



Mining, Minerals and  
Sustainable Development

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## Part III: Challenges

# Chapter 14 Roles, Responsibilities, and Instruments for Change



International  
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For the minerals sector to improve its contribution to sustainable development, all the actors – governments, companies, labour unions, international institutions, communities, and NGOs – need to understand and be able to fulfil their roles and responsibilities. Working towards effective governance represents the greatest challenge facing the sector and is the key to overcoming many of the challenges discussed in previous chapters. In most cases, sustainable development requires some redefinition of roles, responsibilities and the introduction of new instruments for change. It requires all actors to respect a core set of governance principles, as well as the broader objectives of sustainable development. (See chapter 1.)

Government has a central role to play in improving the sector's contribution to sustainable development. Passing laws, adopting regulations, deciding cases in courts, and enforcing the law are among the core governance activities. In the 1990s, new or modified mining policies and legislation were adopted in more than 100 countries. These changes have, for the most part, been undertaken to promote foreign investment and to create a stable and attractive fiscal and regulatory climate. Legal frameworks that institutionalize liberal economic policies have helped many countries to attract mining and other investments, while creating a competitive international arena. Whether this flow of investment can catalyse sustainable development is yet to be seen.

Minerals investment has unquestionably created real opportunities and benefits for some people in some areas of the world. In other cases, those opportunities have been lost due to, for example, a lack of government capacity, corruption, or damaging power struggles and conflicts over who controls the revenue. Governments may provide clear enabling legislation and strong policies in one area but not the rest. Other areas of policy may be just developing, hobbled by unclear or antiquated laws, with unclear lines of authority and few resources.

In the most successful economies, the state's role as facilitator of investment is balanced by its role as regulator – establishing laws and policies that provide for regional land use planning or that put limits on environmental impacts. Relatively well resourced states may also provide a social safety net that cushions the impact of change – such as the closure of a mine – on those most in need.

To improve their ability to fulfil their roles, governments must be given support and assistance: in eliminating the asymmetries in policy and legislation; strengthening capacity; and building a policy framework capable of turning investment into sustainable development. This will take time, and many are insisting that there be some mechanisms to keep development on track and to control some of the effects of weak governance during the strengthening process.

In areas where governments lack resources, others have in various ways attempted to fill part of the gap. For example, the World Bank operational guidelines and safeguard policies have had a significant influence in addressing a series of problems associated with the minerals sector, ranging from resettlement of displaced communities to unresolved land claims by indigenous communities. Environmental conditions attached to credit and insurance have also encouraged improvements in planning and management. They have

initiated environmental impact assessment procedures or required respect for human rights, and have been widely followed by commercial lenders.

In some cases, mining companies have developed stronger policies to govern their own conduct where a government is not effectively policing them. There have also been advances in voluntary actions by industry in a variety of areas – from corporate reporting to codes of conduct on human rights. Other advances have been made in defining and promoting best social and environmental practice in the management and operation of mining projects.

The impositions of external actors, such as multilateral lending institutions, can cause resentment with national governments. Such actions can create a tension between the right of the sovereign state to manage its own affairs and the desire of outside institutions, subject to political forces in other parts of the world – mainly the North – to fill what they regard as gaps in national policies.

This chapter focuses on the roles of different actors in various instruments – such as regulations, market-based mechanisms, and voluntary initiatives – which can be used to promote change. It closes with a discussion of the main governance challenges facing the minerals sector.

## **The National Policy Framework**

### ***Legislation***

Law has always been and will continue to be a key part of the governance framework for the mining sector. Effectively implemented, law is a leveller: it generates consistent incentives for responsible behaviour of all companies and other actors, regardless of their size.

National government provides the legislative framework for the minerals industry, and national or sub-national legislation is the route through which most legal obligations attach to companies. For the regulator, a clear-cut and enforceable framework is essential to control the activities of the industry effectively. For the industry, it is important to have a regulatory system that is stable, transparent, and appropriate to the conditions of the country. National law provides the basic framework for determining the distribution of economic wealth. It can even reduce power imbalances between companies and communities. Legal rights to land, to information, and to compensation enhance communities' negotiating powers. Legally enforceable rights and effective access to justice can help build trust by reducing the fear that compromise inevitably means a win by the more powerful party.

Law must be understood in context. It is never the total answer to how societies govern themselves. If it were, society would be in a continual state of adversity. Negotiated cultural norms, traditional ways of doing things, and the influence of religious doctrines are extremely important to how things get done. Law has different levels of importance in different societies. In some – perhaps the United States – law has achieved a dominant position in the way things are done. In others – remote traditional villages with infrequent

contact with central authorities – the affairs of society are governed by rules well understood locally, but not necessarily incorporated into national legislation. In many countries, effective implementation and enforcement of law is currently little more than a desirable goal.

A mining company from a culture where law is paramount, is not operating in the same framework as a traditional society. The company may see itself as entitled to rely on the framework of national law that creates the conditions for its investment. National government may see the company as an instrument for extending the authority of its laws and institutions into areas where they are weak. Local people may regard this as an imposition that undermines customary or other systems of local authority. To prevent conflict in such situations, operation within the national legal framework and good understanding of local systems are both paramount.

Ill-conceived legislation may bring social or environmental benefits at huge economic cost. It may help one group at the exclusion of others. Getting the right balance for the distribution of costs and benefits taxes all policy-makers.

The range of legislative systems in different countries has resulted in a diversity of methods for allocating the responsibilities of these issues among mining, environment, and other laws. No two countries possess exactly the same framework. Each country needs to assess the level of legislation generic to all industries and how much should be specific to the mining industry. In addition, the arrangements for administration and enforcement tend to be complex because the division of responsibilities between different government departments and between national, provincial (or state), and local levels of government is seldom straightforward. There is no ideal system. Law is inextricably linked to local circumstances. Every state must decide for itself how to construct and implement a regulatory framework.<sup>1</sup>

### *Mining Legislation*

A *mining act* is the principal regulatory instrument governing mineral exploitation activities in most regimes, and it defines both the rights and obligations of the mining title-holder and the power of the government officers. The government's first role is to regulate the sector at all levels, including domestic exploration and exploitation or extraction, as well as primary mineral processing.

Many mining acts, or the associated implementing rules and regulations, either state that the holder of an exploration or mining licence must comply with all other relevant laws or include a number of provisions, such as environmental ones. For example, many mining acts require one or all of the following: an environmental and social impact assessment/statement, an environmental management plan, a rehabilitation programme, and a rehabilitation or restoration fund. Many of the environmental clauses contained in mining acts overlap with environmental legislation, though the latter are usually generic to all activities and contain a more precise description of the requirements. There is a growing trend for countries to draft specific environmental regulations for the mining sector.

One kind of mining-specific legislation requires special mention: mine closure planning laws, also referred to as reclamation or rehabilitation laws. These are the norm in countries such as Canada, Australia, and the US.<sup>2</sup> Typically they require the development of a plan, with some form of public participation, specifying the environmental conditions to be achieved at the site at the end of the mine's life. South Africa has such a law. Few other developing countries have closure legislation, although some are starting to appear. Although these laws have played important roles in improving performance in industry, they require a considerable capacity to administer.

The World Bank has undertaken important work in assisting governments to reform their mining codes. Though the reform of mining codes addresses environmental concerns and, occasionally, social issues, it has largely focused on addressing the concerns of investors and lenders, not least because foreign direct investment is an important source of capital for economic development in poor countries.

### *Other National Legislation*

A mining act is only one part of the policy framework. Many important issues relevant to the minerals sector are found in other legislation. This section provides an idea of the range and scope of this legislation, although it is by no means an exhaustive catalogue of the options.

*Investment laws*, for example, set out the basic conditions of security for foreign investment. To protect investments, investors prefer that there are transparent, non-discriminatory systems for the granting of mineral tenure; that a judicial system protects mineral tenure against all third parties and the state; that the holder of the mineral exploration rights has the sole and exclusive right to exploit any commercial deposit discovered; that the applicable taxation laws are fair and reasonable; that the producer has the right to sell any product produced on the free market; and that the producer has the right to freely convert profits to other currencies and to repatriate capital.<sup>3</sup>

The need to provide clear and predictable rules for private investments is reflected in the changes in the World Bank mining policies of the last decade, which stress the important role of secure and stable governance arrangements in attracting mining investment. With World Bank support, a movement for liberalization and reform of mining and investment codes has begun and has now led to legal changes in many countries.

A number of countries have passed laws that assure investors some form of stability of conditions of investment. In other nations, government enters into contractual 'stabilization agreements'. The tension here is between the desire to create an attractive investment climate and the need for laws to reflect the reality that societies change and evolve.

*Tax laws* vary widely, but are highly relevant to mining investment. (See Chapter 8.) A major question is often tax stability – the degree of protection that the company has from future government decisions to raise taxes. Numerous laws give minerals projects protection against future tax increases.

*Business law* sets out the basic framework for the pursuit of profit at the national level, governing the relationships between owners (such as shareholders) and managers (often directors) of businesses. It sets out the basic rules that govern how the interests of financial stakeholders are protected and financial risk allocated.

*Labour law* provides the basic framework for the protection of workers in the minerals sector. It deals with issues like terms of employment, job security, dismissal, and the rights of injured workers. It also deals with the rights of trade unions and the issues of health and safety and child labour.

*Land law* deals with land tenure – the acquisition, disposal, use, protection, and management of land. Some aspects of this are discussed in Chapter 7.

*Environmental law* is increasingly important to minerals activities in almost all countries. Countries with little framework of this frequently start by enacting a law to provide for environmental impact assessment, the most common tool of environmental management in national legislation. This may be accompanied by a ‘framework law’ establishing the national environmental authority and allocating responsibilities among government agencies. In many developing countries, international treaties such as the Convention on Biological Diversity have provided the direction for national law.

As systems of environmental law mature, they tend to add legislation for water pollution control, air pollution, solid waste, and the handling and disposal of toxic substances, all of which are highly relevant to the minerals industries. Other areas that apply to the minerals sector include water resources law covering use of surface and ground water. The pace at which many developing countries have adopted legislation, inspired by international conventions, internal political demands, and foreign examples, has been rapid and may have grown faster than the infrastructure necessary to make it work effectively.

The tensions over environmental law in the minerals industries are many. Three most salient are the extent to which environmental statutes can be used as a hidden barrier to development of projects rather than confronting the management of their impacts; the extent to which companies can be held liable later for environmental problems arising from activities that were legal when they were conducted; and the administration of the law by an environmental agency versus a sectoral agency, such as a mining or natural resource ministry.

### ***International Conventions***

International agreements in the form of new conventions or protocols to existing conventions have been adopted in many areas relevant to sustainable development. Most of these address specific global or regional issues. Although conventions are meant to be legally binding, most have no mechanism for ensuring compliance. Conventions are intended to oblige governments to pass national legislation to implement their commitment, but many of them are not integrated into national policy due to a lack of resources, political will, and the power of enforcement. There are also non-legally binding ‘soft law’ declarations setting international policy objectives and norms for government action in a range of areas. Broader sets of international statements to which governments

subscribe, such as the Rio Principles, attempt to codify basic values that should underlie individual and collective action.

The number of international conventions has increased significantly in recent years, dealing with an ever widening range of issues on which global action has been deemed necessary. (See Table 14–1.) Conventions today cover biodiversity and protected areas, and most recently climate change, but also pollution and waste issues such as hazardous chemicals and the disposal of waste (See Chapter 10). The International Labour Organization core conventions (see Chapter 6) and others provide for the protection of workers, women, and children, including the 1995 Safety and Health in Mines Convention. OECD member countries and five other states adopted a Convention on Combating Bribery of Foreign Public Officials in International Business Transactions in 1997.<sup>4</sup> (See Chapter 8.) There are a number of international instruments (such as the Rio Declaration) that recognize public rights to information or participation in decision- making, the most recent being the 1998 Aarhus Convention.<sup>5</sup> (See Chapter 12.)

<b>Table 14–1. Key International Agreements of Relevance to the Mining Industry</b>	
<b>Instrument</b>	<b>Relevance to the Mining Industry</b>
Aarhus Convention, 1998	Establishes rights to access to information, public participation, and access to justice.
OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 1997	Requires international cooperation in the to combat corruption.
ILO Safety and Health in Mines Convention, 1995	Establishes the principle for national action on the improvement of working conditions in the mining industry.
Biological Diversity Convention, 1992	Aims to conserve biodiversity and ensure an equitable distribution of benefits from its use; implemented through national biodiversity strategies and plans.
Framework Convention on Climate Change, 1992	Seeks to limit changes in the global climate by controlling emissions of greenhouse gases, notably through the 1987 Kyoto Protocol, and is leading to a range of national measures such as carbon/energy taxes.
Basel Convention on the Trade in Hazardous Wastes, 1989	Prohibits all transboundary movements of hazardous wastes for recycling and recovery, affecting the trade in scrap metals.
Indigenous and Tribal Peoples Convention, 1989	Provides basic rights for indigenous and tribal peoples, including respect for their traditions and property.
Montreal Protocol on Ozone Depleting Substances, 1987	Forces changes to fire protection and refrigeration practices, especially in the deep gold mining in South Africa.
World Heritage Convention, 1972	Affects permission to mine if there is the potential to affect natural or cultural values.

There is currently no international governance regime or statement of principles for mining or mineral resources, which stands in stark contrast to renewable resources such as agriculture, fisheries, marine resources, and forestry.<sup>6</sup>



## **Other Instruments**

Command-and-control legislation, accompanied by a threat of punishment and a penalty, is not the only effective way of promoting change. Prescriptive legislation can be costly to implement and requires an appropriately trained enforcement team, extensive and regular monitoring of operations, analytical and data evaluation support, and an effective judicial system to administer fines and penalties.

Increasingly, it is recognized that it is useful to improve standards by appealing to the self-interest of those most directly involved. A new generation of policy thinking ties instruments to the characteristics of the societies where they will be implemented. For example, laws intended to enforce the eradication of child labour in small-scale mining need to be accompanied by strategies for poverty elimination that provide economic alternatives.

Government authorities are now using a variety of other regulatory approaches to overcome these limitations. However, none of these alternatives used alone is able to address all situations. In practice, a mixture of instruments is now advocated in order to provide the most suitable response to national needs. Among these are performance targets, market-based instruments, and negotiated or voluntary agreements. In many cases, these require collaboration between the community and NGOs as well as relevant government agencies and the company.

### ***Prescriptive versus Non-Prescriptive Legislation***

Prescriptive legislation provides absolute values or standards, set by the relevant government department or agency, that have to be met at all times. They are relatively simple to put in place and provide a measured response to the question of compliance. While prescriptive legislation can be highly successful in certain areas such as pollution reduction, there are also disadvantages in this approach. Large minerals operations lack the degree of standardization present in other sectors such as manufacturing. Standardized requirements, an integral part of a prescriptive system, may result in reduced efficiency – under-protection at some sites and unnecessary over-protection at others. This promotes standardized solutions that do not necessarily deliver the optimum environmental or economic performance.

In contrast, non-prescriptive legislation relies on the operator identifying the issues and making the management commitments to deal with them. This provides the opportunity to develop the process and procedures and to identify suitable standards on a site-by-site or case-by-case basis to be built into the overall management of the operation. This approach is more flexible to deal with many social and environmental issues that tend not to fit any one model.

On the other hand, non-prescriptive regulation can provide the operator with the opportunity of understating or hiding issues that may be socially or environmentally critical. Ill-defined standards are difficult to measure and open to individual interpretation. It also means that compliance or non-compliance often is unclear, leaving the regulating agency unsure of its role.

## ***Standards and Criteria***

A standard (or criteria) is a measure that serves as a basis to which others should conform. Social and environmental standards are developed, for example, to regulate the discharge of pollutants to the natural environment. They provide guidance on a range of issues from public participation and reporting to community development. Standards are an essential tool for a regulator who wishes to use (at least in part) a command-and-control or prescriptive approach, but they should be used with caution. Unfortunately, many standards are established using little science and much guesswork. A government may base its standards on those of another country with little or no reference to the existing conditions.

## ***Performance Targets***

Performance targets are one of the instruments available to the regulator using a non-prescriptive approach, particularly on environmental performance. They are based on the local environment and the most appropriate technology, and are expected to show a gradual but continuous improvement. The choice is left to the operator, who is assumed to have sufficient expertise to make sound, well-informed decisions. They differ from quality objectives in that they try to define the behaviour of industrial operations rather than its impacts. Such an approach assumes that there is an effective regulatory and enforcement system in place and that legal recourse, in cases of non-compliance, is feasible. Where sufficient resources are not available, independent monitors, trusted by both the government and the operator (and preferably the community as well), should be used to monitor compliance.

While there are statements of intent in many government policy documents and provisions in minerals agreements on areas such as local employment targets, business spin-offs, and infrastructure, the use of social performance targets generally lags behind environmental ones.

## ***Market-Based Instruments***

Market-based instruments are increasingly favoured because they can harness competition to drive better performance and because they are more economically efficient than 'one size fits all' or command-and-control systems. They can, when properly applied, produce a desired outcome at lower cost than regulation by encouraging innovation and continuous improvement, by finding solutions suitable for local situations, and by reducing enforcement and administrative costs.

They can be used in both prescriptive and non-prescriptive regulatory regimes, as way to provide funds for the regulatory agency or as an incentive to improve environmental and social management. In a prescriptive situation, fees or charges can be levied for a number of stages in the regulatory process, such as the submission of a social and environmental impact statement or the issuing of an environmental permit. These fees are usually set at a fixed rate regardless of the social and environmental implications of the project and provide no incentive for a company to improve their performance.

Governments have long used tax incentives as a tool of public policy. These can take a wide variety of forms, depending on the national tax code and the objectives being sought. For example, tax incentives can be used to reduce the cost of an environmentally related expenditure or to encourage reductions of emissions or waste generation. In the mining sector, they can also play a role in encouraging technological adaptation towards more efficient and sustainable processes.

Because tax incentives can be costly and may distort investment decisions, many governments have recently reduced rather than increased the tax incentives they offer. Instead of lowering costs to business, some governments have begun to increase costs by taxing environmentally undesirable activities. The Scandinavian countries, in particular, have introduced several taxes, primarily related to the use of energy.<sup>7</sup> Over the long term, such ‘green’ taxes may be offset by cuts in traditional taxes, such as income or payroll taxes, as part of an effort to shift the tax burden from ‘goods’ to ‘bads’.

### ***Voluntary Agreements***

Voluntary agreements, covenants, and other instruments sometimes described as self- or co- regulatory are finding an increasingly important place in the regulatory system. The advantage is the high degree of flexibility they provide, allowing companies to find the most cost-effective solutions for each individual case. The disadvantage is their inability to ensure that all companies comply (enforcement mechanisms are rarely built into voluntary agreements) and the fact that non-signatory parties are not bound by the agreements. Nevertheless, efforts such as MEND (Mine Environment Neutral Drainage) in Canada and the Responsible Care programme in the Chemicals industry demonstrate that sector-wide voluntary programmes can produce impressive results in some areas.<sup>8</sup>

There are complex linkages between voluntary initiatives and domestic law. For example, many commentators emphasize the need for a strong underlying regulatory regime to encourage the development, participation in, and continued evolution of effective voluntary initiatives. Without a credible threat of regulation, the argument goes, few companies will invest in a voluntary initiative requiring significant behavioural change. On the other hand, there is also the possibility that through widespread acceptance and application, voluntary initiatives take on some authoritative status of their own as ‘best practice’, or even, in common law legal systems, a standard of care with legal consequences.

### ***Terminal Liabilities: A Long-Term Challenge***

A key governance challenge in the minerals sector is the issue of closure costs or long-term liabilities. Closure costs can be significant and may include the expense of relocating work force, maintaining schools and other infrastructure, environmental remediation, and the long-term treatment of acid drainage from the site. At many mine sites, and especially where governance is weak, there may be no clear agreement on who should be responsible for these various costs – government, the company, the local community, unions or individuals. As the time for closure approaches, questions over responsibility come to the forefront and opportunities for positive solutions decrease. This is most extreme where

closure results from a lack of profitability. In the absence of prior agreement such as bonding, it is likely that no one will have set the funds required aside.

Sustainable development requires a long-term approach to decision-making. Investment in long-term, durable solutions is unlikely to be made unless the company, the government, and others take responsibility for closure costs and regard them as part of the costs of mining. All too often there is the assumption that someone else will pay – in the future.

The lack of acknowledgement of closure costs is exacerbated by the accounting treatment they receive, as the costs may look small when discounted at 6–8% or more over 30 years. There should be a serious look at the balance sheet treatment these anticipated liabilities receive and how company accountants and auditors view them.

The lack of clarity regarding ‘who pays what’ in the absence of detailed prior agreement can also provide an incentive to all parties to delay closure because they fear the outcome of negotiations. When closure occurs, there is sometimes a justified concern that costs simply will not get paid: the company and the government may never agree on who should pay what, or one party may not have sufficient funds. Moreover, they will have a joint interest in minimizing the bill.

This concern is heightened by a number of recent controversial end-of-life solutions. Box 14.1 examines two cases – Ok Tedi in Papua New Guinea and Marcopper in the Philippines. These demonstrate the importance of factoring in the costs of closure from the time a mine opens and not developing a project if the environmental or social costs are likely to be prohibitively expensive. They also demonstrate the importance of ensuring that open and transparent processes for dealing with closure are in place, along with clear processes of arbitration when disputes arise.

#### **Box 14–1. Terminal Liabilities: The Cases of Ok Tedi and Marcopper**

The mining of gold and copper from Mt. Fubilan in the Star Mountains adjacent to the Ok Tedi River in PNG began in 1984.<sup>9</sup> The approved proposals incorporated two stable waste dumps and a conventional tailings storage facility, but a landslide destroyed the facility site. An interim tailings disposal scheme was approved that retained 25% of the tailings but released the rest into the Ok Tedi river. Following unsuccessful attempts to identify a suitable storage site, the PNG government approved the deferral of the construction of permanent waste retention facilities until 1990. A further agreement in 1990 allowed for the disposal of all the tailings and a large portion of waste rock from the failing dumps into the Ok Tedi, with considerable impact on the environment.<sup>10</sup> (See Chapter 10 for further information on these impacts.) Because of its revenue-generating potential and provision of employment in a region with poor development, the mine has been actively supported by the government of PNG.<sup>11</sup>

It is estimated that 73,500 people live in the Ok Tedi/Fly River drainage area with a subsistence lifestyle based on traditional gardening and hunting. Inundation of the floodplains has meant a loss of land, especially in the Ok Tedi area, and elevated sediment levels have severely reduced the fish population in the Ok Tedi.

Growing opposition to the waste disposal culminated in legal action against the operating company, BHP, and an agreement to pay damages to landowners in 1997. In 2001, the newly merged BHP Billiton sought to close the mine rather than face further environmental litigation over mine waste

#### Box 14–1. Terminal Liabilities: The Cases of Ok Tedi and Marcopper (continued)

polluting the river system but was opposed by minority partners Inmet Corp. of Canada and the PNG government, because the mine accounts for 10% of GNP and 20% of total exports.<sup>12</sup> Despite the fact the PNG government as regulator had stated that the mine would not be closed, BHP Billiton negotiated with other shareholders for this to occur because it felt that it had no alternative but to exit.<sup>13</sup>

The net result is that BHP Billiton is terminating its involvement with the project.<sup>14</sup> In the words of its Managing Director, Ok Tedi is 'not compatible with our environmental values and the company should never have become involved'.<sup>15</sup> BHP Billiton has made a commitment not to become involved in new mines with riverine tailings disposal. Under the withdrawal plan, BHP Billiton will transfer its 52% stake in Ok Tedi Mining Limited to a specially established Singapore-based Programme Company called the PNG Sustainable Development Programme, to be used for sustainable development purposes in PNG for up to 40 years.<sup>16</sup> Outlining the main elements of the agreement, Inmet said that the new company had clearly defined corporate rules for decision-making, distribution of funds and public reporting. BHP Billiton would give financial support to the new company for three years.<sup>17</sup>

Another aspect of the BHP Billiton's exit arrangements requires that full cash provisioning for mine closure be made by all shareholders between now and then, including a proportional contribution from the Programme Company to ensure responsible mine closure at Ok Tedi. Another condition for the exit arrangements was that there should be a process of informed consent. Consultation was conducted by Ok Tedi Mining Limited (OTML) and the PNG government with the affected villages in the Western Province so that, in formally agreeing to the mine continuing for its full life, they understood that the mine's continuing operation would result in significant environmental impacts.<sup>18</sup> The Melanesian Peace Foundation was commissioned two years ago by the company to help the local communities develop negotiation skills. To date, Mine Continuation Agreements have been signed with more than 90% of affected villages. In these agreements, Ok Tedi and its shareholders are released from all demands and claims associated with future environmental impacts. This arrangement has met with considerable opposition. Four landowner leaders wrote a letter to PNG Members of Parliament, warning that if legislation setting the scene for BHP Billiton's liability-free exit from Ok Tedi passed, they would shut down the mine.<sup>19</sup> The PNG Parliament passed the OK Tedi Mine Continuation Bill in December 2001.

In the Philippines, the Marcopper Mine on Marinduque Island was permitted in 1968. The mine was 39.9% owned by Placer Dome. Initially tailings were stored in an impoundment north of the Taipan open pit. In 1975 Marcopper shifted to near-shore disposal of tailings into the shallow waters of Calancan Bay. Between 1975 and 1990 an estimated 200–300 million tonnes of tailings were discharged. In 1991, production shifted to the San Antonio open pit, and tailings disposal was shifted into the old Taipan pit. This method of disposal involved plugging a dewatering tunnel that had drained the open pit.<sup>20</sup>

In March 1996, the plug in the drainage adit failed catastrophically, releasing an estimated releasing an estimated 1.5–3 million cubic meters of tailings into the Makulapnit River, Boac River, and eventually the ocean west of the island, 26 kilometres from the open pit. A UN investigation blamed the spill on poor environmental stewardship by the management of the mine.<sup>21</sup>

In 1997, a year after the Boac river spill, Placer Dome divested its shares in Marcopper and refuted the claim that it had responsibility for the spill, as it was a 39.9% shareholder in the mine and not the operator. Nevertheless, the company agreed to clean up the river and compensate affected villagers. The clean-up included installing a temporary plug in the adit, building berms to prevent further overbank flooding, and the dredging of a channel in the Boac River to catch tailings washed

#### Box 14–1. Terminal Liabilities: The Cases of Ok Tedi and Marcopper (continued)

downstream. Placer Dome has spent about US\$50 million to clean up the Boac River and retired a US\$20-million loan that Marcopper owed the Asian Development Bank.<sup>22</sup>

The Ok Tedi and the Marcopper cases raise many important questions regarding liability for past decisions. In the case of Ok Tedi, regarded as a national asset by PNG's Prime Minister Sir Mekere Morauta, the government has prevented the mine being closed, which would clearly be the best solution for the prevention of further environmental damage. The government fears that closing the mine would devastate the national economy and ruin communities.<sup>23</sup> The establishment of a fund management company in Singapore has raised questions for many, particularly community members. In the case of legacy issues, it is incumbent on companies and governments to be entirely transparent about their dealings and respond to the serious questions raised by stakeholders if trust is to be built and maintained.

At Marcopper, Placer Dome was a minority shareholder in the operating company, Marcopper Mining. Questions remain about the conditions of the company's withdrawal from a project that used a system of tailings disposal deemed unacceptable in its home country of Canada. The company believes that it has exceeded its contractual liability by paying for the clean-up, which is still being completed. However, local actors and others continue to worry about the long-term implications of the project, still dogged by reports of seriously unsafe and leaking tailings storage facilities and the possibility of a repeat of the 1996 spill.

### *Financial Surety*

The regulatory authority is usually ultimately responsible for the cost of treating the social and environmental problems created by the abandonment of a mine site. As a result, it is becoming common practice for some form of financial surety or rehabilitation bond to be established prior to project approval. This provision is designed to guarantee performance and to cover both the technical and financial failure of a mine operator to meet the full obligations at the time of closure or in the event of an unplanned closure. (See Chapter 10.) Governments establish financial sureties in order to protect the environment and avoid the costs of cleaning up orphaned sites. However, the cost of a surety can be significant and could deter a potential mining investor. Smaller or thinly capitalized companies often have difficulty with surety requirements. It is therefore necessary for the government to have a good understanding of the issues involved in the design and application of a financial surety policy.

For some mine operators, the amount of financial surety is established during project negotiations based on information in the environmental impact statement and is an estimate of the closure and rehabilitation costs. Another method is for the mine operator to be charged a levy on every tonne of rock or ore mined or processed or on every tonne of concentrate or metal produced. The financial surety should be available to either the mine operator or the relevant regulatory authority, to pay for rehabilitation. If the mine operator defaults, the money remains in the hands of the regulatory authority. Once all stages of rehabilitation have been completed, including a passive care programme, the remaining funds may be returned to the mine operator. Whichever method is used to establish a financial surety, it is essential that it is regularly assessed, as part of the environmental

management of the project, and increased or decreased as necessary. In some countries, contributions to a financial surety are tax-deductible.

## **Enforcement**

While all instruments promoting behavioural change need data collection and monitoring, those based on specified requirements require an effective and regular enforcement mechanism to ensure their success. Traditionally, a mining or an environmental inspectorate has been charged with monitoring and enforcement. Today, the increasingly complex legislative requirements require new approaches to enforcement as well as training and institutional strengthening to support the more conventional functions of the enforcement agency. Close liaison between various government departments is essential. Practical resource allocation increasingly favours a division of functions, with, for example, the environmental agency responsible for establishing policies, law, and standards, while the mining department undertakes management and enforcement.

In countries with a federal government structure, it is common for enforcement to be delegated to the provincial (state) or local government. While the central government maintains the overall control and management of the project, the regional government, which is often more in touch with the local situation, is responsible for the day-to-day monitoring and direct liaison with the company and local community. Some countries have elected to place a full-time enforcement officer at each major project who, with proper training, can work closely with the company to ensure compliance while improving cooperation and consultation with all levels of government and the local community.

Whatever arrangement is adopted, compliance with environmental standards and legislation may be ensured by mechanisms such as imposing civil liability on mining operators, compulsory insurance or payment into a guarantee fund to pay for damages and compensation, financial surety, and incentive measures to maintain social and environmental standards in the absence of specific regulations. All these measures require some degree of inspection and enforcement by the competent authorities, and fines or sanctions of sufficient importance to dissuade non-compliance.

Government agencies are also starting to use consulting services in enforcement. In Western Australia, for example, evaluation of the assessment reports is now being handled by accredited assessors rather than by the government agencies directly. A key new role for the agencies is now checking the credentials of assessors.

## **Litigation**

Depending on national laws, litigation is available to individuals acting alone or in class action, to private organizations, and to governments. Lawsuits can take many forms, including private-versus-private litigation (for example, where industrial activity imposes 'unreasonable' costs on neighbouring communities); government-versus-private litigation, as a means of enforcing statutory obligations; and private-versus-government action, in which individuals or groups seek a judicial order to compel a government to act in accordance with its constitutional or statutory duties. In addition, in some countries

governments can ask courts for help in clarifying responsibilities such as whether a particular level of government has the authority to address a particular issue.

Litigation can provide clarity and an enforceable outcome. Because it is expensive and time-consuming, however, and often tends to exacerbate and formalize conflict among the litigating parties, it is normally only pursued where non-confrontational modes of resolving the dispute are not possible or have failed. The extent to which private parties have access to litigation, including right of standing and intervention, depends in part on national statutory provisions.

Responsibility without accountability is a hollow prospect, and providing for effective access to justice is a fundamental path to accountability. In many countries, even where claimants have serious, valid complaints as a result of environmental, health, or human rights aspects of mining activities, their national court systems do not necessarily afford them clear or speedy remedies. Other countries may have corrupt court systems or systems where legal actions associated with human rights abuses by public agencies cannot be pursued. More significantly perhaps, lack of access to trained lawyers or effective financial assistance for legal representation may put justice through the courts beyond the reach of many citizens. In South Africa, for example, the Legal Aid Board, faced with a financial crisis, ceased providing funding for all but a very few personal injury claims in 1999. In a series of actions beginning in 1997, more than 7500 South Africans, assisted by public funding from the Legal Services Commission, claimed damages for personal injuries in UK courts against Cape plc, at one time the world's largest asbestos mining company. An 'in principle' agreement on an out-of-court settlement worth £21million was reached in December 2001.<sup>24</sup>

In the face of such barriers, there have been a growing number of cases against parent companies of mining (and other resource companies) in recent years: in UK courts over operations in South Africa and Namibia, in Australian courts over the Ok Tedi mine in Papua New Guinea (PNG), and in US courts over operations in Papua (formerly Irian Jaya).<sup>25</sup> They have resulted in a variety of rulings, with a limited record of success for the claimants. While some of this litigation may be motivated by nothing more complex than the fact that getting access to courts in OECD countries is easier or that they award higher damages, it also reflects weak systems of governance in some host countries. A major factor in bringing this litigation is that there is sometimes nowhere else to take these complaints.

Bringing a claim over community-level problems in Africa, Asia, or Latin America before British or Australian court systems is not the ideal way to proceed. But if there is no other option, the pressure to open up these or similar fora to numerous increasingly complex disputes will be high. Without clear and effective methods of expressing grievances within an ordered system of governance, they will emerge as they often do now – before institutions that are not well equipped to handle them, in social protest movements, in media campaigns, and with no clear mechanism for demanding that some kind of action be taken where it may be sorely needed.



## **Lenders and Investors**

### ***Sustainability Criteria for Investment***

Sustainability criteria or principles for investment can be used to set out the conditions for the investment of funds by institutional investors in equity or debt markets. Criteria include requirements for: a commitment to environmental awareness and accountability; an ongoing process of continuous improvement and dialogue; and comprehensive, systematic public reporting.

There are many examples of ‘sustainability’ criteria – such as green funds and socially responsible or ethical funds – initiated by financial services and investment sectors, sometimes in collaboration with social or environmental interest groups. (An example is the Dow Jones Sustainability Index, which ranks publicly traded companies against a set of sustainability criteria.) Many of these have none or very few minerals companies in their portfolio.

Experience to date indicates that both pressure from shareholder coalitions and investment opportunities associated with good corporate performance on sustainability criteria can encourage publicly traded companies to change their behaviour.

### ***Sustainability Criteria for Lending***

Criteria for lending can prescribe sustainable development–related conditions for the provision of funds by public or private lending agencies to companies for the development of new projects and for their ongoing operations. These types of criteria would either have to be adopted by the lending agency itself or imposed on it by legislation at the national level. Public pressure could help lead such a change. For public institutions, broad stakeholder support would probably be required if the criteria were to significantly alter or constrain the lending institution’s activities. (See Chapter 6.)

Criteria for lending can apply to both private and public lending agencies. Many private lenders (such as chartered banks) already account for social and environmental factors in assessing the risk related to a potential loan. Some have gone further and are starting to explore the utility of more comprehensive sustainable development–related risk factors. This trend could be extended to account more explicitly for sustainability factors in a particular sector such as mining and minerals. Public lending agencies such as multilateral national development banks and, to a lesser extent, export-credit agencies already account for a range of public policy considerations that are not directly related to their own expected rate-of-return when determining how to dispense funds (such as meeting environmental or job creation objectives).

## **Improving Industry Performance**

The minerals industry operates in a business climate that is increasingly demanding successful adaptation to changes in social values and public expectations of corporate behaviour. At the corporate level, respect for social and environment standards is increasingly considered to be an essential element of good business practice. (See Chapter 6.) Many of the major mining companies are now committed to the continuous improvement of their social and environmental performance, in some cases including involvement in voluntary initiatives.

There is a wide range of instruments that can be classified as voluntary. These include company-specific and industry-wide codes and policies, reporting norms, management systems, procurement requirements, and agreements between government and industry, between company and community, or between company and NGO.

At the same time as there is increasing recognition of the role that voluntary initiatives can play in supplementing existing legal regimes, many concerns have been raised about such initiatives. Some of these have to do with the vast number of these instruments being developed. NGOs and academics worry about their capacity to track and influence all relevant initiatives to ensure they embody high standards and are applied as intended. A growing number of businesses also maintain that there are too many voluntary initiatives, some of which are duplicative. They worry that continued rapid proliferation may lead to confusion that, in turn, may dilute the effectiveness of any given voluntary initiative in reassuring stakeholders.

Governments, NGOs, and businesses also retain a healthy scepticism about the potential efficacy of voluntary initiatives for addressing 'difficult' measures of performance. This scepticism stems in part from a reluctance to depart from the perceived certainty of outcome associated with regulatory approaches. It also relates to the lack of assurance of performance gains and unclear public accountabilities in a number of international and national voluntary programmes. In response to all these concerns and to lessons learned from voluntary initiatives in other sectors, there is growing recognition of the need for transparent design processes, clear measures of performance, and good accountability mechanisms.

### ***Policy, Codes and Guidelines***

Some mining companies have adopted corporate policies, demonstrating their commitment to improved performance and sending a clear signal throughout the organization that sustainable development is a corporate priority. These policies are designed to promote the integration of social and environmental concerns into all aspects of corporate activity, from exploration to the closure of a mining project, and are given the same treatment as economic considerations.

In some cases, the underlying principles of these corporate social and environmental policies have been adopted and incorporated into a common framework by mining associations for application on an industry-wide basis at international and national level.

The Australian Minerals Industry Code for Environmental Management (See Box 14–1.) and the guidelines on the environment and on participation formulated by the South African Chamber of Mines provide two examples. The Minerals Association of Canada has also drafted principles in its Towards Sustainable Mining Initiative; as of 2000, there are mandatory reporting requirements for members.

#### **Box 14–1. Australian Minerals Council Code**

In 1996 the Minerals Council of Australia launched a Code for Environmental Management on behalf of the Australian minerals industry. The Code is recognized by the UN Environment Programme (UNEP) as one of the most comprehensive voluntary codes devised for the mining industry and the only one to require disclosure of environmental performance. The code is periodically updated as part of an ongoing pledge to ensure it remains relevant to the needs of communities, industry, and regulators.

The code is built around a framework of principles designed to change values and behaviour and to encourage signatories to improve existing levels of performance. Signatories represented by the Minerals Council of Australia account for 90% of Australia's mineral production, though this does not include the vast majority of small and medium-sized companies. To date, over 40 public environmental reports have been published.

A defining feature of the code is that its implementation is adaptable to the size, scale, and environment of each mining operation. The voluntary nature and the absence of prescriptive or standard-setting requirements seeks to encourage creativity among companies to develop solutions to their own environmental issues. This level of flexibility is recognized by the Australian minerals industry as an essential driver for change across a diverse industry. Conversely, this is also regarded by some NGOs as an excuse for enacting minimal change.

The cornerstone objectives for the code are underpinned by a set of elements and activities, including cultural and social objectives, with primary emphasis given to environmental management priorities. But the lack of explicit recognition of social priorities such as human rights, particularly in relation to off-shore activities of Australian mining companies, has attracted some NGO criticism. The translation of code principles into practice has also generated debate on issues of implementation, where ingrained corporate culture and the absence of governance systems to monitor compliance effectively have been identified as further areas of code development that need to be addressed, particularly if performance is to be achieved in different cultural and community settings. Incorporating these concerns is an essential part of the Code review process.

Clearly the code has already had an important impact in terms of providing open access to environmental reporting and a forum for addressing stakeholder concerns appropriate to community expectations for the industry. It has also helped to inform the debate on the role of voluntary industry-led initiatives.

Source: Dick Wells (2001), MMSD Australia Report (2001).

At the international level, the International Council on Mining & Metals (ICMM) has a Sustainable Development Charter, endorsed by its members, that is an international code of conduct for the mining and metals industry. The current charter has 32 management principles covering environmental management, product stewardship, community responsibility, ethical business practices, and public reporting. Decisions about how to implement the code are left to individual companies. The charter was not developed by industry alone. A task force of member companies of the International Council on Metals

and the Environment (ICME) prepared the first draft in 1999. With the assistance of the World Bank, ICME then convened a multistakeholder workshop to review the draft and to comment on subsequent versions.

There is no clear evidence that the charter has had direct impact on company performance as yet. Member companies are not required to adhere to it, and it does not provide for verification or for public reporting. Only a relatively small portion of the industry, mainly the largest international and national companies, has actively supported the charter, and much work remains to be done for it to gain universal understanding and application. Nevertheless, it may represent the basis for the development of a more detailed set of norms and management framework guidelines for the mining and metals sector.

The Agenda for Action recommends that a Sustainable Development Code be developed over time for the minerals industry.

### **Certification Schemes**

Organizations or companies can seek certification to demonstrate to interested stakeholders that their activities, products, or services meet the requirements of a particular recognized standard. Certification schemes can be product-related (such as the eco-label certification programs), process-related (management system certification schemes such as European Eco-Management and Audit Scheme and ISO 14001), or site-related (certification of greenhouse-gas-emission reductions associated with a particular project). While some standards allow companies to self-certify their conformity with the requirements (companies can, for example, declare that they have met the requirements of ISO 14001), many management systems and product standards require independent verification or certification of a company's adherence to the standard, thus providing a level of assurance to interested stakeholders.

Certification by an independent third party is usually perceived to be most credible, although this can entail significant costs to the company seeking certification. This is the model used by the Forest Stewardship Council, which accredits certification bodies to conduct audits of company sustainable forest management practices. Companies will usually pursue third-party certification to a given standard only if there is an adequate business case supporting the decision – that is, if it will provide them with such benefits as access to new markets, maintenance of existing markets (where certification becomes a requirement for doing business with customer organizations), enhanced reputation, or improved employee motivation and morale. A high level of consumer awareness and understanding of what certification to a particular standard means is essential for the broad success of such programmes.

A company must decide to seek certification in order to initiate the process. Usually the standard-setting body will establish the certification requirements and infrastructure. Certification bodies either accredit or directly conduct certification audits. Certifiers and auditors of adherence need to be trained specifically for the purpose and to be subject to some form of oversight. For example, the chemical industry's Responsible Care Program sets out the frequency of verification audits and dictates the composition of the verification

team. It also requires that the verification team include a community representative as a full team member. This is one method of including community or NGO participation in the certification process; another approach would be to ensure they are interviewed as part of the certification process.

In the minerals sector, few examples exist of attempts to develop certification programmes. The Kimberley Process on international diamond certification provides a useful example of certification for a specific product. In Australia, the World Wide Fund for Nature is investigating the feasibility of a system of independent certification on the environmental and social management performance of mine sites in the South Pacific. (See also Chapter 11.) Certification (or verification) for the minerals industry may be an option as part of the development of a Sustainable Development Code.

### **Corporate Reporting**

Many mining companies now prepare annual public reports describing their environmental (and sometimes social) performance. While voluntary reports are often a requirement of any voluntary code or charter to which a company is a signatory, public reporting is also seen as a method of enhancing a company's reputation.

Voluntary social reporting in the mining industry is a more recent phenomenon and occurs infrequently and inconsistently. Social performance is a key ingredient in assuring a company's licence to operate and supports the company's ability to deliver high-quality environmental and economic performance. While there is some agreement on measures for certain dimensions of social performance, they are not as well developed to date. Social reporting provides an opportunity for the presentation of corporate social policy and provisions, measurement against social performance indicators, and the systematic analysis of corporate community involvement. Considerable focus needs to be given to defining useful metrics for the measurement of social performance that can be easily reflected in reporting.

There is no consistent or harmonized approach towards the format or level of detail these reports should contain, and companies have total discretion in publishing what they wish. In response to this, the Global Reporting Initiative (GRI) produced *Sustainability Reporting Guidelines on Economic, Environmental and Social Performance* in June 2000, providing a framework for reporting that promotes comparability between reporting organizations while recognizing the practical considerations of collecting and presenting information across diverse groups. The GRI is currently addressing sector-specific guidelines for the minerals industry.

A consistent system of reporting guidelines needs to be developed for the minerals sector. The system will only work well if there is trust in the transparency and accountability of those doing the reporting and it has support of a broad cross-spectrum of actors. (See Chapter 12 and the Agenda for Action.)

## ***International Institutions and Guidelines***

A number of international organizations have produced guidelines that are relevant to or specific to the mining industry. These include agencies such as the World Bank Group and the United Nations. In the case of the former, the guidelines are designed to apply to all Bank Group–funded projects, although they are often used as a benchmark for other projects. Guidelines produced by agencies such as UNEP and the World Health Organization (WHO) are more generic in nature and are intended to provide a world-wide reference point:

- The World Bank Group approved the *Pollution Prevention and Abatement Handbook* in July 1998 (published in 1999), which replaces the 1988 *Environmental Guidelines*. It contains a number of industry-sector guidelines that specifically relate to the mining sector.
- The World Bank Group, through the Environment Division of the International Finance Corporation (IFC), has also produced a good practice manual, *Doing Better Business Through Effective Public Consultation and Disclosure*. This provides the policy and procedural framework to deal with the need for and benefits of consultation with people affected by IFC projects. It is designed to reflect the IFC’s private-sector mandate and project cycle and is modelled on the World Bank’s revised environmental and social policies.
- The United Nations, through UNEP, has produced a series of guidelines relevant to the mining sector. These include *Monitoring Industrial Emissions and Wastes*, *Environmental Management of Nickel Production*, and *Environmental Aspects of Selected Non-Ferrous Metals Ore Mining*.<sup>26</sup>
- In 1996 WHO produced a revised version of *Guidelines for Drinking-water Quality, Health Criteria and Other Supporting Information*, with an addendum in 1998.
- Amnesty International has developed a set of human rights principles, based on international standards, to help companies develop their role in situations of human rights violations or where there is the potential for such violations.
- The UK and US Governments have developed Voluntary Principles on Security and Human Rights for companies in the extractive and energy sectors.

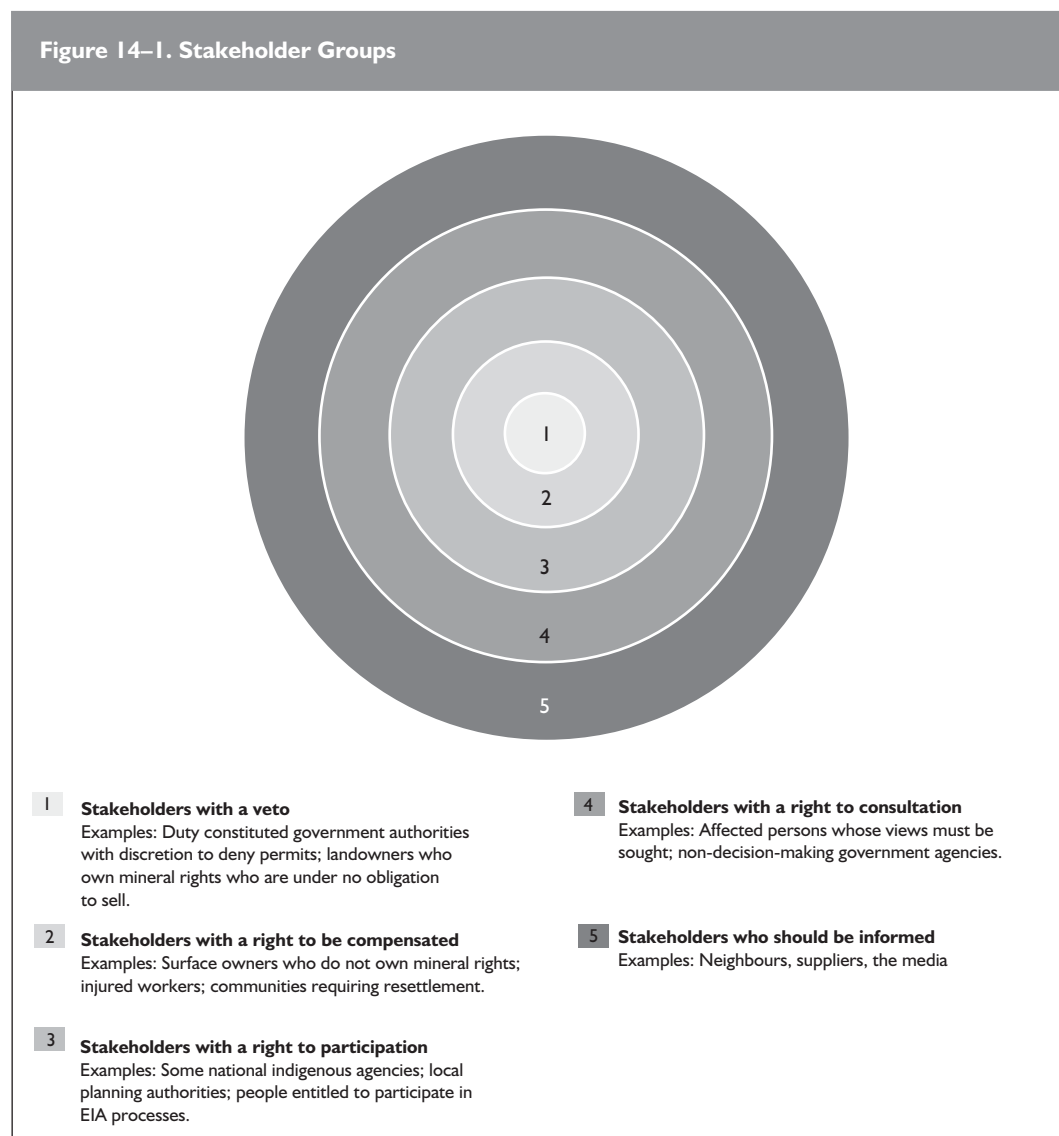
Guidelines have limited utility without systems designed to ensure their effective application and to resolve disputes over their applications. The World Bank has also developed some dispute resolution mechanisms – an Inspection Panel, which had a process for complaints relating to World Bank–financed projects to be presented and resolved. This does not often apply to the mineral sector, since much of the Bank’s involvement in minerals projects is through the IFC and the Multilateral Investment Guarantee Agency (MIGA), which deal with the private sector. But now there is an IFC/MIGA ombudsman too. There was a long dispute over the extent to which these bodies should apply the guidelines, and what remedies would be available if they did not. Bank management has now made it clear that the guidelines do apply to the Bank’s private-sector activities, and established a system, an office of the Compliance Advisor/Ombudsman (CAO), which now has pending before it a number of mining-related complaints. There have also been experiments with a number of private dispute resolution mechanisms. One of the notable

has been the Mining Ombudsman project run by Oxfam Community Aid Abroad in Australia.

## Stakeholder Engagement

### Who a Stakeholder is

Who constitutes a ‘stakeholder’ in the minerals sector will depend on the issue at hand. For some issues, such as local skills development, stakeholders will be concentrated in the local community but may also include company representatives, government, labour and civil society groups. For other issues such as the impact of energy use in the minerals sector on global warming, the stakeholder group is likely to be much larger and more globally distributed. One way of classifying stakeholders is presented in Figure 14–1.



## **Stakeholder Processes**

There is a good deal of importance given to ‘stakeholder process’ in sustainable development. This comes fundamentally from two considerations. The first of these is that globalization means that, to an unprecedented extent, people distant from each other share interests. There is often no existing government or other structure that can bring them together to discuss how to deal with their common interests or resolve their differences. Second, even within countries government is often not capable of serving as a broker to resolve differences or promote shared opportunities effectively. This is particularly true in poor countries, where government may simply lack the resources or legal structures capable of fostering joint decision-making. This is also true in countries experiencing conflict, particularly where government is seen as allied with one side.

In addition to creating more shared interests, globalisation has also increased the range of opportunities available to those who do not like the status quo or the results of decisions, to block or frustrate implementation. They can, for example, trigger international campaigns through the internet, put pressure on banks or export credit agencies, or disrupt companies’ annual meetings.

The purpose of stakeholder processes is therefore twofold: to try to get the right people together to share information and make decisions, and to ensure that there is joint ownership of the decisions reached. Even where the result is not completely satisfactory to a particular interest group, they are likely to accept it – or at least not try to resist it – if they have participated in a process they regard as fair.

In any situation with conflicting interests, there are those who will seek common ground and those who think their interests are best served by staying apart. Since stakeholder processes are almost always voluntary, to make progress, they need to be sufficiently attractive that a ‘critical mass’ of people see their interests better served by participating.

Stakeholder processes are most effective where there is a relative balance of power among those involved. The influence of different stakeholders will depend on a number of factors including the strength of their interest in the outcome, their legal rights, their access to external support, or their ability to block then outcome. Where there are great disparities in capacity and access to those with decision-making power, those who feel at a disadvantage are likely to be reluctant to participate unless some sort of rules of engagement can be developed to redress the imbalance. Getting over this hurdle can be very difficult. From one perspective those with the most power are seen as wanting to rush into discussions in which they will clearly have the upper hand. From the other, there is an impatience to get to substantive discussion. Conducting these preliminary negotiations through a skilled intermediary trusted by all enhances the opportunity for success. Processes will also need to have sufficient flexibility to be able to adapt to changing priorities and capacities.

## **Ensuring Representation**

Some interest groups – often those who are politically marginalized or lack economic resources– do not have very well defined ways of representing their interests through acknowledged, legitimate leadership. This presents a challenge for governance of the sector.



Entering into a consultation or shared decision-making process with any constituency requires an appraisal of those who set themselves up as spokespersons or ‘gatekeepers’ for interaction. While it may seem easier to approach the group through gatekeepers, this can be fraught with problems unless it is clear that the group has unequivocally appointed them to that role.

Some people make their living as intermediaries between outsiders and particular groups. The harder the group is for outsiders to understand or interact with, the more prominent this role is likely to be. Gatekeepers may also misrepresent the community. Generally, they represent only some subset of the community: in addition to personal motives of power or economics, they may wish to maintain their exclusive roles to ensure that the interest of the subgroup they represent dominates in any dealings with outsiders.

At a particular mine site, the host-country governments, the multinational company, and the NGO may each appoint a different community gatekeeper to confer legitimacy. This can result in local communities being polarized to serve outside interests, and internecine conflict in the local community may ensue. When an outside group seeks to consult or interact with a particular community, it is important that the contacts are not limited to professional gatekeepers.

In conclusion, the right of groups to select their own representatives and leadership should be respected. The more broad-based, transparent, and democratic the process of selection, the greater credibility and legitimacy the representatives will have.

## **Overcoming Governance Challenges**

*Ensuring Balanced Governance* - Even though there have been areas where governance of the minerals sector has significantly improved, prevailing governance structures continue to reflect imbalances in the power between different actors and in the priorities given to certain interests at the international level. In particular, minerals development has in the past decades become the province of the investor, often foreign.

To ensure a transition towards sustainable development, it is important to emphasize a move towards more symmetry in establishing the rules of the game and to ensure more equitable distribution of rights between different actors. Moves to provide clear rules and predictable results for mining investors and lenders should proceed hand in hand with similar rules and fair processes to deal with other concerns, such as national interest, community issues, and environmental management.

*Building Capacity* - Many of the issues discussed in this report relate to poor governance or to the need to improve governance to cope with the dynamics of an increasingly complex and interdependent world. Weak governance results from many factors, including lack of resources and capacity, power imbalances, lack of political will, lack of coordination and integration, or a lack of representation of stakeholders in decision-making. Problems of capacity apply to differing degrees to all actors.

It is especially important to focus on strengthening the capacity of national and local governments to design and enforce regulations. Building on efforts by the World Bank Group and the UN Conference on Trade and Development (UNCTAD), international institutions and bilateral donors could devote more resources to capacity building for developing countries and local communities.

Companies need to ensure that effective sustainable development capacity is integrated thoroughly into its businesses. The development of a company sustainable development policy will assist in achieving this.

The capacity of communities can be improved through providing platforms where they can learn from and communicate with each other. UN bodies, NGOs, and industry trade associations can play active roles in this process.

Capacity can also be strengthened through voluntary collaboration between different actors. Collaboration builds on complementary competencies, where each sector contributes resources and skills for the common good. The work undertaken by Business Partners for Development provides useful examples of the benefits of collaboration at the local level.

*Strengthening Institutions* – In some cases, existing governance structures fail due to bureaucracy, dictatorship, lack of accountability and transparency, or corruption. At the extreme, poor governance can go hand in hand with abuses of human rights and conflict.

Companies, individually and collectively, can take voluntary measures to ensure that at a minimum they do not encourage poor governance in countries where they operate. International organisations and NGOs can play an important role in assisting in the development of these measures. (See Chapter 8.)

*Improving Stakeholder Engagement* – For good governance to work, there will need to be clarity and consistency in the ways that responsibility for minerals and sustainable development is understood and shared locally, nationally, and globally. Agreed standards and benchmarks will need to be established, together with agreed mechanisms to deal with the legacy of past mining operations and the future effects of today's activities.

In order to achieve this, effective and trusted fora are required. These need to ensure those with most at stake, especially the most vulnerable groups, are able to participate in appropriate ways. (See Agenda for Change for a recommendation on a global multistakeholder forum.)

*Building on Existing Initiatives* – Efforts are needed to avoid the proliferation of competing schemes – norms, standards, guidelines, and criteria for the minerals sector. There is a need to work with interested organizations to build on existing and well-functioning initiatives and to collaborate on the ones that overlap.

## Recommendations

Chapter 1 laid out a series of governance principles that should be followed by the different actors if progress is to be made:

- Support representative democracy, including participatory decision-making.
- Encourage free enterprise within a system of clear and fair rules.
- Avoid excessive concentration of power through appropriate checks and balances.
- Ensure transparency through providing all stakeholders with access to relevant and accurate information.
- Ensure accountability for decisions and actions, which are based on comprehensive and reliable analysis.
- Encourage cooperation in order to build trust and shared goals and values.
- Adhere to the principle of subsidiarity, which recognizes that decisions should be decentralized and taken as close as possible to the people and communities most directly affected.

Adhering to these principles is a prerequisite for sustainable development. In achieving the long-run vision of a governance structure consistent with sustainable development, different actors will need to take small steps forward at a time, sometimes in collaboration with others and sometimes alone. At a broad level, the following are required:

### **National Policy Framework**

Governments should take the lead in setting standards to ensure sustainable development takes place at the national and local level. To achieve this they need to:

- Develop or strengthen the *policy and regulatory framework* relating to the minerals sector to ensure that social and environmental issues are prioritized along with investment and economic development objectives. This will need to be undertaken through a *participatory process*. Complementary or alternative instruments should be used where appropriate to supplement regulation.
- Ensure that effective *enforcement* provisions are in place and that there is sufficient capacity to carry out enforcement. Where there is insufficient capacity, alternative instruments based on voluntary incentives should be considered.
- Have a good understanding of the issues involved in the design and application of a *financial surety policy* for mine closure. Whichever method is chosen, it is essential that it is regularly assessed, as part of the environmental management of the project, and amended as necessary.
- Build *linkages* among governance structures at different levels and between different departments to improve coherency and strengthen capacity.
- Create accepted, legitimate *dispute resolution mechanisms* that deal with complaints and problems at the appropriate level.

## **Lenders and Investors**

- Institutional investors and lenders should aim to increase their use of ‘*sustainability criteria*’ in informing investment and lending decisions. Criteria could be extended to account more specifically for certain sectors, including the minerals sector.

## **Improving Industry Performance**

- Companies should develop a *company policy* demonstrating their commitment to sustainable development and embedding it in core company objectives.
- To ensure consistency in approach and to guide the behaviour of companies, the industry should develop a *code of practice* based on the principles of sustainable development. This code should consider options for *verification*, preferably by an independent third party.
- A consistent system of *reporting guidelines* needs to be developed for the minerals sector through a stakeholder process.
- *Terminal liabilities* - There needs to be detailed prior agreement between the company and government (and potentially other actors) on how the costs associated with mine closure should be shared.

## **International Institutions**

International institutions should continue to:

- Fund and conduct *capacity building* efforts with national governments and communities;
- Help to *harmonize the standards* of mineral development operations in host countries and to ensure that standards incorporate the goals of sustainable development;
- Synthesize cross-sectoral and transnational *learning* for public dissemination; and
- Facilitate national and international *stakeholder processes* for sharing information and decision making.

## **Non-governmental and Other Independent Organisations**

NGOs and other independent practitioners should:

- Assist in *capacity-building* and in facilitating company-funded development at both the national and local levels.
- Play a role in designing and participating in *stakeholder processes* and continue to lobby at all levels for effective participation by stakeholders.
- Act as ‘*watchdogs*’ – independent arbitrators or monitors.

## **Stakeholder Engagement**

- *Stakeholder processes* should be developed where appropriate to try to get the right people together to share information and make decisions, and to ensure that there is joint ownership of the decisions reached. Efforts should be made to ensure that the process does not favour any particular group and that stakeholder groups are fairly represented.

## Endnotes

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- <sup>1</sup> The discussion in this section is drawn from Sassoon (2000b).
- <sup>2</sup> Danielson and Nixon (2000);
- <sup>3</sup> Bourassa and Vaughan (1999)
- <sup>4</sup> OECD (1997).
- <sup>5</sup> UN Economic Commission in Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. The Convention was adopted on 25 June 1998 and entered into force on 30 October 2001 when the sixteenth party ratified. See <http://www.unece.org/env/pp/>
- <sup>6</sup> The discussion on the lack of international governance regimes for the minerals sector is drawn from Ma. Cecilia Dalupan, 'Mining and Sustainable Development: Insights from International Law,' 2001
- <sup>7</sup> [[source to come on Nordic energy taxes]]
- <sup>8</sup> [[MEND; Greenhouse Challenge in Australia full source to come]]
- <sup>9</sup> Pintz (1984).
- <sup>10</sup> MMSD Large Volume Waste Working Papers, Ok Tedi case study
- <sup>11</sup> King (1997).
- <sup>12</sup> Regan (2001).
- <sup>13</sup> Personal communications with BHP Billiton, February 2002.
- <sup>14</sup> Banks and Ballard (1997)
- <sup>15</sup> Fitzgerald (1999)
- <sup>16</sup> Personal communications with BHP Billiton, February 2002.
- <sup>17</sup> Regan, J (2001)
- <sup>18</sup> Personal communications with BHP Billiton, February 2002
- <sup>19</sup> O'Neill, I (2001)
- <sup>20</sup> Plumlee et al (2000).
- <sup>21</sup> (U.N.: September 30, 1996:67-70); Coumans (1999b).
- <sup>22</sup> Robinson (2001).
- <sup>23</sup> Regan, J (2001).
- <sup>24</sup> See Richard Meeran, 'Cape pays the price as justice prevails', *The Times*, 15<sup>th</sup> January 2002
- <sup>25</sup> For an overview, see Ward (2001).
- <sup>26</sup> UNEP/UNIDO 1996, TR27; UNEP 1993, TR15; UNEP/ILO 1991, TR5.

