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**OUT OF THE CONFLICT ZONE: THE CASE FOR
COMMUNITY CONSENT PROCESSES IN THE
EXTRACTIVE SECTOR**

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Lisa J. Laplante
Suzanne A. Spears

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Lisa J. Laplante
Visiting Assistant Professor of Law
Marquette University Law School
Sensenbrenner Hall
P.O. Box 1881
Milwaukee, Wisconsin 53201-1881
Lisa.laplante@marquette.edu

Article

Out of the Conflict Zone: The Case for Community Consent Processes in the Extractive Sector

Lisa J. Laplantet[†] & Suzanne A. Spears^{††*}

An examination of contemporary struggles over extractive industry projects shows that they are not adequately captured by current CSR strategies because they are not exclusively disputes about the environment, human rights or health and safety as those subjects are generally understood by companies. Rather, they are better understood as disputes over community control of resources and the right of community members to control the direction of their lives. This Article proposes that extractive industries can tackle the underlying causes of the growing opposition to their projects in the developing world by engaging in consent processes with communities and groups directly affected by projects with a view to obtaining their free prior and informed consent (FPIC). The authors propose that FPIC must be enduring, enforceable, and meaningful in order to take companies and communities out of their current defensive positions. FPIC should instead allow companies and communities to take up proactive positions – with those companies that have the consent of the communities in which they operate obtaining a competitive advantage and those communities that have enforceable agreements with companies obtaining control over the natural-resource-based development process on which their future depends.

[†] Visiting Assistant Professor, Marquette University Law School; Deputy Director, Praxis Institute for Social Justice; Member of the School of Social Science, Institute for Advanced Study at Princeton. The case study here builds on ethnographic research conducted in Peru during 2007-2008. The author would like to thank Maricarmen Valdivieso for her research assistance and the Peruvians who agreed to share their experience in interviews.

^{††} Wilmer Cutler Pickering Hale and Dorr LLP, London, England. The opinions in this article are those of the author and not necessarily of Wilmer Cutler Pickering Hale and Dorr LLP or any of its clients.

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I. INTRODUCTION

*These natural resources are ours... If I enter your house, I knock first.
When have they asked our permission to enter a community? . . . Never.¹*

Miguel Palacin, Peruvian Indigenous Leader, Sept. 3, 2007

Why is it that, with many of the large extractive industry companies having taken up the mantra of corporate social responsibility (CSR) in recent years,² conflicts between such companies and their host communities are multiplying as never before? Today extractive industry companies can call upon a range of CSR initiatives, standards and tools to help them manage community relations responsibly, and many major companies have codes of conduct in place. Yet barely a day goes by without news of another multi-billion dollar energy or mining project being protested, delayed, occupied or otherwise blocked by community opposition. The number of disputes between foreign investors and host states is also on the rise and not since the 1980s have we seen as many government interventions in energy and mining investments as we have seen in the last two years—many as a result of or accompanied by vigorous community opposition.

An examination of contemporary struggles over extractive industry projects illustrates that they are not adequately addressed by current CSR strategies. Such strategies seek to address only a narrowly circumscribed range of headline-grabbing issues, such as extractive industry companies' complicity in human rights abuses by security forces, their involvement in corruption and their role in fueling armed conflict in diamond-rich countries. In addition to these important concerns, CSR must also begin to address the underlying causes of community opposition to extractive industry projects, which are likely to relate to the rights of communities to control the natural resources they have long seen as their own and of community members to control the direction of their lives. In other words, to overcome conflict, the new generation of CSR techniques must contribute to sustainable development.

Building on the findings of a number of recent studies,³ this article

1. Interview by Lisa Laplante with Miguel Palacin, Coordinator of the Coordinating Body of Andean Indigenous Org. (CAOI) and former Chairman of the Nat'l Confederation of Peruvian Communities Affected by Mining (CONACAMI), in Lima, Peru (Sept. 3, 2007).

2. Corporate social responsibility (CSR) addresses the relationship between corporations and the societies with which they interact. It includes the responsibilities inherent on both sides of these relationships and calls for corporations to respond not only to shareholders, but also to other stakeholders interested in their operations.

3. E.g. ENVTL INST. ET AL., PRIOR INFORMED CONSENT AND MINING: PROMOTING THE SUSTAINABLE DEVELOPMENT OF LOCAL COMMUNITIES (2004), available at http://www.elistore.org/reports_detail.asp?ID=10965 [hereinafter ELI ET AL.]; ETHICAL FUNDS, WINNING THE SOCIAL LICENSE TO OPERATE: RESOURCE EXTRACTION WITH FREE, PRIOR

proposes that extractive industries can tackle the underlying causes of opposition to their activities in the developing world by engaging in consent processes with communities directly affected by their projects with a view to obtaining their free prior and informed consent (FPIC). In addition to being free, prior, informed and consensual, FPIC must be enduring, enforceable and meaningful. Although fraught with contingencies and in need of considerable further analysis, FPIC presents the obvious next step in the evolution of the relationship between extractive industry companies and communities, as it is a model of stakeholder engagement with the potential to address the complex and dynamic root causes of community concern.

If implemented properly, FPIC processes should take companies and communities out of their current defensive positions, in which companies attempt to manage community-related risks in order to protect their social licenses to operate, and communities disrupt extractive industry projects in attempts to protect their ways of life. FPIC processes should allow companies and communities to take up proactive positions instead; companies that maintain the consent of the communities in which they operate will obtain a competitive advantage, while communities that have enforceable agreements with companies will have more control over the development processes on which their future depends. If properly obtained, FPIC should allow large extractive industry projects to go forward in a less conflicted atmosphere.

Part II of this Article explores why extractive industry projects are particularly vulnerable to community opposition, and identifies the triggers for and underlying root causes of that opposition. Part III examines the emergence of social engagement as an objective of the extractive industries in the 1990s and the development of second-generation CSR initiatives since then. Part IV examines the emergence of sustainable development as an objective of the extractive industries and introduces the concept of FPIC as a third-generation CSR technique. Part V presents the principal challenges facing FPIC, including concerns about sovereignty, the legal status of the concept, and the difficulty of “operationalizing consent.” Part VI illustrates the themes discussed in the preceding Parts by discussing four case studies of extractive industry

AND INFORMED COMMUNITY CONSENT (2008), *available at* <https://www.ethicalfunds.com/sitecollectiondocuments/docs/fpic.pdf>; MINING, MINERALS & SUSTAINABLE DEV. PROJECT, BREAKING NEW GROUND – THE MMSD FINAL REPORT (2003), *available at* <http://www.iied.org/mmsd/finalreport/index.html> [hereinafter MMSD PROJECT]; 1 EMIL SALIM, STRIKING A BETTER BALANCE (2003), *available at* http://www.commdev.org/files/1955_file_Extractive_Industries_Review.zip [hereinafter SALIM 1]; 2 EMIL SALIM, STRIKING A BETTER BALANCE (2003), *available at* http://www.commdev.org/files/1955_file_Extractive_Industries_Review.zip [hereinafter SALIM 2]; WORLD RESOURCES INST., DEVELOPMENT WITHOUT CONFLICT: THE BUSINESS CASE FOR COMMUNITY CONSENT 45 (2007), *available at* <http://www.wri.org/publication/development-without-conflict> [hereinafter WRI]; WORLD COMM’N ON DAMS, WCD REPORT (2000), *available at* <http://www.dams.org/report/execsumm.htm> [hereinafter WCD].

projects in Peru. Finally, we offer some preliminary conclusions about community consent processes.

II. EXTRACTIVE INDUSTRIES IN CONFLICT WITH COMMUNITIES

During the 1980s and 1990s, relatively depressed mineral prices and the dominant development theories of the time contributed to a trend of privatization, deregulation and increased openness to foreign direct investment in the extractive industries of developing economies.⁴ As a result, foreign direct investment in those countries' extractive industries rose by nine times between 1990 and 2000 and by more than fifty percent between 2000 and 2005.⁵ The recent boom in mineral prices, spurred in large part by the rapid growth in the Chinese and Indian economies, means that extractive industries are likely to continue expanding into previously untouched land and coming into contact with new communities in the developing world in the coming years.⁶

Given their prominent role in the mineral production of many developing countries, transnational corporations inevitably become associated with the social costs of extraction.⁷ Few other industry sectors have such a profound social impact—and consequently such a propensity to provoke community opposition—as the extractive industries. At the same time, the sector is particularly vulnerable to disruption by community opposition and in need of earning and maintaining the trust of affected communities over time. The following three Parts will explore why extractive industries find themselves in this conundrum, beginning with an examination of the vulnerability of the extractive industries to community opposition, and then examining the triggers for and underlying root causes of opposition to extractive industry projects.

A. Vulnerability of the Extractive Industries to Community Opposition

As a preliminary matter, extractive industry projects are particularly vulnerable to community opposition because they are very long term (generally lasting at least twenty years), complex (usually involving a chain of investments, multiple contracts and numerous parties) and capital intensive (often requiring investments of several billion dollars). Because

4. Extractive industries are those involving the extraction of non-renewable resources, including energy minerals (oil, gas, coal and uranium), metallic minerals (copper, gold, bauxite, iron, nickel), industrial minerals (phosphates, salt, gypsum), construction materials (stone, sand, gravel) and precious stones.

5. U. N. CONFERENCE ON TRADE AND DEV., DIV. ON INV., TECH. AND ENTER. DEV., WORLD INVESTMENT REPORT 2007: TRANSNATIONAL CORPORATIONS, EXTRACTIVE INDUSTRIES AND DEVELOPMENT at 102, U.N. Sales No. E.07.II.D.9 (2007) [hereinafter UNCTAD].

6. See UNCTAD *Sees Increased FDI in Extractive Industries*, REUTERS, Jan. 8, 2008.

7. See Chris Ballard & Glenn Banks, *Resource Wars: The Anthropology of Mining*, 32 ANN. REV. ANTHRO. 287, 287-313 (2003).

revenue does not begin to flow until the entire project is complete, breakdowns or delays in any part of the integrated chain of investments as a result of blockades, work stoppages, lawsuits, and other forms of community opposition can negatively affect capital recovery and overall project internal rate of return.

The financing, construction, and operational risks associated with extractive industry projects all increase as a result of community opposition. Financing risks increase because investors and financial institutions may delay their approval, impose additional conditions or decide not to finance a controversial project or company.⁸ Construction risks increase because delays resulting from community opposition may raise costs and trigger contractual penalties or finance charges.⁹ Operational risks increase because a disrupted project might not be able to produce a sufficient quantity of output, and may have higher production costs, reduced access to necessary inputs, and reduced access to markets.¹⁰ Community opposition also might make it more difficult to attract qualified local workers, require greater expenditure on security and raise tensions to the point where it becomes unsafe for expatriate management personnel to reside in the host community.¹¹

Conflict with communities also increases reputation and legal risks for extractive industry companies.¹² Reputation is an extractive industry company's lifeblood, as it is the key to attracting quality partners, gaining the opportunity to extract and distinguishing one company from another.¹³ Reputations can be tarnished by media reports, NGO investigations, lawsuits and activist campaigns that bring international attention to the negative effects of a company's projects in remote parts of the world. Mounting public relations campaigns, implementing CSR programs to repair the damage, and defending or settling lawsuits are expensive endeavors that take up significant managerial time. Lawsuits also often produce costly settlements and necessitate expensive post-hoc CSR programs to repair community and public relations.

Finally, companies that make enemies out of the populations affected by their projects experience higher corporate and political risks. The disruption or loss of a project may reduce a company's profitability, asset values and stock price—even for well-diversified companies—due to the multiplier effects such events can have on a company's reputation.¹⁴ Controversial companies and projects may also be unable to obtain licenses

8. UNCTAD, *supra* note 5 at 92; WRI, *supra* note 3, at 13.

9. Int'l Fin. Corp., Managing Environmental, Social and Business Risks, <http://www.ifc.org/ifcext/enviro.nsf/Content/RiskManagement> (last visited June 6, 2008) [hereinafter IFC]; WRI, *supra* note 3, at 13.

10. WRI, *supra* note 3, at 13.

11. *See id.*

12. "Reputation risk is the current and prospective impact on earnings and capital arising from negative public opinion." *Id.* at 14.

13. *See* Steven W. Percy, *Environmental Sustainability and Corporate Strategy: Why a Firm's Chief Environmental Officer Should be its CEO*, 7 CORP. ENVTL. STRATEGY 194, 202 (2000).

14. *See* WRI, *supra* note 3, at 14-15.

or other crucial means of support from host- and home-country governments.¹⁵ Aggrieved communities may prompt governments to bring enforcement actions, impose penalties or tighten regulations.¹⁶ In extreme cases, host-country governments may force companies to renegotiate the terms of their contracts, refuse to comply with their own contractual obligations, or even expropriate project assets in response to community opposition. Similar grievances in different communities may accumulate to the point where the overall business environment becomes inhospitable for a given company or industry.¹⁷

B. Potential for Extractive Industry Projects to Trigger Community Opposition

The feature common to all extractive industry projects that triggers the most community opposition is the need for delineated areas of land.¹⁸ The need for land frequently causes property disputes and collides with the rights of indigenous peoples, who often see their lands as non-saleable and collectively held, without clearly defined borders or titled owners.¹⁹ A state's use of eminent domain to evict people from their traditional lands to make way for an extractive industry project can lead to the disruption of communities and cultures as well as the loss of livelihoods, particularly when done without adequate compensation.²⁰

The sheer physical and economic scale of extractive industry projects relative to traditional forms of local production also tends to provoke community opposition.²¹ Tensions may build as projects compete with communities for services and scarce resources.²² Projects often attract an influx of workers, which may reconfigure local social structures, relationships and identities; trigger racial and ethnic tensions; threaten local cultures; and introduce new social pathologies and illnesses.²³ Positive developments, like the creation of jobs and the expansion of

15. *See id.* at 15.

16. *Id.*

17. *Id.*

18. *See* UNCTAD, *supra* note 5, at 150.

19. MARCUS COLCHESTER & FERGUS MACKAY, IN SEARCH OF MIDDLE GROUND: INDIGENOUS PEOPLES, COLLECTIVE REPRESENTATION AND THE RIGHT TO FREE, PRIOR AND INFORMED CONSENT 8 (2004).

20. SALIM 1, *supra* note 3, at 18-19. *See also* EMILY CARUSO ET AL., EXTRACTING PROMISES: INDIGENOUS PEOPLES, EXTRACTIVE INDUSTRIES AND THE WORLD BANK 2 (2003) (quoting Augustine Hala's remarks concerning a case study in Papua New Guinea: "When you take our land you cut away the heart of our existence . . .").

21. *See generally* Gavin Hilson & James Haselip, *The Environmental and Socioeconomic Performance of Multinational Mining Companies in the Developing World Economy*, MINERALS & ENERGY, Sept. 2004, at 25, 30 (discussing mining's impact on developing world economies and societies).

22. UNCTAD, *supra* note 5, at 150. *See also* SALIM 1, *supra* note 3, at 5 (discussing the toll that extractive industries take on local resources).

23. UNCTAD, *supra* note 5, at 150; SALIM 1, *supra* note 3, at 5; Gavin Bridge, *Contested Terrain: Mining and the Environment*, 29 ANN. REV. ENV'T & RESOUR. 205, 216-17 (2004).

businesses and development of local infrastructure may vanish once a project is over.²⁴ The unequal distribution of the costs and benefits of a project over time may cause rifts in communities and resentment toward an extractive industry company.²⁵

In addition, extractive activities tend to ignite social conflict because they make a deeper environmental footprint than other industrial activities.²⁶ For example, oil and gas extraction can lead to leakages, spills and flaring of excess gas while building access roads can lead to deforestation and the disruption of natural habitats -- all of which can lead to serious environmental damage.²⁷ For its part, metal mining is prone to contaminating surface and groundwater with toxic wastes, and to causing deforestation, soil erosion and the spread of mine tailings.²⁸ The physical impact of extraction on topography is sometimes irreversible or entails large clean-up costs that governments or companies refuse to assume. Indigenous peoples and farmers, who depend on their environment for subsistence, are particularly vulnerable to environmental damage.²⁹

Communities also resent extractive industry companies that contribute to or facilitate the corruption endemic in many societies that rely on natural resources as their main source of income.³⁰ They also fear companies that commit human rights violations or use private security forces that commit human rights violations.³¹ Local populations may target extractive industry projects during civil wars and other violent conflicts fueled by mineral riches.³² Companies that sustain unpopular regimes or that sustain conflicts by intentionally or unintentionally funding combatants are likely to provoke the ire of and perhaps become the target of violence for at least one segment of society.

24. UNCTAD, *supra* note 5, at 150; SALIM 1, *supra* note 3, at 5.

25. SALIM 1, *supra* note 3, at 5; Bridge, *supra* note 23, at 29.

26. The Special Representative of the Secretary General, *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, ¶ 29, U.N. Doc. E/CN.4/2006/97 (Feb. 22, 2006) [hereinafter SRSG].

27. UNCTAD, *supra* note 5, at 95; SALIM 1, *supra* note 3, at 5.

28. UNCTAD, *supra* note 5, at 151; SALIM 1, *supra* note 3, at 5.

29. SALIM 1, *supra* note 3, at 5-6. UNCTAD, *supra* note 5, at 151; U.N. Econ. & Soc. Council, Comm'n on Human Rights, Sub-Comm'n on the Promotion & Prot. of Human Rights, Working Group on Indigenous Populations, *Report of the Workshop on Indigenous Peoples, Private Sector Natural Resources, Energy and Mining Companies and Human Rights*, ¶ 90, U.N. Doc. E/CN.4/Sub.2/AC.4/2002/3 (June 17, 2002) [hereinafter ECOSOC, *Workshop*]; U.N. Econ. & Soc. Council, Comm'n on Human Rights, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, at 2, U.N. Doc. No. E/CN.4/2003/90 (Jan. 21, 2003) [hereinafter ECOSOC, *Special Rapporteur*].

30. See Matthew Genasci & Sarah Pray, *Extracting Accountability: Implications of the resource Curse for CSR Theory and Practice*, 11 YALE HUM. RTS. & DEV. L.J. 37, 45 (2008).

31. Extractive industry companies have been accused of committing or being complicit in human rights violations more than companies in any other industry. SRSG, *supra* note 26, ¶ 25.

32. Extractive industry companies may become embroiled in civil wars and other violent conflicts fueled by mineral riches. See UNCTAD, *supra* note 5, at 152; Ballard & Banks, *supra* note 7, at 295.

C. Underlying Root Causes of Community Opposition to Extractive Industry Projects

Given the long list of extractive-industry-related grievances, there is an understandable lack of trust on the part of local communities with respect to companies and governments in the context of extractive industry projects.³³ Over the last twenty-five years, indigenous peoples and other vulnerable communities have learned to express their grievances about the issues outlined above in the language of human rights and environmental stewardship³⁴ and, as will be discussed below, the extractive sector has begun to respond accordingly.³⁵ However, as crucial as it is to address these grievances, they may not actually form the dominant impetus for local community opposition to extractive industry projects.

Anthropologists find that most local communities are primarily concerned with “questions of control over their own destinies, both in relation to the state and in terms of the management of projects, the flow of benefits, and the limitation or redistribution of mining impacts.”³⁶ This is consistent with the findings of a study by an extractive industry group, the International Council on Mining and Metals (ICMM). In a survey of thirty-eight mining-related human rights controversies, the ICMM found that the main issues dominating headlines concerned adverse health and environmental impacts in about forty percent of cases, infringements on indigenous rights in about thirty percent, human rights abuses arising from security arrangements in about twenty-five percent, company complicity in civil conflict in about twenty percent, and unfair resettlement in about twelve percent of cases.³⁷ But complaints regarding companies’ failure to conduct meaningful consultations or obtain community consent for projects, and about the undesirable economic consequences of these projects, were even more widespread, underlying nearly fifty percent and more than sixty percent of community concerns respectively.³⁸

It is not surprising that the predominant concerns of communities affected by extractive industry projects in recent years relate to their inability to control and failure to benefit from such projects. Most of the

33. INT’L COUN. ON MINING & METALS, DRAFT POSITION STATEMENT: MINING AND INDIGENOUS PEOPLES’ ISSUES (2006) *available at*

http://www.icmm.com/library_pub_detail.php?rcd=190 [hereinafter ICMM].

34. Ballard & Banks, *supra* note 7, at 299.

35. *See infra* Part III.

36. Ballard & Banks, *supra* note 7, at 298-99. *See also* Bridge, *supra* note 23, at 239 (noting that contemporary struggles over mining are disputes about community sovereignty as well as the environment).

37. INT’L COUNCIL ON MINING & METALS, SECOND SUBMISSION TO THE U.N. SECRETARY-GENERAL’S SPECIAL REPRESENTATIVE ON HUMAN RIGHTS AND BUSINESS 22 (2006), *available at* <http://www.icmm.com/uploads/1469ICMM-BHR-2ndsubmissionFINAL.pdf>.

38. *Id.* at 22-23.

projects realized as a result of the 1980s extractive industry expansion are located near communities that are marginalized geographically, economically and politically within their countries, and in countries that are marginalized within the international system.³⁹ Often they are located within communities of indigenous people⁴⁰ or farmers who have lived in the same remote areas for many centuries.⁴¹ Compared to the dominant populations in their own countries and to the people in the countries of origin of extractive industry companies, the people most affected by extractive industry operations in the developing world tend to have less access to justice, formal political processes, decision-making structures, social services, economic systems and land tenure systems, and they experience higher rates of poverty, discrimination and prejudice.⁴²

Communities affected by extractive industry projects often feel that, because of their lack of power, the benefits of extractive industry projects are channeled toward national centers and the countries of origin of extractive industry companies (a view that is increasingly shared by development specialists).⁴³ They also sense that their governments become even less accountable as extractive industry revenue frees them from their dependence on other forms of taxation.⁴⁴ Communities that have no say in the extractive industry projects that affect their lives, receive little if any benefit from them, and disproportionately feel the brunt of their many negative impacts have strong reasons to protest the presence of these projects in their midst.

The World Bank's three year-long Extractive Industries Review (EIR) concluded that "[m]any grievances from communities and especially from indigenous peoples living near extractive industries projects relate to their claims that their rights to participate in, influence, and share control over

39. Ballard & Banks, *supra* note 7, at 288.

40. Indigenous peoples are defined as people who, "having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of societies now prevailing in those territories, or parts of them." Comm'n on Human Rights, Sub-Comm'n on Prevention of Discrimination and Protection of Minorities, *Study on the Problem of Discrimination Against Indigenous Populations*, ¶¶ 397-82, U.N. Doc. EC/CN.4/Sub.2/1986/7 (Sept. 8, 1981) (prepared by José R. Martínez Cobo).

41. Peruvian farmers do not identify themselves as indigenous peoples, but they too have long been stigmatized as outsiders. Like indigenous peoples, they see their cultures as unique and their identities as intimately linked to their lands. See generally ALEJANDRA ALAYZA MONCLOA, *NO PERO SÍ: COMUNIDADES Y MINERÍA* 20-21 (2007).

42. JO M. RENDER, INT'L COUNCIL ON MINING & METALS, *MINING AND INDIGENOUS PEOPLES ISSUES REVIEW* 19 (2005). See also SALIM 1, *supra* note 3, at 7 (describing power differentials between industrialized and non-industrialized nations and within each country).

43. RENDER, *supra* note 42, at 19; SALIM 1, *supra* note 3, at 6-7 (noting that benefits are generally distributed through central government, which may be extremely corrupt). See generally RESOURCE ABUNDANCE AND ECONOMIC DEVELOPMENT (R. M. Auty ed., 2001) (providing information concerning economics and the extractive industries, including the history of government uses of monetary benefits derived from natural resources).

44. See UNCTAD, *supra* note 5, at 152. See also Daron Acemoglu et al., *Kleptocracy and Divide-And-Rule: A Theory Of Personal Rule*, 2 J. EUR. ECON. ASS'N 162 (2004) (discussing the proclivity of kleptocrats to utilize foreign income from the sale of natural resources to bribe opponents).

development initiatives, decisions, and resources are ignored.”⁴⁵ This is consistent with an earlier study by the World Bank Group called *Voices of the Poor*, which found that the poor feel that their voices are not heard and that they have no control over the events that have the greatest impact on their lives.⁴⁶ The report found that impoverished and marginalized people, particularly women, tend to describe their diminished well-being not in terms of anxiety about meeting their basic material needs, but in terms of anxiety about their inability to control their own destinies.⁴⁷ As Nobel Prize winning economist Amartya Sen points out in his book *Development is Freedom*, human agency is an essential component of developmental well-being.⁴⁸ Poor communities are interested in economic benefits from extractive industry projects, but, more importantly, desire “to receive visible, tangible forms of recognition from the mining company.”⁴⁹

When communities feel excluded from participating in decision-making processes and have grievances regarding extractive industry projects, they resort to forms of protests that are detrimental to all stakeholders. Thus, while extractive industry companies must address the negative impacts of their own operations, they also must address certain features of the environments in which they operate—including host community’s feelings of disempowerment and economic distress—if they are going to avoid community opposition in the future.

III. THE STAKEHOLDER ENGAGEMENT MODEL FOR MANAGING COMMUNITY OPPOSITION

Faced with growing community opposition as a result of the factors outlined above, and unprotected by traditional political risk mitigation techniques, many companies came to see CSR as a branch of risk management during the 1990s.⁵⁰ Whereas the first generation of CSR was characterized by “charitable philanthropy,” this second generation called for “social engagement.”⁵¹ The addition of local communities to the “previously binary relationship between states and corporations has led to the widespread adoption by industry analysts of a three-legged or triad stakeholder model” of engagement.⁵² It also entailed a “mind-shift away from confrontation and towards constructive engagement,” including on

45. SALIM 1, *supra* note 3, at 18.

46. Susan Moller Okin, *Poverty, Well-Being, and Gender: What Counts, Who’s Heard?*, 31 PHIL. & PUB. AFF. 280, 307 (2003).

47. *Id.* at 307-08.

48. See AMARTYA SEN, *DEVELOPMENT AS FREEDOM*, at xi-xii (1999).

49. Saleem H. Ali & Andrew Singh Grewal, *The Ecology and Economy of Indigenous Resistance*, 18 CONTEMP. PAC. 361, 387 (2006), quoting Leah Horowitz, *Daily, Immediate Conflicts*, 73 OCEANIA 35, 42 (2002).

50. Mallen Baker, *Forward* to WILLIAM B. WERTHER, JR. & DAVID CHANDLER, *STRATEGIC CORPORATE SOCIAL RESPONSIBILITY: STAKEHOLDERS IN A GLOBAL ENVIRONMENT*, at xvi (2006).

51. See Gordon Brown, *Socially Responsible Business Behaviour*, in INT’L CHAMBER OF COMMERCE, *GUIDE TO GLOBAL CORPORATE SOCIAL RESPONSIBILITY* 16 (2003).

52. Ballard & Banks, *supra* note 7, at 289.

the part of some NGOs.⁵³

In practical terms, second-generation CSR methods entailed extractive industry companies consulting with local communities about the social, economic, and cultural benefits and costs, in addition to the environmental effects, of their projects.⁵⁴ These CSR methods also involved companies consulting with NGOs and governments and increasingly even with their competitors to set guidelines for their relationships with the societies in which they operate.⁵⁵ The following two Parts examine the emergence of social engagement as an objective of the extractive industries and the development of second-generation CSR initiatives.

A. Emergence of Social Engagement as an Objective of the Extractive Industries

Two interrelated trends that began during the 1990s led to the focus on social engagement. First, as globalization heightened the visibility of extractive industries' operations in the developing world, new non-traditional, non-state actors began to intrude on areas that were once considered the preserve of extractive industry management or state officials.⁵⁶ Consumers, for example, began to demand that extractive industry companies help solve social problems in addition to making profits.⁵⁷ The International Finance Corporation (IFC), the World Bank's private lending arm, began to require environmental and social impact assessments for large-scale extractive industry projects as a condition for financing arrangements.⁵⁸ Some NGOs began to partner with business to address difficult social problems.⁵⁹ Indigenous peoples started to demand that extractive industry companies attend to their concerns,⁶⁰ and activists forced multinational corporations to focus on reassuring the public about globalization through a series of protests.⁶¹ Suddenly, satisfying the

53. Ralph Hamann, *Mining Companies' Role in Sustainable Development*, 20 DEV. S. AFR. 237, 239 (2003).

54. Gary McMahon, *The Rise of the Community*, MINING ENVTL. MGMT, Jan. 1999, available at <http://www.mineralresourcesforum.org/docs/pdfs/communtty.pdf>.

55. Daniel Franklin, *Just Good Business*, ECONOMIST, Jan. 19, 2008, at 3-6 (discussing the rise of CSR and the involvement of think tanks, consultancies, and governments).

56. Bridge, *supra* note 23, at 206; Scott Greathead, *The Multinational and the 'New Stakeholder': Examining the Business Case for Human Rights*, 35 VAND. J. TRANSNAT'L L. 719, 726 (2002).

57. See CONSUMER PROT. IN THE GLOBAL MKT. WORKING GROUP, INT'L ORG. FOR STANDARDIZATION, THE DESIRABILITY AND FEASIBILITY OF ISO CORPORATE SOCIAL RESPONSIBILITY STANDARDS 6-7 (2002), available at http://ec.europa.eu/employment_social/soc-dial/csr/isoreport.pdf.

58. RAMAMOCHAN MAHIDHARA, INT'L FINANCE CORP., THE ENVIRONMENTAL AND SOCIAL CHALLENGES OF PRIVATE SECTOR PROJECTS: IFC'S EXPERIENCE 30 (2002).

59. MCKINSEY & CO., SHAPING THE NEW RULES OF COMPETITION: UN GLOBAL COMPACT PARTICIPATION MIRROR 24 (1997).

60. ELI ET AL., *supra* note 3, at 2.

61. Cynthia A. Williams, *Civil Society Initiatives and 'Soft law' in the Oil and Gas Industry*, 36 N.Y.U. J. INT'L L. & POL. 457, 468 (2003-2004).

expectations of a host state was no longer a sufficient means of conducting business.⁶² Thus, by the turn of the century, business leaders had started referring to a company's need to obtain a *de facto* social license to operate—from both the local and the international communities—in addition to a *de jure* license to operate from host country governments.⁶³

Second, as a result of a number of well-publicized controversies, the extractive industry became the face of corporate social responsibility, particularly in the United States and the United Kingdom.⁶⁴ In 1995, Royal Dutch Shell became an environmental and human rights *cause célèbre* in the United Kingdom in response to its plan to sink a decommissioned oil buoy in the North Sea and allegations surrounding its complicity in the execution of Ogoni community leaders in the Niger Delta.⁶⁵ Shell and a number of other extractive industry companies became the targets of ground-breaking litigation in the United States under the Alien Tort Claims Act (ATCA) focusing on their behavior overseas.⁶⁶ No corporation has been found liable in an ATCA case to date, but these lawsuits raised the very real possibility that extractive industry corporations could be held internationally responsible for their actions in developing countries.⁶⁷ Thus, by the end of the 1990s, many extractive industry companies had come to see CSR as a branch of “risk management” that could help them avoid legal risks as well as risks to their reputation.⁶⁸

62. Bridge, *supra* note 23, at 205, 206.

63. This was evident at the World Economic Forum in Davos in 1999, where the “Global Compact” with business was launched by Secretary General Kofi Annan. Press Release, Secretary-General Kofi Annan, Secretary-General Proposes Global Compact on Human Rights, Labour, Environment, in Address to World Economic Forum in Davos, U.N. Doc. SG/SM/6881 (Feb. 1, 1999), available at <http://www.un.org/News/Press/docs/1999/19990201.sgsm6881.html>.

64. Williams, *supra* note 61, at 467.

65. *Id.*

66. See, e.g., Cynthia A. Williams, *Corporate Social Responsibility in an Era of Economic Globalization*, 35 U.C. DAVIS L. REV. 705, 751-61 (2002) (discussing ATCA litigation against Texaco for alleged environmental harm in Ecuador); Elliot J. Schrage, *Judging Corporate Accountability in the Global Economy*, 42 COLUM. J. TRANSNAT'L L. 153, 161-63 (2003-2004) (discussing ATCA litigation against ExxonMobil for security practices in Indonesia); Greathead, *supra* note 56, at 726 (discussing ATCA litigation against Chevron for actions against protestors in Nigeria and against Freeport-McMoran for human rights and environmental violations in Indonesia); Bill Baue, *To Avoid Risk of Alien Tort Claims Act Cases, Companies Must Improve Human Rights*, SUSTAINABILITY INV. NEWS, Aug. 17, 2007 (discussing *inter alia* ATCA litigation against Drummond for complicity in paramilitary killings of union members in Colombia), available at <http://www.socialfunds.com/news/article.cgi/2353.html>.

67. Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, ¶¶ 27, 30, U.N. Doc. A/HRC/4/35 (Feb. 19, 2007) [hereinafter SRSG 2].

68. Franklin, *supra* note 55, at 4.

B. Second-Generation CSR Instruments Available to the Extractive Industries

These trends led companies and their supporters to begin trying to manage the risks of community opposition to extractive industry projects individually and in consultation with others in a number of ways. First, they started adopting codes of conduct to guide their relationship with the societies in which they operate, with Shell leading the way in 1997 and BP following closely behind in 1998.⁶⁹ Today, almost all of the *Fortune* Global 500 companies have an explicit set of principles or management practices regarding the social dimensions of their operations.⁷⁰

Second, companies began engaging in multi-stakeholder initiatives to develop voluntary standards of conduct for the sector in conjunction with NGOs and governments.⁷¹ In early 2000, for example, the U.S. and U.K. governments convened a stakeholder dialogue to address human rights issues inherent in extractive industry operations, which led to the development of a voluntary set of principles for handling security arrangements, the Voluntary Principles on Security and Human Rights (VPs).⁷² Extractive industry companies also engaged in a multi-stakeholder initiative to address the corruption and lack of transparency in many host countries, the Extractive Industries Transparency Initiative (EITI).⁷³ A third multi-stakeholder dialogue, the Kimberley Process Certification Scheme (KPCS), which originated in the efforts to combat the use of “conflict diamonds” to fund the civil wars in Sierra Leone and Angola, requires that rough diamonds traded internationally be certified as “conflict free.”⁷⁴

Third, extractive industry trade associations also started developing guidelines for their members. The ICMM instituted a Sustainable Development Framework⁷⁵ and issued a Draft Position Statement on Mining and Indigenous Peoples Issues,⁷⁶ while the International Association of Oil and Gas Producers (OGP) issued guidelines for social and environmental impact assessments.⁷⁷

69. Michael J. Watts, *Righteous Oil? Human Rights, the Oil Complex, and Corporate Social Responsibility*, 30 ANN. REV. ENVTL. RESOURCES 373, 394 (2005).

70. JOHN RUGGIE, HUMAN RIGHTS POLICIES AND MANAGEMENT PRACTICES OF FORTUNE GLOBAL 500 FIRMS 3 (2006).

71. John Ruggie, *Business and Human Rights: The Evolving International Agenda*, 102 AM. J. INT'L L. (forthcoming 2008) (manuscript at 22), available at http://www.hks.harvard.edu/m_rcbg/CSRI/publications/workingpaper_38_ruggie.pdf.

72. Williams, *supra* note 61, at 477. See also BUREAU OF DEMOCRACY, HUMAN RTS. & LABOR, U.S. DEP'T OF STATE, VOLUNTARY PRINCIPLES ON SECURITY AND HUMAN RIGHTS (2000), available at <http://www.state.gov/g/drl/rls/2931.htm>.

73. See Genasci & Pray, *supra* note 30.

74. Kimberley Process Homepage, <http://www.kimberleyprocess.com>.

75. INT'L COUNCIL ON MINING & METALS, ICMM SUSTAINABLE DEVELOPMENT FRAMEWORK, ICMM PRINCIPLES (2001), available at http://www.icmm.com/icmm_principles.php.

76. ICMM, *supra* note 33.

77. See INT'L ASS'N OIL & GAS PRODUCERS, THE ENVIRONMENTAL AND SOCIAL DIMENSION (1997), available at <http://www.ogp.org.uk/pubs/265.pdf>.

Fourth, the principal financial institutions involved in the sector also began issuing guidelines. The World Bank Group adopted an Indigenous Peoples' Policy intended to ensure "that the development process fully respects the dignity, human rights, economies, and cultures of Indigenous Peoples."⁷⁸ The IFC also established a Policy on Social and Environmental Sustainability, part of which relates to the treatment of indigenous peoples.⁷⁹ In 2006, a coalition of more than forty of the world's largest private-sector financial institutions—the so-called Equator Principles Banks (EPBs)—agreed to harmonize their environmental and social policies with the IFC's.⁸⁰

Finally, recognizing that "good stakeholder relations are a prerequisite for good risk management,"⁸¹ the World Bank Group also began requiring project sponsors to engage in "meaningful stakeholder participation" processes in 1992.⁸² The World Bank's Legal Department interpreted this to mean that the communities consulted had a right to reject projects.⁸³ However, in practice the World Bank has not made obtaining community consent a prerequisite for companies to obtain funding.⁸⁴

C. Assessment of Second-Generation CSR Initiatives

The shift towards constructive social engagement and the voluntary CSR initiatives it produced remains controversial. Critics argue that the "concept of partnership and stakeholders perpetuates the myth that there is a collective endeavor, that all players are equal and conflicts of interest can be resolved by roundtables seeking consensus."⁸⁵ Some critics are skeptical that stakeholder engagement represents genuine recognition of community concerns as opposed to corporate public relations.⁸⁶ They accuse extractive industry companies of undertaking voluntary CSR

78. WORLD BANK OPERATIONAL MANUAL, OPERATIONAL DIRECTIVE 4.10 ON INDIGENOUS PEOPLES ¶ 1 (July 2005), *available at* <http://wbln0018.worldbank.org/Institutional/Manuals/OpManual.nsf> [hereinafter WORLD BANK MANUAL].

79. INT'L FIN. CORP., POLICY ON SOCIAL AND ENVIRONMENTAL SUSTAINABILITY (2006), *available at* [http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol_SocEnvSustainability2006/\\$FILE/SustainabilityPolicy.pdf](http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol_SocEnvSustainability2006/$FILE/SustainabilityPolicy.pdf) [hereinafter IFC].

80. See Equator Principles, <http://www.equator-principles.com> (last visited June 6, 2008).

81. INT'L FIN. CORP., STAKEHOLDER ENGAGEMENT: A GOOD PRACTICE HANDBOOK FOR COMPANIES DOING BUSINESS IN EMERGING MARKETS 2 (2007).

82. Robert Goodland, *Free, Prior and Informed Consent and the World Bank Group*, 4 SUSTAINABLE DEV. L. & POL'Y 66, 71 (2004).

83. *Id.*

84. See *id.* See generally Fergus MacKay, *Indigenous People's Right to Free, Prior and Informed Consent and the World Bank's Extractive Industries Review*, 4 SUSTAINABLE DEV. L. & POL'Y 43 (2004) (discussing the World Bank's failure to incorporate consent processes into its policy and practice to date).

85. Asia-Pacific People's Forum, Statement of the Asia-Pacific Peoples' Forum on Sustainable Development ¶ 14 (Nov. 25-26, 2001), *available at* http://www.un.org/jsummit/major_groups/peoples_forum_statement_asian_prepcom.doc.

86. See Hamann, *supra* note 53, at 242.

initiatives merely to avoid being subjected to mandatory regulation with higher standards and stronger disclosure, monitoring and enforcement mechanisms.⁸⁷ By contrast, advocates laud second-generation CSR initiatives as the new face of “regulation by information” or “soft law”⁸⁸ and maintain that the same incentives that led companies to adopt voluntary initiatives will lead them to adhere to and strengthen them.⁸⁹

Both critics and proponents must concede that second-generation CSR initiatives have been largely unable to prevent extractive industry operations from triggering community opposition. Indeed, instances in which multi-billion dollar extractive industry projects have been blocked and even terminated as a result of community opposition have multiplied.⁹⁰ In part, that is because second-generation CSR initiatives were adopted only as risk mitigation strategies. They seek to address only “flashpoint” or headline-making CSR issues, such as human rights violations by security forces (the Voluntary Principles), corruption (the EITI), and armed conflict (the Kimberly Process)—but do not address the underlying root causes of community opposition to extractive industry projects, including communities’ lack of control over their own destinies and the natural resources they consider their own.

Consultation as a model of engagement with affected communities cannot address the underlying root causes of community opposition, because it “do[es] not involve sharing or transferring decision-making authority to those who will be directly affected . . . requires only an exchange of information . . . and [is] rarely an empowering form of public engagement.”⁹¹ In practice, plans are presented to communities to “ask for comments, followed by a decision that incorporates only cosmetic modifications to the original plan.”⁹² This sort of consultation is incapable of fostering the sort of broad community support necessary for successful projects and good risk management.

The continued expansion of extractive industries into new territory, combined with global population growth, means that more communities are facing the prospect of hosting extractive industry projects. At the same time, communities—particularly of indigenous peoples—are growing more vocal and are gaining increasing recognition of their rights. These developments promise to lead to a growing number of clashes in the coming years unless the extractive industries manage to reduce the negative impacts of their operations *and* address the underlying causes of

87. See, e.g., Naomi Roht-Arriaza, *Codes of Conduct: The Fiction of Corporate Self-Regulation*, 58 GUILD PRAC. 38 (2001) (criticizing voluntary initiatives).

88. See Williams, *supra* note 61, at 464; Anne-Marie Slaughter, *Global Governance Networks, Global Information Agencies, and Disaggregated Democracy*, 24 MICH. J. INT’L L. 1041 (2003).

89. INT’L COUNCIL ON MINING & METALS, SUBMISSION TO U.N. SECRETARY-GENERAL’S SPECIAL REPRESENTATIVE ON THE ISSUE OF HUMAN RIGHTS AND BUSINESS: CLARITY AND CONSENSUS ON LEGITIMATE HUMAN RIGHTS RESPONSIBILITIES FOR COMPANIES COULD ACCELERATE PROGRESS 7 (2006) [hereinafter ICMM 2].

90. See *infra* notes 109-119 and accompanying text.

91. WRI, *supra* note 3, at 7.

92. Ali & Grewal, *supra* note 49, at 386.

community opposition.

IV. THE COMMUNITY CONSENT MODEL FOR OVERCOMING CONFLICT AND PROMOTING SUSTAINABLE DEVELOPMENT

Second-generation CSR efforts are largely defensive, meaning that they are strategies to protect companies against legal and reputation risk.⁹³ Today, some companies see opportunities for those who lead the industry by example.⁹⁴ Third generation CSR is based on the idea that, if approached strategically, responsible engagement with society creates value and forms part of a company's competitive advantage.⁹⁵ Aside from risk reduction, harmonious relations with a host community will produce financial benefits, as others will prefer to do business with a company that has a community's support.⁹⁶ Harmonious relations will also produce developmental benefits for host communities⁹⁷—an objective embraced by many extractive industry companies.⁹⁸

There is a long road ahead, but the idea that behaving responsibly increases profits may well be able to prompt a true transformation in how businesses behave.⁹⁹ Even if companies embraced sustainable development out of a sense of charitable philanthropy at the outset, they will be required to make progress on the issue in order to maintain not only their social license to operate, but also their competitive advantage.¹⁰⁰ The following two Parts examine the emergence of sustainable development as a core strategic issue for the extractive industries and introduce FPIC as a third-generation model of stakeholder engagement.

93. Franklin, *supra* note 55, at 4.

94. *Id.* See also MCKINSEY & CO., *supra* note 59, at 5 (survey of CEOs shows some see CSR as an opportunity to gain competitive advantage); David Humphreys, *A Business Perspective on Community Relations in Mining*, 26 RESOURCES POL'Y 127, 131 (2000) (Rio Tinto's chief economist making the case that relations between mining companies and local communities play a crucial role in the economic and competitive strength of a mine); CHARLES O. HOLLIDAY ET AL., WALKING THE TALK: THE BUSINESS CASE FOR SUSTAINABLE DEVELOPMENT (2002) (Chairman and CEO of DuPont, Honorary Chairman of the World Business Council for Sustainable Development, and Chairman of the Committee of Managing Directors, Royal Dutch/Shell Group of Companies making the business case for CSR); Klaus Schwab, *Global Corporate Citizenship*, FOREIGN AFF., Jan./Feb. 2008, at 116-17 (Executive Chair of the World Economic Forum making the business case for CSR).

95. See Michael E. Porter & Mark R. Kramer, *Strategy & Society: The Link Between Competitive Advantage and Corporate Social Responsibility*, HARV. BUS. REV., Dec. 2006, at 78.

96. Percy, *supra* note 13, at 202; MCKINSEY & CO., *supra* note 59, at 6, 9.

97. See Brown, *supra* note 51, at 16 (calling for CSR based on "poverty reduction").

98. See Rio Tinto, Rio Tinto and Sustainable Development (2005), <http://www.riotinto.com/SustainableReview/development/programmes/default.aspx>; BHP Billiton, Sustainable Development Policy (2005), available at <http://www.bhpbilliton.com/bbContentRepository/docs/SustainableDevelopment/policiesAndKeyDocuments/HSECPolicy.pdf>.

99. See Hamann, *supra* note 53, at 242.

100. See MCKINSEY & CO., *supra* note 59, at 9.

A. Emergence of Sustainable Development as a Core Strategic Issue
for the Extractive Industries

Two trends combined to make “[d]oing well by doing good . . . a fashionable mantra” for businesses today.¹⁰¹ First, financial markets have created rankings and indices of various kinds to measure and reward the positive impact of effective CSR strategies on a company’s value.¹⁰² The Dow Jones Sustainability Indexes and FTSE4Good, for example, provide benchmark and tradable indices for socially responsible investors.¹⁰³ Many companies now measure their performance using the “Global Reporting Initiative” (GRI),¹⁰⁴ a sustainability reporting framework designed by the NGO CERES, and Goldman Sachs now integrates CSR issues into some of its equity research.¹⁰⁵ By 2007, the investment firms supporting the UN Global Compact represented nearly eight trillion dollars of global investments.¹⁰⁶ As a result of the “socially responsible investment” (SRI) trend, one hundred percent of mining companies and sixty-three percent of oil and gas companies among the *Fortune* global top 250 companies now issue social, environmental or sustainability reports in addition to their financial reports.¹⁰⁷ This so-called “triple bottom-line” reporting forces extractive industry companies to internalize (and try to reduce) the social and environmental costs of their operations. It reminds them, as the former Chairman of Shell put it, that “[t]he demands of economics, of the environment and of contributing to a just society are all important for a global commercial enterprise to flourish.”¹⁰⁸

Second, proliferating news reports of extractive industry companies engaged in ugly confrontations with host communities and governments are driving companies to get out ahead of their competitors in making peace with local communities.¹⁰⁹ Crises facing extractive industry companies as a result of community opposition over just the past six months include: planning put on hold in Romania for what would have become Europe's largest open-pit gold mine due to widespread community

101. Franklin, *supra* note 55, at 4.

102. MCKINSEY & CO., *supra* note 59, at 23.

103. See Dow Jones Sustainability Indexes, <http://www.sustainability-indexes.com> (last visited Apr. 22, 2008); FTSE Good, http://www.ftse.com/Indices/FTSE4Good_Index_Series/index.jsp.

104. See Global Reporting Initiative, <http://www.globalreporting.org>.

105. GOLDMAN SACHS, GS SUSTAIN (2007), http://www.unglobalcompact.org/docs/summit2007/g_s_esg_embargoed_until030707pdf.pdf.

106. MCKINSEY & CO., *supra* note 59, at 23.

107. KPMG, INTERNATIONAL SURVEY OF CORPORATE SUSTAINABILITY REPORTING 2002 10 (2002), available at <http://www.gppi.net/fileadmin/gppi/KPMG2002.pdf>.

108. Mark Moody-Stuart, The Values of Sustainable Business in the Next Century, Lecture at St. Paul’s Cathedral, London (July 12, 1999), available at <http://www.shell.com/static/media-en/downloads/3983Englishpdf3.pdf>.

109. Rebecca Bream, *Digging Deep: Mining Faces Up to the Cost of Presenting a Cleaner Image to the World*, FIN. TIMES, Jan. 17, 2006.

opposition and court challenges;¹¹⁰ South Africans refusing to leave their ancestral lands to make way for a platinum mine;¹¹¹ Brazilians blockading an iron-ore mine and major railroad-supply routes;¹¹² Ghanaian villagers winning more than U.S. \$ 900,000 from a company to replace their houses, a church, a mosque and a school destroyed to make way for a gold mine;¹¹³ installation of a tailings pipeline suspended at a nickel project in New Caledonia following protests from the local community;¹¹⁴ the Ardoch and Shabot Obaadjiwan Algonquin First Nations blocking access to a site in Canada where a mining company wants to test drill for uranium;¹¹⁵ and a U.S. \$ 16 billion environmental lawsuit filed by Ecuadorian indigenous groups against an oil company.¹¹⁶ The past few years have also seen governments pressuring extractive industry companies in response to community opposition in Canada,¹¹⁷ Russia,¹¹⁸ Ecuador, Bolivia, Venezuela¹¹⁹ and elsewhere. As a result, extractive industry companies increasingly recognize that, “projects are more likely to be successful over the long term if they have the broad support of local communities—including of indigenous peoples—from exploration through to closure.”¹²⁰

110. See *Romania Moves to Block Canadian Gold Mine Project*, REUTERS, Dec. 6, 2007, available at <http://uk.reuters.com/article/governmentFilingsNews/idUKL0659283320071206>; *Romanian court deals new blow to Canadian gold mine*, REUTERS, Jan. 24, 2008, available at <http://uk.reuters.com/article/rbssIndustryMaterialsUtilitiesNews/idUKL2490031820080124>.

111. See Angus Stickler, *Who Pays the Price of Platinum*, BBC NEWS, Mar. 25, 2008, http://news.bbc.co.uk/2/hi/programmes/file_on_4/7305335.stm; *Mining Forces Out Thousands in SA*, BBC NEWS, <http://news.bbc.co.uk/1/hi/world/africa/7312018.stm>, Mar. 25, 2008.

112. Devon Maylie, *Alcoa Invests Near Planned Mines*, WALL ST. J., Mar. 24, 2008, at B4.

113. Jerry Mensah-Pah, *Demolished Ghanaian Village Wins Court Decision*, OXFAM AMERICA, Jan. 11, 2008, http://www.oxfamamerica.org/whatwedo/where_we_work/west_africa/news_publication/s/demolished-ghanaian-village-wins-court-decision.

114. *Vale Halts Pipeline Installation at Goro Nickel After Protest*, DOW JONES COMMODITIES SERV., Feb. 25, 2008, available at DOW JONES FACTIVA, Doc. No. DJCS000020080225e42p00003.

115. *Mining - North America*, MERGENT INDUSTRY REPORTS, Nov. 1, 2007, available at DOW JONES FACTIVA, Doc. No. MIRAUS0020071228e3b10000b.

116. Kelly Hearn, *\$16 Billion Environmental Lawsuit Tests Chevron*, CHRISTIAN SCI. MONITOR, Apr. 9, 2008, at 6.

117. KEMESS NORTH MINE JOINT REVIEW PANEL, KEMESS NORTH COPPER-GOLD MINE PROJECT (2007), available at <http://www.ceaa-acee.gc.ca/050/documents/23469/23469E.pdf> (finding that the proposed mine was not in the public interest).

118. Terry Macalister, *Environmentalists Back Putin Over Shell's Energy Permit*, GUARDIAN, Sept. 25, 2006, available at <http://www.guardian.co.uk/business/2006/sep/25/russia.oilandpetrol>.

119. Christian Parenti, *Hugo Chavez and Petro Populism*, NATION, Apr. 11, 2005, at 15; Christopher Toothaker, *Morales Aligns Himself with Chávez and Castro*, ASSOCIATED PRESS, Jan. 3, 2006; *Ecuador Cancels an Oil Deal With Occidental Petroleum*, REUTERS, May 17, 2006, <http://www.nytimes.com/2006/05/17/business/worldbusiness/17oil.html>; Marco Aquino, *Strikes, Protests Hit Latin America Mining Boom*, REUTERS, Jan. 5, 2007, available at DOW JONES FACTIVA, Doc. No. LBA000002007010Se315001j4.

120. INT'L COUNCIL ON MINING & METALS, THIRD SUBMISSION TO THE SPECIAL REPRESENTATIVE OF THE UN SECRETARY-GENERAL ON THE ISSUE OF HUMAN RIGHTS AND BUSINESS: ICMM SUPPORTS THE DEVELOPMENT OF ADDITIONAL PRACTICAL MEASURES TO STRENGTHEN BUSINESS & HUMAN RIGHTS OUTCOMES 12 (2007).

Whereas in the past companies looked to establish support or trust—“a precious intangible capital”—through philanthropy, today they are looking for commercially viable models to compete for it to the benefit of society as well as their own bottom line.¹²¹

B. Free, Prior, and Informed Consent (FPIC)

In recent years, indigenous peoples and other vulnerable communities have begun to demand some form of prior and informed consent to the extractive industry projects that impact them.¹²² The passage of the United Nations Declaration on the Rights of Indigenous Peoples in September 2007 has strengthened their case, as it recognizes the right of indigenous peoples to give “their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of their mineral, water or other resources.”¹²³ Like the passage of the Declaration, general acceptance of the concept of FPIC is long-overdue, as more than ten years have passed since the organizer of a World Bank-sponsored conference on mining and the community predicted “that the move from consultation to participation in decision-making is the next logical (albeit difficult) step in the evolution of [extractive industry]-community relations.”¹²⁴

FPIC envisages that local communities are informed about development projects in a timely manner and given the opportunity to approve or reject a project prior to the commencement of operations.¹²⁵ This includes “participation in setting the terms and conditions that address the economic, social, and environmental impacts of all phases of mining and post-mining operations.”¹²⁶ FPIC differs importantly from consultation in the way decision-making authority is exercised and legitimated.¹²⁷ Whereas consultation processes require only that extractive industry companies hear the views of those potentially affected by a project and take them into account when engaging in decision-making processes, consent processes require that host communities actually participate in decision-making processes.¹²⁸ Consent processes give affected communities

121. MCKINSEY & CO., *supra* note 59, at 26.

122. ELI ET AL., *supra* note 3, at vii.

123. United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, ¶ 32(2), U.N. Doc. A/Res/61/295 (Oct. 2, 2007).

124. Gary McMahon ed., *Mining and the Community: The Results of the Quito Conference*, at x (World Bank Energy, Mining & Telecomm. Dep’t, EMT Occasional Paper No. 11, 1998), available at http://www.wds.worldbank.org/external/default/main?pagePK=64193027&piPK=64187937&heSitePK=523679&menuPK=64187510&searchMenuPK=64187283&siteName=WDS&entityID=000094946_99101605302865.

125. ELI ET AL., *supra* note 3, at vii.

126. *Id.*

127. WRI, *supra* note 3, at 7.

128. *Id.*

the leverage to negotiate mutually acceptable agreements under which projects may proceed, thereby ensuring that projects stand a better chance of producing results that benefit them.¹²⁹

Proponents agree that FPIC processes will only be empowering, however, if they meet a number of criteria, particularly the three criteria that their name implies. First, consent must actually be freely given, meaning that it must be entirely voluntary and obtained free of coercion, bribery or manipulation.¹³⁰ While a social license to operate may ostensibly be easier to obtain by bullying vulnerable groups unable to protect themselves, this will not lead to true community buy-in. Unless explicit voluntary approval is given, protests may break out once communities have the confidence to revoke a social license granted under duress.

Second, advocates point out that consent must be obtained prior to a company receiving legal authorization and financial approval for a project.¹³¹ Thus, it should also be obtained prior to commencement of any activities that would affect communities, their lands, territories and resources.¹³² To ensure that all aspects of the project are considered together and that comprehensive mitigation techniques are designed, the consent process should be conducted during the initial assessment of environmental, social and human rights impacts. Project sponsors should view obtaining community consent as a necessary cost of project development" and one of the many approvals required to go forward.¹³³

Third, consent must be fully informed, meaning that affected communities must know enough about their own rights and the implementation of the proposed project to be able to negotiate with equality of information.¹³⁴ They will need information about all stages and potential impacts of the project and about its revenue in a form that is understandable and available in local languages. They must also be allowed sufficient time to review and discuss information provided to them.

Finally, an effective community consent process must be enduring and enforceable. Thus, gaining FPIC must not be "a 'one-off' procedure."¹³⁵ Rather, it involves "a continuous, iterative process of communication and negotiation spanning the entire planning and project cycles."¹³⁶ Ensuring that consent is enduring requires both community and independent

129. *Id.* at 7-8.

130. See MARTA MIRANDA ET AL., FRAMEWORK FOR RESPONSIBLE MINING: A GUIDE TO EVOLVING STANDARDS 57 (2005); WRI, *supra* note 3, at 7.

131. See MIRANDA ET AL., *supra* note 130.

132. See *id.*

133. WRI, *supra* note 3, at 12.

134. See Goodland, *supra* note 82, at 67; OXFAM AUSTRALIA, FREE PRIOR AND INFORMED CONSENT: THE ROLE OF MINING COMPANIES 7 (2007), available at www.oxfam.org.au/campaigns/miningdocs/FPIC_statement.pdf.

135. OXFAM AUSTRALIA, *supra* note 134, at 7.

136. WCD, *supra* note 3, at 281. See also Lyla Mehta & Maria Stankovitch, OPERATIONALISATION OF FREE PRIOR INFORMED CONSENT 19 (2001), available at <http://www.dams.org/docs/kbase/contrib/soc209.pdf> (discussing the project cycle).

monitoring and evaluation mechanisms.¹³⁷ These should be supported by independent grievance processes to ensure that community concerns are addressed throughout a project's lifetime.¹³⁸

C. Potential of Free, Prior, and Informed Consent

While the concept faces many significant challenges, as will be discussed in further detail below, FPIC processes have the potential to heal relations between extractive industry companies and communities. If implemented properly, these processes should begin to address both of the most prevalent underlying root causes of community grievances against extractive industry projects—failure to obtain consent and negative economic impacts or insufficient economic benefits.

Effective FPIC processes should address the claims of many people living near extractive industry projects that their rights to participate in, influence, and share control over development decisions are ignored. As the World Resources Institute points out, consent processes should “empower host communities by changing the basic terms of engagement, and can thereby help ensure that the poorest and most marginalized or disenfranchised groups are included in the decision making.”¹³⁹ Well-implemented FPIC processes should also constitute the sort of visible, tangible forms of recognition from extractive industry companies that many affected communities expressly desire. But to be effective, FPIC cannot be merely symbolic: “Participation must . . . improve project performance.”¹⁴⁰

Meaningful participation in decision-making should also address community concerns about negative economic impacts of projects and ensure that they receive an equitable share of project benefits.¹⁴¹ Although extractive industries are inherently unsustainable, insofar as they involve consumption of nonrenewable natural resources, they “could be considered sustainable if [they] improve[] the welfare of future generations by, for example, raising other forms of capital, such as human capital (if revenues are used, say, for education) or social capital.”¹⁴² Local participation should also help counter the lack of good governance at the national level that often prevents the extractive sector from becoming an

137. WRI, *supra* note 3, at 49.

138. *Id.*

139. *Id.* at 8.

140. Mac Darrow & Amparo Tomas, *Power, Capture, and Conflict: A Call for Human Rights Accountability in Development Cooperation*, 27 HUM. RTS. Q. 485, 505 (2005).

141. See Ballard & Banks, *supra* note 7, at 303. See also Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 169 I.L.O. 1989, 28 I.L.M. 1382 (entered into force Sept. 5, 1991), available at <http://www.unhchr.ch/html/menu3/b/62.htm> [hereinafter ILO Convention]; Declaration on the Right to Development, G.A. Res. 41/128, Annex, art. 2(3), U.N. Doc. A/RES/41/128 (Dec. 4, 1986), available at <http://www.unhchr.ch/html/menu3/b/74.htm>.

142. SALIM 1, *supra* note 3, at 3-4.

“engine for poverty alleviation.”¹⁴³ It can also enable local communities to define the concept of poverty alleviation, which is particularly important for indigenous people for whom wealth may mean not only the accumulation of money, but also the preservation and development of their unique ways of life.¹⁴⁴

Moreover, participation in decision-making should address the most common triggers of community opposition. It is known to help protect and is a core tenet of a number of specific human rights, including the right of self-determination,¹⁴⁵ the right to meaningful participation in environmental decision making,¹⁴⁶ and the right for communities to control access to their lands and resources.¹⁴⁷ Participation in decision-making is also recognized as a core tenet of the rights of indigenous peoples¹⁴⁸ and as an important mechanism for operationalizing the human-rights based approach to development.¹⁴⁹ Its recognition would enable communities to guide extractive company behavior away from committing or being complicit in human rights violations.¹⁵⁰ By addressing both the triggers and the underlying root causes of community opposition, FPIC should accomplish many of the risk management objectives of CSR’s second generation as well as the competitive objectives of CSR’s third generation.

FPIC means recognizing the right of communities to reject extractive industry projects and a corresponding acceptance by extractive industry companies that they may have to walk away from projects, even when in “possession of full, state-sanctioned rights of access and extraction.”¹⁵¹ This may seem a lot to ask of companies, but, in an age when extractive industry companies are seeing their projects effectively vetoed around the world after they have already sunk large unrecoverable costs into them, the risk of rejection prior to development should seem a relatively small price to pay in exchange for a peaceful process in the event that the project does go forward. Moreover, communities are more likely to accept a project if

143. SALIM 2, *supra* note 3, at 2.

144. SALIM 1, *supra* note 3, at 4 (2003).

145. See International Covenant on Civil and Political Rights, art. 1, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

146. See United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *The Rio Declaration on Environment and Development*, U.N. Doc. A/Conf.151/5/Rev.1 (June 13, 1992).

147. See *Moiwana Cmty. v. Suriname*, Case 11.821, Inter-Am. C.H.R., Report No. 26/00, OEA/Ser.L/V/II.106, doc. 3 rev. at 278 (1999), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_124_ing.pdf.

148. See U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 123, art. 18.

149. U.N. Econ. & Soc. Council, Permanent Forum on Indigenous Issues, *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples*, ¶ 12, U.N. Doc. E/C.19/2005/3 (Feb. 17, 2005).

150. Participatory models, which espouse values similar to FPIC, are often included in overall guidelines for good governance. See, e.g., AUSAID, *GOOD GOVERNANCE: GUIDING PRINCIPLES FOR IMPLEMENTATION* 1, 3 (2000), available at <http://www.aid.gov.au>.

151. *Bridge*, *supra* note 23, at 250.

they have participated in decision-making throughout the project cycle.¹⁵² FPIC processes also give communities the ability to withhold their consent in a peaceful manner if their concerns are not addressed, eliminating the need to resort to violence, blockades and other disruptive forms of protest. While the business and development case for FPIC is sound, there is no question that the adoption of FPIC by extractive industry companies would represent a truly historic shift in the relationship between companies and communities.

V. CHALLENGES FACING COMMUNITY CONSENT PROCESSES

A number of extractive industry associations, initiatives and companies have endorsed FPIC.¹⁵³ However, a number of other extractive industry participants continue to resist the principle. The Extractive Industries Review, a multi-year review of the extractive industries commissioned by the World Bank, endorsed the principle;¹⁵⁴ but the governors of the World Bank ultimately refused to do so.¹⁵⁵ Instead of adopting FPIC, they mandated that an extractive industry project must secure the “broad support” of affected communities through a process of “free, prior, and informed *consultation*” in order to be eligible for Bank financing.¹⁵⁶ Following a comprehensive review of its own environmental and social policies, the IFC also adopted the broad community support standard,¹⁵⁷ and the Equator Principles Banks (EPBs) followed suit.¹⁵⁸ In its 2006 Draft Position Statement on Mining and Indigenous Peoples Issues, the ICMM stated that its members “*may . . . seek consent for [their]*

152. See WCD, *supra* note 3, at 7. See also Ali & Grewal, *supra* note 49, at 385-86 (explaining that the willingness of developers to change siting decisions based on indigenous concerns helps build trust and mutual respect).

153. These include the International Petroleum Industry Environmental Conservation Association (IPIECA) and the International Association of Oil & Gas Producers (OGP). See IPIECA/OGP, KEY QUESTIONS IN MANAGING SOCIAL ISSUES IN OIL AND GAS PROJECTS 5 (2002), available at

http://www.ipieca.org/activities/social/downloads/publications/key_questions.pdf (noting that “it is important for communities to be able to give free and informed consent”). The ICMM has endorsed FPIC in its Draft Position Statement on Mining and Indigenous Peoples Issues. ICMM, *supra* note 33 (identifying “seeking consent” as a possible way to implement Commitment 5). A number of specific companies, including Rio Tinto and Anglo American, have committed to FPIC in their corporate policies. ANGLO AMERICAN, TOWARDS SUSTAINABLE MINING (2002), available at <http://www.eupolitix.com/NR/rdonlyres/3940BD43-2C2C-44AF-AE699A71DE5FBC4E/0/sdreport.pdf>; RIO TINTO, HUMAN RIGHTS GUIDANCE: GUIDANCE FOR MANAGERS ON IMPLEMENTING THE HUMAN RIGHTS POLICY 2 (2003), available at www.riotinto.com/documents/ReportsPublications/corpPub_HumanRights.pdf.

154. SALIM 1, *supra* note 3, at 18-19.

155. WORLD BANK GROUP MANAGEMENT, STRIKING A BETTER BALANCE: WORLD BANK GROUP MANAGEMENT RESPONSE 7 (2004) [hereinafter MANAGEMENT RESPONSE].

156. *Id.* (emphasis added). They also revised the Bank’s indigenous peoples policy to apply the same broad community support standard. WORLD BANK MANUAL, *supra* note 78, at 1.

157. INT’L FINANCE CORP., GUIDANCE NOTES TO PERFORMANCE STANDARD 7, 152 (2007).

158. See The Equator Principles, *supra* note 80.

activities” as part of a process of gaining and maintaining broad community support.¹⁵⁹ It remains to be seen whether the final position statement, due to be released this year, will go further to require FPIC in all instances, retain the text as drafted, or retreat from this principle.

Extractive industry companies and their financial institutions appear to have three principal concerns with the concept of FPIC: that it is a direct challenge to sovereignty, that it is not well enshrined in law, and that it is difficult to operationalize. Each of these valid concerns, which are recognized to varying degrees even by FPIC’s proponents, will be treated briefly in turn below.

A. Concerns About Sovereignty

Some extractive industry companies argue that FPIC is a direct challenge to national sovereignty.¹⁶⁰ Those who argue for full government control over the permit process claim that FPIC would allow communities an effective veto over projects that would be beneficial to the broader development goals of the nation.¹⁶¹ They note that, “[t]here are actually very few developed countries in which central government does not have . . . an ultimate say” and ask, “should different standards apply in the developing world?”¹⁶² Implementing FPIC would, they say, lead to a reduction in foreign direct investment in extractive industries, thereby eliminating development opportunities for resource-rich but otherwise poor countries.¹⁶³

Meanwhile, NGOs who argue in favor of FPIC for local communities point out that the concept is an internationally recognized human right, particularly for indigenous peoples, and that, as such, it cannot be overridden by state sovereignty or the collective rights of a nation to economic development.¹⁶⁴ They argue that the failure to obtain FPIC in violation of human rights would be “contrary to state responsibility under international law.”¹⁶⁵ They ask why extractive industry “companies and governments should be allowed to veto indigenous peoples’ human rights.”¹⁶⁶

Striking a balance between the rights of local communities to control their lives and lands, and the rights and responsibilities of central governments to pursue national development goals is a challenge for all governments.¹⁶⁷ Given the revenue extractive industry projects can

159. ICMM, *supra* note 33, at 2 (emphasis added).

160. See RENDER, *supra* note 42, at 30.

161. ICMM 1, *supra* note 89, at 7. See also, MANAGEMENT RESPONSE, *supra* note 155, at v (emphasizing that consultation “does not mean a veto power for individuals or any group”).

162. *Id.*

163. *Id.* at 6.

164. OXFAM AUSTRALIA, *supra* note 134, at 9.

165. *Id.*

166. MacKay, *supra* note 84, at 47.

167. ELI ET AL., *supra* note 3, at 3.

generate, some governments undertake this balancing act in only the most perfunctory manner with the outcome in favor of the extractive industry project all but a foregone conclusion. By requiring companies, governments and affected communities to actively engage with one another, to seek a mutually acceptable approach to extractive industry projects, and to abandon projects when no such approach can be identified, adherence to the principle of FPIC would help ensure that governments take their obligations to all of their citizens seriously. Moreover, projects formulated with community input are more likely to benefit local communities and to be accepted by them, thereby benefiting companies and host nations.¹⁶⁸

B. Concerns About Legal Status

Some extractive industry companies and their financial institutions are also hesitant to adopt the principle of FPIC because they maintain that there is a lack of international consensus regarding the principle¹⁶⁹ and, “with very few exceptions, it is not enshrined in local legislation.”¹⁷⁰ As a preliminary matter, an international consensus on the obligatory nature (if not the precise content) of the principle of FPIC is emerging as evidenced by the inclusion of the right to FPIC in the text of several human rights instruments and through the jurisprudence of a number of international human rights bodies.

The Declaration on the Rights of Indigenous Peoples, for example, while not a binding instrument, constitutes recognition of indigenous peoples’ right to FPIC by most members of the international community.¹⁷¹ International Labor Organization Convention No. 169 also requires that states “establish or maintain procedures through which [they] shall consult [indigenous] peoples” to determine if their “interests would be prejudiced”¹⁷² by extractive industry projects, “with the objective of achieving agreement or consent.”¹⁷³

Although the right to FPIC is more clearly recognized with respect to indigenous peoples, the International Covenant on Civil and Political

168. See David Baluarte, *Balancing Indigenous Rights and a State's Right to Develop in Latin America: The Inter-American Rights Regime and ILO Convention 169*, 4 SUSTAINABLE DEV. L. & POL'Y 9 (2004) (arguing that ILO Convention 169 and Inter-American human rights jurisprudence endorse FPIC as the key to balancing indigenous and state development rights); MacKay, *supra* note 84, at 47 (arguing that project sponsors cannot expect to gain the “broad community acceptance” that the World Bank and other financiers now require if communities believe that their opinions will not be respected).

169. See Caruso et al., *supra* note 20, at 18.

170. ICMM, *supra* note 37, at 8.

171. U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 123, at 5-6, 8. See also Draft American Declaration on the Rights of Indigenous Peoples, Committee on Juridical and Political Affairs, OEA/Ser.K/XVI (May 22, 2007), available at <http://www.oas.org/consejo/cajp/Indigenous%20documents.asp>.

172. ILO Convention, *supra* note 141, art. 15(2).

173. *Id.* art. 6(2).

Rights and the International Covenant on Economic, Social and Cultural Rights provide for self-determination and free pursuit of development by *all* peoples.¹⁷⁴ Accordingly, some argue that all communities should have a meaningful role in making decisions about projects that affect them.¹⁷⁵ As noted by the WRI,

For non-indigenous communities, the case for FPIC is based on (1) the right to meaningful participation in environmental decision making; (2) the right to control access to their lands and resources; (3) contemporary standards of public participation as a hallmark of legitimate governance; and (4) basic principles of equity and justice.¹⁷⁶

UN treaty bodies have also recognized the right to FPIC. The Human Rights Committee, for example, has “stress[ed] the obligation of the State party to seek the informed consent of indigenous peoples before adopting decisions affecting them.”¹⁷⁷ Observing that indigenous peoples have and continue to suffer from discrimination, and “in particular that they have lost their land and resources to colonists, commercial companies and State enterprises,” the Committee on the Elimination of Racial Discrimination has called upon states to “ensure that no decisions directly relating to their rights and interests are taken without their informed consent.”¹⁷⁸ Further, the Committee on Economic Social and Cultural Rights has noted “with regret that the traditional lands of indigenous peoples have been reduced or occupied, without their consent, by timber, mining and oil companies.”¹⁷⁹ It then recommended that the State party “consult and seek the consent of the indigenous peoples concerned.”¹⁸⁰

Like the U.N. human rights treaty bodies, the Inter-American human rights bodies have consistently held that indigenous peoples’ informed consent is required in relation to activities that affect their traditional territories.¹⁸¹ The Commission has observed that Inter-American human rights law requires “special measures to ensure recognition of the particular and collective interest that indigenous people have in the

174. ICCPR, *supra* note 145, art. 1; International Covenant on Economic, Social, and Cultural Rights art. 1, Dec. 16, 1966, U.N.T.S. 3.

175. WRI, *supra* note 3, at 9-10.

176. *Id.* at 10.

177. Hum. Rts. Comm., *Concluding Observations of the Human Rights Committee: Canada*, ¶ 22, U.N. Doc. CCPR/C/CAN/CO/5 (Apr. 20, 2006).

178. Comm. on the Elimination of Racial Discrimination, *General Recommendation XXIII (51) Concerning Indigenous Peoples*, 3 A.I.L.R. 142, 143 (Mar. 1998).

179. U.N. Comm. on Econ., Soc., & Cultural Rts., *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Colombia*, ¶ 12, U.N. Doc. E/C.12/1/Add.74 (Nov. 10, 2001).

180. *Id.* ¶ 33.

181. James Anaya, *Indigenous Peoples Participatory Rights in Relation to Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples have in Lands and Resources*, 22 ARI. J. INT’L & COMP. L. 7 (2005).

occupation and use of their traditional lands and resources and their right not to be deprived of this interest except with fully informed consent, under conditions of equality, and with fair compensation.”¹⁸² In a number of cases involving extractive industry or forestry projects, the Court held that states violated indigenous peoples’ human rights by failing to obtain their consent in relation to land concessions,¹⁸³ land delimitation, demarcation and titling,¹⁸⁴ and the provision of compensation or alternative lands.¹⁸⁵

A number of countries have also incorporated community consent provisions in domestic law.¹⁸⁶ Yet, even where they have not incorporated the principle into domestic legislation, states are obligated to give domestic legal effect to applicable human rights guarantees under both customary international law and the human rights conventions to which they are parties.¹⁸⁷ States also have affirmative obligations to prevent and respond to human rights violations committed by private persons, including multinational extractive industry companies.¹⁸⁸ While states hold the primary obligations under international law, extractive industry conduct that contravenes human rights norms at a minimum triggers the state’s duty to actively intervene and protect victims.¹⁸⁹

C. Concerns About “Operationalizing” Consent Processes

Finally, extractive industry companies and NGOs alike point to the challenges of operationalizing FPIC, including determining what constitutes “consent,” who represents the affected “community” and how historically marginalized communities can engage “meaningfully” with

182. See, e.g., *Dann v. United States*, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, OEA/Ser.L/V/II.116, Doc. 46 ¶ 131 (2002).

183. *The Mayagna (Sumo) Awas Tingni Community Case*, Inter-Am. Ct. H.R. (ser. C) No. 66 (Feb. 1, 2000), available at <http://www1.umn.edu/humanrts/iachr/C/66-ing.html>.

184. *Moiwana v. Suriname*, Case 11.821 ¶¶ 209-211.

185. *Yakye Axa Indigenous Community v. Paraguay*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125 (June 17, 2005).

186. See WRI, *supra* note 3, at 8-9 (discussing the Philippines, the United States, Australia and Russia); MacKay *supra* note 84, at 60 (discussing Ecuador and Colombia).

187. See, e.g., ICCPR, *supra* note 145, art. 2; International Convention on the Elimination of All Forms of Racial Discrimination, art. 2, Dec. 21, 1965, 60 U.N.T.S. 195; American Convention on Human Rights arts. 1, 2, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123. See also, *inter alia*, U.N. High Comm’r for Hum. Rts., Hum. Rts. Comm., *General Comment 31 on International Covenant on Civil and Political Rights*, ¶ 8, U.N. Doc. CCPR/C/Rev.1/Add.13 (May 24, 2004) [hereinafter HRC General Comment 31].

188. *Velasquez Rodriguez Case*, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988). See also HRC General Comment 31, *supra* note 187.

189. SRSG 2, *supra* note 67, ¶¶ 10-18 (discussing the state duty to protect). See also Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Report to Human Rights Council, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008), available at <http://www2.ohchr.org/english/bodies/hrcouncil/8session/reports.htm> (discussing the state duty to protect, the corporate responsibility to respect and access to remedies).

extractive industry companies. None of these questions has an easy answer and this is the area most in need of extensive future study, although a number of important contributions have already been made by a handful of academics and NGOs.¹⁹⁰

First, an effective FPIC process will require careful analysis of what constitutes consent. According to a paper prepared for the World Commission on Dams by the University of Sussex, consent may take various forms, “such as a report from a community task force . . . a community referendum or a community meeting.”¹⁹¹ It also pointed out that, “[m]ost indigenous peoples also have their own customary mechanisms for arriving at a consensus within the community.”¹⁹² Others have argued that consent must take the form of binding, negotiated and enforceable formal legal agreements.¹⁹³

While consent should be consensual—meaning that there is harmonious agreement with the measures designed to make the proposed project acceptable—it does not need to constitute absolute consensus—meaning that a majority may be sufficient and a single person should not be permitted to veto a project.¹⁹⁴ Consent requires that a community has discussed important issues together with their leaders and with the project sponsor until they have determined that, on balance, they will benefit from the project and are satisfied that mechanisms are in place to address any problems that arise.

Second, obtaining consent from communities is often complicated by the difficulty of determining who comprises the relevant community and who speaks for that community. Communities are far from homogeneous and may be divided about whether to support an extractive industry project.¹⁹⁵ The ICMC observes that “resolving disputes and deciding how to treat groups that may be impacted to differing degrees” poses a serious challenge to FPIC processes.¹⁹⁶

The consent process should allow communities, indigenous peoples in particular, to participate through their own freely chosen representatives and customary or other institutions.¹⁹⁷ Indigenous peoples may have special status and rights under international law, but all interested

190. See generally MEHTA & STANKOVITCH, *supra* note 136. See also VIVIANE WEITZNER, NORTH-SOUTH INST., THROUGH INDIGENOUS EYES: TOWARD APPROPRIATE DECISION-MAKING PROCESSES REGARDING MINING ON OR NEAR ANCESTRAL LANDS (2002), available at <http://www.nsi-ins.ca/english/pdf/synenfinal.pdf>; GAIL WHITEMAN & KATY MAMEN, NORTH-SOUTH INST., MEANINGFUL CONSULTATION AND PARTICIPATION IN THE MINING SECTOR (2002) available at <https://idl-bnc.idrc.ca/dspace/handle/123456789/35236>.

191. MEHTA & STANKOVITCH, *supra* note 136, at 19.

192. *Id.*

193. WRI, *supra* note 3, at 49.

194. OXFAM AUSTRALIA, *supra* note 134, at 7.

203. *Id.*; ALAYZA MONCLOA, *supra* note 41, at 14; Colin Filer & Martha Macintyre, *Grass roots and Deep Holes: Community Responses to Mining in Melanesia*, 18 CONTEMP. PAC. 215 (2006).

196. ICMC, *supra* note 37, at 8.

197. U.N. Econ. & Soc. Council, Permanent Forum on Indigenous Issues, *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples*, ¶ 12, U.N. Doc. E/C.19/2005/3 (Feb. 17, 2005).

community members should be allowed and encouraged to take part in the FPIC process, including stakeholders affected by indirect or cumulative impacts.¹⁹⁸ A number of advocates stress that “[o]ppportunity to participate in decisions about development should . . . not further marginalise individuals or groups that may traditionally be denied social power due to gender, ethnicity, religion, class or caste.”¹⁹⁹ Consent processes must be inclusive if they are to help prevent future conflict, meaning that the entire community must have the opportunity to be heard, to have their questions answered, and to give their consent freely.

Third, perhaps the greatest challenge facing FPIC processes is ensuring that communities possess “a genuine capacity to influence the economic and political agendas” surrounding an extractive industry project.²⁰⁰ This will require the building of social capital—meaning a set of norms that will be shared between and among the extractive industry company and the affected community.²⁰¹ Such norms may be very difficult to construct if there is already a legacy of distrust between the community and the extractive industry company or if resentment against the state is displaced onto extractive industry companies, as is often the case in developing countries where the state is effectively absent from the regions in which extraction occurs.²⁰² In such situations, communities may pursue their own interests directly with the extractive industry companies. Companies that, like the state, find their claims to mineral rights disrespected and contested if they fail to provide tools for sustainable development, may try to meet a community’s development demands or pressure the government into doing so in an effort to build confidence and trust with the community.²⁰³

For communities to engage meaningfully in consent processes, they may also need education about their rights, training to ensure that they can advocate for themselves, or assistance from civil society organizations.²⁰⁴ Building “adequate channels and organizational capacities for participation can be an expensive and time-consuming exercise.”²⁰⁵ Yet capacity building is a worthwhile exercise. Unless communities have the capacity to negotiate an adequate share of project benefits and to express their grievances effectively through the FPIC process, they will revert to damaging protests. The World Bank Group has concluded that the “extractive industries can contribute to sustainable development, when projects are implemented well and preserve the rights of affected people, and if the benefits they generate are well-used.”²⁰⁶ This requires effective

198. MIRANDA ET AL., *supra* note 130, at 47.

199. OXFAM AUSTRALIA, *supra* note 134, at 9.

200. Darrow & Tomas, *supra* note 140, at 507.

201. See Francis Fukuyama, *Social Capital and Development*, 22 SAIS REV. 3, 23 (2002).

202. Ballard & Banks, *supra* note 7, at 296.

203. *Id.* at 292.

204. See Jonathan Rosenberg & Linus Spencer Thomas, *Participating or Just Talking?*, 5 GLOBAL ENVTL. POL. 61, 65 (2005) (discussing United Nations Environmental Programme’s capacity-building programs).

205. Darrow & Tomas, *supra* note 140, at 510.

206. MANAGEMENT RESPONSE, *supra* note 155, at iii.

guidance from the affected peoples themselves.

VI. THE PERUVIAN EXPERIENCE

After leading a bloodless self-coup in 1992 that gave him almost limitless executive power, President Alberto Fujimori abruptly liberalized the Peruvian economy and welcomed foreign direct investment (FDI) into the country's languishing extractive sector.²⁰⁷ He also wrote a new constitution, which asserts that "renewable and nonrenewable natural resources are property of the Nation and it is within the State's sovereignty to decide their use,"²⁰⁸ and created a framework of laws for investment growth and protection, which provides that "all companies have the right to organize and develop their activities in the form they judge necessary."²⁰⁹ In response to these and other enticements, FDI began flooding into Peru's extractive sector, particularly the mining industry.²¹⁰ Today, Peru is among the top ten countries in terms of FDI in the extractive sector and is host to some of the world's largest extractive industry companies.²¹¹ It is the world's second largest copper and zinc producer, the fifth-largest gold producer and the leading silver producer,²¹² and is "widely seen as having the biggest mining potential in South America."²¹³ The mining industry has committed to investing over U.S. \$ 11 billion in Peru between 2007 and 2011.²¹⁴

207. See Carol Wise, *The Politics of Peruvian Economic Reform*, 36 J. INTERAMERICAN STUD. & WORLD AFF. 75, 75 (1994).

208. Constitución Política del Perú art. 66 (translated by Lisa Laplante).

209. Ley Marco para el Crecimiento de la Inversión Privada, Legis. Decree No. 757, art.9 (1991) (Peru) (translated by Lisa Laplante).

210. See PERU SUPPORT GROUP, MINING AND DEVELOPMENT IN PERU 5 (2007), available at <http://www.perusupportgroup.org.uk/pdfs/Mining%20and%20Development%20in%20Peru.pdf> (noting that mining accounted for fifty-five percent of all exports in Peru in 2005 and for thirty-seven percent of FDI in Peru between 2001 and 2003). Subsequent administrations have continued with Fujimori's liberal policies. See John Crabtree, *Alan García's second coming*, OPEN DEMOCRACY, July 28, 2006, http://www.opendemocracy.net/democracy-protest/garcia_second_3773.jsp.

211. ALAYZA MONCLOA, *supra* note 41, at 13. See *Director del FMI resalta progreso que experimenta la economía Peruana* [FMI Director Emphasizes Peruvian Economy's Progress], LA REPÚBLICA ONLINE (Peru), Sept. 21, 2007, http://www.larepublica.com.pe/component/option,com_contentant/task,view/id,179252/Itemid,0.

212. *Peru's Copper, Zinc, Gold Output Grew in February*, REUTERS, Mar. 30, 2008, available at <http://www.reuters.com/article/rbssIndustryMaterialsUtilitiesNews/idUSN3034063820080330>.

213. Hal Weitzman, *Roof Caves in for Mining Groups in Peru*, FIN. TIMES, Aug. 31, 2006, available at <http://www.ft.com/cms/s/0/05e645a4-388d-11db-ae2c-0000779e2340.html>.

214. See José de Echave, *Entre la convención de Arequipa y Majaz* [Between the Arequipa and Majaz Conventions], LA REPÚBLICA ONLINE (Peru), Sept. 16, 2007, http://www.larepublica.com.pe/component/option,com_contentant/task,view/id,178198/Itemid,0/; *Minería espera inversiones por 11.600 millones dólares hasta 2011* [Mining Industry Expects Investments of U.S. \$11.6 Million Until 2011], LA REPÚBLICA ONLINE (Peru), Sept. 11, 2007,

The growth in investment in extractive industries has been accompanied by “an equally remarkable surge in social mobilization and conflict around mining.”²¹⁵ By 2007, the Peruvian Defensoría del Pueblo (Ombudsman’s Office) was recording thirty-five separate ongoing conflicts related to mining²¹⁶ and an average of thirty reported incidents of conflict per month.²¹⁷ The Ombudsman found that communities, companies, and the State were using violence, their positions were growing more polarized and communities were mobilizing.²¹⁸ The result was “confrontations resulting in lives lost, grave injuries, destruction of private and public property and paralyzed investment.”²¹⁹

Ironically, the increased social unrest associated with the investment boom in the extractive industries has undermined the efforts by the government to improve the investment climate in Peru.²²⁰ Since Fujimori’s reforms, companies have seen their operations disrupted, their property destroyed, their stock prices plummet, their expansions blocked and their state licenses rescinded. They have also lost time, money and productivity as a result of community opposition.²²¹ The five mining conflicts discussed below – Yanachocha, Tambogrande, Majaz, Antamina and Tintaya – are but a few of the countless protests reported in the press in the post-reform period.²²²

The erosion of support for foreign investment in the extractive sector occurred relatively rapidly, with sixty-two percent of the population supporting the privatization process in 1992 and only twenty-nine percent supporting it in 1999.²²³ This suggests that the majority of the Peruvian population welcomed foreign extractive industry companies in theory and that opposition has stemmed from the way privatization has been

http://www.larepublica.com.pe/component/option,com_contentant/task,view/id,177452/Itemid,0/.

215. PERU SUPPORT GROUP, *supra* note 210, at 6.

216. *Defensoría del Pueblo reporta que el 2008 inicia con 78 conflictos sociales* [Ombudsman’s Office Reports 2008 Begins with 78 Social Conflicts], EL COMERCIO ONLINE (Peru), Jan. 7, 2008, available at

<http://www.elcomercioPeru.com.pe/ediciononline/HTML/2008-01-07/defensoria-pueblo-reporta-que-2008-inicia-78-conflictos-sociales.html>.

217. Interview by Lisa Laplante with Miguel Levano, Staff Member of Social Conflict Unit, Peruvian Ombudsman, Lima, Peru (Aug. 25, 2007) (transcript on file with author).

218. DEFENSORÍA DEL PUEBLO, *LOS CONFLICTOS SOCIOAMBIENTALES POR ACTIVIDADES EXTRACTIVAS EN EL PERÚ* [Socio-environmental Conflicts Caused by Extractive Activities in Peru] 4 (2007), available at <http://www.defensoria.gob.pe/inform-extraordinarios.php>.

219. *Id.* (translation by author).

220. HEIKE MAINHARDT-GIBBS, *THE WORLD BANK EXTRACTIVE INDUSTRIES REVIEW* § 3.9 (2003), available at assets.panda.org/downloads/eirsalsummarydec03.doc (last visited Apr. 21, 2008).

221. See, e.g., Aquino, *supra* note 119; *Halting the Rush Against Gold*, *ECONOMIST*, Feb. 3, 2005; *Revolt in the Andes*, *ECONOMIST*, Sept. 20, 2007; Hal Weitzman, *Mining Groups Struggle to Operate in Peru*, *FIN. TIMES*, June 3, 2005; Weitzman, *supra* note 213.

222. See MAINHARDT-GIBBS, *supra* note 220, § 3.9.

223. *Id.*

implemented and companies have behaved in practice.²²⁴ The following two Parts will explore why extractive industries are the focus of so much social conflict in Peru and then examine five examples of mine-community conflicts in the country.

A. Causes of Conflict Between Extractive Industry Companies and Communities in Peru

There are many explanations of the post-reform conflicts between extractive industry companies and communities in Peru,²²⁵ but three stand out as the most significant. First, a legacy of environmental damage for which few have assumed responsibility coupled with recent expansion into more environmentally sensitive areas has helped turn much of the population against the extractive sector.²²⁶ Although the Fujimori-era investment growth and protection law mandates observance of environmental standards²²⁷ and the country's Environmental and Natural Resource Code requires companies to submit an environmental impact assessment that is subject to public review and comment before a project can proceed,²²⁸ Peru has no environmental ministry to monitor compliance. Instead, the Ministry of Energy and Mines handles the environmental portfolio. As a result of the conflict of interest inherent in ministries responsible for economic expansion and foreign investment also managing environmental issues, projects are rarely, if ever, rejected on the basis of a potential negative environmental impact.²²⁹ Thus, among the principal demands of communities affected by mining is the creation of an environment ministry and increased environmental monitoring and regulation.²³⁰

Second, many Peruvian communities have come to resent extractive industry projects because they have enjoyed relatively few developmental

224. *Id.* See also Clotilde Gouley, *Conflictos mineros, interculturalidad y políticas públicas* [Mining Conflicts, Interculturality and Public Policy], 65 *ECONOMÍA Y SOCIEDAD* 46, 50 (2007) (noting that mining communities were among those who initially welcomed the development of the sector but became disillusioned).

225. DEFENSORÍA DEL PUEBLO, *supra* note 218, at 5-6.

226. *Id.* See MAINHARDT-GIBBS, *supra* note 220, § 3.8; PERU SUPPORT GROUP, *supra* note 210, at 4; WORLD BANK, *WEALTH AND SUSTAINABILITY* (2005), available at <http://siteresources.worldbank.org/INTPERU/SPANISH/Resources/TheEnvironmentalandSocialDimensionsoftheMiningSectorinPeru.pdf>.

227. Ley Marco, *supra* note 209, art.9.

228. Código del Medio Ambiente y Los Recursos Naturales [Environmental and Natural Resources Code], Legislative Decree No. 613 (1991) (public hearings required through Ministry resolution No 335-96-EM/SE (1996)).

229. MAINHARDT-GIBBS, *supra* note 220, at 46. See also José Carlos Reyes, *Nuevo ministerio debe fiscalizar minería* [New Ministry Must Fiscalize Mining], LA REPÚBLICA ONLINE (Peru), Jan. 11, 2008, http://www.larepublica.com.pe/component/option,com_contentant/task,view/id,198479/Itemid,0.

230. *Revolt in the Andes*, *supra* note 221; Milagros Salazar, *Activists Accuse Prime Minister of Siding with Mining Firm*, INTER PRESS SERV., Oct. 31, 2007.

benefits from them, while bearing the brunt of their costs.²³¹ The extractive industry boom has taken place largely in remote mountains and rainforest, among the country's poorest and most marginalized communities, including indigenous peoples and subsistence farmers.²³² Fujimori's reforms weakened the rights of these communities while strengthening investors' land rights and facilitating their access to resources,²³³ resulting in some communities losing their ancestral lands and livelihoods without adequate compensation.²³⁴ Fujimori's reforms also eliminated all royalty payments from the mining industry and lowered the tax rate so substantially that, despite having one of the strongest economies, Peru had among the lowest levels of tax revenue and social expenditure in Latin America during the 1990s.²³⁵ So little tax revenue returned to local governments²³⁶ and so few local jobs were created²³⁷ that host communities remained as poor in 2000 as they had been before the extractive industry boom.²³⁸ Not surprisingly, disappointed communities concluded that, "nothing [good] arrives for the people" as a result of extractive industry projects.²³⁹ Some Peruvian economists are also disappointed with the economic impact of FDI in the extractive industries and urge the government to rein in labor subcontracting, impose a windfall tax,²⁴⁰ or eject foreign companies from the sector all together.²⁴¹ Development specialists concur that, to overcome social conflict, Peru needs to do a better job of orienting extractive industry revenue towards sustainable development.²⁴²

231. DEFENSORÍA DEL PUEBLO, *supra* note 218, at 5-6.

232. ALAYZA MONCLOA, *supra* note 41, at 28.

233. The reforms did not address conflicting land classification schemes, causing industry rights to overlap with indigenous reserves and protected areas where mining previously had not been permitted. MAINHARDT-GIBBS, *supra* note 220, § 4.2. Law No. 26570 also modified Article 7 to include the concept of servidumbre (or easements). See ALAYZA MONCLOA, *supra* note 41, at 129.

234. Monte Reel, *In Chile, Precious Lands Often Go for a Pittance*, WASH. POST, Dec. 26, 2006, at A2 (discussing the Andean region).

235. MAINHARDT-GIBBS, *supra* note 220, § 2.4 (noting that tax revenue was approximately twelve percent of GDP in 2000).

236. *Id.* § 3.7, § 4.2 (noting that about twelve percent was required by law to be returned, but it usually was not). See also Weitzman, *supra* note 213.

237. Extractive industry projects in Peru have generated relatively few jobs and rarely use local contractors. *Revolt in the Andes*, *supra* note 221.

238. Seventy-two percent of the rural population was poor and forty percent was extremely poor in 2005. WORLD BANK, PERU OPPORTUNITIES FOR ALL: PERU POVERTY ASSESSMENT, Report No. 29825-PE (2005), available at http://www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2006/05/11/000012009_20060511144754/Rendered/PDF/298251PE0rev0pdf.pdf.

239. Interview by Lisa Laplante with Miguel Palacin, Coordinator of the Coordinating Body of Andean Indigenous Org. (CAOI) and former Chairman of the Nat'l Confederation of Peruvian Communities Affected by Mining (CONACAMI), in Lima, Peru (Sept. 3, 2007).

240. See *Revolt in the Andes*, *supra* note 221.

241. *Pasada la consulta* [Consultation Passed], LA REPÚBLICA ONLINE (Peru), Sept. 17, 2007, http://www.larepublica.com.pe/component/option,com_contentant/task,view/id,178332/Itemid,0.

242. MAINHARDT-GIBBS, *supra* note 220.

Finally, local communities in Peru have resorted to disruptive protests against extractive industry projects because they have no other outlet for their grievances.²⁴³ Peruvian investment law provides that “to dispose of, encumber, lease or exercise any other act on communal lands in the mountains or rainforest requires approval by at least two-thirds of the community members of the local general assembly.”²⁴⁴ However, the principle of free, prior informed consent generally has not been adhered to in practice.²⁴⁵ Indeed, in 2006, the Vice-Minister of Mines and Energy implied that Peru’s law and its policy do not coincide when he argued that communities do not have the right to veto mining activities.²⁴⁶ Increasingly aware that they do in fact have that right under both international and domestic law, but lack a domestic forum in which to exercise it, communities affected by the extractive industries often “end up seeing protest, even violent protest, as their only means of expression.”²⁴⁷ Thus, according to Peru’s Ombudsman’s Office, better mechanisms for citizen participation and capacity-building are key to stemming the tide of social conflict.²⁴⁸ As a result of these three factors and prompted by some specific conflicts, including those over Yanacocha and Tambogrande,²⁴⁹ communities affected by mining united under the banner of the National Confederation of Peruvian Communities Affected by Mining (CONACAMI) in 1999 to coordinate their advocacy efforts and campaign at the national level.²⁵⁰ One of CONACAMI’s demands is that the government enforce communities’ right to give their free, prior and informed consent (or to reject) extractive industry projects.²⁵¹ Another objective of the network is to support communities that reject extractive industry projects in their struggles to prevent them.²⁵² Under the banner of CONACAMI, communities have employed a variety of protest tactics, including “political action, mass mobilization and civil disobedience.”²⁵³ In 2002, in the context of the Tambogrande and Majaz conflicts, they also started organizing local referendums.²⁵⁴

By late 2002, the World Bank and the Inter-American Development Bank (IDB) were warning that social conflict related to the extractive

243. See Aquino, *supra* note 119.

244. Ley de la Inversion Privada, Law No. 26505, art.11, July 10, 1995 (translation by author).

245. See ALAYZA MONCLOA, *supra* note 41, at 37.

246. PERU SUPPORT GROUP, *supra* note 210, at 7.

247. Interview with Miguel Levano, *supra* note 217.

248. DEFENSORÍA DEL PUEBLO, *supra* note 218, at 11.

249. See *infra* at Parts VI.B.1 and VI.B.2.

250. Jeffrey Bury, *Livelihoods, Mining and Peasant Protests in the Peruvian Andes*, 1 J. LATIN AMER. GEOGRAPHY 1, 4 (2002).

251. Interview with Miguel Palacin, *supra* note 239.

252. Interview by Lisa Laplante with Luis Vittor, Technical Advisor to the Coordinadora Andina de Organizaciones Indígenas (CAOI) (Andean Coordinator of Indigenous Organizations), Lima, Peru (Aug. 28, 2007).

253. WRI, *supra* note 3, at 45.

254. See *infra* at Part VI.B.2.

industries was beginning to dominate the political landscape in Peru.²⁵⁵ By 2005, in the wake of a number of high-profile conflicts, including that over Cerro Quilish and Tintaya,²⁵⁶ a nationwide “anti-mining sentiment” had spread across the country.²⁵⁷ That year, anti-mining protests placed at least U.S. \$ 1.1 billion of existing investments at risk and jeopardized planned investments of U.S. \$ 3 billion.²⁵⁸ They also kept radical nationalist Ollanta Humala ahead in the presidential polls for several months as he pledged to revise contracts and impose a windfall tax on foreign investors.²⁵⁹

Today some communities accuse the victor of the election, the more moderate nationalist Alan García, of siding with foreign companies because his administration has negotiated a “voluntary contribution” to social programs, rather than imposing a windfall tax,²⁶⁰ has empowered public security forces to use greater force against mining protesters,²⁶¹ and has presented a draft law to Congress declaring twenty mining projects “in the national interest,” including some that have been rejected by local communities.²⁶² The perception of bias caused communities to be skeptical when the government finally began trying to facilitate dialogue and the peaceful resolution of community-company conflict.²⁶³ Thus, although some progress is being made by individual companies, including Antamina and Tintaya,²⁶⁴ the atmosphere in the country remains hostile toward new and expanded mining investments.²⁶⁵

B. Examples of Extractive Industries in Conflict with Communities

1. Anti-Mining Sentiment at Yanachocha

One of the world’s largest and most profitable gold mines, Yanachocha produces almost half of Peru’s gold.²⁶⁶ It is a lynchpin asset for each of its two principal owners, U.S. Newmont Mining Corporation and the

255. WORLD BANK & INTER-AMERICAN DEVELOPMENT BANK, RESTORING FISCAL DISCIPLINE FOR POVERTY REDUCTION IN PERU 166 (2002).

256. *Id.* at 46.

257. See de Echave, *supra* note 214.

258. *Protests Endanger \$1 Bln Mine Investment in Peru*, REUTERS, Aug. 4, 2005.

259. Weitzman, *supra* note 213.

260. *Revolt in the Andes*, *supra* note 221 (citing the recommended contribution as three percent of a company’s after-tax profits); Weitzman, *supra* note 213.

261. See Wilfredo Ardito Vega, *Semejanzas y diferencias entre García y Toledo* [Similarities and Differences Between García and Toledo], INSIGNIA ONLINE, July 2007, available at http://www.lainsignia.org/2007/julio/ibe_021.htm (suggesting a return to the repressive methods of the Fujimori years).

262. Salazar, *supra* note 230.

263. See *id.*

264. See *infra* at Parts V.B.3 and V.B.4.

265. See *Unions Call for National Strike as More Workers Down Tools in Peru*, REUTERS, Sept. 20, 2007, available at

<http://www.mineweb.com/mineweb/view/mineweb/en/page504?oid=37106&sn=Detail>.

266. DEFENSORÍA DEL PUEBLO, INFORME DEFENSORIAL NO. 62, at 11 (2001), available at <http://www.defensoria.gob.pe/inform-defensoriales.php> (last visited April 4, 2008).

Peruvian Compañía de Minas Buenaventura, and it is the IFC's largest investment in the mining sector.²⁶⁷ Yanacocha's owners reportedly invested U.S. \$ 405 million in the project.²⁶⁸ The mine, which is expected to be productive for the next thirty to fifty years, closed in 2007 with 14.2 million equity ounces of gold reserves.²⁶⁹ If gold prices were to stay at the all time high reached in March 2008 of one thousand dollars an ounce,²⁷⁰ Yanacocha's reserves would be worth U.S. \$ 14.2 billion.

When Yanacocha broke ground in 1992, inhabitants of the nearby city of Cajamarca welcomed the prospect of new jobs and improved living conditions.²⁷¹ However, the mine's rapid and unexpected growth, heavy use and pollution of local water supplies, and growing workforce comprised mainly of outsiders soon provoked significant community opposition.²⁷² In 1999, approximately 6,000 people blockaded the mine's headquarters, voicing opposition to its expansion. The protesters expressed concerns about the mining company's unilateral decision-making style and hoarding of the riches extracted from the community's backyard, as well as its failure to bring in promised development.²⁷³

In 2000, an accidental mercury spill and the mine's slow response triggered even more serious community opposition and brought the problems at Yanacocha to the attention of a wider audience.²⁷⁴ When a company truck spilled 330 pounds of liquid mercury onto the main street of the village of Choropampa, many villagers took the small silver balls home. A week later, more than a thousand began to suffer acute mercury poisoning. As the villagers struggled to overcome the health and environmental effects of the spill, NGOs helped them try to hold the company accountable for its negligence in Peruvian courts,²⁷⁵ and filmmakers made an award-winning documentary about their ordeal.²⁷⁶

Tensions mounted even further a few years later when the Yanacocha mining company attempted to explore a 3.7 million ounce deposit of gold called Cerro Quilish over the vigorous opposition of the people of Cajamarca, for whom the land was sacred and a primary source of water.²⁷⁷

267. WRI, *supra* note 3, at 40.

268. MAINHARDT-GIBBS, *supra* note 220, at 27 tbl.3.6.

269. *Newmont Mining Corp NEM* (NYSE), REUTERS, Apr. 18, 2008, available at <http://stocks.us.reuters.com/stocks/fullDescription.asp?rpc=66&symbol=NEM>.

270. *U.S. Gold Hits \$1,000 Record High*, REUTERS, Mar. 13, 2008, available at http://biz.yahoo.com/rb/080313/markets_gold.htm.

271. WRI, *supra* note 3, at 41.

272. *Id.* at 42.

273. Bury, *supra* note 250, at 10. For a general discussion of conflicts surrounding Yanacocha, see Jane Perlez & Lowell Bergman, *Tangled Strands in Fight Over Peru Gold Mine*, N.Y. TIMES, Oct. 25, 2005, at A1.

274. Perlez & Bergman, *supra* note 273, at A12-A13.

275. See *Ven caso de derrame de mercurio* [Mercury Spill Case Heard], LA REPÚBLICA ONLINE (Peru), Dec. 19, 2007, http://www.larepublica.com.pe/component/option,com_contentant/task,view/id,

276. TAMBOGRANDE: MANGOS, MURDER, MINING (Guarango Film & Video, 2007).

277. Carla Salazar, *Peru Mine Closed by Farmer Protests*, ASSOCIATED PRESS, Aug. 26, 2006, available at <http://www.minesandcommunities.org/article.php?a=2786>.

The company managed to overturn a city ordinance declaring Cerro Quilish protected from mining at the Supreme Court, and moved drilling equipment into the area in 2004.²⁷⁸ In response, the community blocked the road to the mine and mobilized approximately 10,000 people in the city-center.

The indefinite delay in the development of Cerro Quilish dealt a serious blow to the company and its owners. Assuming a continued gold price of U.S. \$ 1,000 per ounce, Cerro Quilish's reserves are worth U.S. \$ 3.7 billion and their exploitation would have helped offset the decline occurring elsewhere on the company's concession.²⁷⁹ The loss of Cerro Quilish contributed to a thirty percent decline in Yanacocha's overall production over two years, as well as a quarterly drop in profits for Newmont, the mine's majority owner.²⁸⁰ The IFC tried to sell its stake in the mine, but "found a cool reception."²⁸¹ The controversy over Cerro Quilish became the subject of a 2005 *New York Times* article and an episode of the PBS television program "Frontline World," which highlighted the many problems of the Yanacocha mine for an international audience.²⁸²

The mine continued to court controversy as it began laying plans the following year to replace the production loss from Cerro Quilish by using "cyanide and large amounts of water to extract gold from ore" in another gold pit called Carachugo.²⁸³ The residents of Cajamarca once again held a series of protests, pointing to studies showing that the proposed method would endanger their water and food supplies, and culminating in a week-long blockade of the access road to the mine.²⁸⁴ The blockade, which cost the mining company U.S. \$ 1.8 million per day,²⁸⁵ ended when the government agreed to monitor the area's water quality and the mine agreed to construct water purification plants.²⁸⁶

The controversy over Carachugo may have been a tipping point for Yanacocha. In April 2007, Newmont's board supported a shareholder resolution requiring the company to investigate and report on the impact of the mine's operations on local communities to the 2008 annual

278. Minas Conga S.R.L. y Otros, Tribunal Constitucional de Perú, 300-2002-AA/TC (2003), available at <http://www.tc.gob.pe/jurisprudencia/2003/00300-2002-AA%2000301-2002-AA%2000302-AA.html>.

279. See Perlez & Bergman, *supra* note 273 (discussing decline in company's concession).

280. Dorothy Kosich, *Yanacocha's 2Q Gold Production Decline Shocks Analysts Despite Warnings*, GOLD NEWS, July 31, 2007, available at <http://www.mineweb.co.za/mineweb/view/mineweb/en/page34?oid=24290&sn=Detail>; Steve James, *Energy, Miner Shortage Hurt Newmont Profit*, REUTERS, Oct. 26, 2005.

281. Robert Kozak, *World Bank's IFC See Continued Role in Peru's Yanacocha*, DOW JONES, Nov. 10, 2006.

282. Perlez & Bergman, *supra* note 273, at A12.

283. *Protests Shut Down Production at Gold Mine in Peru*, INT'L HERALD TRIB., Aug. 29, 2006, available at <http://www.ihl.com/articles/2006/08/29/yourmoney/mine.php>.

284. *Id.*

285. *Newmont Gold Mine in Peru Reaches Agreement in Pollution Dispute*, AFP, Sept. 4, 2006, available at http://findarticles.com/p/articles/mi_kmafp/is_200609/ai_n16925990.

286. Leslie Josephs, *Peru Brokers Accord Between Villagers, Yanacocha Gold Mine*, ASSOCIATED PRESS, Sept. 4, 2006.

meeting.²⁸⁷ Yanacocha recently became the first major mining project in Peru to receive ISO 14001 environmental management certification for its operations,²⁸⁸ indicating that it is making an effort to address one of the major issues that has triggered community opposition to its operations.²⁸⁹ The mine is still experiencing periodic blockades,²⁹⁰ however, indicating that it has yet to successfully address other causes of community opposition. Further progress at Yanacocha would be good news, not only for the communities and the companies directly affected, but for the mining industry in Peru generally. The most prominent leader of community opposition to the mine predicts that, “[i]f Yanacocha does things better, it will open the doors to all mining projects in the North of Peru. If it doesn’t, it will close the door to these projects.”²⁹¹

2. Referenda at Tambogrande and Río Blanco

In 1997, Manhattan Minerals, a Canadian company, won a concession to explore the copper, zinc, silver, and gold deposits that sit directly beneath the town of Tambogrande in the northern region of Cajamarca. Building a mine would require the relocation of half of the town’s population, approximately 9,000 people. The project also required digging an open pit next to the Piura River, a vital source of water to the farming communities of Cajamarca, which had used irrigation to turn an arid desert into a lush orchard of limes, mangos and other fruits, making it Peru’s largest fruit exporting region.²⁹² Manhattan Minerals, which anticipated that the project would require a U.S. \$ 405 million investment, expected to find a senior partner and be operating by 2004.²⁹³

Manhattan Minerals proceeded with its exploration without consulting surrounding communities, leading to a sustained period of conflict between 1998 and 2003.²⁹⁴ At first the protests were infused with humor,

287. Steve James, *Newmont Backs Socially Conscious Shareholder Move*, REUTERS, Apr. 23, 2007, available at

<http://www.reuters.com/article/companyNewsAndPR/idUSN2026303220070423>.

288. Press Release, Newmont, Yanacocha receives ISO 14001 certification for mine in Peru (Apr. 4, 2008), available at

<http://www.mineweb.com/mineweb/view/mineweb/en/page674?oid=50250&sn=Detail>.

289. See generally Weitzman, *supra* note 221 (noting that even Yanacocha’s opponents concede it has improved environmental standards).

290. See Press Release, Yanacocha, *Sobre El Ilegal Bloqueo Que Continúa En Huambocancha Alta* (On the Illegal Blockade that Continues in Huambocancha Alta) (April 4, 2008), available at <http://www.yanacocha.com.pe/index.asp>.

291. WRI, *supra* note 3, at 44.

292. Ernesto Cabellos, Oxfam America, *The Promise of Gold: Tambogrande, Peru* (2002), available at

http://www.oxfamamerica.org/whatwedo/where_we_work/south_america/news_publications/art2603.html.

293. WRI, *supra* note 3, at 45.

294. STEPHANIE ROUSSEAU & FRANCOIS MELOCHE, INT’L CTR. FOR HUM. RTS. & DEMOCRATIC DEV., *GOLD AND LAND: DEVELOPMENT AT STAKE* (2002), available at <http://www.ichrdd.ca/english/commndoc/publications/demDev/>

with marchers descending on the capital, Lima, dressed as limes and carrying signs reading “Ceviche en Peligro! Sin limón no hay ceviche” (“Ceviche in danger! Without lime there is no ceviche”).²⁹⁵ But eventually a rally outside Manhattan’s barracks turned violent, ending in the burning of several buildings and followed by the murder of the main leader of the opposition to the proposed mine.²⁹⁶ With a new leader urging the town to choose peaceful resistance, residents next took their protest to the ballot box, holding a referendum on June 2, 2002 in which 120,000 community members voted and ninety-eight percent rejected Manhattan Mineral’s plans.²⁹⁷

The central government denied the legality of the vote; but, as a result of the referendum and a sustained follow-up campaign by NGOs, Manhattan Minerals could not find a senior partner for the venture or meet the terms of the option to develop the site that it had received from the Peruvian government.²⁹⁸ It decided to abandon its plan for the mine, its only project at the time, and subsequently renounced all intention of investing in Peru ever again.²⁹⁹ The loss of the project apparently cost Manhattan Minerals U.S. \$ 60 million.³⁰⁰

The Tambogrande precedent has influenced the posture of other Peruvian communities, including those affected by the proposed Río Blanco Project in the northern region of Piura.³⁰¹ In 2003, the United Kingdom’s Monterrico Metals acquired the rights to develop the Río Blanco Project, thought to contain the largest deposits of copper anywhere in the world.³⁰² The company planned to develop the mine through its Peruvian subsidiary, Minera Majaz, at a cost of about U.S. \$ 1.4 billion.³⁰³ The project’s expected lifespan is twenty years with annual exports of one billion dollars a year.³⁰⁴

Relations with surrounding communities got off to a bad start when Minera Majaz was accused of having only community leaders sign documents that were required by law to be authorized by two-thirds of the

tambograndeReportEng.html.

295. Corinna Zeltsman, *Choropampa: The Price of Gold/Tambogrande: Mangos, Murder, Mining*, N. Am. Congress on Latin Am. Rep. on the Am., July-Aug. 2007.

296. *Id.*

297. *Id.*

298. WRI, *supra* note 3, at 45.

299. *Id.*

300. *Id.*

301. Stephanie Boyd, *Tambogrande Referendum Has Domino Effect in Peru* (July 16, 2002), <http://americas.irc-online.org/citizen-action/focus/0207tambogrande.html>.

302. PERU SUPPORT GROUP, *supra* note 210, at v; Río Blanco, *Nuestra Empresa* [Our Company], <http://www.rioblanco.com.pe/detailspage.asp?idcategoria=1&idpagina=1> (last visited Apr. 21, 2008).

303. Río Blanco, *Estudio de factibilidad* [Feasibility Study], <http://www.rioblanco.com.pe/detailspage.asp?idcategoria=2&idpagina=7> (last visited Apr. 21, 2008); Oxfam America, *Río Blanco: History of a Mismatch in Peru* (Sept. 14, 2007), http://www.oxfamamerica.org/whatwedo/where_we_work/south_america/news_publications/rio-blanco-history-of-a-mismatch-in-peru.

304. Oxfam America, *supra* note 303.

community, and then claiming it had acquired the necessary community assembly vote to obtain its license.³⁰⁵ According to a leader of the affected communities, when the population complained about the company having “entered our lands without authorization . . . the problems and threats began.”³⁰⁶ Farmers and environmental groups also warn that Piura’s cloud forests and alpine plateaus, which are home to endangered species and the source of rivers that support farming communities in valleys below, are an inappropriate location for an open pit operation using cyanide like that planned by Minera Majaz.³⁰⁷

The resulting conflict between the community and the proposed mine has led to prolonged blockades of access roads, violence, and deaths, and the arrest of hundreds of local farmers and community leaders.³⁰⁸ It has also led the Peruvian Ombudsman to lodge a complaint with the Minister of Energy and Mines and to community protests against Monterrico Metals in front of the London Stock Exchange.³⁰⁹ The protests also caused such a significant drop in Minera Majaz’s share price that China’s Zijin Consortium was able to take control of the company from Monterrico Metals in April 2007.³¹⁰ After years of frustrated attempts at dialogue, local communities decided to follow the example of Tambogrande and hold a referendum with the support of the local government. On September 16, 2007, almost sixty percent of the 31,000 voters in affected districts cast their vote, with ninety percent voting against the mining project.³¹¹ One voter explained, “[it] cannot be that a company invades us without respecting the laws of the community.”³¹² The referendum gained national and international attention, attracting Peruvian Congress members, as well as

305. Frank García & Julio Talledo, *Minera Majaz debe solicitar nuevos permisos a comunidades* [Majaz Mining Company Should Request New Permits from Communities], LA REPÚBLICA ONLINE (Peru), Sept. 28, 2007, http://www.larepublica.com.pe/component/option,com_contentant/task,view/id,180547/Itemid,0.

306. Milagros Salazar, *Qué vamos a dialogar si Majaz invadió nuestras tierras y quiere encarcelarnos* [Why Should We Have a Dialogue When Majaz Invaded Our Lands and Wants to Imprison Us?], LA REPÚBLICA ONLINE (Peru), Sept. 9, 2007, <http://www.larepublica.com.pe/content/view/177009/593>.

307. *Anti-mining Demonstrators Blockade Peruvian Roads*, ENV’T NEWS SERV., May 7, 2007 [hereinafter *Demonstrators Blockade Roads*].

308. Milagros Salazar, *¿La lucha de los bárbaros?* [Fight of the Barbarians?], LA REPÚBLICA ONLINE (Peru), Sept. 12, 2007, http://www.larepublica.com.pe/component/option,com_contentant/task,view/id,177457/Itemid,0/. See also *Demonstrators Blockade Roads*, *supra* note 307 (describing the blockades of major roads in Piura).

309. *Demonstrators Blockade Roads*, *supra* note 307; Simon Goodley, *Business Diary: Copper protesters turn to street theatre*, TELEGRAPH ONLINE, Apr. 6, 2007, <http://www.telegraph.co.uk/money/main.jhtml?xml=/money/2007/04/05/ccdiary05.xml>.

310. Goodley, *supra* note 309; Río Blanco Copper S.A., Historia del proyecto [History of the Project], <http://www.rioblanco.com.pe/detailspage.asp?idcategoria=2&idpagina=9>.

311. *Revolt in the Andes*, *supra* note 221.

312. Milagros Salazar & Javier Cobeñas, *Abrumador ‘NO’ a la minería* [Overwhelming ‘No’ to Mining], LA REPÚBLICA ONLINE (Peru), Sept. 17, 2007, http://www.larepublica.com.pe/component/option,com_contentant/task,view/id,178429/Itemid,0 (last visited March 25, 2008).

international observers.³¹³ The National Elections Jury call the vote illegal,³¹⁴ while the President and Prime Minister rejected the community initiative as “anti-mining” and “anti-development” and claimed its organizers were “communists.”³¹⁵

Despite the initial attitude of the executive branch, the referendum turned the tide in the communities’ favor. A week after the vote, the Congressional Commission on Energy and Mines facilitated a meeting among company representatives, community leaders and mayors of towns near the proposed project,³¹⁶ and on October 12, 2007, the executive branch temporarily suspended the project pending the approval of an additional environmental impact study.³¹⁷ Since then, Minera Majaz has undertaken a costly CSR campaign in an attempt to dispel fears about the project and gain permission to go ahead with the mine.³¹⁸ It hopes that work on the mine will begin sometime in 2008, but currently the future of the project is uncertain.³¹⁹

3. Consultation at Antamina

Antamina is the world’s third largest mine, Peru’s leading producer of zinc and the second largest copper and molybdenum mine in Peru.³²⁰ The U.S. \$ 2.2 billion construction program was one of the largest new mine development projects ever undertaken.³²¹ With the price of copper

313. *Consulta fue transparente* [Consultation Was Transparent], LA REPÚBLICA ONLINE (Peru), Sept. 21, 2007, http://www.larepublica.com.pe/component/option,com_contentant/task/view/id,179137/Itemid,0.

314. Liliana Rojas, *30 mil comuneros se pronunciarán sobre la actividad minera en consulta vecinal* [Thirty Thousand Community Members Will Discuss Mining Activity in Village Meeting], LA REPÚBLICA ONLINE (Peru), Sept. 2, 2007, <http://www.larepublica.com.pe/content/view/175704/483/>.

315. *Del Castillo: “No se pueden exigir obras y estar en contra de inversiones”* [Del Castillo: “One Can’t Demand Public Works and be Against Investment”], LA REPÚBLICA ONLINE (Peru), Sept. 14, 2007, http://www.larepublica.com.pe/component/option,com_contentant/task/view/id,177935/Itemid,0; *Presidente García pide “no sobrevalorar” consulta de Majaz* [President García Recommends “Not Overvaluing” Majaz Consultation], LA REPÚBLICA ONLINE (Peru), Sept. 16, 2007, http://www.larepublica.com.pe/component/option,com_contentant/task/view/id,178287/Itemid,0.

316. *Congreso invitará a directivos de minera Majaz para conciliar posiciones* [Congress Will Invite Minera Majaz Officials to Reach Compromise], LA REPÚBLICA ONLINE (Peru), Sept. 19, 2007, http://www.larepublica.com.pe/component/option,com_contentant/task/view/id,178845/Itemid,0.

317. *Mesa de diálogo por caso Majaz se instala hoy con todos sus actores* [Majaz Roundtable Opens Today with All Parties], LA REPÚBLICA ONLINE (Peru), Oct. 29, 2007, http://www.larepublica.com.pe/component/option,com_contentant/task/view/id,185888/Itemid,0.

318. Río Blanco Copper S.A., *Políticas de Responsabilidad Social* [Social Responsibility Policies], <http://www.rioblanco.com.pe/detailspage.asp?idcategoria=1&idpagina=3>.

319. *Revolt in the Andes*, *supra* note 221.

320. See *Compañía Minera Antamina S.A., Nuestra Empresa* [Our Company], http://www.antamina.com/01_antamina/En_empresa.html [hereinafter *Nuestra Empresa*].

321. Antamina Mine Site,

hovering around U.S. \$ 8,645 per ton and the price of zinc at U.S. \$ 2,405 per ton in March 2008,³²² Antamina's annual production of 675 million pounds of copper and 625 million pounds of zinc³²³ is worth U.S. \$ 3.2 billion per year. Three Canadian mining companies sponsored the project, which is now owned by Xstrata, BHP Billiton Plc., Teck-Cominco Limited and Mitsubishi Corporation.³²⁴

Exploration of Antamina began in 1998 in the province of Huari, one of the poorest in Peru.³²⁵ At the time, eighty four percent of the residents were farmers or raised animals, seventy percent of the population was malnourished, and the majority of homes lacked basic necessities, such as potable water, electricity and proper drainage.³²⁶ Most residents spoke only Quechua, the local indigenous language, and few held legal title to land, as they had always lived communally.³²⁷

Antamina should have been a success story according to second-generation conceptions of CSR. The mine consulted the host community from the outset, holding public hearings to evaluate its Environmental Impact Study and forming discussion roundtables.³²⁸ It formulated a Community Development Plan and established a Foundation to invest in the community with projects in health and education, agriculture, herding, tourism, and cultural development.³²⁹ Antamina's relocation plan was based on World Bank standards,³³⁰ and it integrated the ICM's principles into its code of conduct.³³¹ The company stated that its goal was "to be a facilitator, a strategic partner that provides the necessary tools so that these communities are able to achieve their own development and improve their quality of life."³³²

Yet, despite all these efforts, Antamina soon began to confront distrust and discontent on the part of local communities. Some attribute the company's troubles to its failure to uphold the agreements it made in the exploration phase of the project and to the fact that the office charged with

<http://www.infomine.com/minesite/minesite.asp?site=antamina>.

322. *Metals Copper Turns Lower on Profit Taking Close to All-Time High*, THOMSON FIN. NEWS, Apr. 7, 2008, <http://www.fxstreet.com/news/forex-news/article.aspx?StoryId=66eca858-cdeb-4330-9505-ea445dc83669>.

323. Antamina Mine Site, *supra* note 321.

324. Nuestra Empresa, *supra* note 320.

325. Cynthia A. Sanborn et al., *Aprendiendo sobre la marcha: La Compañía Minera Antamina* [Learning As They Go: Antamina Mining Company], in *MOVIENDO MONTAÑAS: EMPRESAS, COMUNIDADES Y ONG EN LAS INDUSTRIAS EXTRACTIVAS* [Moving Mountains: Corporations, Communities and NGOs in Extractive Industries] 39-40 (2007).

326. *Id.*

327. *Id.*

328. Antamina, CONCENTRADOS DE ANTAMINA, Sept. 2007, at 2, available at <http://www.antamina.com/boletin/boletines/concentrados15eng.pdf>.

329. *Id.* at 30-31 (noting that, by 2006, Antamina had invested approximately U.S. \$ 38 million in the community).

330. SANBORN ET AL., *supra* note 326, at 33.

331. COMPAÑÍA MINERA ANTAMINA S.A., CODE OF CONDUCT 11 (2006), http://www.antamina.com/04_social/pdf/cod_conducta_eng.pdf.

332. Compañía Minera Antamina S.A., Social Responsibility, http://www.antamina.com/04_social/En_index.html (last visited May 6, 2008).

engaging with the community and the team responsible for their relocation had inadequate staff and resources and no knowledge of the local culture.³³³ Some maintain that, while Antamina adhered to the legal requirements of its government license and World Bank financial institutions, it did not adhere to the communities' customary conception of law, including laws regarding land tenure.³³⁴ According to both views, "the breach between discourse and practice can be explained in great part by the inexistence of an organizational culture committed to social responsibility."³³⁵

The consultation model used by Antamina, which was adopted in part at the suggestion of the World Bank, also appears to be to blame for the company's troubles.³³⁶ Community members were not satisfied with the roundtables the company organized, because they did not see changes being made to company plans, and they viewed the company's social initiatives as symbolic compensation for the negative effects of mining, instead of contributions to sustainable development.³³⁷ One mine official viewed the company's inability to meet growing expectations as a "time bomb" that led the company to focus on short-term measures to appease the community at the expense of longer-term development strategies.³³⁸ In 2001, conflict erupted when members of a fishing village, fearful of contamination from a pipeline transporting minerals from the mine to the Pacific Ocean, grew so frustrated about the project's impact on their livelihood that they blockaded the port and detained two mine officials.³³⁹

In the aftermath of the incident, the company began moving towards the third-generation CSR model of community consent. It has adopted the lexicon of "social capital," emphasizing the need to help affected communities pursue a more symmetrical dialogue with the company³⁴⁰ and an "open doors" policy to community concerns.³⁴¹ The company has invested over U.S. \$ 60 million in its CSR effort and has been heralded as a leader in CSR.³⁴² Nevertheless, in 2005, the company's offices were temporarily occupied by angry protesters.³⁴³ In April 2007, there were regional strikes to protest the mine's activities and local mayors began

333. SANBORN ET AL., *supra* note 326, at 33, 51-54.

334. David Szablowski, *Mining, Displacement and the World Bank*, 39 J. BUS. ETHICS 247 (2002).

335. Sanborn et al., *supra* note 326, at 50.

336. Communities presented complaints to the World Bank in 1999 and 2000, which resulted in the Multilateral Investment Guarantee Agency (MIGA) conducting on-site visits and making a variety of recommendations to Antamina. See OFFICE OF THE COMPLIANCE ADVISOR/OMBUDSMAN (CAO), FINAL ASSESSMENT REPORT 9, (2006), available at http://www.cao-ombudsman.org/html.english/documents/Final_Antamina_Assessment_May06a.pdf (describing MIGA's study of the Antamina case).

337. SANBORN ET AL., *supra* note 326, at 51-54.

338. *Id.* at 57.

339. *Id.*

340. *Id.* at 63.

341. *Id.* at 65.

342. SANBORN ET AL., *supra* note 326, at 26.

343. *Id.* at 66-67.

calling for an end to construction of the pipeline and for municipal participation in environmental monitoring.³⁴⁴ Today the pressure is growing on Antamina to deepen its CSR efforts and resolve remaining problems with local communities. This pressure is intensified by the discussions surrounding a Canada-Peru free trade agreement now before the legislatures of both countries: the Canadian government is pointing to one of Antamina's owners, Teck-Cominco, as an example of the socially responsible way in which Canadian mining companies conduct themselves in Peru.³⁴⁵

4. Consent at Tintaya

The Tintaya copper mine, located in the Espinar province, produces 120,000 tons of copper per year, or about U.S. \$ 1 billion-worth per year at March 2008 prices.³⁴⁶ Between 1996 and 2006, the mine was owned by BHP Billiton, the world's largest diversified mining company.³⁴⁷ Even before BHP Billiton took it over and operations began, local communities began expressing a number of grievances against the mine, including that land purchases and expropriations had not been conducted fairly, with adequate compensation, or with their informed consent.³⁴⁸ Some complained of violent forced evictions, others of losing their traditional means of livelihood, and others about pollution and the lack of direct benefit from the mines.³⁴⁹ Relations between the mine and the company became so poor that, in 2000, CONACAMI asked Oxfam Community Aid Abroad to address the Tintaya case with the head office of BHP Billiton, prompting a field visit by the Australian Mining Ombudsman in 2001.³⁵⁰

Upon the recommendation of the Ombudsman, Tintaya instituted a "mesa de diálogo" (roundtable) for professionally-led negotiations to take place, and formed commissions to address community concerns.³⁵¹ After several years of negotiations, the process produced two agreements between the company and local communities in September 2003 and

344. Marco Aquino, *Peru Miners to Strike on Monday*, REUTERS, Apr. 30, 2007, available at <http://www.reuters.com/article/idUSN2936874620070430?sp=true&view=sphere>.

345. See Government of Canada, Canadian influenced mining: Turning profits into promise — mining company raises the bar on corporate social responsibility in Peru, http://geo.international.gc.ca/latin-america/peru/whats_new/default-en.aspx?id=11691.

346. Press Release, Xstrata Plc, Xstrata PLC Announces Acquisition of Tintaya Copper Mine from BHP Billiton for U.S. \$740 Million (May 16, 2006), <http://www.xstrata.com/media/news/2006/05/16/0701CET/news/200605161.en.pdf>.

347. BHP Billiton *Investors Shrug Off Tintaya Shutdown*, REUTERS, May 26, 2005 [hereinafter *Investors shrug off Tintaya Shutdown*]; OXFAM COMMUNITY AND ABROAD, MINING OMBUDSMAN ANNUAL REPORT 32 (2003), <https://www.trailwalker.com.au/campaigns/mining/docs/2003-annual-report.pdf>.

348. OXFAM, *supra* note 347, at 33.

349. *Id.*

350. *Id.*

351. BHP Billiton, Tintaya Resolves to Restore Community Consultative Processes Following Violent Protest (2005), available at <http://hsecreport.bhpbilliton.com/2005/docs/repository/caseStudies/CaseStudies25.pdf>.

December 2004.³⁵² In September 2003, Tintaya agreed to contribute three percent of its annual pre-tax profits to sustainable development projects and infrastructure in Espinar.³⁵³ In December 2004, it promised not to undertake activities on land not already owned by the company without the consent of its owners, to pay adequate compensation of all land it acquired, to establish a development fund, and to involve the community in environmental monitoring.³⁵⁴

In May 2005, communities that had not been included in the earlier agreements demanded that the company invest U.S. \$ 20 million in development projects in their communities as well.³⁵⁵ The protestors occupied the mine, shutting it down for a month, forcing the evacuation of company staff, causing significant damage by setting fires and looting, and dispersing only when authorities intervened with tear gas.³⁵⁶ The protest temporarily shut down the roundtable as well, while the company questioned if those sitting at it were truly the community's chosen representatives.³⁵⁷ However, the roundtable resumed after a number of NGOs and prominent individuals from various sectors of Peruvian society supported it in a paid newspaper announcement entitled *Dialogue Not Violence – Agreements Not Impositions* and the Ministry of Energy and Mines formed a mediation commission to assist the process.³⁵⁸ According to BHP Billiton's study of the incident, "the indirect outcome was that the few community leaders who had promoted the use of violence found their public support base severely eroded."³⁵⁹

The mine stoppage in 2005 did not have an appreciable impact on BHP Billiton's profits, given that the mine represented only about one and a half percent of the company's holdings, but it led copper industry analysts to fear that the unrest could have ripple effects through the region.³⁶⁰ It also prompted the company to redouble its efforts to implement the community agreements, including by committing to use "a significant part [of the development fund] to construct a new hospital in Espinar."³⁶¹ According to BHP Billiton, when it announced its intention to seek a buyer for Tintaya in February 2006 (for reasons unrelated to the May 2005 event), it found that "the value of the strong relationship between mine and communities became even more apparent than it had been before. Potential buyers, some initially concerned about future social conflict in view of the May

352. *Id.*

353. *Id.*

354. *Id.*

355. *Investors Shrug Off Tintaya Shutdown*, *supra* note 347.

356. BHP Billiton, *supra* note 351.

357. MARTÍN SCURRAH, DEFENDIENDO DERECHOS Y PROMOVRIENDO CAMBIOS 184-86 (2008).

358. *Id.* at 3.

359. BHP BILLITON, SUSTAINABILITY REPORT 2006 (2006), available at <http://hsecreport.bhpbilliton.com/2006/community/caseStudies/communityEngagement/tintayaDialogueTable.asp>.

360. *Investors shrug off Tintaya Shutdown*, *supra* note 347.

361. BHP BILLITON, *supra* note 359.

2005 violence, were reassured when they heard first-hand from community members about their relationship with Tintaya."³⁶²

To reassure community leaders concerned that Tintaya might abandon its participatory approach after the sale, BHP Billiton committed to negotiating only with companies willing to "meet strict criteria of financial strength and commitment to better practices in health, safety, environment and community development."³⁶³ When the Anglo-Swiss mining group Xstrata plc bought Tintaya for U.S. \$ 750 million in May 2006, it declared its commitment to respect the agreements in place and to maintain the dialogue processes.³⁶⁴ By the end of 2006, Xstrata was reporting that it expected to see Tintaya's production rise five percent during the company's first full year operating the mine and noted the company's pristine relations with the community and participation in sustainable development programs.³⁶⁵

VI. CONCLUSION

The imperative to overcome the conflicts that characterize many community-company relationships around the world today is becoming more urgent for both sides. As the prices of extractive industry products and the global demand for them hit all time highs, the risks of community opposition to companies and the desire of communities to share in natural-resource wealth are increasing. With easy to reach mineral deposits largely exhausted, companies are expanding into more remote areas of the developing world. Communities in these areas are becoming more vocal and well organized, and have captured the attention of fund managers and the financial press.

The Peruvian cases demonstrate that CSR has become part of the price of operating an extractive industry project. They also show that the business risks of imposing an extractive industry project on a community without its consent are numerous and serious, and can threaten the success of a project. Due to community opposition, Yanacocha (at Cerro Quilish and Carachugo), Río Blanco and Antamina's pipelines have experienced construction delays. Indeed Yanacocha and Tintaya have suspended operations periodically, and development of Cerro Quilish and Río Blanco is postponed indefinitely. Meanwhile, Manhattan Minerals and

362. *Id.*

363. *BHP Billiton to Sell Copper Mine Tintaya*, AGE (Austl.), Feb. 9, 2006, available at <http://www.theage.com.au/news/Business/BHP-Billiton-to-sell-copper-mine-Tintaya/2006/02/09/1139379597033.html> (quoting BHP BILLITON, *supra* note 359).

364. Press Release, Xstrata Plc, Xstrata Plc Announces Acquisition Of Tintaya Copper Mine From BHP Billiton For U.S. \$750 Million (May 16, 2006), available at <http://www.xstrata.com/media/news/2006/05/16/0701CET>.

365. Pav Jordan, *Xstrata Sees Peru Tintaya Copper '07 Output Up*, REUTERS, Mar. 29, 2007, available at <http://uk.reuters.com/article/idUKN2837133920070329?pageNumber=1&virtualBrandChannel=0>.

Monterrico Metals have abandoned or lost control of their respective projects. Conversely, BHP Billiton reportedly received a good sales price for Tintaya in part due to the good will the mine had engendered and Xstrata reports that its production is up as it carries out sustainable development agreements reached with the community.

The hostility of a community may affect a company and even the entire extractive industry beyond the controversial project in question. The controversy at Yanacocha helped spread anti-mining sentiment, making the operating environment more difficult for all companies. Documentaries about Yanacocha and Tambogrande damaged their sponsors' reputations, while accusations regarding the Yanacocha mining company's poor handling of community concerns complicated Newmont's ability to win approval for projects in other communities and prompted activist shareholders to force a change in the company's culture. On the other hand, Teck-Cominco and BHP Billiton enjoyed public relations boosts for their handling of community relations in Peru.

Community concerns often evolve over a project's long lifetime, so consultation and consent processes must be informative, ongoing and responsive. The controversies surrounding Cerro Quilish and Tambogrande demonstrate that some projects may never obtain community support, given the importance of certain sites to people's identities, livelihoods and well-being, and that time and money can be saved by finding this out before significant investments are made. Meanwhile the conflicts at Antamina and Tintaya indicate that companies should not assume that, once given, consent will not be revoked if new concerns arise. The mercury spill at Yanacocha demonstrates that communities have well-founded fears about environmental damage, while communities' fears about the processes to be used at Río Blanco—which in a well-run mine may not be harmful—show the importance of communication.

Addressing the primary triggers of opposition and consulting with communities cannot fully mitigate the risks that social conflict presents to businesses and to sustainable development. Antamina and Tintaya were committed to second-generation CSR techniques and to consultations, but these proved insufficient to avert outbreaks of conflict. Whereas Antamina's experience shows that consultations must be part of consent processes in which companies relinquish some measure of control over decision-making, Tintaya's experience shows that durable agreements cannot be reached unless companies and communities have the capacity to engage in meaningful consultations. Tintaya's ongoing community consent process highlights some of the many challenges facing the FPIC model—how to determine who constitutes the relevant community, for example—but also some of its many rewards. All of the Peruvian cases suggest that conflict will ensue unless communities feel in control and see

improvement in their lives as they watch companies and governments extract profits from lands they have long occupied.

Finally, the cases indicate that host and home country governments can play an important role in facilitating mutually beneficial outcomes for business and society. In Peru, insufficient avenues for public participation and inadequate regulation led to frustration and violence on the part of communities. The government's failure to enforce its own laws requiring community consent led communities near Tambogrande and Río Blanco to take matters into their own hands and vote down projects that already had state sanctioned licenses to operate. Yet tensions eased over the Río Blanco project once a congressional commission convened a dialogue between the opposing sides and the Tintaya roundtable got back on track with support from the Ministry of Energy and Mines. The Canadian government's interest in Antamina rewards the mine for its efforts while making it less likely that it will abandon the community development projects it has initiated.

Given the costs of social conflict for both business and development, consent processes offer a much needed risk mitigation strategy for extractive industry companies and the communities they affect. The Peruvian examples suggest that the companies that do a good job of discerning and responding to community concerns will have more successful projects, while the communities that have the capacity to negotiate meaningfully with companies will be more likely to obtain greater benefits from projects. Joint decision-making will also help stakeholder relationships withstand the transitions between times of plenty and hardship that characterize the extractive industries. In conclusion, the companies and communities that seize this dangerous but propitious moment in community-company relations by engaging in consent processes stand to gain a competitive advantage over their competitors while the communities that seize it stand to gain sustainable development as a result of extractive industry projects.