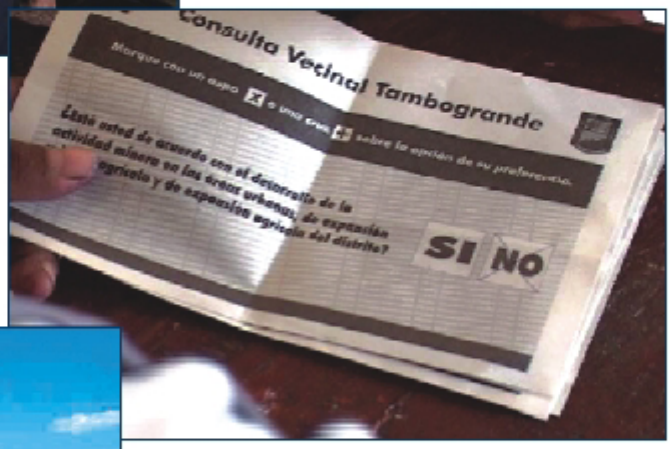
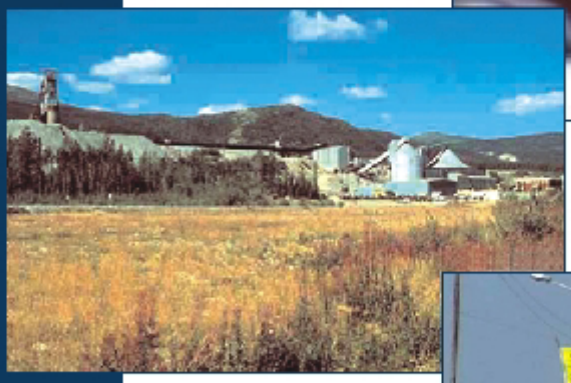
PRIOR INFORMED CONSENT AND MINING

Promoting the Sustainable Development of Local Communities





Sociedad Peruana de Derecho Ambiental

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Cover Photos (top to bottom):

Alfredo Rengifo Navarrete, mayor of the municipality of Tambogrande in Peru, casts his vote to determine the future of mining activities in the region. The turnout for the vote was approximately 74 percent, and an overwhelming 98 percent voted against the mine. Tambogrande, June 2, 2002. Credit: Edgardo Castañeda for GUARANGO Film & Video, courtesy of Oxfam America.

One of the ballots used for the municipal vote in Tambogrande. The ballot asked voters if they agreed with the development of mining activities in urban areas, areas of urban expansion, agricultural areas or areas of agricultural expansion in the Tambogrande Municipal District. Tambogrande, June 2, 2002. Photo by Edgardo Castañeda for GUARANGO Film & Video, courtesy of Oxfam America.

Whitehorse Copper mine and mill near Whitehorse, Yukon Territory; the mine produced copper from a skarn deposit from 1967 to 1982. Photo by Dave Sinclair, courtesy of National Resources Canada.

People gather in Tambogrande to participate in the municipal vote. Although the vote wasn't mandatory (official votes are mandatory for Peruvians from 18 to 60 years old), many peasants came from the country-side, where the majority of population lives, because they wanted to participate. Tambogrande, June 2, 2002. Credit: Edgardo Castañeda for GUARANGO Film & Video, courtesy of Oxfam America.

PRIOR INFORMED CONSENT AND MINING

Promoting the Sustainable Development of Local Communities

Environmental Law Institute®

Prior Informed Consent and Mining: Promoting the Sustainable Development of Local Communities

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This report is also available in Spanish.

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EXECUTIVE SUMMARY

While national governments and multinational corporations profit from mining exploration and operations around the world, local communities often bear the brunt of the negative environmental, social and economic impacts of these activities. In response, there is a growing effort among communities to control the impacts of mining on lands that they occupy or use. Mining communities have begun to assert their right to exercise some form of prior informed consent to mining exploration and operations, thereby setting their own priorities for development that has an impact on their lives, livelihoods, and culture.

This report examines the emerging concept and practice of "prior informed consent" in the context of communities affected by mining. For the purpose of this report, the term "prior informed consent" refers to the right of a local community to be informed about mining operations on a full and timely basis and to approve a mining operation prior to the commencement of operation. This includes participation in setting the terms and conditions addressing the economic, social, and environmental impacts of all phases of mining and post-mining operations.

However, as revealed in the report, this right is not often manifested in full, but rather in a range of degrees and variations—from the right of communities to be informed regarding mining development, to the right to dictate the terms and conditions of mining development, to the right to veto mining development on community lands. The report draws upon analyses of nine case studies where the right of prior informed consent was a significant issue. The report explores these various manifestations, recognizing that the right of affected communities to exercise prior informed consent is critical to promoting long-term sustainable development, democratic processes, and respect for basic human rights.

The case studies reveal that on the national and local level recognition of mining communities as key partners in decision-making is growing. Governments are increasingly acknowledging the importance and legitimacy of various components of the right to prior informed consent, particularly the rights of indigenous people to control development of their lands. This recognition is evident in expanding requirements for mining companies to provide information to and consult with local communities, and in a limited number of cases, obtain their consent to mining projects. Mining companies are also increasingly consulting with communities to obtain a "social license to operate," even in the absence of legal requirements, in order to avoid incurring costs due to community resistance and risks to their corporate reputations.

In addition to efforts asserted and exercised at the national level, the right to prior informed consent is gaining prominence in the international arena. International instruments, including both legally-binding treaties and non-binding guidelines and declarations, have recognized the right of affected communities—particularly indigenous communities—to participate in mining-related decision- making. Growing consensus in international processes as to the definition of prior informed consent may contribute to eventual recognition of this right as customary law. However, individual state practice is not sufficiently consistent or widespread so as to confirm such a right as customary law today.

The right to prior informed consent is effective only if it is defined and applied in a manner that guarantees the sustainable development of local communities. Through analysis of numerous case studies involving variations of the right of prior informed consent, this report identifies the key elements of an effective right to prior informed consent. These elements include the need to legally establish this right, the need to broadly define the community to be consulted, the right to veto mining development, and the right to participate in monitoring and enforcement.

PRIOR INFORMED CONSENT

INTRODUCTION

INTRODUCTION

The "Mining And Communities Project"

Around the world, local communities often bear the worst of the environmental, social, and economic impacts of mining operations. Communities may be forced off their lands as a result of concessions granted to mining companies, and have to forego traditional means of earning a living. Their drinking water, rivers, and lakes may be polluted as a result of improperly designed or badly conducted mining operations. Smelters can release toxic air pollutants with serious health and environmental consequences. The introduction of outside practices and lifestyles may interfere with local social and cultural traditions, and introduce devastating diseases and problems, such as HIV/AIDS and alcoholism to remote villages.

Although laws protecting the rights and interests of mining communities have been advancing in some countries, thus far they are extremely limited. Enforcement of these measures is rare, due to lack of political will and limited financial resources of many national governments. Although citizens in many countries now have the right to file complaints and bring their own enforcement actions, the lack of information, resources, and capacity often hinders their ability to take maximum advantage of sophisticated legal mechanisms, such as citizen suits. Citizens also often have little or no voice at the outset in the development of standards to regulate the environmental, social, and economic impacts of mining.

To assist mining communities in addressing these challenges, in 2001 the Environmental Law Institute (ELI), Oxfam America, and the Sociedad Peruana De Derecho Ambiental launched the "Mining and Communities Project" with the support of the Ford Foundation. This initiative sought to help communities in the Andean region explore and develop their own environmental, social, and economic agenda for the development of local mining operations, and to identify and evaluate a range of strategies and mechanisms, including certification systems, for promoting this agenda.

One of the first steps in the project was to identify the legal rights of communities with respect to mining operations. In determining these rights, project team members became aware of the urgent need to clarify a fundamental set of issues: Are mining companies required to seek the prior informed consent of local communities? And if they are, "What terms and conditions are communities entitled to impose on mining operations in connection with giving their prior informed consent?"

The answers to these questions are of great importance and consequence, not only to the communities involved in the Mining and Communities Project, but also to other communities affected or potentially affected by mining operations, advocacy groups working on behalf of these communities, government policymakers and regulators, and mining companies themselves. The existence of a right to prior informed consent would strengthen the position of communities in formal proceedings and informal negotiations with governments and mining companies. In the absence of such a clear-cut right or during its development and implementation, communities may need to rely on different or complementary tools, such as a certification system, boycotts, or advocacy campaigns. In addition, knowing the scope and detail of the terms and conditions that communities are entitled to impose on mining operations would help frame the scope of a community- based agenda.

The purpose of this report is to describe and analyze the current status of the legal and conceptual framework and the actual practice of prior informed consent in the context of communities affected by mining. The report adopts as the working definition of prior informed consent the right of the local community to be informed about potential mining operations on a complete and timely basis and to approve the operation prior to the commencement of the operation. This includes full participation in setting the terms and conditions addressing the economic, social and environmental impacts of all phases of mining and post-mining operations. This definition of prior informed consent is consistent with and critical to promoting long-term sustainable development, democratic governance processes, and respect for basic human rights.

Specifically, the report sets out to identify and understand:

- What are the legal and extra-legal authorities for the right of prior informed consent?

- How have the key concepts involved in the exercise of this right (community, consent, decision-making processes) been defined?
- How have the procedural aspects of this right been structured ?
- What are the mechanisms for guaranteeing long-term implementation of this right?

To conduct research on these issues for the report, ELI staff, in consultation with the project partners, identified and selected for examination and analysis nine case studies where the right of prior informed consent was a significant issue. In the first three case studies, the topic of prior informed consent is explored in the context of a policymaking or legislative initiative. In the next six case studies, prior informed consent is reviewed in the context of a specific mining operation. The right of prior informed consent involved in many of these case studies was of narrower scope than the working definition of the right that is used in this paper. However, since many key elements of the broader right were at issue in these cases, an analysis of the policy basis and practice of these key elements is of great relevance to an understanding of the broader right.

MINING AND COMMUNITIES

Recent decades have seen dramatic growth in the mining sector worldwide. A combination of factors, including growing global demand for minerals, technological changes that have increased the accessibility of minerals, and relaxed regulatory environments in host countries, have contributed to this growth.[1] Much of the growth has occurred on or near indigenous lands. It is estimated that in 20 years, about half of all gold and copper mined will come from territories used or claimed by indigenous people.[2]

Consent can provide mining companies with a "social license" to operate, allowing the company to improve its relationship with the community and thereby lessen its risk of incurring costs due to conflict and delay.

Mining presents communities with opportunities for economic and social development, as well as risks of negative environmental and social impacts. Potentially positive impacts can include increased access to jobs, health care, education, and sanitation. However, mining can also result in devastating impacts on human health, local ecosystems, social structures, production systems, and cultural traditions; physical displacement; demographic shifts due to influx of workers; and a rapid shift from subsistence farming and hunting to dependence on a cash-based economy.[3]

GROWING RELEVANCE OF PRIOR INFORMED CONSENT

The growth of the mining sector, particularly on community and indigenous lands, has heightened the importance of prior informed consent. The expansion of mining activity into new territory, compounded with global population growth, means that more communities are facing the prospects of hosting mining operations. This has led to an increasing number of clashes between community groups and the mining industry.[4] Indigenous and community groups worldwide increasingly have asserted their right to benefit from the development of minerals on their land, and to minimize the destructive potential of mining on their social fabric and environment.

Unlike the traditional mining model, in which mining companies typically negotiated agreements with governments that focused on the needs of the company, the principle of prior informed consent focuses on the needs of the community. It promotes partnership and dialogue, and allows communities to shape, or in some cases to reject, the development of the mining activity. Thus, prior informed consent is intended to promote a more sustainable form of development, in which the short-term mining interests do not compromise the community's longerterm needs for survival.

Although mining companies may not recognize a community's "right" to prior informed consent, some companies are voluntarily seeking community consent for proposed mining projects. Such consent can provide mining companies with a "social license" to operate, allowing the company to improve its relationship with the community and thereby lessen its risk of incurring costs due to conflict and delay. Moreover, mining companies are increasingly concerned about avoiding risks to their corporate reputation, as local protests can easily turn into global protests and consumer boycotts due to advances in global communication technology. Therefore, obtaining a community's informed consent prior to engaging in mining activity can in fact

1 See Amy Rosenfeld Sweeting and Andrea P. Clark, *Lightening the Lode: A Guide to Responsible Large-scale Mining*, Conservation International Policy Paper, 2000, at 8.
2 *Id.* at 7.
3 *Id.* at 47.
4 *Id.* at 7.

enhance a firm's competitiveness. These economic justifications likely play a significant role in a mining company's decision to incorporate some degree of community consent into its policies or practices.

DEFINING THE COMMUNITY'S RIGHT TO PRIOR INFORMED CONSENT

The right to prior informed consent is gaining international attention. In a recent report, the World Bank's Extractive Industries Review endorsed prior informed consent as consistent with their goal of alleviating poverty through sustainable development. The report states that "To help ensure that local communities receive benefits from extractive industry projects, the WBG should: require companies to engage in consent processes with communities and groups directly affected by projects in order to obtain their free prior and informed consent…"[5] In spite of the growing importance and relevance of the right to prior informed consent, there is no clear consensus on what this right involves. As reflected in the case studies, the right to prior informed consent has manifested itself in many different forms, ranging from the right of communities to be informed regarding mining developments, to the right of communities to dictate the terms and conditions of mining developments, to the right of communities to actually veto mining development on community lands.

The lack of consensus on a community's right to prior informed consent can be attributed to several factors. First, from a legal perspective, the right to prior informed consent has been based on a number of different types of legal authority. For example, the right may be based on a country's constitution, statutes, or regulations, as well as treaties the country has entered into. Various extra-legal authorities—such as mining guidelines, company social and environmental responsibility codes, voluntary contractual agreements with communities, and community votes and political referendums—are also increasingly being used, and are viewed as legitimizing a community's right to consent. The various authorities for prior informed consent lend themselves to varying definitions of this right.

Second, the definition of the right to prior informed consent may vary depending on the affected community. In particular, indigenous peoples are increasingly recognized as a separate group under international law, and may thereby derive distinct rights to prior informed consent. For example, Article 27 of the International Covenant of Civil and Political Rights protects the cultural, linguistic and religious rights of minorities and provides a broad umbrella for recognizing indigenous peoples' rights.[6] Also, as discussed in the World Commission on Dams case study, International Labor Organization Convention 169 requires governments to consult with indigenous and tribal peoples within their countries regarding development projects and other activities affecting them, and lays down criteria for these consultations.[7] Similarly, Article 30 of the United Nations Draft Declaration on the Rights of Indigenous Peoples explicitly recognizes the right of indigenous peoples to "require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources…"[8] Due to the evolving body of international law specifically directed at protecting indigenous peoples' rights, the right to prior informed consent may be more strongly developed with respect to indigenous than non-indigenous communities.

Finally, the right to prior informed consent is difficult to define because it raises key issues about the balance between community rights and the national interest. In other words, how do we recognize the right of communities to dictate the terms of mining development, but still ensure that sufficient development takes place to serve the national interest? Does it make sense to give a community veto power over mining development that may be in the national interest? On the other hand, how do we determine that a project is in the national interest, notwithstanding local impacts? Similarly, how do we ensure that the local community receives benefits proportionate to the burdens it faces with mining operations? It is essential to strike an appropriate balance between the community's right to consent and the national interest in mining operations. This project is intended to shed light on the definition of the community's right to prior informed consent. What does prior informed consent mean? Does the right to prior informed consent include the right to veto a mining

5 Extractive Industries Review *Final Report: Striking a Better Balance* (2003), available at http://www.eireview.org/EIR/eirhome.nsf/(DocLibrary)/0CE5D11BE6EDFF7C85256DF00 0269C9D/$FILE/Exec%20Summary%2026%20Nov.pdf

6 *International Covenant on Civil and Political Rights*, Dec. 16, 1966, art. 27, available at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm (last visited Sept. 18, 2003).

7 *International Labour Organization Convention No. 169*, *Concerning Indigenous and Tribal Peoples in Independent Countries*, adopted Jun. 27, 1989, reprinted in 28 I.L.M. 1382. Convention No. 169 has been ratified by 13 countries: Bolivia, Colombia, Costa Rica, Denmark, Ecuador, Fiji, Guatemala, Honduras, Mexico, Norway, Netherlands, Paraguay and Peru. http://www.ilo.org/public/english/standards/norm/whatare/standards/ind_tech.htm (last visited Sept. 18, 2003).

8 *United Nations Draft Declaration on the Rights of Indigenous Peoples*, E/CN.4/SUB.2/1994/2/Add.1 (1994), available at http://www.usask.ca/nativelaw/ddir.html (last visited Feb. 1, 2003).

project entirely, or is it limited to the right to specify the terms and conditions for mining? How do we define the community? What percentage of the community needs to grant consent? How does a community determine and express its consent? How will communities be educated about mining issues in order to provide informed consent? Does the community have ready access to information concerning the project and its potential impacts? What enforcement and monitoring mechanisms can be used to ensure implementation of the terms and conditions of a community's prior informed consent? These issues, and many others, are explored in the context of each case study.

The case studies in this report collectively reveal the potential scope of the right to prior informed consent. They are intended to illustrate the range of possibilities for defining this right, as well as some of the potential advantages and shortcomings of each option. They provide novel and innovative examples of how such a right can be designed and manifested, what mechanisms can be used to obtain or adopt such a right, and what approaches can be used to make this right most effective. The case studies can therefore be instructive for community groups, policymakers, mining companies, and other stakeholders who are trying to assert, create, or enhance a community's right to prior informed consent.

CASE STUDIES

This section examines and analyzes how the key elements of the right to express prior informed consent have been defined and practiced in policymaking processes and projects at the international, national and local level. The first three examples focus on the treatment of prior informed consent in the policymaking context. The next set of examples explore the definition and practice of this right in the context of specific resource development projects.

POLICYMAKING PROCESSES

World Commission On Dams

In its report *Dams and Development: A New Framework for Decision-Making*, The World Commission on Dams recognized the importance of obtaining "prior, informed consent of indigenous and tribal peoples [for] developments that may affect them."[9] Although the strategic priorities and guidelines set forth in the report stem from the Commission's findings related to development of water and energy resources, they can be extrapolated to offer valuable lessons for the mining context. Since this report provides a policy framework, rather than a specific case study, many of its terms are vague, allowing them to be tailored for use in a specific case.

Authority for Prior Informed Consent Process

The report offers international and national legal authorities, as well as social justice and legitimacy reasons, as justifications for the exercise of prior informed consent. In Australia, Canada, India, New Zealand, the Philippines, and many Latin American countries, for instance, the rights of indigenous people are legally recognized.[10] However, because a number of other countries do not have similar legal authorities, the report seeks to affirm that there are other legitimate bases for prior informed consent.

The report points to several international legal instruments that provide legal authority for indigenous peoples to exercise the right of free, prior informed consent with respect to development projects affecting their lands and resources. For example, Articles 6 and 7 of International Labour Organization Convention 169 stipulate that governments must consult with indigenous and tribal peoples within their countries regarding development projects and other activities affecting them, and lay down criteria for these consultations.[11] In addition, Article 30 of the United Nations Draft Declaration on the Rights of Indigenous Peoples explicitly recognizes the right of indigenous peoples to "require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources…"[12]

Regardless of the legal authority that may exist for prior informed consent, the "Commission believes that all countries should be guided by the concept of free, prior and informed consent, regardless of whether it has already been enacted into law."[13] The guidelines refer to the need for governments to act in a fair, equitable, and socially legitimate manner and to recognize the rights of all interested and affected groups, whether the laws require such actions or not.[14] The customs of indigenous peoples should serve as a guide for the prior informed consent process.[15] Thus, the guidelines indicate that even where legal authority is lacking, countries should recognize an extra-legal authority for prior informed consent.

Threshold Definitions

As to defining the affected community, the Commission states that the right to express prior informed consent should apply to all groups that have descended from pre-colonial societies; have been subjugated, excluded, or discriminated against; are vulnerable to disadvantages during the development process; have close ties to the ancestral lands and natural resources in the area; and identify themselves as separate from the dominant group in society.[16] The guidelines also state that stakeholders should negotiate agreements on energy and water resources development through recognized stakeholder bodies.[17] Thus, the guidelines implicitly acknowl-

9 World Commission on Dams, *Dams and Development: A New Framework for Decision- Making* (2000) at 215.The report identified seven strategic priorities for decision-making (Chapter 8), as well as 26 specific guidelines for applying these priorities to the planning and project cycles (Chapter 9). Prior informed consent is mentioned in the context of a strategic priority (Strategic priority 1: gaining public acceptance) and is listed as one of the 26 guidelines necessary for effective implementation of the strategic priorities (Guideline 3).

10 *Id.* at 256, note 1.

11 *International Labour Organization, Convention No. 169, supra* note 7.

12 *Draft Declaration on the Rights of Indigenous Peoples, supra* note 8.

13 World Commission on Dams, *supra* note 9 at 219.

14 *Id.* at 215-220.

15 *Id.* at 219.

16 *Id.*

17 *Id.* at 217.

edge that the consent of every individual in the affected community is not required—and that the consent of a representative group of stakeholders in the community can be sufficient. In addition, the guidelines acknowledge the importance of involving other vulnerable groups, specifically women, in the decision-making process.[18]

The Commission recognized the importance of establishing the method by which the community will determine its views, but did not set specific parameters or guidelines for doing so. Instead, the guidelines state that: "[t]he customary laws and practices of the indigenous and tribal peoples, national laws and international instruments will guide the manner of expressing consent."[19] The guidelines also state that indigenous peoples must indicate at the beginning of the process the manner by which they will express their consent, and that a final decision on how to express consent must be resolved before the negotiations commence.[20]

Framework of Prior Informed Consent Process

The guidelines recognize that in order for women and other vulnerable groups to participate fully and actively in negotiations, "they need access to adequate resources, including legal and other professional support."[21] The guidelines also state that all stakeholders, especially indigenous and tribal peoples, women, and other vulnerable groups, deserve open access to information, legal and other support to secure their informed involvement in the decision-making process.[22] The guidelines recognize that capacity building must be ongoing.[23] However, while they state that the planning process should be sensitive to social and economic disparities and devise mechanisms to address the issue, the guidelines do not specifically address how capacity building in affected communities is to occur.[24] Additionally, the guidelines do not indicate how communities are to be given access to adequate resources, or how the term "adequate resources" is defined.

The guidelines state that a community's prior informed consent is required at all stages of the mining process. Specifically, they state that stakeholders must participate fully in "all negotiated agreements throughout the process, from options assessment to final implementation, operation and monitoring."[25]

The guidelines recognize that indigenous and tribal communities have both "the power to consent to projects and to negotiate the conditions under which they proceed." [26] While the guidelines do not explicitly provide communities with the right to completely veto a project, they do make clear that communities must have the opportunity to meaningfully participate in the options assessment process before the decision is made to proceed with the project.[27]

The guidelines do not mention where the negotiations should occur—in the local community or in the capital city. The guidelines do, however, emphasize time as an important factor of the negotiations, since communities require plenty of time to examine proposals and deliberate.[28] While the guidelines do not place a specific time on the length of the negotiations, they acknowledge that the negotiations can be a lengthy process and that the parties involved should recognize the need for an extended timeframe.

The guidelines do not mention the involvement of the government or third parties in the negotiations, except for third parties in dispute resolution, as discussed below.

The guidelines state that "negotiations should result in demonstrable public acceptance of binding formal agreements among the interested parties."[29] The guidelines emphasize the importance of using such agreements. Thus, the guidelines recognize that the final product from these negotiations should be an enforceable document.

In order to resolve disputes, the guidelines recommend the use of an independent dispute resolution body that is created with the participation and agreement of stakeholders.[30] It is suggested that stakeholders refer any disagreements they have in negotiations to this body and allow it to examine the issue and provide assistance.[31]

Implementation of the Process

The guidelines recognize that the negotiations should "result in binding and formal agreements."[32] The communities should be able to ensure that the negotiation results are being followed. The agreement should have "implementable institutional arrangements for monitoring compliance and redressing grievances."[33]

18 *Id.* at 216.
19 *Id.* at 219-220.
20 *Id.* at 220.
21 *Id.* at 217.
22 *Id.* at 215.
23 *Id.* at 216-217.
24 *Id.* at 216.
25 *Id.*
26 *Id.* at 219.
27 *Id.* at 221-222.
28 *Id.* at 217.
29 *Id.*
30 *Id.* at 218.
31 *Id.*
32 *Id.*
33 *Id.* at 217.

The agreement must also include "mechanisms for hearing and settling subsequent grievances."[34]

The Aboriginal Land Rights (Northern Territory) Act Of 1976 (Australia)

Authority for Prior Informed Consent Process

Australia's Aboriginal Land Rights (Northern Territory) Act of 1976 provides traditional Aboriginal[35] owners with the right to consent to explorations on their land, which includes the right to veto any such explorations, as well as the right to negotiate agreements and timeframes for such exploration.[36] The Land Rights Act requires mining companies to obtain permission from the Northern Territory government to negotiate with the traditional owners prior to conducting explorations on lands held by Aboriginal traditional owners.[37] Once permission is obtained, the company is compelled to negotiate with the traditional Aboriginal land owners who have the authority to exercise their veto powers over any exploration of their land.[38]

Although the governor can override a community's exploration veto in cases of national interest, this override provision has never been used.[39]

Aboriginal communities have frequently exercised their authority under the Northern Territory Act to veto exploration by mining companies.

Aboriginal communities have frequently exercised their authority under this Act to veto exploration by mining companies. Over the past 20 years, Aboriginal communities have vetoed at least 122 exploration license applications.[40]

The Act also expanded Aboriginal ownership of traditional lands in the Northern Territory. When the Act was passed, former government "reserves" became Aboriginal land.[41] The Act also established a claims process for vacant crown (or government) land, some of which has since been converted to Aboriginal land. Land granted under the Act is held as inalienable freehold title for the benefit of Aboriginal traditional owners. This means that the land is communally owned and cannot be bought, acquired, or mortgaged. It can, however, be leased, and the leases can be mortgaged.[42] Communal title is formally vested in Aboriginal Land Trusts composed of Aboriginal people who hold the title for the benefit of all Aborigines with a traditional interest in the land.[43] The operation of the Act has resulted in almost 50 percent of the land in the Northern Territory being transferred to Aboriginal groups.[44]

Threshold Definitions

The Act created four Land Councils to identify and represent the interests of the communities in claiming and managing their traditional lands. The Land Councils are composed of community members directly elected by Aborigines. Some specifically require representation by women. The Northern Land Council, for example, has five positions specifically set aside for women.[45] The Councils consult with the Aborigines, negotiate on their behalf, and manage the prior informed consent process.[46]

The communities exercise their right to prior informed consent through the Land Councils. Part VI of the Land Act specifies the process through which the decision- making occurs:

- First, in order to gain authorization to explore on Aboriginal land, a mining company must apply to the Northern Territory Department of Mines and Energy for an exploration license and consent to negotiate with traditional owners.[47]
- The mining company must then submit its application for consent, including exploration proposal, to the Land Council within three months. The explo-

34 *Id.* at 218.

35 In this paper the term «Aboriginal» shall be capitalized when referring to the traditional Australian indigenous peoples, but not capitalized when referring to indigenous peoples in other nations.

36 The Office of Aboriginal and Torres Strait Islander Affairs of the Department of Immigration and Multicultural and Indigenous Affairs, *Submission to the House of Representatives Standing Committee on Industry and Resources Inquiry Into Resource Exploration Impediments* (June 2002), available at http://www.aph.gov.au/house/committee/ isr/resexp/sub66.pdf (last visited Feb. 1, 2003) (hereinafter «OATSIA: Resource Exploration Impediments»). The Northern Territory Aboriginal Sacred Sites Act provides additional protection for sacred or traditionally significant properties not held by Aboriginal land trusts from actions that may negatively affect such lands, including mining. The Aboriginal Areas Protection Authority, charged with enforcing the Act, has established a registry of sacred sites. The Act thus extends some of the protections of the Land Rights Act to lands not possessed by Aboriginal people, but deemed important to them. *See Northern Territory Aboriginal Sacred Sites Act* (1989) (Ca.), available at http://notes.nt.gov.au/dcm/legislat/legislat.nsf/0/5a6151aa4abdc04069256c8d000bcc40?OpenDocument (last visited Sept. 22, 2003).

37 OATSIA: Resource Exploration Impediments, supra note 36.

38 *Id.*

39 *Id.*

40 *Id.*

41 Northern Land Council, *Land Rights Act: How the Act Works*, available at http://www.nlc.org.au/nlcweb/land_a…d_rights_at_how_the_act_works.html (last visited Jan. 30, 2003).

42 *Id.*

43 *Id.*

44 OATSIA: Resource Exploration Impediments, *supra* note 36.

45 Northern Land Council, *Inside the NLC: Councils*, available at http://www.nlc.org.au/html/abt_inside_counc.html (last visited Mar. 10, 2003).

46 Northern Land Council, *About the NLC*, available at http://www.nlc.org.au/html/abt_menu.html (last visited Mar. 10, 2003).

47 Gary Scott and Mark Wakeham, *Uranium Exploration in West Arnhem Land* (Nov. 2001), at 11, available at http://www.ecnt.org/pdf/uranium_report2.pdf. (last visited Jan. 30, 2003).

ration proposal must describe all aspects of the exploration activity, including possible social or environmental impacts.[48]

- If the Land Council determines that the proposal provides sufficient information for traditional landowners to make a decision, it convenes a meeting of traditional owners and affected groups within 30 days. At this meeting, the applicant presents its proposal, and traditional owners have the right to instruct the Land Council to refuse consent or to negotiate an agreement with the company.[49]
- If the traditional landowners instruct the Land Council to refuse consent, the applicant may not reapply for another five years.[50]
- If the traditional owners instruct the Land Council to negotiate an agreement, this negotiation must be concluded within 12 months. A liaison committee of traditional landowners can be involved in the negotiations. The negotiated agreement is then presented at a meeting of traditional landowners for their consideration.[51]
- If the traditional landowners instruct the Land Council to enter into the agreement, their decision must be considered by the full Land Council to ensure that it meets the requirements of due process.
- The full Land Council can reject the agreement if it is considered unreasonable. If the full Land Council accepts the agreement as reasonable, it must then seek the approval of the Minister for Aboriginal and Torres Strait Islander Affairs to enter into the agreement. Once the agreement is executed by the parties, the Land Council notifies the Northern Territory government, which subsequently issues the exploration license for a period of six years, with an ability to extend for a further four years.[52]

Framework of Prior Informed Consent Process

The local communities are educated about the mining process through a meeting convened by the Land Council, where the applicant presents his proposal and the communities exert their right to veto or negotiate an agreement. It is the responsibility of the Land Council to make sure the landowners' decision is informed. However, informational requirements for the exploration proposals seem to be fairly minimal. Companies are not even required to specify what mineral they are looking for, although they generally do.[53]

The scope of the community's rights under this Act is expansive—the community has the right to completely veto a project, not simply the right to be consulted or to set conditions for development. However, under the Act, the community's prior informed consent is only required at the exploration stage, not at the mining stage.

Therefore, once a community has consented to the exploration stage, it is also deemed to have consented to the subsequent mining if it occurs.[54] This was not always the case. Prior to 1987, the Act allowed Aboriginal people to have a veto at both the exploration and mining stages. However, amendments to the Act in 1987 removed the "dual veto," restricting the veto to the exploration stage alone.[55] An Australian Supreme Court decision in 1992 further weakened the Aboriginal veto power by finding that a Land Council could not require further consent at the mining stage, even when the mining company itself agreed with this provision.[56]

While this change has provided companies with an incentive to invest in exploration, the lack of veto power at the mining stage has made it difficult for traditional owners to make arrangements with mining companies that effectively safeguard their rights, as communities are forced to negotiate a deal on mining at a stage when the viability and worth of the mine is uncertain.[57] Nevertheless, terms and conditions relating to future mining actions are generally attached to the exploration license as contractual provisions.[58]

The community determines its demands and conditions through the Land Councils—through its elected representatives on the Councils and/or through direct participation in Land Council meetings involving the wider community. A liaison committee of community members can be involved in the Land Council's negotiation of the conditions to consent with the mining company.

Negotiations occur at Land Council meetings. There are currently four locations for Land Councils in the Northern Territory.[59] Negotiations are supposed to be

48 *Id.*
49 *Id.*
50 *Id.*
51 *Id.*
52 *Id.*

53 *See Id.* See also Northern Land Council, *Mining and Exploration Under the Land Rights Act*, 9, available at http://www.nlc.org.au/html/busi_mining_act.html (last visited Mar. 10, 2003) (hereinafter «Northern Land Council, *Mining and Exploration*»).
54 Scott and Wakeham, *supra* note 46; Northern Land Council, *Mining and Exploration, supra* note 53.
55 OATSIA: Resource Exploration Impediments, *supra* note 36.
56 Scott and Wakeham, supra note 46; Northern Land Council, *Mining and Exploration, supra* note 53.
57 Peter Boyle, *Behind the Mining Companies' Hysteria on Mabo*, available at http://www.greenleft.org.au/back/1993/111/111p3.htm (last visited Jan. 31, 2003).
58 Scott and Wakeham, *supra* note 47.
59 There are currently four land councils in the Northern Territory established under the Act: The Northern Land Council, Central Land Council, Tiwi Land Council, and Anindilyakwa Land Council.

completed within 12 months.[60] However, the timeframe for negotiations can be extended by the Commonwealth Minister, and is a practice that has regularly occurred.[61]

The government has some involvement in the negotiations process. First, the Commonwealth Minister has discretionary authority to extend the negotiation timeframes (without limitation to the length or number of extensions).[62] Also, the Governor General is authorized to override a community's exploratory veto in the national interest, although this has not yet occurred.[63] In addition, the government provides funding for the Land Councils. It pays into the Aboriginals Benefit Account an amount equivalent to the statutory royalties received by it and the Northern Territory government from mining companies operating on Aboriginal land in the Northern Territory[64] The Aboriginal Benefit Account then distributes 30 percent of the royalties to the Aboriginal people affected by the mining and 40 percent to the Northern Territory land councils, with the 30 percent remaining for the administration of the Account and for distribution to the Aboriginal people throughout the Northern Territory.[65]

The Act does not specifically include third parties in the consultation process.

Implementation of the Process

The negotiated agreement between the Land Council and the mining company is a legally-enforceable lease agreement.

MINING PROJECTS

Whitehorse Mining Initiative (Canada)

In September 1992, the Canadian mining industry launched a multi-stakeholder consultation process among governments, aboriginal representatives, environmental groups, and labor unions over the future of mining development in Canada. This national effort became known as the Whitehorse Mining Initiative (WMI). The goal of WMI was to establish a framework for dealing with mining issues in Canada in a cooperative and collaborative manner.[66] The participation of aboriginal representatives in the WMI represents a form of "community consultation" in a national planning process for mining development.

After 18 months of negotiations and consultations, the Whitehorse Mining Initiative Accord ("Accord") was reached in September 1994. The Accord contains many principles and goals, several of which recognize the importance of aboriginal community participation in mining decisions. For example, the Accord's principle on aboriginal involvement in the mining industry recognizes that "aboriginal people are entitled to opportunities to participate fully in mineral development at all stages of mining and associated industries and at all employment levels."[67] The goals of this principle further specify the need to "ensure regular and open communications between exploration companies and mine developers, and aboriginal communities, and to ensure that the aboriginal communities are involved in decision-making processes that concern exploration, infrastructure development, mine development and reclamation."[68] The Accord also contains a principle on open decision-making processes, which seeks to expand opportunities for meaningful and responsible participation by aboriginal peoples in decision-making processes that affect the public interest. This is meant to ensure that stakeholders have access to necessary information and resources that enable them to participate, and to ensure that stakeholder viewpoints are fairly heard and considered.[69]

Therefore, both the consultative process itself and the resulting Accord are important in terms of recognizing the legitimacy of community consultation in national mining policy and decisions.

Authority for Prior Informed Consent Process

The WMI was spearheaded as a voluntary initiative by the Mining Association of Canada, and was not based on any legal authority.

The Accord reached through the WMI was not a legally-binding agreement.[70] Therefore, provisions in the Accord that call for aboriginal participation in mining decisions do not constitute legal authority for prior informed consent. They do, however, constitute persuasive justification for recognizing the right to prior in-

60 Scott and Wakeham, *supra* note 47.
61 OATSIA: Resource Exploration Impediments, *supra* note 36.
62 *Id.*
63 Northern Land Council, *Land Rights Act: How the Act Works, supra* note 41.
64 *Id.*
65 Northern Land Council, *Mining and Exploration, supra* note 53.
66 WMI Leadership Council Accord Final Report (1994), cover page, available at http://www.nrcan.gc.ca/mms/pdf/accord.pdf (last visited Feb. 1, 2003) (hereinafter "Accord Final Report").
67 *Id.*
68 *Id.*
69 *Id.*
70 United Nations, *Initiative: Whitehorse (Canada) Mining Initiative*, available at http://www.un.org/esa/sustdev/viaprofiles/Canada_Mining.html (last visited Dec. 24, 2002). See also Accord Final Report, *supra* note 66, cover page ("The Accord is not intended to create legal obligations between the signatories, the organizations they represent and/or third parties.")

formed consent, having been negotiated and adopted through a national, well-recognized, multi-stakeholder initiative. The Mining Association of Canada has publicly expressed its commitment to the principles and spirit of WMI.[71]

Threshold Definitions

The aboriginal community was one of five stakeholder groups that participated in the WMI. The other stakeholder groups consisted of the environmental community, industry, labor, and the government. However, the aboriginal representatives who participated in the consultative process may not in fact have been representative of the larger aboriginal community. WMI publications do not indicate how aboriginal representatives were selected to participate, or whether any efforts were made to reach out to diverse aboriginal communities to ensure that all elements were consulted. Natural Resources Canada recognized this problem in stating that the reports of the WMI Issue Groups "stand as the work of individuals who could not always speak for the breadth and scope of their constituencies."[72]

The operating structure for consultation and decision- making included a Leadership Council, a Working Group, and four Issue Groups. The Leadership Council consisted of 40 members, including aboriginal representatives, who would ultimately decide on adoption of the Accord.[73] The Working Group supported the Leadership Council, and also included key representatives of aboriginal communities.[74] Each Issue Group consisted of 20-30 stakeholders addressing one of the four topics of interest: Environment; Finance and Taxation; Land Use; and Workplace and Workforce issues.[75] Aboriginal issues were to be considered within each of these four issue groups, rather than as a stand-alone topic.[76] Each Issue Group produced a set of principles and objectives and an extended list of more than 150 very specific recommendations.[77] Representatives of the major stakeholder groups, including aboriginal peoples, were represented in each of the Issue Groups.

Framework of Prior Informed Consent Process

The WMI did not include specific mechanisms to educate the stakeholders about the mining issues. It did, however, provide approximately $454,000 to support stakeholder expenses, such as preparation for meetings, staffing needs, and expenses for traveling to sessions.[78]

The WMI's multi-stakeholder consultation process was particularly progressive in that it elicited the views of community members in the planning process for national mining policy generally—not in the context of an actual mining project. Moreover, the Accord specifically provided that consultation with aboriginal communities should occur "at all stages" in the mining process,[79] adding further support for including community members in planning processes from the outset of a project.

Issue group negotiations and consultations took place across Canada to give the process a "national" character.[80] The process was to take no longer than 12-15 months, concluding no later than the Annual Meeting of Mines Ministers in the fall of 1994.[81] Full scale discussions began in February 1993, and 18 months later culminated in the Accord.[82]

The government was extensively involved in the negotiations, as one of the five key stakeholders in the process. The provincial and territorial mines ministers also served as co-sponsors and trustees of the WMI.[83] The government played an important role in funding the consultation process. The federal government assumed onethird of the costs, the 10 provincial and two territorial governments assumed another third (split according to the ratio of their mineral production), leaving the remaining third to be assumed by the Mining Association of Canada.[84]

As discussed above, the WMI included third parties —such as trade associations and environmental groups—as stakeholders in the consultation process.

The agreement of the various stakeholders was formalized in the Accord. As discussed above, this is a nonbinding voluntary commitment adopted by the consensus of the Leadership Council.

The Whitehorse Mining Initiative did not include specific provisions for conflict and dispute resolution.

71 See Gisele Jacob, Mining Association of Canada, *A Presentation to the House of Commons Standing Committee on Natural Resources and Government Operations* (Nov. 5, 1998), available at http://www.mining.ca.previewmysite.com/english/publications/wmi.html (last visited Sept. 19, 2003).

72 Natural Resources Canada, *Whitehorse Mining Initiative*, available at http://www.nrcan. gc.ca/mms/poli/wmi_e.htm (last visited Jan. 31, 2003).

73 See Mary Louise McAllister and Cynthia Jaqueline Alexander, *The Whitehorse Mining Initiative*, 6, July 31, 1999, available at http://www.idrc.ca/mpri/930415.doc (last visited 2/1/2003); Accord Final Report, *supra* note 66 at 3.

74 Accord Final Report, *supra* note 66 at 3.

75 See McAllister and Alexander, *supra* note 73.

76 See *Id*.

77 Accord Final Report, *supra* note 66 at 3.

78 See McAllister and Alexander, *supra* note 73.

79 Accord Final Report, *supra* note 66 at 27.

80 See McAllister and Alexander, *supra* note 73.

81 See *Id*.

82 Natural Resources Canada, *Whitehorse Mining Initiative*, available at http://www.nrcan. gc.ca/mms/poli/wmi_e.htm (last visited Jan. 31, 2003).

83 See *Id*.

84 See McAllister and Alexander, *supra* note 73.

Implementation of the Process

The Accord produced several principles and goals relating to aboriginal community participation in mining decisions. However, the Accord did not provide guidelines for implementation of these goals. It simply stated that implementation will occur through "building broader support within constituencies based on the momentum achieved and encouraging stakeholder support for principles and goals."

A follow-up meeting was convened to monitor implementation of the Accord. In November 1995, each of the stakeholder groups from the Whitehorse Mining Initiative attended a participant meeting to discuss the status of implementation of the principles and goals. A progress report released in January 1996 summarized the results of these discussions.[85] Implementation of the commitments in the Accord has been limited. The lack of an agreed form for the outcome or a well-defined plan about what to do with the results contribute to problems involved in maintaining momentum after the signing of the Accord.[86]

Diavik Mine (Canada)

The Diavik diamond mine project, located in the Northwest Territories in Canada, is scheduled to begin production in 2003. The Diavik mine lies within territory traditionally used by four groups of First Nations peoples.[87] The developer of the mine, Diavik Diamond Mines, Inc. (DDMI), has engaged in an extensive consultative process with the surrounding communities in planning the development of the mining project. DDMI initially consulted with the public during the course of conducting a "Comprehensive Study" of the project's expected environmental and socio-economic impacts. The Comprehensive Study was required by the government, but DDMI's public consultations were voluntarily undertaken. DDMI later consulted extensively with the public in negotiating and entering into an Environmental Agreement, a Socio-Economic Monitoring Agreement, and separate Participation Agreements for the affected communities. While there was no specific legal requirement that obligated DDMI to enter into these other agreements, it was heavily influenced by the government to do so.

The Environmental Agreement sets out a consultative and cooperative approach to the environmental management of the project.[88] The parties to the Environmental Agreement are DDMI, the Government of Canada, the Government of the Northwest Territories, the Dogrib Treaty 11 Council, the Lutsel K'e Dene Band, the Yellowknives Dene First Nation, the North Slave Metis Alliance, and the Kitikmeot Inuit Association.[89] The Socio-Economic Agreement formalizes socio-economic commitments and recommendations made by DDMI.[90] The parties to the Socio-Economic Monitoring Agreement are DDMI and the Government of the Northwest Territories.[91] The Participation Agreements are cooperative agreements between the company and aboriginal groups that address business and employment opportunities for each group.[92] DDMI entered into separate Participation Agreements with the Yellowknives Dene First Nation, the Dogrib Treaty 11 Council, and the North Slave Metis Alliance.[93]

Authority for the Prior Informed Consent Process

DDMI was not required by law to engage in extensive community consultation in conducting its Comprehensive Study of the environmental and socioeconomic impacts of the mine. Although the Canadian Environmental Assessment Act (CEAA) requires parties to undertake the Comprehensive Study,[94] it does not require public hearings.[95] While DDMI's extensive public consultation went beyond the CEAA's requirements for the Comprehensive Study, its decision may have stemmed from the fact that, under the CEAA, the Environment Minister can require parties to engage in a formal Panel Review process if he finds the Comprehensive Study to be insufficient. The Panel Review would require independent public hearings focused on a detailed Environmental Impact Statement prepared by the

85 Natural Resources Canada, *Whitehorse Mining Initiative*, *supra* note 72.The progress report is available on this website.

86 See McAllister and Alexander, *supra* note 73.

87 Archibald R.M. Ritter, *Canada: From Fly-In Fly-Out to Mining Metropolis* in Large Mines and the Community, Ch. 6, available at http://www.idrc.ca/books/focus/949_mining/949/f949c062canada.htm (last visited Jan. 31, 2003).

88 Indian and Northern Affairs, Canada, *Environmental Agreement Signed Off*, March 8, 2000, available at http://www.ainc-inac.gc.ca/nr/prs/j-a2000/2-00113_e.html (last visited Jan. 31, 2003).

89 Press Release Library, *Diavik Project Approved*, December 19, 2000 at http://www.aber.ca/investor/info/Dec1900.htm (last visited Jan. 31, 2003).

90 Canadian Environmental Assessment Agency, News Release, *Minister of the Environment Sends Diavik Diamonds Project to Regulatory Phase*, November 3, 1999, available at wysiwyg://53/http://www.ceaa.gc.ca/0009/0003/0025/rel1991103_3.htm (last visited Jan. 31, 2003).

91 *Id.*

92 *Id.*

93 *Id.* As of July 2001, Participation Agreements with the Lutsel K'e Dene Band and the Kitikmeot Inuit Association were still under negotiation. *Diavik Diamond Mines, Inc.: Catalogue of Social Practices in the Canadian Minerals and Metals Industry*, available at http://www.nrcan.gc.ca/mms/sociprac/diavik_e.htm. (last visited Dec. 12, 2002).

94 Archibald, supra note 86.The CEAA requires a Comprehensive Study for listed types of projects that are likely to have significant environmental effects. *Pollution Prevention in Mining in the Americas: Research Guide for National Case Studies* at 6.

95 *Pollution Prevention in Mining in the Americas: Research Guide for National Case Studies* at 6. Public hearings are only required for the most rigorous type of environmental assessment – the panel review, and not for comprehensive studies.

project proponent.[96] Therefore, DDMI may have opted to voluntarily engage in extensive public consultation at the Comprehensive Study stage in order to avoid the potential delay of having to conduct the additional Panel Review. Ultimately, the Minister decided that the Panel Review was not necessary, and seemed to have been influenced by the extensive public participation that took place during the Comprehensive Study stage.[97]

DDMI was also not legally required to enter into the Environmental Agreement, Socio-Economic Monitoring Agreement, or Participation Agreements. However, DDMI's decision to enter into these agreements was likely influenced by several factors. First, the Canadian Ministry of Environment made it clear that it would require DDMI to implement the mitigation measures identified in the Comprehensive Study.[98] These mitigation measures could be implemented either through regulatory instruments or through explicit agreements.[99] DDMI opted to enter into explicit Environmental, Socio-Economic, and Participation Agreements to implement its proposed mitigation measures. Second, after producing the Comprehensive Study, DDMI still needed to obtain the requisite licenses for development of the mine. The Canadian regulatory agencies may have used their authority to sign on these licenses as leverage to get DDMI to enter into these agreements with the surrounding communities.[100]

Threshold Definitions

The procedures on how Diavik identified the community to be consulted, or the means through which these communities expressed their consent or conditions, were not discussed in the material available for review.

Framework for Prior Informed Consent Process

The community's consent was formalized through the Environmental, Socio-Economic, and Participation Agreements. The agreements themselves constitute private contracts and are legally binding on the parties.

The Environmental Agreement was developed with the active involvement of affected aboriginal groups, the company, and the governments of the Northwest Territories, Nunavut and Canada.[101]

The Participation Agreements were negotiated individually with each indigenous organization or community.[102] The fact that the communities lacked necessary information (geological, technical, commercial, organizational) posed a significant obstacle to the construction of fair agreements.[103]

The government played a role in the consultations over the Comprehensive Study report process. After the Canadian Environmental Assessment Agency received the report from DDMI, it spent 18 months reviewing it, and engaged in over 300 public meetings[104] and consultations with aboriginal associations, the territorial government, and the federal agencies responsible for the project.[105] The Comprehensive Study Report was presented to the public in June 1999.[106]

Implementation of the Process

In the Environmental Agreement, the parties established an advisory board to oversee the environmental management of the project, to design and implement scientific and traditional knowledge studies, and to make recommendations on the participation of aboriginal community members in training and monitoring programs. Diavik agreed to fund the advisory board and the Canadian and Northwest Territory governments agreed to provide supplemental funding for the first two years. Diavik also agreed to establish monitoring programs for the project and to annually produce a report on the results of environmental monitoring programs. Disputes arising out of the Environmental Agreement are subject to arbitration.[107] The Environmental Agreement also specifies that adequate security measures must be in place at all times during the life of the mine to rehabilitate the mine site.[108] DDMI proposed creation of a $46 million fund over time for the management of environmental problems and the long-term stewardship of the mine site, although it is not clear whether this ever materialized.[109]

The Socio-Economic Agreement created a community advisory board with representatives from each of the affected aboriginal communities, the company and the government. It meets on a regular basis to help

96 *Id.* at 5.
97 Canadian Environmental Assessment Agency, News Release, *supra* note 90.
98 *Id.*
99 *Id.*
100 See Indian and Northern Affairs, Canada, *Environmental Agreement Signed Off, supra* note 88 (stating, "Now that the Environmental Agreement is in effect, DIAND will issue a land use permit to allow Diavik Diamond Mines Inc. to begin preliminary site activities").
101 *Id.*
102 Archibald, *supra* note 87.
103 *Id.*
104 Canadian Environmental Assessment Agency, News Release, *supra* note 90.
105 Archibald, *supra* note 87.
106 *Id.*
107 Northwest Territories Resources, Wildlife and Economic Development, *Backgrounder: Diavik Environmental Agreement*, available at http://www.gov.nt.ca/RWED/ newsreleases/diavik.htm (last visited Dec. 12, 2002).
108 Indian and Northern Affairs Canada, *Environmental Agreement Signed Off, supra* note 88.
109 See Archibald, *supra* note 87 (citing Globe and Mail, 6 January 2000).

DDMI achieve its socio-economic commitments in the surrounding communities.[110]

Each Participation Agreement calls for the creation of a joint implementation committee to outline responsibilities, tasks, and timelines for reaching project-related employment and business development targets. Each aboriginal group agreed to employ a representative to liaise with DDMI on these and other social development issues.[111]

Voisey's Bay Mining Project (Canada)

In this project, the Voisey's Bay Nickel Company (VBNC), a subsidiary of Inco Inc., proposed to mine nickel, copper, and cobalt in northern Labrador. Two aboriginal communities reside in the area: the Labrador Inuit Association (LIA) and the Innu Nation. Both the LIA and Innu Nation asserted that their consent was required before project authorization, and both have land claims that overlap with the project area.[112]

The LIA and Innu Nation sought to exercise some control over the environmental assessment process to ensure that it was adequate to manage the potential environmental impacts of mining on their lands.[113] On January 31, 1997, the LIA, Innu Nation, and the governments of Canada and Newfoundland and Labrador signed a Memorandum of Understanding (MOU) establishing how the environmental effects of the proposed project would be reviewed.[114] The MOU was entered into under the Canadian Environmental Assessment Act (CEAA). It was established to harmonize the environmental assessment processes of the federal and provincial governments, and to recognize the two aboriginal groups that have overlapping land claims in the area.[115]

The Canadian Supreme Court affirmed the constitutional protection of aboriginal land title, noting that where aboriginal people have title to their traditional lands, governments must ensure that they participate in resource development, be properly consulted, and receive fair compensation.

The MOU established a five-person Environmental Assessment Panel charged with preparing a report with recommendations on VBNC's proposal.[116] Based on the Panel's recommendation for environmental co-management, the LIA and Innu Nation entered into an Environmental Management Agreement (EMA) with the governments of Canada and Newfoundland and Labrador. The EMA established an environmental advisory board composed of two representatives from each of the four groups, plus an independent chairperson. The board will advise the ministers.[117]

After extensive public hearings, the Environmental Assessment Panel recommended that the project move ahead to permitting, but only after the conclusion of land rights negotiations (or interim arrangements that would leave the Inuit and Innu Nation no worse off than if land claims agreements were in place), and after Impact Benefit Agreements (IBAs) were entered into with both LIA and the Innu Nation.[118] The IBAs are legally-binding contractual agreements between VBNC and the appropriate aboriginal community. They provide economic opportunities for the communities and mitigate against negative impacts of the development.[119]

With leverage from the Panel's recommendations,[120] both the Innu Nation and LIA negotiated and entered into interim land claims arrangements with the governments of Canada and Newfoundland and Labrador. These interim arrangements allowed the Voisey's Bay development to proceed while the land claims are under negotiation.[121]

The LIA and Innu Nation were also able to negotiate individual IBAs with VBNC concerning the Voisey's Bay project. Under the terms of the agreements, the

110 Rio Tinto, *Long Term Commitment in Community Relations: Global Business, Local Neighbour*, available at http://www.riotinto.com/library/reports_PDFs/corpPub_GloBus_part4.pdf (last visited Mar. 10, 2003).

111 *Diavik Diamond Mines, Inc.: Catalogue of Social Practices in the Canadian Minerals and Metals Industry*, available at http://www.nrcan.gc.ca/mms/sociprac/diavik_e.htm (last visited Dec. 12, 2002).

112 Government of Newfoundland and Labrador, *Aboriginal Involvement in Voisey's Bay*, available at http://www.gov.nf.ca/voiseys/news/backgrounder9.htm (last visited Dec. 18, 2002); Canadian Environmental Assessment Agency, *Voisey's Bay Mine and Mill Environmental Assessment Panel Report*, at Section 4.1, available at http://www.ceaaacee. gc.ca/0009/0001/0001/0011/0002/contents_e.htm (last visited Mar. 10, 2003) (hereinafter "CEAA Voisey's Bay EAP Report").

113 *The Innu Nation and Inco's Voisey's Bay Nickel Mine/Mill*, available at http://www.miningwatch. ca/aboriginal%20gathering/Case_Studies/html#anchor62391 (last visited Jan. 31, 2003).

114 Canadian Environmental Assessment Agency, *Summary: Voisey's Bay Mine and Mill Environmental Assessment Panel Report*, available at http://www.ceaa-acee.gc.ca/0009 /0001/0001/0011/0002/summary_e.htm (last visited 12/17/2002) (hereinafter "CEAA Voisey's Bay EAP Report Summary").

115 CEAA Voisey's Bay EAP Report, *supra* note 112.

116 CEAA Voisey's Bay EAP Report Summary, *supra* note 114.

117 Government of Newfoundland and Labrador, *Aboriginal Involvement in Voisey's Bay, supra* note 112.

118 *See The Innu Nation and Inco's Voisey's Bay Nickel Mine/Mill, supra* note 112; CEAA Voisey's Bay EAP Report Summary, supra note 113.

119 Government of Newfoundland and Labrador, *Aboriginal Involvement in Voisey's Bay, supra* note 112.

120 The Panel recommended that before the project goes ahead, the federal and provincial governments finalize land agreements in principle with LIA and the Innu Nation, and put enforceable interim measures in place until final agreements are signed. See CEAA Voisey's Bay EAP Report Summary, supra note 114.

121 Government of Newfoundland and Labrador, *Aboriginal Involvement in Voisey's Bay, supra* note 112.

two aboriginal communities will receive an estimated $300 million over the next 30 years, and guarantee minimum levels of aboriginal participation in various jobs and business opportunities generated by the project.

Authority for Prior Informed Consent Process

The prior informed consent process in this case study consisted mostly of consultations and negotiations between the aboriginal communities and the federal and provincial governments. These consultations and negotiations resulted in the MOU, the Panel report, the interim land claims arrangement, the EMA, and the IBA.

In the Delgamuukw case,[122] the Canadian Supreme Court affirmed the constitutional protection of aboriginal land title, noting that where aboriginal people have title to their traditional lands, governments must ensure that aboriginal people participate in resource development, be properly consulted, and receive fair compensation.[123] The fact that these aboriginal communities here had unsettled land claims in these areas added leverage to their claimed right to consultation. Since the LIA and the Innu Nation had potential title to the land at issue, they could more persuasively and forcefully exert a right to consultation and participation. Land title would not, however, allow them to assert the right to full consent. Even if they held to the land, the Delgamuukw case establishes that only participation and consultation, but not full consent, is required for a mining project to proceed on aboriginal land.[124]

VBNC was required to prepare an environmental impact assessment (EIA) under the Canadian Environmental Assessment Act. The responsible government agency must notify the public of the report's issuance, how copies may be obtained, and the deadline for comments. The CEAA requires the responsible government agency to consider all public comments when reaching a decision as to whether a project will continue or not and whether the EIA should be submitted to an Environmental Assessment Panel for review. If the project is referred to a panel, the panel has the option of allowing the public to participate in its review process. However, all panel hearings and relevant documentation must be made public, including the panel's final report. Citizens also have the option to appeal the report or the minister's decision to a federal court for judicial review.

Community negotiations and ultimate entry into an IBA with VBNC provides another example of prior informed consent. IBAs typically contain provisions that require the company to minimize the project's environmental, social, and cultural impacts, and to ensure that certain project benefits will remain in the local communities. The laws and policies for IBAs vary greatly throughout Canada; however, where a land claims agreement is already in place, IBAs are non-discretionary and a project cannot proceed without them.[125]

Threshold Definitions

The two communities involved in this case study were the Labrador Inuit and Innu aboriginal communities.

The Innu community established a task force to formulate its position on mining development. When faced with the prospect of mining development on their land, the Innu leadership first sought a mandate from the communities to confront the mining and exploration companies. It established a task force to serve as a forum for the community to discuss the issues of mining on Innu lands, the potential for economic development opportunities, probable environmental degradation, and the absence of a land rights agreement. The task force led to production of a report[126] that provided a clear mandate to the leaders. The report indicated that the Innu people would not consent to mining development without an IBA, environmental assessment, and a land claim agreement.[127]

Community representatives also served on various organizations created through the community consultation process. As parties to the MOU, the LIA and Innu Nation were able to appoint two members each to the Environmental Assessment Panel created by that agreement.[128] This provided the aboriginal communities with a greater voice in the panel's final report and its non-binding recommendations to the various governmental bodies.

The 2000 LIA members and approximately 600 Innu members were allowed to vote on the two IBAs. Both IBAs were formalized after 82 percent of the LIA voters and 68 percent of the Innu voters approved the respective agreements. The agreements will pay the two aboriginal communities an estimated $300 million over

122 *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.
123 CEAA Voisey's Bay EAP Report Summary, *supra* note 114.
124 CEAA Voisey's Bay EAP Report, *supra* note 112, at Section 4.2.1.
125 *Id.* at Section 4.2.3.
126 *Between a Rock and a Hard Place: Aboriginal Communities and Mining*, available at http://www.miningwatch.ca/issues/aboriginal_gathering/workshop_summary.html (last visited Sept. 22, 2003).
127 *The Innu Nation and Inco's Voisey's Bay Nickel Mine/Mill*, *supra* note 113.
128 *Id.*

the next 30 years and guarantee minimum levels of aboriginal participation in various jobs and business opportunities generated by the project. They also contain provisions that will help ensure the protection of the environment.

Framework of Prior Informed Consent Process

As discussed above the Supreme Court ruling in Delgamuukw held that even if the communities in fact possessed fully recognized title to the land, they would only have the right to participate in development and the right to be consulted, not the right to veto the mining project.

Both the federal and provincial governments played a central role in the community consultation process in this case study. These governments entered into the MOU, the EMA, and the interim land claims arrangements with the communities. The governments also provided additional leverage for the negotiation of the IBAs. Third parties were not significantly involved in the negotiations and consultations with the communities.

The VBNC proposal is one of the few mining projects, out of hundreds, that actually has gone through the panel review process under the Canadian Environmental Assessment Act. The signing of the MOU solidified the establishment of a five-person Environmental Assessment Panel.[129] The Innu Nation and LIA, as parties to the MOU, were able to appoint members to the panel charged with reviewing and preparing a report on VBNC's proposal.[130] The Environmental Assessment Panel's public hearings took place in 10 Labrador communities over 32 days.[131]

The Environmental Assessment Panel's final report included findings and conclusions as well as non-binding recommendations to the provincial ministers, federal ministers, and the presidents of LIA and the Innu Nation. The report also presented the concerns that were expressed to the panel throughout the process. Ultimately, the Environmental Assessment Panel recommended that the project be allowed to proceed, subject to 107 recommendations.[132]

The LIA and Innu Nation entered into an Environmental Management Agreement (EMA) with the governments of Canada and Newfoundland and Labrador based on the Environmental Assessment Panel's recommendation for environmental co-management. The parties to the agreement negotiated for over three years before signing the EMA.[133] The provincial and federal governments have agreed to finance the first five years of the EMA and to provide the environmental advisory board created by the agreement with an annual budget of $450,000.[134]

The Innu Nation and LIA were able to appoint two representatives each to the environmental advisory board, which also includes two governmental members, two business members, and an independent chair.[135] The board was established in recognition of the need to directly involve all relevant parties in the environmental management of the project, and will serve in an advisory capacity to the ministers.[136] Through the board, the community representatives were able to review and advise the government on the company's actions in fulfilling its obligations throughout the environmental assessment process. As members of the board, the representatives were able to oversee and obtain valuable information on the company's actions, operations, and environmental performance, as well as its fulfillment of its environmental and socio-economic obligations.

Negotiation of the IBAs took several years, but they were finally entered into in June 2002. Because the aboriginal communities had potential claims to the land and had entered into interim land claims arrangements with the federal and provincial governments, they were better able to exert pressure on VBNC to enter into the IBAs. The agreements do not rely on any specific legal authority, and the VBNC has consistently maintained that the IBAs were entered into on a purely discretionary basis.[137] The IBAs will thus act as legally-binding contractual agreements between VBNC and the appropriate aboriginal community.

Both the LIA and the Innu nations had representatives who negotiated the IBAs, but both groups presented the final IBA to a larger portion of the community to legitimize its final approval. In the end, 1,640 of the 2,000 voting LIA members and about 408 of the 600 voting Innu members approved their respective agreements.

129 CEAA Voisey's Bay EAP Report Summary, *supra* note 114.
130 *The Innu Nation and Inco's Voisey's Bay Nickel Mine/Mill*, *supra* note 113.
131 CEAA Voisey's Bay EAP Report Summary, *supra* note 114.
132 CEAA Voisey's Bay EAP Report, *supra* note 112.
133 Government of Newfoundland and Labrador, *Voisey's Bay Environmental Management Board Announced*, Oct. 11, 2002, at www.gov.nf.ca/releases/2002/env/1011n01.htm (last visited Dec. 18, 2002).
134 *Id.*
135 Government of Newfoundland and Labrador, *Aboriginal Involvement in Voisey's Bay*, *supra* note 112.
136 *Id.*
137 CEAA Voisey's Bay EAP Report, *supra* note 112, at Sections 4.1, 4.2.3.

Implementation of the Process

The formal environmental impact assessment process and the Environmental Assessment Panel were implemented in accordance with the Canadian Environmental Assessment Act and the Memorandum of Understanding. The EIA process was essentially completed once the Panel issued its final report and recommendations. Prior to issuing its final report, the Environmental Assessment Panel held two rounds of public consultations, with scoping sessions in the spring of 1997 and public hearings in November 1998.[138] The scoping sessions were held to allow individuals to present their issues to the panel. Public scoping and information sessions were held in 10 communities and public hearings in 11 communities, all over a span of two months.[139]

The Environmental Management Board, established under the Environmental Management Agreement, provides the national and provincial governments with a means of consulting with the aboriginal communities prior to government decision-making.[140] The board's function is to advise the governments on all permit applications, leases, construction and operation plans, as well as rehabilitation and closure plans.[141] In the event of changes or additions to such plans, the board will advise the governments with respect to the necessity for any further environmental assessment.[142] The board also reviews and advises the minister on the fulfillment of the Voisey Bay Undertaking Order, which set the terms for releasing the VBNC project from the environmental assessment process.[143] This function will require the board to oversee the Voisey Bay environmental performance and protection plans and the fulfillment of its socio-economic obligations.[144] Therefore, the Environmental Management Board will help ensure that the company follows through with its commitments and fulfills its obligations under the EMA.

The IBAs are independent contractual agreements between VBNC and the LIA and Innu Nation and can thus be legally enforced in court.

Ekati Mine (Canada)

In 1994, Broken Hill Proprietary Company Limited (BHP) proposed to develop the Ekati mine—Canada's first diamond mine—in the far reaches of the Northwest Territories.[145] This proposal was met with great concern on the part of local First Nations, who have several outstanding and overlapping land claims in the region.[146] The First Nations were concerned about how their interests would be addressed during project approval and operation, and about the environmental impacts of the mine on their traditional hunting, trapping, and fishing grounds.[147]

The approval process for the Ekati mine included a number of innovative instruments aimed at addressing these concerns and including aboriginal communities in the decision-making process. The Minister of the federal Department of Indian Affairs and Northern Development (DIAND) made project approval contingent on the negotiation of several legally-binding agreements, some of which required the consent of aboriginal groups.

First, DIAND required the negotiation of an environmental agreement among the federal government, the territorial government, and BHP. Affected aboriginal groups were invited by DIAND to participate in the process and were actively involved in negotiations, although they were not signatories to the agreement.[148] The 1997 BHP Environmental Agreement ("Environmental Agreement") imposes obligations on the company that surpass existing legal provisions, including requirements that BHP develop environmental management plans and monitoring programs and report compliance with the Agreement.[149]

DIAND also required BHP to negotiate Impact Benefit Agreements (IBAs) with four aboriginal groups affected by the Ekati mine. The purpose of the IBAs was to minimize adverse impacts of mining on local communities and ensure that these communities benefited from mineral development.[150] Finally, BHP was required to negotiate a socio-economic agreement with the territorial government.[151]

Commercial production in the Ekati mine began in 1998.[152]

138 CEAA Voisey's Bay EAP Report Summary, *supra* note 114.
139 CEAA Voisey's Bay EAP Report Summary, *supra* note 114.
140 Government of Newfoundland and Labrador, *Voisey's Bay Environmental Management Board Announced, supra* note 133.
141 *Id.*
142 *Id.*
143 *Id.*
144 *Id.*
145 Karyn Keenan, Jose de Echave, and Ken Traynor, *Mining and Communities: Poverty Amidst Wealth*, November 2002, available at http://www.umass.edu/peri/pdfs/CDP3.pdf (last visited Jan. 31, 2003).
146 Kevin O'Reilly, *The BHP Independent Environmental Monitoring Agency as a Management Tool,* Oct. 1998, at www.carc.org/rndtable/vbpanels.html (last visited Dec. 18, 2002); Keenan et al., supra note 145.
147 Keenan et al., *supra* note 145.
148 Kevin O'Reilly, *supra* note 146.
149 Keenan et al., *supra* note 145.
150 *Id.*
151 Kevin O'Reilly, *supra* note 146.
152 Keenan et al., *supra* note 145.

Authority for Prior Informed Consent Process

The DIAND Minister used his authority to approve the required water license as leverage to force the negotiation of the Environmental Agreement, Socio-Economic Agreement, and IBAs.[153]

However, the DIAND Minister's decision to require the negotiation of an Environmental Agreement and creation of an Independent Environmental Monitoring Agency was purely discretionary. There is no legal requirement in Canada that mandates the adoption of such instruments.[154] There is also no legal authority that requires the negotiation of IBAs for non-titled lands and those not under land claim agreements.[155]

The First Nations have several outstanding and overlapping land claims in the project area.[156] As discussed in the Voisey's Bay Nickel Company case study, title to the land would have provided legal authority for the community's right to participation and consultation in resource development, and receive fair compensation, as well as required the company to enter into IBAs as a prerequisite to project development.

Threshold Definitions

Community consultation in this case occurred through various processes and decision-making structures. Aboriginal community representatives participated in the Northwest Territories water board hearings for the issuance of a water license, as well as the public hearings by the four member environmental panel established by DIAND to review the proposed mining project.[157] Aboriginal organizations also participated in a September 1996 workshop convened by DIAND to discuss and negotiate the Environmental Agreement. DIAND invited aboriginal organizations to participate in the workshop, but did not allow them to become signatories to the agreement.[158]

Aboriginal representatives were also included in a funded working group to oversee the establishment of the Independent Environmental Monitoring Agency.[159]

Framework of Prior Informed Consent Process

During the negotiations period, several of the aboriginal organizations had legal counsel,[160] which may have enabled them to protect their rights and exert greater bargaining power. The creation of the Independent Environmental Monitoring Agency enhanced the education of the affected communities on mining issues. The Agency created a web site and a newsletter, and has begun to hold its meetings in the surrounding communities. It also compiled an issues paper to track community concerns raised during the environmental panel review and water board hearings.[161] Finally, BHP made some efforts to educate Agency staff by providing voluminous amounts of material for the Agency's review, as well as organizing workshops and meetings.[162]

In this case, the community was consulted prior to the development stage of the mining operation. A limited form of community consultation is also expected to occur at the construction and operations phases through review of BHP's environmental management plans.[163]

These negotiation and consultative processes did not present the aboriginal communities with the right to veto the project, but rather allowed them to set conditions on its implementation through the negotiated agreements.

The creation of the Independent Environmental Monitoring Agency enhanced the education of the affected communities on mining issues.

Both the federal and territorial governments played a central role in these negotiations. The DIAND minister, Ron Irwin, used his authority to approve water licenses as leverage to force BHP to enter into negotiations and agreements with the local communities.[164] Both DIAND and the territorial governments are parties to the Environmental Agreement.[165] DIAND also exerted pressure on BHP to negotiate and enter into IBAs with four aboriginal groups affected by the mine.[166] Third parties were not significantly involved in the negotiations and consultations with the communities.

The agreement was formalized through a contract. The Environmental Agreement is a legally binding contract among the federal and territorial governments and BHP, and includes enforcement provisions (discussed

153 Kevin O'Reilly, *supra* note 146.
154 Keenan et al., *supra* note 145.
155 CEAA Voisey's Bay EAP Report, *supra* note 112, at Section 4.2.3.
156 Kevin O'Reilly, *supra* note 146.
157 *See Id.*
158 *Id.*
159 *Id.*
160 *Id.*
161 *Id.*
162 *Id.*
163 *See Id.*
164 *Id.*
165 *Id.*
166 Keenan et al., *supra* note 145.

below).[167] The IBAs are binding contracts between BHP and the individual communities.[168] The Environmental Agreement only covers the term of operation of the mine, and does not extend after the mine is closed.[169]

Implementation of the Process

The Environmental Agreement requires the establishment of the Independent Environmental Monitoring Agency, a non-profit organization that acts as a public watchdog over the implementation of the Environmental Agreement. This Agency has seven directors who are appointed by the government, BHP, and First Nations, but act independently.

The Environmental Monitoring Agency reviews and advises on the company's environmental management and monitoring activities, as well as government regulatory activity, and facilitates aboriginal involvement in the regulatory process.[170] The Agency is to report annually. The government and BHP are required to provide a written response as to their reasons for not implementing any of the Agency recommendations.[171]

The Agency will receive $450,000 each year for the first two years to fund its operations. BHP will provide $350,000, and responsibility for the remaining amount will be split between the two governments. Subsequent funding is to be provided by BHP in consultation with the Agency. Where no agreement can be reached, the matter can be referred to binding arbitration.[172]

BHP is also subject to reporting requirements under the Environmental Agreement. BHP is required to report annually on its environmental compliance, monitoring programs, research, operations and future activities, and remedial or mitigative action.[173] Environmental management plans, including detailed monitoring programs, are required for the construction phase and operations phase. These plans are subject to review by government, aboriginal organizations, and the Agency.[174]

BHP must also post security for the progressive reclamation of the land-related disturbances created by the project. These funds may also be drawn upon if BHP does not comply with requirements in the Agreement, including non-compliance with reporting requirements or failure to rectify faulty management plans.[175]

There is no mechanism created for review, monitoring or communication of results of compliance with respect to the socio-economic agreement.[176]

The IBAs, as private contracts between the parties, are legally enforceable in a court of law.

Camisea Oil Project (Peru)

In early 1996, Shell signed a contract with the Peruvian government for exploration of the Camisea oil fields in Peru. This exploration phase was intended to provide a better estimate of gas and condensate reserves in the fields, which would serve as the basis for Shell's final investment decision.

During its exploration campaign in Camisea from 1996-1998, Shell engaged in extensive consultations with the affected communities through the environmental impact assessment (EIA) process.[177] It first produced a scoping report to identify the issues and focus the process. The scoping report was made available to external stakeholders for information and input.[178] In late 1995, Shell conducted an initial EIA, which included a social impact assessment.[179] Shell held a public hearing on the EIA in 1996.[180] Ultimately, Shell conducted three additional EIAs, one for each subsequent segment of the project (upstream, transportation, and distribution), and eight public hearings (three for upstream, four for transportation, and one for distribution).[181]

In 1998, however, Shell decided not to continue with the project, after having invested over $250 million.[182] Shell cited various economic and financial factors for its decision,[183] although a few observers have suggested that the environmental and social controversy surrounding the proposed project may have played a role in Shell's decision.[184] Since then, the Peruvian government has awarded contracts to several new consortia for comple-

167 Kevin O'Reilly, *supra* note 146.
168 Keenan et al., *supra* note 145.
169 Kevin O'Reilly, *supra* note 146.
170 Keenan et al., *supra* note 145.
171 Kevin O'Reilly, *supra* note 146.
172 *Id.*
173 *Id.*
174 *Id.*
175 *Id.*
176 *Id.*
177 Aaron Goldzimer, *Prior Informed Consent of Project Affected Indigenous Peoples*, available at http://www.ksg.harvard.edu/ksr/article_AG.htm (last visited Jan. 30, 2003).
178 IPIECA/E&P, *The Oil Industry: Operating in Sensitive Environments, Case Study: Shell in Camisea, Peru*, available at http://www.ipieca.org/publications/biodiversity.html (last visited Mar. 10, 2003) (hereinafter "IPIECA Shell Case Study").
179 *Id.*
180 *Id.*
181 *Camisea: Environment and Communities, available* at http://www.camisea.com.pe/environ.asp. (last visited Jan. 30, 2003).
182 *Red List Risk Profile: Amazon Financial Information Service, Camisea Gas and Field Pipeline Project*, January 25, 2001 (hereinafter "Red List Risk Profile: Camisea").
183 *Id.* (citing cost overruns and an inability to work out a vertical integration agreement with the Peruvian government). *See also* Amazon Alliance, Amazon Update, August 1998, available at http://www.amazonalliance.org/update/1998/upd_aug98_en.htm (last visited Jan. 30, 2003) (citing limited domestic market and natural gas pricing disagreement with Peruvian government).
184 Red List Risk Profile: Camisea, *supra* note 182.

tion of the project.[185] The construction phase of the project is expected to be completed by August 2004.[186]

Authority for Prior Informed Consent Process

Shell was legally required to consult with the community in order to gain authorization for its project. Peru's Environmental and Natural Resources Code[187] requires the submission of an Environmental Impact Assessment (EIA) to gain authorization for development activities. The EIA must be made publicly available. In July 1996, the Ministry of Energy and Mines strengthened the public participation criteria for the EIA, requiring a public hearing at the local level and prior notification in a national newspaper for actions in the energy and mining sector.[188]

The International Labor Organization (ILO) Convention No. 169 was ratified by the Peruvian government in 1993 and provides additional authority for a community's right to prior informed consent. This international treaty established criteria providing native peoples with the right to consultation prior to the implementation of projects that exploit natural resources in their territories, as well as the right to participate in decisionmaking processes involving such projects.[189]

Threshold Definitions

In order to identify the community for consultation, Shell conducted a stakeholder identification study in 1995.[190] Shell identified and contacted about 200 organizations representing stakeholders in areas that the project would affect.[191]

Shell engaged the community at several different levels. First, Shell worked closely with the indigenous federations. The federations are legally constituted to represent groups of native communities and to advance their common interests with respect to territorial rights, education, public health, resource management and economic development. Nearly all of the communities in the affected region belong to one of the three federations. Decisionmaking in these federations closely reflects traditional decision-making in native communities. Most decisions are made by the community at the annual or semi-annual community-wide congresses, rather than by federation officers.

Shell made initial contact with the communities in meetings during federation congresses, held meetings with federation officers, and invited federation leaders to national and international seminars on the Camisea project, often donating funds for their expenses. However, the federation officials' expense-paid travel created resentment and tension, as the native communities felt that they had not gained any tangible results from the travel and that the officials' had failed to adequately disseminate information. To improve the communication gap between federation officials and native communities, Shell staff took meeting notes for officials to disseminate to the communities, provided portable computers and printers to speed dissemination, provided a two-way radio to improve communication, and furnished boat fuel to enable federation officials to travel to local communities. To avoid further travelrelated problems, Shell held meetings within the region, and made meeting attendance as open as possible.[192]

In addition, Shell engaged in direct consultation with the local communities and their individual associations. Shell's Community Liaison Officers (CLOs) took part in hundreds of community and association meetings.[193]

In negotiating contracts, Shell initially sought the agreement of the local leaders whom it believed legitimately represented the community.[194] However, the ensuing tensions and divisions among community members soon led to the realization that a broader participatory approach was necessary to provide legal support to company operations on community lands.[195] Thus, Shell determined that community members should be involved in the agreements through their communal assemblies.[196] At the same time, because of the transaction costs involved with such a participatory approach, Shell sought to build the capacity of representative local community organizations and indigenous federations that could confront specific problems as they arose.[197]

185 *Id.*
186 *Camisea Project: Public Participation and Consultation Process: Summary and State of the Project*, August 2002, available at www.camisea.com.pe/docs_mAmbiente/Camisea_summary. pdf (last visited Feb. 1, 2003).
187 Legislative Decree No. 613 (1991) (Peru).
188 Ministry Resolution No. 335-96-EM/SE, July 1996 (Peru). See Peter May, *Corporate Roles and Rewards in Promoting Sustainable Development: Lessons Learned from Camisea,* 11, fn. 11.These regulations were substantially modified in December 2002.The new rules require public consultations prior to the public hearings, increased access to environmental impact studies, and the increased participation of regional authorities and the public. See Mary Powers, *Peru seeks more environment info from Manhattan Minerals*, Reuters News Service 1/10/2002, available at http://www.planetark.org/avantgo/dailynewsstory.cfm?newsid=19353 (last visited Jan. 30, 2003).
189 However, some observers have noted that implementation of this Convention is limited in Peru, where social mores typically discourage individuals from identifying themselves as indigenous. Email communication with Rachel Kyte (International Finance Corporation) and Martin Scurrah (Oxfam America) (on file with author)
190 IPIECA Shell Case Study, *supra* note 178.
191 May, *supra* note 188 at 11.
192 *Id.* at 18-19.
193 *Id.* at 19.
194 *Id.* at 38.
195 *Id.*
196 *Id.*
197 *Id.* at 38-39.

Framework of Prior Informed Consent Process

Shell used a variety of techniques to educate local communities about the issues. First, it disseminated relevant written materials to stakeholders. This information included 13 bilingual briefing papers, issued about every three months, which contained summaries of technical reports and project updates.[198] Shell also provided written information through its Camisea website, which it regularly updated.[199] Second, Shell exchanged information with stakeholders through a series of six participatory workshops at different levels (regional, indigenous federations, national, and international).[200] These workshops were intended to facilitate dialogue and avert misunderstandings.[201] Finally, Shell directly communicated information to communities through its CLOs.

Prior informed consent in the Camisea case consisted of the power to impose conditions upon —rather than the power to veto.

Direct engagement by CLOs became the centerpiece of Shell's consultation effort.[202] Shell's CLOs distilled information into simpler form and presented it to the communities.[203] They used a range of techniques to communicate complex project plans to native communities, including: briefing notes (simplified project briefing papers translated into Machiguenga); posters; videos; picture packages (showing various project components, construction methodology, and mitigation measures); and scale models of project components.[204] However, the effectiveness of this information dissemination effort was limited by the CLOs' lack of training in cross-cultural communication.[205]

Shell engaged in public participation from the initial exploration and appraisal stage of its project. During the core of the consultation process for full field development, Shell consulted with over 30 native communities in six meetings.[206] Shell sought to identify issues with the community prior to or during the design phase, rather than after the start of operations.[207]

Although Shell engaged in extensive consultations with the community in determining the scope of the project, it is not entirely clear that Shell would have withdrawn from the project if community support was not forthcoming.[208] Accordingly, prior informed consent in this case really consisted of the power to impose conditions upon—rather than the power to veto—the proposed project. Shell formalized these conditions through contracts with the communities.[209]

The consultations included government leaders and third parties, such as national and international NGOs, and scientific institutions.[210] The third parties played an important role in providing insight into Peru's social and environmental situations, as well as valuable technical and scientific expertise.[211] Shell invited a number of NGOs to work in partnership with the company in activities related to local communities. For instance, it signed a contract with a network of national environmental organizations (consisting of 38 NGOs) to conduct an independent assessment of the project and to monitor the project's socio-environmental procedures and impacts.[212]

Third parties were also instrumental in the planning process that focused on helping local communities manage their future. Third parties carried out baseline studies or diagnostics, on which the planning was based. After the field study, a draft report with findings and recommendations was taken back to the communities for discussion in the workshops to validate the facts and establish community priorities. The results were then reviewed again by regional and national governments to gain their commitment to implementation.

Implementation of the Process

Shell facilitated inspections by NGOs to ensure that it was following through with its commitments. For instance, it developed an arrangement with the Peruvian Environmental Network (RAP) to undertake quarterly independent monitoring. During each visit, two RAP members visited the affected communities, in order to better gauge attitudes and concerns. RAP issued reports on each visit, which were made public. Shell agreed to meet all expenses for these monitoring visits and paid RAP a small sum for internal use.[213]

198 *Id.* at 40; IPIECA Shell Case Study, *supra* note 178.
199 May, *supra* note 188 at 11.
200 *Id.* at 12.
201 *Id.* at 13.
202 IPIECA Shell Case Study, *supra* note 178.
203 May, *supra* note 188 at 15.
204 *Id.*
205 *Id.* at 16.
206 *Id.* at 11.
207 *Id.* at 36.
208 Goldzimer, *supra* note 177.
209 May, supra note 188 at 38.
210 *Id.* at 12.
211 *Id.* at 13.
212 *Id.*
213 IPIECA Shell Case Study, supra note 178.

Tambogrande Mining Project (Peru)

Manhattan Minerals began exploration in the Tambogrande Municipal District in the Piura Province of Peru in 1997, finding extensive deposits of copper, zinc, silver, and gold. From the onset, there has been widespread opposition to the Manhattan Mining project.

Many local residents have been concerned that the mine would cause significant environmental pollution, create health problems, and hurt the local agricultural economy.[214] The current mine plans would displace almost half of the town's population (approximately 8,000 residents) and result in the dismantling of one-third of family homes, because a portion of the mine is located directly underneath the community.[215]

Problems arose early on in the mining process, when Manhattan Mining was granted mining concessions by Peruvian government authorities without having consulted any local government bodies.[216] The murder of a leading mine critic and reports that mining companies have asked the Peruvian government to take a "tough hand" towards mining protests have further inflamed the situation.[217]

Local opponents representing diverse interests have organized the Tambogrande Defence Front.[218] This group consists largely of individuals who fear that the mine would impair local agricultural production. The group has the support of the local mayor, church leaders, and international advocacy groups.[219]

To quell the extensive opposition from local groups, Manhattan Minerals engaged in a number of community outreach and consultation efforts.[220] In April 2001, the company announced that it would spend one year improving community relations, and in May it signed an agreement to establish a forum for dialogue among stakeholders.[221] The company also held reconciliation meetings with local groups after there were violent protests against the mine.[222] However, these efforts were generally unsuccessful because local community stakeholders felt that the company had not offered adequate information on the environmental and social consequences of the project.[223]

In response to these ineffective consultation efforts, the Tambogrande municipal government adopted a municipal order and agreement on October 11, 2001 that created the municipal consultation, or consulta vecinal, for the Tambogrande district.[224] The municipal consultation aimed to provide the Tambogrande citizenry with information on the mining project, an opportunity to participate in the mining decision-making process, and an opportunity to express—through a community vote— their position on the project.[225]

When the national government learned that the municipality intended to hold a community vote as part of the *consulta vecinal,* it initiated its own consultative dialogue by inviting 18 community representatives to meet with the Minister of Energy and Mines and the Minister of Agriculture. The process was meant to provide support for the environmental impact assessment process being carried out by the government and Manhattan.[226]

Peru's laws require companies to hire a third party to prepare the EIA.[227] Although it was suggested that the government provide funding to the local community to conduct an independent impact evaluation, the government chose to only have an independent review of the EIA. The EIA had been prepared by a private consulting firm hired by Manhattan in accordance with standard practice at the time.[228]

On January 8, 2002, the Tambogrande Defence Front officially removed itself from the discussion, stating that the ultimate goal of the dialogue was the completion of the EIA and the continuation of the mining proposal, which ran counter to the Front's objectives.[229] All other stakeholders remained in the dialogue.[230]

214 Stephanie Rousseau and Francois Meloche, *Gold and Land: Democratic Development at Stake – Report of the Observation Mission of the Tambogrande Municipal Consultation Process in Peru* (2002), available at http://www.ichrdd.ca/english/commdoc/publications/ demDev/tambograndeReportEng.html (last visited Dec. 16, 2002); Red List Risk Profile, Amazon Financial Information Service, *Peru: Tambo Grande Mining Service*, January 2002, available at http://www.redlisted.com/peru_tambogrande.html (last visited Mar. 10, 2003) (hereinafter "Red List Risk Profile: Peru"). There is long history of mining projects in Peru that have excluded local communities from the economic benefits while leaving them with the negative consequences, such as displacement, pollution of vital resources, and health problems. See, e.g., The Mining News, *Communities March Against Mining Industry*, June 22, 2002, available at http://www.theminingnews.org/theminingnews/case_tambogrande. html (last visited Mar. 11, 2003); Canadian Business, City of Gold, February 5, 2001, available at http://www.charlesmontgomery.ca/tambo.html (last visited Mar. 11, 2003).

215 The Mining News, *Tambogrande Sign-on Letter*, available at http://www.theminingnews. org/theminingnews/case_tambogrande.html; Red List Risk Profile: Peru, supra note 214.

216 Rousseau and Meloche, *supra* note 214.

217 Red List Risk Profile: Peru, *supra* note 214.

218 *Id.*

219 *Id.*

220 *See Manhattan Minerals Corp. Community Relations – Building A Foundation for Growth*, available at http://www.manhattan-min.com/s/CommunityRelations.asp (detailing community consultation efforts) (last visited Jan. 30, 2003).

221 Red List Risk Profile: Peru, *supra* note 214.

222 *Id.*

223 *Id.*

224 Rousseau and Meloche, *supra* note 214.

225 *Id.*

226 *Id.*

227 *Id.*

228 *Id.*

229 *Id.*

230 *Id.*

Thereafter, the Peruvian government and the Tambogrande municipal authorities went their separate ways. The Peruvian government announced that the firm hired to evaluate the EIA process would be acceptable to Piura's civil society and would explain its analysis at meetings and workshops before the residents of Piura and Tambogrande.[231] The government stated that civil society representatives would act as observers of the EIA process.[232] Additionally, public hearings would be held to inform the public of the EIA findings, and the mining company would have to sufficiently answer the criticisms made during the hearings by citizens or government authorities.[233]

The Tambogrande municipal authorities decided to go ahead with the municipal consultation and community vote to determine the future of mining activities in the area.[234] The municipality adopted a council agreement on April 20, 2002, which set June 2, 2002 as the date for the municipal vote.[235] The Peruvian government expressed its opposition to the community vote and stated that it would have no legal force as to the mining conflict.[236] Nonetheless, the municipal authorities went ahead with a community vote on June 2, 2002.[237] Although exact statistics for the event slightly vary, the turnout was approximately 74 percent of the eligible voting population, and an overwhelming 98 percent voted against the mine.[238] A debate was also held between a biologist who opposed the mining project and a representative from Manhattan Mining, although a raucous crowd produced an atmosphere that was not ideal for an exchange of view.[239] The Tambogrande municipal consultation was the first of its kind in Peru.[240]

The Peruvian government did not recognize the legitimacy of the community vote and allowed Manhattan Minerals to proceed with the environmental impact study of the mining project. Manhattan presented the environmental impact study in December 2002. In January 2003, the Peruvian government asked Manhattan Minerals to submit additional information on its environmental impact study. The 120-day period foreseen by the law for approving or rejecting the environmental impact study was frozen until Manhattan Minerals submitted the information in April 2003.[241] A series of 7-10 workshops on the EIA are expected to be held in the Tambogrande communities, followed by a public comment period.[242]

Authority for Prior Informed Consent Process

Questions surrounding the legality and legitimacy of Manhattan's mining concessions, particularly in Tambogrande's urban areas, have exacerbated the tensions surrounding the project. Manhattan Minerals stated that community residents were consulted prior to its first explorations in 1997; however, some members of the Tambogrande municipal council dispute the legitimacy of such actions. These council members claim that the company's explorations began before the appropriate consultations and agreements, and that the agreements reached between Manhattan and certain rural landowners were not legitimate because the council was not properly consulted.[243]

In May 1999, the Peruvian national government, through a supreme presidential decree, granted Manhattan Minerals 10 mining concessions rights in the Tambogrande region, including some in urban and urban expansion areas.[244] Law 27015 requires companies to undertake a consultation with the provincial municipality and district municipality on the viability of exploration activities in urban and urban expansion areas prior to the granting of concessions.[245] Manhattan did not consult with the Tambogrande municipal authorities prior to the issuance of the presidential decree; however, at the time, the authorities had not completed the administrative procedures for the identification of urban and urban expansion areas.[246] Manhattan's consultations with the municipal council to begin explorations in the area began in May 1999. On November 18, 1999, the Tambogrande mayor authorized Manhattan's exploratory drilling in the urban area of Tambogrande through Decree No. 010-99-MDT.[247]

In order to gain authorization for development activities, Peru's laws require that a third party prepare and submit an Environmental Impact Assessment (EIA)

231 *Id.*
232 *Id.*
233 *Id.*
234 *Id.*
235 *Id.*
236 *Id.*
237 *Id.*; John Newcomb, *Mine Prospect Looms Over Northern Peruvian Farmers*, 29 May 2002, available at http://csf.coloado.edu/mail/elan/2002/msg00277.html (last visited Dec. 16, 2002).
238 The Mining News, *Tambogrande Residents Vote "No" to Proposed Gold and Silver Mine*, available at http://www.theminingnews.org/theminingnews/case_tambogrande.html#No. But see, e.g. Keenan et al., supra note 145 (97% of voters against the mine); Scott Wilson, *A Life Worth More Than Gold: Peruvian Town Tries to Turn Away Mining Company*, Wash. Post, June 9, 2002 (nine in 10 voters against the mine).
239 Rousseau and Meloche, *supra* note 214.
240 *Id.*
241 Powers, *supra* note 188.
242 Emily Russell, *Tambogrande EIS Underway*, Business News Americas, April 9, 2003, available at http://www.bnamericas.com.
243 Rousseau and Meloche, *supra* note 214.
244 *Id.*
245 *Id.*
246 *Id.*
247 *Id.*

and make it publicly available.[248] A public hearing and prior notification in a national newspaper is also required for energy and mining projects.[249] A division within the Department of Agriculture, Instituto Nacional de Recursos Naturales (INRENA), analyzes the EIA and presents a non-binding recommendation to the Department of Energy and Mines (MEM) relating to the impact of the proposed action on natural resources.[250] MEM then holds public hearings on the EIA, where citizens can express their views on the mining proposal.[251] Citizens may also express their views in writing to MEM within two weeks of the public hearings.[252]

In December 2002, the Peruvian government announced new procedures for public hearings on environmental impact studies for mining projects. These new rules require consultations with the local population prior to the public hearings, better access to copies of environmental impact studies, increased citizen participation in the hearings, including language interpretation, and more input from regional authorities.[253] Although these rules were not in place when the company's EIS was being developed, a transitional clause allowed these procedures to be retroactively applied to the Manhattan Mining project.

In addition to the laws above, Manhattan's consultation and outreach processes have been guided by extra-legal authority. Manhattan Minerals Corporation's socio-economic policy commits the company to participating "in the social, economic and institutional development of the communities surrounding the project" and ensuring "full community participation and involvement in the financing and implementation of community initiatives."[254]

The consultation dialogue, initiated by the Peruvian national government (after learning of the municipality's decision to undertake a community vote), was established under the auspices of the Office of the Ombudsman.[255] The dialogue was not established as a process for expressing the community's prior informed consent to the Manhattan mining project, but rather as a forum to discuss issues relating to the project. The Tambogrande Defence Front's withdrawal from the dialogue provides more credence to the argument that it was, at best, a consultative process.

248 Legislative Decree No. 613 (1991) (Peru).
249 Ministry Resolution No. 335-96-EM/SE, July 1996 (Peru). See May, *supra* note 188 at 11, fn. 11.
250 Rousseau and Meloche, *supra* note 214.
251 *Id.*
252 *Id.*
253 Powers, *supra* note 188.
254 Rousseau and Meloche, *supra* note 214.
255 *Id.*

Tambogrande municipal order number 012-2001-MDT-C and municipal council agreement no. 020-2001-MDT-CM of October 11, 2001 created the municipal consulation (*consulta vecinal*) as a tool to promote citizen participation in the district.[256] The following legislation legally recognizes municipal consultation:

- The municipal organic law (*Ley orgánica de municipalidades*) gives the municipal authority responsibility in development planning (Articles 62 and 64) and the capability determine the methods to increase public participation in community development (Articles 10 and 79);[257]
- The Act respecting rights of participation and control by citizens (*Ley de los derechos de participación y control ciudadanos no. 26300*) establishes the tools for implementing public participation at the municipal level.[258]

According to the Tambogrande municipal authorities, the community vote initiated by the mayor also relied on legitimate legal authority. In 2001, approximately 75 percent of Tambogrande's voting population (28,000 citizens) signed a petition circulated by the mayor that called for an end to mining activities in the region and the withdrawal of Manhattan Minerals Corp.[259] While to the Peruvian Congress and several public institutions received the petition, the State failed to acknowledge it. On February 16, the municipal council agreed by resolution to "respect the will of the residents to oppose the government's wish to grant authorization to the mining project in the district of Tambogrande" (*"hacer cumplir la voluntad de inconformidad de los pobladores en torno a las pretensiones del Gobierno Central de autorizar la explotacion minera en el Distrito de Tambogrande"*).[260]

Peru's central government did not recognize the authority of the community to deny mining through use of the *consulta vecinal*. Nor did the government find that the community vote had any legal significance. In fact, the Peruvian government published a resolution in February 2002 stating that such votes are illegal because they conflict with laws (such as the EIA requirements) that set forth the process by which the development of mining deposits are approved.[261]

In the end, the *consulta vecinal* provided a means for the community to peacefully and formally express the sentiments of its members regarding the Manhattan

256 *Id.*
257 *Id.*
258 *Id.*
259 *Id.*
260 *Id.*
261 Newcomb, *supra* note 237.

mining project. While it does not appear to have contravened any law that would render it "illegal," it also does not appear to be a legally-binding vote as defined by Peruvian law. Moreover, Peruvian law does not allow such local votes to trump national government decisions. This is consistent with the central government's position, under three successive governments of different political colors, that the central authorities control the mining permit process, and that local authorities should not have the power to veto mining outright in their communities.[262]

About 75% of the Tambogrande voting population signed a petition that called for an end to mining activities in the region and the withdrawal of Manhattan Minerals Corp., but the State failed to acknowledge it.

Threshold Definitions

For the consultation dialogue with MEM and the Minister of Agriculture, the Office of the Ombudsman's representative in Piura invited 18 persons to represent the community. Those invited to the meeting included the mayor of Tambogrande and three leaders from the Tambogrande Defence Front.[263]

In the case of the community vote, the "community" that was eligible to participate in the vote included all the citizens who had registered for the 2001 elections.

Framework of Prior Informed Consent Process

Manhattan Minerals claims that it made an effort in its initial consultations to provide informational and educational materials about the impacts of the mine to the affected communities. It disseminated information within the community, including a monthly news bulletin, and published weekly letters from the president of Manhattan Minerals in the local newspapers.[264] Manhattan Minerals also organized information sessions and screened mining documentaries for the public.[265] The company paid for a trip to Chile for some leaders of Tambogrande, including the mayor and president of the Tambogrande Defence Front, to view the coexistence of agriculture and mining at a nearby mine.[266]

However, the extent to which these actions disseminated clear factual information on the potential negative impacts of the mine is unclear. The information provided largely focused on the community benefits from the mine and the relocation process. A large number of community members and municipal officials claimed that they were not provided specific information on the environmental and social impacts of the mine.

The central government-initiated consultation dialogue took place under the aegis of the Office of the Ombudsman. Although the Office of the Ombudsman is highly respected among the Peruvian public,[267] its capacity and effectiveness—particularly at the regional level—is limited by its shortage of resources.[268] The central government provided information to the public about the decisions reached in the consultation dialogue through a letter to the Ombudsman. In this letter, the government explained the proposal formulated during the consultation dialogue and called for increased public participation in the EIA process. However, opponents of the mine felt that this proposal denied them the right of prior informed consent by limiting the community's rights to simply placing conditions upon—but not being able to veto—the mining project. On January 8, 2002, The Tambogrande Defence Front formally removed itself from the dialogue.[269]

During the municipal consultation, the community was largely informed about the issues through material dispersed by a group of individuals who opposed the mine, and who were collectively registered as the "no" campaign.[270] An election committee was established to oversee the vote.[271] The community voted on whether to allow or prohibit mining in the region—the terms and conditions for the acceptance of the mine were not addressed in the voting process.[272]

The national government and municipal government took different approaches to the prior informed consent process. The federal government clearly opposed the municipal vote, because it was not a legal mechanism provided for under the applicable legislative framework for approval or rejection of a mining

262 Email communication with Rachel Kyte (International Finance Corporation) (on file with author).
263 Rousseau and Meloche, *supra* note 214.
264 *Id.*
265 *Id.*
266 *Id.*
267 *Id.*
268 Email communication with Rachel Kyte (International Finance Corporation) (on file with author)
269 Rousseau and Meloche, *supra* note 214.
270 *Id.*
271 *Id.*
272 *Id.*

ESQUEL MINING PROJECT (ARGENTINA)

On March 23, 2003, the residents of Esquel, Argentina voted in a non-binding referendum to determine the future of a gold mine proposed by Meridian Gold Inc. About 75 percent of Esquel residents participated in the referendum, and approximately 80 percent of them cast their votes against the mining project, which Meridian intended to put into production by late 2004.

The community has been concerned with the mine's potential impacts on water supplies (especially from the use of cyanide), fish populations, agriculture, and the local ecotourism industry. The proposed mine would be located about five miles from the town of Esquel and 28 miles from Los Alerces National Park, a tourist destination and home to an endangered species.

Initially, Meridian dismissed the referendum, stating that it planned to continue with the exploration and permitting process as scheduled. However, the results of the referendum increased pressure on local government officials. Governor Jose Luis Lizurume of the Chubut Province asked Meridian to halt work on the mine until an additional environmental study is completed. The company has since hired a San Francisco-based non-profit organization, Business for Social Responsibility, to help it better understand community concerns.

Meridian brought in new consultants to review its initial Environmental Impact Assessment (EIA). The EIA published by Meridian Gold was harshly criticized in a report by Dr. Robert Moran.[277] Dr. Moran stated that the EIA would not be found acceptable by regulators in Western Europe, America, or Canada. New consultants will also publish a new study that assesses the potential impacts of the mine on the community's water sources. The results of the study will be audited by Argentina's National Institute of Water. A public hearing is scheduled to take place at least 30 days after the study is published.

Meridian's stock fell dramatically as a result of the uncertainties regarding the Esquel mine, and the company admitted that it made mistakes with the project. Meridian believes that it was too impatient in trying to push through its project and that it should have spent more time consulting with the local community. The company stated that it will not continue with the project unless the community changes its opinion on the project, but it is hopeful that its new efforts will build public support for the project.

project.[273] Conversely, the municipal government in initiating the community vote demonstrated strong support for the Tambogrande community's right to prior informed consent.

Third parties were also involved in the community prior informed consent process. From the beginning of 2000, a number of NGOs from Piura and Lima formed the Tambogrande Technical Support Committee to provide the Tambogrande Defence Fund with valuable tools to back its opposition to the mining project.[274] International NGOs, primarily Oxfam, provided financial support, commissioned environmental studies, and carried out awareness and education activities. A Canadian group, Rights & Democracy, sent a mission to observe and monitor the public consultation process. Oxfam Great Britain provided financial support of US$20,000 to hold the community vote.[275]

Implementation of the Process

Peruvian law required Manhattan's EIA to include information on the mine's direct benefits to the communities and region, the forms of citizen participation, and the compensation and other mitigation measures that would be taken as a result of the mine's impacts on the community and its environment.[276] As stated above, approval of the EIA has been withheld pending the submission of additional applicable information.

Since the community consultation processes discussed in this case study have not yet culminated in an agreement between the mining company and the community, there is no agreement or process to be implemented.

Stillwater Mine (United States)

The Stillwater Mining Company (SMC) produces palladium, a precious metal, in the Beartooth Mountains in Stillwater County, Montana, USA. This region is also home to ranchers, trout fishermen and wealthy large landowners seeking refuge from big cities. Over the years, local environmental and community groups

273 *Id.*
274 *Id.*
275 *Id.*
276 *Id.*
277 Dr. Moran is a hydrologist and geochemist who prepared a report on the proposed mine site for Greenpeace Argentina and the Mineral Policy Center. See Robert Moran, *Esquel, Argentina: Predictions and Promises of a Flawed EIA*, (Mar. 2003), available at http://www.mineralpolicy.org/publications/pdf/PredictionsPromisesFINAL.pdf (last visited Sept. 18, 2003).

have attempted to use many traditional legal tools, including participation in the environmental impact assessment process and citizen suits, to resolve their complaints over SMC's mining operations.[278] However, because traditional avenues failed to yield results, the groups began exploring the use of a new tool: the Good Neighbor Agreement. In a Good Neighbor Agreement, the community negotiates directly with the local company "to establish a set of principles and practices that will govern those aspects of the company's business activities that most keenly affect the community."[279] In May 2000, three local groups entered into a Good Neighbor Agreement with SMC. The agreement imposes on SMC more stringent environmental standards than required by Montana or federal law, and also contains expansive provisions on citizen access to information and public participation and monitoring concerning the mine.[280]

Authority for Prior Informed Consent Process

SMC was not required by law to enter into the Good Neighbor Agreement. Rather, SMC's decision to enter into the agreement stemmed in part from the need to protect its corporate image as a socially-responsible company. SMC is a publicly-owned company, and its investors include socially responsible mutual funds. Therefore, its share prices and ability to attract investors were particularly sensitive to public criticism. After criticism of SMC's operations were published in an article in the New York Times, SMC appeared more willing to enter into the agreement.[281] Moreover, at the time, SMC was also facing a pending lawsuit from local community organizations. SMC's entry into the agreement also likely stemmed from the possibility that the lawsuit might be dismissed in exchange. The community organizations did in fact withdraw the lawsuits in exchange for the SMC's commitments in the agreement.[282]

Threshold Definitions

The company consulted with three grassroots organizations: the Northern Plains Resource Council (NPRC), the Stillwater Protective Association (SPA), and the Cottonwood Resource Council (CRC). NPRC is a statewide grassroots organization with numerous local affiliates, including SPA and CRC.[283] Several women participated in the negotiations as representatives of the community organizations.[284] These groups did not purport to represent the general public, but they did engage in several outreach efforts with the rest of the community.

These organizations made decisions through negotiations with SMC. At first, SMC was unwilling to sit down with local groups, but SMC eventually changed course and supported the agreement.[285] The negotiations for the agreement began in May, and lasted for almost one year.[286] The organizations' consent was expressed through the negotiations leading up to their ultimate signing of the agreement.

Framework of Prior Informed Consent Process

The local organizations that negotiated the Good Neighbor Agreement had extensive experience, education, and access to information about mining. SPA and CRC, as members of NPRC, had access to NPRC's legal, technical and advocacy expertise built up over years of community organizing.[287] They also benefited from strong outside legal and technical support during the negotiations, and an intensive negotiation skills training session by an outside expert.[288]

Moreover, through the agreement, SMC expanded the community groups' access to information. SMC guaranteed access to information and notice of proposals and meetings before final decisions are made.[289] It also promised to disclose all data, sampling results, studies, reports, evaluations, plans, projects, audits, transcripts, and other documents derived from or collected under the agreement.[290] Certain materials deemed confidential would only be disclosed to a limited number of designated council representatives.[291] In addition, SMC agreed to pay for the costs of various informational materials and reports to inform the continued consultation, monitoring, and review processes envisioned under the agreement. For example, SMC would pay for costs of independent scientific and technical consultants who would conduct environmental audits, an evaluation of the company's reclamation plan and bonding, a fisheries study and monitoring plan, a baseline water quality report, and groundwater studies.[292]

278 Manuel Pulgar-Vidal y Adriana Aurazo, eds., *Mejorando la Participación Ciudadana en el Proceso de Evaluactión de Impacto Ambiental en Minería* 137, 137-147 (2003).
279 *Id.* at 137.
280 *Id.* at 144.
281 *Id.* at 145.
282 *Id.* at 144.
283 *Id.* at 139-140.
284 *Id.* at 143.
285 *Id.* at 141.
286 *Id.* at 141, 143.
287 *Id.* at 144-145.
288 *Id.* at 145.
289 Good Neighbor Agreement, May 8, 2000, Section 1.0(c).
290 *Id.* at Section 3.0.
291 *Id.*
292 Pulgar-Vidal et al, supra note 278 at 144; Good Neighbor Agreement, *supra* note 289 at Section 4.1.

In this case, the community sought to be consulted when the mine was already in operation, after it had learned of the company's plan to increase its production.[293] The parties here were not opposed to the mining (or necessarily its expansion), but simply wanted the practice to be environmentally and socially responsible.[294] Correspondingly, the Good Neighbor Agreement guarantees the community the right to consultation and participation in mining decisions—but does not provide the community with the power to veto a mining project completely.

Neither federal nor state governments were represented at the negotiating table for the Good Neighbor Agreement.[295] The negotiations did not include outside third parties. The agreement between the mining company and these groups was formalized through a legallybinding and enforceable contract.

The agreement contains provisions for dispute resolution and enforcement. Parties are bound to first negotiate in good faith to resolve disputes. If negotiation fails to resolve the dispute, parties may enforce the agreement through civil action in a district court, or may submit the dispute to binding arbitration.[296]

The terms and conditions extend as long as the agreement is in effect. The agreement will terminate when the mining operations have ceased and the company has fulfilled all federal and state closure and reclamation requirements.[297]

Although the agreement itself was concluded through a one-time negotiation process, it provides for continuing community consultation through community participation in company planning and environmental management.[298]

Implementation of the Process

The agreement contains a variety of mechanisms that enable the community to monitor the company's operations and engage in an ongoing dialogue on key issues.[299]

The agreement supports the creation of citizen oversight committees to establish a process for considering new issues and to monitor the implementation of the agreement.[300] The SMC agreed to pay for the committee members' and consultants' administrative and travel costs, as well as the costs of citizen sampling up to $270,000 for the first two years of the agreement.[301]

Councils have the right to enter and inspect mine facilities, and to conduct citizen sampling, take photographs, and meet with relevant SMC employees during all such inspections. Councils are limited to no more than two inspections per mine site per year, and must complete each inspection within a reasonable period of time.[302]

The agreement also imposes monitoring and reporting obligations on SMC. For example, SMC is required to notify the relevant oversight committee if any water quality trigger level is exceeded, and to prepare a corrective schedule that needs to be approved by the identified stakeholder groups.[303]

293 Pulgar-Vidal et al, *supra* note 278 at 137.
294 *Id.* at 145.
295 *Id.* at 139.
296 Good Neighbor Agreement, *supra* note 289 at Section 9.
297 *Id.* at Section 15.
298 Pulgar-Vidal *et al*, *supra* note 278 at 137.
299 *Id.* at 137.
300 *Id.* at 144; Good Neighbor Agreement, May 8, 2000, Section 7.
301 Pulgar-Vidal et al, *supra* note 278 at 144; Good Neighbor Agreement, *supra* note 289 at Section 4.3.
302 Good Neighbor Agreement, *supra* note 289 at Section 10.
303 Pulgar-Vidal *et al.*, *supra* note 278 at 144.

ANALYSIS

The case studies presented in the preceding section detail variations in the conceptualization and practice of prior informed consent in different contexts around the world. Stepping back from the rich detail of the individual case studies and looking at the bigger picture allows us to assess what these case studies can cumulatively tell us about the community right to prior informed consent in the mining context. What can we learn from this information that can be applied in other contexts? This analytical review provides a comparative analysis of the key elements of the right to prior informed consent present in the case studies, highlighting the different approaches to these elements and the overall right to prior informed consent, and the potential advantages and shortcomings of these approaches.

AUTHORITY FOR PRIOR INFORMED CONSENT

The case studies reveal a range of different authorities —both legal and extra-legal—that provide the basis for obtaining a community's prior informed consent in the mining context. Several legal authorities—such as a country's constitution, statutes, regulations, and treaties entered into—in fact mandate prior informed consent, and have therefore served as powerful tools for community groups seeking a voice in mining decision-making. Moreover, such legal authorities are a significant indicator of the level of importance that the country places on a community's prior informed consent, and of the growing support for the concept of prior informed consent worldwide. Interestingly, the case studies also reveal that mining companies have increasingly engaged in consultation with communities even when not legally required to do so. Many of the examples stem from extra-legal authorities and mechanisms, such as international and national mining guidelines, corporate social and environmental responsibility codes, contractual agreements with the community, and community votes.

Legal Authority

Legal authority for prior informed consent takes a number of different forms. One way of securing community rights is to obtain constitutional protection through a judicial system. As discussed in the Voisey's Bay case study, the Canadian Supreme Court held that where aboriginal people possess title to their traditional lands, governments must ensure that the aboriginal people participate in resource development, be properly consulted, and receive fair compensation. Constitutional rights are extremely powerful because they derive from the supreme law of the land, and therefore cannot be overridden or overturned by government. Canada is the only country in this study to provide such rights through the judiciary.

Many countries have statutes or regulations requiring community consultation in the mining process. Unlike constitutional rights, those rights derived from statutes or regulations can in fact be overturned by act of a legislative arm of government. In this study, both Peru (as discussed in the Camisea and Tambogrande case studies) and Canada (as discussed in the Voisey's Bay and Diavik case studies) have statutory requirements for community consultation as part of the Environmental Impact Assessment (EIA) process. In addition, Australia has adopted an innovative statutory authority for community consultation, as discussed in the Aboriginal Land Rights Act case study. This statute creates a right to community consultation that is not rooted in the EIA process, and is in fact much more expansive. It creates "Land Councils"—legally-recognized bodies composed of elected community members —to manage the prior informed consent process. Such an established and legally-recognized organizing basis enables the community to more effectively assert its rights. Moreover, the statute provides traditional Aboriginal owners with the right to consent to explorations on their land, which includes the right to veto any such explorations, as well as the right to negotiate agreements and timeframes for such exploration. In other words, it is not simply the "passive" right to be consulted as part of an EIA process, but an "active" right to dictate whether or not mining development occurs in the first place.

International treaties also provide legal authority for the rights of indigenous people to be consulted regarding development projects affecting their lands and resources. For example, as mentioned in the World Commission on Dams case study, the International Labour Organization Convention 169 requires governments to consult with indigenous and tribal peoples within their countries regarding development projects and other activities affecting them, and lays down criteria for these

consultations. Countries that have ratified this treaty are legally bound to implement it.[304] However, as an intergovernmental agency, ILO has no enforcement power, and must rely instead on dialogue, political pressure, persuasion, and financial assistance to compel countries to comply.[305] Therefore, although technically legally binding, this treaty is essentially a "paper tiger" without any real teeth to force compliance. Nevertheless, it still serves as a valuable source of moral justification and legitimacy for efforts to promote prior informed consent.

Although technically legally binding, the ILO Convention is essentially a "paper tiger" without any real teeth to force compliance.

Extra-legal Authority

The case studies also reveal that mining companies have occasionally sought a community's consent even when not legally required to do so. A number of motivating factors could prompt a company to seek a community's prior informed consent to its project. The company could be acting out of a sense of responsibility or commitment to an ethical standard (i.e., a "good corporate citizen"), or to foster a better relationship with the local community and government, prevent civil unrest, and create a more comfortable atmosphere for its on-site workers. A company could also be acting to uphold a positive public image or avoid a negative one. A company could also be reacting to pressures from the community, the press, or its stockholders. A combination of these factors likely motivates a company's decision to voluntarily seek a community's consent for a mining project.

There are various types of extra-legal authorities that support such voluntary consultation. For example, the World Commission on Dams guidelines—although not legally binding and certainly controversial—constitute extra-legal authority for prior informed consent, stating that "all countries should be guided by the concept of free, prior and informed consent, whether or not it has already been enacted into law."[306] Similarly, as mentioned in the World Commission on Dams case study, the United Nations Draft Declaration on the Rights of Indigenous Peoples—although it has not yet been adopted—constitutes persuasive authority for the right to prior informed consent. The Draft Declaration states that indigenous peoples may require states to obtain their "free and informed consent prior to the approval of any project affecting their lands, territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources."[307] In addition, national guidelines—such as those adopted by the parties in the Canadian Whitehorse Mining Initiative case study—also constitute extra-legal authority for prior informed consent. Finally, many mining companies—such as Manhattan Minerals in the Tambogrande case study—have environmental and social responsibility policies and codes that could form the basis for voluntary community consultation initiatives. Although all of these authorities are extra-legal in the sense that they are non-binding and do not require the company to engage in community consultation, they can influence corporate action.

Companies have used a variety of extra-legal mechanisms to engage in consultation with and obtain prior informed consent of the community. Several case studies illustrate the potential role of contractual agreements as a mechanism for obtaining and formalizing prior informed consent. For example, in the Stillwater case study, the company consulted with community groups in the process of negotiating the "Good Neighbor Agreement." Although the agreement would be considered an extralegal mechanism, because the company was not required by law to enter into it—it was a legally-binding agreement once executed. The case studies highlight several other agreements—contracts with the community in the Camisea case study, Participation Agreements in the Diavik case study, Impact-Benefit Agreements (IBAs) in the Voisey's Bay and Ekati case studies—that are all different names for similar types of extra-legal mechanisms used to consult with a community, and to obtain and formalize its prior informed consent.

These contractual mechanisms have a distinct advantage over the international and national guidelines discussed above in that they are clear, transparent, recognized by government, and—most importantly—enforceable in court. However, there may be practical obstacles that limit a community's ability to enforce these

304 Countries that have ratified this treaty include Norway, Mexico, Columbia, Bolivia, Costa Rica, Paraguay, Peru, Honduras, Denmark, Guatemala, the Netherlands, Ecuador and *Fiji*. *Introduction to ILO Convention No. 169*, available at http://www.ilo.org/public/ english/r…/mdtsanjose/indigenous/intro169.htm (last visited Apr. 7, 2003).

305 *See Convention No. 169: Its Nature and Fundamental Principles*, available at http://www.ilo.org/public/english/employment/strat/poldev/papers/1998/169guide/169gui de.htm#C3 (last visited Apr. 7, 2003).

306 World Commission on Dams, *supra* note 9, at 219.

307 *United Nations Draft Declaration on the Rights of Indigenous Peoples*, *supra* note 8 at Part VI, Article 30.

provisions, such as a lack of funding, legal knowledge, capacity to monitor compliance, or access to information. Moreover, reliance on corporate self-regulation raises a larger issue about the role and duty of the state. Does the state have a duty to protect all of its citizens, or can the state rightfully leave this to voluntary corporate initiatives?

Government officials have also used extra-legal authority to pressure companies into going beyond what the law may require. For example, in the Ekati case study, a Canadian Minister essentially used his authority to approve the required water license as leverage to force the company to negotiate the Environmental Agreement, Socio-Economic Agreement, and Impact-Benefit Agreements with the affected communities—none of which were legally required. Similarly, in the Diavik case study, the Canadian regulatory agencies may have used their licensing authority to pressure the mining company to enter into agreements with the surrounding communities. Moreover, as illustrated in the Diavik case study, even without explicit pressure from the state, mining companies may engage in voluntary public consultation up front, in order to avoid the potential delay associated with the more heavy-handed regulatory requirements for public consultation that may be imposed upon them later in the process.

The Tambogrande case study provides one of the most interesting and innovative examples of a local government's use of an "extra-legal" mechanism to publicize and promote the community's right to prior informed consent. In this case, the municipality of Tambogrande held a community vote on whether or not the mine should be developed, and an overwhelming majority of residents voted against the mine. Although the municipality believes that it relied on legitimate legal authority in submitting the issue to community vote, the national government has not recognized the vote as legally authorized or binding. Even if the community vote does not carry any legal weight, it has served as a powerful extra-legal mechanism for community consultation, allowing communities to express their voice and generate public support for their right to prior informed consent.

Rights Derived From Land Title

Land title is a key determinant of a community group's ability to successfully assert its right to express its prior informed consent to a project. As documented in a recent field study, indigenous peoples without land title face greater difficulties than those with land title in participating in consultations over mining development.[308] Moreover, having a "recognized land base" most likely enables indigenous people to enter into negotiations on a "stronger footing."[309]

In addition to providing greater negotiating power, land title is also the basis for certain types of legal authority for consultations and prior informed consent. For example, as discussed in the Voisey's Bay and Ekati case studies, Canada provides a constitutional right to community consultation for indigenous populations with title to their traditional land. Similarly, Australia's Aboriginal Land Rights Act grants traditional Aboriginal land-owners the right to consent to explorations on their land. The Act also significantly expands indigenous land title, thus strengthening the coverage of this right.

Interestingly, several case studies demonstrate that even potential land title can enhance community leverage in mining-related decisions. In the Voisey's Bay case study, the community cited its unsettled land claims in the area to be mined as authority for its right to consent to the mining project. Ultimately, the communities were able to use their leverage to enter into consultations and negotiations with the mining company, an MOU on the environmental impact assessment process, an environmental management agreement, interim land claims arrangements, and individual IBAs. Similarly, in the Ekati case study, the fact that the community had pending land rights may have been a factor in the Minister's decision to require negotiation of IBAs as a condition for consent for issuing the water license. In both cases, because the communities had potential title to the land at issue, they could more persuasively and forcefully exert their rights to consultation and participation.

Unfortunately, however, land title in developing countries is often not clear and, in the case of indigenous peoples, may not respect traditional land ownership. Moreover, governments may lack the time and resources to clarify land title when a mining project is proposed. As a result, mining projects often move forward without clarifying the underlying land title issues, thus denying affected communities the potential to assert their right to consent.[310]

THRESHOLD DEFINITIONS

Exploring the definitions of three key concepts involved in the right of prior informed consent—"com-

308 Viviane Weitzner, the North-South Institute, *Through Indigenous Eyes: Towards Appropriate Decision-Making Processes Regarding Mining On or Near Ancestral Lands, 2002*, at 33.

309 *Id.* at 25

310 Email communication with Rachel Kyte (International Finance Corporation) and Martin Scurrah (Oxfam America) (on file with author).

munity," "consent," and "decision-making processes"—is critical to the understanding and practice of this right. The following discussion analyzes the range of definitions given to these concepts in the case studies.

Community

In examining how "community" is defined in the context of prior informed consent, the case studies examined: Who is the community? How is the geographic, ethnic, or other scope of the community defined? Who legitimately represents the community? Is it simply representatives from local community organizations, or is it necessary to reach out to more diverse groups, such as women, to ensure that all elements are consulted?

The definition of community adopted or manifested by actual practice in a particular case delineates the universe of stakeholders with the right to participate in the prior informed consent process. This universe should be expansive enough to include all relevant and interested parties, "in order to promote equity and avoid future conflict resulting from lack of inclusion."[311] Once it is known who is included within the definition of a community, the affected parties will better be able to identify who must be consulted.

Defining the community and identifying legitimate representatives is particularly challenging when the affected community contains diverse elements with different demands and needs, and varying abilities to express their voices. For example, women in the community, who often face disproportionate negative impacts from mining development,[312] may have a weaker voice and may not be represented in community organizations. The World Commission on Dams guidelines specifically recognize the importance of involving women and other vulnerable groups in the decision-making process.

The negotiation of agreements with community representatives or stakeholder bodies can be a legitimate means of obtaining the community's prior informed consent —so long as the individuals or organizations are in fact representative of the community as a whole. The Camisea case study provides an example of efforts by a resource extraction company to include diverse community interests in the prior informed consent process. In this case, Shell conducted a stakeholder identification study, through which it identified and consulted with more than 200 organizations representing a variety of stakeholder interests. Moreover, Shell did not limit its efforts to these organizations, but actually conducted extensive direct outreach in the communities, providing opportunities for consultation with women and others that may not have been represented in the community organizations.

The need to ensure that all elements of a community are properly accounted for is particularly important when the resulting agreement will affect more than one locality. The World Commission on Dams has implicitly acknowledged the legitimacy of representative consent, stating that stakeholders should negotiate agreements on energy and water resource development through representative stakeholder bodies. However, special precautions must be taken to ensure that industry does not express a bias in its process of selecting community representatives by, for instance, consulting only with politically and economically powerful groups while ignoring the voices of others.

The Northern Land Council, established under the Aboriginal Land Rights Act, provides an example of such assurances, by specifically setting aside five Council positions for women. Compare this with the selection process for the aboriginal representatives who participated in the consultative process to create national mining guidelines in the Whitehorse Mining Initiative (WMI). In this case, there were no assurances that the ad hoc selection process would result in aboriginal participants who were in fact representative of the larger aboriginal community in Canada.

Consent

The case studies presented a range of mechanisms for determining community consent, including a few examples of direct community consultation through a community vote. Direct representation through voting is one of the most effective ways to ensure that each member of the community has a voice in the process of providing legitimate consent. However, even direct representation requires the difficult determination of what constitutes "consent." In other words, how much of the community must agree in order to constitute consent?

In the Tambogrande case study, all citizens of the municipality who had registered for the 2001 elections

311 See Sweeting and Clark, *supra* n. 1 at 51.

312 These impacts can include: fewer job opportunities for women in mining communities, as many countries ban female labor in mines; erosion of women's status and role in subsistence production as the community shifts to a cash economy; greater impacts from environmental harms, as women are often more responsible for subsistence agriculture; loss of assistance in agriculture as men go to mines to work; and greater stress on family life as men go to far-off mines to work and women are left to maintain the household. See International Institute for Environment and Development and World Business Council for Sustainable Development, *Breaking New Ground: Mining, Minerals, and Sustainable Development*, 2002, (hereinafter "MMSD") at 206.

were allowed to participate in the community vote. Approximately 74 percent of the eligible voting population voted, and about 72.5 percent of them voted against the mine.[313] In a similar, very recent case, 60 percent of the residents of Esquel, Argentina, voted against the development of a gold mine in their community.[314] In Voisey's Bay, all members of the Labrador Inuit Association (LIA) and Innu Nation tribes were allowed to vote on whether or not to approve the Impact Benefit Agreements (IBAs) that their representatives had negotiated with the mining company. In the end, 82 percent of the LIA's members and 68 percent of the Innu members voted to approve the IBAs.

Consent should be defined in a way that ensures the agreement is representative of the affected communities and their factions.

In all the case studies, the prior informed consent of a community was not defined as absolute consensus. Rather, consent (or lack of consent) was expressed by a significant majority of people in the community—and was deemed to constitute a sufficient expression of prior informed consent. If the numbers had been closer—had only 50 percent of people expressed consent, for example — the determination would have been more difficult.

When the community is not directly consulted, and is instead consulted through its representatives or community organizations, it is even harder to define the threshold for consent. Do all representatives or community organizations need to agree? If not, which ones, and how many, must agree? As Goldzimer suggests, there is no single standard that would be appropriate in all cases.[315] As is the case for defining the community to be consulted, consent should be defined in a way that ensures the agreement is representative of the affected communities and their factions.

Decision-Making Process

Consultative processes are the sum of the techniques used by companies and governments to engage the community about the potential for a mining project, educate it about the project's consequences, and determine its position on the issues. Consultative processes are frequently ridden with conflicts and controversies, since they often do not align with the traditional decision-making processes used by indigenous societies. The decision-making process is key to the effectiveness of the prior informed consent process and is discussed more fully in the section below on "Framework of Prior Informed Consent Process."

Consultative processes can often weaken and fragment communities, particularly through "divide-and-conquer" tactics used by some companies.[316] Moreover, consultative processes often replace traditional decision-making authority with less cohesive forms of decision-making, thus exacerbating the problem of community fragmentation.[317] However, several of the case studies reveal efforts by industry or government to strengthen community decision-making processes, and thereby minimize the destructive potential of the consultation process.

The Voisey's Bay case study features a unique mechanism through which the community acted on its own to determine and articulate its needs and demands in a cohesive, inward-looking way. In this instance, the Innu community, when first faced with the prospects of mining development on their land, did not simply wait to be consulted. Rather, the community established its own task force to formulate its position on mining development. This task force served as a forum for the community to discuss the issues of mining on Innu lands, the potential for economic development opportunities, probable environmental degradation, and the absence of a land rights agreement. The task force led to production of a report that provided a clear mandate for the leaders to confront the mining development. The report indicated that the Innu people would not consent to mining development without an IBA, environmental assessment, and a land claim agreement.

The Camisea case study also provides an example of efforts to engage and strengthen—rather than replace— traditional decision-making structures. In this case, Shell worked closely with the indigenous federations, where decision-making reflects traditional decision-making in native communities. Shell also took steps—such as providing meeting notes, portable computers and printers, a two-way radio, and boat fuel—to improve communication between federation officials and native communities.

313 This statistic is calculated based on the following information from the Tambogrande case study: 74 percent of the eligible voting population cast a ballot in the community vote, and 98 percent of the population voted against the mine.

314 This statistic is calculated based on the following information: 75 percent of Esquel residents participated in the vote, and 80 percent of them voted against the mine development. Lynne Oliver, *Meridian Gold Off 9%, Esquel Residents Vote Against Mine*, Wall Street Journal, Mar. 24, 2003, available at http:online.wsj.com/article/ 0,,BT_CO_20030324_004612,00.html?mod=COMPANY (last visited Mar. 24, 2003).

315 Goldzimer, *supra* note 177.

316 SeeWeitzner, *supra* note 308 at 31.

317 See *id* at 30.

Although it does not engage traditional decision-making processes, the Aboriginal Land Rights Act creates innovative entities to help indigenous communities voice their demands in a more unified, cohesive way. The Act creates four Land Councils to identify and represent interests of the communities. The Land Councils consult with the community, negotiate on its behalf, and manage the prior informed consent process. Since the Land Councils consist of community members who are directly elected by the community, the community may view the Land Council's decisions as being more legitimate than that of a community leader or group that is selected by industry to represent the views of the community. In addition, Land Councils can act as a check on divide-and-conquer techniques, since the full Land Council is required to consider a decision of the larger community to ensure that it meets the requirements of due process, and can reject the decision if it is unreasonable.

PROCEDURAL ASPECTS OF THE PRIOR INFORMED CONSENT PROCESS

Access to Information

Many communities lack sufficient information and education to enable them to participate effectively in prior informed consent processes. Often, communities have no experience with large-scale mining projects, and therefore cannot draw on their own experiential knowledge base. They may lack access to project information, and even when such information is provided, it may be unclear, highly technical, or not translated into the local language. They also may lack certain types of information, such as the economic value of resources or the short-, medium-, and long-term impacts of the mining process, which puts them at a disadvantage in the negotiation process.[318] These informational hurdles must be overcome in order for communities to be able to participate on an equal footing.

As discussed in the case study, the World Commission on Dams guidelines recognize this necessity, stating that access to information, legal, and other support should be available to all stakeholders, particularly indigenous and tribal peoples, women, and other vulnerable groups, to enable their informed participation in decision-making processes.

The Camisea case study represents an extensive effort at improving community access to information. In this case, Shell disseminated relevant bilingual written materials to stakeholders, created a regularly-updated project website, and held a series of participatory workshops. It also communicated information to communities directly through its Community Liason Officers (CLOs). The CLOs distilled information into simpler form for presentation to the communities, using innovative training tools such as briefing notes, posters, videos, pictures, and scale models. This case study highlights some of the mechanisms that can be used to bridge the information gap. However, because the impact of these efforts was somewhat limited by the CLOs' lack of cross-cultural training, the case study also points to the importance of cultural training and sensitization in information dissemination efforts.

The timing of providing access to information is critical. In contrast to the Camisea case study, educational efforts in Ekati emerged only after the negotiated agreements were already in place. In the Ekati case study, there were no special efforts to educate the communities about mining impacts and the communities' rights during the negotiation period for the various agreements.

The case studies also provide good examples of how communities can use negotiated agreements to increase their access to information. In the Ekati case, the community was able to create, through the Environmental Agreement, an independent Environmental Monitoring Agency, which has enhanced the education of the affected communities on mining issues through a web site, newsletter, and meetings. Similarly, in the Stillwater case study, the Good Neighbor Agreement permitted the community to secure access to key data and documents that would enable them to better monitor and enforce the agreement.

The case studies also highlight several examples of the right to prior informed consent being fundamentally undermined as the result of the lack of access to information. For example, while the Aboriginal Land Rights Act is one of the few examples of the right to veto a mining project, it is difficult for Aboriginals to exercise this right, because the Act denies them access to necessary information. Informational requirements for exploration proposals are fairly minimal, and companies are not even required to specify which minerals they are looking for. Additionally, in the Diavik case study, the communities lacked necessary geological, technical, commercial and organizational information, posing a significant obstacle to the construction of fair agreements.

318 *See id* at 29. *See also* MMSD, *supra* note 312 at 224 (noting that "the overuse of technical language can form an instant barrier to communication," and that "availability of transport, child care, and the timing and location of meetings are also critically important to enable a cross-section of the community to participate").

It is also important to consider the nature of the information that is being disseminated. Even when the mining company does engage in educational or informational efforts, the information provided may not always be balanced or factual, and may be unfairly tilted towards the mining interests. For example, in the Tambogrande case study, Manhattan Minerals alleged that it provided information about the impacts of the mine to affected communities. It claimed to have arranged for Tambogrande leaders to visit a mine site, disseminated a monthly news bulletin, published informational materials in the newspaper, organized information sessions, and screened mining documentaries for the public. However, the information that was provided focused largely on the community benefits from the mine and the relocation process. Many community members and municipal officials claimed that they were not provided specific information on the environmental and social impacts of the mine. In this case, NGOs—and to a lesser degree, the central government— stepped in to fill the gap. Both national and international NGOs carried out extensive awareness and education activities surrounding the community vote. Prior to the vote, the central government initiated its own consultation dialogue with the community, and provided information to the public regarding the decisions reached in the dialogue.

Consultations that address community concerns early in the process are more likely to generate community support for the project.

Timing of Consultation

Both international and national mining guidelines have recognized the importance of including communities in project planning processes from the outset of a mining project. According to the World Commission on Dams guidelines, stakeholders must participate fully in "all negotiated agreements throughout the process, from options assessment to final implementation, operation and monitoring."[319] Similarly, the Whitehorse Mining Initiative guidelines provide that consultation with aboriginal communities should occur "at all stages" in the mining process.[320] The Whitehorse Mining Initiative is a good example of a government carrying out community consultation at an early stage. In this case, officials elicited the views of community members in the development of a national mineral policy, not in the context of an actual mining project.

The various case studies confirm the numerous reasons why early consultation and involvement is critical to enabling the community to act as genuine partners in the process. First, early consultation is necessary in order for the community to exercise any meaningful input into whether or not the project is in fact developed. Second, early consultation allows the concerns of the community to be incorporated on a timely basis into the project design. Such modifications may be difficult to make once a project is underway. In the Camisea case, Shell sought to identify issues with the community prior to or during the design phase, rather than after the start of operations. This allowed Shell to modify the project design to address community concerns about the building of access roads. The revised design opted instead to rely solely on helicopter and river transport to deliver supplies. Consultations that address community concerns early in the process are more likely to generate community support for the project.[321]

In contrast, lack of inclusion in the initial stages of the process is likely to generate community resentment, distrust, and resistance to the project. In the Tambogrande case study, Manhattan Minerals did not engage in any real consultation efforts until exploration was complete and it had already received a mining concession from the central government. The community's lack of inclusion in the process generated stiff opposition to the project, and led the community to create its own consultation process implemented through the community vote.

In sum, it is vital for a community to be involved early on in the conception of a project in order to set an appropriate agenda for the consultation process. The Tambogrande case study is illustrative. There, the company's informational efforts focused primarily on the displacement of residents, while the community's concerns regarding the mining project's effect on the local agricultural economy were largely left unaddressed. Thus, it is crucial that the affected communities be consulted early and often, so that the focus of later consultation efforts can properly address the local resident's environmental, social, and economical priorities.

Scope of Community Right

This issue goes to the core of the debate over a community's right to prior informed consent—what

319 World Commission on Dams, *supra* note 9, at 216.
320 Accord Final Report, *supra* note 66 at 27.
321 Goldzimer, *supra* note 177.

exactly does this right entail? Does a community have the right to completely veto mining development on its land, or can it only set terms and conditions for its implementation? What degree of shared decision-making does this right actually imply?[322]

The case studies reveal enormous variety in the scope of the community's right to consent. While some communities have asserted or even been accorded the right to completely veto a mining project on their land, this right is rarely recognized by national governments or mining companies in practice.[323] More often, as reflected in the case studies, the community is simply allowed to take part in discussions regarding how to manage the impacts and benefits of a project. Internationally, the recognition and promotion of the right to prior informed consent in the report of the World Commission on Dams and the Draft Declaration on the Rights of Indigenous Peoples confirm the growing pressure for recognition of such a right at the national level.

Of all the case studies, only in the Aboriginal Land Rights Act case does a national government recognize the right of a community to veto a mining project on its lands. In all of the other case studies, only the right to be consulted or to set conditions for development was acknowledged. As noted in the case study, Aboriginal communities have frequently exercised this authority, having vetoed at least 122 exploration license applications over the past 20 years.

Even if the right to veto is not explicitly recognized, communities have still claimed such a right. For example, in the Voisey's Bay case study, the LIA and Innu asserted that their consent was required before the project could go ahead. However, the Canadian Supreme Court recognized only a right to be consulted, not the right to veto a project. In this case, the communities did in fact consent to the project, so it is not clear whether the company or government would have respected the communities' self-proclaimed right to veto the project. In the Tambogrande case study, the community attempted to assert its right to veto the project through the community vote process. However, the national government denied the legality of the community vote, and has not recognized the community's right to veto a mining project on its land. In a similar subsequent case, the community of Esquel, in Argentina, asserted its right to veto development of a gold mine through a non-binding vote in which residents voted overwhelmingly against the mine. In response, the provincial governor ordered the mining company to stop work pending a public hearing on the project's environmental impact assessment.[324]

In most of the case studies, the scope of the community's right was limited to participation in setting the conditions for development of the project. In some cases, the community exercised its right through participation in regulatory processes, for example, by defining how the EIA would measure project impacts in the Ekati case study or by participating in water license hearings in the Voisey's Bay case study. Communities were also able to participate in the negotiation of agreements between government and industry (e.g., the Environmental Agreement in the Ekati case study). In most of the case studies, however, the scope of the community's right was limited to the right to negotiate an agreement directly with the company over the terms of the mining and the benefits to the community. For example, in the Ekati and Voisey's Bay case studies, the community negotiated Impact Benefit Agreements with the company. Similarly, in the Stillwater case, several community-based groups negotiated a Good Neighbor Agreement to safeguard local interests. In many of these cases, the community's right included the right to monitor these agreements through participation on monitoring bodies created in the agreement.

Timeframe and Location for Consultations

The timeframe and location for the consultations can be key determinants of a community's ability to effectively participate in the prior informed consent process. As revealed in a recent study, most consultations suffer from inappropriately short timeframes, leaving communities feeling like there was not enough time to explore and understand the implications of the project.[325] Moreover, if consultations are held in inaccessible or distant locations, community members may not be able to participate, due to lack of funding or inability to travel.

The World Commission on Dams guidelines explicitly recognize the need for an extended timeframe for negotiations, stating that communities need sufficient time to examine proposals and to consult among themselves. In most of the case studies reviewed, there

322 See MMSD, *supra* note 312 at 224 (noting that "Currently one of the biggest areas for debate is the extent to which consultation implies some degree of shared decisionmaking").

323 See, e.g., *id* (noting that "while mining companies increasingly recognize that communities and NGOs should be involved in defining mitigation measures or social development projects, sharing decision-making on core management issues is not easily accepted.") Consultations that address community concerns early in the process are more likely to generate community support for the project.

324 Business News Americas, *Meridian Told to Halt Work at Esquel – Argentina,* Mar. 23, 2003.

325 Weitzner, *supra* note 308 at 29.

did not seem to be any apparent problems with the timeframes for consultation. It is, however, interesting to note that the Aboriginal Land Rights Act provides the Commonwealth Minister with the authority to increase the prescribed 12- month consultation period if necessary, and that this mechanism has regularly been used.

In many of the case studies, negotiations were held in the local community. For example, in the Camisea case study, Shell's Community Liaison Officers held hundreds of meetings at the local community level. However, when Shell began inviting select indigenous federation leaders to attend international seminars and meetings, community members became resentful. Shell then started holding its meetings within the region and making attendance as open as possible. Also, in the Voisey's Bay case study, the Environmental Assessment Panel hearings were held in 10 communities in Labrador—not in the nation's capital. In the Whitehorse Mining Initiative case, where the largescale meetings were held at distant locations, the communities were provided with funding for travel expenses.

Role of Government in Negotiations

The government can play a crucial role in leveling the balance of power between the community and the mining company in consultation processes. However, often this is not the case. A recent study suggests that indigenous communities perceive that "governments consistently side with companies rather than fulfilling their obligations to indigenous peoples, and are usually not even present when consultations and negotiations proceed."[326] The case studies reveal numerous ways in which governments can strengthen the community's position in consultations and negotiations with mining companies.

Governments can help level the playing field by providing funding to communities to build their capacity to participate in negotiations.[327] Under the Aboriginal Land Rights Act, the Australian government provides funding to the Land Councils, which are made up of elected Aboriginal community members who negotiate on behalf of their communities. In the Diavik case study, the Canadian federal and territorial governments provided funding to the advisory board to monitor and oversee the implementation of the Environmental Agreement. In the Voisey's Bay case study, the provincial and federal governments agreed to finance the expenses relating to the Environmental Management Agreement for the first five years, and to provide its environmental advisory board with an annual budget of $450,000. Similarly, in the Ekati case study, both the national and territorial governments provided some funding for the Environmental Monitoring Agency created under the agreement.

In addition, governments can enter into agreements with communities and/or the mining companies to protect the communities' rights. For example, in the Ekati case study, the central and territorial governments entered into an Environmental Agreement with the mining company to protect the community from harmful environmental impacts. In the Voisey's Bay case study, the central and territorial governments entered into an Environmental Management Agreement with the indigenous communities to ensure environmental co-management. In the Diavik case study, the federal and territorial governments entered into an Environmental Agreement with the mining company and communities, and the territorial government entered into a Socio-Economic Monitoring Agreement with the mining company.

Alternatively, rather than entering into agreements itself, the government can require or pressure the mining companies to enter into agreements directly with the community. For example, through the Aboriginal Land Rights Act, the Australian government requires mining interests to negotiate agreements with local communities to obtain their consent to mining on their lands. In the Ekati case study, the Minister used his authority to approve water licenses as leverage to force the mining company to enter into negotiations and protective agreements with the communities. Similarly, in the Voisey's Bay case study, the government also entered into interim land claims arrangements with the local communities, which provided them with additional leverage in negotiating agreements with the mining company.

Where a country's laws require public consultation and hearings, a government can promote community consultation by strictly enforcing these requirements. The Tambogrande case study provides an example of the negative consequences of not enforcing these re-

326 Viviane Weitzner, the North-South Institute, *Through Indigenous Eyes: Towards Appropriate Decision-Making Processes Regarding Mining On or Near Ancestral Lands,* 2002, at 5.

327 As revealed by the case studies, government funding for community consent processes has largely been limited to the United States, Canada, and Australia. In countries where public resources are scarce, the mining companies have provided most or all of the financial support, which may raise issues about the independence of the process. Churches and other religious institutions represent another source of support for community consent processes. In Camisea, for example, the Catholic University is serving as a facilitator to engage the community in dialogue. Email communication with Rachel Kyte (International Finance Corporation) (on file with author). However, the University does not seem to have much credibility in this case, and there are a serious lack of legitimate institutions to facilitate the community consent process in Peru. Email communication with Martin Scurrah (Oxfam America) (on file with author). This is likely a consistent problem throughout developing countries, and speaks to the need for government to play a significant role in providing the funding and support for community consent processes.

quirements. In this case, Peru's national government granted mining concessions by supreme presidential decree without fully consulting with the local governments. At the same time, the Tambogrande case study also illustrates the potential for local governments to play a significant role in supporting a community's right to prior informed consent, in this case, by initiating a community vote. Although the central government did not recognize the legality of the vote, it has since heightened government attention to and enforcement of the EIA regulations.

NGOs played a crucial role in monitoring the project's socioenvironmental impacts, acting as an independent "third eye" for the community.

Role of Third Parties

Like government, third parties—such as NGOs—can play an instrumental role in helping to level the power balance between communities and mining companies in the community consultation process. This role was illustrated in the Camisea case study, where NGOs helped build the community's capacity to effectively participate in the consultation process. NGOs assisted communities with establishing their needs and demands by conducting baseline studies and by discussing findings and recommendations with the communities. They also provided social, environmental, and technical input to Shell, thus informing and shaping Shell's consultation process to meet community needs. Finally, NGOs played a crucial role in monitoring the project's socio-environmental impacts, acting as an independent "third eye" for the community.

NGOs played a similar capacity-building role in the Tambogrande case study. A number of domestic NGOs, for example, formed a committee to provide technical support to the community to back its opposition to the mining project. International NGOs provided financial support, commissioned environmental studies, carried out awareness and education activities, and monitored the public consultation process.

When either governments or NGOs become involved in the process, there is a risk that they may not adequately represent the community's interests. In some cases, they may have a different agenda from the community. On the other hand, these third parties may hold different positions on certain issues, due to their technical expertise or access to information that has not been available to the community. Thus, the community must be vigilant in defining the role of third parties in the process, engaging in a dialogue and process to set a common agenda, and monitoring the communications and actions of the third parties.

Form of Agreement

The World Commission on Dams guidelines emphasize the importance of using legally-binding formal agreements to memorialize the results of the prior informed consent negotiations. Formalized agreements—such as contracts —have the advantage of being clearer, more transparent, and more enforceable than informal agreements.

This report examines different mechanisms used to formalize the terms and conditions upon which prior informed consent was granted by the community, as well as other accords between the mining company and the community. In most of the case studies, agreements were formalized through legally-binding contracts between the mining company and the community. Under the Aboriginal Land Rights Act, for example, the mining company negotiates legally-enforceable lease agreements with the Land Council. Similarly, the agreements with the community in the Camisea case study, the Participation Agreement in the Diavik case study, the Impact Benefit Agreements in the Voisey's Bay and Ekati case studies, and the Good Neighbor Agreement in the Stillwater case study, are all formalized contractual agreements between the community and the company. In other cases, the community entered into formal agreements with the government, such as the environmental co-management agreement and interim land claims agreements between the LIA and Innu Nation and the federal and provincial governments in the Voisey's Bay case study. A final category of formalized agreements used in these case studies were those exclusively between the mining company and the government, such as the Socio-Economic Monitoring Agreement in the Diavik case study.

Some of the prior informed consent processes studied here adopted less formal agreements. For example, in Voisey's Bay, the LIA and Innu Nation entered into a Memorandum of Understanding (MOU) on how the environmental effects of the proposed project would be reviewed. An MOU, although a source of guidance and persuasive authority, does not carry the legal weight of a binding contract. Similarly, the Whitehorse Mining Initiative and the World Commission on Dams issued non-binding guidelines, as the large scale and scope and policy nature of these processes did not lend themselves to the types of formal legal commitments that are more easily reached in the context of actual mining cases. However, the absence of any requirement for the mining company or government to enter into a binding,

formalized agreement can make implementation of these guidelines difficult. For example, in the Whitehorse Mining Initiative case, post-Accord implementation was very limited due to the lack of an agreed-upon form for the outcome, the absence of performance goals, and the lack of sanctions for non-compliance.

Conflict And Dispute Resolution

For conflicts arising in the course of negociations, the World Commission on Dams guidelines recommend the use of an independent dispute resolution body that is created with the participation and agreement of stakeholders. The guidelines suggest that stakeholders refer any disagreements they have in negotiations to this body, and allow it to examine the issue and provide assistance. None of the other prior informed consent processes examined in this study specifically included provisions for conflict and dispute resolution during the course of the negotiations. Some case studies did, however, include mechanisms for resolving conflicts and disputes that arose out of the agreements ultimately reached, as discussed in the "Implementation" section below.

Duration of Terms and Conditions of Prior Informed Consent

This report also looked at the timeframe during which the terms and conditions established as a result of the prior informed consent process remained in effect in the various case studies. In most cases, the terms and conditions set forth in the consent agreements were applicable during the exploration, development, and operational phases of the mining operation. A few case studies also specifically included measures that extended through closure of the mine. For example, in the Ekati case study, the Environmental Agreement required the mining company to post security for the reclamation of land-related disturbances through closure of the mine. Similarly, in the Diavik case study, the agreement required that the company provide adequate security measures for closure and rehabilitation of the mine site.

Extent of Continued Consultation

The ability of a community to consult with a mining company at the later stages in the mining process may be critical for ensuring that its rights and interests are properly respected. As mining proceeds, the environmental, social and economic impacts of the operation may change due to unforeseen circumstances. Unless communities have additional opportunities to consult with the company and to amend the terms and conditions for consent, the right to prior informed consent may be ineffective in promoting sustainable development of the resource.

The Whitehorse Mining Initiative Accord provides that consultation with aboriginal communities should occur "at all stages" in the mining process.[328] However, the case studies indicate that consultation generally consists of a one-time negotiation during the initial stages of the project, and is unlikely to continue in later stages of the mining process. The Aboriginal Land Rights Act case study illustrates the difficulties of consultation through onetime negotiation. Under this Act, prior informed consent is only required at the exploration stage, not at the mining stage. Therefore, once the community has consented to exploration, it is also deemed to have consented to the subsequent mining. The lack of a right to consent at the mining stage has made it difficult for traditional owners to make arrangements with mining companies that effectively safeguard their rights, as communities are forced to negotiate a deal on the mining stage when the viability and worth of the mine are uncertain.

The Voisey's Bay case study presents an innovative, albeit limited, means of continuing community consultation throughout later stages of the mining process. In this case, community members serve on an Environmental Management Board that oversees implementation of the Environmental Management Agreement between the LIA and Innu Nation and the Canadian and provincial governments. The board has the authority to provide advice to the government regarding permit applications, leases, construction and operation plans, and rehabilitation and closure plans throughout the life of the mine. This mechanism allows communities to provide significant input into the mining process.

Finally, the Stillwater Mining Company Good Neighbor Agreement included several innovative measures for ongoing consultations with the community. For example, citizen groups are to be consulted concerning future operating permit amendments and property acquisitions for future tailings and waste rock disposal and workers camps.

LONG-TERM IMPLEMENTATION OF THE PROCESS

Institutional mechanisms to ensure that a mining company complies with the terms and conditions of

328 Accord Final Report, *supra* note 66 at 27.

consent are essential to the effective exercise of the right of prior informed consent. The terms and conditions of consent —even if formalized in contractual agreements—are often not implemented due to lack of political will or follow- up.[329] This report examined the various mechanisms used in the case studies to ensure and enhance implementation of the consent agreement, including monitoring and enforcement mechanisms in particular.

The World Commission on Dams guidelines recommend that consent agreements provide for "implementable institutional mechanisms for monitoring compliance."[330] The case studies provide several good examples of such mechanisms. In the Camisea case study, for example, Shell facilitated inspections by NGOs to ensure compliance with its commitments. It developed an arrangement with the Peruvian Environmental Network (RAP) to undertake quarterly independent monitoring, and issue public reports on each visit. Allowing inspection by outside NGOs helps to enhance transparency is particularly important when local communities lack the capacity to monitor implementation on their own.

Effective monitoring and implementation can only occur where there are clear performance indicators.

The monitoring mechanisms most commonly found in the various agreements were independent monitoring committees or advisory boards staffed in part by community members or their representatives. For example, in the Voisey's Bay case study, the Environmental Management Agreement created an environmental advisory board that included two community representatives. Through the board, the community representatives can oversee the company's fulfillment of its environmental and socio-economic obligations.

Similarly, in the Ekati case study, the Environmental Agreement required the creation of an independent Environmental Monitoring Agency, with seven directors who are appointed by the government, BHP, and First Nations. The Environmental Monitoring Agency reviews and advises on the company's environmental management and monitoring activities, as well as government regulatory activity; facilitates aboriginal involvement in the regulatory process; and produces annual reports. Finally, the Stillwater Good Neighbor Agreement creates citizen oversight committees to monitor implementation of the agreement and establish a process for considering new issues. The agreement also guarantees access to information necessary for effective monitoring—the right to enter and inspect mine facilities (up to two inspections per mine site per year), conduct citizen sampling, take photographs, and meet with relevant company employees during all such inspections.

Several of the agreements also impose monitoring and reporting obligations on the company. For example, the Environmental Agreement in the Ekati case study requires BHP to report annually on its environmental compliance, monitoring programs, research, operations and future activities, and remedial or mitigative action. Similarly, under the Stillwater Good Neighbor Agreement, the company is required to notify the relevant oversight committee if any water-quality trigger level is exceeded, and to prepare a corrective schedule that needs to be approved by the identified stakeholder groups.

Effective monitoring and implementation can only occur where there are clear performance indicators. In the Whitehorse Mining case study, the parties failed to agree on specific guidelines for implementation of the goals established in the signed Accord. The Accord simply provided that implementation would occur through "building broader support within constituencies based on the momentum achieved and encouraging stakeholder support for principles and goals." Due to this broad language and lack of measurable indicators of performance (or non-performance), implementation under the Accord has been very limited.

Effective enforcement mechanisms—such as fora for redress, sanctions for non-compliance, and financial security measures—are also crucial to ensuring implementation of consent agreements. Several agreements specifically designate fora for enforcement purposes. In the Diavik and Ekati case studies, disputes arising out of the agreement are referred to arbitration. In the Stillwater case study, the parties are bound to first negotiate in good faith to resolve disputes, and failing this, may enforce the agreement through civil action in a district court or binding arbitration. The various contractual agreements—such as the Impact Benefit Agreements in the Voisey's Bay or Ekati case studies, or the lease agreement in the Aboriginal Land Rights Act case study—are enforceable in court.

Effective enforcement also requires sanctions for noncompliance and financial security measures to ensure ability of the company to comply with them. For example, in the Diavik case study, the Environmental Agreement specifies that adequate security measures to

329 See Weitzner, *supra* note 308 at 30.
330 World Commission on Dams, *supra* note 9.

rehabilitate the mine site must be in place at all times during the life of the mine. Similarly, in the Ekati case study, the company was required to post security for progressive reclamation of the landrelated disturbances created by the project. These funds may also be drawn upon if the company does not comply with requirements in the Agreement, including non-compliance with reporting requirements or failure to rectify faulty management plans.

In spite of the monitoring and enforcement mechanisms built into a consent agreement, a community cannot compel implementation if it lacks the capacity to use these mechanisms. In several of the case studies, the mining company or government provided funds to enable communities to exercise its rights to monitor and enforce the agreements. For example, in the Stillwater case study, the mining company agreed to pay for administrative and travel costs of committee members and consultants, as well as costs of citizen sampling up to $270,000 over the first two years of the agreement. In the Camisea case study, Shell agreed to meet all expenses for RAP's monitoring visits and paid RAP a small sum for internal use. In the Diavik case study, the mining company and federal and state governments provided funding for community-staffed advisory boards and implementation committees. In the Voisey's Bay case study, the provincial and federal governments agreed to finance the first five years of the Environmental Management Agreement and to provide its environmental advisory board with an annual budget of $450,000.

CONCLUSION

Communities are increasingly becoming aware of and asserting their right to control the development of mineral resources on lands that they occupy or use, thereby setting their own priorities for development that has an impact on their lives, livelihoods, and culture. Recognizing the legitimacy and importance of this right, governments are increasingly requiring mining companies to consult with communities and, in a limited number of cases, obtain their consent for mining development projects. Mining companies are also becoming more aware of the need for consultation and consent, even in the absence of legal requirements. The case studies illustrate the growing number of contexts in which the right to community consent has been demanded, recognized, and exercised, revealing an emerging trend toward including communities as key partners in mining decision- making.

This trend is reflected in various international instruments that have recognized the right to community consent. For example, International Labour Organization Convention No. 169—a legally-binding treaty—provides that indigenous and tribal peoples

> shall have the right to decide their own priorities for the process of development,… to exercise control, to the extent possible, over their economic, social, and cultural development,… [and to] participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.[331]

It also provides that such peoples are "not [to] be removed from lands which they occupy," unless "necessary as an exceptional measure" and with their "free and informed consent."[332] Similarly, various extra-legal authorities —such as the Extractive Industries Review,[333] the World Commission on Dams guidelines,[334] the United Nations Draft Declaration on the Rights of Indigenous Peoples,[335] and the Draft Inter-American Declaration on the Rights of Indigenous Peoples[336]—lend moral legitimacy to the right to community consent, particularly with respect to indigenous peoples.

The recognition of the right to community consent in these international instruments raises the issue of whether the right to community consent constitutes a customary rule of international law (or "custom"). A custom would bind not only parties to a particular treaty, but all nations.[337] In order for a rule to rise to the level of a custom, the rule must be "generally accepted as a rule of conduct." [338] General acceptance can be proved by showing that (1) State practice is consistent with the rule, and (2) States act according to the rule out of a belief that it is a legal—rather than simply a moral or political—obligation to do so.[339] Because the International Court of Justice has required that State practice be both extensive and virtually uniform,[340] it may be difficult currently to establish consistent State practice with respect to community consent. Many states do not in fact require companies to obtain community consent in practice, even if they may profess to do so. Moreover, even where States have required companies to obtain community consent, they have diverged in their interpretation of what this right actually involves. The right to community consent has ranged from simply providing information to communities regarding the impacts of a proposed mine, to actually according communities the right to veto a proposed mining project. Therefore, the lack of consistent State practice makes it more difficult to establish the existence of a customary right to community consent.

331 *ILO Convention 169, supra* note 7, Article 7.

332 *Id.*, Article 16. The Convention, however, stops short of granting such communities the absolute right to veto a mining development project, stating that "where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations… which provide the opportunity for effective representation of the peoples concerned." *Id.*

333 Extractive Industries Review, *supra* note 5.

334 World Commission on Dams, *supra* note 9, at 219 (providing that "all countries should be guided by the concept of free, prior and informed consent, whether or not it has already been enacted into law.")

335 *United Nations Draft Declaration on the Rights of Indigenous Peoples, supra* note 8, Part VI, Article 30 (stating that indigenous peoples may require states to obtain their "free and informed consent prior to the approval of any project affecting their lands, territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.")

336 *Draft of the Inter-American Declaration on the Rights of Indigenous Peoples*, Article XVIII (1995) (providing that "the States shall not transfer or relocate indigenous peoples except in exceptional cases, and in those cases with the free, genuine and informed consent of those populations…")

337 Once a custom is established, it becomes binding on all States, regardless of whether those States in fact expressed an intent to be bound by the custom or contributed to its formation. However, "a State may exclude itself from the obligations of the particular customary rule by persistent conduct exhibiting an unwillingness to be bound by the rule or a refusal to recognize it as law." Restatement of Foreign Relations Law of the United States, Section 102, comment b, cited in David Hunter et al., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY, 2d ed., 311 (2002).

338 *The Scotia,* 14 Wall. 170, 187 (1871), *quoted in The Paquete Habana,* 175 U.S. 677, 20 S. Ct. 290 (1900).

339 See Hunter, *supra* note 337 at 311.

340 See *Id.* at 311.

However, in spite of the traditional requirements for proving customary law, some rules have in fact been recognized as customary law even where State practice is far from uniform. For example, certain environmental law principles found throughout international treaties and declarations—such as sustainable development, the precautionary principle, and Principle 21 of the Stockholm Declaration[341]—have been recognized in judicial opinions and elsewhere as customary law, even though States vary greatly in their interpretation and implementation of these principles.[342] Although the debate as to whether such principles are in fact customary rules continues, the basis for recognition of these principles as customary law suggests that a custom may form even in the midst of inconsistent State practice, thus "reflecting changing notions of how customary law is made."[343]

Engaging communities as partners helps ensure that short-term mining interests do not compromise the community's longer-term needs for survival.

Moreover, even if no customary right to prior informed consent exists at present, such a right is arguably forming. The case studies reflect the efforts of States across the globe to incorporate community consent mechanisms, suggesting that in time State practice may become more extensive, and therefore "consistent." In addition, the World Commission on Dams Guidelines represents a concerted international effort to define the scope of the right to prior informed consent, indicating that there may be evolving consensus on the definition of this right. As State practice becomes more consistent, and international processes help to create a uniform definition of prior informed consent, the argument becomes stronger that a customary right exists.

Even in the absence of a right to community consent under customary international law, there are numerous options for formalizing the right under national law and through extra-legal authorities. Under national law, the legal basis for the key elements of community consent can be found in environmental impact assessment legislation and in innovative statutes like the Australian Land Rights Act. States have also relied on extra-legal authority to require mining companies to seek community consent, for example by calling for municipal referendums or by using their licensing or permitting authority as leverage to require companies to enter into agreements with communities. Moreover, even when not required to do so, mining companies have sought community consent and formalized it through a range of mechanisms, including impact-benefit agreements, Good Neighbor Agreements, and environmental and social impact monitoring agreements.

Designing and implementing effective community consent processes is essential to protecting community rights and interests. Engaging communities as partners in decision-making allows communities to guide the development of the mining activity, helping to ensure that short-term mining interests do not compromise the community's longer-term needs for survival. Moreover, as is increasingly being recognized by mining companies, community consent can also help to improve mining operations worldwide. Community input can lead to mining projects that are better suited to local conditions, generate support from the community, avoid social resistance and the associated negative publicity or consumer boycotts, and enhance worker productivity and morale.

Prior informed consent processes constitute valuable tools for community groups seeking to protect their rights, for mining companies seeking to be good corporate citizens and improve their mining operations, and for governments seeking to promote sustainable development. As a consequence, formal recognition and use of these processes is likely to continue and expand around the globe.

341 Principle 21 prohibits States from acting within their own territory so as to causeharm outside their territory. *Stockholm Declaration on the Human Environment* (1972),available at http://www.unesco.org/iau/tfsd_stockholm.html (last visited May 28, 2003).

342 See Hunter, *supra* note 337 at 313.

343 *Id.*

"...I firmly believe that Prior Informed Consent is fundamental for sustainable development in any mining project. Your study truly strengthens my conviction.

I hope this valuable study receives the deserved attention from decision-makers, at all levels, including decision-makers within the World Bank Group, to help them achieve true poverty alleviation and sustainable development within the context of mining, oil and gas projects that they may finance in the future."

Emil Salim
Extractive Industries Review
Chairman, World Summit on Sustainable Development

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