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"Is Industry Ready for a Sustainable Development Code for Mining?"

I. The International Legal Framework.

The idea of a code directly implies norms of behavior and benchmarks against which performance may be evaluated. The following presentation intends to illustrate recent trends in the development of international law, with a view to providing evidence on the increasing direct effect of traditional sources of law on new international actors. In this line of inquiry, the emergence of soft law instruments receives attention, as well as the recognition of rights and responsibilities of individuals, corporations, and international organizations.

i. Soft Law.

The emergence of soft law instruments transformed the international legal landscape during the latter half of the XXth Century. The extent to which soft-law authorities represent law in formation or guidance for legal interpretation remains disputed, but beyond debate is that soft-law has opened a new role for international organizations and other non-state actors. In this category of authorities, voluntary codes represent an effort by industry to express a commitment towards sustainable development. Besides certain advantages of voluntary codes, these have by definition a series of limitations, including prominently the absence of strong accountability mechanisms for cases of non-compliance.

ii. A Rights Perspective.

Perhaps an even more significant transformation of the international legal system is the increasing direct effect of traditional hard law sources of law to persons, corporations, and international institutions. From a rights perspective, it is well known that individuals and groups are guaranteed fundamental human rights, and that in Africa, Europe, and the Americas they enjoy access to international oversight mechanisms.[1] Even in one of the most traditional spheres of international law, that of consular and diplomatic relations, the ICJ's recently decided *La Grand* Case provides evidence of how detained individuals enjoy rights different from the rights of the sending state, rights that the host state is obliged to respect.[2]

For corporations, the transition towards international law's direct effect has followed a similar path. The traditional concepts of diplomatic protection have given way to the rights of foreign investors, under certain international agreements, *i.e.* NAFTA and ICSID, to initiate international arbitration against host governments. These international tribunals may award monetary damages for loss suffered by the violation of international minimum standards, such as expropriation and denial of justice.

In the case of international organizations, the ICJ recognized their international legal personality early on, in the *Reparation for Injuries* Case[3]. Accordingly, international organizations enjoy international rights, including the right to bring an international claim to obtain reparation from a State.

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[1] A note of caution in that implementation of economic, social, and cultural rights is dramatically lacking.
[2] *La Grand* Case, Germany v. United States, 21 June 2001, para. 77.
[3] *Reparation For Injuries Suffered In The Service Of The United Nations*, Advisory Opinion, 11 April 1949.

iii. An Obligations Perspective.

From an obligations perspective, the transformation of international law has been slower and remains anchored in the state-centered system. That is, the international legal system has recognized rights of individuals, corporations, and international organizations *against* the State, but has been slow in moving towards recognizing corresponding responsibilities and obligations of individuals, corporations, and international organizations. Overwhelmingly, accountability of non-state actors in the international system depends on State jurisdiction, which faces several material and juridical hurdles including lack of enforceable standards and doctrines such as *the forum non conveniens*.

From an obligations perspective, international organizations (IOs) have the duty to carry out their mandate and are thus accountable to the governments that created them, that hold their shares, or that adhered to their statutes. IOs also have contractual duties with its employees and several administrative tribunals have been setup within IOs to hear complaints. To ensure the adequate functioning of IOs, special agreements recognize immunity to the organization and its officers, which effectively insulates them from local courts. This immunity translates into lack of accountability mechanisms for persons and communities that may be affected by the activities of IOs. Still, if an IO's actions produce harm, there are compensation schemes available for affected persons.

Recently, international financial institutions began experimenting with mechanisms for increased transparency and accountability. The Board of Directors of the IBRD created the Inspection Panel in 1993, which is open to receive complaints by project affected people that allege the failure of the Bank to comply with its internal operational guidelines. The IFC has recently established the Compliance Advisor/Ombudsman, which is to perform the roles of providing advice to management, conducting compliance audits, and acting as an ombudsman in the search of concrete solutions to problems on the ground.[4] These models have been taken by other regional financial institutions, and represent a recognition of IOs' obligations towards individuals and groups, beyond those owed to member governments.

The transition toward direct application of international legal obligations for individuals is visible in the criminal field. The imminent opening of the International Criminal Court and the emergence of customary norms providing for individual criminal responsibility, *i.e.* genocide, crimes of war, and crimes against humanity, are clear examples of this trend. Even more, several international treaties include provisions on environmental crimes.

The transition towards an international legal system where corporations are accountable at the trans-national level is lagging behind. The doctrine of *forum non conveniens* frequently represents an insurmountable obstacle to holding firms accountable at the courts of the state of incorporation. In the United States, the *Alien Torts Claims Act* provides a cause of action in this regard but requires violation of international law, which often produces a vicious cycle. Thus, remedies for individuals and communities are only available at the local level, which is too often inadequate to provide relief.

Recently an important step towards strengthening the international legal framework governing multinational corporations was taken with the conclusion of the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*. These efforts complement the soft-law approach of the *Code of Conduct for European Enterprises Operating in Developing Countries*, elaborated by the European Parliament, and of the *ILO Tripartite Declaration on Multinational Enterprises and Social Policy*.

[4] It has been argued, not without strength, that these functions may not be effectively exercised by a single organ, given the conflicts of interests that arise.

In the past, the international community has addressed the challenge of creating mechanisms to tighten operational industrial standards and to provide compensation for loss of property, livelihoods, and ecological services. The liability regimes governing the marine transport of oil, which include the operation of a compensation fund financed by levies on the oil industry, provides an interesting case-study of alternative regimes.

iv. The Unfinished Global Partnership.

That corporations do have responsibilities in the international arena is beyond question. The *Universal Declaration of Human Rights* clears all doubts in its preamble,

> "The General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and *every organ of society*, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction."

The *1993 Vienna Declaration and Program of Action,* adopted at the World Conference on Human Rights, further elaborated that "All human rights are universal, indivisible and interdependent and interrelated". Furthermore, the *1992 Rio Declaration on Environment and Development* proclaimed "the goal of establishing a new and equitable global partnership through the creation of new levels of cooperation among States, key sectors of societies and people."

Transparency, accountability, and public participation are key tenets of democracy. The challenge of establishing effective mechanisms for trans-national corporate accountability remains an outstanding task for the international community.

II. Questions Raised By A Sustainable Development Code For Mining

1. Is the mining industry ready to commit to *meaningful public participation* in the review of proposed mining operations and monitoring of existing operations?

While many countries have environmental impact assessment or similar laws that allow for public participation in theory, obstacles such as the inaccessibility of hearing sites, the lack of translated documents and the lack of understanding of technical terms often preclude meaningful participation.

2. Is the mining industry ready to *disclose information* on environmental conditions, emissions, post-mining conditions, and health and safety to the government and the community?

Few if any countries have comprehensive monitoring and reporting requirements for the mining sector which allow for public access to the data.

3. Is the mining industry ready to engage in *comprehensive closure planning from the beginning* of the mine operation?

While recognition of the need for closure planning is growing, few countries have closure planning regimes in place that cover key issues such as reclamation standards, financing, monitoring, etc.

4. Is the mining industry ready to commit to *reclamation that will restore the productivity of the land?*

Because mining is only a temporary use of the land, reclamation standards and practices need to focus on ensuring that other productive land uses are available after mining is complete.

5. Is the mining industry ready to post *financial assurance sufficient to complete closure and reclamation?*

Recent history is filled with examples such as the Summitville mine in the U.S. where national governments have been left holding paying for substantial costs in excess of the financial assurance provided by mining companies.

6. Is the mining industry ready to make a commitment to protect and restore biodiversity, *including establishing 'no go' areas* for threatened or endangered biological resources and fragile waters and ecosystems.

While there have been many dialogues in many international fora on this topic, there still appears to be a lack of full commitment to protecting threatened or endangered biological resources.

7. Is the mining industry ready to embrace *practices that go beyond existing standards*, such as pollution prevention (including ratcheting down emissions, introduction of toxic substances to the mine site, etc.) and environmental management systems?

In the long term sustainable development requires mining companies to move beyond control and treatment of pollution to preventing the creation in the first place. This involves processes such as recycling and substitution of materials. It also requires investment in new technology. At the same time pollution prevention practices offer companies an opportunity for savings through efficiency and savings on control and treatment costs as well as possible clean up costs.

8. Is the mining industry ready to *support national mining laws* that include at least the following elements:
   - o standards
   - o environmental impact assessment
   - o closure and reclamation
   - o public participation
   - o monitoring and reporting
   - o enforcement
   - o financial assurance.

9. Is the mining industry ready to *engage the local community* in a process for identifying and addressing environmental, social, and cultural impacts as well as for sharing the benefits from mining?

Faced with growing difficulties on the ground, many mining companies have recognized the need for a 'social license' from the community to operate. The alternative, unfortunately, in many cases has been violence.

While many companies and countries have experimented with processes for consulting the local communities, these efforts have yet to be heartily endorsed by the local communities.

10. Finally, is the mining industry ready to establish an *independent compliance monitoring mechanism* that could receive claims from individuals and groups affected by mining operations?

The creation of a forum empowered to investigate claims of non-compliance with the SD Code is essential for securing adequate implementation of the Code's provisions. This mechanism should be impartial and independent from industry, but at the same time, if it is to be effective in influencing policy and operations on the ground, it should maintain high-level dialogue with industry.
