

Finding Common Ground

Indigenous Peoples and their Association
with the Mining Sector

A Report based on the work of the Mining
Minerals and Sustainable Development Project
at the International Institute for Environment
and Development

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2 Mining and Indigenous Peoples: Stakeholder Strategies and Tactics

Theodore E. Downing, Carmen Garcia-Downing, Jerry Moles and Ian McIntosh

An unknown but significant percentage of the world's remaining unexploited ores attractive for modern commercial exploitation lie under indigenous lands. For the mining industry, the key issue is how to gain access and develop these deposits. In sharp contrast, for indigenous peoples encounters with mining raises three broader sustainability issues. What rights do indigenous peoples have when mining companies desire the minerals beneath the land they occupy and use? What obligations do mine owners or investors have to the indigenous peoples living on or near land that is to be explored or mined? What strategic issues should be 'on the table' so that indigenous peoples and mining or mineral companies can determine whether or not they can work out a mutually satisfactory deal?

The Encounter

2.1

The outcomes of encounters between mining and indigenous peoples are uncertain. Mining may empower indigenous peoples by providing opportunities to realize their goals, by alleviating poverty and providing community and individual amenities, by creating training and employment opportunities, and by providing a share of project benefits. More commonly, mining may threaten their sovereignty and pose multiple impoverishment risks. If all or any part of the group is involuntarily resettled, the risk of multidimensional impoverishment increases greatly (Mathur 2001, Govt. of India 1993, Sonnengberg and Munster 2001, Downing 2002).

Neither outcome is inevitable. Whether indigenous peoples are impoverished or empowered depends on what happens during a sequence of interactions that can be

called ‘the encounter’. This includes many parties or stakeholders, including mining companies, governments, financiers, non-governmental organizations (NGOs), and the affected indigenous groups.

An encounter has four dimensions. The first is stakeholders’ perceptions, presuppositions about one another and desired outcomes. The second involves the stakeholders’ capacities to sustain or resist negotiations. The third consists of socio-economic and environmental risks to the sustainability of the indigenous peoples. And the fourth dimension – the main focus of this chapter – involves stakeholder strategies and tactics for dealing with one another during an encounter.

2.1.1 Stakeholder expectations

Stakeholders enter an encounter with distinct views about one another’s identities and motives. These views include a) who is or is not indigenous, b) presuppositions about one another’s culture, and c) one’s own and the others’ desired outcomes.

Who are indigenous people?

From the onset, stakeholders may hold different beliefs regarding who is indigenous. This question is of considerable significance to both indigenous and non-indigenous stakeholders. Financial obligations for impacts are likely to be incurred and a key issue here is who and who is not eligible to make a claim.

Indigenous communities vary greatly. Living in areas ranging from the Arctic north to the humid and dry tropics, indigenous peoples have devised many ways to reproduce themselves within a culturally managed, ecological setting. Each community has evolved its own methods of gaining sustenance, protecting its resource base, maintaining community organizations, and dealing with external threats. Indigenous social organization, just as indigenous knowledge, is fundamental to indigenous cultural survival. So also is their identity.

The term ‘indigenous’ describes many peoples, but few describe themselves as such. Indigenous peoples usually call themselves by names in their own language that translate as the ‘people of the land’ or ‘people of a place’ or ‘people of X’, where X refers to some critical natural resource that sustains or symbolically represents them.

One seemingly objective way to unravel who is ‘indigenous’ is to turn to emerging international criteria, such as definitions set forth by the International Labour Organization (ILO) in the Indigenous and Tribal Peoples Convention 169,

the World Bank in its indigenous people's policy (OD 4.20), the World Council of Indigenous Peoples, the Rio Declaration on Environment and Development, the International Convention on the Elimination of All Forms of Racial Discrimination, Rio Agenda 21, the Organization of American States (OAS) Declaration on the Rights of Indigenous Peoples, the UN Draft Declaration on the Rights of Indigenous Peoples, or the UN Convention on Biological Diversity.

Definitions of indigenous peoples agree on three broad points: attachment to ancestral lands or territory and the natural resources contained therein, customary social and political institutions, and self-identification as a group. The last of these, self-identification, is given considerable weight.

There is no unanimity as to whether other criteria – including sharing a common language or the presence of a subsistence economy – should be a part of the definition of indigenous peoples. From an operational perspective, a language-based definition of indigenous peoples risks denying benefits to indigenous children because they do not speak their parents' language. Use of this criterion is a formula for divisiveness and conflict.

Particular care should also be exercised to avoid the misleading and obfuscating use of economic criteria for defining a cultural group. The World Bank's definition of indigenous peoples includes having a subsistence economy. No other major institution takes this approach. This criterion confuses the culture of poverty with a peoples' cultural identity, leading to the erroneous proposition that if indigenous peoples gain wealth or education, they become non-indigenous. With the emergence of modern technologically based societies, members of some indigenous groups have developed capacities to participate beyond their home communities as attorneys, legislators, businesspeople, and so on and serve as advocates for their peoples.

Stakeholders' presuppositions

In addition to these views, indigenous peoples, mining enterprises, governments, development agencies, NGOs, and others enter an encounter with notions about each other's motives, cultures, and rights. These are usually presuppositions – seldom spoken, presumed 'truths' that are based on past experience, cultural stereotypes, or descriptions from diverse sources, including non-written, verbally transmitted ones. If incorrect – and they frequently are – they may obstruct or misdirect negotiations.

The content of non-indigenous presuppositions varies from encounter to encounter, but six particularly troublesome ones resurface in project after project:

- Indigenous peoples who are in the way of mining should passively sacrifice themselves and their culture in the national interest or the greater common good.
- The financial risks facing local peoples are insignificant relative to the risks taken by industry, financiers, and developers.
- Cultural differences between indigenous peoples and the outside world will ultimately disappear, removing the need to worry about development-induced cultural changes.
- Undesired project impacts are indirect – and not the responsibility of the mining company or government. (Implicit in this presupposition is the notion that indigenous people must be responsible for dealing with negative impacts from a given project).
- The extent of an economic or social impact is directly proportionate to the linear distance from the mine or associated infrastructure.
- Infrastructure impacts affect only individuals, not social groups, communities, or cultures.

All six of these presuppositions are false (Hyndman 1994, Downing and McIntosh 1999).

The most significant presupposition held by indigenous peoples is that their inalienable rights to their lands and resources override subsequent claims by conquering or dominant societies. Indigenous people can be expected to hold firm to their perceived rights to determine their priorities: a) on their land, b) on their own terms, and c) within their own timeframe. Furthermore, they believe that they are part of the land (Rogers 2000). Land is not a distinct marketable commodity, save for internal transfers of use rights (which could be market transactions) to other members of the group – who are equally part of the land. And indigenous land – its mountains, rocks, rivers, and specific places – may hold religious and ceremonial significance comparable to the significance that the great religions place on Jerusalem or Mecca. Ethnographic surveys often reveal that land markets are socially circumscribed, with very low levels of market transfers among indigenous peoples to outsiders and with around 10–15% of the land parcels being transferred through sales as opposed to inheritance (Downing 1972).

Non-indigenous stakeholders are likely to misunderstand indigenous people's attachment to the land. They tend to approach the encounter as primarily an economic transaction in which the loss of land and resources is compensated for

with cash payments or some potential employment, with possibly short-term material benefits. In contrast, the indigenous struggle is not simply to own real estate but also to protect a culturally defined landscape. Land is not a marketable commodity. The loss of land may mean, to them, that their entire culture is threatened, including their ways of being and doing, their shared expectations, and their shared understandings of the nature of their environments and their pasts, presents, and futures. Anthropological research and decades of work on this problem by groups such as Cultural Survival lend support to indigenous concerns.

History is essential to the way in which indigenous peoples navigate an encounter. But while some people have clear knowledge of the potential of mining to empower or impoverish their communities, others have no experience. In this case, the demands of mining are interpreted as comparable to previous claims and forced takings of their resources by outsiders. Historically, such encounters have wrought havoc, and in some cases extermination, of indigenous peoples. Yet non-indigenous promoters of a mining endeavour (owners, investors, negotiators, and on-site representatives) may have little or no interest in indigenous peoples or their historical struggles.

Indigenous and non-indigenous peoples work on different time frames. The indigenous time frame may not match the multiple clocks ticking during an encounter. To the indigenous communities, exerting their will over the outcome of a mining venture is more important than the time it takes to complete a successful negotiation. To the mining company, fixed and variable costs, returns made to investors, and loan payments must all be considered. Investment demands that projects are permitted in the shortest possible time at the least possible cost. Likewise, governments are concerned about receiving their timely share of taxes, fees, and expected accommodations. And financiers expect timely repayment and return on their investments.

Desired outcomes

Mining companies, along with their investors and supporters, are clear about their desired outcome: minerals discovered and then taken out of the ground in a form acceptable to buyers or for further processing. To reach this outcome, they need unfettered use and access to the mineral resources of indigenous lands. Non-indigenous stakeholders may also seek other non-mining-related outcomes that influence their actions during the encounter. They may foresee cultural or economic futures for indigenous peoples reflecting the outsider's culture and values. Chew and Greer reported that even when mining companies and other business interests in Australia prepare impact assessment studies of social and environmental effects,

the perspectives of local Aboriginals and Torres Strait Islanders are likely to be ignored (Chew and Greer 1997, Howitt 1995). Desired outcomes will influence how options are evaluated. While these outcomes may not reflect any formal government or company policy, leaders and staff often assume moral authority over indigenous peoples, whom they may see as poorly informed, needy, or inferior peoples in need of charitable assistance.

Just like non-indigenous peoples, indigenous peoples want tomorrow to be better than today – with ‘better’ being defined by them in a culturally appropriate manner. Outcomes are linked to on-going struggles for support, services, sovereignty, or self-determination. Indigenous peoples use distinct processes for decision-making that often make it difficult to determine their desired outcomes. They reach an agreement after divergent points of views have been expressed, discussed, incorporated, or rejected. Consequently, it is not uncommon for indigenous peoples to hold divergent views as to the nature of the threats to their communities and the desirability of certain outcomes of the mining encounter. There may be no community consensus about what potential alternatives are available or possible. And it is not uncommon for these views to evolve in the light of new information or discussions. Thus indigenous peoples frequently enter into encounters without a clear and concise idea of their position or preferred outcomes on a particular endeavour, even though they hold a clear view on their preferred outcomes for their culture.

Frequently it is difficult to determine who speaks for the group, making it difficult to reach binding agreements. This proves especially challenging to non-indigenous groups in dealing with communities without a hierarchical, corporate structure with clearly defined and accepted decision-making processes. If decisions are to be reached, lengthy deliberations are often required. Costly, time-consuming conflict is almost assured if the non-indigenous stakeholder unilaterally designates a spokesperson in order to move things along.

2.1.2 Capacities to sustain or resist

A second dimension of an encounter is indigenous culture’s capacity to sustain or resist a prolonged engagement with mining interests and their allies. A stakeholder’s capacity to sustain or resist a negotiation is determined by knowledge, organization, resources, and time needed to reach a consensus or agreement on a plan of action. Non-indigenous stakeholders hold considerable advantages over indigenous ones. This includes not only access to capital but also knowledge about the potential market value of indigenous resources, legal representation, and political influence. Outsiders can read ethnographic works and interview cultural

experts. In contrast, indigenous peoples are rarely trained in the culture and economics of the other stakeholders they meet during an encounter.

How long an indigenous group can resist depends not only on the internal capacity of the group but also on the ability of mining promoters to forge strategic alliances with government and other non-indigenous stakeholders. Conversely, indigenous peoples may increase their capacity through alliances with NGOs and other sympathetic interest communities, such as religious, labour, academic, and environmental organizations.

Sustainability risks

2.1.3

An encounter's socio-economic and environmental risks may also threaten the sustainability of indigenous peoples. Some risks are associated with the physical activities of mining. Others may destroy a people's ability to accumulate, maintain, enhance, and transfer wealth to future generations.

Construction and operational risks are well known. Workmen come to indigenous communities and engage in a number of practices against which the local people have no defence – including robbery, rape, consumption of alcohol, and even murder. With the opening of roads and the movement of machinery, animals and people are frequently injured and on occasion killed. Avoiding and preventing these potential risks is a necessary first step for any company working on or near the lands of indigenous peoples. If unavoidable, then restoration and reconstruction must be immediate and mandatory.

In the case of environmental risks, the degradation of vegetation cover, soil contamination, reduced water quality and quantity, and loss of biodiversity often reduce or eliminate an indigenous community's livelihoods – its capacity to provide for itself – and limit the capacity of landscapes to maintain them. Environmental changes are often cumulative and delayed, and the consequences may not be anticipated or understood by indigenous communities or even by mining companies and governments. Indeed, where there are difficult and unknown issues, it may be in the interest of these actors not to point them out. The risks are greatly exacerbated if the group is faced with mining-induced displacement or resettlement (Downing 2002).

Indigenous wealth and impoverishment risks

Less obvious are the impacts of mining on indigenous wealth. All stages of the mining process – from the earliest days of planning and consultation, exploration, and exploitation through decommissioning – may disrupt the accumulation and intergenerational transfer of indigenous wealth.

Those unfamiliar with indigenous culture may mistakenly believe that mining poses minimal risks since indigenous peoples have little income or wealth to lose and high unemployment. Promoters argue that the local income from mining might break the unending chain of poverty. They argue that both the mining industry and governments have fulfilled their obligations once indigenous peoples are compensated for the market value of lost lands, material goods, and public facilities.

Earned incomes represent only a small portion of indigenous wealth. The wealth that supports the sustainability of their culture is found in institutions, environmental knowledge, and resources, especially land embellished with cultural meaning. It includes access to common resources, local prestige, culturally appropriate housing, food security, social support, and identity. Indigenous peoples invest vast amounts of time and resources perpetuating their culture, institutions, and social support systems. Their cultures provide members with a well-travelled map of where they came from and what is likely to happen today, tomorrow, next week, and next season (Downing 1996, Moles 2001). This cultural map is localized, reflecting generations of experience, and is not readily transferable to another landscape. Such wealth yields tangible returns.

Lest there be any doubt as to the value of indigenous wealth to sustainability, indigenous peoples have flourished for generations, often in highly marginal environments that are incapable of sustaining non-indigenous life ways without substantial injections of external capital, energy, and technology. Indigenous sustainability is based on protecting environmental and resource endowments. Indigenous peoples protect their resources and draw on the fruits of the land, much like drawing on the interest from an account without touching its principal.

The risks to sustainability have been documented over the last 50 years from impacts of infrastructure projects on indigenous peoples. They include landlessness, homelessness, loss of income (from traditional sources), loss of access to communal resources vital to their survival, cultural destabilization, food insecurity, health degradation, marginalization, corrosion of sovereignty, disruption of social organization and traditional leadership, spiritual uncertainty, restriction of civil and human rights, limitation of the capacity to participate in the broader society, and threats from environmental disasters.

More precisely, we find that indigenous wealth may simultaneously be threatened from eight directions. Mining and negotiation activities may break the

ebb and flow of social and economic life. Second, the encounter may make excessive demands on the time and capacity of the local people and their traditional leaders. It may disrupt educational activities, both traditional and formal. Fourth, it may exacerbate factionalism resulting from inadequate consultation. Quite often, it may also disrupt the leadership structure or improper legitimization of individuals as ‘authorities.’ It may undermine civil rights and traditional decision-making by ignoring prior informed consent. The encounter is also likely to drawdown on limited financial resources. Finally, the very symbolic structure that offers the ‘why we do it’ of a culture may be shaken if sacred sites are desecrated.

These spiritual ties that bind indigenous peoples to specific landscapes create a special problem, especially when the disturbed or destroyed landscape is a ceremonial or worship place or viewed as a bequest from ancestors or spiritual powers. The loss of the solace once found with traditional practice can leave indigenous people adrift and prey to the unscrupulous. When fundamental beliefs are challenged, the ability of a group to sustain itself is threatened.

It should now be easier to understand why it is not easy to compensate indigenous peoples for their loss of wealth. Remedial actions require stepping beyond monetary compensation. Reviewing the push for full compensation, the former Senior Social Policy Advisor of the World Bank recently concluded that even perfect compensation assessment and conveyance would still be insufficient for achieving the policy objective of restoration and improvement. The means of compensation are not commensurate with the goals of restoration. The very principle of ‘only compensation’ is faulty (Cernea 2000, 2001).

In contrast to only compensation for lost land, restoration of indigenous wealth is a more realistic criterion to judge benefits to indigenous communities. Restoration means full compensation to cover the market values of lost wealth, including lost social and environmental services. Restorative actions might include a long-term sequence of non-monetary steps, institution building, training, environmental restoration, and extended financial arrangements to ensure that people retain or regain their ability to accumulate wealth. The effectiveness of these efforts, judged from the perspective of indigenous sustainability, rests on whether the project leads to an accumulation of indigenous wealth – within the broader definition of wealth. And the effectiveness of all restorative and mitigating actions will be, in the end, judged by a key question: are the indigenous peoples giving more than they receive? If so, they are subsidizing the mining project – which is morally and economically outrageous.

Aware that the distribution of these economic benefits may be short lived limited, some companies have instituted programs to stimulate small indigenous-owned businesses (Cameco in Saskatchewan, Red Dog in Alaska, and WMC Resources in Australia). Such economic outreach efforts are important, but the remedy provided may not address underlying impoverishment and sustainability threats.

Development-induced displacement and resettlement

Mining-induced displacement and resettlement significantly increase the risks of impoverishing local populations, threatening their livelihoods and truncating their chances for sustainable development or even survival (Cernea 1999, 2000, 2001; Pandey 1998; Fernandes 1994; Downing 1996 and 2002; Government of India 1993). Societies that have endured for hundreds if not thousands of years can quickly unravel and disintegrate under the pressures of forced displacement.

Avoidance of this catastrophic outcome demands detailed planning and the allocation of adequate financial and human resources. Integral to any successful resettlement outcome is the use of skilled development-induced resettlement specialists (see www.displacement.net for examples of professional profiles of resettlement specialists).

Extensive development knowledge and scientific research show that rehabilitation and restoration (R&R) of livelihoods is more likely when all potential impoverishment risks are identified early and arrangements are made to mitigate or avoid them. R&R is also more likely with the informed, timely, widespread, and active participation of project-affected peoples. Involuntary resettlement is a socio-economic, not an engineering issue. The chances of risk mitigation and restoration are increased when stand-alone financing is provided for the displacement, since this removes the conflict of interest that tempts companies to view displacement as an unnecessary social service rather than a necessary cost.

Loss of sovereignty

One of the primary causes of indigenous resistance to mining is the potential loss of sovereignty. Sovereignty refers to the acknowledgement by government of the collective rights of indigenous peoples to their traditional territories and heritage. It does not necessarily infer a desire for a separate state.

Among indigenous, just as among non-indigenous peoples, sovereignty is a sacred concept, like freedom and justice. It refers not only to land and sea rights but also to political and economic self-reliance and the right to determine

the extent of cultural distinctiveness (d'Erico 1998). Threats to group sovereignty may come in many ways, especially through the loss of human and civil rights and the capacity to pass along a culture, including its wealth, to subsequent generations.

Mining frequently disrupts indigenous life ways and institutions, threatening a peoples' sovereignty. Indigenous peoples pursue their sovereign rights as coequal members of the community of nations within nations. For example, the US Supreme Court recognized early in the nineteenth century that the relationship between Indian tribes and the federal government is 'perhaps unlike that of any other two people in existence'. This special relationship is not based on race but on the inherent sovereignty of Native American people, especially their rights of self-governance and self-determination.

Land and a people's relationship to it are fundamental in 'indigenous sovereignty' struggles. A small body of international indigenous law has emerged to recognize the inherent rights of indigenous peoples to their land and heritage. International charters and organizations such as the Inter-American Commission on Human Rights, the UN Human Rights Committee, and ILO 169 recognize that indigenous lands and their resources are critical to the survival of indigenous peoples (Anaya 2000). A successful negotiation is more likely to take place when title to the land has been confirmed in state law (Ali 2001). When title is unclear, resistance or negotiation strategies are the ones most likely to secure indigenous claims. The US government has recognized the significance of this issue in law when it notes that 'Indian people will struggle – will never surrender – their desire to control their relationships both among themselves and with non-Indian governments, organizations and persons' (US Congress Pub. L. 93-638, 1975).

Another dimension remains. Peter d'Erico (1998) recognizes the spiritual, land-based origin of sovereignty:

Ultimately it is land – and a people's relationship to the land – that is at issue in 'indigenous sovereignty' struggles. To know that 'sovereignty' is a legal-theological concept allows us to understand these struggles as spiritual projects, involving questions about who 'we' are as beings among beings, peoples among peoples. Sovereignty arises from within a people as their unique expression of themselves as a people. It is not produced by court decrees or government grants, but by the actual ability of a people to sustain themselves in a particular place. This is self-determination.

2.2 Stakeholder Strategies and Tactics

The probability that indigenous peoples will persist as distinct cultures increases if impoverishment and sovereignty risks are avoided or at least mitigated. Likewise, stakeholder costs and conflicts are reduced when indigenous issues are addressed strategically early in the project preparation. By strategy, we mean that a stakeholder has procedures for planning and guiding operations towards desired outcomes (goals) *before* an encounter. In contrast, tactics are manoeuvres used to gain advantage or success *during* an encounter. This section offers a typology of strategies used by governments, companies, international financial intermediaries, NGOs, and indigenous peoples as stakeholders in an encounter (Figure 1).

2.1.2 Government Strategies and Tactics

National legal frameworks define the rights and obligations of stakeholders during an encounter. The relevant legal frameworks pertain to eminent domain, the rights of indigenous peoples, mining provisions, and environmental protection laws. These frameworks frequently are inconsistent and contradictory, opening the door to appeals and political arrangements.

Most governments reserve the right to transfer sub-surface or other natural resources or take land under the doctrine of eminent domain. This proves problematic for indigenous peoples – especially those with unsettled claims to land (NRTEE 2001). Indigenous claims to reparations under the doctrine of eminent domain are challenged by communal stewardship, weakly articulated land markets, poorly delineated aboriginal boundaries, lack of deeds, and non-recognition of the surface/subsurface distinction.

Exploration and exploitation may take place at the expense of some groups or individuals in the name of common good, usually with the proviso that landowners are fairly compensated. Indigenous lands may or may not be recognized as eligible for the compensation, being considered vacant or government lands. Compensation for takings is restricted to the value of the land – which may be difficult to determine given that land markets are weakly developed in indigenous communities and that access to impartial justice for those who dispute company valuations may be unavailable. The doctrine of eminent domain incorrectly assumes the elasticity of land, ignoring its spiritual and emotional value to an indigenous community.

TABLE 1 Overview of Stakeholder Strategies



Legal and regulatory frameworks

In developing countries, trade liberalization and the need to increase foreign exchanges are leading to major revisions in mining laws. Simultaneously, a growing concern for world peace and human rights has encouraged greater formalization of the legal rights of indigenous peoples (Handelsman 2001). Concern for peoples and populations identified as indigenous is now a part of a broader focus on peoples who suffer the legacy of colonization. New and revised indigenous laws have been passed, legal challenges raised (Cody 2001, Kirsch 2001), and new, albeit weak institutions formed to protect indigenous rights (Anaya 2000). The pace of the transformation varies.

More concrete laws are being passed in the Americas and in industrial countries with strong democratic traditions in which native peoples have pushed hardest for their rights (Anaya 2001). In some countries, indigenous rights are subsumed under environmental laws. ILO 169 has been ratified by Perú, Paraguay, Norway, the Netherlands, Mexico, Honduras, Guatemala, Fiji, Ecuador, Denmark, Costa Rica, Colombia, Bolivia, and Argentina and in the recent court victory for Amerindians in Nicaragua (see Section 2.2.3). In developing countries, most of these laws and the formation of related regulatory agencies took place within the past two decades.

Viewed in terms of their impact on indigenous peoples' rights during an encounter, the revisions sometimes move contradictory directions. In some cases, the legal reforms are placing the sustainability of indigenous communities under proximate threat. In the Philippine Mining Act of 1995, international mining interests are permitted to assume full control of their local subsidiaries (in contrast to a previous requirement of 60% Filipino ownership). The act assigned companies an Easement Right, allowing them to evict indigenous peoples. Mineral lands are also exempted from the issuance of ancestral land claims and ancestral domain claims (Bastida 2001, Tartlet 2001). In the wake of this change, Corpuz reports that hundreds of mining applications have been filed in the Philippines, covering around 13 million hectares of indigenous lands (Third World Network 1997). Taking the lands applied for and including existing and already approved mining operation areas, 45% of the entire 30-million-hectare land area of the Philippines is now under mining applications and operations. In the heavily indigenous Cordillera region alone, the applications cover more than half the region (1.1 million hectares).

In other situations, the redrafting of mining laws appears to have slightly strengthened the rights of those in the way by more clearly defining the obligations

of mining companies to indigenous populations. In India, new regulations are superseding The Coal Bearing Areas Act of 1957, expanding national obligations to those who are displaced or otherwise have their livelihoods threatened by India's voracious demand for its only traditional energy source.

Better scenarios are found in the Northern Territory in Australia, where some Aborigines have obtained the important legal power of prior informed consent, including the right to detailed information on proposed blocks, avoidance of sacred sites and places of significance, and the right to veto development projects on their lands. The new Aboriginal Lands Rights Act has extended Aboriginal control beyond surface rights to include all minerals in about half the Northern Territories. This is an improvement over the Native Title Act that covers the remainder of the Northern Territories only extends Aboriginal rights to six feet below the surface. Under the new act, indigenous peoples receive roughly 14% of net profits, while under the Native Title Act, the returns from mining range from 2% to 7% of net profits. Nonetheless, Aborigines do not have the right to enter into agreements with a company to 'develop' their lands. They can only expect full consultation when representative indigenous organizations, as recognized by the government, set up a meeting with mining decision-makers.

Lack of harmonization

Indigenous peoples and mining promoters may anticipate prolonged legal battles in countries where reformed mining, indigenous, environmental, and land tenure laws are not yet harmonized. Whether this is due to a desire to properly exercise fiduciary obligations to indigenous peoples, the mining industry, or the environment or simply due to traditional intra-governmental scrapping, the stage is set for prolonged conflicts. The conflicts can continue to consume local and national resources long after mining has stopped and the company is gone. In the case of Navajo uranium mining, for example, damages done in the 1940s have been drawn out for over 60 years.

Harmonization conflicts are surfacing in national Supreme Courts. In the fall of 2001, a clash between the relatively new Philippine Indigenous Peoples Rights Act and the rights of the state to subsurface mineral resources reached the Supreme Court of Justice. Proponents of resource extraction narrowly lost their claim that the new indigenous peoples' law deprives the state of ownership over lands of the public domain and minerals and other natural resources, therein violating the Regalian Doctrine embodied in Section 2, Article XII of the Philippine Constitution (Mordeno 2001).

A possible first step to avoid these prolonged appeals and conflicts appears to be taking place in Panama. As part of the process of reforming its mining law (Codigo Recursos Mineros de Panama), the Inter-American Development Bank (IDB) has contracted for local indigenous technical assistance to ensure that the rights of indigenous peoples are respected. This proactive step might lead to a harmonization of laws, overcoming the common conflicts between the indigenous and mining legal frameworks (Acosta 2002).

Delegation of negotiations to local or international levels

There is another strategy. Governments may also delegate decisions on a conflict-filled encounter to another local level or an international mediator. During 1995, the OAS was invited by the Suriname Government to broker a tripartite agreement among the government, Canadian mining companies, and the Maroon community of Nieuw Koffiekamp. The negotiations were inconclusive, a sticking point being the refusal by the government and the companies to treat the Saramaka Maroons as legitimate landowners, in line with the 1992 Peace Accord, as the OAS had suggested (Forest Peoples Programme 1996).

Use of force – state and company combined

With large revenues at stake, some governments opt to vacate indigenous claims through the use of judiciary procedures and force. In the Guyana region of Venezuela, for example, the government faced the choice of evicting miners or indigenous peoples. Indigenous peoples were reported to have violently tried to block wildcat and multinational corporate mining from taking place on their land. Laws allowing lands to be set aside for the indigenous inhabitants were not enforced (ICE no date). The unacceptable solution appears to take place in legal systems that do not recognize indigenous concepts and customary land laws. In the Philippines Cordillera, reports are that the Igorot have been evicted from their ancestral lands. Local protests by the Cordillera Resource Centre for Indigenous Peoples have been answered with military force (FIVAS 1996).

Violence directed at indigenous peoples can either originate directly with the state or consist of the state's failure to act effectively to prevent violence orchestrated by company security forces, local paramilitaries, or 'unknown parties'.

Company Strategies and Tactics

2.2.2

Strategies and tactics for dealing with indigenous peoples rank low on corporate agendas. Warhurst (1998) surveyed the social policies of 69 companies, including the top 50 mining companies rated by market capital, the *Financial Times*, and members of the International Council on Metals and the Environment. (See Table 1). The resulting profile is damning. Less than a fifth of the 38 companies that responded considered mitigate social risks associated with their activities. Only a small number of respondents (13%) considered the precautionary principle a means of minimizing risk (see precautionary principle – section 2.8) and just 5% undertook social impact assessments related to indigenous peoples or integrated such assessments into their operations. Only two companies had a specific indigenous people’s policy (Zambia Consolidated Copper Mines and Normandy Mining Ltd of Australia).

The capacity of companies to deal with social (including indigenous policy) issues is equally disappointing. Only WMC Ltd employed anthropologists or social scientists, and just 8% of companies had offices or personnel dedicated to indigenous affairs or social issues. The survey identified the fact that companies were reluctant to set up a compensation system for affected communities (only 13% did so) or to negotiate with communities over land rights issues beyond the law (also done by just 13%). With only a single data point, 1998, it is not possible to ascertain whether things are improving – although it does appear that some changes are under way. (See PricewaterhouseCoopers 2001; though this survey does show a higher level of appreciation of the importance of social and economic impacts on communities, it does not go into the same level of detail as the Warhurst study on specifically indigenous concerns). There is an urgent need to redo the Warhurst survey.

Globally, our research identified six broad patterns of organizational and financial arrangements being used by companies during encounters.

Corporate belly-flopping

The least defensible but all too common approach is to do nothing and just react to situations as they emerge during an encounter. (A fair number of companies refer to this as ‘trying to fly below the radar’). We call this the corporate belly-flop strategy, where a company dives into an encounter. Arguments such as ‘that’s life’ or that ‘people always get harmed when development takes place’, that ‘cultures were going to disappear anyway’, or that ‘the company is only responsible for direct impacts’ (with ‘direct’ being self-defined to avoid obligations) are

TABLE 1 Social Responsibility Survey of Major Mining Companies

Social action or response	Companies (number)	Share of total (%)
Willingness expressed to employ local community members	14	37
Commitment shown to employment of local communities and indigenous peoples by providing education and training	12	32
Propose to improve social performance	10	26
Willingness expressed to employ indigenous peoples	9	24
Education for community regarding culture and activities of company and possible impacts	9	24
Identification of social risks and opportunities	7	18
Education of employees regarding local community culture/values	7	18
Integrate social policy within corporate management	6	16
Contribution of skills or funding to local charities	6	16
Take a precautionary approach to operations to minimize risk	5	13
Commitment to discuss and negotiate with community over 'land rights' issues beyond demands of the law	5	13
Compensation system for affected communities	5	13
Collaboration with U.N., World Bank, ILO, and WHO efforts for sustainable development	4	11
Have a dedicated Dept./Office/Representative for social issues	3	8
Have a dedicated office/personnel for indigenous affairs	3	8
Cooperation with local NGOs	3	8
Co-operation with and contribution to government development programmes	3	8
Specific indigenous peoples policy	2	5
Employ community members as liaison officers	2	5
Undertake Social Impact Assessments (SIAs), detailing traditional economic activities, social structure, religious activities, skills, land use sacred areas, etc.	2	5
Undertake SIAs from the outset of the project	2	5
Integrate SIAs within operations	2	5
Employ environmental scientists/researchers	1	3
Employ anthropologists/social scientists	1	3
Adherence to ILO Convention 169 (Rights of Indigenous Peoples)	0	0

**38 of 69 companies reporting. Adapted from Warhurst 1998.*

unsubstantiated rationalizations used by the promoters of mining to avoid facing moral and ethical responsibilities. This reactive approach almost assures prolonged confrontations, ad hoc costly agreements, and exposure of the company ledgers to undisclosed liabilities and risks.

Minimalist

Using the minimalist strategy, a company argues that the national and local laws, particularly environmental, indigenous peoples, and mining laws, delimit their responsibilities to the local peoples. PT Freeport, for example, took the minimalist approach when responding to accusations that it was undermining the livelihood of the Amungme and Komoro people. The company claimed that it respected the Papuan indigenous peoples' close relationship to their lands, especially ancestral lands. But it argued that the land within PT-FI's Contract of Work Area was, like almost all land in Indonesia, *tanah negara* (state-owned land). Furthermore, they argued that the land that they used had been 'released' by five legal *hak ulayat* releases and that 'recognition' had been paid to the community.

Corporate responsibility statements and beyond

Over the past decade, more and more companies have released corporate responsibility statements (CRSs), detailing their environmental and community responsibilities (for a sample, see csrforum.com). CRSs are usually broad statements of principle that are published in annual reports rather than in languages of indigenous peoples living near projects. Critics feel that CRSs reflect a monologue, a company talking to itself, rather than dialogues or negotiations with indigenous peoples about specific responsibilities.

From the indigenous peoples' perspective, a broad CRS is a 'trust me' statement, but it does not foretell company actions. Demonstrated commitment increases where organizational arrangements are put in place and open channels of communication are established with the community. Some CRSs are limited to a specific project and do not reflect corporate strategies towards other indigenous peoples who are 'in the way' of mining (Jerve and Grieg 1998). By not adopting a pan-indigenous corporate policy, a company is indicating that it intends to set different standards for different encounters.

Companies may also hire agents to generate positive publicity on the value of the mine to the local indigenous peoples. Publicity alone may improve public perception, but it has nothing to do with avoiding or mitigating on-the-ground risks and can be considered exploitative (Mineral Policy Institute 1998).

At least one company is adding performance benchmarks to its CRS. BHP Billiton has established specific management standards designed to ensure that the company's presence provides lasting benefits and causes as little disruption to the rights of indigenous peoples as possible (BHP Billiton 2001). The standards include performance expectations for all operations that are reported in its annual reports. The targets include ensuring that none of the company's activities transgress the UN Declaration of Human Rights and making a modest aggregate contribution of 1% of pretax profits, including in-kind support, to community programs calculated on a three-year rolling average. This percentage is not based on any risk assessment and may be below replacement value.

Contract a broker

Mining companies, governments, and other non-indigenous stakeholders seek consultants to help them with technical and environmental issues. This practice is notably less common when dealing with indigenous issues. Warhurst's survey of 38 major mining corporations discovered that only 3 had dedicated offices or staff to social issues and that none employed professional social scientists (Warhurst 1998).

Unless a company has specific expertise in indigenous development, management is wise to avoid its inherent conflict of interest and not take on the role of brokering arrangements between themselves and indigenous peoples. For centuries, specialists known by anthropologists as 'cultural brokers' have been used or hired to bridge the cultural gaps between indigenous peoples and outsiders. Several options are open. The most inappropriate option is to contract environmental specialists to deal with indigenous issues. The training and skills of an environmental scientist does not include expertise in indigenous development.

A second option is to hire local bicultural individuals to serve as community liaison officers. Precautions must be taken. It is tempting for companies to assume that their hired people are leaders or even designated spokespersons for the indigenous community. Neither fish nor fowl, community liaisons move back and forth between two worlds – and may be trusted by neither or may even use their roles corruptly. Local community liaisons are most valuable for their educational and communication role – leading each side to understand the other – without interfering in the decision-making process. Third, companies may also turn to NGOs, assuming they have the capacity to communicate with indigenous peoples (which is discussed later). A fourth option for the 'contract a broker' strategy is to hire a consultancy firm to broker a deal with indigenous peoples. In Guyana, for example, the Canadian firm CANARC contracted with a consultancy firm, SEMCO, to broker a deal with the local Caribs whose small-scale gold mines were being threatened with closure.

Benefit-sharing arrangements

Over the past decade, benefit-sharing arrangements (BSAs) have become an increasingly popular approach for dealing with the impact of mining on indigenous peoples. BSAs might include training programs, with or without employment opportunities; support for the development of small business enterprises primarily to subcontract with the mining company; formation of benevolent or development foundations (some of which are company- controlled, with others controlled by indigenous people). BSA might also include indirect transfers to indigenous peoples, such as benefits-sharing arrangements with government agencies in which a negotiated percentage of profits flow back into the indigenous communities (Hemmati 2000).

Foundations are double-edge swords. They may prove to be instruments for colonization and control, especially when the control of funds is vested in the company. Or they may provide valuable laboratories for building the governing and development capacities of indigenous peoples (Downing 1996).

Mining companies are in the business of mining, not the development of indigenous peoples. Without a risk analysis that anticipates the social and economic impacts, establishing the level of support and needs of indigenous peoples is a major problem. If a BSA only mitigates the damages inflicted by the company on the indigenous peoples, then it is merely offering compensation for local damages – not a benefit. A more conscientious approach steps beyond the minimum and offers indigenous peoples opportunities for local training or employment (Red Dog in Alaska, for example, and Golden Bear Mine in British Columbia).

Use of force

Given all the alternative ways to approach an encounter, it is unacceptable that mining companies turn to the use of force by their employees or surrogates. Surrogates may include contractors, private security firms, government police or military forces, or less ‘deniable’ third parties such as ‘security consultants.’ In conflict-prone developing countries, government security forces are unable to provide security for the staff and installations of mining companies. The companies have felt obliged to engage private security firms for protection. From the company’s perspective, security is solely for defensive purposes, and the needs and conduct of the companies are entirely legitimate. Force is usually exercised in response to what are announced as ‘illegal actions’ by the indigenous peoples including trespass. Trespass is most difficult for indigenous peoples to understand, especially when land is not considered private property.

A sampling of the violence is sufficient to highlight the continuing use of this option (Aoul et al. 2000). In Indonesia, a Dayak in Indonesian Borneo was shot by a BRIMOB security guard (ENS 2002; www.mpi.org.au/indon/eng_kalteng.html). The Indonesian Human Rights Commission confirmed gross human rights violations against Amungme and Nduga villages and in the region of the Grasberg copper and gold mine, further to the east (www.survival.org.uk/indo1.htm). Local peoples have testified against TVI Pacific, a Canadian firm mining in the Philippines. In India, police fired on demonstrators against Utkal Alumina (www.moles.org/ProjectUnderground/drillbits/6_01/do.html). Reports of violence against local indigenous peoples at the Freeport McMoRan mine have been reported by the Australian Council for Overseas Aid and the Catholic Church of Jayapura (www.corpwatch.org/trac/feature/humanrts/cases/in-ziman.html). And these are hardly the only such incidents.

Internationally, actions are being proposed to reduce violence. The United Kingdom Mission to the United Nations noted that the conduct of firms employed for security has on occasion fallen short of internationally recognized human rights standards. In December 2000, the mission announced voluntary guidelines on overseas security provisions during mining operations (United Nations UK Mission 2000). These are designed to promote and protect human rights during mining and energy company operations.

2.2.3 Strategies and Tactics of International financial intermediaries

The World Bank and the regional multilateral development banks invest about US\$11 billion in mining, making them stakeholders in indigenous peoples/mining encounters. In addition, national risk insurance agencies, such as the US Overseas Private Investment Corporation, assume some of a company's risks when operating in developing countries. The multilateral financiers leverage is greater than their modest contributions. Approval by the financier's environmental departments may reassure hesitant syndicated investors, especially commercial banks, that the impact of a given project on indigenous peoples has been properly assessed and that mitigation plans meet the multilateral lenders' safeguard policies.

Multilateral financiers and risk insurance groups are experimenting with at least six strategies and tactics. The first and increasingly rare option is to do very little – comparable to the minimalist approach of companies. A slightly more invasive approach involves publishing non-legally binding guidelines for best practices (see www.ifc.org, www.worldbank.org, ADB 1994). In October 2001, the World Bank began a year-long review to create guidelines for investments in

oil, gas, and other extractive industries. Initiating the review, the Bank argued that mining can be compatible with the Bank's 'overall mission of poverty reduction and the promotion of sustainable development'. Other commentators disagree. Third, the World Bank Group and its private-sector arm, the International Finance Corporation, have crafted operational 'safeguard' policies regarding steps their clients must take to avoid harm to indigenous peoples and their environment. Ideally, these steps should be completed before loan approval. Fourth, the intermediaries may impose actionable contractual conditions as part of their loan agreement with a company. Fifth, the lender may gain a voice by holding a small equity position in their client's company. The last two options increase lender access to the site and allow a lender to influence management decisions in a way comparable to any other minority shareholder. Finally, the financial intermediaries may voluntarily submit themselves to internal or external compliance reviews or inspection panels to judge how well they comply with the policies they may have established. A significant question is how these institutions react when violations are alleged to have occurred at a site before the current owner applies for financial assistance.

Safeguard policies define the lender's view of the risks and responsibilities of projects to indigenous peoples (www.worldbank.org). For those concerned about indigenous rights, the policies are beginning to recognize the unique circumstances of indigenous peoples. Currently, they are too narrowly focused on compensation for damages rather than on indigenous development as defined by the people (see Section 2.2.4). The indigenous people's policy at the World Bank is undergoing revisions that may either strengthen or weaken this strategy.

From the perspective of indigenous peoples, two of these approaches pose special problems. Currently, co-financing and conditional loans are not disclosed by the lender and the borrower. Companies are concerned that the agreements they sign with a lender may reveal trade secrets. Such secrecy leaves national governments and the agencies responsible for indigenous peoples ignorant of the terms of agreement. Further, such agreements may be de facto considered violations of the human rights of indigenous peoples and an affront not only to their sovereignty but also to the government agencies holding fiduciary responsibility for their welfare.

This problem is easily handled. Both the government and indigenous peoples are primarily concerned about any part of the loan agreement that externalizes costs (or benefits) to the indigenous peoples or to the government. Externalization of costs may threaten indigenous sustainability through changes in their livelihoods, environment, or sovereignty. These clauses do not routinely involve trade or financial secrets. Borrowers or underwriters or lenders might be persuaded to

disclose those components of the agreement, but – given the mistrust and amount of money involved – ground rules and arbitration would be necessary to avoid disagreement over what constitutes an impact.

2.2.4 Non-governmental organization strategies and tactics

Indigenous peoples have found sympathetic ears among NGOs, especially where they have few or no avenues to air grievances. Scores of NGOs are focusing on the issue of mining and local communities (see www.minewatch.org, www.moles.org, www.caa.org.au).

NGOs show great diversity of objectives and organizational capacities. Some local organizations focus on particular mining projects. Others assume broader, global policy objectives. Their positions range from militant resistance to uncritical promotion of mining interests. Both globally and locally, NGOs routinely gain strength by forming alliances.

NGOs also deploy a wide range of strategies and tactics, including national and international lobbying, civil disobedience, serving as information clearinghouses, coalition building, and community outreach. Others options include referrals to other support groups and resources, meetings with the institutional financiers of mining, hosting conferences, organizing resistance campaigns, and subcontracting to assist in indigenous development or cross-cultural brokerage to interested stakeholders. Controversy and conflicts occasionally arise when NGOs speak out or raise funds on behalf of indigenous peoples without their consent.

Localized services to indigenous communities

NGOs may offer indigenous communities a wide range of services including fund-raising, on-the-ground research, legal representation, monitoring of environmental and social compliance, and capacity building (negotiating skills, for example, or organizational management and consulting on risks, such as evaluation of health threats). The types and qualities of NGO services vary. Some employ professional staff while others depend on volunteers.

Global policy advocacy

An NGO may pull together a cluster of strategies into a campaign. Campaigns are a coordinated set of actions designed to influence policy or change the course of particular encounters. Campaigns often take on global dimensions; especially since internet communication has permitted NGOs with limited resources to communicate as easily as large corporations (e.g., Mining Watch Canada,

www.miningwatch.ca; Oxfam Australia, www.caa.org.au/index.html; Project Underground, www.moles.org; and the Indigenous Environmental Network, www.ienearth.org/mining_campaign.html#project). Recently, Project Underground and the Indigenous Environmental Network formed the Indigenous Mining Campaign Project to support indigenous peoples in developing strategies ‘against the spiritual, cultural, economic, social, and environmental impacts of mining and oil extraction’.

Global NGOs are attempting to change the due diligence policies used by financiers and insurance underwriters when they invest in mining. Oxfam, the Center for International Environmental Law, and the Bank Information Center, for example, are attempting to lay down a global standard in their dialogues with the World Bank and regional development banks. This effort extends NGO activities into the areas of human rights, indigenous peoples, cultural sustainability, and mining. Of note are the UN instrumentalities and conventions to protect the Earth’s biological, linguistic, and cultural diversity. A recurring concern has been the promotion of consultation, self-determination, group rights, and protection of indigenous cultural patrimony. In the absence of industry action, Community Aid Abroad in Australia has established its own ombudsman code of conduct for mining companies working with indigenous communities (Oxfam 2001), which in 2001 provided detailed reviews of seven cases of mining companies’ overseas operations in the Asian-Pacific Region. There have also been demands for standards, benchmarks, and accountability of mining companies within their home countries for the overseas treatment of indigenous peoples.

Setting Legal Precedents

While there have been a series of failed legal actions against oil and mining companies (Freeport McMoRan, BHP, and Texaco) by NGOs, the Indian Law Resource Center scored a landmark victory by challenging another extractive industry that may set a precedent for the mining sector. On September 17, 2001, the Inter-American Court of Human Rights ruled that the government of Nicaragua violated the human rights of the Mayagna Indigenous community of Awas Tingni. The community had been attempting to protect its lands and resources from exploitation by a Korean logging company. The logging company was rumoured to also be considering mining. When the Nicaraguan legal system failed to address the community concerns, the Indian Law Resources Center (ILRC) filed a petition before the Inter-American Commission on Human Rights against the government of Nicaragua. The ILCR claimed the Nicaraguan government was violating

international law by ignoring traditional land ownership in granting the logging concession without informed participation of locally affected communities. In 2001, Nicaragua was ordered to demarcate the traditional lands of the Awas Tingni community and establish new legal mechanisms to demarcate the traditional lands of all Nicaraguan indigenous communities. James Anaya, a lead attorney involved in this case, concluded that ‘the precedent applies directly to all states in the Americas that are parties to the American Convention on Human Rights and, indirectly, to all other countries where indigenous people live’ (Elton 2001).

In a similar vein, NGOs have also filed formal complaints to regulatory agencies on behalf of the interests of indigenous communities. For example, the Mineral Policy Institute and the Australian Conservation Foundation filed an official complaint to the Australian Securities Commission against the world’s largest mining corporation, Rio Tinto, alleging that the company management misled shareholders over environmental and human rights impacts at its Freeport mine.

Indigenous NGOs

Some indigenous peoples have formed their own NGOs. Most are localized, focusing on issues specific to their ethnic groups. Others are national and regional. Only handfuls are global and pan-tribal. At the local level, these organizations may not necessarily be formally incorporated. Rather, they may be informal drawing upon part-time, unpaid volunteers working to build the capacity of their peoples. When mining occurs within their spheres of interest, these non-militant indigenous ‘NGOs’ spring into action, using their special abilities to mobilize and advocate for indigenous peoples. Increasingly, non-indigenous global NGOs have found it useful to form alliances or encourage the development of localized indigenous NGOs. International NGOs such as Cultural Survival Inc. have supported the formation of indigenous NGOs for over 30 years, as has a small department inside the World Bank. At least one government has tried to offer resources to such groups in the hope of developing indigenous development plans (Cultural Survival Quarterly winter 2000, www.bloorstreet.com/300block/aborintl.htm#3, and lanic.utexas.edu/la/region/indigenous).

2.2.3 Indigenous Peoples’ Strategies and Tactics

From the preceding review, it is evident that indigenous peoples have limited strategic and tactical options. Laws are ill-defined and often skewed against them. They lack resources to carry out a prolonged legal battle. And they face a tangled national bureaucratic maze where their voices of appeals are seldom, if ever heard.

Facing this situation, indigenous peoples may find their only options are to either resistance or acquiescence. Both options we call Plan A (Downing and Garcia-Downing 2001). Known resistance strategies and tactics include – violence, civil disobedience, appeals to NGOs, religious groups or to any other organization that will listen. Resistance strategies may attract sympathetic support from outside groups whose primary interest may not be the cultural survival of the affected peoples. To win a battle in what, for them, is a much larger war, advocates are likely to understate or overstate the mining project's potential impacts. On the other hand, acquiescence means acceptance of any arrangement the mining companies and/or governments may bring to the table.

A people's chances for cultural survival increase when they develop their own Plan B to deal with a proposed project. A good Plan B answers the all-important question, 'if this particular project is approved, rejected, or modified, what will happen to my people?'

An indigenous Plan B may be developed concurrently with Plan A. A good Plan B should have at least eight components (Downing and Garcia-Downing 2001):

1. examination and explanation of the project's economic and legal aspects to the community in a way they will understand;
2. full assessment of the project's risks and mitigation actions, including, threats to sustainable livelihood, employment loss, disruption of productive systems, environmental and health risks and socio-cultural disarticulation;
3. budgeting and organization of actions to mitigate each risk;
4. determination, by the people, of how the project fits within their cultural vision;
5. arrangements of institutional and financial steps that assure the project's benefits are opportunely and transparently allocated to the indigenous peoples;
6. equitable distribution of benefits and costs through a common community-defined process;
7. development of new alternative resources to provide a sustainable livelihood to replace those lost;
8. preparation of strategies for negotiating with the project promoters, financiers, government, and other key stakeholders, with negotiations focused on benefit-sharing arrangements over and above risk mitigation; and
9. formalization of negotiated arrangements with legally binding instruments.

These nine elements empower indigenous people in an encounter.

Indigenous Plan Bs have proved successful (Hermission 1999, Castaneda 1992, Moles 2001). The Tahltan of British Columbia in western Canada issued a declaration of their sovereign rights to their land, including a section to be retained for their exclusive use in perpetuity. The Tahltan not only were determined to maintain control of their land, but also took control of the mining company equipment when formal agreements were not opportunely ratified. They affirmed that all questions concerning their lands and resources would be settled by treaty with the province and federal governments (Natural Resources Canada 1990). The Tribal Council also issued a resource development policy statement, with protection of the natural environment as the first requirement for development. The Tahltan National Development Corporation (TNDC) was formed as an umbrella organization to promote large-scale business ventures serving the mining operation and taking advantage of other opportunities. The Tahltan Training Centre was established and continues to train students in new skills needed by regional employers.

Working under their Plan B, a cooperative mining company is working with the Tahltan – Golden Bear Project (Chevron Minerals Limited and North American Metals (B.C.)) – and support from the Canadian government significantly increased. At the end of the 1990 fiscal year, the TNDC employed 82 people (90% were Tahltan) and paid approximately CDN\$2.1 million in wages.

The cost of a Plan B is small compared with an industry's preparation costs for a project. The duration of the planning, however, may be longer. The capacity of tribal groups to prepare a participatory Plan B varies. Some have only a handful of tribal members with secondary school education. Other groups have the capacity to prepare a Plan B with minimal external technical assistance (Castaneda 1992). Most lack legal representation. Non-indigenous project promoters demonstrate confidence in the virtues of their proposed endeavour and good will towards the indigenous community when they are willing to underwrite the costs of Plan B.

Alternatively, organizations active in Plan A should be willing to stand behind their commitment to indigenous peoples and pay some of the costs associated with Plan B. Non-indigenous NGO stakeholders may demonstrate their support for the community by their willingness to donate time and technical assistance.

The costs of preparing Plan B should be provided without obligating indigenous peoples. To trade underwriting the costs of preparing Plan B for access to land or promised eternal resistance is a ruse, comparable to paying for a doctor with one's life.

As with any other project component, accelerating the schedule for preparation of Plan B dramatically accelerates its costs. Mining promoters' access to capital is opportunistic, often making project timelines brutally short. Consequently, people may be pushed to make decisions within a timeframe too brief for consensual agreements. Pressures to speed up the process should be folded back on the promoters.

A good Plan B is a plan for cultural survival through empowerment, not a plan for surrender. A viable Plan B may be more important than a good Plan A. A willingness to prepare a Plan B indicates confidence and a desire to move beyond unequivocal support of or resistance to a project. A well-executed Plan B will alter project financing, making clear the differences between payment for damages, risk mitigation, and benefit-sharing arrangements. It may not end factionalism, but it focuses discussions away from exhausting arguments and onto very specific topics.

Plan B builds respect by redefining the project owners' and financiers' relationships with the indigenous peoples. The act of taking control – producing and ultimately implementing their Plan B – is a significant step towards self-determination. And, most important, by laying out a project's full social and economic dimensions, a good Plan B influences whether or not Plan A ever takes place.

Trends and countertrends

2.3

A strategy for dealing with indigenous peoples ranks low on the priorities of non-indigenous stakeholders. It is not illegal in most places for mining to harm indigenous peoples. Non-indigenous stakeholders are not obliged to take any proactive steps to help indigenous peoples. And apart from harm that might come to securing financing from certain lenders or protecting company reputation and image, the business case for doing the right thing seems thin. It will come as no surprise, therefore, that few stakeholders, including indigenous peoples themselves, have well-articulated strategies to reduce the known threats that mining poses to the sustainability of indigenous peoples.

Mining companies trudge through different, but not uncharted, territories and legal frameworks. The rules of the game change from place to place – even within the same country. There are no industry-wide social standards and faint concern for risk assessment, social development, or indigenous cultures. International legal frameworks are routinely ignored. NGO and development bank policy are treated more like guidelines than legally binding agreements, reducing their effectiveness to

regulate an encounter. Tactical rather than strategic thinking dominates. As encounters mature, strategies and tactics shift, especially in cases of prolonged conflicts. These shifts seem to correspond to the revelation of undisclosed risks as the project matures (Cook 2001).

Our review also reveals that indigenous peoples are not treated as legitimate 'stakeholders' in an encounter, in the full and participatory meaning of the word. In places where indigenous peoples have gained stronger legal rights, and particularly where their ownership rights over minerals are recognized, such as in Australia, Canada, and the United States, more progress is being made.

In developing countries, it is a different story. Indigenous peoples are almost never afforded the right to timely, prior informed consent. Non-indigenous stakeholders cut deals and make arrangements for the use of indigenous peoples' lands without their participation or knowledge. Indigenous peoples become stakeholders when they have the right of prior informed consent (PIC). The issue is not simply whether or not indigenous communities have the power of veto over development, but whether they have a voice and vote in determining the use of their resources and destiny as peoples (Downing and Moles 2001). PIC is technically challenging but possible – since technical concepts must be presented to an often non-technical culture. PIC does not, in and of itself, give people the power to consider options for their destiny because many indigenous groups have no experience in evaluating such material. If planning is done, it is externalized and done for, not by, the peoples (Whiteman and Mamem 2001). Such a situation limits communities to being informed, empowered, and giving or not giving their consent. Such an outcome hardly leads to commitment or ownership of a plan. For many, the lack of PIC or top-down PIC without active participation of the people echoes the recurrent theme – loss of sovereignty. A negative feedback loop can begin in which the lack of capacity or PIC of the group leads to a mistaken rejection of a viable alternative.

At this point, our review shows that stakeholders are experimenting with a variety of organizational and financial arrangements. Traditional alliances between government and the mining industry continue to dominate encounters, fortified by antiquated doctrines of compensation and eminent domain. New rearrangements are appearing, some favourable, others not. These trends include:

- Global initiatives to encourage free trade are resulting in a rewriting of mining laws – sometimes to the detriment of indigenous rights (e.g., in the Philippines). In contrast, an IDB has an initiative to bring indigenous peoples into the redrafting process and clarify their rights within mining codes.

- The traditional role of government is changing, whereby it facilitates indigenous, industry, and sometimes NGO partnerships. For example, beginning in 2001–02 the Australian government provided about A\$1 million over a four-year period in grants to promote mutually beneficial partnerships between the mining industry and Aboriginal communities for training, employment, and business opportunities.
- Non-governmental coalitions and alliances also are increasing their outreach and advocacy. Such is the case in the Africa-Canada Partnership, an NGO alliance that focuses on human rights abuses in African mines (see www.partnershipafricacanada.org).
- Financiers and risk insurance underwriters are expanding their alliances with the private sector. They are stepping beyond the banker/borrower relationship and they are assuming an active, minority equity position on mining investments (see www.ifc.org for a listing of the International Finance Corporation holdings).

In contrast, attempts to form indigenous coalitions beyond the local level face serious linguistic, cultural, and financial obstacles. Occasional conferences, such as the two workshops organized by the Mining, Minerals and Sustainable Development Project and the Mining Watch Canada and Canadian Consortium for International Social Development workshop, revealed the commonalities in encounters (Rogers 2000). None of these forums claim to be representative. Nor is there any financial support to assure their sustainability. The problem of how to conduct global indigenous consultations haunts sectors apart from mining, as well (Posey 1999).

As alliances grow, so does the potential for conflicts of interests between stakeholders. There are many of these. One obvious conflict is between a government's fiduciary responsibilities to local indigenous peoples and its desires for revenues as a business partner. In the Cordillera Blanca range of the Andes, local people argue that the Peruvian government has not addressed their concerns over water because it is part owner of the Antamina mine. A comparable problem emerges in Papua New Guinea (PNG), where the government owns 30% of the Ok Tedi OTML. PNG's apparent resolution was to reserve 2.5% of its share for local landowners and another 12.5% on behalf of the people of the Western Province, and to retain the rest for itself. In 2001, the PNG passed legislation giving BHP immunity from future liabilities for the environmental damages of its Ok Tedi mine, with BHP moving a 52% share of the mine into a development trust fund (Multinational Monitor 2002).

2.4 Precautionary Principle for Mining Near Indigenous Lands

At this point, avoidance of indigenous questions increases the risk of human rights complaints or costly downstream litigation. A few decades ago, it might have been fair to argue that increased awareness of the issues might lead to more sustainable encounters between indigenous peoples and mining, but not now. Indigenous peoples are now aware of the risks to sustainability posed by mines developed near or on their lands. And thanks to increased literacy, high-speed communication, and active NGOs, even remote indigenous groups are becoming aware of the risks. Company claims that a few unskilled jobs or training will offset these risks is being challenged.

Indigenous peoples and the international community have placed empowerment high on the agenda. In this emerging arena, empowerment is understood to mean that the indigenous people gain the capacity and ability to control the impact of a mining project on their culture and livelihood. This empowerment stands over and above compensation for mining related damages. Empowerment is not training people for non-existing employment. It is not gift-giving. It is not an agreement for the company to assume the costs of government welfare. And it is not outside reformers promoting what they feel are alternative lifestyles for indigenous peoples.

Empowerment begins with tolerance and compassion. And from the perspective of sustainable development, empowerment means that indigenous peoples do not diminish but rather improve their livelihoods and enhance their cultures. The probability of an empowered, sustainable outcome increases as each of 15 elements is brought into an encounter:

1. Sovereignty is respected and strengthened.
2. The rights and access to indigenous land and nature are secured.
3. At the beginning, both indigenous and non-indigenous stakeholders' presuppositions about one another are aligned with fact.
4. The desired outcomes of the encounter for indigenous peoples emerge from meaningful, prior informed consent and participation.
5. Non-indigenous stakeholders fully and opportunely disclose to the indigenous group their plans, agreements, and financial arrangements related to the group in their language and in a culturally appropriate manner.

6. The non-indigenous stakeholders identify and disclose all the risks of a proposed mining endeavour. Full risk assessment means identification of not only of the threats posed by the loss of land but also the full range of anticipated social, economic, and environmental impacts.
7. Prompt unambiguous institutional and financial arrangements are made to mitigate each risk.
8. Benefit-sharing arrangements are made that step beyond compensation for damages.
9. Indigenous peoples, as an informed group, have the right to approve, reject, or modify decisions affecting their livelihoods, resources, and cultural futures.
10. Should restoration of a disturbed habitat prove impossible, the non-indigenous stakeholders should make provisions for an improved habitat that supports a lifestyle acceptable to the affected indigenous peoples.
11. Basic human and civil rights are protected, as specified in international conventions.
12. The focus of the encounter is on protecting indigenous wealth, especially social relations that guide the sustainable use of their natural resources.
13. Financial and institutional arrangements are forged that bridge the discrepancy between the multigenerational time frame of indigenous peoples and the short time frame of a mining project.
14. A guarantor is established to assure compliance with and funding of any negotiated and mutually satisfactory agreements.
15. Indigenous people should not subsidize mining.

The more elements incorporated in the encounter, the greater the chances for a sustainable outcome. The vision of President K.R. Narayanan of India is a wise guide for future encounters:

Let it not be said of India that this great Republic in a hurry to develop itself is devastating the green mother earth and uprooting our tribal populations. We can show the world that there is room for everybody to live in this country of tolerance and compassion.

Address to India on Republic Day, January 25, 2001

Given the uncertainties of an encounter, the prudent approach is not only to identify, avoid, and mitigate risks but also to focus on benefits over and above

compensation and rehabilitation for damages. Unquestionably, the prudent approach demands long-term commitments, innovative solutions, financial and institutional guarantees, and the use of professionals experienced in the issues of social development and indigenous peoples. It also requires continual monitoring by technically competent, independent observers of these indicators, providing all stakeholders with opportunities to take corrective actions.

In light of the history of encounters between stakeholders in this field, it would make sense to extend the environmental precautionary principle approved at the Earth Summit in Rio to the impact of mining on indigenous peoples. Thus a Precautionary Principle for Mining in or near Indigenous Peoples would read:

Non-indigenous stakeholders in mining shall use the precautionary approach to protect the indigenous peoples and the environment that supports them. Mining cannot take place without their prior informed consent and participation in their self-defined indigenous development. Where there are threats of serious or irreversible damage, scientific and economic uncertainty shall not be used as a reason to postpone cost-effective measures to avoid and mitigate risks to indigenous livelihoods and cultures.

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