CHAPTER 14

SECTOR GOVERNANCE: ROLES, RESPONSIBILITIES, AND INSTRUMENTS FOR CHANGE

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Achieving effective governance is a major challenge facing the mining and minerals sector and is a key to dealing effectively with many of the issues discussed in previous chapters. Sustainable development requires understanding and redefining the roles, rights, and responsibilities of all the actors – governments, companies, labour unions, international institutions, communities, and non-governmental organizations (NGOs) – and introducing new instruments for change.

Though there have been areas where governance of the minerals sector has significantly improved, prevailing governance structures continue to reflect imbalances in power among different actors and in the priorities given to their interests at the national and international levels. Minerals development has in the past been the province of the investor, who was often foreign.

A transition to sustainable development requires more symmetry in establishing the rules of the game and a more equitable distribution of rights and responsibilities, as well as risks and benefits, among 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 concerns such as national interest, community issues, and environmental management.

Government has a central and unavoidable role to play in improving governance for sustainable development. Government provides incentives, passes laws, adopts regulations, decides what kinds of cases can be brought in courts, and enforces laws, all of which are core governance activities. Another key role for governments is enabling, organizing, or participating in multistakeholder processes for policy reform. All of these and other activities constitute a framework that has enormous impact on whether and how various minerals activities occur.

As one observer has noted: 'The 1990s saw a remarkable regulatory transformation in the developing economies. Nation after nation adopted a new mining code and amended their related laws in an effort to become globally more competitive. The reform process was driven by a realization that exploration and mining activities are not well suited to government-managed development and that to attract private sector investment, the regulatory environment must be conducive to investors' needs.'[1] New or modified mining policies and legislation were adopted in more than 100 countries. These changes demonstrated quite clearly just how responsive the sector is to the governance framework: they stimulated international interest in minerals as well as investment in countries where it was previously minimal. The reforms were for the most part explicitly undertaken to promote foreign investment and to create a stable and attractive fiscal and regulatory climate. They institutionalized liberal economic policies for mining and other investments, creating a more competitive international arena.

Whether this legal and institutional reform will result in a renewed flow of investment when economic conditions in the industry improve, and whether this in turn will catalyse sustainable development, remains to be seen. This 'first generation' of reforms dealt mainly with the concerns of investors, who in many cases are now enmeshed in problems that were not so thoroughly addressed by the reform movement, as described in earlier chapters. Can these problems be addressed successfully by a 'second generation' of reforms that meet the challenges of sustainable development?

Minerals investment has unquestionably created real opportunities and benefits for some people in some areas of the world. It has also increased the adverse impacts and risks for others. Some of the opportunities have been lost due to lack of adequate governance structures to resolve conflicts or through lack of government capacity to manage them, corruption, or damaging power struggles and conflicts over who 'owns' the asset and who 'controls' or shares in the revenue. Governments may provide clear enabling legislation and strong policies in one area, but these are devalued by failure to address the rest. Complementary and essential areas of policy may be just emerging, 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, for example, as regulator – establishing laws and policies that provide for regional land use planning, ameliorate environmental and social impacts, or take advantage of the opportunity to develop roads, schools, and better health care. Relatively well resourced states may also provide a social safety net that cushions the impact of

change – such as the move away from a subsistence to a cash economy, or 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, in strengthening capacity, and in building a policy framework capable of turning investment into sustainable development. This will take time. It will highlight the importance of supplementary instruments of governance not to replace the state role, but to deal effectively with immediate and pressing problems while governments find the ways to respond more effectively.

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

National Policy Framework

Legislation

Law has always been and will continue to be a key part of the governance framework for the mining sector.[2] Effectively implemented, law is a leveller: it generates consistent incentives for responsible behaviour of all companies and other actors, regardless of their size. It implements the will of the majority while protecting the rights of minorities. The application of law is rarely simple. Laws alone achieve nothing without effective and capable administrative agencies to administer them, or effective access to a functioning court system to enforce and protest the rights they create. Law can also be a tool for the powerful in some countries, helping one group to the exclusion of others. Getting the right balance for the distribution of risks and opportunities, and of costs and benefits, taxes all policy-makers.

National government provides the legislative framework for the minerals industry, and national or sub-national legislation is the route through which most legal rights and obligations attach to companies and the many others with whom they must deal. For regulators, a clear-cut and enforceable framework is essential to control the activities of the industry effectively. For citizens, the framework protects them against the risk of loss of livelihoods or property, or unfair and arbitrary treatment, and gives them opportunities to seek to improve their position. For 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 litigation. Negotiated cultural norms, customary usage of business and trade, traditional ways of doing things, rules observed by cultural groups that precede the creation of the nation-state, 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. Some countries or societies are to a large extent governed by customary law. 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.

An exploration or mining company that is domiciled where law is paramount may find itself operating in a traditional society. The company may see itself as entitled to rely on the national laws that create the conditions for its investment, whereas communities who do not fully recognize those national laws and receive a disproportionate share of the risks without a compensating share of the benefits may see it as a 'licence for theft'. 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 a good understanding of and respect for local systems are both required.

The range of legislative systems in different countries has resulted in a diversity of methods for allocating the rights and responsibilities for these issues among mining, investment, planning, environment, and other laws. No two countries possess exactly the same framework. Each nation 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 among different government departments and national, provincial (or state), and local levels of government is seldom straightforward. There is no one ideal system.

Mining Legislation

A mining act is the principal regulatory instrument governing mineral exploration and production activities in most regimes. It defines both the rights and the obligations of the mining title-holder and the power of 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.[3]

Mining acts or associated rules and regulations typically state that the holder of an exploration or mining licence must comply with all other relevant laws; some include provisions, such as environmental or social requirements, that go beyond the traditional province of mining law. 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, or 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.

Many mining acts also provide for 'regulatory stabilization' in one form or another: a guarantee that the investor will not be subject to new or changed requirements, such as higher taxes or new environmental laws, planning requirements, or other future legislation.[4] Even where these are not explicitly stated in legislation, countries have in some cases been willing to agree to project-specific contractual 'stabilization agreements'. Although these may encourage investors, they are also controversial, as they may bind the hands of government in terms of dealing with changing social demands and circumstances of development for decades into the future.

Another kind of mining-specific legislation is mine closure planning laws, also referred to as reclamation or rehabilitation laws. These are the norm in Australia, Canada, and the US.[5] 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, and a financial guarantee assuring that the company will meet those objectives. South Africa also has such a law. Few other developing countries have closure laws, although some are starting to appear, and they generally do not require the financial guarantee. Although these have played important roles in improving performance in industry, their administration requires considerable capacity.

The World Bank has had a key role in helping governments reform their mining codes. It has made loans for legal and institutional strengthening to attract investment, with the idea that increased revenues will provide a source of funds for loan repayment. Though this reform addresses environmental concerns and, occasionally, social issues, it has largely focused on meeting the concerns of investors and lenders, not least because foreign direct investment is an important source of capital for economic development in poor countries. This activity and project-specific support by Bank group entities such as the International Finance Corporation (IFC) and Multilateral Investment Guarantee Agency (MIGA) for new mines in countries where investment has been facilitated by the reform process have attracted criticism from many NGOs. They argue that the outcomes of the reforms are biased towards needs of industry at the expense of community concerns. Since a 'second generation' of reform to deal with these problems might not generate obvious streams of revenue for loan repayment, it is unclear how to finance it.

Other National Legislation

Many important issues relevant to the minerals sector are found in other legislation. Investment laws, for example, set out the basic conditions of security for foreign investment and other important issues such as the ability to repatriate profits. Investors want to know 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.[6]

Tax laws vary widely, but are highly relevant to mining investment. (See Chapter 8.) A major question previously mentioned is often tax stability – the degree of protection that a company has from future government decisions to raise taxes.

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.

Planning laws create a framework for local or regional land use and economic planning issues, and for the coordination necessary to ensure that infrastructure needs can be met in an effective manner. They may also be a basis for planning regarding social needs such as medical care, education, and housing.

Environmental law is increasingly important to minerals activities in almost all countries. Countries 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 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 simply to stop development of projects rather than focusing more on improving 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 environmental laws 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, or 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. (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 (ILO) core conventions (see Chapter 6) and others provide for the protection of workers, women, and children. A number of international instruments (such as the Rio Declaration) recognize public rights to information or participation in decision-making. (See Chapter 12.)

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.[7] Some NGOs consider this as a gap. Part of the explanation for it may be that the exploitation of mineral resources does not lend itself as readily to international standards or principles as other resources do because of the number of minerals and their uses, the wide variety in methods of extraction, and the differences in physical environments and climates where mining takes place. But arguably the most significant issue is one of jurisdiction and national sovereignty. The few international regimes for mining that do exist apply only to areas beyond national jurisdictions. However, arguably, similar differences exist in the case of marine, forestry, and other resources for which international principles or governance regimes have already been formulated.

Table 14–1. Key International Agreements of Relevance to the Mining Industry

Instrument	Relevance to the Mining Industry
Aarhus Convention, 1998	Establishes rights to access to information, public participation in decision-making, and access to justice.
Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Organisation for Economic Co-operation and Development (OECD), 1997	Requires international cooperation in the effort to combat corruption.
ILO Safety and Health in Mines Convention, 1995	Establishes the principle of 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 1997 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	Protects natural or cultural values.

Another factor may be the size of the global mining industry in comparison with other development activities, since the level of capitalization is relatively small. There may be less impetus for broader action.

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 that are incentive-based. 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. Because of differences in ore bodies, climate, local resources of concern, and other factors, 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 – underprotection at some sites and unnecessary overprotection at others. Standardized solutions do not necessarily deliver the optimum environmental or economic performance. There are also significant capacity problems with adoption of numerical norms, such as the water and air criteria that have been developed in such detail in the industrial economies. Measuring pollutants in waste streams or general environmental media at parts per million or parts per billion levels requires skilled personnel using expensive and specialized equipment, often in laboratories, which many developing countries lack.

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

Standards are an essential tool for a regulator who wishes to use (at least in part) a command-and-control or prescriptive approach. They are also used for market-based instruments and voluntary agreements. Standards should be used with caution. Many of them are established using little science and a great deal of guesswork. A government may base its standards on those of another country with little or no reference to existing domestic conditions. The best standards are the product of local multistakeholder processes, with a degree of international comparability, and follow internationally agreed norms in their development.

Performance Targets

Performance targets are part of a carrot-and-stick approach. They enable the regulator to use 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. Independent monitors, trusted by the government, the operator, and the community, are needed 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 are often used in regulatory regimes as a way to provide funds for the regulatory agency or as an incentive to improve environmental and social management. 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 its 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. But 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.[8] 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 Program in the chemicals industry demonstrate that sector-wide voluntary programmes can produce impressive results in some areas.[8] (Voluntary initiatives are discussed further later in this chapter.)

Financial Surety

Government is usually ultimately responsible for the cost of dealing with 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. In addition, it is important to note that in the forestry sector, for example, the means used for long-term financial surety are highly vulnerable to politically motivated misuse or to corruption (such as long-term hidden funds).[10] 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. Thus, the funds from the guarantee should be separate and not reachable by creditors in the case of bankruptcy or business failure. 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 call for 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. Others have deliberately rotated officers to keep them from becoming too close to company management.

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 discourage 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. In addition, there are calls from some quarters for independent roles in enforcement that could be taken up by NGOs.

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 (though this does not apply to all countries). In addition, in some countries courts can help to clarify responsibilities on, for example, 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 fundamental 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 significant 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 £21 million was reached in December 2001.[11]

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) and Colombia.[12] They have resulted in a variety of rulings, with a limited record of success for the claimants. Although some of this litigation may be motivated by nothing more complex than the fact that getting access to courts in western industrial countries is easier, that they award higher damages, or that they reflect values different from host-country governments, 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 forums 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.

Key Challenges for National Legal Systems

Environmental issues are far from the only area where there is conflict or uncertainty over national legal requirements. Many of the problems are complex and depend heavily on national circumstances. The areas where attention is needed, as identified in previous chapters, include – in addition to environment – management for sustainable development, land rights, revenue sharing, access to information, and public participation. This is the agenda for a 'second generation' of reform of legal and institutional structures in the minerals sector. It may be that not all of these elements are important everywhere, or that this list may need to be supplemented, but these are core issues. Governments need to make a concerted effort to find ways forward on them in consultation with other stakeholders.

Management for Sustainable Development

A framework for the relationship between the minerals investor and the host-country government is essential. But so is a framework for the interaction of these parties with others who have a vital interest in the outcome. Such a framework probably has at a

minimum three elements, which should link with and support each other:

- a good system of integrated impact assessment early in a project that includes thorough attention to all relevant environmental issues, but that also includes the relevant economic and social factors that will be affected by any development;
- a provision for developing a Community Sustainable Development Plan, in consultation with all who may be affected, to create a vision of the economic, social, and environmental future and to identify how to achieve the objectives; and
- a requirement for developing an integrated closure plan, defined at the earliest possible stage, that identifies the desired environmental, social, and economic results at and beyond the point of closure and that assigns responsibilities for achieving those objectives.

Land Rights Regimes

In many countries, minerals belong to the state, which can grant concessions to others to search for and develop them. Where this happens, affected owners should in principle be compensated for any losses, such as having to leave their land. But particularly where people depend heavily on subsistence activities, a cash award of 'fair market value' for a small agricultural holding may not be adequate to live on, even if invested. Other lost values, such as the use of communal lands, may not be compensated at all. People understandably also resist the loss of the only social and community ties they know. In addition, many people in developing countries have no recognized legal title to the land they occupy and may therefore not be compensated at all. Where an owner does not think an offer adequate, the courts may be far away or expensive to gain access to, take years to hear a plea, or simply not be trusted. Where displacement or resettlement of people is proposed, the issues become even more difficult.[13]

The solution of a decree in court ordering legal or informal occupants to leave with compensation they do not accept or no compensation at all, followed by police or military action to evict them, may lead to violence and continued conflict through the life of any project. It is increasingly unacceptable to companies worried about their reputations, to lenders and investors, and to much of national and world opinion, led by campaigning NGOs inside and outside the host country.

Photograph not shown

Indigenous, Aboriginal, and Traditional Land Claims

There are relatively few situations in which indigenous, aboriginal, and traditional land claims have been resolved to the satisfaction of all. In many places there is at best an uneasy status quo. National governments believe they have settled the issue by constitutional provisions and legislation, much of which reserves all mineral rights and revenues to the state even when the right of local populations to own or control the surface and its resources is acknowledged. Indigenous, aboriginal, and traditional occupants in many cases have not agreed to these legal provisions, and do not acknowledge the right of the government to grant concessions in the territory they regard as rightfully theirs. At the extreme, governments do not acknowledge the existence of indigenous or aboriginal peoples or any distinct cultural identity and rights. And these communities in turn may give little recognition to the government or its claimed prerogatives. Asserting a claim through an exploration or mining concession in these circumstances is almost bound to lead to conflict.

Sharing of Revenues

The local community and local government will experience a great increase in the demand for all kinds of services from water, waste disposal, and law enforcement to education and housing. Without some share of the revenues, local government will be marginalized and dependent on what the company may choose to do. And development opportunities will certainly be lost if government is unwilling to spend to help extend and complement the transportation, education, or health care facilities that the industry may build. There is no universal formula for how to do this,

and the result should likely depend on a number of factors such as whether the local community is a few dozen households or hundreds of thousands of people. This issue cannot be solved without government leadership. The message is that whatever the ultimate formula, national government cannot simply ignore the issue.

Access to Information, Public Participation, and Access to Justice

The right to participate in decision-making and to have access to needed information are key elements for any framework for sustainable development. Without clearly established laws and administrative procedures to give these rights substance, the ability to capture the benefits of development is very likely to be lost.

Lenders, Investors, and Customers

Criteria for lending can prescribe sustainable development–related conditions for the provision of funds to companies for new projects or 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.)

Central to current practice in this area are the various guidelines, policies, and directives used by the World Bank Group in its lending decisions. These are applied not only when the IFC makes a loan or MIGA guarantees it. They are almost universally used as a guideline by private commercial banks even where there is no World Bank Group involvement in a project. They are also referred to frequently by insurers, export credit agencies, national investment guarantee authorities, and others important to minerals finance. The Extractive Industries Review currently being sponsored by the Bank is therefore of broad importance, as any proposals it makes for significant changes could have widespread effects.

Criteria for lending are used by both private and public lending agencies. Even aside from the World Bank policies, 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 job creation objectives). Dialogue with lenders over these criteria and future direction in their application was a major focus of MMSD activities.[14]

Sustainability criteria or principles for investment are used to set out conditions for the investment of funds by institutional investors in equity or debt markets. Criteria vary, but often include requirements for a commitment to environmental awareness and accountability, an ongoing process of improvement and dialogue, and comprehensive, systematic public reporting. 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. It is also important for the financial community to be open and transparent in its dealings and screening methodologies.

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 no or very few minerals companies in their portfolio. Social and environmental criteria are also increasingly used by insurers active in the minerals sector. In addition, some large consumers of mineral products are becoming aware of the potential impacts of environmental and social factors in their supply chains.

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. They may include the expenses of relocating or retraining work force, maintenance of 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 arise and opportunities for positive solutions decrease. This is most extreme where closure results from a lack of profitability. Without prior agreement, such as bonding, it is likely that no one will have set aside the funds required.

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 on this issue 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 cases. (See Box 14–1.) In Papua New Guinea, one condition of BHP Billiton's withdrawal from the Ok Tedi mine was that there would be a process of informed consent. Consultation was conducted by Ok Tedi Mining Limited 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, villagers understood that the mine's continuing operation would result in significant environmental impacts.[15] 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.[16] The PNG Parliament passed the OK Tedi Mine Continuation Bill in December 2001.

The Ok Tedi and 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.[17] 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 are still being raised by critics 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.

These two cases demonstrate the importance of factoring closure costs in from the time a mine opens and not developing a project if the environmental or social costs are likely to be prohibitively expensive.

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 Papua New Guinea began in 1984. 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. (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.

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 polluting the river system, but this 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. 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.

The net result is that BHP Billiton is terminating its involvement with the project. In the words of its Managing Director, Ok Tedi is 'not compatible with our environmental values and the company should never have become involved'. 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. 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. 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.

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.

In March 1996, the plug in the drainage adit failed catastrophically, 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.

In 1997, 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 Boac 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 downstream. Placer Dome 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.

Sources: Ok Tedi from Pintz (1984); King (1997); Regan (2001); Banks and Ballard (1997), Fitzgerald (1999), and personal communications with BHP Billiton, February 2002; Marcopper from Plumlee et al. (2000), Coumans (1999a), and Robinson (2001).

They also demonstrate the importance of ensuring that open and transparent processes for dealing with closure are in place, along with clear processes of dispute resolution when conflicts arise. Ok Tedi is a subject about which much has been said and written. (See Box 14–2.)

Box 14–2. An Alternative View on Terminal Liabilities

According to some observers, despite criticism dating from the outset of the Ok Tedi project BHP and Ok Tedi Mining Limited failed to implement tailings containment that would have prevented the devastation of two rivers. Indigenous petitions and protests were discredited and indigenous political campaigns carried out both domestically and abroad were ignored by the mining company and the government. What policy initiatives might help prevent another Ok Tedi?

- Indigenous people should have veto power over projects affecting their land and livelihoods.
- Independent social and environmental monitoring is required to evaluate mining and other large-scale resource extraction projects.
- Where appropriate, indigenous environmental knowledge should be incorporated into environmental impact assessments and monitoring.
- There is an urgent need for full disclosure of environmental information and more effective communication between mining projects and affected communities regarding impacts.
- Corporations must provide just and reasonable compensation for their impact. Valuations should take local cultural values into account.
- Mechanisms for dispute resolution at a variety of levels must be supported, including the courts.
- There is an urgent need for international legal precedents based on recognized standards and norms and for greater specificity of standards for environmental human rights.

Mining companies need to assess their responsibilities in terms of longer time frames commensurate with the longevity of their environmental impacts – at least 50 years in the case of the Ok Tedi mine, for example. Most important, no new ore bodies should be exploited until tested and reliable strategies for tailings containment are identified. This means that some ore bodies will be off-limits to development in the near future and perhaps even permanently if no effective means of tailings disposal is available.

Source: Kirsch (2001).

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 often now considered an essential element of good business practice. (See Chapter 6.) Many companies in the minerals sector are committed to the continuous improvement of their social and environmental performance, in some cases including involvement in voluntary initiatives. A voluntary initiative is one not required by law – but this does not mean that its requirements are always non-binding on those who voluntarily subscribe to it.[18]

A wide range of instruments 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.

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 of, participation in, and continued evolution of effective voluntary initiatives. Government measures might be necessary to create the appropriate incentives for compliance.[19] Initiatives may be better at improving the performance of the best than in dealing with the poorest performers. But 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 possible standard of care with legal consequences.

Governments, NGOs, and businesses 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 that is 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 involvement of non-industry stakeholders, transparent design processes, clear measures of performance, and good accountability mechanisms.

While there is increasing recognition that voluntary initiatives can supplement existing legal regimes, many concerns have been raised about them. Some have to do with the vast number of these instruments being developed – more than 100 in ecotourism alone. 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. On the other hand, there is no denying that voluntary initiatives can be as effective as, but less cumbersome and costly than, regulations.

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 14–3) and guidelines on the environment and on participation formulated by the South African Chamber of Mines provide two examples. The Minerals Association of Canada also has draft principles in its Towards Sustainable Mining Initiative; as of 2000, there are mandatory reporting requirements for members.

The Australian code has already had important national

Box 14–3. 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 reviewed periodically to ensure it remains relevant to the needs of communities, industry, and regulators.

The code does not seek to replace regulation but to provide a framework of principles and processes aimed at encouraging signatories to improve existing levels of performance, from exploration to mine closure. 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. A number of major companies are applying the code to their operations world-wide and have integrated code reporting requirements with other environmental management systems, such as ISO14001. To date, over 40 public environmental reports have been published. Other signatories are yet to fully implement the code to cover all operations and have signed on as their Australian or Asia-Pacific operations.

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 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 areas 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's regular review process.

The code was reviewed in 1999, involving further consultation with all interested parties. The operation of the code was streamlined, and its environmental management focus was placed within a broader sustainable development context. The revised code, launched in 2000, emphasizes the importance of verification of performance and includes a self-assessment protocol to monitor and analyse industry implementation. The next review, which will commence in late 2002, will address the issue of developing enhanced governance structures, including entry criteria and sanctions for non-compliance, as well as a strengthened approach to external verification of code implementation. The code will also evolve to incorporate the social dimension.

Source: Wells (2001), Personal Communication with Minerals Council of Australia (2002).

impacts in terms of providing open access to reporting and a forum for addressing stakeholder concerns appropriate to community expectations for the industry. It has been used as a model for a codified framework in Ghana, and interest has been expressed by a number of other countries. It has also helped inform the international debate on the role of voluntary industry-led initiatives and is among the leading models that could provide a basis for a similar framework on a global scale. A principles-based framework could provide the flexibility and variation required to reflect the differences among the countries and regions.

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. It was developed in response to constituency pressure to broaden the mandate to cover sustainable development issues more comprehensively. 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), the predecessor of ICMM, prepared the first draft in 1999. With the assistance of the World Bank, ICME convened a multistakeholder workshop to review the draft and to comment on subsequent versions.

There is no empirical evidence that the charter – formally adopted only within the last year – has yet had direct impact on company performance. Member companies are not required to adhere to it, and it does not provide for verification or 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. (See Chapter 16.)

Certification Schemes

Organizations or companies can seek certification to demonstrate that their activities, products, or services meet the requirements of a particular recognized standard. Certification schemes can be product-related (such as eco-label certification programmes), 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-declare or self-determine 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 to provide 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. A high level of consumer understanding of what certification to a particular standard means is essential for the 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. One approach would be to ensure that

communities and NGOs are interviewed as part of the certification process. 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. While research has indicated that the rate of improvement of Responsible Care firms is slower than non-participants, it also shows that the overall performance standards of the chemical industry have improved since the inception of Responsible Care.[20]

Based on lessons from other sectors, a number of observations can be made about certification for the minerals sector.[21] First, it is important to identify the users (consumers, investors, lenders, insurers, or others), as this has implications for the design of the certification scheme. Second, the boundaries of a certification scheme need to be explicitly set. A cut-off point could be the individual mine-site or operation, which has the benefit of simplicity and control. However, certification of mining companies, combined with performance checks of individual mining operations, might be appropriate for equity investors. Specific dispensations could be made in the certification process for small operations.

Third, mineral processing and the manufacturing chain are very diverse and it would be extremely difficult to include them under a single certification scheme. Where processing or trade in minerals involves a high-profile, high-value, niche product, however, and where there are obvious environmental or social issues that might concern consumers, a post-extraction certification scheme might be appropriate. Such product labelling for consumer reassurance would involve extra requirements (such as a chain-of-custody certification) and may not be practical for many products with complex chains.

Fourth, the costs of certification depend on the type and level of standard, the costs of accreditation, and the needs for consultation and transparency. Experience from other sectors indicates that certification may have inequitable effects: it is often granted to the larger, richer groups, while others experience various forms of discrimination (based on costs or because local norms and practices are not recognized by standards). They also may tend to reflect the values of industrial-country institutions with resources to participate actively in their development more than the values of developing-country stakeholders. They may emphasize the environment pillar of sustainable development more than the economic or social pillars. Although certification schemes need to build on best practice, this must not only mean the practices of bigger, richer, 'scientific' enterprises. Many other traditions need to be incorporated, and poorer countries and producers need help to participate.

In the minerals sector, few examples exist of attempts to develop certification programmes. The Kimberley Process on international diamond certification provides one useful example for a specific product. And 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 Chapter 11.) It is possible to envisage a time where certain minerals products (such as diamonds) and most large-scale mineral operations are certified.

Corporate Reporting

Many mining companies now prepare annual reports describing their environmental (and sometimes social or sustainable development) performance. While 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. Reporting is also a valuable internal tool, as it provides a comprehensive assessment of the company's operations, and challenges managers, engineers, and others to address the sustainable development issue.

Voluntary social reporting in the mining industry is a 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 a framework for reporting that promotes comparability between reporting organizations while recognizing the practical considerations of collecting and presenting information across diverse groups.[22] (See Chapter 12.) 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. A balance must be struck between the need for consistency to allow comparison and the need for flexibility to meet the different information needs of local stakeholders. 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.

International Institutions and Guidelines

A number of international organizations, such as the World Bank Group and the United Nations, have produced guidelines that are relevant or specific to the mining industry. 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 world-wide reference points:

- 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 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.*[23]
- 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, including an Inspection Panel that has a process for complaints about World Bank–financed projects. 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 MIGA, which deal with the private sector. 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, which now has pending before it a number of mining-related complaints.[24] There have also been experiments with a number of private dispute resolution mechanisms. One of the most notable has been the Mining Ombudsman project run by Oxfam Community Aid Abroad in Australia. (See Chapter 9.)

Stakeholder Engagement

There is a good deal of importance given to 'stakeholder process' in sustainable development. The interest in stakeholder processes comes fundamentally from two considerations. First, globalization means that, to an unprecedented extent, people in different parts of the world 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 governments may not be capable of serving as brokers to resolve differences or promote shared opportunities effectively. This is particularly true in poor countries, where governments may simply lack the resources or legal structures to foster joint decision-making. It is also true in countries experiencing conflict, particularly where government is seen as allied with one side.

Stakeholder processes therefore have two main purposes: to try to get the right people together to share information and make decisions, and to ensure that there is joint ownership of any decisions reached. Even where the result is not completely satisfactory to particular interest groups, 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 and have achieved at least some of their objectives.

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, if they are 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 the outcome. Globalization has made it easier for people to block or frustrate implementation of decisions they disagree with; they can, for example, trigger international campaigns through the internet, put pressure on banks or export credit agencies, or assert complaints at companies' annual meetings.

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.

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 sector governance for sustainable development. 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 cause problems unless it is clear that the group has unequivocally appointed them to that role.

Some people make their living as intermediaries. The harder a group is for outsiders to understand or interact with, the more prominent this role is likely to be. Gatekeepers may also misrepresent the community. They may sometimes serve their own interests as much as the interests of the group they are representing. 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 conflict within 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 twin dimensions of proven or accepted primary identity with the group concerned, and accountability to that group, are important. The more broad-based, transparent, and democratic the process of selection, the greater credibility and legitimacy the representatives will have.

Capacity Building

Many of the issues discussed in this report relate to poor governance or to the need to build the capacity to cope with the dynamics of an increasingly complex and interdependent world. Weak governance results from many factors, including lack of resources and capacity, lack of specialized personnel, power imbalances, lack of political will, lack of coordination and integration, or 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, international institutions and bilateral donors could devote more resources to capacity building for developing countries and local communities. 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. Developing the capacity of local government is a key, often overlooked priority. Companies need to ensure that effective sustainable development capacity is integrated thoroughly into their businesses. The development of a company sustainable development policy will assist in achieving this.

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.

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. As one way to strengthen institutions, 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 organizations and NGOs can play an important role in assisting in the development of these measures. (See Chapter 8.)

The Way Forward

The issue of governance has been emphasized throughout this report. In the context of sustainable development, it is not enough to talk of the triple bottom line or the reconciliation of social, environmental, and economic factors without some idea of how that can take place over time in a myriad of circumstances. For good governance to work, there will need to be clarity and consistency in how the 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. To achieve this, effective and trusted forums for stakeholder engagement are required. These need to ensure that those with most at stake, especially the most vulnerable groups, are able to participate in appropriate ways. The way things get done is very culture-specific. One size does not fit all.

Efforts are needed to avoid the proliferation of competing schemes – norms, standards, guidelines, and criteria for the minerals sector. No one's system will work if everyone is developing something different. 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.

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.

Different actors continue to rely on the state to define the needed boundary conditions for the roles, rights, and responsibilities of the various players who operate within its boundaries. Companies may be granted a legal licence to operate. But when the law is not arrived at in an open and democratic way, or when it is outdated for today's circumstance, or when it is not enforced equitably, it is helpful to have a set of norms for 'sector governance' that are applied to different actors regardless of the location of the operations. Chapter 1 laid out such a set 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 and incentives.
- 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.
- Ensure that decisions are made at the appropriate level, adhering to the principle of subsidiarity where possible.

While these can be improved upon and elaborated further, the point is clear. There have to be some guiding rules if sustainable development is to follow. MMSD did not set out to negotiate such a set of principles but attempted to lay out the ones that seem to have come up most frequently in the course of the study. More work is required to achieve consensus on some guiding principles.

Strengthening the National Policy Framework

This report suggests that governments should take the lead in setting standards to ensure sustainable development takes place at the national and local level. Of course, this is not always easy to achieve; nor do governments always have the power to choose. In addition, many issues remain contested, such as the so-called Washington consensus, which assumes that liberal economic reforms should be universally applied. Regardless of the difficulties, there is no substitute for government intervention of one kind or another. With the wide array of instruments available, this need not always mean regulations. As a starting point:

- Countries with significant mineral development could consider a comprehensive review of their legal frameworks and their impacts on sustainable development. While the review should be respectful of the need for investment, it should focus on how to turn this investment into opportunities for sustainable development. This review would be most beneficial if it were not an internal process within government but an open discussion that involves all of the key actors in industry, labour, and civil society.
- The government bodies responsible for managing the impacts of minerals development – social, economic, and environmental – must have adequate resources. A complement to any review of national legislation could be a review of the resources available to the various state departments charged with managing mineral wealth and turning investment into opportunities for long-term development. This will require analysis of the ability of government at all levels to use project revenues effectively for development purposes. This review could be carried out in a manner in which relevant stakeholders at the national level could forward their views.
- The subject matter of sustainable development is distributed throughout government in a sometimes awkward way – from local communities to provincial or state government, national government, and even the United Nations. The mechanisms for cooperation across ministerial or departmental boundaries at these various levels are often inadequate. Sustainable development will suffer until these are found.
- Individual governments should develop or strengthen the policy and regulatory framework relating to the minerals sector at all stages of the life cycle to ensure that social and environmental issues are properly considered along with investment and economic development objectives. Three key and interrelated elements of this framework were previously identified: integrated impact assessment, Community Sustainable Development Plans, and integrated planning for closure. Governments should also ensure effective participation by stakeholders, build linkages among governance structures at different levels and between departments to improve

coherency, and strengthen capacity.
- Individual governments should ensure that effective enforcement provisions are in place. Where there is insufficient capacity, alternative instruments based on voluntary processes should be considered (for example, between management, labour, and communities).
- This report identifies the need to find methods of capturing the benefits of financial surety. Major companies, environmental organizations, governments, and others that want to move forward on this issue share an interest in solving them. Some suggestions are to:
  – develop administrative procedures to come up with plans within a reasonable amount of time, and ensure that guarantees would be ended when the plan is complied with – the World Bank and UNEP could be a source of advice;
  – adopt a collective approach among countries through regional bodies to take this issue out of the realm of competition for investment; and
  – recognize that financial surety is not an effective way of managing artisanal miners and those at the very smallest scale of production – different approaches should be developed for them, and the guarantee applied only to those above some cut-off point.

Photograph not shown

Improving Industry Performance

While an individual organization such as a company should pursue policies consistent with sustainable development to improve performance, collective action can also help provide incentives. A variety of initiatives are already being facilitated through national mining associations, commodity associations, or global bodies such as the International Council on Mining & Metals.

A Declaration on Sustainable Development embodying a commitment to a Sustainable Development Protocol is the next step along this path. The Declaration and Protocol are intended to complement, not replace, other priorities and initiatives identified at other points in this report. They are designed to simplify the current multiple codes and sources of guidance by providing a way to bring these together over time into one document and one management system. They should build on the recently adopted Sustainable Development Charter of the ICMM. The first step could be review of that charter, based on the findings and conclusions of this report.

The process of developing a Declaration – and then a Protocol – for the sector could take place in three phases. (See Chapter 16.) While ICMM might have a key role in developing the language of the Declaration and Protocol, including guidelines, codes of practice, and principles, from the outset these should be in a form that allows non-member companies – small, large, and intermediate – to subscribe to them.

It is suggested that the Declaration call for an immediate set of commitments that could be adopted by individual companies to demonstrate willingness and to have some requirements in place while the Protocol is developed. One alternative would be to declare adherence to existing guidelines, codes, conventions, and laws that can provide guidance for companies. While many elements for such a list have been proposed, there is a need to consider the practicality of achieving an initial commitment in a reasonable amount of time. The preliminary list of principles should be small enough in number so that companies can understand and apply them. A limited number that best serve the purposes of the Declaration have been identified. (See Box 14–4.) They are principles already contained in existing initiatives that:
- can be applied world-wide,
- have been developed through recognized international processes,
- preferably have received a commitment from at least one minerals company,
- reflect an understanding of the need for a partnership approach,

Box 14–4. Candidates for Initial Declaration Elements

- Rio Declaration
- The United Nations Global Compact
- Environmental, social, and economic guidelines on corporate reporting that have been developed within the Global Reporting Initiative
- OECD Guidelines for multinational enterprises
- World Bank Group's Operational Guidelines, including, but not limited to, those on Environmental Assessment, Involuntary Resettlement, Indigenous Peoples, and Projects in Disputed Areas.
- OECD Convention on Combating Bribery of Foreign Officials
- ILO Convention 98 on the Right to Organize and Collective Bargaining; ILO Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries; ILO Convention 176 on Safety and Health in Mines and ILO Recommendation 183, which accompanies it
- Voluntary Principles on Security and Human Rights

- reflect a balance of industry-specific and general considerations, and
- relate to factors important to the way financial markets evaluate risk.

The Declaration should also provide for a company commitment to adopt and comply with national or regional industry codes of conduct where they exist. For example, companies operating in Australia should initially comply with the Australian Minerals Industry Code, and companies in Canada with the Mining Association of Canada's environmental policy.

An Emergency Response Capability

When accidents occur, their impacts are immensely magnified when there is no effective capacity to deal with them promptly, decisively, and effectively. Uncertainty, lack of knowledge, and inaccurate information may cause as much public concern as the accident itself. An international Emergency Response Facility, supported in part by industry and with appropriate involvement of other stakeholders, could play a significant role. It could mobilize world-class experts who could supplement government capacity to assess, respond to, and control accidents and emergencies, or to make sure that threatened emergencies do not happen. This approach could assure the public that the best possible advice was available to responsible officials. This function might not need ongoing staff beyond a coordinator but could rely on an 'as needed' basis on experts from consulting firms, universities, governments, companies, or other institutions, including NGOs. Preventing or just minimizing the impact of one incident could achieve considerable direct and indirect savings.

A Sustainable Development Support Facility

The complex and demanding tasks of proper management of the minerals sector may tax available expertise and capacity of government and other actors, particularly where countries do not have a great deal of prior experience with such operations. It may be very useful to group all existing aid players to coordinate and target efforts.

This could be centred in a Sustainable Development Support Facility that could be supported by one or more sources of concessionary funds, with a commitment long enough to give it a chance to prove its worth, and could be administered by the World Bank Group as a trust fund. It could help governments, NGOs, UN bodies, trade unions, or other appropriate organizations committed to cooperative approaches to sustainable development to build the capacity of applicants and others to raise performance and standards in the minerals sector.

This would, in effect, be a fund available for technical assistance relevant to the goal of sustainable development. It would need a small secretariat set up regionally or globally and based in existing organizations.

Lenders and Investors

The MMSD process continuously found that many actors believe 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.

Commercial lenders could require that an effective dispute resolution mechanism be available to affected people and organizations as a condition of loans. If the proposed industry Declaration and Protocol are adopted, commercial lenders could support it as a means to the better management of risk. It could be recognized appropriately in credit decisions.

The insurance industry could also follow the development of the proposed industry Declaration and Protocol carefully – perhaps participating in its design – to maximize these business opportunities. If the Declaration and Protocol emerge as effective tools for managing risk, the insurance industry could recognize this appropriately in the products it offers to companies that adopt the Protocol, or in the rates it charges them.

In addition, the insurance industry is keen to prevent accidents and emergencies. It could participate in the design of the proposed emergency response capability and in defining its tasks to ensure maximum business benefits. Companies could also consider whether these benefits are sufficient to merit financial support from the insurance industry, in the way that this industry has supported other collective risk-reduction organizations in the past.

Equity investors may want to evaluate the extent to which company participation in the proposed Declaration and Protocol are likely to be relevant to investors' risks and share value.

International Organizations and Donor Governments

Since capacity building is key, international organizations such as the World Bank Group and donor governments should give greater priority to funding for and capacity-building efforts of national governments and communities in selected areas indicated in this report, such as the Communities and Small-Scale Mining initiative. Their efforts could help to harmonize the standards of mineral operations in host countries and to ensure that standards incorporate the goals of sustainable development. They could work with member governments and others to develop benchmarks for capacity building.

International organizations such as the World Bank and the UN could continue to facilitate national and international stakeholder processes for information-sharing and decision-making. In addition, organizations with research capacity such as the World Bank, the UN, research institutions, and NGOs could also synthesize cross-sectoral and transnational learning for public dissemination.

NGOs and Other Independent Practitioners

NGOs and other independent practitioners could 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; continue to lobby at all levels for effective participation by stakeholders; and act as 'watchdogs' – independent arbitrators or monitors. They could also enhance their effectiveness by developing internal policies for sustainable development and management systems to implement them. This could include, where appropriate, published standards for investigation of claims – similar to those now used by several human rights organizations – to enhance the impact of their campaigns.

A Complaints and Dispute Resolution Mechanism

Companies should have a serious interest in endorsing fair, reasonable ways (through a form of mediation/conciliation system) for people with grievances to get the attention of management, and to seek some kind of solution. Lack of such a mechanism drives people with grievances to other measures, many of which can present much higher levels of risk for all.

A mechanism must not conflict with national jurisdiction or existing processes – rather, it should reinforce them in positive ways. But when a group feels aggrieved by a foreign investor or an interest group, it should be able to be heard in a setting that has rules of evidence and procedures.

A dispute resolution mechanism should bring parties together, in a neutral forum, to work out a mutually acceptable facilitated settlement. The elements of the mechanism are envisioned as similar to the methods and procedures of an ombudsman, such as the IFC's Compliance Advisor/Ombudsman or the Mining Ombudsman project that has been operated by Community Aid Abroad in Australia.

The principal elements of this mechanism are described in Chapter 16. In each region or locality, an independent organization would be contracted to operate the complaints and dispute resolution mechanism. A balanced Board would periodically issue public reports of its activities and the overall process. It can establish rules for the conduct of the process, and amend them as necessary based on stakeholder feedback.

Endnotes

[1] Otto (2002).

[2] A good part of the discussion in the legislation sections is drawn from United Nations (2002).

[3] A good deal of information, mostly written from an industry perspective, about legislation of all types that affects mining is available through the Rocky Mountain Mineral Law Foundation, at http://www.rmmlf.org.

[4] A list of some countries providing tax stabilization is given in Table 4 of Otto (2002).

[5] Danielson and Nixon (2000).

[6] Bourassa and Vaughan (1999); Parr (2002).

[7] The discussion on the lack of international governance regimes for the minerals sector is drawn from Dalupan (2001).

[8] See, for example, http://www.vyh.fi/eng/environ/econinst/econotax.htm.

[9] See http:// www.nrcan.gc.ca/mets/mend.

[10] Bass and Hearne (1997).

[11] See Meeran (2002).

[12] For an overview on Papua, see Ward (2001); Greenhouse (2002).

[13] See Downing (2002).

[14] MMSD (2001g); MMSD (2002).

[15] Personal communications with BHP Billiton, February 2002.

[16] O'Neill (2001).

[17] Regan (2001).

[18] MMSD did considerable research on voluntary initiatives; see Greene et al. (2001); MMSD (2001).

[19] Palmer (2001).

[20] King and Lenox (2000).

[21] Bass, Font et al. (2001).

[22] Global Reporting Initiative (2000).

[23] UNEP/UNIDO 1996, TR27; UNEP 1993,TR15; UNEP/ILO 1991, TR5., cited in United Nations (2002).

[24] See http://www.tomoye.com/simplify/cao/ev.php.