

Free Prior and Informed Consent (FPIC) concept to responsible mining in sustaining rivers and communities

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Abstract

The paper highlights the fact that Free, Prior, and Informed Consent (FPIC) arises out of the fact that community-based natural resource management offers local people the chance to participate directly in decisions about local ecosystems. In this case emphasis is placed on rivers. FPIC consists of giving local people a formal role – and some form of veto power – in the consultations and ultimate decisions about local development projects. To date, however, FPIC has been most relevant and critical in cases involving mining projects in countries as diverse as Australia, Canada, Peru, and the Philippines. The inclusion of FPIC as a legal condition for financing, investment, or regulatory decisions could become a critical means to make poverty alleviation programs more sustainable. The paper draws examples from countries like the Philippines and Australia that have enacted laws requiring that FPIC be obtained by the government for projects within the ancestral domains of indigenous peoples. Internationally, the World Commission on Dams and the Extractive Industries Review of the World Bank have recommended the adoption of FPIC in making decisions about dams and oil, gas, and mining projects.

1.0 Introduction

Organizations involved in upstream (exploring and extracting) and downstream activities (refining and marketing) for mineral products are among some of the most profitable companies in the world. Whether they are involved in upstream or downstream activities, whether they are public corporations or state-owned companies, players in the mining industry must operate within the context of significant issues and major trends that are shaping the long-term outlook for oil that include coping with the growing demand, dealing with volatility above, facing uncertainty underground, expanding business opportunities, doing more with less faster and making adaptation to the workplace (Change and challenge in the petroleum industry, 2007). Mining effects environmental and social change no matter where it occurs. Mining-related disruptions can impact the physical environment (through, for instance, loss of habitat and contamination of surface and ground waters) or local communities (through, for instance, cultural adjustments to the presence of miners). Although some degree of disturbance is inevitable even in the best-managed mines, *nearly all negative social and environmental impacts are avoidable* if companies would operate according to the best possible standards (Miranda et al, 2005). Unfortunately, existing frameworks have not consistently ensured responsible behavior in mining operations, and negative environmental and social impacts occur more frequently than they should. Issues of Free, Prior and Informed Consent are taking center stage to give the locals a form of veto power to sanction or reject a mining project. In the ensuing discourse, I will unveil the FPIC concept, FPIC legal framework, FPIC to responsible mining and sustaining communities and rivers, present FPIC in Uganda's experience and suggest a way forward.

2.0 FPIC Concept

Indigenous peoples are one of the main groups affected by mining and gas and oil exploitation (Policy Paper, 2004). As mining operations continue to spread to remote areas, Indigenous territories are being exposed to exploration and mining or development of gas and oil pipelines. This often takes place without Indigenous people's consent, sometimes destroying their sacred sites. The principle of free, prior and informed consent (otherwise known as FPIC) is vital to upholding the human rights of Indigenous peoples and local communities (Cacas, 2004). This principle states that individuals and communities should be informed - in appropriate, accessible language - about projects that might take place on their land. It also guarantees that they are given the opportunity to give, withhold or negotiate land use and related issues. Free refers to the general principle of law that consent is not valid if obtained through coercion or manipulation. Prior refers to meaningful, informed consent sought sufficiently in advance of any activities by a company. Informed means that the process must involve consultation and participation by Indigenous peoples with full disclosures of a development activity in accessible and understandable forms to affected peoples and communities (Tebtebba, 2004).

Free, prior and informed consent helps to protect indigenous people's rights to consent and self-determination, promotes equitable relationships between Indigenous peoples, industries and governments, and recognizes their rights to have control over their traditional lands (Tebtebba, 2001). *Free* should imply no coercion, intimidation or manipulation. *Prior* should imply that consent has been sought sufficiently in advance of any authorization or commencement of activities and that respect is shown for time requirements of indigenous consultation/consensus processes. *Informed* should imply that information is provided that covers (at least) the following aspects: The nature, size, pace, reversibility and scope of any proposed project or activity; The reason(s) for or purpose(s) of the project and/or activity; The duration of the above; The locality of areas that will be affected; A preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks and fair and equitable benefit-sharing in a context that respects the precautionary principle; Personnel likely to be involved in the execution of the proposed project (including indigenous peoples, private sector staff, research institutions, government employees and others); and Procedures that the project may entail (Bass et al, 2003).

With regard to *consent*, consultation and participation are crucial components of a consent process. Consultation should be undertaken in good faith. The parties should establish a dialogue allowing them to find appropriate solutions in an atmosphere of mutual respect in good faith, and full and equitable participation. Consultation requires time and an effective system for communicating among interest-holders. Indigenous peoples should be able to participate through their own freely chosen representatives and customary or other institutions. The inclusion of a gender perspective and the participation of indigenous women are essential, as well as participation of children and youth, as appropriate. This process may include the option of withholding consent. Consent to any agreement should be interpreted as indigenous peoples have reasonably understood it (Goodland, 2004).

Methodologies on free, prior and informed consent should have as their basic objective the improvement of the living conditions of indigenous peoples and that free, prior and informed consent should cover all matters connected with the life of indigenous peoples. The principle of free, prior and informed consent encompassed not only a procedure to be elaborated, but also a right associated with indigenous peoples' right to self-determination, treaties and indigenous peoples' rights to lands, territories and natural resources. Procedures concerning free, prior and informed consent should recognize indigenous customary law where this is relevant, and address the issue of who represents indigenous peoples. Free, prior and informed consent is an evolutionary process that could lead to co-management and decision-making by indigenous peoples on programmes and projects affecting them. free, prior and informed consent was particularly relevant for the prevention of conflict and for peace building (Tebtebba, 2004).

The implementation of the principle of free, prior and informed consent presents a number of practical problems. A number of questions need to be posed: How can we define "free" in practice? How far ahead does "prior" mean? What are the formal terms of "informed consent"? What is the role of customary law in FPIC? And what is the role of official processes, such as public hearings or referenda? In a diverse community, how is consent given and who gives the consent? Is a majority enough or is full consensus required? Is a written, legally binding agreement necessary? How is FPIC verified? Does the government

verify it or is oversight by an independent party necessary? In implementing FPIC, how do we ensure a balance between the state, the general public interest, and affected community interests, particularly in the distribution of benefits? Who or which institutional entity provides consent in a community when the latter is being consulted? Should the collective consent of indigenous peoples be considered more important than the individual property rights of non-indigenous persons who may occupy the same territory? And how should such conflicts be dealt with? Which actor(s) should be responsible for providing information and impact assessments on projects that affect indigenous communities? What type of documentation and information should be provided to indigenous communities? How should the lack of awareness and capacity among those involved in free, prior and informed consent processes be addressed? How can the disparity in resources, and power imbalances between indigenous peoples and private developers, or between indigenous peoples and the State, be addressed? How should indigenous communities benefit from their contribution of traditional knowledge to conservation and sustainable use of resources? What mechanisms for seeking redress should be available to indigenous peoples if free, prior and informed consent processes have not been followed? Answers to these type of questions are hard to decipher. What must be emphasized is that they illustrate the challenges that free, prior and informed consent poses (MacKay, 2004). As a result, non-participation, inadequate consultations, or non-consent will always arise.

Several governments freely issue operating licenses for projects in indigenous territories but indigenous peoples do not participate in the distribution of profits there from. Special challenges to the principle of free, prior and informed consent exist in Africa, given the non-recognition of indigenous peoples by a number of States (Tebtebba, 2004). The ideal would be for indigenous people to have the right to consent, and the right to refuse consent, and that the private sector should also be engaged in consultations.

Community-based natural resource management offers local people the chance to participate directly in decisions about local ecosystems and to benefit economically from their efforts. But in the real world, poor communities often do not initiate the large-scale resource development projects—such as mines, oil and gas development, or major forest concessions—that account for most natural resource wealth. More often, they are bystanders or second-class participants in these negotiations, inheriting the ecosystem costs of these projects with little gain (Bass et al, 2004).

The practice of “free, prior, and informed consent”—or FPIC—is designed as an antidote to this state of affairs. FPIC consists of giving local people a formal role—and some form of veto power—in the consultations and ultimate decisions about local development projects. It is intended to secure the rights of indigenous peoples and local communities: their rights to self-determination, to control access to their land and natural resources, and to share in the benefits when these are utilized by others (Perrault, 2004). Many experts believe that without such informed consent on large projects, a community’s land and resource rights are compromised.

In fact, without the kind of substantive participation that FPIC mandates, the tenure security of rural communities is always at the mercy of decisions made by others. It is well documented that such insecurity perpetuates poverty. In contrast, with the bargaining power that FPIC provisions bring them, communities can demand direct compensation for damages or a continuing share of the profits of resource extraction. They can even require the backers of development to invest part of the profits from these ventures to meet community needs. In this respect, FPIC is a tool for greater equity and a natural pathway to a co-management role for local communities in large development projects (Permanent Forum on Indigenous Issues, 2005).

Bass et al (2003) notes that FPIC is relevant when governments make regulatory decisions - for example, allowing logging in forests traditionally occupied by indigenous peoples, or displacing riverside communities in order to construct a large hydropower dam. It can also be incorporated into infrastructure planning - from the building of roads that traverse through ancestral domains, to tourism development decisions such as providing access to sites considered sacred by tribal peoples. It is equally important in making decisions about bioprospecting for genetic resources as it is for making choices about locating major energy projects, from power plants to pipelines. To date, however, FPIC has been most relevant

and critical in cases involving mining projects in countries as diverse as Australia, Canada, Peru, and the Philippines (Tebtebba, 2002)

The potential poverty impact of FPIC in decisions on extractive industries such as oil, gas, and mining is particularly relevant and contentious. In order for communities to reap greater benefits from such development, their rights to sustainable livelihoods must be protected. Rules enforcing these rights will not only promote “cleaner” extraction, but also empower local communities to take the risks and share the benefits of future development. Without FPIC, these projects may further the economic marginalization of peoples and communities that are already poor and vulnerable (Cacas, 2004).

These projects often require involuntary resettlement and all the negative economic consequences such dislocation brings. An FPIC requirement would enable affected people to negotiate more favorable relocation terms, including legally binding provisions on compensation, support for new housing, and the necessary infrastructure not only for shelter, but for livelihoods and education as well. Requiring FPIC could even allow these people and communities to negotiate fair, equitable, and enforceable terms of revenue- and other benefit- sharing. The inclusion of FPIC as a legal condition for financing, investment, or regulatory decisions could become a critical means to make poverty alleviation programs more sustainable (Goodland 2004; Kamijyo 2004).

To date, countries like the Philippines (Congress of the Philippines, 1997) and Australia (Commonwealth of Australia, 1976) have enacted laws requiring that FPIC be obtained by the government for projects within the ancestral domains of indigenous peoples. Internationally, the World Commission on Dams (WCD, 2000) and the Extractive Industries Review (World Bank Group, 2003, MacKay, 2004) of the World Bank have recommended the adoption of FPIC in making decisions about dams and oil, gas, and mining projects. In addition, FPIC as a principle has been acknowledged in the Convention on Biological Diversity, with regard to access to and benefit-sharing of genetic resources (Perrault, 2004).

3.0 FPIC Legal Framework

3.1 International Level

The International Labour Organisation's Convention on Indigenous and Tribal Peoples in Independent Countries - 169/1989 refers to the *principle of free and informed consent* in the context of relocation of indigenous peoples from their land in its article 6. In articles 6, 7 and 15, the convention aims at ensuring that every effort is made by the States to fully consult with Indigenous Peoples in the context of development, land and resources.

The UN Draft Declaration on the Rights of Indigenous People ('UNDD') (Sub Commission resolution 1994/45, annex) is an emerging instrument on the rights of indigenous peoples that explicitly recognizes the principle of FPIC in its articles 1, 12, 20, 27 and 30. UNDD refers to the Indigenous Peoples right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including FPIC from state in connection with development and utilisation of surface and subsurface resources such as:

- a) Article 10 on forced relocation;
- b) Article 12 on culture and intellectual property;
- c) Article 20 vis-à-vis legislative and administrative measures taken by the States
- d) Article 27 with regards to indigenous peoples' lands, territories and resources, and
- e) Article 30 with development planning (Robbinson, 2003).

The UN Committee on the Elimination of Racial Discrimination ('CERD') made observations and general recommendations on State obligations and indigenous rights under convention and calls upon States to 'ensure that members of indigenous peoples have rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent' (GR XXIII 51 concerning Indigenous Persons adopted at the Committee's 1235th Meeting, 1997).

In 2000, in its concluding observation on Australia's report, the CERD reiterated, its recommendation that the State party ensure effective participation by indigenous communities in decisions affecting their land rights, as required under article 5C of the Convention and the General Recommendations XXIII of the Committee, which stresses the importance of ensuring the 'informed consent' of indigenous peoples (Colchester, 2001).

In 2001, the UN Committee on Economic, Social and Cultural Rights on report of Columbia in relation to traditional lands (E/C 12/I/Add 74, para 12) in its concluding observation, noted 'with regret that the traditional lands of indigenous peoples have been reduced or occupied, without their consent, by timber, mining and oil companies, at the expense of the exercise of their culture and the equilibrium of the ecosystem'. It subsequently urged 'to consult and seek the consent of Indigenous peoples concerned prior to the implementation of timber, soil or subsoil mining projects and on any public policy affecting them.

The UN Workshop on Indigenous Peoples, Private Sector Natural Resource, Energy and Mining Companies and Human Rights, held in Geneva from 5–7 December 2001 discussed the principle of FPIC and recognized the need to have a universally agreed upon definition of the principle. The participants reached a basic common understanding of the meaning of the principle, as the right of indigenous peoples, as land and resource owners, to say '*no*' to proposed development projects at any point during negotiations with governments and/or extractive industries (E/CN 4/Sub 2/AC 4/2002/3, para 52).

The Convention on Biological Diversity 1992 ('CBD') in its article 8(J) calls on contracting States, to respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities and promote their wider application with the *approval and involvement of the holders* of such knowledge, innovation and practices.

The Fifth Conference of Parties ('COP') to the CBD Decision V/16 expresses a firm commitment to the implementation of prior informed consent in its general principles:

access to traditional knowledge, innovation and practices of indigenous and local communities should be subject to *prior informed consent or prior informed approval from the holders of such knowledge, innovations and practices*. Decision V/16 further calls upon: Parties to take measures to enhance and strengthen the capacity of indigenous and local communities to be effectively involved in decision-making related to the use of their traditional knowledge, innovations and practices relevant to the conservation and sustainable use of biological diversity subject to their *prior informed approval and effective involvement* (World Bank Group, 2003).

The United Nations Conference on Environment and Development 1992 accepted Indigenous Peoples as a Major Group for the implementation of Agenda 21. The Rio Declaration, in Article 22, explicitly noted that Indigenous peoples and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognise and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development. Agenda 21 and Forest Principles recognize: indigenous rights to land, intellectual and cultural property and to maintain their customary and administrative practices; the need for greater participation; the value of their involvement in forest management and conservation.

3.2 Regional Level

The Draft American Declaration on the Rights of Indigenous Peoples of the Organization of American States ('OAS') in its articles XVII AND XXIII states that the States obtain FPIC prior to the approval of any project affecting IPs lands, territories and resources, particularly in connection with the development, utilization or exploration of mineral, water or other resources.

The Inter-American Commission on Human Rights ('IACHR') has developed considerable jurisprudence on FPIC. The Commission has stated that the Inter-American human rights law requires 'special measures to ensure recognition of the particular and collective interest that indigenous people have in the occupation and use of their traditional lands and resources and their right not to be deprived of this interest except with fully informed consent'. In 2003, the IACHR stated that FPIC is generally applicable 'to decisions by the State that will have an impact upon indigenous lands and their communities, such as the granting of concessions to exploit the natural resources of indigenous territories'. IACHR has precedence on FPIC as in the case of the Mayagna (Sumo) in Nicaragua in 2000, 'State of Nicaragua is actively responsible for violations of the right to property, embodied in Article 21 of the Convention, by granting a concession to the company SOLCARSA to carry out road construction work and logging exploitation on the Awas Tingni lands, without the consent of the Awas Tingni community' (Mackey, 2001).

The Inter-American Development Bank's ('IADB') 1990 Strategies and Procedures on Socio-Cultural Issues as Related to the Environment provides that '[i]n general the IDB will not support projects affecting tribal lands and territories, unless the tribal society is in agreement'. FPIC is already included in the IADB's policy on Involuntary Resettlement.

In 1998, the Council of Ministers of European Union adopted a Resolution entitled, Indigenous Peoples within the Framework of the Development Cooperation of the Community and Member States. It provides that 'indigenous have the right to choose their own development paths, which includes the right to objects, in particular in their traditional areas' (Speaking Out International Conference, 2002). This was reaffirmed in 2002 by the European Commission, which stated that the EU interprets this language to be the equivalent of FPIC.

The Association of Southeast Asian Nations Draft Agreement on Access to Biological and Genetic Resources (2000) in its preamble acknowledges the fundamental principle that the prior informed consent of the Member State and its indigenous peoples and local communities embodying traditional lifestyles would have to be secured before access can take place (Policy Paper, 2004).

3.3 National Level

The Philippines, Malaysia, Australia, Venezuela, Peru, etc, have national legislation on the free, prior and informed consent of indigenous peoples for all activities affecting their lands and territories, for example.

In Philippines, the *Indigenous Peoples Rights Act* (1997) recognizes the right of FPIC of Indigenous Peoples for all activities affecting their lands and territories including:

- a) Exploration, development and use of natural resources;
- b) Research-bioprospecting;
- c) Displacement and relocation;
- d) Archaeological explorations;
- e) Policies affecting Indigenous Peoples such Executive order 263 (Community Based Forest Management);
- f) Entry of Military.

Venezuela adopted a law on Biodiversity in May 2000. Article 39 provides the conservation of cultural diversity through the recognition and promotion of traditional knowledge ('TK') and Article 44 has provision that TK holders can oppose the granting of access to genetic resources or materials or TK projects in their territories or ask halt to the activities that they feared might affect their cultural heritage and biological diversity (Gupta 2000).

Malaysia, Sarawak State passed the Sarawak Biodiversity Centre Ordinance 1977, and then the 1998 Sarawak Biodiversity (Access, Collection and Research) Regulations. The Sarawak Council is responsible for regulating access, collection, research, protection, utilization, and export of the State's biological resources. In 2004, the Sabah State of Malaysia in its 'Framework for incorporating indigenous communities within the rules accompanying the Sabah Biodiversity Enactment 2000' created a system rule that ensures indigenous peoples 'shall all times and in perpetuity, be legitimate creators, users and custodians of traditional knowledge, and shall collectively benefit from the use of such knowledge.

A Revised Peruvian proposal in August 2000 recognizes the FPIC for scientific research and cultural heritage as well as for the commercial exploitation of the resources (Gupta 2004: 60) and right of FPIC recognized according to traditional systems of representation and customary law (Law 27811).

In five states of Australia, consent has been obtained through statutory indigenous-controlled Land Councils in the mining area for more than 30 years. These consent procedures were reviewed by the National Institute of Economic and Industry Research in 1999, which found that they had been successful in safeguarding Aboriginal control over Aboriginal land and have also provided a process of negotiation by which an increasing proportion of Aboriginal land in the Territory has been made available for mineral exploration.

4.0 FPIC to responsible mining in sustaining communities

In Venezuela, the 3.5-million-hectare Imataca reserve, the site of Placer Dome's greenfield gold and copper project, includes conservation areas, formal and informal mining interests, indigenous peoples, and forests. However, the government drew up a plan without involving other interested parties. As a result, Placer Dome was unable to clarify such critical issues as land access and treatment of the claims of illegal miners and has been forced to develop its own plan for the miners. Environmentalists, arguing that the government's plan is unconstitutional and its forestry policy outdated, have initiated a lawsuit, and the government's plan has still not been agreed.

In BPXC's oil project in Colombia, the company, local communities, and local government shared responsibility for mitigating social impacts. BPXC personnel worked directly with affected communities to diagnose their development needs. Once priorities were established, the communities, with BPXC support, prepared plans for individual development projects, specifying objectives, material requirements, and costs. Projects were submitted to the appropriate municipal authorities for approval, because BPXC's involvement was generally contingent on the availability of counterpart funding. This approach was effective because development projects were driven by the demands of the communities that would benefit from them, and the latter's direct involvement in planning and managing projects fostered a sense of ownership.

Papua New Guinea, where distribution of benefits derived from natural resources is negotiated on a case-by-case basis, introduced a "development forum" in 1998, whose primary responsibilities are to disseminate information on the nature, scope, and impacts of mineral projects and to determine how project benefits will be shared by stakeholders. Papua New Guinea's mining laws grant ownership of subsurface minerals to the government, but project developers must apply for access to landowners, who have a clearly defined right to negotiate a package with the government and the company. However, the communities' responsibilities with respect to using project revenues to foster local development are not clearly defined, and the government's lack of transparency and accountability in connection with the stewardship of revenues has eroded its credibility.

One of Ghana's last remaining forests, the Ajenjua Bepo Forest Reserve, sits atop a large gold deposit. Newmont Mining wants to develop an enormous open pit in the forest, one that would measure 1.65 miles long (2.6 kilometers), a half mile across (.8 kilometers), and more than a quarter mile deep (402 meters). The proposed pit's dimensions, as well as how the pit will be reclaimed after mining, have sparked off controversy that has led to a delay in the mine's permitting process. If developed, Akyem would become the largest open-pit mine in Ghana and would destroy some 183 acres (74 hectares) of forest in the reserve. Much of Ghana's forested land has been denuded over the past 40 years. Only 2.9 million acres (1.2 million hectares), or less than 11 percent of the original forest cover, remain, most of which can be found in the country's forest reserves. The forests are part of the Guinean Forests of West Africa biodiversity hotspot and endangered eco region. Ghana's leading environmental groups argue that these forest reserves should remain off-limits to mining. They also point to the diversity of species that the Ajenjua

Bepo Forest Reserve supports, in particular the 83 species of birds, as well as threatened and endangered species such as Pohle's fruit bat, Zenker's fruit bat, and Pel's flying squirrel. The forest reserves of Ghana are also extremely important for protecting many rare and threatened plant species. Communities living around the forest fear the mine will pollute their water sources by destroying forests and by releasing chemical contaminants (EARTHWORKS and Oxfam America, 2007).

In 2004, a Canadian mining company called Ascendant Exploration (now Ascendant Copper) acquired the rights to a copper land concession in the Intag cloud forest region of Ecuador. Ascendant acquired the rights in order to mine the southern side of the Toisan, a mountain range that predates the Andes (EARTHWORKS and Oxfam America, 2007). The Toisan forms a natural border between Intag and the Cotacachi-Cayapas Ecological Reserve. It is the largest protected area in western Ecuador. The Intag cloud forest region, home to spectacled bears, howler monkeys, pumas, jaguar, the critically endangered

brown-headed spider monkey, and a population of 18,000 peasant farmers, is an integral part of the last remaining stretch of these forests. Barely 10 percent of Ecuador's western forests remain.

The copper deposit itself lies under a 7,413-acre (3,000-hectare) community-owned nature reserve in Junin. For more than a decade, local and organizations have been working to protect this region from large-scale mining through peaceful resistance. Bishimetals, a subsidiary of the Japanese giant Mitsubishi Corporation, arrived in Intag in the early 1990s but left a few years later in the face of strong community resistance. The community of Junin, along with several other in the Intag region, remains strongly opposed to mining. These communities have been working with local organizations to establish alternative forms of development, including an organic, shade-grown coffee cooperative, a community-run ecotourist project, and 15 community-based ecological reserves that protect local watersheds and the area's endangered biodiversity (EARTHWORKS and Oxfam America, 2007)..

To date, countries like the Philippines and Australia have enacted laws requiring that FPIC be obtained by the government for projects within the ancestral domains of indigenous peoples. The *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) (ALRA)* is a Commonwealth Act with application to the Northern Territory of Australia. The *ALRA* provided for the granting of a fee simple interest in certain lands (set out in Schedule 1 to the *ALRA*) to Aboriginal Land Trusts and for the claiming of unalienated crown land by those groups of Aboriginal people who could prove (through a claims process before an Aboriginal Land Commissioner) that they were the traditional owners of such land. The *ALRA* provides for the creation of at least two Aboriginal Land Councils to administer certain areas of land in the Northern Territory and for the creation of Aboriginal Land Trusts to hold freehold title to both Schedule 1 land and to land granted by way of a successful land claim.

There had been some positive experiences in respect of free, prior and informed consent involving the Inuit and Haida peoples in Canada. A good example of joint decision-making was the agreement between the Voisey Bay Nickel Company, the Innu Nation and the Labrador Inuit Association. The Voisey Bay agreement recognized the constitutional rights to land of the Innu, and that mining could go ahead only if the Innu people had provided their consent. In practical terms, this meant the involvement of indigenous peoples in project design, employment, environmental protection, social security and cultural protection measures.

Another good example was the landmark *Haida* case in which the Supreme Court of Canada ruled that the Governments of Canada and the provinces had a legal duty to consult, and to accommodate the concerns of, indigenous peoples when a Government had knowledge of the potential existence of a right or title to lands, and contemplated conduct that might adversely affect them. The achievement of this decision, however, required significant resources on the part of the indigenous peoples of Canada.

Another example, provided by the Russian Federation, was the outcome of the case involving the Gazprom gas exploration project in the Yamal-Nenets autonomous district. An ethnologic study conducted with the help of academic experts commissioned by the Russian Association of Indigenous Peoples of the North (RAIPON), which had concluded that the project would have negative effects on the community, caused Gazprom to stop its exploration.

5.0 FPIC to responsible mining in sustaining rivers

The dumping of liquid mining waste into natural water bodies such as rivers is among the mining industry's most controversial practices and can have destructive impacts on water resources, ecosystems, and community health. Known euphemistically as "riverine tailings disposal" and "submarine tailings disposal," these practices are effectively banned in countries such as the US, Canada, and Australia because of the profound environmental damage they can cause. Yet mining companies from these same countries continue to use these practices in places such as the Philippines, Indonesia, and Papua New Guinea. On a positive note, some firms have banned riverine tailings disposal from their operations—this includes Australia's BHP Billiton, which has also adopted a policy against the use of tailings disposal in coastal waters. Below are some of the scenarios of where mining has far reaching implications to the health of rivers:

5.1 Marcopper, Minahasa Raya, and Batu Hijau Mines

These are located in the Philippines and Indonesia and run by companies known as Placer Dome (now owned by Barrick Gold Corporation) and Newmont Mining Corporation. The major problem is damaging aquatic ecosystems, including coral reefs, by dumping massive quantities of chemical-tainted mine waste off coastal waters and exposing fishing communities to health risks through consumption of contaminated fish and direct contact with polluted water. But ocean dumping—in both shallow coastal and deeper waters—is a significant ecological concern. Coastal waters are biologically the richest parts of the oceans. These same waters are where Placer Dome's Marcopper Mine pumped 200 million tons of mine waste into a shallow bay over a period of 16 years, carpeting 30 square miles (80 square kilometers) of seabed, suffocating coral reefs and reef fish (EARTHWORKS and Oxfam America, 2007).

Ocean dumping is also a public health concern. In the late 1990s, researchers investigating the deaths of three children in Marinduque Island, the Philippines, found dangerously high levels of lead and cyanide in their blood. On the island of North Sulawesi in Indonesia, the fishing community of Buyat Bay alleges that toxic mine waste from Newmont's Minahasa Raya Gold Mine has led to numerous health problems, including skin rashes and sores, severe headaches, tumors, and reproductive health problems.

PT Newmont Minahasa Raya, a subsidiary of Denver-based Newmont Mining Corporation, and its president were prosecuted by the Indonesian government over the pollution and illness charges but were acquitted in April 2007.

5.2 Porgera Gold Mine

These are located in the Enga province of Papua New Guinea and run by a company known as Barrick Gold Corporation, Orogen Minerals Ltd. The major problems associated with this is dumping millions of tons of mine waste into the Strickland River system each year. There are allegations of human rights abuses, including shootings, by the mine's security forces. On its path to the Pacific Ocean, this river flows through some of the world's most biologically diverse areas, as well as the homes of numerous indigenous groups. Many of these people continue to practice traditional subsistence livelihoods, relying on water from the Strickland River. Barrick acquired the majority interest in Porgera Mine through its acquisition of Placer Dome in late 2005. The Porgera Mine, originally an underground mine, began shifting to open-pit mining around 1993 and increased both its gold and tailings output gradually since then. The mine now removes over 210,000 tons of ore and waste per day from the mine. Additionally, the mine dumps its waste rock onto designated "erodible dumps"—piles of waste material that, with the force of gravity and the heavy rains of the region, gradually wash into the river over time. Between 10 million and 15 million tons of this waste rock enter the river system each year (EARTHWORKS and Oxfam America, 2007).

5.3 Pebble Mine

Southwest Alaska's Bristol Bay watershed is a tremendously productive ecosystem vital to Alaska's commercial and recreational economies. The watershed is at risk of destruction because of the proposed development of a massive copper-gold mine and associated mining district. Multinational firm Anglo American is partnering with the small Canadian firm Northern Dynasty to develop the proposed gold mine

at the headwaters of the watershed, which is on Alaska State lands. If developed, the Pebble Mine could be the largest mine in North America, covering over 15 square miles (39 square kilometers) of land and generating more than 3 billion tons of mine waste over its life. The waste will be impounded in a seismically active area behind a number of dams. The mine will also require the construction of a 100-mile (161-kilometer) road and massive power plant. The company proposes to withdraw more than 70 million gallons (265 million liters) of water per day, nearly three times the amount of water used in the city of Anchorage, from the Kaktuli and Upper Talarik watersheds—which are key salmon spawning streams. The Bristol Bay watershed supports the world's largest sockeye salmon run and commercial sock eye salmon fishery (EARTHWORKS and Oxfam America, 2007).

5.4 Zortman-Landusky Mine

This mine is located in Little Rocky Mountains, Montana, USA and is mined by company known as Zortman Mining Inc. (a fully owned subsidiary of Pegasus Gold Inc.). The major problems include generating acid drainage that led to long-term stream contamination and spilling cyanide into water systems used by the nearby community. The mine has failed to clean up the mine and its waste or provide adequate funds for cleanup and causing damage to a mountain held sacred by indigenous communities in the region (EARTHWORKS and Oxfam America, 2007).

5.5 Bogoso/Prestea Mine

This mine is located in Prestea, Wassa West district of western Ghana and run by a company known as Golden Star Resources Ltd. The major problems associated with this mine is repeated cyanide spills contaminating community water resources, waste rock dumping impeding access to important water sources and arable land and inadequate compensation provided to people affected by the mining operations (EARTHWORKS and Oxfam America, 2007).

6.0 FPIC in the Ugandan experience (With reference to oil and gas extraction)

The government of Uganda has defined five exploration areas in the Albertine Graben out of these six exploration areas exploration area 1 was licensed to Heritage Oil and Gas Ltd (Heritage) and Energy Africa Ltd (now Tullow Oil Company) in July 2004. Exploration area 2 was Hardman Resources Ltd and Energy Africa Ltd in October 2001. Exploration area 3A was re-licensed to heritage in September 2004. In September 2005, Neptune Petroleum Ltd., (now Tower Resources), acquired exploration license over exploration area 5. Exploration area 3 and 4 are available for licensing.

Oil production is to start soon in Bunyoro region especially in Hoima (Waraga 1, Mputa 1 and Mputa 2). The exploration recorded more than 30 million oil barrels that can be recovered. According to Hardman Resources report between 100-300 million barrels of oil have been established in the limited portion of the block that has been explored (The New Vision, 2006). Heritage Oil corporation, the second company exploring for oil in Western Uganda announced that they had struck oil at their Kingfisher – 1 well in Block 3A, just a kilometer on the shores of Lake Albert. That they proved a stabilized flow rate of 4,120 barrels of oil per day (bopd) at a depth of 1783 and 1795 meters (The New Vision, 2006). Consequently, with the prospects of oil extraction increasingly becoming a reality, government has formulated the National Oil and Gas policy of which the citizens have made little (if any) or no input. Tullow Oil commissioned the Environmental Impact Assessment (EIA) of the Early Production Scheme (EPS) and presentations were made at a Public hearing in Hoima. The local and the Civil Society Organisations made observations that are worthy noting.

The civil society organizations reiterated their support to the ongoing efforts to exploit fossil fuels in Uganda, noting that the revenue accruing from the exploitation of oil and gas provide an opportunity for confronting the current levels of underdevelopment and poverty prevalent in the country. However, they were also conscious of the fact that the ongoing development projects are taking place in a serious legal and institutional vacuum which needs to be addressed as a matter of priority. They, therefore, made the following observations regarding the ongoing oil exploitation activities in general and the Early Production Scheme's Environmental Impact Assessment:

6.1 Legal Weaknesses

The legal, policy and institutional frameworks against which petroleum exploitation is going to be carried out are either inadequate or lacking altogether and cannot confidently bring lasting benefits, assurances and solutions in the petroleum sector. While the National Oil and Gas Policy (2008) goal seeks to use the country's oil and gas resources to contribute to early achievement of poverty eradication and create lasting value to society, it is challenged by several weaknesses and sectoral conflicts. For example:

- S.9 of the Petroleum Exploration and Production Act (2000) allows the Minister for Petroleum to grant an exploration license in any place, which can include forest reserves or National Parks, which is in conflict with other national laws governing protected areas in the country, e.g. National Parks, gazetted forests and watercourses;
- S.31 (1) Cap 150 of the Petroleum (Exploration and Production) Act 2000 require a project developer to conserve the environment, while S.31 (5) imposes a fine on an investor who fails to protect the environment. However, the law is weak in the sense that it offers the Court the liberty or discretion to issue a mere caution to the investor. Also, Section 100 of the Environment Management Act (2000) imposes a different fine and penalty to an investor who abuses the environment, but because they are two laws with different fines/penalties for similar offences, they become difficult to enforce or implement.

These and other conflicts (disparities or inconsistencies) in the law raise significant questions as to whether petroleum can be produced and consumed in a sustainable manner in the current Ugandan context, especially when the petroleum industry is often characterised with corruption, social abuses and environmental disasters in many developing countries with similar policy, legal and institutional challenges

like Uganda. There is need to put in place the adequate legal and institutional frameworks to govern the petroleum sector and its development from the outset.

6.2 Strategic Environmental Impact Assessment

There was no Strategic Environmental Impact Assessment as basis for national decision making concerning the petroleum sector. There is an urgent need for such a Strategic Assessment to be conducted to provide a sound basis for informed and participatory decision making and planning of the sector and its relations to poor peoples' livelihoods and numerous other interests in Uganda, such as tourism, fisheries, forestry, environmental conservation, water supply, agriculture etc. This is particularly important as basis for developing the sector since petroleum exploitation is likely to occur in many parts of the country.

6.3 Selection of Early Production System (EPS) Location

The selection of the EPS location is essentially based on Tullow's narrow perspective and desire to cut down on the construction and operational costs, apparently ignoring key factors of economic, social and environmental importance. It fails to take into account the stakeholder opinion expressed in the environmental impact assessment process, impacts on biodiversity that are articulated in the EIS and the economic value of the maintaining the ecological integrity of the Kabwoya Wildlife Reserve. The location of the EPS inside a protected wildlife area sets an unacceptable precedence, in particular as petroleum development activities are ongoing or planned in other protected areas. This location of the EPS is also contrary to several international recommendations on such developments. Importantly, the selection of the EPS location fails to take into account development of other petroleum sites in western Uganda, which may require a majorly different size or location of such facilities, possibly making the currently proposed location neither economically, socially or environmentally good for the country within a short time. The EPS should be shifted outside the Kabwoya Wildlife Reserve and the location for such facilities requires further studies before a location in the wider interest of Uganda can be determined.

6.4 Biodiversity

The EIA does not explicitly demonstrate neither the full impacts nor how the sanctity and health of biodiversity will be preserved. What exist in the EIA reports are only proposals and recommendations for Tullow to develop the necessary mitigation measures and monitoring for the identified impacts. It, therefore, lacks a comprehensive environmental management plan to deal with biodiversity, air quality, water, fisheries, wastes, oil spills and pollution, affected communities, tourism, etc. In the absence of explicit mitigation measures and monitoring, the National Environment Management Authority (NEMA) may want to approve the EPS EIS subject to the following:-

- All proposed mitigation and monitoring plans be put in place in a specific and time bound manner with clear responsibilities for implementation and covering the costs of implementation before final approval and production commences;
- Mitigation measures and monitoring should be stated as commitments on the part of the developer rather than general statements of potential activities and intentions;
- Detailed decommissioning plans be put in place as part and parcel of the Environmental Management Plan;
- Tullow and Government put in place long-term monitoring plan for the flora and fauna in the Kaiso-Tonya valley;

6.5 Opinionated Impact Assessment

The EIA report is characterised by statements on impacts that are opinionated and not based on empirical or research information such as *"the impact will be negligibly-low, low and medium negative"*.

6.6 Access to Information

The Public is bearing requested to contribute to designing of the project in an information vacuum and very little capacity to understand the actual implications of such developments. For example, the public did not have access to the Production and Revenue Sharing Agreements; Environmental Management Plans and how the revenues accruing from the sector will be managed. This lack of public access to information, especially among civil society, was evident at the Public Hearing in Hoima on 29th July 2008.

6.7 Comprehensive Economic Analysis

The EIA does not explicitly demonstrate the cost-benefit and opportunity-cost analysis of having the EPS in the area *vis-a-vis* other economic activities such as tourism, fisheries and wildlife conservation.

6.8 Abuse of the EIA Process

There is evidence of abuse of the EIA process. Even before a decision is made, there already survey mark stones on one of the proposed location i.e. 1C. In addition, press statement attributed to Mr. Peter Javis, senior manager of Tullow Uganda, states *“One square kilometre oil refinery will be built in Kaiso-Tonya Wildlife reserve, Hoima district before the end of the year despite concerns by environmentalists”* said Mr. Peter Javis, Senior Manager Tullow Uganda (New Vision, Thursday, July 31, 2008). These kinds of action do not only affect public confidence in the proposed development, but also undermines the essence of the EIA process as a process to inform sound decision making in the interest of society as a whole. NEMA should give clarifications in this regard.

6.9 Rivers

The Kaiso-Tonya Valley is backed by the escarpment, rising about 300m onto the plateau. The escarpment is carved by numerous streams that drop over waterfalls and continue through vegetated kloofs, all providing spectacular scenery. The plateau above the escarpment is more undulating than the Kaiso-Tonya Valley with the dusty road traversing rolling hills past small farms and villages. The Kaiso-Tonya Valley slopes from the escarpment in the east to the shores of Lake Albert in the west, a fall of about 80m across between 5 and 10 kms. The Valley is drained by a number of rivers flowing from the escarpment to Lake Albert. There are two perennial water courses, the Hohwa River and Wambabya River. Other river courses in the Valley include Warwire, Kabyosi and Sebugora, all south of the Hohwa. Except for the Hohwa River, these rivers have cut their courses through the Valley, perpendicular to the escarpment, providing an undulating valley plain, with minor ridges and valleys. The Hohwa River flows in a northwest direction, almost parallel to the escarpment before turning to run perpendicular to the escarpment to Lake Albert. Given that it is in this valley that the EPS is to be established, no adequate explanation is given as to how the rivers will be protected from pollution (Tullow Uganda Operations (Pty) Ltd., 2008).

6.10 Weak Monitoring and Evaluation of Project Activities

Although it is assumed that environmental monitoring will be carried out by NEMA at the national and local level, in effect the EIA vests significant responsibility for monitoring and evaluation of activities and mitigation measures to Tullow, which is a recipe for conflict of interest, corruption and manipulation, especially when NEMA lacks the financial and human resource capacity to carry out this responsibility. In such a case, Tullow becomes “the explorer”, “the Producer and supplier”, “the Judge”, “the Jury” and “Counsel”. There is need for a third party monitoring and evaluation mechanism that is multi-stakeholder based, including civil society organisations (NGOs & CBOs), local community representatives, cultural institutions, government and the private sector.

6.11 The Proposed National Oil Company

The proposed National Oil Company to manage affairs of oil production, marketing and national oil revenues does not create confidence or provide an appropriate mechanism for accountability. Therefore, there is need to establish a statutory body that will manage the affairs of petroleum production, marketing and petroleum revenue management.

6.12 Recommendations

They recommended that the EPS location to be shifted outside the Kabwoya Wildlife Reserve and the location of such facilities be studied in a wider perspective of the development of petroleum resources in Western Uganda to arrive at location and size of such facilities that are wise investments for the country.

They were of the view that the EPS EIS be approved subject to the following: (i) outstanding impacts and uncertainties be clarified and mitigation measures put in place; (ii) specific and time bound commitments for the mitigation and monitoring measures and responsibilities for their implementation be clearly set out in the approval certificate; (iii) the EIA certificate require a deposit of a performance bond on the part of Tullow Oil. That a geographically and thematically wide ranging Strategic Environmental Impact Assessment be implemented urgently and provide the basis for the development of the petroleum sector, paying due consideration to the numerous other interests in society currently not considered. They need the Production Sharing Agreements to be made public and the necessary legal and institutional frameworks be put in place as basis for developing the petroleum sector as well as access to information be improved and capacity to understand and make use of such information enhanced, in a manner that makes wider and meaningful participation in such important processes for Uganda possible for a much wider audience.

In addition to the above comments relating primarily to the EPS, the Civil Society Organisations believe the development of petroleum resources in Uganda requires much more efforts from all relevant parties to ensure a higher level of transparency and accountability in order for the petroleum resources to benefit Uganda and its people as a whole. There is also an urgent need to address the energy crisis in the country by looking at Uganda's renewable energy resources, which has the potential to provide much more power to Uganda than the proposed EPS.

7.0 Way Forward

7.1 Opportunities and risks

Large scale mining can have significant economic, social and environmental impacts at the local, regional and national level. In recent years companies, NGOs, governments and the communities themselves are being challenged to ensure that the benefits accruing from mining, are maximized in a sustainable way and that the negative impacts of the mine are mitigated to the extent that the communities both during and after the life of the mine, are better advantaged by the presence of a mining investment. At a local level, a mine has the potential to significantly benefit the local population through the creation of direct and indirect employment, skills transfer, enhancing the capacity of health and education services, improved infrastructure, and small and medium business opportunities (MacPhail, 2000). However, the advent of mining and the inevitable closure of a mine, can also cause significant adverse effects on the local population, infringing on certain rights, and affecting their traditional means to livelihood. This can be manifest in many ways, impacting on land rights and the rights of indigenous people, induced inflation, influx of newcomers to the area, disruption of traditional social structures and social jealousy.

7.2 Sharing Experiences

The impact of mines on local communities has been an area of growing concern and attention, and one that mining companies, NGOs and governments are grappling with. The World Bank has used its convening power and neutral position to bring together a number of different agencies to pursue discussion in this area, share experiences and enable diverse agencies to work more cooperatively together, with the view to resolving some of the problems affecting this area. Recent work in the Department sets out to explore more specifically the linkages that exist between mining operations and the four dimensions of poverty – economic opportunity, capability, security, and empowerment – in the context of two generically different forms: (i) large scale mining; and (ii) small scale and artisanal mining (Stavenhagen, 2003 and World Bank, 2004). The convening of conferences, meetings, analytical research and the dissemination of good practice are among the number of ways in which the Mining Department has been working to gain a better understanding of these issues, develop mechanisms for resolution and propagate good practice.

Collaborative arrangements and networking are the key ingredients of this intervention. The intervention will showcase the best approaches to Public – Private – CSO Partnership. Tri-Sector Partnering (Cullen, 2006) is a new way to manage social issues within the extractive industries. It is more than public relations or stakeholder consultation. It is where organizations drawn from across the three sectors of society – business, government and civil society - 'pool' their complementary resources, knowledge and skills to jointly address complex social problems. It is about turning relationships and dialogue into active partnerships. Tri-Sector Partnering builds on the concept that each sector in society has core competencies and resources that are complementary to one another. This can include:

- The supply chain, project management, engineering, infrastructure (eg power generation, water supply) and logistical expertise of the investing mining company;
- The strategic co-ordination and the ability to source funding of public services of the local government;
- The capacity to mobilize community participation of local NGOs (Non Governmental Organizations) and community action groups.
- Tri-Sector Partnering delivers a “win-win-win” outcome for development and business, with benefits to all partners.

Benefits include:

- More sustainable community development;
- More transparency within government;

- A more equitable distribution of wealth;
- The avoidance of local disputes;
- A more robust, informal social 'license to operate' for the investing companies;
- And the reduction of dependency of the local communities on the companies.

7.3 Benefit sharing

Many developing countries, rich in natural resources, have welcomed private investment in their oil, gas, and mining industries. Although projects in the extractive industries can have a serious environmental impact and be socially disruptive as well—particularly if people must be resettled to make way for them - they can make a significant contribution to the economic development of host countries if their adverse consequences are minimized through careful planning. Because they generate sizable revenues, create jobs and business opportunities, and often bring new roads and access to water and power to the isolated rural areas in which they are typically located, they have the potential to stimulate economic growth, reduce poverty, and raise living standards. In addition, host countries benefit from being exposed to best international practices in project planning and implementation and forced to build up their administrative and institutional capacity.

Frequently, however, national governments reap the most benefit from these projects, while social and environmental costs tend to be borne by local communities.

7.4 The importance of partnership

The missing ingredient in these four projects—and in many others like them—is partnership. For projects to contribute to the development of host countries, governments, private companies, and local communities or the nongovernmental organizations (NGOs) that represent them must be committed to working together as partners. Although each has different responsibilities, the partners must have mutually agreed objectives, shared responsibility for outcomes, clear accountability, and reciprocal obligations

7.5 Keeping up with change

The rapid construction of projects and sudden huge cash flows into noncash economies have transformed life in many communities. The injection of cash into the local economy and the emergence of contractors competing for work have fueled corruption and extortion, causing civil conflicts to escalate. A robust monitoring system is therefore needed - not only to ascertain the success of mitigation plans but also to ensure that plans remain relevant as conditions change. Monitoring programs should focus on results (for example, the number of local jobs created because of business opportunities related to the project) and not on inputs (for example, the amount of money allocated to business development). Monitoring responsibilities should be clearly allocated between the government, the company, and civil society. And, if mitigation plans are found to be falling short of their objectives, they must be redesigned by experts who can interpret findings and determine what changes are needed. The active and sustained involvement of local communities is also necessary, to ensure that programs meet local needs and build a sense of ownership.

7.6 Improving the odds of success

To ensure that developing countries reap the maximum benefit from oil, gas, and mining projects while protecting the natural environment and minimizing social problems, the players must learn to work together, even if their agendas seem initially to conflict. Specific actions that will enable host countries to take full advantage of the development opportunities offered by these projects include:

- strengthening national policy frameworks and government's capacity to deliver the services for which it is responsible, such as health care, education, and security;
- identifying biological and cultural sensitivities to facilitate project planning and selection of the best alternatives for mitigating negative impacts;
- negotiating equitable concession agreements with private sector companies;

- strengthening policies and procedures for public consultation and promoting transparency in project planning and implementation; and
- building capacity at the local level to absorb incremental revenues for development purposes.

7.7 FPIC

Main areas where FPIC is relevant:

- In relation to indigenous lands and territories, including sacred sites (may include exploration, such as archaeological explorations, as well as development and use).
- In relation to treaties, agreements and other constructive arrangements between States and indigenous peoples, tribes and nations.
- In relation, but not limited, to extractive industries, conservation, hydro- development, other developments and tourism activities in indigenous areas, leading to possible exploration, development and use of indigenous territories and/or resources.
- In relation to access to natural resources including biological resources, genetic resources and/or traditional knowledge of indigenous peoples, leading to possible exploration, development or use thereof.
- In relation to development projects encompassing the full project cycle, including but not limited to assessment, planning, implementation, monitoring, evaluation and closure, whether the projects are directed towards indigenous communities or, while not directed towards them, may affect or impact upon them.
- In relation to policies and legislation dealing with or affecting indigenous peoples.
- In relation to any policies or programmes that may lead to the removal of their children, or their removal, displacement or relocation from their traditional territories.

7.8 Framework for Responsible Mining

7.8.1 Deciding Whether Mining Is Appropriate Land Use

- Mining should not occur in IUCN protected areas or in any marine protected areas
- Mining should not occur in Ramsar sites that are categorized as IUCN protected areas.
- A multi-stakeholder process should be used to identify additional areas of high conservation value that qualify as “no go” zones.
- Companies should ensure that their projects provide net conservation benefits that are consistent with maintaining the biological resources and ecosystem services on which local communities depend.

7.8.2 Ensuring Environmentally Responsible Mining

Exploration

- Details of the exploration project and potential impacts should be made available to affected communities and area residents in an appropriate language and format, and should be made accessible to the public.
- To cover the lasting environmental impacts of the exploration phase, companies should provide adequate financial guarantees to pay for prompt cleanup, reclamation, and long-term monitoring and maintenance.

Environmental Impact Analysis

- Stakeholders should be given adequate notification, time, financial support to pay for technical resources, and access to supporting information, so that participation in the EIA process is effective.
- Companies should collect adequate baseline data during the EIA process

- Environmental costs, including those associated with regulatory oversight, reclamation, closure, and post-closure monitoring and maintenance should be included in the environmental impact assessment.
- Environmental assessment should include worst-case scenarios and analyses of off-site impacts. Companies should work with potentially affected communities to identify potential worst-case emergency scenarios and to develop appropriate response strategies.

Water Contamination and Use

- Companies should make discharge reports of contaminants to surface and ground waters publicly available.
- A qualified professional should certify that water treatment, or groundwater pumping, will not be required in perpetuity to meet surface or groundwater quality standards beyond the boundary of the mine.
- Minimizing water usage should be a stated mine management goal.
- Mine dewatering should be minimized to prevent all undesirable impacts on ground and surface waters, including seeps and springs.

Acid Mine (Rock) Drainage

Companies should conduct adequate pre-mining and operational mine sampling and analysis for acid-producing minerals, based on accepted practices and appropriately documented, site-specific professional judgment. Sampling and analysis should be conducted in accordance with the best available practices and techniques.

Air

- Companies should monitor and publicly report airborne hazardous emissions (particularly mercury, lead, and greenhouse gases).
- Energy Consumption
- Reducing energy use and greenhouse gas emissions should be a stated mine management goal.

Noise

Maximum noise level requirements should be implemented at the project boundary.

Waste Management

- Tailings impoundments and waste rock dumps should be constructed to minimize threats to public and worker safety, and to decrease the costs of long-term maintenance.
- Tailings impoundments and waste rock dumps should be constructed in a manner that minimizes the release of contaminants by installing liners if seepage would result in groundwater contamination. In addition, waste facilities should have adequate monitoring and seepage collection systems to detect and collect any contaminants released in the immediate vicinity.
- Net acid-generating material should be segregated and/or isolated in waste facilities.
- Hazardous material minimization, disposal, and emergency response plans should be made publicly available.
- Rivers should not be used for the disposal of mine waste.
- Companies should not engage in shallow-water submarine waste disposal. Deep-water submarine waste disposal should not be used unless an independent assessment can demonstrate minimal environmental and social risks.

Cyanide

Mine operators should adopt the Cyanide Management Code, and third-party certification should be utilized to ensure that companies implement safe cyanide management.

Reclamation and Rehabilitation

- Companies should develop a reclamation plan before operations begin that includes detailed cost estimates. The plan should be periodically revised to update reclamation practices and costs.
- Companies should restore all disturbed areas so that they are consistent with future uses.
- Companies should re-contour and stabilize disturbed areas. This should include the salvage, storage, and replacement of topsoil or other acceptable growth medium. Quantitative standards should be established for re-vegetation in the reclamation plan—and clear mitigation measures should be defined, to be implemented if these standards are not met.
- Where acid-generating materials are exposed in the rock wall of the mine, companies should backfill the mine pit if this would minimize the likelihood and environmental impact of acid generation. Backfilling options must include reclamation practices and design to ensure that contaminated or acid-generating materials are not disposed of in a manner that will degrade surface or groundwater.
- Where subsidence is considered likely, companies should backfill underground mine workings to prevent negative environmental impacts.
- Underground workings and pits should be backfilled to minimize the size of waste and tailings disposal facilities.

Financial Guarantees

- Financial sureties should be reviewed and upgraded on a regular basis by the permitting agency, and the results of the review should be publicly disclosed.
- The public should have the right to comment on the adequacy of the reclamation and closure plan, the adequacy of the financial surety, and completion of reclamation activities prior to release of the financial surety.
- Financial surety instruments should be independently guaranteed, reliable, and readily liquid. Sureties should be regularly evaluated by independent analysts using accepted accounting methods. Self-bonding or corporate guarantees should not be permitted.
- Financial sureties should not be released until reclamation and closure are complete, all impacts have been mitigated, and cleanup has been shown to be effective for a sufficient period of time after mine closure.

Post-Closure

Reclamation plans should include plans for post-closure monitoring and maintenance of all mine facilities, including surface and underground mine workings, tailings, and waste disposal facilities. The plan should include a funding mechanism for these elements.

Monitoring and Oversight

- If permit violations occur, companies should commit to rapidly implementing corrections in order to maintain clean surface and groundwater.
- The environmental performance of mines and the effectiveness of the regulatory agencies responsible for regulating mines should be addressed in an independent environmental audit. These audits should be conducted on a regular basis and the results should be made publicly available.

- Communities should have the right to independent monitoring and oversight of the environmental performance of a mine.

7.8.3 Ensuring That Mine Development Results in Benefits to Workers and Affected Communities

Indigenous Peoples and Free, Prior, and Informed Consent

Companies should obtain the free, prior, and informed consent of indigenous peoples before exploration begins and prior to each subsequent phase of mining and post-mining operations.

Participation in Decision Making/Consultation

- Companies should negotiate with affected indigenous peoples and community men and women before exploration. Such negotiations should continue throughout the life of the mine, with the understanding that indigenous peoples or local communities may withhold consent at each stage of mine development.
- Companies should conduct consultations that are culturally appropriate, using mechanisms and institutions that are recognized by the affected indigenous peoples and community women and men in the area in which they wish to operate.
- Indigenous peoples and community women and men should be provided with sufficient resources to evaluate a project in order to decide whether, and how, they would like it to proceed.
- Companies should not try to extract a community decision in support of mining (or encourage governments to do so for them) as this may divide communities and create dissent.

Access to Information/Disclosure

- The company should provide full disclosure of pertinent information regarding a mining project to both women and men, as well as to marginal groups within potentially affected communities, in culturally appropriate forms and in locally accepted languages, as well as in English.
- The company should provide accurate information regarding employment opportunities for local people at the mine project, especially for women, indigenous peoples, and marginal groups in the community, as well as information regarding positive and negative economic impacts on non-employed members of the community, and “just transition” arrangements for employees and the community post-closure.
- If requested by the community, companies should facilitate site visits to other mines they operate. Communities should be allowed to choose the sites they wish to visit, and such visits should be designed to allow communities to fully explore the company’s operations, including the opportunity to speak freely with other community members, as well as with critics, if any, of the mining company.

Consent-Benefit and Compensation Agreements

- Companies should enter into binding contracts with communities that specify the terms under which a particular phase of a mining project may proceed. Such agreements should be mutually agreed upon and enforceable through the national court system in the country of operation or through mutually acceptable arbitration procedures.
- Indigenous peoples and community women and men have the right to deny consent to a project if the project changes substantially or if the company does not honor its binding agreement with the community.

- If a community has withheld consent for a mining project, no further requests for consultation by that company or any other should be made within a five-year period unless the community indicates otherwise.

Recognizing Women’s Rights and Addressing Gender-Related Risks

- Companies should conduct Gender Impact Assessments (GIAs) in conjunction with Environmental and Social Impact Assessments before mining starts.
- If the mine proceeds, regular gender audits should be conducted to evaluate impacts and compliance with agreed-upon measures over time.
- Companies should compensate households headed by women just as they would those headed by men.
- In conjunction with women, companies should develop, implement, and enforce a code of conduct for their employees that covers responsible use of alcohol, relations with local women, increased risk for sexually transmitted diseases and HIV/AIDS, and gender sensitivity training in the workplace and in the community. Employees should be made aware of the Code of Conduct.
- Companies should comply with international labor standards that safeguard women with equal pay for work of equal value; safe and healthy working environments; and freedom from discrimination, violence, and sexual harassment.
- Women mine workers should have access to paid maternity leave and childcare leave. Breast feeding and crèche facilities should be provided on site unless an alternative location is preferred by women mine workers. Women mine workers who become pregnant while working at the mine should be provided with the option of appropriate alternate employment during pregnancy and early motherhood that does not expose them to hazardous substances and dangerous work.
- Women mine workers should be allowed the option to participate in the development and implementation of mining company policies, and internal monitoring, evaluation, and verification systems to ensure that mine managers and other mine employees protect and promote women’s rights and equality. The company should put in place accountability, verification and incentive mechanisms to encourage and enforce these policies and systems.
- Mining companies should encourage and provide employment training opportunities for women in the formal mining sector in all areas of work, including underground mining and blasting, not just in traditional clerical positions. Companies should also provide training and jobs for women in social and environmental impact monitoring.
- At the national level companies should encourage governments to develop the appropriate capacity, allocate sufficient resources, and foster the political will necessary to develop, implement, and enforce successful policies and legislation that reflect human rights and labor standards and address all aspects of relations between mining companies and local community women and women mine workers.

Recognizing Labor Rights and Addressing Worker-Related Risks

- Companies should respect the right of their employees to join a union and the right of their employees to bargain collectively.
- Together with representatives from employee organizations, companies should implement training sessions to educate employees on their basic labor rights and establish independent verification and monitoring procedures to ensure that basic labor rights are protected.
- Together with representatives from employee organizations, companies should establish formal and confidential complaint mechanisms for employees.
- Mining companies should provide job training to local community members so that they can employ a maximum percentage of their labor force locally.

- Mining companies should maximize training and employment opportunities for women and take active measures to counter discrimination against hiring of women, harassment of women in the workplace, and unsafe working conditions for women.
- In addition to gender equity, companies should ensure equal pay for equal work, as well as equal employment opportunities and protections for workers of any race, ethnicity, religion, caste, sexual orientation or political opinion.
- Mining companies should provide HIV/AIDS awareness training for all staff and their families and develop policies to protect, support, and provide for staff and their families living with HIV/AIDS. As women mine workers are particularly vulnerable to HIV/AIDS, prevention and protection programs should be particularly directed at women.
- Mining companies should prioritize workplace health and safety and adopt a broad view of health.
- Companies should not develop mines if they are prohibited from hiring unionized labor, or if their employees are subjected to forced labor.

Recognizing the Rights of Small-Scale and Artisanal Miners and Addressing Risks to their

Livelihoods

- Mining companies should engage small-scale miners and their communities, help them obtain legal status, integrate them into the formal sector, help them gain access to markets, and provide technical and educational resources that will allow them to work in a more environmentally and socially sustainable fashion.
- Mining companies should adhere to guidelines on relocation and compensation if small-scale miners have to be removed from their homes and places of work.

Resettlement/Relocation and Compensation

- Resettlement should be avoided if at all possible and should not occur without the free, prior, and informed consent of affected individuals set out in a binding Consent Agreement.
- Voluntary resettlement must be preceded by a detailed displacement impact assessment that assesses all possible costs to communities and individuals who will be affected by the displacement, either directly or indirectly.
- Companies should allow enough time for assessment, consultation, participation of affected people, alternative land acquisition, and resettlement.
- Absence of legal title should not constitute a barrier to compensation through the resettlement process.
- Resettled individuals should be better off in their new situation than they were before resettlement.
- No displacement should take place until all likely risks and outcomes have been independently assessed for men and for women, a binding agreement is in place, compensation has been provided, alternate land has been allocated, people have had a chance to start rebuilding in the new location and policies and facilities are in place that allow resettled people to preserve or increase their standard of living. In addition, resettled individuals should be able to access an independent complaint and dispute resolution mechanism.
- Companies should encourage the establishment of dispute resolution mechanisms so that affected women and men can freely participate in the successful implementation of the resettlement program. Any complaints should be acknowledged, recorded, and addressed expeditiously in an agreed-upon fashion.
- Performance bonds or resettlement insurance should be provided in case these efforts do not provide better livelihoods in the timeframe originally agreed upon.

- All payments and expenses related to resettlement and compensation should be publicly disclosed to ensure accountability and transparency and to counter charges of corruption or misuse of funds.

Security Issues and Human Rights

- Companies should conduct an independent peace and conflict impact assessment to assess the risk of provoking or exacerbating violent conflict through their operations. Companies should avoid investing in areas where the risk of violent conflict is high (e.g., in areas of civil war or armed conflict).
- Companies operating in conflict zones or using armed security guards should abide by all major international human rights agreements, international humanitarian law, and refugee law. Security forces should never be used to address conflicts between the company and community women and men or the company's workers.
- Companies should not operate in areas that require them to use military forces or excessive security in order to maintain their operations, as such conditions are likely to result in human rights abuses. Companies should also not pay for or provide logistical or other support for police or armed forces of the host country in return for security services at the mine.
- Companies should not adopt policies that create or intensify divisions in communities, including hiring traditional enemies of the local community or one faction of an internal division in the community as security guards.
- Companies should cooperate with conflict prevention and conflict resolution NGOs to alleviate existing conflicts.
- Companies should state in their contracts with security personnel the conditions under which force may be used and make these contracts public.
- Companies should make sure that mining infrastructure and properties, such as vehicles or explosives, are not used to further conflict and that economic rents from mining are not used to provoke or prolong civil conflict or to support regimes that abuse human rights.

7.8.4 Ensuring Good Governance

- Companies should report their progress toward achieving concrete environmental and social goals through specific and measurable indicators that can be independently verified. Such information should be disaggregated at a project or site-specific level.
- Financial institutions should report the environmental and social risks associated with their lending in the mining sector.
- Companies should report money paid to political parties.

Accountability

- An independent dispute resolution mechanism should be established so that communities can count on fair resolution of concerns they may have with mining companies.

Transparency

Companies should report payments made to central governments, state or regional governments, and local government and authorities, and these payments should be compared to revenues governments receive, as well as to government budgets.

Corporate Governance

- Corporate governance policies should be made public, implemented, and independently evaluated.

- Companies should encourage adoption of sustainability concepts by employees in the workplace.
- Companies should review contractor practices to ensure compliance with sustainability principles.

7.9 Further research

There is need for the following studies with particular respect to the analysis of the cultural, environmental, health and socio-economic situation in the selected communities before the opening of the large mines and after they have been in operation for at least 2 years.

It is important to undertake studies and disseminate information on the actual effect of mining activities to rivers.

There is need to analyse the legal and consultative processes undertaken in the negotiations for the establishment of these mines and their effects on the final outcome.

It is important to prepare strategies to deal with the opening of large mines near established communities which can be beneficial to all the major stakeholders.

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