

# POLICY BRIEF

## A House Undermined: Transforming relations between mining companies and Indigenous Peoples in the Americas

In March 2008, a helicopter with a large ball suspended from its underbelly appeared in the skies over the territory of the Embera Chamí, an Indigenous People in eastern Colombia. It reappeared every day for a month, hugging the contours of the land and hovering over mountains sacred to the people living on the Cañamomo Lomapieta reserve. Each time it loomed overhead, people panicked and ran for cover. During the extended conflict in Colombia, Indigenous Peoples<sup>1</sup> have been murdered, tortured, raped and subject to mass displacement, forced disappearance and forced recruitment into combat units. Their lands have been occupied by guerilla, paramilitary and other illegal armed groups.<sup>2</sup> This bitter history, coupled with the appearance of the helicopter, persuaded the Embera Chamí that they were about to be killed.

Only after community leaders publicly denounced the flyover were they told a multinational mining company hired the helicopter to survey their land.<sup>3</sup> While the company had secured government permission, it ignored the constitutional right of the Embera Chamí to prior consultation and consent. Had contact been made, the company would have learned that the local people would not countenance large-scale mining on mountains central to their cultural identity, or on land crucial to their livelihood. The company, as it turned out, had wasted its money on a survey, frightened and angered the local people and damaged the firm's reputation. "They had disrespected us in our own house," said Hector Jaime Vinasco, then Chief Governor of the Cañamomo Lomapieta reserve. The government, ignoring its obligations, suffered a decline in its already weak support among Indigenous Peoples.

This incident in Colombia is one of thousands playing out across the world as companies, encouraged by soaring global demand and favourable investment conditions, take their search for minerals, oil and gas to ever more remote areas, where they inevitably come into contact with Indigenous Peoples. Some Indigenous communities are not willing to consider projects they feel will threaten their environmental, social and cultural survival. But others welcome the potential economic benefits from extractive developments, as long as the highest environmental and social standards are followed, their views are considered and their rights respected and upheld.

Photos: Primary rainforest in West Suriname and ancestral territory of the Lokono and Trio Peoples. A multinational firm explored the area without first assessing environmental impact or consulting with Indigenous communities, contrary to its own policies.

### Key Points:

- At the root of conflict around mining, oil and gas is the enormous power imbalance that exists between Indigenous Peoples defending their land and way of life on the one hand, and companies and governments pushing for extractive projects to go ahead on the other.
- As extractive activities slated for Indigenous lands intensify with soaring global demand, there is urgency in addressing governance gaps in home and host countries to ensure decision-making that upholds the rights of affected communities.
- Voluntary mechanisms are largely ineffective because there is no penalty for ignoring them.
- Implementing the right to free, prior and informed consent is critical to strengthening governance, transforming relations between Indigenous Peoples, industry, investors and government, and reducing conflict.



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The rights of Indigenous Peoples, particularly the right to free, prior and informed consent over developments affecting their territory (see box), are enshrined in a variety of international instruments, and increasingly in national laws and international jurisprudence.<sup>4</sup> If extractive projects are to proceed peacefully and deliver maximum benefits to all concerned, then relations between companies, governments and Indigenous Peoples must be transformed. Our goal in launching a decade-long, multi-country research project was to find out how this could be

achieved. A large part of the answer is ensuring that free, prior and informed consent is understood, respected and implemented.

### Where we started

In the late 1990s, as public pressure was growing to implement appropriate consultation processes for extractive projects affecting ancestral lands, The North-South Institute (NSI) partnered with Indigenous organizations to examine the issue from the perspectives of Indigenous Peoples.

Our early research (2000-2002) focused on Indigenous assessments of consultations and decision-making initiated by government and industry, identifying critical elements for strengthening these processes. Our later research (2004-present) examined how best to support communities dealing

with the extractive sector, with an emphasis on how they can achieve free, prior and informed consent in decisions about proposed projects affecting their lands. The research in each country responded to the needs identified by participating communities and organizations.

In *Suriname* we looked at the potential impacts on Lokono and Trio Peoples of proposed large-scale bauxite mining, including a potential hydroelectric dam, smelter and related infrastructure. We undertook both community-based and independent expert research. Our partner was the Association of Indigenous Village Leaders in Suriname.

In *Canada* we examined lessons learned by the Lutsel K'e Dene First Nation in the Northwest Territories in their negotiations with multinational companies. We examined Indigenous participation in mineral policy dialogues at the national level, held a workshop on free, prior and informed consent in Canada and arranged exchange visits between the Dene of Canada and Lokono People of Suriname. Our partner was the Lutsel K'e Dene First Nation.

In *Guyana* we documented the activities of Canadian companies and assessed alternative livelihoods to small-scale mining by Indigenous communities. We helped strengthen capacity through workshops and the production of a series of practical guides on implementing free, prior and informed consent, impact assessment and negotiating agreements. Our partners were the Amerindian Peoples Association and the Forest Peoples Programme (United Kingdom).

In *Peru* we analyzed negotiations and conflict around the Tintaya Mine, the processes a Canadian oil and gas company used by which they claimed free, prior

Photo by: Viviane Weitzner

The Chief shows a map of traditional Lokono territory to community women. Community-based mapping is one tool for Indigenous Peoples to show how they use and occupy land, and to defend their rights.

### Free, prior and informed consent means:

**Free** — The proponent cannot use violence, threats, intimidation, pressure, manipulation or bribery, and must act in good faith.

**Prior** — Negotiations should start before plans are decided, before permits are issued, before prospectors start exploring, and long before construction begins.

**Informed** — The proponent must provide all information on the proposal, in forms and languages communities can understand; communities should also be supported in their efforts to gather additional information on the full range of possible impacts and be given the time they need to understand these.

**Consent** — Any decision to say “yes” or “no” that comes from traditional or other authorities freely chosen by the people to represent them. These decisions should respect customary laws and decision-making processes that take into account the concerns and interests of different community members — women and men, young and old.

and informed consent had been achieved, as well as Canada's role in Peru's extractive sector. Our partner was the Peruvian organization CooperAcción.

And in *Colombia* our ongoing project will yield concrete recommendations on how to make free, prior and informed consent work in the context of armed conflict. Our research is aimed at developing protocols on free, prior and informed consent, strengthening the management of artisanal mining, opening a dialogue with government and the private sector, and analyzing how best to hold companies to account. Our partners are the Embera Chamí of the Resguardo Indígena Cañamomo Lomapieta (the Cañamomo Lomapieta Indigenous reserve) and Afro-descendent communities of northern Cauca represented by the Proceso de Comunidades Negras (Process of Black Communities)- Women's Association.

## Snapshot of key findings

No two countries have the same political, legal, institutional and cultural context. For example, Suriname has no laws protecting Indigenous rights to land or requiring environmental impact assessments. In contrast, Colombia boasts one of the most progressive frameworks for ethnic rights protection in the world, although rights are not upheld in practice. Yet despite these differences, common issues emerge.

## Fundamental issues

At the root of conflict in the extractive sector is the enormous power imbalance between communities on the one hand, and companies and governments on the other. Communities also have a different conception of what constitutes appropriate development and who owns the resources below, on and above ancestral lands. While states continue to insist on their rights to these resources, international courts continue to clarify and recognize Indigenous rights. In this context, free, prior and informed consent processes are recognized not only as a minimum requirement for upholding Indigenous rights; they are also critical tools for bridging fundamental cultural differences.

## Host governments

Every multinational extractive company answers to both the government of the country where its headquarters are located (the home government) and the government of the country where its activities take place (the host government). Our research highlights the extent to which host governments, eager to attract foreign investment, too often put the interests of companies above those of communities. Systemic problems allow this to continue.



Chief among them is unrecognized or unsecured rights to ancestral lands. In Suriname, for example, Indigenous Peoples hold no title to their lands. In Guyana, titles cover only one-third to one-half of lands considered ancestral and there are cases where the government has ignored title in order to allow mining to proceed. Speedy resolution of land claims is the number one priority for Indigenous Peoples.

Another critical issue is lack of appropriate consultation and consent processes when concessions are issued and permits granted for exploration and exploitation. In all of the countries we looked at, companies can secure a concession without any consultation at all, contrary to international norms and legal precedents. Even when a company or government initiates consultation, community participants usually feel it is an empty formality.

Ultimately, there is a disconnect between national legislative frameworks and international commitments (all countries involved in our research now support the United Nations Declaration on the Rights of Indigenous Peoples). There is also policy incoherence. For example, Guyana welcomes and encourages large-scale mining, while committing to preserve its forests and promote low-carbon development under climate change mitigation schemes. Many governments lack the capacity to conduct impact assessments or monitor extractive activities. And appropriate domestic remedies for legitimate complaints are largely absent.

Yet there are signs of progress. Host governments are starting to understand that they need to secure more benefits for their country and their people from extractive projects. In Suriname, for example, the government is reviewing its agreements with companies to strengthen its hand in future negotiations. Reason for hope can also be found in Colombia, where the constitutional court has invoked free, prior and informed consent in recent decisions, and where the government is considering a new law on prior consultation that could include consent. And in

Rodolfo Stavenhagen, former UN Special Rapporteur on Indigenous Rights, listens as Hector Jamie Vinasco explains a memorial to Indigenous leaders killed in Colombia for standing up for the rights of their people.

the Yukon Territory in Canada, the Oil and Gas Act refers explicitly to consent.

## Home governments

Home governments worsen the power imbalance when they intervene on behalf of their companies without investigating how their actions affect Indigenous rights. In Colombia, for example, Canada helped finance a reform of the mining code that resulted in a series of regressive outcomes, including the erosion of Indigenous rights to territory. The new code also sets onerous demands for artisanal miners who risk being declared illegal.<sup>5</sup>

The potential for conflict over extractive development is extremely high in countries where land claims are not settled, environmental impact assessment procedures are weak or non-existent, Indigenous rights are not officially recognized, judiciaries are weak, or in the case of Colombia, where there is armed conflict. Yet few legal instruments exist for Indigenous communities to seek remedy in a company's home country. With Canadian companies not only the front runners in exploring the world's resources, but also increasingly known for fuelling the largest percentage of mining-related conflicts, there is much at stake in establishing a mechanism that ensures accountability.<sup>6</sup> Indeed, Canada has been urged by the UN Committee for the Elimination of Racial Discrimination to explore ways to hold Canadian corporations to account for their actions abroad that negatively affect the rights of Indigenous Peoples.<sup>7</sup> While Canada has recently established a counsellor for corporate social responsibility, this office has a weak mandate that will not lead companies to change their behaviour.<sup>8</sup>

## The company

Many companies and industry associations have policies on corporate social responsibility. Some even have far-reaching policies on Indigenous Peoples. On their own, these voluntary mechanisms are largely ineffective because there is no sanction for ignoring them. They cannot take the place of strong protection, regulation and enforcement by host and home governments. In Suriname, a multinational firm explored a large tract of primary rainforest without undertaking an environmental impact assessment or consulting the local Indigenous communities, even though its own policy called for both. After the fact, the company issued a public apology. It did not, however, restore the damage it had done to the environment.

Too often what a company or government calls consultation is delivery of information that is not

culturally appropriate and is difficult to understand. And too often, customary decision-making processes are undermined.

We have seen cases where there is intense pressure for decisions to be made or where negotiations proceed in bad faith. In Suriname, a multinational company pressed the Lokono people to sign an extremely weak agreement, without allowing the Lokono time to conduct a legal review and without legal counsel present. Yet the company had its legal counsel present throughout.

## Indigenous Peoples

The power imbalance between government, industry and Indigenous Peoples makes it difficult for the weakest party – almost invariably the Indigenous People – to insist on their right to free, prior and informed consent. In Guyana, community members felt intimidated when they were presented with complex documents on a national conservation scheme at meetings with government ministers who had flown in to “consult.” Before the people had time to understand the documents, let alone express an opinion on them, the ministers were gone. However, we found evidence that Indigenous Peoples are responding by strengthening their capacities, issuing their own guidelines for free, prior and informed consent, and using these in negotiations.

Governments, companies and Indigenous Peoples can all help transform the relationship between Indigenous Peoples and extractive firms. Here are our recommendations:

## Recommendations

### 1. Recognize that Indigenous Peoples have a right to free, prior and informed consent

Governments and companies must recognize that Indigenous Peoples are not simply other stakeholders to be consulted in projects affecting their territories. They have a right to free, prior and informed consent. Their self-determination, autonomy, cultural identity and responsibilities to future generations are inextricably linked to this right.

### 2. Strengthen host country governance

Host governments should:

- Develop effective, fair and transparent mechanisms for clarifying territorial rights and resolving land claims issues. These must involve Indigenous representatives and experts chosen by the community.

**“It’s not only leaders that want our people’s wellbeing. We, the women, elders and young women, are ready to struggle for our territory. We’ve always done so. It they contaminate us, how will we live? What are we going to eat?”**

- Achuar woman, Peru

- Review current legislative frameworks – or develop these where they do not exist – to align with the UN Declaration on the Rights of Indigenous Peoples. Clear provisions should be made for obtaining free, prior and informed consent in all projects and plans affecting ancestral territories.
- Review environmental and social impact assessment procedures so they incorporate due diligence on human rights, provide for meaningful participation of affected communities, and incorporate Indigenous knowledge.<sup>9</sup>
- Strengthen domestic laws and the judiciary to enable Indigenous Peoples to seek appropriate remedy for complaints domestically.
- Raise awareness and build the capacities of the public service regarding Indigenous rights, international standards and leading-edge practice regarding impact assessment and negotiations.
- Build systems and capacities for assessing, monitoring and enforcing laws on human rights and the environment.

### **3. Strengthen home government accountability**

Home governments should:

- Ensure that in supporting the growth of their companies abroad they are not undermining human rights in the host country.
- Establish an effective mechanism whereby Indigenous communities can hold companies to account for their actions in the host country.<sup>10</sup>

### **4. Improve corporate practice**

Companies should:

- Adopt strong policies governing their relations with Indigenous Peoples that recognize their obligation to implement free, prior and informed consent.
- Refrain from initiating environmental and social impact activities or consultations until a community has a consent process in place. Provide time and — when asked — support for the development of one.
- Negotiate with the appropriate community authorities and their representative institutions.
- Ensure communities have timely access to all relevant information about any proposal affecting Indigenous territories in formats that are culturally appropriate, available in local Indigenous languages, and easy to understand.

- Where communities are remote and lack communications infrastructure, donors, governments and proponents should consider installing telephone and internet connections.
- Independently assess and verify processes for free, prior and informed consent using experts chosen in consultation with affected communities.<sup>11</sup>

### **5. Strengthen Indigenous Peoples governance<sup>12</sup>**

Indigenous Peoples should:

- Establish their own ‘development’ plan in order to judge whether a proposed project fits with the community’s aspirations. As part of this, they should research and document socio-economic, cultural, spiritual and environmental baseline conditions.
- Develop protocols for free, prior and informed consent to guide decision-making and develop strategies for maintaining community unity.
- Build alliances with communities affected by mining and supportive national and international organizations. Use these alliances to share knowledge on negotiating strategies, best practice on impact assessments and Indigenous rights under international law.
- Obtain information about project proponents and the impacts of proposed activities.
- Seek independent funding and identify independent experts and legal counsel.
- Consider strategies to influence outcomes, including use of the media and of national and international courts.

### **6. Increase the involvement of international donors**

International donors should:

- Fund and support Indigenous Peoples organizations so they can represent their communities in dealings with governments, corporations and other actors.
- Ensure that initiatives to strengthen the capacities, policies and decision-making processes of Indigenous Peoples take place in a manner that is independent of companies and not only in areas where projects are imminent.
- Allow communities to choose the resource people and organizations which will support them.

**“We are not against development, but it shouldn’t be done at our expense. Industry must ensure that all our rights are upheld.”**

- Lusel K’e Dene  
First Nation  
negotiator, Canada

Medium-scale mining at Marit-tao (Marudi) Mountain, Guyana. Large-scale gold mining at the site, which is part of the traditional territory of the Wapichan People, is expected to commence later this year.

## Conclusion

Our decade-long research on relations between the extractive sector and Indigenous Peoples found a rather bleak situation. But it also revealed a way forward if governments, companies, investors and Indigenous Peoples choose to take it. Of central importance is recognizing that free, prior and informed consent, aside from being a right, is also a critical tool that can help reduce power asymmetries, mitigate conflicts, pave the way to better decision-making and potentially reduce costs. In short, it is in everyone’s interest to ensure this right is protected, respected and upheld. 

*This policy brief summarizes research led by Viviane Weitzner, NSI Senior Researcher. For more information on her work, please go to <http://www.nsi-ins.ca/english/research/progress/56.asp>.*

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## Endnotes

- 1 The word Indigenous in this paper encompasses both Indigenous and Tribal Peoples.
- 2 Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people, UN Commission on Human Rights, E/CN.4/2005/88/Add.2 10 November 2004.
- 3 The dangling ball was a geo-referencing system used for aerial minerals exploration.
- 4 Relevant instruments include the United Nations Declaration of the Rights of Indigenous Peoples; ILO Convention 169; the Convention on Biological Diversity; the UN Convention on the Elimination of Racial Discrimination; and the Covenant on Economic, Social and Cultural

Rights, among others. Far-reaching and binding judgments upholding free, prior and informed consent have also been made by the Inter-American Court on Human Rights, with 2007 *Saramaka People* particularly important.

- 5 The reforms have not undergone appropriate consultation, as required by ILO Convention 169, which Colombia has ratified.
- 6 A recent report commissioned by the Prospector and Developer’s Association of Canada reveals Canada is responsible for three times as many mining-related conflicts as its closest peer, Australia (Corporate Social Responsibility: Movements and Footprints of Canadian Mining and Exploration Firms in the Developing World. The Canadian Centre for the Study of Resource Conflict, 2009). In 2009, 53% of minerals exploration companies were domiciled in Canada (Overview of Trends in Canadian Mineral Exploration, Natural Resources Canada, 2009).
- 7 CERD/C/CAN/CO/18, paragraph 17.
- 8 In 2010, legislation calling for a tougher mandate was narrowly defeated in the House of Commons.
- 9 Following the Akwe:kon guidelines developed by parties to the Convention on Biological Diversity. These are seen as leading edge practice in assessment involving Indigenous Peoples, and are promoted in the Inter-American Court on Human Rights *Saramaka People* judgment.
- 10 In the case of Canada this means re-considering legislation to prevent Canadian companies from having adverse impacts on the rights of Indigenous Peoples outside Canada and establishing an independent ombudsperson with the power to undertake investigations and withdraw public support from companies who have violated Canada’s CSR framework. This follows one of the key recommendations of the March 2007 report of the national roundtables on corporate social responsibility.
- 11 Otherwise there is a real risk –highlighted in our research in Peru – that companies will proclaim they have obtained free, prior and informed consent, while Indigenous communities have very different views.
- 12 Further recommendations and guidance for communities are outlined in the case study and video on Lutsel K’e Dene First Nation’s experience negotiating with mining companies, and the practical guides on FPIC, Impact Benefit Agreements and Impact Assessment produced for Guyana, and forthcoming for Colombia.



Photo: Meaghan Simms



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