SUSTAINABLE DEVELOPMENT: EMERGING CONCEPTS OF GOVERNANCE IN THE MINERALS INDUSTRIES

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PREFACE

The Mining Minerals and Sustainable Development (MMSD) project is a two-year effort, sponsored by some thirty of the world's principal mining companies, as well as a variety of labour, environmental, government and international organizations, to examine the role of the minerals sector in the global transition to sustainable development. [1]

The project, overseen by a balanced international panel of experts known as the project Assurance Group,[2] will publish a draft report in December 2001, and after a period of public review and comment will then publish a final report in March of 2002. It is anticipated that the report will inform the deliberations of the heads of state at the Rio +10 Earth Summit, which will be held in South Africa later in 2002.
The authors are respectively the Director, and the Coordinator for Latin America of the MMSD project.

A number of important questions, including the issue of what "sustainable development" means in a more sophisticated sense, and specifically what it means in the minerals sector, which is largely based on production of non-renewable resources from finite deposits, are outside the scope of this paper. Views are those of the authors, and not necessarily those of the Mining Minerals and Sustainable Development Project, the International Institute for Environment and Development, the World Business Council for Sustainable Development, or anyone else.[3]

1.1 INTRODUCTION

The phenomenon of globalisation has created many new opportunities. It has also created a variety of challenges. Some of these challenges and opportunities are of particular importance to law and the legal profession, as they relate directly to issues of accountability: what are the rules, who makes the rules, and what incentives encourage compliance with the rules, all matters very familiar to lawyers.

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[1] The project is operated by the International Institute for Environment and Development, <www.iied.org>, with support from the World Business Council for Sustainable Development, <www.wbcsd.ch>. For more information on the Mining, Minerals and Sustainable Development project *see* <www.iied.org/mmsd>.

[2] For further information *see* <www.iied.org/mmsd/governance.html>.

[3] However, an important amount of background information has been drawn from MMSD's "Planning for Outcomes" working paper written by George Greene at <www.iied.org/pdf/Planning_for_Outcomes.pdf>.

Understanding the purpose of this paper requires placing it in a framework. Those who work in the field of sustainable development framework are accustomed to speaking of "pillars" and "levels."

1.2 Pillars of Sustainable Development

Sustainable development is an idea that received wide attention at the time of the Brundtland Commission[4] and the Rio de Janeiro Earth Summit of 1992,[5] is a concept which unites four core sets of concerns into what is hopefully described as – and which may yet become – a single agenda. Those four concerns or "pillars" are:

- Economic development and poverty reduction, with particular emphasis on alleviating the condition of people and countries in extreme poverty.
- Social development, including conditions conducive to fulfilling human cultural potential and its expression by individuals and communities.
- Environmental protection, especially the preservation of the proper functioning of ecosystems and maintaining their productivity.
- Fostering systems of administration, governance, and institutions appropriate to achieve the first three goals in an open, transparent, and participative framework.

1.3 Levels for Action

As the complex problems of sustainable development have been analysed by numerous observers, it has become clear that a world based on a sustainable model of development cannot emerge without actions occurring simultaneously at distinct levels of human organization:

- There are parts of the problem that can only be solved by action at the global level.
- Effective action at the global level depends on and supports action at the regional level among groups of neighbouring countries with respect to their shared concerns.
- Action must be taken at the national level to solve problems identified at the national scale.
- Certain problems require action at the local level within nations.
- Other issues must be dealt with at a community level or a workplace level.

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[4] For more information *see* <www.hoechst-forum.uni-muenchen.de/sustainability/brundt-comm.html> or <www.unep.org>. The Brundtland Commission defined sustainable development as satisfying present needs without compromising the ability of future generations to meet their own needs.

[5] For more information *see* <www.un.org/geninfo/bp/enviro.html> or <www.unep.org>.

- Finally, there are some parts of the transition that require action at the individual or household level.

1.4 This Paper

This paper deals with the potential options for addressing the problems of sustainable development at the global and broad regional levels. It addresses principally the fourth of the "pillars" of sustainable development: governance, law, institutions and administration. It focuses on concerns of the mining and minerals industries.

We must be absolutely clear that this paper is not in any way intended to promote or prefer one of the described alternatives over others. That discussion must be had, but it is not for the authors to decide which alternative is best, or indeed whether anything needs to be done at all.[6]

What we hope to do is provoke informed discussion of these issues. We are hardly the originators of these ideas, which are being discussed intensively in a number of forums.[7] The pace of that discussion will accelerate as we approach the new 2002 Earth Summit of the world leaders in Johannesburg.

Our view is simply that these are of fundamental importance to the future of the industry, and particularly to those concerned with law and governance issues in the mining and minerals industries. The discussion of the problems and the options therefore should not be limited to a few professional participants in ratified international policy processes. It should be broadened to include a wide range of those most concerned, and whose experience and knowledge can help shape solutions appropriate for a sector they know intimately.

Perhaps, the next Earth Summit, in a major mining centre of the world principal mining countries, will be an auspicious forum for advancing the sustainable development agenda in the minerals sector.

1.4.1 What Are The Issues?

Our argument is founded on three basic premises:

- Issues of sustainable development are vital to the future of the minerals sector.
- Some problems of sustainable development can only be solved if there is action at the global or regional level.

Effective institutions capable of managing problems of sustainable development at the global or regional level have in general not sufficiently emerged.

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[6] We do believe that the absence of any concerted effort to develop a good alternative for global performance in the industry does not mean nothing will happen. It appears very likely that something – maybe a number of things – will emerge. A "hands off" approach simply makes it more likely that whatever emerges will not be shaped by people who understand the industry.

[7] UNEP Mineral Resources Forum <www.natural-resources.org/environment/aboutmrf.htm>. For a comprehensive study on Global Public Policy *see* <www.globalpublicpolicy.net>.

1.4.2 The Future of the Minerals Sector

In the increasingly globalized world, issues of poverty, economic and social development, and environment are reshaping the context in which the minerals cycle exists. They play a major role in determining whether the industry has what is referred to as a "social license to operate": whether there is land open to exploration, on which deposits which have been found can in fact be mined, whether the precautionary principle will be properly applied or instead used to place irrational bans on mineral products, whether communities will resist mineral development or become partners in it, and whether developing countries see the industry as a source of poverty or part of the solution to it.

The fact that the social license of the industry – particularly the mining end of the industry – is in jeopardy is hard to dispute in large parts of the world. Polls show mining companies are viewed like tobacco companies as industries with negative images. The industry has very low levels of trust with many important social groups with which it must act.

These concerns are very real and express themselves in innumerable ways: whether the best graduates choose the minerals industries or other careers, whether investors choose to hold mining stocks, how hard it is to get concessions or permits, and whether markets are open or closed, to name just a few.

Maintaining the industry's license to operate, and rebuilding trust, are therefore vital business issues. It is hard to see how there can be sufficient progress without some way of developing thoughtful, balanced, meaningful norms that (1) express what good practice is and is not, (2) help those inside and outside the industry to distinguish between those who are doing a good job and those who are not, and (3) provide some system of incentives for good performance.

These needs are principal drivers in the rapid changes in law and legal regimes at the national and local levels. They are also creating a very real pressure for some system of "rules of the road" at the international level.

1.4.3 Action at the International Level

Globalisation has created new stresses and new issues which require cooperation at a level beyond national territorial limits. Trade in endangered species cannot be controlled effectively if there are wide open markets in some countries creating irresistible economic incentives for their exploitation. The poorest countries simply do not have the resources to feed their people, or to support development, without trade, or aid, or *some* form of infusion of skills, money, equipment, materials from somewhere outside their borders. Control of global pollutants such as CFCs or greenhouse gases cannot be accomplished at a national level.

In the minerals industries there are a number of concerns which some have suggested need attention at a global level. These include, in the view of some observers, the lack of any mechanism to identify or reward those companies which are doing a good job at moving toward a more sustainable model, or to identify and impose sanctions on those whose conduct falls outside some accepted set of norms. Examples of the direction in which events are moving include the recent proposal to create a system for certification of diamonds as "conflict free."[8]

1.4.4 Lack of Suitable Institutions and Structures

National governments and national legal systems are sovereign within their spheres. However, those spheres have real and juridical limits. This has important consequences.

There are mining companies operating in conflict zones where it is not clear what the government is, or whether there is a real "government." Even many developed country governments have found the mobility of capital in the globalized age to be beyond effective regulation. Stock and commodity markets are in a process of rapid change and adjustment. Governments have limited territorial jurisdiction. And they lack capacity in many areas of skilled personnel, funding, legal frameworks, information technology and otherwise to be effective partners to the private sector in sustainable development or effective counter-weights in preventing harm. The weakness of host country legal frameworks has been cited as one rationale for attempts to sue resource companies in their home countries for alleged environmental or social claims arising in developing countries.[9] There is no effective international regulatory agency, though there is one step – under active discussion – to create such an agency: the World Environment Organization.[10]

Negotiating conventions and treaties is painfully complex and often enormously slow.[11]

Mining and minerals companies are faced with some very difficult issues: what kind of environmental norms to apply when there is no effective regulation, what kind of human rights policies to employ when operating in regions in which human rights are not always respected, what role the company properly has in encouraging sustainable economic development in the countries and communities in which it operates – and the limit on this role.

Any one of these issues can give rise to litigation. Any one of them can pose risks to the company's reputation. Either legal action or damage to reputation can be enormously expensive.

1.5 Outlines of a Voluntary Response

Problems should not be solved if we can't define them. Otherwise we run a real risk of creating a good deal of confusion and inefficiency to no good purpose.

We define the problem on which we are focussing in the perception that there is an international "vacuum" of norms in areas of concern to sustainable development, resulting

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[8] *See* <www.unfoundation.org/unwire/archives/15>.

[9] Ward, Halina, "Securing Transnational Corporate Accountability Through National Courts: Implications and Policy Options," upcoming publication in *Hastings International and Comparative Law Review*, 2001. Halina Ward is Senior Research Fellow at the Royal Institute of International Affairs.

[10] Ruggiero Renato, Director-General, World Trade Organization called for the creation of a World Environment Organization parallel to the World Trade Organization. Environment New Service, March 15, 1999 at <ens.lycos.com/ens/mar99/1999L-03-15-01.html>. *See also* on the Earth Summit Meeting of 2002 <www.unedforum.org/RandP/summit3.htm>.

[11] A summary of international conventions and guidelines affecting mining is presented in *Mining and Sustainable Development II: Challenges and Perspectives*, United Nations Environment Program, Industry and Environment, Division of Industry, Technology and Economics, Special Issue 2000, ISSN 0378-9993, at 84-85.

in inadequate or nonexistent "rules of the road," and a lack of institutions able to apply such norms as may exist, affecting a number of sectors of the minerals industry.

If there is such a vacuum, consequences are said to include an inability to define best practice, and an inability of companies which are managing these factors well to distinguish themselves from companies which are not.

These lead to a list of other concerns. Often cited problems are the inability to predict future claims against the company, inability to deal with adverse comment or public campaigns against the company in the absence of any accepted benchmarks, lack of a forum in which the industry and its critics can meet on an equal footing for a rational discussion of what needs to be done, lack of an accepted neutral "fact finder" where there are conflicting allegations, and poor overall industry image.

There may also be enormous practical problems in upholding national norms in the new global arena. The emergence of an internationally accepted set of accounting standards [12] for the extractive industries is one example: there is now a growing view that national accounting standards may not suffice in the new global environment.

These are most serious issues. The direct link to the function of lawyers in advising mineral clients should be evident. Without in any way indicating a preference for any of the options, we focus this paper on one set of possible responses, which we classify as "voluntary initiatives."[13]

1.5.1 Possible benefits of a system based on voluntary initiatives

A voluntary system designed to address the defined problem could have a number of functions. In one broad set of options it would be capable of (1) reaching a broadly agreed consensus as to what management approaches were (and which were not) acceptable; (2) having some way to decide who was and who was not following these rules; and (3) promoting some system of positive or negative incentives to encourage compliance with the rules.

The existence of such a system could have benefits for many actors.[14] If such a system successfully promoted sustainable development, it would benefit us all by reducing poverty, improving environmental performance, and in general raising the playing field. And something does need to be done, since progress is too slow.[15]

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[12] For more information *see* <www.iasc.org.uk>.

[13] Some of other kinds of initiatives are discussed in Greene, "Planning for Outcomes", *supra* note 3.

[14] We believe that people and organizations are generally the best judges of their own interests. Therefore each of the affected constituencies will have to decide whether it would gain more than it would lose by creation of this kind of system.

[15] "In the past, we could afford a long gestation period before undertaking major environmental policy initiatives. Today, the time for a well-planned transition to a sustainable system is running out. We may be moving in the right direction but we are moving much too slowly. We are failing in our responsibility to future generations and even to the present one," United Nations Secretary General Kofi Annan, quoted in *The Guardian*, 15 March 2001 at 15.

If we focus specifically on the possible consequences for the industry itself, benefits which are sometimes suggested include:

- Creating a recognized standard for responsible companies which are good at managing environmental and social factors to distinguish themselves from others who do not deal as effectively with those issues.
- Lower insurance rates or increased access to insurance for complying companies.
- Easier access to land resources required for the industry to continue.
- Increased access to capital on more favourable terms.
- Access to markets or customers where access would otherwise be problematic.
- Conceivably, a price differential for "certified" products.
- A higher degree of certainty as to when future claims would or would not arise.
- Lessening the perceived need for highly prescriptive regulations.
- Lower political risk to projects.
- Better success at attracting and retaining the best personnel.
- Improved company reputation.

These are serious objectives that should be of real interest to those who have the interest of the industry – and society – at heart.

1.5.2 Elements of A Voluntary System

A system does not need to have all of these elements. Indeed, it might still be very useful with some more limited set of characteristics. But there are at least three general ideas which bear discussion These are: (1) norms, (2) a facility which has various functions related to the norms, and (3) incentives or consequences. These are quite familiar to lawyers as basic elements of a system of laws. What distinguishes a voluntary initiative is that while it may have these three elements, it may be created voluntarily by the industry in question – alone or in cooperation with others. Action by sovereign states may be very helpful, but is not in principle required.

1. <u>Norms</u>

We choose to use the word "norms" as the most neutral word we can find to describe rules about conduct. The term as we use it includes guidelines, standards, statements of principles, codes of conduct, and a wide variety of other statements about conduct. It could even include the instruments of "soft" international law, or even hard national legislation or regulations. It could include stock exchange disclosure rules, or other codes promulgated by essentially private bodies. At this early stage, we want to avoid getting drawn into discussions of whether "guidelines" are better than "codes of conduct" or whether we are talking about "standards" or "regulations." We will therefore continue to use the word "norms" as a generic term for all of these more specific ideas.

The idea is simply that a set of norms can define the level of practice which we seek to achieve, or at least some minimally acceptable "floor." They may also define conduct we wish to discourage or proscribe.

In the sustainable development context these norms could deal with economic development at the national level in the host country and at the level of the local community, the way land is accessed and used, the way occupants of that land may be compensated or resettled, social factors including the specific issues associated with minority, traditional, or cultural communities, and the broad range of human rights and environmental issues. They could also deal with some much smaller subsets of these issues. The proposed norms would attempt to define and separate the roles of industry, government, labour, civil society organizations and others, and set clear benchmarks for what companies should be held accountable for and what is not their responsibility. This is closely related to the question of sustainable development indicator on which much work is underway notable at the Mining and Energy Research Institute.[16]

2. <u>The "Facility"</u>

The word "facility" is again chosen for its neutrality. It could be an organization with ongoing existence. It could be as light as some sort of secretariat to convene occasional meetings. We do not call it an institution, because that implies some sense of permanence or even bureaucracy, neither of which is necessary in a number of scenarios.

It could have three general types of relationships to industry. First, it could be completely owned and governed by industry, such as a trade association. Second, it could be something in which "ownership" or governance is shared among industry and a variety of other stakeholders such as prominent NGOs, governments, community representatives, international organizations, financial institutions and investors, or others. Third, it could be wholly independent of industry.

These issues are related also to the question of what the facility would cost and where the resources to maintain it would come from. The "lighter" the structure, the more manageable the financial issues.

We have identified five functions which this hypothetical "facility" could have; obviously it need not have all of them.

- *Serving as a Forum.* This proposal is for the establishment of a neutral facility in which industry leaders, government environment ministries, NGOs, labour and other concerned actors could come together to discuss sustainable development concerns, and search for a way forward. The United Nations Environment Program has been stimulating the discussion of such a forum.

[16] For further information *see* <users.wbs.warwick.ac.uk/ccu/mern>.

- *Developing Norms.* The facility might be well adapted to developing norms. Just as the International Accounting Standards Committee is developing accounting standards for the extractive industries,[17] the hypothetical facility could develop sustainable development norms for the minerals industries.

- *Reviewing and Improving Norms.* No set of norms is perfect as developed. Experience with them will show their strengths and weaknesses. Ongoing review and revision of norms over time is another potential role of the facility.

- *Determining compliance with norms.* The facility could have a role in determining whether norms are being complied with, or violated. This does not imply that it would necessarily conduct direct investigations of companies or projects. While that could be one approach, the facility might simply limit itself to developing terms of reference or competency standards for third party auditors or others who would do actual verification. Or it could be a certification body.[18]

- *Fact finding, mediation, conciliation.* The facility could have a role of fact finding in disputes over whether the norms were being infringed at a particular project site. This could be coupled with a role in mediation or other dispute resolution. One model – though certainly not the only one – is the Ombudsman of the International Finance Corporation.

3. Incentives and Consequences

There is a sense in which the kind of system under discussion could be justified simply as the right thing to do: an expression of corporate social responsibility. But if such a system were to be created, its effectiveness would be maximized if it created incentives for adhering to the norms: increased shareholder value, lower insurance rates, access to customers and markets, preferential loan rates, or other more or less direct financial benefits.

Under the auspices of the Mining Minerals and Sustainable Development project there is an ongoing exploration of the potential for creation of such incentives.[19] Examples include:

- A series of public meetings, cosponsored with the World Bank and the United Nations Environment Program, in which mining company Chief Financial Officers, senior lenders in mining departments at private banks, insurers, equity investors, NGOs, governments and others are looking at the issues involved in, *inter alia,* developing a set of sustainable development criteria, perhaps an advanced model of the Bank's existing guidelines, and a system of rewarding companies which follow the criteria. The most recent meeting, April 9, will be opened by World Bank President James Wolfensohn, who has also announced that he will be creating an Extractive Industries review process to examine the basis of the Bank's participation in oil and gas and mining projects.

[17] *See supra* note 12.

[18] There is an ongoing Mining Certification Evaluation Project looking at the potential for independent certification of environmental and social performance in the mining sector. This is a joint project of World Wildlife Fund – Australia and Placer Dome Asia Pacific. *See* WWF-Australia Discussion Paper, resource Conservation Program, Mineral Resources Unit, January 2001.

[19] This activity is managed by Elisabeth Wood, Assistant Project Manager of the MMSD Project.

- A review of what would be involved in applying sustainability criteria to transactions on minerals exchanges such as the London Metals Exchange.

- A review of the opportunities afforded by e-commerce for easier identification of the origins of minerals traded in commerce, and potential application to certification processes or other systems of norms.

1.6 Considerations Of Balance

The very concept of sustainable development is a balancing act which attempts to accommodate many interests. At the core, there is an attempt to marry the agenda of developing countries (often referred to as "the south"), which is said to be more oriented toward human needs, especially poverty reduction, with the agenda of the richer and more economically successful countries ("the north"), which is believed to be more focussed on environmental issues. But there are many other balancing acts as well.

Developing a set of norms, or a facility with some role in creating or applying those norms, or a set of incentives for compliance, involves extremely important issues of balance and equity and should not be attempted unless there is meticulous attention to creating a process which can maintain that balance. Such a process could be quite counterproductive if it were "highjacked" by actors interested in imposing one limited agenda, or emphasizing one element to the exclusion of others.

Particularly if – as we believe – the momentum is gathering toward some form of broad voluntary system, and if –as we also believe – there will be a tendency for convergence among the many initiatives already away on a single model, the way that model is owned, who participates in it, and how, become crucial.

Governance issues in organisations which don't yet exist may seem a fairly abstract concern. But if there are important benefits to be gained by moving in this direction, the movement will be quick when it starts, and it is better to have the issues related to control, participation and balance well in mind before we go too far down the road.

The facility itself, as well as the norms, might truly need to have much of its operation at a regional level, where needs and priorities of individual countries or societies can be given a clearer voice.

1.7 Should There Be A Voluntary Process?

The questions of whether there should be some form of voluntary (or involuntary) system created, who should be involved in it, and how it should work if established all involve many actors beyond the MMSD project. Our remit is not to establish such a process. Nor is it to lobby for one or another outcome. Our terms of reference begin and end with assuring that all aspects of these issues receive a wide and open discussion, that options emerge, and that there is a serious examination of the options.

In that spirit, we would suggest that the answer depends on at least three variables:

- Is there a better way to raise the bar on performance?

- Are there real and substantial incentives available?

- Will someone else create a system anyway if industry does not take leadership?

1. Is There A Better Way?

If we share the view that society, including the minerals industry, is going to make progress toward sustainable development – reduction of poverty, more social opportunity, more robust ecosystems, more honest and transparent governance arrangements – then if the industry does not wish to propose some form of voluntary system, what will it do? If there is a better way, what is it?

2. Are There Real and Substantial Incentives Available?

Answering this question involves not just an analysis of the minerals industries but also some review of the experience in other industries, which have adopted some form of voluntary structure. A detailed discussion of the results of those efforts – such as the Forest Stewardship Council, the Responsible Care program in the chemical industry, the World Commission on Dams, or the Marine Stewardship Council – is outside the scope of this paper but part of the ongoing work of the Mining Minerals and Sustainable Development project.

3. Will Someone Else Act if the Industry Does Not?

The answer to this question is clear: there are many different actors with many different slants trying to fill the "governance gap." This does not mean that they will succeed wholly or partially. But it is evident that they are trying. Among these actors are:

- *The Global Compact.* The Secretary General of the United Nations has established a "Global Compact" to which a number of prominent companies are signatory. While the principles of the compact itself are fairly general,[20] there are a number of mechanisms for more specific sector by sector agreements being developed, including the Global Reporting Initiative guidelines for the mining sector.[21] In addition, some of the organizations in the United Nations family, notably the United Nations Environment Program, are interested in the development of a World Environment Organization, something which will surely be discussed at the Rio + 10 Earth Summit next year.

- *The ethical investment movement.*[22] It appears that so-called "ethical investment funds" or individual "ethical investors," or portfolio managers who use one or another set of "ethical" investment criteria are now a significant and growing

[20] *See* <www.unglobalcompact.org>.

[21] The Mining Minerals and Sustainable Development project has a memorandum of understanding with the Global Reporting Initiative for joint exploration of approaches to such guidelines and what they should contain.

[22] "Over one in four Americans that own shares say that a company's record on its broader social responsibilities has influenced their decision to purchase or sell its shares. Fully 60% of Americans own shares either directly or indirectly (such as through a stock mutual fund). Twenty-eight percent them report buying or selling shares on the basis of a company's employment practices, community involvement or business ethics; and another 10% percent say they have considered doing so." Environics International media release of 27 February 2001, described in *Wall Street Journal* 27 February 2001.

fraction of investment capital.[23] The real questions are "by what criteria are investments judged to be ethical?" and "who makes these decisions?" While the answers vary a good deal, the answer in a good number of cases is that "ethical" investment criteria *exclude investment in any mining company, no matter how responsibly managed*. And while some funds or investors are more sophisticated, a disappointingly high number of these funds relegate decision-making to a limited number of fairly junior personnel with very little knowledge of the minerals industry. Investments wind up being judged on a small number of criteria, which may be selected mainly because they are quick to extract from annual reports.

- *The World Bank*. The World Bank has a set of detailed environmental and social guidelines for its activities, as well as some specific policies on the mining sector. These are broadly applied by private lenders, export credit agencies, regional banks and others even where no World Bank financing is involved. A group of nongovernmental organizations recently challenged the World Bank to declare a halt to all lending in the mining and oil and gas sectors. While the Bank has not at this stage announced such a moratorium, it will be conducting an Extractive Industries review, which could very likely address systems of rules for international minerals investments.

- *Sustainability indices*. There are a number of companies, including the Dow Jones Sustainability Index, and Innovest, which are purporting to rate companies according to their performance on sustainable development scorecards. There is a growing literature arguing that performance on these indices is an indication of a company's likely future financial performance, and that view is gaining some adherents. Again, the questions are similar to those raised by the "ethical investment" funds: on what criteria are companies rated, and who makes the decisions? And again, the answers are uneven.

These are not the only instances where one or another approach is being suggested to the perceived "governance gap." Others are described below in this paper.

And there should be no implication here that these are not the right approach, or not part of the solution.

The only point that we wish to make is simply to debunk the idea that if industry takes no leadership, nothing will happen. Rather, the reverse may well be true: if industry does not show leadership, quite a lot may happen. It may work out very well, or it may be directed by people who, however well meaning, lack a profound understanding of the sector and its problems.

And industry has taken a good deal of leadership in establishing processes with more limited aims. Examples are the voluntary code for the use of cyanide in mining, being developed by the International Council on Metals and the Environment in partnership with

[23] *Financial Times* Editorial comment: Ethical investment, February 27, 2001. As of November 1999, the Social Investment Forum reports that one in eight dollars of assets under management in the United States, a total of $2.16 trillion, is in investments that integrate social and environmental concerns. Of those dollars, $5.4 billion represent community investment dollars.

the United Nations Environment Program, the Mining Certification Evaluation Project carried out by World Wildlife Fund and Placer Dome,[24] and the ARET program for accelerated reduction and elimination of toxics.[25]

2. EMERGING NORMS APPLICABLE TO OTHER SECTORS

One way of examining the potential value to the mineral sector of a clearer set of norms for transnational operations is to examine the experience in other sectors. Several other sectors have been trying deal with very similar issues using a diverse set of mechanisms and instruments.

Four sectors, which have developed voluntary structures to define and encourage best practice in their industries, are the forest industry, marine resources industry, the chemicals industry, and the dams industry.

2.1 Forests: Forest Stewardship Council[26]

The Forest Stewardship Council (FSC) was created in 1993 as a response to growing public concern about the destruction of the world's forests. This concern placed a premium on products produced from well-managed forests. There was a lack of consensus about what defined "well managed" or sustainable forestry, how one should decide whether a particular forest was being managed consistent with those principles, and who should be involved in making those decisions.

This, in turn, led to a proliferation of forest product certification systems and many conflicting claims made on forest products. FSC intends to reduce the confusion by providing a truly independent, international and credible labelling scheme on timber and timber products. They assert that this will provide the consumer with a guarantee that the product has come from a forest that has been evaluated and certified as being managed according to agreed social and environmental principles and criteria.

The FSC was founded by a diverse group of representatives from environmental and social NGOs, the timber trade and the forestry profession, indigenous people's organizations, community forestry groups and forest product certification organizations from around the world.

The FSC's purpose is to promote environmentally appropriate, socially beneficial, and economically viable management of the world's forests.

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[24] Rae Michel, Rouse Andrew, Mining Certification Evaluation Project: Independent Certification of Environmental and Social Performance in the Mining Sector, *supra* note 16.

[25] Accelerated Reduction / Elimination of Toxics is a voluntary, non-regulatory program that targets 117 toxic substances, including 30 that persist in the environment and may accumulate in living organisms. Michael Sopko, Chairman & CEO Inco Limited stated, "member companies of the Mining Association of Canada are committed to sustainable development that embodies protection of human health, the natural environment, and a prosperous economy. The voluntary ARET program helps us to communicate our continuing improvement to our communities, our employees and to all Canadians.' For further information *see* <www.ec.gc.ca/aret/homee.html>.

[26] For further information *see* <www.fscoax.org>.

1. Environmentally appropriate forest management ensures that the harvest of the timber and non- timber products maintains the forest's biodiversity, productivity, and ecological processes.

2. Socially beneficial forest management helps both local people and society at large to enjoy long- term benefits and also provides strong incentives to local people to sustain the forest resources and adhere to long-term management plans.

3. Economically viable forest management means that forest operations are structured and managed so as to be sufficiently profitable, without generating financial profit at the expense of the forest resource, the ecosystem, or affected communities. The tension between the need to generate adequate financial returns and the principles of responsible forest operations can be reduced through efforts to market forest production for their best value.[27]

The FSC implements a certification process through the application of a set of Principles and Criteria which apply to all tropical, temperate and boreal forests.

In order to have a product certified, the producer must contact a certification institution, which has been previously accredited before the FSC. This institution has to verify through the chain of custody that the Principles and Criteria have been complied with. Therefore, in order for products originating from certified sources to be eligible to carry the FSC trademark, the timber has to be tracked from the forest through all the steps of the production process until it reaches the end user. Only when this tracking has been independently verified, can the product carry the FSC logo.

The governance structure of the FSC follows a tripartite partnership approach. The highest organ of the FSC is the General Assembly formed out of individual members or duly designated delegates of members organizations which in turn is made up of three chambers: 1) social and indigenous organizations, 2) environmental organizations, and 3) individuals and organizations with an economic interest in the forest products trade. The purpose of the chamber structure is to maintain the balance of voting power among different interests without having to limit the number of members.

To achieve a balance between "Northern" and "Southern" perspectives within each chamber, "Northern" and "Southern" organizations and individuals shall have 50% of the voting power. Therefore, the FSC's by-laws provide that there shall be "Northern" and "Southern" sub-chambers within each of the three chambers.

The General Assembly delegates operational activities and most decision making to the Board. The Board is made up of nine individuals who are elected for a three-year term.

The expenses of the FSC are paid by funds derived from:

- Evaluation fees paid by certification bodies to cover the costs of the accreditation process.

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[27] Forest Stewardship Council A.C. By-Laws, ratified, September 1994; Revised February 1999, Mission Statement, hereinafter FSC by-laws.

- Licensing fees charged to accredited certification bodies for use of the FSC logo.

- Grants and donations. FSC will accept contributions from non-governmental organizations, foundations, government sources, multilateral agencies and individuals, as long as no restrictions are attached which would affect the independence or integrity of FSC.

- Membership dues.

- Returns from investments and services.[28]

The benefits to a producer of having products certified by the FSC are said to be many, starting with improved image and business reputation. The principal concrete benefit is that the certified product bears a mark indicating that it is certified, leading presumably to higher acceptance by some consumers, and conceivably some price increment in some markets.

So far, more than 15 million hectares have been certified and over 3,000 certified wooden products are on sale in UK stores alone.[29]

2.2 Marine Resources: Marine Stewardship Council (MSC)[30]

The Marine Stewardship Council started as a joint venture between Unilever and the World Wildlife Fund in early 1996. In 1997 it was established as an independent organization in response to chronic overfishing which in some cases has driven staple species commercially extinct, resulting in loss of thousands of jobs in regions dependent upon this industry.

The objective is to reverse the overfishing crisis through developing long-term solutions, which are environmentally necessary, carry economic incentives and are politically feasible

The implementation of this process is carried out through the application of the MSC Principles and Criteria, and the certification of its compliance similar to the one from the FSC.

The Principles and Criteria intend to build upon, and to complement, the existing work of international organizations and the best practice of the fishing industry. Each principle has an expressed intent and accompanying management system criteria:

- Maintenance and re-establishment of healthy populations of targeted species.

- Maintenance of the integrity of ecosystems.

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[28] FSC by-laws, number 10.

[29] *See* <www.un.org/esa/sustdev/viaprofiles/FSC.html>.

[30] United Nations Sustainable Development Web page on Voluntary Initiatives at <www.un.org/esa/sustdev/viaprofiles/MSC.html>. For further detail *see* <www.msc.org>.

- Development and maintenance of effective fisheries management systems, taking into account all relevant biological, technological, economic, social, environmental and commercial aspects

- Compliance with relevant local and national local laws and standards and international understandings and agreements.

The certification process ensures that the fisheries are complying with the MSC Principles and Criteria through a third party, independent, voluntary certification program.

The MSC programme works through a multi-stakeholder partnership approach, taking into account the views of all those wishing to secure a sustainable future for fishing.

The MSC's governance structure seeks to be as open as possible, and is currently under review to further increase its openness.[31] Several committees ensure the integrity in the MSC's affairs, reviewing its fisheries environmental standards, its remit as an educator, and its accountability to its stakeholders. In addition, a Senior Advisors Group advises the MSC on policy matters and the future development of the organisation.

The MSC Board comprises 9 individuals, appointed in their personal capacity for a three-year term. They are automatically trustees of the charity and represent the MSC in public whenever appropriate.

2.3 Chemical Industry: Responsible Care[32]

Responsible Care was created in 1985 by the Canadian Chemical Producers' Association (CCPA) in response to a series of industrial accidents, public concerns with chemicals, as well as existing and expected regulations.

The objective of Responsible Care is to promote continuous improvement in member company environmental, health and safety performance in response to public concern and to assist members' demonstration of their improvement in performance to critical public audiences.

Responsible Care's approach to engaging the chemical industry is to commit the CEO or most senior executive of every member of CCPA to implement the guiding principles and codes of practice of Responsible Care® within three years of joining the association and publicly to verify this compliance.

In addition to this, companies have the obligation to report progress quarterly to the Leadership Groups of other company CEOs, who have the mandate to assist and encourage timely implementation, and who can recommend removal from membership of any company not meeting its commitment. Peer pressure is used as a means to promote compliance. The signatories go through two rounds of verifications. The first one determines whether the company has the necessary systems in place as required by the program. This comprehensive inspection process focuses on the life cycle of a chemical, and is conducted by

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[31] The MSC governance structure report is due during the first half of 2001.

[32] United Nations Sustainable Development Web page on Voluntary Initiatives at <www.un.org/esa/sustdev/viaprofiles/CCPA_Responsible_Care.html>. For further information *see* <www.ccpa.org.ca>.

an independent team composed of 2 industry experts, 1 activist and 1 community representative. The second round ensures that there is no slippage and that companies have 'raised the bar' to meet changing stakeholder and industry expectations. This additional monitoring process focuses on performance and takes place three years after the Round 1 Verification.

Responsible Care is described as a successful initiative. CCPA's 1998 report on the program lists the following achievements:

- a 55 % reduction in emissions of chemicals since 1992
- a projection of a further 26 per cent reduction by the year 2002
- reduced frequency and severity of transportation incidents
- continued reduction in frequency of worker injuries

There is at least anecdotal evidence that this program has resulted in lower insurance rates and/or increased access to insurance for participants.

Part of Responsible Care's concept relies in the establishment of country specific association which consider the realities of each location. Currently, Responsible Care is being implemented in 42 countries.

2.4 Dams: World Commission on Dams[33]

In 1997, the World Conservation Union (IUCN) and the World Bank convened a meeting of international stakeholders to discuss an internal World Bank study of 50 bank-funded dams. The Forum, comprised of environmental entities, indigenous groups, industry representatives, state enterprises and international development banks, agreed that an independent Commission was needed to review the performance of large dams and set guidelines for the future. This Forum selected its members but the Commission remained independent.

The Commission consisted of a Chair, eleven Commissioners of which one was to be named Vice-Chair, and a full-time secretariat. Commissioners were to be available for a minimum of four weeks per year. The Head of the Secretariat was appointed by the Chair and was an ex-officio member of the Commission.

The goals of the Commission were: (a) to review the development effectiveness of dams and assess alternatives for water resources and energy development, and (b) to develop internationally-accepted standards, guidelines and criteria for decision-making in the planning, design, construction, monitoring operation and decommissioning of dams. These goals were elaborated in a set of six objectives laid out at Gland, Switzerland, and accepted by all the stakeholders, and which were to be addressed by the work of the Commission.

[33] For further information *see* <www.dams.org>.

The Commission is independent and its remit includes issues that address both *broader considerations* such as water and energy policy as well as more *specific technical and case study oriented questions*, such as resettlement, compensation of affected communities, ecological impacts, and wider effects in basin-wide catchment contexts.

The Commission's work is of an *advisory nature not investigatory* in the sense of judicial commissions. It included the review and assessment of a range of specific cases, but the Commission was not to adjudicate specific disputes.

The report of the World Commission on Dams[34] was officially launched in London on 16 November 2000. This report includes an analysis of the accuracy of predictions of costs and benefits used in the dam planning process and of their overall development effectiveness and the need for restoration and reparation where necessary. It presents stakeholders with recommendations on policies, standards, guidelines, best practices and codes of conduct in the dams' decision-making process.

This past February, the Forum of the WCD met to discuss the responses of several stakeholders to the Report. There has not been unanimous endorsement of the Report, but there is agreement that the dialogue must continue, even though it is still uncertain what structure will be created for that to happen.

3. EMERGING NORMS APPLICABLE TO THE MINING SECTOR

There is a growing body of voluntary international norms applicable either to industry generally, including the mining sector, or specifically to mining or extractive industries.

One rationale for a broader structure would be to promote convergence. As it is, many of these sets of norms, such as the rating criteria for ethical investment funds, or for stock market "sustainability indexes," all rate different variables, impose different information needs on companies, and may even conflict in their views on substantive issues they are trying to address. This creates confusion and reduces the value of any one of these systems.

Trying to harmonize these different emerging norms and the data requirements they impose on companies might increase the value realised by those who use and comply with them.

We here have a "helicopter view" of a limited subset of the norms which are emerging. Ongoing work of the Mining Minerals and Sustainable Development project will amplify and expand on this list and the descriptions of these activities. But the following, we hope, will at least get the message across at a broad strategic level: there are a lot of actors who feel that the posited "vacuum" of international norms is real. And they are moving to fill it.

[34] Dams and Development: A New Framework for Decision-Making, The Report of the World Commission on Dams, November, 2000.

3.1 Global Initiatives

3.1.1 The United Nations Global Compact[35]

The United Nations, through its Secretary General Kofi Annan, has issued a call for the private sector to commit to a vision of increased corporate social responsibility in sustainable development, including human rights. Secretary General Annan presented companies with a challenge to join the United Nations in a "global compact of shared values and principles which will give a human face to the global market."

Mr. Annan called upon the private sector to embrace, support and enact a core set of values in the areas of human rights, labour standards and environmental practices.

<u>Human Rights</u>. The Secretary-General asked world business to:

> **Principle 1**: support and respect the protection of international human rights within their sphere of influence; and
>
> **Principle 2**: make sure their own corporations are not complicit in human rights abuses.

<u>Labour</u>. The Secretary-General asked world business to uphold:

> **Principle 3**: freedom of association and the effective recognition of the right to collective bargaining;
>
> **Principle 4**: the elimination of all forms of forced and compulsory labour;
>
> **Principle 5**: the effective abolition of child labour; and
>
> **Principle 6**: the elimination of discrimination in respect of employment and occupation.

<u>Environment</u>. The Secretary-General asked world business to:

> **Principle 7**: support a precautionary approach to environmental challenges;
>
> **Principle 8**: undertake initiatives to promote greater environmental responsibility; and
>
> **Principle 9**: encourage the development and diffusion of environmentally friendly technologies.

Participation in the Global Compact is voluntary function of willingness and ability to contribute to the advancement of the nine principles. The Compact does not assess performance but seeks to identify and promote good practices through dialogue among

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[35] *See* United Nations Global Compact web page <www.unglobalcompact.org>.

stakeholders. However, it does not intend to create guidelines even though it promotes other initiatives such as the Global Reporting Initiative, which will do so.

3.1.2 Global Reporting Initiative[36]

The Global Reporting Initiative (GRI) was established in 1997 by the Coalition for Environmentally Responsible Economies (CERES) in partnership with the United Nations Environment Programme (UNEP) with the mission of developing globally applicable guidelines for reporting on the economic, environmental, and social performance. The GRI incorporates the active participation of corporations, NGOs, accountancy organisations, business associations, and other stakeholders from around the world.

The GRI's Sustainability Reporting Guidelines were released in exposure draft form in London in March 1999. The GRI Guidelines represent the first global framework for comprehensive sustainability reporting, encompassing the "triple bottom line" of economic, environmental, and social issues.

The GRI's Sustainability Reporting Guidelines are designed to assist organisations to publish reports:

- In a way that provides stakeholders with reliable and relevant information that fosters dialogue and inquiry;
- Through well-established reporting principles, applied consistently from one reporting period to the next;
- In a way that facilitates reader understanding and comparison with similar reports;
- In a form that provides management across different organisations with valuable information to enhance internal decision-making.

The GRI intends to bring standard reporting guidelines to a global audience. The engagement of multiple stakeholders across regions and nations distinguishes the GRI from numerous other reporting initiatives. At the same time, the GRI continues to build bridges to such initiatives in pursuit of its vision of a generally accepted sustainability reporting framework.

The Global Reporting Initiative Guidelines are generic. That is, they apply to all sectors of the economy. However, the GRI is now developing sector specific guidelines to supplement the general guidance, and focus on specific issues in each industry. Mining is one of the first industries in which such guidance is being developed. The Mining Minerals and Sustainable Development Project has a memorandum of understanding with the Global Reporting Initiative for joint examination of the specific problems and issues posed in the minerals sector.

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[36] See Global Reporting Initiative web page at <www.globalreporting.org >.

3.1.3 Amnesty International's Human Rights Principles For Companies[37]

Amnesty International has developed a widely accepted introductory set of human rights principles, based on international standards, to assist companies in developing their role in situations of human rights violations or where there is the potential for such violations.

These principles are based in a series of accepted UN Declarations, documents and international instruments. With no binding effect, these principles have frequently been cited by other initiatives and processes, such as the Global Compact, Global Reporting Initiative and the International Labour Organisation.

3.1.4 ISO 14000[38]

The ISO 14000 standard was created in the fall of 1996. It grows out of ISO's commitment to support the objective of "sustainable development" adopted at UNCED (the Earth Summit) in Rio de Janeiro in 1992.

The objective of this standard is to provide a framework for an overall *strategic* approach to organizations' environmental policy, plans and actions.

ISO 14000 is a set of standards and guidelines that state the requirements for what the organization must do to manage *processes* influencing the impact of the organization's activities on the environment. It also supports the related standards on terminology and specific tools, such as auditing which provide a mechanism for verifying that the management system conforms to the standard.

The ISO 14001 Environmental Management Systems Specification does not prescribe specific levels of environmental performance. This is intended to allow standards to be implemented by a wide variety of organizations at differing levels of environmental maturity. But the specification does require a commitment to compliance with applicable environmental legislation and regulations, along with a commitment to continuous improvement.

ISO 14004 – Environmental Management Systems does provide guidelines on the elements of environmental management systems and their implementation, and discusses basic principles and issues involved in such systems.

ISO 140001 specifies the requirements for monitoring performance of an environmental management system. Fulfilling these requirements demands objective evidence, capable of being audited, to demonstrate that the system is operating effectively in conformance with the standard.

The ISO/TC 207 is the "umbrella" committee under which the ISO 14000 series of environmental management standards are being developed. The TC 207 has a Chair's

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[37] For the report *see* <www.amnesty.it/ailib/aipub/1998/ACT/A7000198.htm>.

[38] United Nations Sustainable Development Web page on Voluntary Initiatives at <www.un.org/esa /sustdev/viaprofiles/ISO_14000.html> downloaded 26 of February 2001. *See also* the International Standard Organisation web page at <www.iso.ch>.

Advisory Group (CAG) and an operations manual. The CAG does not make decisions for the TC, but rather identifies issues, holds preliminary discussions on how to address them, and through the Chair, makes recommendations to the TC. The operations manual has been developed as a policy document intended to support and supplement the ISO directives and provide internal guidance to the TC.

Membership in ISO/TC 207, like that of every ISO technical committee, is made up of Participating (P) members, Observing (O) members, and Liaison (L) organizations. Countries are usually represented by their respective national standards organizations.

TC 207 is ISO's largest technical committee, and as of June 2000 had 61 "P" members, 15 "O" members, and 42 "L" organizations. "P" members represent countries who wish to vote, participate actively in discussions and have access to all relevant documentation. "O" members represent countries not wishing to vote, but rather only to participate in discussions and receive all relevant information. Representatives from "L" organizations (international or broadly based regional organizations) are invited to take part in discussions and are permitted to receive all information from the TC but are not granted voting status.

3.1.5 Social Accountability International[39]

Social Accountability International founded in 1997 as the Council on Economic Priorities Accreditation Agency (CEPAA), addresses consumer concerns about labour conditions around the world.

SAI's mission is to enable organizations to be socially accountable by:

- Convening key stakeholders to develop consensus-based voluntary standards;
- Accrediting qualified organizations to verify compliance; and
- Promoting understanding and encouraging implementation of such standards worldwide.

The first of these standards, Social Accountability 8000 (SA8000), and its verification system draw from established business strategies for ensuring quality (such as those used by the international standards organization for ISO 9000) and add several elements that international human rights experts have identified as essential to social auditing. SA8000 regulates workplace conditions and a system for independently verifying factories' compliance.

In order to develop SA8000, SAI convened an international Advisory Board that included experts from trade unions, businesses and NGOs. Among the Advisory Board members there is a broad range of expertise: human rights, child labour, and labour rights, and socially responsible investment firms, as well as, auditing techniques and the management of large supply chains.

[39] See Social Accountability International web page at <www.cepaa.org>.

SAI also maintains close oversight of the companies it accredits to carry out SA8000 certification, ensuring their capabilities and requiring their collaboration with local experts.

3.1.6 ILO Convention 176[40]

Adopted in 1995 by the UN's International Labour Organization, Convention 176 and the accompanying Recommendation 182 contain important provisions intended to protect mine workers.

Unions, employers and governments are represented on equal terms within the ILO, which adopts and monitors international standards on a wide range of labour-related issues.

Under the new Convention and Recommendation, states commit themselves to consult with the social partners (unions and employers) for the introduction of a coherent health and safety policy in mining.

Workers are to be fully informed of the health and safety risks in each mine. Most importantly, they are to have the right to stop work and leave the mine if they have reasonable grounds for believing that they are in serious danger.

The mining Convention defines the steps governments must take to protect miners, including routine inspections and on-the-job training

3.1.7 International Accounting Standards Committee

The International Accounting Standards Committee is developing a set of internationally accepted accounting standards for extractive industries.[41] These could well have important sustainability implications in areas such as accounting for costs of community development efforts, accounting for eventual mine closure costs, expensing of pollution control costs, or other issues.

3.1.8 Sustainability Indexes/Ethical Investment Funds

We will not in this paper get into this subject in great depth. But it is important to note that there are many companies which are now publishing one or another index purporting to rate corporate performance on "sustainability factors," and a growing number of "ethical investment" or "socially responsible investment" funds which use one or another set or criteria to target their holdings according to the perceived performance of companies on environmental, social, or labour factors.

One of the well-known indices of this type is Innovest.[42] Another is the Dow Jones Sustainability Index.[43] They are hardly alone in the field. According to its website, "The new

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[40] For more information *see* International Federation of Chemical, Energy, Mine and General Workers' Unions web page <www.icem.org>. For the text of the Convention *see* <ilolex.ilo.ch:1567/scripts/convde.pl?query=C176&query0=176&submit=Display>.

[41] Comment is being sought on the *Issues Paper: Extractive Industries* through June 30, 2001. This document is available for download at <www.iasc.org.uk>.

[42] *See* <www.innovestgroup.com>.

[43] *See* <www.sustainability-index.com>.

Dow Jones Sustainability Group Indexes (DJSGI) are based on the world's first systematic methodology for identifying leading sustainability-driven companies world-wide."

The Dow Jones Sustainability Index "consist[s] of more than 200 securities selected from the 2,000 stocks with the largest market capitalization in the DJGI. These companies represent the top 10% of companies that lead the field in terms of sustainability in each industry group in all countries covered by the DJGI."

Obviously, both individual companies and the industry as a whole have a vital interest in both the criteria which are used by indexes such as Dow Jones, Innovest– or their competitors – and the processes which come up with these criteria. The Dow Jones Sustainability Index states that its system rationale is:

> The corporate sustainability assessment methodology consists of a multi-factor analysis including ecological, social and economic criteria that are equally weighted. The assessment criteria are focused on future trends and technologies specific to each industry group. These criteria distinguish between sustainability-related opportunities and risks based on widely accepted standards and definitions of sustainability. Annual reviews of the assessment criteria ensure compliance with state-of-the-art practice.[44]

A growing percentage of the funds invested in markets in North America and Europe are invested according to "sustainability" or "ethical" investment criteria. In general, without focusing on any of the specific funds or rating systems, some of which may have developed very fine systems, we want to express some concerns:

- The processes by which these criteria are developed are not always clear or transparent.
- In some cases, the criteria may lump mining stocks in with tobacco or liquor stocks, or nuclear power, and simply forbid all investment in them.
- Even where this is not the case, the criteria by which some companies rate high on "sustainability performance" and others low may be questionable.

Following this trend, the Financial Times Stock Exchange (FTSE) will launch in July the FTSE4Good. This index is intended to identify companies with the strongest records of corporate social and environmental performance, providing an objectively determined universe as a basis for launching investment funds or a performance benchmark for socially responsible investing.[45]

This is an area in which developments are so rapid that keeping abreast of them is a major challenge.

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[44] *Id.*

[45] *See* <www.ftse4good.com>.

3.1.9 Voluntary Principles on Security and Human Rights for Companies in the Extractive and Energy Sectors[46]

The process of developing the principles began in February 2000. They were formulated as a result of discussions between the U.S. Department of State, the U.K. Foreign and Commonwealth Office, transnational oil and mining companies, human rights organizations, unions, and business organizations.

The companies involved in the process included BP, Royal Dutch/Shell, Chevron, Texaco, Enron, Rio Tinto Zinc, and Freeport McMoRan. Human Rights Watch, Amnesty International, the Lawyers' Committee for Human Rights, and International Alert were among the human rights organizations involved in the process. The International Federation of Chemical, Energy, Mine, and General Workers' Unions was the representative for trade unions. The Prince of Wales Business Leaders Forum and Business for Social Responsibility were the participating business organizations.

The principles fall into three categories:

- risk assessment,
- relations with public security organs, and
- interactions with private security forces.

These principles are part of an ongoing effort to ensure that corporate security arrangements fully respect human rights.

3.1.10 Voluntary Code for the Use of Cyanide in Mining

After the Cyanide spill in Baia Mare, Romania, international concern has risen to important levels. Within this context, the International Council on Metals and the Environment (ICME), an industry trade group, and the United Nations Environment Program held a multi-stakeholder meeting in Paris in May 2000 to consider the development of an international voluntary Code of Practice for the management of cyanide in the industry.[47] This initiative is still under discussion.[48]

3.2 Regional or National Initiatives

3.2.1 OECD Guidelines on Multinational Enterprises[49]

These Guidelines were adopted in 1976 to encourage the positive contributions that multinational enterprises can make to economic and social progress and to help minimize and resolve the difficulties to which their operations might give rise. The objective is to strengthen the basis of mutual confidence between enterprises and government authorities

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[46] For the full text *see* <www.state.gov/www/global/human_rights/001220_fsdrl_principles.html>.

[47] Nash Gary, Secretary General of the ICME, "Mining and Sustainable Development II," *supra* note 11, at 94.

[48] For further information *see* <mineralresourcesforum.unep.ch/cyanide/index.htm>.

[49] United Nations Sustainable Development Web page on Voluntary Initiatives at <www.un.org/esa/sustdev/viaprofiles/OECD_Guidelines.html>; for the Guidelines and further information *see* <www.oecd.org/daf/investment/guidelines/mnetext.htm>.

and to promote the economic, social and environmental benefits of foreign direct investment and trade, while minimizing the problems associated with these activities.

The Guidelines have been periodically reviewed (1979, 1984, and 1991). A thorough review process was undertaken in 2000. The resulting draft was signed by all member states plus Chile, Argentina and Brazil.

The Guidelines are a voluntary instrument, so follow-up is non-adversarial. They are simply recommendations addressed by governments to multinational enterprises. They provide voluntary principles and standards for responsible business conduct consistent with applicable laws.

The Guidelines are drafted in general terms that can encompass the diverse institutional environments in the countries that have signed them. Consequently, clarifications may be necessary in individual cases.

The Guidelines are divided into 9 chapters.[50]

The institutional arrangements consist of three elements:

1. The National Contact Points;

2. The OECD's Committee on International Investment and Multinational Enterprises;

3. The Business and Industry Advisory Committee (BIAC) and the Trade Union Advisory Council (TUAC).

The National Contact Points are typically a government office in a Member country. They serve to promote the Guidelines and to gather information on and experience with the Guidelines. They also discuss issues and problems relating to the Guidelines with each other and with other interested actors (e.g., trade unions, businesses, NGOs).

BIAC and TUAC are expected to promote the Guidelines among their members and to seek their members' inputs in all matters relating to the Guidelines. They can request consultations with the National Contact Points on issues related to the Guidelines (other interested parties, including NGOs can also contact the National Contact Points).

3.2.2 The McKinney Bill[51]

In June 2000 United States Congresswoman Cynthia McKinney introduced a Corporate Code of Conduct Bill into the United States House of Representatives. This Bill proposes that United States nationals employing more than 20 persons in a foreign country implement a Corporate Code of Conduct for which the Bill prescribes minimum standards. Under the Mc Kinney Bill, each Code of Conduct must abide by internationally recognised environmental standards and minimum international human rights and labour standards.

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[50] 1. Introduction; 2. General Policies; 3. Disclosure of Information; 4. Competition; 5. Financing; 6. Taxation; 7. Employment and Industrial Relations; 8. Environmental Protection; 9. Science and Technology.

[51] For a copy of the legislation *see* <thomas.loc.gov>.

The Mc Kinney Bill defines minimum human rights standards as those contained in existing instruments including:

- The Universal Declaration of Human Rights
- The International Covenant on Civil and Political Rights
- The International Covenant on Economic, Social and Cultural Rights
- Convention on the Elimination of All Forms of Discrimination Against Women
- The Convention on the Rights of the Child
- The Declaration on the Elimination of Violence Against Women
- The Draft Declaration on the Rights of Indigenous Peoples

The bill defines minimum international labour standards as those contained in certain International Labour Organisation (ILO) conventions:

- The Freedom of Association and Protection of the Right to Organise Convention (No 87)
- The Right to Organise and Collective Bargaining Convention (No 98)
- The Forced Labour Convention (No 29)
- The Abolition of Forced Labour Convention (No 105)
- The Discrimination (Employment and Occupation) Convention (No 111)
- The Equal Remuneration Convention (No 100)
- The Minimum Age Convention (No 138)
- The Occupational Safety and Health Convention (No 155)

Under the proposed legislation, a firm must at its own cost implement and monitor compliance with a Code of Conduct consistent with these and other principles. The Bill also requires firms to have procedures for independent monitoring of the code and for auditing the effectiveness of compliance monitoring.

Firms would be required to have procedures for disciplinary action in response to violation of the principles and to ensure that steps are taken to prevent similar violations from occurring in future.

The McKinney Bill proposes reports of firms' compliance with the Corporate Code of Conduct Bill be tabled annually in the United States Congress and that penalties for failure to comply with the Bill include liability for compensation in a civil action initiated in a United States District Court by any person or their heirs who proves failure of compliance.

As well as prescribing penalties for non compliance, the McKinney Bill also offers incentives for United States firms compliance with the Corporate Code of Conduct Bill. These include that:

- In entering contracts for the provision of goods and services, United States government agencies are to give preference to these firms.

- Preferential trade and investment assistance is to be provided by the United States Department of Commerce to these firms.

- The United States foreign investment insurance, credit and guarantee agencies – the Overseas Private Investment Corporation and the Export-Import Bank of the United States – are to give preferential treatment to these firms.

The McKinney Bill has not yet been reintroduced to the current House but will be shortly. A similar proposal, "The Truth Act," was also presented for discussion. This act would oblige American corporation overseas to disclose their current practices in environment, labour and human rights areas in accordance with international agreed principles.

3.2.3 The London Stock Exchange[52]

The London Stock Exchange informed all United Kingdom based companies that they will be required to take account of "environmental, reputation and business probity issues" when considering internal controls. From 2000 it is a listing requirement of the London Stock Exchange for companies to create systems to identify, evaluate and manage their risks and to make a statement on risk management in their annual report.[53]

This requirement has arisen from the recommendations of the Turnbull Committee charged with developing proposals for implementing the Combined Code of the Committee on Corporate Governance, published in 1998. A key thrust of the Turnbull Committee's recommendations is that companies consider not only narrow financial risks, but all major risks – including those to intangible assets such as their brand and reputation.

The Turnbull Committee recommendations will require many companies to give considerably more attention to identifying their exposure to human rights issues and exploring how this exposure can be managed.[54]

3.2.4 Australia Minerals Industry's Code for Environmental Management[55]

The development of the Australian Code began in August 1995. It was launched in December 1996. In response to and in recognition of community concerns and public perceptions about the environmental performance of the minerals industry, that industry took the initiative, through development of the Code, to demonstrate its commitment to excellence in managing the environmental aspects of its operations.

The objective is to provide, by means of a set of principles, a framework to enhance the minerals industry's environmental management. The Code facilitates continual improvement and periodic performance reviews to meet changing government and community expectations, with the bottom line objective of improved environmental performance.

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[52] *See* <www.londonstockexchange.com>.

[53] *see* <www.ends.co.uk/report/June00_3_tx.htm>.

[54] *See supra* note on "Ethical Investment" and "Socially Responsible Investment."

[55] United Nations Sustainable Development Web page on Voluntary Initiatives at <www.un.org/esa/sustdev/viaprofiles/Australia_Minerals.html>. *See also* <www.ameef.com.au/publicat/groundwk/grnd398/gspindus.htm>.

The Code has several important features:

- **It is voluntary**. The Code applies to all sites of a signatory company's activities. Registration is open to all mining and minerals companies.

- **It does not prescribe** specific environmental practices at mining and mineral processing sites. Rather, it sets out key principles for environmental management that allow signatories to progressively improve their performance.

- **The Code does not set minimum** standards to be reached prior to becoming a signatory. The intention is for as many companies as possible to commit to the Code and its principle of continual improvement. Signatories are committed to releasing an annual public environmental report within two years of sign-on. Conformance with Code principles will then be open for review by any stakeholder with an interest in the signatory's activities.

Signatories to the Code are committed to excellence in environmental management through:

- **Sustainable Development** - Managing activities in a manner consistent with the principles of sustainable development such that economic, environmental and social considerations are integrated into decision making and management.

- **Environmentally Responsible Culture** - Developing an environmentally responsible culture by demonstrating management commitment, implementing management systems, and providing the time and resources to educate and train employees and contractors.

- **Community Partnership** - Consulting the community on its concerns, aspirations and values regarding development and operational aspects of mineral projects, recognizing that there are links between environmental, economic, social and cultural issues.

- **Risk Management** - Applying risk management techniques on a site-specific basis to achieve desirable environmental outcomes.

- **Integrated Environmental Management** - Recognizing environmental management as a corporate priority and integrating environmental management into all operations from exploration, through design and construction to mining, minerals processing, rehabilitation and decommissioning.

- **Performance Targets** - Setting environmental performance targets not necessarily limited to legislation, license and permit requirements.

- **Continual Improvement** - Implementing management strategies to meet current and anticipated performance standards and regularly reviewing objectives in the light of changing needs and expectations.

- **Rehabilitation and Decommissioning** - Ensuring decommissioned sites are rehabilitated and left in a safe and stable condition, after taking into account beneficial uses of the site and surrounding land.

- **Reporting** - Demonstrating commitment to the Code's principles by reporting the company's implementation of the Code and environmental performance to governments, the community and within the company.

The Code commits companies to continuous improvement at a pace dictated by the company's resources and other factors including stakeholder concerns, government regulation and technological change.

A key requirement is for signatory companies to prepare publicly-available annual environmental reports that documents their performance and implementation of the Code. These reports are vital in establishing credibility for the Code and for industry's commitment to community consultation.

When it was launched in December 1996, 18 companies indicated their intention to sign on to the Code. Now more than 43 companies had become signatories to the Code. This covers over 250 sites in Australia and overseas.

These are only a selection of the relevant initiatives. We do not discuss, for example, the program for certification of diamonds.

9.4 CONCLUSION

Do the ideas discussed in this paper describe a way forward for the industry and the many others with a vital interest of one kind or another in its future?

We cannot answer that question: the answer will really depend on the actors themselves.

We do believe that these ideas should be thoroughly discussed, analysed and debated, in light of several ideas:

- The problems which the various proposals we have discussed seek to address seem in many cases to be serious challenges for the minerals industries.

- A large segment of the participants in several other resource industries seem to have found it in their interests to promote some form of overall voluntary structure.

- There is already a very long list of systems dealing with one or another aspect of the minerals industries.

Indeed, the very multiplicity of these initiatives may argue for promoting convergence toward a single set of norms -- or at least some more manageable number of them. Given the apparent demand for such systems, it is likely that this convergence will occur anyway, just as the users of the various rival videocassette systems suddenly converged when there was a critical mass of support for one of the technologies. The question may be simply whether and how we try to influence the choice.

If there is to be such a convergence, the most important issues are that the convergence be toward a system which is:

- Rational, where the factors which rate company performance are meaningful in the context of the overall idea of sustainable development, and measure real phenomena.
- Balanced among the interests of rich and poor, north and south, labour and management, industry and government and civil society.
- Transparent, in which it is clear to everyone who is making decisions, what decisions are being made, and according to what factors.
- Accessible, meaning that everyone who has a serious interest or stake in the outcome has a clear channel to comment on or otherwise influence the outcomes.
- Accountable, where those who make the system work are subject to a very real set of checks and balances.

All of this may not be "law" in the most narrow traditional sense, but it is obviously very closely related to what lawyers do. It is very much part of the business context in which legal advice may be given; there may be quite direct links between voluntary systems of codes or certification and what constitutes sound legal counsel.

And while many professions and skills must be brought into this debate, the experience and perspectives of attorneys, used to thinking in terms of mechanisms to adjust rights and responsibilities, creating accountable systems, and insuring procedural fairness, are an essential contribution to forward progress.