Issues and Options for a Policy on Impact and Benefits Agreements

Prepared for the
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Executive Summary

This discussion paper was prepared for the Mineral Resources Directorate of the Department of Indian Affairs and Northern Development (DIAND). The purpose of the paper is to assist DIAND in developing policy relating to impact and benefits agreements (IBAs) for mining projects in northern Canada. In particular, the principal objectives are to identify and analyse the major issues raised by the negotiation and implementation of IBAs and to set out an array of policy options for addressing these issues. In addition, the paper provides some contextual information regarding the use of IBAs in the North.

The preparation of this paper involved a series of interviews with individuals from government, aboriginal organizations, the mining industry, environmental groups and the consulting business who are familiar with the IBA process in northern Canada. Although a comprehensive consultation with all interested parties was not possible as part of this project, an effort was made to obtain input from all relevant perspectives. The range of people interviewed and the level of detail of these interviews were sufficient to ensure that most, if not all, relevant issues were touched upon. The information obtained through interviews was supplemented by a review of written material and informed by previous work on IBAs undertaken at the Canadian Institute of Resources Law (CIRL).

The paper begins with an overview of the legal and regulatory context for northern IBAs. The importance of patterns of land ownership is noted, since the extent of DIAND’s involvement in the IBA process will vary depending on whether the land and mineral resources in question are owned by the Crown or by aboriginal people. Where aboriginal people own subsurface resources, they have broad authority to determine the terms and conditions governing resource disposition and development and the scope for a DIAND IBA policy is correspondingly reduced. On Crown land, DIAND exercises full regulatory authority, subject to aboriginal rights as established by case law and land claims agreements.

The legal and regulatory provisions applicable to IBAs in the three northern territories are then briefly reviewed. The most extensive IBA regime is that established by article 26 of the Nunavut Land Claims Agreement. These provisions include thresholds for the IBA requirement, guiding principles, direction regarding the content of IBAs, linkages between IBAs and the overall regulatory framework, and established procedures for the negotiation of IBAs. There is no comparable regime in the Northwest Territories (NWT), although several type of agreements specified under the Inuvialuit Final Agreement address local benefits from resource development. IBAs are not dealt with explicitly under the Sahtu Dene Metis and Gwich’in comprehensive land claims agreements, although these agreements include some provisions dealing with the impacts and benefits associated with mineral development. It remains possible, however, that the land and resource management regimes established under these agreements will include provisions for the negotiation of IBAs. In areas of the NWT not covered by settled land claims, there is no legal or regulatory framework for IBAs. Finally, the Umbrella Final
Agreement (UFA) in the Yukon does not require IBAs for mineral development, nor are these agreements referred to in the economic development provisions contained in Chapter 22 of the UFA. Several of the Yukon First Nations final agreements do, however, contain provisions for ‘project agreements’ that will come into effect upon the assumption by the Yukon Territorial Government of regulatory authority. Although the current regulatory environment in the Yukon is both complex and fluid, aboriginal land ownership and self-government powers provide a basis for requiring IBAs for mineral development in some circumstances. IBAs might also be required through the Development Assessment Process established under the Yukon land claims agreements.

The federal policy context for northern IBAs is then briefly reviewed. There is currently no federal policy that explicitly makes the negotiation of IBAs a precondition for mineral development or that establishes either procedural or substantive parameters for IBAs. DIAND has, however, contributed to a widespread perception that major mining projects will not be allowed to proceed without IBAs. This perception is based primarily on the recent precedent established in the approval process for BHP’s Ekati diamond mine, the informal advice that government officials give to mining companies and others, and the availability of DIAND funding to assist aboriginal organizations in negotiating IBAs. The result is that IBAs are generally seen as a de facto regulatory requirement that lacks the procedural and substantive parameters normally associated with regulation.

The next section of the paper summarizes key features of current IBA practice. This discussion reviews the broad range of topics that have been addressed in IBAs and notes that IBAs are now commonly negotiated on a bilateral basis between mining companies and aboriginal organizations. Reasons for the successes and failures of IBAs are then enumerated, although there is little systematic analysis of agreements on which to base conclusions about their track record. Successful IBAs are characterized, among other things, by commitment of the parties, clarity in objectives and roles, reasonableness in expectations, attention to the capacity of aboriginal people and businesses, and effective implementation plans. The failure of IBAs to meet expectations often reflects a mismatch between the skills and interests of aboriginal people and the opportunities in the mining industry, a lack of capital and business expertise in aboriginal communities, social and cultural barriers to aboriginal involvement in mining and related businesses, an inability to translate project-specific job and business opportunities into long term benefits for individuals and communities, and the vulnerability of a project-based economic development strategy to the mineral industry’s boom-bust cycle.

The final section of the paper that addresses contextual matters examines the characteristics of three benefits regimes that could provide models for DIAND’s IBA policy. First, the federal government’s benefits regime for northern oil and gas operations is reviewed. This regime requires the development of benefits plans — but not IBAs — for specified oil and gas operations. Second, the requirement for benefits agreements under the Yukon Oil and Gas Act is summarized. This regime includes both substantive and procedural parameters for benefits agreements involving oil and gas companies, government and aboriginal organizations. The
The third regime that is examined is the benefits requirement and related labour market policies that apply to mining operations in northern Saskatchewan. The key elements of this regime are specific requirements for benefits commitments in mining surface leases, annual Human Resource Development Plans for all operating mines, a Northern Labour Market Committee that concerns itself with the match between employment opportunities and qualified individuals in northern Saskatchewan, and a Multi-Party Training Plan that establishes a clear framework and specific commitments for training northern residents to fill positions in the mining industry.

The paper then turns to a survey of issues raised by current IBA practice in the North. These issues are divided into seven broad categories. These categories and the principal issues discussed under each are as follows.

**General Policy Issues**

- the policy objectives of the IBA process have not been well thought out and clearly articulated, resulting in IBAs becoming catch-all regulatory and contractual instruments;
- the roles of mining companies, aboriginal organizations and government are not properly defined and some inappropriate off-loading of responsibilities by government is occurring;
- IBAs have an ambiguous status as both voluntary contractual arrangements and products of regulatory requirements; and
- IBA negotiations tend to be unstructured bargaining processes because the rights and obligations of the parties are not clearly defined.

**Issues Relating to Aboriginal Entitlements**

- the entitlement of aboriginal organizations to IBAs when mineral development occurs on Crown land is not well understood by many people or fully explained by government;
- IBA negotiations are complicated by a number of issues when mineral development occurs in areas where land claims have not been settled;
- there is no principled basis for determining eligibility to negotiate IBAs in areas of unsettled land claims or where project impacts cross settlement area boundaries; and
- the basis for the cash components of IBAs is not clearly defined, resulting in uncertainty and a perception that some of these payments may reflect improper dealings.
**Economic Development Issues**

- bilateral IBAs between mining companies and aboriginal organizations may be unable to overcome the fundamental obstacles to economic development in the North;

- current IBA practice may be poorly suited in several ways to securing meaningful and long term economic development;

- the economic potential of relatively small mining projects may not be recognized adequately by the current approach to IBAs;

- lack of attention to implementation explains the failure of some IBAs to achieve their intended results;

- companies may lack the internal incentive structures to translate IBA undertakings into tangible results at the work site; and

- skills training programs may be insufficiently focused on the practical training that aboriginal people require in order to work effectively in the mining industry.

**Societal and Distributional Issues**

- the narrowing of classes of beneficiaries under IBAs may be socially divisive in the North;

- bilateral, project-specific IBAs may result in marked inequalities among communities and may increase the long-term economic risks for many northerners;

- the bilateral model for IBAs can increase tensions within groups of aboriginal people and foster conflict between communities and between aboriginal organizations;

- distributional issues may arise within aboriginal organizations and communities depending on how the benefits from IBAs are distributed;

- the inclusion within IBAs of large cash transfers may increase risks of inefficiency and corruption if mechanisms are not in place to ensure transparency and accountability; and

- the preferences established by IBAs may, in some cases, conflict with anti-discrimination provisions in human rights and labour legislation.

**Industrial Policy Issues**

- the uncertainty surrounding the IBA process is seen by some people as an increasingly
significant deterrent to mineral development in the North;

- expectations associated with IBAs may exceed what many projects can reasonably deliver;
- the transfer to exploration activities of expectations based on IBAs for producing mines could deter mineral exploration;
- the mining industry is concerned about the lack of coordination between the benefits commitments and cash payments under IBAs and the overall fiscal regime for mining;
- IBAs are sometimes characterized as involving excessive interference with private sector market decisions;
- current IBA practice in the North is inconsistent across sectors; and
- the inclusion of subsidies and restrictions on the mobility of labour and capital in IBAs may be inconsistent with rules governing domestic and international trade.

**Environment and Resource Management Issues**

- IBAs may be used as an alternative to more open and transparent regulatory processes;
- the negotiation of IBAs may create a dynamic where environmental protection is sacrificed for economic benefits;
- IBAs sometimes include provisions that limit the ability of aboriginal parties to participate freely in project review and regulatory processes;
- the use of leverage obtained through other regulatory processes in order to apply pressure in IBA negotiations is a concern to some people;
- IBAs and other regulatory processes may overlap on issues such as compensation; and
- the IBA process and environmental assessment may be poorly coordinated.

**Process Design and Implementation Issues**

- there are often no formal mechanisms to ensure an appropriate balance of bargaining power in IBA negotiations;
- the IBA process generally lacks established procedures and end points;
the IBA process is costly for all parties;

the competitive dynamic created by multiple bilateral IBAs for a single project may have negative consequences for the IBA process;

lack of professional knowledge and intercultural skills can impede IBA negotiations;

confidentiality of IBAs raises a number of important public policy issues;

the adaptability of IBAs to changing circumstances is a concern in certain situations;

there is uncertainty about the legal enforceability of IBAs and about what types of commitments, if any, should be binding; and

the inability of third parties to ensure adherence to bilateral IBAs may be a concern if these agreements have implications for the public interest.

Having enumerated and briefly described a broad range of issues raised by IBAs, the paper then turns to a discussion of general principles that could guide the development of IBA policy. Seven principles are presented as candidates for consideration.

(1) Apply standard regulatory principles relating to predictability, due process, limitations on discretionary authority and sanctions for non-compliance to the requirement that IBAs be competed before final project approval;

(2) Focus IBA policy on general opportunities for adding value to the IBA process that are independent of the particular contexts within which these agreements may be negotiated;

(3) Simplify and separate issues and processes in order to streamline the IBA process;

(4) Distinguish between impact-based claims and general economic development objectives;

(5) Promote the broadest possible access to economic benefits that is consistent with the principle that people adversely affected by mineral development should receive corresponding benefits;

(6) Focus on capacity building and the provision of opportunities for economic development; and

(7) Minimize the costs of negotiating and implementing IBAs.

A DIAND IBA policy based on principles such as these would, it is argued, address a number of the significant issues raised by current IBA practice.
The final sections of the paper set out a menu of options that DIAND could consider when developing IBA policy. The approach adopted here is to present these options, for the most part, as free standing policy initiatives or regulatory requirements that could be combined in various packages. Options are grouped under seven broad headings.

**Options for Overall Policy Direction**

- maintain the *status quo*;
- explicitly state that IBAs are not a requirement for project approval;
- entrench the BHP precedent of IBAs as ‘private’ agreements subject to minimal regulatory backing;
- use the federal oil and gas benefits regime as a model for the mining sector;
- establish a basic regulatory framework for IBAs;
- establish guidelines or requirements regarding the content of IBAs; and
- establish procedural guidelines or requirements for IBA negotiations.

**Options to Facilitate the Negotiation of IBAs**

- develop an enhanced framework for early consultation with aboriginal organizations;
- facilitate IBA negotiations by providing information, advice and assistance to the parties; and
- develop a comprehensive approach to funding aboriginal participation in IBA negotiations.

**Options for Enhancing the Economic Development Role of IBAs**

- promote a multilateral approach to IBAs;
- establish an economic development strategy that incorporates project-specific IBAs; and
- promote the use of IBA implementation plans.

**Options for Structuring the Cash Component of IBAs**

- identify possible rationales for the cash component of IBAs;
• address the issue of aboriginal entitlement to access payments or revenue sharing for projects on Crown lands that are within traditional aboriginal territories;

• develop a policy on the use of cash payments as means of distributing benefits from mineral development;

• establish standard principles and procedures for cash payments relating to surface rights and compensation;

• address the relationship between IBA payments and the overall fiscal regime for mining; and

• consolidate the framework for the cash components of IBAs.

**Options for Addressing the Relationship between IBAs and Other Processes**

• clarify the relationship between IBAs and environmental regulation;

• restrict opportunities and incentives for side-deals and strategic issue linkages; and

• establish a policy framework or protocol for IBAs in areas where land claims have not been settled.

**Options for Monitoring and Enforcing IBAs**

• encourage or require the inclusion of provisions for monitoring and evaluating the implementation of IBAs; and

• encourage or require compliance mechanisms for IBAs.

**Options for Establishing and Enforcing IBA Policy**

• rely on complementary initiatives and moral suasion;

• establish formal policy guidelines backed by existing regulatory and political leverage;

• enact a formal legal requirement for IBAs;

• provide for legislated project agreements; and

• support territorial leadership regarding IBAs.

Each of these options is briefly outlined and discussed in the paper.
The paper concludes by noting that, despite the complex and interrelated issues raised by IBAs, there are a number of concrete steps that DIAND could take to add structure and value to the IBA process. Developing policy in this area will require both broad consultation and further legal and policy analysis. Progress in this enterprise, it is suggested, requires a clearly defined set of issues and options to serve as a focal point for debate. The material presented in this paper is intended to provide DIAND with information and ideas that can be used to structure this policy process.
Disclaimer

This discussion paper was prepared for the Mineral Resources Directorate of the Department of Indian Affairs and Northern Development (DIAND). It reflects the research, analysis and conclusions of the author and is not intended to be a statement of either DIAND policy or the views of the Mineral Resources Directorate.
**List of Abbreviations**

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<th>Abbreviation</th>
<th>Description</th>
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<tr>
<td>CIRL</td>
<td>Canadian Institute of Resources Law</td>
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<tr>
<td>COGOA</td>
<td><em>Canada Oil and Gas Operations Act</em></td>
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<td>DIAND</td>
<td>Department of Indian Affairs and Northern Development</td>
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<td>EA</td>
<td>environmental assessment</td>
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<td>IBAs</td>
<td>impact and benefits agreements</td>
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<tr>
<td>IFA</td>
<td><em>Inuvialuit Final Agreement</em></td>
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<td>IIBAs</td>
<td>Inuit Impact and Benefits Agreements</td>
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<td>ILA</td>
<td>Inuvialuit Land Administration</td>
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<td>MDP</td>
<td>Major Development Project</td>
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<td>MPTP</td>
<td>Multi-Party Training Plan</td>
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<td>NLCA</td>
<td><em>Nunavut Land Claims Agreement</em></td>
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<td>NWT</td>
<td>Northwest Territories</td>
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<td>RAN</td>
<td>Resource Access Negotiations</td>
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<td>UFA</td>
<td><em>Umbrella Final Agreement</em></td>
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<td>YTG</td>
<td>Yukon Territorial Government</td>
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1.0 INTRODUCTION

In the northern territories and indeed elsewhere in Canada, project-specific impact and benefits agreements (IBAs) are increasingly used to address socio-economic, environmental and other impacts and to ensure local and regional economic benefits when mineral development occurs on traditional aboriginal territories or in proximity to remote communities. Although the first agreement of this type in the North was signed in 1974 by the federal government and a mining company,¹ recent IBAs are typically the product of direct negotiations between aboriginal organizations and mining companies, often without government participation as a party. For aboriginal organizations, the federal government, and the territorial governments, IBAs are attractive as instruments of economic development when mining occurs in regions where there is little private sector economic activity and where communities suffer from high levels of unemployment and associated socio-economic problems. Aboriginal people also see IBAs as an important means of influencing, monitoring and participating in mineral development on their traditional territories and, more generally, as tangible instruments for achieving greater control over the decisions that affect their individual and collective well-being. From the perspective of mining companies, IBAs are often seen as a mixed blessing, offering a means to establish positive and mutually beneficial relations with local communities but also adding to the costs and uncertainty associated with developing and operating mines in northern Canada.

Although the negotiation of IBAs is now widely accepted as standard practice for new mines in the North, very little about the IBA process has in fact been standardized. There is currently no explicit legal requirement that IBAs be negotiated for mining activities in northern Canada aside from the provisions contained in the Nunavut Land Claims Agreement and the requirements for somewhat analogous agreements under the Inuvialuit Final Agreement. In terms of policy direction, the Department of Indian Affairs and Northern Development (DIAND) has promoted the negotiation of IBAs between mining companies and aboriginal organizations but has not yet developed a formal policy framework to guide either the IBA process or its own involvement in that process. The Government of the Northwest Territories and the Yukon Territorial Government have also demonstrated an interest in securing IBAs for mining projects, but neither has a legal or policy regime in place that covers these agreements. Throughout much of the North, therefore, the negotiation of one or more IBAs is widely viewed as a de facto regulatory requirement for mining projects but there are no established parameters governing the content of these agreements or the process by which they are negotiated and implemented.

The unstructured nature of the IBA process has become a matter of increasing concern in recent years. DIAND’s intervention in the process leading to approval of BHP Diamonds Inc.’s Ekati mine in the Northwest Territories (NWT) was clearly ad hoc and raised a number of

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important legal and policy issues. Parties to IBA discussions in relation to the mine proposed by Diavik Diamond Mines Inc. continue to struggle with an undefined process and a lack of certainty on key issues, notably how IBAs will ultimately be treated in the regulatory context. In the Yukon, a high level of uncertainty regarding IBAs prevails as mining companies and aboriginal organizations seek to establish workable agreements within a complex and fluid regulatory environment. Even in Nunavut, where relatively specific provisions regarding Inuit Impact and Benefits Agreements are found in article 26 of the *Nunavut Land Claims Agreement*, experience with IBAs is very limited and many important and potentially contentious issues remain unresolved. Overall, the significant uncertainty associated with the IBA process in the North has fuelled widespread concern that current IBA practice may not be serving the best interests of government, aboriginal organizations, the mining industry and the public at large.

The centrality of IBAs to the regulatory and benefits package that was developed for BHP’s Ekati mine contributed significantly to the profile of IBAs in the North and elsewhere in Canada in recent years. Following approval of that project, the Mineral Resources Directorate of DIAND commissioned the Canadian Institute of Resources Law (CIRL) to examine the regulatory and negotiated processes that were used in relation to the Ekati mine. CIRL’s *Independent Review of the BHP Diamond Mine Process*, released by DIAND in June, 1997, included a discussion of IBAs in this context and made a number of recommendations relating to the IBA process. On the basis of that work, the Mineral Resources Directorate asked CIRL to undertake a more detailed investigation of issues raised by IBAs. The results of that investigation are reported here.

In particular, CIRL was asked to prepare a discussion paper to assist DIAND in deciding how it should respond to the important policy questions raised by IBAs. This task had two principal components. The first involved identifying and analysing the key issues raised by the negotiation and implementation of IBAs in the context of mineral development in northern Canada. The second component was to set out an array of options for consideration by DIAND. CIRL was also asked to include some general contextual material on northern IBAs in its discussion paper.

The review of issues and options in this paper is primarily based on a series of interviews with individuals from government (federal, territorial and provincial), aboriginal organizations, the mining industry, environmental groups and the consulting business who are familiar with the IBA process in northern Canada and with related issues. This set of interviews was neither a comprehensive consultation with all interested parties nor a scientific survey of opinion on IBAs. The range of opinion canvassed was sufficiently broad and the interviews were sufficiently detailed, however, to ensure that most, if not all, of the principal issues raised by

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IBAs were touched on. The information obtained through interviews was supplemented by a review of written material and informed by previous work on IBAs undertaken at CIRL.

The interviews were relatively unstructured, with each person being asked an initial open-ended question regarding his or her concerns relating to IBAs. Although interviewees were provided with a project description and list of issues in advance, the range and complexity of issues raised by IBAs and the various backgrounds of the people interviewed made it impractical to impose a standard format on all interviews. As a result, all of the issues raised by IBAs were not addressed in each interview and it was impossible to provide each interviewee with an opportunity to respond to the full range of concerns and issues raised in other interviews. Most discussions followed fairly non-linear paths, reflecting the particular interests and experience of interviewees. In general, interviews elicited a broad range of concerns regarding IBAs but fewer specific proposals for addressing them.

Given the scope of the topic and the range of views that were expressed during interviews, a comprehensive exposition and analysis of all of the issues relating to IBAs would be too lengthy and unwieldy to be useful. This paper is therefore necessarily selective and does not purport to present a full discussion of all perspectives on all issues. Furthermore, it does not offer a consensus view on the problems raised by IBAs and how these problems could or should be addressed by DIAND. Although many common themes emerged in the interviews, a consensus on specific future directions for IBA policy has not yet crystallized. The discussion that follows is therefore intended, at a minimum, to impose a logical structure on the myriad of issues raised by IBAs and to set out some general principles and concrete policy options that could serve as focal points for more detailed policy analysis and consultation with interested parties. The goal here is to help lay the groundwork for a policy process relating to IBAs, not to provide a blueprint for the end result.

The paper is organized as follows. Following these introductory comments in Section 1, the legal and regulatory context for IBAs in northern Canada is briefly described in Section 2 and the federal policy context is summarized in Section 3. Section 4 reviews several features of current IBA practice and Section 5 describes three existing benefits regimes that could serve as models for IBA policy. Section 6 provides an extensive enumeration of issues raised by current IBA practice, organized into seven broad categories. Seven principles that could guide DIAND’s policy in responding to these issues are then proposed in Section 7. At this point, the paper turns to a review of policy options. A brief explanation in Section 8 of the structure used to present policy options is followed, in Sections 9 to 15 of the paper, by the discussion of a broad range of policy initiatives and regulatory requirements that could be included in IBA policy. Finally, brief concluding comments are found in Section 16.
2.0 THE LEGAL AND REGULATORY CONTEXT FOR NORTHERN IBAs

The key variable in determining the legal and regulatory context for IBAs in northern Canada is the land claims situation. Land claims agreements address IBA requirements with varying degrees of specificity. All settled land claims, however, establish patterns of aboriginal and Crown ownership of surface and subsurface land that have important implications for IBA negotiations. Where land claims are not settled, the negotiation of IBAs is complicated by the presence of unresolved and in some cases overlapping aboriginal claims to rights in land and resources. Any future devolution of federal authority to territorial governments will also alter the legal and regulatory context for IBAs.

This section of the paper begins with a brief overview of patterns of land ownership and their implications for IBAs. The legal and regulatory implications of the current land claims situation and other developments in Nunavut, the NWT and the Yukon are then briefly described. Given the complexity of the land claims agreements, only an overview of key provisions is provided. Readers seeking more details on the contents and implications of these agreements are referred to the agreements themselves and to the growing secondary literature on northern IBAs.4

2.1 IBAs and Categories of Land Ownership

Three categories of surface and subsurface land ownership are relevant to IBAs. First, land claims agreements establish aboriginal ownership of both surface and subsurface lands in certain portions of settlement areas. This category of ownership provides maximum scope for aboriginal organizations to set the terms and conditions for land use and mineral development, including the requirements that may be negotiated as part of IBAs. For this category of land, the extensive autonomy of aboriginal organizations in the area of resource disposition and development leaves correspondingly less scope for a DIAND policy on IBAs. There is, nonetheless, room for a DIAND policy to facilitate the IBA process and complement the aboriginal IBA regimes. Furthermore, laws of general application remain applicable to mineral development on aboriginal land.

Second, aboriginal ownership may be limited to surface land only, with subsurface rights remaining with the Crown. Land claims agreements typically provide for a large measure of aboriginal control over surface land use in this situation, although the owner of subsurface mineral interests retains a right to have access to land for development. Procedures for

arbitration are generally established in the event that the surface owner and the holder of subsurface mineral rights cannot reach agreement on the terms and compensation provisions governing surface access. DIAND’s subsurface ownership and control over mineral development provides considerable scope for a DIAND IBA policy in this situation.

Finally, both surface and subsurface lands are owned by the Crown in significant portions of settlement areas as well as in areas where land claims have not been settled. Within settlement areas, mineral development in areas of Crown surface and subsurface ownership typically requires some involvement of aboriginal organizations, perhaps through notification and consultation prior to issuing approvals. Where claims have not been settled, the Crown’s obligations to aboriginal people when development is proposed within traditional territories are a function of the Crown’s general fiduciary duty and the more specific obligations regarding consultation that are being defined through court cases on aboriginal rights. DIAND clearly has maximum scope to determine IBA requirements in the areas where the Crown owns both the surface and the subsurface.

2.2 Nunavut Territory

Article 26 of the Nunavut Land Claims Agreement (NLCA) establishes the most detailed legal regime for IBAs in northern Canada. Seven key elements of this regime are highlighted here.

First, Inuit Impact and Benefits Agreements (IIBAs) are required for any “Major Development Project” (MDP), defined as “a project involving the development or exploitation, but not the exploration, of resources wholly or partly under IOLs [Inuit Owned Lands].” A threshold requirement of at least 200 person years of employment or $35 million of capital costs within the Nunavut Settlement Area over five years is also set for MDPs. The NLCA thus establishes not only a clear requirement for IIBAs, but also firm thresholds defining the types of activities to which this requirement applies.

Second, section 26.3.3 of the NLCA specifies that the following principles are to guide the negotiation and arbitration of IIBAs:

- (a) benefits shall be consistent with and promote Inuit cultural goals;

- (b) benefits shall contribute to achieving and maintaining a standard of living among Inuit equal to that of persons other than Inuit living and working in the Nunavut Settlement Area, and to Canadians in general;

- (c) benefits shall be related to the nature, scale and cost of the project as well as its direct and indirect impacts on Inuit;

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5 NLCA, s. 26.1.1.
(d) benefits shall not place an excessive burden on the proponent and undermine the viability of the project; and

(e) benefit agreements shall not prejudice the ability of other residents of the Nunavut Settlement Area to obtain benefits from major projects in the Nunavut Settlement Area.

Third, the NLCA specifies the parties to IIBAs. These agreements are to be negotiated between the company proposing to carry out the project and the “Designated Inuit Organization”. The NLCA does not address the possibility of participation by the federal or territorial government as parties to an IIBA.

Fourth, the NLCA includes specific guidance regarding the content of IIBAs. Section 26.3.1 states that “An IIBA may include any matter connected with the Major Development Project that could have a detrimental impact on Inuit or that could reasonably confer a benefit on Inuit, on a Nunavut Settlement Area-wide, regional or local basis.” In addition, Schedule 26-1 of the NLCA sets out a list of matters considered appropriate for inclusion in an IIBA. This list includes training, preferential hiring, employment rotation, scholarships, labour relations, business development and opportunities, housing, health and safety, language of work, implementation and enforcement, and a number of other matters. The possibility is also left open for the inclusion within IIBAs of “Any other matters that the parties consider to be relevant to the needs of the project and Inuit.”

Fifth, IIBAs are explicitly linked to the overall regulatory process. Section 26.3.2 of the NLCA establishes a formal requirement that IIBAs be consistent with the terms and conditions of project approval, including those terms and conditions established pursuant to any ecosystemic and socio-economic impact review. This consistency requirement may also be mirrored in the agreements themselves, as illustrated by the provision in the Ulu Agreement whereby the parties acknowledge that the final review and approval of the project will be subject to the environmental assessment process under the NLCA and agree to renegotiate the IIBA if necessary to ensure that it is consistent with the terms and conditions of project approvals. The NLCA also provides for oversight of the IIBA process by the Minister of DIAND. In particular the minister has authority to block the coming into effect of a negotiated or arbitrated IIBA in the event that: (1) the agreement fails to conform with the terms and conditions of project approval, as provided for in section 26.3.2; (2) the agreement fails to reflect certain guiding principles for IIBAs, as set out in section 26.3.3; or (3) in the case of an arbitrated agreement, the

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6 NLCA, s. 26.4.1.

7 Ulu Inuit Impact Benefit Agreement between Eco Bay and the Kitikmeot Inuit Association, 17 September 1996, article 3.5.
the arbitrator has exceeded his or her jurisdiction. Ministerial oversight thus provides a direct link between the IIBA process, conducted between the project proponent and the appropriate DIO, and the broader regulatory process that is established under the NLCA and is administered by government departments and regulatory agencies.

The sixth key point is that the NLCA establishes both procedural guidelines and a deadlock breaking mechanism for IIBA negotiations. Section 26.4.1 of the NLCA requires the parties to begin good faith IIBA negotiations at least 180 days prior to the proposed start-up date of a Major Development Project. In this way, it is anticipated that the timing of the IIBA process will be consistent with the overall regulatory time lines. Parties may, of course, initiate IIBA negotiations well before the 180 day time limit, as occurred in the case of the Ulu Agreement. The NLCA also provides for voluntary arbitration if agreed to by both parties and compulsory arbitration at the request of either party if agreement has not been reached within 60 days after the commencement of negotiations. Furthermore, parties negotiating IIBAs are under an explicit obligation to negotiate in good faith. In the event that any party considers that another party is not negotiating in good faith, an arbitrator may be appointed to investigate the allegation of bad faith and, if necessary, to proceed with compulsory arbitration. These arbitration provisions thus provide a deadlock-breaking mechanism designed to ensure that, in the absence of voluntary agreement, the IIBA component of the regulatory package can be finalized within a reasonable time frame.

Finally, it should be noted that IIBAs are negotiated within a broader land claims context that includes specific provisions for matters such as wildlife compensation, surface access and surface rights adjudication, and the sharing of resource royalties between Inuit and the Crown. A number of the contentious issues that are sometimes included in IBAs may thus be dealt with through separate mechanisms under the NLCA. For specified matters, however, agreement in an IIBA may take precedence over other arrangements under the NLCA.

Article 26 of the NLCA is the most detailed framework for IBAs in place at the present time in northern Canada. It would be premature, however, to conclude that the NLCA sets out a comprehensive and problem free approach to IBA negotiation and implementation. As will

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8 NLCA, s. 26.8.1.

9 A report on IIBAs published by the Kitikmeot Inuit Association acknowledges that, despite the NLCA provisions:

“there is still considerable latitude for interpreting the degree and magnitude of elements which should be in an agreement. It is this latitude that has created further concerns about what is expected of the mining industry in terms of IIBA provisions, their roles and responsibilities in ensuring the agreement achieves its objectives, and the relative roles and responsibilities of other parties to these agreements.”
become evident from the survey of issues in Section 6 of this paper, the NLCA framework still has gaps and could give rise to significant concerns for aboriginal organizations, mining companies and government. Furthermore, only one IIBA has been negotiated pursuant to the NLCA provisions.\textsuperscript{10} This agreement was for a relatively small project and has not been implemented because the project was deferred for economic reasons. The NLCA provisions have not, therefore, been fully tested in practice and this model should not be uncritically accepted as a panacea for the concerns with current IBA practice throughout the North.

2.3 Northwest Territories

In contrast to Nunavut, the NWT lacks a single IBA regime. Impacts and benefits from mineral development are dealt with to some extent under the three settled land claims agreements in the NWT, although nowhere in the level of detail found in the NLCA. The are also, of course, significant areas of the NWT where land claims agreements have yet to be completed.

The \textit{Inuvialuit Final Agreement} (IFA) provides for three principal types of agreements that may fulfill IBA-type functions. First, a Participation Agreement must be concluded when industry obtains permanent access to Inuvialuit lands in order to carry out significant commercial activities such as the development of subsurface minerals. These agreements may include provisions governing access and land use as well as measures relating to the sharing of economic benefits. Section 10(3) of the IFA lists the following examples of matters that may be addressed in these agreements:

(a) costs associated with any ILA (Inuvialuit Land Administration) inspection of the development work sites and the nature and scope of such inspection;

(b) wildlife compensation, restoration and mitigation;

(c) employment, service and supply contracts:

(d) education and training; and

(e) equity participation or other similar types of participatory benefits.

While the IFA envisages voluntary agreement between project proponents and the Inuvialuit, the federal government may establish a timetable and negotiation procedures when agreement is not reached. Arbitration under section 18 of the IFA is also available if the parties fail to conclude a Participation Agreement.

\textsuperscript{10} \textit{Ibid.}

See, Christensen, \textit{supra}, note 4, p. 2.
Second, the IFA provides for broader Cooperation Agreements that may be entered into by the Inuvialuit and developers. These agreements may address “social and economic interests, including employment, education, training and business opportunities.” The IFA states that when these agreements conform with government requirements, the government may accept them as sufficient to satisfy its approval process. More generally, it should be noted that section 16 of the IFA, dealing with “Economic Measures”, includes commitments by both the federal and territorial governments to promote economic development to benefit Inuvialuit within the Inuvialuit Settlement Area.

Third, interests in subsurface resources owned by the Inuvialuit are issued by way of concession agreements. The standard form for these agreements includes measures relating to employment and training programs and the provision of Inuvialuit goods and services. The details of these matters are left to the negotiation of each concession agreement.

Additional details regarding agreements under the IFA are set out in the Rules and Procedures of the Inuvialuit Land Administration. This document also provides for the negotiation of Access Agreements, which apparently may serve many of the same functions as Participation Agreements. In addition, the Rules and Procedures address the issue of contracting with Inuvialuit businesses under Participation Agreements. Finally, the Rules and Procedures provide for Reconnaissance Permits which give holders the non-exclusive right to explore for minerals. Conditions attached to these permits may include training programs for Inuvialuit and profit sharing from the sale of information, indicating the intent of the Inuvialuit to secure benefits at the mineral exploration stage in some circumstances.

The other two settled claims in the NWT, the Sahtu Dene Metis and the Gwich’in comprehensive land claims agreements, include some provisions dealing with impacts and benefits from mineral development. Neither of these agreements provides explicitly for IBAs. In relation to mineral activity where the Crown owns surface and subsurface lands, the agreements state that mineral rights holders must consult with specified aboriginal organizations on a range of matters including environmental impacts and mitigation, impacts on wildlife harvesting, employment, business opportunities and contracts, and training for aboriginal employees.

Where surface access to aboriginal owned land is required to develop mineral rights issued by the Crown, the developer must attempt to negotiate an access agreement. The Sahtu Dene Metis and Gwich’in comprehensive agreements provide no guidance regarding the content of access agreements. Terms and conditions regarding land use and provisions for benefits of various types could therefore be included. Failure to reach an agreement leads to the referral of the matter to the Surface Rights Board, which will then make an access order. One commentator has suggested, however, that there is some doubt regarding the jurisdiction of that Board to go

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11 IFA, s. 16(11).

12 Keeping, supra, note 4.
Beyond the award of monetary compensation and impose requirements regarding matters such as training, employment and business opportunities. This limitation may restrict the ability of the Sahtu and Gwich’in to use surface access agreements as a lever to secure benefits commitments.

At the present time, it is unclear exactly how IBAs will be addressed in relation to areas where the Sahtu and Gwich’in own subsurface minerals. It is likely, however, that benefits requirements and related issues will be negotiated as part of the lease or licence by which mineral rights are issued. The other point that should be noted about the Sahtu and Gwich’in agreements is that they establish a regime for royalty sharing for mineral development within the Mackenzie Valley region.

In the areas of the NWT not covered by settled land claims, there is no legal requirement or regulatory framework for IBAs. The most recent relevant precedent is the treatment of IBAs in relation to BHP’s Ekati diamond mine. BHP and aboriginal organizations voluntarily entered into IBA negotiations, but agreements had not been reached when the Minister of DIAND formally stated that “satisfactory progress” on IBAs was a precondition for the granting of regulatory approvals, notably the water licence. The Minister’s announcement included a 60 day time frame for negotiations, within which two of the four IBAs under negotiation were either signed or virtually completed. DIAND has not developed regulatory guidelines or requirements based on the BHP precedent, although it appears to be widely assumed both within and outside of government that IBAs of some sort will be required, or at least strongly encouraged, for subsequent mines in the NWT. IBA negotiations are currently under way in relation to Diavik’s proposed diamond mine in Lac de Gras. DIAND has not, however, issued a formal statement of how it will treat IBAs in the context of regulatory processes and approvals for this project.

Finally, it should be noted that land claims and self-government negotiations are well advanced between the federal government and the Dogrib First Nation. It remains to be seen how IBAs, resource revenue sharing and related issues are addressed in this agreement.

Mineral development in the NWT must therefore confront significant uncertainty and variability in relation to the IBA process. Any mining company proposing a major development will face strong — probably irresistible — pressure to negotiate one or more IBAs. With the partial exception of the IFA provisions, however, there is little in the way of an explicit regulatory framework to guide the IBA process. Aboriginal ownership of subsurface minerals as established through land claims agreements provides the legal leverage to require IBAs under certain circumstances, but there is no general legal requirement for IBAs when mining occurs on Crown land. In areas of the NWT where claims have not been settled, IBAs are negotiated in a

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13 Ibid.

14 CIRL, supra, note 2.
highly charged political climate without the benefit of legal underpinnings or a regulatory framework.

2.4 Yukon Territory

Land claims and self-government agreements with First Nations in the Yukon are being negotiated on the basis of the *Umbrella Final Agreement* (UFA). There is no requirement in the UFA for IBAs in relation to mineral development and IBAs are not referred to in Chapter 22 of the UFA, which deals with economic development. Chapter 22 does, however, address a number of topics that are commonly included in — or are directly relevant to — the IBA process. Despite the absence of a formal requirement, IBAs have been signed in the Yukon and it appears likely that they will be negotiated for future mineral development. Yukon First Nations own some surface and subsurface lands within their respective settlement areas, giving them leverage to require benefits provisions when issuing leases and permits for surface and subsurface access. The self-government powers of Yukon First Nations are another possible basis for requiring IBAs for mineral developments on First Nation lands. In addition, the Development Assessment Process established under the UFA includes a broad mandate to examine environmental and socio-economic impacts and mitigation measures. Project approvals issued through this process may, in the view of some people, be used to require IBAs or other arrangements for addressing impacts and securing local benefits. At the present time, however, it is unclear exactly how IBA requirements for mineral development in the Yukon will be developed and administered.

The situation in the Yukon is also complicated by the possibility that significant powers relating to mineral development will be devolved from the federal government to the Yukon Territorial Government (YTG). If devolution occurs, legal authority for establishing IBA requirements for Crown land would be transferred to the YTG. In anticipation of this transfer of powers, provisions for the negotiation of “Project agreements” have been included by YTG and some Yukon First Nations in individual first nations final agreements. These provisions are have not been agreed to by DIAND and they will only come into effect when the YTG assumes authority to issue ‘Decision Documents’ for projects.

The legal and regulatory context for IBAs in the Yukon is thus particularly complex and fluid. It remains to be seen whether formal requirements governing the content of IBAs and the procedures for negotiating these agreements will emerge from the implementation of land claims and self government agreements, the Development Assessment Process, and devolution.

2.5 Overview and Implications

In an ideal world, land claims agreements containing clear IBA requirements for both aboriginal and Crown land within settlement areas would be in place before the issues raised by

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15 See, for example, the *Little Salmon/Carmacks First Nation Final Agreement*, 21 July 1997, Chapter 22, Schedule A — Economic Measures, article 2.0.
major mining projects are addressed by aboriginal people, the federal and territorial governments, and mining companies. The reality, however, is different.

Most existing land claims agreements contain nothing approximating a complete framework for IBAs and even the NLCA leaves important issues unresolved. The federal and territorial governments may also wish to address the impacts and benefits of mining projects from the perspective of the broader northern population, including both non-aboriginal people and aboriginal people who are not beneficiaries of the land claims agreement that covers the area where a given project is situated. Finally, government may wish to promote alternative approaches to impacts and benefits that may complement the provisions in land claims agreements, even where these provisions are fairly extensive and detailed. In the end, the legal, political and institutional context of each settlement area will have to be examined to determine how a DIAND policy on IBAs could best mesh with claims-based arrangements. It is very unlikely, however, that the settlement of land claims will resolve all of the issues that could provide a rationale for a DIAND policy on IBAs.

Mineral development will also continue to occur in areas not covered by settled land claims for some time in the future. Developing IBA policy where claims are not settled is complicated because fundamental questions relating to land ownership and regulatory authority await final resolution. In the absence of settled claims, IBA policy confronts sensitive legal and political issues surrounding resource development on Crown land that is within the traditional territory of aboriginal people. Strategic linkages between the land claims and IBA processes are also a real possibility, further complicating the latter. The shadow of unresolved land claims thus hangs over the IBA process in some areas of the North.

The complexity of the legal and regulatory context in northern Canada is a significant challenge for any DIAND policy on IBAs. The need for flexibility to adapt to a range of specific circumstances must be balanced against the risk that policy direction and coherence will be lost by a descent into too much context-specific detail. Several of the possible guiding principles for IBA policy, presented below in Section 7, are intended to suggest how this balance might be struck. In particular, IBA policy should probably focus on opportunities to add structure and value to the IBA process in ways that can be applied broadly across the North and can mesh with specific provisions related to IBAs that are contained land claims and self government agreements.
3.0 THE FEDERAL POLICY CONTEXT FOR NORTHERN IBAs

There is currently no federal policy that explicitly makes the negotiation of IBAs a precondition for the approval of mineral development in northern Canada. There are also no policy guidelines that establish either procedural or substantive parameters for IBAs. There is, however, a widespread perception that mineral development will not be allowed to proceed without IBAs. This perception has been fostered by the federal government in at least three ways.

- The decision by the Minister of DIAND to require “satisfactory progress” on IBAs before project approvals would be granted for BHP’s Ekati diamond mine is an important recent precedent.

- The advice that DIAND officials give to mining companies operating in the North is that companies are at least encouraged, if not formally required, to negotiate IBAs with aboriginal organizations.

- DIAND provides funding through the Resource Access Negotiations (RAN) Program to assist aboriginal organizations in negotiating IBAs.\(^{16}\)

In terms of the IBA process, DIAND has tended to leave the negotiation of recent IBAs largely, if not exclusively, in the hands of mining companies and aboriginal organizations. Even in the case of BHP’s Ekati mine, where the negotiation of IBAs was effectively turned into a regulatory requirement through the exercise of ministerial discretion, DIAND was not a party to IBA negotiations and the content of these agreements was allowed to remain confidential between the company and aboriginal organizations.

The key point about the current policy context is that while IBAs in northern Canada are negotiated and implemented in a virtual policy vacuum, DIAND appears both unwilling and unable to remove itself completely from the IBA process. DIAND’s explicit and implicit support for IBAs along with its broader regulatory responsibilities mean that parties to IBA negotiations are acutely aware of the federal government’s presence — or absence — in relation to the IBA process. The model of IBAs as ‘private’ agreements between mining companies and aboriginal organizations fits poorly with the inevitable influence of government on both the balance of bargaining power in negotiations and on the multitude of circumstances that affect the success of IBA implementation. As the discussion of issues presented below in Section 6 will show, many of the concerns with current IBA practice centre on the apparent ambiguity of DIAND’s

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\(^{16}\) Eligible project purposes for RAN funding include “‘Major project negotiating activities’, with developers of off-reserve resource projects near reserves or communities and related parties to gain employment, business and other economic benefits from these projects.” See, Resource Access Negotiations (RAN) Program — Program Guidelines, Environment and Natural Resources Directorate, July 1998, p. 1.
overall policy direction in relation to IBAs, the absence of specific guidelines to structure what many people see as a *de facto* regulatory requirement, and the perceived lack of federal initiative in assuming government’s proper responsibilities for ensuring the successful implementation of IBAs.
4.0 CURRENT IBA PRACTICE

The development of IBA policy should obviously reflect current trends in IBA practice in the North and elsewhere in Canada. There is a growing body of anecdotal evidence and knowledge on this topic, but little systematic analysis has been undertaken to date. Generalizations must be treated with caution given the relatively small number of IBAs that have been completed in Canada and the significant differences in the circumstances within which they have been negotiated and implemented. A few comments can be offered, however, regarding the content of recent agreements, the IBA process, and the reasons why IBAs are seen to have succeeded or failed in achieving intended objectives.

4.1 Overview of IBA Contents

The content of IBAs has evolved significantly, from generally worded provisions dealing with a limited range of socio-economic matters to much more formal and precise language covering a broader range of topics. IBAs recently negotiated in the North and elsewhere in Canada have included detailed provisions dealing with topics such as employment and training, economic development and business opportunities (including contracting practices), social, cultural and community support, financial payments and equity participation, environmental protection, and cultural resources. In addition, these agreements may contain provisions relating to matters such as amendment and renegotiation, dispute resolution, confidentiality, reporting and monitoring, aboriginal participation in regulatory processes, and project expansion.

The expanding scope of IBAs reflects a number of factors. Industry and aboriginal parties often view their IBA as the basis for a long-term relationship, spanning the life of a project and encompassing many economic, social, environmental and cultural aspects of project management and company-community interaction. Aboriginal organizations increasingly see IBAs as a key instrument for promoting economic development and achieving a greater measure of control over resource development and related activities on their traditional territories. For industry, IBAs represent an opportunity to achieve greater certainty on issues that may, if unresolved, prove to be obstacles to regulatory approvals and project development. Pressure to expand the scope of IBAs is also seen by some people as a direct response to deficiencies in regulatory processes and government programs.

17 A recent survey of Canadian IBAs by CIRL came up with 18 signed agreements, although a number of other agreements were identified but could not be obtained because of confidentiality provisions. See, Steven A. Kennett, A Guide to Impact and Benefits Agreements (Calgary: Canadian Institute of Resources Law, 1999) (in press). There is no authoritative and comprehensive listing of IBAs in Canada, nor is there a central repository for these agreements.

18 See, Kennett, Ibid.
As the scope and detail of IBAs increase, so too do their potential implications from a public policy perspective. IBA provisions dealing with the training and hiring of aboriginal employees, compensation and other cash payments to aboriginal parties, and environmental protection — to give three examples — should arguably be coordinated or integrated with the employment programs, compensation and fiscal regimes, and regulatory processes established by the federal and territorial governments. The allocation of roles and responsibilities among the federal government, territorial governments, aboriginal organizations and industry may be blurred as IBAs become vehicles for the direct provision or financing by industry of a range of benefits, sometimes extending to basic infrastructure and social services. As well, the cash components of IBAs may in some cases raise questions about the traditional role of federal and territorial governments in collecting and redistributing resource revenues. A DIAND policy on IBAs would be one means of addressing a series of issues arising from the increasing scope of many recent IBAs.

4.2 Parties and Process

There has been a marked evolution of IBAs throughout Canada in terms of the parties to these agreements and the negotiation process. In particular, there is evidence of an important shift in the respective involvement of federal, provincial and territorial governments on the one hand and aboriginal organizations on the other. A number of the earliest agreements were negotiated between government and resource companies. While this model may still be used — as illustrated by the Socio-Economic Agreement between BHP and the Government of the Northwest Territories — IBA negotiations generally now include the direct involvement of aboriginal representatives. In fact, a number of recent IBAs have been negotiated between resource companies and aboriginal organizations, with little or no direct participation by federal, provincial or territorial governments. The tendency of public governments to leave IBA negotiations primarily to the aboriginal and corporate parties is evident across the North, not merely in Nunavut where a specific legal framework for these agreements is established under the land claims agreement.

The process for negotiating IBAs has also changed, reflecting the expanding scope of these agreements, their growing importance from the perspectives of the parties, and the complex legal, regulatory and political environments within which some agreements have been negotiated. The negotiation of IBAs in relation to several recent mining projects in the North and elsewhere in Canada has proven to be a time-consuming, expensive and contentious process. Negotiations have in some cases extended over several years. The aboriginal and industry parties to these negotiations require considerable human and financial resources to conduct negotiations effectively. Furthermore, there is evidence of uncertainty and disagreement regarding fundamental questions relating to the appropriate scope of IBA negotiations and to the relationship of the IBA process with other aspects of project regulation and, in some cases, ongoing land claims negotiations. From the perspective of some participants, the prevailing model for IBA negotiations is shifting dangerously away from a focused discussion of project-
specific impacts and benefits and towards the much more complex, open-ended and contentious process that typifies many land claims negotiations.

Not all IBAs raise the procedural difficulties and complex issue linkages that plague negotiations relating to large projects that are located in areas of overlapping and unsettled land claims. It is still possible for mining companies and aboriginal organizations to negotiate focused IBAs in an efficient and cost-effective manner. There is, however, increasing concern that both the absence of government from the IBA table and the procedural costs, complexity and uncertainty surrounding some IBAs are problems that need to be addressed at the level of IBA policy.

4.3 Reasons for the Successes and Failures of IBAs

Evaluating the track record of IBAs is difficult for several reasons. First, several decades of experience with IBAs and the increasing prevalence of these agreements have not, unfortunately, lead to a systematic cataloguing of successes and failures, let alone a detailed body of analysis that attempts to explain this record. IBAs have rarely included monitoring and evaluation provisions and much of the information available on their successes and failures is therefore anecdotal. A second problem is the number of independent variables that may affect the success of particular IBAs. The characteristics of mining projects, mining companies and aboriginal communities differ significantly from one IBA to the next and these factors will be critical determinants of the success or failure of individual agreements. Furthermore, the premature closing of the mine is a relatively common explanation for the failure of some IBAs to achieve intended results. When this occurs, the lack of success in promoting long-term economic development may have little to do with the adequacy of the IBA itself. The third difficulty is that evaluating of the success of IBAs is to some extent a subjective process, reflecting priorities and expectations that may vary considerably over time and among interested parties. Generalizations about the overall success of northern IBAs in delivering short-term and long-term benefits must therefore be made with some caution.

Bearing in mind these obstacles, a few comments will be made regarding the underpinnings of successful IBAs and the reasons why many agreements have failed to live up to expectations. Evidence on both of these topics is largely anecdotal, supplemented by a few published sources.  

A few rules of thumb have emerged regarding what might be termed ‘best practices’ in relation to IBAs. For example, one experienced commentator listed the following factors as contributing to the success of IBAs:


20 George Tough, ‘Resource Revenue-Sharing and Related Mechanisms for Promoting
commitment by the parties to the IBA;
- realistic expectations and clear objectives;
- understanding, respect and candour across the cultural line;
- aboriginal leverage and knowledge, and the capacity to use them effectively;
- clarity about the roles and responsibilities of the parties;
- sufficient aboriginal individuals and businesses with the requisite skills;
- cooperative programs to fill skill and knowledge gaps;
- clear, effective and well-resourced implementation plans;
- clear accountability and sanctions for failure (and incentives for success); and
- community support.

Additional work on best practices has been compiled and published in *Aboriginal Participation in the Mining Industry of Canada, 1996*, the seventh annual report of the Sub-committee of the Intergovernmental Working Group on the Mineral Industry. This report contains a chapter on “Factors Contributing to Increased Aboriginal Participation in Mining” which includes checklists for exploration companies, aboriginal people and mining companies. Much of the emphasis in this report is on the importance of good communication, beginning with early consultation between industry and aboriginal people. There is, however, no short and definitive list of factors that will guarantee successful IBAs. Attention to a number of interrelated factors and sensitivity to particular circumstances is clearly required.

As noted above, little systematic work has been done to evaluate whether IBAs have lived up to expectations and what factors may explain the failures that have occurred.\(^2\) A number of people interviewed for the preparation of this paper did, however, express concerns

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that current IBA practice is not delivering the desired short-term and long-term benefits in the area of economic development. Among the principal reasons offered for this disappointing track record were the following:

- There is often a mismatch between the skills and interests of aboriginal people and the employment opportunities available in the mining industry.

- Mining companies may lack the commitment, flexibility, and internal incentive structures needed to achieve significant levels of aboriginal participation in their operations.

- Aboriginal businesses may lack the business expertise and capital required to provide goods and services on a reliable and cost-effective basis to the mining industry.

- Social and cultural barriers to the integration of aboriginal people into an industrial workforce may impede the implementation of IBAs.

- IBAs that focus too narrowly on slotting local people into specific, often unskilled, jobs at particular projects may not be successful in leaving a lasting legacy of increased capacity when those projects are completed.

- IBAs that seek to guarantee benefits and implement strong affirmative action programs may in fact create an environment of dependency and reliance on subsidies that undermines initiative and self-esteem and is, in the long run, unsatisfactory from the perspectives of local people, the mining industry, and government.

- The employment and business opportunities resulting from IBAs may not benefit local communities if the money earned by aboriginal people is spent in regional centres and if the extended absences of mine employees and their access to significant amounts of cash result in increased strains on community and family life.

- Aboriginal people may be worse off following the closing of a mine than they were before it opened if the legacy of the project and its IBA includes disappointed expectations, skills that are no longer readily marketable, and disruptions in traditional social structures and ways of life.

- The focus on IBAs as a key component of an economic development strategy may accentuate the boom-bust cycle of northern economies since the success of IBAs is contingent on specific projects in an industry that has proven itself to be highly cyclical.

- The cash payments associated with some IBAs may not yield the expected long-term economic benefits if the money is not subject to appropriate accountability mechanisms and if it is not used wisely.
Each of these concerns with IBAs raises complex social and economic issues that cannot fully be explored here. It is also clear that the concerns noted above do not apply equally, or in some cases at all, to every experience with northern IBAs. Finally, some of these problems reflect largely unavoidable negative effects of economic development in the North and should therefore be weighed against the benefits that development can and does deliver when compared with the alternative of economic stagnation. Nonetheless, the reasons noted above for the failure of IBAs to live up to expectations reflect a widespread view that current IBA practice leaves much to be desired from the economic development perspective.

The track record of IBAs could also be evaluated from other perspectives, reflecting the fact that these agreements are often more than economic development instruments. It might be asked, for example, whether IBAs have succeeded in increasing aboriginal input into project management and fostering improved communication and understanding between the mining industry and local communities. In these areas as well, information is largely anecdotal and the record of IBAs is clearly mixed. Beyond the basic rules of thumb noted above, it is difficult to generalize about the reasons for success and failure.

The ultimate measure of success of IBAs from the economic development and other perspectives is whether they succeed in addressing the adverse impacts of mining and in ensuring that aboriginal people and other northerners obtain short-term and long-term benefits from mineral development. Attention should be paid not only to improving peoples’ lives during the lifespan of mining projects but also to the social, economic and environmental legacy that remains when the projects shut down. A failure of IBAs to deliver both short-term and long-term benefits is clearly a matter of concern from a public policy perspective. If IBAs are not achieving their potential for reasons that could be addressed through government action, a rationale exists for the formulation of an IBA policy by DIAND. There is no doubt that many of the people familiar with current IBA practice in Canada have serious doubts as to whether these agreements are in fact achieving their potential in northern Canada and are looking to the federal and territorial governments to address this problem. There remains, however, a significant degree of optimism that IBAs have at least the potential to contribute significantly to building better relationships between aboriginal organizations and the mining industry and to enhancing the economic, social and cultural well-being of aboriginal people and other northerners.
5.0 OTHER BENEFITS REGIMES

There is little experience with formal IBA regimes in Canada for DIAND to draw on aside from the provisions in the NLCA outlined above. Three models that are relevant, however, are the benefits regimes established under the federal and the Yukon oil and gas legislation and the benefits requirements and related initiatives that apply to mines in northern Saskatchewan. These models are briefly described in this section.

5.1 The Federal Oil and Gas Benefits Regime

The federal requirement that companies secure approval for benefits plans before commencing oil and gas operations is established under the Canada Oil and Gas Operations Act (COGOA) and referred to in the Canada Petroleum Resources Act. COGOA defines benefits plans to mean:

“a plan for the employment of Canadians and for providing Canadian manufacturers, consultants, contractors and service companies with a full and fair opportunity to participate on a competitive basis in the supply of goods and services used in any proposed work or activity referred to in the benefits plan.”

The Act also states that benefits plans may be required to “include provisions to ensure that disadvantaged individuals or groups” have access to training, employment and business opportunities. No approval of a development plan and no authorization of any work or activity can occur until the Minister of DIAND has approved a benefits plan or waived the benefits requirement.

Guidelines regarding the benefits requirements are contained in the calls for bids issued by DIAND. The “Benefits Statement of Principles” requires companies to take initiatives in the following areas:

* Community Consultation — to provide information on its exploration programs to concerned individuals, groups and communities in the region;

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22 This regime is described and evaluated in more detail in Keeping, supra, note 4.

23 COGOA, s. 5.2(1).

24 COGOA, s. 5.2(3).

25 This summary reproduced from a mimeograph outline of the Northern Benefits Requirements provided by DIAND. An example of the full statement of principles can be found in Attachment 3 to the “1999 Beaufort Sea / Mackenzie Delta Call for Nominations”, pp. 18-19.
Employment and Training — to work with regional communities to identify potential employment and training opportunities and to give first consideration for employment to qualified individuals living in the regional communities;

Industrial Benefits — to provide opportunities for involving northern businesses by considering potential suppliers on the basis of best value, competitiveness and benefits to regional communities;

Compensation — to provide compensation to individuals involved in hunting, trapping and fishing for any adverse impacts from project-related activities; and

Annual Report — to submit a report to DIAND within six months of completion of its seasonal work program which includes, among other things, information on employment and business generated by the project in northern communities.

Several other aspects of this benefits regime warrant special mention. First, the parameters of the benefits requirement are quite flexible given the general wording of the statement of principles and the recognition by officials that the nature and duration of work programs determine the extent to which companies can implement benefits principles. Second, the benefits plans contain best efforts undertakings, not fixed quotas. The philosophy underlying this regime is to encourage the creation of opportunities for benefits, as opposed to establishing guaranteed entitlements. Aboriginal involvement in oil and gas activities is therefore intended to be the result of employment and business relationships arrangements entered into on a free and competitive basis. Third, the details of the benefits plan are finalized only after a company’s bid for oil and gas rights is successful. This timing has been criticized as creating uncertainty regarding the nature of these obligations when companies are determining their bidding strategies. Fourth, the only formal enforcement mechanism available under legislation is to suspend or cancel the company’s oil and gas lease. This option is generally seen as too draconian to be exercised, although the best efforts commitments contained in benefits plans may in any case be too vague to be enforceable. Fifth, COGOA is a law of general application and so its benefits requirements are not restricted to oil and gas development on Crown lands. These requirements would normally be waived, however, where benefits arrangements are established pursuant to requirements under land claims agreements or through leases or licences issued by aboriginal organizations when companies’ operations involve aboriginal-owned subsurface resources.

The federal oil and gas benefits regime thus differs significantly from the IBA process that is currently used in relation to northern mining projects. To begin with, this regime has a firm legal basis and includes policy guidelines. Although a degree of uncertainty is inherent in the process because the specific details of benefits plans are not finalized until after oil and gas companies have bid on mineral rights, at least companies are aware in advance of the general parameters of the benefits requirements. Second, the limitation of obligations to ‘best efforts’ undertakings and the lack of direct enforceability is in marked contrast to the specific
contractual — even legalistic — language that is used to secure commitments in some IBAs. Third, the oil and gas regime is specifically limited to three categories of benefits: employment and training, industrial benefits, and compensation. Unlike some IBAs, benefits plans are not used to address the full range of impacts and potential benefits relating to resource development and will not include, for example, cash payments directly to aboriginal people unless these take the form of compensation for specific project-related impacts. The oil and gas benefits regime is thus intended to establish not only a floor regarding benefits requirements, but also a ceiling. Finally, this regime does not anticipate formal agreements between aboriginal organizations and oil and gas companies; in fact, benefits plans are a matter primarily between DIAND and the companies, with aboriginal involvement guaranteed only through the company’s obligation to undertake community consultation.

5.2 The Yukon Oil and Gas Benefits Regime

Section 68 of the Yukon Oil and Gas Act provides for a benefits regime for oil and gas operations. The key elements of this regime can be summarized as follows:

- licensed oil and gas activities cannot be carried on unless a benefits agreement is in effect between the licensee and one or both — depending on the category of land where the activities are to occur — of the Minister of Economic Development (on behalf of the YTG) and the Yukon First Nation on whose settlement land or traditional territory the oil and gas activity will be carried on;

- in cases where a benefits agreement proceeds without the signature of either the Minister or the Yukon First Nation, a consultation procedure is set out to ensure “full and fair consideration of the views” of the non-party;

- benefits agreements shall contain undertakings by the licensee to provide opportunities for the Yukon First Nation, its citizens, residents of communities affected by the oil and gas activity and other Yukon residents to obtain employment, training and business opportunities;

- benefits shall be commensurate with the nature, scale, duration and cost of the work to be undertaken by the licensee in relation to oil and gas activity but shall not place an excessive burden on the licensee;

- a benefits agreement is not required if the cost of work by the licensee is less than a prescribed threshold or if the requirement is waived by the Yukon First Nation and the Minister;

26 It should be noted, however, that aboriginal organizations may be able to use leverage in other processes — notably related to surface access — in order to secure benefits from oil and gas companies that go beyond those obtained through the formal benefits regime.
the respective roles of the Minister and the Yukon First Nation in the process depend on whether the oil and gas activity occurs on category A settlement land (the Yukon First Nation has final authority), category B settlement land (a joint process is required) or land other than category A and B settlement land (the Minister has final authority); and

- an arbitration mechanism is provided in the event that the parties cannot agree on the contents of a benefits agreement for oil and gas activity on category B settlement land.

This regime thus provides a firm legal requirement for benefits agreements, complete with parameters governing the content of these agreements, the identification of parties, and the process to be followed in the event of deadlock.

The Yukon regime thus includes elements of both the federal requirement for oil and gas benefits plans and the IBA model that has emerged in the mining sector. Like the federal model, it emphasises the provision of “opportunities” for economic development and limits the scope of benefits provisions to employment and the provision of goods and services. Benefits agreements are not, therefore, the unstructured vehicles for considering a broad range of impacts and potential benefits that IBAs have sometimes become. Unlike the federal oil and gas regime, however, the Yukon legislation specifically requires agreements that, in many cases, will involve both aboriginal organizations and government. Furthermore, it specifically sets out the respective rights and powers of the YTG and Yukon First Nations, depending on the category of land where oil and gas activities are to occur. Finally, the Yukon approach reflects the contractual model for benefits agreements by providing for an independent arbitration mechanism in the event of deadlock.

5.3 The Northern Saskatchewan Benefits Regime

A unique and highly successful model for securing local employment and other benefits from mining has been developed in northern Saskatchewan. This model differs significantly from the IBA process that has emerged in the northern territories and elsewhere. In northern Saskatchewan, mining companies are required by their surface leases to make undertakings regarding northern employment and training. These commitments are then implemented in an environment where industry, government, local communities and aboriginal organizations work together through several multi-party arrangements to promote economic development and provide for training that is specifically directed towards opportunities in mining. Although the programs and preferences associated with this initiative are framed in terms of northern residents, it is noteworthy that the target population is over 85% aboriginal. The key elements of the Saskatchewan model can be summarized as follows.

The surface leases for mines in northern Saskatchewan contain clauses aimed at maximizing northern employment through training. These clauses require mining companies to negotiate Human Resource Development Agreements with the Saskatchewan Department of Post-Secondary Education and Skills Training. Employment quotas were dropped from surface
leases in the mid-1980s in favour of a more collaborative approach that focuses on planning for the hiring, training and promotion of northern residents. The surface lease provisions do, nonetheless, provide a solid legal basis for the benefits commitments of mining companies. These commitments could be enforced under the surface lease, although enforcement appears not to have been an issue in practice given the generally high level of commitment on the part of industry and government, working together, to increasing the participation of northern residents in mining.

The specific commitments of mining companies in relation to the opportunities for northern residents to participate in mining are established through annual Human Resource Development Plans that are provided for under the project-specific Human Resource Development Agreements. These agreements are negotiated directly between the Saskatchewan government and the mining companies, following a generic model agreement. The agreements are relatively short, containing:

- key definitions (e.g., ‘Resident of Saskatchewan’s North’, ‘Impact Communities’, ‘Pick-Up Points’, ‘Stages of the Mine Project’ and ‘Employment Classification’) and the basic commitments of the parties;
- a statement of intent (including the specific intent “to maximize the direct employment opportunities available to residents of Saskatchewan’s North in general and to residents of the Impact Communities in particular”);
- a delineation of the scope of the covenant (limiting its application to the production stage and subsequent stages of the mining project);
- an enumeration of the responsibilities of the mining company (focusing on the annual Human Resource Development Plans and regular employment status reporting to the Minister of Post-Secondary Education and Skills Training);
- an enumeration of the responsibilities of the Minister of Post-Secondary Education and Skills Training (relating to the provision of information on the northern labour force, such as a community-by-community skills profiles, and information relating to curriculum development and instructional material relevant to the mining company’s training programs);
- an enumeration of joint responsibilities (relating, for example, to cooperation in identifying and developing needed pre-employment and employment-advancement training programs, cooperation on apprenticeship programs, and the negotiation of the parties’ respective financial commitments regarding training); and
The agreement concludes by affirming that the commitments contained therein are binding upon the parties and their successors.

Associated with the Human Resource Development Agreements are annual Human Resource Development Plans that must be formulated by the company in consultation with the Saskatchewan Department of Post-Secondary Education and Skills Training. The Introduction in the generic model plan states that:

“This Plan sets forth the responsibilities, expectations, and measurable objectives concerning actions appropriate to [the mining company], and actions appropriate to Post-Secondary Education and Skills Training regarding the recruitment, hiring, training, and advancement of Residents of Saskatchewan’s North in general and of such Residents of the Impact Communities in particular (together called the Priority Employment Group). This Plan also provides for an effective and ongoing means of assessing the achievements of both parties with regard to these expectations.”

The plans then set out specific details regarding the designated impact communities, employment classification for the project, and a priority employment plan. The objectives include the identification of employment opportunities over the term of the plan, the establishment of targets for the recruitment from the “Priority Employment Group”, and the coordination of this recruitment process with training programs. Appendices to the plans identify specific impact communities and pick-up points, provide an employment classification summary, and contain detailed statistical information and projections regarding employment opportunities and training.

These project-specific arrangements operate within a broader framework of cooperative initiatives focused on economic development in northern Saskatchewan. A key component of this framework is the Northern Labour Market Committee. Membership of this Committee includes representatives from First Nations and Metis agencies, industry, education and training institutes and the provincial and federal governments. Its mandate is “to identify and assess emerging labour market and economic development issues and to initiate actions which will enable northerners to benefit from activities in their region”. More specifically, the responsibilities of the Committee include identifying and prioritizing emerging labour market issues, coordinating and facilitating cooperative planning and action among agencies, and preparing “an annual profile of the labour market and industrial sectors in northern Saskatchewan which will function as an integral part of program planning, facilitate communication among stakeholders, and provide a regional labour market picture to guide

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human resource policy.

The Northern Labour Market Committee has established a number of subcommittees, including the industry-led Mineral Sector Steering Committee. A principal accomplishment of this sub-committee has been the Multi-Party Training Plan (MPTP) Agreement.

The MPTP is a key component of the economic development framework for northern Saskatchewan and provides important support for the project-specific initiatives set out in individual Human Resource Development Plans. The concept reflected a general recognition that:

"long-standing problems in northern Saskatchewan - poor school completion, low levels of youth and adult literacy, high unemployment, a low academic and skills profile in many communities, and few people with the training to work in trades or small businesses - have been barriers to northern participation in [mining] development. If northerners were to benefit from the employment opportunities being created by the mining industry, innovative training-to-employment initiatives would have to be developed."

The multi-party approach reflected in part an general increase in cooperation between the Government of Saskatchewan, training institutions, federal funding agencies, and the mining industry in the northern Saskatchewan. In particular, the initiation of a formal multi-party process was a result of the fact that:

"By 1990, it had become apparent that effective training for apprenticeship and other high-skill positions in the mining industry could not be offered through programs developed for one mining operator at a time. Collaboration among all the major mining operators and Northlands College, together with both provincial and federal agencies, would be required."

The first five-year MPTP was negotiated in 1993 and the arrangement was renewed in 1998-1999. Parties to the MPTP are the Government of Saskatchewan, the federal government, Northlands College, a number of aboriginal councils, organizations and development corporations, and the mining companies operating in northern Saskatchewan.

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29 Ibid.
31 Ibid.
A full description of the MPTP will not be provided here as this information is readily available elsewhere. The key elements of the MPTP relate to northern employment reporting, the development, delivery and tracking of education and training programs, financial reporting, business development activities, and evaluation and accountability. Commitments of the parties are set out, including financial and in-kind contributions.

The overall success of the MPTP is impressive. Financial commitments by government and industry during the first five year term totalled about $10.5 million. During this period, 556 of the 974 jobs created by the mineral sector went to residents of northern Saskatchewan. A very detailed evaluation of the MPTP’s record between 1993 and 1998 was conducted by the Business Advisory Services, College of Commerce, University of Saskatchewan. This report concludes that the MPTP “has been very successful in generating employment opportunities” and should therefore be continued.

The Saskatchewan model clearly differs in important ways from the approach to securing benefits from mining that prevails in the northern territories. In particular:

- government and industry in Saskatchewan are major partners at both the project-specific and more general levels, in contrast to IBA practice in the North where bilateral IBAs are negotiated between mining companies and aboriginal organizations at the project level and there is no over-arching integrated framework that involves government;

- aboriginal organizations are parties to the MPTP, but have not typically negotiated project-specific agreements with mining companies (although there is currently active consideration of this latter type of agreement in at least one region);

- the Saskatchewan model reflects an explicit rejection of the project-specific approach to economic development in general, and training in particular, as being inadequate to deal with the underlying obstacles to the participation of northern residents — most of whom are aboriginal people — in the mining industry;

- although highly cooperative in design and execution, the Saskatchewan model is legally grounded in specific obligations that are tied to surface leases negotiated for mining projects; and

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32 Ibid.


34 Ibid., p. xix.
the Saskatchewan model for economic development does not extend to the full range of issues relating to both impacts and benefits that are addressed in many IBAs.

Finally, it should be noted that the levels of aboriginal participation in mining in northern Saskatchewan far exceed anything obtained in the northern territories or elsewhere in Canada.

For all of these reasons, the Saskatchewan model provides both a clear contrast with IBA practice in the northern territories and a source of very useful ideas on how IBA policy could be developed to support, redirect, or perhaps substantially overhaul the pattern of bilateral, project-specific IBAs that has become established in the North. Although further analysis and consultation would be required to determine the extent to which it would be possible, or desirable, to transplant elements of the Saskatchewan model to the North, it is at least clear that this approach represents a concerted attempt to address some of the most pressing issues that are associated with current IBA practice. These issues are the subject of the next section of this paper.
6.0  SURVEY OF ISSUES

An important step in determining whether DIAND should develop a policy on IBAs in northern Canada is to identify the issues that such a policy could address. This section of the paper briefly describes the principal issues raised by current IBA practice, as identified in interviews and through a review of written material on IBAs. Four caveats should be entered at the outset regarding the issues set out below.

First, these issues are not experienced equally in relation to every mining project or IBA process in northern Canada. In particular, the explicit legal framework for IIBAs contained in the NLCA addresses some — but not all — of the problems experienced by unstructured IBA processes elsewhere in the North. For simplicity of exposition, however, the survey of issues presented below reflects the typical situation of an IBA process unstructured by legal or policy parameters. Generalizations refer to this context, with exceptions to the general pattern that result from the NLCA and other land claims agreements not being spelled out in detail for each issue.

The second caveat is that this section does not attempt to measure in a precise way the breadth or intensity of concern regarding each issue within government, the mining industry, aboriginal organizations and other groups that have an interest in the IBA process. All of the issues discussed below are viewed by at least some of the people familiar with the IBA process as worthy of attention, and many of these issues reflect what appears to be a broad consensus regarding problems with current IBA practice. Nonetheless, it would be a mistake to assume that there is unanimity regarding the importance of each of the issues outlined below.

Third, the discussion in this section is restricted to a succinct statement of each issue, reflecting the position of those who view it as a serious matter. A full discussion of the various arguments and perspectives would have made this section overly complex and cumbersome. The objective is simply to provide the informed reader with sufficient detail to understand the nature and origin of each issue that is raised.

Finally, the objective here is not to provide a balanced evaluation of the advantages and disadvantages of IBAs. Clearly, there are positive things that can be said about current IBA practice in the North and about the potential of these agreements to achieve a range of important objectives. The uniformly negative tone of the following sections reflects the fact that policy development in this area — if it occurs — will respond to issues and problems. An implicit assumption throughout the discussion of issues and options in this paper is that the positive aspects of the IBA process should be reenforced and enhanced through IBA policy.

The issues examined in this section are divided into seven broad categories: (1) general policy issues; (2) issues relating to aboriginal entitlements; (3) economic development issues; (4) societal and distributional issues; (5) industrial policy issues; (6) environmental regulation and resource management issues; and (7) process design and implementation issues.
6.1 General Policy Issues

- The policy objectives to be achieved through the IBA process have not been well thought through or clearly articulated. As a result, IBAs have sometimes become catch-all regulatory and contractual instruments that attempt to address a very broad range of issues, interests, and expectations.

- The roles and responsibilities of mining companies, government and aboriginal organizations are matters of concern in relation to some IBAs. In particular, there is a perception that mining companies are sometimes being expected to undertake initiatives that go beyond their areas of expertise and address issues that are traditionally — and properly — viewed as responsibilities government. Some people argue that the current approach to IBAs has resulted in government off-loading responsibilities and costs onto industry in a number of areas such as basic education and training, social services, the provision of public infrastructure, and the sharing of resource revenue with aboriginal people. The lack of reciprocal obligations and joint accountability among mining companies, aboriginal organizations and government is also identified as a concern. This line of argument suggests that mining companies, aboriginal organizations and government should each assume appropriate responsibilities and be held accountable within the IBA process.

- IBAs often have an ambiguous status as both voluntary contractual arrangements between mining companies and aboriginal organizations and as the products of regulatory requirements established by government. As a result, the negotiation of IBAs is widely seen as a de facto regulatory requirement that lacks the substantive and procedural parameters one would normally expect in a regulatory regime.

- The absence of a legal and policy framework for IBAs means that the rights and obligations of the parties are not clearly defined. IBA negotiations therefore tend to become an unstructured bargaining process where the end result is as much a product of raw bargaining power as it is a reflection of considered public policy objectives or the rights of the parties.

6.2 Issues Relating to Aboriginal Entitlements

- Some non-aboriginal parties do not fully understand the rationale for an IBA process that appears to place aboriginal organizations in a direct and privileged relationship with private resource developers operating on Crown land. The legitimacy of IBAs is eroded by the perception that they represent an unjustified — or at least unexplained —

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35 There is no ambiguity, of course, when IBAs are required under land claims agreements, notably the NLCA. In this context, IBA negotiations occur within an explicit regulatory framework.
deviation from the general principle that Crown land and resources are managed in the interests of the public at large through the regulatory processes and the taxation and royalty regimes established by public government.\footnote{36}

- The negotiation of IBAs is complicated when mineral development occurs in areas where land claims have not been settled. Aboriginal organizations have obvious grounds for concern if the prime mineral bearing lands in their claims areas are developed by private companies, with royalties flowing to the federal government and aboriginal people being assured of neither monetary benefits nor a measure of control over the projects. There is a view within government, however, that treating aboriginal people with unsettled land claims in a manner similar to those who have already signed land claims agreements would prejudge the outcome of land claims negotiations and compromise the process. As a result, in areas of unresolved land claims the IBA process occurs in an environment of considerable uncertainty and some controversy surrounding the rights and legitimate interests of aboriginal people. Furthermore, bilateral IBAs between mining companies and aboriginal organizations risk becoming something of a surrogate for land agreements and explicit or implicit linkages may be established by aboriginal parties between IBAs and the land claims process.

- There is no principled basis in current IBA practice for determining which aboriginal organizations or communities are entitled to IBAs when mineral development occurs in areas of overlapping but unsettled land claims or when a project’s impacts — or potential impacts — extend beyond land claims boundaries. When IBAs are negotiated on a bilateral basis between companies and aboriginal organizations, uncertainty regarding entitlement to negotiate may lead to a proliferation of claims for bilateral agreements and an arbitrary process of setting limits on eligibility.\footnote{37}

- Uncertainty regarding the basis for the cash components of IBAs has resulted the widespread perception that cash payments sometimes reflect unprincipled and improper dealings, being either ‘extorted’ from mining companies by aboriginal negotiators or serving as ‘bribes’ or ‘pay-offs’ to aboriginal organizations in order to conclude IBA negotiations and secure commitments not to oppose projects. The suggestion of impropriety regarding cash payments is, understandably, strongly resisted by aboriginal people who view the money received through IBAs as entirely legitimate. A paper on IBAs recently published by an aboriginal organization also argued forcefully that the

\footnote{36} It should be noted that aboriginal entitlements to revenue from mineral development on Crown lands are established under land claims agreements. These arrangements provide aboriginal organizations with a share of Crown royalties and do not create a separate aboriginal entitlement to secure revenue directly from mining companies.

\footnote{37} The determination of eligibility to negotiate IBAs was an issue in the BHP process. See, CIRL, \textit{supra}, note 2, pp. 84-85.
importance of the cash components of these agreements has been exaggerated and that IBAs “are about opportunities — not money.” Nonetheless, without a formal mechanism to establish eligibility for cash payments and determine the appropriate amount to be paid, the perception is likely to remain that, in some instances, support for projects may in fact be ‘purchased’ through the IBA process and aboriginal organizations with sufficient leverage may be able to extract cash windfalls from lucrative mining projects.

6.3 Economic Development Issues

- There is widespread concern that bilateral IBAs between individual mining companies and aboriginal organizations may be unable to overcome many of the fundamental obstacles to economic development in the North. The lack of basic education, skills, business experience and capital among aboriginal people are frequently cited as major reasons for the failure of many mining projects to generate significant employment and business activity in aboriginal communities. A relatively long lead time is sometimes required in order to prepare aboriginal people to take advantage of the opportunities that will exist when a mine begins operations. While bilateral IBAs can have an impact on some of these obstacles, there are limitations on what can be achieved by mining companies and their aboriginal partners through project-specific agreements.

- A range of social and cultural obstacles to economic development based on mining are also seen by many people as being inadequately addressed at the present time. The provision of employee and family counselling, money management training, alcohol and substance abuse programs, daycare for working mothers, and other programs to assist aboriginal people to integrate into an industrial workforce are widely viewed as essential to the success of IBAs. While these issues are addressed in some IBAs and through a variety of other programs, uncertainty remains regarding the respective roles and responsibilities of government, mining companies and aboriginal organizations in providing the ‘social infrastructure’ for economic development.

- The effectiveness of certain elements of IBAs in securing meaningful and long term economic development has been questioned. Fixed quotas and guaranteed jobs or contracts are widely viewed as inappropriate and ultimately self-defeating in terms of promoting economic self-sufficiency. Simply slotting people into unskilled jobs may provide few long term benefits if a project shuts down after a few years. The effectiveness of some IBA contracting provisions in building local business capacity has been questioned on the grounds that aboriginal organizations have sub-contracted the work to non-aboriginal companies or formed joint ventures in which aboriginal people have only a minor operational role. There is also concern in certain quarters that untied cash payments to aboriginal organizations may not secure long-term economic benefits, at least not

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Christensen, supra, note 4, pp. 10-11.
without proper accountability structures and economic development strategies. In sum, the focus of some IBAs on ‘end results’ as opposed to the creation of preconditions and opportunities for economic development is viewed by some people as problematic.

- There is concern that current IBA practice may not be well attuned to the economic development potential of relatively small mining projects. Small companies and those with more marginal projects may not be able to match the ability of a large mining company with a lucrative project to promote economic development through measures such as scholarships and internship programs, hiring summer students, providing course-based and on-the-job training programs for actual and potential employees, and making cross-cultural training and counselling services available to aboriginal and non-aboriginal employees. As a result, leaving IBAs to bilateral negotiations between companies and aboriginal organizations may reduce the potential for aboriginal people to benefit from smaller projects. While these projects may generate a modest total stream of benefits, they may nonetheless mesh better with the northern economy than the mining mega-projects that operate on a global scale in terms of their access to labour and technology. Furthermore, smaller mining projects located throughout the North may spread economic benefits more widely than is possible if development is limited to a few mega-projects.

- Lack of attention to implementation is a frequently cited concern regarding the ability of IBAs to achieve their intended economic benefits. While the signing of an IBA may be seen by companies, aboriginal organizations and governments as an occasion for celebration, one experienced practitioner interviewed for this paper noted that it is at this point where the real work begins. Several of the people interviewed argued every IBA should include a detailed implementation plan, closely linked to the characteristics and likely evolution of the project, the capacity of the aboriginal beneficiaries, and the government programs and other initiatives that could be used to support IBA objectives. Without such a plan, the roles and responsibilities of the parties may be unclear and mechanisms for individual and joint accountability may be lacking.

- Ensuring that companies’ IBA undertakings are translated into tangible results at the work site is another important implementation issue. While a mining company’s executive officers and its aboriginal affairs or community relations department may be committed to providing opportunities for aboriginal participation, these good intentions may be undercut in practice if the commitment is lacking among mine site managers and supervisory personnel. To ensure full implementation of an IBA, the level of awareness and the economic incentives may have to be adjusted at the mine site. An example noted in one interview is the situation where a company’s aboriginal affairs representative receives bonuses for various initiatives to increase aboriginal involvement, but the performance of shift supervisors at the mine site is related strictly to economic indicators such as cost of production and timeliness in meeting targets. This incentive structure provides only a down-side risk to supervisors at the mine site when they confront the
practical challenges of increasing the participation of aboriginal people within the workforce.

- Another obstacle to IBA implementation concerns the relevance of the skills development programs used to prepare aboriginal people for the jobs available in mining. One mining executive interviewed for this paper commented that much of the classroom-based training provided to aboriginal people is of little value at the mine site. He argued that more effort should be directed to hands-on training, such as programs giving people the practical skills to operate heavy equipment. More generally, there is concern that some government training programs are not closely enough aligned with the opportunities that are made available through IBAs.

6.4 Societal and Distributional Issues

- Some observers of IBA practice in the North are concerned that the definition of beneficiaries seems to be shifting over time from a focus on Canadians as a whole, northerners, or residents of the one of the northern territories to residents of particular regions, members of specific groups of aboriginal people, or even particular communities within those groups. The risks of this approach are seen to be the establishment of increasingly divisive hierarchies of beneficiaries within the North and a focus on dividing up the benefits pie, as opposed to increasing its size and ensuring that it is widely distributed. In particular, IBAs are seen by some people as a potential source of tension between aboriginal and non-aboriginal northerners.

- An exclusive focus of IBAs on local communities risks accentuating inequality among communities on the basis of proximity to mineral deposits. Opportunities to benefit from mineral development in the North may increasingly be allocated on a lottery basis, with the winners being those communities that fortuitously find themselves located close to lucrative mining properties. While this system clearly confers at least short-term advantages on communities that know they will be winners, the long-term economic risks for almost all communities are likely increased given the cyclical nature of mining and the relatively limited number of mining projects that are likely to be operational at any one time in the North.\(^{\text{39}}\)

- The bilateral model for negotiating IBAs between mining companies and particular aboriginal organizations can foster conflict between aboriginal people. The decision

\(^{39}\) This issue may be addressed to some extent in the Yukon where First Nations apparently have reached an accord on the sharing of resources and royalties. This accord is referred to in Kevin O’Reilly & Erin Eacott, *Aboriginal Peoples and Impact and Benefit Agreements: Report of a National Workshop*, Northern Minerals Program Working Paper No. 7 (Yellowknife: Canadian Arctic Resources Committee, 1998), p. 18. There are also revenue sharing provisions in the Sahtu Dene Metis and Gwich’in land claims agreements.
whether or not a particular organization is entitled to negotiate an IBA may make the
difference between obtaining significant benefits from the project in question or
receiving none at all. This issue can be a source of conflict if there is uncertainty
regarding the appropriate representative for particular groups of aboriginal people. In
addition, bilateral negotiations can create a competitive and adversarial dynamic among
aboriginal organizations in situations where the allocation of benefits is seen as a zero-
sum game or where opening up the process to additional parties may reduce the benefits
that can be allocated to those already at the table. Besides being divisive for aboriginal
people, this dynamic can place mining companies in an uncomfortable position if they
are obliged, without adequate guidance, to make difficult allocative decisions.

- Significant distributional issues may arise within the aboriginal organizations and
  communities that are signatories to IBAs, depending on how benefits — including cash
  payments — are allocated. IBAs may produce social and political tensions within
  aboriginal communities between those who gain from the mining project (e.g., young
  men who secure jobs) and those who feel excluded from the benefits, particularly if the
  latter group includes individuals who bear disproportionately any costs the mining
  project imposes on aboriginal people (e.g., women and older people with more traditional
  ways of life). The distributional impacts of cash payments will be influenced not only by
  who benefits directly, but also by the use to which the money is put. Interpersonal and
  intergenerational effects will likely differ significantly depending on whether the money
  is used to create a perpetual trust for economic and social development, spent on
  community economic and social infrastructure, used to fund current programs or meet
day-to-day expenses of aboriginal organizations, or distributed on a per capita basis to
  individuals — to list only four possibilities.

- The inclusion of large cash transfers in IBAs creates the potential for inefficiency and
corruption, both of which must be guarded against if the interests of the community as a
whole are to be protected. This problem is a particular concern where the IBA process
lacks transparency and has few mechanisms to ensure accountability.

- There is some concern that the preferences established by IBAs may, in certain
  circumstances, conflict with the anti-discrimination provisions of human rights and
  labour legislation. The constitutionally entrenched rights of aboriginal people as set out
in land claims agreements cannot, of course, be overridden by ordinary statute. As well,
most human rights legislation allows for the creation of some preferences where, for
example, a bona fide or government approved affirmative action program is designed to
assist a disadvantaged group\(^40\). The requirements in IBA policy and the commitments by
individual companies that systematically favour one group of territorial residents or
Canadian citizens over another may, therefore, have to reflect entrenched aboriginal rights

\(^{40}\) Provisions of this type are contained in the \textit{Canadian Human Rights Act} (s. 16), the
Yukon \textit{Human Rights Act} (s. 12) and the NWT \textit{Fair Practices Act} (s. 9).
or fit within the affirmative action exceptions in human rights legislation in order to avoid legal concerns relating to discrimination.

6.5 Industrial Policy Issues

- The current uncertainty surrounding the IBA process has resulted in some people seeing IBAs as an unquantifiable and potentially unmanageable risk factor for mining companies contemplating mineral development in northern Canada. In particular, some companies feel that they cannot accurately predict the process to be used for negotiating IBAs, the length of time required for these negotiations, the implications of the IBA process for regulatory approvals and other key milestones in project development, the type of IBA obligations that they will be asked to undertake, and the costs that these obligations will impose on their projects. While some of these matters are inherently subject to the negotiation dynamics and characteristics of particular projects, there is widespread concern that the lack of procedural and substantive parameters for the IBA process may be a significant deterrent to mineral development in the North.

- There is some concern that expectations regarding the benefits from mineral development may exceed what many projects can deliver. Two precedents are commonly cited as having ratcheted up expectations. The first is BHP’s highly profitable Ekati diamond mine, which some people view as having set a standard for cash payments and other benefits that is unattainable by many less lucrative operations. The second frequently noted source of high expectations is the Raglan Agreement in northern Quebec, which also included a significant cash component. The fact that cash payments to the aboriginal beneficiaries were offset by tax concessions to the mining company may, it is argued, be overlooked by those who see this agreement as a precedent to be followed in other IBA negotiations. The aboriginal response to these concerns is that expectations will be adjusted in each case to reflect the scale and profitability of the project. An argument is also made that the ‘marginal’ mining operations likely to be deterred by rising IBA expectations are those that are most likely to leave behind a legacy of social dislocation and unfunded environmental liabilities. The fact remains, however, that the effect on IBA expectations of several high profile and in some ways anomalous projects is cited as a reason why smaller and less profitable mining operations that could nonetheless contribute to the northern economy may not be undertaken. The perception that the bar is continually being raised may well persist in the absence of a clear framework for establishing IBA requirements.

- There is also concern that expectations generated by IBAs for producing mines are being transferred to the exploration stage of the mining cycle. An example cited in several

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41 The special regime in Quebec for “new mines north of the 55th parallel” is noted in, DIAND, Proposed Amendments to The Northwest Territories Mining Royalty Regime in the Canada Mining Regulations — Discussion Paper (Ottawa: DIAND, 1996), p. 6.
interviews for this paper involved an aboriginal community seeking million dollar cash payments or commitments for extensive studies from a company planning a one-year bulk sampling project. Demands of this type, it was argued, place an unacceptable burden on a company that has not yet determined the commercial viability of its deposit. The shift in IBA expectations to exploration is possible because, outside of Nunavut, there are no formal thresholds to determine what type of mineral development activities give rise to IBA obligations. This lack of structure is seen by some people as opening the door for the use of procedural delay — notably through the consultation process associated with land-use permitting — to pressure exploration companies for cash and other benefits. Mineral exploration in the North is an expensive and risky business, often undertaken by relatively small companies with limited resources. It is, however, the basis on which future mineral development depends. An unstructured IBA process that produces uncertainty and a risk of delays and increased costs at the exploration stage could therefore have important long term implications for the northern economy if the result is to discourage mineral exploration.

- The mining industry is concerned about the implications of IBAs for the overall fiscal regime for mining. In particular, there is a perception that some aboriginal organizations are using the unstructured IBA process — perhaps with the tacit support of government — to claim what amounts to a royalty entitlement based on an undefined property interest in traditional territories. IBA payments and other expenses are not, however, deductible by mining companies when calculating their taxation and royalty payments and there is no mechanism to coordinate the cash component of IBAs with the overall fiscal regime for mining. Furthermore, government maintains that it is entitled to the usual royalties from Crown owned resources and has thus far refused to strike royalty-sharing arrangements with aboriginal organizations outside of settled land claims. The result is a perception in some quarters that the IBA process is being used to transform a conflict between the federal government and aboriginal people about resource revenue sharing into a double royalty obligation on industry.

- Some aspects of the IBA process have been criticised from an industrial policy perspective as constituting undue interference with private sector market decisions. Critics of IBAs point to what they see as the disappointing record of federal expenditures on regional economic development throughout Canada and argue that government is — or should be — reconsidering the use of this type of industrial policy. They also argue that arrangements which effectively require companies to hire employees or engage contractors on the basis of non-market considerations are often unsatisfactory for both sides. The company may treat its obligations as tokenism or make-work projects and the employees or contractors may develop a dependence on implicit subsidies or they may have the illusion of being competitive in a market economy when in fact they are not. Finally, the argument is made that an IBA process that fosters an attitude that benefits are entitlements or subsidies rather than the result of mutually advantageous commercial
relations can create an adversarial environment where companies generally feel exploited and beneficiaries feel that they are being short-changed.

- The lack of consistency across sectors is seen by some people as an important industrial policy issue relating to mining IBAs. Oil and gas operations in the North have statutory benefits regimes and IBAs are not required in other sectors. This disparity gives rise to two concerns. The first is that IBA requirements may introduce distortions into investment decision-making in the North. Relative rates of return may well be affected if mining and petroleum operations are subject to different benefits requirements while construction or tourism projects, for example, have no IBA-type obligations. The second concern is that IBA precedents in relation to mining may have unanticipated spillovers into other sectors. In particular, the oil and gas benefits regime may be under pressure from expectations generated in the mining sector.

- The trade law implications of IBAs are another matter of concern from the industrial policy perspective. Whether or not legislation or policy requiring IBAs is consistent with the rules governing internal and international trade will depend on the particular provisions and trade agreements in question. Nonetheless, measures that establish subsidies or preferences for local residents and businesses or that impede the mobility of labour and capital across political borders may well be vulnerable under the internal and international trade agreements to which Canada is a party. If DIAND is to develop a policy or legislative framework for IBAs, a specific analysis of trade law implications may have to be conducted in order to reduce the potential for conflict with the rules promoting free trade.

### 6.6 Environmental Regulation and Resource Management Issues

- The possibility that IBA negotiations may be used as an alternative to more open and transparent regulatory processes in addressing the environmental impacts of mining projects is an important issue for some people. In particular, there is some concern that the negotiation of project-specific environmental standards and compliance requirements in IBAs may undercut either the substantive requirements of the general environmental protection regime or the procedural guarantees that permit public involvement in the regulatory process and oversight of its results. The closed process for negotiating IBAs, the confidentiality provisions found in many agreements and the likelihood that IBA obligations can be enforced — if at all — only by signatories are particular reasons why

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42 These regimes are described above in Section 5.0.

the use of IBAs for environmental regulation may be inconsistent with the broader public interest.

- A related concern is that a linkage between environmental protection and economic benefits within IBA negotiations may create a dynamic where the public interest in environmental protection is sacrificed for economic aspects of IBAs. This concern raises a sensitive issue, since an aboriginal organization or local community may decide, with full knowledge of the facts, that a certain level of environmental risk is worth bearing in order to obtain the range of economic benefits associated with mineral development. In the context of IBAs, however, this type of trade off raises a broader policy issue. If the economic benefits are focused on a specific segment of the population — the beneficiary of the IBA — while the costs and environmental risks are borne by society as a whole, then the arrangement is questionable from a public interest perspective. As a result, it is argued, the substantive environmental requirements and regulatory procedures that apply to mining projects should be protected from the give and take of negotiations that include a benefits component.

- There is widespread agreement that IBAs should not be used to limit the ability of the aboriginal parties to participate freely in project review and regulatory processes. Two principal arguments support this view. First, if the negotiation of IBAs reflects either a fundamental entitlement of aboriginal people to derive benefits from mineral development occurring within their traditional territories or a public policy choice that mining projects should provide local economic benefits, it is unclear why the attainment of these objectives should be contingent on a limitation of aboriginal participation in regulatory processes. The second argument is that it is inappropriate as a matter of public policy for aboriginal organizations to fetter through private contract their legal rights to participate in public regulatory processes. This concern is particularly pressing when regulatory processes that are intended to safeguard the broad public interest are to some extent intervenor-driven. For example, expressions of concern by local people and

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44 This issue is discussed in CIRL, supra, note 2, pp. 91-93 and Keeping, supra, note 4. Provisions of this type are explicitly prohibited by s. 26.9.2 of the NLCA:

“The negotiation and conclusion of an IIBA shall be without prejudice to the participation by the DIO [Designated Inuit Organization — the aboriginal party to the IIBA], any other Inuit organization, and any Inuit in any hearings or other proceedings of the NIRB [Nunavut Impact Review Board — the environmental assessment body established under the Nunavut Agreement], the National Energy Board, or any other administrative agency, or to the enforcement or contesting of any decision or order of such agency.”

45 The BHP process arguably illustrated the important role of inclusive and participatory processes in project review and regulation. See, CIRL, supra, note 2, pp. 42, 91-93.
organizations are often an important trigger for environmental assessment and regulatory review. Intervenors may also be a significant source of project scrutiny in these processes. If an intervenor-driven review and regulatory process is premised on the assumption that local people and other intervenors can be relied upon to raise legitimate regulatory issues related to projects, what are the implication of an IBA incentive structure that effectively opens the door for the trading off of regulatory involvement against cash and other benefits?

- The relationship between IBAs and requirements for consultation and project review is also a matter of concern to people who argue that aboriginal organizations have sometimes used their ability to delay these other processes in order to pressure mining companies for concessions in IBA negotiations. In cases where there appear to be few significant regulatory issues, this tactic is sometimes characterized as an abuse of process. Establishing strategic linkages between IBA negotiations and other processes may, of course, be explained by the weak position of some aboriginal organizations in an unstructured IBA process, an issue that is addressed below. The flip side of this coin, however, is that enormous leverage can sometimes be obtained through obstruction and delay in consultation and in regulatory processes when projects are on a tight time line for financial or logistical reasons. Furthermore, tactics of this type clearly undermine the efficiency, effectiveness and legitimacy of these other processes.

- Particular areas of overlap between IBAs and other regulatory processes may be matters of concern. Compensation is one example. Compensation procedures are contained in some IBAs and the cash components of IBAs are sometimes characterized as compensation payments. Compensation for the adverse effects of mining development may also be addressed through mechanisms established in statutes or land claims agreements, notably in connection with the issuance of water licences or through trapper compensation programs. There is currently no formal means of coordinating these compensation provisions with IBAs. IBAs may also be used to complement existing environmental protection regimes, adding a variety of substantive and procedural requirements designed to minimize impacts and ensure that the aboriginal parties are kept informed about environmental risks and adverse effects. Wherever this type of overlap occurs, opportunities may exist to coordinate regulatory regimes and IBAs in order to maximize the efficiency and effectiveness of both.

- Concerns with the respective timing of the IBA and environmental assessment (EA) processes have arisen in the context of several mining projects. These processes may cover some of the same issues, particularly when the mandates of environmental assessment panels are broadly defined to include a full range of socio-economic and other impacts, along with consideration of measures that may be used to mitigate, or compensate for, these impacts. From the EA panel’s perspective, early completion of an IBA may be an advantage. If the IBA addresses potential impacts or provides for specific compensation measures, there may be little or no need to consider these matters within
the EA process. Furthermore, the panel may be hesitant to make recommendations that are at variance with the outcomes of the IBA process. The other side of this issue, however, is that the findings of the EA process are likely to be directly relevant to aspects of IBAs dealing with project impacts. Aboriginal parties, for example, may be unwilling to conclude IBA negotiations until the EA has been completed. There is presently no standard procedure for coordinating IBA and EA processes.

6.7 Process Design and Implementation Issues

- The relative bargaining power of the parties to IBA negotiations is difficult to determine in many instances. The major exception is when land claims agreements establish aboriginal leverage through surface and subsurface ownership rights or create arbitration processes for IBA negotiations or surface rights disputes. Apart from these situations, the signals that government sends through the regulatory process can be the principal determinants of bargaining power. Withholding regulatory approval until an IBA is signed confers an effective veto on the aboriginal party. On the other hand, indicating merely that IBAs are encouraged but that project approval is not contingent on these agreements would serve to strengthen significantly the company’s hand. An intermediate position, such as the Minister’s statement that “satisfactory progress” on IBAs would be required before approvals would be issued to BHP, allows for a more nuanced approach but introduces a large measure of uncertainty and subjectivity into the IBA process. Whatever government decides, it will inevitably influence bargaining power and thus have a potentially decisive outcome on IBA negotiations. The current absence of policy direction on this issue is a concern because it creates uncertainty for all parties, making the bargaining dynamic in IBA negotiations largely contingent on ad hoc government intervention and on whatever extraneous sources of leverage are available to the parties. The result could be characterized as a negotiated process that has regulatory backing but lacks formal mechanisms to ensure a level playing field.

- With the notable exception of the provisions of the NLCA that establish a time frame for IIBA negotiations, require good faith bargaining, and provide for arbitration in cases of deadlock, the IBA process in northern Canada currently lacks any established procedure or end points. As a result, there is no formal mechanism to oversee the bargaining process in order to ensure that the parties are bargaining in good faith with a view to concluding an agreement within a reasonable time frame. This unstructured and potentially open-ended process creates a high degree of uncertainty at the outset of negotiations, particularly given the absence of policy guidance on the content of IBAs. It also provides no mechanism for dealing with deadlock. Furthermore, the absence of a structured process and firm end points may even increase incentives for parties to delay IBA negotiations for strategic purposes, related either to the issues directly at stake in the IBA process or to broader regulatory, political or economic objectives. The absence of

46 See, CIRL, supra, note 2, p. 79.
The direct costs of IBA negotiations are a concern for both aboriginal organizations and mining companies. Aboriginal organizations often lack the resources to participate effectively in IBA negotiations. Faced with complex issues and the well-financed negotiating teams of large mining companies, many aboriginal organizations feel at a decided disadvantage. While some funding is available from government and money is sometimes provided by the mining company, the cost of negotiations — both financial and in terms of the demands on aboriginal leaders — remains an obstacle to effective aboriginal involvement in some IBA processes. For mining companies, lengthy and uncertain IBA negotiations result in direct costs which, especially for smaller companies, can be a significant burden. Furthermore, company funding for aboriginal negotiating teams can become a source of resentment when negotiations become protracted and adversarial.

The competitive dynamic created by the negotiation of a series of bilateral IBAs for a single project may have several potentially negative consequences for the IBA process. This dynamic is seen by some people as creating opportunities for mining companies to play different aboriginal organizations off against each other, employing a ‘divide and conquer’ strategy that fosters conflict among aboriginal people and undermines their collective ability to achieve their objectives in IBA negotiations. Other people argue that aboriginal organizations can exploit this dynamic to ratchet up demands, feeding a spiral of rising expectations based on competition to achieve the ‘best’ deal. In addition, the competitive dynamic may create an incentive to delay negotiations in order to see what is offered to others before making a decision to sign an IBA.

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47 Ibid., pp. 79-80.

48 This issue is discussed in Ciaran O’Faircheallaigh, “Maximizing Indigenous Benefits from Resource Development” in Monique M. Ross & J. Owen Saunders, eds., Disposition of Natural Resources: Options and Issues for Northern Lands (Calgary: Canadian Institute of Resources Law, 1997), pp. 243-247,
• A problem that sometimes impedes IBA negotiations is a lack of appropriate professional knowledge and intercultural skills at the bargaining table. An experienced observer of IBA negotiations commented, for example, that mining companies sometimes put forward negotiators who lack the experience and cultural sensitivity to deal appropriately with aboriginal people. Equally, a senior mining company executive expressed frustration at the lack of understanding of the mining industry that he observed among many of the representatives of aboriginal organizations and their advisors in IBA negotiations.

• The confidentiality provisions that restrict public access to some IBAs are a matter of concern to some, but not all, of the people interviewed for this paper. Those who favoured confidentiality argued simply that the parties to these ‘private’ agreements have every right to keep them secret. The analogy is made with commercial contracts and with some lease and royalty arrangements between government and developers. Those opposed to confidentiality made several arguments. From a public policy perspective, the confidentiality of IBAs is seen to be inconsistent with the principles of transparency and public scrutiny that are generally associated with regulatory requirements. If government requires mining companies and aboriginal organizations to negotiate IBAs, access to these agreements by government and the public at large is arguably appropriate in order to determine the impact of this regulatory requirement and ensure that the contents of IBAs are consistent with the public interest. This access is not currently guaranteed, as illustrated by the BHP IBAs. Although government applied significant regulatory leverage to ensure that these agreements were concluded, they remain available only to the company and the aboriginal parties. The provisions in the NLCA that guarantee a right of ministerial oversight are a noteworthy contrast. Furthermore, public access to IBAs is desirable because they often include provisions dealing with preferential employment and contracting opportunities, environmental protection and monitoring, and even participation of aboriginal parties in other regulatory processes — all matters that may affect the interests of non-parties. Confidentiality also raises questions regarding accountability and transparency, particularly where these agreements involve large cash transfers. As well, there are practical arguments for openness in order to facilitate the coordination of training, employment and economic development initiatives established under IBAs with government policies and programs. Finally, confidentiality

49 The confidentiality issue is also discussed in O’Reilly & Eacott, supra, note 39, pp. 19-21.

50 An illustration of this problem is found in the BHP process. The Socio-Economic Agreement negotiated between the Government of the Northwest Territories and BHP deals with many issues that, presumably, are addressed in the IBAs between the company and aboriginal organizations. In fact, the possibility of overlap is explicitly addressed in the Socio-Economic Agreement, which provides in s. 10.12 that: “Where there is any inconsistency or conflict between an IBA and this Agreement the IBA shall prevail to the extent of the inconsistency.” Given the confidentiality of the IBAs, it is difficult to see how this clause — contained in a public agreement signed by the territorial government — can be given effect to at all, let alone in
of IBAs impedes useful information exchange and discussion regarding these agreements, the ultimate result of which would likely be to improve the practice of negotiation and implementing IBAs in the North and throughout Canada. While a rationale may exist in some cases to permit the confidentiality of commercially sensitive information, the confidentiality of IBAs is arguably inconsistent with their regulatory role, impedes the public scrutiny and private accountability required to prevent abuses of the IBA process, and casts an unnecessary shroud of secrecy over a process that should have nothing to hide.

- The adaptability of IBAs to changing circumstances is an issue raised by several people interviewed for this paper. Three examples were given. First, unless IBAs contain explicit provisions on this issue there is no established procedure for determining how changes in the operation and scope of a mining project affect the parties’ IBA obligations. Second, the characterization of IBAs as private contracts raises questions about what happens in the event that a mine is sold. For aboriginal people who have relied on these agreements and who may have made concessions of their own in exchange for them, the prospect of their entitlements being undermined by the sale of the mine is obviously a cause for concern. Finally, companies operating in areas of unsettled claims may be concerned about the implications of land claims settlements for their IBAs. A company that has fulfilled its IBA commitments in relation to employment, training programs and business opportunities and has paid significant sums of money to one or more aboriginal organizations under an IBA may feel unfairly treated if the rules of the game governing its project change suddenly with the settlement of land claims. All of these issues could be addressed by through a regulatory framework for IBAs.

- The enforceability of IBAs is an important issue for some people. While there is little support for strictly enforceable quotas, there is also concern that IBAs which contain nothing more than ‘best efforts’ undertakings may be of limited value. One problem is that IBAs may lack both the legal attributes required for contractual enforceability and the statutory underpinnings that would make them enforceable as regulatory instruments. They may therefore create the illusion of enforceability, while lacking the characteristics of legally binding obligations. An closely related issue with both legal and policy aspects concerns the type of IBA undertakings — if any — that should be legally enforceable. The choice of sanctions for non-compliance is also an important issue. It is noteworthy, for example, that the only sanctions available for non-compliance with obligations under the federal oil and gas benefits regime are suspension or cancellation or the company’s lease, options that are considered too drastic to be used in this context.

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a way that respects the values of transparency and accountability.

51 This issue is discussed in Keeping, supra, note 4.
An additional enforcement issue is whether third parties should have the right to enforce IBAs. In the case of bilateral aboriginal-company agreements, government itself is a third party. Technically, it may have no legal right to intervene in the event that parties do not fulfill their obligations. Even where government is a party to IBAs, third party enforcement may be an issue for some people. Non-governmental organizations may be concerned if, for example, environmental safeguards contained in IBAs are not enforced by the parties.

6.8 Overview and Implications

This review of the numerous issues raised by current IBA practice in northern Canada provides a starting point for considering whether or not DIAND should develop a policy on IBAs and, if so, what that policy should aim to achieve. There is clearly no shortage of concerns with the IBA process as it has evolved in much of the North. In fact, the variety and complexity of issues raised in relation to IBAs highlights several of the challenges of policy analysis and development in this area and has implications for how these challenges might be met.

To begin, this attempt to summarize issues in a systematic manner may well draw comment from those who feel that their concerns have been inadequately expressed or, perhaps, omitted. The objective here was to crystallize a broad array of general and specific concerns with IBAs into a discrete set of issues. Depending on the comments received on this section, an interactive process that goes beyond what was possible in the preparation of this paper may be useful to further refine the list of issues.

Second, there is obviously more that could be said about the relative importance of these issues and about the merits of the arguments that for and against the concerns that are reported above. It might therefore be useful to provide an opportunity for those with an interest in IBAs to rank and comment on these issues, perhaps through interviews, consultations or a written questionnaire. With a precise set of issues on the table, it might be possible to elicit more specific and detailed responses on these matters than could be obtained in the general interviews conducted for this paper. Policy makers would then have more precise information on where there is broad consensus regarding problems with current IBA practice and where differences of opinion on the nature and importance of issues are likely to appear.

Finally, it is necessary to move from a large menu of often interrelated issues to a more discrete set of policy options that could be evaluated individually and in packages. The remaining sections of this paper are directed to this challenge. The next section steps back from the specific issues and proposes a series of principles which, it is argued, could be of assistance in defining the general direction for a policy on northern IBAs. Following that, a number of discrete policy options are examined which cover the broad range of possibilities open to DIAND and provide means to address many of the issues identified above.
7.0 GUIDING PRINCIPLES FOR DIAND’S IBA POLICY

If DIAND is to respond to some or all of the issues noted above by developing a policy on IBAs, general policy direction could be established through a set of guiding principles. There are, of course, some generic principles that should be applied to any policy initiative. These include attention to efficiency, effectiveness, fairness, transparency, and avoidance of unintended consequences. In addition, a number of the principles and specific strategies set out in DIAND’s sustainable development strategy could usefully inform IBA policy. More specific principles could, however, be adopted in response to the particular set of issues raised by IBAs. The following seven principles illustrate this approach to policy development.

7.1 Apply Standard Regulatory Principles to the Requirement that IBAs be Completed before Final Project Approval

Unless DIAND is prepared to approve mines in northern Canada without requiring IBAs and to resist actively attempts by aboriginal organizations to use the regulatory process as leverage to secure these agreements, IBAs are a de facto regulatory requirement. Explicit recognition of IBAs as regulatory instruments is therefore one possible guiding principle for IBA policy. This recognition implies adherence to the standard principles applicable to government regulation in a society that is governed according to the rule of law, recognizes that the exercise of public power must respect the rights and reasonable expectations of citizens, and endeavours to create a regulatory climate conducive to socially and environmentally acceptable private sector economic activity. These principles include:

- regulation on the basis of a clear set of requirements that are known in advance by those who will be affected by them;
- procedural fairness and due process in regulation (e.g., predictability and transparency in the establishment of requirements and the exercise of regulatory authority);
- limitations established by law, regulation and policy on the exercise of political and administrative discretion; and
- reasonable, predictable and meaningful sanctions for non-compliance.

In sum, any policy that establishes IBAs as a requirement for mineral development in northern Canada should meet the standards normally expected of government regulation.

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7.2 Focus IBA Policy on General Opportunities for Adding Value to the IBA Process

IBAs in different parts of the North are likely to reflect the particular legal, political, social and economic contexts in which they are negotiated. While the NLCA establishes a relatively developed framework for IIBAs, other land claims agreements are much less explicit regarding IBA requirements. In areas of unsettled and overlapping land claims, the IBA process must contend with a significant degree of uncertainty on key issues. The characteristics of mining projects and the objectives and capacity of aboriginal communities and organizations also vary considerably across the North. Finally, the diversity of experience with IBAs has given rise to differing expectations and concerns. Rather than trying to capture all of this complexity in a detailed and comprehensive policy framework, DIAND might begin by identifying regulatory measures or policy initiatives that could add value to the IBA process regardless of the particular context. This principle would focus IBA policy on key economic development objectives, generally recognized weaknesses in current IBA practice, and areas where government initiatives could complement the IBA process. IBA policy should allow for some flexibility in implementation and should accommodate situations where issues are already adequately addressed under land claims agreements or other arrangements.

7.3 Simplify and Separate Issues and Processes

A pervasive problem that underlies many of the concerns with current IBA practice is that IBAs are becoming something of a catch-all regulatory and contractual instrument. Employment, education and training, business development, social support services, community infrastructure, compensation, resource revenue sharing, preservation of culture and traditional ways of life, and environmental protection and monitoring are among the principal topics that may be addressed in IBA negotiations. Many of these issues are also addressed through other processes, programs, and agreements. IBA negotiations may also become focal points for diverse expectations and strategic objectives of aboriginal organizations, mining companies and governments. Depending on the state of land claims and self government negotiations, they can easily become embroiled in broader agendas. The problem with addressing such a diverse array of issues through a single process is that it increases the risk of confusion regarding the rights, obligations and roles of the parties, the objectives to be achieved, and the appropriate means of achieving them. The absence of a commonly accepted rationale for the cash component of IBAs is one example of this confusion. The widely held perception that government is using the IBA process to off-load its responsibilities in certain areas is another example. To address this potential morass, one guiding principle for DIAND policy could be to strip away the layers of complexity by attempting, where possible, to identify discrete issues and handle them through distinct and carefully tailored policy measures and processes. This approach could simplify IBA negotiations, reduce the risk of overlap with other policies and processes, and provide a better basis for dealing with particular issues in a principled and structured manner.
7.4 Distinguish between Impact-based Claims and General Economic Development Objectives

As their name suggests, IBAs are concerned with both impacts and benefits. One rationale for these agreements is captured by DIAND’s commitment to “consideration of sharing the risks and benefits from development” as one of its sustainable development principles. Communities that experience direct impacts from mining development have a strong basis for claiming benefits in the form of compensation or other offsetting measures. This basis for IBAs could be referred to as the ‘impact principle’. There is, however, a perfectly valid public policy rationale for promoting the increased participation of aboriginal people and other northerners in mining and related activities that is in no way dependent on demonstrating adverse impacts on the people in question. Recognizing this distinction as an important principle when designing IBA policy would have four advantages.

First, it would reduce the likelihood of confusion and resentment regarding eligibility to benefit from IBAs. On the one hand, a lack of emphasis on the role of IBAs in promoting general economic development may result in the communities experiencing impacts claiming the exclusive right to secure benefits from a project, instead of acknowledging that an impact-based claim should reflect the extent and nature of the impacts, not the total amount of benefits that the project may generate. On the other hand, a failure to recognize explicitly the validity of impact-based claims and address them in a principled manner may leave individuals who receive fewer benefits because they are outside of a project’s ‘impact communities’ feeling that there is arbitrary discrimination in favour of local residents. A policy that distinguishes between impact-based claims and general economic development objectives would therefore clarify an important eligibility issue.

A second advantage of distinguishing between impact-based claims and broader economic benefits concerns the element of reciprocity in obligations. Several of the people interviewed for this paper argued that a situation where IBAs do not recognize reciprocal obligations among all parties are unlikely to be successful. On the other hand, there is a view that some of the benefits that aboriginal people receive from IBAs are entitlements which should be enforced, as a matter of right, against the other parties. Confusion on this issue might be reduced if IBA policy explicitly recognized that the reciprocity required varies between impact-based claims and economic development objectives. There is a strong argument that compensation for direct economic and other impacts should in most cases be the responsibility of the mining company. For example, compensation should be payable when mining operations affect a trapline. There is no reciprocal obligation on the trapper receiving compensation, beyond the standard duty to mitigate his or her loss. Where impact-based claims relate to more general cultural and social disruption caused by mining operations, obligations to provide compensation or support mitigative measures might be broadened to include the government. Equally, the reciprocal obligations on the aboriginal community may be somewhat more

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53 Ibid., p. 9.
extensive if the measures aimed at minimizing social and cultural disruption are to be effective. Finally, the securing of economic development opportunities for aboriginal people and other northerners arguably requires a fully reciprocal set of obligations involving the mining company, government and the affected beneficiaries. Without each party meeting its responsibilities, the intended results are unlikely to be achieved.

The third advantage of distinguishing between impact-based claims and economic development objectives relates to arguments about the ‘burden’ that IBAs place on mining projects, particularly so-called ‘marginal’ projects that are expected to generate relatively low returns on investment. If a project that is unable to meet legitimate impact-based claims is allowed to proceed, it is effectively externalizing the costs of its operations onto local people. This result is inequitable when people who are not benefiting from the operation are bearing the externalized costs. It is also an inefficient use of resources, since the project is not justified given a proper accounting of its costs and benefits from both private and social perspectives. As a result, an impact-based IBA requirement that prevents this type of ‘marginal’ mine from proceeding is arguably justified on equity and efficiency grounds. A different analysis would apply, however, when considering the ability of a project to sustain economic development spin-offs. Once impact-based claims are met, the economic contributions made by a mine generally constitute a net social benefit. An IBA regime that establishes arbitrary standards for economic spin-offs and thereby renders ‘marginal’ operations of this type uneconomic is consequently doing a disservice to all those who stand to benefit from the mine. The economic benefit provisions of IBAs should therefore be tailored to the profitability of each project, while the impact-based provisions should reflect the scope of impacts. The distinction between impact-based claims and general economic spin-offs therefore provides a criterion for evaluating whether the impact of IBAs on marginal operations is justifiable.

Finally, the impact-based claims and other economic spin-offs might be treated differently from a procedural perspective in the context of IBA negotiation and implementation. Impact-based claims might be dealt with through a formal mechanism designed to evaluate likely impacts and assess reasonable compensation or mitigative measures. This process could be separated to some extent from the more fluid negotiations surrounding the appropriate measures to create economic opportunities and maximize the ability of aboriginal people and others to take advantage of these opportunities.

The distinction in principle between impact-based claims and general economic spin-offs may, of course, become somewhat clouded in practice. The ‘impact principle’ could support the establishment of priorities in allocating access to economic development opportunities based, perhaps, on the proximity of communities to the mine site. ‘Impact communities’ may therefore be given the first — but not the exclusive — right to take advantage of certain economic development opportunities. Nonetheless, the distinction between impact-based entitlements and general economic development objectives remains important in principle and has significant practical advantages for the design and implementation of IBA policy.
7.5 **Promote the Broadest Possible Access to Economic Benefits that is Consistent with the Impact Principle**

The principle of inclusiveness in the allocation of benefits would apply to the economic development aspects of IBAs that are not directly tied to specific impacts. In other words, once the specific impacts of projects on individuals and communities have been addressed, the objective of the IBA process would be to spread economic development opportunities as widely as possible among northern residents and communities. This principle would have both equity and efficiency advantages.

From the perspective of equity among individuals and communities, there is a strong argument that opportunities to benefit from mineral development should not be allocated on the basis of the fortuitous location of mineral deposits in relation to communities. The inequalities that result from this random allocation of economic development opportunities are unfair to the individuals who are excluded from benefits and may promote socially divisive jealousies between ‘have’ and ‘have not’ communities. Spreading opportunities as widely as possible reduces the risk that some communities will receive large windfalls while others remain impoverished. This principle logically implies that, from the perspective of DIAND policy, the potential benefits from mineral development should be extended to all northerners. Needless to say, the allocation of benefits from particular projects would reflect the needs and capacity of specific target groups and the legal rights of aboriginal people under land claims agreements and general principles of aboriginal law. IBA programs aimed at remote aboriginal communities might well differ from those directed to non-aboriginal northerners in larger centres. Nonetheless, an inclusive approach to IBAs would recognize that — apart from the need to address impacts and recognize the specific legal rights of aboriginal people — the opportunities available through a benefits regime for mineral development should be available to all northerners.

The principle of inclusiveness can also be defended on efficiency grounds since it would promote a larger and more flexible pool of labour and business expertise in the North. Mining companies would benefit because they have access to a larger group of potential candidates when looking for employees and suppliers of goods and services for a particular mining project. Northerners as a whole would also benefit, since individuals and business would have access to a broader range of opportunities and therefore would be less dependent on individual projects. People in northern communities with skill sets and business experience relevant to mining would thus be less likely to be left with no work and disappointed expectations when a particular project closes. An approach that emphasised spreading benefits and opportunities broadly is also consistent with taking advantage of economies of scale in training programs. Finally, the broader and more flexible northern labour pool that would likely result from an emphasis on inclusiveness in IBAs could reduce the likelihood that the limitations in capacity within particular regions or aboriginal communities would result in benefits escaping the North altogether.
7.6 Focus on Capacity Building and the Provision of Opportunities for Economic Development

An explicit decision to focus the economic development components of IBAs on capacity building rather than end results could constitute a useful guiding principle for IBA policy. This approach would direct attention to the underlying impediments to participation by aboriginal people and other northerners in the mining industry and related activities. IBA policy would be designed to create an environment where opportunities are available and intended beneficiaries are able to take advantage of those opportunities through mutually advantageous employment and commercial relationships with mining companies. Establishing this guiding principle for the economic development component of IBAs would have the following advantages:

- All parties would have a clearer understanding that the primary purpose of the economic development components of IBAs is to build capacity so that aboriginal people and other northerners can take advantage of the opportunities provided by mining.

- IBAs could be explicitly linked with a broader strategy to address the underlying obstacles to economic development in the North. This approach would address the criticism that, by focusing primarily on the specific employment and business


“without the corporate capacity in the strictest business sense, Impact Benefits Agreements and the like will have virtually no meaning in the long run.

From a public policy standpoint, some of the missing ingredients at this point are interim support measures to assist groups in developing their corporate capacity so that groups can immediately begin to foster business partnerships and relationships with resource developers at all stages of project development. What is meant by corporate capacity is the ability of aboriginal groups to have the financial, management and entrepreneurial capabilities to create wealth through business relationships with resource developers in the north. In most cases these required dimensions of northern aboriginal economic development are indeed very scarce.

Filling this programming gap ought to be the central focus of any Federal resource/economic development policy aimed at improving the economic circumstances of the northern regions.”
opportunities available at projects, IBAs often pay inadequate attention to the conditions that must be in place if aboriginal people and other northerners are to take advantage of these opportunities.

- Focusing on building basic capacity would increase the overall educational and skills base of local communities and aboriginal people in a way that assists people in benefiting from project-specific opportunities but also leaves them in a better position to pursue other options when the project ends.

- IBAs reflecting this principle would entail limited interference with the free market employment and contracting decisions of mining companies and their contractors and employees. While IBAs would create obligations and structure incentives in order to create opportunities (e.g., by offering targeted training programs and breaking down contracting requirements into smaller parcels) and build capacity (e.g., by supporting education, skills training, and business development), employment and commercial arrangements would generally be freely entered into by the parties.

- IBA programs aimed at building capacity would be less likely than other schemes of preferences or direct subsidies to contravene the prohibitions relating to discrimination or preferential treatment that are contained in human rights codes, labour law and trade law.

- Enforceable obligations under IBAs would take the form of commitments to provide training and other support directed to building capacity. These obligations would be undertaken by mining companies and governments, with reciprocal obligations on aboriginal organizations to assist with implementation. Individual and collective responsibility could therefore be established for the support for economic development. While commitments to support capacity building would be strictly enforceable, end results relating to issues such as employment levels and contracting would remain subject to ‘best efforts’ undertakings.

Simply building capacity may not alone be sufficient to achieve the potential of IBAs as instruments of economic development. Incentives, targets and specific obligations may also be required in order to promote changes in the hiring and contracting practices of the mining industry. Nonetheless, an explicit focus on capacity building and a commitment by government to do its part would provide useful direction to IBA policy.

7.7 Minimize the Costs of Negotiating and Implementing IBAs

The minimization of ‘transactions costs’ associated with negotiating and implementing IBAs is another possible general principle for IBA policy. This principle would require that IBA policy be directed to reducing the complexity and cost of IBA negotiations so that the IBA process itself does not become an excessive burden on aboriginal organizations and a source of
undue cost and delay for mining companies. IBA policy would therefore include the identification of opportunities to standardize IBA practice and to simplify negotiations by taking advantage of existing precedents and programs. A number of specific ways of minimizing transactions costs are discussed below, including the establishment of both procedural and substantive parameters for IBAs.

7.8 Overview and Implications

The seven principles set out above provide a link between the multitude of concerns with current IBA practice enumerated in the previous section and the specific options for IBA policy described below. The objective here has been to identify principles that address a number of the underlying issues raised by IBAs and that provide some fairly specific guidance when selecting policy options. Reference back to these principles will therefore be useful when considering the options discussed in the next section.

The choice of guiding principles is, of course, a subjective exercise. Some of the suggestions made above may well be controversial. For this reason, this list of seven principles should be treated as a starting point only in the event that DIAND decides to proceed further in establishing general direction for IBA policy. Input from government, the mining industry, aboriginal people and others would undoubtedly produce other candidates for inclusion, as well as suggestions for modifying — or perhaps deleting — some of the principles that are suggested here. Regardless of what principles are finally agreed to, the discussion in this section shows how a set of reasonably specific principles could provide useful parameters for the selection of specific policy options.
THE STRUCTURE OF POLICY OPTIONS

This following sections set out a range of options for a DIAND policy on IBAs. These options are presented as discrete policy initiatives or regulatory requirements which, for the most part, could stand alone. Policy options are organized thematically, with several specific options described under each theme. Since many of the options set out below are not mutually exclusive, the following sections can be read as a menu of choices which could be combined in various packages or implemented cumulatively through an incremental process of policy development.

There are three principal reasons for using this segmented approach. First, it provides a manageable approach to the complex task of addressing the diverse and interrelated issues raised by IBAs. Although full cross-referencing of issues and options is not attempted, an effort is made to highlight instances where a single policy option would address a number of the issues identified earlier in the paper. The second reason for this segmented approach is to facilitate evaluation of the options. In order to progress through a focused and rational process of policy analysis and consultation, a set of relatively discrete options is needed as a basis for discussion. The options set out below are intended to be sufficiently clear and discrete that each could be the subject of independent evaluation and debate. The final reason for a segmented approach is that it preserves maximum flexibility for selecting options that would add structure and value to the IBA process without necessarily committing DIAND at the outset to a complex and tightly integrated policy package.

Many of these options presented here would, however, fit logically together to constitute a detailed regulatory framework and complementary set of policy initiatives. A comprehensive approach would establish procedural and substantive parameters for IBAs and clearly define the roles of government and the other parties in the process of negotiating and implementing these agreements. It would also strip away from the IBA process issues that could best be addressed through discrete processes or consolidated with existing regulatory institutions or policy initiatives. Finally, it would fit the IBA process within a broader policy framework. Many of the options described below could be treated as building blocks for this type of comprehensive IBA policy.

The discussion of options begins by sketching several alternative directions for IBA policy and elaborating on the content of a regulatory model. The other themes examined relate to facilitating the negotiation of IBAs, enhancing the economic development role of IBAs, structuring the cash component of IBAs, addressing the relationship between IBAs and other processes, and improving the monitoring and enforcement of IBAs. Finally, several options for establishing and enforcing IBA policy are briefly reviewed.
9.0 OPTIONS FOR OVERALL POLICY DIRECTION

DIAND has a number of broad directions to choose from when deciding how to respond to the issues raised by current IBA practice. One option, of course, is to maintain the status quo. DIAND could also explicitly state that IBAs are not a requirement for project approval, it could entrench the BHP precedent as a model for IBAs, or it could adopt the model used in the oil and gas sector. Finally, it could exercise greater control over the IBA process by establishing a basic regulatory framework for IBAs. Once this framework is in place, IBA policy could then provide more specific parameters regarding the content of IBAs and the process to be used in negotiating these agreements. This section briefly describes and evaluates each of these options.

9.1 Maintain the Status Quo

The first option available to DIAND is simply to maintain the status quo, allowing IBA practice to evolve in a policy vacuum and intervening only on a selective and ad hoc basis when government can assist parties with IBA negotiations or create incentives to overcome deadlock. This approach is illustrated by DIAND’s role in the BHP process and by the absence of government direction in setting procedural or substantive end points for IBA negotiations relating to Diavik’s proposed mine. The implication is that each mine should have its own IBA process, reflecting the unique of characteristics of the project and the particular constellation of interests involved in IBA negotiations.

The status quo option has several potential advantages. First, it appears consistent with the theory that government should allow maximum flexibility for mining companies and aboriginal organizations to design mutually satisfactory arrangements. Whether the parties view this flexibility as in their own best interests depends, of course, on their perception of both the balance of bargaining power within IBA negotiations and the implications of that process for their broader objectives.

Second, the current approach eliminates the need for government to engage in direct regulation, thereby avoiding the task of designing and implementing an IBA policy and regulatory framework. It does not, however, reduce the regulatory burden on the mining industry as long as IBAs are viewed as an implicit regulatory requirement. In fact, the uncertainty associated with the current unstructured process may be more burdensome than a clearer and more formal regulatory regime.

Third, the absence of policy direction creates an environment where parties are encouraged to experiment with different approaches to IBAs and avoids the risk that government will restrict developments in this area by coming forward prematurely with detailed and prescriptive requirements. It may be, for example, that parties to the Diavik negotiations will come up with a new approach to IBAs that improves on the BHP model in ways that could not easily have been predicted in advance. Had government moved too quickly to entrench the BHP model in policy or legislation, this development would have been thwarted. Similarly, perhaps
government should refrain from taking action until the results of Diavik negotiations have been tested and applied to subsequent projects. Against this argument, however, must be weighed the direct and indirect costs of experimentation and the risks that the incentives facing individual mining companies and aboriginal organizations in unstructured IBA negotiations will produce a pattern of agreements that increases uncertainty, deters mineral exploration and development in the North, and aggravates conflicts among aboriginal organizations, the mining industry, and northerners as a whole. There is no guarantee that a series of unstructured IBA negotiations for individual projects will spontaneously result in convergence around a stable set of precedents and ‘best practices’ that meet the needs of the parties and reflect the broader public interest.

Finally, a ‘wait and see’ approach to IBA policy could be justified on the grounds that the settlement of land claims and implementation of land claims and self government agreements will progressively address many of the underlying issues related to IBAs. On this view, many of these problems are largely transitory and can be expected to disappear as land claims agreements define rights and establish institutions and regulatory processes to deal with the impacts and benefits of mining. The reasons for questioning this approach, some of which are addressed above in Section 2, relate to the slow pace of some land claims negotiations and the fact that none of the settled land claims agreements addresses the complete range of issues raised by IBAs or fully anticipates the role that government policy could play in complementing and enhancing the IBA process.

The principal arguments against maintaining the status quo are set out in the “Survey of Issues” contained in Section 6 of this paper. It is true, of course, that there is not universal agreement regarding the significance of all of the issues identified in the earlier section. Nonetheless, the broad consensus on many of these issues and the sheer number of concerns with current IBA practice suggest widespread dissatisfaction with the status quo. Furthermore, it is significant that none of the people interviewed for this paper felt that the status quo was adequate and the vast majority felt that DIAND could and should be doing more to in the way of facilitating, structuring or participating directly in the negotiation and implementation of IBAs.

### 9.2 Explicitly State that IBAs are not a Requirement for Project Approval

Theoretically, one alternative to the status quo is for DIAND to state explicitly that signed IBAs are not a precondition for project approval. Agreements between mining companies and aboriginal organizations would be treated simply as private contracts, except where they are required under land claims agreements (e.g., the NLCA) or by aboriginal organizations exercising authority over land and resource management or powers of self government. In any scenario, however, DIAND would refrain from a policy role in relation to these agreements.

One possible rationale for this approach would be to send a clear signal to industry that IBAs do not constitute another layer of federal regulation in the already complex and uncertain regulatory environment that surrounds northern mining. The federal government might also wash its hands of the economic development objectives of IBAs, arguing that regional economic
development has had limited success in Canada and that market forces should be the ultimate determinants of decisions relating to mining in the North. Even if this policy direction could be justified on economic development and other grounds, it would only succeed in encouraging mineral development in the North if projects could in fact proceed without IBAs. If IBAs remain a practical necessity even in the absence of a formal regulatory requirement, then government’s withdrawal from a regulatory role simply leaves industry and aboriginal organizations to make out as best they can in a complex and politically charged environment.

In reality, expectations in the North regarding IBAs are sufficiently well formed that most observers find it inconceivable that a major mining project could proceed without attention to this matter. Furthermore, IBAs are explicitly required for some projects under the NLCA and other land claims agreements either provide for agreements dealing with the impacts and benefits from resource development or provide aboriginal organizations with ample leverage to secure IBAs in certain circumstances. While a decision by DIAND to step away from an IBA requirement would seriously undercut the negotiating position of some aboriginal organizations, aboriginal people would nonetheless continue press for these agreements using whatever leverage is available to them. Without implicit or explicit regulatory backing from DIAND, aboriginal organizations that lack a firm basis for IBAs in land claims agreements would likely employ a full range of legal, regulatory, political and, perhaps, extra-legal instruments in order to press mining companies to address concerns regarding impacts and provide some tangible benefits to local communities. Given the current climate and expectations in the North, companies would ignore these pressures at their peril. The absence of a regulatory requirement would not, therefore, eliminate the pressures for IBAs. It would simply result in these pressures being exerted in less predictable ways.

Most informed observers agree that there is no way to ‘roll back the clock’ in the North and eliminate IBAs — or at least some means of directly addressing local impacts and benefits — as a de facto requirement for mining projects. Furthermore, the past history of mining in the North and the needs and aspirations of aboriginal people and other northerners make it unlikely that this policy option would be politically acceptable. DIAND must also bear in mind its special obligations to aboriginal people and its very broad responsibilities — at least until devolution — for land and resource management in northern Canada. While the current practice of negotiating bilateral IBAs through an unstructured bargaining process may not be the best approach, DIAND does not really have the option of simply walking away from the issue.

9.3 **Entrench the BHP Precedent of IBAs as ‘Private’ Agreements Subject to Minimal Regulatory Backing**

DIAND could entrench the approach to IBAs used in the BHP process. In essence, DIAND would refrain from direct involvement in IBA negotiations and would allow these

55 For a description of this process and a set of recommendations dealing with IBAs and related matters, see, CIRL, supra, note 2.
agreements to remain confidential, thereby permitting the parties to avoid government oversight of the contents of IBAs. Regulatory leverage would be applied to the parties, however, in order to encourage good faith bargaining and secure at least ‘satisfactory progress’ on IBAs before the granting of project approvals. The Minister of DIAND would, at the end of the day, determine whether the conduct of the parties and the progress on IBAs justified a decision to proceed with the project.

Entrenching this model would arguably represent a step forward from the status quo in that mining companies and aboriginal organizations would have a better understanding of DIAND’s expectations regarding IBAs and the measures that it would use to encourage parties to sign these agreements. Ministerial discretion provides one — albeit very ad hoc — means of ensuring a reasonable balance of bargaining power in IBA negotiations and establishing end points for the IBA process.

The principal objection to entrenching the BHP model is simply that it does not address many of the problems with current IBA practice that are enumerated in Section 6 of this paper. The BHP model retains a largely unstructured bargaining process for IBA negotiations, provides little guidance on the rights and obligations of the parties, and allows virtually no role for government in the IBA process. When government does become involved, the nature and extent of that involvement is highly discretionary and there remains considerable doubt regarding the legal basis for the ultimate regulatory sanction — the Minister’s threat to refuse to sign the water licence — that was relied on in the BHP process. The interviews conducted for this paper provided no evidence that entrenchment of the BHP process would be widely viewed by aboriginal organizations, mining companies or government officials as a significant step forward in improving the IBA process. Many observers, in fact, have serious reservations about that process and are looking to DIAND for corrective measures.

9.4 Use the Federal Oil and Gas Benefits Regime as a Model for the Mining Sector

As noted above in Section 5.1, the federal government’s benefits regime that applies to oil and gas operations in northern Canada could be used as a model for policy in the mining sector. This approach would establish a legal requirement for benefits plans, but would not require project-specific agreements between mining companies and aboriginal organizations. The emphasis would be on ‘best efforts’ undertakings to create economic opportunities and the scope of benefits requirements would be limited to employment, business opportunities and compensation.

A thorough evaluation of the effectiveness of the oil and gas benefits regime and its potential applicability in the mining context is beyond the scope of this paper. Nonetheless, several comments can be made regarding its strengths and weaknesses as a model for the mineral sector. On the positive side, the oil and gas regime has the advantage of both a firm legislative basis and a measure of constraint on the scope of benefits obligations. It might, therefore, result in a more predictable and streamlined process for securing local benefits. The oil
and gas model is also broadly consistent with the several of the principles set out above in Section 7. In particular, it would distinguish between impact-based claims and economic development objectives, promote broad access to economic benefits, and focuses on the provision of opportunities. This regime has also been administered in a way that accommodates benefits requirements established under land claims agreements. Finally, adopting this model would also have the advantage imposing a uniform benefits regime on two of the principal non-renewable resource sectors in the North.

There are, however, a number of arguments to suggest that it may not be either easy, or desirable, to transplant the oil and gas regime to the mining sector. One concern is that this regime has not, according to some observers, been notably successful in securing significant benefits from oil and gas development. The establishment of specific benefits requirements after companies have bid for oil and gas rights has also been criticized as creating uncertainty, although this whole clearly issue requires a different approach in the mining context where resource disposition occurs through the free entry system. More generally, the limited extent of aboriginal involvement in this process, its narrow scope, the vagueness of the requirements set out in legislation and policy, and its emphasis on ‘best efforts’ undertakings on the part of companies suggest that a significant rolling back of expectations would be required for it to be accepted by aboriginal organizations in the mining context. Furthermore, some of the key issues raised by mining IBAs, notably in relation to their effectiveness as instruments of economic development, do not appear to be addressed more satisfactorily under the oil and gas regime. It is noteworthy that among the people interviewed for this paper who considered this issue, there was no consensus that the oil and gas benefits regime, by itself, provides a model that could displace current IBA practice in the mining sector.

Despite its limitations, however, the oil and gas regime does provide a precedent for the development by DIAND of both legal requirements and policy direction relating to the local benefits and impacts associated with resource development in the North. In some important respects it is clearly preferable to the completely unstructured IBA process that currently applies to mining projects in significant areas of the North. This model could, therefore, provide a basis for a more comprehensive and integrated benefits regime that might ultimately be applied to oil and gas, mining, and perhaps other resource sectors in northern Canada.

9.5 Establish a Basic Regulatory Framework for IBAs

One general explanation for the high degree of uncertainty surrounding northern IBAs outside of Nunavut is the fact that they occupy an ill-defined middle ground between private contractual arrangements and regulatory requirements. Although the negotiation of IBAs is generally left to an unstructured bargaining process between private mining companies and aboriginal organizations, regulatory leverage is an important element in most bargaining dynamics and offers the best prospect for establishing a principled and structured basis for these agreements. DIAND’s IBA policy could address this ambiguity by moving the IBA process clearly into the realm of government regulation.
Establishing a basic regulatory framework for IBAs would involve clearly stating that IBAs are a precondition for the approval of mining projects, providing general guidance on what sort of agreements qualify as IBAs for this purpose, and establishing a process for DIAND to oversee and enforce this requirement. Even a relatively minimal regulatory framework along these lines would more clearly define the fundamental rights and obligations of the parties in the IBA process. As a result:

- a reasonable balance of bargaining power in IBA negotiations would be ensured without the need for *ad hoc* intervention by government;
- a basis would exist for policing good faith bargaining within established parameters and establishing end points and deadlock breaking mechanisms for the IBA process; and
- the public interest in both the IBA process and the substance of these agreements would be affirmed and protected.

A regulatory framework could also link the requirements contained in IBAs to project approvals and ongoing regulation, thereby providing an avenue for enforcement and a mechanism to ensure both flexibility and continuity in IBA provisions given changes in the nature of mining operations or in mine ownership.

The establishment of a basic regulatory framework for IBAs need not imply a strict command and control approach to these agreements. A large measure of negotiation and customization of IBA provisions is perfectly consistent with the regulatory model. The common interest of aboriginal organizations and mining companies in developing a formal basis for their relationship could still be the driving force behind many IBAs. Nonetheless, the uncertainty surrounding current IBA practice could be reduced if parties knew that the requirement to negotiate IBAs had a clear regulatory underpinning and if government conducted itself accordingly. Once a basic regulatory framework is in place, government could of course go further by providing more detailed substantive and procedural parameters for IBAs.

### 9.6 Establish Guidelines or Requirements Regarding the Content of IBAs

The absence of guidelines regarding the content of IBAs is a frequently noted source of uncertainty in current IBA practice throughout much of the North. A number of people interviewed for this paper argued that DIAND should provide a list of topics to be addressed in IBAs and, perhaps, a list of topics or types of provisions that should not included. Parameters of this type would structure expectations, underlining the key issues that parties should be prepared to discuss while at the same time preventing the content of IBAs from becoming open-ended.

A useful starting point for a policy on the contents of IBAs is the list of “Matters Considered Appropriate for Inuit Benefits” contained in Schedule 26-1 of NLCA. As noted above in Section 2.2, this schedule contains most of the standard items found in IBAs. It also
omits a number of the more controversial matters. For example, there is no mention of cash payments with the exception of a general reference to “wildlife disruption compensation schemes”. There is, however, a general regime for resource royalty sharing in Article 25 of the NLCA. If cash payments are to be considered appropriate parts of IBAs, the options discussed below for structuring these payments could be included in guidelines covering the content of IBAs.

Guidelines could also identify objectionable provisions that should not be included in IBAs. An obvious candidate for prohibition would be any restriction on the freedom of aboriginal parties to participate in project review and regulatory processes. The inclusion of confidentiality clauses that limit access to IBAs could also be prohibited, with the possible exception of narrow protection for commercially sensitive financial information. Without a restriction on confidentiality, of course, there would be no way for DIAND to ensure compliance with guidelines on IBA contents.

The establishment of guidelines or requirements regarding the contents of IBAs would have a number of advantages including:

- reducing the costs of IBA negotiations by promoting focused and results-oriented bargaining on a restricted set of issues;
- establishing clear aboriginal entitlements to certain types of IBA provisions while avoiding a continual spiral of expectations through the inclusion of new types of benefits in IBAs;
- providing mining companies with a better basis for predicting what types of benefits they will be expected to provide; and
- reducing the scope for parties to include provisions that are inherently unfair or contrary to the public interest.

Ideally, a DIAND policy on the content of IBAs would encourage parties to focus on the impact-based claims and economic development opportunities associated with particular projects.

Given the absence of any guidance on this issue for projects not subject to the NLCA provisions, even a general statement from DIAND regarding the appropriate content of IBAs might be of some assistance. If policy direction regarding the content of IBAs is to constitute a real constraint, however, some attention should be paid to the leverage that DIAND could exert over the parties. Several options are available. First, DIAND could indicate that IBAs must conform to the content guidelines if they are to satisfy the basic regulatory requirement for project approval. Second, arbitration provisions and other means to police good faith bargaining could provide a recourse against parties seeking to avoid core IBA issues or expand the scope of an agreement beyond the list of appropriate topics. Third, ministerial oversight and approval of
IBAs could be required, as is done under sections 26.8.1-26.8.5 of the NLCA. Finally, statutory prohibitions could be enacted which would make specified types of provisions illegal and unenforceable.

9.7 Establish Procedural Guidelines or Requirements for IBA Negotiations

The arguments for procedural parameters for IBA negotiations are at least as strong as those for guidance regarding the content of agreements. A number of people interviewed for this paper argued that it is inappropriate for government to have imposed a de facto regulatory requirement without establishing a fair, efficient and reasonably predictable process for concluding IBAs.

As with the issue of appropriate IBA contents, procedural guidelines could begin with the precedent established by the NLCA. Key elements of this process include:

- clear criteria defining the type of projects that trigger an obligation to finalize an Inuit Impact and Benefits Agreement (IIBA) before the project commences (definition of “Major Development Project” (MDP) in section 26.1.1);

- an explicit time frame that links the obligation to commence IIBA negotiations with the proposed start-up date for an MDP (section 26.4.1);

- provision for voluntary arbitration at the request of both parties (section 26.5.1);

- provision for an application to the Minister by either party for the appointment of an arbitrator if agreement has not been reached within 60 days of the start of negotiations (section 26.6.1);

- provision for the use of compulsory arbitration to police the obligation to negotiate in good faith (section 26.6.2); and

- provisions governing the appointment of an arbitrator, the time frame for an arbitration decision, and the costs of arbitration (sections 26.6.3-26.6.5).

The NLCA also states that except where otherwise agreed by the parties, an IIBA shall provide for its renegotiation (section 26.10.1).

Procedural requirements of this type would address a number of the issues raised by current IBA practice. In particular, they would establish criteria based on factors such as project size or expected impacts that would determine when IBAs are required and identify the types of projects and activities — for example, mineral exploration — for which IBA requirements would be minimal or non-existent. Procedural parameters would also level the playing field between the parties to IBA negotiations by making compulsory arbitration available. They would
also provide endpoints and deadlock breaking mechanisms so that IBA negotiations do not become open-ended processes, vulnerable to stalemate and susceptible to being delayed for strategic reasons.

Procedural guidelines or requirements could also be used to address linkages between IBA negotiations and other processes. For example, DIAND could state its expectation that IBA negotiations will usually be completed following the environmental assessment (EA) process so that the parties have the benefit of the EA panel’s findings regarding the project’s likely impacts. An EA panel with a mandate that extends to socio-economic impacts and mitigation measures could make recommendations in these areas that would then be addressed through regulatory processes or IBAs.
10.0 OPTIONS TO FACILITATE THE NEGOTIATION OF IBAs

A number of the issues raised by IBA practice relate to uncertainty and costs associated with the negotiation of IBAs. DIAND could therefore consider a number of options that would assist the parties at this stage in the IBA process. One option is to develop an enhanced policy framework to guide the mining industry, aboriginal organizations and government through the early stages of consultation relating to mineral development. Second, DIAND could facilitate IBA negotiations through the provision of information, advice and assistance to the parties. Finally, a comprehensive approach to funding aboriginal participation in IBA negotiations could be developed. Policy initiatives in each of these areas could streamline the IBA process and better define the roles and responsibilities of mining companies, aboriginal organizations and government.

10.1 Develop an Enhanced Framework for Early Consultation with Aboriginal Organizations

There are both legal and practical reasons why early consultation involving government, mining companies and aboriginal organizations should be an important part of the IBA process. Legally, the duty to consult with aboriginal people when resource development occurs on traditional territories is an important part of aboriginal case law and many land claims agreements. This duty rests formally with the Crown, although in practice the consultation process often involves the companies engaged in resource development.

As a practical matter, consultation is widely recognized as a vital component of the IBA process. Early consultation is fundamental to building the relationship of trust and mutual understanding that underlies successful IBAs. Aboriginal people require information about the nature, scale, timing and impacts of the proposed development, while the developer needs to understand the conditions, objectives, capabilities and concerns of the communities that may be affected by, or benefit from, the project. In order to avoid confusion, uncertainty and asymmetry of information as project planning unfolds, early and ongoing contact between representatives of aboriginal organizations and mining companies is essential. Ideally, a proper consultation process will lay the groundwork for concluding IBAs in a focused, efficient and cost-effective manner.

If DIAND is to be actively involved in the IBA process, it should also be involved in early consultations. In this way, DIAND could ensure that it fully understands the interests and objectives of the other parties and the role that it can play in the negotiation and implementation of IBAs. Even if DIAND has only limited involvement in the IBA process, its responsibilities as

56 For a recent discussion of the case law and its practical implications for the consultation process, see: Cheryl Sharvit, Michael Robinson and Monique M. Ross, Resource Developments on Traditional Lands: The Duty To Consult, CIRL Occasional Paper #6 (Calgary: Canadian Institute of Resources Law, February 1999).
land and resource manager and its particular duties to aboriginal people suggest an important role in relation to consultation.

Including a consultation framework in DIAND’s policy on IBAs could also address a number of concerns in this area. Policy guidelines, developed jointly with industry and aboriginal representatives, could reduce uncertainty regarding the type and extent of consultation that is required and the respective roles and responsibilities in that consultation process of DIAND, industry, and aboriginal organizations. In addition, consultation guidelines for the IBA process could provide a basis for exposing the misuse of that process. Problems such as inadequate disclosure of information and other examples of bad faith in consultation, culturally inappropriate consultation practices, or the abuse of the consultation process through unnecessary delays and a failure to meet reasonable time lines have apparently occurred in some instances. A DIAND IBA policy dealing with the consultation process could provide some standards and leverage for policing this sort of objectionable conduct. Finally, the burden that the consultation process imposes on aboriginal organizations and small mining operators could be lightened if DIAND’s IBA policy provided for direct financial and in kind support for that process and specified that DIAND itself will assume significant consultation responsibilities.

The consultation component of DIAND’s IBA policy could build on existing consultation guidelines and on the consultation provisions relating to resource development that are contained in land claims agreements. In addition, guidelines developed for mining IBAs could be integrated into a broader consultation framework for northern resource development. This type of integration would be one step in addressing concerns regarding the different treatment accorded to mining and other sectors. DIAND’s involvement in consultation could include:

- providing background information to aboriginal organizations and to developers regarding the legal and policy requirements relating to the project in general, and the IBA process in particular;
- providing general criteria and specific guidance to aboriginal organizations and mining companies to assist in identifying the appropriate aboriginal party or parties to IBA negotiations;
- establishing ‘best practice’ guidelines for consultation processes;
- assisting the parties with cross-cultural, technical and economic issues that may arise in consultation processes;
- assisting with community meetings and with technical sessions and informal discussions among the parties and their expert advisors;

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57 See, for example, s. 27 of the NLCA.
• ensuring that the parties have adequate notification of other project review and regulatory processes relating to the project; and

• addressing aboriginal funding requirements for participation in the consultation stage of the IBA process.

IBA policy could thus formally define the DIAND’s role in the consultation process and establish the rule of the game for all parties. The result would be more efficient and predictable consultation, hopefully leading to similar improvements in the process for negotiating IBAs.

10.2 Facilitate IBA Negotiations through the Provision of Information, Advice and Assistance to the Parties

One component of DIAND’s IBA policy would be a series of measures designed to assist the parties and reduce the costs and uncertainties associated with the IBA process. In addition to the establishment of a consultation framework as discussed above, other ways that DIAND might contribute to the IBA process include:

• ensuring that the parties have access to baseline socio-economic and environmental data and any information that government has regarding the expected impacts of the project;

• providing guidance to the parties on how best to undertake IBA negotiations;

• assisting both aboriginal organizations and mining companies in understanding each others’ interests, priorities and cultural perspectives;

• providing expert facilitators to assist with IBA negotiations;

• making IBA precedents available to the parties and facilitating the exchange of information regarding experience with IBAs for other projects;  

• providing practical advice to mining companies and aboriginal organizations on how overcome obstacles to the successful implementation of IBAs; and

• providing information on government programs and sources of funding that are available to assist with IBA implementation;  

58 Sharing information on IBAs among aboriginal people was a principal objective of a workshop organized by the Canadian Arctic Resources Committee in 1998. Results are reported in O’Reilly & Eacott, supra, note 39.

59 The argument that government programs should be a key source of funding for industry’s employment and training obligations under IBAs is made by Christensen, supra,
DIAND’s IBA policy could thus significantly reduce the ‘transactions costs’ associated with negotiating and implementing these agreements.

10.3 Develop a Comprehensive Approach to Funding Aboriginal Participation in IBA Negotiations

A concern commonly expressed by aboriginal organizations is that they lack the resources to participate effectively in IBA negotiations. One problem is the excessive demands placed upon the limited pool of aboriginal leaders and officials. Another problem is access to the legal, economic and technical advice that may be required for IBA negotiations. While some funding is available to aboriginal organizations through DIAND’s Resource Access Negotiations (RAN) Program, the amounts available are viewed as inadequate by many aboriginal organizations. As a result, cash payments to cover the expenses of aboriginal participation are sometimes included in IBAs.

Funding for aboriginal participation can be a contentious issue for all parties in IBA negotiations. Establishing some rules of the game in this area could provide greater certainty regarding rights, obligations, and safeguards. Explicit policy direction could be provided by DIAND, based on consultations with aboriginal organizations and the mining industry. Policy in this area could have a number of elements:

- DIAND could include as part of IBA policy an explicit recognition that aboriginal organizations require some upfront funding in order to participate effectively in IBA negotiations;

- policy guidelines or a model memorandum of understanding for IBA negotiations could allocate responsibility for providing financial and other support for aboriginal participation in IBA negotiations between DIAND and the mining company;

- funding for aboriginal participation could be complemented by policy initiatives aimed at minimizing the costs of IBA negotiations; and

- a joint or independent procedure could be established to resolve any disputes regarding the financial support requested by, or provided to, aboriginal organizations and governments.

IBA policy could thus provide a specific means for aboriginal organizations to receive, from DIAND and industry, the money necessary to participate effectively in IBA negotiations. In note 4, pp. 4-5, 10.

60 Supra, note 16.
addition, it could establish principles, accountability mechanisms and cost saving initiatives that would draw some boundaries around this entitlement.
11.0 OPTIONS FOR ENHANCING THE ECONOMIC DEVELOPMENT ROLE OF IBAs

The role of IBAs as instruments of economic development is arguably the most important reason for these agreements from the perspectives of aboriginal organizations and governments. In addition, the argument that IBAs can provide tangible benefits to the mining industry — notably through the provision of a qualified and motivated local work force and through opportunities to secure goods and services in an efficient manner from local providers — depends in large measure on the ability of these agreements to achieve economic development objectives. There is widespread concern, however, that the current model of project-specific, bilateral IBAs between mining companies and aboriginal organizations is ill-suited to meeting the challenges of economic development in northern Canada. Several policy options could be considered to modify or enhance this model. First, DIAND could promote a multi-lateral approach to project-specific IBAs, bringing the mining company, all affected aboriginal organizations, and the federal and territorial governments into a common process aimed at maximizing opportunities associated with the project and addressing obstacles to economic development. Second, DIAND could develop a broader economic development strategy that specifically incorporates project-specific IBAs. Finally, DIAND could promote the use of IBA implementation plans to define more clearly the roles and responsibilities of mining companies, aboriginal organizations and government following the signing of IBAs.

11.1 Promote a Multilateral Approach to IBAs

The pattern of bilateral IBAs between mining companies and aboriginal organizations underlies a number of concerns relating to current IBA practice. One element of DIAND’s IBA policy could therefore be to encourage — or require — a shift from bilateral IBAs to multi-party project agreements. A multi-party approach would aim to include all aboriginal organizations with an interest in a given project and would also involve direct participation by DIAND and the territorial government as parties to IBA negotiations.

A well designed multi-party approach would have the following advantages:

- it would avoid the divisiveness that may arise when different communities and aboriginal organizations undertake separate IBA negotiations with a mining company;

- the distribution of employment and business opportunities and other project-specific benefits would be handled in a common forum so that all parties would know that they are being treated in an even-handed manner;

- direct involvement by government could be used to promote inclusiveness in the application of IBAs and to ensure that the broader public interest is protected in these agreements;
increased efficiency in the IBA process would result from the avoidance of duplication of effort in both negotiations and implementation;

- efficiencies and economies of scale could be realized in the delivery of economic development programs, particularly in areas such as training and business development;

- by broadening the pool of beneficiaries and ensuring a coordinated approach to building capacity in light of project-specific opportunities, greater flexibility could be achieved in matching individuals and businesses with opportunities; and

- issues such as cumulative environmental and socio-economic effects could be more easily addressed since they require a regional perspective.

There are, of course, several challenges to implementing a multi-party approach to IBAs. One of these is the difficulty of ensuring that all parties will work together. In particular, there is a need to prevent the process from being derailed by particular agendas or self-interested strategic behaviour. This issue could be addressed by ensuring that a well-understood common framework, including procedural rules and substantive guidelines, is in place before IBA negotiations begin. This framework would narrow the issues on the table and reduce the need for time-consuming and divisive bargaining. Although the ideal would clearly be a collaborative process that results in consensus among the parties, government’s leadership role in this process and its control of the regulatory levers of power would enable it to police multi-party negotiations to ensure that they are not high-jacked by particular interests.

A second concern with the multi-party approach may be the different circumstances and priorities of the various aboriginal organizations and other potential beneficiaries. This diversity cannot be ignored for the sake of a streamlined and predictable IBA process. The issue of tailoring IBAs to specific local circumstances is discussed below in Section 11.3.

A variation on this option is to develop an IBA policy that envisages both a broad multilateral project agreement and narrower bilateral or multilateral negotiations. For example, a multilateral umbrella agreement could deal with issues such as training, cumulative effects and regional economic development. Within the framework established by this agreement, the developer and individual aboriginal organizations — with or without the direct involvement of government — would then be free to negotiate sub-agreements to reflect specific community concerns and circumstances. The intent of this model would be to improve the overall functioning of the IBA process by ensuring that issues are addressed in the most appropriate forum (multilateral or bilateral). In addition, the efficiency of bilateral agreements might be improved by placing them within a common framework that is established through the policy guidelines, programs and other initiatives contained in the multilateral agreement. The disadvantage is that a two-level approach might add a further level of complexity to the IBA process.
11.2 Establish an Economic Development Strategy that Incorporates Project-Specific IBAs

DIAND policy promoting a multilateral approach to the IBA process could lead naturally to the development of a general economic development framework for project-specific IBAs. This framework would provide a means of fitting IBAs for new projects within a broader set of programs aimed at capacity building, improving the flexibility of labour markets, and diversifying the economic opportunities available to individuals and businesses in the North. An economic development framework for IBAs would facilitate the integration of benefits arrangements among different mining projects and would reduce the risks associated with dependence on a single project for particular aboriginal organizations communities. Mining companies, aboriginal organizations and government would have a pre-existing structure within which to fit their IBA commitments, as opposed to starting from scratch with each IBA. They could also take advantage of economies of scale in program delivery. Finally, the task of capacity building in relation to mining could begin well before the start-up of particular projects, the point at which many IBAs come into force.

The design of an economic development framework for IBAs would likely involve a broad range of interests and programs. In particular, a likely focus of attention would be the fundamentals of capacity building in relation to northern mining opportunities. For example, a northern mining training program might be developed, funded by government alone or jointly by government and industry. Project-specific IBAs could then be linked to this program in several ways. New mines could be required participate in the program through direct or in kind contributions. Instead of focusing exclusively on project-specific training and recruitment, their IBA obligations could be directed to providing support for the general training program and integrating its graduates into their operations through targeted recruitment, co-operative education and internships. Project-specific training and apprenticeship programs could be coordinated with the broader initiative. Mining companies could also be given a direct say in managing the program, in order to ensure a practical orientation and the development of relevant skills. A cooperative approach to capitalizing on mining development in the North could thus replace in large measure, or at least complement, the more fragmented model of bilateral IBAs between mining companies and aboriginal organizations.

Integrating IBAs into a broader economic development strategy would clearly require both upfront work and project-specific adjustments. At the front end, coordination among all interested parties would be needed to develop the guiding principles and establish the programs required to promote capacity building and economic development on the basis of opportunities provided by mining or, for that matter, other resource development and economic activity in the North. A useful starting point in developing a policy framework of this type is the set proposals contained in Meeting the Challenges of Northern Resource Development, a recent aboriginal-industry submission to the Minister of DIAND on strategic issues and priorities for northern
resource development. This position paper argues that “the current roster of government economic development support programs lack a resource development focus and do not recognize the strategic importance of mining and oil/gas activity to future economic growth.” It recommends the establishment of a joint federal-territorial resource development program involving the direct participation of industry and aboriginal organizations. This proposal could be adapted to allow for the incorporation of project-specific IBAs into the broader program.

The design of an economic development strategy based specifically on the mining sector could also draw on the experience of the very successful benefits regime in northern Saskatchewan. The key elements of this regime, described above in Section 5.3, are the inclusion of benefits requirements in the surface leases for individual mines, the preparation of annual Human Resource Development Plans for mines, the establishment of the Northern Labour Market Committee to promote employment in mining and related activities, and the implementation of the Multi-party Training Program that involves government departments, educational institutions, industry, local communities and aboriginal organizations.

Once an economic development strategy is developed, a process for integrating project-specific IBAs would be required. This process could involve:

- identifying project-specific and cumulative impacts and resolving impact-related claims associated with the new project;
- identifying opportunities for economic benefits associated with the new project;
- identifying any constraints that may affect the ability of intended beneficiaries to take advantage of new opportunities;
- determining the contributions, roles and responsibilities of each of the relevant parties in relation to capitalizing on opportunities provided by the project; and
- making any required adjustments to the overall economic development framework in order to accommodate the new project.

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If the economic development framework is well conceived and flexible, this approach would reduce the uncertainty and effort associated with project-specific IBAs while significantly increasing the ability of mining projects to contribute in a coordinated manner to economic and social well-being in the North. It would also increase the ability of northerners to respond to the changing pattern of opportunities related to mining as new projects are opened in some areas and closed elsewhere. Finally, this approach could be broadened to address impacts and benefits associated with other types of resource development. A broader policy framework of this type could therefore provide a means of integrating the oil and gas benefits regime with IBA requirement for mines. Ultimately, this approach could be expanded to other resource sectors and, perhaps, other types of economic activity.

11.3 Promote the Use of IBA Implementation Plans

The economic development objectives of IBAs could be promoted through a DIAND policy that addressed implementation issues. One suggestion made by several people interviewed for this paper is to develop specific plans for implementing IBAs. These plans could be tailored to the circumstances of particular aboriginal organizations or communities. In this way, they would complement multiparty IBAs and broader economic development strategies. The principal elements of an IBA implementation plan could include:

- an assessment of the baseline capacity of target beneficiaries and the development of a program for building capacity over the lifetime of the project so that people are well prepared for opportunities that will become available through mining;

- an evaluation of the specific characteristics, needs and priorities of particular communities and how to secure economic benefits that are best suited to these attributes; and

- a description of the respective roles and responsibilities of government, the mining company and aboriginal parties in implementing the IBA.

In addition to their economic development focus, IBA implementation plans could include explicit measures to address the negative social impacts that are sometimes associated with the integration of aboriginal people into an industrial workforce. Programs to address substance abuse, advice on money management, and the establishment of counselling services and healing centres are examples of initiatives that could increase the likelihood of IBAs being successfully implemented. In these and related areas, guidance from and IBA policy and direct involvement of DIAND would be of assistance.

IBA implementation plans could also play a valuable role in providing ongoing monitoring of IBA performance. Periodic evaluation of progress against benchmarks established in IBA implementation plans could result in changes in both the targets set by the parties and in the strategies used to reach those targets. Treating implementation plans as living documents
could reduce the risk that IBA commitments will be viewed by mining companies and aboriginal organizations as check-lists, requiring little attention as long as the formal requirements are met.

The need for implementation plans depends, of course, on the detail with which implementation issues are addressed in IBAs themselves. A lack of attention to this issue is, however, one of the weaknesses noted by some people with current IBA practice. DIAND’s IBA policy could facilitate cooperation between government, aboriginal organizations and mining companies in order to ensure a coordinated approach to IBA implementation.
12.0 OPTIONS FOR STRUCTURING THE CASH COMPONENT OF IBAs

Current IBA practice creates confusion and controversy regarding both the rationale for a cash component in IBAs and the appropriate methods to be used in calculating the size of these payments. Leaving these issues to be resolved through unstructured bargaining means that the cash payment in any given IBA is likely to be determined primarily by the bargaining strength of the aboriginal party and the profitability of the project. DIAND could establish a more predictable and principled framework for the cash component of IBAs by identifying the different rationales for these payments and establishing appropriate processes for those types of payments that are considered to be legitimate. This approach is consistent with the general principle that IBA policy should aim to simplify and separate the myriad of issues currently addressed in IBAs. It would also eliminate the unstructured cash transfers that give rise to a number of concerns with current IBA practice. Several different paths could be pursued in developing IBA policy in this area.

One option is to include legitimate types of cash payments in a set of guidelines or requirements regarding the content of IBAs. Specific provisions regarding cash payments would thus be part of the substantive parameters for IBAs, as described above in Section 9.6. Since several of the possible categories are likely to be controversial, a process of consultation and policy analysis will be required to determine whether or not they should be included on DIAND’s list of legitimate rationales for cash payments. One category requiring attention is payments to aboriginal organizations when mining occurs on Crown lands. The second relates to cash payments as a means of distributing benefits from mining.

The second broad option for DIAND’s IBA policy would be to provide guidance or establish requirements regarding the procedures to be used for addressing monetary claims. These procedures could operate either within or outside of the IBA process. In particular, established procedures could be developed to address claims based on surface rights and compensation. Options relating to the expenses incurred by aboriginal organizations in IBA negotiations are dealt with above in Section 10.3.

Finally, attention could be paid to the relationship between cash payments and the overall fiscal regime for mining and to the establishment of a consolidated framework for cash payments under IBAs. All of these options are briefly surveyed below.

12.1 Identify Possible Rationales for the Cash Component of IBAs

An examination issues relating to the cash component of IBAs is complicated at the outset by the fact that there is no common understanding of the rationale for these payments. Confusion on this issue is evident from the absence of standard terminology to refer to these payments. They are often loosely referred to as ‘compensation’ payments, although the cash component of IBAs often appears unrelated to specific and quantifiable losses. These payments are also sometimes described as ‘access’ payments for the use of traditional lands for resource...
development. They may also be seen as means of providing aboriginal organizations with a ‘share’ of project revenue or profits. Finally, cash payments are sometimes characterized as ‘bribes’ or ‘pay-offs’, used by mining companies to purchase aboriginal consent or obtained by aboriginal negotiators through threats to delay projects through procedural and other means.

DIAND’s IBA policy could address this confusion by identifying specific rationales for the inclusion of cash payments in IBAs. To begin, a comprehensive list of possible rationales could be assembled. These rationales could include:

- access payments when there is aboriginal ownership of surface land;
- access payments for the use of Crown land that was traditionally occupied or used by aboriginal people;
- a share of resource revenues when mining occurs within traditional aboriginal territories but in areas where aboriginal title to the subsurface has not been established through the land claims process;
- compensation to groups or individuals for direct and measurable losses suffered as a result of the mining activity;
- compensation for the risk of losses arising from mining activities (e.g., risk of a low probability, high impact event such as the failure of a tailings dam);
- compensation for indirect and unquantifiable impacts relating to the mining activity (e.g., social, cultural or aesthetic impacts on communities close to the mine site);
- reimbursement for the costs incurred by aboriginal organizations in IBA negotiations; and
- payments intended to secure economic benefits for local people from the mining project.

Input from aboriginal organizations, mining companies, government and other interested parties might well lead to modifications to this list of possible categories.

It should be noted that mining operations in areas where there is aboriginal ownership of subsurface minerals will pay royalties to aboriginal organizations. The aboriginal subsurface owner has the right to determine whether access to these minerals will be granted to mining companies and, if so, on what terms and conditions. The royalty rate established for subsurface minerals owned by aboriginal people is therefore not a matter relevant to DIAND’s IBA policy.

The list of rationales set out above could serve two purposes. First, parties to IBA negotiations could be encouraged or required to be explicit in specifying the basis for cash
payments. Second, the list of possible rationales could reviewed to determine whether, from a public policy perspective, payments of each type are appropriate for inclusion in IBAs. DIAND might then specify that certain types of payments are standard components of IBAs, some should be addressed through separate processes, and others are simply inappropriate.

12.2 Address the Issue of Aboriginal Entitlement to Access Payments or Revenue Sharing for Projects on Crown Lands that are Within Traditional Aboriginal Territories

Perhaps the most controversial categories on the list of potential rationales for cash payments are those relating to mines located on Crown land. The key question is whether aboriginal organizations have a legitimate claim to cash payments arising from the use of Crown land and resources that is within traditional territories. This question is controversial because the legal basis for claims of this type is uncertain and their fiscal implications for the Crown could be significant. Furthermore, recognition by government of a general aboriginal entitlement to access or royalty payments for projects on Crown land is seen by some people as inconsistent with the principles and incentives that guide land claims negotiations. While the federal government has agreed to resource revenue sharing under land claims agreements, it has thus far refused to agree to share royalties from projects on Crown land when claims have not been settled. Aboriginal organizations that do not have settled claims argue strongly, however, that they should receive some payment reflecting the use of their traditional territories for mining development. Faced with a government refusal to give ground in this issue, aboriginal organizations have sometimes turned to mining companies for fixed access payments or a share in project profits which is, in practice, analogous in some respects to a royalty. Use of the IBA process to secure payments of this kind is therefore a matter of considerable controversy. Three policy options could be considered to address this issue.

The first option is for DIAND to establish and enforce a policy that aboriginal people are not entitled to access payments or a share of resource revenues for mining activities on Crown lands unless a right to such payments is established through land claims agreements. As a matter of DIAND policy, therefore, this potential basis for cash payments would simply be ruled out of order and excluded from IBA negotiations. DIAND could use its influence over the IBA process — up to and including ministerial approval of IBAs of the type envisaged under the NLCA — to ensure compliance with this policy. While this type of policy would clarify the basis for cash claims under IBAs, it may entail political and legal risks.

The second option is to accept in principle that some payment for access or share of royalties is appropriate, but to treat this as a matter between DIAND and aboriginal organizations that is separate from the IBA process. The result would likely be a payment schedule or revenue sharing arrangement to be worked out between DIAND and the representatives of the aboriginal people on whose traditional territory mining activity occurs. Revenue sharing could also involve the territorial government. Payments of this type would not
be the responsibility of the mining companies and would not, therefore, become an issue in IBA negotiations between companies and aboriginal organizations.

A third option is to provide within the IBA framework for direct access payments or a royalty equivalent to aboriginal organizations from mining companies operating on Crown land within traditional territories. To improve on the current situation, this option would require a standardized procedure for setting the level of these payments. In other words, access and royalty-like payments would reflect a principled basis for recognizing rights of traditional use and occupancy as opposed to being determined through an unstructured and unpredictable bargaining process. There is also a strong argument for coordinating payments of this type with the overall fiscal regime for mining, an issue discussed below in Section 12.5.

There are obviously important issues of principle, practical politics and strategy in land claims negotiations that are raised by these options. As well, legal and economic implications would require careful analysis. No opinion is offered here as to which option is the most appropriate. There is, however, no doubt that a significant source of uncertainty in current IBA practice would be removed if IBA policy set some ground rules for dealing with aboriginal claims for access payments and revenue sharing when mining activities occur on Crown land within traditional territories. These rules would, ideally, state clearly whether payments of these types are a legitimate form of cash transfers under IBAs and, if they are, how the appropriate amount of these payments should be determined. Since this issue is essentially between the federal Crown and aboriginal people, it should arguably be resolved by them so that the mining industry is not caught between competing claims about who is the landlord. The alternative is to perpetuate a situation where there is no principled basis or established procedure for dealing with a frequently stated rationale for cash payments.

12.3 Develop a Policy on the Use of Cash Payments as Means of Distributing Benefits from Mineral Development

The use of direct payments from mining companies to aboriginal organizations as a means of redistributing benefits from mineral development is another possible rationale for the cash component of IBAs that raises important policy issues. For analytical purposes, it is important to keep the redistributive function distinct from other categories of payments. This rationale is unrelated to the compensation principles underlying some payments because it is not dependent on showing that compensable losses result from a mining project. It should also be kept conceptually distinct from any entitlement that may arise from aboriginal land ownership or from the use and occupancy of traditional territory. These types of IBA payments reflect rights in property and are therefore most analogous to rent or royalties. The focus here, in contrast, is on payments as pure redistributive mechanisms.

Using IBAs for distributional purposes is a clear deviation from the normal practice whereby the federal and territorial governments collect money from mining companies in the form of taxes and royalties and then redistribute this money through payments to individuals,
program and tax expenditures, and other means. Establishing a direct conduit for transferring project revenue from mining companies to aboriginal organizations is arguably inconsistent with the efficiency and equity arguments that justify government’s traditional role in this area. It might also be argued that untied cash payments to aboriginal organizations are less likely to build capacity and achieve economic development than targeted employment and training programs. Finally, cash transfers of this type may be more susceptible to being wasted or misdirected. On the other hand, cash payments do provide a means of ensuring that some benefits from development flow to communities are unable — or unwilling — to avail themselves of other economic opportunities provided by mining projects. Perhaps aboriginal communities that cannot provide goods and services or supply qualified employees to a mining project should nonetheless be entitled to some tangible benefits outside the normal mechanisms for government redistribution. If IBAs are to be used in this way, however, some policy direction is desirable. Two options are available for addressing the current uncertainty regarding this rationale for cash payments.

The first is to establish a principled basis for using the cash component of IBAs as a means of sharing the benefits of economic development. A rationale would have to be provided for distributing benefits in the form of cash to some aboriginal communities or organizations, while other aboriginal people, other northerners, and Canadians as a whole are restricted to the benefits that they receive either through the direct economic opportunities provided by the project (e.g., employment or contracting) or through the share of project revenue that is redistributed through the federal government’s consolidated revenue fund or through territorial taxation and expenditure. Once this rationale was established, a process would have to be devised to determine what constitutes an equitable allocation of benefits in the form of cash to any particular aboriginal organization and how the payments that a mining company makes for this purpose should be treated for taxation and royalty purposes. Attention might also be paid to the accountability mechanisms necessary to ensure that the money transferred to aboriginal organizations through a government sanctioned IBA mechanism is properly managed with a view to improving economic and social well-being.

The second option is to state clearly in IBA policy that the general principles and practices regarding the redistribution of wealth created by private sector economic activity apply in the North. In particular, payments out of project revenue for redistributive purposes would occur only through the normal government channels of taxation and royalties, not through the cash components of IBAs. Cash transfers from mining companies to particular aboriginal organizations would be limited to payments reflecting either specific aboriginal rights or impact-based claims. Access to a share of the general economic benefits from mining projects would be available to aboriginal people and to other Canadians only though the opportunities for direct involvement in the project or through the project’s contribution to government programs via the taxation and royalty regimes.

It should be conceded that this second option rests on an implicit distinction between cash and in-kind benefits that breaks down to some extent in practice. Choosing this option
would not preclude, for example, the inclusion in an IBA of training or business development initiatives funded by the mining company. An argument could be made that, from the company’s perspective, these initiatives have a dollar cost, confer a direct benefit on particular people, and therefore are equivalent to a direct cash transfer equal to the cost of the initiative. There are four arguments, however, why this type of in-kind transfer should be viewed differently from a pure cash payment and why it would make sense to permit the former while prohibiting the latter.

First, company expenditures on initiatives such as training and business development programs differ from pure cash payments because they have the potential of producing mutual benefits. In particular, successful programs will assist aboriginal beneficiaries and also provide the company with a skilled local workforce and reliable local contractors.

Second, programs of this type differ from straight cash transfers by creating an environment of reciprocal obligations and joint responsibility for success. This environment is consistent with the principle, discussed above in Section 7.6, that the economic development component of IBAs should be directed towards building capacity and creating opportunities, as opposed to establishing subsidies and fostering dependency.

Third, in-kind measures are inherently less open-ended than cash transfers. The risk that a redistributive rationale will contribute to a spiral in demands for cash payments that could ultimately constitute an impediment to mineral development in the North is therefore reduced.

Finally, many of the in-kind initiatives that mining companies direct towards aboriginal beneficiaries through the IBA process may in fact be subsidized, directly or indirectly, through government programs. In this situation, the implicit transfer of wealth from a company to a particular community or aboriginal organization is underwritten in whole or in part through the normal redistributive process undertaken by government.

12.4 Establish Standard Principles and Procedures for Cash Payments Relating to Surface Rights and Compensation

DIAND’s IBA policy could promote a structured approach to resolving certain types of cash claims. In particular, payments for access to surface land and compensation payments could be handled through formal principles and processes, rather than being left to unstructured IBA negotiations. This approach is consistent with the principle of separating and simplifying issues raised by IBAs.

Payment for surface access may become an issue in IBA negotiations when mining activity occurs in areas where aboriginal people own the surface land but not the subsurface minerals. In addition, as discussed above in Section 12.2, aboriginal organizations may argue that access payments are appropriate when mining occurs on Crown land within traditional territories, particularly when land claims have not been settled. IBA policy could assist the
parties in resolving these issues by establishing a surface rights regime. This model has been used elsewhere in Canada and is required by some land claims agreements. Although surface rights regimes typically provide compensation for adverse impacts on the surface owner, rental payments could also reflect the use of the surface owner’s land without any requirement to show adverse impact.

The negotiation of surface access agreements remains a possibility under a surface rights regime and negotiations may in fact be actively encouraged. These negotiations occur, however, in the shadow of a surface rights board and will therefore reflect principles and precedents established by that board. Ideally, the scope for negotiations will be narrowed, thereby facilitating private agreements and reducing the likelihood that disputes will require adjudication by the board. In the event that the parties cannot reach a satisfactory solution on their own, the issue may be referred to the board which will then hear evidence and arguments and make a determination. In this way, individual surface rights disputes can be resolved in an efficient and principled manner that reflects the legitimate interests at stake. A well designed surface rights regime would guarantee equitable treatment to surface owners and allow mining companies to predict the approximate cost of securing surface access.

A second means of simplifying and separating issues raised by the cash component of IBAs would be to address claims for compensation through a formal compensation. This process could be integrated with the surface rights regime or could operate separately. The establishment of a formal process to address the range of compensation issues that may arise in IBA negotiations is attractive for a number of reasons:

- aboriginal people and others who are adversely affected by mining development would have their entitlement to compensation clearly affirmed and a means of pursuing compensation claims made available;
- mining companies would understand in advance the principles and process that would determine their compensation obligations;
- IBA negotiations would be simplified because general claims for ‘compensation’ in the form of cash payments or other benefits would be less likely to be combined with other types of claims as part of an undifferentiated IBA package; and
- the overall regulatory process could be streamlined because the elements of compensation that are currently incorporated into some IBA negotiations could be coordinated or integrated with other compensation processes (e.g., trappers’ compensation regimes, compensation provisions in water licences, etc.).
A number of complex issues would have to be addressed if a coordinated approach to compensation is to be established. In particular, not all compensation claims will be easily translated into quantifiable losses. For example, the disruption of social and cultural life that may occur if a mine is located close to a remote community could provide a basis for arguing that cash compensation should be paid, although an alternative approach would be to offset losses of this type by privileged access to non-monetary benefits or by measures aimed directly at mitigating these adverse effects. Regardless of how this issue is resolved, a formal compensation regime would provide a principled and predictable way of addressing it. The inclusion of formal compensation provisions into IBA policy would involve separating impact-based claims for compensation from other IBA issues, establishing principles and procedural guidelines to deal with these claims, and ensuring coordination with existing compensation regimes.

12.5 Address the Relationship between IBA Payments and the Overall Fiscal Regime for Mining

Depending on how the issues relating to cash payments are addressed, there may be a need for DIAND’s IBA policy to reconsider the overall relationship between IBAs and the fiscal regime for mining. A significant concern of the mining industry is the lack of coordination between cash payments and other expenses associated with IBAs and the overall and royalty regime for mining. The experience with the Raglan Agreement in northern Quebec — where payments to aboriginal people were offset by tax concessions — is still very much an exception to the general approach to mining IBAs.

If IBA payments are limited to matters of surface rights, compensation and reimbursement of expenses, there is likely to be little need for coordination with the taxation and royalty regime. In fact, as noted above in Section 7.4, the distinction between impact-based claims and other benefits suggests that mining projects should be required to internalize the costs of their impacts on aboriginal people and others without the benefit of tax or royalty concessions. In cases where IBAs include significant access payments or a revenue-sharing formula for projects on Crown land or where direct payments from mining companies to aboriginal organizations are a significant means of redistributing the economic benefits of resource development, a stronger argument can be made for coordinating these payments with the federal government’s fiscal regime for mining.

As a general principle, the royalty and taxation regime should ensure a fair share of project revenue to the public without being either so onerous or so unpredictable that it constitutes a deterrent to development. To achieve these objectives, the fiscal regime should be

Compensation issues are discussed in Steven A. Kennett, “Survey of Issues and Options for Compensation Regimes”, prepared for DIAND, Renewable Resources, Yukon Region, 5 March 1999. This paper has not yet been released for general circulation. Inquires should be directed to Jennifer Guscott, Director, Renewable Resources, DIAND, Yukon Region.
relatively stable, attention must be paid to the cumulative impact of various taxation and royalty regimes that apply to mining projects, and it may be desirable to tie payments under these regimes to profitability so that less lucrative but nonetheless viable projects are not unduly penalized. The risk with incorporating significant cash payments into IBAs — particularly if these payments are justified on revenue-sharing or redistributive grounds — is that they may be inconsistent with the basic objectives of the fiscal regime for mining. Several options are available to ensure that cash payments and significant expenses associated with IBAs are integrated with the overall taxation and royalty regime in a manner consistent with sound fiscal principles.

First, DIAND could establish a predictable basis for setting the total financial obligations to be imposed on mining companies through taxes, royalties and IBAs. Within the limit established through this process, the allocation of money between government and aboriginal organizations would be worked out between them, without company involvement. This approach is illustrated by a resource revenue sharing regime that allocates a certain percentage of government royalties to aboriginal organizations.

A second option would be to allow mining companies to deduct some or all of the cash payments (and perhaps other expenses) made under IBAs when calculating their tax and royalty obligations to government. In this way, the overall fiscal burden could also be stabilized and payments to aboriginal organizations would look less like a double royalty that, while backed by regulatory sanction, remains uncoordinated with the standard Crown royalty regime.

Finally, DIAND could include in its IBA policy a requirement that certain categories of cash payments under IBAs be linked to project profitability, revenue or a similar variable. While this measure would not achieve full fiscal integration, it would at least signal to the parties that normal principles governing taxation and royalties should apply when imposing additional financial obligations on the mining industry.

12.6 Consolidate the Framework for the Cash Components of IBAs

Each of the options reviewed above would contribute to addressing the issues raised by the cash component of IBAs. The final step that could be taken to establish a structured basis for cash payments would be to consolidate the processes and policy decisions discussed above into a unified framework. Ideally, this framework would clearly identify the types of cash payments that could legitimately be included in IBAs and the principles and processes that should be used when determining the amount of money to be paid to particular beneficiaries. DIAND’s leverage over the IBA process would then be used to enforce adherence to this framework and to discourage the inclusion of additional cash payments in IBAs. Depending on whether issues such as surface rights or compensation are handled within the IBA process or through separate regimes, the scope for cash payments within IBAs could vary considerably.
One result of this framework would be to affirm the existence of certain legitimate entitlements to cash payments that should be addressed through the IBA process or elsewhere. A second result would be to limit the potential for improper use of cash payments within the IBA process and the damage to DIAND’s credibility as a regulator and to the investment climate in northern Canada that results from a perception of impropriety. If all cash payments in IBAs could be justified according to established categories, principles and processes, there would be much less potential for them to be perceived as either company ‘pay-offs’ to aboriginal organizations or as the products of ‘extortion’ by aboriginal organizations able to use political, regulatory or other sources of leverage in an unstructured IBA process.
OPTIONS FOR ADDRESSING THE RELATIONSHIP BETWEEN IBAs AND OTHER PROCESSES

One of the factors complicating IBA negotiations in northern Canada is the sometimes complex set of linkages between IBAs and other processes. DIAND policy aimed at formalizing, simplifying or eliminating some of these linkages would contribute to making the IBA process more streamlined and predictable. Several options of this type could be considered. First, IBA policy could clarify the relationship between IBAs and environmental regulation. Second, measures could be taken both through IBA policy and within other regulatory processes to restrict opportunities and incentives for side-deals and strategic issue linkages. Finally, DIAND could tackle the difficult issues raised when IBAs are negotiated in areas subject to outstanding land claims.

Clarify the Relationship between IBAs and Environmental Regulation

The inclusion of provisions relating to environmental protection and monitoring in some IBAs has raised concerns regarding the relationship between the IBA process and environmental regulation. Environmental provisions are included in IBAs because aboriginal organizations are unsatisfied with aspects the standard regulatory regime, typically in areas such as disclosure of environmental risk, reclamation, compensation, and opportunities for aboriginal involvement in monitoring. While these provisions are often intended to augment the regulatory regime, environmental organizations and others argue that certain aspects of environmental protection may be shifted from the realm of public regulation to that of private IBAs. Specific concerns in this respect were enumerated above in Section 6.6. Several options are available to address these issues.

First, some attention to improving the environmental regulatory regime may appropriate. Ideally, the environmental regulation of mining should be conducted primarily, if not exclusively, through a public regulatory process that does not require ‘topping up’ through project-specific IBAs. Changes to the environmental regulatory regime for northern mining that responded to the concerns of aboriginal organizations could therefore increase confidence in that regime and reduce the pressure for including environmental provisions in IBAs. This result would be consistent with the principles of simplifying and separating issues currently dealt with in IBAs and reducing the complexity and cost of the IBA process. Input from aboriginal organizations, the mining industry, independent regulatory agencies (e.g., Water Boards), government departments and environmental organizations would be required as part of a review of environmental regulation in the North. From the perspective of IBA policy, attention should focus on those areas, such as environmental monitoring, that arise most frequently in IBA negotiations.

A second option is to state explicitly in IBA policy that the treatment of environmental issues in IBAs must respect the standards and procedural safeguards that are found in the public regulatory process. Guarantees of this type could be further strengthened by requiring, as does
section 26.3.2 of the NLCA, that IBAs “shall be consistent with the terms and conditions of project approval, including those terms and conditions established pursuant to any ecosystemic and socio-economic impact review.” Combined with a transparent IBA process, the public availability of signed IBAs and the involvement of government as a party, this approach would do much to allay the fears of third parties that their interests — or the public interest as they define it — may be ignored by IBAs.

A third option is to remove environmental issues from the IBA process and establish a separate mechanism for dealing with project-specific environmental concerns. This approach was used in the BHP process, where an environmental agreement was used to address a range of issues relating environmental protection and monitoring that some aboriginal organizations had originally put on the IBA negotiating tables. This agreement was signed by BHP, the federal government, and the territorial government; aboriginal organizations were actively involved in the negotiations and indicated their agreement by signing an Implementation Protocol. Although the use of a separate mechanism to address environmental issues would increase the number of negotiated processes associated with project approval, it would simplify the IBA process and provide a focused mechanism for addressing environmental issues. Separation of the two processes might address concerns that the promise of economic benefits in the give and take of IBA negotiations could be used to erode environmental protection. Government involvement in the environmental process could, along with guarantees of transparency and some provision for direct public involvement, ensure that the broader public interest is not overlooked. A separate environmental process could also be carefully coordinated with the broader regime for environmental regulation.

Fourth, DIAND could establish regional processes to address environmental issues relating to mining. These processes could involve the federal and territorial governments, all affected aboriginal organizations, all mining companies operating in the region, and other interested organizations (e.g., environmental organizations, hunters and trappers associations, etc.). This approach is particularly well suited to issues such as cumulative effects that cannot be adequately addressed on a project-specific basis. It would also avoid the duplication that could occur if, for example, separate independent environmental monitoring agencies were established for two mines located in the same area. The negotiation process would be simplified by providing for the integration of new projects into a pre-existing framework and guarantees of transparency and public accountability would ensure that the public interest is not overlooked.

A final option is to provide non-parties with a role in the monitoring and enforcement of any environmental agreements — including environmental provisions in IBAs — that are associated with mining in the North. A role for the public at large could be provided through a variety of enforcement and public accountability mechanisms, several of which are discussed below in Section 14.

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64 See, CIRL, supra, note 2, pp. 19-25.
13.2 Restrict Opportunities and Incentives for Side Deals and Strategic Issue Linkages

If the IBA process is to be relatively efficient and predictable, measures to restrict the ability of parties to make side deals and establish strategic linkages with other issues and processes may be required. Achieving these objectives will not be easy. The issues addressed in IBAs inevitably overlap with other regulatory processes and have implications for a range of legal, political, economic and social issues of vital importance to aboriginal people and mining companies. IBA negotiations cannot, therefore, occur in a vacuum. Nonetheless, efforts to structure the IBA process will be undermined if parties can easily apply pressure for IBA concessions through other regulatory levers, hold the IBA process hostage because of unresolved issues elsewhere, or cut side deals to circumvent, for example, any limitations on cash payments in IBAs.

While the ability of parties to engage in these types of strategic behaviour can probably not be eliminated, it might be restricted somewhat by a number of measures including:

- ensuring at the outset that there is a reasonable balance of bargaining power in IBA negotiations;
- ensuring that the IBA process is as open and transparent as possible;
- ensuring fair but firm enforcement of reasonable time lines and other procedural constraints in other processes — notably consultation and environmental review processes — so as to reduce opportunities to use delay and other procedural tactics to affect IBA negotiations;
- providing a means, such as compulsory arbitration, for parties to police bad faith bargaining and resist unconscionable pressure tactics; and
- ensuring that the DIAND’s regulatory sanctions or policy leverage is used only to support IBAs that conform to procedural and substantive requirements established by IBA policy.

All of these measures would reflect a trade-off that is unavoidable if IBA policy is to have a meaningful effect on current IBA practice. Achieving a more structured and predictable process requires some restrictions on the parties. In particular, the scope for increasing leverage in IBA negotiations through what amounts to the abuse of process in other forums should be reduced. This limitation is reasonable in the context of an policy that establishes secure entitlements to IBAs and a level playing field for IBA negotiations.
13.3 Establish a Policy Framework or Protocol for IBAs in Areas where Land Claims Have Not Been Settled

The controversy and uncertainty surrounding IBA negotiations are undoubtedly increased when projects are proposed for areas of the North where land claims have not been settled. Addressing these problems through IBA policy is a challenge because of the fundamental issues that remain under negotiation (e.g., the extent of aboriginal surface and subsurface ownership rights) and because, in many cases, parties will be reluctant to make firm commitments in the IBA context that might adversely affect their positions in land claims negotiations. Several of the people interviewed for this paper argued, in fact, that a significant amount of uncertainty regarding IBAs and related issues will inevitably be associated with mineral development in areas where land claims have not been settled. Consideration could be given, however, to establishing policy guidelines or a negotiation protocol that would reduce the risk of individual projects becoming caught up in the broader land claims agenda.

One option, of course, is to place restrictions — or a moratorium — on development in areas of the North where claims have not been settled. Other options could involve guaranteeing aboriginal people without settled claims a set of basic substantive and procedural rights related to the impacts and benefits associated with mineral development in areas of outstanding land claims. Interim measures might also be adopted, such as an arrangement to hold a portion of resource royalties from projects in trust for aboriginal people until land claims negotiations are completed. This approach could reduce the pressure for IBAs to become something of a surrogate for land claims agreements. A thorough discussion of these options would require a more detailed evaluation of the interrelationships between IBA and land claims processes than was possible for this paper.
14.0 OPTIONS FOR MONITORING AND ENFORCING IBAs

Monitoring and enforcing compliance with IBAs is an area where weaknesses in current IBA practice have been identified. DIAND’s IBA policy could reinforce this part of the IBA process by encouraging or requiring the inclusion of provisions for monitoring and evaluating the implementation of IBAs and by focusing attention on enforcement mechanisms.

14.1 Encourage or Require the Inclusion of Provisions for Monitoring and Evaluating the Implementation of IBAs

As the negotiation of IBAs becomes the norm for mining projects located within traditional aboriginal territories, information on the success — or otherwise — of the various approaches that may be used in drafting and implementing these agreements will become increasingly valuable to the mining industry, aboriginal organizations and government. The proliferation of IBAs means that there will also be more opportunities to learn from past experience. Ensuring that these lessons are learned and applied will, however, require systematic monitoring and evaluation. In particular, this process should involve the use of ongoing monitoring and retrospective case studies to evaluate the success of individual IBAs. Eventually, a more general and systematic analysis of the effectiveness of alternative models for these agreements should be possible.

Monitoring the implementation of IBAs could provide useful information to the parties that are directly involved. For example, monitoring could yield information on the type and level of economic benefits that aboriginal people are obtaining under the agreement and the extent to which employment targets or other objectives are being achieved. Monitoring could thus provide a steady flow of information to determine whether the agreement is achieving its intended results. Qualitative and quantitative measures of the success of recruitment strategies and training programs could be provided and information on the average length of employment and the reasons for termination could be used to identify barriers to aboriginal employment. As another illustration, monitoring the skill level of aboriginal employees and their career development would enable parties to an IBA to assess whether aboriginal people are being successfully integrated into the mining project’s workforce at different levels. This information could be used to reassess, if necessary, the appropriateness of the targets established in the IBA and to modify the programs used to reach these targets. Monitoring could thus provide the basis for incremental improvements in IBA implementation or, in some cases, a more substantial renegotiation of the agreement. The information gained from ongoing monitoring could be used to advantage by both aboriginal organizations and the mining company to improve their working relationship over the life of the project.

Monitoring and evaluation could also have more general benefits given the trend towards greater use of IBAs. From a public policy perspective, there is an obvious interest in determining their success in achieving stated objectives. Clearly, a regulatory framework that requires the negotiation of IBAs should be designed to achieve maximum benefits at minimum cost and
delay. Regulatory design should incorporate information based on practical experience, some of which could be generated through systematic monitoring.

In some cases, of course, the costs of monitoring may be excessive relative to the benefits to be achieved. Monitoring provisions also be included in IBAs without any government involvement. Given the private and public benefits that monitoring IBA implementation could provide, however, policy direction in this area could be justified and would likely improve current IBA practice.

IBA policy could enhance the monitoring and evaluation of IBAs in three ways. First, where IBAs are required as a matter of law or policy or where government is an active participant in the IBA process, government could take a lead role in evaluating the success of IBAs in achieving their objectives. This type of evaluation could be achieved in three ways: (1) the compilation of specified information as reported by the parties to IBAs; (2) periodic information gathering and analysis by government officials; or (3) the commissioning of independent reports on IBA implementation. A second approach is for the DIAND to support or require the inclusion of IBAs of provisions giving the implementation committees both the specific mandate and the resources to monitor implementation and make recommendations to improve effectiveness. Finally, provisions requiring periodic independent evaluations of IBAs could be promoted as standard features of these agreements.

The use of these techniques and the broad dissemination of the resulting information could improve both the implementation of individual agreements and the general ‘state of the art’ of IBAs in Canada. In addition, a more extensive body of written work evaluating the success of various IBA techniques would be likely to develop. Improved monitoring and evaluation of IBAs thus has the potential to yield clear benefits to all interested parties as the use of these agreements becomes increasingly prevalent.

14.2 Encourage or Require Compliance Mechanisms for IBAs

The enforceability of IBAs is an issue that gives rise to both confusion and frustration. Understandably, beneficiaries of IBAs who feel that their expectations are not met may look to the compliance of other parties with their undertakings under the agreements. In cases where they feel that compliance has not lived up to the terms of the agreement, enforcement becomes an issue. Enforcing IBAs is difficult, however, because the ability of these agreements to deliver the intended benefits is often affected by a range of factors, some of which are beyond the control the parties and some of which can only be modified by concerted action of more than one party. For example, a failure of a mining project to achieve a target level of aboriginal employment or contracting can be due to a wide variety of factors. Although one of these factors may be a failure of the mining company to follow through on its IBA commitments, problems may also be linked to a range of other factors such as inadequate education and basic training among the aboriginal population or a lack of interest on the part of aboriginal people in the
available jobs. Where several of these factors are at play, simply penalizing the mining company because targets were not met seems both unfair and futile.

Widespread recognition of the inappropriateness of enforceable targets or quotas in many circumstances means that this approach is not generally used in IBAs. If the alternative is simply loose ‘best efforts’ language, however, these agreements may have few teeth and little impact. An argument can made, of course, that a properly structured IBAs should result in mutually advantageous commercial relations between mining companies and local people. Nonetheless, there is concern in some quarters that IBA commitments, whether viewed as contractual or regulatory, should be binding in a formal sense. If this approach is to be pursued, four issues could be addressed. The first concerns the types of IBA commitments that should be enforceable. The second issue is the sanction to be used to secure compliance. Third, the rights of non-parties may sometimes be raised as a compliance issue. Finally, attention could be paid to the mechanism for resolving disputes and determining the appropriate sanction in cases of non-compliance.

The issue of which IBA commitments are enforceable could be addressed by making clear at the outset that enforcement will be directed to measurable commitments relating, for example, to the payment of compensation and the provision support for capacity building. In other words, commitments by a mining company to compensate a trapper, contribute money to a training program, make a specified number of internship positions available or implement a rotation and leave schedule that accommodates aboriginal employees would be strictly enforceable. Equally, government would be expected to comply with commitments to provide specified funds or programs as part of the IBA. This approach reflects the general principle, discussed above, of emphasising the role of IBAs in capacity building and the provision of opportunities for economic development, as opposed to focusing directly on specific end results. It is also fair because the party undertaking these commitments has the capacity to deliver on them unilaterally. From the compliance perspective, IBAs would not simply be weak ‘best efforts’ documents because the parties — primarily mining companies and governments — would have firm obligations to take specific measures to build capacity and create opportunities. Also included in IBAs, however, would be weaker ‘best efforts’ provisions such as undertaking to fill available positions with qualified local people and provide contracts to local businesses. These commitments would not be strictly enforceable, although actions in these areas might well be subject to monitoring and scrutiny in order to identify problem areas and opportunities for improvement.

If enforcement is appropriate for certain types of firm commitments that can be clearly defined in advance and are within the exclusive control of the party who makes them, the second issue is the type of sanction to be used. Sanctions should be onerous enough to constitute meaningful incentives to comply with IBA commitments, as opposed to being merely non-compliance fees. They should not, however, be so onerous that they are unlikely ever to be used. If the only sanction for non-compliance with IBA commitments is the closing down of a mine, this option is unlikely to be exercised and breaches of the IBA may therefore go unpunished. A
graduated approach to sanctions may also be appropriate, with relatively minor penalties for initial non-compliance and more punitive measures available in the case of a persistent pattern of ignoring IBA commitments.

Particularly when the value of the undertaking can be measured in monetary terms, a financial penalty is a logical choice. Financial sanctions could be applied to both impact-related compensation provisions and to commitments related to economic development (e.g., support by industry for training or internship programs or support by government for day care or counselling services). A failure to deliver could result in an obligation to pay an amount sufficient to provide what was promised by other means. This money could be used directly to provide the program or fund the initiative that was called for in the IBA. A punitive penalty could be added to this restitution amount in cases where non-compliance is particularly serious or where it reflects a pattern of behaviour.

In addition to financial sanctions, regulatory measures could be used to enforce IBAs. This approach depends on the connection between the IBA regime and the other regulatory levers available to government. For example, regulatory approvals or renewable surface or subsurface leases provide obvious means for government to enforce IBA commitments. One option, of course, is simply to deny the approval, cancel the lease, or refuse an application for renewal in the event that IBA commitments are not met. A less drastic option would be to reduce the term of the approval or lease, requiring the company to reapply in a relatively short time and address the issue of IBA compliance at that time. Regulatory levers for securing compliance require, of course, a legal nexus between the IBA requirements and the exercise of discretion by the regulator.

Public accountability could also be used as a sanction for non-compliance. This approach could involve a formal complaint process whereby one party to an IBA could require one or more of the other parties to answer allegations of non-compliance in a public forum. Compliance could also be encouraged through an open review of the parties’ compliance with the IBA. A review of this type could involve all parties and need not be triggered by a particular complaint. The sanction in both cases would be the embarrassment and bad publicity that would result from a formal finding of non-compliance. This sanction could stand on its own or could be linked, of course, with the type of financial penalty described above.

One advantage of a public accountability sanction is that it could be applied to all parties, regardless of whether their obligations are easily quantifiable. As noted above, the economic development objectives of IBAs often imply reciprocal or complementary obligations on the part of mining companies, government and aboriginal organizations. All three parties could be called to account through a public review process. The forum for this type of public review could be a legislative committee, an independent oversight body, or a committee of the parties. The mandate of this body would be to evaluate compliance with the terms of the agreement, highlight areas of non-performance, and work constructively towards improving IBA
implementation in order to achieve better results. Its proceedings would be open and its findings made publicly available.

The third issue relevant to enforcement concerns the interests of non-parties. The contractual model for enforcing IBAs means, of course, that non-parties would generally be without a remedy in the case of non-compliance by one party. A regulatory approach could open the door for non-party enforcement, although regulatory instruments are generally at the discretion of the regulator so long as it acts within its statutory mandate. Public accountability mechanisms offer perhaps the broadest scope for non-party involvement, although some constraints would likely be necessary to ensure that non-parties could not highjack the IBA process in order to pursue other agendas.

The appropriate mechanism for dispute resolution and determining penalties in individual cases is a fourth issue. As noted above, this role could be played by the body charged with the public review process. Another alternative would be the inclusion within the IBA of an arbitration provision. An arbitration procedure specific to IBAs could be developed, or disputes could be dealt with through the general statutory arbitration provisions of the jurisdiction.

Enforcement is by no means a full solution to problems with IBA implementation. The complex reasons why IBAs sometimes fail to deliver expected benefits often cannot be reduced to non-compliance with obligations by particular parties. Furthermore, it is generally recognized that IBAs should, ideally, provide a basis for developing a positive and mutually beneficial relationship among the parties. Much of what is required to make IBAs work falls into the subjective areas of good faith, commitment, understanding, respect and mutual accommodation. None of these can be easily enforced and all can be undermined by an adversarial approach to IBA implementation. The fact remains, however, that clear commitments and meaningful adherence remain important elements of the IBA relationship. A DIAND IBA policy that gave some attention to enforcement and compliance could foster greater confidence in this area.
15.0 OPTIONS FOR ESTABLISHING AND ENFORCING IBA POLICY

A number of means are available for implementing the policy options described above. One option is to rely on moral suasion and initiatives that complement the IBA process. A second approach is to establish formal policy guidelines, backed by existing regulatory and political leverage. Third, formal legal requirements for IBAs could be enacted. Fourth, a mechanism could be established for legislated project agreements. Finally, DIAND could provide support for territorial leadership in relation to IBA policy. This section of the paper provides a brief description of each of these possible vehicles for IBA policy.

15.1 Rely on Complementary Initiatives and Moral Suasion

Several of the policy options discussed above could be implemented through initiatives that would complement, but not regulate, the IBA process. In addition, DIAND could rely on the use of moral suasion and leadership by example to exert influence on the IBA process. This approach would be intended to address concerns with current IBA practice and affect the incentives facing the parties without the use of coercive powers of regulation. It may be, for example, that simply by providing some guidelines regarding IBA procedure and the content of these agreements, DIAND could have a positive impact on IBA practice. Furthermore, the provision of information and assistance to the parties might by itself facilitate IBA negotiations. The risk, however, is that a very light-handed approach will not significantly affect the contextual factors and incentive structures that are currently driving IBA practice. Furthermore, the absence of a more substantial and legally grounded framework for IBA policy makes ad hoc intervention of the type used in the BHP process both more likely and more problematic in legal and policy terms.

15.2 Establish Formal Policy Guidelines Backed by Existing Regulatory and Political Leverage

A second option would be to include whatever policy options are selected in a formal set of policy guidelines and then enforce these guidelines using existing regulatory and political leverage. In other words, parties would be advised that timing for project review and approval could be affected depending on the progress in IBA negotiations and the parties’ compliance with the policy framework. DIAND’s leverage in relation to surface leases or the issuance of water licences, to give two obvious examples, could be used to induce parties to follow the guidelines set out in IBA policy. Some observers of current IBA practice argue that DIAND currently has sufficient leverage to influence IBA practice and that a more flexible, policy-based approach is preferable at this time to the establishment of specific legal requirements. The principal counter argument is that existing regulatory levers are not designed to support IBA requirements, making their use for this purpose both legally questionable and inherently unpredictable.
15.3 **Enact a Formal Legal Requirement for IBAs**

A clear legal requirement that makes IBAs of some form a precondition to project approval is a third option for policy implementation. Precedents for this approach include the provisions of article 26 of the NLCA, the benefits requirements established under surface leases in northern Saskatchewan, the legislative basis for benefits plans — but not IBAs — under federal and oil and gas legislation, and the provisions requiring benefits agreements under the Yukon Oil and Gas Act. Legal IBA requirements would provide maximum certainty for IBA policy direction and would enable DIAND to regulate directly specific matters relating to IBA practice. For example, a legal basis would be required to prohibit IBA provisions that restrict aboriginal participation in regulatory processes or impose confidentiality shields on agreements. Entrenching IBA policy in legislation is, of course, more complicated than simply issuing a policy statement. An intermediate option would be to elaborate IBA policy through regulations, notably under the *Canada Mining Regulations*.

15.4 **Provide for Legislated Project Agreements**

Entrenching project-specific agreements through legislation is a fourth option for implementing IBA policy. This mechanism has been used in Australia, where custom designed regulatory packages have been negotiated for large projects and embodied in project-specific legislation. The result would be to give legal weight to the contents of IBAs. If combined with a general legislative framework to structure the IBA process, the result would be to establish a clear legal and regulatory basis for both the negotiation and the implementation of IBAs.

15.5 **Support Territorial Leadership Regarding IBAs**

A final approach that could be considered is for DIAND to lend its regulatory weight to the development and implementation of IBA policy at the territorial level. This approach clearly raises a host of issues relating, for example, to devolution and to political sensitivities regarding the respective roles of DIAND and the territorial governments. As several people interviewed for this project pointed out, however, topics such as education and training that are central to IBAs are within the primary authority of territorial governments. The Yukon Territorial Government has taken independent initiatives in the benefits area, notably the benefits requirements under its *Oil and Gas Act* and the inclusion of provisions in some Yukon First Nations final agreements — agreed to by the territorial government and First Nations but not by the federal government — that would result in ‘Project agreements’ for mines. In the NWT, the territorial government’s active interest in securing local benefits from major mining projects is illustrated by the Socio-Economic Agreement that it signed with BHP in connection with the Ekati mine. IBA policy is

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thus an area where collaboration with territorial government would appear desirable and ceding the leadership role to the territory could be considered under some circumstances.
16.0 CONCLUSION

The challenge of developing IBA policy should not be underestimated given the complex and overlapping issues raised by these agreements, the range of interests that are involved, and the wide variety of circumstances in which IBAs may be negotiated. Some of the issues addressed by IBAs are rooted in the fundamental political and socio-economic challenges facing northern Canada. For these issues, there are clearly no simple solutions. There are also important linkages between IBAs and other areas of DIAND policy, notably on questions relating to the negotiation and implementation of land claims agreements, the devolution of powers to the territorial governments, and the establishment of revenue sharing arrangements with aboriginal people. While clear policy decisions on some of these contentious issues would have direct benefits for IBA policy, it seems unlikely that IBA concerns will be the principal driving force behind policy direction in these areas. The result is that IBA policy development will be affected by, but not determinant of, policy developments in other areas. In short, the IBA process will continue to be subject to forces beyond its control.

There are, nonetheless, a number of concrete policy options available to DIAND if a decision is made to move away from the status quo in relation to IBAs. The options set out in this paper provide the building blocks for IBA policies ranging from a cautious set of initiatives intended to structure and complement the IBA process to the development of a comprehensive legal and policy framework for IBAs. In selecting among these options, the principles set out in Section 7 of this paper could provide some guidance.

A number of themes run through the issues, principles and options set out above. At the risk of oversimplification, several of these themes can be singled out for particular emphasis at this point. Perhaps the most significant contribution that IBA policy could make to improving the effectiveness of IBAs would be to support the economic development aspects of these agreements through capacity building initiatives. In this area, there is a strong argument that government has a key role to play. Procedurally, IBA policy should aim to increase certainty for all parties in IBA negotiations. This objective would be furthered by separating out and dealing with discrete issues in a structured manner and by establishing end points and deadlock breaking mechanisms for the IBA process. More generally, DIAND policy could address a variety of issues by applying standard regulatory principles to the IBA process, including the establishment of parameters for both the substance of these agreements and the procedure for their negotiation and implementation.

In terms of the development and implementation of IBA policy, there is clearly scope for a series of modest initiatives that would add structure and value to the IBA process. Rather than seeking to establish at the outset a single, fully formed and tightly defined policy framework for all IBAs in northern Canada, IBA policy could be developed in an incremental fashion by focussing on issues where a measure of consensus can be achieved and where meaningful progress can be made. On this basis, a more comprehensive approach to the IBA policy could be developed over time with input from all interested parties.
Finally, it should be underlined that a comprehensive consultation process, supported by additional legal and policy analysis, will be required before finalizing IBA policy. The interviews conducted for this paper showed clearly that although IBAs elicit a high degree of interest and concern in northern Canada, many of those involved in or familiar with the IBA process have not yet developed precise ideas about how to improve current IBA practice. A striking feature of the interviews was the understandable difficulty of moving from general concerns with IBA practice to specific proposals for IBA policy. Progress in this respect, it is suggested, requires that a well defined set of principles and options be put on the table in order to generate concrete comments, criticisms and suggestions. If this paper contributes to a more focused debate on these matters, it will have achieved a worthwhile objective.

The consideration of options for IBA policy in northern Canada will undoubtedly intensify the already vigorous debate about what is to be achieved through IBAs and how the rights, interests and objectives of the various parties can best be reconciled. DIAND’s response to these issues will have important implications for the future of mining in the North and for the well-being of aboriginal people and other northerners. The discussion of issues and options presented in this paper will, it is hoped, assist DIAND in establishing a basis for this policy process and provide all interested parties with some raw material for the discussions that will inevitably ensue.