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# Indigenous Communities and Mineral Development

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Indigenous Nations and Peoples are entitled to the permanent enjoyment of their aboriginal ancestral-historical territories. This includes air space, surface and subsurface rights, inland and coastal waters, sea ice, renewable and non-renewable resources, and the economies based on these resources

Numeral 4.

**Declaration of Principles on the Rights of Indigenous Peoples.**

The new trend in globalisation dedicated towards an integrated world economy and rapid advances in technology have accelerated the development of natural resources throughout the world. This fast tracking of such development has caused the migration of mining companies into remoter regions, hitherto untouched. In some cases these terrains are inhabited by Indigenous Peoples who see in such development a threat leading to the infringement of their traditional rights related to the management of lands which they perceive are theirs by right of tradition and usage. In consequence this projected development of such lands precipitates conflicts that can generate stagnation in the economic growth of countries especially those that rely heavily on the development of their natural resources. Such conflicts have arisen because of the diverging interests of the principal stakeholders in the mineral development namely states, investors and the Indigenous communities. With the objective of avoiding this type of conflict, it is imperative to find the fairest and most equitable approach, which caters objectively for all the interests involved.

# Table of Contents

1	<i>Introduction</i>	4
2	<i>Indigenous Rights and Mining Activities</i>	6
3	<i>Australia</i>	8
3.1	Partnership between Mining Companies and Indigenous Communities	11
4	<i>New Zealand</i>	13
5	<i>Canada</i>	15
6	<i>Latin America</i>	17
6.1	Background	17
6.2	Mining Investment in Latin America	19
7	<i>Final Considerations</i>	24
	<i>Bibliography</i>	27
	<i>Annex 1</i>	30

# I Introduction

The development of natural resources is seen as an essential prerequisite for the economic growth of many countries. The accelerating development of natural resources throughout the world, triggered by the liberalization of international markets, technological advances and the promise of finding more opportunities in places hitherto untouched, has led investors to focus on more remote areas. In many cases such areas are located within the homelands of the Indigenous Peoples<sup>1</sup> of the countries targeted, in which they have been surviving in their traditional way preserving their cultural identity. The main factors, which contributed towards this survival, were undoubtedly the remoteness of these lands and the fact that they were considered economically unattractive.

Under such circumstances the development of remote lands precipitates conflicts, because of diverging interests, which are:

- The interest of the states in obtaining more earnings by increasing the development of natural resources through the investment of private capital;
- The interest of the Investor to do business to obtain a profit, and,
- The interest of the Indigenous communities which goes beyond any economic considerations. For the Indigenous communities their relationship with the land is deep seated and is frequently based on religious beliefs forming part of their heritage. It is difficult for Western Societies to understand the strong connection between the Indigenous Peoples, their land, and its resources. There is a big cultural chasm that in many instances can only be bridged with difficulty.

Particularly, in the case of mining activities, such development can conflict with the rights of the Indigenous Peoples, especially those related to their native titles<sup>2</sup> and the management of their lands, leading in many cases to the stagnation of the mining ventures until problems have been resolved. This stagnation can impact adversely on the economic growth of a

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<sup>1</sup> There are many definitions of Indigenous People. For the purposes of this study, the definition of the UNESCO Commission on Human Rights in 1982 will be adopted, which states that “*Indigenous Populations are composed of the existing descendants of the peoples who inhabited the present territory of a Country wholly or partially at the time when persons of a different culture or ethnic origin arrived there from other parts of the world, overcame them, and by conquest, settlement or other means, reduced them to a non-dominant or colonial situation; who today live more in conformity with their particular social, economic and cultural customs and traditions than with the institutions of the country of which they now form a part, under a state structure that incorporates mainly the national, social and cultural characteristics of other segments of the population that are predominant...Although they have not suffered conquest or colonization, isolated or marginal groups existing in the country should be regarded as covered by the notion of Indigenous Populations*” for the following reasons:

- a) *they are descendants of groups which were in the territory of the country at the time when other groups of different cultures or ethnic origins arrived there;*
- b) *precisely because of their isolation from other segments of the country's population they have preserved almost intact the customs and traditions of their ancestors which are similar to those characterized as Indigenous;*
- c) *they are, even if only formally, placed under a State structure, which incorporates national, social and cultural characteristics, alien to theirs.*

In B. Goehring, *Indigenous Peoples of the World*, 5 (1993).. For a detailed study of the historical evolution of the impact of the development of natural resources on the Indigenous rights, See, J.A. Cordes, *Mining and Indigenous People*, CPMLP, 1997.

<sup>2</sup> Native Title is an integral part of the Indigenous Rights. Native Title has been defined as a still-uncodified collection of rights and interests of Indigenous people derived from traditional laws and customs over land and water.

country as a whole. The opposition from the Indigenous communities to this type of development is certainly understandable, because, in the past the exploitation of mineral resources has provided substantial profits only for the State Governments and mining companies, who had overlooked the fact that the resources were located in Indigenous lands. Now there is a general concern on how to create adequate instruments that will permit the mineral activity to contribute to the global transition towards sustainable development<sup>3</sup>

Within this context, and with the aim of avoiding conflicts prone to occur in the course of the development of mineral resources, an important question arises ***what will be the best, fairest and most equitable approach catering for all the interests involved?*** With the aim of finding an appropriate answer to this question and taking account of the global significance of the development of natural resources, this study will provide an overview of the different legal approaches related to the recognition and affirmation of the existence of Indigenous rights in countries with a history of colonization, such as Australia, New Zealand and Canada and selected countries of Latin America.

The conflicts with Indigenous communities related to the land property and its resources, which arose with the inception of mining activities, are present not only in the developing countries but also in the developed world. The connection of the Indigenous Peoples with their land is almost the same worldwide. The Indigenous communities do not consider land as a commodity to provide any material profits. The land, for these communities has a spiritual connotation. The land for the Indigenous communities is the "*mother earth*", therefore they do not own it but conversely the land owns them. The land property is vested in the community and it can be used collectively. Countries rich in mineral resources such as Australia and Canada finally recognized the concern that mining activities have generated within their Indigenous communities. Also, in the case of the developing world for example in Latin America, the impact of mining activities has focussed the attention of the world, because they are attracting the greatest share of investment in exploration. This amounts to more than thirty per cent of the global exploration budget.

This study will highlight the differences and similarities between selected countries with Indigenous communities in which the development of natural resources has caused concern. It will review the international situation pertaining to the rights of Indigenous communities, before turning to an analysis of particular situations. It will also provide an overview of the approaches of developed countries with a British colonial history such as Australia, Canada and New Zealand and those of developing countries such as Colombia, Argentina, Peru, Ecuador, Bolivia located in South America with a Spanish colonial heritage. This overview will elucidate the main differences and similarities in the legal systems of these countries pertaining to land management. It will attempt to provide a basis towards the development of a workable compromise in which all the various interests could be harmonized to achieve sustainable development.

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<sup>3</sup> This is the main objective of the Mining, Minerals and Sustainable Development Project (MMSD) . For a further understanding of the principal objective of this project see, C. Digby, and G. Flores, *The eight Challenges Facing the Mining and Minerals Sector*, in MERN Research Bulletin 16, 2000/2001

## 2 Indigenous Rights and Mining Activities

An issue of contemporary importance is the effect of Mining Activities on the Indigenous communities amongst other socio-economic impacts.<sup>4</sup> The relevance of this issue is the special characteristic attributed to the Indigenous communities who are viewed internationally as being different and therefore, subject to special treatment. The particular characteristic of the Indigenous Peoples is that they consider themselves different from the new community living in their territory -who eventually predominated numerically through time- while they persisted with the desire to preserve their own culture, their ethnic identity and their political and social systems.<sup>5</sup>

The colonizer, conqueror or invader was generally motivated by the acquisition of new terrain, which therefore negated the rights of the Indigenous communities.<sup>6</sup> In the two last decades International Bodies have drafted instruments that gave the Indigenous community rights over land, and the right to participate in the decision-making process about different issues which can affect them, specially those related to the development and management of Natural Resources (See Annex 1). Some of these important instruments which in one way or another reaffirm the rights of the Indigenous people to have more control over the management of their lands and natural resources within them were promoted by the same communities. This is the case of the Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, adopted by the General Conference of the International Labour Organization (ILO) (Geneva, June 27, 1980. Entered into force in Sept. 5, 1991). Its Article 7, contemplates that

The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible over

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<sup>4</sup> Mining activities cause several socio-economic and cultural impacts, such as:

- Variations in land use caused by temporary access routes leading to operational sites.
- Augmentation of local populations upsetting the socio-economic equilibrium.
- A destabilizing influence through the creation of disparity in incomes for a limited period.
- Disturbance of Indigenous cultures, provoking conflicts over land use and inequitable distribution of wealth derived from natural resources.
- Construction of new town sites and competing land uses e.g. National Heritage Locations and National Parks.
- Roads and rail construction, changing transport patterns (generating sometimes danger of accidents, noise, etc.)

<sup>5</sup> M.A. Chubb, International Human Rights and Non-Renewable Natural Resources: Autochthonous Rights of Influence Over the Mineral Development Process, Implications for Corporate Policy. Dissertation to obtain LLM Degree in Mineral Law and Policy, CPMLP, 1997, at 2.

<sup>6</sup> Brownlie, sets out five types of colonization:

- An extension of powers without the necessity of any incursion of settlers into the country and the recovery of independence without a major demographic change. e.g. Ghana and Nigeria.
- The typical colonization with an inflow of settlers as was the case of Kenya, and Southern Rhodesia. The importance of this model is that when the de-colonization is reached the settlers can be allowed to stay with the compromise of taking citizenship and stay as a part of a Multicultural Treaty.
- The aggressive colonization, with the aim of eliminating the Indigenous community or at least their eviction from their lands e.g. Indians in Argentina.
- The so-called “self-determination” in which the Indigenous communities have the opportunity to decide about their nationality, because they were a minority.
- The “League of Nations” which restrained the radical forms of colonization.

their own economic, social and cultural development. In addition they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.

Nevertheless, while the analysis of each of these documents is outside the scope of this study, it is important to recognize their relevance in relation to the issue of Native Titles. For instance the Agenda 21, adopted by the U.N. Conference on the Environment and Development in Rio de Janeiro (June 12, 1992) is an important document because it specifies the obligation of the parties to promote the participation of the Indigenous communities in the policy-making process relative to resource management.<sup>7</sup> Likewise, the Draft of the Inter-American Declaration on the rights of Indigenous people lays down their right to own property and enjoy their territories. It also specifies the State's obligation to guarantee the participation of the Indigenous communities in decisions over mineral resources before authorizing any programs for their development.<sup>8</sup>

There is clearly an increasing global awareness about the recognition of Indigenous rights. The topic of the protection of such rights is a contemporary issue, which must be addressed within the policies of the countries with Indigenous communities. In the particular case of development of natural resources, especially mineral resources, this issue is of great importance, due to the considerations that investors must make before deciding on any commitment. Mining companies are interested in finding a good project in which they can invest to obtain a profit. Therefore, in order to realize this aim, the mining companies initially selected the most promising areas whose potential has long been recognized, that are located in the New World countries situated in Australasia and the Americas.<sup>9</sup> This is an era of the development of resources within new-frontiers. All these new countries were, and still are inhabited by Indigenous communities, who have different perceptions of the development of their natural sources inside their lands, which were their property, by tradition. Under such circumstances a conflict of interests is prone to arise obliging the host states to provide the mechanisms to resolve the impasse, since security of tenure is a key issue in decision making for investment purposes in mining projects.

During the decision-making process on mineral investment it is of vital importance to know who owns the mineral resources. With the exception of South Africa, the USA and a few other countries or specific minerals, mineral ownership is generally vested in the State. In

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I., Brownlie, Treaties and Indigenous Peoples, 1-3 (1992).

<sup>7</sup> For the full text, see UN.DOC. A/CONF.151/26 (VOL3) AT 16, (1992).

<sup>8</sup> In its Section Five, Article XVIII, No. 5, sets out *"In the event that ownership of minerals or resources of the subsoil pertains to the State or that the State has rights over other resources on the lands, the Government must establish or maintain procedures for the participation of the peoples concerned in determining whether the interest of these people would be adversely affected and to what extent, before undertaking or authorizing any program for tapping or exploiting existing resources on their lands. The peoples concerned shall participate in the benefits of such activities and shall receive compensation in accordance with international Law for any damages which they may sustain as a result of such activities.* Draft of the Inter-American Declaration on the rights of Indigenous Peoples, approved by the Inter-American Commission on Human Rights at the 1278<sup>th</sup> session held on September 18, 1995, in S.J. Anaya, Indigenous Peoples in International Law, 225 (1996).

<sup>9</sup> Connell and Howitt point out that *"the expansion of mining into more remote areas has coincided with the depletion of established mines, increasing costs in many metropolitan mines, new methods of extracting mineral resources (especially epithermal gold) and more adequate geological exploration and surveys"*. J. Connell and R. Howitt, eds., Mining and Indigenous Peoples in Australasia, 2 (1991).

Latin American countries with a tradition of Civil Law and a *regalian*<sup>10</sup> system, the States have the unrestricted and exclusive dominion or proprietary rights over their mines. In the Civil Law countries the proprietorship over the land does not extend to the ownership of the minerals of the subsurface. In countries with a Common Law tradition, generally, the owner of the land owns the minerals located in the subsurface *usque ad caelos usque ad inferos*<sup>11</sup>. In the case of mineral resources located in the lands of Indigenous communities the development of such wealth could generate conflicts and in some cases violence, since as was previously indicated for the Indigenous Peoples, the earth has a value more spiritual and religious than material which is the view held by the Western cultures. Mining activities can greatly disturb the Indigenous communities, through the building of new infrastructures, the damage to their natural habitat, changes in their social structure, change of the land usage and competition for the use of their waters. The new trend is to find out the necessary tools that would provide for an equitable development of the mineral resources of Indigenous lands, through the participation of these communities during decision-making over a mining project and the distribution of its wealth in a fair and equitable way. The only method of guaranteeing sustainable development of a mining venture is through the participation, during the decision-making process of all the key stakeholders, namely governments, mining companies and communities<sup>12</sup> inclusive of Indigenous people.

### 3 Australia

It is well known internationally that the mining industry is a very important activity within the Australian economy. Australia is a major producer and exporter of key metals and minerals, which include gold, coal, iron ore, base metals and alumina. Furthermore, due to the vast size of the country, this industry has extensively developed an essential infrastructure that has brought progress to very isolated locations. It is important to emphasize that in Australia since last century, the ownership of minerals has been vested in the Crown.

Western Australia, Queensland and Northern Territory which provide more than 85% of Australian's total mineral production, also have the largest proportion of potential claimable land such as: vacant Crown Land. Recently debates about Native Title Claims have had a marked negative impact on the mining industry, particularly on account of unclear legislation and the impetus that the Native Title issue has had in international forums. When uncertainty arises the attractiveness for investment diminishes and impacts negatively on mining activity in the country. This is notably the case in Australia where Native Title claims have exerted a strong negative influence over investment decisions so that investors are now tending to look elsewhere towards countries that offer more security of tenure.

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<sup>10</sup> In the regalian system the State is the original owner of the minerals without considerations of who owns the surface of the land. The other system is called the Accession System in which the owner of the land is the owner of the mine as well.

<sup>11</sup> T. Walde, *Mineral Development Legislation: Result and Instrument of Mineral Development Planning*, 12 (1) NRF (1988).

<sup>12</sup> For a detailed account on the characteristics, roles, interests and objectives of the stakeholders in mining projects, see O. Ostensson, *The Stakeholders: Interest and objectives*, in J. Otto, and J. Cordes, Sustainable Development and the Future of Mineral Investment, UNEP, Paris, 2000, 3-1/30.

In Australia, where the Indigenous rights<sup>13</sup> are not enshrined in the Constitution, Common Law plays an important role in recognizing and protecting these rights. In this role, Common Law has become an evolving legal system. While responding to new circumstances, Common Law also has its origin in the earliest English Law. Because Australia shares such origins with other Common Law Countries with a comparable history of colonization, its Courts also draw on the experiences of Canada, New Zealand and the United States.

At the time when settlers arrived on that Continent in 1788, from the point of view of the colonizers, the aborigines who occupied Australia for over 40.000 years were considered primitive. There was no advanced system of government and the Indigenous population lacked an well-organized social system. Therefore, the European settlers did not initially recognize the sovereignty of the aborigines. No Treaty or agreement was signed between the Indigenous people and the Europeans. In other words, it is reasonable to assert that the Australian Indigenous People were ignored<sup>14</sup> and Australia was considered as *terra nullius*<sup>15</sup>. As a consequence of the application of this doctrine, the Crown acquired complete sovereignty over Australian territory and the absolute property right over the entire land.<sup>16</sup> Between this époque and the Mabo decision<sup>17</sup>, aboriginal communities have been granted some statutory rights related to lands, which they use for hunting or ceremonial purposes and occasionally to construct dwellings. From the middle of the last century onwards, aboriginal reserves were established, for the use and benefit of the Aboriginal communities. Only in this context and prior to the Mabo decision, the land was shared with the Aboriginal Communities without the existence of a clearly defined legal regime that recognized the rights of these communities.

In the *Mabo* case which was initiated in 1982 through the claim of the lands of the Murray Islanders, the Court of Queensland found sufficient evidence to decide that these lands were the property of the Indigenous community before the British settlement and consequently the concept of land ownership survived the annexation of Australia to the British Crown and its assertion of sovereignty. The decision rejected the position which declared

Australia a vacant uninhabited land belonging to no-one –terra nullius-,

because this was not the case, since Indigenous people were living there before the settlers arrived on the island. The *Mabo* decision was applied initially only to the Murray Islands not to mainland Australia.<sup>18</sup>

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<sup>13</sup> In Australia the term Aboriginal Communities is generally used when referring to Indigenous Peoples..

<sup>14</sup> British Crown acquired sovereignty over the Australian Land on the “grounds of injustice” as is pointed out by Wells and Doyle. Also “*The notion of the “discoverer of lands acquiring absolute sovereignty over those lands, is equally unjust: the principle that the ‘discovery’ of lands inhabited by an Indigenous population vests sovereignty in the ‘discovering ‘ nation is (similarly) based on the proposition that Indigenous people are insufficiently civilized or Christian to merit being viewed as competing sovereign powers. Fortified by the illusion of superiority, European powers claimed that the act of settlement in itself divests Indigenous Peoples of any and all sovereign authority over their land and their people”*. B. Wells, and J. Doyle, *Reconciliation and the Constitution, in Indigenous Australians and the Law*, 187 ( E. Johnston, M. Hinton and D. Rigney , eds., Sydney: Cavendish Publishing, 1997).

<sup>15</sup> *Terra nullius*: Doctrine which describes the land as empty of people before its discovery.

<sup>16</sup> D. Barberis, *Negotiating Mining Agreements*, 175-177 ( London:Kluwer Law, 1998).

<sup>17</sup> The High Court's Mabo Decision of 1992, marked a fundamental step in the recognition of indigeneous rights in Australia

<sup>18</sup> The *Mabo* decision which did not fix any scope and/or extent of the nature of the Native Title, created uncertainty in the land holder and Lease grant holder. This uncertainty is caused by the requirements to establish

The *Mabo* decision was for the aboriginal people just recognition of the injustice perpetrated when the colonists arrived and deprived them of their freedom, culture and religious beliefs or in other words the self-determination rights of the Indigenous community were greatly diminished.<sup>19</sup> It was also seen as a success because it was based on Laws that the same colonists brought with them and was not a “political favour”. This decision has led to the filing of many claims -some of them unfounded- with an obvious negative consequence for the mining industry.<sup>20</sup>

In 1993, the Native Title Act (NTA) was promulgated. It upheld the *Mabo* decision and set forth the rights of the aborigines in some specific cases to rule their own land within their traditional form of law and custom. The NTA provides for the claimant of Native Title the right to negotiate (RTN). This right is an addition to the rights of Native Title claimants, and will be used before any decision is taken, which recognizes their title at Common Law. Recognizing that Native Title is a “pre-existing title to land” that had existed under the traditions and customs of the Indigenous peoples which ruled Australia before the colonization, the Native Title Act 1993, sets out processes through which the recognition of Native Title can be obtained.

The aim of the process set up by the NTA is to decide how Native Title can be recognized, how the interests of non-aboriginal communities can be accommodated, and how future acts can be done in relation to the creation of interests in lands subject to Native Titles.

In December of 1996 the High Court, through the *Wik* decision, restated the fundamental principles of its decision on *Mabo* related to the existence and recognition of Native Title at Common Law and reaffirmed that Native Title was “not a common law tenure but rather an interest in land that was capable of coexisting with other interests in land”<sup>21</sup>.

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Native Title which are vague and ambiguous: “ 1) *Traditional connection with or occupation of lands under the laws and customs of the group*, 2) *The existence of an identifiable community or group which is entitled to Native Title and 3) The substantial maintenance of the connection with the land since its annexation by the Crown*”. Therefore a plural presence in the land is not necessary to claim it. This situation has resulted in large tracts of terrain of mainland Australia coming under or being subject under Native Title claim, with unfavourable consequences for the mining companies who sometimes have to wait long periods until the claim is resolved. In this context the difficulty to determine the connection of the aborigines with the land is the application of the Customary Law of the aboriginal community which is linked with spiritual beliefs; rules that do not bear any comparison with Western Property Laws. W.D. Keil, Native Title Land Rights in Australia and the Implications for Resource Development, 10-13 (Dundee: CPMLP, 1995).

<sup>19</sup> This principle of self-determination is upheld by the Australian Indigenous communities, with justification founded on the fact that the British colonists arrived in the Land only 200 years ago and by that time the Aborigines had already been living there for thousands of years, with “total control over their lives”. The various Indigenous rights are channeled through the self-determination principle. These have been classified into three principal categories: “*autonomy rights*: which focus upon the right of Indigenous Peoples to determine the way in which they live and control their social, economic and political system; *identity rights*: which are related to the right to exist as distinct peoples with a distinct culture, and *territory and resource rights*: which encompass such things as land entitlements, the right to the resources of that land, and the use of those resources.”. See Wells and Doyle, *supra* note 14, at 197.

<sup>20</sup> In W. Australia for 1998, the areas claimed by Native Titles amounted to 82% of the entire State and included almost all (98% of the mineral titles applied for). These claims also cover the Eastern Goldfields in which the majority of the gold and nickel mining operations are concentrated. W. A. Department of Minerals and Energy – 1998 Statistics Digest <<http://www.dme.go.au/statistics/Index.ht>>.

<sup>21</sup> M. Tehereran, *Coexistence of Interests in Land: A dominant Feature of the Common Law* at <<http://www.aiatsis.gov.au/ntpapers/ntip.12.h>>.

Nevertheless, the substance of the interest in land was not specified, although the decision made it clear that the scope of Native Title derived from the traditions and customs exercised by the aboriginal communities before the European settlers arrived and each case needed individual consideration on its own merits.<sup>22</sup> As a consequence of the *Wik* decision many of the exploration and mining tenements were in danger of being declared invalid, because the government granted them on the assumption that the granting of pastoral leases had extinguished the Native Title.<sup>23</sup>

### **3.1 Partnership between Mining Companies and Indigenous Communities**

Through the initiative of the Commonwealth Minister for Industry, Science and Research the *Indigenous Communities/Mining Industry Regional Partnerships Programme* was recently initiated, which will be funded through a budget of A\$ 1,2 million over four years, starting in 2001. This initiative resulted from the recognition of a cultural change in the relations between the mining companies and the Indigenous communities and the need of a long term partnership between these two stakeholders in the mining industry. Within this partnership programme the government provides support for the Indigenous communities through building capacity and the development of commercial enterprises. The mining companies participating in such programmes are committed to

- Provide jobs for the Indigenous people
- Provide pre-employment training
- Provide skills and career development for Indigenous employees
- Offer business opportunities to the local communities
- Facilitate opportunities for investment by Indigenous businesses

In response to the *Mabo* decision, since 1995, Rio Tinto, started to promote a new relationship with the Aboriginal and Torres Strait Islander People, with the aim of assisting them to achieve "economic independence through employment, business development and training. Rio Tinto's Aboriginal and Torres Strait Islander People's Policy states that:<sup>24</sup>

In all exploration and development in Australia, Rio Tinto will consider Aboriginal and Torres Strait Islander people's issues:

Where there are traditional or historical connections to particular land and water., Rio Tinto will engage with Aboriginal and Torres Strait Islander stakeholders and their representatives to find mutually advantageous outcomes.

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<sup>22</sup> The *Wik* decision was the first to establish that, if there is a conflict between Pastoral Leases and Native Titles, the former will prevail. It specifies the validity of co-existence of different rights over the same land, defining the interest of each of the parties to prevent conflict.

<sup>23</sup> In response of the *Wik* decision and after several discussions, the Commonwealth Government issued the "10-Point Plan" which deals with the issues related to the more important issues of Native Title. For a detail study of this topic, See *Australian for Native Title and Reconciliation (ACT)*, at <<http://www.antar.org.au/act/niwg.sth>>.

<sup>24</sup> See <http://www.isr.gov.au/resources/indigenouspartnerships/overview>

Outcomes beneficial to Aboriginal and Torres Strait Islander people will result from listening to them

Economic independence through direct employment, business development and training are among the advantage that Rio Tinto will offer. We will give strong support to activities that are sustainable after Rio Tinto has left an area.

This policy is based on recognition and respect. Rio Tinto recognises that Aboriginal and Torres Islander people in Australia:

- Have been disadvantaged and dispossessed
- Have a special connection to the land and waters
- Have native title rights recognised by law.

Rio Tinto respects Aboriginal and Torres Strait Islander people's:

- Cultural diversity
- Aspirations for self-sufficiency
- Interest in land management

Rio Tinto, also has signed more than 30 mine development and exploration land access agreements, that, in many cases have taken place outside the NT process. Worth mentioning in this context is the Yandicoogina Land Use Agreement signed in 1997 with the Gumala Aboriginal Corporation, for the development of the Hamersley Iron's Yandicoogina iron ore project in the Pilbara, Western Australia. Through this project Rio Tinto has provided training and education programmes for the Aboriginal community, helped to build their own businesses, and gave them employment. This new programme involves the traditional landowners in township matters, environmental work, and heritage and culture protection. In 2000 Hamersley Iron signed a Memorandum of Understanding with the community of Eastern Guruma, in which the terms of negotiation for an Indigenous Land Use Agreement (ILUA)<sup>25</sup> covering 10.000Km<sup>2</sup> has been stipulated.<sup>26</sup>

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<sup>25</sup> "The main advantage of an ILUA is that it provides contractual certainty. An ILUA, once registered, is a binding agreement in respect of all future acts, effectively permitting the parties to contract out of the future act and the right to negotiate provisions. It overcomes the common law principle that the contract is only binding on the parties who sign it (personally or through their agent) and will bind all holders of native title in the area even though they may not be parties to it." M. Hunt, *Native Title and Aboriginal Heritage Issues Affecting Oil and Gas Exploration and Production in Australia*, 19 (4) JENRL 368 (2001)

<sup>26</sup> For a detailed account of the most important development agreements concluded by Rio Tinto, see P. D., Cameron and E. Correa, *Towards the Contractual Management of Public Participation Issues: A Review of Corporate Initiatives*, to be published (on file with the author). A recent version of this article was presented at the IBA-SERL/MMSD Seminar, *Public Participation in Sustainable Development: The New Law of Public Rights in Private Mining, Energy and Resource Development*, at Vermont, 25-27 May 2001. Cameron and Correa indicate as features of the development agreements between Rio Tinto and the Indigenous Communities the following: "

- Long term benefits are sought through the agreements
- Negotiations over company proposals are to be conducted through a 'mediator' and the process recorded in a Memorandum of Understanding; the principles and procedures to guide negotiations are described.
- Committee structure set-up to facilitate implementation of the agreement, with regular consultations to take place among the parties

There are many other cases in Australia of successful partnership programmes between major mining companies and Indigenous communities, such as those of Anglo Coal Australia Pty Ltd, Auiron Energy Limited, BHP Iron Ore, Normandy Mining Limited, Pasminco Century Mine and WMC Resources Ltd.

Nevertheless, despite the willingness showed by major mining companies, to engage the participation of the Indigenous communities in the development of the mineral resources, there is still much to be done with the aim of finding a mechanism which addresses all the conflicting interests to avoid the spread of the much feared stagnation in the Mining Industry.

## 4 New Zealand

The situation in New Zealand is different from Australia, for many reasons, including the size of the country and the fact that the Maori Community owns only 5% of the total land area. Furthermore, the mining activities are not of great importance to the growth of the national economy. Moreover, New Zealand differs from Australia in that the preservation of the Maori culture was ensured at the time of the European occupation. Therefore these Indigenous People had a say in the political decision-making process in New Zealand. The legal instrument, through which the Maori's rights were recognized, is the Treaty of Waitangi, which was signed in 1840 by a large representative proportion of the Indigenous population and the British Government. This important document validates the transfer of the sovereignty of the New Zealand territories to the British Crown. In the case of New Zealand, the colonization scenario represented a complete departure from the existing models<sup>27</sup>. Through the adoption of the Waitangi Treaty the Maoris obtained the same rights and duties of citizenship as the British people.

Accordingly, the most important point to be highlighted in the context of this study is that the colonization of New Zealand was apparently lawful in relation to the transfer of land. As a result, the "Principle of Legality" was recognized.<sup>28</sup> However, it seems that the real implementation of the principles set forth by the Waitangi Treaty was not achieved until 1975 with the promulgation of the Waitangi Act.<sup>29</sup> This new Act set up a Waitangi Tribunal, which is empowered to make recommendations to the government upon any claim submitted to the Tribunal. Its work is complementary to that of the Courts. Their decisions are not binding. One very interesting point here is that the claims must be against the Crown and not against private owners. This would be unsatisfactory as it stands, because there are claims over lands that are private property.

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- *Specific commitments to cover social impact assessments; health facilities; compensation at mine site and along pipeline corridor; detailed provisions on employment and training.*
  - *Claimants undertake to support mining company's exploration and mining activities, and not to oppose the grant of future grant of tenements."*

<sup>27</sup> See, Brownlie, *supra* note 6, at 5.

<sup>28</sup> The Waitangi Treaty introduced the exclusive right of pre-emption or purchase of land by the Crown, as the legal instrument for extinguishing Maori Customary Title.

<sup>29</sup> " An Act to provide for the observance and confirmation, of the principles of the Treaty of Waitangi by establishing a Tribunal to make recommendations on claims relating to the practical application of the Treaty and to determine whether certain matters are consistent with the Treaty". See, Brownlie, *supra* note 6, at 83.

The ownership of the sub-soil minerals by the Crown in New Zealand is not as exclusive as in the case of Australia. There are private property rights pertaining to the sub-soil. Before 1913 the mineral rights on land belonged to the owner of the private property. During the colonial era, the theory was that the development of natural resources would bring advantages to all the members of the community. At that time the concept of sustainable development was not known. The Maoris believed that the Natural Resources were limitless.

In relation to the issue of the Crown's sovereignty over New Zealand, there exist two tendencies that explain the origin of the governments implanted over the British colonies. One is the theory of "Divine Right of Kings" and the other one is that promoted by scholars, which states that, the origin comes from the "consent of the communities". The latter, for obvious reasons, is the commonly accepted interpretation and the only one, which still survives. Accordingly, a requisite sine qua non for the British Crown was that the Indigenous communities first consented to the new Legal Order. By that time there was an unmistakable belief that official acquisition of tribal consent was a condition of the constitutionality of British Government within the colonies. An express consent was a prerequisite to British annexation. Within this context the Treaty of Waitangi is seen as a materialization of the approach of the contractual theory and the foundation of British sovereignty over the Maori Community.<sup>30</sup>

Despite all the apparent success in the treatment of the Indigenous Peoples of New Zealand through the signing of the Waitangi Treaty in 1840 (160 years ago), controversies related to the interpretation of the both versions (Maori and English) still exist. This is apparently due to the big cultural gap between the Maoris and the Pakehas (Europeans) and the difficulty encountered in 1840 in translating the Indigenous language, especially in the absence of a written form. It is very interesting to know what were, in reality, the rights that the Maori community wanted to transfer to the European colonizers. Many debates and scholarly interpretations have been produced since, oriented towards attaining a conclusive determination of the differences and common ground of both parties. Recently the Waitangi Tribunal and the Court of Appeal after recognizing some of the Principles of the Treaty, stated that these must be interpreted in a *dynamic sense*.<sup>31</sup>

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<sup>30</sup> In the response of Lord Glenelg to the proposal in 1837 of the New Zealand Association of a systematic colonization, he sets out the position of the Crown of obtaining permission of the Tribes in order to establish its Imperium. "It is difficult or impossible to find in the History of British Colonization an Example of a Colony having ever been founded in derogation of such aboriginal rights, whether of Sovereignty or of Property, as are those of the Chiefs and People of New Zealand. They are not Savages living by the Chase, but Tribes who have apportioned the Country between them, having fixed Abodes, with an acknowledged Property in the soil, and with some rude approaches to a regular System of internal Government. It may be therefore be assumed as a basis for all **Reasoning and all Conduct on this Subject, that Great Britain has no legal or moral right to establish a Colony in New Zealand, without the free consent of the Natives, deliberately given, without compulsion, and without fraud.** To impart to any Individuals an Authority to establish such a Colony, without first ascertaining the consent of the New Zealanders, or without taking the most effectual security that the Contract which is to be made with them shall freely and fairly be made, would, as it should seem, be to make an unrighteous use of our superior Power." (Emphasis added) ( In I.H. Kawharu, (Ed. ) Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi, 30 (1989).

<sup>31</sup> In the Atiawa Report, the Court of Appeal referred to the Tribunal observations that state " The spirit of the Treaty transcends the sum total of its component written words and puts narrow or literal interpretations out of place. The Treaty was an acknowledgement of Maori existence, of their prior occupation of the land and of an

The new Legislation, the Resource Management Act and the Crown Minerals Act, which came into force in October 1991, took into account the dispositions of the Waitangi Treaty.<sup>32</sup> In consequence, to initiate any kind of mineral resource development, the developer has to negotiate with the landowner who cannot refuse access for minimum impact developments. In the case of land belonging to the Maori community, they have the right to refuse access if it is considered sacred by the tribe. The refusal of access can occur during any stage of the mineral development activity, but the Minister can overturn the decision if he considers the proposal to be in the public interest.

## 5 Canada

Indigenous rights in Canada differ from Australia and New Zealand insofar as such rights are protected by the Constitution and there is also a long history of treaties between Indigenous communities and the Government. The recognition of the Indigenous rights was not so late as in Australia, but also not as early as New Zealand in the sense that in the case of New Zealand this recognition was brought about at the beginning of colonization.

In 1763, the Royal Proclamation issued by King George II of Great Britain stipulates that a portion of land, which remained vacant (without the presence of settlers) in possession of the Indigenous People must be reserved for them. However, it was also stated that the Indigenous Peoples could transfer their rights to the Crown. After this Proclamation a series of Treaties were agreed between the colonists and the Indigenous communities while the new settlers expanded across the country. Within this context, the question, which arises, is what is the basis of legitimacy of the Crown's sovereignty over Canadian territory? Decisions of the Supreme Court of Canada asserted that the Crown assumed sovereignty over the territory of Canada by conquest or discovery. In 1973, a very important decision was taken by the Supreme Court of Canada, in the case of *Calder vs. Attorney-General British Columbia*,<sup>33</sup> in which it was agreed by the majority of the Justices that Native Title existed at law and continued to exist unless it had been validly extinguished. After this decision, the Federal Government began to settle aboriginal titles over the land, which remained in the possession of the aboriginal people, through a comprehensive land claim process. Consequently, the Canadian Government has signed several agreements with the Indigenous communities. Within these Modern Land Claim Settlements, the Indigenous people waive their rights to issue future land claims in exchange for participation in the

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intent that the Maori presence would remain and be respected.... The Treaty was also more than an affirmation of existing rights. It was not intended to merely fossilize a status quo but to provide a direction for future growth and development. The broad and general nature of its words indicates that it was not intended as a finite contract but as the foundation for a developing social contract. We consider then that the Treaty is capable of a measure of adoption to meet new and changing circumstances provided there is a measure of consent and an adherence to the broad principles." P. Mac. Hugh, *The Maori Mana Carta: New Zealand Law and the Treaty of Waitangi*, 4-5 (1991).

<sup>32</sup> The Resource Management Act, states the obligation to "Recognise and provide for the relationship of Maoris to their ancestral land, water, sites, wahi tapu and other taonga (or treasures). ...Have particular regard to kaitiakitanga (guardianship of resources) and take into account the principles of the Treaty". Sir J. Ingram, *Native Title and the New Zealand Mining Experience*, 3 AusIMM Bulletin 9-14 (1994).

<sup>33</sup> T. Isaac, *Aboriginal Law: Cases, Materials and Commentary*, 20-35 (1995).

management of the land with respect to all the issues concerned with this process, such as environmental protection, tax regime, compensation, employment, etc.<sup>34</sup>

The Nunavut Land Agreement, signed in 1993 after seventeen years of negotiation, is a model for transfer of title and management of lands and natural resources from the Indigenous Peoples to the Crown. It is one of the most important Agreements because the compromise that it contains seems to be fair and equitable for both parties -the Indigenous People and the Canadian Government-. It covers an extensive area of the North West of Canada (355.000Kms<sup>2</sup> including water and marine areas). Through this Agreement the Inuit Tribe (former Eskimos) “cede, release and surrender” all their rights, titles and interest in and to lands and waters to the Federal Crown, in exchange for: financial compensation, participation in the development of their lands and the establishment of an special Code for regulating the Inuit Lands.

The actual situation in Canada is that, notwithstanding the history of Treaties, Land Claim Settlements and most important of all, the Constitutional protection of Indigenous rights, there is still scope for conflicts, because firstly, not all the Indigenous Peoples have signed Treaties and secondly, the existence in Canada of substantial tracts of land with un-extinguished aboriginal title, which could be subject of claims. Furthermore, the Federal Indian Act, the most important legal framework for the Indigenous Peoples, which endorses the holding of Indian status, the band councils (local government) and the rules for the management and administration of Indian Reserves, does not apply to all the Indigenous groups. For instance the Inuit of Northern Canada do not have reserves and are therefore not affected by the Indian Act, they have signed as previously mentioned, a Land Claim Settlement Agreement. The Metis group like the Inuits have no reserves and also have not signed any Treaty. Their native rights are therefore subject to the Legislation of the Province.<sup>35</sup>

It is concluded that the development of natural resources in Canada has evolved as the catalyst, which brings the recognition of native titles before the Courts.

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<sup>34</sup> The most important Land Claim Settlements - modern day treaties - after the Calder decision are: James Bay and Northern Quebec Agreement, in 1975; the Northeastern Quebec Agreement in 1978; the Inuvialuit Final Agreement in 1984; the Gwich' Comprehensive Land Claims Agreement in 1992; the Claims Agreement with the Tungavik Federation of Nunavut in 1993 and the Final Agreement with the Council of Yukon Indians in 1993. All these Agreements that had been confirmed by the Federal Legislation, confer rights which are protected by the Constitution Act of 1982. The finalization of these Agreements took years, for instance the Nunavut Claim Agreement took 17 years to finalize. See *Id.*, at 255-266, and M. Ivanitz, *The Emperor Has No Clothes: Canadian Comprehensive Claims and Their Relevance to Australia*, in P. Moore, *Land, Rights, Laws: Issues of Native Title*, 8 (1997).

<sup>35</sup> For further details concerning Native Ownership and management of Minerals in Canada, See B.J. Barton, *Canadian Law of Mining*, 80-113 (1993)

## 6 Latin America

### 6.1 Background

In Latin America<sup>36</sup> prior to the colonial epoch, when the Spaniards arrived five hundred years ago, the Indigenous communities already had a relatively advanced mining industry. In fact few new discoveries of alluvial gold were made under the Spaniards during the colonial era. The difference was that for the autochthonous populations the resources extracted did not have a monetary value but a spiritual and religious one. The Spanish Conquerors brought to the New World the concept of mineral wealth. During the colonial époque it is believed that the emphasis on mineral exploitation was as strong as that of the Romans after the Conquest in Spain.<sup>37</sup> At the time of the conquest in 1492 it is calculated that approximately 75 million people were living in those lands. The majority of these populations were established in the highlands of the Andes and the lands located between Northern Central America and Central Mexico. It is believed that after less than half a century more than half of the Indigenous population perished. By 1592 it has been suggested that no more than a fourth survived.<sup>38</sup>

The Spanish and Portuguese style of colonization differed from that of the British in which terra nullius was declared. In most of the cases the conquerors adjudicated the ownership of the land by occupation, since there did not exist a legal title which verified the entitlement of the Indigenous people.<sup>39</sup>

It is suggested that in Latin America the Indigenous peoples have different kinds of titles which support their traditional rights over the lands they occupy. Some are communal land titles, which originated since colonial times. Other titles are those based on the material possession of the land without the need of a written title. A third category is the title obtained as compensation for injustice and discrimination. There have been different approaches related to land ownership<sup>40</sup> in accordance with the époque:

The **Colonial Period** is characterized by the implementation of coercive regimes in which the Indigenous communities have to work in a determined area to produce a taxable surplus. After the conquest, the Spanish colonizers vested the property of the native lands in the Spanish Crown. Before independence, some Indigenous communities managed to buy

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<sup>36</sup> The Latin American Region comprises Mexico, Central America, South America and the West Indies.

<sup>37</sup> A. Vergara Blanco, *Principios y Sistema del Derecho Minero: Estudio Historico-Dogmatico*, 7 (1992).

<sup>38</sup> See, *Latin America History*, at the Latin American Alliance Web, [www.latinsynergy.org/latinoamerica/history.htm](http://www.latinsynergy.org/latinoamerica/history.htm)

<sup>39</sup> L. Nesti, *Indigenous peoples' right to land: International standards and possible developments. The cultural value of land and the link with the protection of the environment. The perspective in the case of Mapuche-Pecheuenche*, European Master's Degree in Human Rights and Democratization, University of Padua-University of Deusto, 1999, at <http://www.xs4all.nl/~rehue/art/nesti1.html>. Nesti argues that "The lack of a legal title and the non-recognition of their special link with their territories has been used by States until our days to expropriate Indigenous peoples lands for development projects, military occupation, border security, division into small private properties to be sold to individuals or for tourism projects. In other cases, States have recognised Indigenous peoples' right to land but never implemented it, nor have protected these lands from exploitation companies or from people interested in their resources. Many times States have not made a distinction between the lands and the resources of the subsoil, attributing to themselves the permanent sovereignty over these latter and allowing for exploration and exploitation projects in Indigenous peoples' lands without consulting them or compensating them for the loss of land or the damage received"

lands from the crown. This produced the so-called indigenous community. In the case of the inhabitants of the lowlands, they did not receive special protection or recognition of any rights since the terrain they were living in was of little interest to the Spanish colonizers. These zones were consigned to the missionaries, who organized the communities within reserves.

With independence, the individual forms of land property were promoted. Since the Indigenous communities were people with little education, the ownership of the lands was concentrated in few hands during this époque. The Indigenous people were given small pieces of land for their subsistence in exchange for cheap labour. This approach caused conflicts that gave way to the creation of special "resguardos" that have their own political and social organization.

During the Twentieth -Century, many changes occurred related to the Indigenous property rights over their lands. Initially the collective ownership of Indigenous lands was recognized with the prohibition of sale, mortgage, division or prescription. Policies varied across the Latin American countries. Around the forties, there was a growing concern about the marginalization of Indigenous people, which led to the development of policies of integration. During the 50's to 70's many Latin American countries enacted agrarian reforms to promote better management of the lands. In some cases the Indigenous peoples received lands that were not suitable for carrying out agricultural activities leading to poverty in the Indigenous lands. In the lowlands the colonization increased through farming and larger commercial enterprises, this produced a need to regularize the lands. Brazil promulgated the Indian Statute in 1973, in which the demarcation of the Indigenous lands was stipulated, given a period of 5 years to carry out this task. During this period, the titling of the Amazonian lands was initiated. Peru, in 1974 through its Native Communities Act recognized the inalienable collective ownership of the Amazonian Indians over their lands. In Colombia the titling started in the 80's and in Ecuador and Bolivia in the 90's

An issue that has impacted in the regularization of lands is the concept of property with a social function that imposes limitations to the type of development undertaken. Within this context the states are empower to decide which economic activity is the one that will have precedence in the use of land. The use is left to market forces. Plant and Hvalkof,<sup>41</sup> indicate the following approaches in Indigenous land tenure:

- **Protective approach**, which is based in the Indigenous rights to be protected against extraneous impacts and market forces. Within this approach the majority of Latin American legislation stipulates that the Indigenous lands are inalienable, imprescriptible and can not be liable to mortgage.
- **Rights based approach**, which recognizes the Indigenous ownership over the lands and its resources within a multicultural state. This approach is in line with the recognition of the traditional ownership of the lands before the conquest, the native title to land. This approach is also referred to the titles granted during the Colonial époque.

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<sup>40</sup> R. Plant, and S. Hvalkof, *Land Titling and Indigenous Peoples*, IADB, Sustainable Development Department, Technical papers (2001).

<sup>41</sup> *Id*, at 19.

This approach can be compared with the Australian one in which, as a part of reconciliation over past injustices, the Indigenous rights to the lands are recognized and affirmed.

- **Environmentally or ecologically determined approach**, which states the special capacity of the Indigenous communities to live and develop lands located in ecologically sensitive areas. This approach emphasizes the fact that from immemorial times the Indigenous communities have been living in ecologically sensitive areas without causing severe impacts. The Indigenous peoples generally use the land with the view of preserve it for future generations. Here one can wonder if perhaps they have a better idea of sustainable development than western societies.

## **6.2 Mining Investment in Latin America**

As stated before, the phenomenon of globalisation, has stimulated international competition on an unprecedented scale to attract investment and has, in the case of mining activities, caused a fundamental shift in preferences for investment. The initiative is moving away from developed countries, which were the leaders in terms of investment attraction, such as the USA, Canada and Australia, to developing countries. This change in attitude has taken place in response to a more favourable investment climate in countries previously characterized by a nationalistic attitude, who have reformed their laws in line with the global patterns of liberalization and the opening-up of economies. A good example of this modernization trend within their mining/investment frameworks is offered by the Latin American countries, whose far reaching reforms have placed some of them in top positions in terms of investment attraction, and also stimulated their economic growth. Recent surveys have shown that the Latin American Region, during the last five to six years has become worldwide, the recipient of more private exploration investment than any other region.

REGION	EXPLORATION EXPENDITURE US\$ MILLION	PARTICIPATION (%) EXPLORATION EXPENDITURE
Africa	293	13%
Asia/Pacific	199	8.5%
Australia	405	17%
Canada	348	15%
Latin America	662	28%
Rest of the World	197	8.5%
U.S.A.	235	10%
<b>TOTAL</b>	<b>2,339</b>	<b>100%</b>

Table 1. Exploration expenditure in 2000

Source: Adapted from Spending Remains Low, Review of Exploration Expending by the Metals Economic Group of Halifax. M.J. (2001).

GLOBAL EXPLORATION EXPENDITURE (US\$ MILLION)						
	1994	1995	1996	1997	1998	1999
Latin America	544	785	963	1,170	814	630
Australia	431	529	666	673	495	404
Africa	195	320	418	667	494	323
Canada	280	329	461	436	308	234
South East Asia	168	257	415	440	266	174
USA	323	294	343	365	243	218
Rest of the World	308	438	258	283	209	182
<b>Total</b>	<b>2,250</b>	<b>2,950</b>	<b>3,520</b>	<b>4,030</b>	<b>2,830</b>	<b>2,165</b>

Table 2. Global Exploration Expenditure

Source: Adapted from The Divide Widens and Expenditure Slump (M.J. 8554 (1999), 8570 (2000))

From these tables it is feasible to deduce that, taking into account that many mineral deposits are located in remote and isolated areas, usually inhabited by Indigenous communities, conflicts might arise over the use of their traditional lands, which are considered as communal property.

The recent trend in the Latin American Countries is the recognition and affirmation of the Indigenous rights. It has been pointed out that " a new Latin American Constitutionalism, firmly recognizes an increasing number of Latin American republics as multiethnic and multicultural societies and often provides special protection for Indigenous lands and

resources".<sup>42</sup> During the last decade several Latin American Countries such as Argentina, Bolivia, Brazil, Colombia, Ecuador, Guatemala, Mexico, Nicaragua, Panama, Paraguay and Peru, have recognized the rights of the Indigenous Communities in their National Constitutions. Countries such as Argentina and Chile also enacted new national laws specifically related to Indigenous communities.<sup>43</sup>

The Colombian legislation pertaining to the recognition of Indigenous rights and the management of traditional lands is considered to be one of the most advanced in Latin America. There, before any mineral development is commenced in traditional lands the Indigenous communities must be consulted. The Colombian Constitution of 1991 in its Title I- Fundamental Principles reaffirms that the State is an Unitary Republic, decentralized, with territorial entities autonomous, democratic, participative and pluralist. It states the recognition and protection of the ethnic and cultural diversity. The Constitution recognizes the resguardos as territorial entities with equal rights to those of other territorial entities<sup>44</sup>. Colombia, has gone further, by regulating mining activities within terrains belonging to the Indigenous communities. The Colombian Mining Code,<sup>45</sup> contains special norms for the exploration and exploitation of mineral resources in Indigenous lands. It devotes Chapter XIV to the "Ethnic Groups". The Mining Code stipulates the obligation of the mining titleholders of carry out their activities in such a way that they do not cause adverse impacts in the ethnic groups that are located in the areas of the concession. It also contemplates the following:

- Obligation of the mining authority to delimit the mining areas inside the Indigenous territories.
- The obligation of consulting with the Indigenous communities before the initiation of any prospecting or exploration activity.
- The Indigenous communities will have preference for the granting of mining titles over third parties.
- The concession will be granted to the Indigenous community as a whole not to an individual member of it.
- No mining activity can be carried out in terrains considered by the Indigenous authorities as sacred or with special social, cultural or economic significance.
- The royalties and other income generated by the mining activity in Indigenous lands will be directed to infrastructure and services that benefit the Indigenous communities.

The new Ecuadorian Political Constitution of 1998 contains similarities to the Colombian one. Its Article 1 states that Ecuador is a multicultural and multiethnic State. It reaffirms in its Article 83 that the Indigenous communities are part of the Ecuadorian State. It also enumerates in a very comprehensive form the special rights of these communities related to their identity, traditions, native title, conservation of the biodiversity, intellectual property,

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<sup>42</sup> For a detailed study of the history of the legal recognition of the native titles in Colombia, Ecuador, Panama and Peru, See R. Plant, and S. Hvalkof, *supra* note 40.

<sup>43</sup> A. M. Crain, *Indigenous Land Regularization in Latin America*, at Native Web, [www.nativeweb.org](http://www.nativeweb.org).

<sup>44</sup> Colombian National Constitution, Article 285, states that "Son entidades territoriales los departamentos, los distritos, los municipios y los **territorios indigenas**" (Emphasis added)

<sup>45</sup> Colombian Mining Code, Law 685, August 15<sup>th</sup>, 2001.

administration of their cultural heritage, conservation of their own languages, protection of their sacred sites as well as animals, plants, minerals and ecosystems that are special from the traditional point of view. The Indigenous communities must participate in the decision-making related to the management and development of their lands and resources. Similar to the Colombian prescriptions, the Ecuadorian Constitution establishes that the Indigenous and Afro-Ecuadorian communities will exist as an independent administrative entity (Article 224). Ecuador has not escaped the Indigenous uprising on a national scale. At the beginning of this year, Ecuador's Capital Quito was invaded by more than 10,000 Indigenous people determined to be heard by the government. Some of their petitions were resolved positively after violent conflicts between the military and the Indigenous. As a result of these events on February 7<sup>th</sup> a 23-point Agreement was signed between the Ecuadorian Government and the Indigenous organizations.

The Bolivian Political Constitution, also recognizes the State as "multicultural and multiethnic". The Article 171, recognizes Indigenous ownership over the collective lands "tierras comunarias de origen" and guarantees the sustainable use and development of natural resources. It also recognizes the Indigenous communities as legal entities.<sup>46</sup>

Argentina is the homeland of approximately 50,000 Indigenous people, located from Kollas in the Andean northwest to Guaranis and Tobas in the Lowlands northeast to Onas in the South of Tierra del Fuego.<sup>47</sup> The Argentinian Constitution of 1994, Article 75<sup>48</sup> recognize the preexistence of the Indigenous communities. The Constitution, similar to other Latin American Countries promises to guarantee the Indigenous rights to education, self-determination, management of their traditional lands, and participation in decision-making concerning the development of their lands. It also guarantees the possession and collective property of the traditional lands, which cannot be sold, transferred, mortgaged or subject to liens. The participation of the Indigenous people is assured in all matters that can affect them. Due to the Argentinian Federal system, the implementation of the National laws pertaining the Indigenous Communities' lands rights and their management is confused since there also exist laws at Provincial level which in some cases are contrary to the national ones. This situation has led to conflicts in the Northwest of Argentina on account of the delays in the regularization of their traditional lands. Recently the Lhaka Honhat Association of Indigenous Communities presented a complain to the Inter-American Commission on Human Rights against the Argentinian State, due to the lack of environmental impact assessments (EIA) and pursuance of the regularization of their traditional lands in the Salta Chaco.

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<sup>46</sup> "During the year 2000, peasants and indigenous peoples realized that government policies with regards to land distribution and natural resources in practice denied them the territorial rights they had obtained over the previous decade through constitutional and legal reforms. In a context characterized by a diminution of their rights, the only alternative has been mobilization by the people in order to generate spaces for negotiation with governments agents through such action" \_International Work Group for Indigenous Affairs (IWGIA) IWGIA's Yearbook: The Indigenous World 200/2001. [www.worldbank.org](http://www.worldbank.org)

<sup>47</sup> For a detailed account of the development of the Indigenous rights in Argentina, see Crain, *supra* note 42

<sup>48</sup> Article 75, of the Argentinian Constitution states that "*Corresponde al Congreso..17) Reconocer la preexistencia étnica y cultural de los pueblos indígenas argentinos. Garantizar el respeto a su identidad y el derecho a su educación bilingüe e intercultural; reconocer la personería jurídica de sus comunidades y la posesión y propiedad comunarias de las tierras que tradicionalmente ocupan; y regular la entrega de otras aptas y suficientes para el desarrollo humano; ninguna de ella será enajenable, transmisible ni susceptible de gravámenes o embargos. Asegurar su participación en la gestión referida a sus recursos naturales y a los demás intereses que los afecten. Las provincias pueden ejercer concurrentemente estas atribuciones.*

The Peruvian Constitution of 1993, follows a similar pattern to the previous Constitutions analyzed. It establishes in its Article 2 (19) that everyone has the right to his or her ethnic and cultural identity. It also recognizes and protects the Peruvian's ethnic and cultural plurality. The Constitution reaffirms the right of the Peruvian people to use their native language. In the same way, the Constitution recognizes the Indigenous communities as artificial persons and therefore with legal capacity.<sup>49</sup> Related to the ownership of the lands the new Peruvian Constitution deviated from the previous approach, stipulating that the land property can be particular, collective or in another associate form.<sup>50</sup> Within the new prescriptions the Indigenous lands are transferable, mortgageable and alienable. The Indigenous people are free to dispose of their lands.

In the case of the inhabitants of the Amazon region, the development of large-scale mining projects has generated huge impacts in the Indigenous communities. This new development has brought to the community changes in the pattern of life, their cultures, and their environment. These projects usually bring changes in the social structure, since the introduction of large amounts of money generates more disparity between the social classes.

Nevertheless, despite this wider Constitutional<sup>51</sup> and legal recognition in Latin America of Indigenous rights including their native titles; there still exists scope for conflict. As previously indicated, generally, the ownership of minerals in these countries is vested in the states. This situation has generated problems in traditional lands subjected to concessions to carry out mineral prospecting or exploration activities. Normally the conflict is between the Indigenous communities and the mining companies, ignoring that the problem also rests with the governments who lacked policies for the management of these lands or that having laws and regulations, they do not have the infrastructure to implement them and/ or monitor their compliance. In this respect the ILO Convention 169, stipulates in its article 15 (2)<sup>52</sup>

In cases in which the State retains the ownership of mineral or subsurface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages they may sustain as a result of such activities

Despite the willingness of the mining companies to carry out their activities in a proper manner in line with international standards which are conducive to sustainable development, conflicts still arise, since in many cases, there is no coherent legislation that provides for all the different issues that arise as a consequence of mining activities. There is a

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<sup>49</sup> Peruvian Political Constitution, Article 89.

<sup>50</sup> *Id.*, Article 88

<sup>51</sup> For the text of the Latin American Constitutions see Georgetown University Center for Latin Studies, Base de Datos Politicos de las Americas, at <http://georgetown.edu/pdba/Constitutions/>

<sup>52</sup> The ILO Convention No. 169 has been ratified by 14 countries: Argentina (3.7.2000), Bolivia (11.12.1991), Colombia (7.8.1991), Costa Rica (2.4.1993), Denmark (22.2.1996), Ecuador (15.5.1998), Fiji (3.3.98), Guatemala (5.6.1996), Honduras (28.3.1995), Mexico (5.9.1990), Netherlands (2.2.1998), Norway (19.6.1990), Paraguay (10.8.1993), Peru (2.2.1994).

lack of proper information about policies and institutions relevant to mining activities.<sup>53</sup> The main tool to avoid future problems is **public consultation** with the Indigenous communities in which they must be empowered to participate in the management of their lands and in the decision-making process to carry out a particular project.

Another issue that has proved to be important in the granting of titles of Indigenous land is the method of demarcation, since some countries are still using manual methods, which are not the most reliable solution. The most modern method, and the one which will avoid confusion is the satellite Global Positioning System (GPS) which offers more reliability. Since the Indigenous communities have the best knowledge of the delimitation of their traditional lands, they have played an important role in the demarcation and titling processes. Examples of this Indigenous participation are the cases of Peru and Ecuador in which they participate actively in the titling, demarcation and mapping of their terrains.<sup>54</sup> The participation of the Indigenous communities during these processes is of vital importance, since it contributes to the understanding of how the Indigenous system of land management works.

In conclusion, countries in Latin America, with a considerable proportion of Indigenous Peoples are in the process of regularizing their rights, including those related to their traditional lands. This goal will be obtained, with the willingness and co-operation of the two other main stakeholders, namely the state and the mining companies. The large mining companies are already implementing the consultation and participation of the communities that can be affected by their projects prior to their initiation included in their agendas.

## 7 Final Considerations

Global demand for mineral commodities, the drive for mining profits, the advances in mining technology and the ambitions arising from the empowerment of States and developers have led to the spread of mining activities into remote areas, which are generally inhabited by Indigenous Communities. With the economic globalization and the liberalization of markets, all the countries endowed with mineral resources are competing to attract private investment. They see the development of their natural resources as the key to the growth of their economies. Countries with Indigenous communities are in the international limelight, because of the global awareness of the need to protect Indigenous rights. Therefore in the delineation of their policies these countries must take into account the need to address the protection of those Indigenous rights that have already received recognition in the international arena. Also, governments must offer systems through which their laws can be implemented.

Other important aspects are:

1. Arguably the treatment of Indigenous rights issues in Australia, which until recently denied the participation of the Indigenous population in the development of the

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<sup>53</sup> K. Mate, *Capacity building and Policy Networking for Sustainable Mineral-Based Development*, Report prepared for UNCTAD under Project M of the UN Development Account (2000-2002).

<sup>54</sup> See, Plant and Hvalkof, *supra* note 40, at 3.

Nation's natural resources on a just and equitable basis, was the least just of the three British colonial systems analyzed. This is a contemporary issue in Australia and much remains to be done to achieve a fair solution. The recognition and protection of Indigenous rights are not enshrined in the Constitution and therefore depend generally upon Common Law. The conflict of interests between aboriginal rights and the development of natural resources must be addressed as a matter of urgency. This issue has already exerted a negative impact on the mineral industry during a vulnerable phase of low prices in the metal commodity markets, resulting in a downgrading of Australia's perceived attraction for exploration, causing an outflow of funds to more competitive countries.

2. 'Prima Facie' the Treaty of Waitangi in New Zealand was hailed as a virtuous model agreement ahead of its time, which safeguarded the interests of the Indigenous peoples upholding their equality with the European settlers. However, a conflict related to its interpretation still exists, leaving the recognition of the rights of the Indigenous peoples in the hands of the Courts.
3. In Canada where the rights of the Indigenous Peoples were largely protected from an early stage in the country's colonial history, the Courts have provided a successful mechanism through which Indigenous people have secured their rights. Furthermore these rights and the Treaties' principles are enshrined in the Constitution and the modern Land Agreements have proved to be a workable system, because they recognize and implement rights. Nevertheless, there exist vast terrains in Canada that are subject to Native Title claims, because their Indigenous owners never signed any Treaty. Therefore it is still necessary to find a more rapid strategy to fast track the settlement of conflicts arising in relation to the development of natural resources located in these territories.
4. In the particular case of Latin America, the issue is not the recognition of the Indigenous rights, which has been enshrined recently within the Constitutions of some countries, but the provision of straightforward regulations to implement the national laws. Also, in countries with two tier systems, such as Argentina and Brazil coherence and consistency between the central and provincial laws must be achieved, which will avoid erroneous interpretations that lead to social conflicts.

In the delineation of mining policies related with land use, the countries with Indigenous communities shall take into account among other issues

- The customary laws of these communities, in which an equitable balance must be found, allowing for the ethnic diversity of the communities involved.
- The distribution of the wealth generated by the mining activities within the communities concerned.
- That the governments, in conjunction with mining companies offer training to the Indigenous Peoples compatible with their new activities, which will generate social capital that will compensate for eventual mine closure. This will also prevent the need for relocation of these communities within unfamiliar settings.
- Clear delimitation of the Indigenous land claims.
- Setting up of transparent procedures for Indigenous Land regularization

- Setting up administrative rules and procedures related to information sharing and consultation.

One answer to the question formulated at the outset could be that the best strategy to resolve conflicts arising during the development of natural resources, especially in the mineral sector, could be the signing of specific comprehensive agreements between the governments, the developers and the Indigenous People with interests in a project. This type of special agreement will encapsulate all the rules that deal with the use of land, protection of the environment, employment, taxation, and so on while establishing all the obligations and rights of the parties involved. With these agreements, all parties will have security in areas of potential conflict. The Government and the Indigenous Communities will have the security that the Investors will comply with their obligations, while the Investor is guaranteed that the contract will have the necessary stability. The most important point of all of these issues is that the country will maintain its international image, because these agreements will reflect equilibrium that harmonizes the interests of the states, the developers/investors and the Indigenous peoples as traditional owners of the lands.

Any negotiation between stakeholders must be conducted within an environment of authentic goodwill, mutual respect and readiness to compromise interests. This negotiation must have as a final goal, the achievement of fair, just and equitable agreement which can be of mutual lasting benefit and will avoid the costs and delays associated with long judicial processes and promote sustainable development.

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## **Annex I**

### **International Regulations Containing Dispositions Related to Indigenous Rights Over Land**

1. The Draft of the Inter-American Declaration on the rights of Indigenous People, as approved by the Interamerican Commission of Human Rights of the Organization of American States (1995)
2. Resolution on Actions required internationally to provide effective protection for Indigenous people as adopted by the European Parliament (1994).
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6. World Bank Operational Directive 4.20: Indigenous People as Adopted by the World Bank Board of Governors on Sept 17, 1991.
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10. Declaration of San Jose as adopted by the UNESCO Meeting of Experts on Ethno Development Ethnocide in Latin America, 1981.
11. Draft Declaration of Principle for the Defense of the Indigenous Nations and Peoples of the Western Hemisphere as developed and circulated by Indigenous Participants at the NGO Conference on Discrimination Against Indigenous People, 1977.
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