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Meaningful Consultation and Participation in the Mining Sector? A Review of the Consultation and Participation of Indigenous Peoples within the International Mining Sector

Executive Summary

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Executive Summary

The issues surrounding meaningful consultation and participation of Indigenous peoples in decision-making about mining developments on or near their ancestral lands are complex and multi-faceted. They range from philosophical and spiritual differences with regards to approaches to development, natural resources management and knowledge systems, to macro-economic policies and global market forces, to land tenure policies and multiple conceptions of what constitutes appropriate and meaningful communication and decision-making processes.

This document disentangles and sheds light on these various layers of complexity by synthesising the most salient issues that emerge in the international literature on Indigenous peoples' participation and consultation in decision-making about mining. It is not an exhaustive examination, but instead presents a comprehensive overview of the issues at stake as a first step toward examining grassroots, policy and research implications and opening dialogue across sectors to improve current practices. The document can be used as a guidebook for Indigenous groups, NGOs, international policy makers, mining companies and government officials who are entering into dialogue related to mining.

This review is one of the principal outputs of a collaborative research project between The North-South Institute (Canada), the Amerindian Peoples Association (Guyana) and the Institute of Regional Studies of the University of Antioquia (Colombia), entitled **Exploring Indigenous Perspectives to Consultation and Engagement in the Mining Sector of Latin America and the Caribbean**. The project was funded by Canada's International Development Research Centre, with additional support from private sector contributions to the North-South Institute's Corporate Social Responsibility Program.

Key Findings

Drawing from a wide variety of sources including academic, corporate, government and NGO literature, and backing their arguments with concrete examples from global mining activities, the researchers' findings include:

Section 1: The Rights of Indigenous Peoples to Meaningful Participation in Natural Resources Management

Ongoing Infringement of Indigenous Rights

Finding #1: Despite international recognition of the rights of Indigenous peoples with respect to land rights, the rights to meaningful participation and consultation, and the right to prior informed consent prior to mining development, infringement of these rights continues throughout the world.

Through international instruments such as ILO Convention 169 and the Convention on Biological Diversity, the international community has collectively recognized Indigenous peoples' rights to cultural identity, traditional lands and territories, self-determination, meaningful participation in development plans and following their own visions of development. In addition, the rights of Indigenous women have been formally recognized through, for instance, the Beijing Platform. However, international agreements are rarely legally binding or enforceable, and are seldom upheld even after governments become signatories. Consequently, ongoing minerals development often results in the continued infringement of the rights of Indigenous peoples.

Section 2: Mining on Indigenous Lands

Global Financial Trends Support Mining Development on Indigenous lands

Finding #2: Economic globalization -- including Structural Adjustment Programs (SAPs), the liberalization of mining laws, increasing availability of political risk insurance for development in previously unstable countries and lack of policy coherence in International Financial Institutions (IFIs) -- is increasing the influence of mining companies worldwide, exacerbating conflict situations on Indigenous lands and further reducing the capacity of Indigenous peoples to participate meaningfully in decisions affecting their lands.

The World Bank and International Monetary Fund (IMF) structural reform programs, combined with their active support of minerals development and liberalization of mining laws, has led to increased private sector interest in developing countries. International political risk insurers and export credit agencies have also made it more feasible to receive risk insurance for mining investment in previously unstable areas. These policy directions have resulted in increased minerals development on – and appropriation of Indigenous lands, which work against Indigenous 'ownership', principles and rights. Such land reform strategies have often benefited large multinational corporations and to developing country governments, yet disempower local communities. This situation has led critics to seriously question the substance of the World Bank and others' alleged support of Indigenous rights, particularly in light of current revisions to the World Bank's policy for Indigenous peoples (OD 4.20), and the World Bank's recent rejection of the right to prior informed consent. Indigenous groups and NGOs worldwide are actively challenging the activities and policies of the World Bank and other international financial institutions including export credit agencies.

Inadequate Consideration of Impacts

Finding #3: Indigenous peoples from both South and North are severely affected by the social and environmental impacts of mineral development, yet these impacts – particularly those affecting Indigenous women – are inadequately considered in feasibility studies, planning and decision-making. Conflict between Indigenous peoples, mining companies and government policymakers often arises as Indigenous peoples struggle to resist negative impacts.

In the literature, key impacts fall into several common themes: impacts resulting from environmental damage; health impacts; abuse of human/Indigenous rights; socio-cultural impacts; and gender impacts. Despite the severity of many of these impacts, however, mining companies and their subcontractors rarely take proactive measures to comprehensively address them. Indeed, the extensive negative impacts of mining are often considered by corporations and policy-makers as a necessary byproduct of progress. These impacts are often exacerbated by poor environmental, health and safety standards, particularly in the South. While more progressive mining companies do undertake environmental and social impact assessments (EIAs/SIAs), these plans are often partial, with key impacts left unmitigated or ignored particularly with respect to social and gender impacts of mining. In addition, cumulative impacts are increasingly important but seldom addressed in EIA/SIAs. Furthermore, the full impacts of mining on Indigenous peoples in remote areas are seldom communicated to shareholders and the public, often due to the absence of paths of communication available to Indigenous peoples to voice their concerns to the outside world.

Section 3: Indigenous Peoples Fight Back

Indigenous Peoples' Strategies and Successes

Finding #4: While limited by technical and financial resources, Indigenous peoples have had some success in affecting minerals development and creating pressure for greater consultation and participation. Yet many Indigenous people argue that fundamental issues such as land rights and rights to prior informed consent must be addressed prior to any discussion of consultation.

Indigenous peoples who have been faced with mining projects on their lands have undertaken a variety of approaches to increase their level of participation in decision-making and in dealing with potential negative impacts. These include: undertaking lawsuits and land claims negotiations; launching public activism campaigns often with the support of other NGOs; challenging environmental impact assessments; developing community policies, guidelines and protocols; and appealing to international fora such as the United Nations. Some communities, desperate to escape poverty conditions, are increasingly examining other economic alternatives, such as benefit-sharing and/or partnering with the mining industry. While progress has been made in some cases, these efforts are frequently frustrated by corrupt governments, lack of recognition

of Indigenous land rights and divide-and-conquer tactics by companies. In addition, the literature suggests that industry tends to focus on consulting with those community members seeking economic benefits rather than more comprehensively engaging with those who may have dissenting perspectives, with the scope of consultations covering economic considerations almost exclusively.

Section 4: International, National, NGO and Corporate Initiatives

International Initiatives

Finding #5: There has been some progress in developing international initiatives to address the need for increased consultation and participation of Indigenous peoples in decision-making about mining, but these initiatives have generally been weak and effective implementation rare.

A large number of initiatives from the international community, NGOs and the mining industry have helped push ahead the agenda for greater consultation and participation of Indigenous peoples on mining development. Our report provides a review of recent initiatives by the UN, the OECD, international financing institutions including the World Bank Group, the Inter-American Development Bank, and export credit agencies. In addition, we examine a number of national initiatives, as well as several activities undertaken by NGOs in order to increase the pressure for meaningful consultation and participation. Finally, we examine the corporate shift towards “sustainable mining”, including a critique of the lack of participation of Indigenous peoples in the current industry initiative – the Mining Minerals and Sustainable (MMSD) project - undertaken by the IIED in preparation for the Rio +10 Summit.

While there is a clear consensus among all interest groups of the need for better consultation and participation of local communities, the approaches vary significantly. Companies, multilateral lending agencies and export credit agencies, among other groups, have demonstrated an interest in the issues of consultation and participation, generally with the goal of reducing conflict. However, these approaches do not go far enough in addressing the root causes of conflict, do not address underlying power imbalances or historical injustices. Most problematic is the continual lack of recognition for the international rights of Indigenous peoples, including the right to prior informed consent and the right to meaningful consultation and participation in natural resources development.

National Initiatives

Finding #6: At the national level, government legislation has begun to recognize Indigenous rights, although follow-through and implementation is problematic.

These concerns are often on the backburner of (frequently conflicting) issues such as the national economy and trade concerns under the legally-binding WTO. In addition, national governments are increasingly supporting voluntary initiatives over the need for regulation and legislation enshrining principles of meaningful consultation and prior informed consent. Consequently, there is little government control or sanctions over industry activities that infringe Indigenous rights.

NGO Initiatives

Finding #7: A variety of NGOs are attempting to tip the power balance between mining companies, government and IFIs on the one hand and mining affected communities on the other, by undertaking campaigns and lawsuits.

For example, a coalition of 200 NGOs has called on the World Bank Group to terminate financing oil and gas ventures, which has catalyzed a Bank review of its extractive industries policy.

Corporate Initiatives

Finding #8: Despite the potential value of the apparent corporate shift towards sustainable development in mining and increased focus on participation, many corporate initiatives have had only limited impact and are considered by many Indigenous peoples and NGOs to be little more than public relations activities. This belief seems to be supported by the placement of consultation and participation activities in corporations' public relations departments, with little communication with operations departments.

By and large, mining companies have not 'voluntarily' become progressive: they have been forced to improve their performance by international pressure and stakeholder conflict. To date, most industry-initiated and government-promoted voluntary codes, guidelines, consultation processes and reporting initiatives have not translated into measurable improvements, and have been criticized as being public relations exercises. Many believe that mining corporations and numerous other parties have embraced the notion of [weak/shallow] consultation inasmuch as it does not tend to threaten their level of control over a project, and in many cases, results in placation of local communities. Further, corporate and government approaches both still tend to view consultation as a straightforward process of engagement with a homogenous group.

Voluntary Initiatives

Finding #9: Voluntary corporate policies and codes are insufficient as a mechanism to ensure the meaningful consultation and participation of Indigenous peoples.

The existence of corporate codes does not ensure an operational shift in corporate vision or practice. Codes that fundamentally recognize the rights of Indigenous peoples to meaningful consultation and participation (including the right to prior informed consent) are largely non-existent. While some corporate policies and codes do identify indigenous peoples as an important stakeholder group, many are narrow in focus and few support independent monitoring and reporting. In addition, codes often do not clearly outline operational level standards to achieve the effective implementation of consultation and participation processes.

Perhaps one of the largest problems with voluntary initiatives is the lack of sanctions for those who do not comply. Corporations are often willing to voluntarily consult with communities, so long as it does not threaten their decision-making power.

Instead, critics recommend stronger approaches such as the implementation of ILO Convention 169, and the implementation of legislation and regulations in favour of voluntary codes. Industry has gone part-way: seemingly addressing these issues to placate and limit opposition, rather than actually empowering communities to act in their own best interests. Nonetheless, while not sufficient, internal shifts in corporate cultures are important catalysts for pushing ahead the consultation and participation agenda.

Indigenous Initiatives

Finding #10: There have been some important initiatives by Indigenous groups to elaborate their own guidelines for research, exploration and development. These have not been given enough importance or respect internationally, and are generally ignored in favour of corporate-driven initiatives such as voluntary measures.

Section 5: Differentiating between Consultation and Participation

What is Meaningful Consultation?

Finding #11: The concept of “consultation” remains a contested area with little consensus on what constitutes a process for meaningful consultation.

Mining companies have typically viewed consultation as largely a forum for one-way communication on corporate plans, with Indigenous peoples participation primarily restricted to narrow areas such as community development plans. Indigenous peoples and NGOs, in contrast, identify consultation more broadly as a two-way participatory process where Indigenous peoples can actively influence decisions on mining development.

Categories of Participation

Finding #12: The levels of participation can be grouped into four main categories: information-transfer, consultative (advisory), collaborative (joint decision-making), and local control. Based on the literature, consultation can be identified as a low level of public participation, and also as a pre-requisite to meaningful participation.

Mechanisms for Participation

Finding #13: Just as there are different levels of participation, there are also different mechanisms for participation, which can influence the quality of participation. There are also important barriers to participation, including political, financial, technical, cultural, and motivational constraints.

From Talk to Action: The Mining Industry in Perspective

Finding #14: While the mining industry has begun to talk about participatory approaches, there are only a few examples of effective Indigenous peoples' participation in action. In contrast, local peoples are gaining increased control and participation in the forestry industry.

Section 6: An In-depth Look at Consultation

Consultation as a Tool for Empowerment

Finding #15: Meaningful consultation on its own is insufficient as a tool to resolve conflict between Indigenous peoples, mining companies and the state. However, more effective community consultation processes have the potential to empower local communities and increase Indigenous peoples' influence on decisions on mining development.

Main Players in Consultation and Paths of Dialogue

Finding #16: To date, very little research has comprehensively examined the wide range of possible consultation dynamics within actual or proposed mining projects. Doing so can highlight the key strengths and weaknesses in consultation approaches. Analysis to date has been limited to a superficial level. Breaking down the relational dynamics of consultation processes into a series of more simple relationships can build understanding of the subtleties of external and internal consultation processes.

The consultation literature focuses largely on company-community consultation, and other paths of dialogue are often overlooked. Effective consultation and participation in decision-making about proposed mining activities on Indigenous lands requires communication between and within numerous parties, most often including: companies, government, affected local people and NGOs. On a fundamental level, consultations can be divided into those that are external and those that are internal. External consultations include the following paths of dialogue: company-community; government-community-company; NGO-community; NGO-company-government; community-community. Internal consultation paths include those: within communities; within companies; within and among governments.

“Strong” versus “Weak” Consultation

Finding #17: Since there are many different conceptions of consultation, it is useful to differentiate between two broad categories of consultation processes. While there is a need to verify this typology from the perspective of Indigenous peoples, consultation processes can be categorized broadly from “strong” through to “weak.”

Table 4 in our report provides a detailed overview of these categories, and examines the principles/values of consultation processes, the goals and objectives, as well as the mechanics of strong and weak consultation processes. In brief:

- **Strong processes** are based on the recognition of Indigenous peoples rights to consultation and participation in natural resources management and their right to informed prior consent; involve joint goal-setting and joint consultation-planning; are culturally appropriate, tailored to the local context, and incorporate traditional ecological knowledge; involve education and capacity-building; incorporate mutually agreed upon processes for dispute resolution and disengagement; and include post consultation follow-up, evaluation and reporting. These consultations occur as early as possible, and are ongoing throughout the mine life cycle.
- **Weak consultations** do not recognize the international rights of Indigenous peoples, involve goals and objectives that are pre-set by companies, are often motivated by the company trying to quell opposition to the project and win the support of local people through one-way information processes with select individuals, involve a top-down consultation design plan, do not include dispute resolution measures, and include little or no follow-up, evaluation or reporting. Weak consultations are not ongoing, but occur once or twice throughout the mine life cycle.

In the mining sector, companies tend to engage in weak consultation processes, most frequently driving the agenda and overriding local aspirations. Despite the rhetoric of the ‘triple bottom line’, providing space for Indigenous peoples’ participation is often perceived to threaten corporate control over profits.

Unless consultation processes incorporate specific key principles and values, goals and mechanics to move them up the ladder toward the strong end of the participation spectrum, they will fall short of their potential value. A variety of recommendations emerge from the literature to this end (some outlined above in the characterization of strong consultations), focusing on the importance of trust-building, cultural awareness and respect, full transparency, accountability and flexibility.

Beyond Consultation

Finding #18: While essential, meaningful consultation is insufficient to ensure equitable and sustainable natural resources development; reaching this goal requires moving beyond consultation to recognize land rights, embrace the right to informed prior consent and the right to meaningful consultation and participation in natural resources management.

A move to ‘responsible’ mining on Indigenous lands must include the right of communities to say “no” to potential development on their ancestral lands. In addition, meaningful participation should not be seen as merely an input into a project, but as an underlining *operational* principle to underpin all activities (from project development through to mine operations, management and closure planning). This is consistent with international law.

Section 7: The Need for Future Research

While Table 4 in our report summarizes existing literature on strong versus weak consultation processes, grassroots data on the perspectives of Indigenous peoples on effective consultation and participation processes is still missing, yet remains critical to the debate. We strongly recommend and support the need to fund Indigenous groups to carry out their own studies on this topic.

The review concludes by identifying key areas for future research, including:

- Examining macro-level issues that affect the relationships between Indigenous peoples and mining companies, including globalization, trade liberalization and the changing role of the State.
- Exploring the regulatory and change management processes and vehicles required for mining companies to move up the ladder of participation towards meaningful consultation and participation practices.
- Validating and refining indicators and reporting mechanisms on consultation and participation from the perspective of Indigenous peoples.
- Developing participatory approaches to community capacity building on these issues.
- Undertaking research on the gender impacts of mining on Indigenous peoples. Developing tools to more adequately incorporate gender issues into Environmental Impact Assessments, and consultation and participation processes.
- Developing culturally appropriate and equitable dispute resolution processes and mechanisms that can account for and minimize power differentials and address community disengagement.
- Evaluating corporate capacity-building programs and cultural awareness training.
- Elaborating options for policy reform which are supportive of Indigenous perspectives and bring countries closer to fulfilling their obligations under treaties pertaining to human rights, Indigenous peoples and environment.
- Developing the capacity and resources of Indigenous peoples to carry out their own community-based research and support them in their efforts to gain access to information, develop community protocols, etc.

Identifying and documenting global ‘high risk’ sites where Indigenous peoples are at risk of, or are currently encountering social and environmental harm from mining development and operations, for example from mercury and cyanide spills, or indirectly, from destruction of Indigenous culture and/or the ecological basis of subsistence activities.

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