

Corporate – Aboriginal Agreements on Mineral Development: The Wider Implications of Contractual Arrangements

Ciaran O’Faircheallaigh
Department of Politics and Public Policy
Griffith University, Brisbane, Australia

E-Mail: Ciaran.Ofaircheallaigh@griffith.edu.au

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Abstract

The negotiation of legally binding agreements between Aboriginal peoples and mining companies is now standard practice in settler societies such as Australia and Canada. While they can certainly offer substantial benefits, identified in the first section of the paper, Aboriginal – mining company agreements raise major issues in terms of Aboriginal relations with other political actors and institutions, including government, environmental groups and the judicial system. This paper considers these implications, identifying some key changes in an Aboriginal group's political and institutional relations that can follow on from signing an agreement with a mining company. It identifies a number of strategies for addressing the wider implications of agreement making, in part by addressing key agreement provisions in areas such as confidentiality, Aboriginal support for projects, and Aboriginal access to judicial and regulatory systems. It also emphasises the importance of ensuring that agreement negotiations do not become isolated from broader community planning and decision making processes.

Introduction

Legally binding agreements between mining companies and Aboriginal groups are negotiated in relation to nearly all new major mining projects in Canada and Australia and, increasingly, in developing countries (Banks and Ballard 1997: Appendix 1; ICMM 1999; IIED 2002; Langton *et al* 2004; Sosa and Keenan 2001). Negotiated agreements have some obvious and potentially substantial benefits, discussed in the next section, and in particular can allow Aboriginal people to share in the wealth generated by mining on Aboriginal lands, and to allow them a say in the manner in which mines are developed and operated (Environmental Law Institute 2004: 11, 13-14; ICCM 1999; Keon-Cohen 2001; Miranda, Chambers and Coumans 2005: 69-70). But agreements can have major implications for other strategies available to Aboriginal peoples in seeking to maximise benefits from mineral development. They can also affect their relationships with the state, including its legal, judicial and regulatory frameworks; with other political actors; and with civil society.

These implications have rarely been the subject of systematic analysis. This paper draws on the author's recent work (O'Faircheallaigh 2008) to explore the wider ramifications of agreement making for Aboriginal groups. It then identifies strategies that Aboriginal people can utilise to ensure that they recognise and address the broader consequences associated with agreement making, while at the same time maximising the specific benefits that agreements can bring. Critical in both regards is the need to break down the barriers that often exist between processes for negotiating project agreements and broader processes for community planning and decision making.

Benefits from agreement making

Binding agreements between mining companies and Aboriginal communities offer opportunities to share in the economic benefits generated by resource extraction. For instance, they can offer Aboriginal groups access to an income stream in the form of royalty or other payments. This can assist in meeting a community's short-term and often urgent need to fund services such as housing, health and education and to augment Aboriginal incomes that are usually well below the national average. There is a risk that government will cut its expenditure on communities in receipt of royalties under agreements, negating some of this positive impact, but on the other hand if used judiciously mining revenues can be used to leverage additional public expenditure. For example the Gagudju traditional owners of the Ranger uranium mine in Australia's Northern Territory used their royalties to start new education and health initiatives that government had refused to fund but, once these were operational, negotiated for government to take over their funding (O'Faircheallaigh 2002: Chapter 9). At a broader level, access to mining income can provide Aboriginal groups a degree of autonomy from the state, allowing them to establish their own priorities rather than having to accept the state's priorities as a condition for access to public funding; and adding to their negotiating power in dealing with the state in relation for instance to service delivery, land title and management, and governance.

In the longer term, income streams from mining create the potential for Aboriginal groups to establish capital funds that will generate income into the future and indeed long after mining has ceased. For instance the Aboriginal signatories of a 2001

agreement in Cape York, in far north Queensland, decided to invest in excess of 50 per cent of their revenues in a long term investment fund. Income is reinvested for 20 years, after which the capital base is preserved and interest is available to fund current spending. The capital fund already sits at more than \$30 million, and by 2021 will have the capacity to generate ongoing and substantial income.

Agreements can also offer preferential access to employment and training and business development opportunities for members of Aboriginal group or for Aboriginal corporations. Income levels tend to be considerably lower, and unemployment levels considerably higher, in Aboriginal than in mainstream communities, and access to such opportunities can be critical in helping to overcome Aboriginal economic disadvantage. To take one example, Aboriginal people accounted for less than 5 per cent of the workforce of Argyle Diamonds Ltd when negotiations for an agreement with Aboriginal traditional owners commenced in 2001. Today they account for over 20 per cent of the workforce, generating employment for some 100 additional Aboriginal employees. At average 2007 mining industry earnings of A\$90,000, this represents additional income of some A\$9,000,000 annually for Aboriginal workers, families and communities.

Another major benefit of agreements is that they can provide opportunities to be involved proactively, and on an ongoing basis, in managing the cultural, social, and environmental impacts of resource extraction. These opportunities might include a key and possibly leading role in defining, identifying and protecting Aboriginal cultural heritage; participation in joint company-Aboriginal environmental management regimes; and involvement in decisions regarding project expansions and project closure. For instance under the Cape York agreement mentioned earlier, Aboriginal traditional owners are funded to operate a cultural heritage protection system intended to avoid damage to sites of significance; receive annual payments to help support a ranger program designed to control impacts associated with the activities of mining town residents and tourists; have an opportunity to comment on all applications for environmental permits; and must be consulted by the mine operator regarding implementation of its environmental management system and any major project changes that may have a significant impact on the environment.

In the absence of Aboriginal – corporate contractual arrangements, opportunities for pursuing this sort of ongoing involvement in managing environmental and cultural impacts, and for achieving a significant share of project benefits, are likely to be limited. For example statutory environmental impact assessment processes do not generally provide such opportunities, because they allow indigenous input only into one-off decisions regarding project approvals and conditions, rather than ongoing environmental and cultural management of projects, and because they tend to focus on minimising adverse impacts rather than on allocation of project benefits (Galbraith, Bradshaw and Rutherford 2007; Joyce and MacFarlane 2001, 3, 12; O’Faircheallaigh 1999).

Wider implications of agreement making

In a recent publication (O’Faircheallaigh 2008) I sought to identify the wider implications of agreement making by comparing a ‘counterfactual’, that is a situation in which no contractual arrangements exist between affected Aboriginal groups and mining companies wishing to develop resources on Aboriginal land, with a situation in which an agreement does exist. This highlighted how negotiation of project-based agreements between Aboriginal groups and mining companies (and in certain cases government also) affects the legal and political status of Aboriginal groups and the nature of their relationship with other elements of the political system. The broader impact of agreement making can be highlighted by considering its effect in four specific areas - the access of Aboriginal people to the judicial and regulatory systems; their capacity to pursue wider political strategies in relation to mineral development; their interaction with the state; and the nature of their overall relationship with mining companies.

Access to the judicial and regulatory systems

In the absence of an agreement, Aboriginal access to components of the judicial and regulatory system that are relevant to project approval and management is unconstrained by any contractual obligations to a mining company. Aboriginal people can exercise rights available to citizens generally or rights arising from any specific property or other Aboriginal interests they hold. Those rights may allow them, for

instance, to challenge the level of environmental assessment proposed for a project; to take legal action to prevent damage to Aboriginal cultural heritage or the environment; or to sue for compensation if such damage occurs. Using legal and procedural rights and political strategies, Aboriginal groups may be able to influence the terms of contractual and regulatory instruments negotiated between the state and the developer, for instance by helping to shape the conditions attached to environmental approvals and mining leases.

At least three features of negotiated agreements can constrain Aboriginal access to the judicial and regulatory systems. First, recent agreements in Australia and Canada almost always involve Aboriginal support for the project concerned, and/or for the grant of specific titles or approvals required for the project to proceed. For example, Kennett notes that many agreements in Canada contain specific provisions that commit the aboriginal party either to support the project involved or to refrain from opposing it in environmental assessment or regulatory proceedings. A number of agreements commit the Aboriginal parties not to oppose projects in the event that they become subject to an environmental assessment as a result of actions taken by non-signatories to the agreements (Kennett 1999: 45-46).

It follows that Aboriginal groups may be contractually constrained in their ability, for instance, to object to government approval of a project either in principle or in its current form. Thus for instance the operator of one project in Canada utilised the existence of such clauses to argue that an Aboriginal signatory to the agreement was prohibited from objecting to the grant of a water licence required to allow expansion of the project.

Second, some agreements contain provisions preventing Aboriginal groups from utilising specific legal or regulatory avenues that would otherwise be available to them. For example, under one recent Australian agreement the Aboriginal parties undertake not to 'lodge any objections, claims or appeals to any Government authority ... under any [state] or Commonwealth legislation, including any Environmental Legislation ...'. Third, agreements may contain dispute resolution processes that preclude the parties from initiating legal proceedings to resolve

disputes, or require all other potential avenues for resolving disputes to be exhausted before they do so.

In combination, such provisions can create a fundamental shift in the ability of Aboriginal groups to exercise legal rights they would otherwise have available and more generally to access legal and regulatory regimes relevant to resource extraction.

Freedom to pursue political strategies

In the absence of an agreement, Aboriginal people are unconstrained in pursuing political strategies designed to halt project development or change the nature or timing of development that does occur. They can for instance seek public support through the media, build political alliances with NGOs such as environmental and church groups, lobby government, and mobilising pressure on corporations and their shareholders. For example Innu and Inuit landowners in Labrador used a number of these strategies to delay the development of the proposed Voisey's Bay nickel project in the late 1990s (Gibson 2006). The Mirrar, Aboriginal traditional owners of the land on which the proposed Jabiluka uranium project in Australia's Northern Territory is located, used a combination of all of them to oppose development of the deposit. They were ultimately successful, with Rio Tinto agreeing to refill a portal that had been constructed to start mine development and committing not to re-commence development without the consent of the Mirrar (Katona 2002).

The common requirement for Aboriginal groups to support a project immediately limits their capacity to manoeuvre politically, particularly in relation to environmental and other groups that might otherwise be valuable political allies. In addition, agreements very commonly (indeed almost universally) include confidentiality provisions that prevent Aboriginal groups from making public information about negotiations and agreements. Confidentiality clauses may be included not only in final agreements but also in negotiation protocols under which companies provide funds to support negotiation processes; and they may continue to be legally binding even where the parties agree to terminate a negotiation protocol or an agreement as a whole.

Confidentiality provisions can severely constrain the capacity of Aboriginal groups to communicate with the media and with other political groups. The requirement to support a project combined with confidentiality provisions can also significantly constrain an Aboriginal group's ability to lobby or otherwise place political pressure on a government in relation to a project. In dealing with government, most Aboriginal groups have two powerful weapons, often used in tandem. The first involves any capacity they have to delay or halt a project, either by accessing the legal and regulatory systems and for example obtaining injunctions on project construction or delays in project approvals; or through direct action aimed at halting or delaying development activity on the ground. The second involves the ability to embarrass government politically by using the media to appeal to its constituents (Gibson 2006; Trebeck 2008). If contractual agreements preclude or inhibit the use of both weapons, this may substantially reduce Aboriginal capacity to influence government decision-makers.

Relations with the state

This last point raises the broader issue of the relationship between Aboriginal groups and the state. The legal and constitutional basis for this relationship varies considerably as between settler states such as Australia, Canada, New Zealand and the United States, and in some cases also varies within individual countries depending on the legal status of particular Aboriginal groups. However it is clear that in general negotiation of agreements between Aboriginal groups and mining companies have the potential to influence Aboriginal relations with the state in a number of ways. First, as mentioned earlier states may seek to reduce their budgetary allocations to Aboriginal communities on the basis that the latter now obtain revenues from commercial sources as a result of their agreements with mining companies. This has certainly occurred in Australia (O'Faircheallaigh 2004a), and the prevalence of confidentiality provisions in agreements may reflect, in part, a desire by Aboriginal groups to withhold information on their revenues from government and so reduce the likelihood of a cut in government funding.

Another area in which significant impacts can occur involves attempts by Aboriginal peoples to win legal recognition from the state of their inherent rights to their ancestral states. Both Australia and Canada, for instance, have been and continue to

be extensively involved in negotiations and/or litigation with Aboriginal groups regarding either recognition of their 'native title' for the first time through negotiation of comprehensive land claim settlements (Canada) or determinations of native title (Australia); or regarding implementation of treaty obligations that the state has historically ignored. The discovery of a major mineral deposit on an Aboriginal group's land often focuses state attention on land tenure issues, in many cases in response to corporate pressure on state agencies and on political leaders to have these issues resolved as a precondition for undertaking major capital investments. The implications of a stronger state focus on resolving land tenure issues as a result of major mineral discoveries are unclear and require further research (see O'Faircheallaigh 2008 for a preliminary discussion).

Relations with developers

Agreement provisions regarding Aboriginal support and confidentiality can also result in fundamental changes in the way in which Aboriginal groups relate to mining companies. As Trebeck (2008) highlights, the willingness of corporations to undertake CSR initiatives in relation to any social group depends, in large measure, on the capacity of that group to inflict damage on the corporation by threatening its social licence to operate. Groups must apply 'an ever-present threat of the loss of social licence to operate to ensure that companies recognise and address [their] demands ...civil society organisations need to maintain surveillance and pressure to ensure it is always in the corporate interest to respond to community demands' (Trebeck 2008: 20). She notes in particular that the capacity of groups to threaten the reputation of corporations is a 'crucial lever'. Where agreements bind Aboriginal groups to support corporate activities and silence them through confidentiality provisions, they have substantially surrendered their ability to threaten a company's licence to operate.

It may of course be the case that this threat is no longer needed, because agreements contain legally-enforceable provisions that ensure the ongoing performance by a company of certain CSR obligations. Two points remain. First, the nature of the relationship between Aboriginal groups and companies has profoundly changed. Second, the question of whether obligations taken on by corporations through agreements with Aboriginal groups are both substantial and enforceable and so

represent a ‘fair trade’ for the forbearance promised by those groups cannot be resolved *a priori*, but only through an examination of the provisions of individual agreements. Another important issue here involves the length of time over which agreements apply, which is typically for the whole of project life and for major projects is often measured in decades rather than years. If Aboriginal groups discover after the event that the trade off they have made is not to their advantage, it may be a very long time before they have an opportunity to change the situation.

Strategies for dealing with the wider implications of mining agreements

A number of strategies are available to Aboriginal groups in seeking to deal with these wider and potentially negative effects of agreements with mining companies, while at the same time gaining the benefits that such agreements have to offer.

Map wider relationships

One obvious but important approach is for Aboriginal groups to undertake, at an early stage in project development, a ‘mapping’ exercise that seeks to identify all of the ways in which a contractual relationship with a mining company may affect their engagement with the political and judicial/regulatory system as a whole, including their existing interaction with government in areas such as service provision and land claim negotiations (see O’Faircheallaigh 2008, Figure 1, p.70, and Figure 2, p.73 for a graphic representation of such an exercise). In my experience of negotiations in Australia and Canada, this is in fact rarely done. Such an exercise can both reveal threats (for instance a group’s inability to maintain valued political alliances, a decline in government service provision), opportunities (for example an increased capacity to engage with government decision-makers), and challenges (for instance the need to develop a capacity to enforce contractual obligations and ensure effective implementation). In the absence of such an exercise and of preparatory work following on from it, Aboriginal groups may be poorly prepared to deal with threats and poorly placed to grasp opportunities and meet challenges.

Focus attention on key agreement provisions

As is obvious from the earlier discussion, agreement provisions in a number of areas, for instance in relation to confidentiality and project support, can be critical in deciding with the broader implications of agreement making for Aboriginal groups. Yet these provisions, in my experience, rarely receive much attention during preparations for negotiations. Community members, community leaders and negotiators tend to focus their attention almost exclusively on what are regarded as ‘substantive’ issues, on the scale and nature of the project, the economic benefits it is expected to generate and the environmental and cultural risks it is expected to pose. Over the 15 years I have been worked for Aboriginal communities as a negotiator, for example, I have been involved in scores of discussions about employment and training, financial and environmental management provisions, but do not recall one occasion on which confidentiality provisions were discussed as a strategic issue rather than a procedural one. The usual approach is to use ‘boiler plate’ or standard confidentiality clauses, often drawn from other agreements, and as long as they apply equally to both parties and exclude material already in the public domain, not a great deal of attention is paid to them.

For reasons discussed above, confidentiality provisions deserve much more careful attention. Critical issues include:

At what point in the negotiation process do they take effect, and how long do they stay in place? It may be inadvisable, for instance, for Aboriginal groups to accept confidentiality provisions in a negotiation protocol, as this may prevent mobilisation of the media and of political allies during the negotiation process. Similarly, it may be inadvisable to accept that they stay in place after an agreement is terminated, because this may prevent Aboriginal groups from putting ‘their side of the story’ in relation to the reasons for termination, or reduce their capacity to take legal action to address issues arising from termination.

Who is constrained from receiving information classified as confidential? Some IBAs in Canada restrict dissemination of information to community members (Hitch 2005), a very onerous and possibly dangerous constraint, for

two reasons. First, it is likely to cause suspicion, friction and disunity in communities, which both itself constitutes a negative social impact from development, and is likely to undermine the community's negotiation effort. Second, it runs contrary to democratic principles and to the norm of indigenous free prior informed consent, and adherence to the latter is widely regarded as critical if indigenous people are to benefit from mineral development on their traditional lands (UNDESA 2004). Such an approach is rare in Australia, where negotiators are commonly permitted to reveal all matters involved in agreements, other than commercially sensitive information (see next point), to members of signatory communities or groups.

What information is regarded as confidential? In some cases even the fact of negotiation or of an agreement may be declared confidential, as well as all communication between negotiation parties and all documentation generated by the negotiation process. In others confidentiality is restricted to a narrow class of information, typically involving commercially sensitive material relating to project economics. In some negotiations in Australia Aboriginal leaders have chosen to restrict access to such material to their commercial advisers, who are free to offer advice to community leaders and members on the basis of confidential information, but not to disclose it. This means that the leaders are unconstrained in communicating with community members and cannot be accused of withholding information from them.

Provisions in relation to consent and support are also critical. It may not be commercially realistic to take the position that an Aboriginal community should obtain the benefits available under an agreement without providing its consent to the grant of licences or approvals without which a project cannot proceed. But even accepting this point a wide range of approaches is possible in this area. This is illustrated by the fact that in developing criteria for evaluating agreements (O'Faircheallaigh 2004b), I identified seven separate points on a scale for assessing provisions dealing with indigenous consent and support (see Attachment 1). Aboriginal negotiators and communities should think carefully about exactly what they *need* to offer a company to secure the benefits they desire, and about what they are *prepared* to offer. In some circumstances, the price required in terms of

indigenous support may be too high, in that it places excessive restrictions on the political freedom of communities and on their access to judicial and regulatory systems. If this is the case, a ‘no agreement’ option may be preferable.

Avoid the ‘negotiation bubble’

At a broader level, it is important for communities to avoid isolating agreement negotiations from wider community planning and decision making processes. There is an inherent tendency for negotiation of mining agreements to develop as an isolated ‘bubble’, for a number of reasons. First, confidentiality provisions can hamper the flow of information between leaders and negotiators and the wider community. Second, negotiations with mining companies call for significant technical skills. These are often not available in Aboriginal communities, and so substantial components of negotiations are undertaken by outsiders who have infrequent contact with community members. Third, funding for negotiations is usually provided by the company involved or by government grants tied specifically to the negotiations. This limits the extent to which negotiations can be used as a platform to address wider community issues. Finally, agreement negotiations are often driven by project time frames, with the result that it is difficult to integrate them into community planning and decision making processes. For instance decisions on negotiations may have to be taken before a community planning exercise is completed or before scheduled meetings of community groups are held.

The development of ‘negotiation bubbles’ has a number of unfortunate effects in relation to the wider implications of negotiations. They may mean that negotiators are driven solely or largely by the desire to reach an agreement, with the result that a ‘no agreement’ option is not even contemplated. Yet as illustrated in the previous section, this option may need to be seriously considered if, for instance, the ‘consent and support’ required by a mining company is deemed too onerous. In addition, when negotiators are isolated it is much less likely that the wider political ramifications of negotiations, and the implications of agreements for relations with other political actors and with state institutions, will be taken into account. It is also less likely that opportunities for enhancing the community’s negotiating position available within the wider political, legal and regulatory environment will be identified.

A number of strategies are available to help ensure that negotiations do not occur in isolation but rather are conducted with an awareness of, and are linked to, wider legal and political considerations and strategies. These include the formation of community-based steering groups that oversee the conduct of negotiations; provision in negotiation budgets of funding for regular community meetings and for on-going communication of information on negotiations; secondment of permanent staff from community organizations or Aboriginal governments to negotiation teams; and, at a more strategic level, conduct of community-controlled social impact assessments designed to ensure that negotiating positions are responsive to broader community goals and concerns (O’Faircheallaigh 1999). These measures demand substantial resources and are unlikely to be maintained without strong commitment from Aboriginal political leaders. But they are essential if the wider implications of agreement making are to be identified and addressed. While not a focus of this paper, they are also indispensable if the benefits created by agreements are to align with community aspirations and priorities (O’Faircheallaigh 1999).

Conclusion

Agreements with mining companies can offer substantial benefits for Aboriginal communities. But entering contracts with corporate interests has wider and important implications for relationships between Aboriginal groups, the state, and civil society. These implications need to be carefully considered both in shaping negotiation strategies and, ultimately, in determining whether contractual relationships represent the best way of pursuing Aboriginal interests in relation to mineral development.

In particular, careful attention must be paid to agreement provisions that can be critical in shaping the wider political ramifications of contractual arrangements, for instance those dealing with confidentiality, with Aboriginal support for the projects involved, and with ongoing Aboriginal access to judicial and regulatory systems. More broadly, care needs to be taken to ensure that negotiation processes do not occur in isolation from community planning and decision making. Failure to do so may mean that the wider ramifications of contractual arrangements are not identified; that opportunities to harness legal and political opportunities outside the negotiation process are not harnessed; that a ‘no agreement’ option is not seriously considered, to

the community's detriment; and that there is a failure to align agreement benefits with community priorities.

Attachment 1

Criteria for assessing agreement provisions related to Indigenous consent and support

- 1 The Indigenous parties recognize the validity of, and undertake not to challenge, identified mining or other related tenements already granted to the developer.
 - 2 The Indigenous parties consent to and undertake to facilitate the issue of identified mining or other related tenements.
 - 3 The Indigenous parties undertake not to impede or prevent the developer from the enjoyment of existing or newly granted mining tenements or related interests. However such a commitment is qualified, for example by not precluding the application of cultural heritage or environmental protection legislation.
 - 4 The Indigenous parties have a positive obligation to support development once mining tenements or interests are granted. However such a commitment is qualified, for example by not precluding the application of cultural heritage or environmental protection legislation.
 - 5 Indigenous people make an unqualified commitment that they will do nothing to hinder the efficient development or operation of a particular project. This could prevent them, for instance, from taking action under relevant cultural heritage protection legislation.
 - 6 Indigenous people consent to the grant of unspecified interests to the developer beyond those identified in an agreement. For example, they may be asked to approve the grant of future mining interests in an area the developer is currently exploring.
 - 7 Indigenous parties make an open-ended and general commitment to support the developer's activities.
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Source: O'Faircheallaigh 2004b

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