



Comments for the review of the Indigenous Peoples & Mining Position Statement of the International Council on Mining and Metals (ICMM)

Asia Indigenous Peoples Network on Extractive Industries and Energy (AIPNEE) and Right Energy Partnership with Indigenous Peoples (REP) jointly submit this commentary for the ongoing review of the Indigenous Peoples & Mining Position Statement of the International Council on Mining and Metals (ICMM), including with reference to draft of the Position Statement shared by the ICMM on 4 June 2024.

At the outset, we at AIPNEE and REP convey our serious concerns that the ICMM has not undertaken meaningful and broad consultations with Indigenous Peoples' representatives from around the world for the review of the Position Statement. That is despite our repeated requests to the ICMM to

- 1) organize targeted consultations with Indigenous Peoples, including at regional, national and local levels with interpretation in relevant languages, on the review; and
- 2) carry out a publicly transparent and time bound review process with information provided about how Indigenous Peoples and other stakeholders can engage at various points, including to provide inputs to the Position Statement itself and related processes of the ICMM.

We again call on the ICMM to carry out a public and transparent review process with meaningful consultations with Indigenous Peoples, among other stakeholders. Further, we add to the call of other Indigenous Peoples organizations to the ICMM and its members to engage in a dialogue with Indigenous Peoples' representatives to hear their concerns on the Position Statement, including through an in-person meeting, and address them before the Position Statement is adopted.

Below, we lay out our key concerns with draft of the Position Statement and expect that the ICMM will address those in the review of the Position Statement. Further below, we have also provided revisions in the text of the draft Position Statement itself.

- 1. Free, Prior and Informed Consent (FPIC) – Our foremost concern is that the draft Policy Statement, under Commitment 4, fails to recognize Indigenous Peoples right to FPIC.** FPIC must be respected consistent with their rights to self-determination and to their lands, territories and resources, among other rights, as guaranteed in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).

We strongly deplore that the draft Policy Statement, under Commitment 5, seeks to transfer the final authority of undertaking a mining project or activity to the State, whereby an ICMM member company may consider proceeding with a project or activity even without FPIC of the affected Indigenous Peoples if authorised by the State using the pretext of “addressing differences of opinion” about the project or activity. Such commitment is not in line with international human rights laws, including the UNDRIP, and jurisprudence of regional courts such as the Inter-American Court for Human

Rights (IACHR)¹, as well as the environmental and social standards of the multilateral institutions such as the International Finance Corporation (IFC) and the World Bank.

IFC Performance Standard 7 (PS7) on Indigenous Peoples requires its client to obtain FPIC of affected Indigenous Peoples's communities when the project 1) impacts on lands and natural resources subject to their traditional ownership or under customary use, 2) causes their relocation from such lands and natural resources, and 3) impacts their critical cultural heritage. The PS7 specifically necessitates its client to "consider feasible alternative project designs to avoid the relocation of Indigenous Peoples from communally held lands and natural resources subject to traditional ownership or under customary use. If such relocation is unavoidable, the client will not proceed with the project unless FPIC has been obtained..." (para 15). Similarly, under the World Bank's recently adopted Environmental and Social Standard 7 (ESS7) on Indigenous Peoples, which requires its Borrower to obtain FPIC for similar circumstances under a project, "when the FPIC of the affected Indigenous Peoples... cannot be ascertained by the Bank, the aspects of the project relevant to those affected Indigenous Peoples...for which the FPIC cannot be ascertained will not be processed further. (para 27)"

The ICMM, under the Position Statement, must commit its members to not proceed with a project if FPIC of the affected Indigenous Peoples' communities have not been obtained. Where it is evident that a project is causing divisions within the affected Indigenous Peoples, the project should not proceed at all. Divisions within or among Indigenous Peoples are irreparable and worst form of impacts on them. The project should only proceed after the concerns of those who have withheld their FPIC are addressed.

The FPIC agreement-making process should respect the needs and aspirations of Indigenous Peoples and the processes through which their decisions are typically made as per their own timeline - regardless of processes and timelines set in some national laws and policies/guidelines. If and when FPIC is obtained and agreement is made, it should be validated with the entire community through the use of language and form understandable to them and a copy of the final agreement should be given to them.

Further, we strongly call for amendment to the draft Position Statement, whereby it states that "Commitment 4 [to obtain (FPIC) agreement with affected Indigenous Peoples] will not apply retrospectively for existing projects. However, consistent with the requirements of Commitment 2 [to carry out (human rights) due diligence], where impacts on the rights of Indigenous Peoples are ongoing, members will carry out (human rights due diligence), recognising that the impacts to Indigenous Peoples' rights may be ongoing and/or change over time as a company's operations and/or operating context evolves. A new (FPIC) agreement may not need to be established."**ICMM must commit its members to establish FPIC through a new agreement if the impacts to Indigenous Peoples' rights are ongoing, including when new significant impacts are identified or occur.**

2. Benefit sharing – In relation to Commitment 6 (to enable benefit sharing), under glossary, benefit sharing is described to consist of "financial benefits such as social and economic development outcomes" and can include "in-kind participation, which refers to opportunities such as education and training, cooperation in environmental and cultural heritage conservation projects, and health initiatives as examples", among other things. Benefit sharing should not be understood as merely allocating those

¹ See, for example, IACHR. Report No. 8/24. Case 13.083. Admissibility and Merits (Publication). Akawaio indigenous community of Isseneru and its members. Guyana. April 24, 2024. Available at https://www.oas.org/en/iachr/decisions/2024/GY_13.083_EN.PDF

limited benefits. **We call on the ICMM to commit its members to benefit sharing in the form of royalties and/or co-ownership for the affected Indigenous Peoples to ensure shared prosperity from their project or activity.**

Further, the draft Policy Statement, under Explanatory Note for the Commitment 5, states that subsets of Indigenous communities, especially women, children and young people, elders, people with disabilities, and others in vulnerable situations should be included in the design and/or implementation of socio-economic development and social investment projects. Those subsets of Indigenous communities should be included not only in those aspects. **We call on ICMM members to specifically involve those subsets of Indigenous communities in more vulnerable situations in the the decision making process of the communities, including to obtain FPIC of the affected Indigenous Peoples for their project or activity. ICMM, under the Policy Statement, must commit its members to establish appropriate engagement processes to ensure that safe spaces for engagement with Indigenous women, youth, and persons with disabilities are in place.**

4. Grievance mechanism – Under Commitment 9 (to provide, or cooperate in, remediation), we call on the ICMM to commit its members to set up operational level grievance mechanisms, which are accessible to the affected Indigenous Peoples and are culturally and gender sensitive, including in line with the customary laws of the concerned Indigenous Peoples.

5. Furthermore, we urge the ICMM to identify areas inhabited by Indigenous Peoples in voluntary isolation, burial grounds and sacred sites of Indigenous Peoples, key biodiversity areas, and conflict affected and high-risk areas as no go zones for its members for any project or activity.

Finally, we are concerned that the ICMM throughout the draft Policy Statement avoids using the terminologies such as Free, Prior and Informed Consent and Human Rights Due Diligence, which are well-established in international human rights law. Referring to FPIC as “consent” or “agreement” and human rights due diligence as “due diligence” can cause confusions and omissions, particularly when the Position Statement is implemented. For example, we have seen companies falsely claim benefits sharing or other agreements as evidence to have obtained FPIC of affected Indigenous Peoples for a project or activity. Similarly, companies often use due diligence to refer to legal due diligence to ensure compliance with local laws, which does not meet the requirements for human rights due diligence in line with the UN Guiding Principles on Business and Human Rights.

We call on the ICMM to use the established terminologies of FPIC and human rights due diligence in the Position Statement to explicitly commit its members to carry out human rights due diligence (Commitment 2) and obtain FPIC of affected Indigenous Peoples (Commitment 4).

Our revisions in the text of draft Position Statement are provided in the annex below.

We hope that the ICMM will amend the draft Position Statement as per our comments and revisions and in line with international human rights laws and standards. We stress that the draft Position Statement in its current form is unacceptable unless the problematic commitments related to FPIC and other issues are revised. We remind that the ICMM must aim to achieve the highest standards in the Position Statement to fulfil its responsibility to respect human rights and the rights of Indigenous Peoples through the review of the Position Statement.