rights in collaboration with UNCTAD, ILO and WTO, December 5 - 7, 2001, Geneva.*

*"The way indigenous peoples are treated by States and the international community will be a major test of the seriousness of our commitment to a genuinely universal human rights regime. If we are serious about development, political participation and human rights, we must address the special situation of indigenous peoples."*

- Boutros Boutros-Ghali, Human Rights Day 1992  
Opening Ceremonies of the UN Year for Indigenous Peoples

THIS SEMINAR ON INDIGENOUS PEOPLES, PRIVATE SECTOR NATURAL Resource, Energy and Mining Companies and Human Rights is very timely. Recent years have seen an expansion in the operations of the extractive industries on indigenous lands, intensifying relationships between indigenous peoples, states and corporations. An examination of these relationships and the evolution of standards governing these relationships is essential in a world of increasing interdependence of multiple actors.

Economic globalisation, and the growing reach of transnational corporations and the private sector into many places and spheres of life previously beyond the realm of commercial activities, has fuelled contemporary debates about corporate responsibilities with respect to human rights and sustainable development. A central theme in this debate is the relationship between extractive industries and indigenous peoples, in whose lands much of the logging, mining and resource extractive activities are now taking place.

Mining has greatly been dependent on the exploitation of indigenous peoples' lands. Even in world's old mining centers in the USA, Canada, Australia and South Africa much mining has been done within indigenous territories. Investment patterns in new mine exploration and development suggest that the exploitation of indigenous peoples' lands will go up in the next 20 years.

The current willingness of various parties to talk under the auspices of the United Nations Human Rights Commission (UNHRC) is an expression of a common perception of the importance and urgency of the issues. While some companies and indigenous peoples have been able to enter and sustain agreements, the conflicts underlying the structural relationships between indigenous peoples and natural resource extractive corporations needs to be acknowledged and addressed. Trust cannot be assumed and must be built on experience and progressive advances on tackling the difficult issues of protecting and promoting the human rights of indigenous peoples.

The United Nations will play a central role in the further evolution and elaboration of the human rights of indigenous peoples as these relate to:

- Self-determination of indigenous peoples;
- Ownership, control and use of indigenous territories, land and resources;
- Free and prior informed consent of indigenous peoples and communities in the development process;

- Respect for indigenous peoples' institutions;
- Respect and promotion of indigenous cultures and traditions;

This seminar on "Indigenous Peoples, Private Sector Natural Resource, Energy and Mining Companies and Human Rights" is therefore a contribution to the ongoing work under the auspices of the Commission on Human Rights relating to the

- Evolution of international standards on the rights of indigenous peoples;
- Evolution of international standards on the Conduct of Transnational Corporations and their impacts on the enjoyment of civil, cultural, economic, political and social rights of indigenous peoples, including the right to development, the right to a healthy environment, and the right to peace.

The results of this seminar could inform the work of the Permanent Forum on Indigenous Issues (meeting for the first time in May 2002), the forthcoming World Summit on Sustainable Development (September 2002) and UN Decade for Indigenous Peoples (1995-2004).

This overview paper will examine the historic and contemporary relationships between indigenous peoples, states and the extractive industries, in the context of evolving standards on human rights and sustainable development. The paper inevitably has its limitations in comprehensive coverage, and I have used examples to highlight some key issues.

### **International Standards on the Rights of Indigenous Peoples**

From the 1980s, significant and steady progress has been made within the United Nations and in broader political processes to develop standards for the protection and promotion of the rights of indigenous peoples.

The establishment of the UN Working Group on Indigenous Populations (UNWGIP) in 1982 and the completion of the Martinez-Cobo Report (1986)<sup>1</sup> provided focus for diverse initiatives and concerns on indigenous peoples rights, leading to the adoption, by the UN Sub-Commission for the Protection and Promotion of Human Rights, of the draft UN Declaration on the Rights of Indigenous Peoples in 1994. The early adoption of a UN Declaration on the Rights of Indigenous Peoples by the UN General Assembly is an important goal of the UN Decade for Indigenous Peoples and Agenda 21 - the programme of action adopted at the UN Conference on Environment and Development (UNCED) - and is the highest priority for indigenous peoples.

Chief Oren Lyons,<sup>2</sup> of the Onondaga Nation and the Haudenosaunee (Six Nations Iroquois Confederacy) articulated for most other indigenous peoples, the primary aims of these efforts at the United Nations:

*" We came seeking justice on our homelands. We came here to appeal to the world at large to support our efforts to seek equitable solutions to discrimination, exploitation, racism, ethnocide and genocide of Indigenous Nations and Peoples ....*

*We came here to speak on behalf of the natural world being plundered by governments and corporations. We spoke on behalf of rooted trees that could not flee the chainsaw. We spoke on behalf of salmon, herring, tuna and haddock killed in their spawning beds. We had alarming news from the Four Directions about fish, wildlife and birds, contaminated, sick and disappearing. And today we continue to speak on their behalf. Today they are more endangered than ever, and if anything, their conditions are worse.*

*In these times, humanity must work together, not just for survival, but for quality of life based on universal values that protect the delicate inter-relatedness of life that protects us all."*

Oren Lyons put simply and directly indigenous peoples' aims within the United Nations:

- to gain recognition for indigenous peoples' human rights and claims for justice;
- to work together with all nations and peoples for peace, grounded on an acknowledgement of our inter-relatedness with the web of life that protects us all.

This message has been repeated consistently by indigenous peoples. Aqqaluk Lynge,<sup>3</sup> speaking five years after Rio, stated that "*aboriginal self-determination and sustainable development are two sides of the same coin*", and this fundamental understanding has informed indigenous approaches in negotiating their relationships with States and natural resource corporations.

Indigenous peoples' rights have assumed an important place in international human rights law, and a discrete body of law confirming and protecting the individual and collective rights of indigenous peoples has emerged and concretized in the past 20 years. This body of law is still expanding and developing through indigenous advocacy in international fora; through the decisions of international human rights bodies; through recognition and codification of indigenous rights in international instruments presently under consideration by the United Nations and Organization of American States; through incorporation of indigenous rights into conservation, environmental and development-related instruments and policies; through incorporation of these rights into domestic law and practice; and through domestic judicial decisions. Taken together, this evolution of juridical thought and practice has led many to conclude that some indigenous rights have attained the status of customary international law and are therefore generally binding on states.<sup>4</sup>

International bodies mandated with protection of human rights have paid particular attention to indigenous rights in recent years. The UN Committee on the Elimination of Racial Discrimination, the UN Human Rights Committee, the International Labour Organization's Committee of Experts and the Inter-American Commission on Human Rights all stand out in this respect. These bodies have contributed to progressive development of indigenous rights by interpreting human rights instruments of general application to account for and protect the collective rights of indigenous

peoples. Even the African Commission on Human and Peoples' Rights, seen as a relatively weaker human rights body, has begun to address indigenous peoples' rights by taking the important step of establishing a working group on Indigenous Peoples in Africa.<sup>5</sup>

These recent judgements and decisions provide important guidance for States and Corporations about meeting their human rights obligations with respect to indigenous peoples.

### **Framework for the Analysis of Contemporary Problems regarding Indigenous Land Rights**

In addition to the UN human rights instruments of general application, and the draft UN Declaration on the Rights of Indigenous Peoples, the various studies by UN Special Rapporteurs on Indigenous Peoples Relationships to Land, and on Treaties, Agreements and other Constructive Arrangements Between States and Indigenous Populations, as well as seminars undertaken provide detailed background and guidelines on our discussions at this seminar.

Special-Rapporteur Mrs. Erica Irene-Daes, in her Final Working Paper on Indigenous Peoples and their Relationship to Land<sup>6</sup>, put forward a framework for the analysis of contemporary problems regarding indigenous land rights highlighting:

- Failure of states to acknowledge indigenous rights to lands, territories and resources;
- Discriminatory laws and policies affecting indigenous peoples in relation to their lands;
- Failure to demarcate;
- Failure of States to enforce or implement laws protecting indigenous lands;
- Problems in regard to land claims and return of lands;
- Expropriation of indigenous lands for national interests, including development;
- Removal and relocation;
- Other government programmes and policies adversely affecting indigenous peoples' relationship to their lands, territories and resources;
- Failure to protect the integrity of the environment of indigenous lands and territories.

The report also outlines some fundamental objectives regarding indigenous peoples' lands, territories and resources, and provides recommendations aimed at securing these objectives. A majority of these recommendations are directed at governments, and some of these are recommendations, which could be considered at this seminar:

1. To ensure that indigenous peoples have land and resources sufficient for their survival, development and well-being as distinct peoples and cultures, including, so far as possible, their traditional cultural and sacred sites;

2. To correct in a just manner the wrongful taking of land and resources from indigenous peoples;
3. To avoid the creation of refugees or landless communities and to avoid the involuntary displacement of individuals or communities;
4. To preserve the security and territorial integrity of States;
5. To resolve and avoid uncertainty of land and resource ownership, and to avoid conflict, instability and violence in relation to indigenous rights to lands and resources;
6. To assure the rule of law, non-discrimination and equality before the law in regard to indigenous peoples and their rights to lands and resources, while recognizing the right of indigenous peoples to exist as distinct cultures with certain unique rights;
7. To assure that all lands and resources are utilized in a sustainable and ecologically sound manner.

To date, the focus of these studies have been on State obligations and responsibilities. Fewer authoritative UN studies exist which analyse the relationships between the extractive industries and their impacts on the enjoyment of civil, cultural, economic, political and social rights of indigenous peoples, including the right to development, the right to a healthy environment, and the right to peace.

### ***UN Global Compact and Human Rights Obligations of Companies***

The obligations of the private sector in relation to human rights is currently being discussed under the UN Sessional Working Group on the Working Methods and Activities of Transnational Corporations under the Sub-Commission on the Promotion and Protection of Human Rights.

In the Working Paper prepared by David Weisbrodt on Principles Relating to the Human Rights Conduct of Companies<sup>7</sup> he states:

*“Any draft code of conduct for companies raises difficult issues with respect to the human rights obligations of non-state actors - a subject that requires further study by the Sub-Commission. While awaiting such an in-depth study, a code of conduct for companies might refer to the Universal Declaration on Human Rights.” (paragraph 11).*

*“The responsibility to promote and secure human rights can be applied in varying degrees to the private sector, for example: principles directly affecting employees, principles involving public and private business partners and their employees; principles affecting the community and the general human rights environment in the community; and other principles which can implicate a company and public institutions, or can involve concerns for individual human rights, the environment and the relevant community.” (paragraph 17)*

The Draft Principles relating to the Human Rights Conduct of Companies includes a

section on “Respect for national sovereignty and the right of self-determination”.

For indigenous peoples, the exercise of the fundamental right of self-determination pertains not only to its political dimensions, but also critically to the right of all peoples to sovereignty over natural resources, and not to be deprived of their own means of subsistence.

The most familiar reference to the international right of self-determination is that found in the international Bill of Rights in common Article I of the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.

#### **F. Respect for national sovereignty and the right of self-determination**

14. Companies shall recognize and respect the national laws, regulations, administrative practices and authority of the State to exercise control over its national resources in the countries in which the companies operate insofar as these laws, regulations, practices and authority do not conflict with international human rights standards. Companies should endeavour to function within the development priorities; social, economic, and cultural objectives; values and way of life of the communities; and structure of the countries in which they operate insofar as those objectives and values do not conflict with international human rights standards. Within the limits of their resources and capabilities companies should also endeavour to encourage social progress and development by engaging in constructive business activities and expanding economic opportunities - particularly in developing countries and, most importantly, in the least developed countries.

15. Companies shall cooperate, in so far as relevant, with national or international monitoring of compliance with national and international laws.

16. Companies shall have the responsibility to ensure that their business operations do not contribute directly or indirectly to human rights abuses and actively to speak out or otherwise use their influence in order to help promote and ensure respect for human rights.

17. Companies shall not offer, promise, give, or demand a bribe or other improper advantage, nor shall they be solicited or expected to give a bribe or other improper advantage to any Government or government official. Companies shall enhance the transparency of their activities and openly fight against bribery, extortion and other forms of corruption.

18. Companies shall respect the rights of indigenous communities and minorities to own, develop, control, protect and use their lands and cultural and intellectual property; indigenous communities and minorities may not be deprived of their own means of subsistence.

#### **Article I**

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of interna-

tional economic cooperation, based on the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The State Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

The enjoyment of these human rights by indigenous peoples depends to a large measure on State governments, who bear primary responsibility for fulfilling their human rights obligations and for addressing human rights violations within their jurisdiction. Nevertheless, corporations, as legal persons, also have human rights obligations, as do other non-state actors, as members of the international community.

### On Realising Rights

In order to determine if a breach has occurred, the precise nature of the obligation

#### **On the meaning of self-determination for indigenous peoples Dr. Ted Moses, of the Grand Council of the Cree,<sup>7</sup>:**

“All peoples, as a result of their right of self-determination, have a right to benefit from their natural resources and the inherent wealth of their natural resources. In other words, all peoples have the right to use and enjoy the natural wealth of their lands and waters, and of their natural environment.

For indigenous peoples, it is the essential content of self-determination We may not be denied a means of subsistence, moreover, we may not be denied our *own* means of subsistence. We have the right to use our lands and waters to live by our own means as we always have, and by whatever means we may choose. Self-determination protects our right to subsist, and it protects as well our right to subsist in the way we as indigenous peoples see fit.

For if we consider the history of the world’s indigenous peoples during the last 500 years, if we consider the history of our people since our contact with Europeans, one terrible and tragic conclusion emerges as a central theme: the denial of our own means of subsistence by those who came to live in our land. It is this violation of our right of self-determination that characterizes our recent history. Self-determination may make some people think of the right to vote, or the right to belong to political parties or even the right to independence. And those are all aspects of self-determination. But when I think of self-determination, I think of hunting, fishing and trapping. I think of the land, of the water, the trees, and the animals. I think of the land we have lost. I think of all the land stolen from our people. I think of hunger and people destroying the land. I think of the dispossession of our peoples of their land.

Of course it is well understood these rights violations are now prohibited under international law. The third paragraph of Article I not only calls upon all States to respect the right of self-determination, but goes much further, and calls upon all States to “promote the realization of the right of self-determination”.

must be ascertained. For analytical purposes, human rights obligations are divided into different levels, each requiring a different level of commitment: positive, negative or neutral. Positive obligations, such as the obligation to protect human rights and the obligation to fulfil human rights, require affirmative measures and acts in relation to both the substantive and procedural aspects of rights. The obligation to respect human rights is largely a negative obligation requiring that the obligation holder refrain from violating rights and act consistently therewith. Neutral obligations require respect for present levels of (international) legal protection attributed to a right: an obligation not to make the human rights situation worse.<sup>9</sup>

### **Some Regional and National Developments**

James Anaya, in his study of international human rights law and indigenous peoples, considers some contested principles in the realisation of indigenous peoples' right to self-determination:

*Ideally, self-determination and sovereignty principles will work in tandem to promote a peaceful, stable and human world. But where there is a violation of self-determination and human rights, presumptions in favour of territorial integrity or political unity of existing states may be offset to the extent required by an appropriate remedy. Furthermore, heightened international scrutiny and even intervention is justified in the degree to which violations of human rights are prone to lingering unchecked by decision makers in the domestic realm. Such heightened international scrutiny, along with a limited suspension of state sovereignty presumptions, has been forged in the context of indigenous peoples<sup>10</sup>*

### **Indigenous Peoples Rights in Constitutional and Other Legislation**

National laws in a number of countries have also been changing to reflect contemporary indigenous rights norms, in many Latin American countries (Chile, Ecuador, Bolivia, Colombia ), in Australia, Canada, New Zealand, Finland, India, and the Philippines, to name but a few.

In the Philippines, the Indigenous Peoples Rights Act (IPRA) was passed in October 1997 recognising rights to ancestral domain, but the implementation of this law has been impeded by a legal stalemate between the law's recognition of "native title" and the continuing exercise of the "regalian doctrine", a legal fiction which presumes all Philippine lands to have fallen under the ownership and jurisdiction of the Spanish Crown, and to successor Philippine governments. This colonial and discriminatory legal doctrine continues to underpin Philippine land laws. Nevertheless, the recognition of ancestral domain and lands under IPRA now puts a requirement for community consent on development projects affecting lands of indigenous cultural communities.

Mining interests challenged the legality of the IPRA in the Supreme Court of the Philippines, arguing on the basis of the pre-eminence of the "regalian doctrine" in Philippine law, and state control over mineral lands. After a two year legal battle,

which resulted in the suspension of the processing of applications for Certificates of Ancestral Domain Titles by indigenous persons and communities, the Philippines Supreme Court upheld the legality of “native title” and the Indigenous Peoples Rights Act by the narrowest margin.<sup>11</sup>

The Philippine law requires the developer or company wishing to operate within ancestral lands to obtain the free, and prior, informed consent of indigenous peoples for the following activities:

1. Exploration, development and use of natural resources;
2. Research-bioprospecting (Executive Order 247)
3. Displacement and relocation (the former is transfer of community due to natural calamities, while the latter is due to man-made activities)
4. Archeological explorations;
5. Policies affecting indigenous peoples like Executive Order 263 (Community-based Forest Management)
6. Entry of the military.

The definition of prior informed consent in the Indigenous Peoples Rights Act of the Philippines provides that:

- All members of the community affected consent to the decision
- Consent is determined in accordance with customary laws and practices
- Freedom from external manipulation, interference or coercion
- Full disclosure of the intent and scope of the activity
- Decision is made in language understandable to the community
- Decision is made in process understandable to the community

In practice, there are frequently recurring problems with company-community relations, which continue to generate tension. Many of these relate to shortcomings and abuses in practising basic principles of consultation, and full and effective participation. Recent problems identified in the Philippines include:

- Failure to recognize or respect indigenous structure and processes
- Failure to gather, recognise or respect local wishes
- Attempts to misrepresent local opinion
- Questionable efforts to influence local opinion to serve company ends
- Failure to provide balanced information
- And absence of needed confidence building measures

#### Failure to recognize or respect indigenous structures and processes.

A frequently repeated experience is company and governmental interference in decision-making processes including selection or creation of structures to deliver decisions favourable to state and corporate objectives. In the Western Mining Corporation's (WMC) Tampakan copper project in the Philippines, some B'laan indigenous leaders opposed to the operations of WMC, yet previously recognized by

the state indigenous agency -- then called the Office of Southern Cultural Communities -- were removed from recognition and replaced by leaders more tractable to corporate aspirations.<sup>12</sup>

Divisions within a community on such a momentous decision as the establishment of a commercial mine are almost inevitable. However, the promotion of factionalism within an indigenous community towards forcing a decision can have longterm destructive impacts.

Legitimate opponents of a project have frequently been subjected to vilification and attempts to discredit them within their community.

In Mindoro island in the Philippines, long-standing Mangyan indigenous organizations with pending ancestral land claims over an area likewise claimed by Mindex/Crew Development found that the State agency responsible for indigenous affairs, the National Commission on Indigenous Peoples (NCIP), worked with the company to establish a new indigenous organization supportive of the mining project, in return for the promise of support for recognition of ancestral land rights in the same area.<sup>13</sup>

Companies are reported to introduce their own expert anthropologist or community expert and give credence to their views, rather than respecting the processes of indigenous decision-making. The aspiration in indigenous decision-making is often to arrive at a widely accepted consensus on major decisions affecting the future of the land and the people. Corporations wish to define and delimit a time-bound process and corporate body with which to enter into negotiations. Respect for indigenous process and long-term agreement may not always be compatible with current company approaches and timeframes.

#### Failure to gather, recognise or respect local wishes.

Expressions of opinion hostile to the company may be dismissed while those favourable uncritically accepted. The requirement to consult is now embedded in the law in several countries. However there are repeated accusations that companies cynically enter into consultation processes to engineer consent without any intention of respecting community wishes to influence the decision on whether or not to proceed.

#### Attempts to misrepresent local opinion.

The isolation of many indigenous communities and poor communication linkages has repeatedly led to situations where community views and wishes are misrepresented to others within the project area and especially to those outside of the project area. Companies claim support where they have none or inflate it when they have little. Accusations of direct and conscious misrepresentation by companies to government agencies and the press are common.

Companies are frequently accused of cultivating special relationships with the media, holding junket seminars and press conferences, hiring local journalists for Public Relations work, and directing their advertising revenue to local press outlets in ways that influence editorial comment.

### Questionable efforts to influence local opinion to serve company ends.

Reports of militarization, violence, and intimidation remain common. Recently these have included even reports of blockading communities, fencing off access to communities within indigenous territories, bulldozing houses and tunnels of small scale miners.

There are many reports of individual leaders being targeted for special treatment including:

- hosting trips for leaders outside their communities for conducting negotiations;
- job offers to key leaders and their relatives during the period of deliberation and decision-making;
- giving of gifts to key persons in the decision-making processes.

### Failure to provide balanced information.

Companies are increasingly providing communities with information on their company and its policies and about their proposals. However, there are many complaints that such information is at best propaganda, and inadequate to provide a basis for informed decision-making. Information, including on corporate social commitments, is often not available in local languages. Currently, there is no provision for independent information to be made available to communities. This brings into question the credibility of claims of genuine attainment of Free Prior Informed Consent.

There is a possible contradiction between the needs of a company to maintain secrecy about the value of a deposit before it secures rights, and the need of the affected community to know the value and potential of the mineral wealth as a basis for sound decision-making.

### Confidence building measures are also needed.

Affected indigenous communities lay emphasis on resolving problems caused in the communities. These should inevitably include addressing outstanding unresolved issues due to past environmental and social damage in the affected community.

### Experiences from Canada

In Canada, the Supreme Court's Delgamuuk decision determined two conditions to be met before resource extraction could take place on aboriginal, ceded, or crown land. These conditions are that the affected aboriginal parties must be supplied with sufficient information to assess the project and the government must address the concerns of affected aboriginal parties. Following this decision, indigenous peoples in Canada have been asserting their right to decide and be heard in the development process especially the Environmental Assessment of projects.<sup>14</sup>

Canada is a center of mining, both for the presence of mines and as the home of mining companies and mining finance operations that influence the development of mining in many regions around the world. Within Canada there are examples of both conflict between indigenous peoples and mining companies and some of coopera-

tion.

Environmental regulations concerning the operations of mines within Canada have risen. Companies are required to post bonds against clean up even after closure of a mine. However, Canadian mining companies are not required to adopt the same standards in their overseas operations. Following the collapse of the cyanide-rich tailing impoundment at the Omai mine in Guyana, local people tried to pursue a case for compensation through the Canadian courts. The attempt to bring the case to court failed.

Canada has been one country where attempts at forging principled agreements including all interested and affected parties in mining in the early 1990s have taken place.

#### Legislation on Corporate Codes of Conduct

#### **The Whitehorse Mining Initiative<sup>12</sup>**

The Whitehorse Mining Initiative was a broad-based structured approach taken by the mining industry in Canada to establish a vision for mining into the 21<sup>st</sup> century.

The Mining Association of Canada, on behalf of the mining industry, took a suggestion for a multi-stakeholder process to the mines ministers of all senior governments at their annual conference in Whitehorse in September 1992. The ministers agreed to become co-sponsors and trustees of the process and named it the Whitehorse Mining Initiative. Representatives of five sectors of society agreed to participate. They were the mining industry, senior governments, labour unions, Aboriginal peoples, and the environmental community.

Full scale discussions began in February 1993 and, eighteen months later, culminated in the Leadership Council Accord. On the Leadership Council were all the mines ministers in Canada, top officials of mining and processing companies, leaders of national Aboriginal organizations, labour unions, and environmental organizations, and independent individuals drawn mainly from the academic field.

The Accord contains a brief background, a vision statement, 16 principles, 65 goals, and a statement of commitment to follow-up action. It adopts a strategic vision for a healthy mining industry in the context of maintaining healthy and diverse ecosystems in Canada, and for sharing opportunities with Aboriginal peoples. It calls for improving the investment climate for investors, streamlining and harmonizing regulatory and tax regimes, ensuring the participation of Aboriginal peoples in all aspects of mining; adopting sound environmental practices; establishing an ecologically based system of protected areas; providing workers with healthy and safe environments and a continued high standard of living; recognition and respect for Aboriginal treaty rights; settling Aboriginal land claims; guaranteeing stakeholder participation where the public interest is affected; and creating a climate for innovative and effective responses to change.

The implementation period following the signing of the Accord will involve building still broader support within constituencies based on the momentum already achieved, and encouraging stakeholder support for the Principles and Goals.

Recent and proposed legislation in several regions and countries reveal a trend to a further internationalising of standards and legal requirements on companies. In the European Union, a standard for the operation of European TNCs operating overseas has been defined, with three elements:<sup>16</sup>

- Clarifying the legal jurisdiction within Europe for actions in third countries;
- Ensuring that existing regulatory instruments, of competition law, of disclosure, of information, for financial assistance, are used in ways which provide incentives to companies that wish to demonstrate environmental and social responsibility, and to prevent other companies from profiting from breaches of such standards;
- Working with companies to promote and strengthen self-regulation, perhaps focusing on the representiveness of negotiations, and on a commitment to implementation and independent monitoring of codes adopted.

A Corporate Code of Conduct Bill has been proposed in the Australian Senate. It would require Australian companies to operate overseas to the same standards as in domestic operations.<sup>17</sup>

### ***Lessons from the World Commission on Dams***

Learning from the previous experiences of indigenous peoples in the development process, it is becoming increasingly urgent to better define the concept and application of free, prior and informed consent, as a part of the norms-setting exercise for the conduct of governments, corporations and development agencies. In this respect, the work of the World Commission on Dams (WCD) can provide comparative information and some insights for this seminar.

The members of the WCD were drawn from the various interested parties in the large dams debate: governments, industry, affected peoples including indigenous peoples, academics, water managers and NGOs. Its two-year work programme, leading to a consensus report, sets a high standard for participatory and inclusive multi-stakeholder policy processes to address highly conflictual issues surrounding sustainable development.

In November 2000, the World Commission on Dams completed its mandate to carry out an independent global review of the development effectiveness of large dams and to propose criteria and guidelines for water and energy development. Its Final Report<sup>18</sup> breaks new ground in understanding the situation of indigenous peoples and other local communities affected by large dams, and by extension, other development projects affecting them. Its global review of experiences of large dams starkly highlighted the disproportionate impacts that indigenous peoples suffer from development programmes, so long as their human rights, including the right to self-determination are not fully recognised, and so long as they continue to be marginalized in decision-making affecting their lives.

Building on the UN Conventions on Human Rights, the General Assembly Resolu-

tion on the Right to Development and the Rio Principles, the WCD proposes that water and energy development decisions should be guided by a “Rights and Risks Approach”, whereby all parties whose rights are affected and who carry risks in project development, should be involved in the negotiations and decision-making from the early stages of needs assessment, selection of options, impacts assessment, project development, implementation, monitoring and evaluation and completion of water and energy programmes.

Gaining public acceptance is identified as a strategic priority in sustainable water and energy development, and the WCD further recommends that projects affecting indigenous peoples be guided by their free and prior informed consent.

In the light of the disproportionate impacts on indigenous peoples of dam construction, an argument can be made that addressing their problems will go some distance towards resolving the problems with dams, by showing how respect for indigenous human rights can be upheld in the planning and project cycles.

### **World Bank and the Extractive Industries**

In the light of the positive lessons from the Whitehorse Mining Initiative and the World Commission on Dams, the World Bank’s Extractive Industries Review launched in October 2001, bears careful consideration. According to its Terms of Reference<sup>19</sup> the specific objectives of the WBG for the EIR are:

- i. To better obtain and understand the views of stakeholders about the best future role of the WBG in the extractive industries in promoting sustainable economic development and poverty alleviation. Stakeholder views will be obtained through an independent consultation process.
- ii. To identify, where possible, areas of consensus on the role of the WBG and the relevant issues, and to identify significant alternative or dissenting views in this respect.
- iii. On the basis of such better understanding, to focus and redesign, as needed, future WBG programs, projects, and processes in the sector given its ultimate objectives.

The EIR states it is not intended to be a standard-setting exercise for the extractive industries generally and is not intended to duplicate or displace ongoing initiatives by other stakeholders in the sector.

A number of issues have been highlighted by indigenous peoples and civil society organisations concerning the World Bank’s involvement in extractive industries which are relevant to the theme of this seminar:

- The World Bank’s role in the restructuring of the mining sector and legislation and its impacts on poverty reduction;
- World Bank Group’s subsidies of TNC miners through the IFC and MIGA;
- Low and declining environmental and human rights standards in World

## **The Report of the World Commission on Dams**

### *Strategic Priority 1*

#### Gaining Public Acceptance

Public acceptance of key decisions is essential for equitable and sustainable water and energy resources development. Acceptance emerges from recognising rights, addressing risks, and safeguarding the entitlements of all groups of affected people, particularly indigenous and tribal peoples, women and other vulnerable groups. Decision-making processes and mechanisms are used that enable informed participation by all groups of people, and result in the demonstrable acceptance of key decisions. Where projects affect indigenous and tribal peoples, such processes are guided by their free, prior and informed consent.

1.1 Recognition of rights and assessment of risks are the basis for the identification and inclusion of stakeholders in decision-making on energy and water resources development.

1.2 Access to information, legal and other support is available to all stakeholders, particularly indigenous and tribal peoples, women and other vulnerable groups, to enable their informed participation in decision-making processes.

1.3 Demonstrable public acceptance of all key decisions is achieved through agreements negotiated in an open and transparent process conducted in good faith and with the informed participation of all stakeholders.

1.4 Decisions on projects affecting indigenous and tribal peoples are guided by their free, prior and informed consent achieved through formal and informal representative bodies.

#### *Rationale*

A fair, informed and transparent decision-making process, based on the acknowledgement and protection of existing rights and entitlements, will give all stakeholders the opportunity to fully and actively participate in the decision-making process.

Because of their scale and complexity, dams affect the existing rights of different groups and create a wide range of significant risks for a diverse range of interest groups. Among those affected are indigenous and tribal peoples, women and other vulnerable groups who have been shown to suffer disproportionately. This has been compounded by negligible participation of these groups in decision-making processes, with the result that planning processes for large dams have frequently overlooked gender and equity aspects. The vulnerability of these groups stems from the failure to recognise, or respect their rights, and from the significant involuntary risks imposed on them.

Failure to recognise the rights of all affected groups, whether legally sanctioned or not, coupled with the significant involuntary risk imposed on the most vulnerable, is central to the dams debate and associated conflicts. To be socially legitimate and produce positive and lasting outcomes, development projects should provide for greater involvement of all interested parties. A fair, informed and transparent decision-making process, based on the acknowledgement and protection of existing rights and entitlements, will give all stakeholders the opportunity to fully and actively participate in the decision-making process. Instead of exacerbating existing inequalities, water and energy resources development should be opportunities for achieving a high level of equity.

Bank guidelines;

- World Bank promotion of voluntary codes over international human rights standards;
- World Bank's implementation of its Policy on Indigenous Peoples and other policies fall below existing international standards on human rights.

#### World Bank Aid and Liberalisation in the Mining Sector

Liberalisation within the mining sector and the privatisation of State-owned mines are policies which, while seeming to be part of free market orthodoxy, have been dependent upon policy intervention and financial support from international agencies including the World Bank. For the countries of the South, the World Bank and other agencies including the Asian Development Bank and UNDP have acted as midwives to new liberalized mining codes and the resultant rapid expansion of mining exploration into tropical forests and other fragile ecosystems. Widespread indebtedness among mineral-rich countries and their dependence on new and renewed loans from international finance has put the Bank in a strong position to influence their policy. The Bank has throughout the 1990's identified influence upon the policy environment of "developing" countries and the promotion of foreign direct investment as at the core of its intervention in the mining sector <sup>20</sup>

A Bank-produced briefing states: "In the late 1980s the World Bank (IBRD, IDA) shifted its focus away from project financing for non-fuel minerals. Instead, the World Bank today provides financial and technical support to its member countries to enable them to undertake the necessary regulatory and institutional reforms, including privatization of State-owned mining assets, to establish the conditions to attract private sector finance."<sup>21</sup>

This strategy effectively directed policy in mineral-rich countries to serve the needs of mining investors while at the same time providing hidden subsidies and support to some of the world's richest companies. By 1991, the Bank had supported privatisation of state assets as part of 71 structural adjustment programmes (SAPs) and 43 sectoral adjustment loans worldwide. Privatisation in the mining sector was a priority.<sup>22</sup>

The strategy of mining deregulation was based in part on World Bank-commissioned researches premised on the desirability of increasing foreign investment in mining in the South.<sup>23</sup> A package of legislation and incentives to attract investors was identified by the straightforward mechanism of asking international mining companies what policies they wanted. The results of this survey became the foundation of the blueprint for "reforms" which now stretch around the world.

The mining laws of more than 75 countries have been "liberalised" in this manner to attract greater foreign investment. The competition for foreign investment can lead to pressures among States to offer ever more attractive deals; if governments fail to deliver, companies may threaten to withdraw from the country or to downgrade their activities. Thus the package of measures countries offer so as to attract foreign companies vary to boost their competitive position. Measures often include stable

investment rights; freedom from government interference or expropriation; stable payment structures; ease of access to mineral deposits; tax breaks and tax holidays; guaranteed rights to move from exploration to mining; reduced payments or share to government; and free repatriation of profits. The rights of indigenous peoples have been squeezed in this process.

Bank funding to specific mining projects is substantial and rising. The most significant rise has been through the International Finance Corporation (IFC) and Multilateral Investment Guarantee Agency (MIGA). These are now the fastest growing sections of the World Bank Group. Between 1993 and 2001, according to the IFC, it financed 33 mining projects providing \$681 million of equity and debt finance.<sup>24</sup> IFC is a direct investor in some controversial projects affecting indigenous peoples including the Yanakocha mine in Peru. The World Bank established MIGA in response to a key private sector demand for greater security, particularly political risk insurance, for their investments in developing countries. In 1996 alone, 22% of all MIGA lending was to mining projects.<sup>25</sup> MIGA funding has been criticized for its lax environmental and social standards and it has also supported projects with serious adverse impacts on Indigenous Peoples including the Omai mine in Guyana and for a time the Grasberg mine of Freeport McMoran.

#### Poverty Reduction and Mineral Development Strategies

The stated goal of the World Bank is the “sustainable reduction of poverty”, therefore its promotion of mining and foreign investment within the sector might be expected to aim for that goal. Sadly there is much research that suggests that large-scale mining can retard economic development even at the national level<sup>26</sup>. For affected communities of indigenous peoples the impacts including loss of land, pollution of the environment and disruption of the social fabric can and have been seriously negative. Frequently mining has left a legacy of impoverishment of indigenous communities and of the health and carrying capacity of the land.

Some indigenous peoples have indigenous mining embedded in their culture. However, there is little to indicate respect or recognition of indigenous mining. The Bank's negative view of small-scale mining is voiced in a video on “Mining and the Environment”<sup>27</sup> produced by the Bank. While the video's assessment of the corporate sector stresses “the significant progress in developing technologies to reduce or prevent environmental damage”, it characterizes artisanal mining as destroying “forests and grazing lands, thus further complicating retention of water and vegetation; and mining camps as attracting itinerant young men to live without their families, leading to very high incidence of drug and alcohol abuse, sexually transmitted diseases, including AIDS.”<sup>28</sup> Studies and advocates of artisanal mining have shown that such mining offers important livelihood and development opportunities to the rural poor while generating serious environmental problems that need to be addressed. The important rights and livelihood issues associated with indigenous peoples' traditional mining and the stable communities on which they depend, as in the Cordillera region of the Philippines and the Bolivian Andes, are not addressed in the Bank's video analysis.

### Low Standards

The World Bank is sometimes identified as a setter of environmental standards for mining projects. Companies frequently boast of their commitment to “World Bank standards” even where they have no connection to World Bank funding and are therefore beyond any form of monitoring. World Bank guidelines have however also been criticized for falling below existing international standards in several crucial areas. Practices banned or carefully circumscribed in many countries, including most notably the United States and Canada, where many transnational mining companies are based, are accepted in Bank standards. Even in some Southern States, the World Bank standards can lower rather than uphold existing standards.<sup>29</sup> Most problematic however is the absence of any general monitoring or regulatory framework.

### Voluntary Codes

In line with the liberalization of national controls and mining regulations across the globe, the World Bank has been actively involved in promoting the industry’s preference for non-binding voluntary codes of conduct, voluntary guidelines and promotion of best practice to replace binding legal safeguards.

Some NGOs are persuaded by this industry shift and have also pushed for the adoption of voluntary guidelines as a first step towards improvements. But a large number of indigenous and civil society organizations now insist upon the need for stronger regulation, legally binding agreements, including mechanisms for independent verification, inspection, enforcement and sanctions for non-compliance of social and environmental standards. Many affected indigenous communities underline the promotion and implementation of existing and emerging human rights instruments, including the recognition of fundamental rights to land and to determine the future developments on their own lands by States and companies as the necessary minimum for the future development of any balanced, respectful relationship with extractive industries.

There is skepticism over premature or misdirected “dialogue” between mining companies and NGOs on voluntary codes of conduct or other matters, which are not based on enforceable sanctions for violations and which fail to respect or include indigenous peoples<sup>30</sup>. Given the current lack of verification, independent monitoring or redress in voluntary standards, community leaders have also expressed the fear that the existence of such Codes may act as a charter to allow miners’ entry to their lands and access to investment funds while still leaving companies free to break any promises made.

## **Industry Initiatives**

### ***Some International Trends in Mining Investment***

In a trenchant analysis of trends in the mining industry, Chris Hinde of the Mining Journal highlights some present challenges facing mining companies:<sup>31</sup>

- overcoming the “historical baggage” of mining’s negative social and envi-

ronmental image and the industry's failure to guide the agenda on "sustainable development";

- grasping the opportunities opened for private sector capital investment in the mining industry in the last two decades and the triumph of capitalism;
- maintaining competitiveness in the market place through efficiencies and geographical diversification, while increasing shareholder value.

How do these challenges for the mining industry square up with respect for human rights and sustainable development?

Contemporary demands for corporations to respect human rights and to be environmentally "sustainable" now and into the future put pressures on the mining industry that historically it has been unable to meet. The demands for market competitiveness as an industry vis-à-vis other sectors and within the industry put pressure more than ever on the corporate objective "to increase shareholder value, minimize the break-even point at which company operations are profitable, and to maintain corporate viability for the foreseeable future".<sup>32</sup> The increased costs associated with meeting social and environmental standards, which are arguably cheaper in the longer-term by overcoming uncertainties attendant to protracted conflicts and public opposition, nevertheless entail additional costs. In the words of a businessman concerned with business and ecology:

*...[E]nvironmental ad campaigns represent the limit and extent to which corporations are presently willing to accept environmental truths ...What corporations do believe is that genuine environmentalism poses enormous threats to their well-being. If you define well-being as their ability to continue to grow as they have in the past, they are correct " 33*

Therefore overcoming mining's historical baggage is not an easy task. For the current industry initiatives in redefinition to succeed requires "buy-in" by mining-affected indigenous peoples and local communities and the broader environmental and social movements. According to a World Bank consultant, "In a conference held in Washington in March 1997 on 'Mining in the Next 25 Years', it was clear that top executives in the mining industry believe that proper management of the relationship with indigenous peoples and local communities is going to be one of the biggest challenges in the next ten to twenty years".<sup>34</sup> Such support has not been forthcoming. There are clearly current and past unresolved issues that work against the generation of confidence. Affected communities call not only for statements regarding future aspirations but visible changes in corporate practices on the ground and the resolution of outstanding legacy issues.<sup>35</sup>

#### Investment difficulties demand short-term profitability

The mining industry is also under pressures to reduce its costs, reduce uncertainty and potential future liabilities and yet maintain its profit margins. Mining requires large investments over relatively long periods to return a profit. A mine may take 10 to 20 years to explore and develop before production can bring some return and

even longer before profit is gained. This may compare unfavourably among potential investors with competing opportunities for quicker and more reliable returns. If the mining industry can reduce conflict and opposition to new projects, this would help in providing a more stable and attractive climate for the long-term investment on which it depends.

#### Predominance of gold and diamond mining

However the requirement for quick profit among investors and companies helps explain why a disproportionately large amount (over 50%) of new investment in mining over the last 15 years has been concentrated in the speculative quick and high return mining operations for gold, diamonds and other gems. While these investment areas tend to be profitable, they are often more controversial because of the environmental impacts of gold mining and the association of such high value mining with militarization and conflict. Gold and diamond mining also has more critics because these are seen as making little essential contribution to society. The short life of many such mines reduces their development potential for long term jobs and wealth creation traditionally promised by mining.

#### Resumption of Aggressive Exploration and Mine Development

In recent years world economic conditions and policy decisions to sell off gold reserves have depressed gold prices and slowed the previous rush of exploration in indigenous territories. One consequence of the September 11 attacks on the USA has however been a boost to the value of gold and a possible spur to new exploration. In addition, gold and diamonds have remained profitable because of the development of new and cheaper techniques of extraction and processing which can also be more invasive and environmentally damaging. For gold mining, these include open-pit mines, submarine tailings disposal, and separation by cyanide leaching. In terms of sustainable development, national industrialisation or human rights protection, gold and diamond mining have severe negative implications. They are often associated with the worst environmental and human rights abuses. Technological “advances” in other sectors (e.g. laterite nickel mining) have, as with gold, opened up whole areas of lower grade deposits to potential commercial exploitation. Many such developments are proposed on indigenous lands and have huge implications for the future of both land and affected peoples.

Much of such exploration is led by ‘Junior’ exploration companies. While it is the majors who are the most active in efforts to change the perception of the industry, it is often the Juniors who are the first contact between the industry and indigenous peoples. The demand for high and quick returns on investment pressures some mining exploration companies to cut corners or adopt more aggressive exploration methods. However the fortunes of major mining companies are interwoven with the more notorious junior (exploration) sector. Many juniors now depend upon substantial backing from larger companies while major companies can save on exploration costs and risks by buying into properties first acquired by juniors.

#### Mining Industry Initiatives Post-Rio

Today, some leaders of the mining industry are promoting a new image for world mining and a commitment to sustainable development. Leading spokespersons have also voiced the feeling that despite their significant efforts towards a change in orientation and practice, these efforts go largely unrecognized and their former bad image persists. To quote Sir Robert Wilson, Chairman of Rio Tinto:

*"Despite the efforts of companies and industry associations, the mining, metals and minerals industry has fallen into increasing public disfavour. It is seen as, at best, a necessary evil. It has become accepted thinking that the industry is incompatible with sustainable development.*

*"Current perceptions, if left unchecked, will have a continuing adverse effect on the industry. They will drive legislation and distort markets in ways that risk harming economies and producing unintended environmental and social consequences."*<sup>36</sup>

The industry's latest and most ambitious initiative to date is termed the Global Mining Initiative (GMI), first proposed in 1998 and originally sponsored by a handful of the world's larger mining companies (Anglo American, BHP/Billiton, Codelco, Newmont, Noranda, Phelps Dodge, Placer Dome, Rio Tinto and WMC.) Today, it includes more than 30 mining companies.

The GMI has three main components.<sup>37</sup>

1. Mines Minerals and Sustainable Development project
2. A global conference: Resourcing the Future
3. The formation of the International Council of Metals and Minerals

### MMSD

The largest and most prominent element of the industry initiative is the Mines Minerals and Sustainable Development project. This project is described as the mining industry's flagship of openness and dialogue and the "cornerstone" of GMI. Its stated purpose is to identify the contribution that mining can make to sustainable development and to identify some of the related problems by gathering opinions, commissioning and conducting research, and initiating points of dialogue. Sir Robert Wilson explains:

*"We knew that an industry-managed project would have neither the independence nor credibility that we sought, so we invited the World Business Council for Sustainable Development to carry the project forward and to draw in non-industry participation in the form of inter-governmental organisations, national governments and conservation groups."*<sup>38</sup>

The World Business Council for Sustainable Development subsequently chose to implement MMSD through the International Institute for Environment and Development (IIED, a London-based international NGO). Despite Sir Robert's assertions of independence, the project has been criticised by an alliance of civil society groups focused on mining issues as an industry-controlled process.<sup>39</sup>

The draft report of the MMSD is soon to be released.<sup>40</sup> It is not within the scope of this paper to comment on its findings. However the difficult relationship between the MMSD and indigenous peoples and civil society organisations bears some examination.

#### MMSD and Indigenous Peoples

Mining companies have repeatedly acknowledged that their relationship with indigenous peoples is one of the most problematic areas, and it appears, these problems have been reproduced in the MMSD.

The mandate of MMSD is focused upon a set of issues concerning the sustainability of mining as an economic activity. MMSD is not structured nor equipped to address or respond to the fundamental concerns of indigenous peoples regarding mining and the protection and promotion of indigenous rights. As an industry-inspired initiative, it has also had difficulty generating sufficient indigenous participation even on secondary issues. A recent consultation with indigenous peoples in Quito, Ecuador had approximately 30 participants, with many mining-affected communities refusing to participate. Mistrust of a process over which they feel little ownership or control is a factor affecting indigenous peoples' attitudes to this project. A follow-up workshop was scheduled for February 2002 in Australia.

#### MMSD Project Governance

The Sponsors Group that oversees the overall MMSD project was originally made up of mining company executives. The framework of the project was laid down at that time. More recently there has been some expansion of the Sponsors Group.

The International Institute for Environment and Development unilaterally selected the first members of an Assurance Group established with the stated purpose of providing an independent review of research output. The Assurance Group includes individuals from civil society groups. However the process of selection of members lacked transparency or participation from civil society and especially from mines-affected communities. An indigenous person was included in the original Assurance Group, who attended only the first meeting. A replacement was selected only late in the project, again through MMSD's internal processes.

MMSD has a budget in excess of \$5 million for two years. It was claimed in advance that funds would come from a range of sources and that a target of 40% from non-industry sources was set to indicate its independence. The project has failed to meet this target and the bulk of its funding has come from leading mining companies.<sup>41</sup>

MMSD has met a mixed reception. The World Bank, UNEP, and others have joined the sponsors groups and contribute to the funding. They have accepted the initiative as the multi-stakeholder dialogue it claims to be. Other groups including mines-affected communities and mine-monitoring groups have openly criticised the initiative, and many have boycotted its activities.<sup>42</sup>

Concern about original project structure is now compounded by the experience of its process. One key concern of project critics was that MMSD might be mistaken

for a genuine multi-stakeholder dialogue with broad-based support and be promoted as such by the mining industry in the lead-up to the World Summit on Sustainable Development over more legitimate processes. This view has done much to deepen suspicion and may, as a result, negatively affect future prospects for future dialogue. The MMSD could intensify the very divisions that it wishes to overcome. The project is perceived to be proceeding according to an agenda and on a time frame defined by the best interests of the industry, and certainly not defined by the best interests of a dialogue process involving all interested and affected parties.<sup>43</sup>

A seminar held in London in May 2001 and attended by representatives of indigenous peoples and southern-based mining campaign groups concluded with a statement expressing concern about the Global Mining Initiative and calling upon NGOs “to refuse to participate in initiatives, such as MMSD, which are primarily spear-headed by the industry to serve its own purposes.”<sup>44</sup>

Critics have also expressed the concern that the existence of the MMSD process might lead to delay on action on such obviously problematic practices as riverine dumping, submarine tailings disposal, mining within indigenous territories without prior informed consent, mining of sacred sites, mining in environmentally sensitive areas, leaving unresolved disputes over reparations and compensation payments. There have been calls to industry to show its commitment to change by immediate action to suspend such controversial practices. Such action would clearly do much for confidence building.

When invited to attend one of the current rounds of MMSD-sponsored meetings for North America, Miningwatch Canada responded by raising the demands of mines-affected communities articulated at the London seminar in May 2001.

*“Thank you for the invitation. However, MiningWatch Canada will not be attending this event. We reiterate our concern that we need to see industry support for the following concrete changes before we will waste our time on a generalized- and abstracted-dialogue.*

*These are:*

- 1) A moratorium on new large-scale mining projects in greenfield areas of Asia, Africa and Latin America.*
- 2) Companies must take legal and financial responsibility for - and clean up -- the terrible damage caused by their past and current mines.*
- 3) The World Bank/IMF and CIDA must cease funding of industry-initiated mining codes which are imposed on the governments of Africa, Asia-Pacific and Latin America.*
- 4) The industry must cease lobbying against regulated higher standards in all mining and smelting (such as the new Metal Mining Effluent Regulations in Canada).*

*5) Surface and subsurface rights of indigenous peoples and all mining-affected communities be unequivocally respected, as well as their right to veto projects they consider unacceptable.*

*We are, of course, always ready to work with specific companies if a community affected by them asks us to, and we are willing to work with industry on specific projects that will contribute to the resolution of the above.*<sup>45</sup>

### Public Relations Tool

Given earlier, but more positive, experiences of multi-stakeholder processes such as the Whitehorse Mining Initiative and the World Commission on Dams, which at least managed to involve directly affected indigenous peoples, it is regrettable that the MMSD has failed to gain the confidence of many indigenous nations and communities and has been identified by critics as a tool of industry public relations.

Prominent critics of corporate strategies - post-Rio and post-Seattle - highlight three steps that companies have taken to strengthen their legitimacy<sup>46</sup>:

1. Acceptance of social clauses as part of the triple bottom-line for business -- economic profitability, environmental sustainability and social concern -- in order to "fast-track" trade negotiations;
2. Participating in the Global Compact promoted by the UN Secretary General Kofi Annan to whitewash corporate images, without the need for compliance; and
3. Embracing civil society in corporate activities, "in order to project dialogue, when in fact monologue governs", and to win legitimacy by the mere mention of "consulting civil society".

Such practices, if true, could generate cynical responses towards corporate initiatives. Given the history of mining company community relations, more real progress must be made in respecting human rights and promoting negotiated agreements to overcome the historical legacy of mistrust between communities and corporations.

### Gap between Words and Deeds

In fact the gap between general industry statements and the specifics of mining company practice remains. While working to project its new image, the industry through the International Council on Metals and the Environment (ICME), represented by executives of major Global Mining Initiative companies, has entered negotiations with IUCN to gain greater access to protected areas including World Heritage sites, proposing that prior to the designation of protected areas in the future, all potential new sites be surveyed for minerals so that if necessary boundaries can be adjusted to accommodate mining activity.<sup>47</sup>

Stricter environmental regulations in Canada have been actively opposed by leading mining companies<sup>48</sup>. Riverine tailings disposal has continued at major mines.<sup>49</sup> The Australian Corporate Codes of Conduct Bill has been actively opposed by companies who elsewhere speak of their efforts to raise standards.<sup>50</sup> Reports of

human rights abuse, misrepresentation of community positions and interference with indigenous decision-making processes continue.<sup>51</sup>

#### Mining companies' problematic practices

Some mining companies claim that the industry is making profound changes towards responsible and even "sustainable" mining in practice. Placer Dome in Canada, for instance, issued a Sustainability Policy in 1998; Rio Tinto in the UK produced "The Way We Work" in 1998, while the Australian WMC has established a distinct policy for Indigenous Peoples.<sup>52</sup>

The substance and credibility of these efforts has been challenged by critics who point to the continuation of old practices on the ground regardless of change in head office rhetoric.<sup>53</sup>

#### Regulation vs Voluntary Codes and Self-Regulation

The preferred approach by companies over the last 15 years has been the liberalisation of mining regulations and the promotion of voluntary codes of conduct. They argue that social and environmental concerns can be adequately (or even best) dealt with through self-regulation, voluntary codes of conduct, identification of best practice and advisory guidelines. It is argued that these mechanisms offer benefits over legislation, which may be inflexible, bureaucratic and expensive.

Where 10 years ago, at the time of the Earth Summit, most companies lacked even a stated social or environmental policy, today virtually each company has its own internal statement. Numerous companies have also signed up to various voluntary codes of conduct concerning a wide range of social and environmental concerns. No doubt, some initiatives can have positive elements and are an expression of the wide recognition of the need for change. However a proliferation of standards and codes tends only to confuse, obscure and to discredit the whole process of standard setting. This is compounded if there is an absence of or inadequate credible independent monitoring of compliance.

Numerous critics of the voluntary approach express concern that whatever the value of voluntary codes, they are no substitute for an effective framework of international and national regulation to ensure that all companies are obliged and monitored to operate at a minimum decent international standard. The potential seriousness of the impacts of breaches of environmental or social standards in a mining project and the frequency at which they currently occur are cited as reasons for legally enforceable standards, independently policed.

It is argued that voluntary codes are often general in character, making the monitoring of compliance difficult if not impossible to determine. The absence of independent monitoring is frequently raised as a problem. Current monitoring is often done by consultants and companies that are dependent upon the patronage of the mining industry for their future work. Voluntary Codes are also characterised by the absence of any framework of sanctions for violations. Under such circumstances they are said to provide inadequate protection to communities potentially affected by mining.

Transnational companies are frequently accused of operating to lower standards in their operations in Southern states and on indigenous lands, when compared to the standards required of them elsewhere. Companies respond that they operate above minimum legal requirements. At the same time, proponents of the voluntary raising of standards are seen to be active in resisting and opposing higher standards and regulations which are legally binding. Such opposition to legal standards brings into question both the quality of protection afforded by the voluntary measures and the commitment of companies to raising standards.

### **Initiatives by Indigenous Peoples and Civil Society Organisations**

The historic relationships between indigenous communities and natural resource corporations has been full of conflict, characterised by community protests and legal actions over the violations of human rights of indigenous persons and peoples.

Today, it is an indisputable reality that more land-based and indigenous communities in more regions of the world are profoundly threatened by new and ever growing mining-related investments than from any other industrial sector. While communities object that the economic gains from mining to the communities where the minerals are extracted are minimal or non-existent, the destruction of their social, cultural and biotic environment is dramatic. In India alone, more than 10 million people have been displaced due to mining related activities and around 75% of them have not even received compensation. The concerns of local communities have become acute with the dramatic stepping up of mining interests.

Mining and other extractive industries have a mixed record with indigenous peoples, both in terms of care for the environment and in showing respect for their fundamental rights. Indigenous peoples from many different regions have voiced their complaints and concerns in many fora including in the sessions of the UNWGIP<sup>54</sup>, about the loss of lands and environmental degradation as a result of the activities of mining companies and other extractive industries. These reports reveal that mistrust of mining companies is widespread.

Most new mines are opposed by the communities to be affected. The legacy of past interaction between mining companies and indigenous communities near mines makes this a likely response. Whereas in the past, opposition to mines in remote areas may have been overcome without outside knowledge, today communities are becoming increasingly effective in projecting their concerns nationally and internationally. They are even becoming successful in stopping unwanted projects. Taking the Philippines as an example, over the last five years, community protests have played a part in closing down at least one major mine, and two other major companies and several minor ones have withdrawn from the country. During the last six months under the new government of President Gloria Arroyo, one mining license has been withdrawn and another suspended, citing indigenous opposition as a major cause. Other mining licenses remain under investigation.

### Legal Redress and Growing Corporate Liability

Recently there has been an increase in the use by indigenous peoples of the courts to gain legal redress for abuses against their rights and lands. Increased awareness of emerging international standards is encouraging communities to seek legal redress and reparations for any perceived wrongs committed by corporations. For example, the people of Bougainville brought a case under the Alien Torts Claims Act in the US courts against the Rio Tinto company.<sup>55</sup> The Amungme people of West Papua also lodged cases in the US courts against Freeport McMoRan.<sup>56</sup> Communities along the Ok Tedi and Fly rivers in Western Province, Papua New Guinea took legal action in Australia to gain redress for the destruction of their valley ecosystem following years of dumping of mine waste into the river.<sup>57</sup>

An increasing number of such claims are being lodged against companies in their metropolitan centers. The current structure of law is not yet supportive of this strategy. Communities have however begun to see positive results from cases. BHP entered into an out-of-court settlement with the Ok Tedi landholders when their case progressed through the Australian courts. BHP and the Ok Tedi landholders are now back in dispute over alleged failure of the company to honour the earlier settlement and the case may go to court again.

In addition, an increasing number of legislators and civil society groups have adopted a call for the strengthening of international regulation of transnational corporations, particularly through the United Nations, including the establishment of an International Convention to regulate the activities of TNCs. A number of respected environment and development NGOs are calling for enforceable international standards to regulate TNCs.<sup>58</sup>

### Impact Benefit Agreements and Other Negotiated Agreements

One mechanism identified by the Innu Nation for exercising aboriginal rights is engagement within the framework of indigenous sovereignty and the negotiation of Impacts and Benefits Agreements (IBAs).

Some of the mechanisms or methods used by INNU are:

- Participation in Environmental Panels to do Environmental Assessment
- Community members participated in EA by making a video, "Speak the Truth"
- Memorandum of Understanding (MOU) regarding the EA process
- Participation in Public Hearings
- Land Rights agreement prior to permit
- Impact and Benefit Agreements
- Stakeholders Forum/ Citizens Panel
- Communities/ Leadership to seek mandate from communities -- organisation of Task Force which issued a report
- The Innu Nation developed guidelines for conduct of companies operating in Innu territory.

### Other Civil Society Initiatives

The Permanent Peoples Tribunal, a long established mechanism of international jurists established to hear and pass judgement on grievances against States, convened at Warwick University in England in 2000 and turned its attentions to corporations including Freeport McMoran/Rio Tinto. Evidence was presented on their record in West Papua and elsewhere. The companies chose not to attend or defend themselves.<sup>59</sup> The International Water Tribunal, a mix of government and NGO groups in Europe, met in the Netherlands in 1992 and heard cases against several mining companies including Ok Tedi/BHP. The tribunal in its judgement made a list of recommendations.<sup>60</sup>

The Australian development agency, Community Aid Abroad, has established an Ombudsman to receive and follow up on complaints from affected peoples concerning the activities of Australian mining companies. CAA makes clear it believes that such an office should be officially established. They produce an annual report of their activities<sup>61</sup>. In addition support and campaign organisations focused on mining have proliferated both in the countries of the North and in those of the global South.

### Global Campaign of Communities Affected by Mining

The creation of a Global Network of communities affected by mining is seen as a necessary response, by communities and national networks, to confront the global expansion, global strategies and concerted global public relations efforts of the mining industry. The deregulation of investment markets, the promotion in developing countries of liberalized mining codes by the World Bank, UNDP, ADB and other agencies, the privatization of state assets and the devolution of state responsibilities to the corporate sector, as well as the general weakening of Nation-States resulting from structural adjustment programs and recent trade agreements, have generated a democratic deficit that leaves local communities largely on their own in their struggles to face and resist mining. This burden has been accentuated by the weakening of labour unions resulting from the structure of the industry that now relies increasingly on contract work to carry out its activities.

In this context, internationalizing solidarity and breaking the isolation of communities are seen as a vital activity of indigenous governments, local governments and civil society organisations. Regional and global networks are in formation at the present time. In a globalised economy where decisions on mining development may be made thousands of miles from the land of those whose future it will determine, no amount of education, training and capacity building at the local level alone will be sufficient to bring about necessary changes in the behaviour of the industry, justice for the affected communities, and respect for the environment. Communities have been forced to seek wider support and new solidarity alliances.

Current public relations efforts by the industry to improve its public image, influence policy makers and shape the global policy environment that will guide the sector's activities in coming years, such as the Global Mining Initiative and the Mining Minerals and Sustainable Development initiative, pose yet another challenge to commu-

nities. To confront these concerted industry strategies, communities are developing their own discourse, adopting some common policy principles and creating the mechanisms and instruments to have a strong independent voice in order to engage in forms of policy dialogue, both nationally and in multilateral forums, where policy decisions that affect the whole planet are being formulated. A global network of communities is an attempt to respond to this immediate challenge. It is envisaged as a process to establish at least a level playing field so that communities can deliberate, develop their own analysis and perspectives, make informed choices and express their own legitimate views and positions in the global policy debate.

This will help give realization to the right of indigenous peoples for full and effective participation in policy formulation and decision-making on all matters affecting them from the community to international forums. ♦

*Joji Carino was a commissioner of the World Commission on Dams. She is currently the Policy Adviser and Coordinator of Tebtebba Foundation's European Desk.*

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*Mining the Image:*  
**The Global Mining Initiative**

**By Geoff Nettleton**

THE MINING INDUSTRY HAS A DESERVED REPUTATION AS AN ABUSER both of the environment and the peoples whose land it despoils for its operations. Today, however, the world mining industry is making claim to a new image as a socially conscious “good neighbour”, protector of the environment and contributor to social development. To make these claims, the industry is attempting to consolidate its organisations within the framework of a strategy called the Global Mining Initiative (GMI) and has invested massively in the projection of its chosen new image.

It is not difficult to understand why the industry would want to adopt a new image. To quote Sir Robert Wilson, Chairman of Rio Tinto and one of the chief architects of GMI, *“Despite the efforts of companies and industry associations, the mining, metals and minerals industry has fallen into increasing public disfavour. It is seen, at best, as a necessary evil. It has become accepted thinking that the industry is incompatible with sustainable development”*. (Wilson, 2001)

The Rio Tinto Chairman has also been quoted as saying *“Current perceptions, if left unchecked, will have a continuing adverse effect on the industry. They will drive legislation and distort markets in ways that risk harming economies and producing unintended environmental and social consequences”*. (Tauli-Corpuz and Kennedy, 2001)

In this article we seek to provide some basic information about the mining industry plans, particularly the Global Mining Initiative, the reasons that lie behind them, and the implications for indigenous peoples and other affected communities around the world.

### **Crisis in Mining**

Today, as Sir Robert Wilson says, the mining industry is faced with increasing difficulties that threaten its ability to sustain profitability. “A pressing concern for the mining and metals industry is the need to overcome poor public perceptions of our industry’s performance in relation to the environment, and our consequent growing vulnerability to increased regulation.” (Wilson, 2001)

There is in this statement a clear prioritisation of image management and protection against regulation in the industrialised investor-rich countries of the North, rather than to address the concerns of the communities affected by mining and, in most cases, opposed to it.

Of course the problems of mining are not confined to perception and image. The environmental and social disasters caused by mining are real and continuing. Each year new and bigger environmental disasters are associated with mining operations -- from Romania to China, Spain to West Papua, tailings dam collapse, cyanide spills, direct river and marine waste dumping, all continue to occur with frightening regularity. Mining is also one of the most dangerous of employment activities for mine workers.

### **Indigenous Peoples and Mining**

Mining has long had a disproportionate dependence on the exploitation of indigenous peoples' lands. Even in traditional centres of world mining in the USA, Canada, Australia and South Africa, much mining was located within indigenous territories. The pattern of investment in exploration for new mines suggests that the exploitation of indigenous peoples' lands will increase in proportion in the next 20 years.

It is the widespread awareness of the social and environmental costs associated with mining that has always led to opposition to most new mines. But where in the past, mine opposition in remote areas may have been suppressed or overridden without anyone outside knowing, today communities are becoming increasingly effective in projecting their concerns nationally and internationally and even in stopping unwanted projects.

### **Growing Liability**

More effective resistance to new projects is however not the only problem of the industry. Increased awareness of international standards and potential support is encouraging communities suffering abuse to seek legal redress and reparations. Efforts are being made, even within a framework of national laws alien and hostile to indigenous peoples, to gain some justice. The people of Bougainville have brought a case under the Alien Torts Claims Act in the US courts against mining giant Rio Tinto. The suit claims the company engaged in a joint venture with the Papua New Guinea government to maintain a copper mine on the island, which resulted in international environmental violations and crimes against humanity stemming from a military blockade motivated by civilian resistance to the mine. The Bougainville suit claims 15,000 civilians died from the military conflict and a further 10,000 as a result of the siege imposed on the island during the conflict.

Communities along the Ok Tedi and Fly rivers in Western Province of Papua New Guinea took legal action in Australia to gain redress for the destruction of the river following years of dumping mine waste from the Ok Tedi mine direct into the river system. BHP, the parent company, initially seemed dismissive of these efforts. The PNG government at the time even sought to make the foreign legal action by the ancestral landholders an illegal act. However, when the case was effectively pursued despite this intimidation, BHP finally agreed to an out-of-court settlement and promised compensation and clean-up measures. Sadly the case is now being brought back to court as the ancestral landholders assert the company has not honoured the agreement and has used the time since the promised settlement mainly to extricate itself from the project. BHP and Rio Tinto are sponsors of the Global Mining Initiative.

An increasing number of such claims are being lodged against companies in their metropolitan centres both by communities and former workers of companies. So far the framework of law is not helpful but the trend to internationalising standards and legal requirements on companies is clear. There is widespread repugnance to the idea that major international companies can exploit poverty and lower standards of

rights and environmental protection to enhance profits. In the European Union a standard has been defined for the operation of European transnational corporations operating overseas. (Howitt, 1998)

In Australia, the Senate has proposed a bill to require Australian companies to operate overseas under the same standards as in domestic operations. (Mining Monitor, 2000) Cases have been considered in the British courts brought by former workers of Rio Tinto in Namibia as well as in US courts against Freeport McMoran brought by West Papuan victims of human rights abuse. (Abrash and Kennedy, 2001) Freeport McMoran is also a GMI sponsor.

When the toxic legacy of mining in many sites around the world are considered, it can be seen that the mining industry is sitting on a time bomb of liability claims for past projects. This is leading to a growing reticence of investors to expose themselves to new mining liabilities.

### **Investment Difficulties**

Mining requires very large investments, and the prospect of investors gaining little or no return because of successful opposition or subsequent liability claims are serious disincentives to the markets. This adds to basic investment problems of mining where a relatively long-term investment is needed before profits are shown (if at all). A mine may take 15 to 20 years to explore and develop before production can bring some return, and longer before profit is gained. This compares unfavourably among potential investors with competing opportunities which offer quicker and more reliable returns. This quick profit orientation helps explain why, despite the concentration of mining industry propaganda on the essential value of the products of mining for the maintenance of industrial society, in fact a disproportionate amount of new investment in mining over the last 10 years has gone to speculative quick and high return mining operations for gold, diamonds and other gems that have limited use value and nothing to do with satisfying basic needs. Unless greed is defined as a basic need.

The difficulty of gathering new private investment has been one incentive for the industry and the World Bank to seek to redefine mining as a developmental activity. Such claims are widely questioned. (Oxfam, 2001) Nonetheless the Bank and other international finance institutions have, over the last 20 years, put increasing amounts of funds into mining projects.

According to Friends of the Earth, the World Bank Group has invested US \$5.9 billion in the 1995-1999 period alone. (Friends of the Earth International, 2001) (Many of these are also into gold and precious gem mining projects.) In addition and even more significantly, the World Bank has orchestrated the liberalising of Mining Codes around the world and especially in the global south to provide freer access and more financial returns for mining TNCs. The Bank has also produced materials actively promoting transnational mining investment as a replacement for indigenous small-scale mining. (e.g. World Bank mining and environment video, 5 March 1996)

The Bank and the International Monetary Fund further have actively encouraged and even required the denationalisation of state-owned mining assets in various southern countries such as Brazil, Zambia and others. Many of these assets, nationalised as part of the decolonisation process, are now back in the hands of large international companies based in the old colonial centres.

The World Bank response to heightened pressure from both the industry, particularly through GMI, and from environmental and human rights NGOs has been to call a review of its involvement in mining. It is revealing to realise that the terms of reference for the “review” borrow the GMI language and approach in presuming the positive contribution of mining to sustainable development.

“The WBG (World Bank Group) has been active in a number of roles in the extractive industries. It believes that such industries can make a positive contribution to sustainable development and poverty reduction in its member countries. However, given increasing concerns as well as changes in the focus of its own activities and in the industries themselves, the emerging lessons of experience and with new issues coming to the forefront, WBG senior management believes that a review of the WBG role is now timely.” (World Bank Report, 2001)

The review it seems will start with the answer and search for the questions.

### **Credibility**

A big problem for the GMI in attempting to change the image of mining transnationals is that the real record of the industry is too well known. Time is running out for the old style mining industry. Reform or radical reappraisal is inevitable. Many communities who have been the unwilling victims of mining development are in desperate need of reparations. There are others who are opposing proposed projects who fear for their future and assert their right to have some control over it. Whatever the efforts of the PR departments, the real legacy of mining and the undue influence of the companies over policy decisions are only too evident.

Yet giant companies that are already seen to have excessive power to influence government decisions, even in the world’s most powerful states, are also seen to be growing ever larger. Mergers, takeovers and the buy-out of former nationalised entities make for ever bigger and fewer companies and are raising growing public concern over their power.

The poor social and environmental record of the mining industry screams out for stricter regulation and independent monitoring. Yet the industry and the World Bank have responded with liberalised investment codes and expansion of exploration into ever more sensitive environmental zones and indigenous territories. They persist in the claim, against the overwhelming weight of evidence, that social and environmental concerns can be adequately (or even best) dealt with through self-regulation, voluntary codes of conduct, identification of best practice and guidelines devoid of any effective sanction.

Such a response is clearly inappropriate and out of line with the needs and de-

mands of affected peoples or the wider public expectation. There is a clear need for the industry to face up to its responsibilities. Initiatives to that end are needed and surely welcome. So when the industry announced its desire, through the GMI and especially the Mines Minerals and Sustainable Development (MSSD) Project, and the World Bank through a review of extractive industries to engage with “critics” and learn from past mistakes and seek out how mining can contribute to sustainable development, surely this too is welcome?

Sadly there are problems. In recent years mining companies have been only too quick to make claims of social and environmental sensitivity and generate new initiatives. Where 10 years ago, at the time of the Earth Summit, most companies lacked even a stated social or environmental policy, today virtually each company has its own statement of social and environmental commitment. Some companies are signed up to several such initiatives. New initiatives from the same companies may even seem to contradict or overlap each other. The result is massive confusion but a general feeling to the casual observer that compromise and concessions are in the air.

Yet most such initiatives have disturbing features in common. Virtually all such commitments are to codes and provisions that lack any credible verification or independent monitoring. There is an absence of any fine or sanction for those who break the codes, or of any independent monitor. If any “monitoring” takes place, it is normally superficial and conducted by auditors and consultants whose only clients are companies they now are being hired to report upon. The result is too often whitewash reports. At the same time many of the same proponents of voluntary raising of standards are active in campaigns to resist and oppose legally binding codes and regulations that would address these very problems. (Mining Monitor, 1998) In addition, their signing on to Codes of Conduct does not seem to prevent the very same companies most active in such promotions to continue to cause environmental damage and violate local rights. The new codes do not appear to significantly affect practice at the project level.

### **Global Mining Initiative**

The industry's biggest initiative so far is the Global Mining Initiative. First proposed in 1998, the GMI is strictly timed for maximum impact in the lead-up to the World Summit on Sustainable Development in Johannesburg, South Africa in September 2002. It was originally sponsored by a handful of the world's largest (and most notorious) mining companies: Anglo American, BHP/Billiton, Codelco, Newmont, Noranda, Phelps Dodge, Placer Dome, Rio Tinto and WMC and Freeport McMoran. Today GMI includes more than 30 companies.

According to the Mining Journal, “the GMI has three components: the launch of an independent analysis of the challenges that need to be met in order for the industry to contribute constructively to ‘sustainable patterns of economic development’, the organization of a major global conference on mining, minerals, metals and sustainable development, and the creation of a strong global network of institutions to rep-

resent and lead the industry in meeting the challenges". (Mining Journal, April 2001)

The Global Mining Initiative has three components:

1. The Mines Minerals and Sustainable Development project
2. A global conference: Resourcing the Future
3. The formation in September 2001 and promotion of the International Council of Metals and Minerals. ([www.iied.org/mmsd/](http://www.iied.org/mmsd/))

### **MMSD**

The largest and most prominent element of the industry initiative is the Mines Minerals and Sustainable Development project. Promoted by the industry as its flagship of openness and dialogue, MMSD is the "cornerstone" of GMI. Its stated purpose is to identify the contribution that mining can make to sustainable development as well as some of the problems that may be encountered along the way. MMSD states it will do this by gathering opinions, commissioning and conducting research, identifying and initiating points of dialogue.

As Sir Robert Wilson declared, "We knew that an industry-managed project would have neither the independence nor credibility that we sought, so we invited the World Business Council for Sustainable Development to carry the project forward and to draw in non-industry participation in the form of inter-governmental organisations, national governments and conservation groups.

"So now the World Bank, UN agencies, national governments and NGOs alongside industry players are among the sponsors. The Council in turn commissioned a London-based NGO, the International Institute for Environment and Development, to map out a new approach to the challenges facing the industry." (Wilson, 2001)

Despite Sir Robert Wilson's assertions, the project is viewed with deep scepticism as a one-sided, industry-controlled process. The World Business Council for Sustainable Development (WBCSD) is also clearly partial. It was established by industrialists as a sectoral organisation to represent their concerns and to replace the more critical and independent UN Centre on Transnational Corporations with an industry-controlled body. Some of the founding members and key office holders of WBCSD were themselves miners, and the companies involved in MMSD are prominent members of the organisation with significant influence over it. Therefore the representation of the WBCSD as, in any sense, a neutral party or an "honest broker" is laughable.

The miners chose, again without consultation with any other party, to operate MMSD exclusively through the International Institute for Environment and Development (IIED). (To the best of our knowledge IIED has no past track record or experience on mining issues and does not therefore enjoy any credibility in this field. IIED conversely has even claimed this as a positive reason for choosing it, arguing once again that it can act as an honest, if somewhat ill-informed, broker.)

MMSD has been condemned and boycotted by industry critics and many community groups. At the same time, and predictably, it has been uncritically embraced as the multi-stakeholder dialogue it claims to be by the World Bank, United Nations

Environmental Programme (UNEP) and some in governments.

### **Who Pays the Piper?**

MMSD has a budget in excess of \$5 million for two years. According to its web site it has a staff of approximately eighteen plus commissioned researchers. It is commissioning research into the various areas of concern to the industry and, in addition, setting up meetings that project its new found concern. It has held joint meetings with the World Bank, Royal Institute for International Affairs and others.

It was claimed in advance that funds would come from a range of sources and that a target of 40% from non-industry sources was set to indicate its independence. The project has completely failed to meet this target. The bulk of all of its funding has come from leading mining companies. To quote Tauli-Corpuz and Kennedy, "No process is independent that relies on \$5 million or more from the very companies whose activities it is trying to analyze." (Tauli-Corpuz and Kennedy, 2001) We can only agree.

To oversee the MSSD project, a Sponsors Group has been set up, originally exclusively made up of mining company executives; the framework of the project was laid down at that time. More recently the Sponsors Group has been expanded to include:

- Chilean Copper Commission
- Colorado School of Mines
- Conservation International
- Department For International Development, UK Government
- Global Reporting Initiative
- Government of Australia
- Government of Canada
- ICEM (International Chemical Engineering and Mineworkers Union)
- International Union for Conservation of Nature (IUCN) - The World Conservation Union
- Mackay School of Mines
- PriceWaterhouseCoopers
- Rockefeller Foundation
- United Nations Environment Programme
- World Bank

MMSD's timetable is to come up with a draft report on the future of the mining industry by December 2001 and a final report by March 2002. This will enable it to present its findings to a global conference planned as the second pillar of the GMI and due to take place in Toronto in May 2002. The results from there, it is planned, will also be fed into the WSSD. Given the resources available to MMSD, there is little doubt that whatever the level of opposition or the superficiality of the results, the two things clear are:

1. A report claiming to be the result of a so-called "multi-stakeholder proc-

ess" will emerge.

2. These results will be used by the industry to promote its credibility and future.

### **Multi-Stakeholder Governance**

MMSD claims to be consultative and participatory but management structures, membership in committees, the research agenda and even overall project goals were largely predefined without the involvement of the wider constituency of all those affected by mining. There has been no control over project planning or management by those indigenous representatives or others who are critical of or have direct negative experience of the mining industry. The companies and IIED even unilaterally handpicked the members of an Assurance Group supposedly set up to provide an independent review of research output.

The Assurance Group does contain individuals from environmental NGOs including Charles Secrett of Friends of the Earth and even Trade Unions. However the one-sided pattern of selection of members destroys all claims to credible participatory governance. The resultant committee has little credibility and no basis to represent the diverse concerns of the victims of mining. Neither does it or the project have any powers. There is no commitment by any company to implement the findings of MMSD. The majority of mining companies remain outside the process, and even those companies who are the project sponsors are under no obligation to have the findings affect their practice.

Fundamentally the initiative was not called for by any indigenous group or affected community nor was it subsequently endorsed by any. The involvement of indigenous peoples or any respect for their positions in defining the agenda is virtually absent. We cannot see how in any sense its predefined aspiration to explore the links between mining and sustainable development and in the process strengthen the prospects for future investment in mining address the key concerns of affected communities whose clearly expressed hope and aspiration is to bar or at least strictly control mining within their lands. MMSD can put no constraints on mining company abuses. Simply put, MMSD speaks to an industry agenda and offers little to indigenous peoples. It is not just that indigenous peoples have been marginalized in the process. It may also be that within the framework of the MMSD as currently set up, nothing is to be gained from participation apart from defending us all from the project.

There is no adequate indigenous representation in its structures. Most indigenous peoples affected by mining don't even know of its existence, and of those who do, few accept its legitimacy. It is among the most disturbing features of the MMSD that the powers behind global mining and global finance, while paying lip service to the modern requirement for dialogue and participation, still have the arrogance to believe they can unilaterally choose even their own "critics" and define the agenda of their own reform.

As a result, affected communities are not represented on the Assurance Group of

MMSD. The Assurance Group member chosen by the project to “represent” indigenous peoples was, until recently, Roger Augustine, a Canadian indigenous businessman described as “Economic Development Advisor to the Assembly of First Nations and a special adviser to the National Chief of AFN.” However, Augustine seems only to have attended the first Assurance Group meeting. It is clear however that he has now withdrawn from the project. Very recently, and very late in the process, he has been replaced by Mick Dodson, a well-known and widely respected indigenous activist. Sadly, Dodson’s appointment comes too late and is in itself too little to inject credibility into a project with the parentage and track record of MMSD.

However it is worth noting that Assurance Group members can, if they wish, take on a critical and defensive role. “The project’s report will be reviewed by the project Assurance Group before final publication; any dissenting and minority points of view will be acknowledged in the final work,” said MMSD Project Director Luke Danielson. (Danielson, July 2001)

Under most circumstances, MMSD’s claim to be a vehicle for significant multi-stakeholder dialogue could be taken as a joke, but because of its large funding and the uncritical acceptance of its claims by some pro-mining agencies, it has moved its agenda forward. Its results, unless effectively challenged, will no doubt carry weight in some receptive circles of government and finance.

### **Less than Best Practice**

This unilateral process for identifying not only the content of the project but even the character and person of its critics is out of line with current international practice. The World Commission on Dams, for example, was formulated prior to the MMSD and therefore its model was available to MMSD planners. The WCD structure contains elements essential to a multi-stakeholder dialogue but completely absent from the MMSD process. (WRI, 2001)

WCD was based on a series of prior multi-stakeholder meetings, and while financing came from a range of sources, the financiers were excluded from the management structures of the project. The prior consultations led to the identification of 12 independent commissioners selected by consensus among all participants and chosen from across the spectrum of concerned groups from government, dam builders and managers, through academics, environmental NGOs and affected communities. It was the commissioners who selected the secretariat staff, defined their work, and identified the research and consultation programme rather than the reverse. Throughout the process a broad forum of all the concerned groups was maintained, which interacted with Commissioners throughout the process. Consultations in different parts of the world were led by panels of commissioners and organised by country committees representing all stakeholders in the area. All these basic elements of a participatory process are absent from MMSD. These structural shortcomings, coupled with the suspicion that greeted MMSD as another in a long line of industry-controlled initiatives, has blighted any hope it had of producing a report with broad acceptance or credibility.

As befits a one-sided, industry-financed project, the research agenda of MMSD is also designed to serve the needs of industry. The main research foci of MMSD, as outlined in its own documents, are:

- “Can the industry assure its own long-run sustainability?
- To what extent can the industry drive development of national economies?
- How can the industry best contribute to broad economic and social development at the community level?
- How can the industry improve its environmental record?
- What are the ground rules for land: its management, access, control and use?
- How can we ensure that future markets and consumption patterns are compatible with a sustainable world?
- How can we keep pace with the information revolution and ensure meaningful access to information for all Stakeholders?
- What should be the administrative relationships, roles, responsibilities and performed standards of the key actors in a more sustainable future?” (MMSD, 2001)

It can be clearly seen these are the questions that the project paymasters want answers to – i.e., how to sustain mining and what positive claims can be made for the industry. These clearly are not the central concerns of communities who want to reject mining on their land, or those who want to gain reparations from companies for the damage already done. As ever, the legacy and liability issues are downplayed in any project directed by the industry. A more balanced process might better reflect this contradiction of aspirations. Any process that wants to engage indigenous communities would have to give high priority to the terrible history of mining interaction with indigenous peoples rather than looking always to the future. MMSD does not do this. Given that its agenda and management were all structured in the absence of the major victims of the process, this is of course not surprising.

MMSD workers are prepared, in conversation, to acknowledge the limitations or failures of the initial structure but then urge that critics participate anyway within the biased structures. They lay emphasis on their independence and orientation. “If we believed that what we are doing was somehow harmful to communities impacted by mining or to the environment, we would not continue in this work for a moment,” declared Danielson. (Danielson, July 2001) However the way the project is conducting itself in practice tends only to confirm the initial fears of the bias of MMSD and futility of hoping for a balanced and constructive outcome.

Considered criticisms of the structure, governance, timetable and defined areas of research presented in correspondence have not significantly affected the project. One key concern of project critics was that MMSD was being presented as some-

thing it was not, particularly in its claim to significant multi-stakeholder participation. Polite responses have been received to these criticisms but the project has continued just the same.

Critics have also expressed the concern that the MMSD process, like so many industry initiatives before, may defer action on such obvious abuses and unacceptable practices as riverine dumping, submarine tailings disposal, mining within indigenous territories, and mining in environmentally sensitive areas. There has been a call to industry to show some commitment to back up its words by immediate action to suspend such controversial practices immediately. In fact the gap between industry statements and mining company practice is becoming ever wider.

The industry through International Council for Metals and the Environment has entered negotiations with IUCN to gain greater access to protected areas. ICME has proposed that prior to the designation of protected areas, all potential new sites be surveyed for minerals so that, if necessary, boundaries can be adjusted to accommodate mining activity. (Mining Monitor, 1999)

During the same period, stricter environmental regulations in Canada have been actively opposed by GMI companies. Riverine tailings disposal has continued at major mines as well as reports of human rights abuse, misrepresentation of community wishes and interference with indigenous decision-making processes.

Both the research and the multi-stakeholder claims of the project have proved deeply problematic in practice.

### **Misrepresentation**

From the beginning critics have cautioned MMSD that, since a significant body of groups have determined that the project's biases are too great to justify engagement, it would be wrong and counterproductive for it to lay claim to broad participation as a validation for its findings. Yet throughout the project international and regional activities have continued to make inflated claims. According to Danielson, "The project is now beginning to make considerable progress. The scale of participation and the quality of the work have been extremely positive. Literally thousands of people have participated in stakeholder dialogues, workshops or experts meetings, sent written comments, or contacted us by e-mail. There has been very broad geographic spread in those responses." (Danielson, 2001)

A meeting billed as a consultation with indigenous peoples in Quito in September 2001 was politely shunned or rejected by many indigenous groups. The seminar did proceed as a preparatory meeting, and MMSD reports that the consultation had a total of 30 participants. Yet claims of broad participation continued up to the date of the meeting and after it. Of the groups that did attend, at least one subsequently reported they were unaware of the nature of the meeting in advance as the invitation emanated from a third party. Elsewhere, NGOs in Papua New Guinea and Australia have expressed concern that MMSD researchers have called on them, gathering information without previously disclosing that they were working for MMSD.

The conduct of the research agenda and “consultations” is also leading to unacceptable conclusions. In a recent article, Danielson writing with Gustavo Lagos of the Catholic University of Chile made a series of controversial assertions as if they constitute the basic framework of facts for discussion. In fact they appear much more as MMSD acting as apologist for the industry. Their comments included the assertions: “The mining industry is not large.” “Mining occupies a relatively small part of the earth’s land surface.” (Danielson and Lagos, 2001)

All things are, of course, relative but last year Rio Tinto alone made profits in excess of \$1.5 billion from its operations all around the world. In the US, mining companies were recently accused of redefining the new US administration’s environment policy on wilderness areas as repayment for their substantial contributions to George Bush’s campaign funds. In Bougainville, Burma, West Papua and elsewhere where mining companies are backed by military forces and where killings and torture have occurred, or in so many regions where the environment and livelihoods of local peoples have been permanently damaged and sacred sites violated, the size and impact of the industry must seem far from small.

Danielson and Lagos also pose what they represent to be a key problem of inflated expectations of mining enterprises: “Mining generates considerable tensions because it is usually carried out in remote locations with little or no alternative means of community development. This creates hopes that a mining project can insure sustainable development for the region. Few other economic activities are asked to lift this entire burden. Mining is unlikely to solve the problem on its own.” (Ibid)

I have discussed mining problems with many different communities over 25 years but have yet to visit one where the central problem is an excessive (or indeed any) expectation of the mining company contributing to sustainable development. The communities I have visited share fears that mining is threatening the little they have. Their key concern in indigenous communities is inevitably the loss of sovereignty, livelihood and land. They fear militarisation, threats to health, disruption of culture and permanent environmental degradation. Suggesting that affected areas have an over inflated expectation of the good a mining project can bring and that this may be the major source of tension around mining is a truly surreal suggestion that not even company PR departments have previously dared to present.

The “balanced approach” of MMSD sees mining as making “positive contributions to local development” through employment, purchase of supplies, introduction of medical facilities, electrification. Other impacts are defined as “problematic” (not negative for some reason) including disruption of traditional culture, introduction of sexually transmitted diseases, displacement or elimination of traditional livelihoods. However militarisation, human rights abuses, land grabbing, forced displacement are not laid directly at the feet of the companies as many who have suffered them do. Once again it is suggested these may result from quarrels over benefit sharing and instigated and perpetrated by local authorities seeking their share. It is possible that Danielson and Lagos hold on to such naïve views of the source of human rights violations perpetrated at mine sites. It is impossible to think it of experienced mining

executives as they persist in operating in countries with authoritarian regimes.

### **Who Does the Assurance Group Assure?**

In practice we know of no significant dialogue between MMSD Assurance Group members and the indigenous peoples and other affected communities who stand to lose most by its outcome. It would be interesting to learn of any interaction that affected communities or indigenous nations have had with them. Sadly despite their individual qualities, Assurance Group members are widely seen as industry appointees, their credibility undermined by the method of their appointment. The chances for future constructive dialogue may therefore even be reduced rather than increased by the mistrust that this unilateral selection has engendered concerning both the outcomes and the stance of the Assurance Group members. It will be of great concern to indigenous organisations to see if the introduction of Mick Dodson can make for a significant change in this perception.

Dr Jay Hair, the former President of the National Wildlife Federation, one of the largest conservation organisations in the US, and of the International Union for Conservation of Nature, was unilaterally selected to head the Assurance Group. However critics who questioned this process were assured that he was a stern and independent critic of the industry. Yet in 2001, Hair stepped down from the chairmanship of the Assurance Group to take up the position of General Secretary of the industry's own new International Council for Mining and Metals (ICMM). The third element of the GMI strategy, the ICMM is the body set up to represent the industry. This clear identification of Hair with the industry agenda and his shift from his former role as the supposed chief defender of MMSD's independence to industry lobbyist tends to confirm the deepest scepticism of the MMSD and the underlying shared interests of these various industry front organisations that make up GMI. Danielson tried to put a brave face on this total assimilation: "It is an indication of how seriously industry is taking the MMSD process that it is calling on one of MMSD's key players." (Danielson, September 2001)

On the other hand, Roger Moody, a long time critic of the industry, writes: "The more obvious, logical and simple interpretation is that MMSD is finally surrendering all claims to true neutrality, and that the 'revolving door' between the corporate mafia and MMSD itself is swinging faster than ever before. No doubt Hair will not be the only one to go." (Moody, 2001).

In several recent speeches, Danielson called for an independent body to assess new mining projects in terms of their sustainability and to act as a certification agency. Indigenous peoples and other affected communities have in the past clearly expressed their opposition to exactly such a development. It is no surprise, however, that this is the emerging outcome of MMSD. It is, however, no less dangerous for its predictability.

Catalino Corpuz of Minewatch Asia Pacific, speaking at a skill-share session organised by the Mineral Policy Institute and FoE Philippines in the Cordillera region

of the Philippines in 1997, made the following appeal to Northern NGOs:

*"We do not want you to agree to a set of general standards with the mining industry detached from the reality of our situation. Those of us who are opposing mines within ancestral lands and are resisting the companies' attempts to impose themselves upon us fear that the existence of such unverifiable standards will be used by the companies as a charter for mining: a check list of requirements that they can easily say they have satisfied.*

*"At present we can appeal for solidarity to Northern NGOs when we oppose mining. We fear if you are tied into agreements of general standards with the companies, you will be less free to support us. Meanwhile we know from our bitter experience that whatever the promises on paper, in practice the companies will not keep to their words. But by the time this is revealed it will be too late and the mines will already be built. We will be isolated and weakened by such agreements between the industry and Northern NGOs."*

Indigenous peoples have enough bitter experience to be clear that they do not wish to surrender their rights to self-determination over the future of their lands and its development to any third party. A monitoring body drawn from external agencies which legitimises the development of a mine or other development not acceptable to and under the control of the affected people is clearly an unwelcome and retrograde development.

## **Conclusion**

The 1992 Earth Summit acknowledged that much was to be learned about sustainable living from indigenous peoples but had nothing to say for mining companies. One might expect therefore that a project seeking to identify what if anything might be done to integrate mining with sustainability might start from the perspective and concerns of indigenous peoples affected by mining. Instead they and their concerns are marginal to the process. Bizarrely it is mining companies and their hired researchers who are defining sustainability. Little wonder then that the result is a focus on the sustainability not of the Earth or of the People but rather of the sustainability of mining as an economic activity.

The MMSD is proceeding according to an agenda that serves the mining industry. It is proceeding on a time frame defined by the best interests of the industry and certainly not of the process.

It is a process that no community organisation called for and is being imposed on them by the industry. It once again addresses generalities and speaks of the future of "the mining industry" (whatever that may be), rather than doing anything to deal with the problem of actual mines, named companies and real histories. In the process it is feared that the industry is also identifying and promoting its own loyal opposition while marginalizing the more critical voices.

## Action Response

MMSD was launched in 2000. It has commissioned and is now publishing a multitude of reports on a wide range of topics, some of which are already available. Materials have also been posted on the MMSD website which does contain a lot of information about their plans. (<http://www.iied.org/mmsd/>) As cited earlier, a draft report was timetabled for December 2001 and a final report for March 2002, which will be presented to an industry conference in Toronto in May. It is also claimed that this conference will be a multi-stakeholder event to which NGOs and indigenous peoples will be invited and for which some funding will be provided by the industry. In the lead-up to and at the World Summit on Sustainable Development in September the conclusions of these activities will be presented.

It is tempting to conclude that as these processes have proceeded through all this time without involving or informing and certainly without respecting the opinions and concerns of affected indigenous peoples, then maybe it should be left to rot in peace. But that is to ignore the wealth of its funding or the over-receptiveness of some of its audience or the industry's objectives in launching the process. The millions of funding for MMSD and ICMM mean they will not go away. The predisposition of the World Bank and other agencies to collaborate in supporting mining means that its results will be hailed as a breakthrough in constructive dialogue. The industry has staked a great deal on regaining some credibility for its operations and a new social license to operate.

Different peoples and groups will assess their own responses to this process in their own way: boycott, condemnation, quiet diplomacy, participation. Of course different peoples face different realities in their localities. It is however clearly unwise to either ignore or trust this process.

Some groups have already expressed their opposition to MMSD. In 2000 at the start of the process, a number of NGO groups listed a series of criticisms, which have not been effectively addressed. They have therefore not cooperated.

A seminar held in London in May 2001 and attended by representatives of indigenous peoples and southern-based mining campaign groups concluded with the following appeal.

"We seek solidarity from civil society and specifically from development and environment NGOs, in response to the global outcry from communities affected by mining. We ask these organisations to:

- 1) Ensure that mining-affected communities are fully informed in advance on all aspects of mining and minerals projects and empowered to speak for themselves in response;
- 2) Refuse to participate in initiatives, such as MMSD, which are primarily spearheaded by the industry to serve its own purposes;
- 3) Advocate for politically and legally enforceable measures that will hold the mining industry accountable, above all to mining and exploration-affected communities." ([www.minesandcommunities.org](http://www.minesandcommunities.org))

On the other hand, MiningWatch Canada, in declining an invitation to attend one of the current rounds of MMSD-sponsored meetings for North America, said:

*"Thank you for the invitation. However, MiningWatch Canada will not be attending this event. We reiterate our concern that we need to see industry support for the following concrete changes before we will waste our time on a generalized and abstracted dialogue. These are:*

- 1. A moratorium on new large-scale mining projects in greenfield areas of Asia, Africa and Latin America;*
- 2. Companies must take legal and financial responsibility for and clean up the terrible damage caused by their past and current mines;*
- 3. The World Bank/IMF and CIDA must cease funding of industry-initiated mining codes which are imposed on the governments of Africa, Asia-Pacific and Latin America;*
- 4. The industry must cease lobbying against regulated higher standards in all mining and smelting (such as the new Metal Mining Effluent Regulations in Canada);*
- 5. Surface and subsurface rights of indigenous peoples and all mining-affected communities be unequivocally respected, as well as their right to veto projects they consider unacceptable.*

*We are, of course, always ready to work with specific companies if a community affected by them asks us to, and we are willing to work with industry on specific projects that will contribute to the resolution of the above."*

The GMI is the mining industry's biggest yet attempt to divert and counteract its critics.

It is an ambitious project which, left to its own devices, will inevitably have some success. It is already generating echoes. The World Bank, a sponsor of MMSD, has just launched its own review of Bank involvement in extractive Industries. In its structure and process it is safe to say that this process promises to be even more biased than MMSD. Once again it is timed to report before the WSSD.

Indigenous groups who wish either to influence or reject these processes need to find independent vehicles to express their concerns and have them heard. ♦

*Geoff Nettleton is the coordinator of the Philippine Indigenous Peoples Links.*

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***MINING, INDIGENOUS PEOPLES  
AND HUMAN RIGHTS:***

# **A CASE STUDY OF THE OK TEDI MINE, PAPUA NEW GUINEA**

**By Stuart Kirsch, Ph.D.<sup>1</sup>**

*The effective exercise and enjoyment of basic human rights for much of the world's population is prohibited by environmental problems. Water and air pollution, accumulations of solid and hazardous wastes, soil degradation and deforestation prevent many people from securing the minimum requirements for health and survival. Whether or not a basic human 'right to the environment' exists, a safe and ecologically balanced environment is necessary for the realization of all basic human rights.*

*The goal of development is the development of the entire human being and a continued increase in the wellbeing of all human beings. Only if development is carried out in a way that is protective of the environment can it be truly sustainable and ensure other basic human rights. Economic development and sound environmental management are complementary aspects of the same agenda. Without adequate environmental protection, development will be undermined and without development environmental protection may fail.*

*Although the United Nations and many governments and regional bodies have recognized that the goal of human development is the realization of all human rights, in many regions of the world, the environment is degraded by developers often with the tacit approval of the Government and in violation of other basic human rights.*

*Poorly planned development projects in vulnerable areas provide an increasing stress on the environment and on the sustainability of human development. Projects intended to improve the standard of living often irreparably damage pre-existing sustainable methods of sustenance.*

*Indigenous peoples are often those most harmed by the development process. Oil exploration, mining, deforestation and dam construction degrade their land and place their cultural and physical survival in peril.*

**(Commission on Human Rights, Agenda 8, Relationship between the Right to Development, Other Human Rights and the Environment).<sup>2</sup>**

LOCATED IN THE STAR MOUNTAINS OF PAPUA NEW GUINEA, THE OK TEDI copper and gold mine has long been criticized for its detrimental impact on the environment. Operated by Broken Hill Proprietary Ltd. (BHP), the majority shareholder in the project, the mine releases thirty million tons of tailings and another forty million tons of waste rock into the Ok Tedi River annually, causing widespread environmental degradation. The Ok Tedi is a tributary of the Fly River, which runs from the central mountain cordillera to the Gulf of Papua, a distance of over five hundred kilometers. The Fly River is one of the largest and most important rivers on

the island. The effects of the mine have been steadily accumulating along the length of the river since production began in the mid-1980s.

It was evident even from the early stages of mining that the Ok Tedi mine was problematic from an environmental point of view. Bill Townsend, an engineer working for the government of Papua New Guinea, published the critical review entitled 'Giving Away the River' in a 1988 UNEP publication.<sup>3</sup> The same year, David Hyndman, an environmental anthropologist who contributed to the original environmental impact studies for the mine, described Ok Tedi as a 'disaster mine'.<sup>4</sup> In 1989, after conducting anthropological research in a village on the lower Ok Tedi River for two years, I described the river as a 'sewer' for the mine and argued that the entire Fly River was at risk.<sup>5</sup> In 1993, The Australian Conservation Foundation described the Ok Tedi River as 'almost biologically dead'.<sup>6</sup>

Despite the widely publicized environmental problems and despite every effort by indigenous peoples to stop the mine from dumping tailings and waste rock into their river system, the mine continued to operate without tailings containment. The communities downstream from the mine organized protests, sent petitions to the mine and the government, enlisted the support of national and international NGOs, travelled extensively through Europe and the Americas, and presented their case to the German Parliament<sup>7</sup> and before the International Water Tribunal in the Hague. The Tribunal found BHP guilty of violating the rights of the people living downstream. Their protests culminated in a high profile lawsuit in the Victorian Supreme Court in Melbourne, Australia, where BHP is incorporated, pitting 30,000 indigenous landowners against one of Australia's largest corporations. The suit was ultimately settled out of court in 1996 for a potential US\$500 million in commitments to compensation and tailings containment.<sup>8</sup>

Yet after the 1999 release of more detailed studies carried out by the Ok Tedi mine, the managing director told the media that the results were 'much worse than previously anticipated' - despite the steady accumulation of evidence of the extent of the problems during the previous decade, and despite extensive local and international scrutiny and criticism.

The present case study, with its emphasis on the efforts of the indigenous peoples living along the Ok Tedi and Fly Rivers to stop the mine from polluting their environment, demonstrates the insufficiency of existing mechanisms to protect the environmental human rights of indigenous peoples. In the conclusions, I make recommendations for rectifying this situation.

### **BHP: 'Not compatible with our environmental values'<sup>9</sup>**

In August 1999, Paul Anderson, the Managing Director and CEO of BHP (now BHP Billiton), told the Australian news media that the Ok Tedi mine was 'not compatible with our environmental values' and indicated BHP's intention to sever its relationship to the project. What are the corporate values to which Anderson referred? According to corporate policy statements signed by Anderson:

*It is BHP's policy to achieve a high standard of environmental care in conducting its business as a resources and industrial company contributing to society's material needs. BHP's approach to environmental management seeks continuous improvement in performance by taking account of evolving scientific knowledge and community expectations.<sup>10</sup>*

Specifically, BHP commits to:

- *Comply with all applicable laws, regulations and standards; uphold the spirit of the law; and where laws do not adequately protect the environment, apply standards that minimise any adverse environmental impacts resulting from its operations, productions and services;*
- *Communicate openly with government and the community on environmental issues, and contribute to the development of policies, legislation and regulations that may affect BHP;*
- *Ensure that it has management systems to identify, control and monitor environmental risks arising from its operations.<sup>11</sup>*

BHP's community relations policies are equally relevant in the Ok Tedi case. BHP pledges to 'work cooperatively with all communities affected by proposed or existing operations for their long term benefit and that of our shareholders'.<sup>12</sup> Specific provisions of their community relations policy spell out BHP's responsibility to:

- *Recognise and respect the importance of culture, heritage and the traditional rights of indigenous people;*
- *Consult with communities, and understand and respond to their concerns and wishes about the responsible management of these impacts.<sup>13</sup>*

Why did the operations at Ok Tedi violate BHP's own values and policies? Why did the mining company not heed the concerns and the protests of indigenous communities living downstream from the mine, which might have prevented these events from occurring? How were the rights of the people living downstream from the mine violated in the process? What lessons can be learned from an examination of the historical record at Ok Tedi?

More broadly, how frequently do similar problems occur in the mining industry? I refer to the gap between well-intentioned corporate policies and actual practices; and between the results of environmental audits produced and reported by mining companies and the consultants they hire, and the actual physical impacts. What can we learn from the Ok Tedi case that might help to prevent the repetition of this environmental tragedy? Finally, how does the recent decision by BHP to transfer its stake in the mine to a trust operated on behalf of the affected communities in ex-

change for a waiver of environmental liability fit in with stated corporate values?

### **The Ok Tedi Mine**

Ok Tedi is a large open-cut copper and gold mine located at the headwaters of the Ok Tedi and Fly Rivers, eighteen kilometers from the Indonesian border. Production began in 1984 after a decade of negotiation and construction. While the lack of expenses associated with tailings containment make the mine a relatively low-cost copper producer, cost overruns and the declining metal prices forced Ok Tedi Mining Limited (OTML) to write off much of the initial US\$1.4 billion dollar investment in the mine.<sup>14</sup> The mine is expected to close in approximately ten years following the exhaustion of the ore body.<sup>15</sup>

The current OTML shareholders are BHP (52%), the Independent State of Papua New Guinea (30%: 15% in its own right; 2.5% on behalf of local landowners; and 12.5% on behalf of the people of the Western Province) and Inmet Mining Corporation (18%). BHP provides management services to OTML, whose operations are regulated by the Mining (Ok Tedi Agreement) Act 1976 and a series of supplemental agreements between the State and OTML.<sup>16</sup>

On average 80,000 tons of ore and 152,000 tons of overburden are mined per day. In 1998, the production of copper concentrate was 491,336 tons, containing 151,556 tons of copper, 413,265 ounces of gold and 838,619 ounces of silver. OTML's primary markets are located in Japan, Asia and Europe. In 1998, OTML's export sales were K701.8 million, which represented 19.9% of PNG's foreign exchange earnings.<sup>17</sup> OTML paid K9.8 million in royalties to the Western Province Government and contributed K52 million in taxes to the PNG Government, which also benefits from being a shareholder in the mine.<sup>18</sup>

The original Environmental Impact Assessment specified the construction of a tailings dam. This structure was never completed after a 1984 landslide destroyed the footings for the project.<sup>19</sup> Temporary permission to continue operating the mine without tailings containment was granted by the government of Papua New Guinea and subsequently renewed in 1989, after the civil war on the island of Bougainville forced the closure of the controversial Panguna Copper Mine operated by Rio Tinto.<sup>20</sup> No significant tailings containment measures were implemented between 1984 and 1999, when a dredge was installed in the lower Ok Tedi River.

Over 2,000 hectares of forest were originally cleared for the mine, the mining township and other infrastructure, including a very large area (15,000+ hectares) set aside for the construction of the tailings dam. Occupation fees worth approximately K3 million were paid for Ok Tedi leases in the mountains between 1981 and 1989. Seventy percent of these fees were paid in cash, with the remainder invested in a trust fund for future generations. By 1991, the occupation fees paid by OTML amounted to approximately K650,000 per annum. The 400 landowners of the Special Mining Lease community received 5% of the 1.25% royalties paid by OTML, for a total of US\$1 million between 1984-1990. This package was subsequently increased to approximately K1.5 million annually.<sup>21</sup>

Until 1997, there were no leases for the land downstream from the mine along the lower Ok Tedi River, despite the obvious and significant impact of the mine on the river, land and resources.

### **Indigenous Responses to Industrial Pollution<sup>22</sup>**

Landowners living downstream from the mining project on the Ok Tedi River first became concerned about environmental problems after a cyanide spill. On 19 June 1984, a by-pass valve was left open for more than two hours, releasing 100 cubic meters of highly concentrated cyanide waste into the Ok Tedi River; dead fish, prawns, turtles, crocodiles and other riverine life floated downstream more than 100 kilometers from the mine.<sup>23</sup> People in the villages along the lower Ok Tedi River recall gathering up the dead fish and animals, which they cooked and ate.<sup>24</sup>

Several years after production began, downstream landowners began experiencing environmental problems resulting from increased sedimentation in the river. This led to riverbed aggradation, flooding and the deposition of mine tailings and other waste material in the adjacent lowlands and rain forest. Community leaders sent letters to the Papua New Guinea government and the mine, expressing their concerns and demanding action. In 1988, residents of a village on the Ok Tedi River sent a petition to the North Fly Area Coordinator, claiming that:

*When the Ok Tedi copper mine became operational in 1981, it harmed all of the living things along the river and the riverbanks; it began killing all of the animals and plants.*

*Now our environment is completely destroyed. Everything is lost forever. The mine wastes and tailings dumped into the river at the mine site have left the environment in very poor condition.*

*This has affected the fish, prawns, crocodiles and turtles in the river - they are almost completely gone. Our gardens along the river were ruined by the mud and by the 'copper chemicals' dumped into the river by the mine.<sup>25</sup>*

A letter written by the people of another village on the Ok Tedi River to OTML expressed even more sweeping concerns about the mine's environmental impact:

*All of these things show evidence of the mine's impact: our garden crops, dogs, pigs, fish and even people becoming ill. Coconut trees have died. People are suffering from sores. Even our staple food sago is affected. The rain makes us sick. The air we breathe leaves us short of breath. And the sun now burns our skin.*

*In the past, everything was fine. We never experienced problems like these before. But in the ten years that OTML has been in operation, all of these changes and more have taken place. Other plants in our gardens have been affected as well. We are concerned about these changes and it seems reasonable to assume that they are signs of the impact of the Ok Tedi mine.*

*Based on the experience of village elders, these things have been caused by the mine. Our lifestyle has changed completely. Everything along the Fly River and the Ok Tedi has been affected.<sup>26</sup>*

These concerns were almost identical to the views expressed in an earlier submission by indigenous landowners about the Panguna mine in Bougainville. Acting as Secretary of the Panguna Landowners Association, Francis Ona (who subsequently led the decade-long rebellion against the mine and the state) identified the following concerns to an environmental review team hired by the mine in 1988:

*Crops: increase of disease; shorter life-spans; lower yields; leaves have rectangular markings.*

*Plants: trees are dying near the mine and road; unknown pollutants have affected cocoa trees; introduced plant species have colonized the area; unregulated harvest of trees for timber.*

*Soil: frequent landslides near the mine; one-fifth of the area has become barren; the soils have been poisoned by run-off; soil fertility has declined; the creeks bear a heavy load of minerals; the mouth of the Jaba River at Empress Augusta Bay has silted up.*

*Rivers: reduction in fish population; fish are not edible because of mineral contamination; other creeks have disappeared because of pit drainage; people cannot bathe in the rivers because of the pollution.*

*Air: the air is polluted by the burning of tyres; the process plant releases pollution into the air; fumes, dust and debris from blasting pollutes the air; industrial pollutants are also released into the air by the mine. Aerial spraying carried out by BCL from 1968-69 was the starting point of environmental problems for plants and trees.*

*People: chronic illness has affected many people; people also suffer from rashes and sores caused by pollution.*

*Animals: birds are affected by unknown diseases; the flying foxes are dying; the fish have sores on their bodies, have no eyes and are dying for no apparent reason; wildlife throughout the impact area are disappearing as well, including birds, pigs and other animals.<sup>27</sup>*

Indigenous concerns about the environmental impacts of these two large copper mines included their gardens, tree crops, fish and wildlife, as well as the larger changes to their landscape. Their experiences of pollution and their description of its effects on local communities are strikingly similar.

When evaluating environmental impact from a scientific perspective, the focus is on changes in biota that can be quantified or measured. In economic terms, one measures natural resources that have specific value as commodities, i.e., things which can be bought and sold. Neither of these perspectives captures the full range of concerns expressed by the people affected by the Ok Tedi mine and the Panguna

mine in Bougainville. Their complaints that there are no more flying foxes on Bougainville, or that no birds fly along the Ok Tedi, are not simply references to changes in species composition or to economic loss; in both cases, the losses symbolically represent the broader changes to their environment.

In order to bridge the gap between corporate and indigenous perceptions, it is important to acknowledge a fundamental difference: for indigenous peoples, large-scale environmental degradation is experienced as being internal to their society, rather than existing apart from it. The very grounds of their existence is threatened by the pollution, prompting an existential crisis. In contrast, members of industrial societies view these kinds of problems as being external to their society, detached from persons and projected onto the wider world in which they live. Both the causes of environmental degradation and their potential solutions are understood as being external to society.<sup>28</sup> Local concerns were largely ignored by the two mining companies.

### **An International Appeal for Assistance**

The Wau Ecology Institute assisted a group of indigenous landowners in presenting their grievances against OTML at the International Water Tribunal in the Hague in 1992.<sup>29</sup> OTML was given timely notice of the procedures and a copy of the complaint; it was invited to present its position, but failed to respond. The jury heard the case and reached the following conclusions, which focused on the fact that the Ok Tedi mine possessed no satisfactory means of safely disposing of waste materials:

- *OTML has discharged large quantities of tailings and waste water, and has dumped tons of waste rock and overburdened the headwaters of the Ok Tedi River.*
- *These waste disposal practices have led to the aggradation of the river bed and as a consequence have flooded plantations and food gardens, and have disrupted the river ecosystem, subsistence fishing practices and boat transportation.*

The Tribunal criticized the mining company for pressuring the government to lower its environmental standards, called on shareholders to enforce more appropriate environmental standards, and suggested future legal action against the mine:

- *The defendant should not, as it has done, use its foreign earning power to influence the government to make exceptions in the application of the law in its favour to the detriment of the local environment and the livelihood of the local people.*
- *OTML's foreign shareholders should ensure that the company fulfills the standards for environmental protection comparable to the ones that are enforced in their home countries and appropriate to the geographical characteristics of the Ok Tedi region.*
- *The present case is a good example of the need for establishing*

*liability of shareholding foreign companies for damage caused by the national counterpart.*

The Tribunal was very critical of the fact that the mine was entrusted with the responsibility for monitoring its own impacts and recommended that the government should sponsor an independent environmental audit:

- *The responsibility of monitoring the environment should be the responsibility of state institutions which are not involved in the management of OTML.*
- *The government should retain consultants to audit where necessary the assessments made by the defendants. The costs should be borne by the defendant and the results of the audit should be made public.*

Finally, the Tribunal recommended that without major reforms in their treatment of waste materials, mining should not continue. It also recommended that the government use its legal powers to prevent further environmental damage or close down the mine:

- *The defendant should thoroughly investigate the possibility of safe storage and treatment of mine wastes. If no such storage or no cost-effective storage is feasible, the jury believes that the externalised costs of the projects grossly exceed the benefits and consequently the activities of OTML should be phased out.*
- *OTML should prepare a comprehensive assessment on the long-term social and environmental effects of its operations after the closure of the mine. The government could consider establishing and enforcing legally binding provisions for OTML to avoid long term environmental damage.*

Forums of this nature, e.g., tribunals and people's courts, provide important opportunities for indigenous and other marginalized peoples to express their concerns and receive a fair hearing, especially when the resources for more protracted legal procedures are unavailable. The judgement of the International Water Tribunal was important in that it internationalized and also legitimated the claims of the people living downstream from the Ok Tedi mine. Unfortunately, however, the Tribunal has no powers of enforcement and neither the government nor OTML changed their policies regarding tailings disposal. In retrospect, however, its judgements proved to be prescient.

### **Documenting the Problems Downstream from the Mine**

In response to the findings of the International Water Tribunal, the Ok Tedi Mine engaged a team of social scientists to carry out social impact studies of the downstream communities. In 1992, I worked with the communities of the lower Ok Tedi River, where I had previously conducted anthropological research from 1987-1989.<sup>30</sup>

As the Ok Tedi River moves from the mountains into the lowlands, it undergoes a transition from a fast-flowing, sloping river that transports its load of suspended sediment downstream to a sluggish, meandering river that begins to release the finer sediment that it carries. The lower Ok Tedi is particularly vulnerable to overbank flooding; by 1992 it had sustained a high level of damage from material deposited outside the river channel.

Mine waste was being deposited onto forest and garden land, into adjacent wetlands areas and upstream into the numerous creeks and streams that flow into the Ok Tedi River. This contrasted starkly with the alluvium that once fertilized the river's flood plains, which permitted gardening with only a short or even no fallow period. The mine wastes had an adverse impact wherever they were deposited, killing plants and trees, and disrupting local ecosystems. As of 1992, the damage extended for approximately forty kilometers along the river, with areas of dead trees that extended up side creeks as far as three kilometers from the main channel. There had been little regrowth, and large areas were virtually devoid of life. This land had been particularly valuable to the river villages because of its location within easy walking or canoe distance, and because it offered resources not readily available in the rain forest interior. At the time of the 1992 research, little formal assessment of the environmental damage had been carried out by the mine or the government and no compensation had been paid. Villagers living in this area were in a state of despair, feeling both frustrated and completely ignored in their efforts to obtain restitution.

Over two thousand people lived in the eight villages in this area at the time of the study. An additional one thousand persons lived in adjacent refugee camps.<sup>31</sup> All were dependent upon local resources for the vast majority of their subsistence needs. The impact of mine waste released into the Ok Tedi River challenged the abilities of the people living along the lower Ok Tedi River to feed themselves and their families. The loss of garden land forced them to compete for plots in the rain forest that produced at most one or two good harvests. There were fewer fish in the river, and most people were afraid to consume them. Once an important seasonal resource, turtles no longer came up the Ok Tedi River to lay their eggs. Many of the small creeks and streams that feed into the Ok Tedi were choked with mine wastes, making it difficult to catch prawns, previously an important source of protein, especially for children. Sago, the food staple of this region, was also severely affected: some sago trees along the creeks and rivers had died, and extensive sago stands on the Ok Tedi had been destroyed by the widening of the river. There were also scattered reports of people losing weight and/or graying prematurely as a result of malnutrition.

The general view expressed in these villages was that if OTML did not adequately compensate the downstream communities for the damages to their environment *and* stop dumping its mine wastes directly into the river, the mine should close. The villagers indicated that rather than resort to violence, which had caused so much hardship and suffering in Bougainville, they would enlist the support of local non-governmental organizations, Ok Tedi/Fly River Environment Ecology (ENECO) and

the Ok Tedi Landowners Association, in order to bring about reform. This warning was included in the social impact study that I presented to the mine in 1993, but not heeded; ENECO went on to file their lawsuit against BHP in the Victorian Supreme Court in Melbourne the following year.

The people whom I interviewed for the study agreed that the mine should not have begun production until a safe method for dealing with the tailings had been put in place. They complained that pollution had already 'spoiled' their land. At that particular juncture, however, they did not want OTML to close down and leave the country; they preferred that the mine stay open and compensate them for the damages that they had already incurred. They also demanded that the mine stop polluting its rivers. These findings were conveyed to the mine in 1993 as part of the larger social impact study undertaken by Unisearch Pty Ltd. under contract to OTML, and read by a number of senior staff at the mine, including the managing director of the mine.

These local concerns were largely borne out by a series of limited NGO audits conducted on the river, including the 1991 Starnberg Report commissioned by the German Lutheran Church, the 1993 review by the Australian Conservation Foundation, and the 1995 report issued by the International Union for the Conservation of Nature and Natural Resources (IUCN), which called for a more conservative approach to the handling of tailings at the mine:

*In planning for the future, it is appropriate to adopt a conservative position with respect to the potential and actual environmental impacts of continued unrestricted waste discharge. This would include the following assumptions:*

- *that the worst case scenarios for the impact on the fisheries of the lower Fly will arise;*
- *that the river and fish fauna will not recover quickly following the cessation of mining and that such a recovery may take several generations, if it occurs at all;*
- *that some contamination of the floodplain lakes may well occur with the resultant adverse effects on fish stocks both within those lakes and in the river system as a whole;*
- *that the Ok Tedi River may never regain a fish fauna comparable to the pre-mining condition, even if mining were to cease immediately<sup>32</sup>*

These reviews were often criticized by the mine for their methods, small sample size and other inadequacies, although on the whole, they proved to be much better predictors of environmental impact than the extensive studies produced by the mine itself.

### Existing International Law and the Failure to Protect the Environment

The people living downstream from the Ok Tedi mine did not receive adequate protection from the government of Papua New Guinea, which failed to adequately monitor or regulate the impact of the mine.<sup>33</sup> Local protests and petitions were largely ignored.<sup>34</sup> Even though the International Water Tribunal was unable to enforce its judgement, its decision encouraged the downstream landowners to seek redress from the courts. As a result, their leaders looked to international law for support in their bid to stop the mine from using their rivers for tailings disposal.

One of the earliest expressions of international environmental responsibilities was Principle 21 of the Stockholm Declaration:

*States have . . . the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their own jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction (Principle 21, Declaration of the United Nations Conference on the Human Environment, Stockholm, June 1972).*<sup>35</sup>

This principle has been invoked in various attempts to establish an international basis for environmental human rights, including the Rio Declaration on the Environment and Development of 1992. The Rio Declaration has figured significantly in several recent legal cases concerning foreign direct liability, the principle of holding multinational corporations accountable for their actions abroad.<sup>36</sup>

Since 1992, lawyers representing 30,000 indigenous people living in Ecuador's Amazonian rain forest have sought compensation from Texaco for polluting their rivers and lakes and exposing them to a variety of environmental and carcinogenic hazards. The effects of this pollution have been characterized as far-ranging, including impacts on the health, culture, environment and nutrition. Their suit was initially filed in the Southern District Court of New York.<sup>37</sup> In a ruling on the case, Judge Broderick referred to the Rio Declaration:

*Although many authorities are relevant, perhaps the most pertinent in the present case is the Rio Declaration on Environment and Development (1992). Principle 2 on the first page of the document recognizes that states have the sovereign right to exploit their own resources pursuant to their own environmental and developmental politics, but also have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or areas beyond the limits of national jurisdiction.*

*The Rio Declaration may be declaratory of what it treated as pre-existing principles just as was the Declaration of Independence. Plaintiffs may or may not be able to establish international recognition of the worldwide impact from effects on tropical rain forests as a result of any conduct alleged in their papers which may have been initiated*

*in the United States*<sup>38</sup>.

In this passage, Judge Broderick envisioned international legal grounds for protecting the environment.

In response to a lawsuit that charged Freeport-McMoRan, Inc. and Freeport-McMoRan Copper and Gold, Inc., operators of a gold and copper mine in West Papua (Irian Jaya, Indonesia) with 'ecocide', Judge J. Duval, Jr. referred to Judge Broderick's discussion of Principle 2 of the Rio Declaration, but dismissed the environmental claim in the case against Freeport:

*Of these general principles and rules only Principle 21/Principle 2 and the good neighbourliness/international cooperation principle are sufficiently substantive at this time to be capable of establishing the basis of an international cause of action; that is to say, to give rise to an international customary legal obligation the violation of which would give rise to a legal remedy. The status and effect of the others remains inconclusive, although they may bind as treaty obligations or, in limited circumstances, as customary obligations.*<sup>39</sup>

However destructive, Duval concluded, 'Freeport's alleged policies . . . do not constitute torts in violation of the law of nations'. Thus while there are precedents concerning the violation of environmental human rights, they cannot be said to constitute an international norm, like conventions forbidding genocide or other crimes of war. These standards must be strengthened and/or other means of protecting environmental human rights must be developed and instituted.

Even where existing statutes exist, they tend to be very general in nature. For example, the following principle is enshrined in the constitution of Papua New Guinea:

*We declare our fourth goal to be for Papua New Guinea's natural resources and environment to be conserved and used for the collective benefit of us all, and to be replenished for the benefit of future generations.* The Fourth Goal and Directive Principle of the Papua New Guinea Constitution.<sup>40</sup>

Legal statutes which are consonant with the right to a healthy and safe environment (i.e., 'for the benefit of us all'), such as this constitutional principle, are often too broad and general to be enforceable as law.

For example, an important case in the Philippines regarding the right of the Timber Licensing Authority (TLA) to harvest the remaining rain forest in the Philippines was based on constitutional guarantees of a 'balanced and healthy ecology'.<sup>41</sup> The courts found that:

*Such a right, as hereinafter expounded, considers the 'rhythm and harmony of nature'. Nature means the created world in its entirety. Such rhythm and harmony include, inter alia, the judicious disposition, utilization, management, renewal and conservation of the country's forest, mineral, land, waters, fisheries, wildlife, off-shore areas and other natural resources to the end that their exploration, devel-*

*opment and utilization be equitably accessible to the present as well as future generations.*

However, Judge Eriberto U. Rosario found that this claim was not enforceable:

*Although . . . fundamental in character, I suggest, with very great respect, that it cannot be characterized as 'specific', without doing excessive violence to language. It is in fact very difficult to fashion language more comprehensive in scope and generalized in character than a right to 'a balanced and healthful ecology'.*

*The list of particular claims which can be subsumed under this rubric appears to be entirely open-ended: prevention and control of emission of toxic fumes and smoke from factories and motor vehicles; of discharge of oil, chemical effluents, garbage and raw sewage into rivers, inland and coastal waters by vessels, oil rigs, factories, mines and whole communities; of dumping of organic and inorganic wastes on open land, streets and thoroughfares; failure to rehabilitate land after strip-mining or open-pit mining; kaingin or slash-and-burn farming; destruction of fisheries, coral reefs and other living sea resources through the use of dynamite or cyanide and other chemicals; contamination of ground water resources; loss of certain species of fauna and flora; and so on.*

*[U]nless the legal right claimed to have been violated or disregarded is given specification in operational terms, defendants may well be unable to defend themselves intelligently and effectively; in other words, there are due process dimensions to this matter. When substantive standards as general as 'the right to a balanced and healthy ecology' and 'the right to health' are combined with remedial standards as broad ranging as 'a grave abuse of discretion amounting to lack or excess of jurisdiction', the result will be, it is respectfully submitted, to propel courts into the uncharted ocean of social and economic policy making. At least in respect of the vast area of environmental protection and management, our courts have no claim to special technical competence and experience and professional qualifications. Where no specific, operable norms and standards are shown to exist, then the policy making departments - the legislative and executive departments - must be given a real and effective opportunity to fashion and promulgate those norms and standards, and to implement them before the courts should intervene.*

### **The Lawsuit against the Ok Tedi Mine**

In 1994, a lawsuit representing 30,000 indigenous persons as plaintiffs against BHP and the Ok Tedi mine were filed in both Port Moresby and the Victorian Supreme Court in Melbourne, Australia, where BHP is incorporated. One of the largest claims in Australian legal history against one of Australia's largest corporations, it received

enormous attention from the media. The public response to the policies and practices of OTML and BHP, moreover, were overwhelmingly negative.

The case against the mine did not address damage to property, because the Court found that it had no jurisdiction to entertain claims relating to the loss of land or damage to land.<sup>42</sup> Moreover, it did not address fundamental questions of environmental human rights, because no statutes were seen as rising to the level of an enforceable international norm and because environmental laws in Papua New Guinea were insufficiently developed to be of use in this particular case.

Accordingly, the claims against the mine were reframed to plead loss of amenity, which embraced the subsistence economy of the plaintiffs.<sup>43</sup> This was a novel concept for the Court, in that it did not involve a claim for economic loss, which forms the foundation for damages in virtually all Western legal systems. Speaking on behalf of the plaintiffs, Queen's Counsel Julian Burnside observed:

*These plaintiffs are people who live a subsistence lifestyle. They live substantially, if not entirely, outside the economic system which uses money as the medium of exchange. But to say that does not alter the fact that if they are deprived of the very things which support their existence, they suffer loss. Of course it is a loss which appears in an uncommon guise because typically the courts have dealt with claims that are rooted in society's adherence to the monetary medium of exchange.*

*It simply cannot be right that because people exist outside the ordinary economic system, they therefore do not have rights where their lives are damaged by the negligence of others.*

*Now, the lifestyle of the Papua New Guinea natives in gathering food, fishing and game and the like and using it to eat or sell is no less an economic activity because it is not translated through the medium of money. It is economic loss to be deprived of your source of food whether measured in money or not.*

In response to Judge Byrne's query regarding the lack of precedent for this claim, Burnside's comments were revealing:

*For practical reasons, people who don't participate in the money economy have not had the practical ability to vindicate their rights in court and so it is a relatively rare occurrence and one which is not welcomed by BHP. That people who operate outside the money system do try to assert their rights and they should not be less entitled to assert them simply because they don't use money as the medium of exchange or as the foundations of their lives.*

*Your Honour should ask yourself: On the pleadings, have the plaintiffs suffered damage? In our submission, the answer is a resounding yes.*

The lawyers for the plaintiffs were thus able to establish the precedent that the Courts may recognize claims for damages derived from lost access to subsistence resources, as summarized in the following statement from Judge J. Byrne:

*to restrict the duty of care to cases of pure economic loss would be to deny a remedy to those whose life is substantially, if not entirely, outside an economic system which uses money as a medium of exchange. It was put that, in the case of subsistence dwellers, loss of the things necessary for subsistence may be seen as akin to economic loss. If the plaintiffs are unable or less able to have or enjoy those things which are necessary for their subsistence as a result of the defendants' negligent conduct of the mine, they must look elsewhere for them, perhaps to obtain them by purchase or barter or perhaps to obtain some substitute.<sup>44</sup>*

This case is of considerable importance to indigenous communities internationally, for whom environmental damage has often meant infringement on their use of subsistence resources.

### **Valuing Indigenous Losses**

In Papua New Guinea, mining companies make three major types of payments to indigenous communities.<sup>45</sup> Only the first of these is officially described as 'compensation', one-time only payments for damage or disturbance to land, forest, or other improvements to the land, e.g., houses, gardens, and lifestyle (an all-purpose category). A second form of payment, usually called 'occupation fees', consists of annual rental for loss of land and disruption of lifestyle. These payments are calculated with regard to the area of mining leases. The third category is royalty payments, which are based on a percentage of the gross value of production. More recently, a fourth category has emerged, that of dividends, as local communities have acquired equity shares in mining projects.

The relative value of these payments varies across mining projects, depending on the degree of damage, the area of land that has been leased, the value of production and the overall profitability of the operation. The payments also vary according to the relationship between particular communities and the mine: royalties are paid to the landowners of the mining lease itself (where the ore body is located), compensation to individual owners who have suffered losses and occupation fees to landowners who have leased land to the mine. The distribution of equity shares varies widely between mining projects and is affected by the organization of the landowner corporation which holds the equity share.

The basis for compensation payments and royalties is the Mining Act 1992 which states that developers must pay compensation for all loss or damage suffered or expected from the exploration or mining or ancillary operations (Section 154, 1992 Act). The Act (Section 154 (2)) specifies the following grounds for compensation:

- *being deprived of the possession or use of the natural surface of the land*
- *damage to the natural surface of the land*
- *severance of the land or any part thereof from other land held by the landholder*
- *any loss or restriction of a right of way, easement or other right*
- *the loss of, or damage to, improvements*
- *in the case of land under cultivation, loss of earnings; disruption of agricultural activities on the land; and social disruption.*

In terms of the value of compensation paid for different types of damage, the Act notes that in the first instance, where applicable, compensation shall be determined with reference to the values for economic trees published by the Valuer General (Section 154(3)). In the second instance, the amount of compensation payable to landholders may be determined by agreement (Section 156(1)). Compensation agreements have therefore become central elements of all mining agreements.

Occupation fees are annual payments made for any deprivation of possession of the surface of the land caused by or associated with mining, and fall into two main categories: those which are paid under Section 173 of the 1977 Mining Act, which are set at 5% of the unimproved value of the land or K5 per hectare, whichever is greater, and a range of negotiated annual payments for use or damage of the land, again calculated on a per hectare basis for the entire area of the mining and ancillary leases held. Under the 1992 Mining Act, occupation fees were dropped, although they were retained in existing agreements. More recent agreements continue to provide annual compensation payments for leaseholders.

The rate of royalty paid by mining companies has been determined by government regulation under the Mining Act and increased from 1.25% to 2% in 1997. The distribution of these funds between landowners, provincial governments and the national government depends on the individual agreements negotiated at the start of the mine. In general terms, the royalties paid to the landowning community have increased from 5% in the case of Bougainville to 50% for Lihir.

In addition to direct economic payments, other economic benefits flow to the community from these mining operations, including employment and business contracts. The significance of these opportunities also varies from one mine to another. At the Porgera mine, for example, there are over 800 local employees who make up over 30% of the mine's workforce; their wages and salaries provide the largest source of income for the local communities.

Large-scale mining operations often result in improved access to health care and education services *in the immediate vicinity of the mine*, usually according to terms spelled out in agreements between the landowners and the government, and the provision of new, albeit not necessarily better, housing and community infrastructure (water supplies, roads, etc.). These elements form a central part of compensa-

tion regimes in the general sense, although the substitution of a water tank for a fresh-water spring, for example, may be measurable on an index of modernization or development, but does not necessarily translate to an improved quality of life, particularly when the water tank will only last for a limited number of years and no provisions are made for its replacement.

The logic of compensation assumes that all damages can be compensated for in monetary form and that all things can be reduced to their value as commodities, which may inappropriately bottom-line values that are not properly amenable to financial calculation.<sup>46</sup> The assumptions underlying the compensation process ignore the existence of other values—the importance of land for local identity, for example, and the way in which land and kinship tend to be ‘mutually implicated’ in subsistence economies.<sup>47</sup> The division of people into social categories through their relationships to land and resources is the basis of relations of production in many indigenous societies and an important means through which these relationships are reproduced. Important connections also exist between land and local knowledge in the sense that indigenous knowledge is closely linked to specific environments. When the land is destroyed or when people are removed from their land, indigenous knowledge—transmitted through engagement and experience—may also be jeopardized. For many communities, ‘knowing the land properly ... is what legitimated their right to take wood, water and animals from the land, whilst at the same time explaining their capacity to do so’.<sup>48</sup> Even indigenous communities which are located in urban areas with extensive participation in the cash economy may actively engage in subsistence pursuits, and these practices often remain central to their identities and essential for social relations.

The destruction of local places, and the severing of connections between people and place, always entail loss. Land is often central to the historical accumulation of experience and identity; its loss must be reckoned not only in economic terms, but also in terms of the community’s capacity to produce local subjects. As legal scholar Margaret Radin has argued, ‘some categories of property rights do justifiably become bound up with persons and then ought not to be *prima facie* subject to rearrangement by market forces’.<sup>49</sup>

### **Provisions of the Settlement**

The lawsuit against BHP and the Ok Tedi mine was settled out of court in 1996. The first component of the settlement established a K110 million compensation package that is being distributed to the 34,000 people living along the Ok Tedi and Fly Rivers during the remaining years of the mine. Following local requests, funds are divided into equal shares for every man, woman and child. Initial distributions, which included backdated payments, amounted to K327/person per annum, or approximately K1,600 for a family of five. This figure was originally established in negotiations between the mining company and the government while the lawsuit was still pending.<sup>50</sup>

A second trust of K40 million was set up on behalf of the landowners and resource

users who live beside the lower Ok Tedi River where the impact of the mine is most severe. Fifteen villages are included in the trust. The trust broadens the category of people with property rights to include not only landowners, but also resident populations who have been granted local use rights and consequently own trees, gardens, rubber stands and other improvements to the land. The majority of this population moved to the area in the 1960s when changes in colonial policy prompted settlement along the river. This definition of affected persons replaced the initial legal interpretation of the category of persons eligible for compensation, which was restricted to landowners.

The Lower Ok Tedi trust provides cash compensation to individuals, which is needed to supplement local food production, in addition to support for a number of community development programs. The trustees include local representatives, local government officials, a national government representative, several appointees from OTML, and representatives from the provincial council of churches and an NGO that participated in the lawsuit. The funds distributed in cash are allocated to each village according to a formula based on population size (35%), the area of deforestation (30%), river frontage (30%) and land under stress (5%).<sup>51</sup> Each village has the responsibility to assess the eligibility of persons applying for their share of the funds.

A key element of the trust is support for local business development, which is intended to provide economic opportunities after the mine closes.<sup>52</sup> Additional business and employment opportunities have emerged through corporate spending on new environmental programs, including the dredging operation in the lower Ok Tedi and other measures intended to rehabilitate the area downstream from the mine. OTML has given these communities preferential treatment in employment opportunities and business contracts, such as road-building, maintenance and security.<sup>53</sup>

The settlement package also included the transfer of a 10% equity share in the mine to the people of Western Province, which was paid for out of the mine's dividend stream. Held by the national government, the benefits from the equity share are earmarked for use in development projects throughout the province. Finally, BHP agreed to pay for the costs of landowner legal fees and expenses, which amounted to A\$7.6 million.

It is Panglossian to suggest, as some critics have, that because the people downstream from the mine have received compensation, the system has proven that it works. On the contrary, under no circumstances can these cash payments make up for what the people living downstream from the mine have lost. Moreover, the settlement monies themselves have been significantly reduced by a more than 50% devaluation of the Kina, and the distribution of settlement funds has been fraught with problems.

The central feature of the settlement was corporate commitment to tailings containment, the most likely option for which was a pipeline from the mine site in the mountains along the east bank of the Ok Tedi river to a stable lowland tailings dump. While these tailings were projected to cover up to 30-50 km<sup>2</sup>, this land could be

progressively rehabilitated. OTML has already signed lease agreements for this land. In 1999 the estimated cost of the pipeline was approximately US\$180 million. The lower Ok Tedi River is also being dredged at a cost of US\$30 million per year; it has lowered the riverbed and reduced flooding into the adjacent lowland forests. However, it only removes from the river only a fraction of what is released into the river at the mine site each day. Finally, the company also agreed to establish an environmental rehabilitation program for the land along the river that has been deforested. The aim of the pipeline and dredging plans was to limit further damage to the land along the Ok Tedi and Fly Rivers. The settlement committed BHP to implement the most practicable tailings containment option on the recommendation of the Papua New Guinea government after it undertakes a review of the options for tailings containment.

The provisions of the accord are backed by an agreement with BHP that any disputes arising during the course of its implementation will be heard by the Victorian Supreme Court in Melbourne rather than in Papua New Guinea. The settlement thus ratifies the principle of foreign tort claims, which seek to hold corporations accountable in the countries in which they are incorporated and according to legal standards at home.

As such, the Ok Tedi case was a forerunner - and one of the most successful cases to date, despite its limitations - of international legal strategies for foreign direct liability, which includes action taken against Freeport-McMoRan's Grasburg mine in West Papua (Irian Jaya, Indonesia), Exxon Mobil's natural gas installation in Aceh (Indonesia), Unocal's oil pipeline in Burma, Dutch Royal Shell for its petroleum operations in the Nigerian delta, Rio Tinto for its alleged military collusion in the civil war on Bougainville, British Thor Chemical for the health impacts of mercury-based chemicals on its South African employees and Texaco for its petroleum operations in the Amazonian Oriente in Ecuador, all of which have recently been or are currently before the courts in the United States and the United Kingdom.<sup>54</sup>

### **Post-Settlement Release of Environmental Information**

I would now like to return to the question raised at the outset of this paper: why did BHP's claim that the Ok Tedi mine was 'not compatible' with corporate environmental values come only after the mine had been in operation for more than fifteen years, and a full three years after the lawsuit was settled out of court? Paul Anderson's comments to the media coincided with the release of a comprehensive self-study undertaken by the mine, which focused on the environmental problems that it had caused and will continue to cause well into the future. The results of this study were substantially different from all other data that the mine previously released to the public.

The most significant observation was that even if mining at Ok Tedi were to stop immediately, the problems downstream from the mine will continue to increase due to the sheer volume of tailings already in the river and ongoing erosion from waste rock dumps adjacent to the mine in the mountains (Parametrix, Inc. and URS Greiner

Woodward Clyde, 1999a: 8). Moreover, these problems will last for at least fifty years, which is as far into the future as these models can predict.

Mine tailings and waste rock will have a cascading effect as they migrate slowly downstream along the Fly River towards the Gulf of Papua. While more than 478 km<sup>2</sup> of forest along the river was already dead or under severe stress in 1997 (Parametrix, Inc. and URS Greiner Woodward Clyde, 1999a: 7), this damage will spread downstream and may eventually affect up to 1,500 km<sup>2</sup>. There are suggestions, however, that this projection may be optimistic, and that the damage incurred may ultimately be twice as great, potentially covering as much as three thousand square kilometers (Parametrix, Inc. and URS Greiner Woodward Clyde, 1999a: 8). While the changes to the river system will eventually stabilise, the peer review emphasised that the local species composition is not likely to return to pre-mine conditions, with savannah grasslands replacing much of the existing rain forest (Chapman et al., 2000: 17).

The review carried out by BHP also claims that none of the proposed strategies for tailings containment - a tailings dam, as envisioned by the original environmental impact assessment, but never completed; dredging the lower Ok Tedi River to remove tailings and sediment; or a combination of dredging and a 100 kilometer pipeline to transport mine tailings to a stable lowlands waste dump - will substantially mitigate the environmental processes already in train. It was this assertion, later challenged by the Peer Review group assembled by the mine, as discussed below, that prompted landowners to return to court in Melbourne in April 2000, charging BHP with breach of the original settlement agreement. Instructions on filing a class action suit on behalf of the original 30,000 (since expanded to 34,000) plaintiffs have been issued by the Court and are currently being carried out in Papua New Guinea.

#### *Multilateral Review*

In late 1999, the Prime Minister of Papua New Guinea asked the World Bank to conduct an evaluation of the data produced by the Ok Tedi mine.<sup>55</sup> While the Bank endorsed the science which underlies the report, it was critical of the emphasis on the report's emphasis on the risk to *shareholders and profit* rather than to the Government of Papua New Guinea. The Bank was also critical of the fact that the reports only weighed a limited set of options, some of which were not realistic options at all (e.g., to close the mine immediately, which would be destabilizing at both local and national levels), while other possibilities were either not considered or not seriously evaluated.

Ultimately the World Bank recommended that the best course of action would be to close the mine as soon as OTML and BHP are able to implement programs to facilitate the social transition to life after the mine. The Bank was critical of the mine report for its failure to provide sufficient information regarding the resources required for early closure. Despite these criticisms, the Bank failed to opine on the responsibilities of OTML and BHP towards providing for future costs and expenses

stemming from the degraded environment. Even when addressing the extended period of time during which the mine's effects will still be felt, the Bank failed to address critical questions of future environmental liability.

#### *Scientific Peer Review*<sup>56</sup>

The reports generated by the Ok Tedi mine were also sent out for peer review to a group of scientists at major research universities in Canada, Australia and the United States. In April 2000, the peer review group released its final report. In contrast to the evaluation submitted by the World Bank, they reported that the mine had systematically underrepresented the potential benefits of tailings containment over the remaining life of the mine. They argued that data presented by the corporation in its environmental studies incorrectly reported the differences between the various tailings containment options, bolstering its intention not to implement any form of tailings containment.

The peer review group also rejected long-standing corporate claims about the lack of toxicity in the tailings released by the mine. They raised concerns about toxicity at both the bottom and the top of the food chain. The peer review group questioned whether algae in the Ok Tedi River has been permanently affected (Chapman *et al.*, 2000: 7-8) and suggested that chemical toxicity may be harmful to the plants and trees along the river, contradicting long-standing company assertions that these trees are dying of hypoxia because their roots have been covered by tailings (Parametrix, Inc. and URS Greiner Woodward Clyde, 1999b: 7-8). Local keystone species, including the ubiquitous flying fox, may also be vulnerable to the presence of heavy metals in the food chain (Parametrix, Inc. and URS Greiner Woodward Clyde, 1999b: 9).

Although the reports commissioned by the mine suggest that the potential health risks of exposure to heavy metals for the human populations along the river are minor (Parametrix, Inc. and URS Greiner Woodward Clyde, 1999b: 13), several concerns remain unresolved. The reports review data on copper, highlighting its irregular release into the river system, whereas previously the company only reported averages, which concealed these fluctuations. Periodic spikes in copper levels in the river can increase the amount of toxic material that becomes bio-available (Chapman *et al.* 2000: 16). High dietary intake of copper is toxic to humans. The reports commissioned by the mine also recommend that populations be monitored for their exposure to lead and cadmium, both of which are highly toxic substances (Chapman *et al.*, 2000: 14). Finally, the threat of acid mine drainage is not insignificant. Were tailings from the mine to become acidic, this would precipitate an even greater environmental crisis. The peer review indicated that continued operation of the mine without effective tailings containment increases the chances that this will occur (Chapman *et al.*, 2000: 8-9).

#### *Indigenous Responses to New Findings*

People living downstream from the Ok Tedi mine have also begun to draw on scientific discourse to express their concerns about changes to their environment, as

illustrated by this letter representing the views from a Middle Fly village, which was recently presented to a Port Moresby human rights NGO working with the downstream communities (reproduced here verbatim and at length):

*What we have been complaining for the Government and Company admitted now. We now know that the government and the company have found out that they are guilty of the serious environmental impacts along the Fly River System.*

*Since the beginning of the mine, the company and the government have been denying the fact that the river system was highly contaminated and that every life along the river was not affected.*

*For a brief detail on environmental impact we will touch only one and the very key point contributing to life.*

*In science under the section of biology and subsection of ecology – study of living organism and their environment. These are topics such as biotic factors, food factors/food chain. Plants are ultimate source of organic food for all animals. Plants are eaten by herbivores, which are in turn eaten by carnivores.*

*It makes us sad to see that the environment around us that once supported us on this earthly lives of ours lost its beauty and gone forever, which money will not bring back, and that it is history for our children and grandchildren. Once nature is changed it is changed forever.*

*We are appealing to defend and protect the base of the food chain contributing to our lives according to the food chain in our various ecosystems. Along the Fly River System every life is in danger as to the destruction of dependency upon one another, been a result of reactions of chemical combination as also in point. . . .*

*The life of the mine means development for the landowners of the Mine Site and around Tabubil Area, income for both government and the company while it means fear, hunger, thirst, sickness and death for us. . . .*

*How does the company expect us to survive if our social life is disturbed by changed environment? We need money in place of the destroyed sago palms and contaminated fish and other things.<sup>57</sup>*

## **Conclusions and Recommendations**

The full range of factors which influenced decision-making regarding Ok Tedi cannot be catalogued here.<sup>58</sup> Multilateral agencies guaranteed loans and provided risk insurance, despite the warnings and environmental problems early in the project history. Financial pressure from the unexpected closure of the Panguna mine on Bougainville in 1989 affected government decision-making regarding continued riv-

erine tailings disposal from the Ok Tedi mine. The State faced international pressure to generate foreign income and had a clear interest in creating an investment climate that encouraged international capital given the limited infrastructure, lack of skilled labor and high costs of living in Papua New Guinea. The State also had a clear conflict of interest due to its investment in the mine and saw itself as 'paying double' for any expenditure on environmental protection, through loss of royalties and loss of taxable income.

In addition, the strategies pursued by transnational corporations in seeking and shaping investment climates in which environmental and other regulations are limited must be considered. The spread of neo-liberal economic policy and free trade agreements also tend to dismantle regulatory regimes, in what some commentators describe as the 'race to the bottom'.

Finally, there was an absence of binding standards, statutes or laws that would have prevented the problems at Ok Tedi from occurring.

In this regard, it is important to be very clear about what *did not work* in the Ok Tedi case. Which efforts undertaken to protect environmental human rights were ineffective and why? Indigenous protests and petitions were discredited, and indigenous political campaigns carried out both domestically and abroad were ignored by the mining company and the government. The findings of an international tribunal were largely dismissed and criticism from scholars in both the natural and social sciences in Papua New Guinea, Australia, Europe and North America was not taken seriously. Media criticism was disregarded, as was the resulting public disapprobation.

Corporate policies, codes of best practice, and other voluntary agreements which do not contain mechanisms of enforcement were ineffective as well.

This is perhaps the most important lesson that can be derived from this case in the context of this workshop on Indigenous Peoples, Human Rights & Extractive Industries: that the indigenous people living downstream from the mine availed themselves of all of these activities in protest against the mine's detrimental impact, yet they were not effective. It took years and a combined political and legal campaign to force the mine to take its environmental impact seriously. Indigenous efforts were unsuccessful despite seemingly advantageous circumstances: the '90s was the UN decade of indigenous peoples and they readily found common cause with environmentalists interested in conserving biodiversity and tropical rain forests. The problems were caused by an industry strongly associated with Australian national identity and a company whose stocks were held by unions and church groups which were sensitive to these issues. The legal case also received extensive media coverage.

Despite criticism dating from the very beginning of the project, BHP and OTML failed to implement tailings containment that would have prevented the devastation of the Ok Tedi and Fly Rivers. BHP (now BHP Billiton) is currently negotiating the transfer of its 52% share in the mine to a private trust that will benefit the people of the province in which the mine is located. The transfer is contingent on the govern-

ment of Papua New Guinea issuing a waiver of future environmental liability for the project. Rather than take responsibility for the long-term impacts of the mine on the downstream environment - which by their own account will last at least forty years and probably much longer - BHP plans to sever its relationship to the project and the affected communities. It is far from clear how this decision - especially given the uncertain nature of the long-term impacts - corresponds with the ideals expressed in their corporate social and environmental policy.

Despite tremendous efforts by affected community members and irrespective of their international support, the outcome was disastrous, as even BHP acknowledges with its statement that the Ok Tedi mine was 'not compatible' with its values. The process by which environmental impacts from mining projects are monitored and controlled is clearly inadequate and in need of major reform. What policy initiatives might help to prevent another Ok Tedi?

Indigenous people should have veto power over projects which affect their land, livelihood and use of subsistence resources. To this end, governments, multilateral agencies and NGOs should formally recognize indigenous land and resource rights.<sup>59</sup> For these communities to exercise this power effectively, they need to be fully informed about environmental matters (see point #4 below).

1. Independent social and environmental monitoring is required to evaluate mining and other large-scale resource extraction projects. Special efforts must also be undertaken to overcome government conflicts of interest regarding its responsibilities as a regulator on behalf of its citizens and its other economic policies and ownership interests.<sup>60</sup> Regular external reviews should be clearly linked to processes through which necessary changes are mandated and implemented. The review process must be open and transparent and subject to public participation and review.
2. Where appropriate, indigenous environmental knowledge should be incorporated into environmental impact assessments and monitoring of extractive industry.<sup>61</sup>
3. There is an urgent need for full disclosure of environmental information and more effective communication between mining projects and affected communities regarding environmental impacts. Translation and explanation of scientific data and other findings may require special efforts and resources on behalf of indigenous communities.
4. Corporations are responsible for providing just and reasonable compensation for their impact on local environments and resources, local subsistence practices, sacred sites and the full costs of relocation if community permission is granted. These valuations must take into account local cultural values associated with land in addition to market values, as described above.
5. Support should be provided for mechanisms for dispute resolution at

a variety of levels, including the courts. Access to the courts should not be restricted, as the government of Papua New Guinea attempted to do in 1995 by criminalizing participation in overseas legal actions against mining corporations for their operations in Papua New Guinea, on the grounds of infringement of national sovereignty. Forums like the International Water Tribunal should be supported and should be linked to mechanisms of enforcement, including, perhaps, binding obligations on multilateral agencies.

6. Finally, there is an urgent need for international legal precedents on environmental human rights which rise to the level of recognized standards and norms. The UNHCHR can play an important role in developing and promulgating appropriate standards and definitions concerning environmental human rights. Furthermore, there is an urgent need for more specificity regarding specific standards for environmental human rights. Existing legal statutes are often too general and require greater specificity if they are to be operationalized.

The potential benefits of these recommendations include greater environmental and social justice, and potential reduction in violence and conflict over resource development. Changes in how extractive industries and host governments calculate the costs of environmental degradation and pollution are also necessary; these externalities must be internalized from the outset of project planning. Mining companies need to assess their responsibilities in terms of longer-time frames commensurate with the longevity of their environmental impacts, e.g., at least forty years in the case of the Ok Tedi mine. New standards for responsible mining practices must be developed, perhaps involving mining at smaller scales with reduced outputs. Most importantly, no new ore body should be exploited until tested and reliable strategies for tailings containment are identified. This means that some ore bodies will be off-limits to development in the near future and perhaps even permanently, if no effective means of tailings disposal is available. Some strategies of waste disposal, e.g., riverine tailings disposal in the tropics, as used by the Ok Tedi mine, Freeport-McMoRan's Grasburg mine, and the Porgera mine in New Guinea, should be permanently banned.

Whether or not a basic human 'right to the environment' has been firmly established, a productive and healthy environment is clearly fundamental to the exercise of other human rights. It is imperative that these reforms be enacted and enforced, to prevent extractive industries, in their pursuit of financial gain, and host governments, in their pursuit of other development goals, from denying essential human rights to indigenous peoples. ♦

*Stuart Kirsch is a Visiting Assistant Professor at the Department of Anthropology, University of Michigan, USA.*

**See Annex C, p. 115 for BHP Billiton rejoinder.**

## Notes and References

<sup>1</sup> This case study was commissioned by the office of United Nations High Commissioner for Human Rights pursuant to Resolution 2000/15 of the Sub-Commission on the Promotion and Protection of Human Rights, which recommended that the High Commissioner in collaboration with UNCTAD, the ILO, the WTO and other relevant organizations organize a workshop on 'Indigenous peoples, private sector natural resource, energy and mining companies and human rights'. The paper draws together fifteen years of ethnographic research in Papua New Guinea on the social impacts of the Ok Tedi mine as well as contributions made by scholars and activists working elsewhere with the Asia-Pacific region. Patricia Townsend, Bill Townsend and Simon Divecha provided useful comments and suggestions. I would like to acknowledge the indigenous environmental organization ENECO based in Kiunga, Papua New Guinea, for their nomination and support for my contribution to this workshop; however, the views represented in this document are those of the author and not necessarily those of ENECO. I take full responsibility for any errors of fact or interpretation. Please note that this is a *working paper*; all comments and corrections will be gratefully received and acknowledged wherever possible.

<sup>2</sup> United Nations, Economic and Social Council, 1994. *Question of the Realization of the Right to Development*. Commission on Human Rights, Fiftieth session, Agenda item 8: points 6-10. Written statement submitted by the Human Rights Advocates, a non-governmental organization in consultative status (category II). 10 February 1994. (E/CN.4/1994/NGO/50).

<sup>3</sup> Bill Townsend, 1988. 'Giving away the River: Environmental Issues in the Construction of the Ok Tedi Mine', 1981-1984, In J. C. Pernetta, editor, *Potential Impacts of Mining on the Fly River*, UNEP Regional Seas Reports and Studies No. 99 and SPREP Topic Review No. 33. United Nations Environment Programme, pps. 107-119. Another UNEP review of the mine was published by Jörg Hettler and Bernd Lehmann, 1995, *Environmental Impact of Large-Scale Mining in Papua New Guinea: Mining Residue Disposal by the Ok Tedi Copper-Gold Mine*. (Final report on a study funded by the United Nations Environment Programme). UNEP Berlin: Selbstverlag Fachbereich Geowissenschaften, FU Berlin.

<sup>4</sup> David Hyndman, 1988. 'Ok Tedi: New Guinea's Disaster Mine'. *Ecologist* 18: 24-9.

<sup>5</sup> Stuart Kirsch, 1989. 'Ok Tedi River a Sewer'. *The Times of Papua New Guinea*, 1-7 June, 491:3.

<sup>6</sup> Australian Conservation Foundation, 1993. *Report on the Impacts of the Ok Tedi Mine in Papua New Guinea*. A report by H. Rosenbaum and M. Krockenberger for the Australian Conservation Foundation, November. The critical Starnberg Institute was issued two years before (Starnberg Institute, 1991. *Development and the environment: economic-ecological development in Papua New Guinea*. Commissioned by the Department of World Mission of the Evangelical Lutheran Church in Bavaria, Germany. Goroka: The Melanesian Institute for Pastoral and Socio-Economic Services).

<sup>7</sup> Hans-Martin Schoell, 1994. 'Introduction: Controversies about Development in the Pacific' in *Development and Environment in Papua New Guinea: An Overview*. Goroka: The Melanesian Institute, pps. 13-14.

<sup>8</sup> John Gordon, 1997. 'The Ok Tedi Lawsuit in Retrospect'. In Glenn Banks and Chris Ballard, editors, *The Ok Tedi Settlement: Issues, Outcomes and Implications*. Canberra: Resource Management in Asia-Pacific and National Centre for Development Studies (Pacific Policy

Paper 27) and Stuart Kirsch, 1997. 'Is Ok Tedi A Precedent? Implications of the Settlement' in *The Ok Tedi Settlement: Issues, Outcomes and Implications*, edited by Glenn Banks and Chris Ballard, pps. 118-40. Canberra: Resource Management in Asia-Pacific and National Centre for Development Studies (Pacific Policy Paper 27). This figure has been greatly reduced by devaluation of the Kina by more than 50% and by the failure of the mine to implement tailings containment, which was the largest expenditure envisioned by the settlement.

<sup>9</sup> Paul M. Anderson (Managing Director and Chief Executive Officer of BHP) as quoted in: Geoffrey Barker and Stewart Oldfield, 1999. 'BHP Admits Mine is a mess, Downer says Dig in', *Australian Financial Review*, 12 August.

<sup>10</sup> Paul M. Anderson (Managing Director and Chief Executive Officer, BHP), 1999. *BHP Environmental Policy*.

<sup>11</sup> Paul M. Anderson, 1999.

<sup>12</sup> J.B. Prescott (Managing Director and Chief Executive Officer, BHP), 1997. *BHP Community Relations Policy*.

<sup>13</sup> Prescott, 1997.

<sup>14</sup> Richard Jackson, a geographer who has consulted for the mine since the planning phases, once argued that it was not so much a case of the government was willing to sacrifice the environment for money, but rather 'to sacrifice the environment for no economic return at all'. Richard Jackson, 1993. *Cracked Pot or Copper Bottomed Investment? The Development of the Ok Tedi Project 1982-1991, A Personal View*. Townsville: Melanesian Studies Centre, James Cook University, pg. 160.

<sup>15</sup> Glenn Banks, 1998. 'Compensation for Communities Affected by Mining and Oil Developments in Melanesia', *The Malaysian Journal of Tropical Geography* 29 (1): 53-67.

<sup>16</sup> Former shareholders include the US company AMOCO, which sold its (30%) share in OTML to BHP in 1993, including a waiver of environmental liability, and three German companies, Degussa (7.5%) Metallgesellschaft (7.5%) and DEG(5%), which sold their shares to the PNG government.

<sup>17</sup> The Kina was roughly equivalent to US\$ 1 until it was devalued by more than 50% in the late 1990s.

<sup>18</sup> These figures are taken from <http://www.oktedi.com>.

<sup>19</sup> Townsend, 1988, pg. 114.

<sup>20</sup> Hyndman notes that, 'the state renegotiated the project six times to sustain mining production, thereby canceling the environmental protection envisioned in the original OTES [*Ok Tedi Environmental Study*]. David Hyndman, 1994. *Ancestral Rain Forests and the Mountain of Gold: Indigenous Peoples and Mining in New Guinea*. Boulder: Westview Press, pg. 90.

<sup>21</sup> Banks, 1998.

<sup>22</sup> For an overview of these events, with special attention to their contextualization within the state, see Colin Filer 1997. 'West Side Story: The State's and Other Stakes in the Ok Tedi mine'. In Glenn Banks and Chris Ballard, editors, *The Ok Tedi Settlement: Issues, Outcomes and Implications*. Canberra: National Centre for Development Studies, Pacific Policy Paper 27 and Resource Management in Asia-Pacific.

<sup>23</sup> Hyndman, 1988, pg. 94.

<sup>24</sup> Cyanide spills continue to trouble the industry in the region. On 21 March 2000, the Tolukuma gold mine of Papua New Guinea dropped one ton of sodium cyanide pellets from a helicopter, 85 kilometers north of the capital city of Port Moresby (Reuters, 23 March, 'Deadly Cyanide Washes into PNG River'). In 1999, there was a breach in the tailings dam at the Gold Ridge Mine in the Solomon Islands which resulted in a major fish kill in the river system behind the capital city of Honiara. At the Ok Tedi mine, there was a major incident involving cyanide in 1984 when a barge carrying 2700 60-liter drums of cyanide overturned in the mouth of the Fly River; only 117 drums were ever recovered (Townsend, 1988, pg. 116).

<sup>25</sup> See Appendix 4, Stuart Kirsch, 1993. 'Social Impact of the Ok Tedi Mine on the Yonggom Villages of the North Fly, 1992'. *Ok-Fly Social Monitoring Programme*, Report 5. Port Moresby: Unisearch PNG Pty Ltd. The original text has been edited for presentation.

<sup>26</sup> See Appendix 3, Stuart Kirsch, 1993. 'Social Impact of the Ok Tedi Mine on the Yonggom Villages of the North Fly, 1992'. *Ok-Fly Social Monitoring Programme*, Report 5. Port Moresby: Unisearch PNG Pty Ltd. The original text has been edited for presentation.

<sup>27</sup> See Appendix IV, Applied Geology Associates, 1989. *Environmental, Socio-Economic, and Public Health Review of Bougainville Copper Mine, Panguna*. Report for Bougainville Copper Ltd. Applied Geology Associates Ltd., New Zealand. See also Appendix 5, Kirsch 1993. The original text has been edited for presentation.

<sup>28</sup> See Barbara Adam, 1998. *Timescapes of Modernity*. New York: Routledge, pg. 28, in which she refers to the work of Stephan Heiland.

<sup>29</sup> Anna Solomon 1992. 'Ok Tedi Found Guilty', *The Times of Papua New Guinea*, 27 February.

<sup>30</sup> This research was published as Stuart Kirsch, 1995. 'Social Impact of the Ok Tedi Mine on the Yonggom Villages of the North Fly, 1992'. *Research in Melanesia* 19: 23-102. Originally distributed as *Ok-Fly Social Monitoring Programme*, Report No. 5. Port Moresby: Unisearch PNG Pty Ltd., 1993.

<sup>31</sup> In 1984, more than 10,000 political refugees crossed the international border from West Papua (Irian Jaya, Indonesia) into Papua New Guinea. Several thousand refugees still live in camps located along the Ok Tedi and Fly Rivers. See Stuart Kirsch, 1989. 'The Yonggom, the Refugee Camps along the Border, and the Impact of the Ok Tedi Mine'. *Research in Melanesia*, 12:30-61.

<sup>32</sup> IUCN, 1995. *The Fly River Catchment, Papua New Guinea—A Regional Environmental Assessment*. Published in collaboration with the Department of Environment and Conservation, Boroko Papua New Guinea. IUCN: Cambridge (UK), pg. 53.

<sup>33</sup> Meg Taylor notes that 'where the state acquires equity in major resource projects, it tends to relinquish its role as an independent arbiter in matters relating to a project, especially in matters involving environmental and social impact . . . It is not impartial and therefore not accessible to the people whose interests are damaged'. Meg Taylor, 1997. 'Putting Ok Tedi in Perspective' in *The Ok Tedi Settlement: Issues, Outcomes and Implications*, edited by Glenn Banks and Chris Ballard, 12-26. Canberra: Resource Management in Asia-Pacific and National Centre for Development Studies (Pacific Policy Paper 27), pg. 24.

<sup>34</sup> See John Burton, 1997. 'Terra Nugax and the Discovery Paradigm'. In Glenn Banks and Chris Ballard, editors, *The Ok Tedi Settlement: Issues, Outcomes and Implications*. Canberra: National Centre for Development Studies, Pacific Policy Paper 27 and Resource Management in Asia-Pacific.

<sup>35</sup> Harold Hohmann, editor, 1992. *Basic Documents of International Environmental Law*, Vol. 1. London: Graham and Trotman.

<sup>36</sup> Newell, Peter 2001 'Access to Environmental Justice? Litigation against TNCs in the South'. *Making Law Matter: Rules, Rights and Security in the Lives of the Poor*. *IDS Bulletin* 32(1): 83-93. Ward, Halina 2001 'Governing Multinationals: The Role of Foreign Direct Liability'. Briefing paper, new series no. 18, 1-6. London: The Royal Institute of International Affairs. and 2001 'Securing Transnational Corporate Accountability through National Courts: Implications and Policy Options'. *Hastings International and Comparative Law Review*.

<sup>37</sup> Judith Kimmerling in Helen Collinson, editor, 1997. *Green Guerillas: Environmental Conflicts and Initiatives in Latin America and the Caribbean*. New York: Black Rose Books.

<sup>38</sup> Broderick, Vincent L. (United States District Judge) (1994). In Maria Aguinda, et al. v. Texaco, Inc. 93 Civ 7527 (VLB) Memorandum. 11 April: pg. 16.

<sup>39</sup> Duval, J. Jr. (1997). Tom Beanal, On Behalf of Himself and All Others Similarly Situated v. Freeport-McMoRan, Inc., and Freeport-McMoRan Copper and Gold, Inc. [Civil Action No. 96-1474 Section K]. United States District Court, Eastern District of Louisiana. 9 April 1997. In this passage, Duval cited Sands, 1995, *Principles of International environmental Law I: Frameworks, Standards and Implementation*.

<sup>40</sup> Papua New Guinea, 1975. *The Constitution of the Independent State of Papua New Guinea*, Port Moresby, Department of the Prime Minister.

<sup>41</sup> Juan Antonio Oposa et al., v. The Honorable Fulgencio S. Factoran, Jr., in his capacity as the Secretary of the Department of Environment and Natural Resources, and the Honorable Eriberto U. Rosario, Presiding Judge of the RTC, Makati, Branch 66, respondents. [G.R. No. 101083. July 30, 1993].

<sup>42</sup> John Gordon, 1997. 'The Ok Tedi Lawsuit in Retrospect'. In Glenn Banks and Chris Ballard, editors, *The Ok Tedi Settlement: Issues, Outcomes and Implications*. Canberra; National Centre for Development Studies, Pacific Policy Paper 27 and Resource Management in Asia-Pacific, pg. 153.

<sup>43</sup> Byrne, J. Judge, 1995. Rex Dagi et al. v. The Broken Hill Proprietary Company Limited No. 5782 of 1994 and others, 10 November 1995: 16. And Victorian Supreme Court (1995). Transcripts, *Dagi et. al v. Broken Hill Proprietary, Inc.* 24 October, pps. 58-63.

<sup>44</sup> Byrne, 1995, pg. 16.

<sup>45</sup> Information about compensation regimes in Papua New Guinea is summarized with permission from Banks, 1998.

<sup>46</sup> Roy Rappaport, 1993. 'Distinguished Lecture in General Anthropology: The Anthropology of Trouble'. *American Anthropologist* 95(2): 295-303, p. 299.

<sup>47</sup> Eric Hirsch, 1995. 'Introduction', in *The Anthropology of the Landscape: Perspectives on Space and Place*, edited by Eric Hirsch and Michael O'Hanlon, pp. 1-30. Oxford: Clarendon, pg. 9. For more on these issues, see Stuart Kirsch, 2001. 'Lost Worlds: Environmental Disaster, "Culture Loss" and the Law'. *Current Anthropology (with CAI Comments)* 42(2): 167-98.

<sup>48</sup> David Anderson, 1998. 'Property as a way of knowing on Evenki lands in Arctic Siberia', in *Property relations: Renewing the anthropological tradition*, edited by C. M. Hann, pps. 64-84. Cambridge: Cambridge University Press, pg. 69.

<sup>49</sup> Margaret Jane Radin, 1993. *Reinterpreting Property*. Chicago: University of Chicago Press, pg. 197.

<sup>50</sup> Designed to weaken support for the litigation, claimants were required to withdraw their support for the lawsuit against BHP in order to receive their share of the funds. The final settlement of the case, however, incorporates all affected parties, not only those who accepted the initial government offer. These payments are also now guaranteed by BHP Billiton regardless of financial performance of OTML. Payments were not affected by the drought caused by El Niño in 1997, for example, which forced the Ok Tedi mine to declare *force majeure* because it was unable to fulfil its export contracts for copper concentrate. Furthermore, the settlement prevents OTML from reducing the size of the fund by subtracting the costs of environmental rehabilitation and any tailings containment option mandated by the Papua New Guinea government, an option available in the original agreement.

<sup>51</sup> Subsequent negotiations have modified these percentages slightly.

<sup>52</sup> Priority was initially given to income-generating projects such as a mobile sawmill operation, vehicles for local bus service, and other new businesses, including village tradestores. Investments in local businesses were to be allocated equally between communities based on a figure of approximately K510/person annually. The initial plans included contingency fund of K600,000-700,000 that would be set aside each year for larger investments, which might include an oil palm plantation, a project to produce organic pineapple juice for the export market, or a river ferry. Other investments initially under consideration included the construction of a supermarket for rental by an established chain or the establishment of a rice depot to manage sales and distribution.

<sup>53</sup> Other funds were set aside for educational scholarships at the post-secondary level. The trust was directed to provide support for literacy training, youth programs and women's issues following the administration of a survey to examine the needs of women and youth prior to any investment. Finally, 15% of the trust funds has been invested annually for the benefit of future generations. These monies will accumulate until after mine closure; it is envisioned that they will provide continued support for the most successful of the trust's programs.

<sup>54</sup> Newell 2001; Ward 2001. The U.S. cases are being heard under the Alien Claims Tort Act (ACTA), a 1789 law designed to enable the United States to hear claims against sea pirates who lacked a national domicile.

<sup>55</sup> No new data was produced and the World Bank review was conducted 'in-house' without local expertise (World Bank 2000).

<sup>56</sup> Chapman, Peter, Margaret Burchett, Peter Campbell, William Dietrich and Barry Hart, 2000. *Ok Tedi Mining Ltd. (OTML) Environment Peer Review Group (PRG): Comments on Key Issues and Review Comments on the Final Human and Ecological Risk Assessment Documents*. April. Available at: [www.oktedi.com](http://www.oktedi.com).

<sup>57</sup> Written submission from Levame village, reproduced in ICRAF (Individual and Community Rights Advocacy Forum 2000, 11-2. The ICRAF (2000) report was included as exhibit 'WKK-10' in an affidavit filed by William Kama Kupo on behalf of Ok Tedi Mining Limited on 9 February 2001 in the Supreme Court of Victoria in Melbourne, in Gabia Gagarimabu *et al.* vs. The Broken Hill Proprietary Company Limited and Ok Tedi Mining Limited

<sup>58</sup> See Filer, 1997.

<sup>59</sup> ICIHI argues that, 'all indigenous land should be made inalienable and secure, mining operations should be re-examined and, if necessary, suspended when the indigenous com-

munity is seriously affected and so demands' in ICIHI, 1987. *Indigenous Peoples: A Global Quest for Justice*. A report for the Independent Commission on International Humanitarian Issues (ICIHI). New Jersey: Zed Books, pg. 50.

<sup>60</sup> Meg Taylor (1997) argues that 'it is an absolute necessity to keep environmental regulation and audit at arm's length', pg. 24.

<sup>61</sup> See Fikret Berkes and Thomas Henly, 1997. 'Co-Management and Traditional Knowledge: Threat or Opportunity?' *Policy Options* March, pg. 29-31. See also Marc G. Stevenson, 1996. 'Indigenous Knowledge in Environmental Assessment'

# **Native Reluctance to Join Mining Industry Initiatives: Activist Perspectives**

**By Victoria Tauli-Corpuz and Danny Kennedy**

MINING, MORE OFTEN THAN NOT, IS A SIGNIFICANT STRAIN ON NATIVE peoples and nature. From its human impacts (social, cultural, economic, spiritual) to its ecological impacts (biodiversity loss, energy consumption, air pollution, water contamination and loss), mining is a devastating assault on people and place. This scenario has been documented time and again, from the foothills of the Sierra Nevada to the island of Bougainville, on every continent except Antarctica.

Mostly, it is the lived experience of first peoples. The mining industry targets landed indigenous populations generally perceived to be economically marginal and politically weak, and therefore more susceptible to “being mined.” The relative proportion of mineral extraction on native lands even in the United States, Canada, and Australia — a clear majority — compared to the amount of land controlled by those countries’ first peoples is a measure of this proactive policy by the mining industry.

The mining industry, however, thinks that its only problem is that it is misunderstood. “Despite the efforts of companies and industry associations, the mining, metals, and minerals industry has fallen into increasing public disfavor. It is seen, at best, as a necessary evil. It has become accepted thinking that the industry is incompatible with sustainable development,” wrote Sir Robert Wilson, Executive Chairman of Rio Tinto, in a recent newsletter (8:3) of the International Council of Metals and the Environment.

In response to the “gulf between the industry’s self-perception and how it is seen by others,” Rio Tinto and a group of other mining companies have begun a public relations offensive. This collaboration is part of a broader Global Mining Initiative (GMI) of the world’s largest mining houses. The process in question, in terms of professional ethics, lacks even procedural, let alone consequential, equity.

Spawned by the GMI of the World Business Council for Sustainable Development (WBCSD) through the International Institute for Environment and Development (IIED), the Mining, Minerals and Sustainable Development (MMSD) initiative describes itself as an *“independent process of participatory analysis aimed at identifying how mining and minerals can best contribute to the global transition to sustainable development.”*

Looking first at this mission statement, we have identified the following problems:

- No process is independent that relies on \$5 million or more from the very companies whose activities it is trying to analyze. This is the ultimate case of cooptation for those of us trying to tackle the industry meaningfully.
- No analysis is participatory that tries to take in the scope of issues created by mining, in terms of its sustainability or otherwise, in two years or less without considering the case of many of the world’s most mine-impacted communities.
- The space for indigenous participation on various levels of the multimillion-dollar bureaucracy created by the IIED has been tokenistic at best; and ignorant and insulting at worst.

- A large-scale boycott of the process (because it appears to have a pre-determined outcome) by mining-related environmental and human rights nongovernment organizations discredits the IIED's MMSD even amongst the public policy elite.
- And then there's that old red herring, sustainable development: if one subscribes to the Bruntland definition, mining clearly cannot be it - resource extraction is the depletion of a non-renewable resource.

Looking beyond the words to the deeds of the companies involved, one sees how troubling this process really is. Rio Tinto, for example, which Sir Robert Wilson leads, has left a trail of tears around the globe for more than a century. It is now up to its neck in unsustainable activities like trying to engage in uranium mining over the wishes of traditional landowners inside Kakadu National Park in northern Australia. It is 12.5 percent invested in (and therefore at least an eighth responsible for) the Freeport-run Grasberg mine in Papua, Indonesia, the locus of documented human rights and environmental concerns. That's not to mention the pollution caused by the Copper Pass tin smelter and endured by the citizens of Hull, England where the company has recently settled for a ground-breaking compensation deal with workers and local families. Nor did we mention the beset island of Bougainville, where poor environmental management by Rio Tinto's predecessor, CRA, led to ignited separatist tensions with Papua New Guinea, and, ultimately, a civil war that claimed 10,000 lives in the last decade.<sup>1</sup>

We don't want to single out Mr. Wilson and his company, Rio Tinto; any one of the other movers and shakers of the Global Mining Initiative, a group of nine companies (Anglo-American, BHP, Codelco, Newmont, Noranda, Phelps Dodge, Placer Dome, WMC), have similar records. The goal of the effort by these companies is to remake their image without acknowledging and dealing with their own histories.

We regret that the World Bank and the United Nations Environment Programme have recently announced their new joint effort with the IIED. The purpose of this collaboration is allegedly to create a forum to consider questions of the sustainability of the mining industry and its impacts on people worldwide. It is at least equally bereft of the meaningful involvement of these very people as was the initial MMSD process run by the IIED.

That the World Bank would participate in such an endeavor is no surprise to those following that institution's effort on the part of civil society. The Bank has been looking for a safe forum to evaluate its investments in mining, oil, and gas since these have become something of a cause celebre for World Bank watchdogs demanding that it abandon the corporate welfare stemming from these portfolios. Such a venue as the MMSD may greenwash the industry enough to justify continued investment. For the UN to enter into the fray, however, especially after the General Assembly rejected the mining industry's approaches at the Earth Summit in 1992, is particularly disappointing.

There are many more legitimate places for this institution to spend its time and energy supporting communities struggling with the environmental and social ramifi-

cations of mining development. Indigenous and other grassroots organizations gather often to discuss these issues and work out ways to resolve existing conflicts.

We know society will continue to choose to mine in order to source some of its material needs (though many could be met through re-use, recycling, and substitution), but the where, when, and how of mining should be decided by those most affected. The companies that have made a business out of stealing the wealth of communities through large-scale mines are not appropriate arbiters of how mining should take place. Nor should they decide which techno-fix or other strategy will make mining “sustainable.” NGOs and others will resist the Global Mining Initiative and look for critical thinking and support when the public is told that corporate specialists have worked out how to achieve “sustainable mining.”♦

### Footnote

<sup>1</sup>Prime Minister’s estimate at the start of peace talks in 1999.

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*Victoria Tauli-Corpuz (Kankana-ey Igorot) is Executive Director of the Tebtebba Foundation, an Indigenous Peoples’ International Centre for Policy Research and Education in the Philippines.*

*Danny Kennedy is an Australian activist and outgoing Director of Project Underground, an environmental and human rights organization based in Berkeley, California.*

*THE WORLD BANK'S "EXTRACTIVE INDUSTRIES  
REVIEW":*

# **A CREDIBLE AND INDEPENDENT REVIEW OF WORLD BANK ENGAGEMENT IN THE MINING, OIL AND GAS SECTORS?**

**By Marcus Colchester**

THE WORLD BANK'S EXTRACTIVE INDUSTRIES REVIEW (EIR) IS AN INITIATIVE of the World Bank, undertaken at the prompting of mainly US-based NGOs and members of Friends of the Earth-International to work out how it should deal with the oil, gas and mining sectors. International campaigns with slogans such as 'World Bank: Git your Ass out of Oil and Mines and Gas!' have been effectively communicated to anti-globalization demonstrators and triggered World Bank President James Wolfensohn to promise to review the Bank's engagement in the sector. NGOs had hoped that this review would be along the lines of the World Commission on Dams (WCD).

However, the Bank has a perception that it was somehow prevented from being able to 'buy in' to the WCD<sup>1</sup> -- it has not adopted any of the WCD's main recommendations -- and it has thus proposed an Extractive Industries Review procedure which lacks many of the elements of autonomy that gave the WCD its credibility with people outside the Bank. In the case of the EIR, the Bank aims to actively engage with the process in order to achieve 'Bank buy in' and so that it can be assured that the process will result in 'actionable recommendations'. The procedures are a bit like a hybrid between a World Bank Sector Review process and the WCD. Also, unlike the WCD, the aim is not to review the whole Mining, Dams and Oil sector, but to focus on the World Bank Group's (WBG) engagement with the sector.

This report summarises my personal impressions of the EIR based on attendance at the Planning Workshop but also includes some basic information about the process designed to make these comments intelligible to those who did not participate.

### **Terms of Reference**

The scope of the EIR is to review the World Bank's role in extractive industries (Oil, Gas and Mining) in the context of sustainable development and poverty alleviation. Nongovernment organizations expressed concern about an opening phrase in the Terms of Reference, which states that the WBG 'believes that such industries can make a positive contribution to sustainable development and poverty reduction in its member countries'. They felt that this showed that the World Bank had drawn its conclusions even before the EIR had started. The meeting was given the impression that the offending phrase would be removed.

There was not much resistance to NGO recommendations for the inclusion of themes like prior and informed consent, recycling, energy alternatives, biodiversity, indigenous peoples, global warming etc. in the scope of the review, but industry spokespeople expressed anxiety that the study would get unduly taken over by global warming concerns. A spokesperson for the International Labor Organization wanted the interests of workers threatened with retrenchment addressed.

It was agreed that Dr. Emil Salim, ex-Indonesian Minister for the Environment and Population during the 1980s and early 1990s, would write a letter to James Bond, Director of Mining at the World Bank, clarifying the TORs and that James Bond would reply. These letters would be posted on the web and in this way it was hoped

that concerns about the scope and intent of the EIR would be allayed.

### **EIR Process**

Unlike the WCD where there had been a whole board of independent commissioners the EIR keys around an 'Eminent Person' (EP), Dr Emil Salim. It is he, alone, who has authority to decide what the final report of the consultation process will say. He will report directly to WB President Wolfensohn. However, the World Bank has reserved to itself the role of making the 'management recommendations' to the Board of Executive Directors. Dr. Salim has already reacted to this limitation in the process and has insisted on the right to directly address the Board of Executive Directors if he feels that the Management Recommendations do not adequately reflect the ideas in his own report. Dr Salim noted openly that the success of the review rests in trust and he publicly committed himself to acting fairly and frankly.

A flow chart setting out how I understand the review process and an organigram can be found on the following pages. Further details should be sought in the official documentation [www.eireview.org](http://www.eireview.org).

### **Focused Research**

The Terms of Reference mention that focused research will be contracted to complement the regional workshops. It was queried who would decide on this research and who would do the contracting. The EP insisted that this would be carried out at his discretion (ie not the World Bank's) and would address cross-cutting themes. It was not clarified what these themes will be but indigenous peoples, governance and gender issues were mentioned.

### **Expert Groups**

Likewise the Terms of Reference mention the creation of Expert Groups to assist the work of the EP and we sought clarification about these too. I urged that the EP should recruit a representative group of commissioners or experts to accompany him in his work, who should share with him the task of assessing inputs and drafting the report and recommendations. The EP's response was that he will select these experts himself – he favours having regional groups that will assist the regional consultations and maybe a final group to help him through the final drafting stages.

### **Writers**

The TORs do not say who will actually draft the consultation report and we sought clarification on this. The conclusion was that writers would be contracted directly by the EP and would work under his close supervision. The EP requested suggestions of who might take on this role.

### **Role of the World Bank**

The key figure on the World Bank's side in this process is the World Bank Director

of Mining, James Bond. The degree to which the WBG appears to dominate the EIR process was highlighted repeatedly throughout the meeting by NGOs and tacitly by some IGOs. Some NGOs expressed a great deal of concern about the number of Bank staff at the meeting. On the other hand the lack of anyone from the GEF was also regretted. In the end there was not clear agreement on what role the WBG should have at future meetings: some thought the Bank should limit its role to listening and providing information; others asked that it be more 'actively involved'.

A view was expressed that the WBG had the role of being both player and referee in the process [or, maybe, judge and jury and executioner?]. The spokesperson for Friends of the Earth International forcefully expressed the view that the EIR was only a process for legitimising further WBG engagement in the sector. Some NGOs called for a moratorium on WBG funding of the extractive industries during the course of the EIR, and some made clear that they think the WBG should move out of the sector altogether.

How autonomous is the day to day functioning of the EIR? The Eminent Person and his assistant are located in Jakarta. However, the EIR secretariat is located within the IFC, the Private Sector arm of the World Bank, on the same floor as the mining department. Three of the four employees of the secretariat are seconded from the World Bank, and the head of the secretariat is a one-time World Bank employee though he has been out of the Bank doing other development work in the past seven years. Currently all the staff in EIR secretariat in Washington DC have employment contracts with the World Bank.

Nongovernment organizations persistently queried the location of the Secretariat in the IFC and recommended that it be relocated to Jakarta. Dr Salim explained that he accepted the secretariat's presence within the World Bank as a means of facilitating his having access to confidential information, to create a 'bridge of trust' and promote World Bank 'ownership'. However, he stressed that he would insist that the staff would be answerable to him on all matters and that he would create a 'Chinese Wall' between the secretariat and the Bank. [The kind of wall through which 'trust', 'ownership' and 'confidential information' can easily flow?]. There was no direct answer given to the question of whether the EP had personally selected the staff. It seemed that some of the staff had not actually met him prior to the meeting.

Nongovernment organizations remain very suspicious about the location and independence of the Secretariat and this may be the one issue on which they really don't share a view with the EP.

## **Budget**

The workshop was not given the details about the budget. It is understood that the EIR currently has a budget of some US\$3.1 million. About US\$1.5 million has already been allocated by the World Bank. The remaining US\$1.6 million is unallocated.

Nongovernment organizations stated the view that the Eminent Person, not the



*Source:* \*An NGO report on the Planning Workshop of the Extractive Industries Review of the World Bank" held in Brussels on 28-30 October 2001.

World Bank, should control the budget. During the workshop Dr. Salim stated that he has insisted on full control of the future spending of the budget. Further funds are being sought.

### **Planning Workshop**

The workshop was led by a team of professional facilitators who were a well-meaning lot. However, it was clear that they were often out of their depth on substantive discussion and as a result they missed many opportunities to lead discussions to more conclusive endings. A lot of issues were left unresolved as a result.

Concern was expressed at the relative lack of IPOs and African participants. Materials were not provided in Spanish, French or Russian and the quality of interpretation was poor. There was no opportunity to actually address any substantive issues, except to flag them as subjects for the regional discussions, but this was not expected as this was a planning meeting.

### **Industry Concerns**

Industry representatives at the meeting did not speak a great deal. Strong views that were expressed included the following:

- The World Bank is only funding 2-3% of FDI in the EI sector – do WB investments in the sector make sense? Would these projects get funding anyway and what was their value?
- Oil, Mining and Gas comprise very distinctive sectors and should not be conflated.
- Social and environmental issues are important for industry.
- Opportunities should be provided for affected communities to tell their stories.
- There should be a balance between 'good' and 'bad' cases.

### **Government Concerns**

Government participants did not have very strong views. Their main concern was that the process should result in clarification of the obstacles that prevent EI from making a positive contribution to sustainable development and poverty alleviation and what the WBG could do about them.

### **Regional Workshops**

It was agreed that the regional workshops should have a balanced participation of four sectors: civil society, business, government and the WBG. Instead of 'stakeholders', the term 'interest groups' should be used. The regional meetings would be open but funds for participation should be targeted to ensure participation by poorer

sectors including CBOs and IPOs as well as NGOs and trades unions. Small mining businesses should also be included. Gender balance should be sought. The principle of self-selection was agreed to be crucial. The meetings should allow time for the presentation of testimonies as well as focused discussions on key themes. Materials should be provided in a timely manner in four languages – Spanish, French, English and Russian. Good and bad experiences should be sought. It was important to get inputs from other sectors.

### **Field Visits**

It was agreed that field visits should be made by the EP and his (undefined) team to get a first hand view of some cases.

### **Relation to OED and OEG Reviews**

The World Bank and IFC both have 'independent' quality assessment units, referred to as the Operations Evaluation Department (OED) and the Operations Evaluation Group (OEG), which report direct to the Board of the Bank and IFC and not to senior management. Both OED and OEG are carrying out reviews of WBG performance in the sector. These reviews will not be completed within the same time frame as the rest of the EIR but will continue into June 2003. At present it is suggested that draft reviews will be provided to the final workshop in June 2002.

### **Schedule**

The aim is for the report of the EP (at least in draft form) to be ready in time to be presented to the Rio + 10 meeting in Johannesburg. The regional meetings are planned for January to April 2002. The ECA meeting, tentatively planned for Bratislava in November/December 2001, will be delayed until next year and maybe held in the Ukraine. The location of the other meetings was not decided.

### **Final Meeting**

I received no reply when I queried what was envisaged with regard to the Final Workshop. This is worrying as it is at this workshop that the draft report of the EP will be discussed and commented on.

### **Strategic Perspectives: Where Does it All Lead?**

My main concern in leaving the workshop is that we don't really have any sense of what the EIR is leading to in terms of action by the WBG. In terms of content this is fair enough – the outcome should depend on the inputs from the regional meetings and other information provided. However, despite my asking for clarification, the Bank declined to give any clear idea of what kind of steps it could take to 'operationalise' any of the recommendations that come from the EIR. Off the record, a World Bank staffer noted that a long term option not favoured by management at the present would be to develop a Strategy and Operational Policy on Oil, Gas and Mining

**UPDATE:**

Since the Planning meeting in 2001, NGOs have raised many concerns about EIR, through meetings and correspondence with the Eminent Person. The main concerns raised (and outcomes so far agreed) include the following:

- TORs should be revised to ensure an open and inclusive enquiry and not a pre-judged outcome and should provide real independence for EP. (TORs have been revised.)
- EP should be supported by a group of advisers from the various interest groups to share the burden of the work and ensure greater representation and independence. (One advisor has been contracted and more are being sought.)
- Focused research on specific issues should be contracted. (An independent participatory review to be carried out by the Tebtebba Foundation and the Forest Peoples Programme on 'Indigenous Peoples, Extractive Industries and the World Bank' has been agreed on. Other focused research is also being discussed.)
- EP and advisers should visit impacted communities. (Some visits are planned.)
- EIR Secretariat should not be housed in the International Finance Corporation on the same floor as the WBG Mining Department nor staffed by World Bank employees. (The head of the Secretariat but not other staff has moved to Jakarta but the personnel remain the same and are still WBG employees.)
- EP should control the full budget and not allow over half to be controlled by WBG. (EP now has greater control of the budget and additional independent funding is being sought.)
- Regional workshops should be open to all observers, delayed, provided with good preparatory documents in the right languages and allow time for testimonies to be presented. Sponsored participants should be self-selected. (All these suggestions appear to have been agreed on but there is still a dispute about the date and location of the Latin America consultation.)
- WBG staff should participate as observers not 'stakeholders' in regional workshops. (WBG will have an 'active role' in the regional meetings.)
- The review should have more time. (Nine months extension agreed.)
- There should be time for EIR to take on board the results of the internal review of the sector being carried out by the WBG Operations Evaluation Department and Group. (EP will have 45 days after OEG/OEG review is issued before submitting his final report.)

(OGM), but that this could take years.

Another scenario would be that the responsibility for Oil, Gas and Mining (OGM) could be passed to the Vice-Presidency for Environmentally and Socially Sustainable Development. A third option, which could be considered, would be the development of 'alternative compliance mechanisms', 'new forms of involving stakeholders'. This is the approach which I personally feel offers the most mileage, and would allow scope for the deployment of a strong argument that mines-affected groups should have the right to prior and informed consent. A staff person noted out of plenary that another form of actionable recommendation would be 'Best Practice' guidelines, such as those the Bank already has for off-shore oil and gas projects. During the plenary, James Bond evinced a great reluctance to answer questions about the ways in which recommendations could be couched in terms of Bank procedures, claiming such questions were 'unfair'. When pressed, he answered that options for operationalizing EIR recommendations might range between setting up a special Panel to adopting an Operational Policy or 'anything in between'.

The strong reluctance of the World Bank to discuss these issues in open plenary left me wondering whether the WBG's plea for the process to be one that allows 'buy in' and 'actionable recommendations' is serious. Rather it seems they want to reserve for themselves the role of deciding what concrete actions and operational guidance should result from the EIR.

By the end of the meeting it was still not clear if the Management Recommendations would be made publicly available in draft before going to the Board. It will be necessary to insist on this if the process is to have any credibility.

Despite its flaws, the EIR seems to offer an important opportunity for civil society groups to make clear their views about the World Bank's engagement in Oil, Mining and Gas. The more vigorously civil society engages, the more chance there is that the real issues will come to light. ♦

*Marcus Colchester is the Executive Director of the Forest Peoples Programme. For more details on EIR. See: [www.forestpeoples.org](http://www.forestpeoples.org) and [www.eireview.org](http://www.eireview.org).*

### **Endnote:**

<sup>1</sup> NGOs query the basis for this suggestion. Although it is true that the World Bank and IUCN, which jointly set up the WCD, were excluded from direct participation on the team of Commissioners – as it was felt this would compromise its independence – the Bank was in no way excluded from participating in the wider WCD process. The lack of 'buy in' by the World Bank was in many ways self-imposed. No budgets were allocated for Bank staff to travel to WCD meetings and Bank senior management pre-judged the outcome of the Review. Some staff rejected the Commission's draft conclusions even before the Commissioners had agreed to them.

# ANNEXES

## ANNEX A

### The London Declaration

- *Refuting the unsustainable claims of the mining industry*
- *Opposing current models of “engagement”*
- *Demanding full recognition of community rights*

We, twenty-four representatives of communities and groups affected by mining from Asia-Pacific, Africa, India, South and North America - met in London from May 18 - 23, 2001, to compare the impacts of mining on the lives of communities and ecosystems and to share strategies on how to confront the industry.

London is the minerals capital of the world, where a major proportion of global capital investment in mining is raised and the most active metals trading takes place. It is here that the international headquarters of some of the major mining companies are located, and that recent initiatives have been launched, seeking to persuade the “international community” that the minerals industry can continue many of its unacceptable practices. These initiatives include the Mining, Minerals and Sustainable Development programme (MMSD) which is supported by more than thirty leading mining companies, the World Business Council for Sustainable Development (WBCSD) and the London-based International Institute for Environment and Development (IIED).

We have seen our peoples suffering for many years from mining in all stages and forms, and from exploration to development to abandonment. Industrial mining has caused grievous pain and irreparable destruction to our culture, our identities and our very lives. Our traditional lands have been taken, and the wealth seized, without our consent or benefit.

Invariably mining imposed upon our communities has poisoned our waters, destroyed our livelihoods and our food sources, disrupted our social relationships, created sickness and injury in our families. Often our communities have been divided by ‘imported’ civil conflicts. Increasing mechanisation has denied many of us a role we once had as mineworkers.

In recent years the mining industry has become more aggressive and sophisticated in manipulating national and international laws and policies to suit its interests. The mining laws of more than seventy countries have been changed in the past two decades. Laws protecting indigenous peoples and the environment are undermined. Structural adjustment programmes have forced many governments to liberalise capital flow for mining expansion. Their role has turned away from responsibility for the well-being of their citizens to becoming servants of the global corporations.

As a result, community resistance has significantly increased; at many sites partnerships have formed between workers and local people. In response the industry has panicked, undertaking a massive public information campaign extolling the virtues of large-scale min-

ing, and promoting self-selected and self-regulated “codes of conduct”.

The latest in the series of corporate-led propaganda offensives is the Global Mining Initiative (GMI), which was initially proposed by three major mining companies, and aimed at influencing the “Rio + 10” UN World Summit on Sustainable Development, to be held in South Africa in September 2002. The GMI has a three-pronged agenda: the self-styled research and “dialogue” programme - Mines, Minerals and Sustainable Development (MMSD); a global conference called “Resourcing Our Future” and the establishment of a new international pro-mining organisation.

These initiatives promote at least four half truths or myths:

1. the supposed need for more and more minerals from ever more mines;
2. the claim that mining catalyses development;
3. the belief that technical fixes can solve almost all problems; and
4. the inference that those opposed to mining mainly comprise ignorant and “anti-development” communities and NGOs.

Our experience emphatically belies these assumptions. We now demand the following:

1. A moratorium on new large-scale mining projects in greenfield areas of Asia, Africa and Latin America;
2. Companies must clean up the terrible damage caused by their past and current mines, without drawing on public funds, and be held morally, legally and financially responsible for their misdeeds;
3. The World Bank/IMF cease funding of industry-initiated mining codes which are imposed on the governments of Africa, Asia-Pacific and Latin America;
4. Mandatory higher standards in all mining;
5. That surface and subsurface rights of indigenous peoples and all mining-affected communities be unequivocally respected and enforced, as well as their right to veto unacceptable projects.

We seek solidarity from civil society and specifically from development and environment NGOs, in response to the global outcry from communities affected by mining. We ask these organisations:

1. To ensure that mining-affected communities are fully informed in advance on all aspects of mining and minerals projects and empowered to speak for themselves in response;
2. To refuse to participate in initiatives, such as MMSD, which are primarily spear-headed by the industry to serve its own purposes.;
3. To advocate for politically and legally enforceable measures that will hold the mining industry accountable, above all to mining and exploration-affected communities

Signatories to the Declaration (in alphabetical order):

Armando Perez Araujo YANAMA (Colombia)

Ms K Bhanumathi MINES, MINERALS AND PEOPLE, and ASIA-PACIFIC WOMEN AND MINING NETWORK (India)

Abu A. Brima NETWORK MOVEMENT FOR JUSTICE AND DEVELOPMENT (Sierra Leone)  
Ms Joji Carino, TEBTEBBA FOUNDATION (Philippines) and PIPLINKS (England)  
Catalino Corpuz, MINEWATCH ASIA-PACIFIC and TEBTEBBA FOUNDATION (Philippines)  
Abdulai Darimani, THIRD WORLD NETWORK AFRICA (Ghana)  
Xavier Dias, MINES, MINERALS AND PEOPLE (India)  
Jose De Echave, COOPERACION (Peru)  
Remedios Fajardo, YANAMA (Colombia)  
Tito Natividad Fiel, DCMI (Philippines)  
Yenis Gutierrez, YANAMA (Colombia)  
Esther Hinostraza, COOPERACION (Colombia)  
Joan Kuyek, MININGWATCH CANADA (Canada)  
Chalid Muhammad, JATAM (Indonesia)  
Adam Rankin, CENSAT AGUA VIVA (Colombia).  
Ravi Rebbapragada, MINES, MINERALS AND PEOPLE (India)  
Hendro Sangkoyo, JATAM (Indonesia)  
Ramamurty Sreedhar, MINES, MINERALS AND PEOPLE (India)  
Roch Tasse, MININGWATCH CANADA (Canada)  
Hildebrando Velez G., CENSAT AGUA VIVA (Colombia)  
Jo M Villaneuva, LRC-KSK (Friends of the Earth) (Philippines)  
Andry Wisaya, JATAM (Indonesia)  
Peter Yeboah, WACAM (Ghana)

Supported by:

Frances Carr, DOWN TO EARTH: THE CAMPAIGN FOR ECOLOGICAL JUSTICE IN INDONESIA (England)  
Stuart Kirsch, UNIVERSITY OF MICHIGAN (USA)  
Frank Nally, SOCIETY OF ST. COLUMBAN (England)  
Geoff Nettleton, PIPLINKS (England)  
Roger Moody, PARTIZANS (England)  
Richard Solly, PARTIZANS (London)

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## ANNEX B

### The Global Mining Initiative: Questions and Answers\*

#### **What is the Global Mining Initiative?**

The Global Mining Initiative (GMI) is a programme by the world's leading mining and metals companies to develop their industry's role in the transition to sustainable development. The programme will contribute to preparations for the World Summit on Sustainable Development in South Africa in September 2002.

The GMI was formed as a leadership exercise in 1998 by nine mining industry Chairmen/CEOs. They were concerned about ensuring the industry's long-term contribution to sustainable development.

The GMI has three components: the launch of an independent analysis of the challenges the industry must meet to contribute constructively to sustainable patterns of economic development; the organisation of a major global conference Resourcing the Future on mining, minerals, metals and sustainable development; and the creation of a strong global network of institutions to represent and lead the industry in meeting the challenges.

The GMI is a change agent; it has no formal institutional structure and is not intended to become a permanent body.

#### **Is it just about mining?**

No. The GMI is concerned with all stages of the mining, minerals and metals cycle: from exploration through project development and mine operations to closure; and from processing through to fabrication, use, recycling and ultimate disposal of materials.

#### **How did it start?**

A number of Chairmen and CEOs first got together informally in late 1998 to discuss the challenges facing the mining, minerals, metals industry. They shared a conviction that the industry needed to be more effectively engaged in decisions affecting its future. They recognised some of the problems of the industry, particularly poor public perceptions of its environmental performance and the industry's consequent growing vulnerability to increased regulation based not on scientific analysis but popular prejudice. They agreed to a series of actions, which subsequently became known as the GMI. Crucial to the programme was a willingness by the company leaders to acknowledge that the industry has a case to answer in terms of both its environmental and social performance.

#### **How long will GMI last?**

The GMI will last until May 2002, leading up to the World Summit on Sustainable Development to be held in South Africa in September 2002 to mark the tenth anniversary of the Rio Earth Summit. The GMI will conclude with a major global conference on mining and sustainable development (see below), which will set the agenda for the ICMM moving forward.

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**Source:** [http://www.globalmining.com/home/gm\\_frame.asp](http://www.globalmining.com/home/gm_frame.asp)

**Who is in it?**

There are currently nine companies whose Chairmen/CEOs are participating in all aspects of the GMI:

Anglo American  
BHP Billiton  
Codelco  
Newmont  
Noranda  
Phelps Dodge  
Placer Dome  
Rio Tinto  
WMC Limited

**Why this group?**

These companies, most of whom have been involved from the earliest discussions which led to the launch of the GMI, make up the Mining and Minerals Working Group of the World Business Council for Sustainable Development (WBCSD). There is scope for other mining and minerals companies which are, or become, members of the WBCSD to be invited to join the Mining and Minerals Working Group. Other interested mining and metals companies are invited and actively encouraged to participate in all the activities arising out of the GMI initiative.

**What is the World Business Council for Sustainable Development (WBCSD)?**

The WBCSD, based in Geneva, is an association of corporations united by a commitment to sustainable development. The GMI group asked the WBCSD to initiate on their behalf an analysis of the role of mining, minerals and metals in sustainable development. The WBCSD contracted the London-based International Institute for Environment and Development (IIED) to develop a scoping study, which led to the formation of the Mining Minerals and Sustainable Development (MMSD) project.

**What is MMSD?**

The Mining Minerals and Sustainable Development project (MMSD) is an independent, stakeholder-based analysis to answer the question how best the mining, minerals and metals industry can contribute to society's transition to sustainable development.

MMSD has a work group that is conducting the study along the lines suggested by the International Institute for Environment and Development, a non-governmental organization (NGO) contracted by the World Business Council for Sustainable Development to manage the MMSD. The method includes both analysis and consultation with as wide a range of stakeholders as can be reached.

The MMSD is scheduled to bring out a draft report of its work in March 2002 and a final report in April. It will document current practice and, based on consultations with a wide array of stakeholders including the industry, attempt to deliver key insights and pointers to changes that will be required to implement a sustainable development model for the industry.

A distinguished body of 24 individuals, mostly from outside the mining industry, provide peer review of the work group's analysis to ensure independence and integrity. The MMSD structure is held together by a project coordinator who is retained by WBCSD.

**What is the GMI's response to the MMSD's draft report?**

We are encouraged by the progress of the MMSD. We are currently reviewing the MMSD's

analysis and initial recommendations and look forward to discussing these with other stakeholders at the GMI conference scheduled for Toronto, Canada, on May 12 - 15, 2002.

It is important to note that the MMSD objectives were very ambitious and have not been fully realized in the time available. Nevertheless the research and analysis process has been very valuable and laid a firm foundation at identifying different concerns and getting processes underway for future work in collaboration with our many industry stakeholders.

Of course, there will be a diversity of opinions throughout the industry. However, we all share the view that there is a strong business case for responsible management of the full range of sustainable development issues and that this should be part of our engagement with stakeholders such as employees, shareholders, financial institutions, local communities, customers, suppliers, joint venture partners, regulators, the media and non-governmental organizations.

### **Aren't MMSD and GMI really the same thing?**

No. MMSD came into being because of the GMI, but it is not responsible to the GMI. Mining sponsors have contributed more than US\$7 million to fund the MMSD's analysis with no conditions, except to be kept informed and consulted like other stakeholders. MMSD also has non-mining sponsors; it is supported by other stakeholders, and enjoys a governance structure that underpins its independence.

The mining industry does not control the MMSD process, neither the way the issues for analysis have been selected, nor the way they are to be analysed, nor who will be consulted, nor how the final document is to be written. The industry voice is one among many stakeholders. More details on the MMSD project are available at [www.iied.org/mmsd/](http://www.iied.org/mmsd/) or by e-mail at [mmsd@iied.org](mailto:mmsd@iied.org).

### **What are the components of the GMI?**

The components are the analysis, an industry conference on sustainable development to discuss the industry's contribution, and the creation of representative structures to carry forward the sustainable development agenda.

### **How do they fit together?**

The analysis will provide pathways and options for industry and stakeholder action on a wide range of issues such as disposal of industry wastes, environmental performance, the fair distribution of economic benefits, community consultation and human rights, as well as product stewardship.

This will help the industry come to grips with how mining, minerals and metals can contribute to sustainable patterns of economic development. The industry will start the process of defining and articulating its response to the MMSD analysis at a global conference scheduled for Toronto, Canada, on May 12 - 15, 2002.

To keep up the momentum of change and maintain the engagement with stakeholders represented by the MMSD consultations and the conference, a new international representative body, the International Council on Mining and Metals (ICMM) has been formed to guide the implementation phase of the industry's commitment to its sustainable development model. The organisation is built on the respected International Council on Metals and the Environment (ICME) and is headquartered with a small expert staff in London.

### **Why is a review of industry associations undertaken as part of the GMI?**

An objective of the GMI is to provide an effective tool for industry to help carry forward the outcomes of the Mining Minerals and Sustainable Development (MMSD) component of the

GMI. The associations are the industry's natural vehicles to deliver the most effective follow-up and leverage for the outcomes of the programme.

One of the initial concerns of companies participating in the GMI was the fragmentation and duplication of industry representation and the attendant costs. This situation hindered the industry's ability to provide leadership in carrying forward the outcomes of the GMI. Producing a better model for external representation was achieved by the transition of ICME to a broader sustainable development leadership organisation, ICMM.

The Secretary General of ICMM is an eminent conservationist, Dr. Jay D. Hair, who has previously led two of the world's most prominent environmental organisations.

### **What is the mandate of ICMM?**

The ICMM has the mandate to:

- initiate, conduct, promote and communicate research and analysis into the interaction of the world's mining, minerals and metals industries with the economy and the environment and communities;
- seek to lead change within these industries by stimulating discussion and coordinating activities between and among member companies, others involved with the industry and their regional, national, commodity and international associations;
- develop and communicate a clear and authoritative position on global issues affecting the future of the mining, minerals and metals industries; determine and promote global best practice performance standards within these industries; and,
- maintain a high-level dialogue with government and inter-government bodies, non-government and community organisations, academic and professional institutions and other stakeholders.

### **Can other companies get involved in the GMI?**

The overall aim is for as many companies from the mining, minerals and metals sector to be involved in the activities associated with the GMI as possible. It has always been the intention that wider industry participation will be sought for projects within the GMI. For example, the MMSD project has some 30 participating companies, and it is hoped to involve more either on the global level or through regional arrangements. Further involvement in other GMI activities is actively encouraged.

### **What are the companies doing it for?**

Many of the participating companies will put different emphasis on their priorities and motivation. In general, all share the view that there is a strong business case for responsible management of the full range of sustainable development issues; and that this should be part of their engagement with stakeholders such as employees, shareholders, financial institutions, local communities, customers, suppliers, joint venture partners, regulators, the media and NGOs.

At the same time, the companies want to help raise the debate from the current exchanges on individual issues to a fuller, shared understanding of what the overall picture looks like. As well as posing some tough challenges for the industry, this will ask searching questions about how governments, international organisations and other representatives of civil society can play a constructive role.

**How committed are the companies?**

Managing these issues is an integral part of the current and future success of the mining, minerals and metals industry. The companies are committed to making the GMI a meaningful change agent.

**How do we know this is more than PR?**

From the outset, the companies have been clear that this initiative is about raising industry performance. They recognise that the conclusions of the work will point to the need to change some aspects of what they do.

Development of pathways and options to meet the challenges the industry faces is a shared responsibility of the industry and all its stakeholders, including its critics. It will succeed only if it leads to clear and significant changes in the behaviours of both the industry and its stakeholders.

**How much money are the companies putting in?**

Those companies sponsoring the MMSD project have so far pledged over US\$7 million for the analytical work. In addition, the smaller group working on other aspects of the GMI have contributed other funds and staff time, for example to support the work with industry associations and to get the planned 2002 conference up-and-running. The financial commitment by the industry is substantial, and is given with no conditions, except that the industry be treated the same as other stakeholders and participants.

**What is the aim of the 2002 conference?**

The May 12 - 15, 2002 conference *Resourcing the Future* is the platform for the industry to develop its sustainable development case with others. The objectives of the conference are to enable the leaders of the industry to engage with the leaders of government and NGOs; to achieve open and inclusive debate; to hear views from outside the industry; to develop an industry consensus on sustainable development; and to describe and encourage best practice. It will set the agenda for the ICMM moving forward.

This will close out the formal work of the GMI and prepare the industry for its contribution to the World Summit on Sustainable Development in South Africa in September 2002. It will help ensure there is effective follow-through in the form of changed behaviours, cement relationships which have emerged from the MMSD analysis and launch a renewed network of external representation.

**When and where will it be held?**

The Royal York Hotel in Toronto, Canada, on May 12 - 15 2002. More information is available on the dedicated web site [www.gmiconference.com](http://www.gmiconference.com).

**Who will come?**

There is likely to be strong participation by the industry, its suppliers and customers. Leaders of social and environmental NGO's and government ministers have been invited. Sponsorships will ensure that local communities, indigenous groups, NGOs and developing country representatives are able to participate and give the event the necessary balance.

**Where can I find more information on this initiative?**

By logging on to:

[www.globalmining.com](http://www.globalmining.com).  
[www.gmiconference.com](http://www.gmiconference.com)

[www.icmm.com](http://www.icmm.com)

By e-mailing:

[contact@globalmining.com](mailto:contact@globalmining.com)

[info@gmiconference.com](mailto:info@gmiconference.com)

[info@icmm.com](mailto:info@icmm.com)

By telephoning:

Hugh Leggatt in London (GMI) (44) (0) 20 7753 2273

Anita Roper in London (ICMM) (44) (0) 20 7290 4930

By writing to:

The Global Mining Initiative  
London SW1Y 4LD  
United Kingdom

The World Business Council for Sustainable Development  
4, Chemin de Conches  
1231 Conches - Geneva  
Switzerland

## ANNEX C

### BHP Billiton Ltd. Rejoinder



BHP Billiton Limited  
600 Bourke Street  
Melbourne Victoria 3000 Australia  
GPO BOX 86A  
Melbourne Victoria 3001 Australia  
Tel +61 3 9609 3333 Fax +61 3 9609 3015  
bhpbilliton.com

16 April 2002  
Mr Jong-Gil Woo  
Human Rights Officer  
Office of the High Commissioner for Human Rights  
UNOG-OHCHR  
Geneva 10 CH-1211  
Switzerland

Dear Mr Woo,

Thank you for your recent e-mail, attaching Stuart Kirsch's case study on Ok Tedi. We welcome the opportunity to comment on the paper, prior to its publication by the Indigenous Peoples' International Centre for Policy Research and Education. Given the time constraints, we will limit our comments to the substantive issues only.

As you may be aware, prior to BHP Billiton's withdrawal from the Ok Tedi project, we consulted widely with interested stakeholders. The subsequent negotiations on the exit involved the other two shareholders, Inmet and the PNG Government, and the agreement was conditional on the agreement of the affected villages to the mine continuing and to the terms of compensation.

It is worth emphasising that BHP's preferred option was early closure of the mine, due to the environmental and related social damage. This is what we proposed to the other shareholders. This was not acceptable to them, in the case of the PNG Government because of the negative impact it would have had on the financial, economic and social situation in PNG, and particularly in the Western Province. We respect that view.

Unfortunately this is a situation where there must be trade-offs between environmental impacts, and the economic and social benefits associated with the Ok Tedi mine, and this judgement is ultimately a matter for the PNG Government and the affected communities. This fundamental point is overlooked in the case study. Because both the PNG Government

and the affected communities supported mine continuation, even if we were to have unilaterally withdrawn from operating the mine the PNG Government as the regulator would almost certainly have required the mine to continue under different management arrangements.

There are a couple of significant factual inaccuracies relating to the recent exit agreement and the Mine Continuation Agreements. First, BHP Billiton has not received a waiver for future environmental liability from the PNG Government. Rather it has been indemnified by the Sustainable Development Program Company, which is the beneficiary of the dividend stream from the 52% equity that BHP Billiton transferred to it.

Second, as regards the community consultation process, the PNG Government and OTML considered this necessary to confirm that the communities associated with the mine wanted the operations to continue, and that this decision was being made in full knowledge of likely future environmental impacts, and the regime be put in place to regulate the mine and to compensate for any loss suffered as a result of its operations. OTML commenced the process of negotiating the agreements over two years ago, and it has been developed and implemented in accordance with the principles of informed consent. The Melanesian Peace Foundation was commissioned to assist the local communities develop negotiation skills. ICRAF, Church groups, and three levels of government provided oversight of the process. To date, more than 90% of the villages have signed the MCAs with OTML.

We will contact you again in the near future regarding the draft report of the December workshop.

Yours sincerely,

Graham Evans  
Vice President, Government and Community Relations

CC

Victoria Tauli-Corpuz  
Stuart Kirsch

## ANNEX D

# AUSTRALIAN MINING GIANT LEAVES ENVIRONMENTAL DISASTER IN PAPUA NEW GUINEA\*

By Will Marshall

SYDNEY, Australia (April 9, 2002 - World Socialist Web Site)—Australian-British mining giant BHP-Billiton announced at the end of January that it was severing all ties with the Ok Tedi copper mine in Papua New Guinea. Facing the possibility of legal liabilities amounting to billions of dollars due to environmental damage, BHP-Billiton secured a deal from the PNG government that indemnifies the company against all future compensation claims.

BHP-Billiton originally intended to close down the mine to avoid further litigation but was opposed by its minority partners, Inmet and the PNG government, which have retained their 18 and 30 percent stakes in the mining project. Mining is now expected to continue for the next 10 years.

The cash-strapped government of Prime Minister Mekere Morauta was determined to extend the mine's life in order to retain its share of the mine's profits, plus \$A30 million in royalties and taxes each year. The PNG parliament passed legislation last December to rubberstamp an agreement to "discharge the Company, BHP, the Company's Shareholders... from all and any demands and claims arising directly or indirectly from the operation of the Mine." This cleared the way for the company, formerly the Australian-owned BHP, to hand over its 52 percent shareholding to a new entity, PNG Sustainable Development Program (PSDP), which the PNG government will effectively control.

BHP dumped 80,000 tons of tailings (rock waste) containing copper, zinc, cadmium and lead directly into the Fly and Ok Tedi Rivers every day for two decades. This has ruined the lands of thousands of subsistence farmers, poisoned some 2,000 square kilometers of forest, polluted the Ok Tedi River and contaminated a section of the Fly River, PNG's second biggest river system, severely depleting fishing stocks. According to a number of experts, the damage will continue for lifetime. Royal Melbourne Institute of Technology Professor Doug Holdway said:

"We're going to see a lot more damage in the future, not less. If you put 400 million tons of tailings down a river system, there should be no surprises that you're going to have significant and biological impacts that will last for decades, possibly even centuries."

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*This recent news article provides an alternative perspective on recent events at Ok Tedi to which the letter from BHP Billiton refers. Source: **PACIFIC ISLANDS REPORT**, Pacific Islands Development Program/East-West Center With Support From Center for Pacific Islands Studies/University of Hawaii, <http://pidp.eastwestcenter.org/pireport/2002/April/04-17-12.htm>*

The mine's operating company, Ok Tedi Mining Limited (OTML), admitted that compensation claims for acid rock drainage - caused when microorganisms act on rock waste to create acids - could run as high as \$7.01 billion each year for 50 years. The Mine Continuation Agreement Act passed last December incorporates agreements with some local landowners. In effect, the company has handpicked some representatives to sign away the rights of the entire local population and all future generations. Under the agreements, "each existing and future member of that person's Community or clan, including, without limitation children and persons who are subsequently born into, or who subsequently join, that Community or clan" is bound not to make any future claims.

Non-government organisations have accused the government and the company of hoodwinking local people. PNG Environmental Law Center spokesperson Almah Tararia said: "Based on my conversations with the local people, it is quite clear that in my opinion the people who are signing this agreement do not know what they are signing."

An Australian group, the Mineral Policy Institute, commented: "The new law will leave Ok Tedi's environmental and social problems for local people and an impoverished Papua New Guinea government to fix up, while BHP-Billiton - the world's largest mining corporation - will walk away."

In order to push through the BHP-Billiton exit deal, Morauta claimed that it would assist local people. "This is a unique initiative, and one that will provide an extremely high level of benefits," he said. "It will also finance environmental mitigation." Notably though, local landowners have no representation on the PSDP board and no say in the allocation of the mine's proceeds. Six directors nominated by BHP and the PNG government will control PSDP, while Inmet, the other part owner, emphasized that the new company would operate by clearly defined corporate rules in making decisions and distributing funds.

For many years, successive PNG governments have colluded with BHP to cover up the mine's environmental damage and suppress compensation claims. In 1995, BHP secretly drafted the government's Compensation (Prohibition of Foreign Legal Proceedings) Act to block a \$4 billion class action by local people in the Australian courts. The legislation imposes fines of K100,000 (\$50,975) plus K10,000 per day for pursuing a compensation claim in foreign courts or challenging the constitutionality of the legislation itself.

BHP unsuccessfully offered the landowners \$110 million to withdraw the case. Facing the threat of prosecution, the landholders eventually agreed to a \$150 million out-of-court settlement in 1996. But landowners claim that BHP-Billiton and OTML have broken the settlement because tailings are still polluting the river system. Their breach of contract case is due to proceed later this year.



