Mining, Economic Development and Indigenous Peoples: 
“Getting the Governance Equation Right”

Report on a Forum Held at
McGill University Institute for the Study of International Development (ISID)
Montreal, August 5-10, 2013

Convened by Jim Cooney, ISID Professor of Practice in Global Governance
Foreword

Prof. Philip Oxhorn, Director
Institute for the Study of International Development

The publication of *Mining, Economic Development and Indigenous Peoples: Getting the Governance Equation Right* marks the public launching of the new flagship Program in Global Governance of McGill University’s Institute for the Study of International Development (ISID). The product of an intense weeklong policy forum held at McGill in August 2013, under the able leadership of Jim Cooney, our first Professor of Practice in Global Governance, the report reflects a uniquely rich discussion among academics and practitioners working on issues relating to the often delicate and conflict-ridden relationship between indigenous communities, extractive industries and governments. Indeed, the richness of the discussion reflected the fact that representatives of the principal stakeholder groups from around the world took part in it, including indigenous communities, governments and mining companies. The variety of experiences and perspectives present in the Forum was unparalleled, providing new insights for finding novel solutions to what increasingly have seemed to be intractable problems. In this way, the dialogue that all participants agreed was essential to avoid increased conflict actually began in the Forum itself, another of the Forum’s laudable achievements.

The Forum and Jim’s continued presence at ISID have proven to be a particularly auspicious way to launch ISID’s new Global Governance Program. The networks created and suggestions for addressing the practical requirements and capacity needs of indigenous communities, governments and extractive industries will continue to provide a fertile foundation for tackling critical problems of global governance and identifying practical responses that meet the needs and interests of key stakeholders for years to come. This not only respects the Program in Global Governance’s broad focus on knowledge-creation, solution-seeking, and broad outreach to civil society, but it reinforces ISID’s own mandate to build bridges between McGill and the international development community through our unique focus on multidisciplinary research that is intended to contribute directly to better evidence-based development policies and practices. In this way we hope to contribute to practical solutions to some of today’s most pressing development challenges.

It is with all this in mind that I extend my heartfelt thanks to Jim, whose leadership propelled the Forum to reach its full potential, as well as the many participants who shared their insights and experiences in such a frank manner so as to begin to lay the foundation for new visions that can help resolve some of the most pressing conflicts of our times.
# Table of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Foreword</td>
<td>i</td>
</tr>
<tr>
<td>Table of Contents</td>
<td>ii</td>
</tr>
<tr>
<td>Executive Summary &amp; Acknowledgements</td>
<td>1</td>
</tr>
<tr>
<td>Introduction</td>
<td>2</td>
</tr>
<tr>
<td>Two-Day Conference</td>
<td>5</td>
</tr>
<tr>
<td>Canada</td>
<td>6</td>
</tr>
<tr>
<td>Australia</td>
<td>14</td>
</tr>
<tr>
<td>Mexico</td>
<td>17</td>
</tr>
<tr>
<td>Colombia</td>
<td>21</td>
</tr>
<tr>
<td>Peru</td>
<td>25</td>
</tr>
<tr>
<td>World Bank and Inter-American Development Bank</td>
<td>26</td>
</tr>
<tr>
<td>Aboriginal Dialogue</td>
<td>30</td>
</tr>
<tr>
<td>The state of governance</td>
<td>31</td>
</tr>
<tr>
<td>How to improve governance</td>
<td>32</td>
</tr>
<tr>
<td>Workshop</td>
<td>34</td>
</tr>
<tr>
<td>Underlying Norms and Values</td>
<td>34</td>
</tr>
<tr>
<td>Practical Requirements and Capacity Needs</td>
<td>38</td>
</tr>
<tr>
<td>Comprehensive Framework: Decision-Making Roles &amp; Responsibilities</td>
<td>41</td>
</tr>
<tr>
<td>Roles and Responsibilities by Issue Category</td>
<td>44</td>
</tr>
<tr>
<td>Summary Remarks and Recommendations</td>
<td>51</td>
</tr>
<tr>
<td>Annex 1: Forum Participants</td>
<td>54</td>
</tr>
</tbody>
</table>
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Executive Summary

Discussion at this Forum was centered on the different but complementary roles, responsibilities and practices of indigenous communities, governments and mining companies in making and implementing decisions and in communicating and engaging with one another in the context of managing the issues associated with mining on traditional indigenous territories.

The objective of the Forum was to understand the underlying factors that support or impede effective decision-making and engagement practices by the three parties and to explore possible approaches towards improving their ability, acting individually or collectively, to prevent or mitigate adverse environmental and cultural impacts from mining within traditional territories and to realize the full potential of mining to provide sustainable economic and social benefits to indigenous communities.

The outcome of the Forum was a set of suggestions for addressing the practical requirements and capacity needs of the three parties, in a manner that would enable decision-making and engagement practices to be more effective, and a comprehensive framework for integrating the decision-making and engagement practices and concerns of all parties in a manner so as to better achieve their shared objectives in the management of issues associated with mining on traditional territories.

The Forum was structured in three segments: a two day conference, a one day Aboriginal dialogue, and a one and a half day workshop. The discussion included perspectives of researchers and practitioners, indigenous and non-indigenous voices, and viewpoints from different provinces of Canada supplemented by views from some countries in Latin America. The driver of discussion was not an effort to achieve consensus, but rather a desire to share insights and experiences.

Acknowledgements

The convener of the Forum is the principal author of this Report. However, the Report would not have been possible without the very valuable assistance and substantial input from several Forum participants, whose contributions are acknowledged here with sincere gratitude and appreciation: Hillary Birch, Ben Bradshaw, Cynthia Callison, Julia Keenan, David MacDonald, Sheldon Tetrault, and Viviane Weitzner.
Introduction

In many disadvantaged and impoverished areas around the world, industrial mining within or near the traditional territories of indigenous peoples is a difficult challenge for countries seeking to use their natural resource endowment to spur sustainable economic development and poverty reduction.

Indigenous communities tend to be economically and socially marginalized within the countries where they reside, and have only recently started to acquire some of the political and legal resources needed to effectively assert their rights and entitlements with regard to mining projects that may have negative impacts on their physical environment and traditional culture.

National and subnational governments often lack the policies, proficiencies, and sometimes even the willingness to defend the interests of their indigenous population in the face of mining projects that offer the prospect of significant economic stimulus and revenue generation, but also pose the risk of significant damage to the physical environment and disruption of traditional indigenous ways of life.

Though some mining companies may endorse voluntary standards that require consultation with indigenous peoples to mitigate adverse impacts and provide economic and other benefits from their operations, they are not subject to accountability mechanisms to ensure that they act accordingly. Some mining companies make little if any effort to deal with indigenous peoples’ concerns and rights.

However, the world is changing. Currently, there is rapid evolution in the direction of affirming the right of indigenous people to decide whether and, if so, under what conditions mining should take place on their traditional territories. The United Nations Declaration on the Rights of Indigenous Peoples (2007) has articulated the right of “Free, Prior and Informed Consent” (FPIC). This right has been incorporated into the Performance Standard on Indigenous People of the World Bank International Finance Corporation (IFC), and consequently compliance with FPIC is a condition for IFC investment in mining projects. The IFC Performance Standards have been adopted by about eighty of the world’s largest banks in a joint initiative called the Equator Principles. As such, compliance with FPIC has also become a condition of commercial loans to mining projects. Thus, change is rapidly advancing in both the practical and the legal context for decision-making about mining on the traditional territories of indigenous peoples.

To lessen or mitigate the adverse impacts of mining and to integrate the potential contribution of mining into sustainable economic and social progress for indigenous people is in many respects a challenge of governance, by the indigenous community, by the mining company and by the government. The concept of governance as used at the Forum refers, first of all, to the process of making and implementing decisions on behalf of a particular group of people, e.g. members of

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1In this Report, the word “indigenous”, where not restricted by a specific qualifier, is used as a generic term that includes Canadian First Nations and other Canadian Aboriginal peoples, and other communities in the Americas that designate themselves as indigenous peoples. The term “First Nations” is used only with reference to Canada. The word “Aboriginal” is used either with reference to Canada or to Australia, depending on context.
an indigenous community, shareholders of a mining company, or citizens of a jurisdiction. Collective governance of mining within the traditional territories of indigenous communities requires the interaction of the three principal parties through processes of engagement. Therefore, the two essential aspects of governance, as discussed at the Forum, are decision-making and engagement.

Discussion at the Forum explored the different but complementary decision-making roles and responsibilities of indigenous communities, governments and mining companies, and the relationships between those three institutional actors in their collective effort to protect indigenous people from adverse environmental and cultural impacts and to achieve sustainable economic and social benefits from mining within or near their traditional territories. The agenda encouraged Forum participants to consider models of excellence, deficiencies in practice, and strategies for improvement in the three dimensions of governance.

Discussion was generally guided by three questions:

- What constitutes and characterizes effective processes of making and implementing decisions related to mining by indigenous communities, mining companies and governments, with respect to the rights and interests of indigenous people?
- What form of communications and relationships between indigenous communities, mining companies and governments will optimize their formal and informal interaction and strengthen them collectively to ensure that the impacts of and benefits from mining to indigenous people are demonstrably positive in the eyes of all three parties?
- What developmental strategies can be implemented to improve governance capacity by the indigenous community, the mining company and the government, in terms of policy, practices, decision-making structures and personal competencies, and how can one measure the success of such capacity building strategies?

The Forum was structured as an invitational event with the objective of assembling a stimulating mixture of academics and practitioners, both native and non-native Canadian voices, as well as first-hand perspectives on indigenous governance and mining issues in Latin America. It was organized as three distinct but related events:

- A two day Conference that featured presenters and discussants on specific topics related to the general themes of the Forum;
- A one day Aboriginal Dialogue arranged and directed by a number of Canadian First Nations and other Aboriginal communities and some indigenous representatives from Latin America; and
- A one and a half day Workshop in which participants distilled the learnings of the previous three days into elements of an integrated strategy for improving governance by the three institutional actors and their ability to work collectively to optimize the beneficial relationship between Canadian Aboriginal or Latin American indigenous peoples and mining projects.

About two-thirds of Forum participants were able to attend the event on all five days. Others participated on two or three days only (list of participants in Annex 1). Discussion at the Forum
was conducted under the Chatham House Rule\textsuperscript{2}, so as to encourage a frank exchange of differing perspectives, without the possibility of subsequent attribution. In this Report, therefore, statements that were made during the discussion have been integrated under the theme to which they related and not in the sequence in which they were expressed. At the conclusion of the Forum, some participants expressed an interest in communicating additional thoughts related to the subjects discussed, and these have also been integrated into this report. This Report should be read as a record of a conversation, not the expression of a consensus, among the participants in the Forum. Therefore, certain statements may appear inconsistent with others, as should be expected in a richly informative and stimulating conversation.

\textsuperscript{2} When a meeting, or part thereof, is held under the Chatham House Rule, participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed.

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“Governance” for the purpose of discussion at the Forum is understood as a process of collective decision-making, the relative quality of which can be assessed in terms of the following descriptors:

- **Representative:** Do the decision-makers (or leaders) reflect the intentions of the collectivity on whose behalf they make and implement decisions? For indigenous communities, this refers to the collective community. For governments, it refers to a majority of citizens of the relevant jurisdiction. For mining companies, it refers to a majority of shareholders or owners of the corporation.

- **Accountable:** Are the decision-makers required to justify their decisions to the collectivity on whose behalf they act, and in the event of the collectivity’s dissatisfaction with their decisions submit to sanctions, such as dismissal?

- **Transparent:** Is knowledge of the process and substance of the decisions of the leaders easily available to all members of the collectivity that they represent and to the general public?

- **Effective:** Do decisions by the leaders and the implementation of those decisions achieve in actuality the intentions of the decision-makers and of the collectivity that they represent?

- **Limited:** Do the decision-makers respect the appropriate boundaries of responsibility and authority of the collectivity that they represent? Do they go beyond their appropriate boundaries in making decisions that should be made by others? Alternatively, do they fall short in discharging the decision-making roles within the boundaries of responsibility that are appropriately theirs?

The experience and knowledge of Forum participants related primarily to Canada, and consequently Canada was the principal jurisdictional focus of the discussion. However, expert perspectives were also presented on Australia, Mexico, Colombia and Peru. While the international standard of “free, prior and informed consent” is not legislated in these jurisdictions (with the possible exception of Colombia), in all jurisdictions legal instruments of one sort or another require consultation with indigenous communities whose lands and resources are potentially affected when mining is proposed on their traditional territories. However, the extent to which governments discharge their duty to consult and accommodate the concerns of indigenous communities about mining projects varies from jurisdiction to jurisdiction, and in no jurisdiction can such consultation and accommodation be regarded as demonstrably adequate and effective.

The governance practices of indigenous communities vary widely across the different jurisdictions, as a consequence of different cultural, historical and legal experiences and circumstances. Most of the discussion focused on current efforts and strategies to strengthen the
collective decision-making and engagement processes of indigenous communities in matters regarding mining on their traditional territories.

Mining companies, though they are in general extensively regulated by law, are generally not subject to legally imposed regulations regarding consultation and accommodation with indigenous communities concerning proposed projects. However, multinational mining companies have generally endorsed a variety of voluntary self-regulatory instruments, with which they endeavour to one extent or another to act in compliance.

Discussion at the Conference part of the Forum focussed primarily on the actual engagement, decision-making and implementation practices of indigenous communities, mining companies and governments, with relatively little attention to formal or informal legal and structural frameworks. The quality of those practices was examined and evaluated in terms of the five criteria described above. The objective of the discussion was not to achieve consensus but rather to share views and insights based on the individual experiences, reflections and/or research of the participants. Consequently, various, sometimes conflicting, perspectives are represented in this record of the discussion.

Canada

*Historical Background*

The discussion of Canada was based on a shared understanding by all participants of the historical background to the current issues around Aboriginal communities and mining on their traditional territories. Aboriginal people have deep roots in the land that today is Canada. They have communities and a way of life that have existed for thousands of years. They have creation stories that tie their origin and identity to certain places. They have a presence in Canada that long predates the arrival of European explorers and settlers.

Aboriginal communities share similar experiences of colonialism and oppression from the European incursion into their traditional territories. Different communities encountered explorers and settlers, traders and merchants, law enforcement officers and government bureaucrats at different times over the past four hundred years. However, the experience of colonialism (be it the creation of reserves, the outlawing of culture and economy, the displacement of traditional forms of government, the residential schools, and other oppressive acts) has had a similar effect across Canada, by severely weakening the fabric of Aboriginal communities from social, legal, cultural, and economic perspectives.

Until the 1970s, Aboriginal communities had little influence over mining activities. They had no say in mine development; no say in influencing the impacts on hunting, fishing, and cultural sites; no say in capturing economic benefits like jobs, training, or royalties. First Nations could do no more than witness the influx of non-Aboriginal workers onto their lands and the extraction of economic resources from their lands.
During the 1970s, changes began to occur. In 1975, the *James Bay and Northern Quebec Agreement* established environmental assessment regimes applicable to mining that gave considerable representation to Crees, Inuit and Naskapi. 1978, the Berger Report of the Mackenzie Valley Pipeline Inquiry concluded that the proposed industrial project should not proceed for as long as social, cultural and environmental impacts on Aboriginal communities were demonstrably negative and aboriginal land claims remained unaddressed.

Then, in 1982, the federal government enshrined Aboriginal and treaty rights in Section 35 of the Canadian Constitution. Subsequent Supreme Court decisions have interpreted the Constitution as imposing on government a duty to consult and accommodate the interests of Aboriginal people before permitting industrial activities, such as mining, that pose significant potential impacts on traditional territories.

However, for every point of law that has evolved to date, there remains a lack of clarity around aboriginal rights and title. Unresolved questions include: Where does title exist? What constitutes a justifiable infringement of rights? What constitutes a reasonable accommodation of rights infringement? To what extent is First Nation jurisdiction and decision-making authority recognized? To varying extents depending on circumstances, this uncertainty allows for different perceptions by First Nations, governments, and mining companies, and has the potential to create tension between the parties in the context of mining development.

This absence of a definitive legal context to govern mining activities on traditional lands of Aboriginal people has opened considerable space for creative and constructive initiatives by all parties. As a leading example, from 1992 until 1994, the Mining Association of Canada together with the federal, provincial and territorial governments conducted the Whitehorse Mining Initiative, which included a significant program of consultation with First Nations leading to a tripartite consensus “Accord” on Aboriginal rights, lands and resources and on Aboriginal participation in mining through the negotiation of agreements. Since then, impact benefit agreements or participation agreements between mining companies and First Nations related to mining on traditional territories have become a common practice.

In 2007, self-determination by indigenous communities as an inherent right was recognized by the United Nations Declaration on the Rights of Indigenous Peoples, which proclaimed the norm of “free, prior and informed consent” as the operating principle governing resource development on traditional territories. This Declaration, endorsed by virtually all members of the United Nations including Canada (after a delay of three years), has given a strong impetus to the efforts of Aboriginal communities to re-assert their right to govern themselves and their lands and resources.

With this historical background in mind, participants at the Forum discussed recent experiences and lessons learned from the decision-making and engagement practices of First Nations, mining companies and governments in matters related to mining on traditional territories. The focus of the facilitated discussion shifted frequently from First Nations, to mining companies, to governments. However, for ease of reference, this summary of the discussion of Canada more or less aggregates separately the perspectives and insights related to First Nations, governments and mining companies, in roughly that sequence.
First Nations: Capacity, Participation, and Self-Determination

For many First Nations, their first experience with mining has occurred in the years since the progressive advancement in rights with respect to mining began in the 1970s, and the community reaction has focused on whether or not to support the mining activity based on the perceived or potential impacts and benefits. The Forum noted examples of this form of interaction between Aboriginal communities and mining companies for new mine development projects in cases located in British Columbia, Ontario, Quebec and Newfoundland and Labrador.

However, many First Nations have had mines operating on their traditional territories for generations, and these mines were developed without their involvement, much less their consent. In a few cases, government and mining companies have come to see the need to rectify this situation, and have entered into mid-mine life discussions with First Nations, aimed at reaching arrangements and agreements that will enable Aboriginal communities to benefit during the remaining years of mining on their traditional territories and that will address environmental and closure issues, given that those communities will be the end-users of the land.

Because many First Nations have experienced a very significant weakening of their community coherence and collective decision-making capability, largely as a result of colonization, they face governance and capacity challenges when addressing mining. Nevertheless, many Aboriginal communities are finding increased interaction with mining to be a stimulus towards the development of more structured collective decision-making and progress in the direction of greater self-determination, whether or not the community supports proposed mining activities. Representatives of those communities concur, however, that further governance evolution and capacity building is required.

In preparation for engaging with a mining company, First Nations may decide to undertake a formal assessment of their overall governance capacity. For this purpose, several tools have been developed to provide guidance to First Nations in assessing their overall governance capacity. These tools may help a First Nation to evaluate its general ability to make and implement collective decisions and to identify priorities for strengthening its governance capacity. However, these tools do not address the specific capacity needs related to making decisions about proposed mining projects.

The new form of Canadian Aboriginal governance that is evolving can be described as a mix of traditional forms of collective decision-making with modern forms of democracy. Indeed, evolving Aboriginal governance goes beyond the current structures of modern democracy with respect to members’ participation in consensus-forming processes.

The fundamental challenge of representative governance for First Nations is how to combine deep diversity with deep consensus, and ultimately with deep democracy, concepts that may be in tension with one another. The leadership role is to balance interests, while fostering

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3 Reference can be made to: (1) the Five Pillars of Effective Governance provided by the National Centre for First Nations Governance; (2) the Governance Capacity Planning Tool (2011) provided by Aboriginal and Northern Affairs Canada; and (3) the Governance Self-Assessment Tool provided by the British Columbia Assembly of First Nations.
community understanding and desire to address impacts. Sometimes deep consensus cannot be found for proposed mining projects and such proposals create or deepen differences. Beyond these inherent challenges, many First Nation leaders perceive the principal impediment to consensual community decision-making to be the Indian Act, which does not promote competence, transparency, due diligence, or mediation of conflict.

First Nation decision-makers find it challenging to incorporate and reflect the diversity of orientations and perspectives of their community members. For some First Nations, many members do not live on the reserve or on the traditional territory. In some First Nations, the members are not engaged in, or choose to ignore, the collective decision-making process. In addition, the background, experience and education of First Nation members cover a broad spectrum.

The objective of First Nation decision-makers is to achieve and reflect a deep consensus of the community. Commonly, consensus emerges and is perceived through discussion. However, the current trend is towards a more formal assessment of community sentiment through voting, including mailed-in ballots and on-line ballots. Without a formal vote, the representativeness of decisions by Aboriginal leaders is open to potential challenges by members who do not agree with the decision.

It was noted that even with 80% support for a decision, some members of a First Nation may deeply dissent and view a resulting decision as wrong or illegitimate. Since a mechanism for balancing individual concerns with collective decisions is either absent or not voluntarily followed, such conflicts find expression through social media and reference to the courts, thus weakening the internal and external perception of the accountability and effectiveness of the Aboriginal decision-making processes.

If a First Nation decides to support a proposed mining project, then normally the First Nation and mining company reach a negotiated agreement. The implementation of an agreement between a First Nation and a mining company is an accountability challenge for all parties. For a First Nation, accountability relates not only to the achievement of particular objectives in the best interest of the community, but also to the on-going process of achieving improvements in the quality of life for the people and of minimizing and mitigating environmental impacts.

Consequently, the effectiveness of a First Nation’s governance should be assessed, not only by whether an agreement with a mining company was achieved, but also by how the agreement is implemented. Have the parties to the agreement truly fulfilled the commitments and expectations expected of each other? Are the economic benefits from mining really contributing to long-lasting improvements in community standards of living and quality of life? Do the community decision-makers act responsibly when they direct the revenue from mining towards certain projects or when they invest the revenue for the benefit of future generations?

The accountability of First Nation leaders for managing revenues from mining projects is first and foremost to the community itself, and failure to provide a fair distribution of benefits to the community can result in internal divisiveness and conflict. Mining companies share the same interest, because if the revenue is not translated into substantial improvements for the
community, the mining company will be held accountable in the eyes of the public for failing to deliver demonstrable benefits to the First Nation.

Accountability of First Nation decision-makers is not only to the contemporary community, but also, very importantly, to future generations. Different practices are emerging in different First Nations to ensure a legacy for future generations through trusts. Ideally, the revenue from the trust should be distributed for the collective benefit of the community. The trusteeship should be representative of the whole First Nation and not only certain sub-sets of interests within that community.

Transparency is a challenge when a First Nation has entered discussions or is negotiating with a mining company. Confidentiality of discussions is a necessity while negotiations are in progress, which can last for several years. Leaders must be able to command the trust of their First Nation during the time when they cannot disclose details of options that are under consideration.

Even after an agreement is reached, the extent to which the contents are communicated to all members of the First Nation will vary. In some First Nations, agreements are put to a vote of all members, in which case the substance of the agreements needs to be made public. In other First Nations, the leaders endeavour to mould a consensus through discussion, often using just a general summary of the agreement. At other times, it is the mining company that refuses to allow community members to retain copies of the agreement due to competitive or other concerns.

For First Nations, current governance practices are generally respectful of territorial boundaries. However, impacts from mining may affect more than one First Nation. In most cases, it has been difficult to find support for mining projects that affect more than one through a joint agreement. Instead, mining companies contract separate agreements with each First Nation. Nevertheless, there are a few examples where First Nations affected by the same project have been able to find enough commonality to take a combined approach in response.

When a mine is on the traditional territory claimed by more than one First Nation, a common position is often difficult if not impossible to achieve, even though one might expect that different Aboriginal communities affected by the same project would have some degree of common understanding and response. Situations of overlapping territorial claims are a decision-making complication, not only for the First Nations concerned, but also for mining companies and governments.

The fundamental issue is the lack of adequate decision-making authority over commercial activity by First Nations on their traditional territories as a result of government policy. Fundamentally there is a question about the legal status of the land and the level of control that First Nations can exercise over it. Until this is resolved there will always be a degree of uncertainty and potential conflict in relation to development that is not First Nation led and directed.

One pressing issue is exploration, as both mining companies and governments lack respect for First Nation decision-making authority regarding exploration on traditional territories. More consultation is required in advance of exploration commencing, both by companies and by
governments. The recent (2012) Ross River Dene Council decision by the Yukon Court of
Appeal, which stated that the government of the Yukon must consult affected Aboriginal
communities before opening up land for staking and the acquisition of mineral title, is an
indication that consultation in advance of exploration activities may be evolving from desirable
best practice towards a legally imposed requirement.

Some issues that emerged from the discussion of First Nation governance related to mining,
which could be the focus of further discussion or possibly academic research, are:

- What is the internal experience of communities in responding to external pressures
  related to development and resources?
- What are the success stories? What is the methodology for measuring success? What are
  the key drivers of success?
- How transferable is the success of one First Nation in dealing with mining projects on its
  traditional territory?
- How can community participation in First Nation decision-making be improved?
- How can First Nations build capacity and respond more effectively to proposed mining
  activities, while staying integrated with the cultural base? How have First Nations done
  this?
- Are there good models for resolving the complexities associated with overlapping
  territorial claims and the effects of mining?
- How should First Nations deal with “retrospectivity” in the encounter with mining
  companies, particularly in cases where mining has occurred on traditional territories
  without their involvement? Can negotiations really focus just on the future, and ignore
  the past?
- How should “free, prior and informed consent” be understood in practice?

Governments and Mining Companies

The decision-making roles and responsibilities of government received considerable attention
from the indigenous, corporate and academic participants in the Forum. It should be noted that
Canadian governmental perspectives were not formally represented at the Forum, though to
some extent those perspectives may have been informally expressed by several participants who
were former government officials.

In general, provincial governments are perceived as having circumscribed too narrowly the scope
of governance responsibilities related to First Nations and mining projects. To varying extents,
governments seem to regard the relationship of a First Nation with a mining project to be
primarily an interaction of the First Nation with the company.

No government is fully or even adequately discharging its constitutional duty, as defined by the
courts, to consult and accommodate the interest of First Nations nor willing to consider the
international standard of “free, prior and informed consent” before granting approval and issuing
permits to mining projects on indigenous peoples’ lands. These deficiencies on the part of
government force mining companies to assume much of that responsibility in practice. However,
both the government and mining companies have responsibilities towards indigenous peoples.
For example, companies are in the best position to make changes in mine design to avoid, lessen or mitigate environmental and other impacts on First Nations, while governments are in the best position to make infrastructure investments and share mining revenue.

Some First Nations and mining companies believe that an integrated and balanced trilateral process would be more appropriate and more effective than the current practice of three bilateral relationships: First Nation and company, First Nation and government, and company and government. However, other First Nations and mining companies believe that these relationships should be kept separate, as governments have limited ability to share decision-making responsibility or authority and to enter mediation or other dispute resolution processes. Moreover, First Nations generally perceive industry as being more flexible and creative than government in its approaches to recognizing and accommodating First Nation interests.

Currently, a diversity of bilateral relationship structures are emerging, based on ad hoc responses of both parties to their mutual encounter. Some discussants suggested that government has a role to play in establishing a consistent framework to guide the bilateral relationships between First Nations and mining companies. However, others expressed concerns that any such initiative by government would tend towards minimizing the rights of First Nations and minimizing the obligations of industry and the Crown to accommodate those rights, and that the structure of relationships should be left for the First Nation and mining company to decide.

Some governments are more advanced than others in becoming directly involved in the decision process around First Nations’ interactions with a mining project. Newfoundland and Labrador is perceived to have created a model of trilateral engagement through the government’s involvement in the decision process around the Voisey’s Bay mine. British Columbia is commended for introducing resource revenue sharing, but can be criticized for continuing to make decisions without regard to First Nations governance. Ontario is providing encouraging signs of possibly advancing along the path to resource revenue sharing with First Nations, but is also absent from the negotiating table. Quebec is perceived to be refraining totally from governmental involvement in the decision process around creating beneficial relationships between First Nations and mining projects. NWT insists that tripartite and bipartite agreements be reached between Aboriginal communities and mining companies.

Overall, governments need to assume more responsibility for fully and effectively discharging their own roles and responsibilities regarding consulting and accommodating the interests and concerns of First Nations related to mining on traditional territories and for providing long-term strategic engagement with First Nations on all issues related to mining, including land and resource management, cumulative effects, shared decision-making, and resource revenue sharing.

Mining companies are advancing towards a new standard of accountability in their relationships with First Nations by implementing the “Tool for Assessing Aboriginal and Community Outreach Performance” developed by the Mining Association of Canada (MAC) as part of the Towards Sustainable Mining (TSM) program, which all MAC members are required to implement. This assessment protocol allows for both self-assessment and independent third party assessment of a mining company’s relative performance in identifying the Aboriginal
communities with which it needs to engage, in conducting effective engagement and dialogue, in establishing processes to respond to Aboriginal complaints and concerns, and in providing regular reporting on its relationships with Aboriginal communities. It should be noted that only about 60% of the mining companies active in Canada are members of MAC and thus obligated to implement this accountability mechanism. Also, these standards are not required for MAC members’ mining activities outside Canada, though a few are making use of TSM in other countries.

Mining companies that are not members of MAC vary widely in their relationships with First Nations. The failure to establish a relationship and to find support for mining activities has caused deep conflict between First Nations and mining companies. The lack of consistency in actions and values by mining companies sends a message to Aboriginal communities that the mining industry may choose when to respect First Nations’ rights and how to fulfill their responsibilities leading to unfairness and an unbalanced playing field.

Ways of ensuring the sustainability of the mining industry on indigenous peoples’ lands were discussed including strategies related to external pressure by the government, security regulation, industry certification, and marketplace motivators, in addition to voluntary policies and standards, risk assessment and management, and communication and cross culture training. Capacity building and evolution of corporate governance of mining companies is required with respect to indigenous issues.

Certain questions emerging from the discussion of governance at the levels of mining companies and governments, which might be the subject of further discussion or possibly of academic research, are:

- How can the provincial or federal governments be motivated to discharge more effectively and consistently their duty to consult and accommodate the interests and concerns of Aboriginal communities on whose traditional territories mining companies propose to conduct exploration or to build and operate mines?
- Should governments participate in trilateral negotiation process with mining companies and First Nations? If so, how can governments be motivated to do so?
- Should governments establish frameworks to guide mining companies with respect to activities that potentially affect First Nations, particularly with respect to the process for determining an appropriate balance of impacts and benefits for First Nations? If so, what would such a framework look like?
- Where does responsibility lie for helping to build the capacity of First Nations to deal effectively with proposed mining activities? Governments? Mining companies?
- Should mining companies in Canada seek greater consistency in their decision-making practices with respect to engaging and building relationships with First Nations? If so, how can that be achieved? Should the Mining Association’s TSM Tool for Assessing Aboriginal and Community Outreach be required of every mining company operating in Canada as an accountability mechanism?
- To what extent can improvements in governance related to mining on the part of Aboriginal communities, mining companies and governments be achieved by advances in
community, corporate and governmental policies and practices; or to what extent is legislation required?

- Are there positive factors that can motivate a mine developer to pay the cost, particularly in time, to enable an indigenous community to develop the governance capacity needed to make important decisions and negotiate good deals?

**Australia**

Mining industry and indigenous Australia have been connected since the colonial era, and today many of Australia’s largest mines are located in remote regions with substantial indigenous populations, and they are frequently on indigenous land. Historically, mining projects operated without the engagement and support of indigenous peoples – and often to their detriment.

The relationship between indigenous peoples and the state of Australia has frequently come to a head around issues of human and land rights, particularly in relation to economic participation in mining and other projects. Legislation recognising indigenous land rights is relatively recent, first in South Australia and the Northern Territory, and then throughout Australia. Significant legislation includes:

- *Aboriginal Lands Trust Act 1966* (in South Australia)
- *Aboriginal Land Rights (Northern Territory) Act 1976*
- *Native Title Act 1993* (Commonwealth).

Native Title Act 1993 established that Traditional Owners could claim to hold certain rights to land throughout Australia where these rights had not been extinguished by other forms of title. The Act established that determination of the existence of native title rights entitles indigenous groups to the ‘Right to Negotiate’ with other parties seeking access to that land. The Act also initiated the creation of the National Native Title Tribunal (NNTT) and accreditation or creation of Native Title Representative Bodies (NTRB) or Service Providers in order to administer certain aspects of the Act.

After 1993, the relationship between mining companies and indigenous Australians changed rapidly. Instead of being summarily excluded, indigenous parties now had a mechanism for translating their native title into economic and social capital and negotiating management of mining impacts in order to protect cultural and environmental values.

Amendments to the Act in 1998 introduced the Indigenous Land Use Agreement (ILUA) as a mechanism for satisfying the Right to Negotiate via voluntary agreement and restricted the conditions of the alternative Right to Negotiate procedure.⁴ Since the introduction of the ILUA, hundreds of legally binding agreements have been registered⁵ with the National Native Title Tribunal for new exploration and mining developments, as well as for operating mines undergoing expansion or licence renewal.

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⁵ Ensuring that ILUA conditions have been met. See http://www.nntt.gov.au/Indigenous-Land-Use-Agreements/Pages/Registration.aspx
The role of the state varies, depending on whether the Right to Negotiate procedure or ILUA negotiation is followed. The state is a party to Right to Negotiate procedures, but not to ILUAs.\textsuperscript{6}

The utility of ILUAs is perceived to be related to their ability to provide both legal certainty and flexibility to community and government parties. The contents of an ILUA are negotiated and frequently include provisions relating to:

- native title holders agreeing to a future act or group of future acts
- compensation for loss or impairment of native title
- how native title rights and interests coexist
- access to an area
- extinguishment of native title by surrender to governments
- framework agreements (i.e., agreements that define terms and conditions for future negotiations, decision-making or other activities)
- the exercise of native title rights and interests

ILUAs can also cover cultural heritage issues, the provision of public works and infrastructure and employment and economic opportunities for native title groups.\textsuperscript{7}

The use of ILUAs as the predominant governance mechanism in Australia has ‘exploded’ since the Native Title Act Amendments, and a ‘culture of agreement making’ has developed to the extent that companies are entering into agreements with indigenous parties even where they are not required by law.\textsuperscript{8}

In many ways, the experience of indigenous governance of mining via agreements has been very similar in Australia and Canada. In general, there is a perception that Australia has more experience with negotiating directly with mining companies, while having less established indigenous self-governance structures. On-the-ground implementation of agreements shows mixed results in both countries. While some agreements have been successful (at least in part) in delivering on commitments, many are ineffective or fail to meet the expectations of agreement parties.

Some general reflections on current experiences of governance in Australia from the perspectives of company, indigenous and government parties are provided below, although interests often overlap, and there are many more issues to consider.

\textit{Indigenous Perspectives}

\textit{Diverse viewpoints on mining:} For some indigenous Australians, the centrality of land and natural resources to their spiritual being makes the concept of resource exploitation on their lands unacceptable. For others, the potential for mining activities to contribute to improved living conditions is seen as a rare chance for remote communities to enter into the mainstream economy that ought to be pursued. In between these positions, there is widespread scepticism about

\textsuperscript{6} There were a small number of agreements reached between the enactment of the Native Title Act and its amendment where the relevant State government is a party.


\textsuperscript{8} For example, with indigenous groups that do not have a registered native title claim.
engagement with mining due to past poor practices, but also a desire to engage with mining over intersecting indigenous and corporate interests, particularly in relation to cultural heritage and environmental protection, as well as economic participation. Indigenous groups frequently aspire to use financial benefits from agreements to strengthen links with traditional lands, cultural activities and language.

Perceived lack of agency: Discussions about historical experiences of marginalisation and exclusion are common within agreement settings. The effects of structural and institutional forces (including the Native Title Act and various business and government policies), as well as social forces (including perceptions of discrimination and social disruption), are felt to limit the negotiation power of indigenous parties. Historical factors impacting group cohesion can also impact negotiation power. These factors include: lack of prior experience in consensus building, limited governance experience, lack of access to legal and financial advice, and historical disputes within groups, among others.

Company Perspectives

Internal coordination: Companies still tend to lack strong integration of agreement commitments throughout the breadth of the organisation. Instead, indigenous commitments tend to be the responsibility of a dedicated unit which, being a non-operational function, can lack organisational influence. Agreement practitioners require better skills in engaging with company-internal stakeholders in order to influence decision making that impacts communities.

Implementing economic engagement commitments: Employment, training and business development are often key components of ILUAs and are a consistent challenge to implement. Overcoming socio-economic disadvantage in order to broaden the labour pool and ensuring that contractors meet requirements for indigenous participation are two recurrent issues.

Both Company and Community

Governance challenges: A range of governance challenges are facing indigenous groups and companies, including: the role of companies in governance, the role of companies in capacity building for indigenous self-governance, appropriate policies on transparency and accountability, formalising decision-making and membership rules, resourcing governance structures, and issues relating to ‘fair’ benefit distribution as communities become more diverse.

Delivering sustainable development: The current legal framework for negotiating ILUAs is difficult to align with leading practices in community development and governance due to focus on legal and financial terms. Particularly for smaller agreements, a lack of baseline research or needs analysis at the outset of negotiation can negatively impact the suitability of agreement terms to local conditions. Emerging leading practice has seen mining companies enter into preliminary agreements in order for initial community planning to occur in early stages of exploration and project design. These initial agreements allow business activities to continue, while the community has time to develop a joint vision in preparation for agreement making that covers mining operation.

Intergenerational equity: ILUAs differ from traditional common law contracts in that they bind all successors to native title to the terms of the agreement. Agreement parties are concerned with
providing benefits to fulfill current community needs, whilst ensuring that the benefits of resource extraction are available to future generations. Future generations’ trust funds are a common component of recent agreements, although many issues relating to their establishment and governance as generations change have yet to be tested.

**Government**

While the state has little direct role in negotiation or implementation of ILUAs, state-funded statutory bodies support the process (e.g. NTRBs and the NNTT). Consistent concerns are the underfunding and under-resourcing of NTRBs (who represent native title parties in negotiations), delays caused by litigation of native title claims and agreements, lack of coordination with regulatory/licencing processes including EIS/SIA, and the adequacy of strategic planning.

**Mexico**

**Historical Background**

Indigenous peoples in Mexico, whom estimates place at around 12-15% of the national population, have exercised little direct influence on the modern mining industry. This situation – which is rapidly changing – is attributable to a complex range of cultural, historical and political factors.

One major determinant is the legal legacy inherited from the colonial and the post-colonial past. Spain, for its part, never recognized indigenous sovereignty; and the nascent, independent state – strongly influenced by modernist, republican ideology – avoided ethnic distinctions in public law. With no acknowledged political precedent, nor contemporary legal personality, indigenous peoples have faced serious obstacles in seeking to defend their interests – not only with respect to mining but across the board.

Two aspects of the prevailing legal framework have made things especially difficult in relation to mining. For one, Article 27 of the Constitution vests ownership of the lands and waters of Mexico “originally in the Nation” and asserts “direct ownership…of all minerals” expressly on behalf of the state; while Article 6 of the federal Mining Law declares mining an activity of “public utility” (*utilidad pública*), which takes precedence over any competing use.

The priority of mining and the lack of legal personality have stacked the cards against indigenous peoples wherever their interests run contrary to mining developments. The lack of personality has, by definition, denied those interests the character of legal rights – rights which, even were they recognized, would be in tension with the state’s declared aim to see developed its mineral resources. Not surprisingly, the combined effect of these arrangements has been to attenuate efforts to avoid or mitigate the adverse impacts of mining on indigenous peoples.

From an indigenous-governance perspective, one factor that has facilitated the emergence and stability of this regime is the historical absence of an indigenous political organization at the national level. Until 1948 there was no national indigenous organization of any kind. The National Indigenous Institute (*Instituto Nacional Indigenista*) or INI, founded in that year,
focused mainly on cultural and educational issues. Tutelary and protectionist in nature, “indigenism” (indigenismo), the resulting operational philosophy, had a fundamentally assimilationist thrust. To the well-meaning and politically well-connected officials and scholars who founded the INI, the point was not to challenge unifying political notions such as citizenship by stressing ethnic difference but, by highlighting the discrepancy between the inherent commitment to universalism and equality and the lived reality of most indigenous people, to seek to generalize their promise. Despite an increase in the direct participation of indigenous people within the Institute in later years, the INI failed to provoke any fundamental change in the government’s approach to indigenous peoples before it was disbanded and replaced by the National Commission for the Development of Indigenous Peoples (Comisión Nacional para el Desarrollo de los Pueblos Indígenas) in 2003.

Indigenous Peoples’ Evolving Legal and Political Status

While basic tendencies remain, the historical relationship of indigenous peoples to mining is demonstrably changing. The clearest evidence of this fact has occurred only within the last year. But these developments are best viewed in the light of antecedents which stretch back at least to the 1990s.

It was then that – building on the large number of indigenous organizations formed in the 1970s and 80s and inspired, amongst other things, by the impending 500-year anniversary of Columbus’s sailing and the post-soviet-era turn in international politics – indigenous groups in Mexico began making rights-based political claims. In 1990, in this newly politicized domestic environment, Mexico was the second country to ratify ILO 169, which in theory imposed a significant duty on the government to consult indigenous communities whenever mining is proposed on their traditional territories. As a general practice, however, the government has failed to discharge its duty to consult indigenous communities under ILO 169 when mining projects have been an issue of indigenous concern.

A further pertinent development occurred in 1992, when Mexico made what was a fundamental change to its republican constitution by revising Article 4 to acknowledge “that Mexico is a multicultural nation originally based on its indigenous peoples.”

Although highly noteworthy, both of these gestures appear largely symbolic, as they remain unsupported by any secondary legislation.

The watershed moment in the evolution of Mexico’s new relationship to its indigenous peoples came in 1994, when on January 1st – the same day the NAFTA agreement came into force – the EZLN, an armed insurrectionary group in Chiapas, one of Mexico’s most indigenous states, occupied San Cristobal and several outlying towns. Peace negotiations between the EZLN and the federal government followed upon the immediate military response, arriving at an initial agreement after two years: the San Andrés Accords. The five basic principles of the agreement – which were discussed and agreed upon by representatives from indigenous groups from all over Mexico – granted autonomy, recognition, and rights to indigenous peoples, including rights to the preservation of the natural resources within their traditional territories, and to decide on their own development plans.
Despite signing off on the Accords, the Mexican government reneged on its commitments and subsequently rejected the legislative proposal prepared by the COCOPA (Comisión para la Concordia y Pacificación), the congressional committee charged with overseeing the talks between the two sides. The Mexican government produced a legislative counterproposal which was silent on several central points, including the jurisdictional and territorial rights provisions contained in the Accords. That proposal was duly rejected by the EZLN and the two sides persist, to this day, in a stalemate.

Although the legislative outcome that the EZLN and other indigenous groups had come to hope for was not achieved, the Chiapas episode did much to raise the public profile of indigenous issues among the general population and to engender effective support for their claims. Echoes of this newfound moral solidarity arguably are evident today in the ready endorsements by celebrities and the fundraising concerts that have been organized in support of various indigenous groups opposed to mining within their traditional lands.

A more recent precedent is the Constitutional reform of June 2011, whereby human rights obligations to which Mexico commits in international treaties have been given constitutional effect. This strengthens the duty to consult under ILO 169, by virtue of its status as an international treaty. Moreover, in a recently delivered interpretative judgment, the Supreme Court has extended the related protections further by declaring Mexican courts to be bound by the jurisprudence of the Inter-American Court of Human Rights, including cases in which Mexico did not participate.

New Relationship of Indigenous Peoples to Mining

Several developments within the last year signal the advent of a new relationship between indigenous peoples and mining in Mexico and point to the likely direction of further change.

Perhaps the clearest testament to this new relationship is the intervention by Mexico’s National Commission of Human Rights in defence of the Wixárika people, whose sacred site, Wirikuta, was allegedly jeopardized by the federal government’s granting mining concessions in the state of San Luis Potosi. In a 72-page Recommendation published in September 2012, addressed to officials at all three levels of government, the Commission found violations of a number of collective rights, including rights to cultural identity, territory and consultation.

In an extensive review of the public administration of the mining industry in Mexico, the Recommendation points up many process failures and a serious disconnect between the state-level and federal governments in respect of officially designated protected areas. Beyond calling to account those responsible for the misadministration, the Commission recommends that the concessions granted in the area near Wirikuta be abrogated.

With the Commission’s help, a Wixárika group, the “Wirikuta Defence Front” (Frente en Defensa de Wirikuta), brought an action in federal court claiming that, in granting the contested concessions, the government had failed in its obligations under ILO 169 to engage them in free, prior and informed consultation. On February 27, 2012 the court found in their favour and granted a temporary injunction preventing further mining activities until the matter is sorted out.
This is the first time the judiciary has defended an indigenous group against a mining company, and *Wirikuta* stands to date as the only such conflict officially recognized by the Mexican State.

Indigenous peoples’ increased stature in relation to mining is evident also in the ruling PRI party’s proposal for reforming the mining law. President Peña Nieto’s “Pact for Mexico” (*Pacto por México*), the policy manifesto he signed along with the leaders of the federal opposition parties on his second day in office, contains as one of its commitments a pledge to reform the mining law to ensure greater benefits for local communities. The current proposal is to collect a royalty from operating mines that is to be distributed, in part, to communities affected by mining. Investment decisions over the funds collected are to be made by a newly created agency within each mining state called a Regional Development Committee (*Comité de Desarrollo Regional para las Zonas Mineras*). The composition rules for these committees stipulate that, in addition to the political and corporate members, affected indigenous peoples each are entitled to a representative. The proposal is silent on exactly how these representatives are to be chosen, which implies that, likely, any passable selection procedure would do. In the absence of any prescribed accountability mechanism, admittedly, the representativeness of these arrangements is open to question. But the mere provision for representatives within the legislative proposal is nevertheless a sign of indigenous peoples’ growing power.

A separate initiative with the potential to increase the power of indigenous peoples recently emerged within debates over the mining-law reform in the Senate. Senators from two left-wing parties, the Democratic Revolution Party (PRD) and the Work Party (PT), have taken up a citizens’ initiative to revise Article 6 of the Mining Law to downgrade mining from a “public utility,” which takes precedence over competing land uses, to a “public interest,” which would not. The objective of this proposal is to subordinate mining to agriculture, tourism, and conservation. Success in this endeavour however would have the additional effect of strengthening the legal position of indigenous peoples who oppose mining on their traditional territory.

**Conclusion**

The governance structures that have lent stability to the Mexican mining sector throughout the recent period of its unprecedented growth are currently changing. Things are moving from a condition of near-absolute state control to one which enables indigenous peoples to better defend their interests in the face of mining on their traditional territories. The situation is still in flux, but it is already clear that Mexico has crossed the threshold into a new era. The success of all parties will be determined by how well they mutually adjust to this emerging reality.
Colombia

Context: Indigenous and Black Communities in Colombia

Colombia is at a crossroads when it comes to human rights and extractives. It boasts one of the most progressive human rights frameworks in the world, with ethnic rights well protected in law, and increasingly making headlines with the cutting-edge judgments by its Constitutional Court. At the same time, the Santos government is actively promoting investment in extractives, and mining in particular, as the ‘engine of growth’ for the country. With the conclusion of free trade agreements with the United States, Canada and several other important partners, and the widespread perception that Colombia is largely post-conflict, investments in potential extractive projects are set to increase dramatically.

Standing squarely in the middle of this crossroads are Colombia’s ethnic peoples (as Indigenous and Afro-Descendant peoples are known in Colombia), whose ancestral territories contain a large proportion of the resources of interest to companies. Indeed, Colombia’s 102 Indigenous Peoples (some 3.3% of the country’s population) possess recognized title to roughly 30% of the country’s landmass, with Afro-Descendant Peoples (some 11% of the population) holding collective title to some 6 million hectares. Official recognition of the ancestral lands of both Indigenous and Afro-Descendant Peoples is set to increase as land claims negotiations continue.

Ethnic Rights Recognition

Colombia’s legislative and constitutional framework is the envy of many ethnic peoples worldwide, who see the country’s human rights commitments as exemplary and leading-edge. Among other relevant instruments, Colombia has ratified ILO Convention 169 on Indigenous and Tribal Peoples, has supported the UN Declaration on the Rights of Indigenous Peoples, and has ratified the Convention for the Elimination of Racial Discrimination. It has also ratified the American Convention on Human Rights, giving Colombia’s Indigenous and Afro-Descendant Peoples access to the Inter-American System and the Inter-American Court on Human Rights. Colombia currently plays an important role in the UN Security Council, and has welcomed the establishment of the UN Office of the High Commissioner on Human Rights in Colombia.

Among other specific rights, the Colombian Constitution (1991) recognizes Indigenous Peoples’ territories as special entities with administrative and budgetary autonomy, the right of Indigenous Peoples to apply their own justice systems within their territories, and the right to self-government. Further, the Constitutional Court has issued far-reaching decisions upholding Colombia’s national and international human rights commitments and international jurisprudence. (The most recent decisions in 2013, however, mark a shift in this respect, with regressive judgments that Indigenous and Afro-Descendant organizations attribute to

9 This perspective is based on the results from an inter-ethnic participatory action research project with Afro-Descendant communities in the Palenke Alto Cauca-Proceso de Comunidades Negras, and 32 Embrera Chami communities the comprise the Resguardo Indígena Cañamomo Lomaprieta in Caldas that took place between 2009 and 2012. More specifically, it draws from the 2012 publication, “Holding Extractive Companies to Account in Colombia: An Evaluation of CSR instruments through the lens of Indigenous and Afro-Descendant Rights” by Viviane Weitzner (available at www.nsi-ins.ca).
manipulations in the selection of the magistrates). And Law 70 of 1993 upholds Afro-
Descendant communities’ rights to collective property, to cultural practices and natural resources
use, while guaranteeing their economic and social development.

Implementation Gap

Yet despite this progressive legal and policy regime, two key factors undermine implementation:
(1) the gap between government commitments (on paper) to human rights, and the lack of
resources and appropriate institutional structures to implement these commitments; and (2) the
internal armed conflict.

(1) Institutional Weaknesses

Serious shortcomings in the current government bureaucracy include:

- An understaffed and under-resourced Defensoría (ombudsperson) for dealing with human
  rights violations
- Severe human and financial resource constraints for the Directorate in charge of prior
  consultations
- An outdated Decree (1320) for consultation, which has been deemed unconstitutional and yet
  is still in place.
- An environmental impact assessment process that does not require social or human rights
  impact assessment, and that does not monitor what takes place in the field or assess
  cumulative impacts;
- A new centralized permitting agency for mining licenses that was established unilaterally and
  without due consultation of ethnic groups; and
- Reduction in power, scope of action and resources for the former General Directorate of
  Indigenous Affairs.

As well, there is a vacuum in appropriate regulation to implement free, prior and informed
consultation and consent. The reform to the Colombian mining code was quashed for lack of
consultation with ethnic peoples – yet it appears that a new version is being negotiated behind
closed doors. And there is still a failure to implement the constitutional requirement for
consultation/consent with ethnic peoples prior to permitting programs for exploration or
exploitation (required in Article 15(2) of ILO Convention 169) and prior to issuing concessions.
These institutional weaknesses are heightened by wide-scale corruption.

(2) Changing Face of the Armed Conflict

Despite peace talks and attempts to demobilize paramilitaries, there are increasing, not
decreasing, assassinations of social leaders, as documented by the United Nations Human Rights
Commissioner’s Office in Colombia. The National Indigenous Organization of Colombia
(ONIC) documented that 117 Indigenous people were killed in 2011, including leaders involved
in the land restitution process. Demobilized paramilitaries have remobilized into illegal armed
groups known as ‘bandas criminales’, or BACRIM, and are becoming increasingly involved in
small-scale and medium-scale mining to fuel their activities, often in-migrating into ancestral
territories. The result is an escalation of violence and massacres. The Colombian State is failing to implement precautionary measures ordered by the Inter-American Commission on Human Rights to protect at-risk Indigenous communities, as well as the Constitutional Court’s (2009) Autos 004 and 005 concerning forced displacement of Indigenous and Afro-Descendant Peoples.

The Extractive Sector in Colombia

It is in this complex landscape of weak governance with regards to human rights protections and armed conflict that investment in the extractive sector is taking place. In 2011, foreign direct investment (FDI) more than doubled to $14.4 billion, up from $6.8 billion in 2010. FDI in mining, oil and gas jumped from 10% overall in 1997 to 77% overall in 2009, with a slight slowing in 2010 to 65% (Rudas Lleras 2011). Canada leads the pack of investors, with its companies accounting for 65% of all mining investments, and over 75% of oil and gas investments in the country. Requests for concessions for extractive projects now cover over 59% of the country’s land mass.

Key Flashpoints/Conflicts: Ethnic Rights, State and Corporate Governance

There are several types of key flashpoints or conflicts that are spurred in the context of minerals activities in Colombia, including:

- **Fundamental/conceptual issues** around: models of ‘development’ (‘buen-vivir’/ good-living vs. economic growth); conceptions of territory and responsibilities to future generations vs. conceptions of territory as embedded with resources to be extracted for the national interest; issues around ownership of the subsoil and who has final decision-making power; ancestral artisanal mining (‘aprovechamiento’) vs. large-scale mining; and recognizing and implementing free, prior and informed consent as a right that goes beyond veto.

- **‘Governance’ issues affecting the Colombian State**, such as: issuing concessions and permits without consent, which contravenes constitutional requirements; lack of clear regulations/process for consent; the mining code crisis, and reversion to the previous mining code due to lack of appropriate consultation with ethnic groups; inadequate EIA processes; the State trying to push reforms through too quickly without appropriate consultation processes at the national level.

- **‘Governance’ issues affecting the countries of origin of companies.** In the case of Canada, where many companies investing in Colombia are headquartered, these include: relying on voluntary CSR instruments, which have not worked to protect human rights violations in Colombia; the need for effective complaints mechanisms for remedy and sanction (e.g. an ombudsperson); access to home country’s judicial system; legislative measures for holding companies to account (as observed by the Committee for the Elimination of Racial Discrimination in 2007 and 2012 in its reports on Canada).

- **Corporate ‘governance’ issues in Colombia.** Research has shown that CSR instruments and policies do not translate into respecting human rights in practice. In Colombia only major mining companies subscribe to international CSR instruments; but they have poor knowledge.
of these instruments. They have weak, unverified reporting, and to lower standards than companies commit to elsewhere. They pick and choose which human rights incidents to include or ignore. They often do not make their reports available in Spanish. Communities are not given – and do not know – company CSR policies. There are major loopholes in reporting, as junior companies working in JVs with majors do not have to report, and exploration – where many conflicts are sparked -- is not covered in reporting (only operations). Generally, companies are ill-equipped for respecting human rights in Colombia: they start consultations ignoring due process (the state needs to be involved and trigger the process); ignore indigenous and black populations whose territory has not been officially recognized; fail to provide full information on projects in culturally appropriate forms; enter ancestral territories to get samples without informing or obtaining consent from Traditional Authorities; and offer cash payments to individuals for access

- ‘Governance’ Issues for Indigenous Peoples and Black Communities: These are complex, and range from the violence, threats and deaths of leaders who speak up for the rights of their people; to lack of information on projects and concessions affecting their lands, even though consultation and consent is required for all activities affecting ancestral lands; to criminalization of ancestral miners by the State. Communities such as several Black Communities in the Palenke Alto Cauca, and Indigenous communities of the Resguardo Indigena Cañamomo Lomaproeta have started strengthening their organization by developing their own rules and regulations around free, prior and informed consent, and taking judicial action, such as the Constitutional Court decision (T-1045A) that the community council of La Toma in Cauca won in 2010, staving off forced relocation and suspending all mining activities in the area by third parties until appropriate consultation/consent processes are undertaken. These communities are conducting their own impact assessments, demarcation of territories and documentation of ancestral mining history.

Conclusions:

Several key questions and considerations emerge from the Colombian context concerning governance, rights and economic growth issues. A critical concern is the need to consider Afro-Descendant communities alongside Indigenous communities in decision-making around extractives; both ethnic groups are recognized in the Colombian Constitution and under international law and jurisprudence.

However, even when rights are recognized, in Colombia it can be very difficult to fully respect those rights on the ground. The Colombian armed conflict poses enormous challenges, raising serious questions as to whether free, prior and informed consultation and consent can be upheld. Leaders who speak up for their rights are often singled out and threatened with death. In the context of violence, what criteria should investors, home countries and companies develop for no-go zones in Colombia? Already, communities are establishing their own rules and regulations to put in place temporary moratoria until such time that conditions are appropriate for decision-making processes to be free from pressures and threats from illegal armed actors.

Turning to civil society, what are the roles and responsibilities of academics and others involved in the minerals sector discussion in Colombia for tipping the immense power imbalance and
enabling conditions for Indigenous and Afro-Descendant communities to freely determine whether they do—or do not—want mining and related projects on their territories; and if they do, on what conditions? And finally, how can all these issues be discussed among the various actors and rights-holders openly and honestly? There is an enormous challenge in Colombia to get the equation ‘right’ in terms of substantive dialogue among State representatives, companies and Indigenous and Afro-Descendant Peoples, given the lack of trust and the egregious human rights violations that have taken place.

In summary, Colombia is unlike the other countries discussed at the Forum in two key respects: (1) the country officially recognizes both Indigenous and Afro-Descendant Peoples as rights holders; and (2) it is in a situation of armed conflict, which means violence and illegal armed groups are at the centre of concerns. Of the other countries discussed at the Forum, Mexico comes closest to Colombia in terms of needing to assess the impacts of narco- and human traffickers and the associated levels of violence that affect rural areas where mining activities often take place.

Peru

Mining was an economic activity of indigenous people in Peru long before the Spanish colonization began in the sixteenth century, but in the time since that dramatic transition until very recently indigenous people have been totally excluded. During the past twenty years, Peru has attracted very large investment from multinational mining companies, and the frequency of conflict between communities and mining projects has increased. In 2013 Peru’s governmental ombudsperson, the Defensoría del Pueblo, reported that of 145 cases of community conflict, 105 involved mining activities. The principal reasons for conflicts are: environmental impacts, right of access to land and/or water and the distribution of economic benefits. Many of these conflicts involve indigenous communities.

There are a number of underlying sources and drivers of conflict in the mining sector. The basic driver is the aggressive consolidation of a pro-export economic model, which is placing high pressure on Peru’s non-renewable natural resources, and on indigenous traditional territories. Until now the social justification for this model has been that massive employment in exploration and construction is the trade-off benefit for the large-scale extraction of mineral resources and the accompanying risk of environmental pollution. However, this model is coming to an end, as the industry matures and is characterized more by established mines that generate fewer jobs than the finding and building of new mines.

The lack of an effective distribution of economic benefits to local areas of mining projects is also a major source of tension and conflict. As recipients of compensation from mining projects, labour unions have declined in importance, and they have effectively ceded to local communities the lead role in demanding financial and other benefits from mining. While the government transfers a significant percentage of mining generated revenues to sub-national governments, those governments generally lack the capacity to invest those funds in social improvements. Consequently, local communities feel that they receive little if any improvement in their standard of living.
Environmental impacts and risks are also a leading source of tension and conflict, involving mines, local communities, non-governmental organizations, and sometimes sub-national governments. These disputes have political ramifications, as they stimulate communities and civil society actors to attack the government for not implementing the country’s environmental regulations, and leaving many mines virtually self-regulating.

Corruption and the lack of transparency and accountability both in the public sector and the private sector accentuate disputes around both the substance and the perception of issues of revenue distribution and environmental regulation.

Peru ratified ILO169 in 1994, and thus the government is legally required to consult with indigenous people before authorizing industrial development on traditional territories. However, until now, as in all other Latin America countries, this law has been very weak in implementation. In 2011, the government enacted a new Prior Consultation Law to provide guidelines for discharging the duty imposed by ILO 169, with a view to reducing the number of social conflicts that have arisen around extractive sector (oil, gas and mining) projects. However, the government then indicated that the new law would apply only to indigenous peoples in the Amazonian region and not in the Andean highlands, either because or in spite of the fact that currently there are over 50,000 mining concessions in the Andean and coastal region, but fewer than 4000 in the Amazonian region. It seems probable, therefore, that until Peru resolves the dispute over defining “indigenous” in a broadly acceptable manner, the government will continue to be seriously deficient in discharging the duty to consult indigenous people about mining projects, much less to seek their consent. The near-term outlook, therefore, is for continuing, and probably deepening, conflict.

Nevertheless, the government has taken positive steps to increase dialogue (“tables”, or mesas) around proposed mining projects among local communities (whether or not they regard themselves as indigenous) and other stakeholders. There are cases emerging where this process has succeeded in reaching consensus and practical strategies to address local issues and concerns. However, not all dialogue initiatives around mining projects in Peru are so successful.

**World Bank and Inter-American Development Bank**

For thirty years, the World Bank has had a safeguard policy on indigenous peoples. The necessity for such a policy is evident, given the Bank’s mission of poverty reduction and sustainable development. Indigenous peoples are among the poorest and most socially excluded populations in the world. They are inextricably linked to the land on which they live and the natural resources on which they depend, the loss of which threatens their identity and cultural survival. Indigenous peoples can be severely impacted by development projects, but they can also make a necessary and vital contribution in ensuring that development is environmentally, socially, culturally and economically truly sustainable.
Currently, all of the Bank’s activities that potentially affect indigenous peoples are subject to Operational Policy 4.10, which requires the Bank to ensure that “the development process fully respects the dignity, human rights, economies and cultures of Indigenous Peoples.” This objective is achieved through: (1) a “do no harm rationale”, i.e. avoiding potentially adverse effects on indigenous peoples, and when avoidance is not feasible, minimizing, mitigating and compensating for such effects; and (2) a “do good rationale”, i.e. ensuring that indigenous peoples receive social and economic benefits that are culturally appropriate and gender and inter-generationally inclusive.

The Bank’s policy is triggered whenever indigenous people are present in or have a collective attachment to geographically distinct habitats or ancestral territories in a project area. It is noteworthy that the policy also applies to indigenous groups who have lost their formal title to their ancestral territories because of conflict, government resettlement programs, dispossession from their lands, natural calamities, or incorporation of their territories into urban areas as long as they still articulate a collective attachment to these territories.

In deciding whether to proceed with a project that has triggered OP 4.10, the Borrower must document that there has been an effective process of “free, prior and informed consultation”, which is culturally appropriate, gender and intergenerationally inclusive, conducted in good faith, voluntary, free of interference and non-manipulative. The Borrower must also ascertain whether the potentially affected indigenous people have provided their “broad community support” for the proposed project, expressed either through their representatives, community decision making process or other form as agreed during project preparation. The government must then prepare an Indigenous Peoples Plan (IPP) as outlined in OP 4.10 and specifically Annex B, that prescribes the actions required to ensure: (1) avoidance of adverse impacts and/or mitigation and compensation measure; and (2) culturally appropriate economic and social benefits. Certain issues may require special attention such as the legal recognition of customary land rights, the commercial development of natural resources or of cultural resources, or the resettlement of indigenous communities.

The World Bank is currently undergoing a comprehensive review of all of the social and environmental safeguards. Updating the current safeguard policy on indigenous peoples is a priority, given the advances in the recognition of indigenous people’s rights during the last few years, notably the United Nations Declaration on the Rights of Indigenous Peoples (2007), which prescribed the norm of “free, prior and informed consent” as a fundamental right. Other emerging issues affecting indigenous peoples also require further consideration, such as the relationship of customary land tenure to natural resource development and the multiple potential effects of climate change on traditional ways of life. The updating of the Operational Policy on Indigenous Peoples is expected to be completed in 2015.

The World Bank’s environmental and social policies are considered by NGO’s, Development Financial Institutions and Governments as one of the highest standards in the world in terms of safeguards for development assistance. It is expected that the new updated set of policies will have a positive influence on many other actors, including governments, which will allow for improved protection of Indigenous Peoples and better strategies to address their developmental needs.
The Bank exercises its leverage on governments through a “carrot and stick” approach, stressing the value added in terms of sustainability if projects related to natural resource projects beneficially include the affected indigenous people first, but also emphasizing that compliance with the Bank’s safeguard policies is mandatory.

Based on the Bank’s experience with indigenous peoples and natural resource projects in Latin America and the Caribbean, reactions from governments regarding the triggering of the Bank’s safeguard policies vary. There is a perception that the safeguards are external norms that are being imposed, even though their own constitutions and laws may already have language to the same effect. Often, the solution is not new legislation, but more effective enforcement of existing laws. This is especially true with respect to the duty to consult indigenous peoples about industrial projects that may affect them, given that a number of countries have national legislation that actually exceeds the current standards of the Bank.

As indicated above, compliance with the Bank’s safeguards is a joint responsibility. The Bank has the responsibility for screening and deciding whether to trigger a policy but the Borrower has the responsibility to undertake the social assessment, to conduct free, prior and informed consultation and to document broad community support for the project. The Bank reviews the process and outcome of the consultation process in order to satisfy itself that the affected communities have in fact provided their broad community support. This may include a review of the consultation plans and terms of reference, reports of any meetings or consultations, visits to project affected communities to verify their support, and discussions with the social specialists hired by the government to undertake the safeguard preparation activities, etc.

Based on many years of experience, the Bank has identified that there are key areas that could be strengthened in order to improve the link between the reality on the ground and the requirements of the safeguard policies: (1) building local capacity to improve participation and decision making in the consultation process; and (2) supporting local institutions to improve organizational capacity at the project level.

Currently, efforts to improve local capacity are being implemented on a project-specific basis, with the objective of increasing the ability of indigenous communities to engage in consultation and to make decisions in their own best interest. The intended outcome is that the communities will be better informed, more self-confident, and generally more capable project partners. This sort of program also gives the Bank a more consistent engagement with the communities, which can be very helpful in the process of monitoring and evaluating both the consultation and decision-making process prior to funding the project and during the subsequent performance of the project.

Local institutions that are credible, effective and representative are needed by all development partners to support indigenous communities in resolving differences and advancing collective interests. Overall, they can strengthen the channels of communications, relationships and trust in the local area, reinforcing social capital in a manner that will optimize the actualization of potential benefits from a nearby resource project.
The Inter-American Development Bank has a program on “Strengthening Governance in the extractive industries in Latin America and the Caribbean”, whose objective is to provide countries in the region with a package of support in four areas: (i) transparency and access to information (ii) legal and regulatory reform; (iii) capacity building, within governments and civil society, to manage socio-economic and environmental impacts; (iv) knowledge generation and dissemination on extractive industries. This project is part of a larger process of internal dialogue through which the IADB is developing its strategy for the sector. A key issue identified in this process has been the limited and uneven capture of the benefits of investment in the mineral sector at the national and local levels. Two fundamental principles of good governance in which the development of the strategy is being developed is the recognition of two major challenges, as countries strive to maximize the benefits from the sector, which are to: (1) minimize the impact of the industrial activity on the environment; and (2) ensure inclusiveness and fairness in the distribution of economic benefits. It is particularly important that the needs and expectations of the potential recipients of benefits are adequately understood by decision-makers. Participatory decision-making is essential for a shared determination of distributional fairness to be achieved.

Interventions linked to the mineral sector at the IADB have focused on four issue areas: infrastructure, skills and technology, institutions, and ecosystems and environment. The IADB has supported its clients through training, financing and applied research. Ultimately, the objective of these actions is to help leverage capital investment in the sector, and promote positive linkages with the local and regional economies. Ideally, manufacturing and service companies or transportation infrastructure and facilities which accompany mining projects, contribute to more that the limited needs of mining projects, they may create multiplier effects for to the overall economy over the longer term, beyond the life of the mine.
Wednesday’s Aboriginal Dialogue was organized and conducted by members and, in some cases, representatives of Canadian aboriginal and Latin American indigenous communities. The conversation considered what works and what does not work with the present forms of decision-making and engagement regarding mining on traditional territories. Individuals spoke for themselves and were aware that their comments were not to be attributed to them. Though consensus emerged on a few topics, this was not a goal of the discussion.

This summary of the Dialogue, which again simply reflects participants’ comments rather than a consensus position, is written from the perspective of the participants:

- **Jhaimy Alvarez-Acosta** - Principal of Children of the Seven Rays; Andean Keeper of Ancient Wisdom, a Traditional Curandero (Healer) from Cusco, Peru who has been trained and initiated in the wisdom teachings of the Northern region of Peru
- **Shawn Batise** - Executive Director of the Wabun Tribal Council in Timmins, Ontario; negotiator for several major agreements including in the areas of mining and energy; member of the Matachewan First Nation
- **Cynthia Callison** - Partner at Callison & Hanna; general counsel for First Nations in matters including land negotiations and resource development; member of the Tahltan First Nation.
- **Luis Felipe Duchicela** - Senior Advisor for Indigenous Peoples, World Bank; former Executive Director, Amazon Conservation Association; former National Secretary of Indigenous Affairs of Ecuador
- **Darwin Hanna** - Partner of Callison & Hanna; general counsel for First Nations in major initiatives in BC and the NWT; Adjunct Professor, Faculty of Law, University of British Columbia, teaching the course First Nations and Economic Development; member of the Nlaka’pamux First Nation
- **Peter Kirby** - President and CEO, Taku River Tlingit Corporations (Taku Wild, Taku Land Corporation, Xeitl Limited Partnership; and the Atlin Tlingit Economic LP)
- **Armand MacKenzie** - Consultant on legal issues for the Innu Nation in Quebec/Labrador; Senior Director, Government and Stakeholders Relations, Tata Steel Minerals Canada; Private practice lawyer working for Aboriginal communities; member of the Innu Nation of Nitassinan
- **Starr Muranko** - Professional dancer and choreographer and the current Artistic Associate with Raven Spirit Dance in Vancouver; mother is from the Moose Cree First Nation in Northern Ontario.
- **Richard Simon** - Director of the mining program and Professor of Mining Engineering, École Polytechnique de Montréal; and Algonquin.
- **Sheldon Tetreault** - Partner of Guerin Tetreault & Associates; former Director of Governance Advisory Services for the National Centre for First Nations Governance; former Senior Administrator for the Lil'wat Nation. Of Métis and Francophone heritage.
• **David Walkem** - Chief, Cooks Ferry Indian Band; Vice-Chair, Nicola Similkameen Innovative Forestry Society; formerly, founding President of the First Nations Forestry Council; member of the Nlaka'pamux First Nation

• **John Ward** - Taku River Tlingit First Nation elected spokesman; former Heavy Duty Mechanic, General Manager of a Construction Company, Regional Consultant for the Yukon Native Alcohol and Drug Abuse Program, Panelist on the Transboundary Pacific Treaty Panel.

• **Michael Fox** (Moderator)- President of Fox High Impact Consulting, specializing in Aboriginal processes, participation, and partnership development in the energy and mineral sectors; Member of the Board and co-chair of the Aboriginal Affairs Committee, Prospectors and Developers Association of Canada; member of Weenusk First Nation.

• **Kristyna Bishop** (moderator) - World Bank, Sustainable Development Department, Latin America and Caribbean Region; Indigenous Bar Association; member of the Chippewas of Rama First Nation

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**Morning – The state of governance (observations from perspective of participants)**

<table>
<thead>
<tr>
<th>Factors that Disempower</th>
<th>Factors that Empower</th>
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<tbody>
<tr>
<td>• Lack of recognition of Aboriginal title (current state is one of partial recognition) and self-determination (reference to changing names of sacred sites and general discrimination and colonial attitudes was one example)</td>
<td>• Development, especially when it is enabled through our own educated members and framed by Aboriginal people themselves</td>
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<td>• Residential school legacy</td>
<td>• Cultural survival</td>
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<tr>
<td>• Lack of funding for FN governance capacity development and overall inconsistency regarding government to government relationship</td>
<td>• Desire to improve material conditions</td>
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<tr>
<td>• Our historical context limits our current options; we work within those constraints</td>
<td>• Industry agreements, recent court decisions, and select government policies</td>
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<tr>
<td>• Lack of direction from governments to industry to negotiate agreements</td>
<td>• Economic development is making us stronger, richer and healthier</td>
</tr>
<tr>
<td>• Government meddling in agreement-making</td>
<td>• Knowing who we are and our traditions; self-determination; developing our own constitution, land use plans, mining policy; respect for Mother Earth etc.</td>
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<tr>
<td>• Lack of open-mindedness by governments to alter the status quo.</td>
<td>• Development of consultation protocols, territory sharing protocols, use of money protocols, election codes, etc.</td>
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<tr>
<td>• Lack of willingness by industry to invest in our human resource capacity, and to take the time to know who we are</td>
<td>• Sharing of resource revenues among FNs (either through benevolence or negotiation)</td>
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Looking Forward

- Our history since contact has been one of non-self-determination
- IBAs are about accepting the fact that there will be impacts
  - Dealing with individuals within a collective can be challenging:
  - Dissenting voices need to be heard and accommodated
  - Especially impacted individuals can be accommodated/compensated
- We need new language to reflect the new relationships between stakeholders

Afternoon – How to improve governance (prescriptions from perspective of participants)

Context of the Dialogue based on discussion at the conference during the previous two days: (1) The key issues may be summarized as: self-determination/internal challenges; capacity (ability to do it our way); and relationships to others; and (2) these are not always compatible.

Relationships to Others

- We need more indigenous people on corporate boards, perhaps there is a need to see this be mandatory
- Bonds posted for reclamation, this with an increased focus on whole project, not just negotiation phase but emphasis through closing of a mine
- Perhaps there is room for certification programs pertaining to Indigenous community relations
- There is a need to do more for non-Aboriginal communities impacted by mining, forging partnerships
- There needs to be a greater sharing of the burden of the three pillars of sustainability by all three parties (governments, communities and companies)
- There needs to be a recognition of First Nations as governments; need to involve First Nations in formal permitting processes
- Crown revenue sharing is a must across Canada, though, if it does, it should not end IBAs
- Though First Nations may desire to garner monies from ventures, federal transfers must continue as a matter of rights
- Companies are not meeting environmental expectations, greater emphasis needs to be placed on this

Capacity

- There is a need to build capacity between all stakeholders; communities, companies and governments
- We all need to learn a new language to make everything make sense to everyone
  - E.G. company axiomatic language like “this project will not get done if there is no financial return for investors” must be matched by new First Nation-inspired axiomatic language like “this project will not get done if there is only impact without sufficient benefit for the First Nation as determined by the First Nation”
- First Nations need to develop their own constitutions, mineral exploration and mine development policies, etc.
Before training can be done, FNs need to complete their own ‘learning needs’ assessments within their communities

**Internal Challenges/Self-determination**
- We cannot count on Corporate Social Responsibility to deliver benefits; we need to act on our rights to obtain better deals
- We cannot expect companies to fix all social ills; there is already considerable social investment, as such First Nations need to take greater responsibility for their social challenges
- We need better use of money and revenue to build the social fabric of communities
- There is a real need to get the youth involved and engaged with governance in order to moved toward long term leadership planning
- Need to consider how to separate the political from the technical aspects of mineral extraction
  - This said, there is a need to maintain a close relationship with the political leadership as aboriginal title is vested in the community, not a non-profit or independent organization
This workshop consisted of a facilitated discussion focused on three questions:

- What are the norms and principles that underlie and give rise to good governance (defined as effective decision-making and engagement) in indigenous communities, mining companies and governments?
- What are the practical requirements or capacity needs for good governance to occur in indigenous communities, mining companies and governments?
- What are the complementary roles and responsibilities of indigenous communities, mining companies and governments that together will form an integrated and comprehensive approach to decision-making and engagement around mining projects on traditional territories?

The discussion at the Workshop, as with other parts of the Forum, was not intended to produce a consensus but rather to elicit a potentially productive variety of insights and perspectives. Consequently, certain statements in this Report on the Workshop may be inconsistent with others.

**Underlying Norms and Values**

When the leaders of an indigenous community, a mining company, or a government make and implement decisions or communicate and interact across the institutional boundaries of the people that they represent, their actions and words reflect or express certain underlying norms or values. Therefore, the objective of achieving effective governance requires that attention be given those underlying motivators or enablers of decisions and actions. Part of the Forum discussion explored what norms and values enable leaders to make and implement effective decisions and enable communities, companies and governments to develop productive relationships. The following synopsis captures some, but by no means all, of the insights that emerged during that discussion.

The structures of governance vary significantly across the spectrum of indigenous communities, mining companies and governments. So general statements about norms and values related to good governance related to indigenous peoples and mining must remain sensitive to that variety. However, at a fundamental level, every form of governance requires on-going communication, among decision-makers, between decision-makers and their constituencies, and across the boundaries of communities, companies and governments. Effective communication requires the capacity to engage, which consists of the ability to: (1) listen well, with mind and heart; (2) reciprocate with thought and feeling; (3) allow time for various iterations of the same conversation; and (4) keep the conversation open-ended, which means continuing the communication beyond the life a mine.
Relationships begin with communication, and deepen through the development of attitudes of mutual trust and respect. Trust emerges as individuals or communities who are engaged in a relationship progress towards understanding and respecting each other’s values, i.e. the convictions or concerns that significantly influence or possibly dictate decisions and actions. Once the values of individuals or groups are mutually and correctly understood, their behaviour should become mutually predictable. If decisions or actions of one party in a relationship surprise the other party, it indicates that the underlying values that cause such unexpected behaviour have been inadequately understood by the surprised party.

There is an evident lack of consistency in approach, values and actions in the mining industry. Different mining companies are motivated by company-specific values, irrespective of the statements on shared values by industry associations. In some cases, the same mining company may act differently at different projects, reflecting an absence of company-wide core values. Indigenous communities are right, therefore, to feel uncertain about the trustworthiness of a mining company upon first encounter. Time must be allowed for trust to be developed. Not until the indigenous community reaches an understanding of the underlying values of the company, and observes that the company’s decisions and actions are consistent with those values, will trust emerge.

The priority values of a mining company and an indigenous community are understandably quite different. The challenge for both is not only to understand but also to respect each other’s values. Mutual respect is the foundation for the level playing field on which a relationship of equals between the company and the community can develop. Differences in values and disagreements over priorities can be discussed constructively, if the relationship is one of mutual respect.

Respecting each other’s values may be easier to prescribe than to practice. Values affect perceptions. The rationalistic, analytical, secularist values of a company will filter data differently from the intuitive, holistic, animist values of an indigenous community. At the extremes, conflicts in perception are the result: “facts” versus “myths”, scientists versus shamans, executives versus elders, net present value calculations versus concerns for future generations. Of course, most conversations take place not at the polar ends of this spectrum, but somewhere in between. Nevertheless, being sensitive and showing respect to one another’s value lenses is a challenge to both parties’ capacity for engagement.

Fairness is an essential characteristic of good governance, both fairness in the way decisions are made and fairness in the outcome. Decisions by indigenous, corporate or governmental leaders, to be accepted and respected by their own constituencies and others, must be perceived to be procedurally fair. Some of the descriptors listed above for evaluating the quality of governance (representative, accountable, transparent) are among the indicators of procedural fairness. Mutual respect among all participants in a decision process is another driver of procedural fairness.

A level playing field is indispensable for a fair engagement process between an indigenous community and a mining company, which means that the community’s capacity to engage may need to be strengthened, if it is to promote its best interests effectively in the face of the company’s superior technical, financial and managerial resources.
One would expect that a fair process of engagement and collective decision-making should lead to a fair distribution of risks and benefits. However, distributive fairness is a matter of perception, and as just stated perception is filtered through values. Within the values hierarchy of a mining company, the company’s shareholders, as the risk takers who invest the capital to make the mine possible, generally perceive themselves to be entitled to the largest direct share of the financial benefits from mining. Also, from a mining company’s perspective, the government’s entitlement to financial benefits, through taxes and royalties, should not exceed that investors. Of course in many jurisdictions, governments may perceive their entitlement to direct financial benefits from mining to be equal, if not superior, to that of mining companies, given their role as owners or stewards of the sub-surface resource, whose development is subject to their sole control and discretion.

On the other hand, the direct share of financial benefits received by indigenous communities, on whose traditional territories the mine operates and whose lives are most directly affected, are relatively minor by comparison, though other benefits may be received in the form of infrastructure development, social investments in the community and business opportunities. It should not be surprising, therefore, that the currently common pattern of revenue distribution from mining is perceived as unfair by many indigenous communities.

Obviously, the distribution of financial benefits from mining in a manner that is perceived to be fair by all three parties will be difficult to achieve. Nevertheless, this tension in perception and values, if addressed honestly through engagement processes characterized by deepening mutual understanding and respect for one another’s values, should be capable of inspiring sensitive and creative responses. A fair distribution will be closely tied to a fair process.

There is also a close tie between responsibilities and rights. In principle, the right holder has a responsibility to recognize and respect the rights of others, as a matter of reciprocity for their respect of his or her right. This is the ideal, but the reality is that rights-holders, such as governments and mining companies, have for long ignored or denied the rights of indigenous communities, who only recently have become able to access legal or social justice.

To assign a leadership role to an individual or a group likewise imposes a responsibility on the leaders to act in a manner consistent with the expectations attached to that role. This responsibility would seem to imply a right to do what is appropriate and necessary to fulfill those expectations, within the constraint of the rights of others. From this perspective, the engagement of indigenous communities, mining companies and governments is an encounter of the different rights and responsibilities of the parties. Just as understanding and respecting each other’s values is a key to constructive discussion, so too is understanding and respecting each other’s rights and responsibilities, their extent as well as their limits.

The processes of decision-making and engagement for indigenous communities, mining companies and governments bring norms and values into tension. One element of tension is between the individual and the collectivity:

- Community self-determination vs. individual self-determination
• Community free prior informed consent vs. government denial of indigenous peoples rights
• Collective rights vs. individual rights

Finding an acceptable balance between these opposite poles is an essential role of governance, and is largely a rationalistic and discursive process.

Norms and values exists in a deeper tension at the level of:

• Secular vs. spiritual worldviews
• Modernizers vs. traditionalists
• Thinking vs. feeling

When mining occurs on the traditional territories of indigenous communities, deep tension in norms and values has the potential either to generate conflict or to inspire creativity. To deal with tension in values and norms at this level, decision-makers cannot rely only on reasoned discourse, and must apply a more holistic and intuitive process of decision-making and engagement, a process that might be described as practical wisdom. Because indigenous leaders generally have more experience in dealing with this deep tension in norms and values than corporate or governmental leaders, practical wisdom more commonly characterizes their approach to decision-making and engagement, both within their communities and with external parties.

If conflict is to be prevented and some form of beneficial harmony is to be achieved, then the decision-making and engagement processes of all parties will without doubt require a large measure of practical wisdom. It would seem useful for mining companies and governments to enhance their governance capacity through focussed efforts to develop personal competencies in practical wisdom for those corporate and governmental leaders who make and implement decisions related to mining on the traditional territories of indigenous communities.

Intergenerational equity is a norm that is dominant in the thinking and decision-making of aboriginal communities. Some aboriginal communities that have successfully hosted a number of mining projects on their traditional territories are beginning to think that development to date may be sufficient for the current generation and that further development should be left for future generations. This perspective is a challenge to mining companies and governments that are intent on capturing the economic benefits of development in the near term. However, intergenerational equity is also a foundational norm for sustainable development: To use resources today with respect for the needs of future generations. As such, it should also be an essential norm guiding decision-makers in mining companies and governments that endorse sustainable development as an overarching policy.

“Heroic ad-hocism”, achieving results against all odds, was cited as a norm that is active in practice, whenever successful integration of mining projects with aboriginal objectives and concerns is achieved, but is certainly not ideal. In fact, if success can be achieved only through heroic efforts, it is indicative of system failure. The alternative norm is a robust system of rules
and practices that supports consistently successful decision-making by all parties regarding mining on traditional territories.

With respect to mining on traditional territories, a normative evolution is gradually occurring from the fundamental “do no harm” principle in the direction of a “do good” principle. However, for mining to “do no harm”, the full cost of all the environmental and social externalities of mining must be borne internally by the companies. Increasingly, the internalization of environmental externalities is occurring, through such principles and practices as “polluter pays” and the posting of bonds to cover closure costs; but a lot more progress in this direction is still required. The internalization of social externalities lags considerably, given the lack of a credible process for calculating the true costs of the full impact on aboriginal communities of mining on traditional territories.

The “do good” principle may require a new economic model for integrating mining into the local economy, beginning by maximizing the potential of local aboriginal communities for economic linkages to mining, and extending to more comprehensive linkages with the broader economy of the host jurisdiction. This approach may require substituting some of the large scale production of goods and services as inputs to mining with a smaller scale, more environmentally friendly and possibly more labour intensive supply of services. An example might be the use of alternative electricity generation through windmill farms or small scale run-of-river hydroelectric facilities to supply part of the power required by mining. The new economic model might also require that the planning for the provision of physical and social infrastructure required by a mine be done with a view to the longer term usefulness of that infrastructure after the mine closes.

Finally, the manner in which norms are disseminated across institutional and jurisdictional boundaries has potential bearing on the question as to: “How transferable is the success of one First Nation in dealing with mining projects on its traditional territory?” The transferability of success from one aboriginal community to another might, first of all, require that the underlying norms that guided the decision-making and engagement processes that produced the success should be made explicit. Then, the possible strategies for embedding such norms in the decision-making practices of different aboriginal communities would need to be explored. This could form the subject of further dialogue among aboriginal communities or possibly the subject of academic research.

**Practical Requirements and Capacity Needs**

Six separate working groups of Forum participants independently considered what were the practical requirements and capacity needs for indigenous communities, mining companies and governments to achieve good governance, i.e. effective decision-making and engagement, both internally and collectively. Some practical requirements and capacity needs are similar for all three parties; but others may be particularly important for a single party. The following point-form summary aggregates the conclusions of the six groups with respect to practical requirements of collective decision-making and engagement that indicate the need to strengthen capacity:
1. Developing a self-understanding on the part of the community, company or government
   - This is the essential pre-requisite to developing a mutual understanding among the three parties
   - Understanding the visions, values, histories and current priorities shared internally, and their role in collective decision-making
   - Understanding the timelines required to reach responsible and effective decisions in the interest of the different collectivities represented by the decision-makers, as these will be different for indigenous communities, mining companies and governments
   - In indigenous communities, understanding the tension between traditionalists and modernizers; the role of rights (internally and externally) and the pressures of poverty; overall community expectations and the priorities of community decision-makers
   - In exploration and mining companies, understanding the tension between the operational and financial “cultures” (values and priorities); informal and formal ways of influencing and arriving at decisions; the CEO and the Board
   - In governments, the tension between legal mandate and actual practice; due process and expedited decisions; public policy and political imperatives

2. Initiating a mutual understanding among indigenous communities, mining companies, and governments
   - This is the essential pre-requisite to effective engagement and joint decision-making.
   - Each party needs to explain to the other its culture of decision-making, as reflected in its collective self-understanding, as well as the expectations of its constituency (community members, share-holders, voters).
   - Each party needs to understand the decision-making authority of the others, especially their ability to say “no” to further work on a mining project.
   - Each party needs to acknowledge the different timelines of the others, as well as the need for a strategy to manage timelines in the direction of convergence.
   - The information and other resource requirements that each party has of the others need to be made explicit.

3. Managing the process of engagement
   - Bilateral processes of engagement are currently the common practice, but consideration should be given to the potential for a single trilateral process to be more effective, with the possibility of engagement evolving from initial bilateral processes towards the establishment of a trilateral process.
   - Effective engagement among indigenous communities, mining companies and governments requires that the right participants be included, who can speak for the broad range of economic, social, environmental and governance issues that require discussion and resolution when mining projects are proposed on traditional territories.
   - Many of the concerns about the impacts of mining find expression from civil society organizations, which though they are distinct from the three principal parties in the engagement need to be heard in the interest of well-informed
decisions, and so a process for integrating civil society perspectives into the dialogue among the three principal parties needs to be decided.

- Participants in the engagement process need to decide whether their dialogue is aimed primarily at reaching a decision or at building a relationship.
- Participants then need to decide how the engagement can progress from mutually respectful individual relationships among the representatives of indigenous communities, mining companies and governments towards meaningful institutional relationships, which will survive a change of individual participants.
- The solidity of the relationships among the principal actors will be reflected in the degree to which they feel trust in each other, in other words, the extent to which their mutual understanding of their decision-making cultures inspires confidence that though individuals at the table may change, the vision and values that he or she expresses will reflect consistency and continuity.

4. Managing uncertainty

- Mining projects carry a high degree of uncertainty at the exploration stage, but much less so at the mining stage, and all participants in decision-making and engagement need to understand the implications of the contextual uncertainty.
- Processes of dialogue also carry a high degree of uncertainty, as conversations can evolve in many directions.
- Agreeing on a structure of dialogue, the rules of discussion, at an early stage in engagement, may help to reduce the uncertainty to some extent.
- Contractual agreements related to the process of engagement and decision-making at the different stages of a mining project may also serve to reduce uncertainty in the dialogue and relationship between a mining company and an indigenous community, but there is a risk that too much legal formality will undermine the foundation of trust on which the relationship should ideally be based.
- Legislation may also help to reduce uncertainty, particularly with respect to deciding appropriate financial contributions from mining companies to indigenous communities for the purpose, as an example, of improving the community’s capacity to assess the environmental, social and cultural impact of a mining project on its traditional territory.
- In certain jurisdictions, such as Canada, considerable uncertainty exists as to how courts will interpret and apply legal protections of aboriginal rights with respect to decisions about mining on traditional territories, and this uncertainty has the potential to motivate all parties to seek agreement without recourse to the courts.

5. Managing conflict

- The tensions (described above) within indigenous communities, mining companies and governments have the potential to create conflict within and among the parties.
- Conflict also has the potential to be destructive, but also to inspire enlightened responses, such as improvements in governance or more effective engagement strategies.
• Anticipating the possibility of conflict, participants in the engagement process may agree on a mechanism for reconciling grievances in a manner that would be acceptable to all parties.
• It may be possible to identify issues early in the engagement process that have the potential to generate conflict, and to establish a process to deal specifically with those issues.
• Ultimately, managing conflict is a matter of continuously deepening a shared understanding of the underlying causes and progressively achieving jointly acceptable resolutions of differences, not of removing or repressing all potential for conflict.

6. Managing financial risk (revenue)
• Indigenous communities risk being affected by the variability of revenue flows from a mine, owing to commodity price cycles, inconsistent ore grades, or other factors.
• Indigenous communities also risk the occurrence of internal division and possibly conflict in the community because of disagreements over the management and allocation of revenues received from mining.
• Mining companies risk being affected if the indigenous community, instead of benefiting visibly from the financial contribution to the community, suffers from deepening division and possibly conflict owing to a perceived, or possibly real, improper or ineffective allocation of the revenues received.
• A framework, possibly legislation, appears to be required to guide indigenous communities in the calculation of risks associated with different forms of revenue available from a mine, and approaches to reducing the potential variability.
• A framework, possibly legislation, would also appear to be required to ensure transparency and accountability on the part of indigenous communities in the utilization of revenues received from a mine.
• Sharing benefits equitably may require that the management of the revenue distribution, both to present members of the community and to future generations, be assigned to institutions, such as trusts, that are relatively independent of the community’s decision-making authorities.

Comprehensive Framework for Decision-Making Roles and Responsibilities

As the last exercise in the workshop, participants attempted to summarize the complementary roles and responsibilities of indigenous communities, mining companies and governments that together form an integrated and comprehensive approach to decision-making and engagement around mining projects on traditional territories. This summary attempts to capture in point form, at a fairly high level of generality, the main observations and insights from the preceding week-long Forum discussion aimed at “getting the governance equation right” in decisions and actions related to mining, economic development and indigenous peoples.

In tabular format, the summary of complementary roles and responsibilities considers five categories of institutional actors: indigenous communities, mining companies, governments, two
or more of the three principal actors in a shared role, and other actors (such as civil society organizations).

The principal categories of issues and possible responses facing the institutional actors are identified in the left hand column of the table below. This list of issue categories and the specific issues and responses in each category are an initial attempt at drafting a comprehensive framework and should be considered to be open-ended and indicative only, as is clear from gaps in the comments below on roles and responsibilities by issue category. Consequently, this last section of the Forum Report should be regarded very much as the initiation of work in progress.
<table>
<thead>
<tr>
<th>Fears</th>
<th>Risks</th>
<th>Indigenous Community</th>
<th>Mining Company</th>
<th>Governments</th>
<th>Shared</th>
<th>Other Benefits</th>
<th>Revenue</th>
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Roles and Responsibilities by Issue Category

REVENUE

Indigenous Community
- Assessment of cultural, social and environmental impacts of a mine on traditional territory
- Development of strategies to prevent damage to the community and its way of life, calculation of cost to achieve the objectives of those strategies
- Risk assessment of different formulas for calculating revenue (e.g. lump sum payments, fixed or variable amount based on volume of production, fixed or variable amount based on commodity price, fixed or variable percentage of profit, fixed or variable percentage of sales revenue, dividends from equity share, etc.)
- Planning for distribution of revenue within the community (sharing among community members and with future generations)
- Planning for investment of revenue to address current community needs and to achieve long term objectives

Mining Company
- Risk assessment of the profit/loss probabilities for the mine under different scenario assumptions
- Strategy for maximizing share-holder value
- Strategy for revenue sharing with indigenous community in the amount necessary to compensate for possible impacts and to secure community support
- Strategy for minimizing taxation

Government
- Strategy for optimizing total revenue captured from the mine through royalties, direct taxation, and indirect taxation (e.g.: on mine employee salaries)
- Revenue sharing with indigenous community through distribution of a percentage of royalty payments collected from the mine
- Leverage private investment for local development: engaging with the private sector to help meet the needs of local communities

Shared
- Analysis of underlying interests: all parties seeking the good use of revenue

Others
- Mining critics: focus on consequences of non-compliance, proper enforcement of regulations, fair decision processes for all parties
- Environmental advocates: focus on accurate calculation of potential environmental impacts, and appropriate strategies of prevention or mitigation, with cost implications
- Good governance advocates: greater transparency and accountability for all three principal actors
OTHER BENEFITS

Indigenous Community
• Improvement in community governance: better structured collective decision processes, more effective participation of community members
• Revenue reporting and review processes: enhanced accountability and transparency

Mining Company
• Improved capability to communicate and negotiate across differences in the hierarchy of values, indigenous versus corporate
• Greater access to locally based employees and to companies that can supply goods and services to the mine, an economic advantage
• Enhanced reputation for “corporate social responsibility”

Government
• Reduction in demand from indigenous communities for revenues, public services and respect for rights

Shared
• Social harmony
• Joint involvement in projects (largely funded directly or indirectly by mine generated revenue) to improve social and physical infrastructure, as all parties benefit from shared improvements in transportation, education, health, etc.

Others
• Energized civil society organizations (strengthened “social capital”)
• Transparency and accountability: improving communication, relationships, and ultimately governance structures

INFORMATION AND KNOWLEDGE

Indigenous Community
• Knowledge of the global norms of transparency: inform community decision-making processes, while at the same time, successes in practicing transparency at the local level can influence global norms
• Cultural understanding: how to incorporate knowledge of culture at all levels and stages of decision making
• Knowledge about mining: knowledge sharing between industry and communities, increasing the local capacity to work with or for mining companies
• Traditional knowledge: promoting and documenting local knowledge that could inform and improve decision-making and engagement processes
• Knowledge of available resources: promoting the appropriate use of physical, cultural and appropriate technology resources
• Education: building local capacity to better engage with stakeholders and to better manage benefits from mining activities
**Mining Company**

- Deeper corporate self-understanding, as well as an improved corporate ability to understand and relate to indigenous communities and traditional cultures
- Education: required to adapt to local context, training company employees at various levels to better engage with communities, improve relationship building competencies
- Knowledge of international standards and guidelines related to mining on the traditional territories of indigenous communities; how to interpret and apply these global norms under local circumstances
- Board and other higher management: review composition of such positions to ensure there is the proper decision-makers in place and to ensure that there are efficient and effective channels of information in place

**Government**

- Limited self-defined role: establish the framework and allow the parties to operate within the framework to maximum effectiveness
- Education: required to adapt to local context, training government employees at various levels to better engage with communities, improve relationship by building competencies
- Vocational training (technical): offer programs to build the technical capacities of communities so that they are better able to engage with mining companies
- Political level: framing the message to most effectively encourage engagement and collaboration

**Shared**

- Epistemic communities: making use of existing (and creating new) opportunities for transnational information sharing
- Develop a shared way of knowing and innovating: use both “traditional “or local knowledge in addition to corporate and scientific expertise
- History of colonialism, practices of corporate colonialism: a legacy that requires an active engagement by all stakeholders to overcome
- Establishing a database on history of land ownership: improved and accessible mapping and database of past and present land ownership/use

**Other**

- Education: applies to all stakeholders, improvements to training to benefit all

**PARTICIPATION AND DECISION-MAKING**

**Indigenous Community**

- Internal constitutions: accounting for traditional structures while leaving space for evolution with changing realities
- Community liaison: building a relationship between industry and community is essential, starts from day one
- Decision making protocols: requires a clear framework and a clear delineation of responsibility
- Duty to consult: consultation should take place from the first stage, consultation about exploration is necessary
• Free Prior Informed Consent (FPIC): challenge of ensuring consent accounts for the entire community and that this is actually informed; at what stage does FPIC commence? What can be said about the exploration stage?

Mining Company
• The Mining Association of Canada “Towards Sustainable Mining” initiative: implement the TSM practices and principles, in addition to performance measures and protocols
• Community of interest panels, advisory boards, community liaisons: setting up processes and mechanisms that allow the company to be transparent, accountable and accessible to the local community
• Free Prior and Informed Consent: challenge of ensuring consent accounts for the entire community and that this is actually informed; at what phase does FPIC commence? What can be said about the exploration phase?

Government
• Participant funding: assist communities in participating in consultations with mining companies
• Free Prior and Informed Consent: challenge of ensuring consent accounts for the entire community and that this is actually informed; at what phase does FPIC commence? What can be said about the exploration phase?

Shared
• Life cycle approach: decision making structures that account for not just the time of operation of the mine, but also before and after the mine is active
• Free Prior and Informed Consent: challenge of ensuring consent accounts for the entire community and that this is actually informed; at what phase does FPIC commence? What can be said about the exploration phase?

Other
• Solidarity and support through political action, policy development
• Role of mediation: the use of mediation to aid the creation of effective governance structures, bringing together perceived juxtaposed parties

STRUCTURES AND INSTITUTIONS

Indigenous Community
• Adopt culturally appropriate policies that will incorporate the values underpinning culture
• Modifying or creating treaties, constitutions: accounting for both traditional and present-day authority structures

Mining Company
• Sustainability: building and consolidating appropriate mechanisms and processes to ensure sustainability, such as the Mining Association of Canada “Towards Sustainable Mining” initiative
• Operational safety standards: implementing appropriate mechanisms and processes to ensure safety
Government
- Integration across ministries and department, between levels of government: better information sharing and coordination between levels and departments of government
- International Labour Organization Convention 169 on Indigenous and Tribal Peoples; how to implement effectively?
- Ombudsman structures: helping to ensure accountability and transparency among various stakeholders
- Mineral claim information systems (licenses and land): better mapping and more accountable systems of licensing

Shared
- Community (not company) joint ventures: creating greater collaboration between local communities, indigenous or not
- Grievance procedures: mechanisms to ensure all parties have access to means of redress for grievances

Other
- World Bank and international development institutions: leveraging their influence on governments to implement appropriate policies and best practices regarding indigenous communities and mining
- Multilateral or global multi-party institutions: disseminating international norms and standards (e.g. IFC Social and Environmental Performance Standards; or the EITI)

INTEGRATED RESOURCE MANAGEMENT

Indigenous Community
- Using resources today with respect for the needs of future generations
- Strategic land use for cultural survival: understanding the link between land and culture, these are often mutually dependent
- Meaning of land: accounting for and articulating local understandings of the land
- Involvement/control of licensing and exploring permits: local ownership from the first stages of mining activity

Mining Company
- Meaning of land; seeking to understand and account for what land means to various stakeholders, particularly indigenous communities
- Sequencing mining projects in a manner that reduces or contains cumulative effects

Government
- Meaning of land: seeking to understand and account for what land means to various stakeholders, particularly indigenous communities
- Participatory planning: including local stakeholders in decision making at all stages, including prior to exploration
Shared
• Interest in developing long term sustainability plans

Other
• From ‘do no harm’ to net gains: sustainability and good governance requires more than a hands-off approach

UNDERSTANDING AND WISDOM

Indigenous Community
• Integrating traditional ways of life with opportunities in the modern economy
• Education and learning: building local capacity to better partner with government and industry
• Self-confidence and empowerment: promoting local capacity, moving towards true self-determination

Mining Company
• Building competencies in “practical wisdom”: thought processes and decision practices that integrate the intellectual and affective dimensions of reality, that are historically sensitive, that comprehend the broad spectrum of human values

Government
• Developing competencies at all levels of administration and for various type of staff concerning cultural sensitivity
• Provide training to improve engagement with local community

Shared
• Empathy and flexibility: allowing for space to adapt and change as inputs and demands change
• Getting to know each other in ways big or small; the importance of establishing both institutional and personal relationships

Other
• History: bringing together varied understandings and experiences of the past
• Respect and listening: placing real importance an achieving good communication between stakeholders, acknowledging that this starts from the first interaction

RISKS

Indigenous Community
• Change/loss of traditional ways of life: loss of culture as a consequence of migration, changing land use, inter-generational tensions, poor governance
• Change of use or loss of land: as land is intimately linked to livelihood and lifestyle, change/loss of land can result in the erosion of traditional way of life and a loss of access to culture for current and future generations
• Continued oppression: continued legacies of marginalization and exclusion from governance processes that are historically rooted
• Invisibility: exclusion from decision making
• Media: the risk of biases, stereotypes, and under reporting

**Mining Company**
• Loss of investors is there is a failure to produce profit
• Exposure and lack of predictability: this can be experienced in terms of production/output, relations with community, the stock market etc.
• Media: biases, stereotypes, reputational damage

**Governments**
• Alienation of voter, either by permitting or denying mining projects
• Media: biases, stereotypes, reputational damage

**Shared**
• Reneging on agreements

**Other**
• Stalled or failed engagement: much goodwill can be squandered or damaged if there is not consistent and continuous engagement, with demonstrated success

**FEARS**

**Indigenous Community**
• Harm to land: damage to way of life, loss of cultural value
• Deeping and emerging divisions: growing socio-economic cleavages, inter-generational divides
• Oppression and invisibility: exclusion from decision making, neglect by industry, government, and the media
• Lack of respect: marginalization of concerns, values, opinions, beliefs
• Invasion: the perception and experience of the take–over of land, resources, culture, etc.
• Power and privilege of others: continued oppression and exclusion by more powerful actors

**Mining Company**
• Financial solvency: the need for both predictability and flexibility in practise
• Loss of control, power, privilege, and flexibility
• Being taken over by hostile companies

**Governments**
• Unwanted issues/conflict, leading to the loss political leverage
• Loss of sovereignty, power, privilege by ceding to much control to both mining companies and local communities

**Shared**
• Fear of deep change in power structures rooted in the colonial experience and how this affects all levels of society and relationship, with this change bringing risk to all involved

Other
• Environmental damage
• Catastrophic climate change
• Water loss, pollution
• Unintended, unpredictable consequences
• Generational setbacks
• Misunderstanding by civil society

Summary Remarks and Recommendations

On the basis of five days of intensive discussion, dialogue, and reflection, a number of possible paths forward can be considered for building the governance capacity of indigenous communities, mining companies and governments to achieve optimal benefits for indigenous people from mining on their traditional territories.

Possible further actions include: continuing the dialogue; doing academic research; providing education and training programs; and developing new tools, mechanisms and strategies. These initiatives could be undertaken by a number of the institutions represented by participants. Many of these initiative could be complementary and mutually supportive. For example, advances in research could serve to support the development of new strategies, while further dialogue could help identify new opportunities for research or for education and training.

Opportunities for Continuing Dialogue

• A significant core of participants in the 2013 McGill ISID Summer Forum could develop an agenda that would be of interest for all to discuss.
• A discussion could be held on the key factors that contributed to a generally acknowledged successful relationship between and First Nation and a Mine, such as personal competencies or collective strategies.
• Consideration could be given to integrating government perspectives into the dialogue.

Possible Subjects for Future Academic Research

• Better documentation of successful decision-making and engagement processes
• Clarification of how norms, principles, and international standards are understood and utilized by local communities
• Identifying possible strategies for embedding emerging norms and principles in the practices of different communities
• Investigation into the possibility of trilateral frameworks of engagement between communities, companies, and governments
• Evaluation of the feasibility/desirability of developing institutions, such as trusts, that are relatively independent of the community’s decision-making authorities to manage revenue distribution
• Analysis of the potential for transnational information and strategy sharing between indigenous groups, including the use of social media
• Historical research into the construction and implementation of internal constitutions, documenting examples of how ‘traditional’ structure are institutionalized while allowing for evolution with changing realities
• Better documentation of the history of land ownership and use, seeking to make this readily available through an accessible database

Education and Training Opportunities

• Certificate programs relating to Indigenous Community Relations for company or government staff, including training to perform effective liaison roles
• Programs for indigenous communities related to developing their own constitutions, as well as policies related to mineral exploration and mine development
• Training programs aimed at developing personal competencies in practical wisdom for corporate or governmental leaders
• Training programs for local communities regarding planning for the distribution and investment of revenue received from mining
• Education and training (technical and managerial) to build the technical capacities of communities so that they are better able work with or within to mining companies, in roles as employees, business suppliers, or corporate managers
• Preparation for indigenous peoples to enroll in mining engineering and related fields

Potential New Tools, Mechanisms, and Strategies

• A mining supplement for already existing governance-self assessment tools
• Better accountability mechanisms to monitor agreements and partnerships throughout the mining life-cycle
• Trusteeship framework/template to better manage resources and revenue for future generations
• Frameworks for trilateral engagement between government, community, and mining, as an option that may be desirable under certain circumstances
• Mechanism to guide indigenous communities in the calculation of risks associated with different forms of revenue available from a mine, as well as approaches to reducing the potential variability of revenue flows
• Mechanism or ensure transparency and accountability in the utilization by indigenous communities of revenues received from a mine
• Framework/method of reviewing company boards and higher management to ensure there is the proper decision-makers in place
• Framework for ensuring that there are efficient and effective channels of information disclosure and distribution
• Integration across ministries and department, between levels of government, with the aim of better information sharing and coordination of activities related to projects involving indigenous communities and mining
• Strengthening and formalizing ombudsman structures or other dispute resolution mechanisms
• Developing a mineral claim information systems (licenses and land) that offers better mapping and more accountable systems of licensing to address the concerns of indigenous communities to exploration on their traditional territories.
Annex 1

Forum Participants

**Jhaimy Alvarez-Acosta:** Principal of Children of the Seven Rays; Andean Keeper of Ancient Wisdom

**Mafalda Arias:** Advisor to Mining Companies in Latin America, Specialist in Intercultural Relations

**Shawn Batise:** Executive Director of the Wabun Tribal Council in Timmins, Ontario

**Antonio Bernales:** Executive Director, lead consultant and founder of Futuro Sostenible; international independent mediator and facilitator

**Hillary Birch:** Graduate Fellow, Institute for the Study of International Development, McGill University; 2013 ISID Summer Forum rapporteur

**Frederick Bird:** Research Professor at the University of Waterloo; Distinguished Professor Emeritus at Concordia University

**Kristyna Bishop:** World Bank, Sustainable Development Department, Latin America and Caribbean Region; Indigenous Bar Association

**Ben Bradshaw:** Associate Professor at the University of Guelph with expertise in environmental governance; originator of the IBA research network

**Cynthia Callison:** Partner at Callison & Hanna; general counsel for First Nations in matters including land negotiations and resource development

**Chris Coggan:** Project Coordinator, Atmacinta Inc; Advisor to and representative of the Naskapi Nation of Kawawachikamach

**Jim Cooney:** Professor of Practice in Global Governance, ISID, McGill University; Adjunct Professor, Beedie School of Business, Simon Fraser University; Adjunct Professor, Norman B. Keevil Institute of Mining Engineering, University of British Columbia; 2013 ISID Summer Forum convener and principal Report writer.

**Wesley Cragg:** Professor Emeritus, Business, Schulich School of Business, York University; Project Director for the Canadian Business Ethics Research Network

**Hevina S. Dashwood:** Associate Professor of Political Science at Brock University; author of *The Rise of Global Corporate Social Responsibility: Mining and the Spread of Global Norms*
**Jeffery Davidson:** Professor, Applied Mineral Economics and Sustainability, Queen’s University; Adjunct Senior Research Fellow, Sustainable Minerals Institute, University of Queensland, Australia

**Luis Felipe Duchicela:** Senior Advisor for Indigenous Peoples, World Bank; former Executive Director, Amazon Conservation Association; former National Secretary of Indigenous Affairs of Ecuador

**Wayne Dunn:** Professor of CSR and a founding member of the Leadership Council of McGill University's Institute for the Study of International Development

**Michael Fox:** President of Fox High Impact Consulting; Member of the Board and co-chair of the Aboriginal Affairs Committee, Prospectors and Developers Association of Canada

**Pierre Gratton:** President and CEO of the Mining Association of Canada (MAC)

**Louis Guay:** Senior Fellow and Ambassador-in-Residence, St. Paul University; Consultant; former Canadian diplomat; former mining company executive

**Arpi Hamalian:** Associate Professor, Department of Education, Concordia University, Montreal; On going Member and President (2002-2006) of Sectoral Commission on Education - Canadian Commission for UNESCO; Chair of the Board, The North South Institute (May 2011-May 2013).

**Darwin Hanna:** Partner of Callison & Hanna; general counsel for First Nations in major initiatives in BC and the NWT; Adjunct Professor, Faculty of Law, University of British Columbia, teaching the course First Nations and Economic Development

**Bryan Hendry:** Senior Policy Analyst at Assembly of First Nations

**Kristina Henriksson:** Adjunct Professor, Beedie School of Business, Simon Fraser University; PhD Business Administration, Lund University (Sweden)

**Julia Keenan:** Research Officer, Centre for Social Responsibility in Mining, part of the Sustainable Minerals Institute at The University of Queensland, Australia

**Joy Kennedy:** Chair, Commission on Justice and Peace, Canadian Council of Churches; former Program Coordinator, Poverty, Wealth, and Ecological Justice, United Church of Canada

**Peter Kirby:** President and CEO, Taku River Tlingit Corporations

**Bern Klein:** Acting Executive Director, Canadian International Institute for Extractive Industries and Development; Professor and Head, Norman B. Keevil Institute of Mining Engineering, University of British Columbia
David Macdonald: Co-Founder and Principal of Agile Sustainability Management Inc.; former Professor of Political Science at universities in Canada and Europe

Armand MacKenzie: Consultant on legal issues for the Innu Nation in Quebec/Labrador; Private practice lawyer

Judy Lynn Malloy: Deputy Director, Sustainable Mining and Materials Policy Division, Minerals and Metals Sector, Natural Resources Canada

Dawn Mills: Finning Resident Scholar for Mining and Communities, Norman B. Keevil Institute of Mining Engineering, University of British Columbia

Philip Oxhorn: Professor of Political Science at McGill University; Founding Director of McGill’s Institute for the Study of International Development; Editor-in-Chief of the international journal Latin American Research Review

David Parker: Executive in residence and Adjunct professor, Norman B. Keevil Institute of Mining Engineering, University of British Columbia; former Vice President, Sustainability, Teck Resources Limited

Dan Pujdak: Policy Analyst, Environment, Chiefs of Ontario; former Senior Policy Analyst, Assembly of First Nations

Ingrid C. Putkonen: Co-Founder and Principal of Agile Sustainability Management Inc.; Adjunct Professor, Norman B. Keevil Institute of Mining Engineering, University of British Columbia

William Roberts: President and Founder of the Whistler Forum for Leadership and Dialogue; Priest-in-charge, St. John the Divine Anglican Church, Squamish, B.C.

Conor Seyle: Associate Director of Research for the One Earth Future Foundation; previously with the Charles F. Kettering Foundation, and Issues Deliberation Australia/America

Glenn Sigurdson: Chair, Responsible Minerals Sector Initiative; Adjunct Professor, Beedie School of Business, Simon Fraser University; Principal, the CSE Group

Richard Simon: Director of the mining program and Professor of Mining Engineering, École Polytechnique de Montréal; member of the Algonquin First Nation

Richard Smith: CSR advisor; author of a report on the CSR Practices of Canadian Companies in Chile; formerly an employee of the Canadian International Development Agency

Sheldon Tetreault: Partner of Guerin Tetreault & Associates; former Director of Governance Advisory Services for the National Centre for First Nations Governance; former Senior Administrator for the Lil'wat Nation
Ian Thomson: Founding member and principal, On Common Ground Consultants Inc

David Walkem: Chief, Cooks Ferry Indian Band; Vice-Chair, Nicola Similkameen Innovative Forestry Society; formerly founding President of the First Nations Forestry Council

Martin Walter: Consultant for the "Strengthening Governance in the Extractive Industries" project at the Energy Division Inter-America Development Bank (IDB)

John Ward: Taku River Tlingit First Nation elected spokesman

Kernaghan Webb: Associate Professor of Law and Business, Ted Rogers School of Management, Ryerson University; Director of the Ryerson Institute for the Study of Corporate Social Responsibility

Viviane Weitzner: Centro de Investigaciones y Estudios Superiores en Antropologia Social (CIESAS-Mexico); Centre for Research and Higher Studies in Social Anthropology (CIESAS—Mexico); former Senior Researcher, North-South Institute

Paul Wilkinson: Senior Vice-President, Environmental and Social Affairs, New Millennium Iron Corp.; President of Paul F. Wilkinson & Associates Inc.; former Special Advisor, Naskapi Nation of Kawawachikamach

Judy Whiteduck: Director, Safe, Secure, Sustainable Communities, Assembly of First Nations