

Comments on Draft MMSD Project Report

March 21, 2002-03-21

First, I would like to congratulate on bringing such a massive project close to completion. The overall project report is clear, succinct, very well written and structured and easy to use.

Second, I also find the balanced overall approach taken commendable and correct.

I have a general and several specific comments. I should perhaps add that I have been the principal UN adviser on mining law and policy (1981-2001) and have built up at CEPMLP/Dundee the leading mineral law and policy programme, with, in total, now over 200 graduate students, 30 PhDs (mainly from developing and resource-producing countries). I have also advised, since 1979, about 60 governments and subsequently also companies and international agencies on issues of mineral law and investment contract (re-)negotiation, plus I have mediated several large-scale investment disputes.

A biographical note is added to indicate my professional background in this field.

General Comments:

While I appreciate the "soft" style of the report, which tries to reduce conflicts and point out at all times to the prospect of an all encompassing consensus of all reasonable men and women, the report thereby acquires the character of UN reports where a lot of past, current and future reality - a reality of conflict, often unresolved and unresolvable - is suppressed. The credibility of this UN-style report is less than analysis which speaks plainly and does not shy from referring to conflict and analysing the character of such conflict. The more the UN-style is adopted, the less will the report be seen as dealing with the various realities (and their differing perceptions), and the more it will be seen as painting rosy pictures.

For example, I would much more prefer that the opposition of specific NGOs (Oxfam - US, in particular its new statements against mining; www.moles.org; friends of the earth; et.al) are specifically discussed and perhaps put into a context - and put into contrast with statements supporting mining. Here, the contrast of Western NGOs, their branches/sponsored NGOs in developing countries and the often different position of NGOs which are independent of Northern NGOs in developing countries - plus the relative lack of a voice which truly represents developing and producing countries - should be presented. There is no need to be partisan, but the analysis should be frank rather than painting warm and fuzzy pictures of approaching overall consensus - which is not true and unlikely. This report is not prepared by an international organisation, and this privilege should not be sacrificed so easily.

In the same line, I would prefer if there was more of an attempt to critically assess - from a position of expertise, independence - the positions taken by mining companies, NGOs, but also of international organisations. I see very little really critical analysis of international organisations - World Bank, UN in particular. While this is normal for international agencies talking about themselves or about "sister agencies", a truly independent report should not be guided by the need to keep friends in all high and relevant places. Much of the proposals made in particular for the UN do not reflect the true operating conditions of the UN system, and the fact that past initiatives (e.g. UNRFNRE) have not come to much.

I also would question the preference I seem to perceive (perhaps wrongly) for the MMSD consultants from the established mining consultancy industry which I would rather see replaced by analyses and position formulations available from developing countries (e.g. I would rather rely on Usman, J Energy/Natural Resources Law 2001/2002) than from Handelsman on human rights/mining. This reflects my general perception that the report is too much influenced by the

current, condescending, top-down North-South moralising about governance in developing countries without appreciating the real difficulties of governance in a situation of underdevelopment.

I also miss much more emphasis on the global economic context. A major problem of dependence on mineral export is the lack of available alternatives - this is why mineral industries/dependence is so much more prominent in very poor (and therefore badly governed) countries. Such dependence does not in my view reflect so much the fortuitous location of mineral deposits in very poor countries, but the fact that in poor countries mining constitutes one of the very few viable economic activities of a certain size. While industrial diversification is the answer, such diversification depends on the global economic context and very much the trade policies of the North. EU and US agricultural subsidy and protectionist policies, for example, undermine in my view much more mineral-dependent countries opportunities for diversification than dependence on minerals. If the North allowed more trade in areas developing countries might have some advantages, then dependence on minerals would not be that great. The reason for such Northern policies is that the North needs developing countries minerals, but not its agricultural products for which there is a strong domestic lobby.

Lastly, I miss a clear statement of who is responsible, i.e. the real people behind the report. This looks like either shying away from responsibility and may, in particular critical NGOs out to find weaknesses anyway, look at the report with much more conspiratorial suspiciousness than is necessary. I would like the individuals, and their background who wrote and managed the report, and I would also like to see a statement on the budget and its uses. The proposals made by the report on NGO accountability apply perfectly well to this report as well - MMSD is a NGO and should comply with normal standards of transparency. Who did what, and where did the money come from and specifically go to.

Specific Comments:

Chapter 3 (p. 18):

I would suggest you include CEPMLP/Dundee here following the MERN network. We now have:

- 200 graduate students in natural resources law and policy, most from developing countries, many of which studying in our mining law, policy, economics courses or engaged in doctoral research, and this seems to be the largest graduate and research institution in the field of natural resources law and policy
- With "ENATRES", the only large-scale, global internet forum for the discussion of natural resources law and policy issues;
- With the cepmlp internet journal one of the most visited sources of information and discussion, in particular by and for developing countries;
- With CAR, the only internationally available and internet-based graduate students review - again mainly with developing country participation.
- (www.cepmlp.org)

Chapter 8 - Corruption

The report displays here - as I think elsewhere - a "northern" bias. Corruption is currently very much on the Agenda as an indication of bad governance in developing countries. But this is a moralistic top-down, North-South perspective. Corruption is as well implicit in, for example, the large-scale political donations made by mining and resource companies for example in the US - where Enron is just a relatively normal case. Corruption features differently in different contexts, but I see not that much difference between buying a US legislator and buying a Third World Minister. The colouring of this discussion - as much of current World Bank/NGO discussion - will be taken easily to reflect a neo-missionary and neo-colonialist condescending attitude towards developing countries reflecting current power relationships.

8.35 (indigenous people): I suggest that academic writers from Africa (such as Usman, JENRL 2001) speak with much more authority than representatives of the N American mining industry such as Handelsman.

Chapter 12:

I suggest that you ask Mr Kernaghan Webb, the coordinator of the leading internet forum on voluntary codes (www.volcodes.com I believe) to review your text. He is in my view most knowledgeable and does not seem to have been consulted or used.

Chapter 13 (SS Mining)

I have organised a UN conference on SSM in Ankara (1988). What I retain is that it is very easy to come up with facile proposals, but very difficult to get them working in a developing country context. Most Northern writers and Western intl agencies (e.g. world Bank) have come up with policy recipes for over 20 years, and these have never worked. I have developed this in my article on mining and environmental policies in developing countries (JENRL 1992). So I suggest to emphasise much more the need to function in the context of underdevelopment. There are success and failure cases, and one can learn from them. I do not see reference to major SSM cases (garimpeiros in Brazil, Indonesia, Philippines for example) where various solutions for SSM were tried. My experience has been that it one needs to understand the social, geological, commercial and ethnic context very carefully before one can try to see which policy solutions work. Economic incentives tend to work better than regulation (licensing) which in developing countries almost never functions if precious metals are involved (e.g. gold or diamonds).

Chapter 16 (16-8-9) (dispute settlement)

I am not sure that the various dispute mechanisms relying on consultation and reporting work that well on their own. I have proposed (J World Investment, 2001) that companies, indigenous communities and NGOs should consider accepting specific commitments and providing for established arbitration procedures to give rights to an aggrieved party to enforce a breach of its rights. Such "hard" dispute settlement is - as the current controversy over NAFTA-investor arbitration shows - much more likely to get real attention and be taken serious, also within corporate bureaucracy, than mere good-will obligations. Such agreements could also incorporate by reference the various soft-law, voluntary code instruments you refer to.

I hope my comments are of some use and I wish to this important project a high-quality end-product, global attention and a lasting success.

Sincerely

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www.cepmlp.org/journal