



PUBLIC REGULATION AND CORPORATE PRACTICES IN THE EXTRACTIVE INDUSTRY

**A South–South advocacy report on community
engagement**

The Mandela Institute, University of the Witwatersrand

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**A SOUTH-SOUTH ADVOCACY REPORT
ON COMMUNITY ENGAGEMENT**

By

The Mandela Institute, University of the Witwatersrand

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INSTITUTE

The opinions expressed in this publication do not necessarily reflect those of the Mandela Institute.

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ABBREVIATIONS AND ACRONYMS

AGA	AngloGold Ashanti
BPC	Bureau of Prior Consultation
CRC	Corporate Responsibility Committee
CSR	Corporate Social Responsibility
CSRMM	Centre for Social Responsibility in Mining
CSO	Civil society organisation
CONADI	National Indigenous Development Corporation
EI	Environmental Impact
EIA	Environmental Impact Assessment
ETIAS	Environmental Impact Assessment System
EIS	Environmental Impact Studies
EITI	Extractive Industry Transparency Initiative
EMP	Mining (Environmental Management and Protection) Regulations of 1999
EPA	Environmental Protection Agency
ESIA	Environmental and Social Impact Assessment
FPIC	Free, Prior and Informed Consent
GDP	Gross Domestic Product
ILO	International Labour Organization
ILO 169	International Labour Organization Convention No. 169
IFC	International Financial Corporation
ICMM	International Council on Mining and Metals
MPRDA	Mineral and Petroleum Resources Development Act of 2002
NEIES	National Environmental Impact Evaluation System
OECD	Organization for Economic Cooperation and Development
PCA	Project, Construction or Activity
PS5	IFC Performance Standard 5 on Land Acquisition and Involuntary Resettlement
PS7	IFC Performance Standard 7 on Indigenous Peoples
STEIA	Specialised Technical Entity on Indigenous Affairs
SLP	Social and Labour Plan
UN	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
USD	United States Dollar

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EXECUTIVE SUMMARY

This report examines the various principles of community engagement as codified in various international instruments and voluntary standards and the extent to which these global principles have been incorporated, replicated and adopted in the domestic laws of the six countries and two global corporations that are reviewed in this report. This report identifies the roles of government at national, sub-national, and local levels in facilitating the process of community engagement and the different methods through which governments and multinational companies have implemented community engagement commitments in the extractive industry.

The countries in this case study were selected based on their economic dependence on natural resources, the extent of transparency in the management of resources, the effectiveness of government institutions to exercise oversight, the prevailing economic conditions in the country, the extent of inequality and the political feasibility of reform. The companies were selected due to their extensive global operations in all the six countries studied.

In Ghana, there is a significant lack of community consultation and consent requirements in the applicable extractive industry laws. While a role has been identified for traditional councils in the exercise of oversight in the extractive industry, the palpable lack of transparency in the sector as a whole hinders any potential effective role to hold corporations accountable.

In Colombia, there is a specific domestic law dealing with the right to prior consultation and the protection of indigenous rights on free, prior and informed consent of communities. However, the government has introduced executive orders to lower the level of protection as an incentive to attract foreign direct investment, which jeopardises the rule of law.

Despite recent legislative reforms in Tanzania, there is a complete lack of awareness on the importance of community consultation and participation in the extractive industry.

In Peru, where a law exists, the lack of enforcement and the perception of consultation as a procedural requirement to secure mining concessions, as opposed to using it as an important vehicle to build trust and partnerships with communities mirrors the position in South Africa. The lack of access to information, weak legal protections and the difficulties of establishing mechanisms to ensure that communities benefit and participate, make it hard for communities in South Africa to hold the government and mining companies accountable and pursue protection of their rights and interests.

Chile has taken significant strides in developing robust approaches to community engagement, though, like other countries assessed in this report, community engagement does not go as far as the right of communities to give consent to the approval and implementation of projects.

[T]his report proposes various recommendations that could significantly shape the institutional and extractive industry legal order in these countries.

In the two companies examined in this report, AngloGold Ashanti and Barrick Gold, there are modest incorporations of various international principles on community engagement into the company policies. The incorporated standards have been weakened and purposefully left vague with very little accountability mechanisms by the companies to the policies adopted. Both companies reference international principles and commitments but none of them reference applicable domestic regulation. Like the applicable laws in the six countries reviewed, the notion of community consent has not been embraced.

Consequently, this report proposes various recommendations that could significantly shape the institutional and extractive industry legal order in these countries to place communities at the centre of resource extraction. These findings include proposals on building trust and partnership with communities, the establishment of an effective oversight authority, community inclusion in project monitoring and evaluation, transparency and information disclosure mechanisms, the strengthening of grievance mechanisms, adoption of domestic regulation, multi-stakeholder oversight, mainstreaming community engagement in company operations, developing a role for communities during the process of licensing applications and the evaluation of community engagement from a human rights perspective.

1

Introduction

In March 2016, an anti-mining activist was killed in a proposed mining host community in South Africa. This followed several months of intense disputes between the community and an Australian mining company, which was seeking a licence to mine in the area but was being actively resisted by sections of the community.¹ This death further exacerbated social unrest in the community and deepened the community's distrust of the company and the government. Social unrest and backlash from mining host communities objecting to extractive operations or demanding improved benefits from extraction are not uncommon.² Such social tensions, distrust or conflict bring into the spotlight the question of how to manage the relationship between multinational mining companies and their host communities and whether there is a role for regulation to preserve communities' public interests.

This project takes a unique approach by adopting a South-South learning method on community engagement in the extractive industry. It does so by examining six countries: South Africa, Ghana and Tanzania in Africa and Colombia, Peru and Chile in South America. These countries have been strategically selected for various reasons. Ghana and Tanzania are Extractive Industry Transparency Initiative (EITI) countries and have different community engagement practices. While South Africa is not an EITI participating country, it is the biggest economy in Africa, economically dependent on the extractive industry, and this industry has been the subject of intense scrutiny regarding how it facilitates and sustains economic inequality. Examining the role and influence of EITI in promoting rule of law features of community engagement in other countries and the relevance of any lessons for South Africa will be enlightening. In South America, a similar approach has also been taken. Both Peru and Colombia are EITI members and have developed regulations that aim to protect and engage with indigenous communities affected by extraction. Chile is an economic giant in the region and, like South Africa, it is not a member of EITI and also suffers from similar socio-economic conditions of wealth disparity.

The first part of the report develops a global overview of community engagement in the extractive industry. It explores the political, economic, social, environmental and legal context of these issues by documenting recent policy advances and emerging regulatory practices. It also sets out the state of the art in terms of community engagement and the role of the state and corporations.

The second part of the report examines the regulation of mining in the six case study countries and identifies the various ways in which international law rules relating to the concept of free, prior and informed consent have been domesticated, how international voluntary principles are applied and how domestic laws aim to facilitate community engagement practices. This section of the report looks at the political, social and economic context of each country. It also deals with the legal context by identifying relevant regulatory practices in the extractive industry that involves communities in addressing issues such as representation and consent in the licensing process, their role in

This report aims to make modest contributions on the use of a rational and inclusive deliberative process in the management of the extractive industry.

monitoring the implementation of projects, environmental management, revenue management and local economic development. Finally, it looks at challenges, failures and key takeaways from the country case studies in law and in practice.

The third section of the report includes case studies on mining companies operating in the selected countries. The case studies explore how the companies have *chosen to interpret* and complied with international laws and voluntary principles, implemented applicable domestic law and developed policies and practices that advance community engagement.

The final section of the report develops key recommendations that will be useful for civil society organisations (CSOs) in lobbying for mining reform. It will also be useful for companies in exploring practices in other companies that can improve their own practices outside of minimum compliance with the law, and assist governments in understanding the loopholes that need to be filled in regulating the extractive industry when it comes to community engagement. Key recommendations are directed to each of these stakeholders.

This report aims to make modest contributions on the use of a rational and inclusive deliberative process in the management of the extractive industry. This research involves deconstructing the present legal order for mineral extraction in different jurisdictions to demonstrate how law facilitates unsustainable mineral extraction and the exclusion of communities. Our aim was to determine where a legal re-ordering that facilitates community engagement is already taking place and establish the need for a governance approach that ensures normative and institutional arrangements for community engagement in mineral extraction. We also explore the role of human rights as the floor of transformative and incremental change to progressively build towards the realisation of sustainable development through community engagement. Other issues to be explored include multi-layered oversight, the relevance of transparency and how to reconfigure the mining licensing process as a way of promoting mining governance that creates a role for communities and ensures adherence to the rule of law.

This study aims to understand how the principles of meaningful community engagement, which have been codified in various international instruments and voluntary good practice standards, have been adopted in domestic laws and applied in the development of community engagement mechanisms by corporations. We analyse the role of government at national, sub-national and local levels in facilitating the process of community engagement by various government institutions and extractive companies in the design of community engagement practices. This is particularly relevant in states with weak governments. This will aid the understanding of the methods employed by governments and companies in making information accessible to the public and identify ways of measuring the effectiveness of the concept of community engagement, as well as methods for independent monitoring and oversight of the implementation of community engagement commitments.

This report adopts the term 'community engagement' to mean the development of a sustained relationship between communities, the state and extractive companies that is centred on the cultivation of a long-term relationship that develops mutual trust and respect among the stakeholders. The use of the term implies that communities are to be adequately represented and allowed informed participation in the decision-making process relevant to the consideration and execution of extractive operations in the relevant community. Such informed participation will be

based on easy access to timely, relevant and complete information that will enable communities to make informed choices. Furthermore, where communities are aggrieved about a substantive or procedural aspect of their involvement, they have access to a grievance mechanism, which adopts rule of law principles that do not stifle the voice of a community.

While the Latin American countries in this case study use the term 'indigenous community,' this is absent in the legal frameworks of the African countries. This report adopts an understanding of 'communities' to include indigenous communities, local communities within the proximity of extractive operations, labour sending communities, and other relevant local populations that will be affected by extractive operations. Therefore, recommendations to adopt proposals from Latin American countries which might have been developed within an indigenous community legal framework have taken into consideration the understanding of communities in the broad sense of mining host communities.

Notes

- 1 Joshua Robertson, 'Australian mining company denies role of South African activist' (Mar. 25, 2016), *The Guardian*, available at: <http://www.theguardian.com/environment/2016/mar/25/australian-mining-company-denies-role-in-of-south-african-activist>.
- 2 See e.g. www.miningcommunities.org.

2

Global overview of community engagement laws and principles

There have been several global developments in recent times to address the harmful consequences of resource extraction. One of the reasons for this trend is that 'over the past 60 years, 40% of civil wars can be associated with natural resources'.¹ It has been suggested that there are three primary ways in which natural resources contribute to conflict: when there is no equitable sharing of benefits and costs of extraction, when there is a lack of engagement with communities, and when revenue from extractives is channeled towards financing conflicts.² Therefore, various global rules, principles and commitments have sought to embed these values in corporate engagement with their stakeholders.

To build sustainable relationships that are founded on trust and constructive engagement, stakeholder engagement needs to be understood as a continuous process that builds relationships with communities. Such a committed and ongoing process should include information disclosure, consultation and participation, and procedures to address grievances.

Companies should consider their various categories of stakeholders and deploy various communication channels to create models of participation, information disclosure and representation of various interest groups that are often marginalised within a community. Such models, for instance, should include disclosures on information dissemination in a local language and a format understandable by communities, representation opportunities that are not patriarchal, giving sufficient time for consultation with a wide range of stakeholders and allowing communities to be involved in the decision-making process rather than simply soliciting their views.

These are all consistent with the notion of free, prior and informed consent (FPIC) of communities, a principle that has been developed in relation to indigenous peoples and local communities. The notion of FPIC is defined as 'the principle that indigenous peoples and local communities must be adequately informed about projects that affect their lands in a timely manner, free of coercion and manipulation, and should be given the opportunity to approve or reject a project prior to the commencement of all activities'.³ While various attempts have been made to integrate the principle of FPIC into various domestic laws, the notion of a community right to veto the development of activities is a sticking point that has been largely ignored in the development of domestic laws reviewed in this report.

FPIC is a right under international law for indigenous communities, and is recognised under the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), 2007. It calls on states to 'consult with indigenous peoples in order to secure their FPIC prior to the approval of projects affecting their lands or resources and in relation to adopting and implementing legislative or administrative measures that may affect them'.⁴ The International Labour Organization (ILO)

Convention No. 169 also requires FPIC for resettlement of people. Articles 6, 15 and 16 require states to:

[c]onsult with indigenous and tribal peoples for legislative and administrative measures which may affect them directly (including with regard to sub-surface natural resources), with the objective of achieving agreement or consent. It requires FPIC for relocation, and when not obtained stipulates that relocation must entail appropriate procedures established by law providing effective representation for affected peoples.⁵

Furthermore, the International Convention on Civil and Political Rights, International Convention on Economic, Social and Cultural Rights and the International Convention on the Elimination of All Forms of Racial Discrimination all require FPIC in the context of extractive industry projects impacting on indigenous peoples' rights.⁶ Sectoral treaties such as the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters recognise principles such as timely notification to the public, reasonable time frames for participation, right of the public to access information, obligation on public bodies to consider outcomes of public participation processes and the right of the public to be notified of decisions that affect their interests.

At a regional level, Article 21 of the African Charter on Human and Peoples' Rights affirms the right of all peoples to freely dispose of their wealth and natural resources in their own interest. The Economic Community of West African States and the Africa Mining Vision also promote community engagement in natural resource communities.⁷ In Latin America, 'the Inter-American Court of Human Rights has issued findings calling on states to implement FPIC for projects with potentially significant impacts on indigenous peoples or groups, which share similar economic, social, and cultural characteristics with indigenous peoples.'⁸ The focus of these regional initiatives has been directed towards the state with private-sector initiatives emerging from separate initiatives.

Private-sector initiatives are also developing around the notion of proactive community engagement. The World Bank's International Financial Corporation's (IFC) Sustainability Framework contains performance standards that promote community engagement on environmental and social sustainability, as well as access to information.⁹ The aim of the framework is to outline the institutional disclosure obligations of corporations in relation to their investment and advisory services.¹⁰ Furthermore, the IFC's standards are intended to assist clients in identifying and managing risks, as well as including 'stakeholder engagement and disclosure obligations of the client in relation to project-level activities.'¹¹ One of the objectives of the standard is 'to promote and provide means for adequate engagement with affected communities throughout the project cycle on issues that could potentially affect them and to ensure that relevant environmental and social information is disclosed and disseminated.'¹² Performance standard 7 of the IFC framework requires companies to obtain the consent of communities and indigenous peoples where projects will cause adverse effects on lands and natural resources that are part of traditional ownership or will require the relocation of people, or may disturb the cultural heritage of people.¹³

In 2015, the International Council on Mining and Metals (ICMM) committed its members to an FPIC process in which 'indigenous peoples can give or withhold their consent to a project, through a process that strives to be consistent with their traditional decision-making processes while respecting internationally recognised human rights and is based on good faith negotiation' and 'to work to obtain the consent of indigenous people where required.'¹⁴ The idea of good faith negotiations as suggested by ICMM goes to the heart of meaningful community engagement that reaches beyond seeking a perfunctory social licence to operate to a more substantive relationship-building with communities.

The United Nations (UN) Guiding Principles on Business and Human Rights use the term 'meaningful consultation' in the context of human rights due diligence processes.¹⁵ Also, the 2011 Organization for Economic Cooperation and Development (OECD) Guidelines on Multinational Enterprises provide that multinational enterprises should 'engage with relevant stakeholders in order to provide meaningful opportunities for their views to be taken into account in relation to planning and decision making for projects or other activities that may significantly impact local communities.'¹⁶ While the UN and OECD principles suggest a weaker standard of consultation with communities rather than

community consent, where consultations are held in good faith, they can potentially achieve similar outcomes with the principle of FPIC.

Meaningful community engagement should involve good faith engagement with communities and their representatives to obtain their views on proposed projects, responsiveness to concerns of communities, opportunities for feedback, access to information, commitment to abiding by communities' withholding of consent and giving equal voice to the various interests that might be present in a given community. According to the World Bank, meaningful consultation is a two-way process that should:

- (a) begin early in the process of identification of environmental and social risks and impacts and continue on an ongoing basis as risks and impacts arise;*
- (b) be based on the prior disclosure and dissemination of relevant, transparent, objective, meaningful and easily accessible information which is in a culturally appropriate local language(s) and format and is understandable to project-affected communities;*
- (c) incorporate feedback, where appropriate;*
- (d) focus inclusive engagement on project affected communities;*
- (e) be free of external manipulation, interference, coercion, or intimidation;*
- (f) enable meaningful participation, where applicable; and*
- (g) be documented by the borrower.¹⁷*

Where these objectives are met, the foundations for building trust and a sustainable relationship with communities will be established.

Both the government and private sectors should collaborate to plan, implement, and monitor their standards through regulation and practice to ensure that the parameters for meaningful community engagement are met. Where such standards are weak, a grievance mechanism that is accessible by communities to resolve disputes promptly 'in an understandable and transparent consultative process that is culturally appropriate and readily accessible, and at no cost and without retribution to the party that originated the issue or concern' is necessary.¹⁸ Such grievance mechanisms should not only be about compensation but should also include the right of communities to object to the development of projects on their lands. Respecting the culture of communities throughout the engagement process should also be a high priority.

The need for community engagement arises at all points during the process of extraction - from the licensing application process to exploration, extraction and mine closures. During each stage of extraction, it is important to keep communities on board and treat them as important partners to achieve successful outcomes. Government plays an important role in this regard. The lack of institutional infrastructure to exercise oversight has resulted in the creation of regulatory problems in implementing oversight over the extractive industry as identified in the case studies in this report. Consequently, companies are able to make commitments on community engagement in vaguely worded policies that are sorely lacking in detail on implementation.

While international laws, principles and initiatives are a good way to police corporate and state commitment to community engagement, states need to strengthen their domestic legal systems to promote and enforce community engagement. To contextualise the problems identified in this section and to emphasise the need for domestic regulation to police corporate practice on community engagement, the countries in this case study were selected based on the following factors: their dependence on resources, the extent of transparency in the management of resources, the effectiveness of government institutions to exercise oversight, the prevailing economic conditions and the extent of inequality, the relative political stability and the political feasibility of reform, as well as the potential receptiveness to reform suggestions that are proposed in this report.

In the countries considered, various approaches have been employed by the state in regulating community engagement. This report examines the various approaches and proposes reform from a human-rights-based approach while identifying critical roles for various stakeholders in supporting this objective. There are five important stakeholders in the extractive industry: the government as industry regulator, the investors who put up capital for mining companies, the mining companies as the principal extractors, the employees of the mining companies (the miners) and the communities

The need for community engagement arises at all points during the process of extraction – from the licensing application process to exploration, extraction, and mine closures.

who bear both the environmental and social cost of mining and too often, are marginalised from the decision-making that affects their interests.

For a long time, the dominant ideology on the role of companies in society has been focused on the notion of shareholder value and limiting the contributory role of companies to social welfare to the payment of taxes, which are utilised by the state for welfare programmes.¹⁹ However, there is a shift towards a more nuanced understanding of a company's role in society from a duty to avoid harm towards the recognition of an obligation towards people and the planet before profit.²⁰

Perfunctory community engagements by companies take place out of the desire to secure a social licence to operate. These have also led to the development of the notion of community engagement through the application of corporate social responsibility (CSR) practices ranging from philanthropy to active partnership with communities to address community concerns.²¹ While there has been a heavy reliance on self-regulation and preference for soft law by companies in terms of adherence to community engagement principles,²² public law has also been used to protect the interests of corporations, as demonstrated in the country reviews in this report where very limited obligations have been imposed on corporations.

Various international instruments also support the principle of voluntary regulation with emphasis on avoidance of harm rather than proactive engagement with communities to protect their rights. For example, the UN Guiding Principles on Business and Human Rights²³ only recognise a state duty to *protect* human rights and a weakened corporate responsibility to *respect* human rights.²⁴ The foundational principle provides that 'business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.'²⁵ Furthermore, Principle 23 of the Guiding Principles provides that corporations should treat the risk of either causing or contributing to gross human rights abuses as a legal compliance issue. This notion of legal compliance is indeed important in shaping corporate behaviour and it is the applicable regulations on community engagement in the various country case studies that this report now examines.

Notes

- 1 United Nations Interagency Framework Team for Preventive Action, *Toolkit and Guidance for preventing and managing land and natural resources conflict: Extractive Industries and Conflict* (2012), 9.
- 2 *Id.* at 10.
- 3 OXFAM, *Community Consent Index* (2015), 207 Oxfam Briefing Paper, 6.
- 4 *Id.* at 27; UNGA, *United Nations Declaration on the Rights of Indigenous Peoples* (Sept. 13, 2007), Articles 19, 32.
- 5 *Id.*
- 6 *Id.* at 7.
- 7 *Id.* at 12–13.
- 8 *Id.* at 13.
- 9 International Financial Corporation, *IFC Performance Standards on Environmental and Social Sustainability* (2012), 2.
- 10 *Id.*
- 11 *Id.*

12 *Id.* at 6.
13 *Id.* at 47.
14 International Council of Mining and Metals, *Indigenous Peoples and Mining Position Statement* (2013),
1.
15 Emma Wilson, Sarah Best, Emma Blackmore & Saule Ospanova, *Meaningful Community Engagement in
the Extractive Industries: Stakeholder Perspectives and Research Priorities* (2016), International Institute
for Environment and Development, 2; *UN Guiding Principles on Business and Human Rights* (2011),
Principle 18.
16 *Id.* at 8; Organization for Economic Co-operation and Development, *Guidelines on Multinational
Enterprises* (2011), 20.
17 *Id.* at 10.
18 International Financial Corporation, *IFC Performance Standards on Environmental and Social
Sustainability* (2012), 15.
19 These earlier doctrines have been discussed by Joel Bakan, *The Invisible Hand of Law: Private Regulation
and the Rule of Law* (2015), *Cornell International Law Journal* 48: 279, 292; Peter Muchlinski *Human
rights and multi-nationals: Is there a problem?* (2001), *Journal of International Affairs* 77: 35.
20 See Doreen McBarnet, *The New Corporate Accountability: Corporate Social Responsibility Beyond Law,
Through Law, For Law*, in Doreen McBarnet, Aurora Voiculescu, & Tom Campbell (eds.) *The New
Corporate Accountability: Corporate Social Responsibility and the Law* (2007); Paddy Ireland & Renginee
Pillay, *Corporate Social Responsibility in a Neoliberal Age*, in Peter Utting & José Carlos Marques (eds.),
Corporate Social Responsibility and Regulatory Governance: Towards Inclusive Development? (2010), 77,
86.
21 Terence Corrigan, *Good Citizens: Corporate Social Responsibility in Africa* (2014), 2.
22 *Id.* at 78.
23 The Principles were adopted in 2010 following the work of John Ruggie, the former UN Special
Representative of the Secretary-General on the issue of Human Rights & Transnational Corporations.
24 United Nations Human Rights Office of the High Commissioner, *Guiding Principles on Business and
Human Rights* (2011), available at: [http://www.ohchr.org/Documents/Publications/GuidingPrinciples
BusinessHR_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf).
25 *Id.*

3

Extractive governance through community engagement

3.1. Ghana: Accountability in mitigating the fear of 'resource curse'

3.1.1. Background and overview of industry today

The political context of Ghana's extractive sector has been evolving since independence in 1957. Known as the Gold Coast during the colonial era, Ghana is Africa's largest gold producer and was exploited for its gold reserves over several decades. In an attempt to control its natural resources, Ghana introduced several laws and regulations to manage its extractive industry. The extractive sector is enormously important to Ghana's economy. In 2014, Ghana's GDP was USD 38.6 billion and exports totaled USD 10.2 billion. Minerals and gas comprised over 64% of exports, with petroleum being the largest export at 26% and gold the second largest at 23%.¹ In 2007, oil in commercial quantities was discovered off Ghana's southern coast, increasing the diversity of natural resources available to Ghana to boost its economy. Despite the discovery of oil and Ghana's long track record in exporting gold, Ghanaians remain poor and the cost of living has been on the increase.² Facing a crisis of infrastructure development in energy,³ buckling under international debt⁴ and bureaucratic constraints in the management of petroleum contracts and revenue administration,⁵ the management of oil and gas revenues has been described as 'highly political', and the UK Department for International Development remarked that 'where there are large rents up for grabs, there is more than the usual scope for corruption.'⁶ However, there are efforts at improving the regulations governing the mining industry.

3.1.2. Overview of legal system

Ghana inherited its legal system from the British, which gives primary power to the parliament. The Ghanaian legal system is based on the 1992 Constitution, which vests lawmaking power in a unicameral legislature but any law passed that is deemed inconsistent with the Constitution is void.⁷ However, Article 40 of the Constitution of Ghana incorporates customary law as a part of the laws of Ghana.⁸ The Constitution of Ghana also contains a Bill of Rights, which protects basic rights such as equality (Article 17), civil liberties (Article 21), labour rights (Article 24) and cultural rights (Article 26).⁹

3.1.3. Laws and regulations governing community engagement in the extractive industry: Oversight and licensing process

At the national level, there are also government consultation requirements. Companies interested in extractive operations in Ghana must apply for a mining licence which involves an application process regulated by the Minerals and Mining Act of 2006. Under this Act, any holder of a mineral right must maintain documents and records as may be prescribed and permit an authorised officer of the

The committee excludes any representation by community groups on the impact of the potential mineral project on an affected community.

Minerals Commission to inspect them.¹⁰ Upon receipt of an application for a mining licence, the Minerals Commission sends copies to the district assembly hosting the area under consideration. The district chief executive publishes the application at specific places, including the offices of the assembly, local information center, post office, and the magistrate court for 21 days.

In the absence of clear regulatory guidelines on community engagement, in practice, companies make sub-national engagements, specifically with community durbars, who provide information at the local level.¹¹ A technical committee comprising representatives from the Minerals Commission, the Environmental Protection Agency and the Geological Survey Department then considers the application and its report is submitted to the board of the Minerals Commission, which makes recommendations to the Minister of Mines. The committee excludes any representation by community groups on the impact of the potential mineral project on an affected community.

Lacking public disclosure of information, communities are further excluded from undertaking an accountability role in the implementation of projects. The Minerals Commission is the primary oversight body, established under the Minerals Commission Act of 1993, which is responsible for the regulation and management of mining company operations and compliance with mining regulations. This oversight institution does not provide any mechanism for community participation and representation, does not have a mandate for community engagement and is not mandated to disclose information to the public.

3.1.4. Access to information

The Ghanaian government does not have a policy of contract disclosure. Under the Minerals and Mining Act records, documents and information provided to the government under the Act, are treated as confidential and will not be divulged to the public without the written consent of the holder.¹² There are no reporting requirements that compel mining companies to disclose their contract terms and conditions to the public. The government does not have any policy regarding the publication of details of contracts between companies and the government and there is no standard format for reporting. However, some petroleum contracts are published by the Ministry of Petroleum.

3.1.5. Environmental management

Though the 1992 Constitution of Ghana does not explicitly recognise environmental protection, Ghana has made notable efforts regarding environmental protection and oversight of the extractive sector. The 1994 Environmental Protection Agency Act provides for the establishment of the Environmental Protection Agency (EPA), which is tasked with monitoring, prescribing regulations and issuing environmental permits. Under Executive Instrument 9, the EPA also has the power to prosecute violations. The Environmental Assessment Regulations of 1999 provide further specificity and procedure for extractive industry operations, including initial and annual reporting requirements. Regulation 17 requires the EPA to hold a public hearing in respect of an application for an environmental permit including when 'there appears to be great adverse public reaction to the commencement of the proposed undertaking' and where 'the undertaking will involve the dislocation, relocation or resettlement of communities.'¹³ All companies wishing to obtain a mining licence are required to obtain an environmental permit as part of the application process, which requires companies to submit an Environmental Impact Statement to the EPA for approval.

3.1.6. Consultation, community engagement and indigenous peoples

Political pressures stemming from these issues led to Ghana's membership in the Extractive Industry Transparency Initiative (EITI) in 2003 and the passage of the Petroleum Revenue Management Act in 2011.¹⁴ Section 51 of this Act provides for the establishment of the Public Interest and Accountability Committee, which monitors and evaluates compliance with the Act. The extent to which local communities have a say in their development priorities and can directly benefit from resource extraction both in terms of revenue allocation and environmental protection are key issues that Ghana's regulatory landscape is yet to successfully unravel.

Different laws regulate taxation of petroleum and mining. In total, extractive industries contribute approximately 17.5% of government revenue.¹⁵ Host mining communities receive portions of payments made by mining companies. Of the total paid, 80% goes to the government consolidated fund, 10% to the minerals development fund, and 10% to the Office of the Administrator of Stool Lands, of which 10% is used to cover administrative expenses, 55% goes to district assemblies, 25% goes to stools, and 20% goes to traditional councils.¹⁶

3.1.7. Conclusion

Ghana's laws governing the mining industry significantly lack community consultation and consent requirements. Notably, in contrast to the mining laws, the Petroleum (Exploration and Production) Law defines 'communities' as 'people living within the area where petroleum operations are being conducted who are likely to be affected by such petroleum operations.'¹⁷ Ghana's regulation of the mining industry would be significantly improved by, as a preliminary step, directly developing a role for communities to be consulted in good faith in the text and substance of the laws and regulations. A second step would be to provide more public access to information so that impacted communities can be adequately informed and engaged.

3.2. Colombia: Mineral extraction in a time of war

3.2.1. Background and overview of industry today

Though the mining industry has been touted as one of the most important sectors for Colombia and its economy,¹⁸ Colombia's mining sector has suffered from strong opposition during the country's long internal conflict. The industry has been in the midst of an especially complex conflict, involving guerillas, paramilitaries, criminal groups and drug cartels.¹⁹ Colombia has suffered from the internal conflict for over six decades, and as it draws to an end,²⁰ questions of land distribution in the new peace agreement might pose problems for the mining industry.²¹ Colombia's mining industry has also suffered because of illegal mining, which has often been controlled by armed groups. Any actions towards strict regulation of the industry has been seen by the armed groups as giving away lands to multinational corporations, which has led to opposition.²²

The mining industry is important for Colombia's economy, and the country's most recent National Development Plan was developed with the goal of strengthening the extractive industries, while protecting the environment.²³ The objective is to improve the mining sector in terms of sustainable development, with a special focus on social and environmental responsibility.²⁴ In order to illustrate the importance of the industry, it should be noted that in 2013, total exports from mining amounted to USD 10 billion.²⁵ In the same year, mining contributed 2.5% of GDP.²⁶ In 2013, the extractive sector received a record-breaking USD 8 billion in foreign direct investment, out of which almost USD 3 billion entered the mining industry.²⁷ In 2013, the revenues from the extractive industries amounted to USD 18 billion, and approximately USD 1.2 billion came from the mining industry.²⁸ This illustrates the government's reliance on the mining industry for substantial governmental revenues.²⁹

3.2.2. Overview of legal system

The political objective of expanding the extractive industries has not been fully implemented due to the country's significant legal protection of indigenous peoples and Afro-Colombian rights. Though the Colombian Constitution states that the government is the owner of sub-soil natural resources

across the country, similar to most other countries,³⁰ there are limits to that ownership. Firstly, the Constitution protects the rights of indigenous and Afro-Colombian communities and states that the exploitation of natural resources in their territories shall not have adverse impacts on the cultural, social and economic integrity of said groups.³¹ The Colombian government is also required to ensure that members of the affected communities take part in the decisions concerning any exploitative activities on their territories.³² Furthermore, the Constitution ensures respect for ethnic and cultural diversity,³³ holds that the collective lands of ethnic groups are 'inalienable, imprescriptible, and not subject to seizure,'³⁴ protects collective rights,³⁵ guarantees territorial jurisdiction for indigenous peoples as long as it is not contrary to the Constitution,³⁶ and lays out the process for the designation of indigenous territories.³⁷

3.2.3. Laws and regulations governing community engagement in the extractive industry: Oversight and licensing process

In order to initiate a mining activity the projects must obtain a licence. The government assigns mineral licences to corporations according to which company or entity makes the first qualified bid. Colombia has designated certain areas that are objectively good for exploration and exploitation. In those areas, the government conducts relevant studies³⁸ and later grants concessions based on the outcome of the studies.³⁹ The idea is that the consultation and the concession process will be based on an 'objective selection'.⁴⁰

There are many state agencies involved in overseeing the different administrative processes related to a mining operation. When a project that requires prior consultation is initiated, it is the Bureau of Prior Consultation (BPC) at the Ministry of Interior that runs and oversees the process.⁴¹ Other agencies involved with reporting requirements are the Bureau of Indigenous, Minority and Roma Affairs⁴² and the Bureau of Black, Afro-Colombian, Raizal and Palenquero Communities.⁴³ They all have different responsibilities, but each plays a significant role in the system concerning prior consultation, since they are responsible for the registration of communities, among other things.⁴⁴

Further, the Ministry of Interior is always involved in the process of prior participation, regardless of whether it is a process that requires a licence, or one that does not.⁴⁵ Its role is to establish spaces for inter-institutional coordination, which will help to define the role of each stakeholder in the process of consultation.⁴⁶ If the process of prior consultation has been initiated by an Environmental Impact Assessment (EIA) or an Environmental Management Plan, the local environmental authorities will oversee the process.⁴⁷

3.2.4. Access to information

The right of access to information is enshrined in the Colombian Constitution.⁴⁸ Consequently, a party that believes the process of registration of communities or participation in decision-making has been flawed, can request information concerning the process in order to protect its rights. A party that considers his or her constitutional rights to have been violated or threatened, may also bring a direct claim to a court in order to protect his or her rights. A threat to a constitutional right, by either an act or an omission by a public entity, is sufficient to make a successful claim.⁴⁹

3.2.5. Environmental management

The Ministry of Environment assesses EIAs, whereas the National Environmental Council recommends practices and regulations that can minimise the impacts on the environment. The environmental legislation further provides specific standards concerning when an EIA must be undertaken.⁵⁰ A specific feature of the system is the environmental licence, which is needed for any construction or activity that might have adverse impacts on the environment.⁵¹ The criteria for such licences are primarily objective and concern certain specific sectors, their size and their potential production levels.⁵² Regardless of general criteria, indigenous and Afro-Colombian groups are entitled to a right to consultation prior to any exploitation of natural resources that might adversely impact them.⁵³

Prior consultation is also a part of the process of EIAs.⁵⁴ Though the process is managed by the environmental authorities, the companies are responsible for conducting the environmental studies,

which includes information-sharing with affected communities.⁵⁵ The regional environmental agencies will then decide whether an environmental licence will be awarded.⁵⁶

The EIA is primarily focused on adverse impacts on the environment, rather than the indirect or direct impacts a project might have on local communities. If a project, construction or activity (PCA) requires an environmental licence to proceed, the corporation must identify potentially affected communities, and ensure that the communities will be informed of the PCA. Though this particular aspect of the process does not amount to a right to participation, it at least ensures that affected communities are notified of future plans in the area. As part of the EIA, a company must also produce an Environmental Management Plan that addresses how the company will prevent and mitigate potentially adverse impacts on the local communities, and how the company will compensate already affected communities.⁵⁷ The process of participation should be sensitive to the cultural and social differences of the affected groups and should ensure that the participation is meaningful.⁵⁸

It is, however, problematic that the communities are responsible for registering themselves with the agencies in order to get protection. It means that the affected communities are ultimately responsible for safeguarding their own rights, rather than the government or the involved companies carrying the responsibility to protect impacted communities.⁵⁹

Another complication occurs when affected communities refuse to participate in the environmental study related to a PCA. If that happens, the corporation will continue to develop the study without the participation of the affected communities. Furthermore, if a community participates in the process of prior consultation, but later refuses to agree on the environmental management plan, such refusal will only be noted. The relevant environmental authority will later take the refusal into consideration when it decides on the environmental licence, but no direct impact is guaranteed. Finally, if an affected community was called to a meeting of prior consultation but failed to show up at the meeting, the absence will be understood as an acceptance of the environmental management plan. The final decision regarding an environmental licence or environmental management plan is communicated to the affected communities.⁶⁰

3.2.6. Consultation, community engagement and indigenous peoples

At the time of Colombia's ratification of the International Labour Organization Convention No. 169 (ILO 169), the government passed a law that codified the rights of the convention in the domestic Colombian legal system. This means that the right to consultation is supposed to be guaranteed to indigenous and tribal peoples.⁶¹ The right to prior consultation has been protected by the constitutional court of Colombia on several occasions.⁶²

In a presidential directive from 2010, the Colombian government clarified its position on prior consultation.⁶³ The directive was introduced with the goal of complying with the obligations of the ILO 169, the Colombian Constitution, and to effectively guarantee the right to prior consultation. The right is recognised as a fundamental right, in accordance with Article 93 of the Colombian Constitution. According to the directive, it is the Ministry of Interior and Justice that is responsible for guaranteeing the right to prior consultation.⁶⁴ The directive further lists when the right to prior consultation must be guaranteed, as well as actions that do not lead to the initiation of the consultation process.⁶⁵ Regrettably, the directive explicitly states that the consultation process does not include a veto right for affected communities.⁶⁶ The attempt to clarify when consultation is needed, and when prior consultation is considered redundant, has been criticised for not being aligned with international standards.⁶⁷

The communities that have a right to prior consultation are defined in the same way as such communities are defined in the ILO 169. As a result, it includes tribal and indigenous peoples that belong to specific cultural, social and economic groups, which distinguishes them from other groups within the country. An indigenous or tribal group must also have its own set of traditions, customs or legislation, distinct from the rest of society. Self-identification as indigenous or tribal is another significant factor.⁶⁸ The Colombian government has stated that the statutory right to prior consultation concerns indigenous peoples, black communities, Afro-Colombian communities, Roma people, the Raizals and the Palenqueras, which it has defined as 'national ethnic groups'.⁶⁹

The Colombian legal system also specifically protects the rights of Afro-Colombian communities. In order to protect their cultural identity, Afro-Colombian communities have a right to participate in EIAs that are undertaken in relation to activities near the residence of the communities.⁷⁰ Afro-Colombian communities also have a right to take part in governmental projects on economic and social development, in order to ensure that any such project duly considers their needs and demands, as well as respects their cultural and social life.⁷¹

It must be noted that in order to be 'automatically' involved in the process of prior consultation, the communities must first register with the Bureau of Indigenous, Minority and Roma Affairs or the Bureau of Black, Afro-Colombian, Raizal and Palenquero Communities. This structure implies two things. First, a community that does not specifically belong to one of the mentioned groups may, in practice, be excluded from the right to prior consultation, even though the group could well fit within the legal definition of a community that has such a right. Secondly, groups that have failed to register with the relevant community bureaus are excluded from the process of prior consultation. A problematic aspect of this structure is that the agencies are given the power to decide upfront which communities they do not consider to have a right to prior consultation.

The Colombian legal system has two separate systems of prior consultation. First, there is a consultation process that must be initiated by an entity, public or private, national or foreign, that is planning to start a PCA in the country. Such an entity must first of all apply for a Certification of Presence of Ethnic Groups, at the BPC at the Ministry of Interior.⁷² The BPC will decide whether there are any potentially affected groups in the area. If the presence of ethnic groups cannot be verified by the existing documentation, or if the scale and impact of the PCA is unclear, the bureau will conduct an on-site visit to verify the presence or non-presence of communities.⁷³ If affected groups are found in the area, the entity must subsequently send in an application to start a prior consultation process together with the BPC and the affected communities. After the application, the BPC is responsible for the process of prior consultation, together with the representatives of the respective PCAs. The BPC and the Ministry of Interior are responsible for the structure of the process for each specific case, whereas the representatives of the PCAs must ensure their active participation in the consultation process. The representatives are also responsible for providing the necessary resources for their processes.⁷⁴ Participation is ensured for communities that are registered with the identified community bureaus above. The registration defines which community participates, and who the representatives are. The consultation process involves studies regarding the PCAs direct impact on the respective communities.

Indigenous and black communities, specifically, also have a right to prior consultation in relation to the process of environmental licensing.⁷⁵ This consultation process must be conducted when the PCA will take place on indigenous reserves or areas that are designated as collective property for black communities. The consultation should also be performed when the specific area has been regularly and permanently inhabited by the respective communities, even if the area is not registered as a reserve. If the presence of affected communities is verified, they must be invited to participate in the environmental studies. The representatives responsible for the PCAs must ensure that the environmental studies are made in collaboration with representatives from the affected indigenous and/or black communities.

3.2.7. Conclusion

Colombia was early to ratify the ILO 169 and to develop domestic legislation regarding the right to prior consultation. There is a good law in place and on the surface it is very protective of indigenous and tribal peoples. Colombia has also successfully extended this protection to the Afro-Colombian communities residing in the country. While the law is certainly among the most protective, it is clear that the government has subsequently tried to lower the level of protection, in order to position itself as an attractive choice for investment. Regardless of this perceived lack of will to fully protect its indigenous, tribal and Afro-Colombian communities, Colombia has over the years created a bureaucratic system that can empower communities affected by mining activities. The important issue is to make sure that communities are sufficiently informed, in order to be able to exercise their rights.

Regardless of this perceived lack of will to fully protect its indigenous, tribal and Afro-Colombian communities, Colombia has over the years created a bureaucratic system that can empower communities affected by mining activities.

3.3. Tanzania: A fertile ground for exploitation in the absence of regulation

3.3.1. Background and overview of industry today

Though mining has been part of the social and economic fabric of Tanzania since the colonial era, the sector did not develop until the last decade of the 20th century, after the government reformed the nationalisation of mines and policies favouring a command economy.⁷⁶ Following the implementation of structural economic reforms to promote development, there was a large increase in foreign investment in the mining sector.⁷⁷ Industry growth and development has continued and is an ongoing process.

The mining industry is a very significant part of the economic and political context in Tanzania. Tanzania is the fourth largest gold producer in Africa and accounts for 1.3% of total global production.⁷⁸ Tanzania is also the only country in the world that produces tanzanite.⁷⁹ Other mineral resources in Tanzania include diamonds, coal, iron ore, base metals, uranium and gemstones.⁸⁰ The extractive sector contributes approximately 12% of total government revenue in Tanzania, primarily from taxes.⁸¹ In 2014, extractive sector revenue increased by 28% from USD 602 million in 2013 to USD 754 million.⁸² In 2014, mining accounted for 3.3% of the country's GDP.⁸³ Gold was the largest export and constituted 34% of total exports.⁸⁴ Mining companies paid almost USD 15.5 million in corporate social responsibility payments in 2014, which was about 2% of total government revenue from the extractive sector.⁸⁵ The mining industry contributes approximately 7 000 jobs to the economy and has the capacity to contribute more, given Tanzania's geological potential.⁸⁶

3.3.2. Overview of legal system

Tanzania has a common law system derived from the British colonial legacy and the system of government is largely based on the Westminster model.⁸⁷ However, unlike Britain, Tanzania has a written Constitution, which was adopted in 1977.⁸⁸ The Constitution contains a Bill of Rights but these are not absolute as they are subject to statutory restrictions.⁸⁹ The rights enumerated in the Constitution relevant to the notion of community engagement include articles prohibiting discrimination (Article 13), protecting the right to just remuneration (Article 23) and equal protection of fundamental human rights (Article 29).⁹⁰

3.3.3. Laws and regulations governing community engagement in the extractive industry: Oversight and licensing process

The current regulatory framework for the extractive industry in Tanzania was initially based on the Mining Act of 1998. This Act provided a legal framework for mineral exploration, exploitation and marketing, and gave the state the power to grant rights to the private sector to explore, develop, produce and trade minerals.⁹¹ A decade later, the government reviewed the Mining Policy of 1998 and formulated the Mining Policy of 2009.⁹² The Mining Act of 2010 was enacted to implement this policy, which aims at integrating the mining sector with the rest of the economy, improving the investment environment, maximising benefits from mining, improving the legal regime and strengthening environmental management.⁹³ The Mining Act governs all matters relating to granting rights and licences and allows both foreign and national participation in mining.⁹⁴ The law is implemented through 11 regulations relating to specific aspects of the industry.⁹⁵ The Ministry of

Energy and Minerals is in charge of granting licences, which is done on a first-come-first-served basis.⁹⁶ Last year, the government passed a new law, the Extractive Industry (Transparency and Accountability) Act of 2015 at the urging of the Tanzania Extractive Industries Transparency Initiative.⁹⁷ This new law contains provisions for increased oversight, reporting and ensuring extractive sector revenue is utilised for the benefit of the people.⁹⁸

3.3.4. Access to information

On 17 November 2009, Tanzania's EITI Multi-Stakeholder Working Group was inaugurated.⁹⁹ This group consists of five members from government, companies and civil society.¹⁰⁰ Under the Tanzania Extractive Industries (Transparency and Accountability) Act, all new mining concessions, contracts and licences must be made available to the public.¹⁰¹ The Act also institutionalises the role of the EITI Multi-Stakeholder Working Group.¹⁰² Information the law requires extractive companies to provide includes local content, corporate social responsibility and capital expenditures.¹⁰³ However, social payments or corporate social responsibility programmes are not mandated by law in Tanzania.¹⁰⁴ The law also includes penalties for failure to provide information or provision of false information and promotes citizen participation and awareness of extractive sector activities and their contribution to development.¹⁰⁵

3.3.5. Environmental management

The mining industry in Tanzania is governed by environmental laws and regulations. Relevant laws include the Environmental Management Act of 2004, the Environmental Impact Assessment and Audit Regulations of 2006 (the EIA Regulations), the Mining (Environmental Management and Protection) Regulations of 1999 (the EMP Regulations) and the Mining (Safe Working and Occupation Health) Regulations of 1999.¹⁰⁶ Under Tanzanian law, companies must submit an EIA which complies with the procedure outlined in the EIA Regulations prior to commencing operations.¹⁰⁷ The EMP Regulations put forth guidelines for sustainable management of the environment at the mining site and mine closure procedures.¹⁰⁸ Mining companies must submit an Environmental Management Plan when applying for a licence and there is government oversight throughout mining operations to ensure ongoing compliance.¹⁰⁹

3.3.6. Conclusion

A major weakness in Tanzania's legal regime governing the mining industry is a significant lack of attention to community participation or protection. Though the Mineral Sector Policy of 1997 recognises the value of greater involvement of local communities in the implementation of mining projects, subsequent legislation, notably the Mining Act of 2010, does not address communities.¹¹⁰ There is no requirement for community consultation in resettlement, but there is a requirement for collaboration with local government leadership in determining compensation for property.¹¹¹

3.4. Peru: Good law, poor enforcement

3.4.1. Background and overview of industry today

The modern history of Peru includes large-scale expropriation of property, followed by a pivot to neoliberalism and privatisation. In the late 1960s, the military installed itself in the Peruvian government following a military *coup d'état*. The coup was later followed by a range of measures introduced to make the country independent from foreign corporate interests, including wide nationalisations of several industries, one of them being the mining industry. The new regulations also changed how and by whom land could be owned.¹¹²

After the economic crisis in 1985, things changed dramatically. When Alberto Fujimori was elected as president in 1990, government policies took a turn towards privatisation and neoliberalism, and private investment in the mining sector was strongly supported by the government.¹¹³ Ever since the Peruvian government took this route, investments in the mining sector have increased rapidly. This also led to an increase in the number of licences for exploration, exploitation and extraction that were awarded all around the country, including in indigenous territories.¹¹⁴

Today, the mining sector is of great importance for Peru. In 2013, Peru had approximately USD 3 billion in revenue from the mining sector.¹¹⁵ In 2014, more than USD 60 million of the revenue from mining activities was distributed to local governments for investment in development programmes.¹¹⁶ Peru is a major producer and exporter of minerals and is known to be amongst the 'top ten richest mineral countries in the world'.¹¹⁷ It is the second largest exporter of copper¹¹⁸ and is one of the world's major producers of many other minerals and metals, such as gold, silver, tin, lead and zinc.¹¹⁹ The country has more than one fifth of the world's silver reserves, and roughly 10% of the world's copper and lead reserves.¹²⁰ Minerals and metals are a major export for Peru and made up more than half of the total amount of exports in 2015 (USD 30.8 billion). In 2015, mining activities contributed to 15% of Peru's GDP.¹²¹

A substantial part of the mineral reserves in Peru are located in the mountain regions, which means that mining activities often take place on lands and territories that are inhabited by indigenous or native peoples.¹²² Peru is the home of around 55 different indigenous groups, which together make up more than 14% (4 million) of the population.¹²³

3.4.2. Overview of legal system

Peru is a constitutional republic with a civil law legal system. The Constitution guarantees the protection of the environment and communities,¹²⁴ and ensures that the state promotes sustainable use of its natural resources.¹²⁵ Furthermore, the Constitution ensures the collective rights of 'rural and native communities,' and their right to freely use and dispose of their lands. The Constitution ensures that these communities have their cultural identity respected by the state.¹²⁶ Peru has ratified the ILO 169, which includes extensive rights for indigenous communities.¹²⁷ Peru is also a member of the EITI.¹²⁸

3.4.3. Laws and regulations governing community engagement in the extractive industry: Oversight and licensing process

Prior consultation exists within the Peruvian legal system both through the ratification of the ILO 169 and the Constitution. The question of when a prior consultation process should be initiated is further addressed in other legal instruments. The Single Consolidated Text, which concerns the administrative process of granting mining concessions, signals three different stages when prior consultation comes into play: 1) before construction of the mine is authorised to take place, 2) prior to activities related to exploration, and 3) prior to any approval of the corporation's plan on how to operate the mine.¹²⁹ Even though this is a good practice, the process outlined by the Ministry of Energy and Mines in order to grant mining concessions does not include a requirement of prior consultation before the initial mining concession is granted.¹³⁰ This is a significant negative aspect of the system, since the rights of indigenous peoples may be violated at such an early stage.

The most important oversight body is the Specialised Technical Entity on Indigenous Affairs (STEIA), which is an agency under the Ministry of Culture. Indigenous communities can request a consultation process when they consider themselves to be affected by an administrative or legislative measure.¹³¹ If the request is rejected, the indigenous community can challenge it before STEIA,¹³² before taking the case to a regular court.¹³³ The Deputy Minister of Multiculturalism, which is the specialised agency on indigenous matters under the executive, is the agency that oversees the consultation processes. It is also responsible for supporting and providing assistance to indigenous peoples in the prior consultation process.¹³⁴ The Geological Mining and Metallurgical Institute is another relevant oversight body. It receives the petitions for mining concessions, grants concessions and terminates concessions when they are contrary to the law.¹³⁵

3.4.4. Access to information

A positive aspect of the Peruvian system concerning consultation is the database of indigenous peoples¹³⁶ and the database of ongoing and concluded consultation processes.¹³⁷ The two databases allow outsiders to follow what is going on, and to find out whether a community is registered in the database or not. However, problems arise when a community does not have this information available to it, or when a community is not registered in the database of indigenous peoples, irrespective of self-identifying as indigenous.

[T]he process outlined by the Ministry of Energy and Mines in order to grant mining concessions does not include a requirement of prior consultation before the initial mining concession is granted.

3.4.5. Environmental management

Peru's environmental laws require mining companies to undertake Environmental Impact Studies (EIS), which are assessed by the National Environmental Impact Evaluation System (NEIES).¹³⁸ The regulations require each new PCA to obtain an approval for its EIS, before any activities can begin. The assessment made by the NEIES concerns not only environmental matters, but also social ones. The NEIES can ensure compliance by carrying out audits of the activities and by imposing fines if a company is not complying with the standards.¹³⁹

3.4.6. Consultation, community engagement and indigenous peoples

In order to guarantee respect for rural and native communities and their rights, the Peruvian congress passed, on 8 September 2011, the Law on the Right to Prior Consultation for Indigenous and Native Communities, as Recognised in the ILO 169 (Prior Consultation Act). The Act was supposed to fully implement the ILO 169, which was ratified in 1993.¹⁴⁰ The regulations were initially structured to exclude mining projects from the prior consultation requirement, in what was an attempt to protect the mining industry. This was subsequently criticised by the government ombudsman as a failure to protect Peru's indigenous peoples.¹⁴¹ The supreme court corrected the failure, and concluded that the Prior Consultation Act should apply to all indigenous peoples, accepting no exceptions for any particular industry.¹⁴²

The Prior Consultation Act says that the state must ensure that affected communities are afforded the right to prior consultation. This obligation cannot be transferred from the state to third parties.¹⁴³ The Act, together with the implementing regulations, lay out the procedural aspects of prior consultation with indigenous peoples. It includes positive obligations for the state and is based on international standards from the ILO 169 and the UN Declaration on the Rights of Indigenous Peoples,¹⁴⁴ and it is explicitly stated that the Act should be interpreted in accordance with the ILO 169.¹⁴⁵ Even though the Act mentions indigenous peoples and natives (*originarios*) specifically, it is also stated that it can include rural (*campesinas*), Andean (*andinas*) and Amazonian communities. The identification as indigenous is based on both subjective and objective criteria and adheres to the definition in the ILO 169.¹⁴⁶ One key aspect of the Prior Consultation Act is that it requires the state to establish a database of indigenous groups in Peru.¹⁴⁷ The database is made up of a total of 55 indigenous communities, which are guaranteed their right to prior consultation.¹⁴⁸

It is clearly stated that the goal of the consultation process is to reach an agreement between the state and the affected indigenous peoples concerning administrative and legislative measures. An agreement should be pursued through intercultural dialogues, which are set out to guarantee the inclusion and participation of indigenous peoples in the decision-making process.¹⁴⁹ It is, however, not stated that consent is an absolute requirement.¹⁵⁰ This clearly stated goal of an agreement illustrates the issues with the legislation. A consultation that is only supposed to lead to an agreement is not necessarily consultative at all.

Other important aspects of the process of prior consultation are that it explicitly requires 'good faith' in consultations, that consultations must be performed in a timely manner, that it forbids any coercive measures, and that all relevant information must be disclosed to the affected community.¹⁵¹ Affected communities should participate in the consultation through their own institutions and

according to their own customs¹⁵² and they should be able to participate in the process using their own language.¹⁵³ On its face, the Prior Consultation Act is aligned with the principles in the ILO 169, which Peru is already bound by, and the process generally complies with international standards. However, questions may be raised regarding its substance.¹⁵⁴ Though the legislation has been recognised as a significant step in the right direction towards effectively respecting indigenous peoples' rights, the system has also been criticised for the lack of resources invested in the process and for not fully adhering to international standards. The criticism raised by the Committee on the Elimination of Racial Discrimination specifically points to the fact that the right to prior consultation is not ensured for all mining projects with 'the view to obtaining free, prior, and informed consent of communities that may be affected.'¹⁵⁵ It also criticised the arbitrariness of the decision regarding which groups become registered as indigenous.¹⁵⁶

3.4.7. Conclusion

The issue of consultation of affected indigenous communities in Peru is not related to a lack of regulation. Rather, it is related to a lack of enforcement of what is already in place. This is highlighted by the fact that the Peruvian government felt inclined to produce legislation that effectively mirrors the ILO 169, 17 years after the convention was ratified and binding on Peru. Despite the existence of the law, the attempt to exempt mining activities from the process shows a lack of political will on the part of the Peruvian government. Finally, it is also alarming that the legislation merely treats consultation as a way to reach the goal of an agreement. This strips consulted groups of power, since there is a risk that consultation ends up being a procedural requirement, and not truly substantive.

3.5. South Africa: The relevance of transparency in community engagement

3.5.1. Background and overview of industry today

Mining in South Africa dates back to the 19th century when gold and diamond rushes sparked an explosion of mining activity in the country.¹⁵⁷ Mining is widely recognised as having had a significant impact in shaping the socio-political, economic and cultural development of South Africa.¹⁵⁸ The mining industry was an important factor in the creation of the Johannesburg Stock Exchange as the industry grew.¹⁵⁹ In 1970, gold mining in South Africa reached an all-time high with South Africa accounting for 68% of global production of gold and mining accounting for 21% of the country's GDP.¹⁶⁰

Today, mining continues to play a significant role in South Africa's development. Currently, South Africa is the largest producer of chrome, manganese, platinum, vanadium and vermiculite and the second largest producer of ilmenite, palladium, rutile and zirconium in the world.¹⁶¹ South Africa accounts for over 10% of global gold production and is the fourth largest producer of diamonds.¹⁶² South Africa is also the world's leading vanadium supplier.¹⁶³ Mining-related activity in South Africa constitutes 18% of the country's GDP and directly contributes 6% of the country's GDP.¹⁶⁴ The mining industry has a total annual income of around USD 32 billion and accounts for 20% of all investment in the country.¹⁶⁵ According to the South African Chamber of Mines, the country's total mineral reserves are estimated at USD 2.5 trillion.¹⁶⁶ Mining is also a significant source of government revenue, contributing approximately USD 1.3 billion in corporate tax and USD 450 million in royalties.¹⁶⁷ The mining industry is one of the major employers in South Africa with more than 1 million people in mining-related employment and is the largest contributor by value to black economic empowerment.¹⁶⁸

3.5.2. Overview of legal system

South Africa's legal system is based on a robust Constitution. The South African Constitution is particularly noteworthy for its broad protections of social, economic and cultural rights. These include labour rights, such as the rights to unionise and strike (section 23), the right to a healthy environment (section 24), and cultural community rights (section 31).¹⁶⁹ Any legislation passed that is inconsistent with the Constitution is invalid.

3.5.3. Laws and regulations governing community engagement in the extractive industry: Oversight and licensing process

The mining industry in South Africa is governed by a number of laws and regulations, which cover a range of issues from environmental protection to health and safety. The main legislation governing the mining industry is the Mineral and Petroleum Resources Development Act of 2002 (MPRDA), which regulates all stages of the mining and production process in South Africa.¹⁷⁰ The Minister of Mineral Resources is responsible for implementing the MPRDA.¹⁷¹ The MPRDA also establishes a Minerals and Mining Development Board, whose purpose is to advise and assist the minister in regulating and monitoring the mining industry.¹⁷² Mining companies must apply to the Minister of Mineral Resources for a licence to operate and, if the licence is granted, the right is executed and then registered with the Mineral and Petroleum Titles Registration Office.¹⁷³ The Mineral and Petroleum Resources Royalty Act of 2008 obligates mining companies to pay royalties for the extraction of minerals, based on gross sales, which are paid to the National Revenue Fund.¹⁷⁴

The MPRDA provides that the holder of a mining right must comply with the requirements of the prescribed Social and Labour Plan (SLP) and that such holders must submit the prescribed annual report dealing with the extent of the holder's compliance. Where the approved SLP is not complied with, the MPRDA allows the Minister of Mineral Resources to suspend or cancel rights where a holder breaches any material term or condition of such right.¹⁷⁵ The MPRDA also provides that the SLP can only be amended with the consent of the minister.¹⁷⁶ Regulation 46 of the MPRDA further requires that SLPs must contain financial information on the implementation of the SLP along with an undertaking by the holder of the mining right to comply with the plan and make it known to the employees.

The failure of the SLP regulation to require public disclosure of the plan to the beneficiaries of the plan (e.g., mining host communities) to monitor implementation and hold companies accountable to compliance, is concerning. Furthermore, the oversight mechanism is the minister but the exercise of his/her powers is discretionary, which weakens this oversight mechanism because the powers are not always exercised. This has led to the practice of unilateral interpretation of terms of the SLPs by mining right holders. This contravenes the requirements of the regulation which requires ministerial approval if the terms of the SLPs are to be amended.

3.5.4. Access to information

South African mining laws do not require the government to share mining agreements with the public.¹⁷⁷ Access to information laws in South Africa have proved ineffective in this regard. The defective framework of the SLP constrains the ability of interested stakeholders to monitor the implementation and compliance with the SLP. It opens up a loophole for companies to escape responsibility in terms of their statutory obligations in the SLPs. The MPRDA and its regulations do not provide an obligation on mining companies or government to make SLPs public, despite the fact that the very purpose of the plan is to benefit mining employees and affected communities. While the MPRDA requires mining companies to share the content of SLPs with its employees,¹⁷⁸ the only way of accessing these plans by other affected beneficiaries is through an access to information request which, in the case of South Africa, is a bureaucratic bottleneck that makes public access to these plans almost impossible.¹⁷⁹

Furthermore, SLPs are a licensing condition and the lack of disclosure of the licence and the conditions create a level of distrust between the excluded role-players on the one hand and the government and mining companies on the other. The lack of public access is further exacerbated by the law's recommendation that communities should be consulted in the development of SLPs¹⁸⁰ but this consultation is not mandatory and it does not extend to giving the SLP beneficiaries a voice in the implementation of the plans or the future amendment of the plans.

3.5.5. Environmental management

South African law has relatively robust environmental protections. This includes section 24 of the Constitution of South Africa, which provides a right to an environment that is not harmful, environmental protection and ecologically sustainable development.¹⁸¹ Under South African law,

before a mining company can commence operations, it must conduct an environmental assessment, which includes learning about the community and consulting with all those who will be affected by the proposed mining project.¹⁸² If a mining company fails to inform the community about how it will protect them from mining-related environmental damage, the community has a right to send an objection to the Department of Mineral Resources.¹⁸³ The National Environmental Management Act 107 of 1998 also has a robust access to information provision for the public to access environmental information.

3.5.6. Consultation, community engagement and indigenous peoples

South African law provides that in converting old-order mining rights into new rights under the MPRDA, extractive companies must submit an SLP to the Department of Mineral Resources for approval.¹⁸⁴ The SLP is a statutory requirement of the MPRDA that is regulated by the MPRDA regulations. The objectives of SLPs are primarily to 'promote employment and advance the social and economic welfare of all South Africans; contribute to the transformation of the mining industry; and ensure that holders of mining rights contribute towards the socio-economic development of the areas in which they are operating.'¹⁸⁵ Given these objectives, at the heart of SLPs is a need for communities to be involved in the determination of the welfare programmes that are being designed for their benefit but this is not the practice.

The MPRDA contains limited provisions relating to mining communities. Under Chapter 2, section 5(4)(c) of the MPRDA, mining companies must notify and consult 'with land owner or lawful occupier of the land in question.'¹⁸⁶ The MPRDA includes broad commitments to community well-being and some limited provisions pertaining to community consultation and notification.¹⁸⁷ As noted, mining companies are required under the MPRDA to implement social programmes and such plans must be approved by the minister before a mining licence is issued.¹⁸⁸ Furthermore, operations:

*must be conducted in accordance with generally accepted principles of sustainable development by integrating social, economic and environmental factors into the planning and implementation of prospecting and mining projects in order to ensure that exploitation of mineral resources serves present and future generations.*¹⁸⁹

In order to achieve this, it is important to take into account community concerns and perspectives which are too often ignored.

3.5.7. Conclusion

There are significant issues with the mining laws in South Africa. A notable criticism is the failure to enforce some of the regulations. For example, many mining companies in South Africa operate without water use licences, and some commence mining without a number of required licences.¹⁹⁰ Further criticism surrounds both legal provisions regarding community engagement and how this operates in practice. The regulatory scheme in South Africa 'presupposes a one-size-fits-all model for such communities, despite their diverse needs and circumstances, and reserves no seat at the regulatory table for the affected mine communities.'¹⁹¹ This is related to and compounds difficulties defining 'indigenous peoples' and 'previously disadvantaged communities' in the South African context, which makes it difficult to design laws that effectively benefit these groups.¹⁹² On the whole, these problems with the South African mining context, laws and their implementation disempower local communities. Taken together, the lack of information, weak legal protections and the difficulties of establishing mechanisms to ensure that communities benefit and participate, make it hard for communities to hold the government and mining companies accountable and pursue protection of their rights and interests.

3.6. Chile: Progressive realisation of community rights

3.6.1. Background and overview of industry today

Mining has been an important industry for Chile since the 1500s, when Spanish colonisers came to the country to find minerals and metals.¹⁹³ In the early 19th century, the government actively promoted

mining and other extractive operations. The Chilean government's focus led to the country becoming a leader in copper production in the mid-19th century. In the early 20th century, mining was immensely important for the country's economy, and comprised around 40% of the GDP.¹⁹⁴ One outcome of the political and social turns that Chile took in the 1970s, however, was the nationalisation of the Chilean copper sector. It was not until the 1990s, when Chile returned to democracy, that the country became a preferred mining destination for foreign mining companies. Since then, Chile's extraordinary deposits of minerals have begun to develop at great speed.¹⁹⁵

Today, Chile has a population of approximately 17 million people, and is a constitutional democratic republic.¹⁹⁶ It is considered one of the best economies in Latin America and one of the most prominent emerging economies in the world.¹⁹⁷ One reason for Chile's surge to its current position in the world economy is its mining industry. The Chilean government predicted that the mining industry would bring in more than USD 110 billion in investment between 2013 and 2021.¹⁹⁸ A significant amount of the world's major mining corporations are involved in the Chilean mining industry, including Anglo American, Barrick Gold, BHP Billiton, Rio Tinto and Glencore Xstrata.¹⁹⁹

In 2012, mining activities made up 15% of Chile's GDP. More than half of total foreign investment in Chile was also related to the mining industry.²⁰⁰ Chile produces one third of all copper in the world, which is more than any other country. It also produces 7% of the world's gold, 39% of lithium, 15% of molybdenum, and 5% of silver.²⁰¹ Due to its size, the mining industry produces many employment opportunities. In 2013, direct employment by the Chilean mining industry amounted to more than 74 000 people. When direct and indirect employment was combined, it accounted for around 12% of total employment in Chile.²⁰² The Chilean government continues to provide significant support for foreign investment in its mining industry by tweaking its laws and regulations. In 2015, more than 50 new mining projects were announced in Chile.²⁰³

Chile is a diverse country due to its history. Around 1.6 million people of the Chilean population consider themselves to belong to one of the indigenous communities that are recognised by Chilean law. As such, indigenous peoples make up around 8% of the total population. The biggest indigenous communities are Mapuche (84% of the indigenous population), Aymara, Diaguita, Atacameña and Quechua (together accounting for 15%).²⁰⁴

3.6.2. Overview of legal system

Chile's current Constitution was adopted in 1980, during the Pinochet dictatorship, and has since been amended several times with the latest review in 2010.²⁰⁵ The Chilean Constitution differs from the constitutions of many other Latin American countries, which often directly recognise indigenous peoples. However, like many other Latin American countries, Chile still offers legal protection for its indigenous peoples, and in 2008, Chile ratified the ILO 169.²⁰⁶

Chile's domestic legal system in relation to indigenous communities is unique. Chile has a law that recognises the 'promotion, protection and development of indigenous peoples.'²⁰⁷ The law recognises 12 different indigenous communities in Chile, and recognises that they are descendants that have inhabited the lands long before the colonisers came to Chile.²⁰⁸ The law also states that Chile has the obligation to respect, protect and promote indigenous development, culture and communities. Furthermore, it is the state's obligation to undertake necessary measures in order to protect indigenous lands.²⁰⁹ While the law was an improvement for indigenous peoples and their rights, it does not fully meet international legal standards on the rights of indigenous peoples. The criticism of the law concerns its failure to fully implement the ILO 169, especially with regard to effectively ensuring the right to prior consultation.²¹⁰

3.6.3. Laws and regulations governing community engagement in the extractive industry: Oversight and licensing process

The Chilean government, through its Mining Ministry, primarily oversees the mining industry. For that purpose, there are four different state agencies, the Chilean Coal Commission, the National Environmental Commission, the Foreign Investment Committee and the National Geology and Mining Service.²¹¹ The Mining Ministry is responsible for the administration of mining concessions.²¹²

Article 3 of the Chilean Transparency Law states that the law shall ensure access to information regarding the procedures and decisions of any public function in Chile. Every person has the right to ask for and receive information of any public entity.

The Environmental Assessment Service manages and oversees the Environmental Impact Assessment System (EIAS) and the Chilean environmental permits.²¹³ The National Indigenous Development Corporation (CONADI) is the responsible agency for the administration of the consultation processes outside of the EIAS. CONADI shares the responsibility with whichever entity initially proposed the consultation process.²¹⁴

3.6.4. Access to information

The Chilean Transparency Law regulates the right to access public information, the principle of transparency of public operations, how the right to information is exercised and the exceptions to the general principle of transparency.²¹⁵ The Chilean legislation on access to information follows the principle of maximum disclosure, which means that the state administration must provide the greatest possible amount of information, with the only exception being information that is excluded by provisions of the Constitution or other laws.²¹⁶ Article 3 of the Chilean Transparency Law states that the law shall ensure access to information regarding the procedures and decisions of any public function in Chile.²¹⁷ Every person has the right to ask for and receive information of any public entity.²¹⁸

3.6.5. Environmental management

In order to further fulfill its obligations under the ILO 169, Chile has produced two separate laws (supreme decrees) regarding indigenous communities' right to consultation and right to FPIC. Supreme Decree 40 of 2012, which came into force in December 2013, concerns the EIAS, which includes provisions on the right to consultation.²¹⁹ Supreme Decree 66 of 2013, which came into force in March 2014, otherwise regulates the process of consultation with indigenous peoples, and was drafted to comply with Article 6 of ILO 169. In order to ensure that there is no overlap, Supreme Decree 66 clarifies that any environmental licence that is to be processed within the EIAS must follow the consultation process explained in Supreme Decree 40.²²⁰ Within the two different systems, it is the designated state agency that is responsible for the consultation processes.²²¹

Until the enactment of Supreme Decree 40, impact assessments did not include any provisions concerning participation or consultation of indigenous peoples.²²² The General Bases of the Environmental Law (*Ley Sobre Bases Generales Del Medio Ambiente*) require that the state must facilitate citizens' participation and allow access to environmental information. State agencies must protect social and cultural traditions of indigenous peoples, communities and individuals, according to laws and international conventions by which Chile is bound.²²³ The law also ensures that EIAs must be made for new exploration or extraction projects or activities in the country.²²⁴ Article 4 of Supreme Decree 40 outlines the differences between Environmental Impact Studies (EI Studies) and the less demanding Environmental Impact Statements (EI Statements). An EI Study must be performed if the proposed project could lead to resettlement or significant alterations of the lives and customs of communities. If resettlement of an indigenous community is considered necessary, it should only continue with the free and informed consent of the affected group. If the state fails to obtain consent, relocation can only take place if the affected indigenous peoples are represented in the process.²²⁵

Decree 40 also has a provision that specifically concerns consultation with indigenous communities. The provision requires that the state conduct a consultation process if the project or activity might

require relocation of affected communities, if it is located on or near protected lands, otherwise protected territories or lands, or if it may adversely affect certain sites of cultural heritage. Consultation is only required for projects that have to conduct EI Studies, as opposed to EI Statements.²²⁶ If a project directly affects an indigenous group, the Environmental Assessment Agency must initiate a consultation process with the community. The consultation must be performed in good faith, using the appropriate mechanisms and together with the affected indigenous community's own representative institutions. This is considered necessary in order to ensure informed participation in the process.²²⁷ However, the community is only offered the option to participate in the process of the environmental evaluation. While the goal of the consultation process is an agreement or consent from the indigenous peoples, failure to obtain consent is not considered problematic as long as the correct process was adhered to.²²⁸

A separate issue surrounding the Chilean system of environmental licensing is that it is difficult to identify exactly what measures require consultation. Civil society organisations have also complained that it is the affected communities that carry the burden of requesting consultation, though the communities might have no knowledge of a proposed project or activity.²²⁹ There is also an issue related to the requirement of consultation to take place *prior* to the proposed activities. It is stated that the consultation process should only be between 20 and 25 days, which in many situations will be insufficient if the process also aims to respect the decision-making system of the affected indigenous peoples.²³⁰

3.6.6. Consultation, community engagement and indigenous peoples

Supreme Decree 66 was instituted to ensure the right to consultation for indigenous peoples generally, and outlines how the process of consultation works, in order for it to comply with Article 6 of the ILO 169.²³¹ It clarifies that the responsibility for the consultation process lies with the state administration and that communities have the right to consultation when they are threatened to be directly affected by either administrative or legislative measures. The consultation process must be conducted in an appropriate way and in accordance with principles of good faith. The goal is to reach an agreement or consent concerning the measures to be taken.²³² According to the decree, the right to consultation can be respected even when the affected indigenous peoples refuse to give their consent.²³³ This explicit provision severely undermines the indigenous peoples' right, since it makes it unnecessary for the state to truly engage with affected indigenous groups.

A positive aspect of Supreme Decree 66 is its definition of indigenous peoples. Article 5 holds that indigenous peoples are defined in the same way as in the ILO 169, and that it also includes the indigenous communities that have already been recognised in Law 19253. Another strength of the regulation is that consultation must be performed together with the representative bodies of the indigenous peoples. However, the law defines a 'measure that may directly impact indigenous communities', in an unnecessarily narrow manner. It requires a significant and specific impact (*impacto significativo y específico*) in order to fall within the consultation process,²³⁴ which is a higher threshold than what is required according to international standards.²³⁵ Apart from being narrow, it also differs from the ILO 169 standards, which the legislation was specifically intended to implement. The ILO 169 standards only require that a measure may have an impact on affected peoples.

3.6.7. Conclusion

While a right to consultation is, arguably, respected under many circumstances in Chile, the right to FPIC is only respected under the EIAS when it is deemed necessary to relocate an affected indigenous community. The other consultative measures explicitly reduce the impact of a refusal to offer consent, which can prove detrimental to a group affected by a mining project or activity.

Chile has undoubtedly taken significant steps in the right direction in the last decade, from a complete lack of recognition of indigenous peoples' rights, towards a system that, at least to some extent, ensures their right to consultation and consent. However, there are still several concerns that require continued focus. The definition of indigenous peoples should be based on the definition found in the ILO 169, instead of leaving it up to the government's discretion. Currently, there is a significant risk of exclusion of communities that would otherwise be considered. Furthermore, the

notion that a failure to achieve consent from affected communities has no real implications on the process, must be addressed.

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- 127 International Labour Organization, *Ratifications of C169 – Indigenous and Tribal Peoples Convention, 1989 (No. 169)*, available at: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102805.
- 128 EITI, *EITI Peru*, available at: https://eiti.org/implementing_country/6
- 129 Human Rights Council, *Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya*, para. 40; Ministerial Decision No. 003–2013-MEM/DM, Annex 1.
- 130 Human Rights Council, *Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya*, para. 40.
- 131 Law nr. 29785 ('Prior Consultation Act'), Article 9.
- 132 Graciela Rodriguez-Ferrand, *Global Legal Monitor: Peru: New Law Granting Right of Consultation to Indigenous Peoples* (Sept. 27, 2011), Library of Congress, available at: <http://www.loc.gov/law/foreign-news/article/peru-new-law-granting-right-of-consultation-to-indigenous-peoples/>.
- 133 Prior Consultation Act, Article 9.
- 134 See Peruvian Ministry of Culture, *Prior Consultation: Processes of Prior Consultation (Consulta Previa: Procesos de Consulta Previa)*, available at: <http://consultaprevia.cultura.gob.pe/proceso/>.
- 135 INGEMMET, *Memoria Anual*, 2014, 6. The Ministry of Energy and Mines may also be mentioned since it is responsible for the EIAs. It is however not a significant resource for indigenous communities, since EIAs are not sufficiently focused on the rights of affected communities.
- 136 Peruvian Ministry of Culture, *Indigenous Peoples' Database (Base de Datos de Pueblos Indígenas u Originarios)*, available at: <http://bdpi.cultura.gob.pe/lista-de-pueblos-indigenas>.
- 137 Peruvian Ministry of Culture, *Prior Consultation: Processes of Prior Consultation (Consulta Previa: Procesos de Consulta Previa)*.
- 138 Law nr. 28611 ('General Environmental Law'), Articles 24 & 25.
- 139 EY, *Peru's Mining & Metals Investment Guide 2014/2015* (2014), 42.
- 140 Graciela Rodriguez-Ferrand, *Global Legal Monitor: Peru: New Law Granting Right of Consultation to Indigenous Peoples*, Library of Congress (Sept. 27, 2011), available at: <http://www.loc.gov/law/foreign-news/article/peru-new-law-granting-right-of-consultation-to-indigenous-peoples/>.
The Prior Consultation Act was also accompanied by implementing regulations, which further lay out the process of prior consultation, see Supreme Decree nr. 001–2012-MC ('Implementing Regulations').
- 141 Rael Mora, *Peruvian Rights Ombudsman Calls Out Gov't on Indigenous Rights* (May 26, 2015), teleSUR, available at: <http://www.telesurtv.net/english/news/Peruvian-Rights-Ombudsman-Calls-Out-Govt-on-Indigenous-Rights-20150526-0042.html>.
- 142 EY, *Peru's Mining & Metals Investment Guide 2014/2015* (2014), 36. The supreme court's clarification that prior consultation should be conducted in all occasions had evident impact. There are currently several ongoing processes of prior consultation regarding mining activities.

- 143 Prior Consultation Act, Article 2.
- 144 Human Rights Council, *Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya*, para. 33.
- 145 Prior Consultation Act, Article 1; *see also* 'Implementing Regulations', Articles 1, 3, 5 & 6.
- 146 Prior Consultation Act, Article 7.
- 147 *Id.*, Article 20.
- 148 Peruvian Ministry of Culture, *Indigenous Peoples' Database (Spa: Base de Datos de Pueblos Indígenas u Originarios)*.
- 149 Prior Consultation Act, Article 3.
- 150 Human Rights Council, *Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya*, para. 33.
- 151 Prior Consultation Act, Article 4.
- 152 *Id.*, Article 6.
- 153 *Id.*, Article 16.
- 154 *See e.g.* Rael Mora, *Peruvian Rights Ombudsman Calls Out Gov't on Indigenous Rights*.
- 155 Committee on the Elimination of Racial Discrimination, *Concluding Observations on the Eighteenth to Twenty-First Periodic Reports of Peru* (Sept. 25, 2014), CERD/C/PER/CO/18–21, para. 14.
- 156 *Id.*
- 157 Africa Mining IQ, *Mining in South Africa*, available at: <http://www.projects iq.co.za/mining-in-south-africa.htm>.
- 158 KPMG, *The Role of Mining in the South African Economy*, available at: <https://www.sablog.kpmg.co.za/2013/12/role-mining-south-african-economy/>.
- 159 *Id.*
- 160 Africa Mining IQ, *Mining in South Africa*; KPMG, *The Role of Mining in the South African Economy*.
- 161 Africa Mining IQ, *Mining in South Africa*.
- 162 *Id.*
- 163 *Id.*
- 164 KPMG, *The Role of Mining in the South African Economy*; *see also* Africa Mining IQ, *Mining in South Africa*.
- 165 *Id.*
- 166 *Id.*
- 167 *Id.*
- 168 Africa Mining IQ, *Mining in South Africa*; KPMG, *The Role of Mining in the South African Economy*.
- 169 The Constitution of the Republic of South Africa (1996).
- 170 South African National Biodiversity Institute, *Mining-relevant Legislation*, available at: <http://biodiversityadvisor.sanbi.org/industry-and-conservation/conservation-and-mining/understand-2/mining-relevant-legislation/>.
- 171 *Id.*
- 172 Minerals and Petroleum Resources Development Act (2002), Chapter 5, sections 57, 58.
- 173 DLA Piper, *Mining in Africa: A Legal Overview* (2012), 53.
- 174 *Id.*
- 175 Minerals and Petroleum Resources Development Act 28 (2002), section 47.
- 176 *Id.*, section 102.
- 177 Tumai Murombo, *Regulating Mining in South Africa and Zimbabwe: Communities, the Environment, and Perpetual Exploitation* (2013), *Law Environment and Development Journal*, 46.
- 178 Minerals and Petroleum Resources Development Act 28 (2002), Regulation 46.
- 179 The Promotion of Access to Information Act 2 of 2000 requires various requirements such as the completion of forms, payment of fees, waiting period of a cumulative total of 60 days and allows private corporations to rely on broad exemptions that the law allows which all collectively frustrate usage of the law by ordinary members of the public. *See* Centre for Environmental Rights, *Money Talks: Commercial Interests and Transparency in Environmental Governance* (Nov. 2014), 7–8.
- 180 Minerals and Petroleum Resources Development Act 28 (2002), Regulation 46.
- 181 Constitution of South Africa (1996).
- 182 Centre for Environmental Rights and Lawyers for Human Rights, *Mining and your Community: Know your Environmental Rights* (Feb. 2014), 2.
- 183 *Id.*, 6.
- 184 Minerals and Petroleum Resources Development Act 28 (2002), sections 25(2)(f) & (h).
- 185 *Id.*, section 41. The content of the SLP must include a human resources development programme that includes skills development, a local economic development programme, processes on management of

downscaling and retrenchment, as well as finance for the implementation of these programmes under section 46.

186 Minerals and Petroleum Resources Development Act 28 (2002).
 187 *Id.*, section 104.
 188 *Id.*, section 26(1).
 189 *Id.*, section 37(2).
 190 Tumai Murombo, *Regulating Mining in South Africa and Zimbabwe*, 37.
 191 *Id.*, 39.
 192 *Id.*, 44.
 193 International Investor, *Chile 2016: Mining Report* (Nov. 2015), 9.
 194 *Id.*
 195 *Id.*
 196 OSEC, *Study of the Mining Sector in Chile and Business Opportunities for Swiss Companies* (Mar. 2013), 145.
 197 *Id.*
 198 U.S. Geological Survey, *2013 Minerals Yearbook: Chile* (Mar. 2015), 7.6.
 199 *Id.*, 7.2.
 200 OSEC, *Study of the Mining Sector in Chile*, 6.
 201 OSEC, *Study of the Mining Sector in Chile*, 6; U.S. Geological Survey, *2013 Minerals Yearbook: Chile*, 7.1.
 202 U.S. Geological Survey, *2013 Minerals Yearbook: Chile*, 7.1.
 203 Virginia Economic Development Partnership, *Mining Market in Chile: 2015* (Aug. 2015), 1.
 204 International Working Group for Indigenous Affairs, *Indigenous Peoples in Chile*, available at: <http://www.iwgia.org/regions/latin-america/chile>; Law 19253 of 1993 ('Indigenous Protection, Promotion and Development Law') Article 1, which recognises: colla, kaweshkar, lickanantai, rapa nui and yamana.
 205 A reform of the constitution, including the recognition of indigenous peoples and their rights, has been planned for quite some time. It was presented before the National Congress in 2007, but there has still been no progress.
 206 Chile also voted in favour of the UN Declaration on the Rights of Indigenous Peoples in 2007. The implementation of the convention has however received criticism for being insufficient.
 207 Indigenous Protection, *Promotion and Development Law*, Article 1.
 208 *Id.*
 209 *Id.*
 210 International Working Group for Indigenous Affairs, *Indigenous Peoples in Chile*.
 211 U.S. Geological Survey, *2013 Minerals Yearbook: Chile*, 7.2.
 212 KPMG Global Mining Institute, *Chile: Country Mining Guide* (2014), 9.
 213 Servicio de Evaluación Ambiental, *Quiénes Somos?*, available at: <http://sea.gob.cl/sea/quienes-somos>.
 214 Supreme Decree 66 of 2013 ('Indigenous Consultation Decree'), Articles 13 & 14.
 215 Law 20285 of 2008 ('Access to Information Law'), Article 1.
 216 *Id.*, Article 11(d).
 217 *Id.*, Article 3.
 218 *Id.*, Article 10. It is further stated in Article 12 how a request for information is made.
 219 The Supreme Decree was adopted in spite of criticism from indigenous organisations, see Due Process of Law Foundation, *Executive Summary: Right to Free, Prior, and Informed Consultation and Consent in Latin America*, 7.
 220 Indigenous Consultation Decree, Article 8.
 221 Due Process of Law Foundation, *Executive Summary: Right to Free, Prior, and Informed Consultation and Consent in Latin America*, 19.
 222 Paula Gajardo, *Free, Prior and Informed Consent (FPIC) Under the New Chilean Impact Assessment Regulations*, IAIA14 Conference Proceedings, 2.
 223 See Law 19300 of 1994, Article 4.
 224 U.S. Geological Survey, *2013 Minerals Yearbook: Chile*, 7.2.
 225 Supreme Decree 40 of 2012 ('Environmental Impact Evaluation Decree'), Article 7, para. 4. The paragraph is drafted in a manner similar to ILO 169, Article 16.2.
 226 Environmental Impact Evaluation Decree, Article 85.
 227 *Id.*
 228 *Id.*, Article 85, para. 2.
 229 See Due Process of Law Foundation, *Executive Summary: Right to Free, Prior, and Informed Consultation and Consent in Latin America*, 18.
 230 Indigenous Consultation Decree, Article 17.

- 231 *Id.*, Article 1.
232 *Id.*, Article 2.
233 *Id.*, Article 3.
234 *Id.*, Article 7.
235 See Due Process of Law Foundation, *Executive Summary: Right to Free, Prior, and Informed Consultation and Consent in Latin America*, 7.

4

Community engagement policy and practices by multinational companies in the case study countries

In order to unpack the notion of community engagement, it is important to understand the failures of corporations in holding themselves accountable and what the actual, rather than the perceived, benefits of community engagement are for corporations. Further, it is necessary to understand the relevance of mainstreaming community engagement into business operations. These are outcomes that can be achieved through an examination in context and the case of the extractive industry across six countries and two global corporations provides a useful analysis for these purposes.

4.1. AngloGold Ashanti

4.1.1. Company overview

AngloGold Ashanti (AGA) is a South Africa-based gold mining company, which was founded in June 1998.¹ AGA employs a total of 52 266 people worldwide² and operates 17 gold mines in nine different countries around the world, including South Africa, Ghana and Colombia.³ About 37% of AGA's total production in 2015 came from its Africa operations.⁴ It employs 11 942 people across Africa⁵ and has put forward numerous commitments and reports relating to its practices globally and, specifically, in Ghana, pertaining to its practices, policies and principles.

In Ghana, AGA has two different gold mine operations at Iduapriem and Obuasi. The Obuasi gold mine, which is located in the southwest of Ghana, suspended operations in 2014 due to community security issues.

4.1.2. Corporate structure

In some areas, such as the Democratic Republic of Congo and Mali, AGA operations are structured as joint ventures with other companies, but this is not currently the case in Ghana.⁶ Notably, the government of Ghana is an AGA shareholder and holds a 1.57% interest in AGA.⁷

4.1.3. Ownership listing and cross-listing

AGA's primary listing of ordinary shares is on the Johannesburg Stock Exchange in South Africa.⁸ The ordinary shares are also listed on the New York Stock Exchange, in the form of American Depositary Shares, on the Australia Stock Exchange, in the form of Clearing House Electronic Sub-register System Depositary Interests, and in Ghana, in the form of Ghanaian Depositary Shares.⁹ Consequently, AGA is subject to the applicable registration and legal requirements of its places of cross-listing.

Notably, there is a commitment to community consultation, not consent, and efforts to avoid resettlement and adverse environmental, social, cultural and economic impacts, but only ‘to the extent feasible.’

4.1.4. Corporate governance

AGA is run by a board of directors comprising nine independent non-executive directors and two executive directors.¹⁰ The board is supported by five committees. The Social, Ethics and Sustainability Committee helps monitor ‘matters relating to safety, health, the environment and ethical conduct to ensure that the company develops and behaves as a responsible corporate citizen.’¹¹

4.1.5. Disclosure practices

AGA publicly subscribes to a number of external principles and industry standards including the Extractive Industry Transparency Initiative (EITI). The EITI is managed by a multi-stakeholder governance body that includes the state, participating companies and civil society organisations.

4.1.6. Community policy practices and policies

AGA’s integrated environment and community policy reflects the fundamental flaws in AGA’s community policies more generally. It is vague, broad and discretionary. The brief one-page bulleted document includes commitment to legal compliance, respect for communities and efforts to reduce negative environmental impacts. Notably, there is a commitment to community consultation, not consent, and efforts to avoid resettlement and adverse environmental, social, cultural and economic impacts, but only ‘to the extent feasible.’¹² AGA’s integrated environment and community policy references no international standards and is limited and lacking in specifics, which are not sufficiently expanded upon in the related documents.

4.1.7. Community complaints and grievances

AGA requires that every mining site develop a mechanism for resolving community complaints and grievances.¹³ This mechanism ‘provides local communities with a means to raise complaints and grievances’ and for AGA to resolve them ‘where reasonable and feasible.’¹⁴ The policy outlines broad company values relating to human rights and community development that it seeks to support and basic requirements for all mechanisms. Though termed requirements, the 13 outlined provisions are more akin to guidelines and permit wide latitude for local discretion in design. An example of this is the requirement that a mechanism be developed before any complaints are actually received ‘by conducting a baseline study.’¹⁵ Another issue is lack of specificity. Regarding the development of the mechanism, the policy states that the site is responsible for development and implementation, but states that ‘input from and involvement of its social partners and stakeholders is required,’ without specifying the level or form of this input and involvement.¹⁶ A related issue is vagueness, such as the requirement that the mechanism ‘be appropriate to the local culture and context, while recognising AngloGold Ashanti’s values.’¹⁷ The most clear and formalised requirements are those dealing with internal reporting processes. These include a company standard for classifying the level of the complaint, as well as documenting and reporting complaints for company records.¹⁸ Notably, the glossary contains no definition of community, but defines ‘stakeholders’ as referring to:

[P]ersons or groups that are directly or indirectly affected by a project as well as those that may have interests in a project and/or the ability to influence its outcome either positively or negatively. Stakeholders include locally affected communities and individuals and their formal and informal

*representatives, government, politicians, religious leaders, civic organizations, and other groups with special interests, the academic community, employees, their families and employee representatives, other businesses, shareholders and joint venture partners.*¹⁹

While this definition covers a wide range of stakeholders, the failure to develop bespoke definitions of communities as applicable in each country context creates a risk of marginalising affected communities during grievance processes.

The policy explicitly lists the International Council on Mining and Minerals (ICMM) report, *Human Rights in the Mining & Metals Sector: Handling and Resolving Local Level Concerns & Grievances*, as a reference document for mechanism development and also refers to other ICMM reports, as well as reports by the Centre for Social Responsibility in Mining (CSRSM), the Compliance Advisor Ombudsman and the Corporate Social Responsibility Initiative.²⁰

Overall, AGA's policy exemplifies a common problem noted by the CSRSM. According to the CSRSM, companies tend 'to devolve responsibility for grievance handling to operations or projects (rather than immediately elevating to the corporate level or an external party).'²¹ The external standards contain a number of points that are either not included at all or are only minimally or broadly referred to in AGA's policy. Furthermore, as noted by the CSRSM, these factors are most likely to work when they are implemented together, which makes the failings of AGA's policy more serious. Though international standards include a commitment to transparent processes, the policy contains no reference to transparency and is notably opaque on the whole.²² Another emphasised point is the importance of local consultation processes, which are not clearly defined by the policy.²³ A related element is the significance of building trust, which is described in one report as an 'integral component.'²⁴

A number of the key features noted by the Compliance Advisor Ombudsman are not present in AGA's policy. These include an emphasis on fairness and systematic identification of emerging issues and trends, as well as freedom from reprisal and mainstreaming responsibility throughout the project.²⁵ Elements included by the Corporate Social Responsibility Initiative, such as predictability, empowerment and continuous learning, are also not present in AGA's policy.²⁶ Overall, a number of widely agreed upon elements and principles for effective complaints and grievances mechanisms are missing or insufficiently specified and emphasised by AGA's policy, which provides far too much discretionary power for sites to develop their own mechanisms.

4.1.8. Community engagement

AGA's engagement standard provides significantly more structure and specificity in promulgating requirements and processes for community engagement. Though the policy does not specify an external standard to follow, it contains references to International Finance Corporation (IFC) Performance Standard 1, the Community Development Toolkit by ESMAP, the World Bank and ICMM, and a guide by the Office of the Compliance Advisor/Ombudsman for the IFC and the Multilateral Investment Guarantee Agency. In contrast to the complaints and grievances policy, the engagement standard contains definitions of social partners and community, in addition to stakeholders. The standard defines a community as:

*[A] group of people who are directly or indirectly affected by the operation, both positively and negatively, comprising local communities, including new arrivals, in which the operation is located (also called host communities) and communities from which it draws its labour (labour-sending areas); communities along the operation's transport routes, if applicable, and, in some cases, other groups, including former local residents and their families who have moved away but still have strong familial, business or other interests in the area.*²⁷

This definition needs to be integrated into all the applicable policies of AGA.

Though the engagement standard specifies that ultimate accountability lies with the site manager, it requires engagement at corporate, country and regional offices, as well as mining sites.²⁸ The language of the engagement standard requirements are significantly less permissive and states that at all levels there must be stakeholder mapping and baseline studies conducted for engagement.²⁹

The requirements also include specified timelines of what engagement strategies should cover and elements they should include, such as a sustainability assessment and 'clear financial and human resources to support its implementation.'³⁰ This is a welcome development and suggests recognition by AGA of the need to mainstream community engagement across its operations.

Though on the whole, AGA's engagement standard is relatively strong and reflects external standards, there are notable areas where it is lacking. The requirements of the standard are largely procedural and do not include any mention of environmental impact or health and safety. The IFC emphasises the interrelated nature of community engagement and social and environmental impact management, which AGA's policy neglects.³¹ The engagement standard also makes no mention of disadvantaged or vulnerable individuals or groups, which are noted as a key element to be considered by the IFC.³² While AGA's engagement standard contains specificity and formal procedural requirements, it still exhibits problems of limiting language and broad discretion. For example, while preparation of an engagement strategy is required, 'the scope and level of detail ... will vary depending on the context' and 'various disciplines as appropriate must play a role.'³³ In contrast, external standards emphasise the importance of defined policies and key elements that should be included in assessments.³⁴

4.1.9. Land access and resettlement

AGA publicly maintains that, specifically with regard to its operations in Ghana, it works to avoid community resettlement and displacement, but that such measures are sometimes necessary.³⁵ In the event that community resettlement is considered 'necessary,' AGA says 'this involves a complex process that is dealt with in a highly sensitive manner and requires in-depth community engagement.'³⁶ AGA lists 'ensuring fair resettlement and compensation' as a key challenge and says that 'for the resettlement process to be successful and conflict-free, it must be built around the needs and priorities of the community.'³⁷ As such, the policy puts the communities at the center of attention, which is positive. However, the focus only shifts to the community when resettlement has been determined to be necessary, and the communities are excluded from the determination of necessity.

AGA's Management Standard on Land Access and Resettlement was created in order to adequately address the complex issue of displacement. The standard was considered important since a badly managed resettlement process can pose risks to both the company and the affected persons. A resettlement or displacement process should be initiated at an early stage and any process must include the 'informed participation' of affected persons and other relevant stakeholders.³⁸ Notably, these are two of the cornerstones of the principle of free, prior and informed consent. The significant difference here is that it does not relate to consent, but to the process concerning already unavoidable resettlement or displacement, as it is called in the AGA Management Standard.³⁹

The idea behind the standard is to ensure that all necessary permissions and documentation are in order and that a resettlement procedure is structured and compensation is ensured, before the activities that are causing displacement get under way. A further objective of the Management Standard is to create a general approach to land acquisition and resettlement for all of AGA's operations.⁴⁰ In order to align itself with international standards concerning displacement and resettlement, the Management Standard directly refers to the International Finance Corporation's (IFC) Performance Standard 5 on Land Acquisition and Involuntary Resettlement (PS5).⁴¹

Whenever land is supposed to be acquired as part of a project, the Management Standard requires that an assessment is undertaken concerning the environmental, social and health risks related to the operation.⁴² However, it is not clear what an assessment of that kind entails. It is merely clarified that any assessment must comply with the regulations and policies of the host country, and that it must be in accordance with the PS5, as well as IFC Performance Standard 1 on Social and Environmental Assessment and Management Systems.⁴³ Further, it is stated that assessment, as well as planning, implementation and monitoring, must be performed with 'the active, free, prior, informed and ongoing participation of affected people and other relevant stakeholders.'⁴⁴ This is particularly interesting, since it is drafted in similar language as the concept of free, prior and informed consent. However, the significant difference, as previously mentioned, is that in this case

the free, prior and informed participation is only ensured after the resettlement has been deemed a necessity, and it does not involve any requirement of consent from the affected persons.

A good feature of the Management Standard is that it is not limited to a particular part of the project, or a particular point in time. Rather, the standards apply regardless of the stage of the operations, as long as it is related to land acquisition and resettlement. The standard is applied irrespective of the number of people involved in the process and irrespective of how significant the impacts are or may be. It also applies to situations where resettlement must be undertaken due to related operations, such as power lines and buffer zones.⁴⁵

Generally, AGA's Management Standard is aligned with the international standards of the PS5. There are, however, a few notable exceptions. The Management Standard only mentions once that 'displacement of people must be avoided' where it is 'practically possible,' only to continue to discuss unavoidable displacements, without clarifying what that means.⁴⁶ While an objective of the PS5 is that involuntary resettlement should be avoided wherever it is possible, AGA's Management Standard focuses on what must be done when the displacement and resettlement is practically unavoidable.⁴⁷ The focus on resettlement as unavoidable shifts the focus from trying to avoid resettlement from the beginning of a project, to considering it as a natural part of any project. This structure risks undermining efforts to develop and explore alternative project designs that could ensure that fewer people would have to be resettled.

Another significant part left out of the Management Standard, compared to the PS5, is the concept of consultation. While participation is mentioned in the standard as a requirement, consultation is not mentioned once. In contrast, the PS5 states that the company should consult with the affected persons after they have been duly informed of the project. Moreover, affected persons should be consulted consistently throughout the entire resettlement process, from implementation to evaluation and compensation, in order to achieve the goals set out.⁴⁸ Even though the Management Standard seems to be in conformity with the PS5 in most aspects, the differences are still significant. While participation is important, being consulted in good faith is much more significant for any party to a resettlement process.

4.1.10. Indigenous peoples

The Management Standard on Indigenous Peoples was instituted in order to align AGA's standards with international law regarding indigenous peoples' rights. AGA's Management Standard on Indigenous Peoples explicitly refers to both the ICMM Position Statement on Mining and Indigenous Peoples, the IFC Performance Standard 7 on Indigenous Peoples (PS7) and the International Labour Organization's Convention 169 on Indigenous and Tribal peoples (ILO 169).⁴⁹ The Management Standard was created to highlight the 'unique characteristics and circumstances' of indigenous peoples, as compared to other communities affected by the activities related to mining.⁵⁰

The Management Standard uses the same definition of indigenous peoples as the ILO 169 and the PS7. Indigenous peoples are therefore defined based on factors such as self-identification, collective attachment to specific territories and areas, particular customs and culture, and spoken language.⁵¹ While it is desirable that the Management Standard defines indigenous peoples broadly in this way, it fails to adhere to international standards in other aspects. First of all, even though AGA is a member of the ICMM,⁵² it has failed to update the Management Standard in order to adhere to the 2013 version of the ICMM Position Statement on Indigenous Peoples and Mining. Even though the 2008 Position Statement is no longer applicable to AGA as a member of the ICMM, it is still the referenced document in the Management Standard. Second, the Management Standard does not refer to the concept of free, prior and informed consent (FPIC), which is a significant aspect of the ICMM Position Statement.⁵³ The IFC PS7, also referenced in the Management Standard, does not discuss the right to FPIC,⁵⁴ but it addresses both the need for 'good faith negotiations,'⁵⁵ and 'free, prior, and informed consultation,'⁵⁶ two concepts that are not discussed in the Management Standard. It is also worth noting that the updated version of the IFC PS7 (from 2012), includes the concept of FPIC as a requirement.⁵⁷ Since one of the main objectives of the Management Standard on Indigenous Peoples was to align it to international standards, it has not fully achieved what it set out to do.

The only stringent requirements instituted through the Management Standard come into play when AGA plans to relocate indigenous peoples from their communal lands. At that stage, alternative activities that could avoid the relocation must be considered. Whenever other options are considered to be unviable and relocation is therefore unavoidable, the company must enter into consultation with the affected indigenous peoples.⁵⁸ The informed participation of the indigenous group in the consultation process has to be documented. Regrettably, it is further stated that 'the successful outcome of the negotiation' must be documented.⁵⁹ Therefore, the possible event that negotiations are not successful for the company is not addressed. Since the company has already found the relocation to be unavoidable, the participation is reduced to a procedural requirement, rather than a substantive right of the indigenous peoples. This structure risks undermining the rights of indigenous people.

Another issue regarding the Management Standard on Indigenous Peoples is the language used in relation to engagement with affected indigenous peoples. For instance, the standard aims to 'foster engagement with and informed participation of ... indigenous peoples.'⁶⁰ It is also stated that AGA aims to establish relationships with and gain support from indigenous peoples.⁶¹ The commitments made by AGA are often weak and vague, like the commitment to 'work to understand and respect ... the interests' of indigenous peoples.⁶²

Finally, the Management Standard includes reporting requirements, grievances and complaints mechanisms, and special concern for sacred sites, among other things.⁶³ However, the main issue with the standard is that any involvement of indigenous peoples in the different processes is reduced to procedural requirements rather than strengthening the indigenous peoples' position in the processes.

4.1.11. Concluding comments on community consultation

A review of AGA's policies concerning complaints mechanisms, resettlement, communities and indigenous peoples shows that AGA has not lived up to the standards it has claimed to adhere to. On many occasions, the standard itself is insufficient, and on others, the commitment is weak and vague. Though the instituted policies generally illustrate a will to go further than what local legislations and regulations require of AGA in each location, it is important that the company adopts international standards. At the same time, having a better set of standards also improves the chances of better community relations, which must be considered a key feature of any mining operation.

4.2. Barrick Gold and Acacia Mining

4.2.1. Company overview

Barrick Gold Corporation is a Canadian mining company, headquartered in Toronto. It was founded in 1983 and is today one of the world's leading mining companies.⁶⁴ As the name suggests, its primary focus is on the mining of gold, but it also operates several copper mines. Its different operations are found in South America (Peru, Chile, Argentina), Australia, Papua New Guinea, Saudi Arabia, the Dominican Republic and Zambia.⁶⁵ Barrick Gold directly employs more than 14 000 people around the world, as well as almost 13 000 contractors.⁶⁶

Currently, Barrick Gold has two operating mines in Chile and Peru, the Záldivar mine and the Lagunas Norte mine, as well as Pierina (Peru, in closing) and the 75% owned Cerro Casale mine. Záldivar is a joint venture project and Barrick Gold owns 50% of the project. The mine is located in northern Chile, in the Andean region, and it produced roughly 220 million pounds of copper in 2015. The copper was sold for more than USD 420 million.⁶⁷ Lagunas Norte is a fully owned gold mine situated in the Peruvian Andes. In 2015, the mine produced 560 000 ounces of gold, at a value of roughly USD 380 million.⁶⁸ The gold and copper produced by Barrick's mines is sold worldwide.⁶⁹ Barrick Gold also has a development project on the Chilean and Argentinean border, called Pascua-Lama. The project was, however, suspended in late 2013, due to a preliminary injunction that was issued due to environmental concerns. In late 2016, the project was still suspended, apart from certain activities related to compliance with environmental standards and other regulations.⁷⁰

A review of AGA's policies concerning complaints mechanisms, resettlement, communities and indigenous peoples shows that AGA has not lived up to the standards it has claimed to adhere to.

Acacia Mining, which is 63.9% owned by Barrick, has been operating in Tanzania for over a decade and is one of the largest gold producers in Africa.⁷¹ It is a UK public company, headquartered in London.⁷² Acacia has three producing mines in Bulyahulu, Buzwagi and North Mara.⁷³ Acacia also has exploration projects at various stages of development in Western Kenya, Western Burkina Faso and Western Mali.⁷⁴ Currently, Acacia is the largest foreign direct investor in Tanzania, having invested over USD 2.5 billion in the country over the past 15 years and made a direct economic contribution of over USD 889 million to the Tanzanian economy in 2015, which represents around 2% of the total GDP of Tanzania.⁷⁵ In 2015, Acacia reported total annual revenue of USD 868 million.⁷⁶

4.2.2. Corporate structure

Barrick Gold has 22 mines (including mines in closure), which are either fully owned (eight mines), joint ventures (five mines) or operated through projects (six mines). Three mines are wholly owned by Acacia Mining.⁷⁷ The relationship between Acacia and Barrick is governed by a relationship agreement, which is intended to ensure that Acacia operates independently of Barrick.⁷⁸ The relationship agreement will continue as long as Acacia is listed on the London Stock Exchange and Barrick owns or controls at least 15% of Acacia's issued share capital or voting rights.⁷⁹ Under the relationship agreement, Barrick is given certain director appointment rights based on the percentage of shares it owns.⁸⁰

4.2.3. Ownership listing and cross listing

Barrick Gold Corporation, the parent company, is headquartered in Canada. It is a publicly traded company listed on both the Toronto Stock Exchange and New York Stock Exchange.⁸¹ The corporation is made up of a multitude of subsidiaries, which are private companies, with the exception of Acacia Mining PLC and a few other rare examples. Acacia Mining is partly owned by Barrick Gold (63.9%), and is listed on the London Stock Exchange.⁸² Acacia also has a secondary listing on the Dar es Salaam Stock Exchange.⁸³

4.2.4. Corporate governance

Within Barrick Gold's corporate structure there are several mechanisms that are instituted to ensure respect for human rights and to address the different operations' impacts on communities. The Corporate Responsibility Committee (CRC) Board of Barrick Gold is an important feature.⁸⁴ The CRC oversees Barrick Gold's activities, operations and policies concerning Corporate Social Responsibility (CSR). The oversight responsibility includes community relations and human rights questions. The CRC is entirely made up of independent directors,⁸⁵ and is tasked with bringing appropriate recommendations to the board when it finds inadequate practices.⁸⁶

Since 2015, Barrick Gold has had a Chief Sustainability Officer.⁸⁷ The officer collaborates with the company's licence-to-operate advisory group, which is responsible for the organisation of Barrick Gold's community relations and general CSR projects.⁸⁸ The CSR Advisory Board was created in 2012. It is made up of external experts in the fields of sustainability, human rights and development. The board gives advice regarding current and future best practices in management of social and environmental impacts, and collaborates with the senior executives of Barrick Gold.⁸⁹ Further, the CSR Advisory Board provides feedback on Barrick Gold's actual performance.⁹⁰

Acacia Mining is governed by a board of directors, which includes management committees, including an Environmental, Health, Safety and Security Committee, and an Executive Leadership Team.⁹¹

As illustrated, Barrick Gold has instituted several oversight bodies within the corporation, with the role of ensuring good community relations and adherence to human rights. While improved oversight of the operations is a positive aspect of the corporate governance structure, there is no presence of community representatives within the different bodies. There is potential in the CSR Advisory Board since it brings in outside knowledge for different fields, including human rights. However, since the concept of CSR is central to the advisory body, there is a risk that it will focus on community investment and development, rather than on substantive human rights protection of affected communities.

4.2.5. Disclosure practices

Barrick Gold has voluntarily committed to several different instruments that include reporting requirements. It is a UN Global Compact participant and must report yearly on its progress.⁹² It is also a member of the Global Reporting Initiative, which requires companies to report on their sustainability (including human rights).⁹³ Barrick is a member of the ICMM Sustainable Development Framework, which also includes transparent reporting requirements.⁹⁴ Finally, Barrick Gold is a signatory to the EITI, and thus, reports on its payments, revenues and 'benefits to communities.'⁹⁵

4.2.6. Community engagement practices and policies

Barrick and Acacia have similar community engagement principles and policies but operate and report on their activities independently.⁹⁶ Barrick's and Acacia's community engagement programmes cite a number of international standards and principles, but fall short of them in practice. Both companies reference commitment to the UN Global Compact and the ICMM.⁹⁷ Both companies are also careful to note their commitment to community engagement and emphasise transparency and dialogue.⁹⁸ Barrick requires all of its projects and operations to complete assessments, such as an Environmental and Social Impact Assessment (ESIA), prior to beginning or substantially changing an operation.⁹⁹ This notably involves identifying environmental impacts and identifying key stakeholders, including local communities.¹⁰⁰ The ESIA process includes consulting with local community members, businesses and CSOs, as well as qualitative assessments, which can include community perceptions of the project.¹⁰¹ This process relates to Barrick's Community Relations Standard, which requires all of Barrick's sites to develop mitigation plans addressing significant social impacts, which are reviewed annually in light of changing circumstances.¹⁰² Both Barrick and Acacia emphasise their efforts to hire locally. Barrick notes that 64% of its employees are from local communities¹⁰³ and Acacia reports that 95% of its workforce is Tanzanian.¹⁰⁴

In approaching community engagement, Barrick and Acacia also emphasise their commitment to human rights. Both companies state that they recognise and respect human rights, which they define as those outlined in the International Bill of Human Rights and related provisions in international treaties.¹⁰⁵ Barrick and Acacia also provide employees with human rights training and encourage compliance and reporting.

Barrick and Acacia do a relatively good job noting and emphasising the importance of community engagement. They make strong commitments to important international standards and the emphasis on transparency and communication is constructive. However, both companies should further develop their community engagement standards with processes for greater local participation. For example, assessments that engage communities and analyse local impact of mining operations would be more effective if communities were empowered to do more than simply voice concerns that the companies might take under consideration. Community engagement would be better if local stakeholders were empowered to play an active role in designing and implementing procedures that reflected the differing interests of all those affected.

4.2.7. Community complaints and grievances

In approaching community grievances and complaints, Acacia and Barrick similarly emphasise transparency and dialogue. Barrick offers a broad definition of this issue stating that ‘a grievance is a stakeholder complaint requesting compensation or corrective action for alleged damage caused by a company or one of its contractors,’ which it says ‘can cover anything from complaints about excessive dust or noise to concerns about speeding vehicles to alleged human rights violations.’¹⁰⁶ The language used to describe grievance mechanisms employed echoes that of the community engagement approach. For example, Acacia emphasises a commitment to ‘work collaboratively and communicate openly’ so that they can be responsive to stakeholder concerns.¹⁰⁷ However, neither company is very specific in describing the operation of local grievance mechanisms. Acacia notes the use of face-to-face communication with community stakeholders through meetings and working sessions, as well as the use of mass media to deliver messages and generate feedback.¹⁰⁸ Barrick, which has only had grievance mechanisms at all of its sites since 2012, lists improvement of grievance mechanisms as one of its issues of ‘medium importance.’¹⁰⁹ To this end, Barrick established an internal working group and reports that 92% of all applicable requirements have now been implemented at their operating sites.¹¹⁰ However, Barrick does not provide details on the specifics of these requirements or how they are implemented.

The approach to grievances and complaints is interwoven with discussions of community engagement and human rights. This is couched in language of broad commitments such as a belief that ‘strong relationships with communities are about getting the simple things right: managing our impacts (such as dust, noise and traffic), doing what we say we will, resolving grievances, and buying and hiring locally.’¹¹¹ Barrick states that the policies and procedures vary at different sites and provides examples of some mechanisms used, such as message boxes, telephone hotlines and town hall meetings, but fails to detail how widely these are used and whether they are used in conjunction with each other at the same sites.¹¹² While it is desirable that Barrick requires all of its sites to have a grievance mechanism that includes documenting, reporting and responding to complaints, the lack of uniform standards and clear processes is problematic.¹¹³

On the whole, Barrick and Acacia make strong commitments to receiving and responding to community complaints, but need to improve their implementation of grievance mechanisms. This seems to be a relatively new area of focus for both companies and requires further development and institutionalisation. The companies’ grievances mechanisms would be improved by clearer articulation of requirements and standards, as well as greater uniformity across their different sites. While the emphasis on transparency and communication is good, there needs to be greater attention to how this is implemented in practice. Similarly, in terms of international laws, principles and standards, Barrick and Acacia provide good guidelines that both companies need to incorporate into their processes rather than merely reference in their reports.

4.2.8. Community engagement

Barrick Gold also has an engagement standard that guides its global operations. It considers that engaging with communities near its operations is of equal importance ‘as any other part of the business.’¹¹⁴ In order to be able to build the long-term relationships needed for a mining project, open and sincere communication is considered key. In achieving this, local communities are to be given the opportunity to participate in decision-making regarding activities that might impact them. This necessarily includes ensuring that local communities have access to all relevant information regarding the operations and their potential impacts – economic, environmental and social.¹¹⁵ In order to achieve adequate engagement with communities, Barrick Gold has created a Community Relations Management System. It was instituted to assist mining operations with information regarding best practices in community engagement, such as stakeholder mapping, ‘developing two way dialogue,’ instituting ‘culturally appropriate [ways] for people to communicate directly to the company’ and understanding the ‘priorities and concerns’ of the communities.¹¹⁶

As part of an effort to standardise engagement in all of Barrick Gold’s operations, all mining operations must produce a Stakeholder Engagement Plan. The plans are required to include mapping of stakeholders, analysis of their concerns and a detailed plan on how to adequately engage with local communities. For engagement to be appropriate, it must be culturally aware and involve the

On the whole, Barrick and Acacia make strong commitments to receiving and responding to community complaints, but need to improve their implementation of grievance mechanisms.

entire community, rather than just a few representatives. Furthermore, Barrick Gold 'expects all stakeholders to be consulted and informed, in a timely manner, about site activities throughout the life of the mine.'¹¹⁷ Barrick also requires that all operations 'facilitate stakeholder participation in the decisions or matters that affect them.'¹¹⁸ Barrick Gold makes no reference to any international standards in its engagement policies. Though Barrick refers to both consultation and participation, it fails to explicitly require that communities are ensured these rights by only expecting consultation and requiring facilitation of participation.

Acacia Mining addresses engagement with 'local stakeholders,' rather than referring to communities, in its human rights policy.¹¹⁹ In order to carry out its human rights policy, Acacia commits to 'engage with local stakeholders' when 'exploration, development, construction, and reclamation operations are planned or take place.'¹²⁰ Through engaging the local communities, the aim is to be able to 'identify, discuss and address human rights concerns.'¹²¹ Other forms of Acacia's community engagement are particularly focused on creating shared values, through employment opportunities or the like.¹²² Acacia's policies do not go far enough, and engagement is addressed in passing as the general and vague human rights policy is outlined. While it is possible that Acacia still engages with communities in practice, there is nothing in the policies that states how this engagement is supposed to be structured. Regrettably, the focus is solely on development of communities.

4.2.9. Land access and resettlement

In its Responsibility Report, Barrick Gold notes that there are times when land acquisition and/or resettlement of communities is unavoidable, in order to initiate or expand a mining project. However, Barrick Gold claims that it 'seeks to avoid resettlement whenever [it] can by exploring alternative project designs.'¹²³ It is never made clear what these alternative project designs are or when resettlement is in fact unavoidable.

However, when resettlement is considered unavoidable, Barrick Gold states that it will collaborate with the individuals in the affected communities, in order to avoid any adverse impacts on relationships with communities. Barrick further states that the resettlement procedure shall unfold in a 'manner consistent with local laws and international best practice,' and that risk management is necessary to both respect human rights and to 'support [the] license to operate.'¹²⁴ In order to effectively manage these risks, each mining site must produce a Resettlement Action Plan. It should be drafted with the participation of the impacted communities, as well as the relevant authorities. It is worth noting that in 2015 none of Barrick Gold's mining sites was involved in resettlement procedures.¹²⁵ Acacia Mining has discussed the existence of land compensation and resettlement programmes in relation to its North Mara mine,¹²⁶ but does not otherwise have any specific policies related to resettlement of communities.

4.2.10. Indigenous peoples policy

Barrick Gold recognises the possible impacts on indigenous peoples and their rights where Barrick operates.¹²⁷ As such, all projects that are located on or near indigenous lands must draft an Indigenous Peoples Plan, which is set out to address how Barrick Gold will ensure the participation of indigenous peoples and how adverse impacts are to be addressed.¹²⁸ As part of the plan, all new operations, including major expansions, must commit 'to work towards obtaining consent' of affected indigenous peoples, as it is required by the ICMM Indigenous Peoples and Mining Position

Statement. The company as a whole shall ‘work towards obtaining consent from *significantly impacted* indigenous peoples.’¹²⁹ While Barrick Gold only mentions efforts to obtain consent, the referenced ICMM Position Statement explicitly addresses mining corporations’ obligations to ensure FPIC,¹³⁰ a principle that is never mentioned in Barrick’s policies.

Acacia Mining does not have a policy concerning indigenous peoples and their rights. There is, however, one reference made to indigenous peoples in the Corporate Social Responsibility Charter, which states that ‘[t]he employment of indigenous peoples and local community members is ... a priority.’¹³¹ The second reference is found in the Community Relations Policy, which states, among other things, that Acacia promises ‘[t]o consider the values, needs and concerns of Indigenous Peoples ... within our sphere of influence.’¹³²

Both Acacia Mining and Barrick Gold are not adhering to international standards and best practices on community relations with indigenous peoples. Barrick’s failure to include FPIC in its policy is flagrant, and Acacia’s complete lack of policy is concerning. On the positive side, both companies acknowledge the particular needs and concerns of indigenous peoples, and if they both build on that while attempting to follow best practices in the field, there are good chances of improvement.

4.2.11. Concluding comments on community consultation

In general, Barrick Gold has created a structure that provides strong possibilities for respecting the rights of indigenous peoples or other communities when they are at risk of being adversely affected by Barrick’s mining activities. The corporate governance mechanisms related to human rights and community relations are promising, as they allow for a certain level of independent assessment of business operations. While direct commitments are being made towards the creation of community development projects, the language is qualified and vague when it concerns substantive commitments to respect and protect communities. The consent requirement is only relevant as an aspiration when a community is significantly impacted by one of Barrick’s projects. While Barrick Gold makes significant commitments to engage with local communities and to respect human rights, in practice, it is clear that its attention is primarily focused on development projects (i.e. education and social projects) and the compliance of national legal rules.

Notes

- 1 AngloGold Ashanti, *Integrated Report* (2015), 158.
- 2 *Id.*, 7.
- 3 AngloGold Ashanti, *Homepage*, available at: <http://www.anglogoldashanti.com/en/Pages/default.aspx>
- 4 AngloGold Ashanti, *Integrated Report* (2015), 75.
- 5 *Id.*, 76.
- 6 *Id.*, 8.
- 7 *Id.*
- 8 *Id.*, 158.
- 9 *Id.*
- 10 *Id.*, 14.
- 11 *Id.*
- 12 AngloGold Ashanti, *Integrated Environment and Community Policy* (June 2009).
- 13 AngloGold Ashanti, *Management Standard: Community Complaints and Grievances* (Oct. 19, 2011), 3.
- 14 *Id.* (emphasis added)
- 15 *Id.*, 5.
- 16 *Id.*
- 17 *Id.*
- 18 *Id.*, 5–6.
- 19 *Id.*, 6.
- 20 *Id.*, 7.
- 21 Center for Social Responsibility in Mining, *Mining Industry Perspectives on Handling Community Grievances* (Apr. 2009), viii.

- 22 International Council on Mining and Minerals, *Human Rights in the Mining & Metals Sector: Handling and Resolving Local Level Concerns & Grievances* (Oct. 2009), 3; *Mining Industry Perspectives on Handling Community Grievances*, xi.
- 23 *Human Rights in the Mining & Metals Sector: Handling and Resolving Local Level Concerns & Grievances*, 4; *Mining Industry Perspectives on Handling Community Grievances*, xi.
- 24 Compliance Advisor Ombudsman, *A Guide to Designing and Implementing Grievance Mechanisms for Development Projects* (June 2008), 1.
- 25 *Id.*, 1–2.
- 26 Corporate Social Responsibility Initiative, John F. Kennedy School of Government, *Rights-Compatible Grievance Mechanisms: A Guidance Tool for Companies and Their Stakeholders* (Jan. 2008), 3.
- 27 AngloGold Ashanti, *Management Standard: Engagement* (Oct. 19, 2011), 3–4.
- 28 *Id.*, 4.
- 29 *Id.*, 5.
- 30 *Id.*
- 31 International Finance Corporation, *IFC Performance Standard 1: Social and Environmental Assessment and Management Systems* (Apr. 30, 2006), 3.
- 32 *Id.*, 5, 9.
- 33 *Id.*, 5.
- 34 See e.g. *IFC Performance Standard 1: Social and Environmental Assessment and Management Systems*; see also *Human Rights in the Mining & Metals Sector: Handling and Resolving Local Level Concerns & Grievances*.
- 35 AngloGold Ashanti, *Operational Profile Iduapriem* (2015).
- 36 *Id.*
- 37 AngloGold Ashanti, *Key Challenges*, available at: <http://www.anglogoldashanti.com/en/sustainability/Pages/Trust-Key-Challenges.aspx>.
- 38 AngloGold Ashanti, *Management Standard: Land Access and Resettlement* (Oct. 19, 2011), 3.
- 39 *Id.*
- 40 *Id.*
- 41 See International Finance Corporation, *IFC Performance Standard 5: Land Acquisition and Involuntary Resettlement* (Apr. 30, 2006).
- 42 AngloGold Ashanti, *Management Standard: Land Access and Resettlement*, 5.
- 43 *Id.*, 6.
- 44 *Id.*
- 45 *Id.*, 5.
- 46 *Id.*, 6.
- 47 *C.f.*, PS5, *Objectives*; AngloGold Ashanti, *Management Standard: Land Access and Resettlement* (Oct. 19, 2011), 3.
- 48 International Finance Corporation, *IFC Performance Standard 5: Land Acquisition and Involuntary Resettlement* (Apr. 30, 2006), 9.
- 49 AngloGold Ashanti, *Management Standard: Indigenous Peoples* (Oct. 19, 2011), 3–4. ILO 169 is only mentioned in relation to the definition of Indigenous Peoples.
- 50 *Id.*, 3.
- 51 *Id.*
- 52 ICMM, *Member Companies*, available at: <http://www.icmm.com/en-gb/members/member-companies>.
- 53 ICMM, *Position Statement on Mining and Indigenous Peoples* (May 2008), 2.
- 54 Even though it discusses ‘free, prior and informed consultation,’ see International Finance Corporation, *IFC Performance Standard 7: Indigenous Peoples* (Apr. 30, 2006), 9.
- 55 *Id.*, *Objectives*.
- 56 *Id.*, 9.
- 57 *Id.*, 13.
- 58 AngloGold Ashanti, *Management Standard: Indigenous Peoples*, 7.
- 59 *Id.*
- 60 *Id.*, 3.
- 61 *Id.*
- 62 *Id.*, 5.
- 63 *Id.*, 6–7.
- 64 Barrick Gold, *About Barrick Gold Corporation*, available at: <http://www.barrick.com/company/default.aspx>.
- 65 Barrick Gold, *Operations*, available at: <http://www.barrick.com/operations/>.

66 Barrick Gold, *2015 Responsibility Report* (2015), 27.

67 Barrick Gold, *Operations: Zaldívar (50%)*, available at: <http://www.barrick.com/operations/zaldivar/default.aspx>.

68 Barrick Gold, *Operations: Lagunas Norte*, available at: <http://www.barrick.com/operations/lagunas-norte/default.aspx>.

69 Barrick Gold, *Annual Report 2015: Partnership, Performance, Value* (2015), 104.

70 Barrick Gold, *Annual Information Form: For the Year Ended December 31, 2015* (2016), 12.

71 Acacia Mining, *What We Do*, available at: <http://www.acaciamining.com/about-us/what-we-do.aspx>.

72 *Id.*

73 Acacia Mining, *At a Glance*, available at: <http://www.acaciamining.com/about-us/at-a-glance.aspx>.

74 Acacia Mining, *What We Do*, available at: <http://www.acaciamining.com/about-us/what-we-do.aspx>.

75 Acacia Mining, *Mining in Africa*, available at: <http://www.acaciamining.com/about-us/market-context/mining-in-africa.aspx>.

76 Acacia Mining, *Annual Reports & Accounts 2015: Continuing to Transform Our Business* (2015), 10.

77 Barrick Gold, *Advancing Together: 2015 Responsibility Report* (2015), 6.

78 The relationship agreement also prohibits Barrick from the exploration or acquisition of gold or silver in Africa without giving Acacia the option to exercise rights of first refusal and requires that all transactions between Barrick and Acacia be conducted at arm's length and on normal commercial terms. *See* Acacia Mining, *Annual Reports & Accounts 2015*, 55.

79 Acacia Mining, *Annual Reports & Accounts 2015*, 55.

80 At 40% or more, Barrick has appointment rights as to the higher of three non-executive directors and the maximum that may be appointed under the UK Corporate Governance Code. *See* Acacia Mining, *Annual Reports & Accounts 2015*, 55.

81 Barrick Gold, *Annual Report 2015*, 171.

82 *Id.*, 104.

83 Acacia Mining, *What We Do*, available at: <http://www.acaciamining.com/about-us/what-we-do.aspx>.

84 Barrick Gold, *Responsible Mining Governance*, available at: <http://www.barrick.com/responsibility/our-approach/responsible-mining-governance/default.aspx>.

85 *Id.*

86 Barrick Gold, *Advancing Together*, 7.

87 *See* Barrick Gold, *Management*, available at: <http://www.barrick.com/company/management/default.aspx>.

88 Barrick Gold, *Advancing Together*, 19.

89 *Id.*, 23.

90 *Id.*, 74. Also, information briefs are published after visits by the CSR Advisory Board to Barrick Gold's mining operations. *See* Barrick Gold, *Summary of Meeting: CSR Advisory Board Meeting, June 4–7, 2016: Porgera Joint Venture, Papua New Guinea (PNG)*, available at: <http://www.barrick.com/files/csr-advisory-board/Barrick-CSR-Advisory-Board-Meeting-June2016.pdf>.

91 The board of directors is comprised of ten members, some of whom are independent and some who are not. *See* Acacia Mining, *Annual Reports & Accounts 2015* (2015), 49–50.

92 The 'Communication on Progress' report is however not controlled by the UN Global Compact, and the companies are solely responsible for the content in the reports. *See* UN Global Compact, *Barrick Gold Corporation*, available at: <https://www.unglobalcompact.org/what-is-gc/participants/1184-Barrick-Gold-Corporation#cop>.

93 For further reference, *see* Global Reporting Initiative, *G4 Sustainability Reporting Guidelines: Reporting Principles and Standard Disclosures* (2013).

94 Barrick Gold, *Advancing Together*, 136.

95 *Id.*, 21.

96 *See* Barrick Gold, *Advancing Together*, 5.

97 Barrick Gold, *Advancing Together*, 84; Acacia Mining, *Community Investment and Donations Policy* (Nov. 2014), 4.

98 Barrick Gold, *Advancing Together*, 13.

99 *Id.*, 60.

100 *Id.*, 61.

101 *Id.*

102 *Id.*

103 *Id.*, 72.

104 Acacia Mining, *Annual Reports & Accounts 2015*, 17.

105 Barrick Gold, *Advancing Together*, 84.

- 106 Barrick Gold, *Barrick Grievance Mechanism Officers Share Experiences, Best Practices, and Challenges* (Jan. 8, 2016), available at: <http://barrickbeyondborders.com/people/2016/01/barrick-grievance-mechanism-officers-share-experiences,-best-practices-and-challenges/>.
- 107 Acacia Mining, *Corporate Social Responsibility Charter*, available at: <http://www.acaciamining.com/sustainability/our-approach/corporate-social-responsibility-charter.aspx>.
- 108 *Id.*
- 109 Barrick Gold, *Advancing Together*, 15; Barrick Gold, *Barrick Grievance Mechanism Officers Share Experiences, Best Practices, and Challenges*.
- 110 Barrick Gold, *Advancing Together*, 15.
- 111 *Id.*, 65.
- 112 *Id.*, 93.
- 113 *Id.*, 68.
- 114 *Id.*, 67.
- 115 *Id.*
- 116 *Id.*
- 117 *Id.*
- 118 *Id.*, 68.
- 119 Acacia Mining, *Human Rights Policy* (Nov. 2014), 3.
- 120 *Id.*, 2–3.
- 121 *Id.*, 3.
- 122 Acacia Mining, *Annual Report & Accounts 2015*, 18–19.
- 123 Barrick Gold, *Advancing Together*, 73.
- 124 *Id.*
- 125 *Id.*, 74.
- 126 See Acacia Mining, *Annual Report & Accounts 2015*, 44.
- 127 As of 2015, Barrick Gold acknowledges that four of its sites are situated near indigenous ancestral lands. See Barrick Gold, *Advancing Together*, 75.
- 128 *Id.*
- 129 *Id.* (emphasis added).
- 130 ICM, *Indigenous Peoples and Mining* (May 2013), Position Statement, 2.
- 131 Acacia Mining, *Corporate Social Responsibility Charter: Our Communities*, available at: <http://www.acaciamining.com/sustainability/our-approach/corporate-social-responsibility-charter/our-communities.aspx>
- 132 Acacia Mining, *Community Relations Policy*, 1.

5

Developing an institutional and legal re-ordering for community engagement

5.1. Building trust with communities

The aim of community engagement is to build trust with communities and understand the local context of communities. In the six countries assessed, all the countries undertook a legislative approach that suggested consultation was seen as an end, and only employed to achieve a particular outcome. At the government level, sensitivity to community contexts and processes should be understood and embraced. Key principles that should govern such sensitivity include respect for community culture and practices, honesty and integrity in dealing with community structures, professionalism, frequent communication and elaborate time frames to build a trustworthy relationship. Communities should be given the opportunity for fair representation and the process of engagement should be ongoing to build trust. It is recommended that states develop legal frameworks that ensure that the government is sensitive to community contexts and processes and incorporates the principles highlighted. The scope of engagement should include discussions of both the costs and benefits of the project, and communities should be allowed to be part of the decision-making process from the pre-licensing approval stage to the exploration and mine closure stages of the project.

5.2. Partnership with communities

It is of utmost importance for states to understand the need to work with, rather than against, communities. As a first step, states should assist with capacity-building within communities, in order for them to be able to assert their rights. Furthermore, states should constantly be in dialogue with communities, to assess community attitudes towards mining operations. The tracking of public attitudes will help governments to decide where public understanding needs to be enhanced. This will enable governments to understand the needs of host communities.

Partnership with communities entails the development of clarity about the roles and responsibilities of the various stakeholders, clarifying the outcomes and expectations of communities and ensuring that the representative structures of the communities have the necessary mandate to participate and respond to community interests.

None of the companies assessed undertake deliberate strategies to be partners with their host communities. It is important for companies to recognise the need to work with communities by developing means of building capacity within a community for rights assertion. Companies should also keep track of community attitudes towards their operations. Tracking public attitudes will help companies to gauge where public understanding needs to be enhanced.

It is of utmost importance for states to understand the need to work with, rather than against, communities.

5.3. Establishment of an effective oversight authority

The Latin American approach, where specialised offices are established and responsible for community consultation, suggests the establishment of strong oversight mechanisms, which are lacking in the African countries, should be considered. In states such as South Africa with a rudimentary framework on community engagement, the oversight structures appear to be weak. Strong regulations do not achieve their desired objectives if states do not develop robust bureaucratic structures that will rigorously oversee compliance with implementation of the law. The weak enforcement regime in a country like South Africa to monitor compliance with the consultation requirements in its legal framework has created a need to overhaul the government's oversight structure and the South American options are useful models to consider.

5.4. Community right to consent

It appears that none of the countries addressed explicitly recognises the absolute right of communities to give consent to a project. To address this, states should ensure that the consent of communities must be obtained before a mining right is allocated to a company. Such a process should be culturally sensitive to the needs of communities when engaging with communities to understand their objections to mining right allocations. Furthermore, in the company case studies examined in this report, no company offered unequivocal commitments to withdraw from a project if a community decides to withhold consent. Companies should adopt an explicit policy commitment on community engagement in line with international principles and develop an implementation guide on the policy statements which should be publicly available.

5.5. Community inclusion in project monitoring and evaluation

In the company policies assessed, the companies all undertook an approach in their policies which meant that consultation was seen as a required means to an end, a box to tick off. Corporations must show sensitivity to community contexts and processes. Communities should be given the opportunity for fair representation and the process of engagement should be ongoing to build trust. It is recommended that corporations institute mechanisms that ensure that they are sensitive to community contexts and processes.

5.6. Transparency and information disclosure

The right of access to information is a recognised international human right, which can also enable the realisation of other rights.¹ In some countries, such as South Africa, the application of the right by the public extends to the private sector. Where transparency practices are opaque, a general access to information law can be used to obtain information about community engagement plans. However, it would be preferable for specific access to information requirements to be applicable to the extractive industry, given the dire lack of transparency in the case studies assessed. Furthermore, there is no specific access to information guideline in the companies reviewed. It is recommended that publicly disclosed information should be accessible on platforms available to communities and

in a language understood by community stakeholders. The information should be extensive and should include relevant information affecting communities, such as environmental impact assessments.

5.7. Community representation

The company policies examined in this report show that community engagement policies are thin on understanding the culture and social dynamics of communities. Therefore, company policies should embrace the diversity of communities and should allow various voices within a community to be represented, including giving an adequate platform to women. Community engagement will be improved when local stakeholders are empowered to play an active role in designing and implementing procedures that reflect the differing interests of all those impacted.

5.8. Adoption of international standards and domestic regulation

In the case studies conducted, a minimalist approach has been taken to the adoption of international commitments and principles. Word substitutions have been employed to claw back the depth of some recommendations when adopted into company policies. Furthermore, none of the companies reviewed explicitly adopted the language of domestic regulation in their policies. Consequently, companies should aim to comply with the spirit of the law and should not adopt a minimalist approach to legislative compliance.

5.9. Strengthening grievance mechanisms

The companies studied have all created local grievance mechanisms that are neither explicitly defined, nor are the processes transparent. It is important that companies specify the operation and process of their local grievance mechanisms in order to achieve significant improvements for local communities. Companies should improve their grievance mechanisms by clearly articulating the standards and processes. It is also recommended that multinational corporations ensure strong uniformity in their grievance mechanisms across different locations.

5.10. Development of domestic regulation

African states are lagging far behind their South American counterparts in terms of adopting community engagement regulations. States should progressively adopt laws that promote community engagement practices. In the South American countries where local consultation laws exist, none of the companies reviewed in this report makes explicit reference to local laws in their commitments to community engagement. For a committed adherence to this principle, companies should explicitly reference their legal obligations under domestic law as opposed to cursory references to international voluntary principles.

5.11. Multi-stakeholder oversight

In the countries assessed, none of the Extractive Industry Transparency Initiative (EITI) countries have a behavioural difference from countries that are not members of the EITI. This is not surprising, given the lack of emphasis of the EITI framework on community involvement in the exercise of oversight on the extractive industry. While the EITI establishes a multi-stakeholder group, membership of such multi-stakeholder group is entirely dependent on the countries and the representatives, and where communities are excluded from the group, this becomes a missed opportunity for communities to exercise oversight over the overall revenue transparency process in a country. Therefore, multi-stakeholder initiatives like EITI should ensure greater participation by communities in the oversight process.

Furthermore, at a government level, both the national and sub-national governments are needed in exercising oversight over the compliance of companies where the right regulations are in place. It also requires proactive oversight from a previously identified stakeholder – investors – who can exert influence and control over companies to exercise a more principled approach that embraces the spirit of the relevant laws towards community engagement. To drive company reform from within, such as mainstreaming community engagement and approaching it from a human rights protection perspective, other stakeholders, such as civil society organisations and labour unions, should invest in companies to ensure they secure a formal voice by exercising shareholder rights within corporate structures.

5.12. Mainstreaming community engagement in company operations

The recommendation in the UN Guiding Principles for corporations to address the risk of causing or contributing to human rights abuses shows that community engagement is not grounded in an approach that embodies the duty of corporations to society, rather than to shareholders. The principle of working with communities as partners requires a process of mainstreaming into the operations and management of a company. A way of achieving this is to have a diverse company board that is representative of all five stakeholders identified earlier in this report. Such representation will allow a diverse range of experience and representation of interests to be involved in the business strategy of a company.

From the case studies in the report, it is evident that companies are increasingly recognising that they benefit from community engagement. Through active community engagement, companies can prevent conflicts that are financially costly, for example, closing down of operations. Therefore, it is recommended that companies develop guidelines to mainstream community engagement as a primary operational objective in the implementation of projects. Through committing to withdraw from a project when affected communities withhold their consent, the company can ensure good faith community engagement.

5.13. A role for communities in the process of licensing applications

In one of the countries assessed, South Africa, there is a duty for communities to be consulted before a mining licence is approved.² However, the duty to consult does not mean that communities have a right to consent. This means that though communities can object to the licensing and approval of a project, the community consultation requirement is no more than a statutory criterion for companies to indicate that communities were consulted and the project can proceed. The law is silent on how the government will apply the information obtained during the consultation process. In the South African case, the process of consultation is sometimes outsourced, which creates further divisions within communities.³ Consequently, principles of participation, representation and respect for cultural rights have in some cases been violated.⁴

While it can be difficult to identify who forms part of an affected community or the legitimate representatives of a community, the community consultation obligation should not rest solely with companies but should be jointly shared with government authorities. The voluntary self-regulation of companies in adhering to principles of community engagement in recognition of their pursuit of a social licence to operate is not ideal. Mandatory regulation that builds on the applicable law as it applies in Peru is required to specify the consultation requirements in the application process for mining licences.

None of the legal frameworks examined provides for consultation with communities through the various stages of exploration and for consent to be re-affirmed, where necessary, when there is a deviation from the initial agreed parameters of a project. It is necessary for governments to establish the necessary legal frameworks to ensure that the community engagement process is clear for both companies and communities to interact with each other throughout the various phases of a project.

5.14. Community engagement through a human rights perspective

To move away from the UN Guiding Principles recommendation to respect human rights towards a proactive duty to protect human rights, directors of corporations should have a duty of care towards human rights compliance.⁵ This will impose human rights responsibilities on corporations and human rights victims will have enforceable rights and remedies against companies and their directors.⁶

Notes

- 1 See Inter American Court of Human Rights, *Claude Reyes v. Chile* (Apr. 20, 2009).
- 2 Minerals and Petroleum Resources Development Act 28 (2002), section 16(5).
- 3 See e.g. *Bengwenyama Minerals (Pty) Ltd. v. Genorah Resources (Pty) Ltd.* (2011), (4) SA 113, which dealt with a case where a mining company outsourced its consultation requirement to another company and consequently resulted in protracted disputes with the community.
- 4 *Bengwenyama Minerals (Pty) Ltd. v. Genorah Resources (Pty) Ltd.* (2011), (4) SA 113.
- 5 Peter Muchlinski, *Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance, and Regulation* (2012), 22/1 Business Ethics Quarterly, 146.
- 6 *Id.*

6

Conclusion

The recommendations made in this report take into account the position that has been taken by the countries considered that despite the adverse consequences of resource extraction, their economic development rests on the continued exploitation of mineral resources. The regulatory frameworks in place have been designed with the right ideas in South American countries. However, they do not go far enough in realising the rights of communities to give consent to resource extraction. In the African countries, there is an alarming absence of regulations to define the parameters of community engagement. The policies of corporations in this report have too many loopholes in implementing and enforcing compliance with objectives of community engagement. Overall, these weaknesses fail to ensure that the extractive industry, in an age of environmental degradation and rising economic inequality with significant impacts on local communities, should be driven by sustainability that takes into account bespoke public interests of locally affected communities. The public interest includes the representation, participation and indeed the right to consent to extractive operations by communities. The involvement of communities must be underpinned by robust access to information mechanisms and strict adherence to the rule of law. We hope the findings and recommendations of this report will help governments in improving their domestic regulations, corporations in strengthening their policy and practice, and civil society in pushing for reform.

