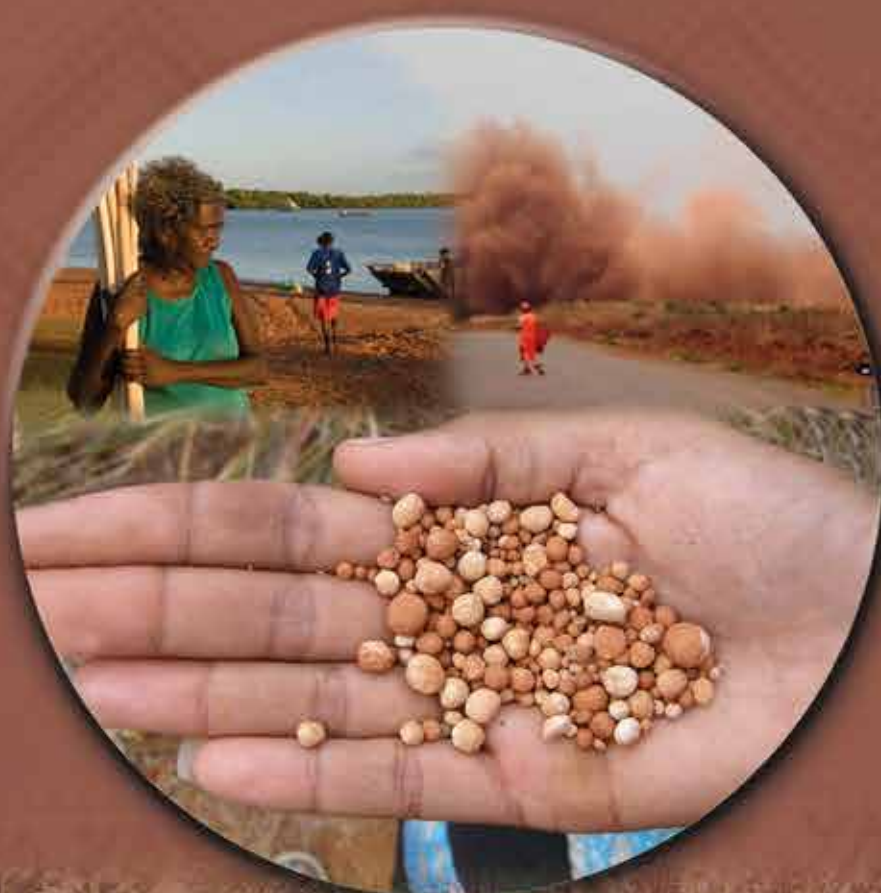


Mining, the Aluminium Industry and Indigenous Peoples

Enhancing Corporate Respect for Indigenous Peoples' Rights



Editors: Dr. Cathal M Doyle, Helen Tugendhat and Robeliza Halip

Mining, the Aluminium Industry, and Indigenous Peoples:

Enhancing Corporate Respect for Indigenous Peoples' Rights

Asia Indigenous Peoples Pact (AIPP)
Forest Peoples Programme (FPP)
International Union for Conservation of Nature (IUCN)
Chiang Mai/Gloucestershire/Gland

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Foreword

There is now increasing global attention on how to change “business as usual” practices of corporations so that they account for environmental sustainability, ensure respect for human rights and contribute to equitable development. Finding ways to ensure that corporations respect and support the protection of the rights of indigenous peoples remains a challenge in securing the implementation of the UN Declaration on the Rights of Indigenous Peoples.

Through international processes and mechanisms such as the UN Guiding Principles on Business and Human Rights, the UN Working Group on the issue of human rights and transnational corporations and other business enterprises and the annual Forum on Business and Human Rights, as well as the development of corporate social, environmental and human rights policies, a set of global standards in relation to corporate responsibilities and approaches to human rights, including the rights of indigenous peoples, is now emerging.

These standards and the principles they embody, including the requirement for the free prior and informed consent (FPIC) of indigenous peoples in relation to corporate activities affecting their rights and interests are key steps forward in addressing conflicts, social justice and participatory and sustainable development. However, these standards and policies alone will remain insufficient unless the political will and institutional mechanisms are in place ensuring that corporations understand and respect, and that States protect the human rights of those impacted by corporate activities.

The experiences re-told in this publication serve to underscore the critical importance of finding ways to improve, in practical and real terms, the experiences of indigenous peoples when faced with extractive industries in their territories. There are many lessons to be learned from these experiences that can assist in moving towards improved engagement based on an understanding of indigenous peoples’ perspectives, rights and aspirations. I join the editors in thanking the contributors and express my hope that the ASI Performance Standard can establish a benchmark of good practice that will provide a way to avoid some of the potentially devastating impacts of extractive and related industries and enable real benefits and genuine opportunities to be realised.

Joan Carling
Expert member, UN Permanent Forum on Indigenous Issues
Secretary General, Asia Indigenous People Pact (AIPP)
10 September 2015

Acknowledgements

The editors of this publication would like to thank the participants of the Indigenous Peoples' Expert Meeting on the Aluminium Stewardship Initiative (ASI) held in Chiang Mai in May 2015. The rich and varied experiences shared at that meeting form the basis of the General Statement found in this publication, and shaped the detailed recommendations and suggestions on indicators provided to the Standard Setting Group of the ASI. We are grateful for the time, invaluable inputs, and considerable efforts that they brought to bear in that meeting and in feeding into this publication.

Our thanks go to Gina Castelain and Heather Rose from Aurukun, for sharing the experiences of the Wik and Wik-Waya peoples, to Sotheara Pharn for sharing the experiences of indigenous peoples with foreign mining companies in Ratanakiri in Cambodia, to Seerat Kachhap and Praful Lakra for sharing the experiences with bauxite mining in conflict zones in India, to Matek Geram for sharing his report on the aluminium smelter company and its impact to indigenous peoples in Sarawak, Malaysia, and to Marie-Josée Artist for sharing the West Suriname situation and the impacts felt by the Kali'ña and Lokono peoples.

We also extend our thanks to Estebancio Castro from *Fundacion para la Promocion del Conocimiento Indigena* (FPCI) and Geoff Nettleton of Indigenous Peoples Links (PIPLinks) for shepherding inputs into the ASI Standard Setting Group on behalf of the attendees of the Expert Meeting.

The Expert Meeting was hosted by INA House, an indigenous collective endeavour to support the economic empowerment of indigenous women's groups in Asia, which provided excellent facilities, rooms, and meals for us all.

Representatives from Norsk Hydro and from Rio Tinto joined for a day and a half of dialogue with indigenous peoples and their active participation in that dialogue was appreciated.

We would like to thank the authors of the case studies contained within this publication for taking the time to research the experiences and stories of indigenous peoples who have seen their communities, livelihoods and lands affected by activities related to the aluminium value chain. In particular we should mention Kabinet Cisse and Aboubacar Diallo who provided detailed research of the views of indigenous communities in Guinea, which constitutes an addition to the discussions held in Chiang Mai where the case was not addressed. A special mention also goes to Jade Tessier for her tireless translations back and forth into French to enable the Guinean experience to be represented here. We also wish to thank Ximena Waarners for her on-going work in documenting the experiences of indigenous peoples with the aluminium industry in Brazil which will be included in a follow-up publication in 2016. Finally, none of this work would have been possible without the support of IUCN, in particular Giulia Carbone and Deviah Aïama to whom we are very grateful.

We greatly appreciated the open and serious efforts that the ASI Standard Setting Group has put into securing independent and self-generated knowledge, experiences and inputs from indigenous peoples and their organisations in countries with significant bauxite reserves. Financial support for the Expert Meeting of Indigenous Peoples and for this publication was provided by the ASI, for which we also express our sincere thanks.

Cathal M Doyle, Helen Tugendhat and Robeliza Halip

07 September 2015

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*Dedicated to the memory of Brian Wyatt,
a tireless advocate on behalf of
mining impacted indigenous communities
and an inspiration to all
who had the fortune to know him.*

Introduction

Indigenous Peoples' Rights and the Aluminium Industry¹

Next to steel, aluminium is the world's most widely used metal, and is found in huge numbers of consumer products. More aluminium is produced every year than any other non-ferrous metal, in a process that is energy-hungry and requires shallow mining over very large areas with significant associated environmental and social impacts. In recent years the demand for aluminium has increased at an annual rate of over five percent.² Despite the increasing efforts to capture and recycle aluminium products, the production of primary aluminium is projected to continue to expand in line with this growing demand.

Historically, the aluminium industry, with its bauxite mines and large-scale dams supplying power for smelting and refining, has had significant direct adverse impacts on the rights of indigenous peoples, as demonstrated in the experiences outlined in this publication. Understanding the history and on-going impact of this legacy is a necessary and indeed critical step in creating a more responsible and responsive industry in the future. Some of these experiences also indicate a positive, if tentative, improvement, in the scale and nature of impacts, how they are managed, and in the level of respect and space provided for indigenous peoples in negotiations about access to and the use of their lands and resources. They also illustrate important proactive steps taken by indigenous peoples to assert their rights in the context of mining and hydroelectric projects.

Interactions between indigenous peoples and various actors in the aluminium value chain are set to increase as the location of much of the world's remaining bauxite resources, and the rivers used to generate power for its processing, are in or near indigenous peoples' territories. It is therefore of growing importance for the aluminium industry to ensure that the rights of indigenous peoples are meaningfully respected and protected, as outlined in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) and further detailed in other international standards and laws. This includes implementation of Free, Prior and Informed Consent (FPIC), a principle which emerges as a core concern in every case addressed in this publication, and which is an essential safeguard for the continued survival and development of indigenous peoples.

The challenge for the aluminium industry, a highly integrated industrial sector with few dominant players, is to find ways to mine, refine, smelt and transform this metal without causing significant harms to the environment or to the affected peoples, and to ensure that any positive steps realized to date are entrenched and systematised across the sector. The experiences shared in this publication point to the historical legacies that must be dealt with, and also highlight the serious challenges to creating a more just and rights-based usage of resources in indigenous peoples' territories.

¹ Authors Helen Tugendhat, Cathal M Doyle, Robeliza Halip

² <http://www.statista.com/statistics/242777/aluminum-demand-and-supply-growth-rates/>

The Aluminium Stewardship Initiative (ASI) was set up by industry leaders (see box 1 below) to establish a framework for improved social and environmental performance in the aluminium value chain. It is an industry-led initiative to establish a certification system to enable socially and environmentally sustainable and responsible aluminium to be tracked through the value chain and certified as such. The ASI Performance Standard: Principles and Criteria require respect for the rights of indigenous peoples. The purpose of this publication is to demonstrate what this means for indigenous peoples affected by aluminium production.

The rights of indigenous peoples

The long and painful history of exploitation and loss of resources, and the associated violence, dispossession and cultural harms, which characterise the extractive industries' impact on indigenous peoples are well documented. As Rodolfo Stavenhagen, a former UN Special Rapporteur on the rights of indigenous peoples noted, where large-scale mining projects

occur in areas occupied by indigenous peoples it is likely that their communities will undergo profound social and economic changes that are frequently not well understood, much less foreseen, by the authorities in charge of promoting them. [...] The principal human rights effects of these projects for indigenous peoples relate to loss of traditional territories and land, eviction, migration and eventual resettlement, depletion of resources necessary for physical and cultural survival, destruction and pollution of the traditional environment, social and community disorganization, long-term negative health and nutritional impacts as well as, in some cases, harassment and violence.³

Stavenhagen's successor as Special Rapporteur, James Anaya, chose the experiences of indigenous peoples with extractive industries as the major theme of his mandate, due primarily to the large number of complaints against extractive industries that his office received. In his 2012 report to the Human Rights Council the Special Rapporteur noted widespread and continuing violations of the rights to lands and resources, and rights to participate in decision-making and to exercise self-determination.⁴ He also highlighted that the right to self-determination means "indigenous peoples have the right to determine priorities and strategies for the development or use of their lands and territories".⁵

A critical road remains to be travelled between the historical disempowerment and exploitation that many indigenous peoples have experienced when their resources have been extracted and a possible future path based on partnerships in which peoples are able to determine their own priorities and strategies, potentially including development of mineral resources in their lands.

³ United Nations, 2003, p.2

⁴ James Anaya, Extractive Industries and Indigenous Peoples, Report to the Human Rights Council, July 2013, A/HRC/24/41.

⁵ UN Declaration on the Rights of Indigenous Peoples, art. 32, para 1, cited in Ibid.

As pointed out by the Special Rapporteur and numerous expert bodies, the international framework for the rights of indigenous peoples is well developed, and is most succinctly articulated in the UNDRIP. Rights to lands, territories and resources, affirmed in articles 25, 26, 27, 28 and 32 of the Declaration, are among the most obviously impacted by mining activities, however self-determination and self-governance rights, including the right to determine priorities and strategies for development (including articles 3, 19, 23 and 32) are also directly impacted by bauxite mining and associated dam projects.

This is particularly the case when corporations invoke national laws in order to avoid compliance with their own independent responsibility to respect indigenous peoples' rights. The right to cultural survival and development (articles 3, 31 and 34) is of central importance to indigenous peoples' well-being and is threatened when a peoples' means of subsistence is damaged or harmed or their ability to control their own futures is impaired.

A core component of effective protection of these rights, as provided for in the UNDRIP, is meaningful implementation of the principle of FPIC. Anaya describes FPIC as "a safeguard for the internationally recognized rights of indigenous peoples that are typically affected by extractive activities that occur within [indigenous] territories."

Other bodies, including UN treaty bodies, the Inter-American Court and Commission on Human Rights and the African Commission on Peoples and Human Rights describe the option to give or withhold FPIC to mining and dam projects as a right of indigenous peoples. The experiences outlined in this publication underline the importance of this principle and right in ensuring open and respectful engagements with indigenous peoples, irrespective of the national governments or national laws under which they live.

By requiring companies to commit to respect and implement FPIC, the ASI standard is taking an important step towards fulfilling its role as a safeguard for indigenous peoples' rights.

In addition to FPIC, and the processes that it implies and requires (dealt with in more detail in chapter two), are the underpinning rights to lands, territories and resources, the right to self-governance and the decision-making authority it ensures and protects, the right to cultural and physical survival and the right to choose one's own future social and economic development, as noted above. Respect for these rights has been repeatedly affirmed as the minimum requirement for the collective survival and continuation of the world's indigenous peoples. A failure to respect and secure these rights in the aluminium sector would have demonstrably catastrophic outcomes.

As explained in this publication, the failure of national governments in Suriname and Guinea to recognize the existence of indigenous peoples and to acknowledge their land and resource rights significantly weakened their ability to engage effectively with multinational corporations looking to invest in bauxite mining in their territories. In Australia, limitations imposed on recognized native title rights in the Wik homelands, in particular around Aurukun, have served to deny related cultural and self-governance rights and deprive the Wik peoples' of the opportunity to determine their own futures. In Cambodia, partial recognition of the land and resource rights of indigenous peoples is undermined by inadequate implementation of these rights and land laws allow for communal title but are rarely issued and ill-protected.

Mining and the importance of the potential income from mining sources also highlight another challenge for sustainable and rights-respecting mining practices: it is often the case that national governments can arbitrarily declare mining investments or associated infrastructure such as dams to be 'in the national interest' and therefore effectively "legalize" rights-denying restrictions on indigenous rights and title, or can even act to ignore or deny (Suriname, Guinea, Cambodia, Australia, India), or even legally extinguish them (Australia).

Mining operations in conflict areas are of a major concern for many indigenous peoples as they significantly increase their vulnerability to violations of their fundamental human rights. A case in point is the experience of indigenous peoples in India where the 4th world's largest bauxite reserves are located mostly in Adivasi (indigenous peoples) lands in East India.⁶ As described in the India case study in Chapter 5, displacement, loss of livelihoods, and destruction of sacred sites are among the many adverse impacts that India's indigenous peoples have experienced in relation to bauxite mining and its associated facilities (railway, hydropower, and thermal power).

Their situation is further compounded by the ongoing conflict between the Naxalites, Maoist groups, and the government with the latter waging an 'all-out offensive' in the areas where the Naxalites are located. These areas are also where many indigenous peoples live and where minerals are found. Like other indigenous peoples impacted by mining in conflict zones throughout the world, the Adivasi are bearing the brunt of this conflict with many of them being subjected to various forms of human rights violations. Laws protecting Adivasi rights exist, such as the Forests Rights Act of 2006, and include recognition of their right to give or withhold consent to projects entering their territories. However, they remain unimplemented.

The presence of mining projects in conflict areas throughout the world serves to exacerbate existing conflicts, as they lead to the hiring of private armed guards by companies, while increasing sources of revenues for weapons for the conflicting parties, and result in an escalation in the State military presence in indigenous peoples' territories. Indigenous communities end up suffering as they inevitably end up being caught in the cross-fire.

Aluminium value chain

The countries addressed in this publication, and in associated forthcoming publications addressing additional cases in Brazil and other countries in Asia,⁷ occupy different positions in the aluminium value chain, from primary bauxite providers (Guinea), to complex value chain operations spanning mining to metal transformation and product fabrication (Australia, Brazil, India). The experiences described deal exclusively with the primary production of aluminium, namely with bauxite mining, alumina refining,

⁶ Smriti Chand Production and Distribution of Bauxite in India available at <http://www.yourarticlelibrary.com/india-2/production-and-distribution-of-bauxite-in-india/19752/>

⁷ A follow up publication addressing cases in these three countries is planned for Q1 2016.

aluminium smelting and semi-fabrication. Subsequent stages of the value chain which include consumer product manufacture, collection and re-cycling of aluminium, are not addressed, while they are important in terms of their impact on future demand for resources in indigenous territories, the processes themselves have minimal direct impact on the rights of indigenous peoples.

Each of the cases involves mining sites, and they span the concession issuance, operations and rehabilitation phases, with issues around the latter highlighted in the Australian case. Mines also require the construction of support infrastructure, and the construction and presence of rail links and roads result in an array of new pressures and impacts on isolated communities – an issue raised in both Brazil and Suriname. Transport of bauxite and attendant concerns about pollution and health hazards are also touched on in a number of cases.

Beyond the significant adverse impacts associated with mine sites and their associated infrastructure, indigenous peoples can also be affected by aluminium production. The nature and extent of these impacts depend on the stages of the value chain with which they come into contact. It is also a function of whether the country in which they live has an integrated or a diversified aluminium value chain. In Suriname, the government's efforts to encourage an integrated value chain for primary aluminium involve plans for mining, smelting, deep-water port facilities and refining capacity, while a greater focus on mining in Guinea has resulted in a more concentrated form of impact from mining and associated infrastructure.

Countries with integrated supply systems aimed at adding as much value as possible to the primary bauxite resource, have value chains that encompass the entire primary production process from mining to semi-fabrication (Brazil, Suriname, India). In such contexts the mine site is only one part of the aluminium production impact area with which indigenous peoples and other affected communities are concerned.

In a number of cases, the production of energy for smelters is highlighted as a serious concern for affected indigenous peoples (Suriname, Brazil, Malaysia). This is because in attempting to develop integrated supply chain and to maximise added value, smelting operations are established which demand enormous supplies of energy, leading to large-scale hydro-electric projects being constructed in, or in close proximity to, indigenous peoples' territories. In Suriname, Malaysia and Brazil, these massive hydroelectric dams have extensive and significant impact zones of their own.

Indigenous peoples' engagement in standard setting for aluminium production: the Aluminium Stewardship Initiative experience

The ASI standard-setting process was structured around the contribution of industry and non-industry stakeholders. The members of the Standard Setting Group included representatives of the aluminium value chain and of civil society, namely: Aleris; AMAG/Constantia Flexibles; Amcor Flexibles; As You Sow; Audi; Ball Corporation; BMW Group; CII – Godrej Green Business Centre, India; Cleaner Production Center South Africa; Constellium; Ecofys; EMPA – Materials Science and Technology;

Fauna and Flora International; Forest Peoples Programme; Fundacion Para la Promoción de Conocimientos Indigenas/Asociación Indígena Ambiental en Panama; Igora; IndustriAll Global Union; IUCN; Jaguar Land Rover; Nestlé Nespresso SA; Hydro; Novelis; Partners Global; Rexam; Rio Tinto Alcan; Tetra Pak; Transparency International and WWF.

In addition to a number of face-to-face meetings bringing together these organizations, additional financial support was provided to indigenous peoples' organisations and representatives from bauxite mining areas to obtain their independent input. As part of this process, indigenous peoples' organisations and representatives of affected communities met in Chiang Mai, Thailand, in 2015 at the Indigenous Peoples' Expert Meeting on the Aluminium Stewardship Initiative (ASI) Performance Standard. This meeting provided an opportunity for indigenous peoples to share among themselves, and with the IUCN and with ASI companies, their experiences with the mining of bauxite in their lands, and with the production of energy linked to the smelting and refining process.

Indigenous representatives at that meeting highlighted the critical importance of the rights recognized in the UN Declaration on the Rights of Indigenous Peoples in ensuring their survival and the possibility of benefit from resource use. Drawing from their extensive experience with the aluminium sector, the participants developed a number of recommendations to the ASI Standard Setting Group.

Among these recommendations was the publication and dissemination of their experiences, along with guidance in relation to FPIC and identification of indigenous peoples. Likewise, the importance of ensuring continued independent input from, and participation of, indigenous peoples in the design, operation, oversight and governance of the certification system was emphasised.

This publication, whose case study chapters are drawn from the experiences shared at the Expert Meeting, forms one small, but nevertheless, significant aspect of what is hoped to be an on-going input from indigenous peoples. Its contents, while particularly relevant to the aluminium industry, are also more generally applicable to any corporate activity involving the use of resources in indigenous territories, including mining, hydroelectric dams, agri-business plantations, and all their associated facilities. The inclusion of the Cambodian case serves to illustrate this point. In addition to the cases presented by meeting participants, experiences are also included from Guinea, and additional cases in Brazil and other countries in Asia will be addressed in a follow-up publication, due to the significant bauxite deposits in those countries and the extent of the impacts their exploitation has had, or is likely to have, on the concerned indigenous and tribal peoples.

‘What is the Aluminium Stewardship Initiative?’

The Aluminium Stewardship Initiative (ASI) was launched at the end of 2012 by key players in the aluminium industry and as of September 2015 is supported by fourteen companies: Aleris, Amcor Flexibles, AMAG/Constantia Flexibles, Audi, Ball Corporation, BMW Group, Constellium, Hydro, Jaguar Land Rover, Nestlé Nespresso SA, Novelis, Rexam, Rio Tinto Alcan and Tetra Pak.

From the outset, these companies shared a common goal: to develop and implement a standard for aluminium stewardship that would drive responsible environmental, social and governance performance across the entire aluminium value chain. This standard was envisaged as a tool for responsible sourcing of aluminium, as well as a material stewardship collaborative framework to improve the overall sustainability performance of the entire value chain of aluminium-containing products.

The ASI builds on the earlier work of a group of aluminium companies, non-governmental organizations, policy makers, retailers and end-users of aluminium products, who joined forces to assess industry-specific sustainability challenges, opportunities and needs. This assessment resulted in a report, *Responsible Aluminium Scoping Phase Main Report (Track Record)* that summarizes the industry’s environmental, social and governance sustainability-related risks and opportunities. The report also underscores the need for a transparent global multi-stakeholder approach that would complement existing sustainability programmes throughout the aluminium industry.

In 2012-2013, the founding members of ASI focused on recruiting a critical mass of companies that would ensure representation from the entire aluminium value chain, from bauxite mining to alumina refining, aluminium smelting, semi-fabrication (rolling, extrusion and casting), material conversion, consumer/commercial goods suppliers and re-melting/recycling. From the outset, it was recognized that real change in the aluminium industry could only be achieved by bringing together the entire value chain, from producers and transformers to end-users. A value chain approach would not only create more opportunities for the final standard to be adopted by all players, but would also allow for all sustainability issues specific to the aluminium value chain to be addressed. The Performance Standard itself was launched in December 2014.⁸

⁸ See <http://aluminium-stewardship.org/asi-standards/asi-performance-standard/>

Indicators, Means of Verification and Guidance Notes).

The International Union for Conservation of Nature (IUCN) has acted as coordinator of the standard-setting process until August 2015. As of September 2015 the ASI is a legally independent organization.

Further information on the ASI is available at its website: www.aluminium-stewardship.org or by contacting: Dr. Fiona Solomon, Executive Director, Aluminium Stewardship Initiative (Telephone: +61398578008, Mobile: +61439049000, Email: Fiona@aluminium-stewardship.org)

PART I:
FACTSHEETS ON CORE CONCEPTS

Chapter

1

**Criteria for the Identification
of Indigenous Peoples**

Cathal M Doyle

Overview of factsheets for the ASI on Criteria for the Identification of Indigenous Peoples and on Indigenous Peoples' Free Prior and Informed Consent (FPIC)¹

Chapters 1 and 2 of this publication aim to provide guidance to mining and hydroelectric companies, in particular those companies involved in the aluminium sector, in relation to two issues that have been the subject of extensive discussions and developments under human rights law and international standards related to indigenous peoples' rights. They consist of two fact-sheets which were developed for this ASI publication of selected case studies on indigenous peoples' experiences with the aluminium industry, but which are relevant irrespective of industry sector and can be read as stand-alone documents. The first factsheet concerns the criteria for the identification of indigenous peoples in various regions throughout the world, and the second addresses the content of indigenous peoples' right to give or withhold their free prior and informed consent (FPIC).

The need for guidance in relation to these two topics, in order to complement the case studies and proposed ASI indicators, was identified at the 2015 ASI Indigenous Peoples' Experts Meeting in Chiang Mai. The workshop involved indigenous peoples from bauxite rich territories in Asia, Latin America and Australia, international indigenous support organizations and networks (Forest Peoples Programme, Asia Indigenous Peoples Pact and Indigenous Peoples Links), the International Union for the Conservation of Nature - IUCN (in its role as the ASI secretariat) and two ASI member companies (Rio Tinto Alcan and Norsk Hydro) that are actively involved in bauxite mining, aluminium processing and hydroelectric projects in the aluminium sector.

The issue of identification of indigenous peoples should be a key consideration for mining and hydroelectric companies during their conduct of their initial due diligence for any new projects or expansion of existing projects. While no single definition of "indigenous peoples" exists under international law, practical guidance is available in relation to the criteria for identification of the groups falling within this category and can assist companies in complying with their obligation to respect human rights and understanding how and when to apply the ASI Performance Standard in relation to indigenous peoples.

The first factsheet addresses these criteria, including those identified by international and regional human rights bodies, global and regional international financial institutions, and international multi-stakeholder initiatives in the mining, hydroelectric and other resource intensive sectors. In so doing, it summarizes existing guidance which has been provided to States and corporations in relation to the identification of indigenous peoples in regions or countries where the term "indigenous peoples" is considered contentious or has been challenged by national governments.

The second factsheet addresses the requirement for FPIC. The right of indigenous peoples to give or withhold FPIC to activities impacting on their lands, territories and resources is an internationally recognized safeguard, the purpose of which is to ensure respect for their collective territorial, self-governance and cultural rights. Its good faith implementation is necessary for the continued survival and development of indigenous peoples in whose territories bauxite reserves are located. Understanding and respecting FPIC is therefore fundamental to the integrity of the ASI Standard and is necessary for environmental, economic and social sustainability of the aluminium industry.

¹ Author Cathal M Doyle

Chapter 1

Criteria for the Identification of Indigenous Peoples¹

According to the UN Permanent Forum on Indigenous Issues (UNPFII) there are approximately 370 million people worldwide, comprising of around 5000 distinct indigenous peoples. The current position of the UN and of the international indigenous peoples' movement is that no single definition of indigenous peoples is possible or desirable, as any definition would either fail to cater to the diversity of indigenous peoples or be so broad as to be unworkable. This position has been accepted by States and is reflected in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) which has no specific provision defining who indigenous peoples are.

However, there are certain definitional criteria under customary international law which assist in identifying "indigenous peoples".² This factsheet will outline these criteria as they have been elaborated on under international human rights law and other international standards, including those identified by international and regional human rights bodies, global and regional international financial institutions, and international multi-stakeholder initiatives in the mining, hydro-electric and other resource intensive sectors. In so doing it will summarize the guidance which has been provided to States and corporations in relation to the identification of indigenous peoples, in particular regions where the term is contentious or has been challenged by national governments, while also addressing some related project level considerations.³

The concept of "peoples", "indigenous peoples" and "minorities"

As with the concept of "indigenous peoples", there is no consensus on how the category "peoples" should be defined. Historically, many international law instruments and processes have conflated peoplehood with pre-defined territorial units, generally corresponding to post-colonial States. This is despite the de-facto reality that the concept of "peoples" is not necessarily - and indeed arguably rarely is - synonymous with State territorial boundaries, as demonstrated by the diversity of peoples within some modern States and those peoples who have seceded from post-colonial States, as well as peoples' traditional territories are found across several modern nation-state territorial boundaries.

¹ Author Cathal M Doyle

² For a more in-depth discussion of the concept of indigenous peoples under customary international law see Castellino J & C Doyle 'Who are Indigenous Peoples? An Examination of Concepts Concerning Group Membership in the United Nations Declaration on the Rights of Indigenous Peoples' in M. Weller and J. Hohmann (eds) *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (OUP: Oxford, forthcoming 2015)

³ The focus of this factsheet is on those regions where there are operating bauxite mines and associated infrastructure exist, or where there are known bauxite reserves <http://minerals.usgs.gov/minerals/pubs/commodity/bauxite/mcs-2012-bauxi.pdf> countries include: Latin America and Caribbean: Brazil, Guyana, Jamaica, Suriname, Venezuela; Asia: China, India, Vietnam; Africa: Guinea, Sierra Leone; Australia & Russia

The claim to an inherent right to self-determination, by virtue of which they are free to determine their own social, cultural and economic development, is common to all peoples, including indigenous peoples. However, due to their numerical composition, historical marginalization and reduced traditional territorial bases, extremely few indigenous peoples seek secession from the States of which they are a part.

Indigenous peoples also share certain characteristics with the category “minorities”. They are in general numerically inferior to other groups in the societies/states in which they reside, and frequently have a vulnerable status vis-à-vis dominant groups. They aspire to maintain and develop their cultures on the basis of non-discrimination and respect for and protection of cultural diversity. However, indigenous peoples’ claims to peoplehood, based on their distinct cultures and ways of life which are directly linked to their lands, territories and resources and self-governance generally distinguish them from the claims of groups classified as minorities.

A core distinguishing feature of “indigenous peoples” from the international law categories of “peoples” or “minorities” is therefore the distinctive relationships with their lands, territories and resources, which commonly underpin the peoples’ cultural strength and survival, and are generally governed under customary tenure regimes and associated with traditional livelihoods and ways of life.

Martinez Cobo UN Working Definition of Indigenous Peoples

Some of the key characteristics of indigenous peoples were identified in the landmark UN study on the prevention of discrimination against indigenous peoples for the UN Sub-Commission on the Prevention of Discrimination of Minorities. The study conducted by Martinez Cobo between 1972 and 1986 includes a “working definition” of indigenous peoples, which reads as follows:

Indigenous communities, peoples and nations are those which, having a **historical continuity** with pre-invasion and pre-colonial societies that developed on their territories, **consider themselves distinct from other sectors of the societies** now prevailing on those territories, or parts of them. They form at present **non-dominant sectors** of society and are **determined to preserve, develop and transmit to future generations their ancestral territories**, and their ethnic identity, as the **basis of their continued existence as peoples**, in accordance with their own **cultural patterns, social institutions and legal system**. (emphasis added)

This historical continuity may consist of the continuation, for an extended period reaching into the present of one or more of the following factors:

- a) Occupation of ancestral lands, or at least of part of them;
- b) Common ancestry with the original occupants of these lands;
- c) Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, lifestyle, etc.);
- d) Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language);

- e) Residence in certain parts of the country, or in certain regions of the world;
- f) Other relevant factors.⁴

This “working definition” – when interpreted in light of subsequent developments in international law - is largely been accepted as a basis for identifying indigenous peoples under customary international law. It is buttressed and enhanced by the criteria for identification of indigenous peoples outlined in ILO Convention 169 (1989), in the guidance of UN Treaty and Charter bodies and in the jurisprudence of regional human rights bodies, and in the standards of International Financial Institutions such as the World Bank. The core elements for the identification of indigenous peoples addressed in the “working definition” also emerge from the provisions of the UNDRIP. The following sections briefly outline them.

The Working Group on Indigenous Populations

In 1983 the UN Working Group on Indigenous Populations (WGIP), the body responsible for the initial drafting of the UNDRIP, identified the following characteristics of indigenous peoples:

- descendants of groups which were in the territory of the country at the time when other groups of different cultures or ethnic origins arrived there;
- isolate[d] from other segments of the country’s population they have preserved almost intact the customs and traditions of their ancestors which are similar to those characterised as indigenous; and
- even if only formally, [they have been] placed under a State structure which incorporates national, social and cultural characteristics alien to theirs.

The characteristics were drawn from the work of Martínez Cobo, but excluded his focus on prior occupation by foreign colonial powers. However, given the difficulty of arriving at a common definition, and the fact that indigenous peoples had historically suffered as a result of definitions imposed by others,⁵ the UNDRIP text proposed by the WGIP chairperson Erica-Irene Daes in 1993 was premised on the principle of self-identification and did not include a definition of indigenous peoples. This approach has been echoed by the UNPFII.

⁴ J Martínez Cobo [Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination & Protection of Minorities] *Study on the Problem of Discrimination against Indigenous Populations*, UN Doc. E/CN.4/Sub.2/1986/Add.4.

⁵ UN Doc E/CN.4/Sub.2/AC.4/1995/3 21 June 1996, para 6

ILO Convention 169 – a renewed focus on self-identification as a fundamental criterion

Article 1(2) of ILO *Convention concerning Indigenous and tribal peoples in independent countries*, which served to revise the 1957 ILO Convention 107, states that “Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.” Article 1(1) of the Convention establishes its scope as applying to:

(a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

(b) peoples in independent countries who are regarded as indigenous on account of their **descent from the populations** which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, **retain some or all of their own social, economic, cultural and political institutions.** (emphasis added)

It is worth noting that the requirement for historical continuity applies from the formation of the present State and is less stringent than that in the Cobo “working definition”. In addition, the ILO Convention 169’s key provisions relate to the unique relationship which indigenous peoples have with their lands, territories and resources and the need to guarantee their right to a permanent and enduring way of life. It recognizes that land rights are derived from customary tenure and the associated requirement that any activities impacting on their land rights, or on their way of life, must be subject to good faith consultations which have the objective of obtaining indigenous peoples’ consent.

Characteristics of indigenous peoples emerging from the UNDRIP

The UNDRIP is premised on the principle of self-identification and does not include a definition of indigenous peoples. However, the key characteristics of indigenous peoples, as outlined in the aforementioned sources, are all implicit in its provisions and preamble. Notable among these are the distinctive collective identity of indigenous peoples as diverse peoples vested with the right to self-determination (preamble and article 3) with the associated right to determine their own plans and priorities for development and the need for their Free Prior and Informed Consent (FPIC) (preamble and articles 19, 23 & 32); the economic and spiritual relationship they have with their lands, territories and resources (preamble and articles 25 & 26); their histories of discrimination and marginalization (preamble & articles 2, 15), and their autonomous self-governance institutions and legal regimes (articles 18 & 40).

The preamble of the UNDRIP also welcomes the fact that “indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring to an end all forms of discrimination and oppression wherever they occur.” In so doing it points to the collective role which indigenous peoples play, from

the local to the international level, in the recognition of other indigenous peoples. The UNDRIP provisions reflect the increased emphasis which international law places on the notion of self-identification and on the right of indigenous peoples to self-determination as well as the reduction in focus on demonstrating historical continuity with pre-colonial societies in order to cater to a broader spectrum of indigenous peoples beyond those indigenous peoples in settler societies such as Australia, the United States, Canada and New Zealand.

Approach of UN treaty and charter bodies of identifying indigenous peoples

The practice of all the major UN treaty bodies in relation to the identification of indigenous peoples is aligned with, and has served to reinforce, the guidance provided in the UNDRIP and other international standards. The Committee for the Elimination of Racial Discrimination (CERD), responsible for overseeing the implementation of the *International Convention on the Elimination of all forms of Racial Discrimination*,⁶ is the treaty body which has been to the fore in addressing indigenous peoples' issues. In 1997, CERD issued a General Recommendation (no. 23) to all State parties clarifying that failure to respect indigenous peoples constituted discrimination under the Convention.⁷ Through its recommendations to state parties, it has repeatedly addressed the need for States to respect the rights of those groups who self-identify as indigenous peoples, and which to varying degrees meet the aforementioned generally accepted characteristics, irrespective of the nomenclature used by the State to refer to them. Along with other treaty bodies, CERD has called on States to use the UNDRIP as the interpretative guide in relation to identification and treatment of indigenous peoples. The same treaty bodies have also highlighted that these indigenous peoples suffer disproportionately in the name of national development which requires them to sacrifice their resource-rich territories without adequate safeguards in place to protect the rights recognized in UNDRIP or processes in place to guarantee fair and equitable benefit sharing arrangements.⁸

The UN Special Rapporteur on the rights of indigenous peoples has also provided guidance in relation to the identification of indigenous peoples and has recommended that corporations make use of the characteristics outlined in ILO Convention 169 as the basis for their due diligence processes.⁹

⁶ The *International Convention on the Elimination of All Forms of Racial Discrimination* opened for signature 7 Mar March 1966, 660 UNTS 195.

⁷ CERD General Recommendation No. 23: Indigenous Peoples 18/08/97

⁸ For an overview of this treaty body jurisprudence see: Doyle C & A Whitmore (2014) "Indigenous Peoples and the Extractive Industries: Towards a Rights Respecting Engagement" (Manila, London: Tebtebba, Middlesex University, PIPLinks)

⁹ A/HRC/15/37, 2010 para 49-52, for an account of the responsibilities in relation to consultation and consent seeking processes in the context of dam construction see Relator Especial sobre la situación de los derechos

humanos y las libertades fundamentales de los indígenas, S. James Anaya Observaciones sobre la situación de la Comunidad Charco la Pava y otras comunidades afectadas por el Proyecto Hidroeléctrico Chan 75 (Panamá) 12 de mayo de 2009

Identification of indigenous peoples in Latin America

Most Latin American states have ratified ILO Convention 169, or its predecessor ILO Convention 107, and many of them were active in the negotiation of the UNDRIP. In recent years many of these States have enacted legislation recognizing indigenous peoples and their rights, and in some cases constitutional recognition has been afforded to indigenous peoples. At a regional level, the Inter-American Commission and Court on Human Rights have developed an important body of jurisprudence around indigenous peoples' rights. The scope of ILO Convention 169, which covers both indigenous and tribal peoples, extends to groups such as Afro-descendants who do not self-identify as indigenous, but share many characteristics in common with them. In this regard the Inter-American Court on Human Rights has clarified that the rights recognized under the international framework of indigenous peoples' rights, including the requirement to obtain FPIC for mining and energy projects, also applies to these tribal groups which

share similar characteristics with indigenous peoples, such as social, cultural and economic traditions different from other sections of the national community, identifying themselves with their ancestral territories, and regulating themselves, at least partially, by their own norms, customs, and traditions.¹⁰

Nevertheless, governments in the region continue to resist full compliance with international standards related to the recognition and protection of indigenous peoples' rights. From the perspective of the corporate obligation to respect human rights, a thorough due diligence process should go beyond national nomenclature issues and respect the inherent collective and individual rights of peoples and groups based on their historical and contemporary realities, identities and necessities. A number of factsheets have been developed in conjunction with the UN International Fund for Agricultural Development (IFAD) on the characteristics and situation of indigenous peoples in Latin America countries such as Argentina, Belize, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Guyana, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru and Venezuela.¹¹

Identification of indigenous peoples in Africa

The question of who are the "indigenous peoples" of Africa has been the subject of significant discussion, with resistance to the concept resting on the fact that a significant majority of Africans are indigenous to their countries, and most others are indigenous to the continent. As a result, unlike in settler colonies, the notion of indigenous peoples as 'first inhabitants that were invaded by foreigners' has little traction. The African Commission on Human and Peoples Rights has attempted to dispel misunderstandings around the concept stating that:

¹⁰ Doyle C & J Carino footnote 48

¹¹ <http://ifad.org/english/indigenous/pub/index.htm>

Rather than aboriginality, the principle of self-identification is a key criterion for identifying indigenous peoples. This principle requires that peoples identify themselves as indigenous, and as distinctly different from other groups within the state.¹²

The Commission also recognises three main characteristics for indigenous peoples in Africa

The focus should be on the more recent approaches focussing on *self-definition* as indigenous and distinctly different from other groups within a state; on a *special attachment to and use of their traditional land* whereby their ancestral land and territory has a fundamental importance for their collective physical and cultural survival as peoples; on an experience of *subjugation, marginalization, dispossession, exclusion or discrimination* because these peoples have different cultures, ways of life or modes of production than the national hegemonic and dominant model.¹³ (original emphasis)

This experience of subjugation was elaborated on by the Commission noting that

Domination and colonisation has not exclusively been practised by white settlers and colonialists. In Africa, dominant groups have also after independence suppressed marginalized groups, and it is this sort of present-day internal suppression within African states that the contemporary African indigenous movement seeks to address.”¹⁴

The Commission has also identified some of the groups which fall under the rubric of indigenous peoples in Africa. Among these are:

the Pygmies of the Great Lakes Region, the San of South Africa, the Hadzabe of Tanzania and the Ogiek, Sengwer and Yakuu of Kenya, all hunter-gatherer peoples. Nomadic pastoralists include the Pokot of Kenya and Uganda, the Barabaig of Tanzania, the Masai of Kenya and Tanzania, the Samburu, Turkana, Rendille, Endorois and Borana of Kenya, the Karamajong of Uganda, the Hinda of Namibia and the Tuareg, Fulani and Toubou of Mali, Burkina Faso and Niger, along with the Amazigh of North Africa.¹⁵

¹² African Commission on Human and Peoples' Rights, *Indigenous Peoples in Africa: the forgotten peoples? The African Commission's Work on Indigenous Peoples in Africa* (Copenhagen: IWGIA, 2006), 11

¹³ Report of the African Commission's Work on Indigenous Peoples in Africa (Eks/Skolens Trykkeri, Copenhagen: ACHPR, IWGIA, 2005), 92-3 available at http://www.iwgia.org/iwgia_files_publications_files/African_Commission_book.pdf

¹⁴ African Commission on Human and Peoples' Rights, *Indigenous Peoples in Africa: the forgotten peoples? The African Commission's Work on Indigenous Peoples in Africa* (Copenhagen: IWGIA, 2006), 92

¹⁵ African Commission on Human and Peoples' Rights, *Indigenous Peoples in Africa: the forgotten peoples? The African Commission's Work on Indigenous Peoples in Africa* (Copenhagen: IWGIA, 2006), 10

As noted by the Commission the diverse ways of life and cultures of these groups are distinct from those of mainstream African society and their livelihoods are highly land and natural resource dependant and frequently subsistence in nature. They include hunter-gatherer communities, nomadic pastoralists, and, to a lesser degree, small-scale farmers and their survival is increasingly threatened by territorial encroachment, in particular by actors in the energy, extractive and tourism sectors. The African Court on Human and Peoples Rights has also recognized the applicability of the concept of indigenous peoples to these groups and the need to ensure protection of their rights. A number of factsheets have also been developed in conjunction with IFAD on the characteristics and situation of indigenous peoples in African countries such as Congo, Kenya, Niger and Tanzania.¹⁶

Identification of indigenous peoples in Asia

In Asia, as in Africa, a number of governments resist the use of the term indigenous peoples and, with a few exceptions, such as the Philippines, Japan and Nepal, Asian States generally do not afford constitutional or legislative recognition to indigenous peoples as distinct peoples with collective rights. As in Africa, the argument put forward by States is that all the people of Asia are indigenous to their countries. However, this argument has been soundly refuted by Asian indigenous groups, academics and UN human rights bodies on grounds similar to those raised by the African Commission in Africa.¹⁷

Unlike Africa and Latin America, Asia lacks a region-wide human rights mechanism to address the issue.¹⁸ At the sub-regional level, the Association of South East Asian Nations (ASEAN) has established a human rights mechanism, but its mandate is limited to the promotion of the ASEAN Declaration on Human Rights (ADHR) which does not explicitly address the rights of indigenous peoples.¹⁹ Region wide guidance has, however, been provided by the UN Special Rapporteur on the rights of indigenous peoples following a 2013 consultation held with representatives of indigenous peoples in Asia.

The Rapporteur's report on the situation of indigenous peoples in Asia explains that there are particular groups, such as those referred to as "tribal peoples," "hill tribes," "scheduled tribes" or "adivasis," which "distinguish themselves from the broader populations of the Asian countries and fall within the scope of the international concern for indigenous peoples."²⁰ These groups have "distinct identities and ways of life, and face very particularized human rights issues related to histories of various forms of oppression, such as dispossession of their lands and natural resources and

¹⁶ Congo: http://ifad.org/english/indigenous/pub/documents/tnotes/congo_dr.pdf; Kenya: <http://ifad.org/english/indigenous/pub/documents/tnotes/Kenya.pdf>; Niger: <http://ifad.org/english/indigenous/pub/documents/tnotes/niger.pdf>; Tanzania: <http://ifad.org/english/indigenous/pub/documents/tnotes/tanzania.pdf>

¹⁷ Erni C (ed) *The Concept of Indigenous Peoples in Asia: A resource Book* (Chiang Mai, Copenhagen: AIPP, IWGIA, 2008)

¹⁸ Sub-regional groups, such as the Association of South East Asian Nations (ASEAN), have formed sub-regional human rights mechanisms but these do not address the rights of indigenous peoples

¹⁹ The ASEAN Declaration on the Elimination of Violence Against Women and Violence Against Children does however include a reference to "women and children belonging to ethnic and/or indigenous groups"

²⁰ Anaya Asia Consultation A/HRC/24/41/Add.3 para 6

denial of cultural expression.”²¹ They continue to be “among the most discriminated against, socially and economically marginalized, and politically subordinated parts of the societies of the countries in which they live.”²² A non-exhaustive list of groups from the various Asian countries represented in the consultation, was listed by the Rapporteur to illustrate this reality.²³

A book addressing the concept of indigenous peoples in Asia has been produced by Asia Indigenous Peoples Pact and the International Work Group on Indigenous Affairs, and factsheets have been developed in conjunction with International Fund for Agricultural Development (IFAD) on the characteristics and situation of indigenous peoples in Asia and the Pacific in countries such as Bangladesh, Cambodia, India, Indonesia, Laos, Nepal, the Philippines, and Vietnam.²⁴

²¹ Ibid para 7

²² Ibid

²³ The non-exhaustive list included the following groups:

- Bangladesh: Chakma, Marma and Tripura (collectively known as Jumma), and Santal, and Mandi, commonly referred to as Adivasi and officially referred to as tribes (upajati), minor races (khudro jatishaootta), ethnic sects and communities (nrigoshthi o shomprodai);
- Cambodia: Broa, Bunong, Chhong, Jarai, Kachak, Kavet, officially referred to as ethnic minority groups, indigenous minority peoples and Khmer-Loeu (hill tribes);
- India: Gond, Oraon, Khond, Bhil, Mina, Onge, Jarawa, Nagas, officially referred to as Scheduled Tribes or Adivasi (original inhabitants);
- Indonesia: Masyarakat adat communities, including groups such as the Dayak Benuaq, the Orang Tengger and the Orang Badui, a subset of whom are officially referred to as komunitas adat terpencil;
- Japan: Ainu, officially referred to as indigenous peoples, and the Ryukyans or Okinawans, who have sought similar recognition as indigenous peoples;
- Lao People’s Democratic Republic: The majority of the Mon-Khmer, Sino-Tibetan and Hmong-Mien grouping, officially referred to as ethnic minorities and non-ethnic Lao;
- Malaysia: Orang Asli (original peoples) of peninsular Malaysia, the Bukitans, Bisayahs, Dusuns, Sea Dayaks, Land Dayaks groups of Sarawak, and the natives of Sabah, officially referred to as aborigines and natives;
- Myanmar: Shan, Kayin (Karen), Rakhine, Kayah (Karenni), Chin, Kachin and Mon, commonly known as ethnic nationalities and officially referred to as national races;
- Nepal: Magar, Tharu, Tamang, Newar, Rai, Gurung and Limbu, commonly known as Adivasi Janajati and officially referred to as indigenous nationalities;
- The Philippines: Aeta, Ati, Ibaloi, Kankanaey, Mangyan, Subanen, officially referred to as indigenous peoples and indigenous cultural communities;
- Thailand: Karen, Hmong, Lahu, Mien, commonly known as ethnic minorities and officially referred to as “chao khao” or “hill tribes”, and the nomadic sea gypsies or “Chao Lay”; and
- Viet Nam: Tay, Thai, Hmong, Muong and Khmer, officially referred to as ethnic minorities (dan toc thieu so, dan toc it nguoi).

²⁴ Erni C (ed) *The Concept of Indigenous Peoples in Asia: A resource Book* (Chiang Mai, Copenhagen: AIPP, IWGIA, 2008); Philippines: <http://www.ifad.org/english/indigenous/pub/documents/tnotes/philippines.pdf>; Bangladesh: <http://ifad.org/english/indigenous/pub/documents/tnotes/bangladesh.pdf>; Cambodia: <http://ifad.org/english/indigenous/pub/documents/tnotes/cambodia.pdf>; India: <http://ifad.org/english/indigenous/pub/documents/tnotes/india.pdf> (IFAD Country Note); https://www.dropbox.com/home/India%20IPs%20Rights?preview=AIPP+report_Reduced_withcover.pdf (ILO Legal Study); Indonesia: <http://ifad.org/english/indigenous/pub/documents/tnotes/indonesia.pdf>; Laos: <http://ifad.org/english/indigenous/pub/documents/tnotes/laos.pdf>; Viet nam <http://ifad.org/english/indigenous/pub/documents/tnotes/vietnam.pdf>

Identification of indigenous peoples in Russia

The Russian legislative framework affords recognition to some of those groups who meet the characteristics of indigenous peoples under international law, including the Sami people and groups referred to as “indigenous small numbered peoples of the north.” However, it arbitrarily excludes those peoples who share similar histories and ways of life, but whose populations exceed 50,000 people.²⁵

All of these officially unrecognized indigenous peoples in Asia, Africa and Russia share similar characteristics with, and face similar issues to, groups in other regions that are recognized as falling under the category of indigenous peoples, being: a) indigenous to a territory b) in non-dominant positions, c) “have suffered and continue to suffer threats to their distinct identities and basic human rights in ways not felt by dominant sectors of society.”²⁶ Indeed, the need to address their disadvantaged situation in accordance with human rights principles has been recognized by their governments at the international level, as reflected in their support for the UNDRIP. Irrespective of the contradictory positions which the governments of some of these countries have adopted at the national level around the use of the term indigenous peoples to describe these distinct peoples, they are equally vested with the inherent rights recognized in the UNDRIP by virtue of their existence, characteristics and needs.

Indigenous Peoples in the United States, Canada, Australia, New Zealand and Europe

In the settler societies of Australia, Canada, New Zealand, and the United States demonstrating descent from the populations which inhabited the country at the time of the establishment of State is less of an obstacle than in other regions. However, issues in relation to State recognition of indigenous peoples exist, and legislative and policy frameworks and judicial rulings continue to fall short of international standards in terms of indigenous rights’ recognition and protection.

In the United States, certain Native American tribes are recognized by the Federal government, with a degree of recognition afforded to inherent indigenous sovereignty under United States’ jurisprudence. As a result tribes are free to determine their membership. However, while self-identification as a tribe is necessary for recognition, it is

not considered sufficient under the law. As a result some tribes remain unrecognized and consequently lack legal protection. Likewise, the rights of members of tribes who reside outside of reservation lands are afforded lesser protections under the law. Furthermore, federally recognized tribal governments exist in parallel with traditional governance structures, a reality which should be addressed during corporate human rights due diligence and has implications for inclusive consultations and consent seeking processes.

²⁵ A/HRC/15/37/Add.5 para 8

²⁶ Ibid para 9

In Canada, indigenous peoples' existing rights have been afforded Constitutional protection since 1982 and a complex, and often slow and inefficient, land claims system exists to ensure recognition and protection of those rights. First Nations' reserves tend to be smaller and more numerous than Native American reservations, and issues also exist around the non-recognition of First Nations that are not registered under the 1951 Indian Act, with the Inuit and Metis' rights only recently recognized. Legal rulings continue to play a significant role in shaping government policy in relation to indigenous self-governance, land rights and the requirement for consultations and consent. In both the United States and Canada historical treaties also exist, and they continue to have an important role in regulating the relationship of the State with indigenous peoples.

In New Zealand, the Treaty of Waitangi governs the relationship between the Crown and the Maori. A tribunal was established to address the claims of the Maori people. While some progress has been made in processing claims, the Waitangi tribunal is under resourced leading to significant delays. The State is also failing to fully comply with its duty to consult the Maori, as "consultation procedures appear to be applied inconsistently, and are not always in accordance with traditional Maori decision-making procedures, which tend to involve extensive discussion focused on consensus-building."²⁷

Australia's indigenous peoples, referred to as Aboriginals and Torres Strait Islanders, lacked citizenship under the Constitution until 1967. The first recognition of their native title rights at the national level was in 1982 in the landmark Mabo case. In 1993, the Native Title Act was enacted to give effect to the ruling. Indigenous rights are also recognized to varying degrees in legislation at the federal and state levels. A variety of institutions exist to represent Aboriginal peoples, ranging from a national representative body to large land councils, such as those established under land rights acts, to corporate like native title representative bodies. The relationship between these representative bodies and traditional land owners can be complex at times, and indigenous groups have pointed to the need for an improved institutional framework that ensures the voice of Traditional Owners are heard and respected.

In Europe, the Sami of Norway, Sweden and Finland are recognized as indigenous peoples. Each country has its own legislation affording recognition to the Sami, with Sami Parliaments existing in Norway, Sweden and Finland. The parliaments are generally focused on issue of cultural heritage, and lack the power or authority to represent Sami communities in negotiations in relation to land and resource access and usage. Of the four countries, Norway has ratified ILO Convention 169 and as a result affords the greatest level of legal protection to indigenous peoples' rights. The European Court of Human Rights has recognized the Sami as an indigenous people, but has not to date developed a body of jurisprudence in relation to the implementation of their land and resource rights.

²⁷ A/HRC/18/35/Add.4 para 21

Approach of International Financial Institutions

i) World Bank Operational Policy (2005) & IFC Performance Standard 7 (2012)

The World Bank and its private sector arm the International Financial Corporation (IFC) have adopted a functional approach towards identifying indigenous peoples. The Bank's 2005 Operational Policy on Indigenous Peoples (OP 4.10) and the IFC's 2012 Performance Standard 7 note "the varied and changing contexts in which Indigenous Peoples live" and the absence of a universally accepted definition of "Indigenous Peoples," and as a result do not attempt to define the term. They also note that different countries refer to those groups who fall under the category indigenous peoples "by such terms as 'indigenous ethnic minorities,' 'aboriginals,' 'hill tribes,' 'minority nationalities,' 'scheduled tribes,' 'first nations' or 'tribal groups.'" Having addressed these definitional ambiguities and inconsistencies in labelling at the national level, they proceed to explain that the term "Indigenous Peoples" is used

in a generic sense to refer to **distinct, vulnerable, social and cultural groups** possessing the following [four] characteristics in varying degrees:

- a) **self-identification** as members of a distinct indigenous cultural group and **recognition of this identity by others**;
- b) **collective attachment to** geographically distinct habitats or **ancestral territories** in the project area and to the natural resources in these habitats and territories;
- c) **customary cultural, economic, social, or political institutions** that are separate from those of the dominant society and culture; or
- d) **indigenous language**, often different from the official language of the country or region.

Consistent with the World Bank's OP 4.10, the IFC Performance Standard 7 clarifies that in addition to applying "to communities or groups of Indigenous Peoples who maintain a collective attachment ... to distinct habitats or ancestral territories and the natural resources therein" that it also potentially applies to communities or groups who for reasons beyond their control "have lost collective attachment to distinct habitats or ancestral territories in the project area..."²⁸ The July 1 2015 draft of the revised World Bank policy clarifies that the indigenous peoples' policy applies to forest dwellers, hunter gatherers, pastoralists and other nomadic groups.²⁹ The policy also notes the "exceptional vulnerability of remote groups with limited external contact, also known as peoples "in voluntary isolation" or "in initial contact" and that measures are required "to avoid all undesired contact with them as a consequence of the project."³⁰

²⁸ Unlike OP 4.10 (para 4(b)), however, the IFC Performance Standard 7 (para 4-6); limits this to severance that occurred "within the concerned group members' lifetime"

²⁹ World Bank Environmental and Social Framework Second Draft For Consultation JULY 1 2015 ESS7 Para 7

³⁰ World Bank Environmental and Social Framework Second Draft For Consultation JULY 1 2015 ESS7 Para 15

Emphasis is placed on vulnerability as a criterion for identification along with self-identification and the nature of the peoples' attachments to their territories. There is no mention of historical continuity. The reference to the criterion of recognition by others has to be read in light of the fact that the policy applies irrespective of State recognition of indigenous peoples. As such recognition by other indigenous peoples is of particular significance. It is of critical importance that the policies explicitly acknowledge that terms used on a national level – by national governments – may differ, and that the requirements of the policy apply irrespective of such national ambiguities or government refusal to use the term 'indigenous peoples'. Another important feature of the policies is that they recognize that the four characteristics are not possessed by all indigenous peoples in a uniform way. Both IFC Performance Standard 7 and the July 1 2015 draft of the revised World Bank policy include Free Prior and Informed Consent (FPIC) as a core safeguard for indigenous peoples' rights.

ii) Asian Development Bank (ADB) (2009)

The ADB 2009 Safeguard Policy Statement echoes the 2005 World Bank OP 4.10 and recognizes that

within Asia and the Pacific, individual indigenous communities reflect tremendous diversity in their cultures, histories, and current circumstances. The contexts in which such peoples live are varied and changing and no universally accepted definition of Indigenous Peoples exists. Indigenous Peoples may be referred to in different countries by such terms as indigenous ethnic minorities, indigenous cultural communities, aboriginals, hill tribes, minority nationalities, scheduled tribes, or tribal groups.³¹

In light of this the policy uses the term Indigenous Peoples in precisely the same way as OP 4.10, listing the same four characteristics, which can apply to indigenous peoples in varying degrees.

As with OP 4.10 it also notes that loss of collective attachment to land as a result of forced severance does not impact on the applicability of the policy and also clarifies that the State's obligation under customary law or conventions to which they are a party must also be taken into account.³² In this regard the policy explains that:

The broad definition of Indigenous Peoples in the policy follows the international consensus that has been emerging in recent decades, the general classification of Indigenous Peoples by international institutions such as the United Nations and the International Labour Organization, and the status of Indigenous Peoples as recognized by international law.

³¹ ADB June 2009 Safeguard Policy Statement SAFEGUARD REQUIREMENTS 3: INDIGENOUS PEOPLES para 6 <http://www.adb.org/sites/default/files/institutional-document/32056/safeguard-policy-statement-june2009.pdf>.

³² ADB June 2009 Safeguard Policy Statement SAFEGUARD REQUIREMENTS 3: INDIGENOUS PEOPLES paras 7 & 8

The trigger mechanisms for the policy are where “a project directly or indirectly affects the dignity, human rights, livelihood systems, or culture of Indigenous Peoples or affects the territories or natural or cultural resources that Indigenous Peoples own, use, occupy, or claim as their ancestral domain.”³³ Finally, the policy followed an informative 2007 review of the ADB 1998 policy,³⁴ and notes that “[c]ountries’ national legislation and definitions of Indigenous Peoples, if any, are seldom fully aligned with ADB’s policy” and that challenges arise in its application in the region “because of the huge variation in countries’ history, cultures, ideologies, economic resources, demography, and politico-institutional frameworks.”³⁵

iii) Inter-American Development Bank (IDB) (2006)

The 2006 IDB Operational Policy on Indigenous Peoples applies to “Peoples who meet the following three criteria:”

- “they are descendants from populations inhabiting Latin America and the Caribbean at the time of the conquest or colonization;”
- “irrespective of their legal status or current residence, they retain some or all of their own social, economic, political, linguistic and cultural institutions and practices;” and
- “they recognize themselves as belonging to indigenous or pre-colonial cultures or peoples.”³⁶

Importantly the policy recognizes the rights of indigenous peoples in voluntary isolation or initial contact “to remain in said isolated condition and to live freely according to their culture.”³⁷

It also requires compliance with “applicable legal norms” which include “national legislation,” “international norms” (such as the jurisprudence of the Inter-American system and international treaties) and “indigenous juridical systems.”³⁸ While indigenous judicial systems are to be “taken into account according to the rules for their recognition established in the legislation of each country,” the relevant international norms addressing the status of indigenous judicial systems would also have to be respected.³⁹

³³ ADB June 2009 Safeguard Policy Statement SAFEGUARD REQUIREMENTS 3: INDIGENOUS PEOPLES para 9

³⁴ ADB February 2007 Indigenous Peoples Safeguards <http://www.adb.org/documents/indigenous-peoples-safeguards>

³⁵ ADB June 2009 Safeguard Policy Statement para 23

³⁶ ADB Operational Policy on Indigenous Peoples page 5

³⁷ The policy refers to “uncontacted” people and equates them with “peoples in voluntary isolation” ADB Operational Policy on Indigenous Peoples page 9

³⁸ ADB Operational Policy on Indigenous Peoples page 8

³⁹ ADB Operational Policy on Indigenous Peoples page 5

iv) African Development Bank (AfDB) (2013)

The AfDB is the only multilateral development bank without a stand-alone safeguard policy on indigenous peoples. Its 2013 environmental and social safeguard policy does make reference to indigenous peoples however it does not include a definition or any criteria for their identification.⁴⁰

The policy does however commit the AfDB to “strengthen the dialogue initiated with continental institutions during the forum on Indigenous Peoples in Development it organised in February 2013 to explore opportunities to increase knowledge and understanding of what is an indigenous peoples group in Africa and how to better support the inclusion and economic development of such groups.”⁴¹

The AfDB has in the past expressed the view that indigenous peoples in Africa are mostly “vulnerable groups.” It also stated that it will give “due consideration to the social issues [by] develop[ing] detailed and specific guidance as necessary, and in line with UN General Assembly’s Declaration on the Rights of Indigenous Peoples (2007) which calls for international finance institutions “to apply safeguards and strengthen the states’ own domestic policies on indigenous people[s].”⁴²

Identification of Indigenous Peoples in Multi-Stakeholder Guidelines

A growing number of industry standards include criteria for recognizing indigenous peoples. In the hydro sector the 2010 Hydropower Sustainability Assessment Protocol identifies indigenous peoples as

distinct social and cultural group[s] possessing the following characteristics in varying degrees: self-identification as members of a distinct indigenous cultural group and recognition of this identity by others; collective attachment to geographically distinct habitats or ancestral territories in the project area and to the natural resources in these habitats and territories; customary cultural, economic, social or political institutions that are separate from those of the dominant society or culture; an indigenous language, often different from the official language of the country or region.⁴³

⁴⁰ African Development Bank Group’s Integrated Safeguards System Policy statement and operational safeguard (December 2013)

⁴¹ African Development Bank Group’s Integrated Safeguards System Policy statement and operational safeguard (December 2013) page 17

⁴² African Development Bank’s Response to Professor Michael Cernea’s article: “Safeguard Social Policies in Africa: A Continent-Wide Public Debate”, March 31, 2012 available at <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Generic-Documents/Response%20to%20Cernea%20Brookings%20on%20safeguard%20policies%20-%20DS%20reviewed.pdf>

⁴³ International Hydropower Association “Hydropower Sustainability Assessment Protocol” (2010) <http://www.hydrosustainability.org/getattachment/7e212656-9d26-4ebc-96b8-1f27eae2ed/The-Hydropower-Sustainability-Assessment-Protocol.aspx> at 27 and 81-83;

Under the standard it is assumed that indigenous peoples are present in a proposed project area unless “credible evidence” is provided to the contrary. The World Commission on Dams reiterates the criteria outlined in ILO Convention 169 and notes that indigenous peoples include “long-resident peoples, with strong customary ties to their lands, who are dominated by other elements of the national society.”⁴⁴ It also notes that “many of the so-called ‘tribal peoples’ of Africa, Asia and the Pacific are indistinguishable from indigenous peoples as far as international law and standards are concerned.”⁴⁵

The International Council on Mining and Metals (ICMM) 2013 position statement on Indigenous Peoples and Mining does not define indigenous peoples but instead refers to the characteristics for identification of indigenous peoples specified in ILO Convention 169 and the rights recognized in it and in the UNDRIP.⁴⁶ Likewise the Round Table Sustainable Palm Oil does not include a definition of indigenous peoples but refers to the UNDRIP and ILO Convention 169.⁴⁷ The 2014 draft standard of the Initiative for Responsible Mining Assurance notes that

There is no universally accepted definition of “indigenous peoples” and the prevailing view is that no formal universal definition is necessary for the recognition and protection of their rights. Generally, however, a fundamental criterion for identifying indigenous peoples is their self-identification as such. Therefore, indigenous peoples may include those not explicitly recognized by national governments.

It draws from the factsheet of the UN Permanent Forum on Indigenous Issues noting that “a modern and inclusive understanding of “indigenous” has been developed and includes peoples who:

- identify themselves and are recognized and accepted by their community as indigenous
- demonstrate historical continuity with pre-colonial and/or pre-settler societies
- have strong links to territories and surrounding natural resources
- have distinct social, economic or political systems
- maintain distinct languages, cultures and beliefs
- form non-dominant groups of society
- resolve to maintain and reproduce their ancestral environments and systems as distinctive peoples and communities

[and that] [i]n some regions, there may be a preference to use other terms such as: tribes, first peoples/nations, aboriginals, ethnic groups, adivasi and janajati. All such terms fall within this modern understanding of ‘indigenous.’⁴⁸

⁴⁴ World Commission on Dams “Dams and Development: A New Framework for Decision-Making” at 218

⁴⁵ Ibid at 219

⁴⁶ ICMM 2013 Position statement on Indigenous Peoples and Mining <http://www.icmm.com/document/5433> at 1

⁴⁷ Principles and Criteria for the Production of Sustainable Palm Oil (2013)

⁴⁸ Draft IRMA Standard July 2014

Project level considerations - addressing all impacted communities

For all mining or dam projects, the presumption in the conduct of corporate human rights due diligence should be that groups exist in the proposed project area which have customary tenure rights over the territories and that prior engagement with them is required.

During due diligence all potentially affected indigenous peoples must be identified. The identification process has to be carried out in a manner that is respectful of local procedures, customs and perspectives. Any group that either owns, occupies or otherwise makes use of the lands, territories or resources, or whose self-governance or cultural rights may be affected, must be identified and consulted. This involves applying international standards irrespective of the position of the State with regard to the recognition of indigenous peoples. Due diligence should therefore identify a) groups recognized by the State as indigenous b) groups that self-identify as indigenous peoples but are not recognized by the State as such, and c) groups which share similar characteristics to indigenous peoples but do not necessarily self-identify as indigenous.

Where multiple peoples or communities are potentially affected, any conflicting claims over lands should be identified. Where due diligence indicates that indigenous peoples would be potentially affected by the project, these peoples' existing governance structures and representative institutions should be identified and verified with them. To this end communities should be asked who their representatives are, how they are to be engaged within the context of seeking their FPIC. Indigenous communities have the right to choose their own leaders and to designate their representatives, free from interference by the State or corporate actors. These may be traditional elders or representatives selected by the community for the specific purpose of engaging in FPIC processes with the company.

In cases where different bodies claim to be representatives of indigenous communities, corporations should engage in broad-based consultations with indigenous authorities, in particular traditional authorities and those mandated by the affected people to represent them, in and around the areas in which they seek to operate, and to be guided by them in relation to the bodies with which they should dialogue. In practice open and inclusive dialogue and extensive cooperation with all indigenous authorities will generally result in the identification by indigenous peoples themselves of their own representatives and representative bodies. The participation of senior corporate representatives in initial open, inclusive and public dialogue with the indigenous authorities and concerned communities is one potentially effective tool towards addressing any perceived problems around representation.

If indigenous peoples are identified in the project area, or their territorial, self-governance or cultural rights would be impacted by the project, then due diligence process should require that their FPIC be obtained. In cases where due diligence indicates that indigenous peoples have not had the opportunity to develop and strengthen their representative structures to the point where they feel fully equipped to enter into FPIC-based dialogue and negotiations, then the granting of consent will not

be possible and projects should not proceed. Research should also determine if there are groups in initial contact or voluntary isolation and any projects which impact on them or their rights should be abandoned.

The criteria for self-identification together with recognition by other indigenous peoples, implies that where there is doubt as to the categorization of a particular group as indigenous peoples, or in relation to the presence of indigenous peoples in a particular area, consultations with the broader community of indigenous peoples can play an important role in providing guidance. This applies at the local level where contestation may arise, for example, in relation to the identification of representatives and where neighbouring indigenous communities may be able to offer guidance. It could also apply at national or regional levels, where guidance may be sought from indigenous federations or networks to assist in the identification process. Engaging civil society, academia and government actors which work closely with, or have expertise on, indigenous peoples in the area may also be appropriate, but cannot act as a substitute for direct consultations with indigenous peoples. Seeking engagement with indigenous representatives outside of project contexts through participation at international mechanisms, such as the UN Permanent Forum on Indigenous Issues and the UN Working Forum on Business and Human Rights, and maintaining dialogue with indigenous peoples at such fora, may also help to address any future potential identification related challenges.

Chapter

2

Indigenous Peoples' Free Prior and Informed Consent (FPIC)

Cathal M Doyle

Chapter 2

Indigenous Peoples' Free Prior and Informed Consent (FPIC)¹

Overview

The right of indigenous peoples to give or withhold free, prior, and informed consent ("FPIC") to activities impacting on their lands, territories and resources is one of the core internationally recognized safeguards for ensuring respect for their collective territorial, self-governance and cultural rights. This Factsheet provides an overview of the requirement for FPIC addressing: i) its human rights bases; ii) the content of the requirement including what it is, how and when it is to be sought, and whose consent is required; iii) its interrelationship with other requirements aimed at safeguarding indigenous peoples' rights; iv) its relevance to the corporate responsibility to respect indigenous peoples' rights; and, v) its role in risk mitigation for corporations and as a platform for building long-term rights-based partnerships with indigenous peoples.

Over the course of its 100-year history the aluminium industry and the numerous large-scale dams and mines which supply bauxite and energy for aluminium smelters have adversely impacted on indigenous peoples' enjoyment of their rights. The location of much of the world's remaining bauxite resources in or near indigenous peoples' territories points to the growing importance for the aluminium industry to ensure that engagements with indigenous peoples are respectful of their rights. Meaningful implementation of the principle of FPIC, which indigenous peoples and human rights law have affirmed as a core rights-based safeguard for indigenous peoples' continued survival and development, is therefore of particular importance to environmental, social and economic sustainability in the aluminium industry and to the integrity of the Aluminium Stewardship Initiative (ASI).

i) What is the rights basis for the requirement to obtain indigenous peoples' FPIC?

The international framework of indigenous peoples' rights is the product of over 30 years of negotiation, analysis and reflection by indigenous peoples, States and human rights experts and advocates. Its clearest articulation is found in the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). The collective and individual rights which are recognized in the UNDRIP are consistent with the jurisprudence of the human rights treaty bodies overseeing the implementation of the major international and regional human rights treaties. These collective rights of indigenous peoples, recognized under international human rights law, can be broadly

¹ Author Dr Cathal M Doyle, Research Fellow at Middlesex University. The factsheet draws extensively from the following publications: Doyle C (2015) *Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative Role of Free Prior and Informed Consent* (London: Routledge) & Doyle C & J Carino (2013) "Making Free Prior and Informed Consent a Reality: Indigenous Peoples and the Extractive Sector" (London: Middlesex University, PIPLinks, ECCR)

classified into three categories of rights: self-governance rights (to self-determination, to autonomy, to participation and to self-determined development, to maintain and develop their own institutions and to exist as distinct peoples), territorial rights (to lands, territories and resources, to property and to customary land tenure regimes, to a healthy environment) and cultural rights (to identity, to customary practices and traditions and spiritual beliefs / religions, and to maintain and protect sacred places).

The associated right of indigenous peoples to give or withhold FPIC is derived from, and is necessary for the realization of, these cultural, territorial and self-governance rights. The requirement to obtain indigenous peoples' FPIC is essentially a corollary of their right, as peoples, to self-determination, which includes the right to freely determine their social, economic and cultural development. In other words, FPIC aims to protect their self-determined social, cultural and economic development as well as their particular relationship with their lands, territories and natural resources. The requirement for FPIC is further reinforced by: a) the necessity of guaranteeing indigenous peoples' cultural and physical survival; b) ensuring the maintenance of their historical identities in the context of externally proposed extractive projects, and c) to cater to their particular historical contexts.²

The requirement to obtain FPIC, along with recognition of the right to self-determination (article 3 of the UNDRIP), forms the skeletal frame of the UNDRIP. The requirement for FPIC is explicitly linked with self-governance rights (article 19) development, territorial and land rights (articles 10, 28, 29, 32) and cultural rights (article 11). The UNDRIP affirms the State duty to "consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their FPIC" "before adopting and implementing legislative or administrative measures that may affect them" (article 19) and "prior to the approval of any project affecting their lands or territories and other resources, *particularly in connection with the development, utilization or exploitation of mineral, water or other resources*" (article 32) (emphasis added).

The requirement to seek and obtain indigenous peoples' FPIC is either explicitly affirmed, or clearly implied, in a range of other international instruments and standards.³ Human rights treaty and charter bodies have affirmed that the requirement for FPIC is implied in all major international human rights covenants and treaties, being a derivative of their provisions addressing self-determination, non-discrimination, cultural and property rights. The focus of these bodies on ensuring respect for FPIC has increased significantly following the adoption of the UNDRIP in 2007.

ILO Convention 169 (C169) recognizes indigenous peoples' collective land and participation rights and affirms that whenever these rights are impacted, consultations must be held which have "the objective of achieving ... consent".⁴ These consultations

² Experts Mechanism on the Rights of Indigenous Peoples (2011) A/HRC/18/42, para. 22; CERD General Recommendation XXIII

³ ILO Convention 169, CBD Article 8j, Nagoya Protocol, IFC Performance Standards

⁴ ILO Convention 169 Articles 6, 7 and 15

must be undertaken “in good faith and in a form appropriate to the circumstances”.⁵ C169 also requires that “[w]here the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent.”⁶ Any deviations from this requirement must be under exceptional circumstances, and subject to formal inquiries involving indigenous representation.

A growing body of recognized good practice industry standards and policies has also afforded explicit recognition to the requirement for FPIC since 2007. Most notable among these for its influence on extractive, energy and financial sector actors was the 2012 incorporation of the FPIC requirement into the safeguards of the World Bank’s private sector arm, the International Finance Corporation (IFC). This was then incorporated by reference into the policies of the private sector Equator Financial Institutions in 2014. Under Performance Standard 7, IFC clients are required to obtain FPIC for design, implementation and expected outcomes stages for projects: impacting on land or natural resources subject to traditional ownership or under customary use; requiring relocation of communities; or significantly impacting on critical cultural heritage of indigenous peoples.⁷

At the national level, a number of States have incorporated the requirement for FPIC into legislation. In other States judicial rulings of national or regional courts have clarified that the requirement for FPIC should be assumed to apply in the context of large-scale extractive or energy projects. Similarly, multi-stakeholder initiatives focused on dams and mining have concluded that FPIC is necessary to ensure respect for indigenous peoples’ rights. The evolving perspectives of some mining companies and the International Council on Mining and Metals (ICMM) and the emergence of multi-stakeholder initiatives such as the Initiative for Responsible Mining Assurance (IRMA) suggest a growing understanding of this rights basis of the requirement for FPIC among key industry actors. Likewise, in the agri-business sector there has been significant uptake of FPIC. The requirement is incorporated into the FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (FAO-VGGT), a United Nations led standard applicable to agricultural sector. It is also required under multi-stakeholder initiatives such as the Roundtable on Sustainable Palm Oil,⁸ the Forest Stewardship Council as well as in the policies all of the major food and beverage companies. A number of commentators suggest that a tipping point has been reached in terms of recognition of the requirement for FPIC as the standard to be adhered to by all parties in their engagement with indigenous peoples, and the focus now must shift towards its implementation. The following section will look at the content of FPIC, briefly addressing the related “what,” “when,” “how” and “who” questions that frequently arise when the requirement is being implemented.

⁵ ILO Convention 169 Article 6

⁶ ILO Convention 169 Article 16

⁷ IFC Performance Standard No 7 (2012) paras 13-7

⁸ M Colchester “Free Prior and Informed Consent and the Roundtable on Sustainable Palm Oil: A guide for companies” (Moreton in Marsh: Forest Peoples Programme) available at [http://www.rspo.org/sites/default/files/FPIC%20and%20Oil%20Palm%20Plantations%20-%20A%20Guide%20for%20Companies%20\(Oct%2008\).pdf](http://www.rspo.org/sites/default/files/FPIC%20and%20Oil%20Palm%20Plantations%20-%20A%20Guide%20for%20Companies%20(Oct%2008).pdf)

ii) Content of the FPIC requirement

a. What is FPIC?

Given the diversity of indigenous peoples' histories and contemporary realities, as well as their broad range of institutions and decision-making practices, a one-size-fits-all formulation of FPIC is not possible. However, indigenous peoples throughout the world regard FPIC as a principle and manifestation of their control as to the future development of their territories.⁹ All indigenous peoples must therefore be in a position to define for themselves what FPIC processes should look like, based on their own particular circumstances, rights and needs. As has been elaborated on by UN bodies addressing indigenous peoples' rights, there are nevertheless a number of overarching principles which are embodied in the four component parts of the requirement for FPIC.¹⁰

- “Free” implies consent is sought in the absence of any actual or perceived coercion, intimidation or manipulation and indigenous peoples can determine the format of the consultations. Free also reflects the fact that participating in consultations aimed at obtaining their FPIC is a self-determination right of indigenous peoples, rather than an obligation which they must meet.¹¹
- “Prior” implies consent is sought sufficiently in advance of any decisions or actions which may impact on indigenous peoples' enjoyment of their rights and that indigenous peoples have the time they need to make their decisions in accordance with their own processes and through their own freely chosen representatives and institutions;
- “Informed” implies that there is full disclosure of all the information indigenous peoples need in order to meaningfully assess the potential risks and benefits of the project (including its location, duration, scope, impacts, benefits and/or partnership models). This information has to be provided in a format understandable to, and through a process agreed by, the concerned indigenous peoples. This may involve participation in, or indigenous conduct of, impact assessments, access to funding for independent technical and legal advice, and negotiations in relation to benefits.
- “Consent” implies respect by all parties, irrespective of the outcome, for the freely taken informed autonomous decision of indigenous peoples. This decision should be the outcome of good faith, rights-based consultations and cooperation with the concerned indigenous peoples. It should be taken by them in accordance with procedures and timeframes of their own choosing and be premised on indigenous rights-based principles of self-determination, inclusivity, consensus, harmony and intergenerational well-being.

⁹ Doyle C & J Carino (2013) *supra*

¹⁰ The implications of its four component parts Free, Prior, Informed and Consent have been addressed at a high level by UN bodies such as the UN Permanent Forum on Indigenous Issues and a former standard setting body, the UN Working Group on Indigenous Populations.

¹¹ Report of the international expert group meeting on extractive industries, Indigenous Peoples' rights and corporate social responsibility E/C.19/2009/CRP. 8 4 May 2009 para 13

Where consent is provided, the associated conditions, agreed with the concerned indigenous peoples, should be formalized in a legally binding document, which, in addition to addressing potential impacts and mitigation measures, benefits sharing or partnership arrangements and rehabilitation plans, also address the monitoring and grievance mechanisms and sanctions applicable in the event of environmental or human rights harms. Where consent is withheld, the decision of the indigenous peoples should be respected. Any conditions (for example in relation to timeframes, scope and process) stipulated by the concerned indigenous peoples in relation to the conduct (or non-conduct) of future consultations should also be respected. FPIC therefore mandates respect for indigenous peoples' rights to be informed and consulted in a timely and culturally appropriate manner and to determine under what conditions, if any, projects are allowed to proceed within their territories. This includes the right to accept, conditionally accept, or reject a particular proposal¹² as well as guarantees that these outcomes are respected and effectively implemented.

b. When is FPIC required? – trigger mechanisms and culturally appropriate timing

There are two dimensions to the question of when consent should be sought, both of which are embodied in the “prior” component of FPIC. One relates to the trigger mechanisms for FPIC, and the sequencing of when it is sought, and the other relates to the time necessary for consultation and decision-making practices. Human rights standards and jurisprudence provide clear guidance in relation to both questions. ILO Convention 169, the UNDRIP and the jurisprudence of international and regional human rights bodies, affirm that the requirement to seek and obtain consent is triggered prior to the issuance of concessions or entering into agreements which impact on indigenous peoples' rights and throughout the lifecycle of projects at key decision-making phases.¹³ Engagement with indigenous peoples must occur early in the project planning phase, with FPIC sought prior to taking project related decisions which impact on their rights. It is subsequently required during key phases of project implementation, up to and including project closure. This is both to ensure that the “prior” component of FPIC is respected, and also to ensure that the good faith relationship that should underpin an effective FPIC process is initiated as soon as possible, and trust and a working relationship can be established or begin to be built.

In the context of mining projects, triggers would include concession issuance, commencement of exploration, exploitation and project closure activities, or any other activities which affect indigenous peoples' enjoyment of their rights.¹⁴ For dam projects,

¹² Doyle C & J Carino (2013) *supra*

¹³ *Saramaka People v. Suriname*, Judgment of November 28, 2007 (Preliminary Objections, Merits, Reparations, and Costs) Inter-Am. Ct. H.R., (Ser. C) No. 172 (2007) para 79; ILO Convention 169 Articles 6 and 15; UN Declaration Articles 19 and 32; CERD and CESCR affirming that FPIC must be sought and obtained in a manner consistent with ILO Convention 169. UN Special Rapporteur on the rights of indigenous peoples A/HRC/12/34 (2009) para 54

consultations in order to obtain consent are also required prior to concession issuance or contractual agreements and again prior to major decisions impacting on indigenous peoples' rights such as project design and implementation, and dam closure and rehabilitation.¹⁵ The second dimension of the "When" question relates to respect for indigenous peoples' decision-making timeframes and realities. It requires that sufficient time is provided for these traditional processes and that consultations are scheduled in accordance with the wishes of indigenous peoples to avoid infringing on their socio-economic activities.

There are rights-based, as well as pragmatic, reasons for this requirement. From a rights-based perspective if indigenous peoples are to determine their social, cultural and economic development in accordance with their right to self-determination they must be involved in decision-making in relation to their territories from the outset, and not after plans or measures impacting on those territories have already been agreed by corporations and States. Similarly, as self-determination is an on-going right, they must be actively involved in the decision-making process throughout the project lifecycle.

From a technical point of view FPIC cannot be obtained for an activity for which there is insufficient information regarding potential impacts, benefits and risks available or where information is not provided in a language and form which are fully understood by the affected communities. In most project phases, information pertinent to a particular activity or stage generally flows from the activities which precede it. A phased approach to obtaining consent at each decision-making point is therefore inherent in the notion of informed consent. In other words FPIC has to be an on-going process if the consent that is provided is to be fully informed.

The implication is that FPIC processes are tailored to the information that is available at a particular point in time and the potential impacts associated with the decision. An initial consultation with indigenous peoples should ask if they would "in principle" be willing to consider a project in their territories.¹⁶ At this initial stage detailed information and prolonged consultations may not be available or necessary. A refusal to consider such a project avoids the need for further consultations, thereby saving expense and minimizing inconvenience for all, while acceptance would be an agreement to enter into consent seeking consultations about a project, rather than to the project itself.

¹⁴ International Labour Organization Convention 169 (1989) article 6 and article 15; Directive C/DIR.3/05/09 Abuja 26-27 May 2009 Sixty Second Session of Council of Ministers Chapter V Human Rights Obligations and Mining Activities article 16; *Saramaka People v. Suriname*, Judgment of November 28, 2007 (Preliminary Objections, Merits, Reparations, and Costs) Inter-Am. Ct. H.R., (Ser. C) No. 172 (2007), para 137; CESCR Cambodia UN Doc. E/C.12/KHM/CO/1, (22 May 2009) para 16; and UN Doc. CERD/C/COL/CO/14, (28 August 2009) para 20

¹⁵ See report of the World Commission on Dams and Relator Especial sobre la situación de los derechos humanos y las libertades fundamentales de los indígenas, S. James Anaya Observaciones sobre la situación de la Comunidad Charco la Pava y otras comunidades afectadas por el Proyecto Hidroeléctrico Chan 75 (Panamá) 12 de mayo de 2009

¹⁶ This is the approach used by the Northern Territory Land Council in Australia in the implementation of the Aboriginal Land Rights (Northern Territories) Act (1976) see M Rumler "Free, prior and informed consent: a review of free, prior and informed consent in Australia" (Oxfam Australia, 2011) at 11

Subsequent consultations would relate to decisions which have legal or practical implications on communities and involve the provision of technical information pertaining to a particular activity.

In addition to these rights-based and technical arguments there are clear business drivers for obtaining informed consent at the earliest stage possible, and maintaining it throughout the project lifecycle. These drivers apply both in cases where consent may be forthcoming or withheld. In the former, by seeking consent at an early stage strong relationships can be built with the community and misunderstandings avoided. Likewise seeking consent at the planning stage avoids scenarios where potentially significant investment losses are incurred because projects are stalled or halted at later stages. Discussions need to take place among indigenous peoples, corporations and States with regard to the precise points at which consent is to be obtained, as well as the process through which it should be obtained. These discussions should also address the manner in which corporations should respect this obligation to obtain FPIC in contexts where States fail to respect the requirement.

Finally, given their exceptional vulnerability, no projects should proceed where the rights or territories of indigenous peoples who are in voluntary isolation or initial contact may potentially be impacted. In such contexts their voluntary isolation should be understood as an exercise of their right to self-determination and a manifestation that FPIC to projects in their territories has been withheld.

c. Who is to be consulted? – indigenous determination of who provides consent

The requirement for FPIC is triggered by any proposed activities in, or affecting, indigenous territories or their self-determination and cultural rights.¹⁷ This applies irrespective of the existence of State issued titles over those territories or State recognition of indigenous peoples or their rights.¹⁸ A single project or project activity may affect multiple indigenous peoples or indigenous communities. Given its rights-basis, in such contexts, the requirement for FPIC is triggered for all indigenous peoples, or communities, whose rights may be impacted, including, for example, downstream communities in cases of water pollution.¹⁹

FPIC must be obtained through indigenous peoples' institutions or representatives chosen by indigenous peoples themselves in accordance with their own procedures.²⁰ They have the right to maintain and develop their institutions or to create new

¹⁷ Report of the UN Special Rapporteur on the rights of indigenous peoples (2012) UN Doc. A/HRC/21/47

¹⁸ Report of the UN Special Rapporteur on the rights of indigenous peoples (2009) A/HRC/12/34 para 44. See Fact Sheet on Identification of Indigenous Peoples for further discussion.

¹⁹ Constitutional Court of Colombia Sentencia T-769/09 (Referencia: expediente T-2315944) 29 de Octubre (2009)

representative structures.²¹ The determination of who is consulted and who provides FPIC is to be made by indigenous peoples themselves and not by State or corporate actors.²² The processes should respect the rights of indigenous women who should be empowered to participate in consultations and decision-making. Communities must be free to institute their own mechanisms to address any issues around the lack of women's participation through internal procedures in a culturally appropriate manner.

d. How to consult? - format of consultations and consent seeking processes

Indigenous peoples view FPIC as a self-determination-based principle which provides for their control over the future development of their territories. One important manifestation of this control is the definition and management of FPIC processes by indigenous authorities and communities whose territories and futures are impacted by proposed projects. Where indigenous peoples have produced their own external facing consultation and FPIC procedures, guidelines, or policies these should be respected by third party.²³ In cases where indigenous peoples chose to work with companies or other third parties to develop consultation procedures, companies should respect and defer to proposals made by indigenous peoples.²⁴ Whenever possible these consensus- based consultation procedures should be agreed with indigenous peoples before companies enter into agreements with States in relation to proposed extractive projects.²⁵ Culturally appropriate consultation procedures aimed at obtaining FPIC must be in a format that is appropriate for the circumstances and ensure:²⁶

- a) sufficient time is available to indigenous peoples to conduct their decision-making and consensus building processes in conformity with their 'own social and cultural traditions';²⁷
- b) respect for indigenous peoples' customary laws, practices and traditions;
- c) consistency with and respect for indigenous peoples' collective rights;²⁸

²⁰ UN Declaration on the Rights of Indigenous Peoples Article 18, 19, 32

²¹ UN Doc. A/66/288 (2011) para 89

²² *Saramaka People v. Suriname* Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs. Judgment of August 12, 2008. Series C No. 185 paras 18 and 22; This has been a consistent theme in the recommendations of the ILO Supervisory bodies, CERD and CESCR see also World Bank Operational Policy 4.10; IFC Performance Standard 7 (2012)

²³ Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to The Convention On Biological Diversity. Nagoya, 29 October 2010 C.N.782.2010.TREATIES-1 (Depositary Notification).

²⁴ UN Doc. A/HRC/21/47 (2012) para 67. See also Representation (article 24) – GUATEMALA – C169 – 2007 – Report of the Committee set up to examine the representation alleging non-observance by Guatemala of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Federation of Country and City Workers (FTCC) Submitted:2005 Document:(GB.294/17/1) para. 53.

²⁵ UN Doc. A/66/288 (2011) para 88

²⁶ Operational Policy 4.10 Annex 1 para 2(c)

- d) information is in a format and language that is accessible to, and understandable by, the peoples in question;
- e) proposed activities do not result in the creation of divisions within communities by facilitating exhaustive internal discussions among community members.

If indigenous peoples decide not to proceed with an FPIC process, or to call a halt to an ongoing FPIC process, this should be recognized as the absence of consent to proceed with the proposed activities and respected as such. Where FPIC is withheld, indigenous communities are entitled to determine when any further consent seeking consultations may proceed.

Indigenous peoples have a right to technical and financial support in the operationalization of FPIC processes.²⁹ This assistance is often necessary in order for meaningful consent seeking consultations to be conducted in good faith and for the imbalance of power between indigenous peoples and entities seeking their consent to be addressed. However, such assistance, aimed at empowering indigenous peoples in informed consent processes and associated negotiations, cannot be used as leverage to influence their positions.³⁰

iii) What is the relationship of FPIC with other safeguards?

In addition to the requirement for FPIC, international human rights law has identified three interrelated requirements which are necessary preconditions for the protection and respect of indigenous peoples' rights in the context of large scale development projects: i) participatory social, environmental, cultural, spiritual, economic and human rights impact assessments; ii) negotiated agreements ensuring equitable benefit sharing and risk prevention and mitigation; and iii) establishment of credible and effective oversight and grievance mechanisms which guarantee access to remedy.³¹

In order to provide their informed consent, indigenous peoples need to be aware of any potential impacts the proposed project plans or activities may have on their lands, territories and resources and their self-governance, cultural and individual rights. The nature of social, cultural, spiritual, and of certain economic and environmental, impacts is context specific and can only be assessed through a particular cultural lens or worldview. For this reason, international human rights and environmental standards require effective and inclusive indigenous participation in the conduct of assessments

²⁷ Representation (article 24) – Colombia – C169 – 2001 – -- – Report of the Committee set up to examine the representation alleging non-observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Central Unitary Workers' Union (CUT) Description:(Article 24 Representation) Convention: C169 Country:(Colombia) Submitted:1999 Document:(GB.276/17/1) Document:(GB.282/14/3).

²⁸ CERD Concluding Observation to the Philippines UN Doc. CERD/C/PHL/CO/20 (23 September 2009)

²⁹ UN Declaration on the Rights of Indigenous Peoples articles 4 and 39.

³⁰ UN Doc. A/HRC/12/34 para 51.

³¹ *Saramaka People v. Suriname*, Judgment of November 28, 2007 (Preliminary Objections, Merits, Reparations, and Costs) Inter-Am. Ct. H.R., (Ser. C) No. 172 (2007) paras 129-140.

spanning social, cultural, spiritual, environmental, gender, human rights and economic considerations. This also applies to the determination of the extent of the actual impact area, which may be dependent on cultural or spiritual significance of areas to groups that reside outside of the physical impact area. The form of participation should be determined by and agreed with the concerned indigenous peoples. It may range from determining what assessments are required, and how and by whom they will be conducted and reviewed, to the conduct of aspects of the assessments by indigenous peoples themselves free from outside interference and with the provision of adequate financial resources. In the conduct of assessments, indigenous peoples should be free to engage experts of their own choosing.

Indigenous peoples have a right to fair and equitable benefits from projects which use land and resources located in their territories. This applies over and above compensation which is necessary to address any infringement of their rights arising from foreseen or unforeseen harms caused by project activities.³² This right to fair and equitable benefits from the exploitation of their lands and resources applies irrespective of State claims to ownership over subsoil resources.³³ FPIC is the mechanism through which indigenous peoples can negotiate benefit-sharing arrangements and enter into agreements that best suit them. Where consent is forthcoming, the outcome of FPIC processes should be a binding mutually acceptable agreement detailing the benefit sharing arrangements and associated terms and conditions. These agreements should also include the measures to prevent or mitigate impacts and limit community exposure to human rights harms including through participatory monitoring, oversight and rights-based grievance mechanisms to detect and provide effective remedy for such harms when they occur. This agreement should include a time-bound and adequately resourced implementation plan, developed with the indigenous peoples concerned, spanning the entire project lifecycle from the design through to the post mine or dam closure and rehabilitation stage.

In order to safeguard indigenous peoples' rights, effective oversight mechanisms have to be in place which can address any failures to meet agreed commitments, problems with consultation or consent processes, or any human rights harms that arise as a result of project activities. The primary responsibility rests with the State to ensure that such mechanisms exist. According to the UN Guiding Principles on Business and Human Rights, where companies cause or contribute to an adverse human rights impact their "responsibility to respect human rights requires active engagement in remediation, by itself or in cooperation with other actors."³⁴ To this end companies are expected to "establish or participate in effective operational-level grievance mechanisms" to be administered either by the company, potentially in conjunction with others, or by a "mutually acceptable external expert or body." Such mechanisms should not "preclude access to judicial or other non-judicial grievance mechanisms" or "negatively impact opportunities for complainants to seek recourse through State-based mechanisms."³⁵ In order to ensure respect for indigenous peoples' rights and to guarantee culturally appropriate rights-based and gender-sensitive grievance handling procedures and

³² ILO Convention 169 article 15; World Bank Operational Policy 4.10 Annex A para 2(e)

³³ ILO C169 Article 15

³⁴ UN Guiding Principles on Business and Human Rights UN Doc A/HRC/17/31 principle 22

structures, operational level grievance mechanisms must be developed in cooperation with indigenous peoples and be based on obtaining their FPIC. The role of customary law and the use of, or interfaced with, existing traditional dispute mechanisms must also be considered as part of this design process. Finally, remedies that are offered must be acceptable to indigenous peoples.

iv. What is the corporate responsibility in relation to FPIC?

The UN Guiding Principles on Business and Human Rights affirm that corporations have a responsibility to respect human rights independently of the State compliance with its duty to protect those rights. A core component of this responsibility is to conduct human rights due diligence. This necessitates the identification of indigenous peoples and any potential impacts on their rights prior to decision-making in relation to plans or activities potentially impacting on them.³⁶ The responsibility includes the requirement to consult with indigenous peoples in order to obtain their FPIC.³⁷

The incorporation of the requirement for FPIC into the IFC 2012 Performance Standards, and by extension the standards of the Equator Banks, is reflective of the reality that the requirement for FPIC applies irrespective of national legislation and should be triggered by any project which may impact on indigenous peoples' rights.³⁸ Just as companies need to understand the national legislative frameworks in the jurisdictions where they seek to do business, companies should similarly understand how to engage with indigenous communities in order to seek their consent in accordance with the communities' laws and procedures.

United Nations bodies, including those dedicated to indigenous peoples' rights, as well as United Nations bodies addressing the issue of business and human rights, have developed guidance targeted at corporate actors explaining their responsibilities in relation to the requirement for FPIC. The UN Special Rapporteur on the rights of indigenous peoples has explained that FPIC seeking consultations should be component of corporate due diligence, while the Norwegian OECD National Contact Point (NCP) has explained that corporations should respect for the outcome of consultations with indigenous peoples, which must be conducted in a form appropriate to the circumstances and involve all potentially impacted indigenous groups.³⁹ The NCP provided detailed guidance in relation to FPIC and noted the need for due diligence to address the 'entire project impact area, including associated infrastructure'.⁴⁰

Human rights guidance explicitly recommends that corporate adherence with the provisions of ILO Convention 169 and the UNDRIP should not be a function of State ratification or support for these instruments.⁴¹ The sovereign power of States

³⁵ UN Framework on Business and Human Rights UN Doc. A/HRC/8/5 para 95.

³⁶ UN Doc. A/66/288 (2011) para 95

³⁷ UN Doc. A/66/288 (2011) para 99

³⁸ A/HRC/15/37 para 30

³⁹ Final Statement Complaint from the Future In Our Hands (FIOH) against Intex Resources ASA and the Mindoro Nickel Project The Norwegian National Contact Point for the OECD Guidelines for Multinational Enterprises (Oslo, OECD, 2011) at 10

is conditional on respect for human rights, including respect for indigenous peoples' rights, and therefore, where those rights are impacted the State does not have a right to override FPIC decisions.⁴² Companies should therefore not invoke State sovereignty or national development arguments as a justification for activities which do not respect indigenous peoples' rights. Instead there should be genuine corporate acknowledgment of, and respect for, the right of indigenous peoples to define their own development paths. This requires that companies "promote the full assumption by Governments" of their duties to protect indigenous peoples' rights and not "accept any award or commence any activity if the State has failed to hold prior and adequate consultations with the indigenous communities concerned."⁴³

Companies must therefore guarantee that FPIC has been obtained in contexts where it is required under international standards, and these same international standards "may require companies to abstain from operations in certain countries where the appropriate consultation framework is not in place".⁴⁴ This has implications for the negotiation and implementation of any investment agreements or contracts which could place limitations on indigenous peoples' rights over their territories. It would be contrary to the corporate responsibility to respect human rights if compensation were required for corporations under international investment arbitration in contexts where States sought to uphold indigenous peoples' rights, including their right to give or withhold FPIC to project activities.

v) Role of FPIC in risk mitigation and a transition to a partnership-based approach

The adoption of the UNDRIP followed over 20 years of indigenous peoples' negotiations with States and was indicative of the lobbying and advocacy power of the global indigenous peoples' movement. The central role for FPIC in the realization of self-determination, cultural and territorial rights, and the obligation it imposes on the private sector, was emphasized in the statement of Global Indigenous Caucus following the adoption of the UNDRIP which held that:

Indigenous Peoples' right to self-determination is about our right to freely determine our political status and freely pursue our economic, social and cultural development. It also includes our right to freely manage our natural wealth and resources for mutual benefit, and our right to maintain and protect our own means of subsistence. 'Free, prior and informed consent' is what we demand as part of self-determination and non-discrimination from governments, multinationals and private sector.⁴⁵

⁴⁰ *ibid*

⁴¹ UN Doc A/HRC/15/37 para 47

⁴² UN Doc. A/66/288 para 95

⁴³ UN Doc. A/HRC/15/37 para 65, 66

⁴⁴ *ibid*

Indigenous peoples throughout the world are now proactively using the UNDRIP as the framework for engagement with all actors who seek to access resources located in their territories. A growing number of indigenous communities being empowered to assert their rights and the expectation that corporations will respect those rights and obtain their FPIC is becoming increasingly widespread. The corresponding risks associated with the failure to obtain FPIC, and the associated lack of social licence to operate, are evident. Numerous large-scale projects have been halted or delayed for extended periods due to indigenous protests, and indigenous advocacy is leading to challenges to the legality of concessions and their potential revocation. Financial risks are also associated with the failure to meet the FPIC criteria of a growing number of private and public financial institutions. Similarly, corporations which do not engage with FPIC may potentially be regarded as complicit in State violations of indigenous peoples' rights.

Engaging in good faith consultations in order to obtain FPIC provides a mechanism through which corporations can avoid the material, legal and reputational risks they will otherwise face in this era of global networks, rapid communications and increased rights-holder empowerment and mobilization.

Ultimately, FPIC provides the platform that is necessary for constructive engagements with indigenous peoples in a manner consistent with the corporate responsibility to respect their human rights.⁴⁵ In so doing, it also offers the only practical long-term approach to the pursuit of extractive and energy projects in or near indigenous peoples' territories for all actors in the Aluminium sector. As a framework within which indigenous peoples' effective participation in impact assessments is ensured, and the power imbalances inherent in negotiations can be addressed, FPIC processes are a foundation for conditions facilitative of rights-based partnerships models with indigenous peoples.

As noted by the UN Special Rapporteur on the rights of indigenous peoples this partnership approach should extend beyond direct financial benefits and include "the option of participating in the management of the extractive projects, in addition to whatever regulatory control they may exercise, in keeping with their right to self-determination". Furthermore, the Special Rapporteur noted, and encouraged, developments along the line of FPIC based agreements

in which indigenous peoples are guaranteed a percentage of profits from the extractive operation or other income stream and are provided means of participation in certain management decisions. In some cases the indigenous people concerned is provided a minority ownership interest in the extractive operation, and through that interest is able to participate in management decisions and profits from the project.⁴⁷

⁴⁵ Statement by the Chairman, Global Indigenous Caucus, Les Malezer, 13 September 2007 on the adoption of the UN Declaration on the Rights of Indigenous Peoples

⁴⁶ Doyle (2015) *supra*

Indeed, given that FPIC is the minimum standard for partnership with indigenous peoples and that new models of indigenous peoples' participation in the extractive sector are also required in cases where indigenous peoples are willing to engage resource extraction, the Special Rapporteur has pointed out that:

In contrast to the prevailing model in which natural resource extraction within indigenous territories is under the control of and primarily for the benefit of others, indigenous peoples in some cases are establishing and implementing their own enterprises to extract and develop natural resources. This alternative of indigenous-controlled resource extraction, by its very nature, is more conducive to the exercise of indigenous peoples' rights to self-determination, lands and resources, culturally appropriate development and related rights, in accordance with the United Nations Declaration on the Rights of Indigenous Peoples and other international sources of authority.⁴⁷

Therefore, while FPIC is a necessary condition for rights-respecting engagements with indigenous peoples, to be meaningful it needs to be understood and operationalized within the broader framework of indigenous peoples' self-determination rights. This implies that FPIC be respected as a safeguard to protect those rights where indigenous peoples wish to pursue alternative non-resource extraction development paths, and as an enabler for new partnerships with extractive industry actors where indigenous peoples are interested in participating in natural resource extraction.

Further Reading on Free Prior Informed Consent (FPIC)

Doyle C & J Carino (2014) "Making Free Prior and Informed Consent a Reality: Indigenous Peoples and the Extractive Sector" (London: Middlesex University, ECCR, PIPLinks) <http://www.socialimpactassessment.com/documents/Consortium+FPIC+report+-+May+2103+-+web+version.pdf>

GIZ & the National Commission on Indigenous Peoples (2013) "An assessment of the implementation of the Free and Prior Informed Consent (FPIC) in the Philippines" Volumes 1 & 2: <http://www.ncip.gov.ph/images/pdf/Assessment%20of%20FPIC%20in%20the%20Philippines%20-%20Volume%20I.pdf> & <http://www.ncip.gov.ph/images/pdf/Assessment%20of%20FPIC%20in%20the%20Philippines%20-%20Volume%20II.pdf>

AIPP (2014) "Training Manual for Indigenous Peoples on Free and Prior Informed Consent (FPIC)": <http://www.aippnet.org/index.php/publication-sp-2697/environment/manuals/1495-training-manual-for-indigenous-peoples-on-free-prior-and-informed-consent-fpic>

⁴⁷ Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya UN Doc A/HRC/24/41, 2013 para 76-7

⁴⁸ Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya UN Doc A/HRC/24/41, 2013 para 8

AIPP (2012) "Hydropower Development and Right to Free, Prior and Informed Consent (FPIC) of Indigenous Peoples - Case Studies from Nepal and Northeast India": <http://www.aippnet.org/index.php/publication-sp-2697/environment/case-studies/1062-hydropower-development-and-right-to-free-prior-and-informed-consent-fpic-of-indigenous-peoples-case-studies-from-nepal-and-northeast-india>

FAO (2014) "Respecting free, prior and informed consent, Practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition": <http://www.fao.org/3/a-i3496e.pdf>

Doyle C (2015) "Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative Role of Free Prior and Informed Consent" (London: Routledge)

S.J. Rombouts (2014) "Having a Say: Indigenous Peoples, International Law and Free, Prior and Informed Consent" (Oisterwijk: Wolf Legal Publishers Law series)

PART II:
CASE STUDIES

Chapter
3

Australia

**Rolling back on progress
towards rights realization:
The Wik peoples' experiences with 40 years of
bauxite mining in their homelands**

Cathal M Doyle

Rolling back on progress towards rights realization: The Wik peoples' experiences with 40 years of bauxite mining in their homelands¹

MY BLEEDING COUNTRY

Gashed, maimed, exposed—reddening the sea, oysters and all things round,
Raped and plundered—for Minerals—feeding the war machine—
My blood drains when my country is wounded.
Red dust in the skies,
Blinding our eyes,
White men in houses protected,
We, exposed, young girls molested
Find refuge in drinking, dreamtime seeking.
My country, it is of my people you are bleeding
Your wounds are my wounds,
Sacred places protected but
We are exposed to the wrath of greed
Living spirits they do not heed.
The Reserve "Ahna" my tribal land,
If we knew before what we know now,
We would have said "NO" to mining our lands.
We have suffered that others may learn,
We can support one another in prayer and song,
That more be spent on the poor
And less for machines of war.
Red flows the waters,
Red dust in the skies, blinding our eyes,
My country, it is of my people you are bleeding.

— Joyce Hall



Published in Keffe J (ed) Love and history, place and war: Australia's heritage in verse (Townsville, Simple Images, 1985)

Overview

Since 1975, the Wik and Wik-Waya peoples (the Wik peoples) have actively struggled with the government of Queensland for the recognition of their native title rights and the associated right to control mining activities on their lands. From the mid-1950's onwards the government of Queensland repeatedly and unilaterally took over the Wik peoples' lands, often in order to grant bauxite leases to mining companies. However, over the course of their 40-year struggle, the Wik peoples have had some important victories, obtaining recognition in the High Court of Australia of native title over much of their lands and simultaneously developing their capacity to engage with government agencies and mining companies seeking to exploit resources located in their lands.

As a result of their efforts, they have successfully negotiated what are regarded by some as landmark agreements with Rio Tinto in terms of benefit sharing and community

empowerment for the two existing mining leases in their lands, although there are big question marks over how the agreements are implemented and if the agreed benefits are in fact being realised. They have also suffered from the negative consequences of bauxite mining, which has led to the bulldozing and burning of forests to waste and the

¹ Written by Dr Cathal M Doyle of Middlesex University for the Aluminium Stewardship Initiative (ASI). The author expresses his sincere thanks to Gina Castelina, a Wik woman and native title holder, for her valuable input and insights as well as her tireless campaigning and advocacy on behalf of the Wik peoples.

degradation of land and pollution of air and water. This has had a major impact on the well-being of the Wik peoples, as their ability to maintain and enjoy their relationship with their homelands and to carry out their responsibilities towards those homelands, has been seriously constrained or denied. As Joyce Hill, a now deceased Wik elder, painfully observed in her poem entitled *My Bleeding Country* “We have suffered that others may learn”.



*Photo of erosion on red cliff taken during a site visit to the Wik Waya Coastline.
© Kerry Trapnel*

The Wik peoples themselves have also learned important lessons from this long experience. They have seen that even in cases like theirs, where indigenous peoples' recognized land rights and associated increased negotiation power have resulted in improved agreements with mining companies, the existing model of benefit sharing in the extractive industry remains inadequate. This existing model is not premised on obtaining their consent to projects and continues to rely on a 'benefits' model that lead to reliance among community members on company handouts, in a manner akin to the affliction of welfare dependency. On the other hand, they have seen that in situations where Wik community members are in a position to make their own decisions and plans and establish their own businesses, that genuine and sustainable community empowerment linked to bauxite mining activity is potentially possible. They have also found that other actors are willing to partner with them, on terms that are acceptable to them, and pursue joint development of the resources in their territory.



Ngan Aak-Kunch Aboriginal Corporation (NAK)

Their conclusion has therefore been that - given the massive wealth already extracted from their lands and the significant reserves of bauxite still remaining, the huge potential for harm if bauxite mining happens in a manner that is not respectful of their wishes, and the refusal of the government and companies to respect their right to withhold their consent to mining - they themselves must be actively involved in regulating, operating and controlling any mining activities that take place in their lands and in the implementation of any agreed commitments made. This approach is consistent with their native title rights and their rights to self-determination and to control over their homelands in accordance with the principle of Free Prior and Informed Consent (FPIC), as recognized under international human rights law and reflected in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) and other international standards.²

² Doyle C "Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative Role of Free Prior and Informed Consent" (London: Routledge, 2015)

Tragically for the Wik peoples, in 2014, the government of Queensland decided, following a highly dubious and ultimately discriminatory process, to select Glencore as its preferred partner to develop a new lease on the Aurukun bauxite reserves. This was despite the Wik peoples' assertion of their self-determination and native title rights in a bid to obtain the mining lease at Aurukun in partnership with investors and mining experts. However, 40 years of Wik struggles for rights and recognition appear to have had no impact on the behaviour of the Queensland government or of multinational mining companies. The Government continues to impose its will in the face of the clearly expressed position of the self-determining Wik peoples. Despite the Wik peoples' progressive proposals and their efforts at self-empowerment they have once again been left with no option but to take the Queensland government to the High Court to force it and Glencore to respect their rights.

Introduction

The Aboriginal and Torres Strait Islander peoples have inhabited Australia for over 40,000 years. British colonisation commenced in 1788, and over the ensuing 200 years the country's indigenous peoples were subjected to extreme racism and genocidal treatment, resulting in the dispossession of their lands and cultural disintegration.³ Throughout this colonial process Aboriginal lands were treated as 'terra nullius' under the racist legal fiction that the native peoples held no rights over them.

Following the formation of the Federation of Australia in 1901, Aboriginal peoples remained excluded from constitutional protection until 1967, when discriminatory provisions excluding them from citizenship were removed from the Constitution. The Commonwealth Racial Discrimination Act was enacted in 1975, prohibiting discrimination on the basis of race, colour, descent or national or ethnic origin, and became central to the protection of Aboriginal peoples' rights. However, the protections afforded under the Act have been shown to be vulnerable to government policy, as demonstrated in 2007 when the Act was suspended in the context of the government's highly controversial Northern Territory Emergency Response.

In 2008, Australia's Federal Parliament issued an apology to the nation's indigenous peoples for laws and policies which had "inflicted profound grief, suffering and loss," and in 2009, it endorsed the UNDRIP, having voted against it during its 2007 adoption by the UN General Assembly. A new national representative body, the National Congress of Australia's First Peoples was established in 2011. However, these steps have been inadequate to address the centuries of discrimination, and Australia's indigenous peoples continue to be severely disadvantaged with respect to other segments of society in terms of their socio-economic conditions.

A government programme entitled "closing the gap" has sought to address this disadvantage by focusing on seven areas: "early childhood, schooling, health, economic participation, healthy home, safe communities, and governance and

³ Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya Addendum Situation of indigenous peoples in Australia UN Doc A/HRC/15/37/Add.4 para 4

leadership.”⁴ Despite its aim to develop partnerships with indigenous peoples, the programme has been criticized for the absence of national consultations in relation to inter-governmental partnership agreements.⁵

In light of their vulnerability to discriminatory governmental actions and the dire socio-economic situation they continue to face, Australia's indigenous peoples have consistently called for entrenchment of legal protections through constitutional recognition of their rights, including their rights to ownership and control over lands, territories and resources.

Land rights and mining in indigenous territories

It was not until the 1992 landmark case of *Mabo v. Queensland (No. 2)* (“Mabo”), which rejected the applicability of the doctrine of terra nullius in Australia, that indigenous peoples' customary title to land, or ‘Native title’ as it is referred to in Australian law, was finally recognized. This led to legislative and policy changes, including the adoption of the 1993 Native Title Act, which was followed by its controversial amendment in 1998. Under the Native Title Act indigenous peoples have a “right to negotiate” with mining companies seeking to exploit resources located in their territories. However, the Act does not recognize their right to give or withhold FPIC and, where an agreement is not reached following the six month negotiation window, a final decision is taken by a tribunal. To date, in cases where agreement was not reached, the tribunal has refused to permit mining in very few cases.

Another highly controversial aspect of the Australian legal framework is the legal possibility to extinguish Aboriginal peoples' rights through legislative acts and the absence of adequate compensation in line with the requirements of the UNDRIP when this occurs.

Mining in Australia, which is increasingly driven by demand from China and India, has been described by the Prime Minister as one of the five pillars of the Australian economy, with mineral resources constituting over 50% of the country's total exports.⁶ Given the location of much of the country's mineral resources in indigenous peoples' lands, it is not surprising that they are disproportionately affected by mining projects. In the Northern Territory alone, where “approximately 30 percent of Aboriginal land is under exploration or currently under negotiation for exploration,” it is estimated that “more than 80 percent of the value of minerals extracted ... comes from mining on Aboriginal-owned land, amounting to more than \$1 billion a year.”⁷

The mismatch between the wealth extracted from the homelands of indigenous peoples and the benefits realized by those peoples, along with the need to address the sector's

⁴ Ibid para 32 citing: Australia, Closing the Gap on Indigenous Disadvantage: The challenge for Australia (Minister of Families, Housing, Community Services, and Indigenous Affairs, 2009).

⁵ Ibid para 61

⁶ Woods M. “Australia's ‘five pillar economy’: mining” The Conversation 30 April, 2015 <http://theconversation.com/australias-five-pillar-economy-mining-40701>

⁷ Northern Territory Land Council <http://www.nlc.org.au/articles/info/the-mining-industry-and-the-nlc/>

historical and on-going legacy in Aboriginal lands, and the importance of respecting Aboriginal wishes with regard to land use and mining, continue to be subjects of major concern for Aboriginal peoples throughout Australia.⁸

Bauxite mining in the lands of the Wik peoples – its history and its effects

Australia produces 30% of the world's bauxite, being the world's largest producer of the material.⁹ Its total bauxite reserves are estimated at 6,280 million tonnes (Mt), second only to Guinea at 7,400 Mt. The largest bauxite reserves in the country (estimated at over 3,000 Mt) are located in the north of Queensland on the western side of the Cape York Peninsula, in the traditional lands of the Wik peoples.

The Wik, Wik Waya and Kugu peoples in Cape York are a complex society consisting of many clans and language groups who have lived in the area for thousands of years. The Aurukun community was established by European Presbyterian missionaries in 1904, at a time when Cape York was regarded as the last frontier for colonial expansion.¹⁰ The only previous contact with European settlers had been when the Dutch visited some 300 years earlier but did not return.

Bauxite deposits were first discovered in 1955 by geologist Harry Evans in the Aboriginal Reserves in Aurukun, Weipa and Mapoon.¹¹ In 1957, the Commonwealth Aluminium Corporation Pty Limited (Comalco) was granted an 84 year mining lease, renewable for a further 21 years, through the Commonwealth Aluminium Corporation Pty Limited Agreement Act 1957 (Qld) ("the Comalco Act"). The Act granted Comalco rights over land, water and sea, incorporating the majority of Weipa and Mapoon mission reserves,¹² and offered no recognition of, or protection to, the Aboriginal peoples exercising customary title over much of the lands – and consequently provided them with no compensation for the conversion of 8000 sq km of their reserves into a mining lease. Subsequent mining leases issued to Alcan in 1962 were also associated with serious rights violations.¹³ Between 1961 and 1963 Aboriginal people in the north of Aurukun were forcibly removed from their homelands and their camps burnt, and many who resisted were chained and forced to walk for weeks to Palm Island prison camp.

⁸ Balch O. "The mismatch between indigenous communities and mining wealth" The Guardian 15 November 2015 <http://www.theguardian.com/sustainable-business/mismatch-indigenous-mining-wealth-utopia>

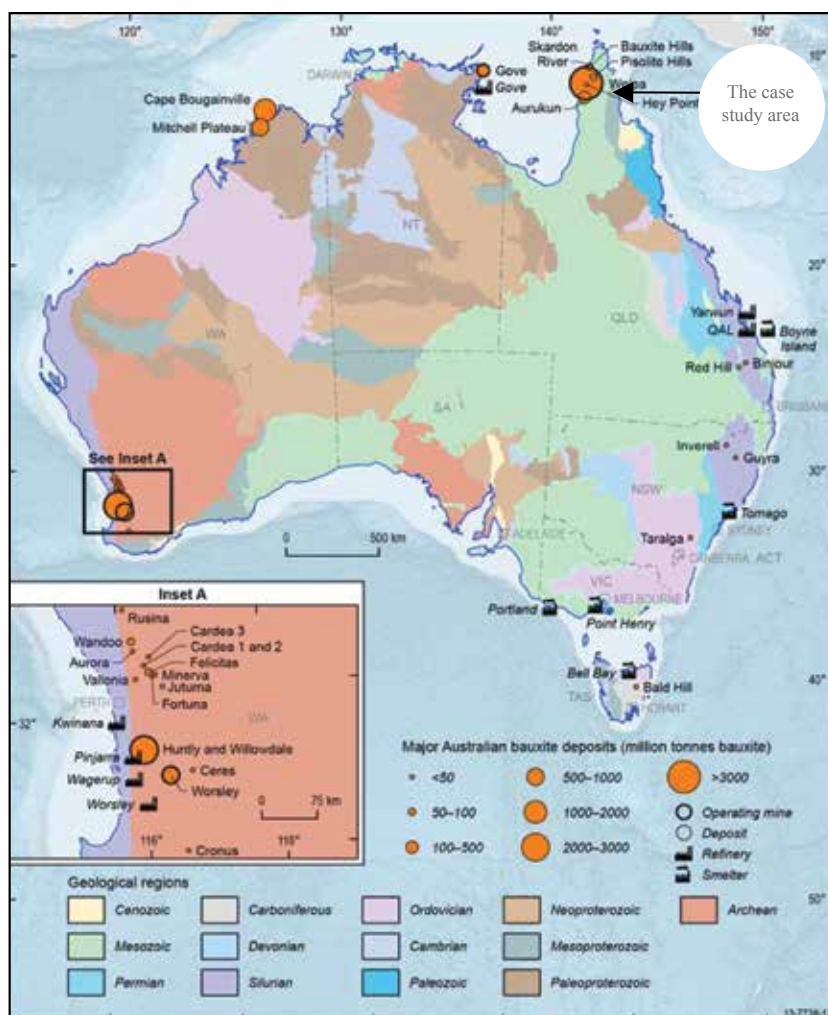
⁹ Australian Atlas of Mineral resources, mines and processing centres, Australian Government, Geoscience Australia <http://www.australianminesatlas.gov.au/aimr/commodity/bauxite.html>

¹⁰ For the Queensland Government overview of the history of Aurukun see "Aurukun Community History" <http://www.qld.gov.au/atsi/cultural-awareness-heritage-arts/community-histories-aurukun/index.html>

¹¹ "The Wik & Wik Way Journey A chronology of events relating to the Aurukun Bauxite Deposit". Prepared by Aurukun Bauxite Development Pty Ltd (ABD) (October 2014) www.abdmining.com.au see also <http://capeyorkpartnership.org.au/news/the-hopes-of-the-wik-people-have-been-cruelly-dashed/>

¹² "Aurukun Community History" <http://www.qld.gov.au/atsi/cultural-awareness-heritage-arts/community-histories-aurukun/index.html>

¹³ Donovan V. "The Reality of a Dark History: From contact and conflict to cultural recognition of Aboriginals and Torres Strait Islanders" (Australian eBook Publisher, 2014)



Source: *Australian atlas of minerals resources mines & processing centres*¹⁴

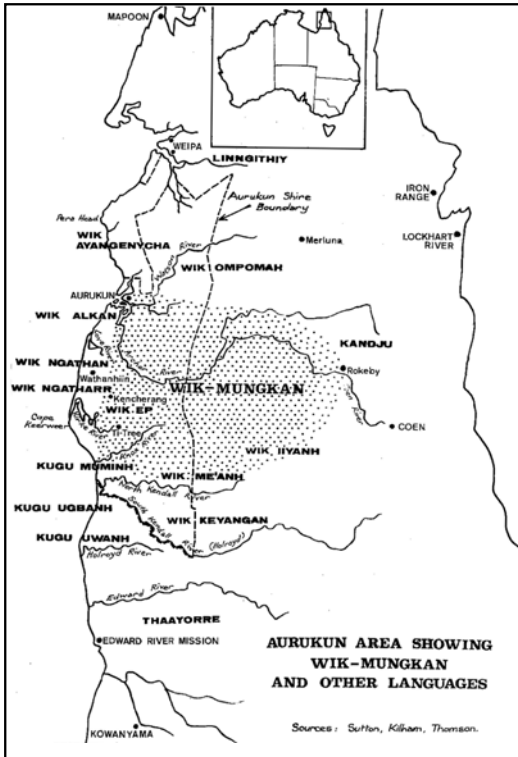
The 1967 constitutional reform - under which Aboriginal and Torres Strait Islanders were recognized as Australian citizens and their affairs no longer managed by state departments responsible for flora and fauna - was a double-edged sword for the Wik peoples. As a result of it the ration economy, (under which people were paid for their work with sugar, tea, flour, tobacco) which existed up to that point, ceased to function. Its collapse meant that the Wik became jobless overnight. The Wik recount how they were then encouraged by the government to sign for welfare payments and were forced to close local businesses, including local educational centres where people learned to read and write in their local language as well as English.¹⁵ The introduction of free money and alcohol into the communities is regarded as having contributed to the deterioration of the community and family fabric.

¹⁴ Supra <http://www.australianminesatlas.gov.au/aimr/commodity/bauxite.html>

¹⁵ Presentation by Gina Castelain to ASI meeting, Chiang Mai, May 2015

While huge profits have been made from the bauxite mining on their lands, with their bauxite resources reportedly warehoused by companies such as Pechiney, the communities of Aurukun and elsewhere have lived in poverty, suffering the severe environmental impacts of the bauxite mines and have seen their social fabric disintegrate as a result of economic disempowerment and continued dependency. Aboriginal communities

such as Aurukun, Napranum and Mapoon continue to experience low socio-economic standards compared to those of mainstream Australian society. Average life expectancy and education levels are far lower than non-Aboriginal people, poverty and chronic illnesses abound and people continue to be denied the right to participate fully in the mainstream Australian economy. Viewed from the perspective of the Wik peoples, a form of de-facto apartheid remains the norm.



Source: Jeffery Koongottema



Wik Projects employee and Wik Traditional Owner conducting water quality testing with CQG Scientist (CQG Consulting was engaged by Wik Projects to conduct wetland condition assessments with Wik Traditional Owners before commencement of Mining)

© Wik Projects

Despite the dispossession, discrimination and marginalization they have been subjected to for the last century, the Wik peoples' culture is nevertheless still alive and they remain connected to the country and the country to them. For the Wik peoples, land is inherited when they are born and is part of who they are. As they explain, land gives you your ceremony group and your land owning group is your spiritual group from which you get your totems, your totem being your sibling. For the Wik, "connection to country is the essential foundation of legitimacy and authority."¹⁶

Struggles to defend people and country

Grounded in this understanding of their connection to their lands, the Wik peoples and their elders have long struggled for their right to make decisions about the land and to ensure that their customs and practices were not subordinated to

¹⁶ Ibid

externally imposed laws and perspectives. One aspect of their struggle was to take numerous legal actions in their efforts to assert their rights. In 1976, they mounted a successful legal challenge in the Supreme Court of Queensland on the issuance of mining leases to a consortium of Billiton, Pechiney and Tipperary corporations, which halted operations for three years. However, the ruling was subsequently overturned at the Privy Council and the lease, which provided a 3% royalty rate to the Department of Aboriginal and Islander Affairs and included clauses on Aboriginal employment and participation, remained in effect until 2004, when it was taken over by Rio Tinto Alcan.¹⁷ The case nevertheless contributed to generating national attention to the issue of Aboriginal peoples' land rights. The State of Queensland, for its part, in 1978 evaded Federal legislation recognizing Aboriginal government self-management rights by reclassifying the Wik lands from 'reserve' to 'crown' lands.¹⁸

Another highly significant case taken by the Wik peoples was the landmark 1996 *Wik Peoples v The State of Queensland* which contributed to the recognition of native title rights, with the High Court holding that native title can co-exist with (and is not extinguished by) the pastoral leases granted by governments over vast areas of the Australian continent. With the Wik peoples' victory in that case, many more indigenous peoples in Australia could pursue legal recognition of their continuing customary title rights, and avoid what would otherwise have been the dispossession of their homelands.

The Wik peoples have had to invest considerable time and effort to prove connections to their lands, with anthropologists repeatedly involved in documenting their situation from 1920 onwards. In 2004, the Wik were finally recognised under the Native Title Act as the registered native title holders of a large portion of Cape York: from Weipa to Poma and inland to Kampi. However, tragically, many of their elders who had struggled for this recognition died before it was realized. Under the law, the Wik prescribed body corporate acts as the agent for the Wik native title holders, managing their native title rights and interests, and is required to consult with them and obtain their consent about decisions affecting those rights. Unfortunately, however, that body is not adequately resourced to negotiate with mining companies and so, after 60 years of bauxite mining in their lands, they remain at a severe disadvantage in fully defending their rights. As will be discussed in relation to the Aurukun Bauxite Resource RA315, the latest obstacles erected by the Queensland government to the Wik peoples' enjoyment of their rights in Aurukun mirror those previous generations faced 40 years ago.

Agreement with Comalco / Rio Tinto Alcan at Weipa

After years of struggle to prevent mining operations and limit their harms, the Wik finally entered into negotiations with Comalco in 1996. Comalco was taken over by Rio Tinto Alcan in 2000, and in 2001 eleven Traditional Owner groups, four Indigenous

¹⁷ Corporation of the Director of Aboriginal and Islanders Advancement v Peikinna & Ors, (1978) 52 ALJR 286

¹⁸ Langton M. "The hopes of the Wik people have been cruelly dashed" The Australian November 15, 2014 <http://capeyorkpartnership.org.au/news/the-hopes-of-the-wik-people-have-been-cruelly-dashed/>, see also "Aurukun Community History" <http://www.qld.gov.au/atsti/cultural-awareness-heritage-arts/community-histories-aurukun/index.html>

Community Councils (Aurukun, Napranum, Mapoon and New Mapoon) and the Cape York Land Council signed the Western Cape Communities Co-existence Agreement with Comalco Aluminium Limited (then part of the Rio Tinto) and the Queensland Government. The agreement covers 4,135 sq km in the Weipa region, including parts of the coastal waters of the State of Queensland. The agreement was registered as an Indigenous Land Use Agreement with the National Native Title Tribunal, under the Native Title Act 1993.¹⁹ It provided for the establishment of charitable trusts to be controlled by a majority of Traditional Owners, and is recognized as a significant achievement, especially when viewed alongside the initial Comalco offer of six land cruiser jeeps as compensation to Traditional Owners for mining on their land.²⁰

In addition to the Western Cape Communities Co-existence Agreement, Rio Tinto Alcan's Weipa operations are conducted under two other Indigenous Land Use Agreements, the Ely Bauxite Mining Project Agreement (EBMPA), and the Weipa Township Agreement. These three Indigenous Land Use Agreements provide economic, education and employment benefits as well as cultural heritage support and formal consultation processes between the company and the Traditional Owners of the land on which Rio Tinto Alcan operates.²¹

Rio Tinto Alcan's South of Embley project

Rio Tinto Alcan is currently developing a second bauxite mining project in Wik lands. The project, located 45 kms to the south of Weipa, is known as the South of Embley Project. It will consist of a mine, as well as processing facilities and a port with barge and ferry terminals.²² The Wik regard employment and training as critical aspects of their participation in the South of Embley project. Adopting a long term view of the benefits they can derive from the project, they see the need for such employment and training to be delivered within businesses which are owned and managed by the local Aboriginal peoples themselves. As they point out, "Critical to our success will be securing a sufficient base of contract work at an appropriate price, to enable us to invest in the kind of comprehensive and long term training and support programs which are essential if we are to recruit, retain and develop core number of local Aboriginal people."²³

In the context of the South of Embley project, the Wik-Waya people who are the Traditional Owners of the region, worked together with Rio Tinto Alcan to prepare a Communities, Heritage and Environment Management Plan which identified culturally significant or sacred areas to be protected, and promotes the maintenance of cultural connections with land and the recognition of and respect for role of Traditional

¹⁹ Comalco Indigenous Land Use Agreement (ILUA) (Western Cape Communities Co-existence Agreement) <http://www.atns.net.au/agreement.asp?EntityID=453>

²⁰ Presentation by Gina Castelain to ASI meeting, Chiang Mai, May 2015

²¹ "Weipa Operations overview" http://www.riotintoalcan.com/ENG/ourproducts/1803_weipa.asp

²² Supra <http://www.australianminesatlas.gov.au/aimr/commodity/bauxite.html>

²³ Presentation by Gina Castelain to ASI meeting, Chiang Mai, May 2015

²⁴ "South of the Embley Communities, Heritage and Environment Management Plan" (Rio Tinto Alcan, WCCCA, Prepared by the South of Embley Communities, Heritage and Environment Working Group 2014) page 5

Owners in land, sea and cultural heritage management and associated decision-making, and where possible the engagement of Aurukun-based indigenous businesses.²⁴ The plan addresses employment, training and business development, cultural heritage management approaches and environmental and sea management, including timber harvesting and seed management and the cultural and environmental aspects of post mine rehabilitation.²⁵

Wik and Wik-Waya self-empowerment initiatives

Since 2006, the Wik peoples have established a number of entities under the Wik Development Group which the Wik Traditional Owners own and control. Their aim is to further their economic participation by empowering the Wik peoples to design and implement their own social, economic, environmental, cultural development and infrastructure projects in Wik country and beyond. The entities include Wik Development Ltd - a charitable trust to distribute benefits once businesses are profitable, and Wik Projects Ltd – a social and economic development organization which provides leadership, management and administrative support to three local indigenous businesses namely: Aurukun Earthmoving – mining industry, Wik Timber Holdings – timber industry, and Aurukun Wetland Charters – tourism industry.

Through these and other businesses the Wik aim to escape “passive welfare dependency and engage in economic development on their country.”²⁶ At present Aurukun Earthmoving is the only Aboriginal business contracted to Rio Tinto at its Weipa operations. It has held the contract to do all of the land clearing and raking since 2006 and the Wik peoples hope that Rio Tinto Alcan’s South of Embley will result in their greater participation in related economic activities. Two other areas where they see potential for viable indigenous enterprise development are harvesting of wood and rehabilitation of lands following mine closure.

One of the last remaining hardwood forests in Wik lands is located in the area of the bauxite reserves. In the past the trees were simply bulldozed and burnt by the mining companies, with 1,800 hectares of land cleared in this manner in 2014 to make way for bauxite mining. This represents a waste of a potentially very important resource for the Wik peoples, both in terms of its economic value and its capacity to contribute to the regeneration of the area following mining. The current practice, besides being wasteful also contributes to carbon emissions. The Wik successfully lobbied the Queensland government to obtain a permit to sell timber harvested from Rio Tinto Alcan’s South of Embley mining lease. A 20-year sales permit (with an option to renew for 20 years) was issued to Wik Timber Holding Pty Ltd and is in keeping with strategic aim of the Wik “to link the timber harvesting operation with reforestation and rehabilitation activities which Traditional Owners can play an active role in.”²⁷

Mine rehabilitation is also both a core concern for the Wik peoples and an activity which offers potential opportunities for community economic empowerment. At present it is

²⁵ Ibid

²⁶ Presentation by Gina Castelain to ASI meeting, Chiang Mai, May 2015

²⁷ Ibid

²⁸ Ibid

estimated that less than 10% of the land is successfully rehabilitated in Wik lands, with estimates as low as 3% for successful rehabilitation by Rio Tinto.²⁸ The Wik believe that if they have the principal role in rehabilitation planning and implementation they can do a better job, pointing to Gove and Jarrahdale as examples of what can be done. Aboriginal -managed rehabilitation, together with timber harvesting and maintenance of seedlings, could lead to economic opportunities, generate employment and revenues from tree plantations that are under Aboriginal ownership and control. As the Wik explain it is “in our interest to play the principal role in rehabilitating the land – it is us that are stuck with the land as we will have it for the next thousand years – the companies resource it but we will implement it.”²⁹



Wik Projects Economic Development and Land Management planning and consultations with Wik traditional owners in Pormpuraaw. Gina Castelain, Cathy Shortjoe Wik TO, Richard Tarpencha, Mayor of Pormpuraaw community and Wik TO, Dennis Michael, Deputy Mayor Pormpuraaw Aboriginal Shire Council.

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Aurukun Bauxite Resource RA315 – rolling back on 40 years of rights struggles

Rio Tinto’s engagement with the Wik peoples from 2001 onwards was not based on FPIC, in so far as the Wik peoples did not have the opportunity to withhold their consent to projects, but it did nevertheless lead to some positive outcomes. On a practical level it has resulted in a degree of Wik empowerment, equipping them with better understanding of how to engage with mining companies and leading to agreements which have the potential to offer some benefits to community members. It also illustrates that some mining companies, such as Rio Tinto, are taking steps towards responding to their responsibility to respect indigenous peoples’ rights. These achievements can, in a large part, be attributed to the Wik peoples’ consistent insistence, since 1975, on respect for their native title rights and their willingness to pursue legal actions in order to realize this.

²⁹ Ibid

However, retrogressive changes to the Native Title Land Act in 1998 are symptomatic of the unwillingness or inability of successive Australian governments to confront the power of the mining industry and ensure protection of indigenous peoples' rights in accordance with the UNDRIP. The absence of constitutional protection of indigenous peoples' rights, and the lack of legislative recognition of their right to give or withhold FPIC, means that any progress the Wik have made is fragile. Their recent experience in Aurukun has demonstrated just how vulnerable their rights are when the government and company seeking access to their lands consider it expedient to ignore them.

Aurukun has a population of 1,300 people, 93% of whom are indigenous and most belong to the Wik peoples. Despite decades of foreign mining companies operating in and around their lands, the communities suffer from poverty and welfare dependency. The Aurukun Bauxite Resource RA315 is located east of Rio Tinto Alcan's South of Embley project, and is the third area in Wik lands that is currently being targeted for bauxite mining. The lands where the bauxite reserve is located are held in freehold by the Wik under the Queensland Aboriginal Land Act 1991 and are also subject to a native title determination. Between 2007 and 2010, the Wik peoples considered entering into an agreement with the Chinese company Chinalco (also known as Chalco) for the exploitation of the Aurukun bauxite reserve. Based on their initial engagement they found Chinalco to be respectful of their peoples and willing to partner with them on terms they considered acceptable.³⁰ However, following a decline in the growth of the aluminium market, Chinalco withdrew from the proposed bauxite mine.³¹

Forty years of engaging, or attempting to engage, with mining companies have convinced the Wik peoples that genuine community empowerment and long-term sustainable benefits can only be ensured if they themselves have an equity stake in whatever company mines their lands, and if they have a say in its operations with a seat on the company board. In the absence of this, they lack control over where, how and when mining proceeds in their lands and what constitutes a fair return for access to their lands and resources and the impacts to which this gives rise.

In an effort to move beyond passive welfare dependency, which is fuelled by existing benefit sharing arrangements and the associated lack of control they have over their own homelands and futures, the Wik decided that an alternative approach was necessary. After four years of discussions with potential investors, bankers, legal advisors and mining industry leaders, they concluded that their preferred option for the Aurukun Bauxite Resource RA315 was to develop it themselves by negotiating a joint venture project with an investment and management team that has strong expertise in mining.

The partnership the Wik decided to embark on was with Aurukun Bauxite Development (ABD) which is headed by the former CEO of Comalco. The agreement affords the Wik peoples a 15% free carried non-diluting equity share in the company, two seats on

³⁰ "Aurukun Aborigines Delegation of Australia Visit Aluminum Corporation of China Limited" Chinalco Headlines 16 June 2008 <http://www.chalco.com.cn/zglyen/xwzx/zxxw/webinfo/2014/07/1405040878235697.htm>

³¹ Tapim F., P. Timms, J. Mawer & M. Maddiso "Chalco calls off Aurukun bauxite mine" 1 July 2010 <http://www.abc.net.au/news/2010-07-01/chalco-calls-off-aurukun-bauxite-mine/887800>

the company board, with responsibility for logistics and community development, and an AU\$1 million “investment in early training for local staff and training and support for local businesses.”³² These conditions are established in an Indigenous Land Use Agreement (ILUA) which was signed by the Wik with ABD, and is the first of its kind in Australia.³³ For the Wik peoples it represents an opportunity to create an economic base and to take back control over their own destiny, something which the government of Queensland had consistently denied them.

In 2012, the Wik were made to believe by the Queensland Premier and Cabinet that their initiative would be supported.³⁴ The competitive bid process for the Aurukun Bauxite mining lease, which involved the Wik peoples’ joint venture and an application by Glencore, ended without a winner on 11 March 2014.³⁵ The Wik were then told that they would have the opportunity to prepare a new bid “with evidence of: mining capacity; financial capacity; and [an Indigenous Land Use Agreement]”.³⁶ On 6th of August 2014, the Wik were, however, informed that the bid process has been stopped. Just over two weeks later, on the 28th of August, the competitive bid was “reinstated” and closed on the same day, with Glencore selected as the Liberal government’s “preferred partner”.³⁷ Glencore, a Swiss mining company, is vehemently opposed by the Wik peoples because of its past reputation in other indigenous peoples’ territories.

The process through which the government’s decision to select Glencore was made was highly irregular. As pointed out by the Wik peoples, the “government opened and closed the Request for Detailed Proposals [RFDP] process in less than 2 hours without giving anyone other than Glencore [the opportunity] to be considered.”³⁸ No explanation was provided as to why the Glencore proposal was preferred to the Wik joint venture, apart from a vague reference to ensuring financial viability. Compounding this, “Glencore did not propose any benefits package for native titleholders even though this was a key condition of the [tender] process.”³⁹ The obvious question of how the government could have selected Glencore as its “preferred partner” without the company having complied with the tender requirements has not been addressed by the government. The Liberal government’s reputation has since been further tainted by allegations of corruption made against it in the context of decisions taken in relation to

³² “Our Story...” Ngan Aak-Kunch RNTBC <https://vimeo.com/136894844>

³³ Ibid

³⁴ “Aurukun: A Chronology of Events Relating to awarding Glencore ‘Preferred Proponent’ and acceptance of MDL Application over RA315”. On file with author.

³⁵ “Deputy Premier, Minister for State Development, Infrastructure and Planning The Honourable Jeff Seeney Bauxite bids fail to deliver for Cape indigenous groups” Media Release Queensland Government 12 March 2014 <http://statements.qld.gov.au/Statement/2014/3/12/bauxite-bids-fail-to-deliver-for-cape-indigenous-groups>

³⁶ “Aurukun: A Chronology of Events Relating to awarding Glencore ‘Preferred Proponent’ and acceptance of MDL Application over RA315”. On file with author.

³⁷ “Deputy Premier, Minister for State Development, Infrastructure and Planning The Honourable Jeff Seeney Government to drive for community benefits from Aurukun mine” Media Release Queensland Government 28 August 2014 <http://statements.qld.gov.au/Statement/2014/8/28/government-to-drive-for-community-benefits-from-aurukun-mine>

³⁸ Gina Castellian “Press Statement Aurukun Takeover Mark 2”. On file with author.

³⁹ Ibid

mining activities.⁴⁰ Another irregularity is the fact that, on 14 January 2015, Glencore's mineral development licence application was accepted by the government while it was in caretaker mode (during the period after the parliament had been dissolved pending an election, as is customary in Australia).⁴¹ The Wik were not consulted in relation to the agreement that was signed with Glencore and to date its contents have not been shared with them.

Following the elections the incoming Labor government did nothing to reverse the decision of its Liberal predecessor, or to clarify the selection criteria and address the irregularities in process. Instead, in May 2015, it issued a notice of proposed grant of a mineral development licence in relation to Glencore's application. It claimed to have performed a review of the process in which Glencore has been selected as the preferred partner, however, it provided no information as to who conducted this review, or how it was carried out, and failed to contact the traditional owners regarding it. From the little information available to the Wik peoples, it would appear that the same individual involved in the decision to select Glencore was responsible for conducting the review. Given the profound implications of the selection process for the Wik peoples any genuine review by the incoming government would have necessitated full transparency and impartiality and required consultations with the traditional owners.

The government's current efforts are oriented towards convincing the community that Glencore should be allowed to proceed, as opposed to openly assessing the relative merits of the ABD/Wik and Glencore proposals.⁴² Rather than engaging with the land owners, through their representative body, the Ngan Aak-Kunch Aboriginal Corporation (NAK), the current government has instead chosen to engage with the Aurukun Shire Council, a body which does not represent the native title holders.⁴³ In addition, according to the Wik, many of the community members with whom it has chosen to engage, at times behind closed doors, are on the Glencore's payroll. The company and the government are also alleged to have contracted the same consultants to promote the project to the Wik people.⁴⁴ According to the community, the government, Glencore, and the consultants they employ, are deploying the same divide and conquer tactics that were used on previous generations in the days before recognition of native title rights.⁴⁵

⁴⁰ Willacy M. & M. Solomons "Queensland corruption watchdog asked to investigate Newman government's retrospective approval of bush clearing" 3 June 2015 <http://www.abc.net.au/news/2015-06-03/retrospective-approval-referred-queensland-corruption-watchdog/6518332> see also <http://www.miningaustralia.com.au/news/new-hope-coal-embroiled-in-corruption-allegations> and <http://www.theguardian.com/australia-news/2015/jul/03/queensland-mine-expansion-state-to-be-a-major-loser-in-a-land-royalty-payouts>

⁴¹ For a chronological account of the process and all associated correspondence see: "The Wik & Wik Way Journey A chronology of events relating to the Aurukun Bauxite Deposit. Prepared by Aurukun Bauxite Development Pty Ltd (ABD)" October 2014 www.abdmining.com.au

⁴² Castellian G. "Press Statement Aurukun Takeover Mark 2" . On file with author.

⁴³ Letter from Gilbert Tobin Lawyers to Dr Anthony Lynham Minister for State Development 6 August 2015. On file with author.

⁴⁴ *ibid*

⁴⁵ *ibid*

Given their experience in 1978 when the government took control of their reserve lands in order to grant mining rights to the consortium headed by the French mining company Pechiney, the current attempt by the government of Queensland to deny the Wik peoples the opportunity to develop their resources through their partnership with ABD, and instead impose Glencore as the operator, smacks of a perpetuation of historical discrimination against the Aboriginal land owners.⁴⁶

The Queensland government has been unwilling to respond to the Wik peoples' repeated calls for ABD and Glencore to be given the "opportunity to table their proposals to the State and NAK and for both proposals to be assessed against the criteria set out at the beginning of the RFDP [tender] process".⁴⁷ Despite the objections of the Wik peoples, the Labor government minister held a meeting on 15 August 2015 with the Aurukun Shire Council (instead of NAK) informing "the Mayor and others that he will respect the decision of the former ... Government to allow Glencore International AG, owned by Swiss interests, to mine Wik land."⁴⁸

The Wik are appealing to the Federal government to use their influence with the Queensland government to address this situation in a manner that is both moral and just. Under international law, the Federal government has the responsibility to ensure that state governments are fulfilling their human rights obligations. This means that the Federal government has a duty to ensure that the decisions of the Queensland government are consistent with respect for indigenous peoples' rights and their obligations under international conventions, such as the International Convention on the Elimination of all forms of Racial Discrimination (ICERD), and the UNDRIP. Future engagement of the Wik peoples with the UN Committee on the Elimination of Racial Discrimination and/or the UN Special Rapporteur on the rights of indigenous peoples may provide an avenue to further pressure the Federal government to act on its human rights obligations.

In her appeal to the Federal government, Gina Castelain, a native title holder, described the decision of the former Queensland government to select Glencore as one of its "most arrogant misuses of power carried out without any consultation with the Wik land people and without the support of the Wik land owners or the registered native title body, Ngan Aak-Kunch (NAK). It was made without the slightest regard for our wishes and in the process the Wik were treated with contempt."

A provision of the *Queensland Mineral Resource Act 1989*, known as the 'Aurukun Provision', is being used to prevent the Wik from appealing the government's decision on the mining lease in their land, and effectively denies them their rights to due process and equality before the law. As a result of this "contemptuous treatment,"⁴⁹ the Wik

⁴⁶ Langton M. supra <http://capeyorkpartnership.org.au/news/the-hopes-of-the-wik-people-have-been-cruelly-dashed/>

⁴⁷ "Aurukun Bauxite Project Meeting with Minister Anthony Lynneham Agenda" 15 August 2015. On file with author.

⁴⁸ "Letter from Gina Castelain and Llyle Kawangka to The Hon Anastacia Palaszczuk MP Premier of Queensland; and The Hon Jackie Trad MP Deputy Premier" 20 August 2015. On file with author.

⁴⁹ Langton M. supra

peoples have once again been left with no option but to pursue the case against the government in the High Court in order to have their rights respected. To this end, on 26 June 2015, NAK commenced an action in the High Court on the basis that the 'Aurukun Provision' is inconsistent with the Commonwealth Racial Discrimination Act 1975.⁵⁰ On 18 August 2015, the High Court agreed to accept the case.



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Conclusions and recommendations

The Weipa mine in Wik territory is frequently presented by Rio Tinto as an example of how lessons have been learned from past rights-denying practices and have led to engagements with indigenous peoples that are mutually beneficial. The 2001 Comalco land use agreement was widely acknowledged as an improvement on past practice in the mining sector, though there have been challenges with its implementation. The more recent 2014 Communities, Heritage and Environment Management Plan with Rio Tinto Alcan at the South of Embley project is another step forward, but the extent to which it will empower the community in practice remains to be seen.

Among the areas where tangible improvements will need to be demonstrated in practice are community control over socio-economic impacts, land access, cultural heritage and environmental impacts.⁵¹ The Wik experience also highlights that land must be returned to the community along with the responsibility and financial resources for

⁵⁰ “Aurukun: A Chronology of Events Relating to awarding Glencore ‘Preferred Proponent’ and acceptance of MDL Application over RA315”. On file with author.

⁵¹ “South of the Embley Project Social Impact Assessment Consultation Wik Projects Ltd – Board Members / Advisors 10th & 11th September 2008 – Three Rivers Tavern, Aurukun” On file with author.

its rehabilitation. Similarly, community rights to harvest and benefit from their natural resources, such as timber and seeds, must be respected and promoted.

Viewed from the Wik perspective, the story of bauxite mining on their lands can be seen as one of a gradual process of empowerment, building on the tireless efforts of their elders and the sacrifices of previous generations, and incrementally moving from a welfare-based approach to benefits to one based on agreement making aimed at greater community empowerment and respect. However, while these newer agreements contain positive features, they were nonetheless negotiated within a framework where the Wik peoples' right to give or withhold their FPIC to projects had not been protected or respected by either the State or the companies engaging with them. Consequently, they were denied the opportunity to full and effective participation in decision-making and to negotiate as an equal partner in accordance with their right to self-determination.

In light of their 40-plus years of experience with bauxite mining in their territories under racially discriminatory laws and the incommensurability of the benefits it has provided with the suffering it generated, the Wik peoples are now insisting on a new model of engagement. They see this as necessary in order to participate in the mainstream economy, achieve socio-economic standards similar to those enjoyed by the rest of Australia, regain their pride, and have ownership over their own future.

To enable real and sustainable change the Wik peoples are therefore determined to move to a new model of self-determined FPIC-based engagements and partnerships, under which they will be able to ensure sustainable, fair and equitable benefits and will own and control resource development in their own territories. In line with this they have elaborated on the development philosophy under which indigenous peoples will:

- make decisions for themselves about social, economic and environmental issues affecting them and their traditional country,

- engage positively with federal, state and local governments about programs and policy initiatives, but not simply accept that government should set the direction of their future welfare and development, and

- be supported and resourced by government to develop their capacity (including the capacity of their organizations) to do so.⁵²

In order to establish the foundation for this, the Wik peoples have outlined the new institutional framework that is necessary for the Traditional Owners to be able to articulate their knowledge and views about country and decide for themselves who speaks for country. This framework must ensure that they are free to engage with external actors about proposals affecting country on their own terms, and have access to resources to obtain independent advice and assistance in formulating their views. The institutional framework must also facilitate reaching outcomes that are considered legitimate by the group as a whole and ensure that these outcomes are respected by external actors.⁵³

⁵² "Developing long term sustainable indigenous governance on the Cape" Prepared for the Department of Environment and Resource Management, Wik Projects Ltd, October 2013, page 20. On file with author.

⁵³ Ibid.

This framework has to be combined with corporate respect for indigenous peoples' decision-making rights. This respect is necessary irrespective of the requirements of national or state legislation. In Australia, respect for indigenous peoples' FPIC has been demonstrated to be compatible with mining in the Northern Territory, where FPIC is mandated by law since 1976. The fact that indigenous peoples' FPIC is not required elsewhere in Australia is reflective of the unfinished business that Australia's indigenous peoples have in ensuring that the government lives up to its obligations under the UNDRIP.

The absence of this FPIC requirement under the law in other parts of Australia in no way excuses corporations such as Glencore for failing to respect indigenous peoples' FPIC decisions, including where they withhold their consent to their presence. The contractual agreement which the Mirarr and its Gundjeihmi Aboriginal Corporation (GAC) successfully pressurized Rio Tinto into signing, requiring the Mirarr consent for mining activities in Jabulika, in the absence of any requirement by the government to do so, is one important example of what can be achieved by indigenous peoples in such contexts, as well as the limitations of such approaches.⁵⁴

The joint venture partnership model proposed by the Wik peoples for the Aurukun Bauxite mining project in their territory is an exercise of their right to self-determination. This precise scenario was envisaged and promoted by the former UN Special Rapporteur on the rights of indigenous peoples, James Anaya. Following his four year study of the extractive industry and indigenous peoples' rights, the UN Special Rapporteur explained that:

In contrast to the prevailing model in which natural resource extraction within indigenous territories is under the control of and primarily for the benefit of others, indigenous peoples in some cases are establishing and implementing their own enterprises to extract and develop natural resources. This alternative of indigenous-controlled resource extraction, by its very nature, is more conducive to the exercise of indigenous peoples' rights to self-determination, lands and resources, culturally appropriate development and related rights, in accordance with the United Nations Declaration on the Rights of Indigenous Peoples and other international sources of authority.⁵⁵

Given this unambiguous guidance to both States and corporations, and its direct relevance to the Wik peoples' situation, should the Wik engage with UN human rights mechanisms, such as the UN Special Rapporteur on the rights of indigenous peoples or the UN Committee on the Elimination of Racial Discrimination, strong recommendations would undoubtedly be issued to the Federal government instructing it to ensure that the Wik peoples' wishes are respected.

⁵⁴ O'Brien J. "No Straight Thing: Experiences of the Mirarr Traditional Owners of Kakadu National Park with the World Heritage Convention" in Disko S. & H Tugendhat (eds) *World Heritage Sites and Indigenous Peoples' Rights* (Copenhagen, IWGIA, FPP, GAC, 2014) see also Doyle C & J Carino *Making Free Prior and Informed Consent a Reality: Indigenous Peoples and the Extractive Industries* (London: Middlesex University, PIPLinks, ECCR, 2013)

⁵⁵ Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya UN Doc A/HRC/24/41, 2013 para 8

Partnerships with indigenous peoples are a key enabler for moving beyond welfare dependency to genuine community empowerment. The outcomes of forty-plus years of mining in Wik territory make it abundantly clear that there is a need for greater economic participation of the Wik peoples in any new or expansion projects. The Wik peoples have demonstrated both their capacity and aspiration to develop the bauxite resources themselves and to move beyond passive and largely ineffectively benefit sharing arrangements to genuine partnerships in mine ownership and operations. Federal and state, as well as corporate, actors must respect this as an exercise of their right to self-determined development. They must act to facilitate, rather than obstruct and undermine, its pursuit. For the government of Queensland this implies giving priority to the Wik joint venture over the Glencore proposal or any other third party proposal. For Glencore it means that they should respect the rights-bases of this joint-venture bid and withdraw their proposal.

The poem entitled “My Bleeding Country”, which is included at the start of this case study, was written by a senior Wik Aboriginal woman, Joyce Hall, from Western Cape York Peninsula. Joyce passed away in the 1990’s, but her poem continues to strike a resonant chord with the views of the communities and their senior Aboriginal people, who regard it as a succinct expression of their perspectives on mining. The poem reflects the profound impacts which bauxite mining has had on the Wik peoples and their lands and seas. It highlights the absence of information on what these impacts would be and the position which the community would have adopted had they been made aware of them.

The sentiments expressed by Joyce Hall in “My Bleeding Country” are particularly pertinent given the current attempt by the government of Queensland to impose Glencore on the Wik as the operator of the Aurukun mining lease. Glencore is a company in which the Wik peoples have no trust and whose presence in their territories they are unwilling to accept. This failure to respect this absence of FPIC is also rejection of the Wik peoples’ self-determined development plans, their rights and their aspirations.

This attempt to impose an unwanted company on a people who are seeking to operate a bauxite mine by themselves, also makes a mockery of their 40 year struggle for recognition of native title rights. It suggests that the Queensland government’s thinking has not progressed very far from the days when Aboriginal lands were considered *terra nullius* and were simply there for the taking by whichever outsiders laid claim to them.

Rather than force the Wik peoples to recourse to legal actions in order to protect their rights, the government of Queensland and Glencore should be guided by ethical considerations and act responsibly by adapting their practices to be in-line with developments in international norms pertaining to indigenous peoples’ rights, as reflected in the UNDRIP and other international standards. This necessitates ensuring transparency, guaranteeing due process of law and respecting indigenous peoples’ self-determination rights. The implications of this are simple. If the Wik peoples withhold their FPIC for a project then that decision must be respected. Likewise, if the Wik peoples seek to exploit a resource located in their territories by themselves, or in partnership with others, then that decision must also be respected. Furthermore, in accordance with the principles of self-determination and consent, their proposal should be given priority over those of any other actors that seek to exploit resources located in their territories.



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Wik children running on beach

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Chapter

4

Suriname

**In Search of Recognition:
indigenous and tribal peoples
and a nascent aluminium industry**

Marie-Josée Artist

In Search of Recognition: indigenous and tribal peoples and a nascent aluminium industry¹

Overview

On 6 January 2003, the Government of Suriname signed a Memorandum of Understanding (MoU) with two mining companies, BHP Billiton and Suralco (a subsidiary of Alcoa), for the exploration for bauxite in the Bakhuis Mountains. The Government then signed a second MoU with Suralco for exploring the possibilities for large-scale hydroelectric power plants in the Kabalebo area, setting up an alumina refinery and aluminium smelter and a possible deep-water port, all directly related to the original bauxite exploration lease. The planned location of these large-scale projects was in an area traditionally inhabited by indigenous people in West Suriname.

The directly affected Washabo, Apoera and Section communities, were not fully aware, and were not directly approached or consulted about the exploration activities on their lands by the companies involved prior to the signing of the MoUs. Instead, the village chiefs heard about the signing of the MoUs through the media. Knowing that indigenous peoples in Suriname have no official recognition of their land rights, community members were alarmed about the plans and the village leaders turned to Bureau VIDS (Dutch acronym of Vereniging van Inheemse Dorpschoufden, the Association of Indigenous Village Leaders in Suriname) for help and advice. The Bakhuis Mountain range, about 80 km from the communities, is in the territory of the indigenous peoples of West Suriname, and forms part of the area they use to hunt, fish and to gather non-timber forest products. It is also where their fresh water sources come from and an area of high biological diversity.



Peoples of communities are forbidden to continue their livelihood activities in the Bakhuis mining concession area.

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¹ Author Marie-Josée Artist

The proposed mining activities would have significant impacts particularly the transport of bauxite using barges down the Corantijn River. The river is used by the Trio and Lokono peoples, on both the Suriname and Guyana side of the river. Aside from the direct impacts of mining and transport of the minerals, there are also impacts from the broader proposed integrated aluminium industry in West Suriname (including smelting and refining the bauxite), and the building of a hydro dam in the Kabalebo area, with associated flooding of a forested area of 2500 km² in the territory of indigenous communities.

It is crucial for the indigenous peoples in West Suriname to study and understand the social and environmental impacts of the proposed projects and to ensure that they can have a voice to make government and companies aware of their concerns and have a say in the decision-making processes. Since the rights of indigenous peoples are not legally recognized in Suriname, the communities in West Suriname face major obstacles in realizing this objective.

With the support of VIDS, the North South Institute (NSI), the Forest Peoples Programme (FPP), and other individual experts, the communities embarked on their pursuit of a path towards rights recognition. In their efforts to find a harmonious way forward with the project proponents, they experienced both ups and downs, but ultimately had to conclude that a path which is not build on a solid foundation of rights recognition and which does not guarantee a balance of power, cannot be walked in harmony.

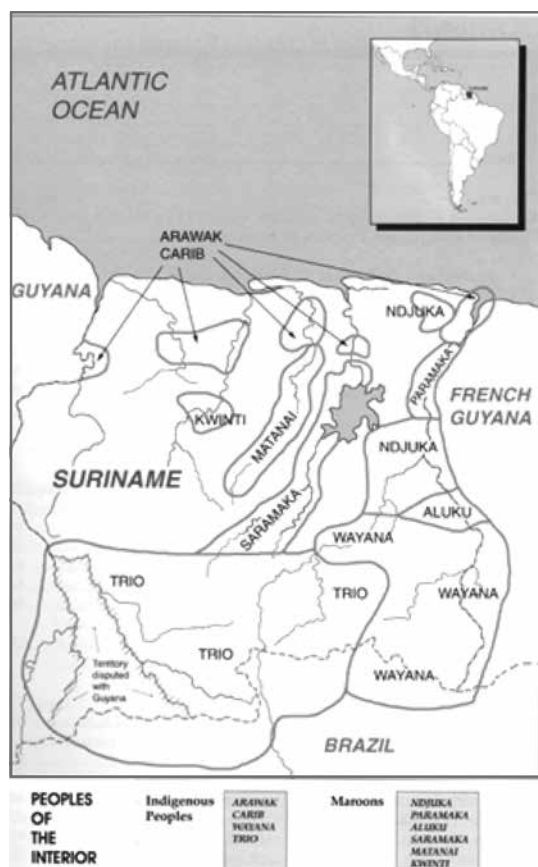
The fact that Indigenous peoples' land rights are not officially recognized makes it hard for the communities to deal with activities that are planned and carried out in their territories by the government, companies and others, including logging and mining activities and plans to turn the Kaboeri Kreek, an important part of their territory, into a Nature Reserve. This also relates to the lack of recognition of other Indigenous rights, particularly the right to free, prior and informed consent (FPIC) concerning activities within their traditional territories.

This study focuses on the process, not on the outcome of the social and environment assessments, and other activities and studies related to the proposed integrated bauxite mining industry. Many studies have been conducted in relation to this proposal and data presented here are collected from these reports and other writings.

Introduction

Suriname is a former Dutch Colony, part of the Guyana shield, on the North East coast of South America. Suriname is bordered by Guyana to the west, French Guiana to the east, Brazil to the south and the Atlantic Ocean to the north. The country is divided into ten districts where most of them are located in the coastal area. The largest part of the hinterland is covered by Sipaliwini district, which incorporates much of the traditional territory inhabited and used by indigenous peoples and Maroon communities.

Indigenous peoples in Suriname number 20,344 people, or approximately 3.8% of the total population of 541,638.² The four most numerous indigenous peoples are the



Kali'ña (Caribs), Lokono (Arawaks), Trio (Tirio, Tareno) and Wayana. In addition, there are small settlements of other Amazonian indigenous peoples in the south-west and south of Suriname, including the Akurio, Apalai, Wai-Wai, Katuena/Tunayana, Mawayana, Pireuyana, Sikiyana, Okomoyana, Alamayana, Maraso, Sirewu and Sakëta. The Kali'ña and Lokono live mainly in the northern part of the country and are sometimes referred to as “lowland” indigenous peoples, whereas the Trio, Wayana and other Amazonian peoples live in the south and are referred to as “highland” peoples. Indigenous peoples are the first inhabitants of Suriname who were descendants of the African enslaved labourers that arrived in the mid- seventeenth century in Suriname. These enslaved persons of African origin fled from the plantations, sometimes with help from indigenous people who considered them possible allies against the white intruders. Based on African traditions, the so-called ‘Maroons’ or tribal

peoples learned to survive in the forest, with the support of the indigenous peoples and set up communities that were mainly self-sufficient.

Suriname is one of the few countries in South America that has not ratified ILO Convention 169. It did vote in favour of adopting the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007, but the legislative system of Suriname, based on colonial legislation, does not recognize indigenous or tribal peoples. Furthermore, Suriname has no legislation governing indigenous peoples’ land or other rights. This forms a major threat to the survival and wellbeing of indigenous and tribal peoples, particularly given the strong focus that is now being placed on Suriname’s many natural resources (including bauxite, gold, water, forests and biodiversity).³ Lack of tenure creates insecurity and the potential for conflict. There is a grossly inadequate legislative framework in place to regulate the environmental and social impacts of activities related to extractive industries taking place in the country.⁴

² Suriname Census, 2012

³ The Indigenous World 2014. The authors and The International Work Group for Indigenous Affairs (IWGIA), 2014, page 135

⁴ Is There Gold In All That Glitters? Indigenous Peoples and Mining in Suriname, Prepared for a project funded by the Inter-American Development Bank’s Canadian Technical Assistance Program (CANTAP) funding, Bente Molenaar, The North-South Institute, 2007

At the village level, traditional governance continues to function and is *de facto* recognised through government budget support and invitations to national events, however it is not legally or officially recognized. Traditional village leaders are supported by assistants or *basjas*. Traditionally, the village leader takes care of local conflicts, issues around hunting and fishing, and ensures the welfare of their communities without much interference from the state. They are leaders, liaisons and spokespeople for their community. Each village leader, also known as ‘captain,’ is a member of the Association of VIDS which was established in 1992 because of a recognised need to strengthen the traditional authorities of the indigenous peoples and to protect indigenous rights in the aftermath of the so-called ‘Interior War,’⁵ a civil conflict between the national army under Desi Bouterse and a jungle insurgency led by Ronnie Brunswijk which lasted from 1986 until 1992. All indigenous peoples in Suriname are represented in VIDS by virtue of their traditional authorities’ membership. The highest priority of VIDS and its legal working arm, the Foundation Bureau VIDS, is the recognition of indigenous peoples’ land rights. In addition, the Foundation Bureau VIDS also works on strengthening traditional leadership and building the capacity of women, youth and communities in general.

Land rights in Suriname

Historically, indigenous and Maroon peoples inhabiting the interior have lived without outside interference and with a degree of *de facto* protection provided by the government. However, this is rapidly changing as private companies and the government look to the interior for its resource potential.⁶ By law, the State owns all lands that have not been granted to other entities and all natural resources, including subsoil resources. It can issue concessions for resource exploitation without regard for indigenous and tribal peoples’ rights to land or other resources. Although legislation recognizes that they are entitled to use and enjoy their villages, settlements and current agricultural plots, should the State decide that these areas are required for other activities, indigenous and tribal ‘privileges’ (as the State calls them) are negated as a matter of law. There are no applicable judicial or administrative remedies that indigenous peoples may invoke should their rights be threatened, violated or negated in this way.⁷

Indigenous peoples (and tribal peoples) are not legally recognized as peoples or collectives in Surinamese legislation, nor are their (collective) rights recognised. This

⁵ In 1980 the democratically elected government was overthrown in a military coup. The military installed so-called ‘peoples committees’ and in the communities these committees threatened traditional village leadership. In 1986 a first attack on military posts was made by tribal peoples of East Suriname and this was the beginning of the internal conflict which only ended in 1992 with the signing of the Peace Accord.

⁶ Is There Gold In All That Glitters? Indigenous Peoples and Mining in Suriname, Prepared for a project funded by the Inter-American Development Bank’s Canadian Technical Assistance Program (CANTAP) funding, The North-South Institute. Bente Molenaar, The North-South Institute, 2007

⁷ Forest Peoples Programme, Free, Prior and Informed Consent: Two Cases from Suriname, FPIC Working Papers, March 2007, p 3

includes denial of their rights to their traditional lands, territories and resources, denial of the right to free, prior and informed consent, denial of the right to participation and consultation and official denial of their traditional authorities and governance structures. There have been some governmental resolutions that have included references to 'traditional rights' or 'customary rights', but there are no further provisions or specification which rights these exactly are and how they can be enforced. Where such legal instruments make a reference to 'the rights of Amerindians and bush-negroes', these 'rights' are made subject to the 'public interest' and other conditions unilaterally formulated by the State.⁸ This is discriminatory since other peoples' rights are not restricted in such a way. Furthermore, traditional livelihood practices such as hunting and fishing are illegal in protected areas. Given the frequent overlap between indigenous traditional territories and these protected areas, indigenous peoples' rights to life and to maintain their way of life are restricted by law. Access to justice for indigenous peoples and their communities is fundamentally constrained because, in addition to the absence of relevant legislation on indigenous peoples' rights, they are not recognized as legal entities with juridical personality, making it procedurally impossible to start a legal case for the collective or community.

Various regional and international human rights bodies have acknowledged these (and other) legislative weaknesses, as well as the discriminatory situation in Suriname regarding the treatment of indigenous and tribal peoples. These bodies have repeatedly requested Suriname to implement legislation in favour of indigenous peoples' rights yet no concrete measures have been taken by the government. This is exemplified by the fact that the landmark judgment of the Inter American Court of Human Rights in the *Saramaka People v Suriname* case has yet to be implemented.⁹

At present, VIDS has two cases before the Inter American Court and Commission of Human Rights, both related to the lack of protection for community land rights. The case of the Lower Marowijne territory in East Suriname, has been accepted by the Court and a decision is expected within a year. The second case, filed by VIDS and the community of Maho, is still in the hands of the Commission.

The legal environment is thus very unfavourable and uncertain for indigenous and tribal peoples in Suriname, severely affecting their ability to conserve and manage their territories and resources in their own holistic, sustainable manner. It is therefore strongly recommended that the government, with the full and effective participation of indigenous and tribal peoples of Suriname, implement a process towards the full recognition of indigenous peoples' rights in accordance with international standards, in particular the UNDRIP, and immediately revise all discriminatory legislative provisions.

⁸ For an example of this, see the Decree on the Principles of Land Policy; in Dutch L-Decreet Beginselen Grondbeleid 1982

⁹ An analysis of the effects of international, regional and national laws, judgements and institutional frameworks on indigenous peoples' territories and community conserved areas, Report no. 11 Suriname, Authored by: VIDS (Vereniging van Inheemse Dorpshoofden in Suriname; Association of Indigenous Village Leaders in Suriname) Published by: Natural Justice in Bangalore and Kalpavriksh in Pune and Delhi Date: September 201

Livelihoods in the interior of Suriname

The livelihoods and living context of the peoples living in the interior of Suriname began to undergo significant and rapid changes from the 1940s, when the introduction of the outboard motors signified a technological revolution for the interior. State authorities began to exert control over the interior, District Commissioners and local administrators called Bestuurs Opzichters (overseers) were appointed, and increased formal contacts between State structures and the traditional authorities of forest peoples began. The interior became relatively less isolated and the peoples of the forest became more involved in the Surinamese nation. But at a political level indigenous and tribal peoples in the hinterland of Suriname were not represented, and this lack of political representation and the absence of legal recognition of their property rights became evident in the course of the construction of the Brokopondo Dam.

The Brokopondo Dam was built to provide energy to Suralco's aluminium smelter and, by extension, the coastal plains including the capital city. The agreement to create the lake was signed in 1958.¹⁰ At the time of construction, Suralco relocated around 6,000 Maroons who were living in the area that was about to be inundated. Despite this (forced) sacrifice, to date the forest peoples and tribal peoples living upstream still do not benefit from the energy of the dam. In an irony of history, the village of Nieuw Koffiekamp, which was built to house the relocated people and named after the old Maroon village of Koffiekamp that lies now at the bottom of the lake, is located in an area where a Canadian gold mining company has discovered an important gold deposit. The insufficiency of political participation and hence the lack of legal procedures for meaningful participation in decision-making about resource exploitation is probably the second most important cause of indigenous and tribal peoples' vulnerability. This includes decisions about the establishment of areas within which nature is to be protected. The Nature Protection Act of 1954 forbids hunting, fishing or practicing agriculture, and thus denies indigenous and Maroon communities' access to vital livelihood assets in such areas.¹¹

Physical destruction of infrastructure and fighting during the conflict in Suriname's interior led to a collapse of the governmental service delivery system and left the interior isolated and dangerously lacking in routine services, a fact recognized by the Organization of American States (OAS).¹² Rebuilding, development and improvement of the interior was agreed upon in the Peace Accord which ended the conflict, but to date neither the Peace Accord nor any other plan has achieved sustained development of the interior. Moreover, in 2005, the United Nations Committee on Elimination of Racial Discrimination (CERD) expressed its "deep concern about authorizing additional resource exploitation and infrastructure projects that pose substantial threats of irreparable harm to indigenous and tribal peoples, without notification or seeking prior agreement or informed consent."¹³

¹⁰ Suriname: the impact of the May 2006 floods on sustainable livelihoods. ECLAC – Studies and Perspectives series – The Caribbean – No. 3, ECLAC SUBREGIONAL HEADQUARTERS FOR THE CARIBBEAN / United Nations publication

¹¹ *idem*

¹² Cited in the in the ECLAC report (2006).

¹³ *idem*

Government policies in the extractive sector

As a consequence of the commitment of the government of Suriname to the Millennium Development Goals (MDGs) at the Millennium Summit in 2000, Suriname developed its own development goals which were presented for the first time in the 2001-2005 Surinamese Multi-Annual Development Plan (Meerjaren Ontwikkelingsplan, MOP). In the Multi-Annual Development Plan 2001-2005 it was recognized that the elementary facilities in the interior are (still) significantly backward compared to those of the coastal area. Following this, the policy priorities for this period included developing a solution to the land right issue and the improvement and creation of basic facilities with regard to education, energy provisions, health care and drinking water.¹⁴ Accordingly, the policy of the Ministry of Regional Development for the period 2006-2007 proposed, among others, to “clarify the legal position of traditional authorities” and to “support and facilitate the dialogue among stakeholders about solution models for the question of land rights.” The improvement of indigenous and tribal communities’ access to livelihoods assets hinges on realizing this.¹⁵

The current National Development Plan (NDP) of the Government (2012-2016) includes the development of extractive industries. This is to be realized through investment in the sector by collaborating with multinationals, the conclusion of agreements with extractive industries, the efficient use of gold reserves and by applying government planning (and government taxes) to the gold sector. Since BHP Billiton sold its holdings to Alcoa in 2009, the latter, now registered as N.V. Alcoa Minerals of Suriname, is the sole owner of the mining concessions, including in Bakhuis. Production dropped to 60% in 2009 because of the world financial crisis. It was predicted that the current mines will have been mined out by 2012.¹⁶ The National Development Plan also includes plans to open new bauxite mines to extend the operation of the bauxite refinery, and old mines will be re-mined to collect remnant minerals.¹⁷ Finally, the NDP also states that the State oil company, Petroleum N.V., plans to search for oil exploitation opportunities and the extraction of non-metallic minerals, such as diamond, para clay, and kaolin and Savannah sand.

Bauxite mining in Suriname

The Bakhuis Bauxite Project was proposed by N.V. BHP Billiton Maatschappij Suriname (BMS) as part of the Next Generation Mines Program (NGM).¹⁸ Bauxite

¹⁴ Analysis of the Status of Indigenous and Maroon Women’s Rights in Suriname, Zaire van Arkel, Marie-Josée Artist, Carla Madsian, Report commissioned by UNIFEM, 2008

¹⁵ *idem*

¹⁶ At this moment Alcoa closed its mines and offices in Suriname and the Government of Suriname are now the owners of the plants.

¹⁷ Ontwikkelingsplan 2012 – 2016. SURINAME IN TRANSFORMATIE. Regering van de Republiek Suriname Paramaribo Suriname Februari 2012

¹⁸ NV BHP Billiton Maatschappij Suriname (BMS) and Suriname Aluminium Company LLC (Suralco), subsidiaries of BHP Billiton and Alcoa respectively, were joint venture partners in the exploration concession for bauxite in the Bakhuis Mountains in the Sipaliwini District of Western Suriname. The concession covers a total area of almost 2 800 km². The exploration program at Bakhuis was concluded in 2005. BHP withdrew from the project in April 2008.

extraction has been a major economic activity in Suriname since 1916, and bauxite is mined at several locations in the central and eastern parts of the coastal plain and refined at the Paranam refinery near Paramaribo. BMS was responsible for mining bauxite from several of the concessions and delivering it to Paranam refinery, where Suralco was responsible for refining the bauxite to produce alumina. The alumina was then exported from Suriname to various places in the world to produce aluminium. The shares in the Refining Joint Venture (RJV) for the management of the alumina refinery at Paranam, were distributed between Alcoa and Billiton at 55 and 45 per cent, respectively. The Mining Joint Venture (MJV) divides the mining of the bauxite mines in Para and Lelydorp between Alcoa (76 per cent) and Billiton (24 per cent). The bauxite mine in Moengo remains 100% owned by Alcoa while the company prepares to exit Suriname, including fulfilling its rehabilitation duties, after which it is expected to be sold to companies established by the Government.

To maintain or increase bauxite production, new locations for extraction need to be developed, and it is hoped that this may include the Bakhuy's Mountains concession in western Suriname, now seen as critical to securing the long-term prospects for the bauxite and alumina industry in Suriname. NV BHP Billiton Maatschappij Suriname (BMS) and Suriname Aluminium Company LLC (Suralco), subsidiaries of BHP Billiton and Alcoa respectively, became joint venture partners in the exploration concession for bauxite in the Bakhuy's Mountains in the Sipaliwini District of Western Suriname.



A lot of damage is done during exploration phase, without consent of indigenous peoples.

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In 2000, Alcoa, the parent company of Suralco, was the largest aluminium company in the world with a production of 14 million metric tons of alumina per year and 3.5 million metric tons of aluminium per year. In mid-2001 the Australian mining company BHP Ltd. merged with the English/Australian mining company Billiton and BHP Billiton was formed, the largest mining company in the world with bauxite, alumina and aluminium in its portfolio. BHP Billiton is the fourth largest producer of aluminium in the world and is also leading in other mining products. On October 16, 2002 both joint ventures were reaffirmed in a Letter of Intent between Alcoa and BHP Billiton. It was also decided that the capacity of the refinery at Paranam would

be increased from 250,000 metric tons to 2.2 million metric tons per year. This project was finished in 2005.

In 2003, indigenous communities in West Suriname learned a deal had been struck between the Government of Suriname and BHP Billiton and Alcoa for bauxite exploration. The Bakhuis Mountains contain reserves of bauxite estimated to be the ninth largest in the world. Under the Bakhuis Bauxite Project, BHP Billiton and Alcoa intend to mine bauxite in a concession area of 2800 km². Related activities would include a substantially expanded port, as well as a potential refinery. The intention was to come to an agreement for the development of a bauxite and alumina industry in West Suriname after an 18-month period of negotiations. Transporting of the bauxite would be done by rail to the port near the Lokono indigenous communities of Apoera, Section and Washabo, and then by barging the raw product down the Corantijn River, along the Atlantic, up the Suriname River to the Paranam refinery for processing into alumina. A second MoU was signed to explore the possibility of large-scale hydroelectricity to fuel a smelter to process the bauxite from the Bakhuis mine, which the Suriname Government was keen to support.

Standards for Bauxite mining in Suriname

A government agency called the Bauxite Institute exists but does not have a monitoring role. Instead, the effects of the bauxite extraction and all related activities, are monitored by the bauxite companies themselves. Suralco and BHP Billiton are both members of the International Council on Mining and Metals (ICMM) and should follow the guidelines for responsible mining established by that body. These guidelines state that member companies should: respect the culture and heritage of local communities; that communities should be informed and consulted on mining activities and possible risks; that companies should promote the social, economic and institutional development of affected communities; and that member companies should establish transparency policies to ensure open communication with affected communities. There is, however, no single body in Suriname to ensure that the bauxite companies effectively comply with this guidance.

Also, the lack of an adequate environmental law complicates the implementation of environmental and social impact studies for activities related to extractive industries. In 1998 the National Council for the Environment (NMR) was established as a policy making body within the Office of the President. That same year it established the National Institute for Environment and Development of Suriname (NIMOS), the operational arm of the NMR. However, because of limitations in their authority, lack of legal backing and lack of human and material resources, these bodies have not delivered any results, other than the development of a draft Framework Law on Environment (known as the Environment Act). However, this has not yet been discussed in Parliament. It has also developed draft guidelines for Environmental and Social Impact Assessment. The 2001 version of this draft Environment Act was a comprehensive environmental policy and management bill addressing guidelines for environmental protection and planning, pollution control, environmental and social impact assessment and public participation, and attributing to NIMOS the role of environmental authority, while maintaining current responsibilities of line ministries.

This draft Act underwent a series of revisions since 2001, and by late 2004 the proposed revisions reportedly represented some major steps backwards. In 2002, the Ministry of Labour, Environment and Technology (ATM) was established, leading to several institutional changes (including ambiguities with regards to the role of the National Council on the Environment), and has held up approval processes with regards to draft legislation. The situation for the mining activities in West Suriname is clear, so far Suriname has no Environment Act and the institution responsible for the ESIA studies (NIMOS) has no mandate.

Activities affecting indigenous and tribal communities in West Suriname over the last 50 years

The beginning of the 1970's saw the first attempt to establish a mining plant in West Suriname. The government expected that the development of the bauxite mine would have a snowball effect on other sectors, such as forestry and animal husbandry. A zoning plan was designed for the entire area surrounding the villages of Washabo, Apoera and Section which was envisaged as including a city, an industrial site, a port, railway, and agriculture and livestock areas. It was assumed that the indigenous communities in the area would be absorbed into the city, or that they would move away to other villages. Indigenous peoples organised action groups to protest at the national and local levels but the Government did not listen to them. The project was only halted because of the fall in the global price of alumina. In the meantime some of the residential areas were parcelled out and some roads and houses were built. This initial area of residential development was equipped with electricity and running water, while the traditional territory where the Lokono lived along the riverside was not provided with these services.



Port expansion area

© Association of Indigenous Village Leaders (VIDS)

The 1970s also saw the beginning of the demand for land rights by the indigenous peoples in West Suriname, and by 1978 they had united themselves to fight for recognition of their land rights, together with indigenous peoples from the lower Marowijne River and with the Maroons of Santigron. In 1980 VIDS joined this fight for land rights, and with the 1986 military coup and the interior war breaking out, West Suriname became the home base of a militant group known as ‘Tucajana Amazons.’ Villagers from communities in west Suriname fled in the wake of the brutal murder of a group of militant indigenous people. The militant group participated in the armed struggle in the interior of the country and demanded recognition of their land rights. Many families were traumatized but returned after they felt it was safe to do so.

Many commercial logging activities in Suriname took (and still take) place within Western Suriname. Men from the villages cut wood in Houtkap Vergunning or HKV areas and sell these, most exclusively during the dry season, as the roads are bad in the rainy season.¹⁹ There are commercial logging companies active in the area, working in logging concessions that have been permitted by the government, often without knowledge of the villagers, and in all cases without their free, prior and informed consent but some companies employ indigenous persons from the villages. Because of new techniques and transportation means (chainsaws, tractors or trucks), a lot more wood can be cut and sold now than in the past. Besides logging concessions, of which many are granted to Asian companies, gravel and other mineral concessions were (and are) also granted by the Government to multinationals and national companies active in West Suriname.

In addition to all these plans, indigenous peoples in Western Suriname also have to contend with government agencies and major international conservation NGOs (such as WWF) that attempt to establish protected areas. In 2005 the government wanted to establish a specific protected area in the region and the communities’ repeated and clear assertion was that a State regulated protected area would not work for them. According to village leader Ricardo MacIntosh:

We did not agree with the nature reserve, because it would mean that we could no longer go hunting in there. [...]. We want to be free to do whatever we want. Because if they say this is a nature reserve, you have to go to the city to ask permission to enter the area. We are not going to do that. We Indigenous people don’t need permission to come here. This creek belongs to Washabo, Section and Apoera. Outsiders do have to ask permission to us. This creek is important to us because we hunt and fish here and we collect material to build houses and everything to live from. The youth start coming too and one day they will use it.

Further, studies and consultations were carried out and have been underway for the establishment of large-scale infrastructure, including roads that will connect Suriname to Guyana via bridge in the vicinity of the indigenous villages of Apoera in Suriname

¹⁹ HKV is a license for communities to use or harvest trees in a certain area. VIDS disagrees with HKV because it means that communities must ask the government for a license to use their own lands. However it is only possible for communities to receive restitution or compensation if they are able to show their license over a particular area. The HKV has now referred to as “community forests” but the underlying ownership principle has not changed, the major change is that while the HKV permit was given to chief of community, the Community Forest license is given to a community foundation and only under a ministerial decision.

and Orealla in Guyana. This is to facilitate the movement of goods related to bauxite mining across the Guyanas, and to provide a road link running from Brazil through the Guyanas to Venezuela (under a broader regional integration project funded by the World Bank, among others, and known as the IIRSA project).

Case study: The communities of Apoera, Section and Washabo²⁰

The communities of Apoera, Section and Washabo are located in the basin of the Corantijn River in West Suriname where petroglyphs of indigenous origin are found, evidence that the indigenous peoples here have inhabited the territory long before Columbus set foot in the Americas.²¹ The three case study communities of Apoera, Section and Washabo are located on the border with Guyana and about 150 km from the mouth of the Corantijn River. The people in the villages are mostly Arowak (Lokono) people, but there are also Carib (Kariña) and Warau inhabitants. According to oral history Washabo and Apoera were founded around 1920 by two different families. Section grew around a native family that went to live between the two villages.

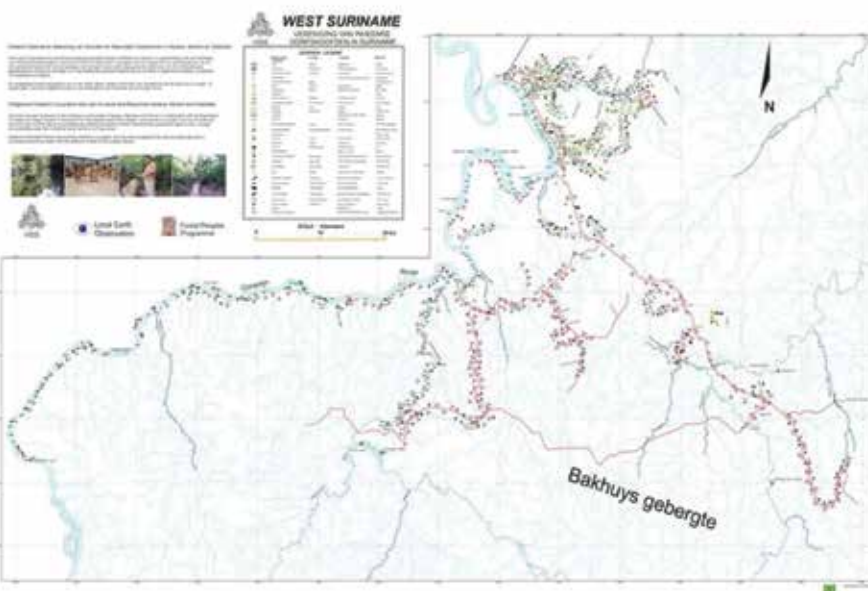
The communities mapped their traditional territory in 2004, indicating which areas are used for specific purposes; where they live, where they hunt, where they farm, where they fish or get their medicinal plants, and which places have a special spiritual or cultural value.

The villages are relatively isolated and are accessible by road; more than a 10-hour drive from Paramaribo, the capital, or from the western border town near the Atlantic Ocean. Through the river, depending on the power of the outboard it takes 4 to 10 hours; or about 1 hour by small airplane (a mode of transport which involves very expensive charter flights).

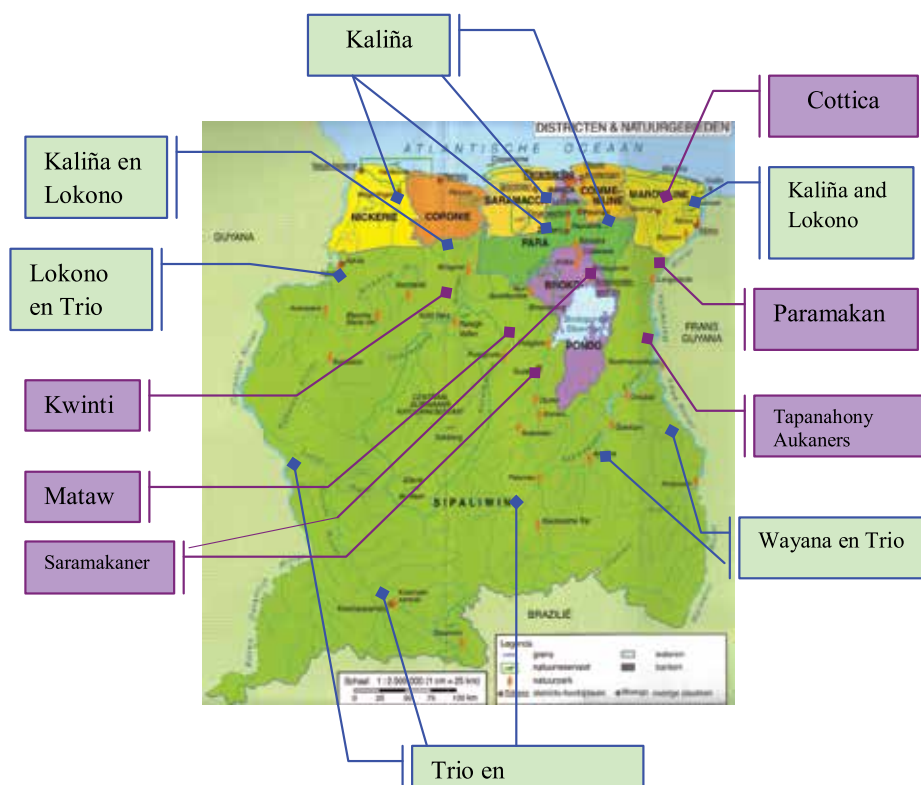
²⁰ While in this case study the focus is on the three Lokono communities in Western part of Suriname, in reality also a small settlement of Trio Peoples is in the affected area.

These peoples originally live upstream the Corantijn River but got permission of the village leader of Apoera to use a piece land and built camps so the Trio children could visit the schools in Apoera. Some elders still live upstream and they will experience impacts of the proposed Kabalebo project. Also downstream the Nickerie River, with its source in the Bakhuis Mountain, a Lokono and 2 Kariña communities were also included in the project activities since this River and catchment area can affect the livelihood of these peoples. The case study focused on the communities in West Suriname.

²¹ De eerste volken van Suriname. J. Wekker, M. Molendijk, J. Vernooij. Stichting 12 October 1992



Association of Indigenous Village Leaders in Suriname. Communities of West Suriname: Apoera, Section and Washabo (2009)



Hebri Scholierenkaart van Suriname, 2004.

Edited by Ellen Rose Kambel in "Indigenous Peoples and Maroons of Suriname", by Ellen Rose Kambel, commissioned by Inter American Development Bank (IADB, 2006)

These days a laterite road connects the three communities. The road is very dusty during dry season and very muddy in the rainy season. There are few vehicle owners and residents are dependent on small local entrepreneurs who own minibuses and maintain regular service to Paramaribo. Locally the villagers mainly walk or use bicycles, and lately more and more mopeds. Some families use wooden boats with outboard motors and others, especially in Washabo, use small boats made out of a trunk, mostly for fishing or when going to their plots.



View of the village in West Suriname.

© Association of Indigenous Village Leaders (VIDS)

A place of great importance to all three communities is Kaboeri Creek (the first written record of which date from the 1740s), where many Arowaks and also Waraus used to live. There are many legends about the time the Arowaks who lived along the creeks, inland from the river, were at war with Carib tribes. By retreating to the creek, they were also protected from the white people, who came on expeditions looking for gold. There remain many signs of the former occupation of the creek, such as old fruit trees that were planted and iron tools that are still sometimes found. People continue to go to Kaboeri Creek today to hunt, fish, and collect timber and non-timber forest products. In 1978, the Ministry of Environment made plans to turn Kaboeri Creek into a Nature Reserve, but the indigenous communities which used the area successfully protested against these plans.

Agriculture is important to all three communities, which use the rotational cultivation method. Every dry season a new plot is cleared and used two or three times after which it is left to regenerate for more than five years until it is ready to be used again. One of the most important traditional crops is the bitter cassava (manioc), which can be processed into various foods and beverages such as cassava bread and an alcoholic drink called kashiri. Other traditional crops are plantain, banana, sweet potato, pepper,

corn and sugar cane, however, the last few years have seen less traditional varieties of vegetables being grown, including long beans and cucumber. In the past, people only planted for their own consumption, but nowadays people also sell part of their harvest.²²

The 'West Suriname Plan'

In the 1960's Suralco and Billiton began extensive explorations in the Bakhuis Mountains. When these failed to lead to mining operations, the Surinamese government devised the 'West Suriname Plan' to develop the region.²³ In the early 1970s West Suriname was thus designated as a new economic growth pole in Paramaribo and in The Hague, without consulting the inhabitants of the area or even providing them with basic information. The Surinamese Government justified its actions on the basis that the locals would "hitch a ride" in the planned economic developments and that this would be huge progress for them. The range of activities contained in the West Suriname Plan came as a surprise to the indigenous peoples of the region. In 1973 they were consulted on the setting up of a sawmill, to which they reacted positively because logging was not a strange activity for them. However, they were never informed about other development plans in their territory, and certainly not the zoning of the lands that they inhabited for generations.²⁴

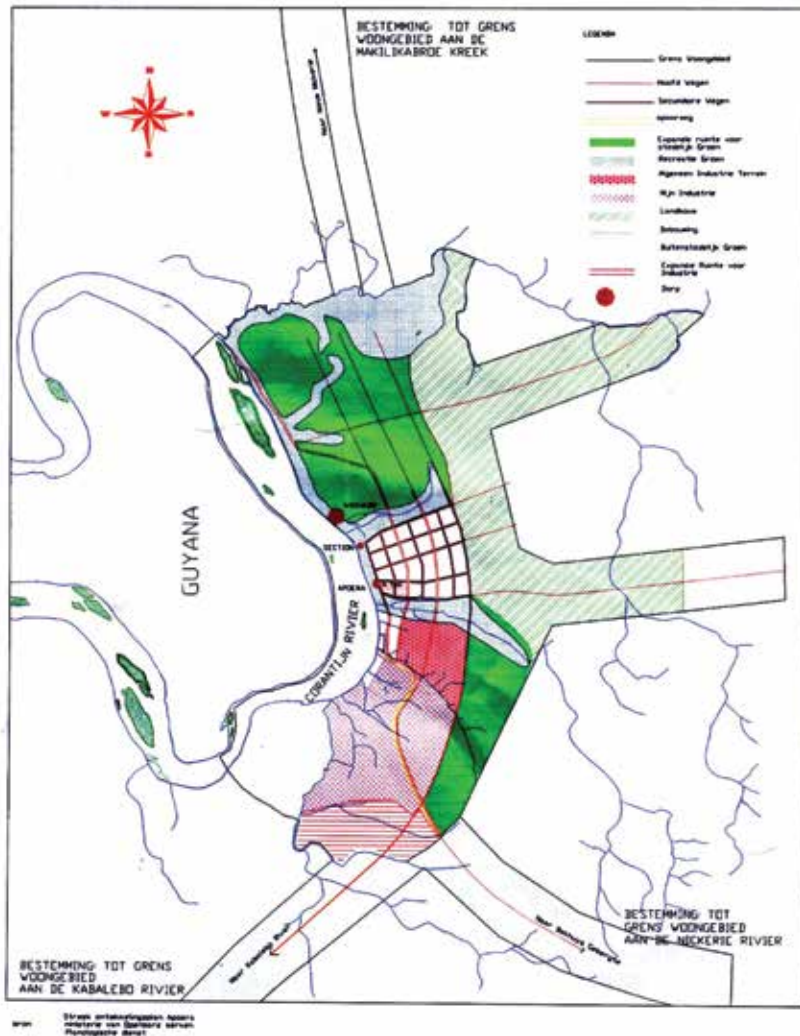
During these initial steps towards bauxite mining an indigenous leader from Apoera stated that he welcomed bauxite mining as he believed that it would provide employment for community members. Leaders from the Kari'na peoples in the Wayambo region, however, were not pleased by the prospect of industrial mining and the construction of a related hydroelectric scheme in their territory. The last hydroelectric scheme that Suriname constructed to facilitate bauxite mining operations caused the forced displacement of approximately 6000 Maroons and is still fresh in their memories. So too is the fact that Surinamese law does not recognize any guarantees for Indigenous and Maroon land rights.²⁵

²² Our Indigenous Territory on the Corantijn. Traditional occupation, use, and management of the Lokono People in West-Suriname. Bureau VIDS, Community Report for Inter-American Development Bank project: "Indigenous Peoples and Mining in Suriname – Building Community Capacity and Encouraging Dialogue" ATN/CT-8811-SU, 2008

²³ West Suriname: Wat Betekent een Geïntegreerde Aluminium Industrie voor de Inheemse Gemeenschappen? Bureau VIDS, 2007

²⁴ Grondrechtenkrant; Grondrechten zijn mensenrechten, augustus 1978; West Suriname: Wat Betekent een Geïntegreerde Aluminium Industrie voor de Inheemse Gemeenschappen? Bureau VIDS, 2007

²⁵ "NATIVE-L Aboriginal Peoples: news & information", <http://www.ainfos.ca/A-Infos97/1/0328.html>



*Streek ontwikkelings plan
(map of regional development plan: planned infrastructure by Government)*

© Association of Indigenous Village Leaders in Suriname.
Communities of West Suriname: Apoera, Section and Washabo (2009)

The currently proposed developments for West Suriname are new versions of the old plans. Back in the 1970s, the Government already began to build infrastructure to enable their vision of a new city, the second largest in Suriname, including a railway line to transport bauxite from the Bakhuis mountain range to a port in Apoera, roads from Apoera to the mine concession, as well as roads to the proposed Kabalebo dam. This did not happen at the time, but the Government renewed its interest in an integrated aluminium industry for the West, as bauxite reserves began to be exhausted in the East and the Government (with Suralco) began to examine the feasibility of building the Kabalebo hydro-dam.

In the face of these developments, and because they were not consulted and had been provided with no information, the Chiefs of the affected indigenous villages of Apoera,

Section and Washabo turned to the Association of Indigenous Village Leaders in Suriname (Stichting Bureau VIDS) for help. Since the Bureau VIDS was implementing community workshops about land rights, it was in the position to organize some community workshops in the communities in West Suriname to identify their priorities. The Bureau VIDS reached out to potential allies for technical support and funding and this resulted in several projects and activities. These included the preliminary mapping of Lokono traditional use areas (2003-2004) and specific awareness raising activities about indigenous rights and mining. It also led to research to gather information about the proposed developments and to begin to identify possible impacts as well as to document existing impacts. Other outcomes were the facilitation of dialogues among the companies, government and the communities and building the capacities of the communities regarding their rights and international best practices around mining. Finally, it also resulted in the undertaking of archival research on indigenous occupation in West Suriname in collaboration with the North South Institute (NSI) of Canada (2004-2006).

In 2006, Bureau VIDS and NSI initiated a follow up project called “Indigenous Peoples and Mining in Suriname – Building Community Capacity and Encouraging Dialogue” which was intended to address key concerns raised by the Lokono communities about the mining plans in West Suriname. The funding came from the Inter-American Development Bank (IDB). The IDB’s interest in this VIDS/NSI project stemmed from the Private Sector Department of the IDB having been approached by Alcoa for potential financing of the hydroelectric power plant, dam and reservoir. While Alcoa would need to undertake its own environmental and social due diligence to obtain IDB funding, the IDB considered the proposed VIDS/NSI project “a critical first step in providing potentially affected communities and their representative organizations with the tools required for a more equitable and effective engagement with PRI/Alcoa and the Government of Suriname.”²⁶

Objectives of the project included: gathering information regarding the potential impacts of the proposed projects on the indigenous communities in the area of influence; providing information about the proposed projects to these communities in West Suriname; building capacity among the indigenous communities to engage in dialogue with the Government of Suriname, Alcoa and BHP Billiton, regarding their rights, needs, concerns and interests.

Key research activities included: documenting traditional land-use and occupation; analyzing current decision-making processes in the communities and how these could be strengthened; assessing the scoping document for the transportation options of the Bakhuis mine’s environmental and social impact assessment (ESIA); and producing a comprehensive paper on indigenous peoples’ issues and mining in Suriname. Capacity-building activities included training on land rights, community organizing, international standards for environmental and social impact assessment and community-based research. In addition, Bureau VIDS provided on-going support to the leadership

²⁶ “*Shifting Grounds*”: Indigenous Peoples and Mining in West Suriname, page 1; also available on the Inter-American Development Bank website: <http://www.iadb.org/en/projects/project-description-title,1303.html?id=SU-T1005>]

²⁷ *Shifting Grounds: Indigenous Peoples and Mining in West Suriname*. Viviane Weitzner (NSI), July 2008.

of the affected communities in their engagement with the companies and government, including presenting to the companies and government the objectives and work plan for this IDB-funded project, as well as the preliminary results and recommendations.²⁷

Although the bauxite companies hired consultants²⁸ to conduct the ESIA studies for the planned mining project, serious errors were made and neither the companies nor the consultants met international guidelines in relation to indigenous peoples' rights and impact assessments. For example, no ESIA was done for exploration in the concession area, in contrast to the requirements under the draft ESIA guidelines of NIMOS, the companies' own guidelines and international standards; the affected communities were not involved in the early stages of the scoping phase, and the companies initially refused to organize workshops for provision of information; and, no Panel of Experts was established to guide and oversee the ESIA process, although this should be the norm for such a large international mining project and is prescribed under the draft ESIA guidelines of NIMOS. After several interventions by the traditional authorities of West Suriname, the companies sought to improve the process. The establishment of the 'Bakhuys' Forum for dialogue between the communities, the bauxite companies and the local government was an important step. And while this is still no recognition or protection of the rights of indigenous peoples, the forum forms a platform on which the communities can assert their rights and concerns.

At a certain stage in 2008 it became urgent for the communities to start and intensify their dialogue with the Central Government, before it entered into an agreement with the bauxite companies. For the Government and the bauxite companies, the pressure for a quick decision was growing since the bauxite reserves in the East had run out and the ESIA studies in the West were completed. The companies had already expressed their desire in the Bakhuys Forum meetings to finalize an agreement with the communities (including an Impact Benefit Agreement). The Government's bauxite negotiating Commission for its part had indicated its readiness to work with the communities on the social and environmental section of the agreement which the Government and the bauxite companies were finalizing and planning to visit the West Suriname communities. VIDS and the communities called for regular consultation between the Central Government, including the Minister for Natural Resources, and the communities' representatives.

In late 2008 the project entitled 'Indigenous peoples and mining in West Suriname: Strengthening our negotiating position, Protection of our area' was approved by the Embassy of the Netherlands, enabling Bureau VIDS to support the meetings between the communities in West Suriname and the Government. The objective was to focus on the establishment of a useful structure for the communities' decision-making processes, and to work towards an acceptable social and environmental section in the exploitation agreement between Government and bauxite companies. However, before the completion of this short-term project, BHP Billiton withdrew from the Bakhuys mining project. Interestingly the Government's position was to announce its intention to follow up their plans for an integrated aluminium industry in West Suriname. The Government and its newly established mining company, Aluminium Company Suriname (Alumsur), even signed an agreement of intent early 2009 with Glencore. The

²⁸ SRK Consultancy was hired

content of this agreement was never made public. The only information disclosed was that the Swiss company would finance the establishment of Alumsur and the Surinam Government would pay back its debt with Alumina. Again the communities were only informed of this through the national media.²⁹ Also, the Ministries of Planning and Development Cooperation (PLOS) and of Agriculture, Animal Husbandry and Fisheries (LVV) stated that the development of hydroelectric works, agriculture and animal husbandry were potential development projects to the area.

Because of these developments the village leaders of West Suriname requested VIDS to change the Netherlands' funded project activities and focus more on effective participation of the Lokono and Trio Peoples of West Suriname in decision making processes of the Government, especially in relation to social and environmental aspects of the proposed mining and related developments, or any other extractive industry activities in, or near their territory. The Embassy accepted the project changes.

The project 'Indigenous Peoples and Mining in West Suriname: Strengthening our Negotiations, Protecting our Homelands' was funded by the Canada Fund for Local Initiatives (CFLI) Suriname, and ran from 2009 to 2010.

As mentioned, in late 2008 BHP Billiton announced the cancellation of its plans to mine bauxite in the Bakhuys mountain range, with immediate effect, and that the company would leave the country by 2010, after the closure of the mines in eastern Suriname, leading the Government of Suriname to seek partnerships to continue the project. It was therefore critical that the communities be fully prepared to deal with any other mining company and finalize the mapping of their traditional homelands, by including new information on their traditional use and occupation that had been gathered through community-based research since the initial maps were made.

It should be noted that while the communities were potentially open to a well-managed bauxite mine that meets international standards and respects indigenous peoples' rights and interests, they stood firmly against the proposed Kabalebo Dam project which would have enormous impacts on the ecosystems and human life in West Suriname. Information generated from this project would therefore support well-informed indigenous positions, the proposal of their own plans and perspectives, and enable protection of the cultural and biological diversity of their homelands. The general objective of the project was to ensure that the rights, interests and aspirations of the Lokono and Trio Peoples in West Suriname, with respect to the proposed Kabalebo dam, Bakhuys bauxite mine and related developments in West Suriname, are respected and protected, through strengthening of their negotiating power and capacity. The specific objectives included: mapping and presenting the new maps to the Government and companies, strengthening the decision-making and community governance capacity of the traditional leadership, and reinforcing the villages and their leaders' capacity to design and implement community development plans and programs.

²⁹ dWT 23 april 2009 & dWT 27 april 2009 (dWT - de Ware Tijd, Suriname daily newspaper)



Presentation of the West Suriname territory mapped by the community.

© Association of Indigenous Village Leaders (VIDS)

The VIDS and the communities of West Suriname were relieved when, in collaboration with FPP and NSI, they were able to source some additional funding to enable the project to proceed. With ESIA's for the proposed Bakhuis bauxite mine just completed, and companies already pushing forward to conclude an exploitation agreement with the government, the project was now entering a critical stage. The support of the Australian Government and the Direct Aid Program (DAP) was specifically sought for the creation of plain-language documents to help community members better understand the impacts of the proposed developments and thus enable them to enter final discussions from a position of strength and knowledge. DAP funding facilitated the organization of a national-level workshop, providing an important opportunity to present the conclusions of an independent panel of experts' review of company ESIA's and to raise awareness of the true implications of the project among government and company negotiators.



Community meeting with the staff of the company.

© Association of Indigenous Village Leaders (VIDS)

These projects have strengthened the negotiating position of the indigenous communities with powerful multinationals. But since the rights of indigenous peoples are not recognized by national legislation, and since there is no legislation that requires an environmental and social impact study, the communities of West Suriname are forced to invoke the international commitments which Suriname has made.

On July 2013, the bauxite companies BHP Billiton and Suralco obtained, for a period of 25 months, the right to explore for bauxite in the Bakhuys reserve. The bauxite companies estimated a cost of US\$8.5 million for the exploration program. Based on the agreement between the two companies, BHP Billiton was responsible for the conduct of the bauxite exploration.³⁰

Process

The indigenous rights' safeguards established by the Government of Suriname have been weak or non-existent. Despite its international commitments to uphold indigenous rights, including support for the UNDRIP and ratification of the Convention on the Elimination of all forms of Racial Discrimination (CERD), in practice the rights described by these instruments are unrecognized in Suriname, and are not protected under domestic law. In fact, Suriname is notorious for being the only country in Central and South America that does not recognize – to any extent – indigenous peoples' ownership rights to their ancestral territories. Nor is there any effective environmental legislation in place.

The leaders of the communities in West Suriname, VIDS, NSI and FPP have drafted reports, presented them to the Government and companies, tabled a petition to the President of Suriname and submitted different reports to the CERD, sent letters to ministries and the media but never received any satisfactory responses from the government. Indeed, most letters were simply never answered.³¹

Early in the exploration phase Dene First Nation peoples from the Northwest Territories, Canada, visited the Lokono Peoples in West Suriname. VIDS and the peoples of West Suriname knew about the procedures and practices of Free Prior and Informed Consent (FPIC), but during this exchange, FPIC 'came to life.' This led to the realization that the way the companies communicated with the communities was not culturally appropriate, was very limited and was not aimed at providing understandable information to the peoples of West Suriname. The community leaders forced the companies to have dialogues with them and to discuss other issues such as the very poor communication or lack thereof. It was this that led to the establishment of the Bakhuys Forum and the discussion in relation to reaching an agreement between the companies and the communities that was based on FPIC.

³⁰ West Suriname: Wat Betekent een Geïntegreerde Aluminium Industrie voor de Inheemse Gemeenschappen? Bureau VIDS, 2007

³¹ Among other things, VIDS have submitted a number of complaints under Article 41 of the Forest Management Act concerning the activities of timber concessionaires on our traditional lands; complaints and petitions about the failure of the State to recognize and secure our property rights in and to our traditional territory; and petitions about our rights to territory and to effective participation in decision making in relation to the Bakhuys project.

During the workshops the communities established their own community FPIC protocol where actually the three communities decided to develop a single protocol for West Suriname, and an agreement was formulated with the support of NSI and FPP. BHP Billiton, however, refused to sign the agreement because they claimed that they could not support the protocol. The community leaders then pressed BHP Billiton and Alcoa to consider the indigenous peoples of West Suriname as the rightful owners of their traditional territories, even though the Government of Suriname has not yet officially recognized this, and requested that the companies negotiate a draft protocol with them setting forth a mutual understanding of what it means to respect their traditional rights. Company reactions were mixed, however. On the one hand, the companies stated that “until such time as traditional rights are recognized by the Republic of Suriname and incorporated into Surinamese law, formal endorsement by BHP Billiton and Alcoa of such claims would be premature.” They added that they would like to work towards an acceptable outcome through dialogue and consensus building “rather than being forced to align with either indigenous people [sic] or government positions to the exclusion of the other’s.” On the other hand, while the companies have rejected signing the communities’ protocol on respecting traditional rights, they have agreed orally to proceed as if the communities are the landowners whose traditional rights have been recognized.³²

As previously explained, the traditional government in the Lokono communities which is a village council is comprised of a Captain (Village Leader) and two or more assistants known as *basya*. Decisions are made by consensus following a series of village meetings and extended and diffused discussion periods. Consensus does not mean that every member of the community is in agreement, but rather that, in accordance with local customs, the vast majority are in favour and those who have reservations choose not to express them.³³ The conduct of a study on traditional governance, aimed at strengthening the communities’ decision-making processes, included not only the institution of the Captain and the *basya*’s, but also other village structures that function according to traditional rules. By capturing how decisions are made and who the participants are, the requisites for achieving an acceptable and sustainable decision can be verified. Because major developments are rapidly unfolding, it was considered very important to stick to the consensus rule and to include all groups. It was decided to strengthen the Captaincy institution by establishing and incorporating supporting groups that would function in an advisory capacity. These new structures were introduced but the decisions continued to be made during village meetings.

The mining project’s exploration phase gave rise to numerous impacts both for the environment and the villagers. Carlo Lewis, Village Chief of Apoera, mentioned in that because of the developments in their territory they are forced to change their way of living:

³² Missing Pieces. An Analysis of the Draft Environmental & Social Impact Reports for the Bakhuis Bauxite Project, West Suriname. Vivane Weitzner, North South institute, 2008

³³ Forest Peoples Programme. (2007). *Free, Prior and Informed Consent: Two Cases from Suriname*. Retrieved September 11, 2008, from http://www.forestpeoples.org/documents/law_hr/fpic_suriname_mar07_eng.pdf.

We are not against the developments, but our way of living has to be taken into account. We are already no longer allowed to hunt in the Bakhuis territory and we cannot go to the supermarket like the people in the city, because we live in the forest.³⁴

These impacts are mentioned in several reports and it is clear that women were particularly vulnerable. For instance, the burden of keeping the household going, including working the land falls on women while their husbands are in the mine plants, often continuously for two or three weeks. In addition, the women were forced to go to the store to buy food more often than before, because fish and game were no longer fresh supplied by their husbands. When they run out of money they had to buy on credit and wait until they obtain part of their husband's salary to repay their debts. In some cases this was impossible as a result of alcohol consumption by their husbands in their new roles as mine employees.³⁵

The arrival of the mining companies has had a big effect on the hunting and fishing opportunities in the area. The bauxite companies have restricted activities in the concession area in the Bakhuis mountain range. One of the hunters explained that before the exploration of BHP Billiton and Suralco, the indigenous peoples also went hunting and fishing at Bakhuis and the surrounding areas. The Moses Creek and Van Ams Creek at Bakhuis were good fishing sites. They especially fished for anjoemaras here, because this type of fish was abundant at Bakhuis. Apart from anjoemaras, there was also much game, including birds and tortoises. The hunters and fishermen did not go to Bakhuis all year round, but only at times that they knew there was a lot of game or fish to catch. As noted by one hunter: "Especially in the dry season we caught a lot of anjoemara at Bakhuis."

But unfortunately, that's no longer possible. So we have to satisfy ourselves with other places such as Kabalebo and the Nickerie River. [...] Nowadays, Bakhuis is out of the picture for every hunter.

Because of the noise of the mining activities and the intrusions into their habits, the fish and the animals have left.

Lessons Learnt and Recommendations

Although officials have indicated that recognition of land rights before mining takes place could be a distinct possibility, no concrete steps have been taken in this regard, aside from initiatives by the communities themselves. In the case of the companies, community leaders have pressed BHP Billiton and Alcoa to consider the indigenous peoples of West Suriname as the rightful owners of their traditional territories even though the Government of Suriname has not yet officially recognized this. Despite the policy statements of the companies and ICM and relatively sophisticated management and assessment procedures (including audits), when the Lokono

³⁴ Request for Follow-Up and Urgent Action Concerning the Situation of Indigenous and Tribal Peoples in Suriname. Association of Indigenous Village Leaders in Suriname, Stichting Sanomaro Esa, Association of Saramaka Authorities, Forest Peoples Programme, July 2008

³⁵ West Suriname: Wat Betekent een Geïntegreerde Aluminium Industrie voor de Inheemse Gemeenschappen? Bureau VIDS, 2007

requested that the companies respect their rights, and in particular negotiate a protocol that defines and protects 'traditional rights,' the companies responded in a manner which effectively subordinated their land rights to discriminatory national legislation, stating that: 'until such time as traditional rights are recognized by the Republic of Suriname and incorporated into Surinamese law, formal endorsement by BHP Billiton and Alcoa of such claims would be premature.' The community leaders perceived that the policy statements, or statements affording a qualified recognition to their rights, were essentially worthless if companies cannot follow them up.

Among other rights, the legal recognition of land rights and FPIC is necessary before any project takes place in indigenous peoples' territory.

As a result of the involvement of independent experts, it was possible to produce a number of reports and have access to reliable information, as opposed to only the limited, possible biased data provided by the companies and consultants working for them. It was also possible to have this information in a culturally appropriate format, that was trustworthy and addressing the issues of most importance from the perspectives of the concerned indigenous peoples. Those reports detail numerous examples of impacts, lessons learned and recommendations, all of which have been validated by, and have proved to be very valuable to, VIDS and the communities.

The study on decision-making process and the experience of the communities raise a number of important lessons, including the following:

- New structures might be necessary to ensure that all groups in the community can participate equally. This implies potential changes at the community level in order to address the challenges posed by the entry of mining companies. Communities need time and space to determine what these changes should be and how to implement them.
- Companies need to be aware of this and respect it. Transparency from companies, government and communities is effective not only in relation to information sharing, but also in the engagement process itself.
- Identifying and training community-based researchers to conduct research work themselves is a means of building awareness of the importance of conducting community-based research to support decision making and strengthening of community processes.
- Communities realize good and strong governance supports economic development and management of their traditional areas in a way that ensure that the unique character and culture of the indigenous people is not lost.
- Government and companies need to understand and respect the decision making process of the affected communities.

Exchange visits with other indigenous peoples are a powerful instrument to make indigenous peoples aware of common situations they face and how to strategize and look for opportunities. A strong recommendation of the Dene Peoples was that the communities of West Suriname should be very careful about the description of the 'project' they are negotiating, and not negotiate an IBA based on a whole claim block area, but instead on each pipe (and in the case of Bakhuys, this would translate to each mining envelope).

From VIDS experience a lack of finance makes it very difficult to commence activities in support of communities. Because of an on-going project it was possible to do some preliminary activities and due to the support of NSI, FPP, and organizations with broad experience in this field, VIDS was able initiate and complete a number of projects, with positive outcomes. Even then it was difficult to comply with all the terms of the contracts, especially with the Inter-American Development Bank, which wanted to have ownership over reports containing culturally sensitive data collected from the communities. Without finance for the implementation of projects which are for, and are based on the perspectives of, indigenous peoples, they will continue to have very unequal positions in negotiation.

To ensure meaningful and effective strengthening of indigenous leaders and communities, any technical assistance which is provided for research must be from supporting organizations which have knowledge and experiences about indigenous peoples' perspectives. Technical assistance is only valuable if those who are providing it cooperate with indigenous peoples.³⁶

Project funders need to be flexible. When mining projects change, indigenous peoples have to adapt to the new situations very rapidly. In case where indigenous peoples' project activities are being funded, financial supporters need to be equally flexible in order to facilitate the necessary adjustments.

Mining projects both individually and cumulatively will have significant, adverse impacts over large parts of the indigenous peoples' territories. This applies not only to current projects but also to earlier projects in indigenous peoples' communities, and the impacts of these need to be taken into account.

In Western Suriname, projects of the 1970s are still affecting communities. At that time, there was no consultation with indigenous peoples living in the area in relation to government plans and activities. The agricultural plots of indigenous communities were bulldozed to make way for Phase I of the West Suriname Plan, namely the establishment of Apoera City and the brick roads that connect its residences. The government has proceeded to issue parcels of land to individuals from the region, especially young families and to people from Paramaribo. The issuing of these parcels to outsiders has resulted in unrest in indigenous communities who are losing their lands. However these communities are confronted by many issues, including the incursions by logging companies who are hiring outsiders and bringing them into the area, and an airstrip being constructed without consent from the communities. Meanwhile local women's groups who process krappa oil are threatened by the logging company seeking to increase their concessions over the indigenous krappa forest areas, and restrictions are being placed on indigenous peoples accessing land parcels being given out to politicians. With the existing infrastructure established by earlier initiatives of the mining companies and the government, West Suriname is a relatively accessible region in the hinterland while regulation and control from the Government is limited, and is therefore very attractive for investment and economic activity – all of which are imposed on the indigenous communities in the area.

³⁶ For lessons learned with regard to this collaboration see: *Shifting Grounds: Indigenous Peoples and Mining in West Suriname*, by Viviane Weitzner (NSI), July 2008, page 7

The multiple threats facing indigenous peoples in the area are overwhelming the capacity of the communities to respond. As a result, they are in a position whereby it is increasingly difficult to defend themselves and ensure their enjoyment of their rights as well as their cultural and physical survival. Equally the impacts of other projects, such as the establishment of nature reserves in the territory of indigenous peoples, cannot be considered in isolation and must be assessed in light of the cumulative impacts of past, existing and foreseeable projects in or near indigenous peoples' territories.

Postscript (October 2nd 2015)

On Wednesday, the 30th of September 2015, the President of Suriname Desi Bouterse gave his yearly address outlining government policy for the coming year.³⁷ In the speech he confirmed that the government of Suriname is pleased with the outcome of the negotiations with Alcoa, and that the government will take over operations of the existing hydroelectric dam from the 31st of December 2019, and that the government will also take over the final stages of rehabilitation of the old mine sites. The President also confirmed that the Bakhuis deposit remains high on the government's priorities for new developments. In the speech, he also stated that Alcoa and the government of Suriname would partner in building a new refinery, with the location yet to be determined, to refine alumina. When questioned about the energy needs of the new refinery and if the refinery would require the construction of a new hydroelectric dam in West Suriname, the President responded that it was possible, but not yet agreed, and that the significant energy requirements may be met by natural gas.

Critical for the indigenous peoples in West Suriname, it is now clear that the construction of a refinery is certain and that increased bauxite mining will be needed. It is also clear that the prospect of a new hydropower dam in West Suriname has become a real possibility. In the speech, the President also stated, among others, that land rights must be realized with the aspirations of the whole nation of Suriname in mind and within Surinamese legislation and that new mining codes were necessary to make the interior of the country more accessible. The implications of this speech for the rights and interests of indigenous peoples in West Suriname are significant.

³⁷ <http://www.starnieuws.com/index.php/welcome/index/nieuwsitem/31491>

ANNEX I

Activities undertaken by villagers between 2006-2008

“Ibidaro Ibidaro Coeritjien Hororo.” A vision of the indigenous peoples living along the Corantijn River about sustainable development in the traditional land of the Lokono Peoples. Drafted by Apoera, Section and Washabo in cooperation with VIDS (page 11, 2010) (Original in Dutch)

We have already taken several actions to protest against violation of our rights as indigenous people and for the legal recognition of our territory. We have, for example:

- On the whole area that we traditionally use and occupy, marked and made a map on which you can see how we use our territory as our hunting and fish areas and for forest fruits, medicinal plants and construction materials.
- Protested against the plans of nature management to get roofing to Kaboeri Creek nature reserve and this has led to the nature management’s plan to be discontinued.

Since 2006, five petitions have been sent to the Government. These are:

- September 18, 2006. *Official petition pursuant to article 41 of the law forest management.* This was a request to the President of Suriname to force logging concession holders to have meaningful consultation with the village chiefs of Washabo, Apoera, and Section.
- September 18, 2006. *Official application in accordance with article 22 of the Constitution.* The village leaders of Washabo, Apoera, and Section request the President of Suriname to recognize the indigenous peoples’ rights to their lands.
- March 22, 2007. *Official application in accordance with article 22 of the Constitution of the Republic of Suriname.* The village chiefs of Section, Apoera, and Washabo request the President of Suriname that indigenous communities be consulted before the Government signs any document with the bauxite companies.
- July 2008. *Official application in accordance with article 22 of the Constitution of the Republic of Suriname* in which the village leaders protest against the violation of the rights of indigenous peoples by the Bakhuis mining project and logging activities in West Suriname.
- 5 December 2008. *Official application in accordance with article 22 of the Constitution of the Republic of Suriname* for immediate cessation of logging and other related activities by logging company Octagon on Sand landing, West Suriname. This protest was by the village chiefs of Section, Apoera, and Washabo over the land that Octagon got within the traditional area of the indigenous peoples despite their negative opinion expressed to the District Commissioner.
- Handed over our demarcation map to the Minister of Regional Development and of Natural Resources and the petitions to the President of Suriname. But we never got a response from the Government.
- Submitted a report to the UN Committee against racial discrimination (CERD) about our concerns regarding the Kabalebo dam and the Bakhuis mining project in West Suriname. The letters were written by Sanomaro Esa, the VIDS together with VSG and FPP on 8 July 2005 and on 6 July 2006. CERD in its ruling of 18 August 2006 indicated serious concern about the alarming situation of the indigenous people and Maroons in Suriname, and that the UN Council, the United Nations High Commissioner for human rights and other UN organizations must pay attention and take appropriate measures.

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Chapter

5

The Bauxite-Aluminium Industry and India's Adivasis

Felix Padel

Chapter 5

The Bauxite-Aluminium Industry and India's Adivasis¹

Overview

India's bauxite deposits are mostly in tribal areas. After several major projects had taken over polluted and destroyed tribal lands during the 1960s-80s, major movements opposing further takeovers started in the 1980s-90s, gathering momentum after a police firing squad killed three adivasis at Maikanch village, in Kashipur, Rayagada district, Odisha, on 16 December 2000. The Kashipur movement was symbolic of this resistance for over a decade, but as the Utkal project beat down resistance, another project came up on the Niyamgiri mountain range 150 kms to the Northeast. An Indian company called Sterlite Industries, after buying up major bauxite-aluminium industries in two areas of India, moved to the London stock exchange under the name Vedanta Resources, where it sought finance for building a new refinery at Lanjigarh, just below Niyamgiri, and new smelters in Odisha and Chhattisgarh. Building the Lanjigarh refinery without first getting permission to mine bauxite from Niyamgiri, the mining plan met strong resistance from the Dongria Kond tribe, who live in Niyamgiri. This movement received strong national and international support, and in 2013 India's Supreme Court ruled that affected villages near the proposed mine should decide whether they want mining or not. The unanimous decision of the 12 villages that were against mining put a stop to Vedanta's plans and inspired adivasi/ resistance movements throughout India. However, Vedanta, as of October 2015, is trying to start mining operation on another nearby mountain range to which adivasis are strongly opposed. Many other mountains in the Eastern Ghats (central-eastern India) remain under threat, each one with local tribal movements organising resistance.

Introduction – who's indigenous in India?

In India, the terms 'tribal people,' 'adivasis' and "indigenous peoples" overlap but have distinct meanings and histories. British rule designated 'tribes' based on local ethnography, with administrators and missionaries the primary ethnographers, and the process often arbitrary. In Independent India, certain groups were officially listed as Scheduled Tribes (STs), Scheduled Castes (SCs), and Other Backward Classes (OBCs), but some were denied ST status for various, arbitrary reasons: sometimes due to a spelling mistake, a number of groups are ST in one state and not in another, and quite a few communities have movements to gain ST status, including a tribal community in the Kashipur region, where politicians have used this wish for ST status to try and undermine the movement against Utkal's aluminium project. India's ST population was recorded as 104,545,716 in the 2011 Census, representing 8.6% of the country's total population.

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'Adivasi' is a Hindi word, coined in the 1930s, attributed to Jaipal Singh Munda, a tribal leader from Bihar (now Jharkhand), who confronted Nehru on the status of tribal people in 1946 with the words 'You cannot teach democracy to the tribal people; you have to learn democratic ways from them. They are the most democratic people on earth.' Apart from the Northeast, most tribal people in India call themselves 'adivasis,' in addition to local names - a complex issue, since tribes' official names since British times are often adapted from local Indian-language words meaning 'tribals' (e.g. 'Khond' or 'Kond' from Odia *Kondho*). In the Northeast, the term 'adivasi' is not used by the dozens of tribal peoples indigenous to this area, partly because it is a Hindi word with its own history, but also because it is used to refer to over a million tribal people brought to the Northeast as 'coolie' labourers to work in tea plantations etc. The descendants of these people settled in the Northeast and have come into serious conflict with tribal people in Assam, such as the Bodo (Gladson 2013 pp.33-45), so though 'Adivasi' literally means 'First dwellers' or 'aboriginals,' its usage in the Northeast is counter-intuitive.

All India's bauxite deposits are located in mainland India, mostly in areas where adivasis are the predominant communities. Their status as "indigenous peoples" (an English term applied, by those who are familiar with it and self-identify as such, in the Northeast as well as mainland India) is confirmed by India's recognition of the UN Declaration on the Rights of Indigenous Peoples, but complicated by the invidious difficulty of determining degrees of indigeneity in India. Presently a section of the Meithei community in Manipur is claiming indigenous and ST status, causing friction with Naga and other tribes. A Supreme Court Judgement in 2011 affirmed tribal people's status as 'descendants of the original inhabitants of India' (special leave petition no.10367 of 2010, *Kailas v. State of Maharashtra*, see Gladson 2013 p.1), but others use the term '*Mulnivasis*' (root inhabitants'), to include SCs and OBCs. In a sense, SCs/Dalits/'untouchables' were enslaved or reduced to serfdom in ancient and medieval times, while adivasis retreated to India's remotest forest and mountain areas, retaining their cultures and languages intact, along with a high degree of autonomy, which began to be eroded during British times - a process that has accelerated post-Independence, as it became clear that the remote mountain and forest areas where they have lived for centuries are rich in a wide range of resources - minerals, water, forest, agricultural, and land itself.

The 5th Schedule of India's Constitution guarantees the inalienable land rights of the STs in mainland India, while in the Northeast, these rights are protected under the 6th Schedule. However, a loophole provides that land can be taken for major projects deemed 'in the national interest,' under the notorious British-era Land Acquisition Act of 1894, which asserted the State's 'eminent domain' over-ruling traditional land rights. Through this loophole, at least 20 million tribal people, about quarter of the total ST population, have been displaced since Independence, in the name of 'development,' mainly by big dams and mining/metal projects, but also by other power projects, roads, firing ranges and national parks/wildlife sanctuaries. Exact figures are impossible to determine, but similar numbers, are under threat and presently resisting displacement.

Tribal land rights, guaranteed under the 5th Schedule, were hugely bolstered by the PESA (Panchayat - Extension to Scheduled Areas) Act of 1996, the Samatha Judgement in the Supreme Court (1997), the Forest Rights Act (FRA 2006), and the LARR (Land Acquisition, Resettlement and Rehabilitation) Act 2013. Each of these is massively

contentious in many different ways: PESA has been minimally implemented, mining companies have tried to find ways to circumvent the Samatha Judgement, the FRA has been implemented in some areas but not properly in most (Gill and Bhattacharya 2015), and LARR excluded no less than 13 important Acts. This 2015, the present Government's attempt to amend LARR to make land acquisition quicker and easier has seen a nationwide Adivasi movement that has forced the Government to let the 2013 Act stand for now. A High Level Committee under Virginus Xaxa wrote an excellent report on the dire situation of India's tribal communities, released in 2014 but so far marginalized, with no attempt to implement its recommendations (Ministry of Tribal Affairs 2014).

Over 75 tribal peoples in India are classed as PVTGs (Particularly Vulnerable Tribal Groups) - a category which recently replaced the older term PTG ('Primitive Tribal Groups') - informally still used by many people, though now deemed an example of cultural racism. This is also the underlying paradigm of the present Government's recently outlined plan to pour money into accelerating the development of PVTGs (Ministry of Tribal Affairs, July 2015), since several of the PVTGs, including the Dongria, are at the forefront of movements against mining companies' invasions into tribal territories, and building roads and schools has the appearance of a propaganda exercise aimed at undermining these resistance movements. With some honourable exceptions that use tribal languages and try to be culture-sensitive, most schools in tribal areas seem to aim at 'assimilating' adivasis into the Hindu mainstream; which is worrisome for many reasons, including hindutva (hindu nationalist) organisations' instigation of adivasis into the massacres of Muslims in Gujarat in 2002 and Christians in Kandhamal, Odisha in 2008.

Companies, Affected Adivasis and their Movements

About 70% of India's bauxite is in the mountains known as the Eastern Ghats in south Odisha and north Andhra Pradesh. The only mountain to be mined here so far is Panchapat Mali, in Koraput district of Odisha, which is the main source for Nalco (National Aluminium company), an aluminium industry fully integrated in Odisha. Although there are often references to Nalco's efforts at rehabilitation being exemplary, ground realities in Koraput after over 30 years of aluminium industry-oriented 'development' show the worst poverty indicators for any district in India, appalling standards of pollution, and of resettlement and jobs for locals, with widespread prostitution in the central town of Damanjodi (Padel & Das 2010, pp.81-89; CSE 2008).

There are now two other main bauxite-aluminium producing companies in India. Hindalco is part of the Birla group, originally a subsidiary of Kaiser Aluminium. Its refineries and smelters at Renukoot (UP) and Hirukud (Odisha), and bauxite mines at Lohardaga (Jharkhand) are extremely exploitative of labour and polluting; with the Rihand and Hirukud dams, specially built to supply electricity and water to these factories, notorious for displacing over 200,000 Adivasis in the 1960s (Padel and Das 2010, chapter 4 and *passim*). Hindalco's Utkal project in Kashipur region of Rayagada district (Odisha) is notorious for its brutal suppression of the strong resistance

movement during the 1990s-2000s, including the Maikanch police firing that killed three adivasis and wounded over a dozen more on 16th December 2000. The refinery near Maikanch is under construction now, with plans to mine Bapla Mali (Padel and Das 2010, chapter 5 and *passim*). Hindalco is also notorious more recently, alongside Essar Energy, for its exceptionally controversial plans for a new coal mine in Singrauli (MP), to supply its Renukoot factories (Kalpavriksh and Greenpeace 2012).

Among India's first aluminium companies were Malco (Madras Aluminium Company) and Balco (Bharat aluminium company) which started with Italian and Russian/Hungarian aid during the 1960s. These did not become viable during the 1980s-90s, and a bid by Balco to start mining a mountain in west Odisha called Gandhamardan was stalled by a massive people's movement, which united Adivasis, Dalits, Hindus and environmentalists, braving ferocious police repression and mass arrests (Padel and Das 2010, pp.89-95). Malco and Balco were both acquired, in 1995 and 2001, by Sterlite Industries, which set itself up as a UK registered company called Vedanta Resources in December 2003. From London it orchestrated foreign investment to build the Lanjigarh refinery in Odisha, and new smelters at Balco's centre in Korba (Chhattisgarh) and Jharsaguda (North Odisha). The Korba refinery-smelter complex is on land that used to belong to the Korwa tribe; and a lot of bauxite mining is done on tribal land in west and north Chhattisgarh; especially in Kawardha district to the west, where the bauxite mines are located among Baiga and Gond villages, creating wastelands and drying out the land.

Vedanta's Lanjigarh refinery is built right next to the Niyamgiri mountain range. The refinery is located on the land of several Kond villages, where people were violently displaced with highly inadequate compensation. Attempts by the company to gain access to the top of Niyam Dongar, the mountain directly above the refinery, have failed, due to a long and complex history of resistance by the Dongria Konds, who are indigenous to the Niyamgiri range, and legal battles. Basically, the Supreme Court's ruling in April 2013 that the people of Niyamgiri should decide whether they wanted mining or not is seen as an enlightened judgement. The 12 villages that each held an official gram sabha (village council), all voted unanimously against mining. Significantly, Dalits (SCs) voted alongside Dongria; and villagers also refused individualised plots of forest they were being offered under the FRA, declaring preference for their traditional custom of collective rights over the whole area, including the mountain summits (Padel and Das 2010, chapter 6; Das and Padel 2013; Padel 2014; and articles in the Foilvedanta website 2011-2015).

The Niyamgiri movement has been hailed as one of India's most successful people's movements in recent times. It also represents an alliance of environmentalists with tribal rights groups, in a context where these are too often pitted against each other. One reason is adivasi activists' clarity that the bauxite deposits, rather than 'lying unutilised' play a vital function in the overall ecosystem. 'The wealth of the hills is the wealth of the plains' as Samatha put this. Bhagaban Majhi of the Kashipur movement has asked repeatedly what kind of 'development' is it to mine millions of years old mountains to benefit a few officials for just about 30 years? 'We want permanent development.' Lado Sikoka, a Dongria leader, at the Belambar Public Hearing in 2009, where all the



The heart of Niyamgiri mountain range where the Dongria Konds live.

local speakers opposed the expansion of Lanjigarh refinery, commented that ‘Some people say there’s so much money on top of Niyamgiri. It’s not money up there. It’s our Maa-Baap (mother-father), and we’ll defend her...’ As a Dongria woman put it, ‘We need the Mountain, and the Mountain needs us.’ (Das & Das 2005)

In scientific terms, the monsoon rain falling on the bauxite deposits just below these mountain summits is held like a sponge, and released slowly in perennial streams. When the bauxite is mined, as on Panchpat Mali, these streams dry up and all the land around start to dry up. This is why the British called the base rock of these mountains ‘khondalite’ around 1900 – ‘after those fine hill-men, the Khonds’; and why Konds have answered Census commissioners who were asking their religion with the word ‘mountains.’ They understand the minerals in these mountains as a source of life.

Yet every one of the bauxite capped mountains in the Eastern Ghats is threatened by plans for bauxite mining. Vedanta is still trying to get access to Niyamgiri, and failing that, to Khandual Mali, near Karlapat in Kalahandi district, about 40 kms to the West, which is another mountain with forest on its summit, and with extraordinary biodiversity, including elephants. In the continuous forest between there and Lanjigarh/ Niyamgiri, Kond villagers are determined to prevent mining. Among the new bauxite-alumina projects being promoted against strong local resistance in South Odisha and Vishakhapatnam district of North Andhra Pradesh (AP) are: Dubal (Dubai aluminium) with Larsen & Toubro, with deals for Siji Mali and Kuturu Mali (Rayagada district, Odisha), and RAK (a UAE aluminium company) with the APDMC (AP Mineral Development Corporation) on the Jerrela group of mountains; and Jindal on several others (Padel and Das 2010 pp.134-137).

In addition to Nalco’s alumina refinery at Damanjodi (Koraput district), Vedanta’s at Lanjigarh, and Utkal [Hindalco]’s 3rd Odisha refinery under construction near Kashipur, L & T plans another nearby, while Jindal plans one over the border in Vishakhapatnam district.

Several highly controversial dams have been and are being built with the aluminium industry in mind. The Hirakud, Upper Kolab and Upper Indravati dams each caused mass displacement of adivasis, supplying water and hydropower to Hindalco’s (formerly

Indal's – a subsidiary of Alcan) smelter of the same name, Nalco's Damanjodi refinery, and Vedanta's Lanjigarh refinery. Recently, work has started on a Lower Suktel dam in Balangir district, with strong police repression against protesters – a project apparently associated with renewed plans for mining Gandhamardan – and also on the Polavaram dam project, on Godavari river in Andhra Pradesh, which is planned as one of India's biggest dams, with record displacements totalling as many as 300,000 of whom a majority are adivasis, or Girijans as they are known in AP, of the Konda Reddi, Konda Dora and other tribes. The movement against Polavaram has been very strong, but has been undermined by political pressures (Umamaheswari 2014), with suspicion of a deal that allowed the bifurcation of AP and creation of the new state, Telengana. It is likely that plans for the Polavaram dam are connected with plans to build alumina/aluminium factories in AP.



Bauxite mining in Kawardha district, Chhattisgarh, on behalf of Vedanta.



Adivasi bauxite miners.



Vedanta's Lanjigarh refinery under construction in 2006 against the backdrop of Niyam Dongar, capped by the contested bauxite deposit.

Free Prior and Informed Consent in a situation of state repression

To summarize, India's extensive bauxite deposits are among the top ten in the world, but are located in areas that are exceptionally densely populated by indigenous communities, living in a highly developed symbiosis of long-term sustainability with the ecosystems that the aluminium industry wants as raw materials – the bauxite on the mountain summits, which acts as water sources for a vast region's fertility; the land and forest areas needed for factories and transport systems; and the rivers the companies want for hydropower and water supply. When producing one tonne of aluminium consumes over 1,000 tonnes of water (Padel 2010 pp.332-47, 382-92), the wastelands the industry creates out of a fertile landscape are beyond belief – as is well understood by adivasis resisting these projects.

This is the second feature of India's bauxite landscape. Though suffering from a long history of ruthless exploitation and dispossession in the name of development, adivasis in Odisha and Andhra also have a long history of effective resistance, and are strongly opposed to more bauxite-aluminium projects in the area.

About two thirds of India's quality bauxite deposits lie on the summits of large mountains in these two states. The rest exists on plateaus in Jharkhand and Chhattisgarh- where the quality is inferior, there is great disturbance of adivasi villages living up on those plateaus, and resistance is less effective against the immense level of exploitation -

and several other areas. Malco's bauxite mines caused 'mountain top removals' over a wide area in Tamil Nadu. Right on the other side of India, Gujarat also has extensive bauxite deposits at a lower level, near the sea near Dwarka (Saurashtra), and inland in Kachchh; these deposits are being extensively mined, supplying Lanjigarh and other refineries, in areas where there are no Adivasis or local protest, with environmental impacts that have barely been studied.

India's new Right to Fair Compensation and Transparency in Land Acquisition, Resettlement and Rehabilitation law (LARR, 2013) insists on consent by 70-80% of people in affected communities, and requires Social Impact Assessments for large projects; though several kinds of projects and other Acts are exempted. The Act does not spell out the principle of Free Prior Informed Consent (FPIC), even though the 'Statement of Objects and Reasons' that concludes it, specifies that 'It has also been ensured that consent of at least 80 per cent of the project affected families is to be obtained through a prior informed process' (Government of India 2013, 45). FPIC is especially significant in practice because public hearings for many major projects, required under the Environment Protection Act since 1997, have been notorious for their coercion and manipulation. Even when local people have been unanimous in their opposition, the fact of 'consultation' has been officially reported to higher authorities as giving 'consent' (Padel and Das 2010, 187-90, CSE 2008). In other words, 'consent' in most cases has consisted simply of a highly manipulated form of 'consultation.' Consent has rarely been given freely, and communities have rarely been properly informed about project plans before public hearings.

While LARR may or may not offer protection for some communities resisting forced land acquisition, the Supreme Court Judgement of 8 July 2013, in the case of *Threesiamma Jacob and Others Versus Geologist, Department of Mining and Others*, concerning contested land in Kerala, declared that the judges 'are of the opinion that there is nothing in the law which declares that all mineral wealth subsoil rights vest with the State... on the other hand, the ownership of subsoil/mineral wealth should normally follow the ownership of the land.' (Rajagopal 2013) This complements the Niyamgiri *gram sabha* process to give local tribal communities much greater legal powers to contest land acquisition for mining projects. Given the paradox, evident throughout India, that exploiting mineral wealth through mining has almost invariably made the majority of local inhabitants a lot poorer than they were before, this is a very welcome development. An attempt to introduce amendments to LARR early in 2015, weakening the pro-people aspects such as 70-80% consent and Social Impact Assessments in the interests of business (*Down to Earth* 2015) has been dropped after nation-wide protests, showing the power of adivasi and farmers' movements.

Basically, no level playing field exists in India for indigenous communities to negotiate with companies on an equal basis: the power discrepancy is huge, and protests are quickly subdued with a show of force from the State in the form of massed police. Corporate Social Responsibility components are more geared to public relations than reality (Padel and Das 2010, pp.539-54); and though there has been talk of introducing a requirement that mining companies make sure that 5% or even 20% of profits go back to communities in the form of local development, or compensating displaced people by making them shareholders in the company displacing them, most people understand this as window-dressing unlikely to bring real benefits.

All this takes place in the context of a civil war playing out between the state and the Maoists, who often oppose industrial projects – including bauxite mining in Andhra Pradesh, where Maoists kidnapped three politicians seen as promoting bauxite mining on 6th October 2015 (Chakravarti 2015). Maoists often oppose industrial projects, yet there is evidence that protection money from mining companies are a main source of their income; and Maoist support for people's movements often serves as a kiss of death to these movements, since it instigates huge police repression. Both sides portray the Maoist conflict as an ideological or class war; yet in many ways it is really a classic resource war, where Maoist opposition is used to legitimise drastic police repression that clears indigenous communities off the land (Dungdung 2013).

Another context is the cultural genocide of indigenous communities that is happening through this war (Padel 2010, 2011, Padel and Krysinska-Kaluzna 2012), which pits militias of adivasi SPOs (Special Police Officers) against adivasi Maoists, both controlled by non-tribal leadership, with hundreds of lives sacrificed for distant goals, and rape used as a weapon of war (Iqbal 2010, Padel 2013); through displacement (Padel and Das 2011); and through increasingly assimilationist education policies, aimed at 'Hindutvaization'.

The 2013 Supreme Court Judgement that has so far saved Niyamgiri and the Dongria from Vedanta's bauxite mining plans by asking for the Gram Sabhas' consent, recognised the sacredness of the mountain in the form of Niyam Raja, ('Law King'), the deity central to Dongria religion, to whom the mountain summits are sacred. Kond statements on the value of the fertility of the mountains over any immediate financial profits, are clear from what Bhagaban Majhi and Lado Sikoka have said on many occasions (quoted above), and from frequent comments that 'we are being flooded out by money' and 'we can't eat money'; and that in a Kond village everyone is a saint, since they live on little, share what they have, and waste nothing (Padel and Das 2010, pp.148-50, 372, 79).

Adivasi value systems, and 'Adivasi Economics' (Padel, Dandekar and Unni 2013), as a system of communal property and exchange labour, based on restraint in what is taken from nature, are oriented to real, long-term sustainability. These systems are under attack from many sides now, but present the strongest possible contrast to the economics that is driving the mining industry, where short-term gain is the main motivation, and the main profits are made by distant investors (Das and Rose 2015).

Women are often at the forefront of the movements resisting mining projects, understanding better what is at stake. Near Lanjigarh, Dai Singh Majhi related with tears in his eyes how women were the first to suffer rapes and other impacts of industrialisation; and women such as Tula Dei have been active among those resisting the project (Padel and Das 2010, pp.148-150). Adivasi movements against further bauxite mining - 'battles over bauxite' (Das and Padel 2014) – deserve to be seen as safeguarding the country's ecosystems for future generations, especially the water sources that start from the bauxite-capped mountains in the Eastern Ghats.

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Chapter

6

Guinea

**Hamdallaye Bauxite:
Its wealth, Its misery!**

Kabinet Cisse and Diallo Aboubacar

Hamdallaye Bauxite: Its wealth, Its misery!¹

Overview

This report is based on data collected in the Hamdallaye mining area, one of the nine sectors in Lavage district located eight kilometers from Sangaredi, the capital city of the rural communes on the Boke-Sangaredi road. The report gives an overview on the challenges that communities living in mining areas are confronted with, as well as the human rights violations which the Hamdallaye communities are facing.

After 45 years of bauxite exploitation in this area, it is fair to say that there has been little or no positive impact on the communities living there. Communities live in habitat patches divided between the different families. Their dwellings mainly consist of small round huts made of dirt and natural vegetation materials (called *banco*). While the form of dwelling chosen by the people does not necessarily imply poverty, in this particular case it is reflective of the complete lack of financial benefits from the bauxite mining for the people as the aspiration of many community members is to have concrete houses. Further, this village is located in the biggest bauxite reserve in the world which is estimated to extend up to 25 km, but the local communities are facing food insecurity with no assurance of at least two regular meals a day or consistent access to potable water.

Local communities have expressed the following wishes to the **Compagnie des Bauxites de Guinee**, or Guinean Bauxite Company (GBC) and to the public authorities:

- Respect the right to free, prior and informed consent (FPIC) of indigenous peoples and wait for their decision before initiating any prospecting or exploration activities;
- Create an information and communication framework and channels between the GBC authorities and the potentially impacted communities;

¹ This case study was written by CISSE Kabinet, Executive Director of CECIDE, and DIALLO Aboubacar (Mining Exploitation and CECIDE Communities Social and Economic Rights Coordinator) and translated from French to English by Jade Tessier.

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- Take into account the suggestions and comments of the potentially affected communities throughout the project period;
- Assist the communities in the elaboration of a development agreement and follow up on its implementation;
- Promote transparency in the management of the resources associated with implementing agreements as well as in the management of the taxes promoting the communities' development.

Introduction

This case study has been completed by CECIDE to provide insights on how the aluminium supply chain can, and has, impacted on indigenous peoples in Guinea. It aims to describe the impacts of the bauxite exploitation on a local community (the Hamdallaye community) living close to Sangaredi, in the north west of Guinea, about 370 km from Conakry. Hamdallaye is located on the largest known bauxite plateau in the world, extending up to 25 kilometres.

Guinean laws (including the Constitution², Mining Code, Property and Land Titles Code, Local Collectivities Development Code, Civil Code, etc.) include provisions providing Guinean local groups or collectivities with recognition of their property and land titles as well as the recognition of their authorities as legal entities with rights to the management of their own resources. Collective property is recognised through the management of the development collectivities, referred to in articles 2 and 3 of the Guinea Local Collectivities Code. Local collectivities constitute the institutional framework for citizens' participation in local democracy and are expected to guarantee the reflection of diversity. This does not however mean that local collectivities afford any recognition to indigenous peoples. It means that people can participate in a democratic process while acknowledging the representation of diversity (sex, ethnicity, religion, minorities/majority, etc) through the local collectivities' administration. However, there is no mention of indigenous peoples in the Guinean law.

Guinean laws do not distinguish between peoples. Article 1 of the Constitution of the Republic of Guinea states: "Guinea is a unitary, indivisible, secular, democratic and social republic. It ensures equality in front of the law of all citizens without any distinction of origin, race; ethnicity, sex, religion and opinion..."³ Under the Constitution, Guinean laws do not refer to the word 'indigenous' but only refer to Guinean people in general. In Guinea, the word 'indigenous' is used only to refer to people whose residence has been established for many years, and it does not confer any specific rights under Guinean law. Provisions 20, 21, 22, 23, 24 and 33 of the Guinean civil code define what is meant by Guinean nationality.

² Articles 134-140 of the Guinea Constitution of 2010 stipulates the roles and functions of local collectivities

³ Translated from the first article of the Constitution of Guinea: La Guinée est une République unitaire, indivisible, laïque, démocratique et sociale. Elle assure l'égalité devant la loi de tous les citoyens sans distinction d'origine, de race, d'ethnie, de sexe, de religion et d'opinion».

As with other countries in Africa, the concept of indigenous peoples is specific to the context of the country and the region and does not refer specifically to groups who have undergone European colonisation. Instead, the term is used here following the understanding of the concept developed by the African Commission on Human and Peoples' Rights (ACHPR), where – in seeking to differentiate minorities and indigenous peoples in the African context – the Commission points to the importance of collective land rights in providing some differentiation.⁴ The Commission highlights that it “is the protection of collective rights and access to their traditional land and the natural resources upon which the upholding of their way of life depends” that characterizes the struggle of indigenous peoples in Africa.⁵ In this report, the emphasis is on the Peul people and their claim to collective land and territorial rights, including the natural resources found therein.⁶

In the overview report of the International Labour Organization and the ACHPR⁷ they identify the following criteria, emerging from the Yaounde Workshop,⁸ which apply to varying degrees for groups identifying themselves as indigenous peoples on the continent:

- Indigenous peoples are socially, culturally and economically distinct.
- Their cultures and ways of life differ considerably from the dominant society and their cultures are often under threat, in some cases to the extent of extinction.
- They have a special attachment to their lands or territories. A key characteristic for most indigenous peoples is that the survival of their particular way of life depends on access and rights to their traditional lands and the natural resources thereon.
- They suffer discrimination as they are regarded as ‘less developed’ and ‘less advanced’ than other more dominant sectors of society.
- They often live in inaccessible regions, often geographically isolated and are subjected to various forms of marginalisation, both politically and socially.
- They are subject to domination and exploitation within national political and economic structures that are commonly designed to reflect the interests and activities of the national majority.

⁴ http://www.achpr.org/files/special-mechanisms/indigenous-populations/achpr_wgip_report_summary_version_eng.pdf p. 14

⁵ Ibid.

⁶ The Peul people are recognized as indigenous to West Africa in ACHPR reports http://www.achpr.org/files/special-mechanisms/indigenous-populations/report_international_labour_org.pdf, pg 6

⁷ http://www.achpr.org/files/special-mechanisms/indigenous-populations/report_international_labour_org.pdf

⁸ The Yaoundé workshop was the first in a series of three workshops envisaged in a three year research project on the promotion of indigenous peoples' rights through the principles of ILO Convention No. 169 and the African Charter on Human and Peoples' Rights. The research project is an initiative of the ILO and the African Commission on Human and Peoples' Rights' (ACHPR) Working Group on Indigenous Populations/Communities in Africa (WGIP) to examine the extent to which legal frameworks of African countries impact upon and protect the rights of indigenous peoples.

- In addition to the criteria outlined above, participants highlighted the primary importance of self-identification, whereby the people themselves acknowledge their distinct cultural identity and way of life, seeking to perpetuate and retain their identity

The Republic of Guinea is divided into four natural regions. The first is maritime Guinea, called Lower Guinea because of its proximity to the Atlantic Ocean, which is inhabited by various linguistic groups, including the Soussou (who form a majority in the region) and the Bagas, the Diakhankés, the Nalous, the Landoumas, the Mikhiforès, the Bassari and the Tchiappy who are minorities. The second region is Middle Guinea or the Fouta Djallon, where (Peul) peoples are a large majority, with Diakhankés or Markas and Malinkés who are minorities. The third region is Upper Guinea or the Guinean Savannah, mainly inhabited by Malinkés and their sub-groups (Koniakés, Sankarankas, etc). Dialonkés and Peul are a minority there. The final and fourth region in Guinea is the Guinea Forest Region, inhabited by the Kpèlès, the Kissis and Koniaké who each constitute half of the population. The Tomas, the Toma-Manians, the Kouranko, the Lélés, the Peul, etc., are linguistic minorities.

When considered on a national level, there are three principal ethnic groups or peoples in Guinea: Peuls, Soussous and Malinké. There are only a few statistics regarding the relative population numbers between these peoples or groups. Nevertheless, Peul people represent the majority in Guinea, followed by the Malinkés and the Sousous. There are no extensive studies and almost no research published on Guinea's ethnicities.

Bauxite is found in the first three natural regions listed above. Gold and diamond are to be found in Upper Guinea and the Guinea Forest Region sub-soils are rich with iron, diamonds and probably uranium. The Guinean offshore is also believed to contain oil. Guinea also possesses a number of other soil and sub-soil natural resources. Hydroelectric potential is also considered to be high, particularly due to the high rainfall and deep gorges of the Fouta Djallon region, although the prospects for developing hydropower plants appear to be too small in scale to provide the type of energy required by a smelting operation.⁹

In order to promote transparency in the extractive sector, the Republic of Guinea joined the Extractive Industries Transparency Initiative (EITI). Guinea also participates in transparency promotion through its National Struggle against Corruption Committee created years ago.

Key Findings

The Hamdallaye area

Located eight kilometers from the mining town of Sangaredi (capital of Sangaredi rural commune), Hamdallaye is one of the nine sectors of the Lavage district which in turn is one of the 11 districts of the Sangaredi rural commune. The distance between the residential areas of Hamdallaye and the mining zone is estimated to be around 400 meters.

⁹ http://siteresources.worldbank.org/EXTOGMC/Resources/336929-1266963339030/eifd13_wa_alu-minum.pdf

The Peul peoples form the largest part of the population present in the Hamdallaye sector and have been there since time immemorial. Although some mining company-related settlement has taken place in the rural commune centre, Sangaredi, Hamdallaye's population has been largely unchanged and is still mostly inhabited by the Peul peoples.

The total population is around 600, mainly farmers and small-scale merchants. In order to meet its food needs, the population is organized in groups and associations of youth and women who cultivate the fields. The horticultural work (vegetable gardens and similar small fields) is mainly carried out by women, contributing greatly to the household's income and adding to the income from the cultivation of rice, millet, corn, sorghum, peanuts, fonio and sweet potatoes which form the main staple crops.¹⁰

Most of the people live in small round huts, with the wealthiest living in houses made of *banco* (*mud, hay, and karate*). Hamdallaye and surrounding communities have a high level of poverty despite being located in the world's biggest known bauxite reserve.

Agriculture is seasonal and familial. Each family has its own land inherited from parents or grandparents. As any other village or town, the last ones to settle in Hamdallaye have little or no arable lands, although at times lands are lent to others for a fixed amount of time. Lands are often set aside due to the lack of chemical fertilizer and low yields. There are no formal property titles, and lands are transmitted by inheritance and are possessed on the basis of customary rights.

Many of the customary practices of the peoples are religious in nature, based on Islamic principles, and involve prayers, wedding and baptism ceremonies, funerals and ritual sacrifices.

The State does not deny that the lands are occupied, but claims that in the public interest it can exploit the resources. Guinean law does recognise the existence of customary tenure and rural property rights, even in the absence of State issued titles. Article 13 of the Guinean Constitution, echoed in article 1 of the Property and Land Titles Code, provides natural and legal persons, as well as the State, with property rights over the soil. Property rights are also reinforced by a Decree issued in 2001 (D/2001/037/PRG/SGG/), which acknowledges property rights in rural areas. This Decree aims to promote economic and social development by acknowledging and securing rural property rights. However, articles 55 and 56 of the Property and Land Titles Code, as well as article 534 of the Civil Code (CC) and article 13 of the Constitution, all provide the Guinean State with the right to exploit land in the public interest if it provides the concerned peoples with appropriate compensation.

¹⁰ <http://ifcext.ifc.org/ifcext/spiwebsite1.nsf/ProjectDisplay/ESRS24374>, International Finance Corporation, World Bank Group, Guinea Alumina Project. p. 14

Mining companies in Sangaredi

There are four mining companies involved in the bauxite operations:

- Guinea Alumina Corporation SA (GAC) is a development society of mining exploitation aiming to advance its bauxite and alumina exportation project in the area of Boke in North West Guinea. The society is a branch and an exclusive property of Emirates Aluminium Mondial PJSC (EGA), created in April 2014 from the merger of the Dubai Aluminium Company PJSC (DUBAL) and the Emirates Aluminium Company Limited PJSC (EMAL). Mubadala Development Company PJSC (Mubadala) and Investment Corporation of Dubai (CIM) have both invested shares in EGA. DUBAL and EMAL have been operating since 1979 and 2010, respectively.
- China Power Investment Corporation (CPI) was granted a research licence from the Guinea government on 11 January 2012 which should have expired on January 10, 2015 in accordance with article 23 of the Mining Guinean Code allowing such licences to be used for a maximum of three years. This expired licence covers a total area of 2269 km² in the Boffa, Boké and Téliélé prefectures.
- Despite the expiry of CPI's licence, the mining resources are still of interest to other Chinese companies, the most well known being the Henan International Mining Development Corporation S.A. and its Guinean subsidiary firm International Mining Development Corporation Henan-China/Guinea S.A.¹¹ The licence covers up to 490 km² spanning the Téliélé and the Boké prefectures located at 260 km from Conakry. It was granted by the Decree N° 2010/245/PRG/CNDD/SGG on October 25, 2010 for 25 years.
- United Company RUSAL Ltd. is also in the process of establishing itself in Guinea and its capital shareholders are mainly Russians.
- The Guinea Bauxite Company (GBC) is in the exploitation process and carried its first mineral loads in August 1973.

GBC is the main company exploiting the bauxite-rich reserve in Hamdallaye. It is an independent company with its head office in Kamsar, 300 km from the capital city Conakry. Kamsar, a rural commune 45 km from Boke, is also the company's mineral transportation harbour. GBC also owns two other offices, one in Sangaredi where the mines are and an administrative head office in Conakry. The Republic of Guinea holds 49% of the shares in GBC and 51% by the Halco group. The Halco group's shares are split as follows: 45% by Alcoa (USA), 45% by Rio Tinto Alcan (Canada, Australia) and 10% by DADCO Alumina & Chemicals (Guernsey, Switzerland). The expected production ranges from 12 to 22 million tons per year. The estimated stock is 300 million tons with 51% being Aluminium Oxide (known as Al₂O₃).

According to the government's expert committee responsible for the review of mining agreements and securities,¹² the operating licence of the mining concession

¹¹ The investment involves the Henan International Mining Development Corporation S.A. under approval of the Henan State-owned capital supervisory commission, and of the Yougheng Coal Electricity (Group) Co. Ltd (51%), the Chico (41%), the Henan State Capital Exploitation Corporation (4%) and the Henan Centers Alliances Mines Co. Ltd (4%).

¹² <http://www.contratsminiersguinee.org>. Another document refers to October 1st 1963.

was signed on June 23, 1964. The Guinean government granted a 75-year operating licence (expiring in 2038) over the bauxite deposit to GBC which may be renewed upon request of both signatory parties.

Role of the State

In Guinea, territorial administration is under the responsibility of two entities with distinct competencies: the ‘deconcentrated administration’ and the ‘decentralized administration.’ The first form is the responsibility of territorial local groups or collectivities, sub-divided in prefectures and sub-prefectures under the authority of administrators. The decentralized administration is the responsibility of the Local Collectivities or LCs (*collectivités locales*) which are composed of urban and rural communes under the authority of the local elected officials. Through the Local Collectivities Code (LCC), the State provides a development strategy for Local Collectivities which are recognized as legal entities with their own authorities and resources. According to articles 2 and 3 of the Local Collectivities Code, they constitute the institutional framework allowing citizens to participate in the local democracy as well as guaranteeing respect for equality before the law given the country’s gender, religious and ethnic diversity. The LCC provides LCs with legal planning tools while also providing the State the opportunity to protect conservation zones under the public interest pretext. Those tools are:

- The Territorial Coherence Scheme (TCS), which determines the fundamental orientation of the territorial management with the aim to preserve a balance between the different activities. It determines the general management of the soils as well as the nature and design of infrastructure.
- The Soil Occupation Strategy Plan defines the territory to be used for urbanized zones, the area exclusively preserved for agriculture, the ones dedicated to the breeding and to the forestry zones and the zones which should stay in the natural state and the urban expansion ones. The Detailed Management Strategy Plan establishes the precise rules and regulations governing use of the soils for determined territories.
- Article 246 of the Local Collectivities Code states that “Any LC which does not have a Territorial Coherence Scheme, a Soil Occupation Strategy Plan or a Detailed Management Strategy Plan can ask for a Zones’ Management Plan to be established, to be covered by its own means, its services or a specific management zone office.” The Zones’ Management Plan is a legal document which is to be established only if the LC has no Soil Occupation Strategy Plan nor any available detailed management plan. This plan delimits zones inside the LC’s territory by defining their purpose and then becomes the primary document regulating the use of territory. (*Cf. Practical Guide on Mines and Communities by ABA Roli*)

The 2011 Guinean Mining Code (MC), amended in 2013, takes into account the consultation rights of local communities bordering mining areas. In order to be granted an exploitation mining licence, a company now has to conduct an Environmental Impact Assessment (EIA), and develop an environment and social management plan (PGES) and resettlement plan depending on the impact of the project. According to article 142, in order to get a research licence, one also has to publish a social and environmental notice. All mining companies now have to respect the social and economic rights of

the communities bordering the mines according to articles 106, 123, 124, 125, 130, and 165 of the amended Guinean Mining Code. The Mining Code also mentions other social issues and requests mining companies to respect those rights, referring to the environmental and social impact issues and the PGES (article 142 MC), social licence and the Social Development Funds (article 130 MC), employment of Guineans (art. 108 MC), the participation of the operator in local development (article 165 MC), property rights (article 123 MC), compensation rights (article 124 MC), the public interest (article 125 MC), responsibility, damage and compensation rights (article 126), preference to Guinean companies (article 107 CM) and compensation in case of a prejudice and in case of damages (article 106).

With regards to obtaining a ‘social licence’ to operate, under article 130 of the Mining Code, the requirements placed on companies include the establishment of what is referred to as a ‘development convention’, an agreement between the developer/company and the local communities. This agreement is considered by the State to constitute a “social licence” to proceed with exploitation. There are basic conditions that this agreement must meet, which include among others the establishment of a Local Development Contribution (a form of benefit sharing) which must be managed efficiently and transparently by conducting consultations with the local communities on the management and utilization of the development fund. The company’s contribution to this development fund is at a rate set by the government.

The development convention should also include provisions regarding the environmental and social measures needed to protect the local community interests. There are multiple laws and legal texts that exist which should positively impact on the lives of communities, including those that are close to the mining areas. Although not having any law explicitly referring to indigenous peoples, the Republic of Guinea voted in favour of the adoption of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007. It is also a signatory party to international conventions and agreements which do recognise and protect the rights of indigenous peoples whose implementation it is obliged to ensure. These include the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the African Charter on Human and Peoples’ Rights. The Guinean State is also party to voluntary mining codes which similarly provide recognition of the rights of indigenous peoples such as the Africa Mining Vision and the Economic Community of West African States (ECOWAS) Mining Directive.

However, in between the text and the practice one should assume that there is often a gap. Hamdallaye community members were not aware of the existence, or the detail, of most of the laws and international instruments mentioned here. In particular, the requirements associated with article 130 of the Mining Code and the need to achieve an agreement with local communities and peoples to proceed (the social licence) could be very useful to the Peul in Hamallaye and elsewhere. As a community member explains: “We heard of the Guinean Mining Code, but we did not see its impact on our daily lives” (*Sector Chief*).

The implementation gap in Guinea can be explained by a range of factors. In addition to the State’s failure to ensure the protection of rights recognized under its international

law obligations, these factors include the lack of proper implementation of existing national laws, encouraging corruption and therefore insecurity and social tensions. The communities do not have much power in terms of claiming their rights and laws and regulations are also incomplete with the implementing rules for the Mining Code still not fully developed. The compensation system is also weak and ineffective that the State is often regarded by the communities as being complicit with mining companies that do not respect Guinea's legal frameworks. This can also present a particular challenge for corporations acting in an environment in which legal requirements exist but are not enforced.



Guinea

Impacts/Implications of the project

The following section provides the direct views expressed by community representatives and members on the impacts and implications of the project on them. What emerges is the absence of any genuine rights-based engagement of the State and the company with the communities. There was a failure to seek and obtain consent and no follow up on commitments made. Communities also feel exposed to risks to, and serious impacts on, their livelihoods, homes, cultural areas and well-being. In addition there are particular impacts on women in the communities. The absence of preventive and mitigation measures, lack of meaningful benefits or compensation and the absence of any effective grievance mechanism or remedy were all raised by the affected community representatives.

When communities raise their concerns to the local authorities, the latter generally ignore them or decide against them without avenue to appeal. To date the communities have not yet managed to fully engage with civil society organizations for support in raising their concerns to various grievance mechanisms.

The Sector Chief: “Sometimes, the company authorities invite us to meetings but there is no follow up after the meeting is over. The persons invited to the meeting also have to go there by themselves, by foot or if any carrier is of goodwill to transport them,

without support from the company. Meetings are convened only when we complain. There was no negotiation between the GBC and us, and no respect for agreements made. How can they therefore pretend that they are involving us? ”

Villager: “When the GBC decided to extend its activities to our lands, its authorities contacted us to show them our borders with the neighbouring communities. Despite their firm pledge to collect and take into account our prior consent, we were surprised, one day, to see them setting up railways, roads ... after that they started the blasting less than 400 meters away from our households.”

Villager: “If there was good faith engagement between us and the GBC authorities, we could have made three requests to them: (1) train our children and employ them; (2) grant health care for the elderly people; and (3) subsidize the livelihood of women particularly in the selling of their farm produce, etc.”

Villager: “In Hamdallaye, there are many impacts of the GBC on our lands as follows: no basic agreement, no compensation, sources of water were closed and plants such as oil palm, mango trees, orange trees, lemon trees and cashew trees, as well as our kitchen gardens were destroyed. In our traditional houses, there were cracks due to the blasting. The blasting also results in a dust cloud polluting the air and causing zero visibility on the road. Regarding our cultural heritage, the installation of the mine fully exploited the domain which was the location of the first village cemetery.”

Villager: “Before mentioning food security, ask first if we have enough to eat. We do not even have a stomach anymore because of a lack of sources of food. All our agricultural fields and gardens as well as the waterways used to irrigate the gardens are occupied by the GBC.”

Villager: “By doing all this, the GBC violates our right to food and to water.”

Sector Chief: “There was no compensation mechanism following the expression of our grievances to the local authorities. We were never compensated after the destruction of our forests, fields and other arable lands. These are some of the forests and kitchen gardens which were destroyed: forests in Bhoundouwadhè, N’Diouria, Pora, Kankaladji, Loukoun, Yariya, Demourouwol, Hamdallaye, Mamabera, Gally Hamdallaye, Horè böwè, Tabakè, Soumata, Fissa and Djoloun Tamassö; and kitchen gardens in Bhoundouwadhè, Kounsi-karè and Kounsi-dialloba. The communities were never informed in advance of the destruction of their forests and gardens.”

Finally addressing issues specific to women, a female villager stated:

“Our kitchen gardens have been destroyed and we have never been compensated. When our husbands complain, they never get justice, then what hope is there for us women to do so. There is no clear grievance mechanism.”

Development perspectives

In Guinea, mining exploitation is classified as being in the “public interest,” and according to the law it is therefore accorded priority. As a result, the Hamdallaye communities do not have any choice when it comes to accepting the GBC company activities. They are forced to accept the mining operations even if the law purportedly guarantees them some control over the social licence of companies to operate in their lands. For the community, they would rather benefit from a development based on agriculture, which is their traditional livelihood. As a villager put it, “Mining resources are exhaustible when the soil does not betray.”

The Hamdallaye communities have expressed their desire to transform the rare cultivable species in their territories into potential cultivable agriculture. However, there are two major obstacles to realizing this: the possible occupation of these areas by the GBC and the poor fertilization potential of the soils. The communities have also demonstrated their willingness to benefit from improved infrastructure such as health care centres, mosques, schools, etc.

Lessons learnt and challenges

The Hamdallaye people are extremely poor despite the 51% bauxite composition of their lands. Keen to benefit from the gains of the GBC extractive activities, they welcomed the arrival of the GBC when it first appeared in the area in 1964. However, after 45 years of witnessing the GBC carrying bauxite away from their lands, their parents' lands, their great grandparents' lands, their ancestors' lands, they now feel deceived. There is almost no development infrastructure, apart from a primary school consisting of three classrooms built by the GBC. There is no health care centre in the community. There is not even a decent religious building apart from a century-old mosque which has a hay roof that is difficult to maintain.

Among the immediate major threats which those communities face today are eviction notices and the community resettlement which has been announced by GBC. Ultimately, the major challenge is how to promote the development of a community which was the first to accept GBC's presence, but has been the last to benefit from the so-called development it promised.

Recommendations:

The following are the main recommendations formulated by the Hamdallaye communities during the focus group discussion conducted by the authors:

To the GBC:

- To compensate the communities for the destroyed forests and kitchen gardens;
- To respect the FPIC of indigenous peoples and wait for their decision before initiating any prospecting or exploration activities;
- To institute information and communication frameworks and channels between the authorities and the communities susceptible to be impacted by any initiatives and take into account the comments and other suggestions from the communities regarding the project;
- To help the communities to identify and fund independent experts of their own choosing to assist them in the future negotiations;
- To help the communities develop internal competencies through capacity building activities so that they can negotiate agreements and be able to effectively manage financial resources they will receive from projects;
- To create a complaints' management desk able to:
 - Examine any issue without delay and work to find a timely solution;
 - Follow up on the effective implementation of the solution applied, etc.;
 - Address grievances in a gender sensitive manner

To the State:

- To help the communities to elaborate a development-focused agreement with companies and follow up on its implementation;
- To promote a tripartite joint follow-up committee or other arrangement which will include companies (in this case the GBC), communities and public authorities;
- To promote transparency in the management of the resources coming from the agreements with companies and from the communities' development taxes;
- To establish sanctions against any party which does not comply with the agreements and against any corruption;
- To facilitate the creation of villagers' committees composed of representatives from the impacted villages for the management of the funds under the development agreements.

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Chapter

7

Cambodia

Indigenous Peoples' Experiences with Mining in the North-eastern Provinces

Mong Vichet

Indigenous Peoples' Experiences with Mining in the North-eastern Provinces¹

Introduction

Cambodia's economy has grown by an average of seven percent annually over the past two decades. Per capita Gross Domestic Product (GDP) has increased from USD 417 in 2004 to USD 1,036 in 2013. With considerable high economic growth during the last decade and along with the country's intension to move into lower-middle income country by 2030, Cambodia's increasing revenue comes from the Mining Extractive Industries Development sector. However, the gradual increase has unacceptable social, economic and environmental consequences. The decision making process of mining exploration or extractive industries projects in Cambodia is inefficient. Most of Cambodia investors are coming from China and Vietnam. The National Strategy Development Plan (NSDP) for 2014-2018 outlines Cambodia's intention to promote its economy by improving infrastructure and reforming the agricultural system.

At the same time, the Royal Government of Cambodia (RGC) has issued a decree on economic land concession to allow mining extractive industry and agriculture development. Many investment projects have started operations in Cambodia since 2004, particularly hydropower dam construction, mining extractive industries, palm oil and rubber plantation, all of which have adversely affected indigenous people's lives. The website of Open Development Cambodia shows that the RGC has granted mining licenses to 231 companies. A total of 267 projects are related to gold, iron, gemstone and granite mining, and quarrying of gravel. Further, there are 299 companies listed for 287 projects on land for rubber plantation, palm tree and sugar cane.

In May 2012, the Prime Minister signed a directive declaring a moratorium on the granting of new Economic Land Concessions (ELCs). The directive also contained the announcement of a systematic review of ELCs. The government has yet to fully disclose the extent of lands that have been given concessions.

To date, the Ministry of Agriculture, Forestry and Fishery has published an oversimplified and incomplete list of companies. The Ministry of Environment has done even less, simply releasing the total number of companies involved and the total land area leased. Neither has disclosed the exact location of the 2.1 million hectares of Cambodian land covered by existing ELCs. A proper review can only be carried out if the government fully discloses all its land dealings to the public. In May 2014, the Phnom Penh Post reported that it had obtained an inter-ministerial proclamation, or Prakas, signed by Minister of Agriculture, Ouk Rabun, and Minister of Environment, Say Sam Ol, on 9 May that aims to amend the management of ELCs to better protect local community interests. Land inhabited by farmers must be cut out of the concession area. Companies

¹ This case study was written by Vichet Mong of Highlanders Association with inputs from Bernice See of AIPP.

must implement a “tiger skin formula” to ensure that ELCs do not affect “the farming lands of villagers, community forest and protected forest.” Graveyards and “spirit places” must be protected, the proclamation says.

Much of Cambodia’s resource wealth lies in the northeast of the country, in Mondulakiri, Ratanakiri and Kratie. These provinces have relatively low population density, and are the homelands of a majority of the country’s indigenous peoples. It is characterized with low literacy levels with indigenous communities rarely having an opportunity and access to higher education. Being of mountainous terrain, these three provinces are also home to diverse ecosystems and extremely sensitive biodiversity, and host the majority of the country’s mineral wealth and major river systems.



*Shifting traditional cultivation of an affected community family
in Mas Village, Poi Commune, Ochum District, Ratanakiri under threat by HAGL clearance*

Because of its natural wealth, the government is looking at this area simply as a resource base, and ignoring the indigenous peoples who call this their homelands. Economic development projects, under government priorities, which include granting of concessions for plantations, mines and social purposes, and expropriation of lands for energy projects and government projects, have proceeded without the free prior and informed consent (FPIC) of affected indigenous peoples. Concerns have been raised by many sectors, especially the indigenous communities in the northeast provinces, indigenous peoples’ organizations and advocates, that mining deals are being negotiated and finalized in a secretive manner. In some cases, communities have had no idea that licenses have been granted in their area until they come across company staff conducting field tests, or observe company offices being established.

Recently, the National Assembly approved the Law on Association and Non-Governmental Organizations (NGOs), which aims to control and regulate the work of groups in Cambodia. The law was approved with the majority parliament members of ruling party voting for it. This law will severely restrict freedom of association and expression of associations and civil society and make it difficult to conduct regular

activities such as meetings, workshops, and to organize public forums and press conferences. The law particularly targets associations and NGOs working on human rights, forest, land and natural resource concerns.

Indigenous peoples in Cambodia

Indigenous peoples in Cambodia comprise 1.3 % of the total population or around 170,000 people from 24 different ethnic groups in 15 provinces all over the country. This is according to the report of the Ministry of Rural Development (MRD) and Department of Ethnic Minority Development.

INDIGENOUS GROUP	PROVINCE							
	Ratanakiri	Mondulakiri	Kratie	Steung Treng	Kampong Speu	Preah Vihear	Koh Kong/ Pursat	Total
Tampuan	30,888	52		48				30,988
Jarai	20,781	71	168	57		182		21,259
Kreung	19,706			246				19,952
Brao	8,540			440				8,980
Kavet	2,308	33	51	2,950				5,342
Lun	77			227				304
Kachak	3,384							3,384
Bunong	351	27,262	9,281	564				37,458
Kraol		682	3,455					4,137
Stieng		523	4,475	22		20		5,040
Mel			1,675					1,675
Kuy	33		4,971	1,660		17,597		24,261
Suoy					1,833			1,833
Pear / Samre						1,582		1,582
Chong					300		750	1,050
TOTAL								129,787

Source: AIPP, Cambodia Indigenous Peoples in ASEAN

Indigenous Peoples' Rights in the National Law

Cambodia has laws and policies that support the respect of indigenous peoples' rights, especially to their lands, territories and resources. These are the laws and policies that specifically recognize indigenous peoples and their rights: 2001 Land Law, 2002 Forestry Law, 2007 Sub-decree on Procedures for Registration on Indigenous Lands, and 2009 National Policy on Indigenous Development. Cambodia also voted in favour of the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

National Policy on Development of Indigenous Peoples (NPDIP)

The NPDIP provides the main policy framework related to indigenous land rights in Cambodia and sets out policy directions in the fields of culture, education, health, and agriculture, among others. It clearly discriminates against shifting cultivation and traditional land rights systems as it favours modern agriculture system to “improve” traditional agriculture to be intensive and geared towards cultivating high yield crops.

The 2001 Land Law

The traditional management of immovable property by indigenous peoples is recognized in the 2001 Land Law (Land Law). This law provides for collective ownership rights of indigenous communities to their lands (Chapter 3, section 2). However, in order to be eligible for collective land ownership, indigenous communities must be recognized as legal entities before the law. In 2009, the RGC passed the Sub-decree on Procedures of Registration on Land of Indigenous Communities (Sub-decree on CLT). The sub-decree requires that communities go through the formal recognition and legal registration process before having their communal land registered with the Ministry of Interior. However, the procedural guidelines on recognition and registration are so tedious that since the Land Law was passed, only eight indigenous communities have successfully completed all the processes for collective land registration and thus were granted collective land titles (CLT).

The Land Law is quite strong in protecting indigenous peoples' rights to territories and land management, however, the RGC still has the prerogative to grant ELCs if it identifies areas deemed to have the potential for national development.

NGOs have been working and supporting some indigenous communities with collective land registration since 2004. There are 156 indigenous communities, out of 415 which have expressed preference for CLT registration in seven provinces (Ratanakiri, Mondulakiri, Kampong Thom, Stung Treng, Preah Vhear, Kampong Speu and Battambang). In terms of CLT registration status, there are 117 indigenous communities recognized by the Ministry of Rural Development (MRD) and granted their Identity Registration, 97 recognized by the Ministry of Interior with their Legal Entity Registration, and 15 in three provinces (Ratanakiri, Mondulakiri and Kampong Thom) have obtained their approved CLT from Ministry of Land Management Urban Planning and Construction (MoLMUPC).

In mid-2012, the government attempted to deny indigenous communities' ownership of land by issuing Directive 01BB. This Prime Minister's directive allowed individual land titling on the pre-text that the owners can still avail of CLT. This caused confusion among indigenous communities and individuals, because once given an individual land title, the individual cannot access collective land. Due to the people's fear of losing their land to the concessions, as they were misinformed by the Youth Volunteers who implemented the directive, several indigenous families felt they had no choice but to accept individual land titles. Individual land titles can easily alienate owners as they now have negotiable instruments. This directive then offers space for ELCs through consolidation of individual lands through buy-outs.

The 2002 Forestry Law

The 2002 Law on Forestry ('Forestry Law') was enacted to govern the management of Cambodia's forests in which one part of the law allows private entities to operate Forest Concessions. Indigenous communities in Cambodia rely heavily on access to forests for their livelihood and maintenance of cultural practices, and for their local economic development.

The RGC prioritized infrastructure development to connect rural areas to the towns for poverty alleviation and promotion of the rural economy. The RGC plans to distribute infrastructure construction throughout the country particularly in the northeastern provinces. From 2008 to date, infrastructure development has connected Preah Vihear to Steung Treng, Ratanakiri, from Banlung to Vietnam boarder, and from Monduliri to Ratanakiri. This has enabled a significant increase in people migration in the provinces, damaging the harmonious relationship between the indigenous peoples and their lands and forests, and contradicting the government's Land Law of 2001.

Policy Development on Economic Land Concession

The government's Policy Development on Economic Land Concession has caused tremendous changes in the customary land governance practices of indigenous peoples and is completely contrary to the Sub-decree on CLT. In May 2012, the Prime Minister issued Directive 01BB on Measures for Strengthening and Increasing the Effectiveness of the Management of Economic Land Concessions. This directive announced the suspension of granting new ELCs and called for a review of existing concessions. One month after the order was adopted, Prime Minister Hun Sen announced a campaign to survey land and issue land titles to people living on state land, including forestland, ELCs and forest concessions. Figures from the Ministry of Land Management, Urban Planning and Construction indicate that by March 2014 over 330,000 hectares of land had been removed from existing ELCs.

Sub-decree No. 146 on ELCs and Sub-decree on Environmental Impact Assessment also mention that a company has to consult with indigenous communities to get the latter's consent. However, recent reports from Oxfam America point out that the Ministry of Environment does not agree with the word 'Consent' in "Free Prior Informed Consent."

Legal and Policy Framework on Extractive Industries

“Ownership of all mineral resources in, on or underneath the land, mountains, plateaus, territorial water and islands, and in or on seabed within the territorial integrity of the Kingdom of Cambodia, shall be included in the property of the State.”²

The Constitution provides for the protection of the environment and the “balance of abundant natural resources” and thus the government shall “establish a precise plan of management of land, water, air, wind, geology, ecological system, mines, energy, petrol and gas, rocks and sand, gems, forests and forestry products, wildlife, fish and aquatic resources.” (Article 59, Constitution)

The principal law that governs the mining sector in the country is the 2001 Law on Mineral Resource Management and Exploitation (Mining Law). This covers “the management and exploitation of mineral resources, the manipulation of mines and all activities relating to the mining operation in the Kingdom of Cambodia save for the mining operation of petroleum and gas which shall be under a separate law” (Art. 1). It details the licensing, exploitation and development procedures and categories, among others, and supported “by more than 20 related sub-decrees and Prakas.”³ The law strictly prohibits mining in “national cultural, historical and heritage sites” (Art. 8) and for “protected, reserved or restricted” areas, mining activities can only be carried out with written permission of the authority responsible for managing that area (Art. 7).

The Mining Law does not mention concessions, but the 2007 Law on Concessions remedied this when it expanded the scope of concessions beyond the ELCs provided for in the 2001 Land Law. These other types of concession include the following: infrastructure development, mining, energy generation and distribution – including hydropower and economic zones. Energy development (hydropower in particular) formed a key part of the country’s National Strategic Development Plan for 2009-2013 and a related law is the 1996 Law on Environmental Protection and Natural Resources Management, which governs areas such as environmental planning, assessment, management, protection and monitoring.

The two other laws that are facilitating mineral development in Cambodia are, unfortunately, environmental laws. The 2008 Protected Areas Law allows mining in so-called Sustainable Use Zones and the 2002 Law on Forestry “allows mining within the permanent forest estate, however, any proposed mining operation, in addition to following other relevant laws, must be the subject of a ‘prior study-evaluation’ by the Ministry of Agriculture, Forestry and Fisheries (MAFF).”⁴

The main regulatory body for the extractive industries is the Ministry of Industry, Mines and Energy, which implement the Mining Law and policy. Under it are the Department of Geology and Mines and the Department of Energy that coordinate the development of the energy and mineral sectors (Investincambodia.com, 2009). The policy governing foreign direct investment (FDI) in the country is based on the 1994

² Art. 2, 2001 Law on Mineral Resources Management and Exploitation

³ https://www.csr.mq.edu.au/Portals/0/docs/02_Policy-Brief-En-V5.pdf

⁴ <http://www.opendevdevelopmentcambodia.net/briefing/mining-licenses/>

Law on Investment. Other bodies that have mandates that affect the country's mineral development are the Council for the Development of Cambodia where companies apply for mining concessions, the Ministry of Economy and Finance, the Ministry of Interior. One very relevant body for mining concerns is the Ministry of Environment, which is mandated to ensure environmental protection and oversee protected areas.⁵

Critique on the legal and policy framework on extractive industries

a. Inadequacy and lack of clarity of the Mining Law

The Mining Law does not provide for addressing the impact of mining operations including those who will be displaced, those whose properties will be harmed, and it is not clear who is the "private land owner" who must be compensated "for any inconvenience and damage to the land."⁶ Since the collective land titling of indigenous communities is not progressing as much as expected and even individual titling has been done haphazardly, most indigenous peoples are without title and thus are left with little protection.⁷

b. Lack of transparency and denial of freedom of information

A strange provision of the Mining Law is Article 20:

The confidentiality of all documents and information as provided in Article 19 of this law shall be maintained until the termination of such license or subsequent to the receipt of an approval from the holder to allow public disclosure of such information:

- provided that information related to environmental and social issues may be released to the public upon notice to the holder of such action by the Minister in charge of minerals; and

- provided that the Ministry in charge of minerals may compile and publish statistics quoted from the holder's documents and information as it relates to national mineral sector analysis.

This provision is hampering indigenous peoples' access to information as to details of the company, the boundaries of the concession or licensed area, among other needed information, and thus makes it impossible to determine encroachment into indigenous territories while still in the application stage.

⁵ Ibid., p.4.

⁶ As quoted from <http://www.opendevdevelopmentcambodia.net/briefing/mining-licenses/>: 2001 Law on Management and Exploitation of Mineral Resources, Article 7 & 25. Private land ownership ... refers to those with title on the land registry. Those with possession rights are normally not interpreted to meet the conditions or Art. 7 of the Law on Mineral Resources until they have transformed their possession rights into a title (based on Article 39 of the Land Law), neither are indigenous communal land titles included in "private land ownership".

⁷ As quoted from <http://www.opendevdevelopmentcambodia.net/briefing/mining-licenses/>: 2001: Those without legal title and indigenous communal land title should still be protected because the RGC has ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) which includes the obligation to respect citizens' right to adequate housing and forbids the destruction of land necessary for subsistence.

c. Lack of legal protection against mining in protected areas

Cambodia's mineral wealth is also located in environmentally sensitive areas, which are also indigenous peoples' territories. However, at least

six out of Cambodia's 23 protected areas now have some form of mining activity within their boundaries.... between August 2006 and January 2008, Global Witness noted the start of mining operations in five of Cambodia's protected areas [and] is particularly acute in Mondul Kiri Province, a heavily forested area of northeast Cambodia, where a large number of mining concessions have already been allocated. 282,700 ha of these mining concessions are inside protected areas – the equivalent of 21 per cent of the Province's total protected areas. (Global Witness, 2009)

Like all other sectors in Cambodia, there is lack of credible data from government and thus, a thorough assessment of the extent of the impact of extractive industries on its peoples and environment cannot be thoroughly completed.

Extractive Industries and Indigenous Peoples

Indigenous peoples' territories in Cambodia are repositories of natural wealth that have been, and are, to this day being, appropriated for national economic development. These resources are in the form of land, waters, forests, minerals and biodiversity.

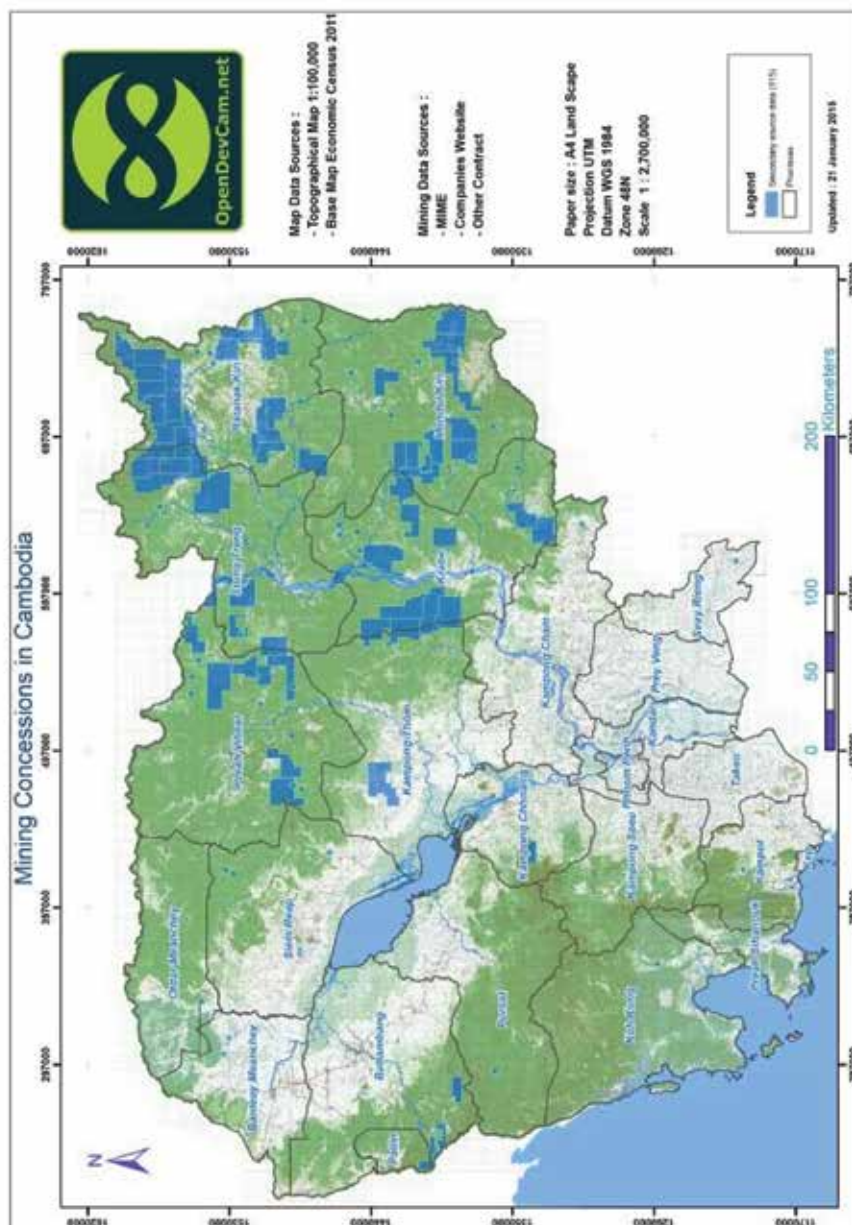
Much of Cambodia's resource wealth lies in the northeast of the country, in Mondul Kiri, Ratanakiri and Kratie. Although these areas have relatively low populations, they are home to diverse ecosystems and extremely sensitive biodiversity. Although logging has taken its toll on the region, much of the northeast is still forested and the area has a number of wildlife sanctuaries, protected areas, protected forests and a national park. According to a 2009 NGO report, "Mondul Kiri province contains areas of four protected wildlife sanctuaries and two protected forests which in their entirety total 1,267,322 hectares. As of 2008 no less than 282,700 hectares or 22 percent of these protected areas were covered by mining concessions."⁸

Land grabbing for commercial plantations, extraction of minerals, oil and gas, and hydropower projects is a major concern in Cambodia as this has caused landlessness for many communities. The unconsented awards of concessions within indigenous territories arise from the State's perspective that there is so much "unproductive" and "empty" land in indigenous territories which are fertile and thus very ideal and potential to be given out for other uses such as single cash-crop agriculture. The accounts below describe the experiences of indigenous peoples with extractive industries in some villages in the country.

With regards to mining issues, a representative from the Jarai community of Peak village recently reported their concerns that mining explorations of Angkor Gold Company are ongoing in at least nine villages in three districts in Ratanakiri Province. The affected areas are in Oyadav district (Peak, Blong & Kongthom villages); in Lamphat district (Pruek, Chamkar san & Katiang villages); and in Andong Meas district (Tangmalu, Vealveng and Tangse villages).

⁸ <http://www.opendevdevelopmentcambodia.net/briefing/mining-licenses>

These nine indigenous communities raised their concerns on the loss of their cultural systems and livelihood because the explorations have affected their communal lands, farmlands, and sites of spiritual significance which have defined their culture. Their livelihoods are mostly dependent on shifting cultivation and gathering of natural resources therein, like non-timber forest products (NTFP), food, medicines, and other materials. They also worry about the inter-community security and health problems as experiences of other countries prove that most companies hire workers from out of town, use chemicals for their extractive operations, and behave in ways that are disrespectful of local culture, especially those that relate to women and girls.



Source: www.opendevdevelopmentcambodia.net

Pak village, located in Yatung commune, Oyadav district has also been affected by mining operations of Mesco Gold, an India-headquartered company.⁹ Mr. Pus Kluk, an elder Jarai ethnic representative of Pak village said, “Eighteen households who owned 40 hectares of land were forced to relocate instead of receiving compensation from Mesco Gold.” On 18 March 2015, Mesco Gold held a public forum in Pak village with media, NGOs (Highland Association, ADHOC) and local authorities to officially hand over compensation in the amount of USD 63,000 to 18 families whose lands had been taken over by the company for their gold mining operation.

Compensation was at least USD 1,500 per hectare. Forty hectares will be allocated for project construction, hospital, school, restaurant and buildings for its staff and mining workers. Additionally, Mesco Gold provided another USD 18,300 for 12 hectares of community forests affected by the mining operations. Dam Chanty, Executive Director of Highlander Association and other local organizations, who had been following up and investigating these cases expressed her concern that there was no transparency and accountability in how the compensation was decided on. It is also apparent that the FPIC of the Jarai villagers was not obtained in a manner that complies with international standards. She said, “The company did not engage with indigenous communities to get realistic consent, which is the primary concept for any project operation in indigenous peoples’ territories.”

It should be noted that Angkor Gold has also sold mining rights of parts of its Oyadao South license area to Mesco Gold but still retains 100% ownership of the Oyadao South license area.

Another similar issue happened with the Kui indigenous peoples in Preah Vihear. Tep Tem, a Kui woman and community facilitator of the Organization to Promote Kui Culture (OPKC) reported that since the Ratanak Stone Kenetic mining company started operation in 2005, the Kui indigenous communities in five villages located in Roveang district in Preah Vihear province experienced adverse impacts particularly on their farmland, paddy fields, and spirit forests. She added that the entry of mining caused serious trouble in inter-community relations, including the breakdown of solidarity among community members because some members worked for the company. These issues happened due to the lack of proper consultation, transparency and full participation of local people and stakeholders.

As for hydropower projects, the Lower Sesan 2 dam (LS2) in Stung Treng Province is currently under construction. The asset surveys have raised concern among villagers being pressured and intimidated into agreeing with the surveys and the proposed resettlement plans, which will relocate around 5,000 people. (Dr. Kem Ley survey 2015)

Besides the above mining and hydropower issues, indigenous communities are also facing problems relating to economic land concessions. In Ratanakiri province, 1,436 household/families in 17 indigenous communities are seriously affected by the rubber plantation of Hoang Anh Gia Lai (HAGL) Vietnamese Company. This project affects

⁹ Data on this Mesco Gold case were taken from <http://www.phnompenhpost.com/national/villagers-mining-firm-settle-land-dispute>

four indigenous peoples, namely, the Tampaun, Jarai, Kreung and Kachak. The 17 villages claim that HAGL has destroyed their farm lands and their forests where streams and ponds are found, depriving villagers of their NTFP such as resin (used as energy source), bamboo, rattan for making Kapha (the traditional back baskets made for both household consumption and income generation), and materials for house building. Their spirit forests where their ancestors are believed to dwell and where they conduct propitiation and other rituals have also been destroyed or desecrated. The mountains which contain big trees, wildlife, wild fruits and food needed by the villagers are also adversely affected.

Most of the indigenous communities affected by these rubber plantations, hydropower and mining development projects reported the loss of their daily income and subsistence as their livelihoods are mainly dependent on their natural resources found on the land, forests and waters. The loss of their farmland, their reserved lands, their shifting cultivation/NTFP collection/fishing areas, and effects on belief in spirit and customary tenure are the issues they are facing. Additionally, the loss of grazing lands affects their livestock-raising of cattle, pigs, buffalos and chicken. In most cases, households have reported loss of access to natural food and thus, experience food insecurity.

Due to the destruction of natural cover, the massive land cultivation and the use of agrochemicals, the quality of the villagers' water supply had been negatively affected. Pollution and contamination coming from chemical substances used in the plantations, forest clearings, and the destruction of stream banks and landfilling of streams are reported to be causing health and skin problems, and other diseases directly caused by the pollution of their water sources. Moreover, the decline of fish resources is due to water pollution in major streams, loss of ponds and streams, and use of magnetic equipment by workers in the plantations.

These are all impacting on traditional sources of subsistence of the villagers and violating their right to food and seriously impairing their quality of life.



*Tampoun Ethnic Women clearing the grass
in the shifting cultivation area*

Most economic land concessions for rubber plantation and mining exploration in Ratanakiri province are within indigenous territories that are in the process of registering as indigenous community legal entities as part of the collective land registration requirements. One example is HAGL whose concession license covers 47,000 hectares with 10 villages out of the 17 villages in the process of registering for collective land titles with the support of indigenous peoples' NGOs and other CSOs. Under the Sub-decree on ELC, there is a need to resolve the overlap before the CLT process can proceed. This is a big constraint on the progress of collective land registrations.

The Angkor Gold exploration license covers an estimated 1,448km² - 1,556 km² spanning nine villages. Five of these have CLTs, evidence that ELCs and mining concessions were granted without due diligence among the relevant ministries as provided by law. These licenses violate the National Policy on Development of Indigenous Peoples, and the Sub-decree on Indigenous Community Land Registration. This also demonstrates that concessions and licenses for extractive industries are fast-tracked and hastily issued without going through required processes, while on the other hand indigenous peoples' applications for collective land registration are far too slow and tedious.

II. Mining in Ratanakiri Province¹⁰

This case study is mainly focused on mining exploration and exploitation in Ratanakiri Province. There are 36 areas in the province that have been allocated by the RGC for mining concessions and 32 for rubber plantation concessions with a total land size of more than 235,201 hectares. Angkor Gold and Mesco Gold are among the mining companies granted licenses by the RGC to operate in Ratanakiri.

Angkor Gold has been operating in the Kingdom of Cambodia since 2009 and has its head office in Phnom Penh. It is a Canadian-owned mineral exploration company whose operations are mainly in Ratanakiri, Mondulakiri, and Siem Reap. The company is the second largest holder of resource exploration rights in Cambodia. Angkor Gold currently holds five exploration licenses in the north eastern province of Ratanakiri with a total area of over 1,448 sq. km.

Area	Size	Minerals Present
Banlung	150 km ² / 240 km ²	Gold, copper, molybdenum
Banlung North	296 km ²	Gold, copper, molybdenum
Oyadao	222 km ²	Gold
Oyadao South	247 km ²	Gold
Andong meas	187 km ²	Gold

Source: Phorn, Sotheara. Gold Mining Exploration in Ratanakiri Cambodia. Powerpoint presentation.

In 2013, Angkor Gold sold 78 km² of its Oyadao license for \$2.4 million to Canxiang Mining, a Chinese company, and six km² mining rights in Oyadao South which they referred as the "Phum Syarung Prospect" for \$1.2 million to Mesco Gold, an Indian company. Additional mining rights of six km² in the same area were sold to Mesco Gold which they called the "Blue Lizard Prospect" located adjacent to the "Phum Syarung Prospect."

In December 2014, Angkor Gold announced that it had received approval to conduct an environmental impact assessment for developing a gold mine at Phum Syarung, Ratanakiri.

¹⁰ Source of the information on this Angkor Gold Private communication.

Angkor Gold claims to be a responsible company with a Sustainable Community Development policy and program, which it describes as a core part of the company's social license to operate. The program's three components are: Community Organization, Community Food Security and Community Environmental Health.

The company established a charitable foundation called the ANK Foundation, which has a teaching and training center in Banlung. In an April 2014 article written by an Angkor Gold shareholder, the company's director of community relations "is establishing Cambodia's first FPIC meetings with Cambodia villages in Angkor Gold's mineral concessions."¹¹ The same author suggested that the company may receive investment from the World Bank's IFC, and that an Australian company is currently viewing another exploration area with the possibility of developing a joint-venture. He also predicted that the company will "roll in oil and gas leases for Cambodia onshore concessions into the Angkor Gold share structure."



*Mesco Gold's exploration 12 km² area in Peak village,
Yatung Commune, Oyadav District, Ratanakiri Province, Cambodia*

Mesco Gold, on the other hand, announced in June 2015 that the Ministry of Mines and Energy is in the final stages of reviewing its application for a mining license. The company aims to begin mining in early 2016 and its project will have a duration of 30 years. The MoU between Mesco Gold and the affected communities was developed with specific seven points to which the company agreed to: 1) provide English teachers for affected communities; 2) stop drilling outside 38 hectares and in Peak community farm; 3) request permission to drill from affected communities; 4) build water storage for Peak community; 5) provide health care for Peak community; and 6) provide employment for Peak community residents.

In June 2015, Mesco Gold made an all-day presentation to the Ministry of Mines and Energy during which the company presented the three zones within the 12 sq. km area over which it has exploration rights. The company is already building a training center and on-site laboratory, but still needs to receive approval to conduct full-scale

¹¹ Calandra, Thom. "Canada Couple Bring Chinese, Indians Into Cambodia Gold Company" - See more at: http://www.equities.com/index.php?option=com_k2&view=item&id=17498:canada-couple-bring-chinese-indians-into-cambodia-gold-company&Itemid=561#sthash.Aem2TZMy.dpuf

mining operations. The Ministry's Secretary told local media that Mesco Gold had submitted a draft report that included a financial evaluation and details on potential reserves, but it was requested to submit additional documents, including a report about its operations in India, to be used for comparison. Mesco Gold also still needs to submit an environmental impact assessment (EIA) to the Ministry of Environment. As there are communities within the area and the company has committed to implement FPIC principles, it will also need to obtain approval from local people.



Mesco Gold mining operations in Peak Village, Yatung Commune, Oyadav District, Ratanakiri Province, Cambodia

In an interview with the Phnom Penh Post, the Country Manager of Angkor Gold was positive that the project will move forward and begin operating in 2016 and stated that although the project will be developed by Mesco Gold, Angkor Gold will maintain an interest in the mine and therefore still has a commitment to working with local communities:

[Mesco and Angkor] have an operational agreement in place and because [Angkor Gold] actually do (sic) get an ongoing royalty; we have an obligation to the community. It doesn't mean that Mesco's not doing anything. These guys have to have a presence in meetings; they have to participate in some of the events that we plan ... Mesco has big water treatment programs planned as well. This is all part of the environmental social impact assessment that will be done there probably sometime in October.

When asked about challenges the company faces in setting up the mine, Angkor Gold's country manager referred to land issues and the difficulty of determining who has pre-existing land rights within the mine area:

In new areas, sometimes there's a dispute over who owns what. We've talked to the ministry about this, and we want to say that if we can't find out who owns this land, it makes it very difficult for us to develop the reserve potential energy for it. We need to know who has the title or the deed, the soft title or the communal title.

The company has presented its plans to local communities, and it was reported in the Phnom Penh Post in March 2015 that representatives of Mesco Gold met with over 20 ethnic Jarai villagers from Pak village, O'yadav district, as well as local authorities and NGOs, to discuss plans to mine gold in the area. According to an NGO worker who joined the meeting, 18 families, holding 26 hectares of land, will be affected but discussions were ongoing to find solutions. In late March the Post reported that the 18 families accepted compensation of USD 1,500 per hectare from an initial company offer of USD 1,300, which was increased after negotiation. The Post also reported that the company had offered USD 18,300 for 12 hectares of community forest "which will be split between the villagers."

The companies still have work to do, with the Ministry of Mines and Energy requesting additional documents; an EIA still needs to be submitted to and approved by the Ministry of Environment; the Council for Development of Cambodia must approve the project; and community consent needs to be obtained. However, Angkor Gold and Mesco Gold are clearly positive about the prospect of the mine becoming operational in the near future, and this project may become the first fully operational licensed gold mine in Cambodia. Mesco Gold Company's duration license of 30 years is with possible extension in case of potential mining and energy.

Impacts/ implications of the project

In several consultations, meetings, and workshops conducted with nine indigenous communities in Ratanakiri affected by mining exploration and exploitation of Angkor Gold, the villagers raised their concerns regarding land loss and environmental impacts, the lack of a genuine consultation mechanism between them and the company, and the lack of a process to get their FPIC, including the lack of engagement with them in the whole process of project planning and implementation. These give rise to the dissatisfaction of affected communities with the way the company has approached, communicated or dealt with them leading to the lack of full and meaningful participation from the indigenous communities. According to Mr. Sav Kluk, the elder representative of Peak village, "The companies didn't give enough time for us to consult among our members as well as with relevant stakeholders, especially with indigenous peoples' organizations, like the Highlander Association."

The indigenous communities do not understand the technical language, terms or jargon that the companies use when communicating with them, a violation of FPIC provision for the use of language and form understandable and culturally appropriate for affected communities. The majority of the affected indigenous communities cannot read and write nor even speak Khmer. Moreover, the haste with decision-making processes which the communities are compelled to undergo is echoed by Sav Klan, a villager, "[i]n March 2015, companies and local authorities gave us only one month to consult among our members to give our consent and to accept the compensation for our land affected by the mining exploitation." Some indigenous communities, particularly all of the members of Tangmalu village, opposed the mining exploration activities of Angkor Gold.

Most affected communities demand that company and local authorities allocate space and an opportunity for them to participate fully in the environmental impact assessment and project design, as they have no access to relevant information about the company. Sal Nok, one of the Kanat villagers explained that, “we know nothing about the mining development project, and we now are facing difficulty because we are losing our resources like land, wild vegetables, animals, fruit, traditional medicines, rattan, vine, firewood, that we have always collected and used to sustainably support our lives.” He added that the activities of HAGL have also adversely affected rice farming, cashew and cassava production, and fishing for food and for selling in rivers, streams and ponds.

Angkor Gold used the term “consultation” to claim that the company had applied the principle of FPIC. The company did not actually apply the international standards governing FPIC, as shown by the lack of engagement with and the absence of full participation of affected communities prior to the commencement of the project activities.

There have been specific impacts especially security issues affecting indigenous women and children in the village when the women go out to collect wild vegetable, fire wood, and water, and when their children tend their livestock.

Actions undertaken by indigenous peoples & CSOs

The Indigenous Peoples Working Group (IPWG) which is composed of community representatives selected by the different indigenous language groups was established in 2013 during an assembly of indigenous communities in Ratanakiri. It was formed to function as an indigenous peoples’ grassroots advocacy mechanism to work towards the formation of solid indigenous peoples’ organizations from a community-organising process. The IPWG is currently composed of 42 members from seven ethnic groups (six people from each ethnic group). Recently the IPWG consulted with 23 villages out of the targeted 250 villages’ on their plans to form associations or community organizations. As an advocacy body, the IPWG has declared its stand on ELCs, thus:

The RGC has the intention to break down the inter-community solidarity of indigenous peoples through the grant of ELCs within territories of indigenous communities.... RGC has not granted ELCs within provinces that have no indigenous peoples.” ELCs impact on our traditional culture and livelihood systems because loss of land means loss of our indigenous identities. The destruction of our culture is due to the destruction of spirit forest/burial grounds, loss of belief in spirits and their home where the tradition of offerings is practiced, loss of ancestor’s burial ground, and loss of customary land tenure systems.

As strategies to address the challenges above involve huge issues, indigenous peoples’ organizations in Cambodia realize that they need to strengthen grass roots groups at the provincial level in order to generate a strong spirit of unity. An effective mechanism enabling indigenous peoples’ organizations to mutually help each other was to join together as a National Alliance called “Cambodia Indigenous Peoples Alliance” (CIPA). This national formation of indigenous peoples’ organisations was founded by four indigenous peoples’ organizations namely: Cambodia Indigenous Youth Association,

Indigenous Rights Active Members, Highlanders Association and Organization to Promote the Kui Culture. Subsequently, four other indigenous organizations joined the alliance: Cambodian Indigenous Peoples Organization, Cambodia Indigenous People's Voices, Yeak Lom and Indigenous Agricultural Development of Cambodia.



*Indigenous Peoples Organizations' (IPOs) quarterly meeting
on the establishment of an IP Alliance*

The indigenous peoples of Cambodia have, on numerous occasions, called the attention of government to its obligations under the Constitution, the 2001 Land Law, the 2002 Forestry Law, the Sub-decree on ELCs, the Sub-decree on CLT, and other various domestic legislation. They raised the violations under these national laws which the different government agencies are committing and the lack of legal remedies to address the complaints of indigenous peoples with respect to their right to be treated equally under the law as citizens of the country, and for their protection assured by relevant laws. They have done this through petitions, dialogues, filing cases in courts, holding sit-ins and demonstrations outside government offices and courts, sending letters to relevant local and national authorities, holding press conferences, and other forms of mobilizations.



Map of affected areas identified by Padorl villagers

Indigenous peoples have also been reminding the RGC that it has voted in favour of the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) as the standard to be observed in the respect, protection and fulfilment of the rights of its indigenous peoples. In so doing, the RGC has committed to respect the right of Cambodia's indigenous peoples "to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions" (Art. 18, UNDRIP). It has also committed to respect the right of its indigenous peoples "to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities" (Art. 20, UNDRIP) and thus must protect their traditional livelihoods. Due to the destruction of these means of subsistence, it must provide for a mechanism to just and fair redress.

Indigenous communities have also indicated to government their interest in being active partners as stakeholders and rights holders who can contribute to national development. Indigenous peoples in Peak and Tangmalu villages particularly expressed that they want "development that can bring balance between the sustainable survival of local communities, and interests of the nation and company."

Indigenous communities have unequivocally informed corporations operating and intending to operate in their lands that their rights must be respected and environment protection must be a priority responsibility for companies to ensure sustainability. Development should include transparency and accountability for all concerned parties, especially towards the affected communities. Comprehensive consultation during the entire process of the project must ensure that the affected people are regularly consulted and their free prior and informed consent is obtained in all phases of the project. Where resettlement and compensation are agreed on, they must be determined and processed based on international standards.

Indigenous peoples' organizations in Cambodia have initiated the creation of a long-term mechanism to build the indigenous peoples' movement by establishing associations or alliances at the grass roots up to the national level to influence policy and decision-makers and relevant stakeholders. This initiative is an on-going process which also includes regular collective spiritual celebrations by indigenous communities.

Lessons learned and challenges

- Sustained engagement with companies by affected communities and advocates can bring about a change in the company's behavior which can lead to the sharing of project information and openness for consultation with the affected villages.
- Cooperation/collaboration among affected indigenous communities and support groups is important in influencing companies and other concerned parties to respect the rights of indigenous communities and to implement FPIC processes.
- Vietnamese and Chinese companies are more difficult to deal with than Western companies, such as the Angkor Gold. For example, Angkor Gold is more open to affected communities with access to information related to its projects, compared to HAGL.
- The RGC has failed to comply with its obligations under national and international laws to respect, protect and fulfil the rights of indigenous peoples in relation to the use of indigenous territories for national and corporate development, but indigenous peoples who are aware of their rights also have a role in educating government authorities on indigenous peoples' rights by engaging with them through various actions.

Recommendations

- The companies must respect the rights, decision-making processes and consent of indigenous communities that are contained in international instruments such as the UNDRIP, and national laws, including the 2001 Land Law, Forest Land Law 2001 and the Sub-decree on Indigenous Land Registration.
- Companies and government should engage with affected indigenous communities in a manner that complies with international standards of engaging indigenous peoples in all levels of project design, implementation, monitoring and evaluation. These include the following principles:
 - a.) Respect community's decision to give or withhold FPIC for the project.
 - b.) Full implementation of the FPIC principle and inclusion of all concerns and impacts as priority agenda for discussion.
 - c.) At all stages of the project cycle, government and companies must give adequate time, space, and information for all affected communities before conducting any step of the FPIC process, particularly before the onset of any project so that there is informed engagement by indigenous peoples.
- Government and companies develop agreements with affected communities to ensure respect and compliance with what have been discussed and agreed upon regarding impacts, concerns, and agreed-on decisions related to any aspect of the project. The agreement shall include the establishment of a project transparency committee-monitoring group that includes representatives from the company, local authorities, NGOs and affected indigenous communities that will monitor the project implementation and monitor the agreements in the MoU.
- All throughout the engagement process, indigenous communities shall have the right to seek assistance from, and consult with, relevant experts of their choice, and the right to withdraw from such consultation without reprisals.
- The government must harmonise its domestic laws and policies to be consistent with the UNDRIP and its commitments to the Outcome Document of the World Conference on Indigenous Peoples (OD-WCIP). In particular, the government must honour its commitment to establish at national level, in conjunction with indigenous peoples concerned, a "fair, independent, impartial, open and transparent processes to acknowledge, advance and adjudicate the rights of indigenous peoples pertaining to lands, territories and resources." (OD-WCIP para. 21)

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PART III:

CONCLUSION AND RECOMMENDATIONS

Conclusion – Towards certification of compliance and ‘good practice’

Cathal M Doyle, Helen Tugendhat and Robeliza Halip

Conclusion

Towards certification of compliance and ‘good practice’¹

This publication constitutes the first step in the planned on-going documentation of indigenous peoples’ experiences related to the production of aluminium. The second follow-up publication is planned for early 2016 and will address cases from Brazil and other countries in Asia. It is intended that this and other publications will serve to inform ASI members of indigenous peoples’ experiences and perspectives and will constitute the basis for on-going advocacy for meaningful engagement with indigenous peoples and respect for their rights.

A number of common experiences and lessons emerged from the case studies presented at the Indigenous Peoples’ Experts Meeting as well as the additional cases included in this and the future publication. One common thread has been the inadequacy of corporate respect for the collective rights of indigenous peoples, irrespective of State recognition or none, of indigenous peoples’ rights under national law.

This problem of a lack of effective respect arose at all stages of the mining and hydroelectric projects that were discussed, from initial project planning, to concession issuance, operations and project closure. It spanned activities, from the early identification and involvement of indigenous peoples, the establishment of culturally appropriate processes to seek (and in some cases obtain) their FPIC, ensuring indigenous peoples’ participation in impact assessments and project monitoring and guaranteeing the adequacy of benefit-sharing agreements. It also applies to the establishment of accessible and culturally and gender sensitive grievance mechanisms and ensuring indigenous peoples’ participation in the formulation of resettlement plans and indigenous peoples’ roles in project closure and rehabilitation.

In India, despite the requirement for the country’s indigenous peoples’ FPIC under the 2006 Forest Act, the cases shared at the Expert Meeting and those addressed in this publication highlight the fact that FPIC was not obtained for resettlement and adequate compensation has not been provided in the form of lands and livelihoods. A core concern for indigenous peoples has been the absence of corporate respect for their beliefs with regard to the sacred nature of their mountains. Likewise, where projects proceeded, communities have not been guaranteed a right of return once projects are completed and were provided with inadequate access to sacred sites and areas of importance during the project duration. The majority of those resettled have migrated to other areas and to cities, as the resettlement areas have not provided them with the possibility to continue their livelihood.

In areas where conflict is on-going, mining companies can stand to profit from State abuses of indigenous peoples’ rights. However, more seriously, the presence of mining companies and the royalties and political interests that surround them can directly contribute to continuing or increasing conflict levels and the associated human rights

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abuses. This is the case not only in contexts where bauxite mining proceeds in conflict zones but also in areas that are considered sacred and of cultural significance by the concerned indigenous peoples or where indigenous peoples are forced to relocate from their traditional lands and lose their livelihoods and identity.

The challenges that faced indigenous communities in Suriname in developing their own FPIC protocol, which they presented to the companies to respect, point to the need for indigenous peoples to be granted the time and space to determine how outside parties are to engage with them, and for acknowledgement of and adherence to the consultation and consent seeking procedures they develop. The experience also highlights the critical importance of access to appropriate and independent technical advice to enable communities to engage with dense and often technocratic information provided to them.

All cases have similarly pointed to the importance of impact assessments being fully participatory and developed in culturally appropriate manner. This included the importance of indigenous peoples being provided with the means and the opportunity to conduct certain aspects of impact assessment, particularly in areas like sacred sites and areas of spiritual or livelihood importance where they are the only knowledge holders. Where external impact assessments are provided to indigenous peoples' communities, again there is a need for access to independent technical review and advice.

Cases presented from India and Malaysia also demonstrated the inadequacy of monitoring mechanisms and their inability to independently and reliably assess and report on impacts of projects on indigenous peoples' rights and welfare. At the root of this issue is the lack of effective participation of the affected community in the design, establishment and operations of the monitoring structures and process.

Likewise during the operations phases there is a pattern of inadequate protection of communities in the context of mergers or transfers of concessions. As evidenced by the experience of the communities in Cambodia and Suriname agreements entered into with the communities with one company did not remain in force when concession were taken over by another company, or flawed or inadequate agreements were not renegotiated based on community wishes.

Similarly, good practice in the area of project closure and rehabilitation by bauxite mining companies in indigenous peoples' homelands is sparse. The case of the Wik peoples in Australia highlighted the inadequate rehabilitation outcomes and processes that are the norm in the sector when rehabilitation processes are not under indigenous control. This experience resonated with that of indigenous and tribal peoples in Suriname.

One of the overarching messages emerging from all of the experiences shared by indigenous peoples is that there is a need for corporations to understand these, and other, issues which arise in the context of bauxite mining and hydroelectric dams in their historical context. That context is one of discrimination and human rights abuses associated with mining and other land and resource exploitation projects in indigenous territories. The vestiges of this discriminatory past remain deeply embedded in the regulatory and institutional frameworks of many States, and continue to underpin the process of concession issuance in indigenous peoples’ territories.

As a result, even if a platform for dialogue is established for engagement in relation to a project, there is rarely, if ever, anything approximating a fair power balance between communities, companies and the State. It is therefore of fundamental importance that indigenous communities are able to define the terms and conditions of engagement and have the opportunity to develop their institutional and technical capacity, with resources to access independent experts of their own choosing. This applies at all stages of the project lifecycle from project planning to FPIC process development and implementation, to benefit agreement negotiations, as well as project monitoring and grievance mechanism design and operation and finally to any project transfers, project closure and post-project rehabilitation.

Engagement with indigenous peoples has to be rights based, meaning that indigenous peoples have to be treated as rights holders and not just as project stakeholders of the project. Consultations and negotiations have to be taken seriously by companies which must translate into the presence of senior management in consent-seeking consultations, negotiations and agreement signing with indigenous peoples, and ensuring that all staff with responsibility for interactions with indigenous peoples have the necessary decision making power to address issues that arise.

Establishment of effective, accessible, and culturally and gender sensitive grievance mechanisms, with due respect for indigenous peoples’ judicial systems, is also very important as this gives confidence to the affected communities that there is a transparent and independent process they can access to seek redress for their grievances, be these in relation to project impacts adversely affecting them or breaches of the terms of agreements entered into with them.²

² For a discussion on this issue see Doyle C. ‘Operational Level Grievance Mechanisms and Indigenous Peoples’ Access to Remedy’ in Doyle C (ed) *Business and Human Rights Indigenous Peoples’ Experience with Access to Remedy. Case Studies from Africa, Asia and Latin America* (Chiang Mai, Madrid, Copenhagen: AIPP, Almaciga, IWGIA, 2015)

Finally, as has been explained by the UN Special Rapporteur on the rights of indigenous peoples, the joint venture partnership model for bauxite mining proposed by the Wik peoples for the Aurukun Bauxite mining project in their territory is an exercise of their right to self-determination. Where indigenous peoples decide to exploit resources in their territories by themselves, or in partnership with others, rather than allow outside actors to exploit those resources, then their decision to do so should be respected by both governments and corporations in line with the principles of self-determination and free prior and informed consent.

One of the challenges facing any certification system, such as that which the ASI aspires to, is to establish consistency and predictability across a diverse range of sites and areas, under different national laws and jurisdictions. Indigenous peoples' internationally recognized rights to their lands and resources and to self-governance, and their associated right to give or withhold their free, prior and informed consent to the use of those lands and resources, exists irrespective of national laws. However, the role of national governments in enabling respect for these rights can be critical, and as the experiences in this publication demonstrate, there are frequently serious impacts and long-term consequences when these rights are not adequately protected by the national governments.

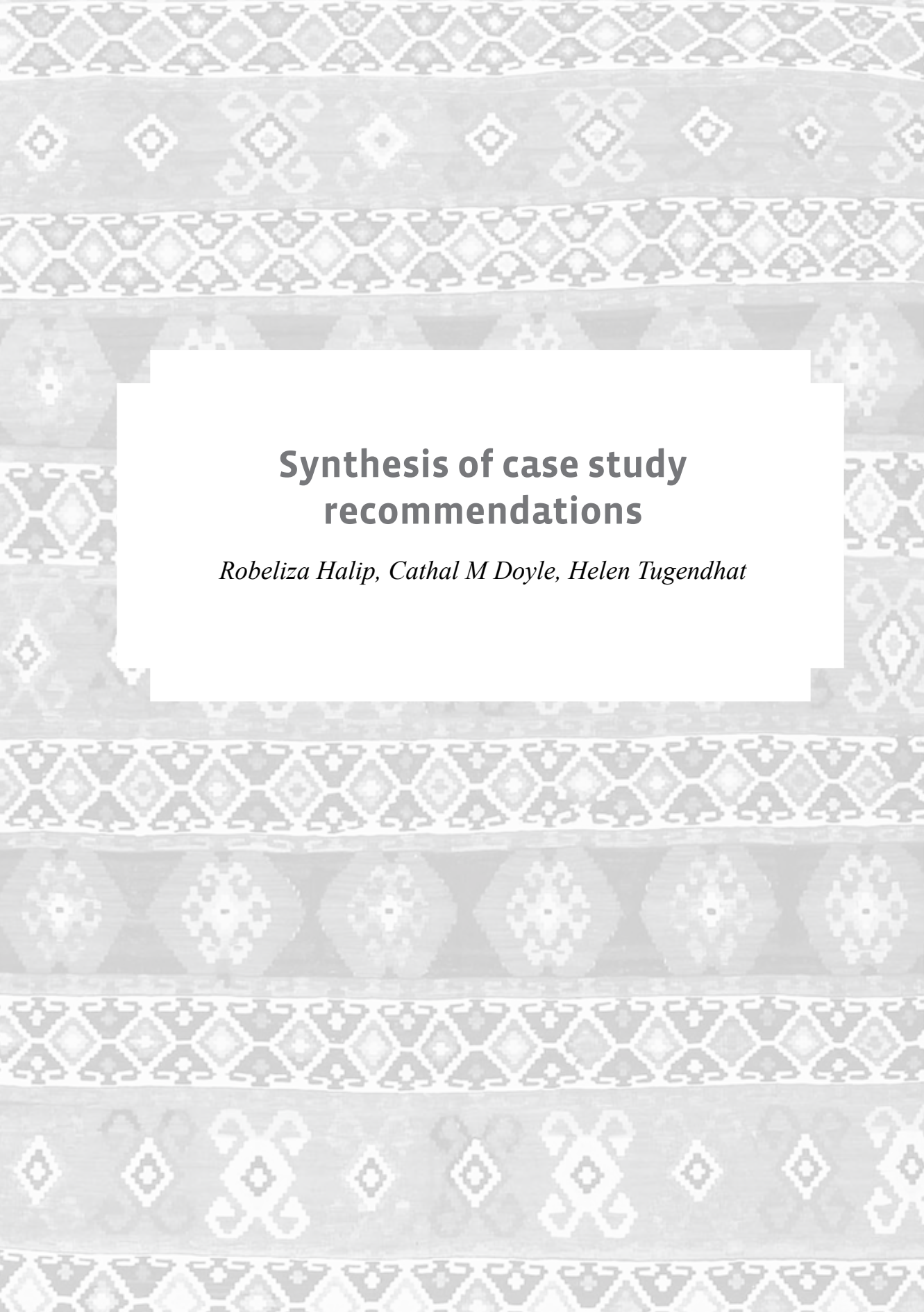
Establishing consistency and predictability within the ASI standard, and ensuring its integrity as a certificate of good social and environmental performance by guaranteeing compliance, will require leadership by ASI certified companies. It will be contingent on these companies promoting - to their fellow ASI member companies, to non-member companies and to national governments - the need to respect the rights of indigenous peoples, including their right to give or withhold their consent to the development of resources in their lands and territories. Negotiating with national governments to improve protection for the territorial, cultural and self-governance rights of indigenous peoples will also, in certain contexts, be a necessary component of demonstrating and ensuring respect for these rights, in addition to ensuring that corporate actions themselves do not actively violate these rights.

It is also the case, as noted by the UN Special Rapporteur, and as emerges from the experiences shared by the Wik peoples, that it is not necessarily true "that the interests of extractive industries and indigenous peoples are entirely or always at odds with each other." Rights-based negotiated agreements can be sought and secured, and where indigenous peoples so choose partnerships which guarantee them control over projects and their own futures can be established.³

³ James Anaya, *Extractive Industries and Indigenous Peoples*, Report to the Human Rights Council, July 2013, A/HRC/24/41 paragraph 2.

Establishing models for such consensual partnerships is an area in which ASI certified companies could provide truly ground-breaking leadership. In cases where negotiated agreements cannot be reached and consent cannot be obtained, demonstrating industry leadership would similarly require respecting and complying with the articulated position of the affected indigenous peoples.

This is what indigenous peoples expect from the promise of respectful engagement in the ASI standard. It is sincerely hoped by all those involved in this publication that the ASI standard will contribute in a meaningful way to such respectful engagement finally becoming a reality.



Synthesis of case study recommendations

Robeliza Halip, Cathal M Doyle, Helen Tugendhat

Synthesis of case study recommendations¹

The following are a non-exhaustive list of recommendations directed at both governments and corporations which emerge from the case studies.

Governments should:

- harmonize domestic laws and policies to be consistent with the UNDRIP and commitments to the Outcome Document of the World Conference on Indigenous Peoples (OD-WCIP)
- establish, in conjunction with indigenous peoples concerned, a “fair, independent, impartial, open and transparent processes at national level to acknowledge, advance and adjudicate the rights of indigenous peoples pertaining to lands, territories and resources.” (Outcome Document-WCIP para. 21)
- give priority and support to economic development projects initiated by indigenous peoples and recognize these as an exercise of their right to self-determination
- assist indigenous peoples in formulating a development-focused agreement with companies, with clear sanctions against any party which does not comply with the agreements and/ or obstructs its participatory and good faith implementation;
- promote transparency in the management of the resources derived from the agreements with companies and from any related taxes or other revenue streams.

Corporations should:

- ensure that their policies and guidelines are in accordance with international human rights standards such as the UNDRIP;
- respect the right of indigenous peoples to give or withhold Free Prior and Informed Consent (FPIC) to proposed projects impacting on their rights;
- respect indigenous peoples beliefs and their particular relationships with their lands, territories and resources, sacred sites and culturally significant areas;
- provide adequate time, space and information for all affected communities at all stages of FPIC processes, particularly before the onset of any project so that there is an opportunity for informed engagement by indigenous peoples;
- respect the right of, and provide the necessary unconditional support for, indigenous communities to seek assistance from, and consult with, relevant independent experts of their own choosing;

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- ensure that after the project ends, land utilized by the project is returned to the community along with the responsibility and financial resources for its rehabilitation;
 - respect and promote community rights to harvest and benefit from their natural resources, such as timber and seeds;
 - develop binding agreements with affected communities which ensure respect and compliance with impact mitigation and prevention, monitoring, grievance mechanism, sanctions and benefits discussed during FPIC processes;
 - ensure that agreements entered into with communities include the establishment of monitoring mechanisms that include representatives from the company, affected indigenous communities, and where desired by the communities local authorities, NGOs and other organizations and experts, which will monitor project implementation and compliance with agreements;
 - ensure just and fair compensation for the affected communities for any harms suffered and for the use of lands, territories and resources;
 - establish information and communication frameworks and channels between company authorities and the communities that are susceptible to be impacted by any project initiatives and take into account the comments and other suggestions from the communities regarding the project;
 - ensure the establishment of independent and adequately funded mechanisms enabling communities to develop their capacity to negotiate agreements, monitor project impacts and effectively manage financial benefits arising from projects;
 - create operational level grievance mechanisms in conjunction with the concerned communities, with full respect for their legal systems and dispute mechanisms, to provide an additional channel to deal with community complaints and conduct activities such as:²
 - examining any issue without delay and work to find a timely solution;
 - following up on the effective implementation of any solutions applied.
 - addressing grievances in a gender sensitive manner

² For detailed proposals in relation to operational level grievance mechanisms see Doyle C. (2014) 'Operational-Level Grievance Mechanism and Indigenous Peoples' Access to Remedy' in C. Doyle (ed.) *Business and Human Rights: Indigenous Peoples' Experiences with Access to Remedy. Case studies from Africa, Asia and Latin America* (Chiang Mai, Madrid, Copenhagen: AIPP, Almaciga, IWGIA, 2014) 27-73

ANNEX ONE

Indigenous Peoples Expert Workshop on the Aluminium Stewardship Initiative (ASI)

General Statement

Over four days in Chiang Mai, Thailand, indigenous peoples' organisations gathered to review the current state of the Aluminium Stewardship Initiative Performance Standard (version 1) and discuss appropriate indicators to measure whether particular Principles and Criteria are being met in practice. Input from participant organisations were drawn from India, Cambodia, Australia and Suriname, with additional advice drawn from indigenous peoples' rights experts from the Philippines, Nepal and Bangladesh. The meeting was facilitated by the Asia Indigenous Peoples Pact Foundation (AIPP) and the Forest Peoples Programme (FPP) in partnership with IUCN as the coordinating body for the preparatory phase of the ASI.

In preparing for, and participating in, this meeting the participants dedicated considerable time and energy to study and understand the draft ASI Performance Standard. The language and format of the ASI PS are technical and dense and required considerable discussion to relate high level Principles and Criteria and associated indicators with the practical experiences of indigenous peoples. Participants brought to the discussion rich experiences and histories of their engagement with, or impact felt from, mining in their lands, territories and resources, and with the associated facilities related to such mining. These experiences encompassed bauxite mining exploration and aluminium smelter operations (Suriname, Malaysia), exploitation of bauxite mining (India, Australia), mining concession preparation and sale of assets between companies impacting on agreements reached with indigenous peoples (Cambodia, Australia), and issues related to the rehabilitation of affected areas (Suriname, Australia).

In addition to a detailed set of recommendations related to appropriate indicators and associated guidance required for effective implementation and assurance of compliance, a number of key issues were raised for communication with the Standard Setting Group (SSG). These issues relate to the continued engagement of indigenous peoples' organisations and support groups to the development of the ASI, and principles and guidance to the establishment of the Governance Bodies of the ASI and the planned ASI-level Grievance Mechanism. This document summarises these key issues and submits them for consideration for the full SSG.

Continued Engagement

Indigenous peoples' organisations have engaged in the formulation of the indicators and means of verification for the ASI Standard in good faith and welcome the Principles and Criteria as contained in version 1 of the Standard. The real impact of the Principles and Criteria will depend in large part on the quality of the governance arrangements set up to ensure the credibility of the Standard, both in the eyes of industry and consumers, and in the eyes of communities impacted by mining and other aspects of the Aluminium supply chain.

Continued good faith engagement will also depend on the structures within the governance system established to provide for cooperation, including multi-stakeholder governance arrangements. The organisations represented in the Expert Meeting held in Chiang Mai, May 28th – May 31st, have provided their time and inputs in the hope and the belief that this Standard can be a leader in the field of voluntary industry certification standards, and it is with this belief that we commit to continued engagement if strong and credible governance is established together with a grievance mechanism at the level of the ASI Standard. It is hoped that such a grievance mechanism that takes into account customary laws and dispute resolution processes is able to provide a mechanism for effective monitoring of compliance and an avenue for the resolution of disputes that are unable to be resolved at the project and/or company level.

Governance of the ASI

While the governance of the ASI remains an issue of continued negotiation within the ASI at the moment, industry members contributing to the dialogue in the Expert Meeting (through representatives from Norsk Hydro and Rio Tinto Alcan) shared broad ideas of how that governance may look. Participants welcomed the commitment to multi-stakeholder involvement in the governance of the standard, while emphasizing that engagement with rights-holders, with indigenous peoples' organisations and communities, must be seen as a separate category of engagement to the broader involvement of civil society organisations.

We recommend that structures be put into place to ensure the full and effective participation of indigenous peoples in the on-going governance of the ASI Performance Standard, including participation in the governance of the associated Grievance Mechanism. We are open to further consultation and discussion regarding what such structures should look like, when the ASI begins to establish the longer-term governance arrangements.

Monitoring of the Standard

The credibility of the Standard will be reinforced by the mechanisms put into place to monitor and ensure that the Standard is being met. We recommend that there is a regular participatory monitoring system put into place to ensure the Standard is being complied with through random sampling of certified companies.

ASI-Level Grievance Mechanism

The form and manner of work of the ASI Grievance Mechanism will be critical in underscoring and supporting the credibility of the Standard. Its independence from ASI management will need to be carefully maintained, perhaps through a separate governance body with reporting responsibilities into the Board. In addition, it is recommended that the establishment of the Grievance Mechanism be based on the principles outlined in the UN Guiding Principles on Business and Human Rights for the establishment of grievance mechanisms.³

There are a number of options available to the ASI in forming the mandate of the Grievance Mechanism. These include (i) assessing compliance with the ASI Performance Standard; (ii) establishing action plans in cases of non-compliance to guide companies to bring them back into compliance; and (iii) providing dispute resolution processes for cases brought by companies and communities that cannot be addressed at the project or company level. It is recommended that the mandate be formed to include all three of these possible roles.

In addition, the Grievance Mechanism should enhance the potential for continued learning in applying the Standard by feeding into policy reviews the process and results of any complaints brought to the Mechanism between policy review periods. Such outcomes could form part of the ‘good practice’ evidence that the ASI can use to inform and educate certified companies in how to meet the Principles and Criteria.

The rules of procedure for the Grievance Mechanism should ensure that the requirements for entry to the complaint mechanism do not act as a barrier to access by communities. We recommend that the rules for access be restricted to the fact that the company involved in the complaint is certified under the Standard. There should be no requirement to exhaust other remedies for action.

Further, the Grievance Mechanism should be well communicated, certified companies should inform all affected communities in a manner and form understood by the communities of the existence of the Grievance Mechanism as well as any information necessary to access to Mechanism. Complaints to the Mechanism should be provided access to an established Trust Fund to provide communities with the financial and technical support they may need to properly prepare for and participate in a complaint or dispute resolution process. Time frames for the resolution of disputes or the finalization of a compliance process should be publicly available and adhered to by the Mechanism.

Any complaint registered with the Mechanism should trigger an investigation by appropriate experts contracted by the Mechanism to ensure that independent advice is provided to the Mechanism as quickly as possible.

³ These principles are that grievance mechanisms should be established to be: Legitimate; Accessible; Predictable; Transparent; Equitable; Rights-compatible; and a continued source of learning. UN Guiding Principles on Business and Human Rights: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

De-certification triggers

Certain criteria and principles are so critical to the reputation of the industry that consideration should be given to trigger de-certification or the suspension of certification where conditions are not met. It is recommended that company involvement in conflict, through support to conflict groups, be one such trigger. The claiming of consent where the communities state it is a fraudulent claim should be another. Any non-compliance severe enough to trigger de-certification of a company should be publicly available on the Complaints Mechanism website.

Further work

In addition to the points raised in this general statement, the participants in the Expert Meeting identified some key further work that was felt to contribute significantly to the work towards establishing a credible industry standard for aluminium. This includes:

1. A briefing note on Free, Prior and Informed Consent principles and processes
2. A briefing note and/or fact sheet on the identification of indigenous peoples
3. Compiling case studies of the experiences shared during the Expert Workshop, including Suriname, Australia, India, Cambodia and Malaysia

We request that additional financing not used to convene the Expert Workshop be allocated to support this work under the supervision of IUCN. This work is expected to be finalized by end of August 2015.

We thank you again for the opportunity to provide input into the indicators for the draft ASI Performance Standard, and provide these additional recommendations to you in the spirit of good faith engagement and involvement. We look forward to seeing the evolving governance and associated mechanisms of the ASI as they are established.

With regards,

Heather Dorothy Rose and Gina Castelain, Wik Projects; Seerat Kachhap, Jharkhand Organization for Human Rights (JOHAR); Praful Lakra, Prabhav Tribal Development & Research Society; Estebancio Castro; Marie-Josée Artist, VIDS (Association of Village Leaders); Sothea Pharn, Highlander Association; Robie Halip, Asia Indigenous Peoples Pact (AIPP); Joan Carling, Member of the UN Permanent Forum on Indigenous Issues and AIPP; Kyasingmong Marma, Asia Indigenous Peoples Pact (AIPP); Pranika Koyu, Asia Indigenous Peoples Pact (AIPP)

Also present and endorsing the outcome:

Helen Tugendhat, Forest Peoples Programme, Geoff Nettleton, Indigenous Peoples Links, Cathal M Doyle, Middlesex University

This publication provides an overview of the experiences that indigenous peoples have had with mining and with the wider process of primary production of aluminium in India, Australia, Cambodia, Suriname, and Guinea. Drawing from an Indigenous Peoples' Expert Meeting held in May 2015, this publication seeks to highlight some of the key challenges that have faced indigenous peoples in their negotiations and engagement with mining companies and corporations involved in the aluminium supply chain and to propose ways in which these challenges can be addressed. This publication is intended as a contextual guide for companies involved in the aluminium industry and an entry point for understanding the perspectives and positions of indigenous peoples in relation to extractive industries in general, and aluminium production in particular. Specific guidance on identifying indigenous peoples in proposed mining areas and further guidance on the process and content of the principle of free, prior and informed consent is provided as an introduction for corporations to these issues.

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