Community-Company Engagements: "Good" Practice in the Extractive Industries?

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COMMUNITY-COMPANY ENGAGEMENTS: "GOOD PRACTICE" IN EXTRACTIVE INDUSTRIES AND INFRASTRUCTURE PROJECTS?

Introduction

The extractive industries' including mining, oil and gas, has had and continues to have, large-scale and systemic impacts on indigenous peoples and local communities that live on or near such projects. It is often the choice of indigenous peoples and local communities around the world to resist the entry of extractive industries on to their lands, based on the well-known history of gross violations of the rights of indigenous peoples and local communities as a result of mining activities. While there are various means of fighting these injustices, these methods do not seek to address a root of the problem, being the imbalance that exists between companies and communities[1] and the lack of engagement prior to, during and in the finalization of such activities. The purpose of this research is to establish some of the building blocks for good community-company engagement, to level the playing field between stakeholders in order to amplify community voice that may help to avoid the disastrous impacts often associated with mining industries.

> The term **community-company engagement** can refer to interactions that take place between a company and communities, and covers a broad range of activities, which induce dialogue between the stakeholders throughout a project life cycle, specific negotiations and agreements and accompanying mechanisms such as grievance mechanisms and development funds.

Local communities often bear the social and environmental cost of mining on their lands while obtaining little or no share of the resulting benefits. Ideally, comprehensive community-company engagement can mitigate the negative effects of extractive industries - ranging from resettlement of communities, destruction of cultural and heritage sites, to a lack of economic opportunities and physical conflict - to explore and enhance potential positive impacts of such activities, including the fulfillment of community-articulated development opportunities, and to create mechanisms that can address any type of conflict between communities and companies. Often these interactions take place against the background of a company's legal and/or voluntary obligations to engage with communities to inform about the project, and to either consult or to obtain consent over use of their lands and resources. The strength of communities' recognized rights under their respective national legal regime and the effectiveness of the rule of law greatly influences the outreach to communities by companies and government, including the stage at which communities are approached, whether this involves genuine consultation, which communities are approached, the quality of community participation and the end results.

[1] "Communities" hereafter encompass indigenous peoples and local communities.

While many national legal frameworks continue to be silent on the rights of communities over their lands and natural resources, and more specifically, their rights as they relate to extractive industry projects,[2] the international legal regime has experienced great development over the past decade in these areas. Numerous binding and non-binding instruments, including the United Nations Declaration on the Rights of Indigenous Peoples and the United Nations Guiding Principles on Business and Human Rights, have been developed and are recognised by governments and industry. Moreover, the strengthened role of regional human rights systems has resulted in a number of landmark rulings that set standards for the rights of indigenous peoples as they relate to consultation and consent. In addition, against the backdrop of a call for greater corporate accountability, of an increasingly strengthened international regime on responsible business practice and the recognition of the rights of indigenous peoples and local communities, as well as the increasing publicity of conflicts as a result of extractive industries and their lack of engagement with affected communities, company practice is slowly shifting.

Today there may be four main reasons for companies to enter into formal engagement processes with affected communities. **First**, to attempt to successfully secure access to land and resources traditionally, owned, utilized or occupied by communities (with consultation and consent); **Second**, to secure clarity over a company's responsibilities; **Third**, to reduce the likelihood of, and to address where possible, conflicts between communities and companies; and **Fourth**, to create a framework for ongoing engagement between communities and companies during a mine's life cycle. Even when community rights are barely formally recognized, companies consider community engagements in the light of these four stated motivations.

Increasingly these engagements can and do result in a number of negotiated agreements concluded between the company and the community, or tri-partite agreements including the government.

In countries where a community's rights to their lands and natural resources are recognized and well-defined, where communities hold the power to deny access to their lands, or where communities have had the strength and opportunity to successfully resist initial attempts to mine, engagements have developed beyond the point of mere information-sharing and consultation, evolving into formal negotiations with parties. In these countries, particularly where communities already have prior experience with mining companies and where there is existing capacity within the communities' leadership and work force, 'engagements' go as far as proper joint venture agreements.

[2] For evidence of the silence of national legal frameworks on the rights of indigenous peoples and local communities in the context of extractive industries and infrastructure projects, please see the *Review of National Laws & Policies that Support or Undermine Indigenous Peoples and Local Communities* for Zimbabwe and South Africa, commissioned by Natural Justice.

In the majority of cases, however, engagements between communities and companies are more loose and company- or government-driven agreements focus on basic socio-economic participation rights regarding the extractives projects. This is particularly the case where communities' face great uncertainty regarding their recognized rights, where the role of communities and government is not clearly defined and where communities have limited capacity to make use of any of the socio-economic participation and benefit concessions.

It is these engagements that the present paper is concerned with. This paper seeks to examine community-company engagement through the lens of communities that, for a variety of reasons, struggle to engage with companies and who seek to use these types of agreements to formalize their role in the process, to obtain clear commitments on key points such as the scope of impact assessments, to draw up mechanisms that can address potential conflicts and to set the stage for more comprehensive socio-economic participation negotiations at a later stage.

Experience shows that supporting communities to engage in community-company engagement needs to address process as much as content. For example, for impact assessment agreements, negotiation agreements and roadmaps for future engagements, the process usually determines the content. Moreover, the process requires a high degree of pre-strategizing as engagements bear as many risks as they bear opportunities.

For instance, community-company engagements can often lead to friction among community members or among various communities, where companies approach communities before a community has mobilized, or when a community begins its engagement as a response to exploration licenses that have already been granted before community consultation has taken place. Depending on the initial community-company engagement, the outcomes thereof can also preclude stronger commitments at a later stage. The interconnectedness of process and content and the importance of getting the process right to achieve the right impact are best emphasized by using a case study. This is set out below.

This paper will proceed to first outline the evolution of community-company engagements. It then discusses good practices on the basis of a number of case studies and interviews and the authors' experiences with certain types of community-company engagements in the extractives sector. It will then conclude with a brief summary of the standards set out in the international regime, which has prompted many of the developments.

Section I: The Evolution of Community-Company Engagements

1. An Introduction to Common Types of Agreement

Against a background of the strengthened international regimes on responsible business and the rights of indigenous peoples and local communities set out in Section III, agreements between mining companies and affected communities have experienced a great evolution over the past decades.

Generally speaking there appear to be four main reasons for companies to enter into formal engagement processes with affected communities:

1. Securing access to land and resources,
2. Securing clarity on a company's responsibilities,
3. Addressing and reducing potential conflict,
4. Creating a framework for ongoing engagement during the mine's life cycle.

Even when community rights are barely formally recognized, companies will consider community engagements in the light of these four motivations. The nature and form of the engagements and resulting agreements, however, strongly depend on the national law applicable in the country hosting the mine. In particular, the first two considerations are highly dependent on the national legal context in which a company operates; the stronger the legal requirements in the host country, the greater the importance of effective community engagements to secure access to land and resources and to define a company's responsibilities.

In countries where a community's rights to their lands and natural resources are recognized and well-defined, and where communities hold the power to deny access to their lands, community-company engagements have developed beyond the point of mere information-sharing and consultation, evolving into formal negotiations with parties on a level playing field.[3] In these countries, especially where communities already have prior experience with mining companies and where there is existing capacity within the communities' leadership and work force, 'engagements' go as far as proper joint venture agreements.[4]

In some countries, governments have introduced national laws that stipulate mandatory processes for community-company engagement, without transferring specific property (land and natural resource) and related veto rights to communities.[5] In these instances, agreements might stipulate specific socio-economic participation rights, including benefit-sharing rights; even though they are negotiated against the background of assumed 'consensus'.

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[3] Canadian Centre for Community Renewal, *The Aboriginal Mining Guide: How to negotiate lasting benefits for your community* (2009), available at: www.miningguide.ca [last accessed December 2014].
[4] *Ibid.*
[5] *See discussion above.*

Yet in other countries, communities continue to struggle to exert basic participation rights due to lack of recognition of any peoples'-specific rights. In these circumstances the nature of community-company engagements and of resulting agreements continues to strongly depend on the pressure exerted on companies and other external stakeholders by affected communities and civil society stakeholders. Often any types of agreements in these situations do not reflect a proper adherence to minimum standards of consultation, consent and 'benefit sharing', though they do contain specific company commitments to mitigate impacts and some infrastructure, social and work place development.

Last but not least, some community-company engagements do not result in any type of agreement between communities and companies, but instead in company commitments vis-a-vis the government.

Community-Company Agreements

Where community-company engagements in the context of mining lead to concrete formal agreements, the variety of community-company agreements can be summarized as shown below in Table 1 (starting with the strongest known agreements, progressively getting weaker). Some existing agreements may not necessarily fall clearly into one of these categories and the different types of agreements listed below are often referred to in a number of different ways. In addition, often numerous agreements are concluded in the context of one mining development, which each building upon and reinforcing the others. The exact strength of an agreement thus also depends on its relationship to other agreements. Nonetheless, the table below gives a good first overview.

Table 1: Five Types of Community-Company Agreements in the context of mining investments

Agreement type	Characteristics
Joint Venture Agreements	• Between communities and companies; • Require a clear recognition of communities' rights over their lands and resources under national (or state) law; • Create joint venture enterprises between the mining company and the affected community, thereby creating real business opportunities for the communities and creating new assets owned by the communities; • Require great business capacity at the community level, often developed during prior businesses.
Benefit Agreements	• Between communities and companies; • May require a clear recognition of communities' rights over their lands and resources under national (or state) law; • Agreements between communities and companies on companies' obligations regarding impact mitigation, compensation and benefit sharing; • Usually contain specific obligations for each state of the

	mining cycle, outlining exact business opportunities for community members, the work conditions required for these, capacity building and education responsibilities for the company, land development aims and obligations (for instance prohibiting certain transit activities in certain areas), etc.; • Commonly contain provisions for the renegotiation at later stages of the mining investment to embrace new needs and opportunities; • Strength of these agreements depends heavily on the exact content.
Community Development Agreements	• Between communities and companies, commonly involving the government as a third party: • The most common type of agreement in countries where communities do not have recognized, exclusive rights over their lands and resources: • These agreements may address both impact mitigation and benefit sharing responsibilities. However, they stay below the standard of benefit agreements in their ambition and depths of commitments. While benefit agreements focus on 'participation' along the entire investment cycle, community development agreements often only outline certain types of development assistance such as infrastructure development, set out a small percentage of royalties to be paid, and contain some general principles for impact mitigation. . This is reflected in the fact that benefit agreements usually outline concrete responsibilities and opportunities and are concluded with a view to adjusting the agreements to changing circumstances. Community development agreements, on the other hand, often remain vague, are not necessarily community specific and are concluded as a one-off agreement. • Frequently, they are also concluded between the government and communities, and the government and companies in the form of community development plans. The government then has a much stronger role. • Such plans are usually harmonized with existing development plans for the affected communities and theyoften focus on development needs not related to the mining investment, such as unrelated infrastructure needs, resulting in companies' commitments to address these, for instance by building and staffing hospitals.
Consultation and Negotiation Agreements	• Between communities and companies; • Often an early stage of benefit agreements; • May be non-binding in the form of memorandums of understanding (MoUs);

	• Outline the involvement of communities in specific processes such as the feasibility and impact assessment studies and set; a mutually agreed agenda for the negotiation of benefit agreements, often stipulating rights of withdrawal, grievance mechanisms to address potential conflict, principles guiding the negotiations etc.; • While not including the same degree of obligations as benefit agreements, these agreements can be of equal strength as they create a level playing field for future negotiations; • Where actual agreements (not only MoUs), these agreements can also be crucial in overcoming a lack of rights' recognition under national law. When companies and communities mutually agree that explicit consensus will be needed before entering into the construction phase of the mining investment and that negotiations are conducted with a right to withdrawal, it will be difficult for governments to intervene and curtail the communities' engagements.

Source: *Author, compilation based on interviews and case studies.*

In addition to these formal agreements, communities and companies may also come to informal arrangements and mutual understandings on, for instance, a community's vision and/or protocols outlining expectations and needs, or on a framework for future engagements. These are not necessarily full-fledged agreements and they may even be drawn up in a unilateral manner and then formally recognized by the other party. Especially where the nature of the engagement between communities and companies changes over time – for the better or to the worse in terms of arising conflict – the parties may also decide on roadmaps to address the changing circumstance. This may include full agreements on, for instance, the establishment and operation of a grievance mechanism.

By nature all of these different agreements can and are concluded at the different stages of a mining investment cycle. The Table 2 below shows the most common times for conclusion and sets out the characteristics of each phase.

Table 2: The 5 stages of mining investments, characteristics and common agreements

Exploration	**Feasibility & Planning**	**Construction**	**Operation**	**Closure**
3-10 years	2-7 years	2-4 years	Resource dependent. Often 7-15 years	Up to 5 years
Prospecting; Scientific assessments; Drilling; Scoping studies.	Evaluation of geological results, industry standards,	Physical construction of the mine and related transport and	Operation, depending on resource and business	Shut down; Decommissioning; reclamation; Post-closure incl.

There are grassroots (no prior mining activity), brownfield (closed mining activity) and on-site (ongoing mining activity) exploration. Low success rates for grassroots exploration. Often conducted by 'Junior companies' who may sell rights after exploration.	engineering analysis and market research; Environment impact assessments; Costs analysis; Obtaining of permits;	support infrastructure.		monitoring
• Joint Venture • Consultation and negotiation agreements	• Joint Venture • Benefit Agreements • Community Development Agreements	• Joint Venture • Benefit Agreements • Community Development Agreements	• New Joint Venture • Renegotiation of Benefit Agreements	• New Joint Venture • Renegotiation of Benefit Agreements
• Engagement protocols			---	
• Engagement/participation agreements, incl. agreements to address specific/new conflicts, such as grievance mechanism agreements				

***Source**: Adopted with variations and additions form the Aboriginal Mining Guide.*[6]

Often the strength of an agreement is assessed on the basis of its socio-economic participation and benefit sharing elements. Benefit sharing, however, depends on a magnitude of external factors, such as the scope of the investment, it's advancement, its relationship with other investments in the area and existing work capacity at the community level (see Annex I). Moreover, strong corporate commitments can only result in strong impacts if communities can make use of the commitments and hold the relevant actor accountable. Thus, formalized agreements may be the most respected in situations where communities have recognized rights over their land and resources and are thus in the position of entering into negotiations in a relatively level playing field. In most countries, however, communities continue to struggle to engage in the first place due to a lack of formalized rights. In these instances, the *process* of engagement and negotiation is important to ensure that any final products of such engagements (by way of a formal agreement) are fair. Moreover, negotiating other commitments, for instance on specific modalities for impact assessments, the design of a

[6] *The Aboriginal Mining Guide: How to negotiate lasting benefits for your community*, p. 84.

grievance mechanism or financial support for internal community engagement, are of great importance also.

The sharing of non-economic benefits (or, concessions) are less easily categorized then those relating to employment and development support, as they are highly context and process specific. They are of particular relevance where communities' face great uncertainty regarding their recognized rights over land and resources, where the role of communities and government is not clearly defined and where communities have limited capacity to make use of any of the socio-economic participation and benefit concessions.

It is these concessions and commitments that the present paper is concerned with. Moreover, it examines these options through the lens of communities that struggle to engage with companies and that seek to use these types of agreements to formalize their role in the process, to obtain clear commitments on key points such as the scope of impact assessments, to draw up mechanisms that can address potential conflict and to set the stage for more comprehensive Impact Benefit Agreements (IBAs) and Socio-Economic Participation Agreements (SEPAs) at a later stage.

Experience shows that supporting communities to engage in community-company engagement needs to address process as much as content. For example, for agreements that set out a community's participation in impact assessments, negotiation agreements and roadmaps for future engagement, including roadmaps on the establishment of grievance mechanisms, the process usually determines the content. Moreover, the process requires a high degree of pre-strategizing as engagements bear as many risks as they bear opportunities.

For instance, community-company engagements can often lead to friction among community members or among various communities, for example, when companies approach communities before a community has mobilized, or when a community begins its engagement on the backfoot, having to deal with prospecting licenses that have already been granted before community consultation has taken place. Depending on the initial community-company engagement, the outcomes thereof can also preclude stronger commitments at a later stage.

Section II: Good-practices for Community-Company Engagement

1. Overview

Tangible community benefits can only be achieved when communities are fully and properly engaged, meaning communities need to be engaged on their own terms, from the beginning. Given communities are not homogenous, capacity needs differ widely. Communities in countries that recognise their rights in clear legal frameworks in the context of a functional rule of law obviously have particular capacity needs with respect to community-company engagement, in

comparison with the majority of communities affected by extractive industries around the world, who require a wide range of support not only with respect to the process of engaging with companies (ie. how they can influence the process, what elements to insist on, what tools to use), but also basic human rights around ownership of and access to lands and traditional resources.

Likewise, companies often require guidance on the unintended, often negative effects, that certain established processes can yield. Far too often 'democratic legitimacy', that is, requiring communities to elect community members to represent them in engagements with companies, is confused with full community participation. In addition, the consequences on communities of community division, internal conflict and inability to actually make use of "benefits" in these instances need to be more clearly articulated from a community perspective.

The following approaches community-company engagement from the perspective of communities that lack access to clearly recognized land and resources rights and that have no prior experience in engaging with companies. With this in mind, general key characteristics and considerations of community-company engagement are distilled from examples below, through desk-top research of engagements between communities and companies, on a number of interviews with affected communities and their leaders, and on the authors' experiences in working with communities around similar processes.

Table 1: Key Characteristics of Community-Company Engagement

1) Who initiates and guides the process?
- Governmentally-led processes
- Company-led processes
- Community-led processes

2) Identification of key communities

3) Coordinating among multiple communities

4) Community representation
- Processes for internal selection
- Obtaining a negotiation mandate and ratification process
- Communicating back to the communities
- Obtaining financing assistance

5) Hard negotiations
- Forming the team
- Key rules for engagement
- Mediators

Each of these will be discussed in turn below.

2. An Assessment of Key Characteristics of Community-Company Engagement

2.1. Who initiates and controls the process?

There are three main approaches to the initiation, control and management of engagements between companies and communities: government-led processes, industry-led processes and community-led processes. While the first is naturally always mandated by government, the second and third option may be government mandated but most often are the consequence of either a company's or a community's initiative. The difference between a government-led and government-mandated process is the role of the government. For government-led processes, the government takes the initiative for the entire process. For government-mandated processes, on the other hand, governments may require companies to consult communities or to enter into formal negotiations without foreseeing any concrete role for themselves.

Government-led processes

It is a basic principle of international human rights law, that it is the responsibility of governments to ensure that the rights of individuals and communities are protected. With respect to extractive industries, this responsibility includes ensuring that adequate legal frameworks are in place to regulate the actions of mining companies with respect to engagement with communities, protection of human rights and the environment, regulation of the use of natural resources (such as water) etc. This also means ensuring that impacted communities are compensated for any losses, and receive benefits from such mining activities. The quality of government-led processes of engagement with communities, if they do occur, varies considerably. It is often the case that governments either do not have the capacity, or do not desire, to ensure that communities in or around mining activities are protected from the deleterious effects of mining. There are, however, instances where governments do intervene, but these cases are also fraught, due to a lack of experience and resources to deal with complex community dynamics.

One of the most well documented examples of government-led processes in a newly-emerging economy is the Development Forum process introduced by the *Mining Act* (1992) of Papua New Guinea (PNG).[7] Under the PNG Development Forum process, it is upon the President to convene a Development Forum prior to issuing any mining leases as a means of consulting all affected stakeholders.[8] Development Forums are designed to represent the national government, provincial government, local level governments, local landowners and the company. For affected communities to be represented in the Forum they must be recognized as landowners

[7] *EI Source Book*, p. 8.
[8] *PNG Mining Act* (1992, as amended).

which in turn requires prior registration and organization in so-called Incorporated Land Groups (ILG).[9]

Development Forums are a means of consultation and governance prior to, during and after the operation of mining projects. They do not, however, yield a veto power. Rather, they are meant to draw up binding agreements and non-binding memoranda of agreement on the distribution of mining-related royalties and compensation payments.[10] Towards that end, existing Development Fora have drawn up framework agreements signed by all members, followed by a series of memoranda between either the national government and the company, or the national government and provincial local governments, or the governments and the landowners. There is, however, no direct engagement between the companies and the communities without control by the government.

In the case of the Lihir gold mine – one of the largest gold mines in the world, situated on Lihir Island in PNG, a first Integrated Benefits Package (IBP) consisting of a number of individual agreements between the different party groups was signed in 1995.[11] The IBP outlined the commitments of Lihir Gold Limited (LGL has since been acquired by Newcrest in 2010) regarding royalty payments, social and technical infrastructure funds and annual compensation payments for damage and loss of land and village relocation.[12] Related agreements then stipulated the allocation of these funds, stating that 20% were destined for landowners, 30% for community development as administered by the local governance body (Nimamar Development Authority), and 50% for the provincial government. Other agreements included national, provincial and local government commitments regarding additional funds and the use of the mining royalties.[13] Most of these were concluded among different governmental actors.

While originally lauded as a 'great democratic process' given the Development Forum involved the engagement of various affected stakeholders, a first review of the agreement and its related impacts in 2001, came to the conclusion that the process had failed to deliver true development to the affected communities. In particular it was criticized that the agreements had only focused on 'hard financial obligations', but had missed out on building community institutions that could administer financial flows. Moreover, there was no future-oriented plan or vision for the use of the funding and little engagement of the affected communities.[14] In 2007, the Lihir Sustainable Development Plan, consisting of a twenty-year vision for community development drawn up through a participatory process, replaced the original IBP. In order to address problems created by the division among landowners entitled to compensation payments and other landowners, the Plan also foresaw greater allocation of annual funds to all affected communities and one-off

[9] *EI Source Book*, p. 8.
[10] *CDA Field Studies*, p. 41.
[11] *Ibid*, p. 49.
[12] *Ibid.*
[13] *Ibid,* p. 50.
[14] *Ibid.*

compensation to the registered landowners. Side agreements with LGL, however, continue to focus exclusively on the landowners who also have equity shares through a joint corporation.[15]

In the case of the PNG OK Tedi mine, originally operated by BHP Billiton, representatives of the mine opted for a much larger community consultation process when it came to negotiating a continuation agreement in 2013 (as the mine was originally destined for closure in 2013 but plans to continue operations till 2025). The OK Tedi mine is infamously known for causing one of the largest environmental disasters of mankind over the course of its operations and corresponding major tort litigation by affected communities. Since the 1980s, mine operators discharged about two billion tons of untreated mining waste into the OK Tedi river and the adjoining Fly River, which caused major environmental damage and harm to human health to the downstream ecosystems of both rivers for about 1,000 kilometres.[16] More than 50,000 community members living in 120 villages near the river were affected.[17] A series of well-documented cases of litigation, a withdrawal of support by the original investors, the government's assumption of control and ownership over the mine, and a series of continuation agreements (in 2007 and 2013) followed.[18] Most importantly, consideration of the continuance of mining operations and the renewal of the mining license by the government (now owner of the mine), was done with the consultation of all affected communities in order to reach an agreement on the terms and conditions of operation.[19]

Unlike the first series of continuation agreements (negotiated by the private mining company, the government and certain affected communities, only after a series of court cases with respect to environmental harm), the second series focused on a joint process involving all affected communities. It was informed by the government's attempt to involve marginalized groups, especially women and youth, instead of focusing on the registered traditional law owners.[20] Despite this increased inclusiveness, the process still remained a government-driven and administered process, not least because of the government's role as mining operator.[21]

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[15] *Ibid.*

[16] OK Tedi Mining Key Statistics, Web Archive, available at : http://web.archive.org/web/20060820172746/http://www.oktedi.com/aboutus/keyStatistics.php [Last accessed: December 2014].

[17] *Ibid.*

[18] Laurence Kalinoe, *The OK Tedi Mining Continuation Agreements* (The National Research Institute, 2008), available at: http://www.nri.org.pg/publications/Recent%20Publications/2010%20Publications/Discussion%20Paper%20105_OkTedi%5B1%5D.pdf [last accessed: December 2014].

[19] OK Tedi Mining website, available at: http://www.oktedi.com/our-corporate-social-responsibility/mine-continuation-consultation [last accessed December 2014].

[20] Yasap Popoitai and Waafas Ofosu-Amaah, *Negotiating With The PNG Mining Industry for Women's Access to Resources and Voice: The Ok Tedi Mine Life Extension Negotiations for Mine Benefit Packages* (World Bank Institute, 2013).

[21] Only the implementation process will thus show whether the increased inclusiveness can also be translated into greater and more equal community benefits. A recent court decision ordering Ok Tedi

These two examples clearly demonstrate the drawbacks of government-led processes. While such processes can support community engagement where community capacity and awareness is low, the processes risk excluding affected communities and creating division among affected communities or individual community members. Without a genuine, long-term commitment to incorporate communities into such decision-making, such processes appear as a superficial, box-ticking exercise (especially where there are no long-term, concerted efforts to meaningfully engage with community).

Such processes can also lead to the manipulation and coercion of communities members who not only have limited (if any) human rights protections at the local level, but no real recourse to challenge and advocate against the use of their traditionally owned, occupied and utilized lands for such purposes. This is particularly true where engagement is externally decided on the basis of already-recognized rights (for example, rights to land through recognized title). Especially in situations where the recognition of land and resources rights in itself is already controversial, the problems are amplified when the right to consultation and engagement is pre-empted and led by the same external actors (i.e. government) who deny such rights. Moreover, the system can prevent or manipulate important direct engagements between the companies and the communities. Tri-partite talks (or more, depending on the number of external actors involved) cannot replace bilateral engagements between companies and communities. The latter, however, are critical for creating awareness and support.

The other two alternatives – company and community driven engagements – have the clear benefit of direct, bilateral engagements. These direct engagements are important to create an understanding between the two, particularly if they are likely to engage with each other throughout the course of mining operations. A number of other factors, such as agenda setting and group participation are critical in determining the success of either approach. For that reason these two will be addressed indirectly in the sections below.

2.2 Identifying and coordinating 'affected communities'

As in the above examples and discussions, community-company engagements, in particular those leading to formal agreements, are most often initiated by governments or companies. As a consequence, the first step of an engagement - that is, the identification of 'affected communities' - is often undertaken by governments or companies.

Against the background of many negative examples, company "good-practice" on the identification of affected communities has undergone significant change over the past few years. Initial identification often focused exclusively on communities living on mining sites or within its immediate vicinity. Moreover, this would exclusively focus on communities with primary or secondary rights, such as the landowners that would be directly affected through expropriation

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Mining (as controlled by the government) to halt the continuous dumping of mining waste into the river system indicates that this may not be the case.

and resettlement, or through significant environmental impacts on their livelihoods. This could exclude downstream communities to be affected by harm caused to the river system adjoining the mine, farming communities affected by extreme dust or lower groundwater levels brought about the mining operations or the exclusion of seasonal land users such as herders or artisanal miners. Finally, it could also exclude communities that are not recognized as landowners or that otherwise have primary rights. The example below emphasizes this point.

Case Example: Minahasa Raya

Minahasa Raya was a large open-pit gold mine, developed by Denver-based company Newmont Mining Corp. Mining activities ceased in 2001, after only five years of operation, due to depletion of ore. Processing of stockpiles continued until 2004 and by 2006 remaining closure activities were completed. An internal Newmont assessment revealed that during the operation phase, community relations had been kept to a minimum.

There had been no concrete consultation prior to the investment and communities' engagement was limited to their interaction through the formation, by Newmont, of a Community Consultative Committee (CCC) which comprised village leaders and other influential figures from the local area. The CCC's role was to assist Newmont in prioritizing community development projects and programs for the immediate neighbouring villages. Newmont staff later reported that the CCC was dominated by relatively powerful individuals from the different communities.[22] Moreover, one beach community from Buyat Pantai was excluded from the process, following protest from the other communities and powerful landowners who reported that the beach community was illegally occupying the land.[23]

From 2004, Newmont was confronted with allegations over severe environmental pollution caused by a tailing disposal practice where tailings were disposed of in Buyat Bay. Following the death of an infant from the community, which some community members claimed was as a result of pollution, Newmont was the subject of adverse international and national publicity, local protests and uprisings and eventually a series of civil and criminal law proceedings in Indonesia, including the detention of Newmont staff by Indonesian authorities.[24] Newmont continuously refuted the allegations and later in 2004 could show clear data from the World Health Organisation and other

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[22] *Newmont Minahasa study*, p. 11.
[23] *Ibid.*
[24] *Ibid,* p. 13.

independent institutions suggesting that there had indeed been no contamination.[25] In 2007 the Director of Newmont Indonesia was acquitted of criminal charges.

In the meantime, Newmont and the Ministry of Environment entered into a Goodwill Agreement in February 2006, containing concrete clauses on an independent scientific environmental monitoring of the post-closure environment, as well as further programs for neighbouring communities. These programs, however, did not extend to a geographical local where half of the affected Bay community had resettled in the meantime. The community itself had split over the dispute, with some continuing to believe in the contamination and others not. Aided by a local NGO, those who still believed their natural resources had been contaminated decided to resettle. However, living conditions in the new location were more precarious, causing new health risks, and soon resulting in the return of some community members.[26] The social responsibility aspects of the Goodwill Agreement thus only addressed the environmental concerns and the government-company relations, but not necessarily the needs of the affected communities.

Nowadays there is an increasing awareness of the importance of extending the identification of affected communities to all communities that could in any way be economically, environmentally, socially or culturally affected by mining projects. This also includes communities living within the vicinity of secondary-infrastructure projects, such as transport corridors and communities from which employees or business services will be drawn, even if these live even further afar. Another example of affected communities that are often excluded are faith-based communities that have sacred sites in mining areas but that live further away. The list of potentially affected communities is certainly very context-specific.

In general, it can be said that affected communities may be found along the entire geographical and business supply chain. For this reason, international organizations, donor institutions and industry initiatives increasingly recommend extending the identification of affected communities to these stakeholder groups.

Past negative experiences have improved recommendations for the process of identification of such communities. In the past, companies would often engage in simple desk-top research or would rely on external experts from the host country to identify relevant communities to engage with.[27] Now there is strong recognition of the importance of self-identification of

[25] *Ibid,* p. 17; Jonathan Hill, 'Case study: Newmont Minahasa Raya', *CSR Asia Weekly*, 22 February 2005, available at: http://csr-asia.com/csr-asia-weekly-news-detail.php?id=3719 [last accessed: December 2014].
[26] *Newmont Minahasa case study*, p. 17.
[27] World Bank, Mining Community Development Agreements Source Book (World Bank, 2012), p. 21.

communities that are likely to be impacted by such activities, and companies increasingly support processes of self-identification at the early project development stages.[28]

However, these processes are often only extended to a group of 'initially selected' communities, thus artificially limiting the scope of communities that might wish to self-identify.[29] The process of self-identification often serves the purpose of dividing affected people into communities on the basis of self-identification, but not for the purpose of actually identifying all potentially affected people through self-identification. This emphasized in the example below.

Case Study: Ahafo Mine

Ahafo is one of the largest gold mines in Africa and in the world. Newmont began construction of its gold mine in 2004, followed by mining operations in 2006. Discussions with community members and other stakeholder began after 2005, resulting in finalization of community development agreements (CDAs) and accompanying agreements in 2008.[30] Agreements were made with ten different communities from two districts in the mining area.

As part of its 'Outreach Communication Plan', Newmont reached out to a much greater number of potentially affected communities, including those along the transport corridors, for the purpose of distributing some information to the community.[31] Some community meetings specifically targeted potentially marginalized groups, such as women and youth.[32] During this process, Newmont specifically aimed at explaining the project, the intent of later negotiations and the planned establishment of a 'Development Forum'. Moreover, there was a small capacity building element to the process, aimed at improving technical skills and knowledge on land ownership legislation and participation rights.[33]

The main process, however, focused on identifying communities to be represented in the final negotiation forum and to support their representation capacities. The group of communities to be represented in the negotiations was decided by Newmont on the basis of two criteria, namely community towns physically located in the mining concession, and community land areas that have a significant proportion of its traditional land covered by the mining lease. While originally reaching out to the chief

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[28] See the brief discussion of the Ahafo project above, regarding the first Communication and Outreach Plan.
[29] *Ibid.*
[30] *CDA Field studies*, p. 25.
[31] *Ibid.*
[32] *Ibid.*
[33] *Ibid.*

leaders of these communities, further community-driven processes resulted in broader representation including women representatives and members of non-governmental organizations, community-based organizations and representatives from the regional government, as shown below:[34]

- *Regional Minister for Brong Ahafo Region*
- *General Manager, Environ & Social Responsibility of Ahafo Mine*
- *External Affairs Manager of Ahafo Mine*
- *External Affairs Superintendent of Ahafo Mine*
- *Three members of Parliament within the two Districts*
- *Two District Chief Executives*
- *Two presiding Members of the District Assemblies*
- *The Chiefs and one subject from each community town nominated by the chief*
- *Two Chief Farmers, one from each District*
- *Six reps of women groups, three from each district*
- *Ten youth representatives, one from each community town*
- *Two NGO representatives, one from each District*
- *Two Farmer Representatives one from each District*
- *A Secretary of Forum, nominated by Moderator and approved by the Forum.*[35]

These representatives jointly formed the Ahafo Social Development Forum, responsible for the negotiation and review of the CDAs, for overseeing their implementation, for conflict resolution, and for the management of the Development Fund.[36]

In 2008, Newmont and the Community Development Forum agreed to a package of three CDAs, including a Social Responsibility Agreement, a Local Employment Agreement and a Development Foundation Agreement. The first Agreement also included a number of annexes on matters such as the composition and management of the Forum and a Participatory Monitoring Management Plan, a Land Access and Compensation Plan and a Closure and Rehabilitation Management Plan.[37]

In its 2009 Review, Newmont considered this process as a major achievement based on past lessons and good-practices. In particular the role of the Forum as a means of grievance mechanisms was considered to have significant advantages for mitigating conflict. [38] *However, Newmont identified a number of risks. Firstly, unreasonable expectations regarding employment opportunities, resulting in great friction in hiring processes. Secondly, 1,700 households were resettled for the project and Newmont observed problems on the new site, due to its concentrated township-type development*

[34] *Ibid.*
[35] *EI Source Book CDA Note*, p. 34.
[36] *Ibid.*
[37] *Ahafo Social Responsibility Agreement*, available at: http://www.nadef.org/downloads/2/2110.pdf [last accessed December 2014]; *CDA Field studies*, p. 25.
[38] *Newmont Review 2009*, p. 43.

(the families had previously lived as farming communities in relatively spread-out hamlets).[39] *The resettled families were unhappy about both the new living conditions and the form and extent of compensation that was received. Finally, problems arose around the role and function of the local chiefs, as community members questioned their close working relationship with Newmont, questioning the legitimacy and accountability of the chiefs.*[40]

The situation was aggravated in 2009 after a negligent cyanide spill, polluting local water and depleting fish stocks. In January 2010, following litigation and an out-of-court settlement, Newmont paid USD 5 million in compensation to the Government of Ghana.[41]

In this example, the comparably broad and early reach out to different affected communities was made easier by the fact that the project was new with no prior mining activity on the site. Therefore, given there were no prior engagements with the communities or in the country, this was an opportunity for Newmont to prepare for engagement with communities beforehand, particularly given the issues that had experienced in other mines around the world.

Certainly such outreach processes can be useful, where genuine, for instance for the self-identification of marginalized groups, of traditional leaders, of ethnic or clan groups and for the information and empowerment of affected communities. However, it should be noted that self-identification is limited to those communities (and their representatives) who have the capacity to self-identify, through the necessary language skills, and education. Care should be taken to ensure that thorough community mapping takes place, in order to incorporate those who lack the capacity to identify and engage without the initial means to do so.

Unfortunately many large donor institutions distinguish between affected and "qualified communities".[42] Qualified communities are considered to be affected communities that have a right to be the principal beneficiaries of community development agreements and as such, those that are qualified to participate in negotiations.[43] Often self-identification is only applied to qualified communities.

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[39] *Newmont Review 2009*, p. 45.
[40] *Ibid.*
[41] Nick Migel, 'Wikileaks cables reveal U.S. mining co. negligence in Ghana Cyanide spill', *Earthworks*, availbale at: http://www.earthworksaction.org/earthblog/detail/wikileaks_cables_reveal_us_mining_co_negligence_in_ghana_cyanide_spill#.VI3vfGTF9xg [last accessed: December 2014].
[42] World Bank CDA Source Book, p.
[43] *Ibid,* p. 19.

The recent international recognition of the importance of community identification is not often translated into negotiation practices. Instead, all too often, initial awareness-raising is extended to a large number of affected communities, with companies then restricting core negotiations to qualified communities, comprising only a small number of affected communities.

Self-identification good practice suggests that self-identification must be a continuous process where initial community knowledge and input results in a first list of affected communities, who in turn might provide information that indicates that there are further communities that might be affected, and so on. One practice is to ask community members to name a potentially affected community that has not yet been named and to then ask that newly mentioned community whether they consider themselves affected. At some point communities will no longer be able to mention any other communities and some mentioned will consider themselves not or only marginally affected. It is important to note that this practice may very well lead to community conflict, where existing tensions between communities are exacerbated by the pressures of an extractives development, and the anticipated possible benefits and pitfalls that come with it.

In addition such identification processes must be supported by information dissemination by the company and by awareness raising and capacity building for all potentially affected communities. In many rural areas, the best means of initial, broad outreach and information dissemination is radio programming in local languages. Regular open consultation and information meetings in local languages with extensive use of visual information are the next step. The aim of these meetings is to create general awareness and to inform anyone who could be affected, no matter how remote or far away, about the initial plans and opportunities for consultation.

Not all of these communities will be affected in the same degree or manner, and this needs to be reflected in the process as well as the company commitments. This should be addressed in the eventual negotiation process, but not in the self-identification process.

Good practice may be to engage in a context-specific process as outlined above, to then provide opportunities for communities to further engage in self-identification of specific groups and to jointly decide on core principles and representation. Community protocol processes (outlined in Box 1) may be particularly well-suited to this, and may, in turn, be unilaterally recognized by the company. Moreover, companies and communities may decide on a memorandum of understanding on core principles that shall guide any future engagement. These may apply between the communities and the company but also among the communities.

It is essential, as early as possible, that community members receive as much information as possible, as early as possible, prior to a decision being made about a mining project (including prospecting. That consultations are free, and informed is essential to capacitating communities to make informed decisions, the self-identification of affected communities, and the management of expectations (particularly of benefits) of any future mining activity. Initial internal consultations can then focus on identification of the degree and type of impact of

activities on individual communities on the basis of their own identification, and thereby set the stage for future engagements, including negotiations. To achieve a truthful, cooperative and amicable engagement of all communities, it is essential that all communities are fully informed, and have a means to engage and raise their concerns. To be avoided is the amplification of existing friction between communities through a lack of information as to the impacts of mining activities on respective communities.

Building the capacity of community members with respect to the laws that support or hinder them, and to understand their rights and implications can be useful to achieve these aims. Furthermore, companies and communities may wish to agree on future mechanisms for engagement, for full impact assessments and for grievance mechanisms that are open to all affected communities. Finally, from a benefit-sharing perspective, it can be useful to agree to principles of benefit-sharing that consider all affected communities through a joint mechanism, leaving it to later individual agreements to set out addition types of benefits for certain affected communities. For this purpose it can be useful to engage the local and regional governments, especially as regards benefits for and rights of the wider group of affected communities. Often rights concern direct impact mitigation and benefit sharing concerns greater regional development objectives. Especially the latter is typically linked to governmental development plans and often concern government match or core funding and governmental decisions over the disbursement of mining royalties. However, it is important at first instance for those communities that are directly impacted by the project to be able to mobilize around, and articulate, their own development plans, if they so desire a project to go ahead. Often governments received benefits from mining projects and justify the receipt of such benefits for the fulfilment of national development plans that have little or no bearing on those communities directly affected. In these cases, communities who depend on their natural resources (subject to mining projects) are left impoverished by mining projects.

Finally, the engagement of independent civil society organizations that already operate in the area can also be useful to aid inter-community conversations.

Box 1: Community Protocols

The term community protocol is used to describe both a process and an outcome that documents a community's territory, customary laws, institutions and decision-making systems, traditional knowledge and natural resource stewardship, governance and/or management systems, visions and plans for the future, issues with and priorities for development, terms and conditions for engaging with external actors, and other characteristics that comprise the community's identity and life plans. In addition, community protocols often identify and link national, regional and international laws and policies with customary laws and practices specific to that community. The identification of these laws helps both communities and external actors understand the former's rights with regard to their livelihoods, territories, and natural resources, and in light of a particular project.

To date, a few community protocols have been developed or are being developed specifically in the context of extractive industries around the world. As a consequence, "good practice" in the development and use of community protocols in this context is still to be determined. Methodologies for using community protocols as a tool to engage with the external actors specific to these sectors, for example, foreign and domestic investors, government agencies, and local contractors, are still to be thoroughly considered and developed. However, given experiences in other sectors, there are strong indications that community protocols are useful tools for communities to achieve a number of inter- related objectives, namely: community mobilisation through internal discussion and visioning; strategy development for external interactions, including the identification of aspirational and defensive demands; and a framework for community-led interactions with external actors, for instance, by clarifying internal decision-making structures and procedures for developing community consensus.

For a comprehensive community-protocol toolkit see: Harry Jonas and Holly Shrumm (eds.), *Biocultural Community Protocols: A Toolkit for Community Facilitators* (Natural Justice, 2012).

For a first discussion of community protocols in the context of extractive industries, including concrete guidance on the potential use of protocols at different stages of a project cycle, see: Steph Booker et al, *Exploring the Development and Use of Biocultural Community Protocols to Help Secure Community Interests and Rights in Relation to Extractive Industries: A Framework Methodology* (Natural Justice, 2014).

2.3 Community representation

For the purpose of community representation at different stages of community engagement, communities need to decide upon and manage their internal representation. This includes deciding upon principles and rules for the election of representatives and installing or reinvigorating processes that will ensure the community is fully aware of any decisions that need to be made, the consequences of such decisions, and that there are appropriate decision-making processes that legitimize decisions made by representatives, ensuring good communication back to the entire community during the negotiation process.

Election of community representation

Regarding principles and procedures associated with the 'election' of representatives, often customary forms of community representation are first referred to. In some countries, national legislation specifically calls for traditional leaders to represent their community. However, good practice clearly shows that such decisions must be taken by the community, not least because traditional leadership may not necessarily have the authority required to represent their community in such engagements, i.e. their traditional role might not extend to the types of concessions usually discussed in engagements with companies. In terms of extractive projects, communities must deal with issues they have never faced before, thus exposing traditional authorities to corruption and coercion by external actors. In some communities traditional leaders might also be mistrusted,[44] or simply represent the concerns of the less marginalized members of the community. As engagements and negotiations normally include discussions on impacts, effects and mitigation possibilities, it is more than essential that all potentially affected groups of a single community feel themselves represented. As mentioned above, this must already be included in the process of community self-identification. The key groups are often women, youth, seniors, spiritual groups and groups of certain livelihood dependencies. While such criteria should not be externally imposed, it should be ensured that there is sufficient opportunity for marginalized groups to have the capacity to articulate their needs and concerns, and to fully engage in entire community discussions. Some representatives, however, may need continual support in order to remain engaged in such processes and this support should be assured.

Moreover, for the purpose of actual negotiations, the entire community should have a means to stay engaged. One good practice is to jointly agree on a negotiation mandate that specifically set out the community's expectations, the expectations of the individual groups, any red lines (or walk-aways) and the principles upon which a final outcome should be based. The mandate ensures that there is an open discussion and that it is fully documented and can be turned back to over the course of the negotiations.

Similarly, a process whereby the representative team regularly reports back to the entire community (and such space and time is held sacred by external parties) keeps the latter fully engaged and empowered on the process. Finally, a process that ends in a full agreement should be subject to a community ratification by means of vote, referendum or otherwise.[45]

Funding

[44] Tim Offor and Barbara Sharp, *Ok Tedi and Fly River negotiation over compensation: Using the mutual gains approach in multi-party negotiations*, in: Negotiate Toolkit (IUCN, 2010), p. 10; Stakeholder interviews with Nigerian communities.

[45] ICMM, *Good Practice Guide on Indigenous Peoples and Mining (ICMM 2010), p. 59.*

A key issue related to the question of community representation and coordination among community representation is the issue of funding. Communities are naturally highly dependent on external support for these types of processes. A number of good practices can be distilled, based on past examples.

First, funding can come from companies, though governments may also support the process. In either case, agreement on funding of such community mobilisation should be made prior to commencing any key negotiations. It is best to address the issue of funding immediately after communities have concluded the process of self-identification and key community representatives have been elected or appointed. A well-suited tool is a memorandum of understanding between communities and companies.

Funding arrangements should be future-oriented, making provision for or taking into consideration arrangements for all possible scenarios, including resources required for fully-fledged negotiations, even at times where communities have not yet decided whether to engage in that manner. The importance of this level of preparedness, is that a community's future decision as to whether to engage in such processes at a later stage can be taken exclusively on the basis of the community's key negotiations interests, and is not dependent on financial considerations.

Second, mechanisms, such as community-governed funds, which can be overseen by the government or a mediator, could be established by agreement. Context must be taken into consideration here, given the variations in capacity and interests of governments in mineral-rich countries. The creation of such a fund ensures that the communities have full control over their financial resources provided through the fund and are not subject to individual payments by the company, that might impact the way they make choices. The creation of such a fund is also a sign of good faith by the company, as the latter invests in supporting a resourced community for future processes. What should be avoided, however, is 'drip funding', where funding only becomes available at the discretion of the company, funding one activity at a time. Similarly, it is better practice that companies fund external advice and support, such as lawyers or scientific experts, through a fund to ensure absolute independence. Third, it is good practice in fund management, for communities to reserve a specific amount as an emergency back-up in case the company decides, at some point in the future, to terminate financial support, or if negotiations break down and the community decides to take other action, such as litigation.

In negotiating for funding, communities will need to internally prepared and, externally, be clear about what type of expenses they will face and what type of support is needed to meet their needs. Some issues to be considered include: access to external expertise; fieldwork for field research; information management and dissemination costs, including for personal meetings, radio education, preparation of visual material, translations etc.; Consultation activities, such as

renting meeting rooms, the cost of refreshments, travel costs; staff salary in case the teams are supported by a secretariat.[46]

2.4 Hard negotiations

Mobilising different teams within communities

Community Representation teams

Teams of community representatives do not necessarily need to be identical to the actual negotiation team. In fact, depending on the complexity of negotiations it may be desirable to use alternates team members for the different types of engagements and/or negotiations. In addition, for external purposes it can be very useful when a larger team of representatives mirrors the composition of the community, with the negotiation team being more concise with **specialized expertise** (having received training). The elected representatives can play the role of coordinating the overall engagement, of appointing individual negotiation teams and of ensuring good communication back to the entire community. To ensure the greatest degree of awareness and transparency, key representatives can participate in the negotiations as negotiation team members on a rotating basis, depending on the skills and strengths of each member.

Community Negotiation teams

For negotiation teams, on the other hand, it is crucial to ensure that all the technical skills necessary are represented in community negotiation teams. In addition, it can also be useful to include different types of personalities in each team – some more accommodating characters, as well as hardliners and to decide on specific group compositions according to the process at hand.[47]

Likewise, whilst in the community representation teams individual members differ in their levels of seniority or internal authority, (especially regarding the involvement of youth representatives), in negotiation teams, however, it can be useful for each member to be of equal authority for the entire team to actively engage and to achieve a united front, without evidence of disparity. It is generally advisable to have one key leader who is a well-respected community member and excellent communicator from within the community.

It is essential that negotiation teams engage with a company on the basis of equivalence.[48] That means, if the company sends technical teams and not members of senior management, the community should also refrain from sending its leaders. As a consequence, if elders, chiefs and other key leaders are among the elected core representatives, it will be essential to have an

[46] Ginger Gibsonand and Ciaran O'Faircheallaigh, *IBA Community Toolkit: Negotiation and Implementation of Impact and Benefit Agreements* (The Gordon Foundation, 2010), p. 82.
[47] *Ibid,* p. 62.
[48] *Ibid.*

alternate negotiation team, as suggested above, and to only include these leaders for high level interactions with the company, on the basis of this equivalence.

In addition, it is advisable for communities to agree to principles of negotiation beforehand, preferably in a comprehensive negotiation agreement or memorandum of understanding with the company. This may contain principles such as 'good faith', 'active listening', 'full disclosure and information', always with a short explanation of what that means. Good practice recommendations for companies increasingly recognize this need. The Canadian Mining Industry Human Resources Council (MIHR), for instance, recommends that the first contact around negotiations between communities and companies should always be made by the highest ranking company representative and that one of the first offers should be to negotiate a negotiation agreement.[49]

Elements of Negotiations

Negotiation agreements

Negotiation agreements contain specific principles that inform the negotiations, benchmarks for minimum outcomes, agreement on an agenda, and, last but not least, rules on logistics and community support. Especially in situations where the nationally recognized rights of communities are weak, previously-agreed negotiation agreements with precise agendas can be powerful tools. This is particularly true when they include a 'right to withdrawal clause' as this provides power to communities less as those being consulted to, and more as negotiation partner.[50]

Agenda-setting

Agreement on agenda points prior to engaging in negotiations is critical; it ensures that all points important for a community are actually raised at an early on stage and that communities can walk away from negotiations when they find that only company interests are addressed and their concerns remain untouched.

Agreement on a set of abstract principles and concrete rules is also advisable. Abstract principles may include commitment to the principles of good faith and full disclosure. More concrete rules and principles can include, for instance, agreement on the participation of lawyers for either party. The exclusion of lawyers can support the conduct of negotiations between the community and the company. Communities may wish to ensure they have the space to access the advice of their lawyers any time they feel it necessary. Another good principle is to agree that the company only engages with the community through the elected representatives and the individual negotiation teams, as indicated by the elected

[49] MIHRC, *Lessons Learned: A Report on HR Components of Aboriginal Community and Mining Company Partnership Agreements* (Mining Industry Human Resources Council, 2012), p. 11.
[50] *World Bank CDA Field Studies*, p. 71.

representatives. There should be a clear understanding that any attempt by the company to reach out on an individual basis is a clear 'walk-away'.

Mediators and negotiators

External mediators may be particularly useful where negotiations are conducted between parties with a history of conflict. Mediators in the region with a background in academia or civil society may be particularly suitable. Where mediators are invited, the rules of their engagement should be clear. In countries where trust in the government is fairly high it is usually suitable for the government to take the role of appointing and funding the mediator.[51] In these cases, all parties agree on the mediator, who signs an agreement setting the standards for engagement (including that of impartiality and good faith). Where alternative arrangements need to be found it is crucial that the company and communities mutually agree on a name and that funding for the mediator is routed through an independent third party to ensure that independence is not prejudiced.

Similarly, where processes are not government led, companies and communities must agree to the role of government officials. Beyond being the initiators of agreements, as discussed above, governments can engage as mediator between the parties (though this could be problematic, as governments are likely to be invested in the outcome, hence impacting on impartiality), as enabler by providing funding and other opportunities to the communities, or as contributor to the benefit sharing agreements, for instance in the form of match funding commitments on local development priorities.[52] Preferences for including or excluding government are highly context-specific, obviously, depending on the general relationship between the government and communities, on the type of agreement negotiated, and the potential links of any concessions with local development plans, on the communities' funding opportunities and of capacity at the government level.[53] In any case, agreement needs to be found prior to commencing negotiations.

The same is true regarding arrangements on financial support, though it is generally advisable to include these issues already in early on memoranda of understanding before individual community negotiations take place, as was discussed above.

Logistics

Regarding logistics, where possible, communities should insist on neutral meeting spaces within their vicinity and on negotiations conducted in their language. Translation should always be available and it is good practice for community negotiation teams to meet for feedback meetings with the entire community in their territory at sufficiently regular intervals between negotiation meetings.

[51] *EI Resources Book*, p. 19.
[52] *World Bank CDA Field Studies*, p. 76.
[53] *MIHRC Report*, p. 28.

Conclusion

Good practice on community-company engagement in the context of extractive industries has evolved substantially over the past decade as companies increasingly recognize the importance of good community relations, necessitating early and proper engagement. The international legal regime has also evolved, making great steps in the direction of properly recognizing the rights of indigenous peoples and local communities over their lands and resources.

Increasingly, the rights of indigenous peoples and local communities are also recognized in 'process terms'; their rights are expressed in the form of expectations regarding consultation and negotiation processes. This welcome focus is also partially translated into company practice. All too often, however, a focus on process seems to be more a box-ticking exercise. For instance, companies will design 'broad community outreach processes' that are expected to conclude within a very tight framework, involving only predefined communities and addressing only a narrow array of issues.

The risks of such a narrow approach are clear: It fails to result in proper engagement between companies and communities and usually results in agreements that are unlikely to deliver proper development benefits as the true needs and aspirations of communities are missed and capacity for the absorption and governance at the community level is missing.

To truthfully respect communities' rights and to achieve amicable engagement that result in stable relations and true development benefits for affected communities, processes must be entirely community driven and supported through independent channels. Various good-practices for companies have been discussed above.

In addition, the above discussions have shown how communities can secure such processes through means such as early on memoranda of understanding, negotiation agreement and development funds. The discussion, however, has also revealed that each and every process will be different and that 'engagement' must remain an evolving process, ready to react to new developments.

Relying on international legal instruments and recognized rights (whether under international, regional or national law) can be useful as it strengthens the case of communities. In fact, the most advanced agreements between companies and communities can be found in regions where communities have clearly recognized rights over their lands, including the right to veto extractives projects. Canada is the most important case in point.

Spelling out the details of process in legal instruments, however, often results in more negative implications than positive ones, especially where other concerns exist over the recognition of indigenous peoples under national law. This is particularly true where the identification of stakeholders is externally driven and where processes are externally mandated, as the discussion on government-driven processes has shown.

Processes thus need to be designed in a manner that communities can fully participate in engagements on a level-playing field, driving the agenda at least as much as the company. Refraining from establishing 'one-size-fits-all' approaches is necessary for that. Instead concrete principles should guide any engagement, supported by a set of potential tools and good-practices. While this approach may increase short-term insecurity for companies as it means that processes remain fluid and unpredictable, it will increase long-term security by basing any engagement on a truly levelled process that takes full account of communities' characteristics and visions. This Guide was a first attempt in that direction.

Section III: International obligations on community-company engagement

As set out above, there has been a growing movement towards greater obligations on governments and corporations to ensure human rights and environmental standards are followed in the context of extractive industries. The following documents the necessary minimum requirements that must be considered when engaging with indigenous peoples and local communities.

1. Responsibility for companies to respect human rights

1.1. UN Guiding Principles

The *UN Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*" (hereafter: UN Guiding Principles) is possibly the most important framework addressing state and corporate behavior with regards to human rights. The framework is based on three pillars: the state duty to protect human rights; the corporate responsibility to respect human rights; and the access to remedy.

The primary duty is on States to protect human rights, but all business enterprises are also required to respect human rights as set out in the International Bill of Human Rights[54] and the International Labour Organization's Declaration on Fundamental Principles and Rights at Work (Principle 11-12). The responsibility to respect human rights requires business enterprises to avoid causing adverse human rights impacts, to address these impacts if they occur and to try to prevent or mitigate adverse human rights impacts (Principle 13). The UN Guiding Principles specify that business enterprises should take particular care in respecting the rights of groups requiring particular attention, such as minorities and indigenous peoples.[55]

[54] The International Bill of Rights consists of the United Nations Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.
[55] Commentary to Principle 1

In order to fulfill their responsibility to respect human rights, business enterprises should elaborate: a policy commitment; a human rights due diligence process; and a remediation mechanism (Principle 15). Human rights due diligence refers to the means to identify, prevent, mitigate and account for the harm business enterprises may cause. In order to exercise human rights due diligence, companies should identify and assess their actual and potential impacts on human rights. This process will involve "meaningful consultation with potentially affected groups and other relevant stakeholders" (Principle 18). The consultation process should pay special attention to vulnerable and marginalized groups and should ensure direct consultation taking into account language or any other barriers. Human rights impacts assessments also need to be undertaken at regular intervals. If adverse impacts on human rights are caused, business enterprises should engage in remediation (Principle 22).

Business enterprises are therefore "encouraged to respect human rights", given the norms applicable to business actors are non-binding except if incorporated in domestic law. However, the endorsement of the UN Guiding Principles by the Human Rights Council in 2011 (A/HRC/RES/17/4, 2011) has increasingly influences businesses to consider the legal and social need to address human rights impacts of their own activities.

Since 2011, following the endorsement of the UN Guiding Principles by the HRC , as well as the Ecuador Declaration "Transnational Corporations and Human Rights" (2013), the HRC established an intergovernmental Working Group on Human Rights and Transnational Corporations and Other Business Enterprises, mandated to monitor the implementation of the Guiding Principles (2014, A/HRC/26/L.22/Rev.1). Many see the Guiding Principles as the next step towards furthering the accountability of states and business enterprises with respect to human rights abuses by business.

1.2. OECD Guidelines on Multinational Enterprises

The *OECD Guidelines on Multinational Enterprises* (1976) were reviewed in 2011 to include a chapter on human rights, drawing explicitly on the UN Guiding Principles. Under the OECD Guidelines, business enterprises should, inter alia, contribute to economic, environmental and social progress of the community affected; respect the human rights of those affected; engage in human rights due diligence; encourage local capacity building and human capital formation; support good corporate governance; develop practices fostering confidence and trust with the communities; and, avoid creating adverse impacts.

In its chapter on human rights, the OECD Guidelines clearly stipulates in Chapter IX that states have the duty to protect human rights, and that enterprises should thus respect human rights. In its commentary, like the UN Guiding principles, it highlights that enterprises "should respect the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them. In this connection, United Nations instruments have elaborated further on the rights of indigenous

peoples; persons belonging to national or ethnic, religious and linguistic minorities; women; children; persons with disabilities; and migrant workers and their families”.

In Chapter VI of the OECD Guidelines, it states that enterprises need also to protect the environment, public health and safety and conduct their activities in accordance with the goal of sustainable development. To do so, enterprises should “engage in **adequate and timely communication and consultation with the communities directly affected** by the environmental, health and safety policies of the enterprise and by their implementation”. In its Chapter II on General Policies, the guidelines furthermore specify that enterprises should "**[e]ngage with relevant stakeholders** in order to provide meaningful opportunities for their views to be taken into account in relation to planning and decision making for projects or other activities that may significantly impact local communities".

Whilst the OECD Guidelines are voluntary recommendations, they become mandatory for businesses that are from, or operate in, member state or adhering countries. There are avenues for individuals, groups or other stakeholders to try to address grievances with the OECD’s internal grievance mechanism, by lodging a complaint with an OECD National Contact Point.

1.3. United Nations Global Compact

The *United Nations Global Compact* (2000)[56] (hereafter UN Global Compact) is a policy initiative of the UN, committing businesses to a set of ten voluntary principles in areas such as human rights, labour, environment and anti-corruption. It is the largest voluntary corporate responsibility initiative in the world with more than 10 000 corporate actors from over 14 countries, aimed at developing sustainable business practices benefiting individuals, communities and markets. The principles elaborated in the UN Global Compact are voluntary but companies subscribing to these principles are held accountable by reporting annually on their respect and implementation of the principles.

With regards to human rights, the principles state that “[b]usinesses should support and respect the protection of internationally proclaimed human rights" (Principle 1) and “should make sure they are not complicit in human rights abuses" (Principle 2). In order to fulfill their responsibility to respect human rights, companies are required to develop a policy commitment and to practice human rights due diligence referring to the UN Guiding Principles. Human rights due diligence requires a company to: assess human rights impacts (which could involve involve meaningful consultation with stakeholders); integrate human rights policies; take action; track performance; communicate and report on performance. Possible actions to ensure a company’s compliance with human rights is to actively engage in dialogue with stakeholder groups and the communities in the pre-investment and post-investment stages of projects. The UN Global Compact’s *Good Practice note on Community Engagement and Investment to Advance Human*

[56] https://www.unglobalcompact.org

Rights in Supply Chains highlights that "the informal acceptance to operate within communities (a "social license") is often as or more important than legal licenses to operate".[57]

The UN Global Compact underlines the importance for businesses to take particular consideration of indigenous communities in its *Business Reference Guide to the UN Declaration on the Rights of Indigenous Peoples*[58] which was launched at the Second Annual UN Forum on Business and Human Rights in 2013. This guide aims to increase the awareness of the rights of indigenous peoples among business enterprises and to provide practical tools for respecting and supporting these rights. The Guide specifically refers to the UN Declaration on the Rights of Indigenous Peoples and encourages enterprises to consult indigenous peoples and respect free, prior and informed consent (FPIC). The UN Global Compact further encourages enterprises to respect indigenous peoples' rights and more particularly, the right to FPIC, set out in the UN Global Compact's *Good Practice Note on Indigenous Peoples' Rights and the Role of Free, Prior, and Informed Consent* endorsed in February 2014.[59]

1.4 Voluntary Principles on Security and Human Rights

The *Voluntary Principles on Security and Human Rights* (2000)[60] (hereafter: VPSHR) are a set of non-binding principles specifically designed for extractive companies. They were developed through dialogue between companies, governments and non-governmental organisations. The VPSHR guides companies in balancing concerns on the safety and security of their operations with the respect for human rights at a local level. As set out in the VPSHR, companies are encouraged to consult the host government and local communities specifically with regards to security arrangements. These principles are voluntary but several companies have included them into their agreements with contractors.

1.5 Equator Principles

Finally, the 2013 Equator Principles are a risk management framework adopted by financial institutions that assists with assessing and managing environmental and social risks in projects. It sets out minimum standards for due diligence, so that decision-making with respect to risks is done responsibly. The Equator Principles explicitly refers to the obligation on financial institutions to respect human rights as stipulated in the UN Guiding Principles and requires FPIC to be respected in the projects they financially support.

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[57] See *Community Engagement and Investment to Advance Human Rights in Supply Chains,* UN Global Compact, 2012 https://www.unglobalcompact.org/docs/issues_doc/human_rights/Human_Rights_Working_Group/CommunityEngage_Inv_SupplyChain.pdf (p.3)

[58] https://www.unglobalcompact.org/docs/issues_doc/human_rights/IndigenousPeoples/BusinessGuide.pdf

[59] https://www.unglobalcompact.org/docs/issues_doc/human_rights/Human_Rights_Working_Group/FPIC_Indigenous_Peoples_GPN.pdf

[60] http://www.voluntaryprinciples.org

2. Right to Participate – (State) Obligation to consult

The right of communities to participate in decision making processes includes a state duty to obtain FPIC from indigenous peoples. FPIC is a requirement to engage in dialogue with communities and come to an agreement on activities that may have a significant impact on them and their environment. In accordance with the international, regional and national instruments enumerated below, it is mainly an obligation incumbent on governments.

A definition of FPIC is provided by the UN Permanent Forum on Indigenous Issues:[61]

(i) people are 'not coerced, pressured or intimidated in their choices of development';
(ii) 'their consent is sought and freely given prior to authorisation of development activities';
(iii) they 'have full information about the scope and impacts of the proposed development activities on their lands, resources and wellbeing'; and
(iv) 'their choice to give or withhold consent over developments affecting them is respected and upheld'.

2.1. International Obligations

ILO Convention 1969

The *International Labour Organization Indigenous and Tribal Peoples Convention, 1989 (No. 169)* (hereafter: ILO Convention 169) recognizes the obligation of governments to engage in consultation and dialogue with indigenous people. The ILO Convention 169 is a legally binding instrument for the States who ratified it[62] and has also influenced various policy documents, decision-making processes as well as national legislation and policies. ILO Convention 169 refers to the principle of free and informed consent. The Convention requires governments to develop, with the participation of the indigenous peoples concerned, a system of actions to protect and guarantee the respect of the rights of indigenous people (Article 2). As a general principle, consultation must be undertaken in good faith, in a form appropriate to the circumstances, with the objective of achieving consent (Article 6). States should also ensure that indigenous peoples have the opportunity to freely participate in decision-making processes (Article 6(2)). Representation is another important component of the consultation process that is emphasized, with Articles 2, 6 and 15 of the Convention requiring States to fully consult with indigenous peoples and ensure their informed participation in the context of development; national institutions, policies and programmes; and use, management and conservation of natural resources. In the context of relocation of indigenous peoples from their land, Article 16 requires free and informed consent. Additionally, ILO Convention 169 recognizes indigenous peoples'

[61] UNPFII, 2005
[62] Bolivian Republic of Venezuela, Spain, Peru, Paraguay, Norway, Nicaragua, Netherlands, Nepal, Mexico, Honduras, Guatemala, Fiji, Ecuador, Dominica, Denmark, Costa Rica, Columbia, Chile, Central African Republic, Brazil, Boliva, Argentina (www.ilo.org)

"right to decide their own priorities for the process of development" and "to exercise control, to the extent possible, over their own economic, social and cultural development" (Article 7).

International Covenants on Human Rights

Common Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and of the International Covenant on Economic, Social and Cultural Rights (ICESCR) establishes the rights of all peoples to self-determination, to freely pursue their economic, social and cultural development, to freely dispose of their natural wealth and resources and to be secure in their means of subsistence. The fundamental right to self-determination of indigenous peoples is a general principle underlying free, prior and informed consent. Both Covenants are legally binding. Individual complaints ("communications") alleging violations of the ICCPR by States parties to *First Optional Protocol to the ICCPR*[63] can be received and considered by the Human Rights Committee. Similarly communications alleging violations of rights contained in the ICESCR by States parties[64] to the *Optional Protocol of the ICESCR* may be received and considered by the Committee on Economic, Social and Cultural Rights (once this mechanism is finalized).

CERD

The *International Convention on the Elimination of All forms of Racial Discrimination* (CERD) aims at eliminating racial discrimination and is a legally binding convention on signatories. In accordance with this aim, States Parties undertake to "ensure the adequate development and protection of certain racial groups" in order to ensure the full and equal enjoyment of human rights (Article 2(2)). Some particular rights requiring state protection are emphasized, including "[t]he right to equal participation in cultural activities" (Article 5(vi)). Individual petitions may be considered by the Committee on the Elimination of Racial Discrimination (CERD) for alleged violations of the CERD by State Parties who made a specific declaration recognizing the competence of the Committee (article 14).

2.2 International Soft Law Instruments

UNDRIP

The *United Nations Declaration on the Rights of Indigenous Peoples* (hereafter: UNDRIP) is an important instrument in the recognition of indigenous peoples' rights. A Declaration adopted by the General Assembly of the United Nations is not subject to ratification by States and is not legally binding. It is a political commitment reflecting the collective views of the United Nations. In this case, all but 15 countries voted in favour of the Declaration (11 countries abstained from voting and the four countries that voted against the Declaration later endorsed it) and hence,

[63] 115 States parties : https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en

[64] 17 states parties: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&lang=en

refers to rights and standards internationally recognized. The UNDRIP reaffirms principles provided under the Convention No. 169. The ILO specifies that "[t]he provisions of the Convention no. 169 and of the declaration are compatible and mutually reinforcing".[65] Indeed, according to the former Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, to say simply "that the Declaration is non-binding is an incomplete and potentially misleading characterization of its normative weight".[66] In addition he further argued that "some aspects of the Declaration — including core principles of non-discrimination, cultural integrity, property, self-determination and related precepts that are articulated in the Declaration — constitute, or are becoming, part of customary international law or are general principles of international law".[67]

UNDRIP explicitly recognizes the principle of free, prior and informed consent in its Articles 10 (forcible relocation), 11(2) (cultural practices), 19 (implementation of legislative and administrative measures), 28(1) (redress indigenous peoples' lands, territories and resources adversely affected), 29(2) (disposal of hazardous material) and 32(2) (development and use of natural resources). As an underlying principle of FPIC, the right to self-determination is addressed in UNDRIP, re-emphasising common Articles 1 of the International Human Rights Covenants (article 3). The right to self-determination implies, inter alia, the right for indigenous peoples to determine and develop their priorities with regards to development (Article 23), to maintain and control their cultural heritage and knowledge (Article 31), to determine their strategies for development (Article 32), their own identities (Article 33) and institutional structures (Article 34). The declaration further stresses Indigenous Peoples' right to participate in decision-making processes (Articles 18-19). Articles 25-32 deal with indigenous peoples' rights to lands, territories and resources.

Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities

The *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*[68] (1992) underlines the rights of minorities to enjoy their own culture, religion, language; "to participate effectively in cultural, religious, social, economic and public life" and to participate effectively in decisions affecting the minority (Article 2). A list of measures is given to States to ensure the enjoyment of the human rights and fundamental freedoms by minorities (Article 4). More specifically, "[S]tates should consider appropriate measures so that persons belonging to minorities may participate fully in the economic progress and development in their country" (Article 4(5)).

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[65] ILO, http://www.ilo.org/wcmsp5/groups/public/---ed_norm/normes/documents/publication/wcms_100792.pdf

[66] A/68/317 (2013) para.61

[67] A/68/317 (2013) para.64

[68] Declaration on the rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (18 December 1992) A/RES/47/135 (hereafter: Declaration on the Rights of Minorities)

United Nations Bodies Experts

The right to participate in decision-making has also been emphasized by different United Nations special mechanisms, such as the United Nations Permanent Forum on Indigenous Issues, the Expert Mechanism on the Rights of Indigenous Peoples and the Special Rapporteur on the Rights of Indigenous Peoples.

The *Expert Mechanism on the Rights of Indigenous Peoples* (EMRIP) was established by the Human Rights Council (HRC) in 2007[69] with the mandate to provide advice (studies and research) to the HRC on the rights of indigenous peoples. In 2011, the EMRIP submitted a *Final report of the study on indigenous peoples and the right to participate in decision-making.*[70] In this report, the EMRIP recognized the difficulty in defining what is a "good" practice involving indigenous peoples' participation in decision-making and highlighted that "[t]he most significant indicator of good practice is likely to be the extent to which indigenous peoples were involved in the design of the practice and their agreement to it".[71] The report further describes indigenous peoples' institutions and legal systems and indigenous peoples' participation in governance.

The EMRIP recognizes that "indigenous peoples have the right to determine their own economic, social and cultural development and to manage, for their own benefit, their own natural resources." The duties to consult with Indigenous Peoples and to obtain their free, prior and informed consent are crucial elements of the right to self-determination".[72] The report stresses that the duty to consult indigenous people "applies whenever a measure or decision specifically affecting indigenous peoples is being considered".[73]

The *Special Rapporteur on the Rights of Indigenous Peoples* was appointed in 2001 by the Commission on Human Rights with a mandate, inter alia, to develop means to overcome hindrances to the effective protection of indigenous peoples' rights and promote good practices.[74] The mandate was renewed in 2004 and in 2007 by the Human Rights Council. In its 2013 report, the Special Rapporteur reiterates that "indigenous peoples' free, prior and informed consent is required, as a general rule, when extractive activities are carried out within indigenous territories. Indigenous consent may also be required when extractive activities otherwise affect indigenous peoples, depending on the nature of the activities and their

[69] Resolution 6/36
[70] A/HRC/18/42, (2011) / Expert Mechanism Advice No.2 (2011): Indigenous Peoples and the right to participate in decision-making, http://www2.ohchr.org/english/bodies/hrcouncil/docs/18session/A-HRC-18-42_en.pdf)
[71] Para.13
[72] EMRIP, para.18
[73] EMRIP Annex para.16 referring to A/HRC/12/34, paras. 42-43, reaffirming Article 3 of the Declaration on the Rights of Indigenous Peoples mirrors common article 1, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.
[74] A/HRC/RES/15/14

potential impact on the exercise of indigenous peoples' rights".[75] He reaffirmed the obligation of states to protect human rights and of businesses to respect human rights and emphasized that:

> *"adequate consultation or negotiation over extractive activities include the mitigation of power imbalances; information gathering and sharing; provision for adequate timing of consultations, in an environment free of pressure; and assurance of indigenous peoples' participation through their own representative institutions".*[76]

He concludes by underlining that agreements between indigenous communities and extractives companies should be developed in respect with indigenous rights and should include provisions on impact mitigation, equitable distribution of the benefits and complaint mechanisms.[77]

The *United Nations Permanent Forum on Indigenous Issues* (UNPFII) was established in 2000 with a mandate to provide expertise on indigenous issues to the Economic and Social Council (ECOSOC) and to promote indigenous issues more generally within the UN system. Most of the recommendations made by the UNPFII draws upon the ILO Convention 169 and the UNDRIP. The UNPFII underlines the right of indigenous peoples to participate in decision making on issues related to their territories, lands and natural resources[78] with a particular focus on the right to free, prior and informed consent.[79]

Furthermore, the UNPFII is currently studying and discussing an optional protocol to the UNDRIP which would provide a mechanism for monitoring and interpreting the Declaration. It would serve as a complaints body, in particular for claims and breaches of indigenous peoples' rights to lands, territories and resources and FPIC.[80] Such an instrument would contribute to a greater awareness and implementation of the Declaration.

2.3 International Financial Institution Standards

The International Finance Corporation

The *International Finance Corporation* (IFC), an international financial institution part of the World Bank Group, offers funding to the private sector in developing countries. It's revised *Performance Standards (2012)* require its clients (enterprises) to seek free prior and informed *consent* with indigenous people, rather than free, prior and informed *consultation,* which features in the current Operational Policies of the World Bank. The IFC defines FPIC as a process "established through good faith negotiation between the client and the Affected Communities of Indigenous Peoples'.

[75] A/HRC/24/41, para.84
[76] A/HRC/24/41, para.91
[77] A/HRC/24/41, para.92
[78] Sixth Session Report of the UNPFII, 2007, p.3; Tenth Session Report of the UNPFII, p.7
[79] Tenth Session Report of the UNPFII, p.8
[80] E/C.19/2014/7

2.4 Regional and National Obligations

Regionally

Moving from an international to a more regional focus, some regional instruments have further contributed to the recognition of the right to participate in decision making processes.

In Europe, the *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (Aarhus Convention) guarantees the right to public participation in environmental decision making, the right to access environmental information and the right to access to justice. The scope of the Convention is limited to the European community. The European Convention on Human Rights (ECHR) does not explicitly refer to the right to participation or to FPIC. The European Court of Human Rights has however interpreted the ECHR as including a right to participation.[81]

The right to property and right to participate in government as recognized in the **American** Convention on Human Rights and in the American Declaration of the Rights and Duties of Man have been interpreted as including the right of affected individuals and groups to participate in decision-making of activities that may affect them. The right to property guaranteed in these instruments is particularly relevant with regards to claims concerning the grant of concessions to exploit natural resources and develop projects on land traditionally occupied by indigenous people as there is a need for special consideration for the interrelationship between indigenous peoples, land and natural resources.[82] In its 2009 report, the Inter-American Commission on Human Rights reaffirmed the obligation of states to consult indigenous peoples and to guarantee their participation in decisions affecting them. These consultations should aim at obtaining the free and informed consent of indigenous peoples.[83] In various decisions, the Inter-American Court of Human Rights (IACtHR)[84] and the Inter-American Commission[85] have upheld the right to self-determination and to FPIC.

[81] For example, when defining the procedural obligations inherent in article 8 ECHR, the ECtHR held that individuals must have "had a meaningful opportunity to contribute to the related decision-making processes" (*Grimkovskaya v. Ukraine* App no 38182/03 (ECtHR, 21 July 2011) para.72).

[82] In the *Case of the Xákmok Kásek Indigenous Community v. Paraguay*, IACtHR, Ser. C No. 214, 2010, Paraguay violated Articles 21, 8, 25, 4, 5 , 3, and 19 of the American Convention by failing to ensure the rights of the Indigenous Community to their ancestral property.

[83] IACHR Indigenous and Tribal Peoples' Rights over Their Ancestral Lands and Natural Resources, Norms and Jurisprudence of the Inter-American Human Rights System, OEA/Ser.L/V/II., Doc. 56/09, 30 December 2009, para.290

[84] For example, *Mayagna (Sumo) Awas Tingni Community v Nicaragua,* IACtHR, (2001); *Yatama v. Nicaragua*, IACtHR, judgement, Serie C, No. 127, 2005; *Pueblo Saramaka v. Suriname*, IACtHR, No. 172, 2007, para.129, 131 and 134; *Kischwa Indegenous Peoples of Sarayaku v. Ecuador*, IACtHR, 2012, para.183, 186-187.

[85] Yanomami v Brazil case 7615, IAHRC, Res. No. 12/85, (1985)

The *Draft American Declaration on the Rights of Indigenous peoples*[86] recognizes that States must obtain FPIC prior to the approval of any project affecting indigenous peoples' lands, territories and resources, particularly in connection with the development, utilization or exploration of mineral, water or other resources. This is a non-binding instrument being developed by the Working group mandated by the Organization of American States to Prepare the Draft American Declaration on the Rights of Indigenous Peoples. While non-binding, this initiative nevertheless illustrates the increasing awareness and commitment of the American continent to advance indigenous peoples' rights.

The *African Charter on Human and Peoples' Rights* guarantees the right to self-determination (Article 20), the right to free disposal of wealth and natural resources (Article 21) and the right of all peoples "to their economic, social and cultural development" (Article 22). Furthermore, the African Charter specifies in its Article 60 that inspiration should be drawn to international instruments, which obviously includes instruments recognizing the rights of indigenous peoples. The African Commission on Human and Peoples' Rights has recognized indigenous peoples' rights and the obligation to consult affected communities in a number of decisions.[87] A first case concerning indigenous people's rights is currently pending before the African Court on Human and Peoples' Rights.[88] The case concerns Ogiek peoples who were evicted from their traditionally owned, occupied and utilised Mau Forest by the Kenyan government on the basis of water conservation measures. The Court is asked to recognize Ogiek's historic land.

In terms of regional economic communities, the Economic Community of West African States (ECOWAS) set out in its 2009 "Directive C/DIR.3/05/09 on the Harmonization of Guiding Principles and Policies in the Mining Sector" the obligation of companies to "obtain free, prior, and informed consent of local communities before exploration begins and prior to each subsequent phase of mining and post-mining operations" (Article 16(3)). Further, companies have an obligation to "maintain consultations and negotiations on important decisions affecting local communities throughout the mining cycle" (Article 16(4)).

Nationally

On a national level,[89] recent decades have witnessed more and more countries reforming their legal systems in order to implement international obligations with respect to the recognition of the rights of indigenous people. For example, *the Indigenous Peoples' Rights Act of 1997* in the

[86] http://www.oas.org/en/iachr/indigenous/activities/declaration.asp

[87] The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria, Communication no.155/96, African Commission on Human and Peoples' rights, 2002, para.55; Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya, African Commission on Human and Peoples' Rights, communication no. 296/2003, 2009, para. 291.

[88] African Commission on Human and Peoples' Rights v The Republic of Kenya, appl. No.006/2012

[89] For more examples of national instruments, see *Final report of the study on indigenous peoples and the right to participate in decision-making* (A/HRC/18/42) and UNPFII, Eleventh Session Report.

Philippines[90] expressly requires the State to ensure the participation of indigenous peoples in decision-making processes.

In Latin America, Peru has enacted a law on prior consultation implementing the *Right to Prior Consultation to Indigenous or Native Peoples* (Law No. 29785) as recognized by the ILO Convention 169 at a domestic level.[91] The Constitution of Mexico also recognizes the right of indigenous peoples to self-determination.[92] The Constitution of the Plurinational State of Bolivia guarantees indigenous peoples' self-determination, acknowledging their rights to autonomy, self-government and culture, while recognizing their institutions and their territories.[93] The new Constitution of Ecuador also guarantees indigenous peoples rights and more specifically their rights to participate in the use and administration of natural resources. It recognizes indigenous peoples' rights to free, prior and informed consent and guarantees compensation for social, cultural and environmental abuses.[94] In its 2014 report on Panama, the Special Rapporteur on Indigenous Peoples highlighted the legal system of Panama as recognizing indigenous peoples' rights and more particularly rights to land, territories and participation.[95]

On the African continent, a few countries have incorporated FPIC. For example, Congo has enacted a law on the Promotion and protection of the rights of indigenous peoples in 2010 which provides for consultations with indigenous peoples affected by the measure concerned.[96]

3 Conclusion

Notwithstanding the progress in the legislative recognition of the indigenous peoples' right to participate in decision making process, concerns are still being expressed with regards to the implementation of those rights in practice.[97] The enactment of regulations recognizing the duty to consult affected communities is a first step in the right direction. However, regulations need also to be properly implemented in order to guarantee the effective recognition and participation of indigenous peoples. In addition, they need to exist where a functional rule of law ensures that any violation of such rights is likely to be remedied, as per the UN Guiding Principles.

Extractive activities conducted without consideration of recognized international minimum standards has given rise to harmful consequences in indigenous communities. Irresponsible

[90] http://www.gov.ph/1997/10/29/republic-act-no-8371/
[91] http://servindi.org/pdf/Ley_de_consulta.pdf; See also http://www.oas.org/en/iachr/media_center/PReleases/2011/099.asp
[92] Art.2; See also http://www.ohchr.org/EN/NewsEvents/Pages/IndigenousPeoplesRightsInMexico.aspx
[93] http://www.harmonywithnatureun.org/content/documents/159Bolivia%20Consitucion.pdf
[94] http://www.asambleanacional.gov.ec/documentos/constitucion_de_bolsillo.pdf
[95] A/HRC/27/52/Add.1, Para.72
[31] A/HRC/18/35/add.5
[97] UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples. Report to the Fourth Session of the UN Human Rights Council, 27 February 2007 http://www.ohchr.org/english/bodies/hrcouncil/4session/reports.htm

corporate activities cannot simply be ignored by States. The list of legal instruments enumerated above aims to highlight the growing interrelationship between the obligations of states, corporations and the rights of communities. States are the primary duty bearer with regards to indigenous and human rights. States have a role to protect communities by developing a regulatory framework recognizing and protecting their rights. Effective sanctions and remedies must also be provided for violations committed by governments or corporate actors. States should secure good faith consultations with indigenous peoples on extractive activities affecting them.

For their part, business enterprises have a responsibility to respect human rights, including the rights of indigenous peoples. This responsibility exists independently of the capacity of states to fulfil their own human rights obligations, and it exists beyond compliance with national laws protecting human rights. Businesses are required to exercise due diligence to ensure that their activities do not infringe the rights of individuals, indigenous peoples' and local communities internationally recognized, regardless of the reach of domestic laws. Given this growing recognition of the duties of business, extractives companies should adopt meaningful policies and practices respecting indigenous peoples' rights including the right to FPIC.

In order to achieve sustainable agreements with indigenous peoples and local communities on extractive projects, State should develop regulatory regimes protecting indigenous rights and local communities; there should be consultation and participation in the planning and monitoring of such projects; corporate due diligence should be exercised; and adequate agreements should be drafted between the corporation and the community.

In so doing, however, it is essential to uphold the principle of community-driven process as the realisation of the outlined rights is highly context dependent and can only be properly achieved where it meets communities' needs and visions, fully taking account of their individual characteristics. In this way, the law can be quite limited, as minimum rights and standards can be put into place, with little or no guidance as to whether or not their application leads to the fulfilment of the actual right.

The growing push for binding international law and standards for business and human rights does set out to achieve more meaningful obligations on business to uphold human rights. However, when it comes to community-company engagement, it is important to realise the limitations of the law and voluntary standards that can, and do, get side-tracked through selective interpretation of corporate responsibilities, differing worldviews that business and community engage in, and/or a lack of knowledge as to how to properly and meaningfully engage with communities and what it requires.

Annex I

The table below gives an overview of the most common business and employment opportunities and other types of concessions that communities may seek to obtain at individual stages of investments. The second table further elaborates on the different categories of employment and the relevant educational requirements.

Common concession opportunities at different investment cycle stages

Exploration	Feasibility & Planning	Construction	Operation	Closure
Non-business/employment concessions				
• Right to social Impact Assessment (IA) • Specific scope/ focus/approach of IA • Right to input to IA, incl. traditional knowledge • Agreement to negotiate, with agenda and principles • Commitment to pay for engagement process, incl. payment modalities • Agreement on grievance mechanism	• Concession to spare certain lands/resources • Agreement to negotiate, with agenda and principles • Agreement on modalities for continuous engagement • Commitment to pay for internal and external engagement process, incl. payment modalities • Agreement on grievance mechanism	• Agreement on modalities for continuous engagement • Commitment to pay for internal and external engagement process, incl. payment modalities • Agreement on grievance mechanism		
Business opportunities				
• Prospectors • Line cutters • Caterers • Equipment suppliers • Camp construction worker • Samplers		• Camp services • Laboratory services • Construction trades and services • Infrastructure developers	• Camp services • Underground and surface contract mining • Road maintenance • Equipment maintenance	• As in exploration phase • Drainage systems development and maintenance • Water sampling and

			• Transportation • Recycling • Insurance	analysis • Water treatment • Dismantling • Site security
Job opportunities				
• Geologists • Geophysicists Assistants to • specialists • Drill Operators Pilots	• Geologist • Geophysicist • Assistants to • specialists • Accountants • Environmental technicians • Drill Operators Pilots	• Accountants • Environmental technicians • Heavy equipment operators • Warehouse technicians • Administrative assistants • Safety coordinators • Engineers • Managers	*See below*	• Field and laboratory assistants • Security • Inspectors • Pilots

Source: *Aboriginal Mining Guide.*[98]

Job opportunities in operating mines

Job type	Examples	Requirements
Entry level	Trade helpers Heavy equipment operators Housekeeping services	Basic school education
Semi-skilled	Warehouse technicians Administrative assistants Smelter positions	School degree, some work experience
Skilled	Safety coordinators Environmental technicians	Diploma
Professional	Managers Engineers Geologists Scientists Accountants	University degree

Source: *Aboriginal Mining Guide.*[99]

Different legal options exist to make use of different economic opportunities for employment and development support. For example, communities can aim to negotiate specific employment

[98] *Aboriginal Mining Guide*, p. 105, 108, 114.
[99] *Aboriginal Mining Guide*, p. 112.

quotas, exclusive contract rights, favorable tender procedures, education support including scholarships and on-site trainee positions.[100] These are possible through SEPAs, IBAs and CDPs.

[100] *Ibid.*