MMSD

Mining, Minerals and Sustainable Development

Report of The Workshop on Indigenous Peoples and Mining, Minerals and Sustainable Development

Perth, 4–6 February 2002
MMSD

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1. Introduction

A meeting on *Indigenous Peoples Issues in the Mining and Minerals Sector* attended by government and industry stakeholders was held at the Hyatt Regency Hotel in Perth, Australia 4–6 February 2002. Hosted by the Mining, Minerals and Sustainable Development (MMSD) Project, and AMEEF (MMSD's Australian partner) the meeting followed an earlier preparatory event in Quito, Ecuador on *Indigenous Peoples and Relationships with the Mining Sector* convened by MMSD, the Mining Policy Research Initiative (MPRI/IDRC) and Ambiente Sociedad. Together these meetings provided a forum for indigenous participants to discuss, identify and suggest courses for action that would move the sector forward on the sensitive issues surrounding its relationship with indigenous peoples. Key areas of discussion focused on indigenous peoples' rights in relation to minerals exploration and mining on indigenous lands; on the need to develop industry and communities' capacity for engagement; and the development of lasting positive relations between mining companies and indigenous communities.

Approximately 70 experts attended the Australian Workshop, from mining companies, governments, non-governmental organisations, indigenous peoples organisations and the academic world. Participants attending MMSD workshops are not regarded as representing any group (unless specifically mandated to do so), but instead invited to attend as individuals to speak to a wide range of experiences and knowledge on these issues. Attendees came from Australia, Canada, Chile, Ecuador, Indonesia, Kyrgyzstan, Panama, Papua New Guinea, Peru, the Philippines, Switzerland and Zambia.

The keynote speech was presented by Mick Dodson. Subsequent presentations focused on: (a) building indigenous people's rights, (b) building and strengthening the capacity of industry, government and communities to interact with one another and, (c) building positive and lasting partnerships between, within and among indigenous peoples, governments and mining companies. The workshop was organized around panels, plenary and small group discussions. A session reserved for indigenous participants took place on 6 February.

1.1 Objectives

The rationale for discussion was structured around three main themes that indigenous peoples had identified at the Quito Workshop as essential to understanding and strengthening their relationship with the mining sector. The aim of this meeting was to address the issues surrounding 1) indigenous peoples' rights, 2) capacity development and 3) ways of building their relationship with the mining sector.

Specific objectives of the meeting were to:

- Address key indigenous concerns and perspectives;

- Review current industry practice; and

- Identify practical steps to ensure resource development respects the rights of host communities and enables the equitable distribution of impacts and benefits

Some of the key questions raised aimed to consider:

- Whether the mineral sector's commitment to improving environmental and social performance has created a situation more considerate of indigenous peoples circumstances?

- What indigenous rights are in relation to minerals exploration and development?

- How effective international conventions and charters are in securing the rights of indigenous peoples in the context of mining and minerals development?

- How indigenous communities can secure their rights in relation to minerals resource development?

- What principles and practices can serve to create more equitable consideration of indigenous communities by industry, government and other stakeholders?

- What can be done to ensure such principles and practices provide sustainable positive outcomes for indigenous peoples in the area of prospective and operating mining projects?

- How can industry, government and communities develop the practical tools and strategies required to achieve desired outcomes?

- How to ensure more equitable outcomes in minerals sector-indigenous community engagement and consultation processes?

- What opportunities exist to develop international networks and partnerships to promote the rights and interests of indigenous peoples in relation to minerals development?

2. Indigenous Peoples and the Mining and Minerals Sector

Understanding sustainable development from an indigenous peoples perspective, raises a number of important considerations. Specifically, the need to look beyond the parameters it immediately sets to a development process which assumes people in all societies should aspire to a path of development best served by Western capitalism. Under this model, Western science and technology are believed to be the most essential means for protecting the environment, as well as the catalyst for a more productive economy that will help to alleviate poverty. However, this position assumes that indigenous peoples, their cultures, traditions and customs are static and unchanging, and an obstacle to development that has to be overcome. In policy terms, this has led to the denial and marginalisation of indigenous rights and the systemic discrimination of indigenous peoples by governments faced with the choice of trading off human rights in favour of economic development.

Such tension can develop into conflict and even human rights abuses. Mines often represent the site of these struggles. On the one hand mining development can be seen to open up spaces for new ways of thinking about culture, identity and intercultural relationships. On the other, it can also be the site of contesting traditions where encounters between different groups can be conflictive and result in a hardening of opposition. This can be seen in cases where protesters have either been imprisoned or even shot, and allegations of complicity between mining companies and governments in committing human rights abuses[1]. While some companies have policies on respecting indigenous peoples' rights, in the absence of industry-wide standards or effective enforcement, these are often disregarded at individual mine sites. Furthermore, government policies vary considerably from country to country, and are often poorly implemented on the ground. Not surprising therefore, that mining companies are often regarded with hostility and mistrust by indigenous communities, who have traditionally seen them as barriers to their own development.

For indigenous peoples, sustainable development is about advancing new forms of understanding and cooperation between stakeholders to decide what benefits can be achieved together. It means thinking beyond barriers and obstacles and developing new approaches to ensure the equitable distribution of impacts and benefits of mineral development on indigenous lands. The notion of balancing social, economic and environmental considerations is a perspective that is intrinsic to indigenous peoples' worldview, and the ideal of meeting the needs of the present without compromising the needs of future generations is one that is embedded in their customs and traditions. Sustainable development therefore, should be seen in terms of advancing new forms of cooperation underpinned by the basic right of all citizens to be treated equally. For mining, this means a respect for indigenous rights over land and resource use, recognition of the principle of prior and informed consent, and developing relationships that are built on trust, respect and understanding for the rights and freedoms of others.

As First Nations, with a special relationship to the land and its resources and a traditional respect for future generations, indigenous peoples have a pivotal role to play in the process towards sustainable development. It is therefore essential that the relationship between the mining sector and indigenous peoples is a sustainable one. Indeed, some of the answers may be found in the unique and special place that indigenous peoples occupy as First Peoples.

The importance of building a more cooperative relationship between different stakeholder groups – and the negative long-term consequences of continued mistrust – is becoming increasingly apparent. Particularly given that mining has the potential to either promote or threaten indigenous lifestyles and livelihoods, depending on how relations between mining operations and indigenous peoples are managed,

At best mining may:

- Provide opportunities for the realisation of community goals;

- Alleviate poverty and provide social infrastructure and desired or essential community services;

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[1] See MMSD Human Rights Workshop Report, September 2001

- Provide employment and training opportunities;

- Affirm the sovereign status of a cultural group through negotiated agreements.

At worst mining may:

- Expose the community to project hazards - e.g. accidents, drinking and associated violence, local price inflation;

- Expose the community to impoverishment risks - e.g. resettlement;

- Undercut sovereign claims;

- Damage the local environment;

- Desecrate sacred sites;

- Undermine human rights;

- Disrupt social and cultural reproduction by placing excessive demands on the capacity of the local people and their traditional leaders to participate in negotiations with mining companies; disruption of educational activities, traditional and formal; exacerbation of factionalism; and/or disruption of leadership structure and/or improper legitimisation of individuals as authorities.

If mining leads to social dislocation, resettlement or displacement, then impoverishment risks are exceedingly high. Past experience demonstrates that few cultural groups have survived forced relocation and is why the World Bank now has specific policies for addressing this issue. Further, in spite of short-term windfalls and increases in income, if, in the end, mining takes more than it gives back to a community, then indigenous peoples are seen to have effectively subsidised a project.

2.1   Benefits to the Mining Industry

For the mining industry, there are numerous benefits to be gained from developing a more equitable and constructive relationship with indigenous peoples.

- Firstly, setting standards in negotiations and dealings with indigenous communities would lead to greater certainty and predictability amongst all parties, and greater speed for the mining company in reaching conclusions. It would also lead to greater trust, understanding and accountability, and enable both parties to manage expectations and decide what is, and what is not, open to discussion.

- Indigenous people have a great deal of expertise to offer to mining companies on the ground, through their knowledge of the local environment, and its flora and fauna.

- Mining companies have become increasingly aware of the reputational risk critical to enhanced shareholder value and the long-term survival of their business. This can suffer through circumventing human rights and the inequitable treatment of indigenous peoples, which they can ill afford in an economic environment characterised by increasing competition.

2.2   Recognition and Respect

The need to raise standards in relation to the recognition and respect of indigenous peoples was a theme that was underscored throughout the workshop. This, it was felt, would be best achieved through international law, rather than national law, as policies vary from state to state. Indigenous peoples themselves are seeking new opportunities for community revitalisation, and want to occupy a central role in the development process. This requires capacity building initiatives to enable them to communicate more effectively, and will mean overcoming a great deal of historical baggage.

In order to build effective relationships with indigenous peoples, developers (and governments) need to deepen their understanding and appreciation of indigenous culture, and to actively seek ways of achieving an equitable distribution of impacts and benefits. They will need to alter their ways of thinking, and learn to assess the impacts of mining from the point of view of indigenous peoples, to understand the need to protect sacred sites within areas of operations and to consider training, employment and business opportunities through to post-closure of mining operations. There is a need to build trust on all sides in order to enable all parties to interact more effectively. If indigenous peoples are treated fairly and involved from the outset, they may provide solutions to many of the perceived problems.

2.3   Resources

In order for this to happen, developers will need to be prepared to provide resources for this process of trust building and negotiation, and to provide access to information concerning development proposals.

2.4   Empowerment

The chance of an empowered, sustainable outcome increases if:

- The desired outcomes of the encounter for indigenous peoples emerge from meaningful participation and communication;

- Non-indigenous stakeholders fully and opportunely disclose to indigenous groups their plans, agreements and financial arrangements in a culturally appropriate manner;

- Indigenous peoples are informed participants with the right to define their own terms of engagement and to approve, reflect or modify decisions affecting their livelihoods, resources and culture;

- Presuppositions of both indigenous and no-indigenous stakeholders about one-another are aligned with fact;

- Sovereignty of the group is respected and strengthened;

- Rights and access to indigenous land and nature are secured;

- The non-indigenous stakeholders identify and disclose all the risks of a proposed mining endeavour. There needs to be full risk assessment, not only of the threats posed by the loss of land, but also the full range of social, economic and environmental impacts;

- The focus is on protecting sustainable social relationships, especially when new technologies are proposed;

- Prompt, unambiguous institutional and financial arrangements are put in place to mitigate each risk;

- Provisioning of benefit-sharing arrangements that step beyond compensation for damages;

- Financial and institutional arrangements to bridge the discrepancy between the multigenerational timeframe of indigenous peoples and the short-term timeframe of mining;

- There is a guarantor to assure compliance with and funding of any agreements.

2 Building Rights

Margaret Donaldson's presentation began with the assertion that it is not possible to talk about sustainable development and its capacity to transform the relationship between indigenous peoples and the mining sector without reference to human rights. Human rights constitutes the ethical basis of the social contract between those who exercise power and accrue wealth and those whose lives are affected by this exercise and accrual. Sustainable development for mining means creating sustainable relationships based on free informed consent. Relationships that are built on this basis necessarily invoke the human rights principles of equality; respect and maintenance of culture; effective participation; and self-determination.

2.1 Equality

If discrimination was simply the result of differential treatment on the basis of race, then legislation could be introduced to mitigate this form of inequality. The law would be applied equally for each individual, without recognising the particular impacts it would have for different ethnic groups. If, however, equality is about ensuring that racial groups have equal enjoyment and access to the benefits of society, and participate equally in determining its future, then differential treatment may not necessarily imply discrimination and may even be required to achieve equality. If there is a basis for dealing differently with different groups in order that their rights might be fully realised, this must be stated openly.

Of particular relevance to the relationship between mining companies and indigenous peoples, is legislation that aims to protect and maintain the distinct cultural identity of indigenous peoples. This calls for a recognition of indigenous peoples right to own, develop and use their resources, and where this has been deprived, to take steps to return their territories. The requirement to maintain and protect indigenous culture is derived from a notion of equality that requires society to pay equal respect to the cultures that live within it. The rights to use one's language and to live on one's traditional lands falls under this category.

2.2 Cultural Rights

There has been significant resistance from indigenous groups in Australia to their rights being equated with the rights of cultural minorities within a particular State. As the First Peoples of a territory, with a specific history and relationship to that territory including one of forced colonisation, they believe they have pre-existing rights. Native Title for example, is a measure born out of the customs and traditions of aboriginal people and has been adopted by the Australian government to overcome an historical legacy of discrimination. Such rights are seen as distinct in the context of the cultural, social economic and political protection they afford. While minority group rights may include indigenous peoples, indigenous peoples have rights in addition to those appropriate for minorities.

2.3 Effective Participation

The right to effective participation requires equal participation in public life. Indigenous peoples must participate in this process and be able to determine its progress.

2.4 The Right to Self-determination

The right of all peoples to self-determination is enshrined in international law under Article 1 of the International Covenant on Civil and Political Rights (ICCPR), Article 1 of the Covenant on Economic, Social and Cultural Rights (ICESCR), and has been developed in the General Comments of the Human Rights Committee.

The right to self-determination is a critical and controversial issue, though seen as necessary by indigenous peoples in the face of government's consistent failure to deliver justice. The political retrenchment of the Australian government to contain Native Title illustrates this point, where Aboriginal native title claims are contested through Western laws and institutions that impose strict conditionalities on how far back in time land title claims can reach.

The denial on the part of the Australian Government to recognise that indigenous peoples in Australia are a people, despite statements to the contrary by the Human Rights Committee, also highlights the discrimination faced by indigenous peoples by their governments. It is important that the notion of sustainable development should not be constrained by, or contained within, a legislative framework that falls short of fully protecting indigenous peoples' rights. It also raises the question of whether indigenous peoples whose rights are not protected by their governments should be able to seek international assistance in their quest for self-determination and what are the implications of this?

The problems of implementation and lack of enforcement mechanisms were discussed, and it was agreed that more pressure needs to be put on governments to adhere to best practice. However, this pressure needs to come from all sides, not just indigenous peoples. The point was also made that rights written for indigenous peoples cannot be actualised until indigenous peoples actually claim their rights.

From the breakout group sessions, it was agreed that recognition of human rights would improve relationships between the mining sector and indigenous peoples in the following ways (see Appendix II):

- It would strengthen the power base of indigenous peoples, enabling them to interact with governments and companies on a more equal footing;

- It would provide a basis for standards to be set in negotiations, leading to greater predictability among all parties, and greater speed in reaching decisions;

- It would lead to greater trust, understanding and accountability, enabling all sides to manage expectations and decide what is and what is not open to discussion.

- It would enhance the competitiveness and reputation of companies trying to do the right thing. Would also avoid lawsuits arising out of poor practice.

Recognition of indigenous rights would enable indigenous peoples to be treated as legitimate stakeholders and provide for the unique consideration of indigenous peoples. Because government rights and responsibilities differ from country to country, and in some cases are often negotiated on behalf of indigenous peoples, recognition of indigenous rights were regarded as essential in valuing difference. As one participant explained: 'human rights provides a right to eat the cabbage, indigenous rights provides a right to own the farm'.

3. Building Capacities

The workshop discussed the capacity needs of companies, government and communities and provided examples of capacity building initiatives in order to think of new ways of how to facilitate equitable stakeholder engagement. These ideas were discussed more fully in the breakout groups (see Appendix II). Capacity building is a contested term, and in this context has been used to describe a process.

3.1 Communities

A case study of the Tahltan Indian people emphasised the importance of claiming rights as the basis for building indigenous peoples capacity. They recognised that asserting their land rights would avoid any future conflicts or disputes over land. The 1910 Declaration of the Tahltan Tribe ensured that the Tahltans were treated as active partners in the dialogue process and not passive recipients of change by stating their desire to participate in any decisions related to their land or well-being. The borders of Tahltan tribal territory, which covers approximately 93,000 square miles, were outlined in the Declaration.

The Tahltans have a successful tradition of commercial enterprise. They understood that rights carry certain obligations, and by defining the terms of engagement with other stakeholders, were able to ensure they received equitable benefits from resource development undertaken in their territory. The Tahltan Tribal Council Resource Development Policy Statement (1987) makes it clear that Tahltan people are not inherently opposed to any kind of resource development, but are committed to participating in any activities that take place within their borders. Furthermore, as a necessary requirement for business development to function successfully in Tahltan territory, developers have to enter

into a project participation agreement with the Tahltan Tribal Council and provide assurances that the following principles will be adhered to:

- development will not pose a threat or cause environmental damage;

- Tahltan aboriginal right claims will not be compromised;

- the project will provide more positive than negative social impacts;

- there will be provision for Tahltans to participate equitably in the project;

- widest possible employment, training and education opportunities for Tahltan people during all phases of development to be provided;

- widest possible development of Tahltan business opportunities over which the developer may have control or influence to be provided;

- development provision to assist the Tahltans with accomplishing the above objectives by providing financial and managerial assistance and advice where deemed necessary

While recognising that developers are mainly interested in conducting business and may not want to engage in native politics, the Tahltans believe that this approach has provided the framework that has enabled them to benefit from a self-sustaining and thriving economy. It also demonstrates the importance of conceiving a development strategy based on the aspirations and needs of indigenous peoples, to achieve and realise community goals.

While the Tahltans worked on the premise that they owned the land, this may not always be consistent with legal frameworks that are in place. An essential component to capacity building is for indigenous peoples to understand the legalities of land ownership before entering into negotiations. The complexities of land ownership and rights are clearly illustrated in the example of PNG, where land ownership lies almost entirely in the hands of the indigenous population. However, legal entitlement to minerals, oil and gas resources falls under state control, and decisions are often made that do not involve indigenous peoples. Clearly, indigenous peoples need to be better informed about their legal rights and entitlements, but low levels of education often prevents this from happening. This is a key consideration when looking at how to manage community expectations and deal with compensation claims, and may be an area where NGOs have a vital role to play.

Mining companies need to share the responsibility of ensuring that local people are informed participants, and that they are frank and honest in their dealings with local communities. Adhering to the standards they practice in their own countries would help to strengthen this process. Governments should undertake to uphold and protect indigenous rights in law, as well as creating a policy environment that is conducive to political representation free from discrimination. Indigenous peoples must be able to participate and derive an equal share of the benefits generated by mineral development.

Building links between community members integrated into a western lifestyle through seeking employment or further education was suggested as another useful way for building capacity. This would provide the means to support and strengthen indigenous development locally, as well as encourage alternatives and assist in communicating an understanding of both traditional and modern ways of life. Building international alliances with other indigenous communities was regarded as another effective strategy.

3.2   Companies

A case study by Helen MacDonald illustrated what one company, Normandy, is doing to build internal capacity to enable personnel to engage more effectively with indigenous communities. Normandy's Five Star system was set up four years ago by the Environment Department and adapted to assess how community relations, environmental protection and health and safety are managed in each of its operations. For each of these areas, an external auditor is used, and audits take place over 4 days. This information is publicly reported, and underlines Normandy's commitment to improving its performance on these issues.

The Environment Code is the benchmark that is used to measure Normandy's performance in this area. However, given that there are no equivalent international standards for meeting social targets, Normandy have based their community star assessments on ISO14001. In the future, they also hope to incorporate a standard for human rights. Stars are awarded for community involvement in policy, planning, implementation and operational phases, monitoring, collective action and review. Every 3 years the performance bar is lifted in terms of what is considered acceptable practice for communities.

Performance is assessed in the following areas, of particular relevance to indigenous peoples and communities in general. These are designed to apply internationally, not solely in relation to Australia:

- The management of culturally significant and religious sites;

- The management of heritage sites;

- Permitting (this might be removed if not seen as useful);

- Community relations protocol;

- Community interaction;

- Local community support;

- Indigenous employment and business development;

- Media relations;

- Brand management;

- Staff behaviour;

- Contractor behaviour;

- Government relations.

Transparency is an essential part of this process. Normandy relies on external auditors to monitor its performance and encourages the participation of community members to assess whether community needs are being met. Auditors are expected to meet with the community to ensure the criteria they have identified is an accurate reflection of local concerns, and all Reports are published on the Internet.

Normandy has undertaken to raise its minimum performance standards every 3 years; to introduce focus group consultations so that the community can identify priority issues; and to build International Cyanide Code requirements into its health and safety evaluation with an added community component. The whole system is designed to be flexible and responsive to change, and driven towards improvement by building capacity at the organisational level.

While Normandy is one of very few examples of a systematic attempt to monitor a company's community relations, the mining industry is increasingly aware of the need for consistency in relationships with different stakeholders, based on an understanding of their different needs and rights, and on their plans, strategies and decision-making processes. Throughout the workshop, the need to develop a much better understanding of the values, priorities and ways of working of indigenous peoples was underlined. There were also calls for the industry to develop an International Corporate Code for Information Delivery to target specific information needs for different communities, and to ensure a wider spectrum of community involvement, not just community leaders.

3.3 Government

The need for consistency over time, and within and across agencies was identified as a key area for government. In particular, it was felt there needed to be a much better coordination of government programmes to avoid duplication and gaps. Governments could also use their convening power to build linkages between all three actors: the government, communities and the mining industry, and also to facilitate dialogue between communities.

There also needs to be a greater willingness and capacity within government to work with indigenous social and political structures, and to be creative in finding a way forward for dealing with indigenous issues. In some cases, such as Australia, the government's own legislation can prevent this from happening. Setting minimum standards in terms of human rights objectives, based on a better understanding of the aspirations of indigenous peoples was suggested as one practical measure that could be taken.

Participants also called for better use of the fiscal measures to drive and offset costs of good practice in community relations.

In many cases, governments need to build capacity both internally and externally, to deliver better services and provide the necessary infrastructure that will enable indigenous peoples participate in the negotiation process on an equal basis. In Zambia for example, where the mining industry has transferred from private to state-owned to private ownership, exploration has taken place in tribal areas characterised by low literacy rates. With few opportunities to participate in decision-making processes, it is essential that education, employment and training opportunities are created to enable communities develop the capacity to deal with and understand the social and environmental impacts of mining. In the absence of institutional structures to facilitate community engagement with outsiders, it is important to involve people who are experts in social impact assessments in order to begin to understand the capacity needs and priorities of communities. In the case of Zambia, establishing networks with organisations in other countries to find out what rules apply elsewhere, and which of these may be applicable to the Zambian context would be valuable.

4.   Building Relationships

While aware of the legal requirements relating to human rights, the mining industry is now looking for ways to move beyond current legal frameworks. The need to identify best practice in relation to agreements between mining companies and indigenous peoples was one of the projects commissioned by MMSD Australia.

The report on 'Agreements between Mining Companies and Indigenous Communities' (available to download from the AMEEF website) provides a snapshot of an area of complexity and a starting point for some of the issues raised. The methodology involved a literature search, stakeholder input, and an analysis of agreements derived from a small number of case studies involving mining companies and indigenous peoples. So far 140 agreements have been recorded, each stating the parties involved, the geographical area, key characteristics, compensation agreements, and the timeframe for reaching an agreement. One of the main recommendations to come out of this study, was for the database holding this information to be developed and held by a native tribunal.

The Report aims to consider what the elements of current best practice are, and what practical steps can be taken to facilitate the negotiation and implementation of agreements that respect the rights of indigenous peoples, and how to promote the equitable distribution of benefits between the industry and indigenous communities. The form of agreement and the way these were implemented was seen to vary according to a range of factors, including the scale, scope and value of the project. In order to arrive at an understanding of what constitutes best practice, the report identified three key elements: process, content and implementation of agreements. Attention to detail of each of these is critical to ensuring that the agreement works in practice.

In terms of process, key to a successful agreement is the relationship between the parties. Where there is a climate of suspicion, it may be necessary to commit to a new relationship, which requires both parties to recognise and accept the rights embodied in national and international legislation. Here, the advice and assistance of Native Title Representative Boards (NTRBs) could prove instrumental in arriving at mutually beneficial solutions, because of their detailed knowledge of indigenous communities. The representation of NTRBs however, varies greatly from region to region, because of problems with funding and a lack of resources. In their findings, it also emerged that a lot of companies expressed dissatisfaction in dealing with NTRBs, though the report concludes that it is better to work cooperatively with NTRBs than to bypass these bodies.

Negotiations are aimed at finding common ground to create win-win solutions. For mining companies, this signals a departure from existing practices and may require seeking independent facilitation. Win-lose approaches are not appropriate. It is therefore essential that negotiations are held with the right people, and that companies provide clear information on the impacts of a proposed development. This will provide indigenous stakeholders with a clear idea of how their rights and interests may be enhanced or diminished. Consultation strategies also need to take into account their particular social,

cultural, economic and geographical circumstances, and ensure that appropriate and effective channels of communication are in place.

To sum up, there are no short cuts to effective agreement making, and each situation is unique. It is important that at the highest level there is full company support for seeing negotiations through to a satisfactory conclusion, and that as much attention is given to implementation as to the negotiation process and the agreement's content.

This case study highlights the need for understanding on all sides in order to build effective relationships. In the breakout group sessions, participants identified the constraints and opportunities they saw affecting indigenous peoples relationship with the mining and minerals sector (see Appendix II). A key conclusion to emerge was that 'dealing with the constraints creates the opportunities'. Participants were also asked to identify the principles and practices they believed would lead to, and foster a more equitable consideration of indigenous communities by industry, government and other stakeholders (see Appendix III).

5.   Conclusions and Key Recommendations

Through discussion, participants at the workshop identified a number of requirements to move forward:

- Indigenous peoples, companies and governments need to move beyond baggage from the past, which can be an obstacle to new forms of interaction;

- The mining industry and governments need to recognise indigenous peoples as an integral part of the community;

- Steps need to be taken to resolve disputes between indigenous groups, which prevents consistency in relations with governments and companies;

- All parties need to be fully informed about the legal aspects of land ownership and the way it is administered;

- Indigenous communities need to have a clear understanding of their rights;

- Indigenous communities should have the right to say no;

- Indigenous communities view timeframes differently to mining companies. Need to consider impacts of mining from an indigenous peoples perspective, particularly in terms of what is left once mining activities cease;

- There needs to be greater support for small-scale mining;

- While there is a need for legislation to be fully consistent with human rights and properly implemented, there needs to be more emphasis on social relations over and above legal relations;

- There need to be legal minimum requirements set for negotiation around rights;

- There need to be better enforcement procedures for companies' circumventing conventions and treaties;

- Industry needs to ensure that practice on the ground is brought into line with policy.

6.   Indigenous Strategies for Action

On the last day during a special session for indigenous participants at the workshop, and building on recommendations emerging from the Quito Workshop in September 2001, it was agreed that an international indigenous organisation would need to be set up to monitor and oversee the performance of the mining sector on issues affecting indigenous peoples. Specifically, functions of the organisation would be to:

- Institutionalise at the international level a consultation process that will enable indigenous peoples have a greater say and control over decision-making processes affecting their lives. One of the main tasks for this organisation will be to develop a minimum set of standards that mining companies will have to comply with when operating in indigenous communities. This will follow-on from the MMSD process and build on existing literature on international standards to promote and facilitate continued dialogue with all stakeholders on how to define and ensure compliance and agreement with these standards.

- Establish an international network to coordinate and facilitate the exchange of information between indigenous peoples.

- Monitor corporate accountability through assessing company response to and uptake of MMSD research findings.

- Enable indigenous peoples to identify examples of best practice and have greater control over defining what the terms of best practice should be. This will empower indigenous peoples around the world to actively participate in and influence mining development processes, while at the same time create and build the social certainty that mining companies need in order to mine successfully.

Links with other fora could also strengthen the role of this organisation, e.g. the UN permanent forum of indigenous peoples. However, negotiating new relationships that will lead to developing new empathetic and culturally sensitive approaches for addressing indigenous peoples issues was seen as a longer-term objective.

Subsidiarity was discussed in relation to the representation and membership of this body. Participants endorsed the need to put their messages across at the highest possible level, while also recognising the need to strengthen regional processes. Particular emphasis was given to addressing the following questions:

- How to decide on the effective participation of indigenous peoples?

- What would be the constitution of this body?

- Would this organisation have the ultimate voice?

The regional disparities highlighted by MMSD, and the gaps in communicating and disseminating information between regions and at the global level provided indigenous peoples with a clear indication as to why an international body for monitoring global mining activities was needed.

The suggestion was made that an interim committee could be set-up drawing on the global representation of indigenous peoples from MMSD workshops and utilising existing resources. The main challenge here was seen as one of establishing links with other indigenous communities and strengthening networks to foster wider international cooperation.

Consideration of the resources and funding required to meet the planned objectives of this organisation were also discussed. Funding assistance by the World Bank, the UN, NGOs and mining companies was regarded as essential to facilitating indigenous peoples' participation with the mining sector and ensuring the existence of a level playing field. Only when these resource requirements are met and the basic premises underlying the function and structure of the organisation clearly defined, will it be possible for participants to consider what the organisation will do after completing its standard-setting exercise. Fulfilling a monitoring role would, at the very least, serve as an indication that indigenous peoples' concerns were being taken into account.

Limitations in terms of time and resource constraints were identified with the MMSD process and doubts as to whether MMSD could enact effective long-term change were expressed. Nevertheless, MMSD was felt to provide indigenous peoples with a viable platform for articulating their concerns, and their involvement with the MMSD process a demonstration of their commitment and willingness to think about new and meaningful ways of engaging with the mining sector.

A necessary first step to ensuring the participation of indigenous peoples with MMSD is properly recognised, was to insist on the inclusion of the recommendations below in MMSD's Final Report. This highlighted the need to monitor the uptake of these recommendations and for an international body to oversee this process. It was believed these recommendations would constitute an agenda for action that would help shape and strengthen indigenous peoples' relationship with the mining sector.

Two main recommendations:

1. That there be established as part of the immediate MMSD standard-setting process, an international regionally representative indigenous peoples' body to:
   – Monitor the elaboration of international standards being developed in the MMSD process and facilitate/ensure the effective participation of Indigenous peoples in the standard setting process.
   – Monitor the implementation of agreed standards once those standards are recommended by the MMSD process.
   The international resource development industry should acknowledge that necessary financial and other resources will be required by this body. The industry should commit to securing funding for the work of this body.

2. The MMSD Global report should include an executive summary and/or appendix of Indigenous issues.
   (For a full account of the discussion that took place see Appendix IV)

Appendix I. Presentations

Session 1.   Introduction

Key issues
Mick Dodson, AIATSIS

Mick Dodson outlined aims of the workshop:

- An opportunity for participants to discuss critical issues surrounding the relationships of indigenous peoples in the mining and minerals sector;

- To focus on positive change in relationships between indigenous peoples and this sector;

- To identify practical steps which might improve respect for indigenous host communities and their rights over land and resource use, with the aim of enabling equitable distribution of impacts and benefits.

The need for precision over the use and definition of sustainable development was highlighted. Sustainable development is normally defined as 'meeting the needs of the present without compromising the needs of future generations'. The question of generations is particularly salient for indigenous peoples throughout the world, who tend to see their existence in terms of the needs of future generations rather than the needs of the present. According to WWF, for development to be sustainable, one must take into account social, economic and ecological factors of the living and non-living resource base. Both long-term and short-term advantages of different actions must also be considered. Sustainable development should be thought of as a long-term, open-ended process, which has at its heart the interaction between human beings and the natural environment, and the potential conflict between the two. It should be thought about in terms of innovation and opportunity, rather than limits and restrictions. Environment and development are interdependent, but indigenous people have often been lumped in with the flora and fauna, rather than in the development part of the equation. The key question is how to define the interdependence between developers and traditional landowners? Answers may be found in the unique and special place that indigenous people occupy as 'first peoples'.

Rights
Certain legal rights held by indigenous peoples in Australia, that have been secured through common law and at international level through the UN, recognise that a special relationship exists between indigenous peoples and their resources. The rights of indigenous peoples, and the enforcement and protection of these rights, are now on the international agenda. The Universal Declaration of Human Rights recognises the cultural importance of indigenous peoples and the protection of their land, and reaffirms the duty of states to preserve and promote indigenous peoples' cultural identity, to protect their rights to use their indigenous language, and to provide for culturally appropriate cultural and social development and political participation.

Informed consent

The recognition of informed consent, particularly for landowners and for those whose interest may not be recognised by colonial law, should be a central feature of any development proposal, and this has the support of international law. Passive participation in negotiations is not sufficient when seeking to reach an agreement between governments and indigenous peoples over the development of the land. There needs to be genuine engagement. Difficulties arise over the principle of good faith, which is regarded as a subjective measure by law courts in Australia. The Industrial Relations Act has provisions on good faith, which require that a sincere effort be made to reach common ground. It must be pointed out that problems of engagement arise from both sides. While the resource development sector share some of the guilt, indigenous peoples do not always engage strictly according to the rules.

There is a need to raise the standards for the recognition of indigenous peoples. This needs to be achieved through international law rather than under national law, which may vary from state to state. Indigenous peoples are also seeking new opportunities for community revitalisation, and to begin occupying a central role in the development process. This will mean overcoming a great deal of historical baggage and developing capacity of both sides for more effective communication. In Australia, for example, there is a legacy of injustice, dispossession and government control that weighs heavily on indigenous attitudes.

Developers need to gain a better understanding and appreciation of aboriginal culture, and to actively look for ways forward to achieving equitable distribution of impacts and benefits. Until now developers have seen such issues as sustainable development, and indigenous peoples' rights as obstacles to be overcome. Similarly, indigenous peoples have seen developers as barriers to their development, rather than as opportunities. There is a need to build trust on both sides, and more effective ways of interacting.

Developers need to be prepared to provide resources for this process of trust building and negotiation, and to provide access to information concerning development proposals. They will also need to shift their thinking to begin considering the impact of development from the point of view of indigenous peoples, to understand the need for protecting sacred sites within areas of operations, and to consider training, employment and business opportunities through to post-closure of mining operations. If indigenous peoples are treated fairly and involved from the outset, they may provide solutions to many of the perceived problems.

Report of MMSD Baseline study of strategic issues in the relations between the mining sector and indigenous communities
Jerry Moles, Global Renaissance

Jerry Moles has been actively involved in setting up research centres to investigate problems identified by indigenous peoples in communities in Sri Lanka and the US. The focus of his research is the relationship between indigenous peoples and governments; communities; and the financial community. Despite the dismal history surrounding the involvement of indigenous peoples, there are also opportunities to address problems.

One of the key issues is whether the encounter results in empowerment or impoverishment, and how these might be defined.

The issue of indigenous peoples' resources is set in a changing economic and political framework characterised by:

- Increased global concern for biological, linguistic and cultural diversity;

- UN and other international conventions on consultation, self determination, group rights and indigenous cultural patrimony;

- International financial intermediaries (IFI) which safeguard policies;

- Revised and new national indigenous and mineral laws (Panama);

- Increased awareness of the counter-development costs transferred/externalised to local populations;

- Increased capacity of indigenous peoples to advocate for themselves.

At the same time, environmental damage is increasing, and there has been a steady loss of civil and human rights, with protesters being imprisoned, and laws put in place that undercut against indigenous peoples and their reactions.

On the ground there are no industry-wide standards; companies act differently in different places; and government policy concerning indigenous peoples' rights changes from place to place. This leads to endless, costly ad hoc negotiations.

Objectives of the background paper
To identify strategic issues that should be 'on the table' for indigenous peoples and mining/minerals sector to reach mutually satisfactory deals or agree not to deal.

Self determination/autonomy
A cultural group has the right to determine its priorities on its own land, on its own terms and within its own timeframe.

Mining may promote indigenous lifestyles and livelihoods through:

- Providing opportunities for the realisation of community goals;

- Alleviating poverty and providing desired or essential community amenities;

- Providing employment and training opportunities;

- A negotiated agreement and the affirmation of the sovereign status of a cultural group.

Mining may also threaten indigenous lifestyles and livelihoods in several ways:

- Project hazards;

- Project-related impoverishment risks;

- Undercutting sovereign claims;

- Damaging the local environment;

- Desecrating sacred sites;

- Undermining civil and human rights;

- Disrupting social and cultural reproduction.

Disruption of social and cultural reproduction
This might be caused by:

- Excessive demands on the capacity of the local people and their traditional leaders;

- Disruption of educational activities, traditional and formal;

- Exacerbation of factionalism;

- Disruption of leadership structure and/or improper legitimisation of individuals as authorities.

If mining leads to social dislocation, resettlement or displacement, the impoverishment risks become exceedingly high. It should also be emphasised that compensation for damages is *not* development. Indigenous peoples are not beneficiaries until they have ownership interests in the mine. Paying them for damages does not make them owners, beneficiaries or material stakeholders. Furthermore, no matter what the short-term windfalls and increases in income, if, in the end, the project takes more than it gives, then the indigenous peoples have subsidised the project.

Empowerment
This means that indigenous peoples do not diminish but improve the sustainability of their culture and livelihoods. The chance of an empowered, sustainable outcome increases if there is:

- The desired outcomes of the encounter for indigenous peoples emerge from meaningful participation and communication;

- Non-indigenous stakeholders fully and opportunely disclose to indigenous groups their plans, agreements and financial arrangements in a culturally appropriate manner;

- Indigenous peoples are informed participants with the right to approve, reflect or modify decisions affecting their livelihoods, resources and culture;

- Presuppositions of both indigenous and no-indigenous stakeholders about one-another are aligned with fact;

- Sovereignty of the group is respected and strengthened;

- Rights and access to indigenous land and nature are secured;

- The non-indigenous stakeholders identify and disclose all the risks of a proposed mining endeavour. Full risk assessment, not only of the threats posed by the loss of land, but also the full range of social, economic and environmental impacts;

- The focus is on protecting sustainable social relationships, especially when new technologies are proposed;

- Prompt, unambiguous institutional and financial arrangements are put in place to mitigate each risk;

- Provisioning of benefit-sharing arrangements that step beyond compensation for damages;

- Financial and institutional arrangements to bridge the discrepancy between the multi-generational timeframe of indigenous peoples and the short-term timeframe of mining;

- A guarantor to assure compliance with and funding of any agreements.

Strategic issues

Strategic issue 1. Whose plan, whose development?

Plan A: unequivocal resistance or support for the mining endeavour;
Plan B: a negotiated outcome, based on a vision constructed by the indigenous peoples. This option has nine components:

- Alternative futures that people anticipate;

- Economic and legal examination of the proposed venture;

- Assessment of the venture's risks and benefits;

- Avoidance or mitigation of all risks;

- Determining how the venture fits within a people's cultural vision – subordinating external economic to internal cultural visions;

- Forming institutional and financial arrangements to ensure that the group share in the benefits of the venture;

- Arranging benefit-sharing;

- Negotiations;

- Drawing up binding and sustainable agreements.

Strategic issue 2: Rights, responsibilities and accountability

The questions here are who executes Plan B? Who pays for it? Who is responsible if things go wrong? Who does the work?

Mining companies, environmental NGOs, governments, publicity and community relations specialists are not in the business of indigenous peoples' development. Building the capacity of indigenous groups is assisted by other specialists and indigenous peoples.

Strategic issue 3: Ground rules for dialogue and negotiation:

- Prior-informed consent;

- Participation;

- Transparency;

- Financing based on risk assessment and development needs;

- Long-term institutional arrangements (external and internal);

- Why is information gathering unidirectional?

Strategic issue 4: Why are companies not adhering to the basic demands of indigenous peoples in terms of consultation, consent and compensation?

What incentives are needed for mining and its financiers to 'do the right thing?', and what can the indigenous peoples do themselves to provide such incentives?

Session 2.   Building rights

Report of the UNHCHR Workshop on Indigenous peoples, private sector natural resources, energy and mining companies and human rights
Jong- Gil Woo, UNHCHR

Jong-Gil Woo reported on the UNHCHR workshop held in Geneva in December 2001. This workshop explored three major themes in order to discuss relationships between indigenous peoples and the extractive industries from a human rights perspective:

- Consulting with indigenous communities prior, during and following the development of private sector projects;

- Benefit sharing by indigenous communities in private sector activities;

- Solving disputes.

These themes had been framed through prior consultation with the private sector, indigenous peoples and the UN system organisations such as the ILO and UNCTAD.

The workshop was attended by indigenous participants, and representatives from UN organisations, industry, NGOs, government and academic institutions.

Key recommendations included:

- All actors, i.e. states, UN organisations, indigenous peoples and the private sector should continue to review experiences in relation to private sector natural resource development on indigenous peoples' lands; consider best practices and explore the links between recognising and respecting indigenous peoples' land rights associated with good practice;

- A framework for consultation, benefit sharing and dispute resolution in private sector projects affecting indigenous peoples should be elaborated, through participation of all actors involved;

- A study should be undertaken on existing and emerging human rights (and other relevant) standards, and industry guidelines relevant to indigenous peoples and private sector resource development on their lands, taking into account existing research and documentation;

- Consultation between indigenous peoples and the private sector should be guided by the principle of free, prior, informed consent of all parties concerned;

- Private sector development on indigenous peoples' land should ensure mutually acceptable benefit sharing;

- Mutually acceptable independent mechanisms should be established for resolving disputes between indigenous peoples and the private sector;

Recommendations for each of the relevant actors included the following:

Private Sector

- Private sector resource companies with activities on indigenous peoples' lands should continue to hold dialogues with indigenous peoples and the UN system on these matters; should gather existing codes and guidelines on human rights and make them available to indigenous peoples and the OHCHR; and should participate in the WGIP and Permanent Forum as well as other relevant fora on indigenous issues.

The Office of the High Commissioner for Human Rights

- The OHCHR should organise a second workshop to elaborate a draft framework on consultation, benefit sharing and dispute resolution in private sector projects affecting indigenous peoples. This should be organised in cooperation with indigenous peoples, the WGIP and other relevant UN organisations, the private sector, governments and possibly investment and social auditing representatives with experience of measuring and monitoring company practices.

- The OHCHR should also request from industry and indigenous peoples existing agreements of consultative processes and benefit in order to develop model best practices.

Indigenous peoples

- Indigenous peoples should provide information on arrangements they have made with the private sector, in particular mechanisms they have established for consultative processes.

The World Bank

- The World Bank was invited to adopt a policy on indigenous peoples which would require that borrowers and clients respect their rights, in particular their land and

resource rights, and to ensure free, prior informed consent with respect to investments, loans, guarantees and operations that may affect them.

A human rights approach
Margaret Donaldson, Director of Native Title Unit, Equal Opportunities Commission

It is not possible to talk about sustainable development and its capacity to transform the relationships between indigenous peoples and the mining sector without reference to human rights. Human rights constitute the ethical basis of the social contract between those who exercise power and accrue wealth, and those whose lives are affected by this exercise and accrual. Sustainable development for mining means sustainable relationships; that is relationships based on informed and free consent. Where human rights principles such as equality; respect and maintenance of culture; effective participation and self-determination form the basis of a relationship between mining companies and Indigenous communities, then, by necessity it is a relationship based on consent.

While the international treaties that enshrine human rights principles create obligations by states in relation to their citizens, the principles themselves are equally applicable to the development of a sustainable relationship between mining companies and the Indigenous communities in which they operate.

Equality and non-discrimination
Racial equality is enshrined in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Rights of the Child (CROC), and the Covenant on Economic, Social and Cultural Rights (ICESCR). Equality has attained the highest standard of international law, *jus cogens*; a norm from which no derogation is permitted.

The standard of equality protected at international law is very high. There are two elements to the definition of racial discrimination, which together, contravene the notion of equality:

- First, a distinction, exclusion restriction or preference based on race is required; **and**

- Second, the distinction based on race must nullify or impair the recognition and enjoyment of human rights by a particular racial group.

If discrimination were simply differential treatment on the basis of race, then equality is achieved through applying all laws identically to each individual, without recognising that the effect of those laws has a differential impact on ethnic groups. If however, equality is about ensuring that racial groups have equal enjoyment and access to the benefits of society and participate equally in determining its future, then differential treatment may not necessarily imply discrimination and may even be **required** to **achieve** equality.

Of particular relevance to the relationship of mining companies to indigenous people is differential treatment that aims to protect and maintain the distinct cultural identity of Indigenous people. The requirement to maintain and protect indigenous culture is born out of a notion of equality that requires society to pay equal respect to the cultures that live

within it. The rights to use one's language and to live on one's traditional land fall under this category.

Indigenous peoples, as a special kind of minority in Australia, have the right to maintain the basic characteristics that distinguish them from non-indigenous people. The human rights treaty committee bodies have elaborated the requirements to enable indigenous peoples to maintain their distinctive cultures. These requirements form part of States' obligations to guarantee equality and non-discrimination before the law. The CERD Committee has confirmed that in terms of their application to Indigenous peoples, ICERD's obligations require States to:

(a) Recognise and respect Indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation;

(b) Ensure that members of Indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous identity;

(c) Provide Indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;

(d) Ensure that members of Indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent;

(e) Ensure that Indigenous communities can exercise their rights to practice and revitalise their cultural traditions and customs, to preserve and to practice their languages.

(f) Recognise and protect the rights of Indigenous peoples to own, develop, control and use their communal lands and territories and resources and, where they have been deprived of their informed consent, to take steps to return these lands and territories. Only where this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.[2]

Thus equality is not only about a comparison of standards between racial groups, it is also about the process by which the disparity in those standards are redressed and cultural identity is recognised. Indigenous people must not only participate in that process they must lead that process and determine its course. They must give their informed consent to that process.

Cultural Rights
There has been significant resistance from Indigenous groups to their rights being equated with the rights of cultural minorities within a particular State. As the First Peoples of a territory, with a specific history and relationship to that territory including one of forced colonisation, they have distinct rights in the context of cultural, social economic and political protection. While minority group rights include indigenous peoples, indigenous peoples have rights in addition to those appropriate for minorities.

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[2]   General Recommendation 23, CERD Committee, 1997

The Human Rights Committee, which monitors State's performance under ICCPR, has interpreted the notion of 'culture' under Article 27, broadly observing 'that culture manifests itself in many forms including a particular way of life associated with the use of land and resources, especially in the case of indigenous peoples.'

Again, as with the CERD Committee, the Human Rights Committee can be seen to be relying on effective participation as a means of ensuring that cultural rights are being protected. The Human Rights Committee has recently (July 2000) commented upon the failure of the Commonwealth Government to provide adequate protection to the heritage and culture of Indigenous Peoples of Australia as required by article 27.

The right of self-determination
The right of all peoples to self-determination is guaranteed at international law under Article 1 of ICCPR, article 1 of ICESCR and has been developed in the General Comments of the Human Rights Committee.

Article 1 of ICCPR and ICESCR states:

> All peoples have a right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> All peoples may, for their own ends, freely dispose of their natural wealth and resources…In no case may a people be deprived of their own means of subsistence.

While the Australian government denies that indigenous people in Australia are a people, entitled to the right of self-determination, the Human Rights Committee, in July 2000, at paragraph 9 of its Concluding Observations about Australia's performance under ICCPR clearly recognised that the right of self-determination does apply to Aboriginal and Torres Strait Islander peoples.

These then are the significant human rights that should form the basis of a new relationship between the mining sector and Indigenous communities; equality, effective participation, cultural rights and self-determination.

It can be seen however that the legislative regime within Australia aimed at protecting indigenous people's rights fall far short of these human rights standards. In this context it is extremely important that the notion of sustainable development is not constrained by or contained within this legislative regime.

Native Title Legislation
Native title was recognised by the High Court, nearly ten years ago, on 3 June 1992. The *Mabo* decision[3] gave recognition to the unique and profound relationship that Indigenous people have always had with their land.

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[3] *Mabo v Queensland (N0.2)* (1992) 175 CLR 1 (*Mabo*)

Australia has had almost a decade to establish a fair and just system to allow the benefits of inherent rights to be enjoyed by indigenous people. This has not eventuated. In my view this is because indigenous people's inherent rights are embodied in a system that is aimed at restricting rather than maximising these benefits. The native title system, as structured by the *Native Title Act (1993)* (Cth) (NTA), and the common law operates together to ensure that where native title co-exists with non-indigenous interests on land, those latter interests prevail; either to the point of extinguishing native title or removing native title as an encumbrance in their pursuit.

At an international level three separate human rights committees have expressed concern at how the amendments to the NTA have breached indigenous peoples' human rights.[4] Nothing has changed. Native title is, today, still governed by the exact same legal structure as that which, in 1998, caused the Committee for the Elimination of Racial Discrimination (the CERD Committee) to put Australia under its Urgent Action procedure and to request an explanation for this extreme imposition of racist policy.

One of the CERD Committee's concerns was the amendments to the right to negotiate provisions in the NTA. The right to negotiate, as originally drafted under the NTA was a benchmark for negotiations between indigenous people and mining companies. It recognised that the capacity for native title to generate economic opportunities for Indigenous people emanates from the right to negotiate. It embodies the principles of equality and effective participation. It permitted full participation by registered native title parties whenever there was an intention to create, vary or extend a right to mine.

The right to negotiate recognised the unique nature of native title as a group right in the traditions and customs of indigenous people. It recognised the potential threat that mining could be to Indigenous culture if there was insufficient time and effort given to communicating Indigenous concerns.

It also recognised the right of indigenous people to control access to their land and the resources that it contains and their right to participate in the management of their land.

It recognised that economic opportunities for indigenous people should not be dependent on government initiatives or welfare but should arise out of the status of Indigenous peoples as owners of their land.

Margaret Donaldson sees the current native title legislation as an obstacle to achieving sustainable relationships between Indigenous peoples and the mining sector. Are companies going to rely on their legal rights to limit the areas of the project that Indigenous people can

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[4] In 2000 the Committee on the Elimination of Racial Discrimination (the CERD Committee) the Human Rights Committee, and the Committee on Economic Social and Cultural Rights criticised Australia's native title legislation based on Australia's obligations under the Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Covenant on Civil and Political Rights (ICCPR) and the Covenant on Economic, Social and Cultural Rights (ICESCR) respectively. For a full analysis of these decisions see
http://www.humanrights.gov.au/social_justice/nt_issues/index.html

participate in or are they going to adhere to human rights standards as a basis for their sustained relationships?

Appendix II. Break-Out Groups

## A.	Building Rights

Why are human/indigenous rights important?

Indigenous rights are 'catch up' rights. Indigenous peoples around the world need to catch up to a great many economic and social rights they have hitherto been denied. It is important to establish exactly what they are actually entitled to.

They balance power bases. In most cases indigenous peoples do not have real economic rights or power bases to stand up to governments or companies.

Human rights recognise rights to life. The right to life is taken for granted in developed countries, but this is not always the case in the developing world.

Differences should be valued and recognised. The world is not homogenised.

Government rights over mineral resources differ between countries, and this demands a case-by-case analysis. In some cases they negotiate with indigenous groups, in others they do not, and therefore, treaties are not always adhered to.

The biggest obstacle to rights is a lack of resources. Resourcing difficulties constitute an impediment to capacity of indigenous peoples to exercise their rights. The capacity to negotiate and consult within governments is also lacking.

Provision of infrastructure. In remote communities, mining companies become the *de facto* government because they provide the infrastructure. While the question of who provides the infrastructure makes little difference to the communities, maintenance can be a problem once the mining companies leave.

How would recognition of human rights improve relationships?

Where do indigenous peoples fit in the hierarchy of rights? Whose rights come first, and what do indigenous people feel about this issue?

Standards would be set in negotiations and dealings with indigenous peoples. This would lead to greater certainty and predictability amongst all parties, and greater speed for the mining company in reaching a conclusion.

A recognition of human rights would lead to greater trust, understanding and accountability. It would enable both sides to manage expectations and decide what is and what is not open to discussion. Discussions need to be full, frank and transparent.

Need to be clear on the difference between rights and interests. The difference between equality and equity needs to be clearly understood. If there is a basis for dealing differently with different groups, in order that their rights might be fully realised, this must be stated openly.

Indigenous peoples need to be treated as legitimate stakeholders. This would establish common ground and lead to a less adversarial process. There needs to be more focus on what the different groups have in common.

What can the mining sector do? Mining is always investment oriented and time critical. It needs to recognise community needs and rights in setting their own priorities. It also needs to accept calls for disclosure. The mining sector can develop international standards, but it needs to recognise that all groups are different. It needs to establish a process for the whole life cycle of a mining operation, rather than continually developing new processes.

The mining industry needs to listen, communicate realistically and be culturally aware. This will involve building capacity and understanding issues from the perspective of indigenous peoples.

C. Building Capacities

Building capacity within companies, government and communities is essentially about different groups educating one another.

Companies
Consistency is a key issue. Linked to this is the capacity for corporate memory which is particularly important in an environment of such change e.g. takeovers.

Companies need to institutionalise relationships in the same way as banks. This will ensure consistent behaviour with different groups of people, based on an understanding of their different needs and rights.

Need a better understanding the needs and priorities of indigenous peoples. Companies need to understand who constitutes 'the community'. What are their plans, strategies and their decision-making processes? What is their understanding of their rights? Companies need to have a policy on indigenous peoples and to implement it.

International corporate code for information delivery. This was suggested to target specific information needs for different communities, and to ensure that different members of the communities were involved, and not just the community leaders.

Governments
Consistency over time and across and within agencies. There needs to be better coordination of government programmes to avoid duplication and gaps.

An ability and willingness to work within indigenous structures. While the government might not have been unwilling to do this, its own legislation may be incompatible with indigenous structures.

Government needs capacity to set minimum standards in terms of human rights objectives. This will mean a better understanding the aspirations of indigenous communities.

Building linkages between all three actors.

To use the tax system to drive and offset costs of good practice in community relations

Communities
Communities are not passive recipients of change, but active partners in the dialogue process.

Nation building and leadership. Allowing communities to develop their own capacities will require a great deal of resources.

A better knowledge of their rights, access to information.

Communities need governments to enshrine their rights in law.

Links between those with a western way of life. Building links between those with a western way of life, and those of the community of origin would enable individuals to stay in touch with their traditions, and to work within both the traditional and the modern communities.

Skills and training. Companies need to train indigenous peoples for permanent jobs, which will remain in the community once the operation has finished. Better educational resources need to be provided by government.

A political environment conducive to mobilising and negotiating. Governments need to provide parameters for negotiation.

Communities need governments to manage the issue of mining licences in a way that does not stretch NTRBs.

Communities need financial resources, but the point was made that they should not become over-reliant on companies to provide such resources.

C.   Building Relationships

Opportunities and constraints

Constraints to development were identified as follows:

- Baggage from the past. Experience of government and previous mining operations and interaction with communities can colour indigenous peoples' perception of current negotiations

- Lack of recognition of indigenous peoples as an integral part of the community

- Internal division within communities which prevents consistency in relations with governments and companies

- Land ownership and the way it is administered. A change of government, can lead to a change in approach to land management.

- Lack of enforcement procedures for companies' circumventing conventions and treaties

- Lack of understanding amongst indigenous communities of their rights

- Lack of financial and technological resources

- Free informed consent

- Legislation either not fully consistent with human rights, or not properly implemented

- Lack of support for small-scale mining

- Need for social relations rather than legal relations

- Industry and indigenous peoples work to different time frames

- Work on the ground is often disconnected from corporate headquarters

- A lack of minimum requirements for negotiation around rights

- Radical political stance, whether by governments, companies, NGOs or within indigenous communities

- Lack of education, skills, literacy and capacity within communities as potential beneficiaries and managers of high levels of investment

But, dealing with the constraints has the potential to create opportunities. Managing indigenous relations needs to be seen as a core company responsibility and addressed specifically at the site level. If relations with indigenous peoples are not dealt with on the ground, this can affect the future of a mining company. Where a relationship has already been established between a company and a host community, the effects of a change of personnel also needs to be considered, as this could negatively impact on advances already made.

It was agreed that there also needed to be consistency between different operations of the same company and between operations on the ground and company headquarters. Even where policies and procedures exist, these are sometimes not implemented on the ground. However, companies operating around the world can also open up new opportunities of engagement. Protocols documenting how a company has dealt with these kinds of issues and how they intend to continue to address them are one way of ensuring consistency.

No matter where companies are operating, they need to explain fully to the community what the impacts of a mining project are likely to be. Through this process, communities will become empowered. Training has the potential to provide opportunities that will last beyond the life cycle of a mining operation. Similarly, indigenous peoples have a great deal of expertise, particularly on the local environment, and its fauna and flora, which could be of great benefit to the mining company.

However, what is often missing is a linkage between groups with expertise in company-government-community relations to facilitate mutual exchange of lessons learned. This is partly due to weak governance and communication structures. It was agreed that there needs to be a more strategic approach to communication and participation, with a greater use of communications technology.

Appendix III: Principles and Practices

Key Principles	Future Practices
To build trust between all groups through: • Partnership • Mutual Respect • Relationships must be underpinned by the principles of equality, without discrimination and the right of indigenous peoples to freely give (or withhold) their informed consent	• Dialogue – talk often, at length, on subjects of mutual interest • Equity – finding ways to share between all groups • Develop an understanding and respect for indigenous culture particularly the relationship between indigenous peoples and their country (this must include business practice)
• Progress – move forward with issues, improve on past performance • Resource – resource the companies and people to achieve • Precautionary principle – development does not proceed until complete understanding of all impacts, benefits and deficits are understood	• Ensure ethical conduct in relation to business practices and indigenous peoples/ communities • Commit to regular inclusive communication opportunities with indigenous peoples • Provide opportunities for sustainable indigenous involvement in industry
• Full recognition of human rights and indigenous rights • Indigenous people need to be involved in decisions that affect their way of life. This involvement must recognise their history of encounters with government and mining. • There needs to be consistency in land management so that industry and community have certainty about how mining titles are allocated and managed	• Try where possible to enshrine this relationship as a right, recognised by government (preferably in law) and by corporations (at least in negotiations) • Include in all aspects of mining development and monitoring, local indigenous communities as important and equal stakeholders in the operations. • Resolving land ownership issues
• The development of better policies and practices within national jurisdictions should take precedence over the development of global principles, which have limited practical effect. • Policies and practices intended to address the needs and interests of indigenous peoples in rich countries should not be used as a lever to dissuade companies from investing in poor countries, where the same standards are more difficult or expensive to apply • The mining industry alone does not have the ability to build the capacity or sustainability of indigenous communities and their organisations without the effective support of governments or other third party organisations.	• Models of best practice are not necessarily to be found in the biggest mining companies or the most developed countries, just because these have the most advanced forms of public relations. • Despite the efforts of the Australian mass media and protectionist interest groups to discredit the mining industry in Papua New Guinea, PNG has a legal policy framework which does far more to protect the rights and interests of indigenous landowning communities than anything currently found in Australia. • Never trust the information coming out of multinational company head office external affairs departments – good practice means and external audit of what happens on the ground.
• International mining companies need to maintain consistent standards no matter where they are operating. There should be an adequate base line	• Greater awareness throughout business and government of indigenous peoples priorities and aspirations

standard used with further actions above this. • Mutual education/ learning • Willingness to achieve mutual benefits	• Capacity building so that indigenous communities can develop their own strategies to achieve their aspirations in decision-making possesses that directly affects their destinies • Government, industry and indigenous peoples input in the decision making process
• Truth – deal with verifiable truth a) demand for minerals will increase b) exploration will be in low population rural areas. Much controlled by indigenous peoples with increased public scrutiny (greater transparency) deals must be reached. • Good faith negotiating. Willingness to listen, gather information when required, set predictable protocols. • Commitment to vibrant healthy ecosystems. The health of the biosphere is the health of us all.	• Compile results of previous negotiations and mining endeavours and make them available in a constantly updated database. Control over input shared by all who wish to participate. • Set up evaluation procedures of mining companies so the good citizens can be recognised and the poor citizens put out of business. • Invest enough in organising encounters between mining companies and indigenous communities so there can be an in-depth understanding by all parties involved. Investment includes monitoring and reporting back.
• Honest working relationship • Justice – stop immediately activities that compromise human life • Mutual respect between both parties to meet at roundtable as equals to complete discussion	• Start working on the legacy without discussing how. The pile of work is great and looking and studying it will not make it smaller. • Change injustices that will allow the forward movement of the industry on a global level. Correct present situations where human life is undermined at the value of the commodity. • Develop a unit to meet as a unit quarterly to share report cards and have authority to correct injustices based on a global policy.
• Recognition/ understanding of traditional ownership and working through Native Title Representative bodies. • Recognition to provide funding to increase indigenous capacity by industry • Indigenous rights in protection of environment, both cultural and environmentally	• Providing independent funding to engage with traditional owners • Collaboration and establishment of joint environmental principles on a regional basis • Engagement
• Respond to indigenous aspirations and to lay the foundation for long-term success • Forget the bottom line • Recognition of inherent special rights of indigenous peoples to land instilled in Native Title	• Inform/ communicate/ listen • Involve indigenous peoples at the earliest stage possible in any project • Utilise, traditional ecological knowledge in all projects
• Free informed consent • Indigenous sovereignty • Openness	• Appreciation of different time dimensions on all sides • CEO and corporate commitment to indigenous rights • Social relations not legal relationships

• Assurance that 'the project' will provide more positive than negative social impacts on indigenous peoples but also provides environmental, social and economic benefits • Freedom to develop culture, language and tradition • Economic justice to be educated	• International watchdog body or legislation for complaints about mining. To monitor and influence awareness. • International networking between all indigenous nations • Having more international conferences sponsored by the mining industry whereby the indigenous population can raise their own agendas
• Take proactive measures rather than reacting to situations • Give voice to indigenous peoples needs and aspirations • Establishment of an international review body for a reporting system and to monitor industry throughout the world	• Essential implementation of recognition of native title. • Provision of further resources for NTRBs and where such regimes are not in place, equitable frameworks to be implemented for negotiation with native titleholders. • Extending best practice approaches to stakeholder dialogue, negotiation and partnerships. In the case of multinationals operating within less developed nations, must operate in accordance with Human Rights Conventions agreed to and certified by their home territories or governments.
• Resource developers must proceed in their relationships with indigenous peoples understanding, and accepting financial and other resources may have to be provided to indigenous parties to effectively participate in the relationship. • Establish equality between negotiating partners • Acknowledge participants rights clearly and in the light of the above	• Create local and national programmes of indigenous peoples development (Human Rights, land ownership, fair distribution of benefits) • Establishment of monitoring mechanisms • Promoting and seeking acceptance worldwide for fundamental principles that will in the future underpin relationships (globally) between indigenous peoples and resource developers
• Openness and honesty on the part of all parties involved in a development project (from first contact through negotiation to closure and beyond) • Mutual understanding, sharing of knowledge and information • Sustainable communities, not sustainable mining. Think long term — life beyond the mine	• Conduct lot more awareness programmes among indigenous communities and potential affected communities at a local level • Companies or mining industry should not apply double standards in are of operation, particularly in developing countries. Avoid dumping of mine waste into rivers and oceans which are our livelihood • Support development programmes among indigenous communities financially. This should not include compensation payment for damage caused.
	• Ensure adequate and equitable resourcing of all negotiating partners • Ensure better than base domestic benchmark outcomes • Build partnerships that recognise that the interplay between governments, communities and companies is the best way forward in bringing acceptable

	development that does not harm the environment
	• Consistent application of company policies internationally and in the absence of policies, consistent application of the companies home country practices (where they are to higher standards) • Companies should give aboriginal considerations equal right in environmental and economic including (but not limited to): • Financing for learning, understanding and negotiating with aboriginal people
	• Giving higher weighting to and/ or recognising indigenous environmental knowledge • View as opportunity, not constraint; solution not problem • Better co-ordination of government programmes at federal and state level (to avoid overlap and duplication). Could be co-ordinated even further with company programmes e.g. educational, social etc.

Appendix IV: Indigenous Strategies for Action

One of the key recommendations to emerge from the Quito workshop was the need for an international indigenous organisation to monitor and oversee the performance of the mining sector on issues affecting indigenous peoples. This idea was developed further in a session convened by indigenous peoples at the Perth workshop, specifically to focus on the practical outcomes indigenous peoples would like to see coming out of the MMSD process. The development of this organisation was believed to be an essential corollary to indigenous peoples' engagement with MMSD, underlining the project's recognition of indigenous strategies for action. It was also considered to be an important tool for shaping and strengthening indigenous peoples' relationship with the mining sector, and would lead to a more equitable and sustainable future for communities impacted by mining and minerals development.

The rise in influence of globally based interest groups and recent mining company initiatives to engage the active participation of indigenous peoples, is believed to have created an authentic space that will enable indigenous peoples to determine their own development strategically. Establishing a forum at the international level to link local, regional and global indigenous concerns was agreed to be the most effective means for achieving this goal. Strengthening communication ties and improving dialogue between indigenous peoples was regarded as the necessary means for enhancing their capacity to become active participants in the decision-making process. Mechanisms to support and facilitate the exchange of information were identified as key elements of this process and an elected function of the new organisation.

The need to develop a standardised approach for dealing with indigenous peoples' issues was further emphasised through the diverse experiences of indigenous peoples' association with mining companies (see Quito Workshop Report for individual case studies). Implementing a framework that would enable indigenous peoples and mining companies to understand and work with one another was recognised as a key requirement for change, and one that was needed to overcome barriers of mistrust and power imbalances. Instituting an international indigenous body in this sense, offered the greatest potential for change in bridging the cultural divide that separates indigenous peoples from other stakeholders. Consideration of the proposed aims and objectives of this organisation also focused on membership and representation, links to other organisations and the benefits mining companies would derive from interacting with a single representative indigenous body.

In the absence of international standards or a set of coherent principles at the legislative level, to advise companies on basic information needs and processes between stakeholders on how to do the right thing by communities, creating an indigenous organisation was also believed to make sound commercial business sense. As a company's ability to do business with indigenous peoples is ultimately contingent on gaining a social license to operate in indigenous communities, a framework that would enable companies to adopt a consistent approach in dealing with indigenous peoples was one that was felt would be broadly welcomed; not only because it was felt this would help to simplify negotiation procedures, but also because it would enhance a company's reputational value by demonstrating that

consultation processes have been conducted in a fair and transparent manner and according to guidelines approved by indigenous peoples.

In representing the interests of indigenous peoples, it was proposed that key functions of this organisation would be to:

- Institutionalise at the international level a consultation process that would enable indigenous peoples have a greater say and control over decision-making processes affecting their way of life. One of the main tasks for this organisation would be to develop a minimum set of standards that mining companies would have to comply with when operating in indigenous communities. This would follow-on from the MMSD process and build on existing literature on international standards to promote and facilitate continued dialogue with all stakeholders on how to define and ensure compliance and agreement with these standards.

- Establish an international network to coordinate and facilitate the exchange of information between indigenous peoples.

- Monitor corporate accountability through assessing companies' response to and uptake of MMSD research findings.

- Enable indigenous peoples to identify examples of best practice and have greater control over defining what the terms of best practice should be. This would empower indigenous peoples around the world to actively participate in and influence mining development processes, while at the same time creating and building the social certainty that mining companies want in order to mine successfully.

Recognition was made that links to other fora could also strengthen the role of this organisation e.g. the UN permanent forum of indigenous peoples. However, negotiating new relationships that would lead towards developing new empathetic and culturally sensitive approaches for addressing indigenous peoples issues was seen as a longer-term objective.

Subsidiarity was discussed in relation to the representation and membership of this body. Participants endorsed the need to put their messages across at the highest possible level, while also recognising the need to strengthen regional processes. Particular emphasis was given to addressing the following questions:

- How to decide on the effective participation of indigenous peoples?

- What would be the constitution of this body?

- Would this organisation have the ultimate voice?

The regional disparities highlighted by MMSD and the gaps in communicating and disseminating information between regions and at the global level provided indigenous peoples with a clear indication as to why an international body for monitoring global mining activities was needed. Assuming a watchdog role was considered to be the primary function of an international indigenous organisation in the first instance, though it was also

recognised that fulfilling this role would demand greater clarity of purpose, function and responsibility.

The suggestion was made that an interim committee could be set up drawing on the global representation of indigenous peoples from MMSD workshops and utilising existing resources. The main challenge here was seen as one of establishing links with other indigenous communities and strengthening networks to foster wider international cooperation.

Consideration of the resources and funding required to meet the planned objectives of this organisation were also discussed. Funding assistance by the World Bank, the UN, NGOs and mining companies was regarded as essential to facilitating indigenous peoples' participation with the mining sector and ensuring the existence of a level playing field. Only when these resource requirements are met and the basic premises underlying the function and structure of the organisation clearly defined, will it be possible for participants to consider what the organisation would do after completing its standard-setting exercise. Fulfilling a monitoring role would, at the very least, serve as an indication that indigenous peoples' concerns were being taken into account.

Limitations in terms of time and resource constraints were identified with the MMSD process and doubts as to whether MMSD could enact effective long-term change were expressed. As one speaker put it, 'we've seen this movie before, just hope this time there is a different ending'. Nevertheless, MMSD was felt to provide indigenous peoples with a viable platform for articulating their concerns, and their involvement with the MMSD process was a demonstration of their commitment and willingness to think about new and meaningful ways of engaging with the mining sector.

A necessary first step to ensuring the participation of indigenous peoples with MMSD is properly recognised, was to insist on the inclusion of the recommendations below in MMSD's Final Report. This highlighted the need to monitor the uptake of these recommendations and for an international body to oversee this process. It was believed these recommendations would constitute an agenda for action that would help shape and strengthen indigenous peoples relationship with the mining sector.

Two main recommendations:

1. That there be established as part of the immediate MMSD standard setting process, and into the future, an international regionally representative indigenous peoples body to:

   - Monitor the elaboration of international standards being developed in the MMSD process and facilitate/ensure the effective participation of indigenous peoples in the standard setting process.

   - Monitor the implementation of agreed standards once those standards are recommended by the MMSD process.

The international resource development industry should acknowledge that necessary financial and other resources will be required by this body. The industry should commit to securing funding for the work of this body.

2. The MMSD Global report should include an executive summary and/or appendix of Indigenous issues.

It was also proposed that these recommendations should be circulated and presented to other bodies including national governments and international funding organisations such as the World Bank etc. While concentrating their efforts mainly at the international level, it was felt that indigenous peoples would be able to use the opportunity to promote programmes at the national, regional and local level particularly for marginalised and isolated indigenous groups. More importantly, it was also felt that the Report could be used to encourage debate between indigenous peoples and to assess reaction to the suggestions proposed here as a way of strengthening ties between different indigenous communities. To assist with this, it was strongly endorsed that the Report needed to be made accessible to indigenous peoples and that synthesising ideas specific to indigenous peoples in an attached summary or appendix would facilitate the dissemination and reading of the report.

Appendix V: Participants List

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