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Sustainable Communities: Mining and Indigenous Governance

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FOCAL
1 Nicholas St., Suite 720, Ottawa, ON K1N 7B7
Tel: 613-562-0005
Fax: 613-562-2525
Email: focal@focal.ca
www.focal.ca

Introduction

Mining companies are increasing the frequency with which they engage indigenous communities and governance issues in Latin America. The elevated frequency of interaction is increasing the pressure felt by individual companies, indigenous communities, and the industry as a whole. Indigenous communities are often located in rural areas where access to information is severely limited, and few leaders have sufficient prior experience or capacity to deal with the ensuing challenges that mining activities generate. Under the best of conditions, working towards sustainable communities should be a guiding principle and priority of the Corporate Social Responsibility (CSR) frameworks of mining companies. Given the varying systems of governance and heightened difficulties involved in finding common ground between the interests of industry and of neglected communities, a focus on sustainability is fundamental to the success of a mine and the communities in its sphere of influence.

Although governance structures vary in each case, they act as a keystone in uniting and holding companies and communities intact. Without a strong system of governance, the structures of a company or community would be susceptible to collapse under the pressures and demands placed upon them. In the case of companies, such pressures primarily involve financial capital. In the case of indigenous communities, pressures on social capital generate the most impact on sustainability.

The cornerstone of governance is leadership and representation. In order for indigenous community leaders to participate in dialogue with companies on potential opportunities that mining could generate, they require a solid backing from their constituency. For this reason, it is also important that companies are sufficiently diligent in identifying the truly representative community leaders. Without the leaders present, and without their backing from the community, opportunities for adequate dialogue are extremely limited, and the likelihood of gaining and maintaining a social license to operate is greatly diminished.

With a focus on sustainable communities, the mining industry could come closer to finding common ground with the governance structures that exist within rural indigenous communities. Ideally, indigenous communities would count on strong representation from their municipal governments that would be working closely with the communities in order to ensure their sustainability throughout the life cycle of a mine. The reality of most rural indigenous communities in Latin America, however, is that they do not find representatives within the municipal government, and that the municipality does not work effectively to assure the sustainability of the community at large.

Sustainable Communities

It is generally agreed that a sustainable community can be identified by its ability to provide for immediate needs, and to respond to change without putting in jeopardy the standard of living and socio-environmental health of future generations. In practice, the sustainability of a community has a lot to do with the quality of services provided, the integrity of social capital, the revenue that is generated by the municipal government, and the existence of a mid to long-term development plan. If any of these components are lacking, the governance structure of the community will be weakened by a constant need to deal with civil unrest and crises. The degree to which a mining company finds itself contributing to, and dealing with, conflict is proportional to the extent that the above conditions are lacking upon arrival into an area.

A plan that involves the participation of the whole community must first be created in order for it to move towards sustainability. In essence, a process of free, prior, and informed consultation (FPIC) between the government and the community is critical. Once a plan has been developed and the needs of the community identified, it will be more adequately prepared to develop and manage a working relationship with a mining company. Companies should respect this process and the decisions taken by the community in their consultation with the government. A framework of CSR that supports the sustainability of communities should require companies to wait until communities have prepared themselves internally for dialogue and negotiation about economic and social benefits that are in line with their mid to long-term development plans.

Corporate Social Responsibility (CSR)

CSR has been gaining a lot of attention over the past few years, especially in the mining industry. However, it continues to be viewed and defined primarily in terms of a tool for risk management, thus ostracizing it from the host community that grants the company social license to operate. The primary limitation that a risk management approach creates comes from its nature to seek, above all, to internally control the process of evaluating and dealing with exposure to external risks. The level of coordination with local stakeholders under this model is therefore limited to the degree to which any given stakeholder is viewed as having or lacking the capacity to contribute to the overall strategy of risk management.

Given that the majority of first encounters are between the community and a company dedicated to exploration, the focus of risk management tends to be short sighted. In other words, the company does not always see it to be in its best interest to engage with the community as a whole from the beginning. There is the belief that this will increase costs and diminish the expected future value of the asset base on which the company aims to capitalize.

The expected future value of the assets of a mineral deposit is limited by international prices and competing projects. The ability of a company to incur expenditures in CSR is determined by the present value of the difference between the costs incurred and the expected value of returns from a project. The focus of exploration companies is therefore to keep costs to a minimum, since little is known about the actual value of the asset or mineral deposit. The immediate cash flow of an exploration company comes primarily from expected returns, and the ability to capitalize on that expectation through debt and equity financing.

For larger companies that are involved in the production of a mine, cash flows come from the production of a proven deposit of minerals at an expected sale price. The focus of a producing company is also to keep costs as low as possible; however, greater attention is given to the risks associated with interruptions in production. As a result, maintaining good community relations takes on heightened importance for the producing company. The advantage that a producing company has over an exploration company is the fact that a proven mineral deposit backs its financing and marketing efforts.

The governance structure of a mining company is a reflection of its relationship with its investors and/or shareholders. An exploration company tends to attract a certain type of investor, often referred to as a venture capitalist. Venture capitalists are more willing to assume the potential losses associated with increased risk, in the hope of a greater return. The shareholders of producing companies tend to include a larger percentage of risk adverse investors. The difference in investor relations has a trickle down effect on the type of corporate governance structure that exists in a mining company, and in turn on the type of corporate social responsibility framework that will be implemented at the project level.

Indigenous Governance

Indigenous communities have their own systems of governance that aim at the sustainability of the community and the use of natural resources. Indigenous governance can be defined as the roles, responsibilities, and relationships that contribute to the social fabric or social capital of indigenous communities. These roles, responsibilities, and relationships are governed by norms and traditions, and contribute to decision-making processes. Indigenous governance stems from a common interest in, and identification with, the lands and territories inhabited by communities, and contributes to the setting of priorities in relation to internal and external influences that affect the social fabric of its members. The extent to which governance exists in a given community varies from case to case.

The reality on the ground is that local structures of indigenous governance are not designed to deal with mining projects, as they stem primarily from agriculturally based societies. The leaders of such communities are not equipped with the capacity to readily adapt to an economic model that includes large-scale mining. In parallel terms, the corporate governance structures of a mining company are ill equipped to adapt quickly to the realities and structures of an indigenous community. Capacity building and dialogue are necessary preconditions for adaptation and mutual understanding.

Indigenous Governance & CSR: Coming Together in Dialogue

Mining developments force communities to deal with issues with which the community has little prior knowledge or experience. Often, what occurs in this case is that the community will sense a lack of organizational capacity to deal with potential issues, and will begin to organize itself. If the community is not engaged from the earliest stages of a mining project, then it is more likely that its process of internal organization and strengthening will be reactive rather than proactive in nature. On the other hand, if the community is engaged from the earliest stages of exploration, the pressures to organize and strengthen its internal governance structures will bear positive results, as it will have sufficient time to develop an adequate structure to deal with the pressures of a potential mining project in its territory. This will in turn lead to a greater chance that they can benefit from, and participate fully in, decision making processes.

The strengthening of local governance structures should be viewed as a prerequisite for gaining a social license to operate from any community, and even more so in the case of an indigenous community. Therefore, CSR frameworks need to accompany the industry representatives who are involved in the earliest stages of exploration. If an adequate exchange of information does not happen at the early stages of development, then the company runs the risk of engaging the community at a point beyond their threshold to adapt to the presence of a mine. What this inevitably creates is a situation where the community engages the mining process with negative sentiments and a palpable incapacity to engage in dialogue and negotiate. The lack of early engagement also renders illegitimate any efforts at a genuine consultation process between government and community, and puts into jeopardy any potential for negotiations.

First of all, negotiations between company and community should aim at coming to a mutual understanding and vision of what a sustainable community should look like. Then they should develop a common plan of action that maintains that vision throughout the life cycle of a mining project. The negotiation process could be conducted in phases, with each phase proceeded by the signing of a memorandum of understanding (MOU). The phasing of the negotiation process serves the purpose of aligning the negotiations with the major phases of a mining project. Similarly, the benefit of using an MOU is that it permits the company and community to evaluate the means being used to achieve the goal of sustainability, and the mechanism for the negotiations themselves. The exercise of entering into dialogue builds trust and respect, and creates a common ground on which specific negotiations for carrying on into sequential phases of an agreement can take place.

Prior to negotiations between company and community, certain conditions and guarantees need to be in place, consisting of, and contributing to, clarity in terms of the rights of indigenous communities. The first condition is that there be FPIC. FPIC is also a legally recognized right of indigenous communities in countries that have ratified the International Labour Organization (ILO) Convention 169. FPIC is the responsibility of the government and should be conducted in good faith. In this sense, consultations conducted after the fact of granting a mining concession do not qualify as in-good-faith procedures.

Consultation: Government & Community

Consultations by government with communities should start as soon as the ministries responsible for approving environmental impact studies and granting licenses and concessions receive an application from a private enterprise. The information received by these ministries about the intended location and activities of the exploration company can then be sent to the municipal governments in the areas of concern. The consultation process can begin shortly thereafter. An association of municipalities that has contacts within the municipal governments could facilitate this process.

A major component of the consultation process is the updating of a mid- to long-term plan for local economic development. If such a plan does not exist, then sufficient time should be dedicated to developing one. During this time, the representatives of the company interested in the concession could be introduced to the community and be permitted to follow the process. However, the company is better off not interfering or participating directly at this point in time; their presence serves the purpose of learning about the needs and priorities of the local communities. Funding for consultations could come from a source such as the mining canon or some other tax revenue that is at the disposal of municipalities and/or the ministries responsible for environmental impact assessments and the granting of mining concessions.

Sufficient time allowance for consultations within indigenous communities is necessary in order to comply with the articles of the ILO Convention 169. Indigenous peoples also have the right to be consulted separately from other stakeholders, such as local business interests and cooperatives. If consultations are to bear fruit in facilitating a dialogue between government, communities, and mining companies, then they must start as early in the process as possible. In addition, consultations should proceed in such a way that indigenous governance structures and internal consultations are respected.

At the later stages of a consultation, when development priorities have been addressed, the focus could shift to developing the capacity of indigenous community leaders to negotiate with the exploration company. In order for this to happen, the community needs to have access to information on their rights, laws and legislation that pertain to mining and use of natural resources, the mining cycle, and the company that they will be dealing with.

Under conditions where communities do not benefit directly from mining activities, consultations will advance little more than the exchange of information. Under these conditions, communities will continue to push for prior consent, arguing that FPIC is insufficient for having their voices heard. If FPIC was followed by direct negotiations with the company, then the community could perceive direct benefits. Consultations would therefore serve as a venue for clarifying expectations and for addressing needs and priorities. Without the option of direct negotiation, the benefits derived from being consulted decrease and the community is more likely to view the consultation process as inadequate.

Enabling Conditions: Memorandums of Understanding

Due to the lack of knowledge about mining within indigenous communities, it is necessary to ease into a negotiation process. Once a proper and impartial consultation has taken place between the government and the community, the exploration company can be welcomed into the discussions. At this point, a tripartite dialogue should begin. As a result of this consultation, the municipal government will have a clearer idea of the mid to long-term needs and priorities of the community, and can therefore incorporate these into its local development plan. From the building blocks established in the plan, the community can begin to enter into negotiations with the company.

An MOU can be used as a way to establish a tripartite dialogue among the municipal government, the indigenous community, and the company, setting the rules, conditions, location, and timeframe for the negotiations. The exercise of establishing an MOU can assist the parties involved in learning about each other prior to entering into more complex negotiations associated with the mining project itself. Engaging in the process of signing an MOU also formalizes the relationship between the community, the local government and the company, and helps the indigenous community prepare for the larger process of negotiating an impact and benefit agreement (IBA) with the company.

Conclusion: Participation

The development of working relationships between indigenous communities and mining companies requires government presence. Mining activities are, by their very nature, unsustainable, and will eventually undergo a process of closure. If a mining company seeks to contribute to the development of a community, then it is useful to look beyond the term of its project and link its social programs to the governance structures that exist at the local level. Systems of indigenous governance have functioned over time to bring sustainability to predominantly agriculturally based communities. Agriculture and the territories on which it depends have therefore been the pillars of sustainable communities. In order for CSR to contribute to development, it needs to look at development from the perspective of contributing to the building of capacities for sustainable communities within a shifting economic model.

The economic activity of the community may change over time from traditional forms of agriculture to other activities, such as tourism and non-traditional agriculture. The success of these changes will depend on the capacity of local institutions to adapt to new circumstances, needs, and priorities. Part of the process of creating these capacities is for the communities and municipal governments to have active mechanisms for dialogue and consultation in place prior to engagement with mining. If the practice of including indigenous communities in the design of local economic development plans has not been established prior to engagement with mining, then the sustainability of the community will be jeopardized by the changes that mining will bring in the short term. Without the proper conditions in place, the efforts of a mining company in terms of CSR will be insufficient to secure the sustainability of host communities in the long run. The right to self-determination and the right to development are enshrined in ILO Convention 169 as basic rights of Indigenous Peoples. A mining company seeks similar rights when deciding where to invest. Finding a common ground is not without its difficulties, but it often begins with recognizing and accepting a common desire for stability.

Annex 1

Suggestions for Action: Free, Prior, and Informed Consultation

1. Upon applying for a license and/or concession, a company could pay a fee to the government department responsible for coordinating consultations with communities. This may not be the same department that is responsible for granting a license and/or concession:
    a. The government should establish a price tag for carrying out a consultation with a community, which would be the basis for calculating the amount of the fee to be paid by the company.
    b. The fee charged to the company would be considered a cost of doing business.
    c. To avoid large disparities between costs, and to increase the capacity of local governments, the responsibility for carrying out the consultation could be given to municipal governments, with coordination assistance from the national level.
    d. Involving the municipal government will also assure that the local development plan is taken into account during the consultations. If a plan does not already exist, it ensures that a minimum preliminary diagnosis is conducted.
    e. If, the government were unable to carry out the consultation within ten months of having received the application for a license/concession from the company, then the company would be reimbursed the cost of the initial charge.

2. The government conducts a consultation with the community:
    a. The consultation would be conducted in good faith and would serve the purpose of establishing the priorities of the potentially affected communities.
    b. The consultation would establish the positive/negative impacts of a potential mine on the local governance structures, whether the community felt that a mine could be managed from an environmental standpoint, and whether it could contribute to the sustainable development of the community.
    c. The exploration company making the application would cover 75 per cent of the cost associated with the consultation.
    d. The government would cover 25 per cent of the cost associated with the consultation.
    e. If the actual cost exceeds the estimated cost, then it would be the responsibility of the government to subsidize the remainder of the consultation costs.
    f. The government's contribution could come from a fund set aside from taxes taken from currently operating mines.
    g. The consultation should be conducted via the local municipality, with coordination from the relevant centralized government department.
    h. An association of municipalities could also be involved in the coordination of the consultations and in the preliminary transfer of information.

3. Towards the end of the consultations between the government and the community, the two actors would agree to incorporate the mining company into the discussions in order to sign a memorandum of understanding (MOU) between the community and the company:
    a. The MOU would outline the conditions under which the approval of the application of a license and/or concession would be granted to the company.

b. The first MOU signed between the community and the company would be coordinated by the relevant central government department.
c. Conditions included in the MOU would include the following: the company agrees to incorporate the local development plan and information gathered from the consultation into the environmental impact assessment (EIA); an adequate review of the assessment will be conducted by the community; and the company agrees to establish a mechanism for community participation in the monitoring of the exploration process.

4. The relevant central government department grants or withholds the license/concession to the mining company:
    a. The decision to grant or withhold the license/concession should be based on a review of the consultation with the affected community.
    b. Once approved, the company would be able to advance with the development of an EIA.

5. The EIA gets reviewed by the community and, as a result, a second MOU is signed, showing how the community will receive capacity building and how the negotiations between the community and company will be carried out:
    a. The municipal government will coordinate the signing of the second MOU.
    b. Capacity building needs in the community would have been assessed in the consultations between government and community.
    c. The timeframe for beginning the negotiations upon acceptance of the EIA is established in the second MOU.
    d. The frequency of reviewing any agreements reached between the community and company will also be established.
    e. The second MOU should involve a clause establishing that the community will have the option to include the local municipality as a mediator in the process of negotiation.
    f. As a result of the two MOUs being signed, a system of tripartite dialogue will have been established.

6. The EIA goes to the relevant central government department for review and acceptance or rejection:
    a. If the EIA is approved, the company will be able to start its exploration activities in the region.
    b. If the EIA is approved, the company and community begin negotiations as per the agreed upon process stated in the second MOU.
    c. If the EIA is not approved, the company has the option of either redoing the EIA or ceasing its activities in the region.

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FOCAL

1, rue Nicholas Street
Suite/Bureau 720
Ottawa, Ontario K1N 7B7 Canada
Tel/Tél: 613.562.0005
Fax/Téléc: 613.562.2525
Email/Courriel: focal@focal.ca
www.focal.ca