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The Law of Public Participation in Mining and Resources Development

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I Introduction

The growth of “public participation” law and practice is one of the most significant occurrences in mining and natural resources development in the late 20th century. And this phenomenon - variously called “public participation,” “citizen involvement,” “stakeholder engagement,” “indigenous peoples’ rights,” “local community concerns,” “NGO intervention,” “access to information,” “access to justice,” “Aarhus rights,” etc. - is predicted to become even more central to the successful, sustainable development of minerals and other resources in the 21st century.

To develop a baseline and analysis of this issue, the MMSD partnered with the International Bar Association (IBA), the world’s largest association of lawyers and legal associations. The IBA’s Section on Energy and Resources Law (SERL) has a highly regarded Academic Advisory Group (AAG), composed of top legal scholars in the field of resources and environmental law from universities and think-tanks around the world (representing Europe, Africa, Asia, Australasia, and North, Central, and South America). The AAG proposed a two-year study (1999–2001) of public participation in mining and resources development, including a workshop at which members’ studies would be peer reviewed and culminating in the publication of a state-of-the-art book on public participation law and practice.

Recognizing the opportunity this presented, IIED/MMSD and IBA/SERL agreed to jointly sponsor the workshop and book. AAG members have prepared a total of 18 in-depth studies analyzing public participation law, practice, and future trends at the international, regional, and national levels. The successful workshop was held on 25–26 May 2001, hosted by the Vermont Law School, South Royalton, Vermont, USA. Oxford University Press will publish the book in April 2002: ***Human Rights in Natural Resources Development: The Law of Public Participation in the Sustainable Development of Mining and Energy Resources***.¹ And the AAG is scheduled to present the book and their views to the IBA/SERL Biennial Conference in Edinburgh, Scotland, 14–19 April 2002.

Following is a summary of the workshop panels and corresponding sections and chapters of the AAG/Oxford public participation book:

¹ *Human Rights in Natural Resources Development: The Law of Public Participation in the Sustainable Development of Mining and Energy Resources* (Donald N. Zillman, Alastair R. Lucas & George (Rock) Pring eds. 2002). For details on ordering, see <http://www.oup.co.uk/law>. Another recent AAG book of interest - on the legal and economic effects of international climate change law on the global energy industry - is *Kyoto: From Principles to Practice* (Peter D. Cameron & Donald Zillman eds. 2001) published by Kluwer. For details, see <http://www.wkap.nl/book.htm/90-411-1689-3>.

2 Workshop Panel I/ Book Section I: The Basics of Public Participation Law

2.1 *The Emerging International Law of Public Participation Affecting Global Mining, Energy, and Resources Development - George (Rock) Pring² & Susan Y. Noé³*

A “public participation explosion” has been occurring since the 1960s, and few sectors will be more impacted by this than the mining and resources development industries. New international and national laws and practices are injecting this “human dimension” into resources planning, financing, licensing, operating, and closure on a global scale. The spread of public participation is uneven, but it is no longer a “luxury” or limited to wealthy western democracies. Government officials and industry historically controlled projects; now there is involvement from local communities, indigenous rights groups, nongovernmental organizations (NGOs), international governmental organizations (IGOs), international financial organizations (IFOs), and a myriad of other “stakeholders.” Project planning must adapt to include public participation from “cradle to grave,” if it is to be successful in the 21st century.

Factors causing the public participation “explosion” include:

- Democratization trends since 1989
- Adoption of the new legal paradigm of “sustainable development”
- International environmental movement
- IFO requirements
- Human rights regimes
- Organization of indigenous peoples and local communities
- Technology, particularly the information-exchange capabilities of the Internet.

Part II of the chapter lays out the conceptual and historical background of public participation, its definition, rationales, and its positive and negative consequences. It notes the modern model (Aarhus Convention) consists of three elements or “pillars”: (1) access to information, (2) participation in decision-making, and (3) access to justice. Part III surveys the numerous international laws with public participation requirements relevant to the mining and resources industries, most significantly the recent Aarhus Convention. Part IV explores other international legal authorities accelerating public participation, including “soft law,” human rights, IFO requirements, and voluntary corporate standards. Part V examines participation rights of special groups, including indigenous/tribal peoples, local communities, women, youth, and NGOs. Part VI concludes with a predictive look at how the international law of public participation may evolve in the coming decades.

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2.2 Underlying Concepts and Theoretical Issues in Public Participation in Resources Development - Barry Barton ⁴

Public participation is fundamentally about values and philosophies, so this chapter explores the underlying theoretical and conceptual ways it fits into our differing views of law, politics, the state, society, and citizenship. This is essential reading to have a framework for the discussion and evaluation of public participation, since all agree it is unlikely to go away in the minerals and energy sector. The chapter's introduction explores the forms, origins, and growth of participation. Part II provides the necessary background of political theory, critically analyzing the models of rational elitism, liberal democracy, pluralism, neo- or market-liberalism, participatory democracy, civic republicanism, and even more radical critiques.

Part III analyzes and critiques in depth the justifications as well as the criticisms of public participation. The "substantive" rationales argue it provides more accurate decisions; the "process" rationales argue it is essential for its own sake. The criticisms include lack of necessity and other drawbacks (negative outcomes, cost, delay, excessive formalism, disillusionment, power imbalances), which are closely criticized in their turn by the author. Part IV looks at a number of issues that will arise in the future, including regulatory reform, regulatory culture-community, the need for empirical and comparative studies, the unevenness of public participation in practice in different countries, and the extent to which it is more than "just politics."

3 Workshop Panel 2 / Book Section 2: International Law Perspectives on Public Participation

3.1 The Rights of Indigenous Peoples to Participate in Resources Development: An International Legal Perspective - Gillian Triggs ⁵

The expropriation of indigenous peoples' lands and resources for national development - often without their consent or even consultation - is a growing and severe problem. This chapter explores the international law that has developed to protect the rights of indigenous peoples, as well as the international procedures resorted to for their protection, and to illustrate both provides a case study of the proposed Jabiluka uranium mine and mill in central Australia.

Part I shows that international law now requires, at a minimum, indigenous participation in resources development on traditional lands. It analyzes these, including include the UN Charter, Human Rights Declaration and Covenants, the Racial Discrimination Convention, ILO Convention No. 169, and other authorities. These substantive rights are now enforceable through procedural mechanisms including both international and national complaints procedures of varying effectiveness. The case study examines the history of the conflict between the Mirrar Gundjehmi people and a major Australian resources company over the Jabiluka project, surrounded by Kakadu National Park, which has been delayed and

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is thought likely to be terminated as a result. This classic case study well illustrates the range of issues concerning mining and indigenous peoples.

3.2 Public Participation, the Aarhus Convention, and the European Community - Peter Davies ⁶

A momentous step in public participation has occurred with entry into force on 30 October 2001 of the 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention). The convention establishes a greatly expanded role for the public in government decision-making. This is already requiring change in European Community (EC) law and will require change globally as more countries ratify the treaty.

This chapter is an in-depth treatise on Aarhus and its “three pillars” (expressed in its title). (1) Access to information: Knowledge is vital if the public is to participate in a meaningful, informed way. The chapter lays out the prior EC law and the improvements made in Aarhus (definitions, exceptions, response timing, grounds for refusal, review, cost, etc.), while pointing out problems and ways in which information can still be denied the public under the convention. (2) Public participation in decision-making: Aarhus adopts the liberal democratic justifications supporting public participation in government decisions. The chapter analyzes the Aarhus participation requirements as to specific activities (including energy and minerals production), plans, programs, and policies, and contrasts them with earlier EC law. (3) Access to justice: If access to information or public participation fail, the public must have recourse to objective, third-party tribunals for review. The chapter explores actions brought by persons against EC institutions and actions brought by the EC against member states. The inescapable conclusion is that the Aarhus Convention will have a major bearing on the future of public participation law.

3.3 The International Law of Public Participation: Protected Areas, Endangered Species, and Biological Diversity - Catherine Redgwell ⁷

For the mining and resources development industry, one of the most challenging and controversy-producing public participation areas comes from the international conventions dealing with preservation. This chapter analyzes the three principle ones with which the industry has most involvement: (1) the 1972 Convention for the Protection of the World Cultural and Natural Heritage (WHC), (2) the 1971 Ramsar Convention on Wetlands of International Importance (Ramsar), and (3) the 1992 Convention on Biological Diversity (CBD).

The older WHC and Ramsar treaties allow greater public participation than the 1992 CBD. Regulatory regimes are created by WHC and Ramsar, including designation of sites of international importance, IGO oversight committees, and NGO input opportunities. Mining projects near Yellowstone and Kakadu National Parks and other protected sites have been affected by the public participation opportunities of these treaties, resulting in “dynamic” use and expansion of the treaties, as well as direct recommendations to the mining industry. The CBD has no comparable public participation process, but does

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require environmental impact assessment (EIA) for activities affecting protected areas, which may in future have significance for the mining industry.

3.4 Contractual Management of Public Participation Issues: Tackling the Sustainable Development Principle - Peter Cameron ⁸ & Ernesto Correa ⁹

The mining and resources industry response to public participation need not be reactive or limited to government regulatory models. Increasingly, the industry itself is creating new bilateral “contract-based” arrangements that address the diverse social, economic, and environmental issues that arise in planning and developing new projects. This chapter analyzes these *private sector* models of public participation, as contrasted with the prevailing public regulatory models.

Four case studies are presented: (1) “Participation agreements” between a diamond mining company and Northwest Territories aboriginal peoples in Canada; (2) “Local agreements” between the Flambeau open pit mine and government and community representatives in the USA; (3) “Future act agreements” between Rio Tinto and aboriginal groups in Australia; and (4) the “Corporate social investment program” of Richards Bay Minerals with local community and cultural heritage interests in South Africa. The conclusion is that there is a definite trend toward contractual or quasi-contractual arrangements to satisfy (if not control) public participation and public benefit interests.

4 Workshop Panel 3 / Book Section 3: Key National and Regional Perspectives on Public Participation in the Developed Nations

4.1 The Human Dimension in the 21st Century Energy and Natural Resources Development: The New Law of “Public Rights in Private Development” in the United States - Celia Campbell-Mohn ¹⁰

In the USA, public participation is a key component of mining and natural resources projects. This chapter provides a welcome “roadmap” through the otherwise bewildering “maze” of US national-level public participation laws.

Public participation laws affecting project planning, siting, and development are first identified and analyzed, including environmental justice legal authorities, “friendly neighbor” agreements, the National Environmental Policy Act, Endangered Species Act, Surface Mining Control and Reclamation Act, and the Coastal Zone Management Act,

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federal resources leasing and management acts, historic preservation acts, special laws governing Native American and Alaskan tribal lands and resources. Public participation laws affecting project operations are then separately detailed, including the Freedom of Information Act, Emergency Planning and Community Right to Know Act, the air/water/waste environmental quality laws, and the Alien Tort Claims Act. Today's "prudent project manager and lawyer" in the USA must focus on a multi-dimensional legal-practical approach that includes all stakeholders from siting to closure.

4.2 Canadian Participatory Rights in Mining and Energy Resources Development: *The Bridges to Empowerment?* - Alastair R. Lucas ¹¹

In Canada, public participation in mining and resources projects "has moved from controversy to orthodoxy" since 1970. Canada's Constitution provides no explicit participatory rights, except for aboriginal peoples, so participation opportunities in Canada come from legislation, agency rules, and other authorities. This chapter documents the legalization of procedural opportunities for stakeholder participation in Canadian project decision-making. It then goes a step further, examining whether the law has moved beyond mere procedures and truly created a "bridge to empowerment" of people of a substantive nature.

Case studies of "bridging" instruments are presented, including (1) constitutionalized aboriginal rights, (2) First-Nations land claims agreements, (3) the Alberta Energy and Utilities Board's consensual dispute resolution process, and (4) participant funding programs of government agencies. The final part of the chapter documents and analyzes the specific participatory rights to be found in Canadian laws, policies, and practices. The conclusion is that participation law is changing the way Canadian mining and resources government agencies, companies, and stakeholders operate but that, with the exception of First Nations, those laws have only created a partial bridge to real empowerment so far.

4.3 The Emphasis on Public Participation in Energy Resources Development in Denmark, and the Rights of Greenland and the Faroe Islands - Anita Rønne ¹²

Denmark has a long tradition of democratic rights including broad public participation in government decision-making, particularly in the last quarter-century. This is being accelerated by its approval of the Aarhus Convention in 2000 and the steps taken to implement it nationally. Part I surveys the Danish responses to Agenda 21. Part II discusses Denmark's constitutional framework. Part III examines the special autonomous status of Greenland and the Faroe Islands in relation to energy and resources development and the differing approaches to public participation in the two areas. The remaining parts of the chapter examine in detail Denmark's evolving laws of public participation, including access to information, development planning, EIA, energy companies, and public appeals.

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4.4 Rights to Public Participation in Norwegian Mining, Energy, and Resources Development - Ola Mestad ¹³

In Norway, public participation law in the natural resources area has been developing over the last 40 years, through legislation and court decisions. There are both general legal rules and principles of public participation, as well as specific sector legislation (e.g. for energy and hydro development but not mining). Three 1980s-90s constitutional changes that advanced public participation are analyzed: rights for the Sami people (Norway's only indigenous population), right to environment, and human rights.

Norway has signed, but not yet ratified the Aarhus Convention. Public participation laws to date are then analyzed with regard to the following stages: overall government planning, the development approval process, administrative appeals, access to justice (including several case studies), and the operation and closure phases of projects.

4.5 Public Participation in Sustainable Development of Energy Supply in the Netherlands - Martha M. Roggenkamp ¹⁴

Public participation is well-established in the Netherlands, particularly in the energy and natural resources sectors. The country has signed the Aarhus Convention and is in the process of harmonizing its national laws to permit ratification, which is not expected to be difficult given the already participation-promoting nature of Dutch laws.

Parts I and II of this chapter elaborate the legal framework for public participation in the Netherlands, with particular emphasis on the importance of the Aarhus Convention, the 1985 EC EIA Directive, and the national Government Information, General Administrative Law, and Environmental Management Acts (the latter three being sufficiently congruent with Aarhus so that it is assumed major changes will not be required in order to ratify it). Parts III and IV take a very in-depth look at the “upstream” and “downstream” mining-energy sectors, respectively, and their differing legal approaches to public participation.

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5 Workshop Panel 4 / Book Section 4: Key National and Regional Perspectives on Public Participation in the Emerging Economies

5.1 New Laws on Public Participation in the Newly Independent States - Svitlana Kravchenko ¹⁵

This chapter surveys the laws and practices of public participation in the “Newly Independent States” (NIS) of the former USSR. ¹⁶ The task of replacing the authoritarianism of the past with modern participatory democracy and the rule of law has begun in the NIS, but its progress is varied and nowhere near completion. Sustainable development generally has not been adopted, and mining and resources development continue to be focused on economic benefits without proper consideration of public views or the environment. The NIS have been leaders in promoting the Aarhus Convention (10 of the 17 countries that have ratified the Aarhus Convention to date are NIS). Declaratory provisions on access to information, public participation, and access to justice exist, but some NIS regimes still prevent citizens from exercising these rights.

The chapter provides a comparative analysis of the NIS’s constitutional, international, and legislative law provisions on the three “pillars” of Aarhus. The principles of public participation in environmental decision-making are well established in the NIS laws, but many countries have done little to transform law into practice. Access to information from government and business is specifically provided in two countries and indirectly (through environmental protection and other laws) in several others. Public participation in mining-energy development (formerly state enterprise) is in theory at least equal to Western Europe (with EIA laws providing the most powerful opportunities). Access to justice is provided by some, not others. All three are beset by obstacles in practice, including lack of participatory democracy traditions, public passiveness, low environmental consciousness and knowledge, post-communist mentality of decision-makers, poor economic conditions, and widespread corruption. The NIS will require numerous reforms in law and practice to meet its Aarhus commitments.

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¹⁶ The particular focus of the chapter is on the five countries with which the author has most familiarity (Armenia, Belarus, Moldova, Russia, and Ukraine), with information as well on others (including Azerbaijan, Kazakhstan, Kyrgyzstan, Turkmenistan, and Uzbekistan).

5.2 The Construction of Participatory Democracy in Central and Eastern Europe - John Bonine ¹⁷

Public participation is now being built into the constitutions, laws, and regulations of most countries and entities of Central and Eastern Europe (CEE).¹⁸ The sources of this change include the requirements to become part of the European Union (EU), ratification of the Aarhus Convention, desire for free trade and foreign investment, increased environmental activism, and the emergence of public interest law firms.

Part I outlines the historical origins and growth of participatory democracy in the CEE states. Part II details the activism of the CEE public interest environmental law movement country by country. Part III examines in detail the influence of the international law on this evolution. Part IV surveys the constitutional bases of the three pillars of public participation as well as a right to environment, and Part V, the legislative counterparts. In conclusion, the author finds public participation “solidly” built into the law of the CEE states and foresees a stable move toward implementation of at least EU-quality public participation standards there, despite present obstacles.

6 Workshop Panel 5 / Book Section 5: Key National and Regional Perspectives on Public Participation in the Developing World

6.1 The Legal Framework for Public Participation in Decision Making on Mining and Energy Development in Nigeria: Giving Voices to the Voiceless - Yinka Omorogbe ¹⁹

This chapter assesses the extent and effects of public participation rights in natural resources development in sub-Saharan Africa in general, focusing on Nigeria and treating South Africa in a comparative perspective. Part I provides the essential historical and cultural background from the pre-colonial era on.

Parts II and III compare and contrast the South African and Nigerian constitutional and legal provisions bearing on public participation in natural resources development, concluding that South Africa provides far more procedural and substantive public participation rights in fact than does Nigeria. Not least, Nigerian law, despite detailed provisions, does not permit public participation to stop, alter, or increase costs of a project. The animosity of local peoples to the oil companies is explored. Case studies of various

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¹⁸ These include the Baltic countries of Estonia, Latvia, and Lithuania, as well as Poland, the Czech Republic, Slovakia, Hungary, the republics or entities of Bosnia, Croatia, Kosovo, Macedonia, Slovenia, and Yugoslavia (Serbia and Montenegro), Albania, Romania, and Bulgaria. A more accurate geographic accounting would include within the term CEE the Ukraine, Moldova, Belarus, and parts of Russia, but these are covered in the preceding NIS chapter.

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projects are analyzed. Obstacles to reform are critiqued. The process of empowering the people has begun in sub-Saharan Africa, but it will take longer for participatory democracy to take root and flourish.

6.2 The Legal Framework for Indigenous Peoples' and Other Public's Participation in Latin America: The Cases of Argentina, Colombia, and Peru - Lila K. Barrera-Hernández²⁰

The benchmark for public participation in Latin America is the International Labor Organization Convention No. 169 (ILO 169), which requires participation and protection of indigenous peoples in natural resources development. While lacking significant ratifications elsewhere, ILO 169 is very significant in Latin America, where it has been ratified by 10 countries, including Argentina, Colombia, and Peru, the focus of this study.

The chapter examines in depth the constitutions, laws, and practices promoting public participation in oil and gas development in each of the three countries, finding that Colombia and Peru are more active in providing participation rights than Argentina. Numerous obstacles are documented in each of the countries - including unclear and unenforced laws, land title problems, narrow participation opportunities, and government intransigence - and curative reforms are proposed.

6.3 Key Regional Perspectives on Public Participation: Mexico and Central America - José Juan González Márquez²¹

In Mexico and elsewhere in Central America, the legal recognition of public rights to participate in mining and resources development has been a function of recent economic development. Constitutional and legal provisions of Mexico and other countries are analyzed. This is followed by analysis of the “publics” entitled to participate, legal rights to land and resources, access to information laws, public participation provisions, and authorities governing access to justice.

The decade of the 1990s marks the true beginning of public participation in these countries, and several illustrative cases are described, both positive and negative as to outcome. Developer sensitivity about being targeted for “ecological dumping” as well as a more environmentally informed and concerned public are contributing to the opening up of the mining and energy sectors, although still in a limited way.

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6.4 Public Participation in the Environment: A South-East Asian Perspective - Lye Lin Heng²²

The 10 member countries of the Association of South-East Asian Nations (ASEAN)²³ present considerable variation in the amount of public participation allowed, based on differing degrees of government policy, development, and economics. This study surveys in depth the public participation law and practice of Thailand, Malaysia, Indonesia, the Philippines, and Singapore and contrasts these with the other ASEAN countries. While public participation may be ingrained in the Philippines and has begun to receive legal recognition in Thailand, Malaysia, and Indonesia, it is almost non-existent in Laos and Cambodia, and appears not to be allowed at all in Myanmar. The Aarhus Convention, being viewed as “European,” is unlikely to be adopted by any ASEAN state in the near future, with the possible exception of the Philippines. Still, it will serve as an aspiration for environmentalists in South-East Asia and points the way for the future.

6.5 Public Participation in Mining and Petroleum in Asia and the Pacific: The Ok Tedi Case and Its Implications - Zhiguo Gao²⁴

The development of public participation in Asia and the Pacific region is very uneven and can be found at three different levels - (1) the developed level of an Australia, (2) the early development level of a Papua New Guinea (PNG), and (3) the lowest level of slow development as found in China, Vietnam, and other countries. Nevertheless, the emerging trend of public participation as seen in Australia and PNG will sooner or later spread to other parts of Asia and the Pacific.

One of the newest developments exemplifying and stimulating public participation is highly publicized lawsuits for money damages filed by locally impacted communities in the home countries of the transnational mining and petroleum companies charged with environmental irresponsibility. To illustrate this, the author provides the dramatic case study of the Ok Tedi mine in PNG, contrasting it with several other widely publicized cases. The conclusion is that such lawsuits are not isolated cases but part of a new trend of environmental participation through access to the courts and that their high costs in money, project delays/stoppages, and bad publicity will put strategic pressure on companies and governments to integrate effective public participation into the development process or pay the consequences.

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MMSD is proud to have sponsored this expert study of public participation in mining and natural resources development. The resulting book should be a state-of-the-art reference on this important topic for industry, government, and stakeholders for years to come.

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