

**REVIEWERS' COMMENTS ON THE  
"FRAMEWORK FOR RESPONSIBLE MINING"**

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**I. INTRODUCTION**

This effort is very much needed, and its sponsors and participants should be recognized for seeking the right kind of approach to the problem at the right time. The papers I have reviewed represent a tremendous amount of thoughtful and focused work. They clearly should, with some further revision and focusing, and some cooperation by principal stakeholders, be capable of achieving their stated purpose: "to serve as a catalyst for a multi-sector dialogue that leads to the adoption of such standards, principles, and criteria."

So in general "good on you." This is a great effort.

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<sup>1</sup> These comments are my own as an individual and do not necessarily represent the views of any organization or institution with which I am or have been affiliated.

It needs to look more at the “development” side of sustainable development. Protecting the poor from the negative impacts of development comes through loud and clear. Poverty reduction is much harder to find.

Further, the direction you are headed – an NGO-multinational company dialogue – has some inherent limitations, because some of the most important problems cannot be solved without effective and functioning government; until government is more in this mix, there are some problems that will stay in the “too hard” box.

## II. GENERAL PRINCIPLES

This excellent work raises a long list of very specific issues and questions. These are important. But once we get immersed in them, it is too easy to lose the ‘big picture’ view of where we are going. So before launching into all the detail, it may be useful to look at a few of the ‘big picture’ issues I have extracted from the enjoyable experience of reading this work.

As is only natural with something as complex and far reaching as this, there are some internal tensions and contradictions. If this were an easy set of problems, someone would have developed the answers by now.

So if I point out some of those tensions and contradictions, it is not necessarily because I think I have the answers. Anyone who once served as the Director of the MMSD Project has had to learn to listen to suggestions and criticisms, and develop a thick skin. I therefore hope that the following, even where my views may differ, will be seen as an attempt to be helpful. If I agreed with everything you said, this review would have little value.

That said, I think I agree heartily with most of what you say. I think where I question what you are doing is not so much that you are wrong in what you present as that this is incomplete: it is very good indeed at analyzing the costs of development, but much less complete on the benefit side.

I do think that you have clearly thought through and sharpened the ideas toward the beginning of the paper more than those at the end. This often happens with long works. But you have some really important subjects at the end, such as resettlement, artisanal mining, etc. and I am not sure that your ideas of the norm or the cutting edge practice are as incisive on these issues as they are on the earlier issues.<sup>2</sup>

It would be helpful if the paper could make its intended scope clearer. All mining? Metals? Industrial minerals? Coal? In much of what you say it shouldn't matter but there are a few places where it does.

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<sup>2</sup> I have found it occasionally useful to start team meetings at the end and work backward to avoid this “tapering off” effect, which seems to affect all of us.

## **A. LEGITIMACY**

A key principle in this discussion needs to be that people who are making decisions with far ranging consequences for others need to have some authority to do so, based on the "consent of the governed." A set of global standards for an industry whose products are used by virtually every one of the Earth's inhabitants, and which is vital to both the world and local economies is of a very high level of importance. Presuming to develop such standards requires a high degree of legitimacy, and a willingness to include those who have a serious stake in the outcome in the dialogue.

I would think, for example, that governments of those developing countries that have a huge stake in this industry (South Africa, Chile, Ghana, and others come to mind) need in fairness to have some ability to influence this process. If they don't, it will undermine the legitimacy of the outcome, and it will be said, fairly or unfairly, that a few of the biggest companies and a few mainly northern-based NGOs came together to create an agenda that advances eco-efficiency and gives the biggest companies a competitive advantage over the rest, at the expense of the development agenda of the South.

I also think that the principle of legitimacy requires that the proposed principle of prior informed consent (FPIC) be understood and limited in a way that it supports and builds legitimacy and democratic structures.

## **B. THE ROLE OF GOVERNMENT**

One of the 'big picture' structural issues that lurks in these documents might be put as follows:

- Some of the things that communities, indigenous organizations, and environmental activists want the most *can only be delivered by government*, and
- Even the combined efforts of communities, NGOs, and multinational companies can't deliver what people want *without a framework of government, law and regulation*.
- Therefore, any certification scheme that does not have the cooperation of government will necessarily be limited to those things that can be delivered without the help of government, and will therefore leave out some vital pieces.

On some level, what is being undertaken here does impact on some classic areas of government authority. In these areas, decisions should ideally be made by democratically elected and politically accountable officials – i.e., government in some form.

There are only three rationales for approaching these issues outside a government framework:

1. *Governments are in competition* to attract investment, employment and economic activity. Absent some sort of structure for setting common minimum principles, there is a 'race to the bottom' in which labor, environmental, and sustainable development concerns will ultimately get very short shrift. In short, there need to be some common 'floor' principles.

2. Some *governments lack the resources and capacity* to confront the exceedingly complex and difficult issues presented by mining investment.

3. Some number of governments are authoritarian, *not democratically accountable*, and do not protect the rights of minorities.

While these things are true, a better world future requires that we not start thinking of them as permanent, acceptable, or inescapable conditions.

There are those in the corporate world who dream of a world without government,<sup>3</sup> but that kind of vision would be bad for just about everyone, including most of the business community. I think the agenda must be:

- Creating international agreements among governments that take certain kinds of issues (basic environmental, labor, and human rights standards) out of the realm of competition for investment;
- Building the capacity and resources of government to become a more effective regulator; and
- Fighting for more open, democratic and accountable government.

These are the litmus tests of any effort:

- 1) Is it helping to build common cause among governments to avoid "divide and conquer" tactics by financial interests?
- 2) Is it helping government to get better at what should be its role and overcome capacity deficits?
- 3) Is it building democratic institutions?

If the answer is "no," then it is a mistake. We can all grind our teeth at the failings of government, but this should not cause us to turn our back on government, because we won't find out there a substitute that we like. The NGO movement cannot afford to flirt with the idea that it can somehow get past all of the defects and frustrations of imperfect democracy and ineffective government institutions by making a deal with industry that bypasses government, even where government's failings make our teeth hurt.

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<sup>3</sup> This is not meant to be a comment on any current government policy of any large nation in North America.

### **C. WHERE IS THE SUSTAINABLE DEVELOPMENT AGENDA?**

If someone asks us “would you be willing to give up that tree?” the natural response is “for what?”

In a world where poverty and lack of access to basic services is such an overwhelming problem for so many, we have to be affirmatively seeking opportunities for development, that put resources in the hands of those who do not have enough. So, if we are accepting some kind of change to natural ecological conditions or impact on traditional cultures, the question is: “for what?”

A fundamental insight of sustainable development is that there is no way to judge the acceptability of proposed actions without looking at both cost and benefits. This paper is very strong in its analysis of the costs of development, but much less complete, rigorous, and analytical in assuring that the benefits of development are maximized.

A good environmental impact analysis process, as you know, looks like this:

|  |
|--|
| <b>MANAGING ENVIRONMENTAL IMPACTS</b><br><b>Fig. 1</b>                           |
| Is the impact negative?  |
| If so, it should be avoided  |
| To the extent it cannot be avoided, it should be minimized                       |
| Whatever impacts remain after minimization should be mitigated                   |
| If there are impacts that cannot be mitigated, there is a need for compensation. |

While there are details here and there that can be strengthened, *this paper is very strong indeed on elaborating this kind of framework for minerals development*, handicapped only by the fact that there are some pieces of the puzzle that only government can deliver.

But management for sustainable development and poverty alleviation requires a more complex multidimensional analysis. My own version of it goes something like this:

| <b><i>MANAGING SUSTAINABLE DEVELOPMENT</i></b>                                   |   |  |
|--|---|--|
| <b>Fig. 2</b>  |   |  |
| <b>MANAGING ENVIRONMENTAL IMPACTS</b>  | <b>MANAGING ECONOMIC IMPACTS</b>  | <b>MANAGING SOCIAL IMPACTS</b>                                     |
| Is the impact negative?  | Is the impact positive?   | Are the most vulnerable protected from the negative impacts?       |
| If so, it should be avoided  | If so, it should be pursued.  | Are benefits distributed in an equitable manner?                   |
| To the extent it cannot be avoided, it should be minimized                       | To the extent it can be achieved, it should be maximized.   | Is cultural autonomy protected?                                    |
| Whatever impacts remain after minimization should be mitigated                   | To the extent key needs are not met after maximization, links must be built for onward development. | Are legitimate and democratic decisionmaking processes reinforced? |
| If there are impacts that cannot be mitigated, there is a need for compensation. | Are the benefits shared and sustainable?  | Are the benefits sustainable?                                      |

Whether you buy all of Figure 2 or not, the fact is that we need to start identifying the building blocks of poverty alleviation and giving them just as much attention as we give the environmental protection pieces.

Even if we are at the state of the art on environmental protection, **we are still not doing sustainable development right if we are missing opportunities to employ people, educate people, house people, or deliver health care.**

And how can we evaluate a project without evaluating its development benefits. If, for example, it has no lasting development benefits and enhances social inequity, why should we tolerate it, even if it has minimum environmental impact?

We have in your excellent paper very detailed analysis of the state of the art of water quality management or protected areas. What is needed is an equally strong definition of cutting edge approaches to using the development opportunity a project creates to:

- Improve education;
- Employ people;
- Build job skills

- Reduce poverty;
- Improve health care and its delivery;
- Develop transportation and communication infrastructure, etc. etc.

The failure to develop this kind of a framework in detail is in my view **the most serious gap** in this very good paper. We have to move beyond 'protecting the poor from development,' as necessary as that may sometimes be. Even if entirely successful, such a strategy does no more than leave the poor where they are, which is not acceptable.

Where is the "right to development?"

What the 'proto-standards' you are developing do, if I may be so bold, is place almost all of the burden of dealing with the two right hand columns in Figure 2 above on the concept of prior informed consent. This is too heavy a burden for FPIC to carry, and will lead in my view to the stalling and eventual collapse of that concept.

#### **D. PRIOR INFORMED CONSENT**

The concept of prior informed consent is a way of dealing with the particular rights and needs of indigenous peoples, who have on one hand all the characteristics of culturally autonomous nations, yet on the other hand often lack the clear recognition of territories, economic resources and political recognition to chart their own course of development free from overwhelming intrusion by others.

Prior informed consent is **not** a substitute for careful planning to maximize development benefits of projects, particularly outside the context of indigenous communities.

Note: Your paper does not rely on prior informed consent for environmental protection.

There are good reasons for this, including the fact that such things as managing acid rock drainage or biodiversity conservation are very complex. They demand considerable resources, and a good deal of technical skill and understanding. Poor rural villages lack these resources and lack the technical skills to negotiate effectively to achieve these ends.

But managing a project to maximize the extension of health care in the project region is just as challenging as environmental protection, and we cannot put the whole burden of doing this on the local community by saying essentially "whatever, as long as the community agrees."

Two points:

- *Some of the things that the community is likely to want are things that only national government can deliver.* For example, if national government continues

to maintain that it is the sole owner of mineral resources, that all taxes are payable to it, and it is not going to share any of the revenues locally, what can the community and the company do? Government needs to be at the table. The MMSD report recommends a three-cornered planning process leading to a Community Sustainable Development Plan. MMSD at 399. Whether or not this is the right model, national government needs to be at the table.

- The same reasons that require some detailed principles and guidance on environmental issues require some detailed principles and guidance on social, economic and development issues. *Putting this whole burden on prior informed consent essentially commits the community to be entirely responsible for a detailed and complex planning process for education, health, transportation, etc.*

## **E. CONVERGENCE AND HARMONIZATION**

As the paper acknowledges, there are already a number of standards, principles and guidelines out there, that represent an enormous investment of time, effort and resources by all kinds of stakeholders. A key question is how the principles we all hope emerge from your project will seek to relate to these other bodies of guidance.<sup>4</sup>

- The people and organizations who put these together can quickly become a “counter lobby” if they feel their efforts are not being respected, or that we seek to push them onto the sidelines.
- The people who will be expected to comply with any principles will understandably be reluctant to do so if the principles, the implementing system, and reporting and verification are duplicative and inconsistent with other guidance they are already using.

If – to use an example – the participants in other guideline processes<sup>5</sup> start to see a whole set of parallel, overlapping and contradictory guidance emerging from this paper, with little or no reference to what they have done, they are going to start to wonder, or resist what will be seen as “yet one more set of requirements.” While I am sure it is the authors’ intention to avoid this, the document will meet much less resistance if it repeatedly – almost to the point of excess – stresses that it seeks to harmonize with as many of these other sets of guidance as possible. Ideally, as this process goes forward, complying with one will assure compliance with the others.

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<sup>4</sup> I commend to your attention G. Greene, *Industry Codes of Practice and Other Voluntary Initiatives: Their Application to the Mining and Metals Sector* (International Institute for Environment and Development 2002), available at [http://www.iied.org/mmsd/mmsd\\_pdfs/voluntary\\_initiatives.pdf](http://www.iied.org/mmsd/mmsd_pdfs/voluntary_initiatives.pdf)

<sup>5</sup> As just a few examples, I would mention APELL, The Equator Principles, the Extractive Industries Transparency Initiative, the Kimberly Process, or the Mining and Minerals Supplement to the Global Reporting Initiative Guidelines.

Perhaps the document could help defuse these concerns by stating that as a general principle, it is desirable to seek convergence with existing standards and harmonization of requirements through cooperative working relationships with the institutions that are developing them.

## **F. COMPLEXITY**

Any effort such as this will face enormous complexities. It is a big world; there are enormous differences and variations among regions, cultures and ecosystems. There will always be people pointing out that there are “missing pieces,” or individual circumstances that don’t fit the rule. These complexities will tend to create a dilemma:

- If there no recognition of these differences and we proceed with a “one size fits all” approach, we end up with unwanted results, and doing a good deal of injustice;
- If we try to accommodate everything, the emerging principles become so complex and unwieldy that they start to become less useful, less understandable to anyone but specialists, active.

How the authors, and the architects of the process, resolve this problem will be key to success.

My suggestion is to try to subsume all of what you want to say under a very limited number of headings, and give them some kind of easy to grasp title or billing: the “Four Freedoms,” the “Eightfold Path” and the “Ten Commandments” have caught on.<sup>6</sup> Something that looks and feels like the Revenue Code will achieve, well – the same kind of reaction that we all have to the Revenue Code.

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<sup>6</sup> By contrast, Luther’s “95 Theses” are no longer a best seller.

### III. SPECIFIC COMMENTS

#### A. FRAMEWORK FOR RESPONSIBLE MINING: A GUIDE TO EVOLVING STANDARDS

[1] P.3, Para.1 – I think you are very much on point in saying that “compliance with the laws of the countries in which they operate may not be sufficient” and that “they should also comply with international codes,” etc.

However, I much urge you to go beyond this and add the third element: *legitimate expectations of local communities*.<sup>7</sup>

This is a really key point that the industry leaders have started to accept, but which the laggards have not yet grasped.

Bluntly, projects can cause, or get into serious trouble *even if* they comply with national legislation and *even if* they comply with the growing body of international norms, if they do not also deal with the aspirations and desires of the communities in which they operate and where their presence and impact are most heavily felt.<sup>8</sup>

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<sup>7</sup> See §14.07 The Third Link: Local Views and Expectations in Luke J. Danielson, SUSTAINABLE DEVELOPMENT IN THE NATURAL RESOURCE INDUSTRIES: NEW PERSPECTIVES, NEW RULES, AND NEW OPPORTUNITIES, 50 *Rocky Mt. Min. L. Inst* 14 at 14-49 (2004).

<sup>8</sup> Not to quote myself too heavily, but I have expressed this as follows.

“They must:

- (1) be successful in complying with *national legal and regulatory frameworks* based on the expectations of national government;
- (2) successfully manage *emerging international standards*, largely based on expectations of international financial institutions, which are becoming clearer and more important with each passing day; and
- (3) be successful in meeting the very real *expectations of local people and communities*.”

Luke J. Danielson, SUSTAINABLE DEVELOPMENT IN THE NATURAL RESOURCE INDUSTRIES: NEW PERSPECTIVES, NEW RULES, AND NEW OPPORTUNITIES, 50 *Rocky Mt. Min. L. Inst* 14 at 14-13 (2004).

We all hope that national legislation will be protective of the rights and interests of local communities, and we hope the same of the emerging international standards. But it is an issue of practicality and of legitimacy. Practically, communities present such a bewildering variety of ecological, social, cultural and economic conditions that not even the most sensitive national or international rule-writers can anticipate and provide for them all. In terms of legitimacy, the people whose lives are most profoundly influenced by natural resource development have never signed off on anything that authorizes the rest of us to speak on their behalf or make profoundly important decisions for them.

You recognize this in the importance you assign to prior informed consent.<sup>9</sup> All I am suggesting is that you make that explicit here in the first paragraph.

Enough – I simply urge you, very strongly, to move past the two-level model to a three-level model. In the body of your rules you have a great deal of material that supports this view.

Some multinational companies might like a set of international rules that tell them “do this and you have done right by local communities.” And they might like this process to give them a cook book approach: “if you have followed these five steps you have done all that is required of you.”

But there is no substitute for engagement and respect *at the local level*. And there is a danger that emerging guidelines wind up being simply more political cover for people who don’t engage with or respect local communities: “these local people are totally unreasonable. We have done everything prescribed by the XXXX code and they still aren’t satisfied.”

**[2] P.3, Para.1** We should not ignore the business motivation: “compliance with the laws of the countries in which they operate, while necessary, may not alone be sufficient to protect the environment or vulnerable communities, or to further the business interests of the companies.”

**[3] P.3, Paras. 2-4.** I think you are taking the right approach. There has been a considerable amount of time wasted by insistence that consumer pressure on products is the best way forward, or that lender standards are better, etc. My points would be:

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<sup>9</sup> Indeed, I have expressed above the concern that you are placing too much reliance on FPIC to solve problems that need to be addressed through at least some base line of international standards.

| <b>Too Prescriptive</b>   | <b>Where We Want to Be</b>  | <b>Not Prescriptive Enough</b>   |
|---|---|--|
| International rule writers try to write detailed rules covering the requirements of every community | A balanced combination of basic standards and respect for dialogue with the community | Very few rules; most of the burden is put on the local community to work things out in an FPIC model |

- The minerals industry is large, diverse, and highly segmented. What works in raising standards in the coal industry or nickel production may be very different from the best solution for the gold industry. A variety of solutions may be needed to fit a variety of problems.
- In the long run it is obvious what we need: a set of standards that is increasingly applied by lenders, insurers, customers, investors, and national regulatory authorities: increasing pressure being applied in the same direction from a variety of leverage points.

**[4] P.3, Para. 4.** The certification experience is hardly limited to forestry, fisheries and agriculture. A highly relevant example is eco-tourism, which shows us precisely what to avoid. Well over 100 certification systems, which range from “green only” systems that focus on things like the number of cubic meters of water consumed per guest to the exclusion of any consideration of community social or economic impact, to much broader sets of criteria. These have varying degrees of credibility, from truly independent systems to systems uncomfortably close to the businesses that are certified.

Hence the point in the introduction about convergence and harmonization. This effort should start from the beginning with an announced purpose to link with other credible efforts that are already underway, so as to avoid the “Babel effect” that is seen in ecotourism certification.

**[5] P.4, Growing Demand for a Definition of Responsible Mine Practices**

You strengthen your case by mentioning the wide variety of emerging standards beyond the ones specifically mentioned here. Most of these are dealt with somewhere later in the paper anyway. I would suggest that the demand for some sort of definition of minimum acceptable business practice that you refer to is very real and you are on the right track. The strength of that demand is shown by the variety of instruments being brought into existence to meet it. These include but are hardly limited to<sup>10</sup>:

- The Global Compact
- The Global Reporting Initiative and the soon anticipated Mining and Metals Supplement;<sup>11</sup>
- The Extractive Industries Transparency Initiative;<sup>12</sup>

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<sup>10</sup> While there are certainly better summaries, there is at least some description and references to pertinent documents in Luke J. Danielson, SUSTAINABLE DEVELOPMENT IN THE NATURAL RESOURCE INDUSTRIES: NEW PERSPECTIVES, NEW RULES, AND NEW OPPORTUNITIES, 50 *Rocky Mt. Min. L. Inst* 14 at 14-34 to 45 (2004).

<sup>11</sup> Mining and Metals is one of the first industries to be developing a sector-specific supplement to the general guidelines of the Global Reporting Initiative. These are coming out almost any day now.

<sup>12</sup> For recent developments see G.R. Simpson, Multinational Companies Unite to Fight Bribery, *WALL STREET JOURNAL*. Jan. 27, 2005 at 1.

- The Voluntary Principles on Security and Human Rights; and
- The ICMM-IUCN Dialogue on Protected Areas and the ICMM principles and commitments.

**[6] P.4, Growing Demand for a Definition of Responsible Mine Practices**

I do think this discussion should not proceed without some reference to and acknowledgement of the compendium of such efforts in J. Walker and S. Howard, *FINDING THE WAY FORWARD: How Could Voluntary Action Move Mining Towards Sustainable Development?* (International Institute for Environment and Development 2002).

**[7] P. 5, Section II, para.3.** I heartily agree with your effort to point out here the importance of government views. I would emphasize more heavily the need to do the work of developing government views at an early stage, because I think there is a real danger of an industry-NGO train starting to leave the station before government is even given a chance to get on board. Given sensibilities of developing country governments, that will make it much harder for them to get on board later.

The works of James Otto are a very good way to get some research grounding in these issues for anyone who is not familiar with them.<sup>13</sup> Professor Bonnie Campbell at the University of Quebec at Montreal has written some very important papers in this area.

**[8] PP. 7-8; Basic Rights.** To these I would certainly add the *right of access to certain kinds of information*. A key source that I would suggest be referenced here is: D. Zillman, A. Lucas and G. Pring, eds., *HUMAN RIGHTS IN NATURAL RESOURCE DEVELOPMENT: Public Participation in the Sustainable Development of Mining and Energy Resources* (Oxford University 2002). Without access to information, there is precious little way of vindicating any of the other rights. You should try to link explicitly with the Aarhus Convention movement. See also Sandor Fulop and Csaba Kiss, *Information Availability: A Key to Building Trust in the Minerals Sector*, available at [http://www.iiied.org/mmsd/mmsd\\_pdfs/a2i\\_info\\_availability.pdf](http://www.iiied.org/mmsd/mmsd_pdfs/a2i_info_availability.pdf)

**[9] P. 8 The Right to Development.** It is extremely important to recognize the right to development. It is also important to recognize the idea that sustainable development contains an absolutely necessary component of equity (p.6).

But where are these principles given any practical effect in the analysis of Parts 1-4, beyond what I think is the overemphasis on prior informed consent as a way to solve far too broad a range of problems.

The ideas and principles in those sections are overwhelmingly about restraining development in the interest of protecting vulnerable ecosystems or communities. This is necessary, as the burden of the change of development too often falls on the poor.

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<sup>13</sup> See especially J. Otto and J. Cordes, *THE REGULATION OF MINERAL ENTERPRISES: A Global Perspective on Economics, Law and Policy* (Rocky Mountain Mineral Law Foundation 2002).

But what are these communities going to eat? How can they not just be protected from development, but have a better future? And to what extent does mining have the ability to feed, shelter, or clothe them, or help them toward that better future? To present a balanced framework of sustainable development, you just have to have in here some criteria or issues about things like:

- Is community income going to be increased? If so, by how much and at what cost?
- How is the improvement in living standards going to be shared? How much equity is there in this development?
- Is improvement in health care and education being achieved? How?
- Is the company paying any taxes?
- How will any of these benefits be sustained post-mining?

There are a lot more of these questions, but I urge you to put some serious effort into balancing this document so that it comes out “the right to sustainable development” instead of “the right to be protected from development” which is frankly how it now comes across to me.

**PP. 8-9. Organization of the Framework.** I share the frustration with the term “best practice.” At MMSD, we had so many requests to “identify best practice” that we finally did a literature search to try to find a definition. And we couldn’t find anything even remotely satisfactory. Lots of people use this term without any clear concept of what they are talking about. So perhaps we need to get “beyond best practice” to a new terminology that has some kind of more clear meaning. It is worth making a couple of points:

- One of the problems, whatever terminology we use, is the variation of circumstances. What may be a great technical solution to a tailings dam problem in the Atacama where it rains a few millimeters every ten years might be a disaster in Indonesia where it rains five meters or more a year. A state of the art approach to community consultation in Montana might, if repeated step by step, be a total fiasco in the Philippines.
- This leads us away from specific technical solutions (“a tailings dam should have 3 meters of freeboard,” or “public consultation should last 6 months”) to process solutions.<sup>14</sup>

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<sup>14</sup> The discussion of “No Go” zones is one clear example. If we try to decree on a world wide basis a complete and definitive list of all the areas that are and are not “no go” zones, as a number of individuals and organizations have tried to do in the past, we will immediately start to founder on a list of questions such as:

**[9] PP. 11, “No Go” Zones.** You say that “many conservationists believe that protected areas are insufficient to guarantee conservation of valuable ecosystems.” This is an understatement. While protected areas are a necessary component of a successful conservation strategy, if private lands are all managed with no regard for conservation, no amount of protected areas we are ever likely to see will get the job done. Hence, one of the prizes of more deeply engaging the mining industry in a discussion of conservation is commitment to improved conservation practices on private land it manages or controls. If we stay stuck only on protected areas we will miss this enormous opportunity. What about a standard for the conservation management of private lands held by mining companies?

**[10] PP. 11-12 “No Go” Zones.** I suggest you also cite I. Koziell and E. Omosa, ROOM TO MANOEUVRE? Mining, Biodiversity and Protected Areas (International Institute for Environment and Development 2003).

**[11] PP. 11-18 “No Go” Zones.** You are stuck here in Part 2 with a dilemma, that you recognize very clearly on pages 20 and 21 below:

- Many, perhaps most, of the decisions as to whether to go into protected areas are made not by the mining majors that are part of this dialogue, but by exploration juniors.
- Many, perhaps most, of the adverse impacts on protected areas are created *at the exploration stage*, such as creation of new road networks, facilitation of access by hunters and illegal settlers, loggers, etc.
- Maybe 1 in 100 exploration projects turns out to be a mine, so the impacts of exploration are felt in 100 times the area that mining is felt.

You might be able to imagine the majors creating a standard that says “we won’t buy projects from juniors if the projects are in certain kinds of areas.” But the saying goes among the juniors to the effect that “if you find a rich enough deposit, all sins will be forgiven.” And this, sadly, may have some truth.

I would suggest not spending a lot of energy trying to get a few individual companies to agree in principle that if someone offers them the richest gold find in 100 years, they

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- Do we really have the legitimacy to speak in a binding way for the preferences of hundreds of thousands or millions of local communities around the world?
  - There are dozens of kinds of protected areas created for dozens of kinds of purposes. Some of them (e.g. National Wildlife Refuges in the United States) specifically allow mining under some circumstances. Does government have the authority to create kinds of protected areas in which mining is permitted?
  - Do we really know in detail about where the values we want to protect are located?

Clearly, the standard cannot be that some few people sit down and draw a map of the world with lines on it, like the victors at Versailles carving up Europe. It has to be based on general criteria, and some guidance as to what kind of decisionmaking processes can be regarded as legitimate. For making site specific decisions.

will refuse to buy it because of the way the exploration company behaved, and will sit by watching their competitor, who has not agreed to the standard, get rich. Your time is too valuable to spend on pursuing this kind of solution.

So, I would explicitly say in your paper something to the effect that:

"All decisions to mine in a sensitive area are preceded by a decision to explore for minerals in protected areas. While major mining companies are responsible for how their exploration activities are managed, most exploration is conducted by small "junior" companies, who are largely not yet part of the dialogue that has begun.<sup>15</sup> Nor are governments, who are ultimately the authority that designates protected areas. The participation of both governments and junior companies is necessary to design and or to implement an effective and lasting solution. As critical as this issue is, its solution must await some greater engagement of these stakeholders."

Whether you agree with that or not, as much as you write around the word "exploration," it is lurking here and I fear you may tie yourselves in unwanted knots if we don't get this out on the table:

- Most of the critical "go/no go" decisions are made at the exploration stage;
- Most of them are therefore not made by the major multinationals that are part of this dialogue;
- The mentality of some is "if you find a rich enough deposit, all sins will be forgiven;"
- Key actors necessary to the resolution of this issue are not at this table; and therefore
- While these issues are exceedingly important they need some other kind of vehicle to address them.

**[12] P. 17. No go zones and biodiversity conservation.** You really hit the nail squarely on the head when you refer to the WWF and CI work in para. 2: "results are too coarse at a global level to be considered 'no go' zones." The fact is that any rigorous research project with any amount of resources that is likely to be committed, and the biggest computers in the world to store the data *will still produce results that are "too coarse at a global level."*

What is the way forward? I believe it is the following:

- A standard for base line data gathering on biodiversity, cultural resources, and any other values that we can identify, in advance of the decision to mine (explore).
- A standard for public diffusion of this information, in advance of the decision to mine (explore).

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<sup>15</sup> Even more problematic: they are in general contracted by these juniors to local drilling companies. So even a well managed junior may face difficulties getting a contractor to meet standards.

- o A set of general principles to (1) ensure the right of affected stakeholders to participate in “go-no go” decisionmaking; and (2) to ensure an open, transparent process.

**[13] P. 20-21. Exploration.** I agree with the points you make on exploration. However, there is one question that desperately needs to be answered – if there is to be a financial surety, *who is going to hold it?* And who is going to decide when restoration has been accomplished and the surety terminates? There almost has to be participation by government here as the surety holder.

But legislation in most developing countries does not provide for sureties, does not establish criteria or procedures, and does not establish safeguards for how they will be handled. (A common company fear is that they will be asked for bribes in some countries as a condition of getting the surety returned). So who, in countries without legislative schemes, establishes, holds, and returns the surety?

**[14] P. 20-21 Exploration/Complaints.** I think that there is one fairly easy, relatively low cost, and exceedingly useful standard here that you might look at. That is a complaints system. One of the most common problems with exploration, especially when conducted through contractors, is that aggrieved local people do not even know who these people are or where to complain. The proposed solution is a complaints mechanism consisting of three simple components:

- o Identification. All vehicles used by company employees and contractors will be required to bear clear identifying information, including a telephone number or local address to which complaints can be made.
- o Logging of Complaints. All complaints received will be entered into a permanent log, together with the company response to the complaint; and
- o Availability. The log is available on request to any interested party.

I think leading edge companies are ready for this. Frankly, it is something that well managed companies should welcome and promote, just as trucking companies find it in their interest, and the interest of better performance, to have signs saying “Don’t Like My Driving? Call 1-800-XXX” on their trucks.

**[15] P.21 Environmental Impact Analysis.** I have been through this a bunch of times in a bunch of countries. I would suggest that the long-term solution may be to link with IAIA (International Association for Impact Assessment) to put together a set of detailed standards for EA for mining projects.<sup>16</sup> The World Bank could make a major advance in this direction as well, but has seemed a bit slow off the mark.

My views of the key defects in current EA practice would include these in the “short list” of truly serious problems:

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<sup>16</sup> The better EA consultants would welcome these standards as a way to protect themselves from competitions by cut-rate incompetents.

- Base Line Data. The list of problem projects where lack of quality base line data were a key part of the problem is a very long one. It includes, for example, the Summitville disaster in the United States, where a company decision to cut corners by submitting meteorological data from somewhere else, rather than take the time to gather it at the site,<sup>17</sup> led to fatally wrong water balance calculations. The problem is that companies are usually in a hurry, and measure success by how quickly permitting is achieved. And gathering data on meteorology, wildlife life cycles, and other things requires an absolute minimum of a year's observation. And no one wants to spend the money to start gathering data until a "go" decision has been made on the project. Really clear, specific minimum base line requirements for all EAs (to be supplemented based on local needs).
- When is the EA prepared? In all too many cases, there is no EA requirement for exploration. And indeed, in all too many countries there is no EA requirement until a permit is sought to mine. This means that detailed development drilling, with hundreds of km of roads, multiple pads, and hundreds of holes in the ground is all done *before* the EA process starts, or indeed before we start gathering information on things like biodiversity. The place looks like the moon before we start doing wildlife studies, only to find – surprise!! – there are no wildlife.

**[16] P.21 Environmental Impact Analysis.** The future is heading beyond environmental impact analysis to integrated impact analysis. See, e.g., MMSD at 399.

**[17] P. 24. Public Reporting of Water Discharges.** I could not agree more. I would note that again government has a role – indeed in a few countries there is legislation restricting disclosure of such data, even if the company wants to disclose it. You are too kind to the World Bank – the ambiguity in their policy is hardly an oversight.

You will find a lot of support for your views in D. Zillman, A. Lucas and G. Pring, eds., HUMAN RIGHTS IN NATURAL RESOURCE DEVELOPMENT: Public Participation in the Sustainable Development of Mining and Energy Resources (Oxford University 2002) that is a real in depth treatment of access to information. See also Sandor Fulop and Csaba Kiss, *Information Availability: A Key to Building Trust in the Minerals Sector*, available at [http://www.iied.org/mmsd/mmsd\\_pdfs/a2i\\_info\\_availability.pdf](http://www.iied.org/mmsd/mmsd_pdfs/a2i_info_availability.pdf)

**[18] P. 25. Perpetual treatment.** There are a lot of perpetual treatment mines getting built out there. Maybe we need to be a little clearer on what a "qualified mining professional" is?

**[19] P. 25 Minimizing Water Use.** I would suggest taking another look at whether this is always a reasonable objective. I wonder whether at some of the big Indonesian or PNG mines there is not so much water that reducing its amount actually has benefits,

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<sup>17</sup> I understand this is the case with Glamis Gold's Marlin Project in Guatemala, now pending. "When will they ever learn?"

like reducing tailings dam hazards, etc. I am not suggesting I know the answer to this but suggest you ask someone who does.

**[20] P. 26 Acid Mine (Rock) Drainage.** This is the biggest of all the environmental problems. As you point out, clear technical understanding, the ability to predict results in advance and ability really to ensure management to a given standard all still elude us.<sup>18</sup> Where I think we need to go is to up the level of public focus by “outing” this issue, so that decisions are made based on clear understandings of the risks, the uncertainties, the unknowns, and the options.

ARD impact on aquatic biodiversity is not sufficiently recognized as a problem, another reason why keeping contamination from leaving the site is important.

Ultimately I think this requires developing a list of questions that need to be addressed in any permitting process, or by any company that pretends to “leading edge” practice. Perhaps these might include:

- An explanation of what ARD is;
- A presentation of the range of possible ARD outcomes at the site, including best case, worst case, and “most probable;”
- A commitment as to specific objectives or criteria that the company will assure will be achieved;<sup>19</sup>
- An indication of where the funds will come from to meet the agreed objectives.

**[21] P. 28. Air.** Identifying individual contaminants here may be a mistake, as the site specific characteristics may mean that at a particular site arsenic, or cadmium, or something else may be a far greater threat than the ones you identify. Maybe the point is to set out criteria for identifying the contaminants that need to be reported rather than trying to achieve a list for all conditions worldwide.

**[22] P. 28 Energy.** See also K. Rabago, A. Lovins, T. Feiler, *Energy and Sustainable Development in the Mining and Minerals Industries*, available at [http://www.iied.org/mmsd/mmsd\\_pdfs/041\\_rabago.pdf](http://www.iied.org/mmsd/mmsd_pdfs/041_rabago.pdf)

**[23] P. 29 Waste.** I strongly commend to your attention the papers “Large Volume Waste and Sustainable Development – Mining for the Future” which were generated in the MMSD project and can be found at [http://www.unr.edu/mines/mlc/presentations\\_pub/LVW.shtml](http://www.unr.edu/mines/mlc/presentations_pub/LVW.shtml). See also [http://www.iied.org/mmsd/mmsd\\_pdfs/draft\\_paper\\_lvw.pdf](http://www.iied.org/mmsd/mmsd_pdfs/draft_paper_lvw.pdf).

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<sup>18</sup> See K. Lappako, *Metal Mine Rock and Waste Characterization Tolls: An Overview* (International Institute for Environment and Development 2002), available at [http://www.iied.org/mmsd/mmsd\\_pdfs/067\\_mftf-f\\_lapakko.pdf](http://www.iied.org/mmsd/mmsd_pdfs/067_mftf-f_lapakko.pdf)

<sup>19</sup> Too often no one wants to commit to anything specific until after they get a chance to see how things turn out; the objectives wind up being based on the outcome, rather than the outcome on the objectives.

There is also a very useful paper by T.E. Martin et al., *Stewardship of Tailings Facilities*, (International Institute for Environment and Development 2002), available at [http://www.iied.org/mmsd/mmsd\\_pdfs/tailings\\_stewardship.pdf](http://www.iied.org/mmsd/mmsd_pdfs/tailings_stewardship.pdf)

**[24] P. 30. Emergencies.** I would suggest mentioning the United Nations Environment Programme APELL program <http://www.unep.org/pc/apell/>

**[25] P. 31. Riverine Disposal.** Do take a look at the case studies on riverine disposal at Ok Tedi, Grasberg, and Porgera prepared by van Zyl et al. and found at <http://www.iied.org/mmsd/wp/index.html>

**[26] P. 32. Cyanide.** Let us get mercury banned and out of use before we spend too much energy on cyanide. We don't have to endorse cyanide in order to have a sense of priorities.

**[27] P. 33. Reclamation.** See A. Warhurst and L. Noronha, eds. ENVIRONMENTAL POLICY IN MINING: Corporate Strategy and Planning for Closure, (Lewis Publishers 1999).

**[28] P. 33. Reclamation.** See van Zyl et al., *Mine Closure Working Paper*, found at [http://www.iied.org/mmsd/mmsd\\_pdfs/draft\\_paper\\_mc.pdf](http://www.iied.org/mmsd/mmsd_pdfs/draft_paper_mc.pdf)

**[29] P. 33 Reclamation.** Here is one place where I do think you are behind the state of the art. I think we are clearly headed toward a concept of integrated mine closure planning,<sup>20</sup> that recognizes that unplanned closure can have all kinds of negative effects:

- o Regional economic collapse as the single industry that drives the rest closes;
- o Unemployment and its companions -- domestic violence, drug and alcohol abuse, depression and mental health problems;
- o Rupturing of established social links as people leave stable communities out of economic necessity;
- o Dramatic fall in government tax receipts just at the time that the demand for social spending to deal with all of the above peaks; etc.

These potential social and economic problems interact with and exacerbate the environmental problems. For example, if government funds are overstressed there is likely to be nothing for maintaining water quality; alternative livelihood activities (turning from mining to grazing as in some parts of southern Africa may create very significant environmental stress, etc. At the same time, deteriorating ecosystems produce less benefits to people who are increasingly in need of them.

I think the movement toward integration of planning for the environmental, social, and economic aspects of closure is taking hold. Here would be a good place to give a positive mention to the Post Mining Alliance, which needs our support. See <http://www.edenproject.com/postmining/>

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<sup>20</sup> MMSD at 400.

**[30] P. 33 Reclamation.** When I went to Chile I also believed that “[r]evegetation is a universally accepted goal.” It isn’t. In the Atacama – and some other mining regions, there isn’t any vegetation pre-mining and there isn’t going to be any post-mining. So I would say “it is universally accepted that revegetation – or in extreme desert conditions some other form of stabilization against erosion – is necessary and desirable.”

**[31] P. 36 Backfilling.** This may often be desirable but I think you are right to say that it can hardly be pursued as a universal practice or option:

- There are conditions (e.g., the backfill material is highly reactive and we want to keep it out of contact with water) where you do not want to backfill because to do so would degrade water quality.
- If 4-7% of world energy use is in this industry, how much do we want to increase that figure? At the big modern open pits, the great majority of that energy is used hauling material out of the hole. Are we going to essentially double the energy consumption of the project by hauling it back into the hole? How much environmental benefit is there in backfilling? And how much energy are we willing to spend to achieve it? This looks awfully site-specific to me.
- What is the social tradeoff? If it costs hundreds of millions of dollars to backfill a pit, most people in developing countries are likely to think that adequate nutrition, more schools, and better health care are higher priority ways to spend that money.

**[32] P. 36 Financial Guarantees.** This was mentioned briefly above in the context of bonding for the environmental costs of exploration. As a former government official who was in charge of a mine closure and bonding program, I am absolutely convinced that *this has achieved more than any other single step in improving environmental practice in the industry.*

Mine projects can last 30, 40, or 80 years. In that time a single mine can generate billions of tons of waste. The cost of moving that material once is staggering. If it is put in the wrong place, and society has to move it again, the cost is again staggering. So it must be put in the right place the first time. This is the essence of the environmental dimension of mine closure planning.

No one can predict mineral markets, or technological change. As a result, mines almost always close either sooner or later than anticipated when they open. Individual mines close unexpectedly for a variety of reasons. We also see massive group closure in response to price changes (silver in the U.S. west in 1893; uranium in the early 1960s, nitrate in Chile in the 1920s, tin in Bolivia, etc.)

When this happens, lots of mines simply fail financially. Whether the intentions of their owners are good or bad, they are going to leave a half completed site; it financial

pressure had forced them to cut corners as profitability declined it may be a real mess. So we came up with the idea of bonding or financial assurance.

The problem? There are a number of them:

- While bonding is in almost universal use in Europe, Canada, Australia, and the U.S., the developing countries in which mining is increasingly centered have been very slow to move to adopt it. South Africa has a system but it is of very limited application. Peru is trying with a lot of fits and starts to write some regulations. But by and large *there is no financial assurance in the developing world.*
- Financial assurance, if done right, is very expensive.<sup>21</sup> If it isn't done right, as you point out in note 134, it is hardly worth doing – and to Zortman Landusky we can add really a lot of other examples such as Summitville.<sup>22</sup> Most of the developing countries want to compete for mining investment, and feel that imposing financial assurance will handicap them in attracting investment, particularly if their neighbors are not imposing similar requirements.<sup>23</sup>

Some of the problems with financial assurance are shown in Figure 3.

| <b>Problems With Financial Assurance</b>   |   |  |
|--|---|--|
| <b>Fig. 3</b>  |   |  |
| <b>Question</b>  | <b>Importance</b>   | <b>Challenge</b>   |
| Who determines the amount of the financial assurance?                            | Experience indicates that some companies tend to underestimate this, and independent review is quite necessary.   | Doing an adequate and defensible calculation of the amount of financial assurance requires a very high level of capacity and professional skill        |
| Who determines when reclamation is complete and the assurance can be terminated? | As noted in your paper, if you give the bond back too soon, you leave unattended problems to deal with. If the company has not confidence it will get the assurance | A really honest, competently run system that neither terminates bonds too early nor creates unnecessary obstacles to getting them back requires a high |

<sup>21</sup> I have forgotten the final figure for the financial assurance Phelps Dodge has been asked to put up at the Chino mine, but it is several hundred million dollars. If an identical project were located in a country with no bonding requirement, is one going to have a cost advantage over the other? You bet.

<sup>22</sup> See L. Danielson et al., *The Summitville Story: A Superfund Site is Born*, 7 ENVIRONMENTAL LAW REPORTER 10388 (1994).

<sup>23</sup> The best surveys of national mine closure and financial assurance requirements are in Spanish, by G. Lagos et al., which I have and can send you on request, and the doctoral thesis of Patricia Gonzalez, pgonzalez@idrc.org.uy.

|   |  |   |
|---|--|---|
|   | terminated without paying bribes it will be very reluctant to give a surety.   | degree of capacity.   |
| If government has not established a bonding system, how can a company give a guarantee? | If government has not established legislation: <ul style="list-style-type: none"> <li>o Who decides how much the guarantee is?</li> <li>o Who holds it?</li> <li>o Who gives it back?</li> </ul> | If there is no financial guarantee, the system of mine closure planning is terribly weakened. But if meeting your standards requires a bond, there is at present no way for operators anywhere but the U.S., Canada, Australia, etc. to comply. |

There are plenty of other issues, but this is enough to indicate what the problem is. Mine closure planning backed up by financial guarantee is probably the most important thing we could achieve. Yet how?

- o It is very hard to see how anything can be done by companies alone, without government as the key player;
- o Individual mining nations are very hesitant to act alone;
- o It appears that the best way forward is through concerted action by the major mining nations. That is, if major mining countries were to move toward a guarantee system together, it would reduce the concern about losing competitiveness; and
- o That is hard to achieve.

What does this mean for your paper? I think you need to acknowledge a couple of things:

- o Financial assurance is very important indeed;
- o Such systems are hard and expensive to create and largely do not exist outside the advanced industrial economies;
- o It is very hard to see how such a system works without government as a player.

Industry, particularly the largest companies, are ready to move on this and have been for some time.<sup>24</sup> The problem is this.

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<sup>24</sup> See the very important paper by C.G. Miller, Use of Financial Surety for Environmental Purposes (ICME 1998).

The large companies have been saying “we will comply with any reasonable requirements on only one condition. That condition is that the rules apply to everyone.”

While on some level this sounds very fair, the fact is that the big multinationals have the capacity to do quality closure planning, and post bonds to assure performance. And a lot of their smaller competitors do not. At the same time, the smaller competitors actually provide considerably more employment than the big companies. So a bunch of requirements that turn all the artisanal and small scale (and mid size for that matter) companies into illegals by imposing requirements that only the big can meet sounds very attractive indeed to the big. And maybe that is the way to go, in the interest of the environment. But what are the losers in this game going to do for livelihoods?

So it is Deputies and Senators that have a lot of small and medium miners in their districts that have the most concern about passing the necessary legislation.

The solution is probably different levels of requirements for different scales of operation. That means everyone has to improve, but that the giant companies can't operate on the idea that they will comply with whatever everyone else complies with, i.e., that the multi billion dollar companies will comply with the same requirements as a company run by three people who make \$3000 each per year and are unable to read and write.

**[33] P. 42. Part 3. Workers and Affected Communities.** This narrative is still very much on the wave length of ‘protecting people from development.’ It focuses entirely on the risks and does not mention opportunities. Or put another way, it is focused on the costs of development and does not talk about opportunities. Or another way, it fails to deal with the right to development

Maybe there are projects where there are few if any benefits and an absence of opportunities. And maybe we need to say “no” to those projects. But where the benefits and the opportunities exist, they will be greater if there is a conscious attempt to manage and maximize them, and we are missing the boat if we don't focus on how to do this.

Communities may well be “involuntary bearers of risks.” But they may also be “those excluded from a fair share of the benefits.”

Or at the bottom of page 42 “[t]here is increasing recognition by governments ... that mining should not leave directly affected communities worse off ... .”

Can we get instead to “there is an increasing consensus that mining should leave the directly affected communities measurably better off than they were before the project started?” I think that is where we need to be.

The list on 43-44 of potential risks is generally good. *But where is the equivalent list of potential benefits?*

In short, *where is the Right to Development?*

If all we are doing is protecting people from the negative consequences of development, then:

- If we are completely successful, people are no worse off; and
- If we are partially successful, they are only partially worse off.

Where and how do people become better off?

**[34] p. 45. Last paragraph.** You say that “[i]ncreasingly, the process of seeking a ‘social license’ to operate is being captured by the need to achieve ‘free, prior and informed consent.’”

Do you have any evidence for this idea?

Indeed, what you are saying here seems to be contradicted by what you say on page 50: The ICMM sustainability Principles “do not address FPIC at all.” In fact, ICMM “argued that FPIC is not sufficiently defined ... .” And the “mining associations of the U.S., Canada, and Australia have also not expressed support for FPIC.”

I think that the statements by a number of mining companies that they will not develop projects over the opposition of local communities are very helpful. But I do not think that it constitutes an acknowledgement of what many mean by “free, prior and informed consent.”

I simply fail to see any support for the existence of the trend described in the text at page 45, but then there is an increasing number of things that escape me as I get older.<sup>25</sup>

**[35] p. 46. Indigenous Peoples.** See the excellent paper by T. Downing, C. Garcia-Downing et al., *Indigenous Peoples and Mining Encounters: Stakeholder Strategies and Tactics*, in FINDING COMMON GROUND (International Institute for Environment and Development 2003), an earlier version of which is available at [http://www.iied.org/mmsd/mmsd\\_pdfs/057\\_downing.pdf](http://www.iied.org/mmsd/mmsd_pdfs/057_downing.pdf).

**[36] p. 49 et seq., Free Prior and Informed Consent.** The concept of prior informed consent has been developed to deal with the specific needs of indigenous and

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<sup>25</sup> If a couple of funders interested in the idea finance a handful of studies this is not evidence for a spontaneous wave of acceptance.

tribal peoples and is recognized by a number of international conventions as an appropriate way of dealing with their problems.<sup>26</sup>

I am not aware of any international agreement that recognizes this concept as applying to anyone else other than indigenous and tribal peoples. I am frankly afraid that trying to extend it – as some would – to the citizens of Leeds, or Milwaukee will ensnare us in such tremendous political and practical difficulties that it will stall the progress indigenous peoples have made in obtaining recognition of their existence, their rights, and of their control of development within their traditional territories. Your paper refers at 46 to their “unique status.” As you also say, “[I]ndigenous peoples are recognized by international institutions as distinct populations that are afforded distinct rights ... .” If we start trying to extend these rights to everyone, the “unique status” is no longer unique, and the “distinct rights” are no longer distinct: their rights become the same as someone living in suburban Frankfurt.

I do think that by trying to extend this concept beyond the case of indigenous and tribal peoples, well meaning people and institutions are going to do a tremendous disservice to those peoples and their long struggle for legal recognition. The “implementation” of the concept of prior informed consent in the indigenous context will be difficult but is achievable. If we delay the implementation in the indigenous context while we try to make this concept fit Perth, or Amarillo, we will be delaying the day indigenous communities achieve greater control over their development future.

N.B. – If there are some problems, issues and unresolved questions in applying the concept of FPIC to the situation of indigenous peoples, these problems are 100 times greater in Milwaukee. In the indigenous context, some of the questions like definition of the community are (even if some problems occur) relatively straightforward. Trying to define “the community” where it has no distinct cultural, national or ethnic identity is by contrast a nightmare. And this is just one of a dozen such issues.

**[37] PP. 50-51 Deconstructing FPIC.** We are dealing with extraordinarily complex phenomena. They are very hard to sort out. If we are trying to talk about universal principles that apply to everywhere in the world, we quickly run into the obstacle that none of us knows the whole world. If we fail to show any humility at the limits of our own knowledge, and try to write rules for the whole world despite our limitations, we can fairly be accused of being ‘control freaks.’

Let me share this perspective on the “FPIC issue.”

#### LEVEL ONE: NO REVENUE SHARING

At the most basic level, there is in nearly every country and place in the world a tension between national government and local interests.

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<sup>26</sup> M. Orellana, *Indigenous Peoples, Mining and International Law*, in FINDING COMMON GROUND (International Institute for Environment and Development 2003), an earlier version of which is available at [http://www.iied.org/mmsd/mmsd\\_pdfs/002\\_orellana\\_eng.pdf](http://www.iied.org/mmsd/mmsd_pdfs/002_orellana_eng.pdf)

The most obviously relevant way in which this plays itself out is in disputes over the ownership of mineral resources and the control of mineral revenues. This is perhaps the most serious and ubiquitous source of community conflict over mineral development, since those who own the mineral resources are the ones with the right to say “no,” or to put conditions on development.

Further, if we take the position of the mineral codes in many, probably most, developing countries, the result is:

- Ownership of all mineral resources is in the national government, which has the exclusive right to grant licenses for exploration and mining;
- Granting of exploration licenses is a ‘ministerial act,’ which requires no public notice or participation;
- The decision to permit mining or exploration resides solely with the national authorities;
- All tax and permit revenues go to the central government; and
- Local government has no power to impose taxes or fees on mining.

At this level, the decision is pretty much a ‘no brainer’ for local interests: No control, no decisionmaking authority and no revenues = all of the risks and few if any of the benefits = ‘we do not want this.’

“One of the most contentious issues is how to share mining revenues between the central government and local governments and communities in mining areas.”<sup>27</sup> Thus, even if there is no ethnic or national difference at all between the local community and the national government, failure to share any of the revenues with local communities will predictably result in their opposition. A recent example is Tambo Grande in Peru. Tambo Grande is not an indigenous community nor is it culturally different from the ethnic groups that dominate Peruvian politics and national government. But the decision of the Fujimori government to suspend sharing mineral revenues with the regions was a key element in sparking local opposition.

#### LEVEL 2: NO REVENUE SHARING COUPLED WITH ETHNIC DIFFERENCES.

Amy Chua’s deeply troubling book *WORLD ON FIRE* (Doubleday 2003) shows how development processes can exacerbate ethnic and national tensions with tragic results.

And indeed, we see all over the world deep and violent conflicts brought about by ethnic or national tension exacerbated by struggles over mineral revenues, from Aceh in northern Sumatra, where the independence struggle is very much a struggle over oil revenues, to Ogoniland, to Congo. See Ian Bannon and Paul Collier, *NATURAL RESOURCES AND VIOLENT CONFLICT* (2003).

We have to face the fact that many of the countries that have emerged from colonialism in the 20<sup>th</sup> Century had no previous national identity. An example is Iraq, created by the

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<sup>27</sup> MMSD at 182.

power brokers of the Versailles Peace Conference, or Indonesia, which in the words of an Indonesian friend “was over 200 separate nationalities with nothing in common except that we were colonized by the Dutch.”

In this kind of situation, national governments are acutely aware that the financial power of mineral revenues can give wings to independence ambitions. To use a current example, there is probably no more contentious issue in Iraq today than the future of Mosul and its oil revenues. The Kurds want these to solidify their ambitions for autonomy/independence. For precisely this reason, the Turks, the majority Iraqis and others have profound misgivings about giving the Kurds this independent financial base.

“Investing in such regions, without some consensual understanding between region and nation, can start a company down a slippery slope. It sometimes starts with a promise by the national government to establish a military or police presence to maintain order and enforce national law. It often leads quickly to an ongoing cycle of violence and human rights abuse.”<sup>28</sup>

So if to the complexities central government – local government tension over tax or permit revenues we add ethnic or cultural differences, the mix becomes quite explosive.

### LEVEL 3: INDIGENOUS AND TRIBAL PEOPLES

As you know – you don’t need me to tell you this – these problems are even more acute where the tension is between an indigenous group, especially one whose territory is not fully recognized by law, and a non-indigenous central government.

Indeed, in many parts of the world, there is an uneasy truce between the indigenous community, which claims full ownership of its traditional lands, and the national government, which does not recognize these land claims despite the fact of indigenous occupancy. Everyone can live uneasily with the status quo until a mining proposal shows up and the national government says “under the law we get to issue a permit and we get all the revenues” and the indigenous organization says “no.”<sup>29</sup>

My point is simply this: if you get into the process of trying to maximize the development potential around projects, as I think you need to, you need to cope with the issue of distribution of mineral revenues: if the local community gets none of the revenues, local government institutions will be too weak to be either effective regulators or effective partners in the process of sustainable development.

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<sup>28</sup> Luke J. Danielson, *Sustainable Development, Natural Resources and Research*, 19 NATURAL RESOURCES LAWYER 39, 43 (2004).

<sup>29</sup> See Janeth Warden-Fernandez, *Indigenous Communities and Nacional Laws*, in FINDING COMMON GROUND (International Institute for Environment and Development 2003), an earlier version of which is available at [http://www.iied.org/mmsd/mmsd\\_pdfs/059\\_warden-fernandez.pdf](http://www.iied.org/mmsd/mmsd_pdfs/059_warden-fernandez.pdf)

**[38] FPIC DECONSTRUCTED (2).** In the indigenous context, a lot of the more troubling issues with FPIC have reasonably clear answers. In the context of Dubuque, Iowa or Sebastopol,<sup>30</sup> these issues are much less clear.

| <b>ISSUES WITH PRIOR INFORMED CONSENT</b>         |  |  |  |
|---|--|--|--|
| <b>Fig. 4</b>                                     |  |  |  |
| <b>QUESTION</b>                                   | <b>INDIGENOUS COMMUNITIES</b>  | <b>'MODERATE' POSITION -- NON-INDIGENOUS COMMUNITIES</b> | <b>'EXTREME' POSITION – NON INDIGENOUS COMMUNITIES<sup>31</sup></b>  |
| What is a "community for purposes of PIC?         | Members of the indigenous group, who have a right to self-definition   | ?  | The right of self-definition gives <i>any</i> group the right to define themselves as a community                |
| What communities are "affected?"                  | Communities with a traditional tie to the land on which the project will be developed; the indigenous group knows its own cultural and spiritual ties to the land and therefore has a right to decide whether it is affected | ?  | <i>Any</i> community has the sole right to determine whether it is affected                                      |
| What process determines whether consent is given? | The decisionmaking process in use by the indigenous community, which is often consensus or unanimity (see your note 207)   | ?  | If unanimity or near-unanimity is the standard for indigenous communities, other communities have the same right |
| Can consent once given be withdrawn?              | If the community has made an agreement it will live by the agreement so long as the other side does so   | ?  | Consent can be withdrawn any time the community changes its mind   |

<sup>30</sup>

<sup>31</sup> If you think this is unrealistic, please realize that among the authors cited in your Cork there are people who are clearly on record as supporting these views, and an even greater number who simply dance around the issues without ever taking a position.

|   |                       |   |       |
|---|-----------------------|---|-------|
| To what extent can national government override a local veto? | As provided by treaty | ? | Never |
|---|-----------------------|---|-------|

I don't want to beat this horse to death. But even if there are some discrepancies over the exact answers, the answers in the case of indigenous communities seem relatively precise and understandable. The answers in the right hand column do not seem defensible to me, though there are people around defending them.

If you add to this the complexity of, say, a project with a mineral pipeline (Alumbrera or Los Pelambres) or transmission line, that passes by several dozen population centers, and take the position that any one of those population centers can withhold consent (or withdraw it at any time once given) you are getting out there on some pretty thin ice.

My point again is that I would be very, very hesitant to take the PIC or FPIC concept beyond the context in which it has legal recognition – indigenous and tribal communities.

If we believe something less extreme than the right hand column of Figure 4, then we might say that the “traditional decisionmaking mechanisms” of the community of Milwaukee are approval by the Milwaukee City Council. In which case, why do we need to load ‘prior informed consent’ on to the process?

The answers in the right hand column of Figure 4 – which as I indicate are not something I have made up, but ideas I have heard advocated by some of the authors you cite – are in my view profoundly antidemocratic.

**[39] A Final Word on FPIC.** As I indicated in my introduction, I think you are loading far too much baggage on FPIC to solve the broad problems of development:

- o FPIC cannot be the answer to every development challenge from schools to clinics to transportation infrastructure; there need to be some standards beyond just leaving it up to the community to negotiate with the mining company;
- o FPIC is so devoid of content as to be dangerous outside the indigenous context; and
- o Trying to resolve all the ambiguities of applying FPIC in Oslo, Norway will entangle the concept in so much baggage that it will work to the disadvantage of indigenous communities who need to concept sooner rather than later.

There is a further danger. I think that you are loading far too much baggage on the Tebtebba Foundation and the North-South Institute to resolve all of the problems of applying FPIC in the world. See your note 209.

You are completely correct and honest in acknowledging the definitional problems and serious questions raised by misguided application of this concept, in the first full

paragraph on page 49. But I think you are very much overoptimistic on thinking that forthcoming research by these two institutions is going to clear all of this up.

**[40].PP. 55-57 Community Consultation and Planning.** You are very much on point here. I think my only comment is that the planning process has to be three-cornered and involve the national government as well because (i) it has so much of the decisionmaking say-so; and (ii) through taxation and permit fees, it is the recipient of the revenues that are needed for capacity building and development. See table 9-2, MMSD at 224.

I think what you have here is very much akin to what MMSD advocated under the name Community Sustainable Development Planning (MMSD at 227).

Since what it leads to is something like a Community Development Plan or consent agreement, I would combine this discussion with the discussion of consent agreements at 59. Again, note that there is a huge limit on what can be accomplished in consent agreements unless national government is a party. What does the dialogue and participatory decisionmaking lead to if not some kind of agreement and ongoing planning process during the mine life?

**[41] P. 57 – Access to Information.** You should in my view very much increase the prominence and profile of this issue in your paper. As I indicated above, I believe:

- *This is one of the fundamental rights of all citizens* that needs to be up there with the right to development, the right to environment, and other human rights in pp. 7-8.
- The Aarhus Convention makes this clear.
- See D. Zillman, A. Lucas and G. Pring, eds., HUMAN RIGHTS IN NATURAL RESOURCE DEVELOPMENT: Public Participation in the Sustainable Development of Mining and Energy Resources (Oxford University 2002).
- See Sandor Fulop and Csaba Kiss, Information Availability: A Key to Building Trust in the Minerals Sector, available at [http://www.iied.org/mmsd/mmsd\\_pdfs/a2i\\_info\\_availability.pdf](http://www.iied.org/mmsd/mmsd_pdfs/a2i_info_availability.pdf)
- See F.Loayza, *Access to Information: A Key to Bulding Trust in the Minerals Sector – The Government Role* (International Institute for Environment and Development 2002), available at [http://www.iied.org/mmsd/mmsd\\_pdfs/018\\_loayza.pdf](http://www.iied.org/mmsd/mmsd_pdfs/018_loayza.pdf)
- See MMSD Chapter 12 at 291.

**[42] P. 65. Gender Impact Assessment.** This is important. But I think we need to have this conducted as a part of the Integrated Impact Assessment. Many of us realize the need for conflict impact assessment, social impact assessment, gender impact assessment, etc. But if each of these is conducted separate and apart, there is too much

chance for things to be lost, and too much confusion. It would be helpful if you could make this point. See MMSD at 399.

**[43] p. 65. Worker rights.** I much hope that you are sharing this with Gino Govender or Reg Green or someone at ICEM for comment. See <http://www.icem.org/>

**[44] p. 69 Artisanal and Small Scale Mining.** Please see T. Hentschel et al., *SMALL SCALE MINING: Risks and Opportunities* (International Institute for Environment and Development 2003). See also the over a dozen studies of the subject available on the web at <http://www.iied.org/mmsd/wp/index.html>

But here is my question for you – if “[m]ining companies should engage small-scale miners and their communities – how about this project? Will small-scale miners have any way to sell their products into the certified markets you envision? Or will the certification system create market advantages for the big companies and market disadvantages for ASM participants?

**[45] P. 72 – Resettlement.** I think you are missing a couple of opportunities here. I think the “cutting edge” is livelihood replacement.

- One of the great evils of resettlement has been that livelihoods based in part on non-cash income and in part on ‘free’ ecosystem goods are valued and compensated in cash.
- The amount of cash is generally not enough, even if invested wisely, to create a survivable livelihood.
- And it is often not spent wisely; it is often given to people with no previous experience in investing even modest sums of money.
- Further, much of the compensation is based on a patriarchal, private property mind set. So we have examples of all the compensation being paid to male heads of household, profoundly affecting the gender relations of the community, or private people being compensated for communal rights which are then lost to others.

So “better off after resettlement” gets us part of the way there, but the measuring rod for “better off” is a better livelihood, not a pocket full of cash.

As a practical matter, one of the problems is making sure that people *stay* better off. In part this comes from the fact that people from traditional communities may be profoundly disoriented by the disruption of tradition and social ties, even if they wind up with a nice piece of land. So how do you assure that people stay better off, and not just on paper, after resettlement?

Downing has proposed the idea of “resettlement insurance” which I think deserves a very careful look. See T. Downing, *Avoiding New Poverty: Mining Induced Displacement and Resettlement*, (International Institute for Environment and Development 2002), available at [http://www.iied.org/mmsd/mmsd\\_pdfs/058\\_downing.pdf](http://www.iied.org/mmsd/mmsd_pdfs/058_downing.pdf)

**[46] P. 75 Conflict., Security and Human Rights.** See comment [37] above.

Disputes over the ownership of mineral resources and the control of mineral revenues are perhaps the most serious and ubiquitous source of community conflict over mineral development.<sup>32</sup>

See Jason Switzer, *Armed Conflict and Natural Resources: The Case of the Minerals Sector* (International Institute for Environment and Development 2002), available at [http://www.ied.org/mmsd/mmsd\\_pdfs/jason\\_switzer.pdf](http://www.ied.org/mmsd/mmsd_pdfs/jason_switzer.pdf), and Amy Chua, *WORLD ON FIRE* (Doubleday 2003).

"Investing in such regions, without some consensual understanding between region and nation, can start a company down a slippery slope. It sometimes starts with a promise by the national government to establish a military or police presence to maintain order and enforce national law. It often leads quickly to an ongoing cycle of violence and human rights abuse."<sup>33</sup>

I think that you are missing an opportunity if you do not explicitly say that "cutting edge" practice is to sign up to and abide by the Voluntary Principles on Security and Human Rights.<sup>34</sup>

**[47] P. 79 Reporting.** I am told the final version of the secot supplement is due out "any day."

**[48] P. 83 Independent Appeal Mechanism.** Do note that p. 67 of the Extractive Industries Review report calls for independent dispute resolution mechanisms.

I do think that you get more mileage calling it a 'dispute resolution mechanism' than a 'grievance mechanism.'

This is an extraordinarily important point. And let me add this.

Private mining investors are increasingly refusing to trust national courts and are insisting that in case of any dispute with host countries their concerns will be heard by international arbitration panels. They are concerned that local courts lack the impartiality, capacity, competence or honesty to resolve these disputes fairly.

Yet the issues of local people who have grievances against mining companies are to be heard where – in precisely the local courts that the companies won't trust when their interests are at stake.

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<sup>32</sup> See Ian Bannon and Paul Collier, *NATURAL RESOURCES AND VIOLENT CONFLICT* (2003).

<sup>33</sup> Luke J. Danielson, *Sustainable Development, Natural Resources and Research*, 19 *NATURAL RESOURCES LAWYER* 39, 43 (2004).

<sup>34</sup> Discussed briefly with references in Luke J. Danielson, *SUSTAINABLE DEVELOPMENT IN THE NATURAL RESOURCE INDUSTRIES: NEW PERSPECTIVES, NEW RULES, AND NEW OPPORTUNITIES*, 50 *Rocky Mt. Min. L. Inst* 14 at 14-34 to 45 (2004).

#### **IV. CONCLUSION**

I much hope that you will find some use in the various working papers available at <http://www.iied.org/mmsd/wp/index.html> and <http://www.iied.org/mmsd/rrep/index.html>

I hope I have not abused your patience and good will with these lengthy comments.

And I appreciate your having requested me to review the very serious piece of work you have sent me.

Thank you and good luck!