

## **Informed Consent and Mining Projects : Some Problems and a Few Tentative Solutions.**

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The issue of informed consent for mining projects from affected communities in Australia and the developing world has arisen in the context of widespread criticism of past practices. In Australia, North and South America and some Asian countries, the concerns have focussed especially on the land rights of indigenous peoples and ethnic minorities – groups who often have been marginalised during colonisation and so tend to live in the remote areas where mining often occurs. In most of Melanesia (Papua New Guinea, Vanuatu and the Solomon Islands – but not Noumea) the indigenous people have retained customary land tenure over their lands and very little has been alienated by governments. This means that the situation relating to informed consent is very different from that pertaining to Aboriginal peoples' rights over land in Australia, Canada, Indonesia and in some parts of Asia and the United States. Moreover, the variation in legal rights means that processes for gaining informed consent will necessarily be great. In this brief paper I want to raise some of the problems that emerge from a 'catch-all' appeal to informed consent. My examples will mainly be drawn from Papua New Guinea, because I draw on my own experience there working on mining projects, but many of the same problems arise in other contexts.

### **Who gives informed consent from a 'community'?**

In many places, the community of people living in a specific area does not necessarily coincide with the group who are customary landowners. This is especially the case in countries where there is little employment in remote or rural areas, so many people move away in search of work. In places where customary ownership is recognised, such as Papua New Guinea, this means that at the time of exploration and negotiation, those who are most well-educated are often away in towns. The same scenario occurs in the Philippines, in Canada and in Australia. In some areas of Indonesia such as Kalimantan and West Papua, where the indigenous peoples have

not been able to exclude immigrants from heavily populated areas of Java and Sumatra, the 'traditional landowners' are outnumbered by immigrants – many of whom have lived there for generations and so must be considered legitimate members of a 'community', even though they might not have customary claims to land. In the case of Indonesia, where resettlement has been managed by the State, these migrants have legal titles granted by the State. Effectively, this is similar to some areas of Australia where various lease arrangements obtain [legal rights], but Aboriginal people will have customary rights.

The issue is then – *who* is to give consent? Is the question one of effect on a *community of people* who live, work and have rights to some areas of land? Or is the consent to be obtained from those who are indigenous and have customary rights to *the land*, even when these are not recognised by the State? Is the group who is to give consent to be defined in terms of residential status, customary rights, legally recognised rights according to the national law or genealogical connection to the original customary owners?

### **Which people in a community give consent?**

The same question has different implications too with respect to the idea of representation and recognition of traditional or customary political rights. In Papua New Guinea this issue has particular problems with respect to the constitutional rights of all Papua New Guineans as citizens. For example, if a community of customary landowners deal with a mining agreement in terms of customary modes of representative authority, the legal rights of young adult men and women are ignored. Male clan leaders will usually be recognised as 'speaking for' the community. However, at Bougainville, Porgera and most recently on Lihir women have voiced their dissatisfaction with the processes that excluded them on the grounds of 'custom'. Women from Africa, India and North and South America make similar criticisms. At the conference "Women and Mining : Voices for Change" held in Madang in August 2003 (organised by Oxfam-CAA and The World Bank) women from nineteen countries unanimously agreed that women must be consulted and their consent given before any project is established. They appealed to their Human Rights and their rights as citizens of their respective countries.

## **Women's Voices and Women's Rights**

Bougainville and Lihir are both places where land is held and transmitted matrilineally. However, at the time of exploration and negotiation, women from these communities were unfamiliar with processes of political meetings. Few spoke English and many did not feel confident to challenge their menfolk – even when they disagreed with them. As time passed they realised that in many instances men had used their positions as clan ‘spokesperson’ or representative to effectively disenfranchise their sisters and their sisters’ children. In societies such as these, men compete for rights over land and some used the mining negotiations to ‘win’ land from other clanspeople. In a few instances where a woman was the last remaining member of her group, male relatives by marriage (all of whom were living on the land and therefore part of ‘the community’) used the mining negotiations to gain control over land that would otherwise have gone to her clans people who were not at that time resident.

The systems of customary land tenure and the complex traditions that excluded women from having a political voice did not in the past mean that a woman and her kin could ever ‘lose’ land. It could not be transferred outside the clan without complex ritual exchanges that were witnessed by all concerned. But from the mining company perspective they are gaining consent from the ‘traditional owners’ in ways that men and women (at that time) agreed were in accordance with customary decision-making procedures.

Years later, when women realise that their male relatives agreed to the use or destruction of land that they can never regain, many feel doubly betrayed. They believe now, that had they been made aware of the implications of giving up rights to land, they would have chosen differently from their men. After all, in these cultures women are the ‘breadwinners’ who grow the food for their families. They maintain that they should have been informed by the company of all implications and been able to give or refuse consent by virtue of their constitutional and human rights. While many concede that at that time, women were reluctant to attend meetings or speak out, they argue that previous experience of the impacts of mining on subsistence and on the lives of women and children, responsible miners should have ignored the appeal to ‘custom’ and proceeded according to the national laws and to CEDAW [UN

Convention on the Elimination of All Forms of Discrimination Against Women – 1979].

### **Absent Customary Landowners and Present Community Members**

In Melanesia, as in most developing countries, when a mining project is established the value of land alters. It can have a cash value attached where previously none had existed. Its former uses no longer determine its primary value. For example, the caldera where the mine is located on Lihir was not used for gardens because it is a geothermal region. The ground was very hot in some places, warm in others. One group used the hot rock pools to cook food, but generally the land was not valued highly because it was unsuitable for gardens. On the fringes, people who had come to live on Lihir as spouses or who had no land rights were given this low value land to garden. In some cases they had been there for generations – they were part of the community. According to Lihirian customary law they had no ‘traditional’ land rights and the clan owners were correct in excluding them from any negotiation. However, as residents on the land, they would have to move and re-establish rights in another area. The mining company was committed to providing relocation housing for Lihirians who had to move. But the landowners could legitimately claim that these other people were simply ‘tolerated visitors’ and not entitled to housing. Should their consent have been required?

At the same time, as on Bougainville, many highly educated Lihirian people had left the island to find employment. They had not lived there as adults and had no houses on their lands. Many had married non-Lihirians – who of course had no customary rights to land there. Sometimes people had lost touch and did not know where their relative was living. But these people often had a much better informed understanding of the implications of industrialisation and social change. Some had even worked on other mining projects. As non-residents at the time of negotiation, with no gardens or houses, but with dormant rights that traditionally they could re-invoke if they returned, should they be among those who give informed consent?

This is a crucial question – because in most developing countries there is an influx of ‘returnees’ seeking employment near family and in a place where they have land rights. These people usually return to find employment *after* the mine has begun.

Because of their higher education, broader understanding of industrialisation and their rights as *citizens*, this group is often retrospectively very critical of the negotiations. In my experience in Papua New Guinea and from reading about mining projects in Indonesia and Brazil, these employed returnees are usually the leaders in political opposition to the mining agreements. They are the most articulate in their appeals to both customary and legal rights – and they are often able to make their case better because they can speak the language of mining company managers and they are able to forge alliances with pressure groups outside.

In my opinion, these people should not be denied a voice in any process that affects land to which they are legitimately entitled by custom. But their absence means that ‘prior consent’ is often impossible to gain. In Papua New Guinea, where newspaper advertisements are generally placed by negotiating companies as a means of informing absentees and inviting applications for employment, the first year rarely ‘picks up’ even half of those who actually return once the project is underway. In places such as the Philippines and Central American nations, where many absentees are away working in other *countries* on contracts, the process of return is even more prolonged. Gaining *prior* consent presents great difficulties that are often glossed over because the political criticisms emerge long after the mine has begun. People ‘forget’ that at the time of initial negotiation the population was small, leadership was in accordance with traditions that have since changed, ideas about representation were not in question and the ‘community’ comprised a different set of people with different interests.

### ***Informed Consent***

The requirement of informed consent is similarly incontestable, since not to inform people of the nature and implications of a mining project effectively amounts to fraud. But what information should be given? Much of the criticism on issues of information to affected communities has been made by external international critics who concentrate almost exclusively on environmental damage. Even where this is acknowledged, as in Ok Tedi and Bougainville, the extent and nature of the damage is disputed by antagonists. There are major problems in communicating scientific studies to communities where people are illiterate and where their understandings of their natural environment are not commensurate with scientific explanations. In many

developing countries traditional understandings of the environment derive from religious or cosmological knowledge systems and from their use of resources. Developing ways of explaining scientific predictions, models of environmental impact and understandings of temporary and permanent transformation is an essential component in the process of informing people. The research work in this area is only just beginning and as yet the majority of environmentalist activists and mining companies do not draw upon it. Environmentalist critics usually draw on a fanciful image of indigenous people as ‘natural stewards and custodians’ and of the environment prior to mining as being in some homeostatic balance with the human population. Mining companies operate with another idea – that of the environment and the population as ‘undeveloped’. Both are usually incorrect in their assumptions. There is a burgeoning literature from environmental and social scientists on the topic of ‘traditional’ ecological knowledge and the ways that it meshes (or more usually fails to mesh) with Western scientific models of environmental transformation. These studies reveal that ‘informing’ people with accurate scientific information at the beginning of a project will not be very useful. However, offering simplified lay explanations as part of the process of gaining consent lays companies open to the justified claim that they did not give detailed accurate information.

Moreover, as the company is presumably trying to gain community consent, the problem of unbiased information is paramount. Should the company provide the information or should some neutral party be responsible? Who would fund the process? If it was the mining company, would this not lead to questions of influence?

The emphasis on environmental damage derives from the interests of people in Western industrial societies (who have already damaged their environments). The social problems that tend to arise around mining operations in undeveloped countries are often of more concern to local people than the environmental issues. At the ‘Women and Mining’ conference mentioned above, the impacts that women thought were most negative were all social in nature : alcohol consumption, violence, increases in crime, economic disparities, gambling, prostitution, family breakdown, the changes in authority structures, in-migration, problems of disaffected youth and the introduction of new diseases, most particularly HIV/AIDS. Mining companies at the beginning of a project have their own reasons for ‘playing down’ the likelihood

that these problems will emerge and small rural communities tend to not believe that ‘their community’ would be subject to such changes.

In my view, a commitment to ‘free, prior and informed consent’ necessarily entails a commitment to a process of educating and informing people about the ‘worst case’ scenarios and the likelihood that some of these will eventuate. This means undertaking thorough environmental and social risk assessments and communicating the findings to local people in ways that are comprehensible to them. It also means undertaking research to determine the most culturally appropriate way of transmitting this information and wherever possible ensuring that people actually understand the scientific information prior to making a decision.

The most devastating environmental damage from mining and the most socially disruptive impacts have often been those which have either not been predicted, or were perceived as low risk. Obviously companies have been working to improve this, but it does suggest that in the interests of transparency in future, even ‘low risk’ predictions should be fully communicated and the reasons why the company perceives them as ‘low risk’ presented so that people can make their own judgements. Unless companies are prepared to inform people fully and in the context of worst-case scenarios present strategies for the company’s role in averting and avoiding negative impacts, I believe ‘informed consent’ will not be attainable.

Such procedures will inevitably add considerable costs at the front end and would necessitate major changes to the ways that mine financing is currently structured.

### **Determining levels of consent**

Providing information is likely to be an expensive operation and assessing whether consent has been given will be similarly difficult and costly. The idea of ‘informed consent’ is derived from Western European traditions of Human Rights and the freedom of the individual citizen. It assumes a nation state exists to protect and maintain the rights of people and that all people will be equal under the law. The appeal to ‘rights’ also assumes rational individual choice so that each person is deemed capable of making decisions in respect of his or her interests and the group he or she identifies with – whether that is an ethnic group, a clan or a political party.

In view of the legal and philosophical tradition on which this principle rests, the only decisive way of determining community response or consent would be a plebiscite by secret ballot with 'one person/one vote'. Even then, the decision about whether a decisive vote would be a majority, consensus or some proportion in favour, would need to be agreed upon prior to the vote.

In order that the results of such a vote be legally acceptable it would have to be conducted in accordance with fair and transparent electoral principles. This would require preparation of an electoral roll of all eligible voters; management of the plebiscite to ensure that there was no fraud, undue pressure or bribery of participants and no tampering with ballot boxes or results. Once again the question of who would finance and manage such a process would be a contentious issue. Ideally the government should be the initiator and the agent for the plebiscite – but as the community might be in conflict with the government over approval of the mine, this would be problematic. If the mining company financed and conducted the process, there would be an easy inference of bias and special interest that could taint the result.

### **Some brief conclusions and opinions**

I believe that the catch-cry for 'free, prior and informed consent' is easily made and very hard to implement faithfully. If a commitment is to be made in good faith, then I think that it cannot be made without a detailed presentation of principles, processes and responsibilities. Given the changes in who constitutes the 'affected community' and 'customary landowners' prior to and over the life of a mine I think that the emphasis on '*prior*' consent is not going to solve the problems its proponents envisage.

In my opinion it would be more realistic, and ultimately more just, to require that agreements between local communities and mining companies are regularly reviewed and that there is a process of continuing education and dissemination of information relating to negative impacts associated with the right of communities to withdraw consent. I think that the right to renegotiate the agreement should be established from the outset and that any changes in mining processes, ore through-put, employment

policies or other procedures that could have a negative effect on the natural or social environment must be made the grounds for review and renegotiation.

The implications of a commitment to free, prior and informed consent are extensive for the community and financially costly for the government or company who has to undertake the procedure. Undertaking a census; compiling an electoral role of people in accordance with the principles of who is rightfully a 'customary owner'; accurately informing people of all the issues they are consenting to in an open and appropriate way; ensuring that the vote is conducted democratically and being prepared to accept a negative vote from the community as an effective veto are part and parcel of a commitment to 'free, prior and informed consent'.

In my view, neither the mining companies nor the NGO proponents have really considered the implications of free, prior and informed consent, nor how it might be reasonably achieved. In cases where gross disregard for the rights of local communities has been associated with the establishment of a mine, such as at Freeport in Indonesia, the government wanted the mine to proceed and was prepared to forcibly remove local people who did not agree. If a company were intending in such circumstances to seek community consent, then an oppressive State would still be able to forcibly evacuate the area and so deprive people of all land as well as their rights. I strongly support the objective, but I fear without having any clear guidelines or processes outlined it will become a token activity that is no advance on 'community consultation' – which at present can mean anything from all of the processes I have suggested above to having an informal chat with a few men who designate themselves 'community leaders'. Unless commitment is matched by an agreement to a clearly-defined set of principles and processes it will be a sham.