

SUSTAINABLE DEVELOPMENT IN THE NATURAL RESOURCE INDUSTRIES: NEW PERSPECTIVES, NEW RULES, AND NEW OPPORTUNITIES¹

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I. INTRODUCTION

Sustainable development is a set of concepts that attempt to harmonize a number of seemingly competing goals. These include providing better conditions of life and more opportunity for people, especially the poor, and bringing production and consumption within limits that ecosystems can tolerate in the long run. The idea of sustainable development is an optimistic response to a disturbing and gloomy vision of the human future: the notion that we cannot have both a better quality of human life and a healthy environment. This pessimistic view holds that there is necessarily a tradeoff in which a better environment means more poverty, or more economic opportunity always leads to environmental destruction.

A fundamental assumption of sustainable development is that there are in fact policies that can simultaneously achieve both sets of objectives – that we do not have to choose, for example, between adequate nourishment and pollution control. There is increasing evidence that this is not just wishful thinking, but that such solutions are – with the right combination of understanding and political will – within reach. Indeed, one very fundamental insight is that the problems of poverty and the problems of environmental degradation cannot be solved separately. Only by dealing with the curse of poverty is there hope for stable and productive ecosystems. Only through maintaining environmental quality can we create the material conditions for people to be better off. The more research helps us understand the problem, the clearer it is that the suggested choice between economic hope and environmental quality is a false one

In part this is simply a way of stating the political reality that took us as a world to the Rio Earth Summit in 1992. That reality is that the very poor are not going to listen with favor to a politics that tells them that they need to remain poor to keep global consumption within ecologically tolerable limits. That reality also includes the acknowledgement that environmental quality is crucial to improving the well being of all of us, most especially the poor.

As governments, companies, researchers, and others attempt to understand what kinds of actions and policies are needed to move us individually and collectively onto a track of sustainable development, it has become clear that the drive for better conditions of life requires a much broader vision of what constitutes well-being than traditional numerical economic measures.² It is also clear that achieving

¹ This paper is an expansion of concepts presented by the author in the keynote address to the First Meeting of Ministers Responsible for Mining of APEC, the Asia Pacific Economic Cooperation, in Antofagasta, Chile in June, 2004.

² “The Human Development Index (HDI), published annually by the UN, ranks nations according to their citizens' quality of life rather than strictly by a nation's traditional economic figures. The criteria for calculating rankings include life expectancy, educational attainment, and adjusted real income.” See <http://www.infoplease.com/ipa/A0778562.html>. See United Nations Development Program, *Human Development Report 2003*, <http://hdr.undp.org/reports/global/2003/>.

development on a sustainable path requires us to build more effective structures of governance, within which market competition can create greater abundance without damaging the other values we consider important.

Improving the condition of the poor, creating more opportunities, protecting the productivity of the ecosystems on which we all depend, and establishing more accountable and efficient institutions of governance are goals that seem hard to object to. At the same time, they seem to some to be very abstract and far removed from the daily concerns of business and industry.

But on a strategic level, these are the central issues that are likely to determine the shape of the industry's future: whether it has adequate access to the resource base, access to capital, a steady supply of skilled specialists, a sympathetic ear for its policy concerns, in short whether it is a healthy, profitable industry, attractive to bright young people, or one at the margins of the economy, barely able to meet its cost of capital,³ unsafe to work in, and adding inexorably to the already considerable environmental legacy of past centuries of mining and smelting.⁴

These issues are also among the key drivers of legislation, regulation, voluntary standards and a host of policies that lawyers working for any kind of clients in the minerals sector need to understand. This is reflected in the consistency with which authors have begun to address the issues.⁵

³ In recent decades, "mining industry profitability falls short of most other industries." International Institute for Environment and Development, *BREAKING NEW GROUND* (2002) at 114, and Figure 6-1.

⁴ *Id.* at 246 *et seq.*

⁵ A basic and by no means exhaustive list would include, with apologies to authors who are inadvertently omitted, these:

J. Epps, *Perspectives on Sustainable Development in the Mining Industry*, Special Institutes 2003 Apr (Mining Law for & Investment in Latin America)

L. K. Barrera-Hernández, *Public Participation in Natural Resources Management in Latin America: To Include or Not to Include?* Special Institutes 2003 Apr (Mining Law for & Investment in Latin America)

L. M. Otto, *Creating a Positive International Investment Climate* Special Institutes 2003 Apr (Mining Law for & Investment in Latin America)

M. Shoop and P. Chiaro, *Sustainable Development and Mining: Oxymoron or Opportunity*, 49 *Rocky Mt. Min. L. Inst.* (2003)

E. Enger, *Sustainable Development Opportunities and Coalbed Methane: A Panel Discussion*, Special Institutes 2002 Nov (Regulation and Development of Coalbed Methane)

L. Danielson, *A Sustainable Development Framework for Coalbed Methane Development*, Special Institutes 2002 Nov (Regulation and Development of Coalbed Methane)

C. Gonzales Guerra, *Community Relations in Mineral Development Projects*, Special Institutes 2001 (Mining and Oil & Gas Development in Latin America)

S. Vinogradov and I. Worika, *Global Stakeholders: The Impact of International Law on the Resources Industry*, Special Institutes 1999 Apr (International Law and Projects)

L. Novoa V., *Sustainable Development and Its Relationship With Mining and the Law*, Special Institutes 1997 Nov (Mineral Development in Latin America)

D. Hunter, *The Role of Environmental Organizations in International Environmental Law*, Special Institutes 1997 Mar (International Environmental Law for Natural Resource Practitioners)

Whether they choose this role or have it thrust upon them, natural resource companies are the only visible agents of development for many very poor people and countries. If they are effective and useful in this role, they will be increasingly welcomed. If instead they are seen as unthinking giants, stepping on the crops without thinking, breaking the family china, and exposing others to all kinds of risks – often without realizing what they are doing -- they will be bitterly resisted.

The business propositions are actually fairly simple:

1. Being an effective agent of a positive kind of development opens opportunities for the company (and others).
2. Companies that consciously manage this aspect of their business get better results than those that leave the outcome to accidents and chance.
3. The leaders in this business are consciously looking for ways to create a highly visible difference between themselves and those who are slow to get the message.

II. IMPROVING THE WELL BEING OF PEOPLE

As has been described elsewhere in some detail, the concept of sustainable development has become established as one of the principal shared values expressed in a growing body of fundamental international agreements and other legal instruments.⁶ In much of the world it is also increasingly important as a principle of domestic law.

L. Lawson and D. Himelspan, Effective Dispute Resolution in Natural Resources and Environmental Cases, Special Institutes 1996 May (Natural Resources and Environmental Litigation II)

S. J. C. Wise, Environmental Considerations in International Mining Operations, Special Institutes 1995 Feb (International Resources Law II: A Blueprint for Mineral Development)

D. Nelson and W. Prince, Developing and Environmental Regulatory Model – Piecing Together the Growing Diversity of International Environmental Standards and Agendas, Special Institutes 1995 Feb (International Resources Law II: A Blueprint for Mineral Development)

J. Kotvis, Environmental Issues in Free Trade Integration in the Western Hemisphere, Special Institutes 1995 Feb (International Resources Law II: A Blueprint for Mineral Development)

D. Massey, Latin American Environmental Laws Affecting Mining Operations, Special Institutes 1994 Apr (International Oil, Gas and Mining Development in Latin America)

⁶ Sustainable development is an idea that has been evolving for over forty years. Some of the major landmarks include:

The Stockholm Declaration. The United Nations Conference on the Human Environment in 1972 issued a declaration highlighting problems of pollution, destruction of resources, damage to the environment, danger to species and the need to enhance human social well being.

Rio Earth Summit. In 1992, more than 100 countries met in Rio de Janeiro for the first international Earth Summit. Major agreements at that event include:

The Convention on Climate Change - limits emissions of the greenhouse gases carbon dioxide (CO₂) and methane (CH₄).

The Convention on Biological Diversity - gives countries responsibility for conserving species diversity and

Achieving sustainable development on a global level, or for individual economies, or even for towns and provinces is not the sole responsibility of the mining and minerals industries. Others must share in that task.⁷

Industry must, however, be a ready and willing partner, or find itself going against the grain of the agenda the world has set for itself. Mining and minerals must be a responsible contributor to achieving the shared agenda. If they are not, they are at best irrelevant. At worst, they would be a positive obstacle to getting where most of us have agreed to go.

Most of the world may not be losing sleep over the intricacies of international conventions. But those conventions reflect a fundamental reality of what people are telling their leaders that they want. The world public does not care about poverty reduction, increased opportunity and environmental protection because Agenda 21 tells them they should. Rather Agenda 21 says what it does because the nearly 200 governments that approved it chose that form to express what they were hearing from very large numbers of their citizens.

In this sense, “sustainable development” is simply a common denominator of what most people in most societies want. Something that supports sustainable development is helping most people and communities achieve their objectives. Something that is an obstacle to sustainable development stands between people and their desires for a better life. If we accept this very general notion, it is not hard to choose which we would rather be.

Business is fundamentally about meeting human needs. The more industry meets human needs and the better it meets them, the more value it creates. The more value it creates, the more abundance there is for everyone – national economies, communities, consumers, employees and shareholders. The more people benefit from this industry, the more stake they have in its success and the more welcome it will be. In a world where minerals operations often have a hard time gaining acceptance, this is a critical business challenge.

It determines much that is highly relevant to our work as lawyers. There are many examples, hardly limited to these:

- Whether there is the political will to create an investment climate favorable to the resource industries, or the contrary: a political constituency successfully pressing for legislation based on the paradigm that the industry is primarily a source of risk and danger that needs to be constrained by law in as many ways as possible;

using biological resources in a sustainable way.

The Rio Declaration and the Forest Principles - sets out the principles of sustainable development and pledges to reduce deforestation.

Agenda 21 - a plan for achieving sustainable development in the 21st century.

Johannesburg 2002 "Rio+10". This conference focussed on poverty and the access to safe drinking water and sanitation. It made a number of important statements about mining, and established several aims, including:

- To reduce the number of people that are not connected to clean drinking water supplies from over 1 billion to 500 million by the year 2015.
- To halve the number of people without proper sanitation to 1.2 billion.
- To increase the use of sustainable energy sources and restore depleted fish stocks.

Adapted from <http://www.uyseg.org/sustain-ed/PAGES/WhatSD/history.html>

⁷ See Tom Bigg, ed., SURVIVAL FOR A SMALL PLANET: The Sustainable Development Agenda (Earthscan 2003).

- ❑ Whether governments and courts have an incentive to uphold the contracts we draft as mutually beneficial, or are looking for ways to avoid agreements which are perceived as benefiting only industry;
- ❑ Whether those whose rights are not formally recognized by the legal system will see the minerals industries as an ally or an adversary as they seek to better their lot.
- ❑ Whether those who are the losers as intense processes of change upset traditional livelihoods will find ways to see their grievances addressed within the legal system, or whether they see only extralegal ways to press their concerns.

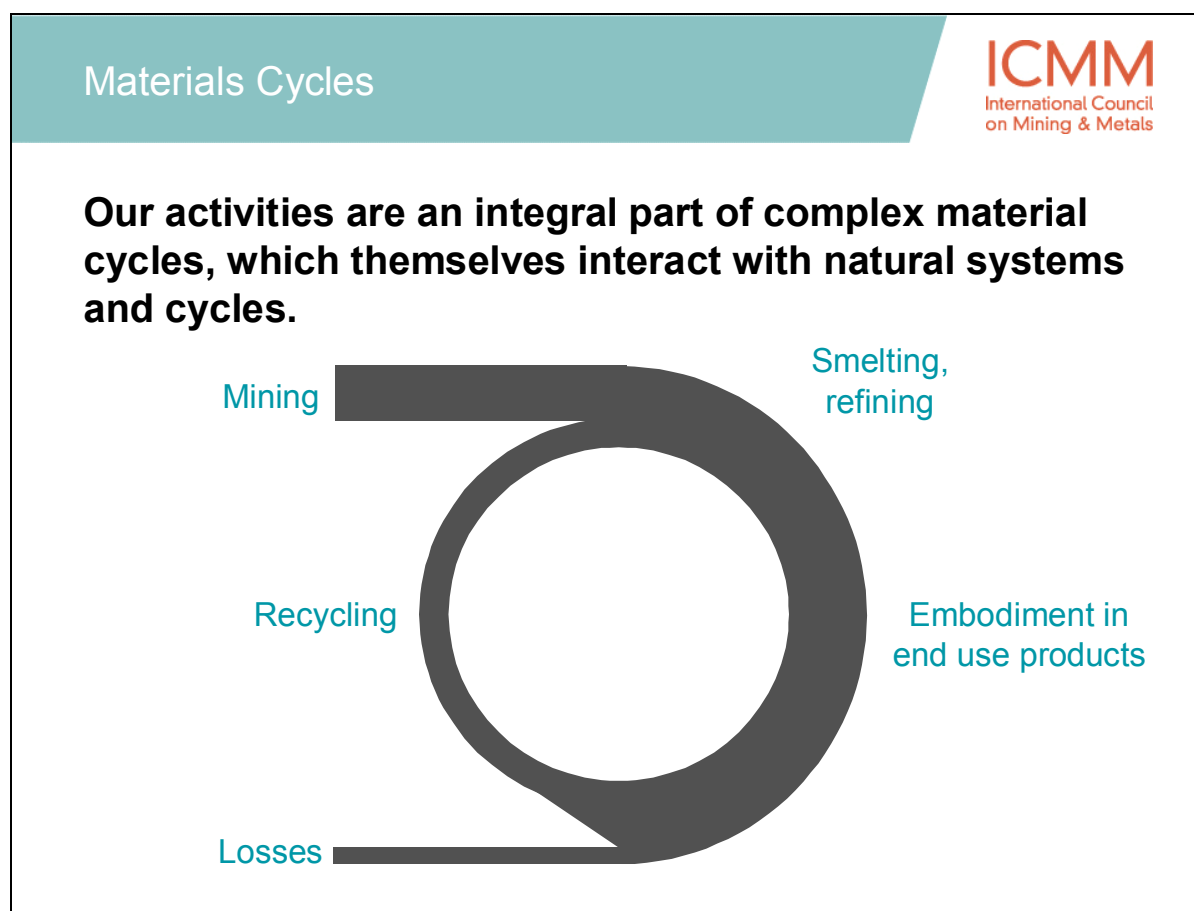
III. INDUSTRY’S ROLE IN SUPPORTING SUSTAINABLE DEVELOPMENT

There are two basic ways that the minerals industries create benefits – through the economic and social development created by their **projects**, and by the value created for human society by the many extremely useful **products** they produce.

Minerals industries have the opportunity to promote sustainable development through the projects they establish: mines, smelters, refineries, fabricating plants, and many other kinds of facilities. Each of these can potentially provide benefits to individuals, communities and countries. Possible benefits include things like employment, public infrastructure, export earnings, building of human capital through training, stronger government revenues, increased opportunities for suppliers, and the like. They can often provide these things in countries or regions that have little success attracting any other kind of economic activities.

The minerals industries produce an infinity of products that are necessary to human well being and to almost all forms of economic activity. These products are an essential basis for meeting all kinds of human needs; they are the source of nearly all material goods other than the products of agriculture, solar energy and the petroleum industry. And even the products of those industries are largely difficult or impossible to produce without the minerals industries: solar energy is very hard to harness without silicon for photovoltaic cells or metal for flat plate collectors; agriculture is hard to imagine without metal plows and harvesting implements; petroleum would be very difficult to obtain without metal drills and pipelines.

Fig 1. The Product Cycle⁸



There is much opportunity to use resources more efficiently.⁹ There is a great deal of opportunity for the rich to consume more wisely and moderately. But there is simply no way for the poorest to achieve a better standard of living without at least some increase in the amount of materials they use.

One of the lessons of a number of recent in-depth studies is that the interests of the mining industry – and the legal ramifications for that industry – do not end when mineral concentrates are shipped from the mine site. Issues of end use of minerals, concerns over environmental and human health impacts of minerals in products, and waste disposal and recycling issues vitally affect the mining industry.¹⁰ Increased communication and cooperation through the entire mineral supply chain is clearly a part of our future, and a major part of the mission of the International Council on Mining and Metals.¹¹

A full evaluation of the role of the minerals industries in development therefore requires a clear look at both the project cycle and the product chain. The purpose of this paper is to focus on the first of these two issues – sustainable development in the project cycle. The second – sustainable development in the minerals product chain -- is the focus of a proposed future article.

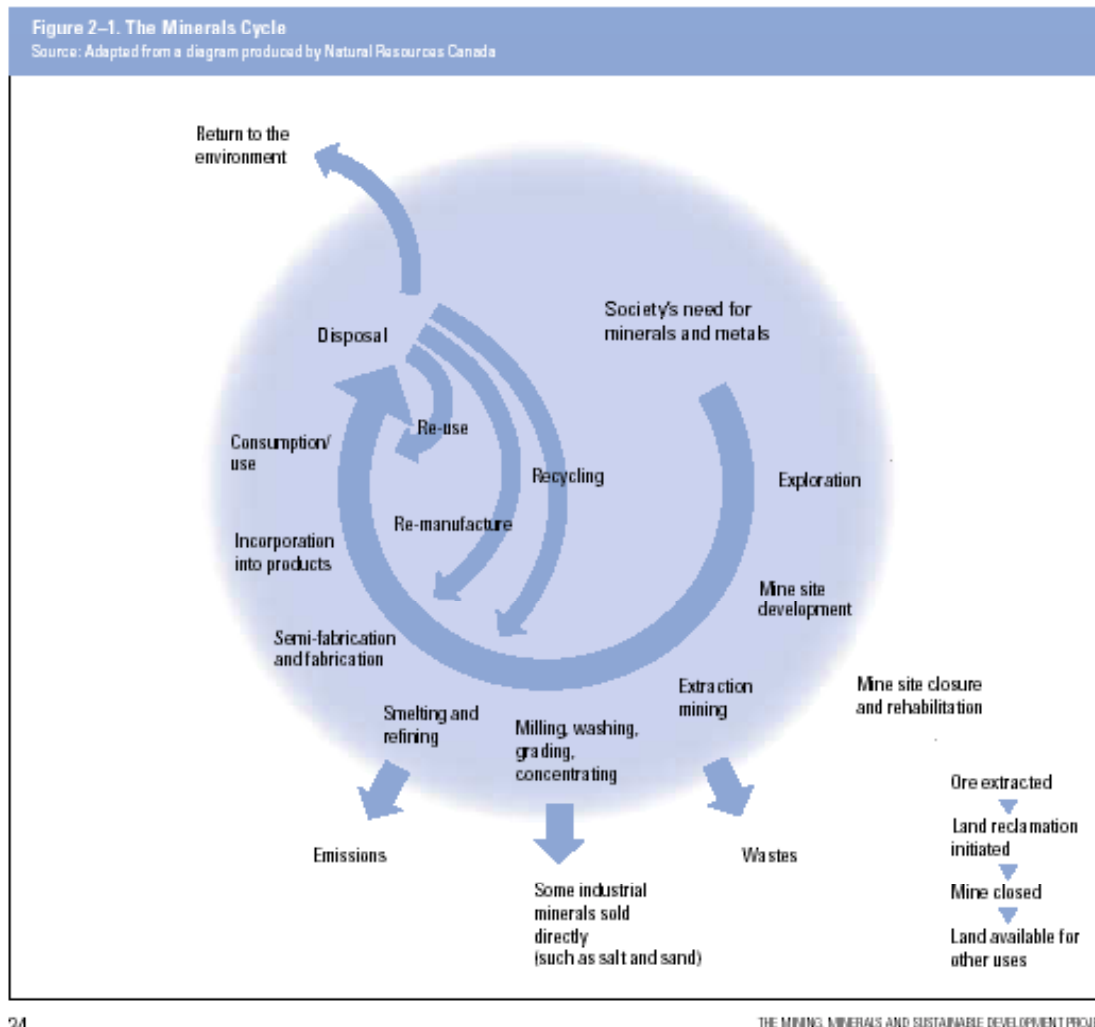
⁸ Figure 1 courtesy of John Atherton, International Council on Mining and Metals.

⁹ See for general discussion R. Ayres *et al.*, *THE LIFE CYCLE OF COPPER, ITS CO-PRODUCTS AND BYPRODUCTS*, Kluwer Academic Publishers (2003).

¹⁰ See *BREAKING NEW GROUND*, *supra* note 3, Chapter 11.

¹¹ See Principle 8 of the ICMC Principles. <http://www.icmm.com/>. See also Minerals Council of Australia, *Global Forum Develops Framework on Minerals Stewardship*, April 2004.

Fig. 2 The Minerals Cycle¹²



Of course, the minerals product chain, and the project cycle, can only be generalized. There are substantial differences in the details depending on which of the over 90 mineral commodities we are focusing on.¹³ Gold, for example, is one of the most highly recycled commodities in the world, while coal is generally not recycled or recyclable. Silicon in computer chips is used only after many stages of intermediate processing and value added; alluvial aggregates are often used more or less “as is.”

¹² BREAKING NEW GROUND, *supra* note3, at 34.

¹³ See BREAKING NEW GROUND, *supra* note3, Chapter 2.

IV. THE PROJECT CYCLE: MANAGEMENT CHALLENGES AT THREE LEVELS

A minerals project that is successful for its sponsors is difficult to achieve, and often involves a high degree of risk. It is sometimes therefore suggested that adding more layers of concerns about the success of the project in creating benefits for communities and others will put too many demands on the project sponsor.¹⁴

But we should not presume that if the sponsor chooses not to deal with them, these demands from various constituencies will somehow disappear. Nor should we presume that if these constituencies' demands are not met at least to some degree, there will be nothing they can do about it.

It increasingly appears that these demands will surface anyway, whether project sponsors are equipped to deal with them or not. Experience is also teaching us that an increasing number of constituencies have ways of spoiling the soup – either stopping projects altogether at least for the present,¹⁵ or simply creating enough problems that much of the potential profitability and benefit to the sponsor is lost.

In much of the world, government is increasingly reluctant to stand as a buffer between mining companies and disaffected local constituencies. The issue is not whether companies that develop minerals projects will feel pressure to acknowledge and support the interests of others, but how to manage those pressures. Not surprisingly, it appears they are more easily and effectively managed when they are anticipated than when the company is surprised by them and operating in a reactive mode.

There is an increasingly visible difference between the companies that are learning how to manage these issues effectively, and companies whose strategy is based more on “flying below the radar” and staying out of the public eye.¹⁶ Part of the lesson may be that at this stage of the information revolution, there isn't any place that is reliably out of the public view. Companies have learned that disputes with local communities in the Andean highlands, or labor practices in central Africa, or environmental performance in the outer islands of the Indonesian archipelago are likely to be debated at annual meetings in London or Toronto, or on the global internet, accompanied by a remarkable amount of information of varying quality.

A set of rules – we can debate in each case whether they should be called ‘principles,’ or ‘guidelines,’ or ‘standards,’ or something else -- is in fact emerging. This is creating an increasingly visible bar, that some in the industry can get over with relative ease, but others seem unable to reach. The consequences of being above or below the bar are already real, and are becoming more serious with each passing day.

Truly successful projects must be successful for investors, local communities, and host national economies. Increasingly, it appears that there is little opportunity for success in one of these dimensions without success in all of them. A project that has terrible results for investors is not going to benefit anyone else very much. A project that burdens the government of a poor country with all kinds of costs of social dislocation and environmental problems while providing little or no revenue to deal with them is likely to have a long list of other problems. The idea that the company is going to be highly successful at meeting its own expectations without meeting the expectations of other key players is increasingly difficult to accept.

¹⁴ “The real question facing the industry is how it can meet the minimal economic performance to remain viable” BREAKING NEW GROUND, *supra* note 3, at 114.

¹⁵ Names such as Tambo Grande, Esquel, Las Crucitas, the Imperial Project and others come to mind.

¹⁶ “There is what appears to be an irresistible pressure for differentiation within the minerals industry.” BREAKING NEW GROUND, *supra* note 3, at 137.

To be successful in all these dimensions, projects have to deal effectively with the expectations of others on at least three levels. They must:

- ❑ Successfully manage *emerging international standards*, largely based on expectations of international financial institutions, which are becoming clearer and more important with each passing day.
- ❑ Be successful in complying with *national legal and regulatory frameworks* based on the expectations of national government
- ❑ Be successful in meeting the very real *expectations of local people and communities*.

Because most of us as lawyers are much more practiced and comfortable with the national legal frameworks, we will start there.

VI. BEING PREPARED FOR TRENDS IN NATIONAL LEGAL REQUIREMENTS

Projects exist within a framework of laws, institutional requirements and expectations. There has been considerable attention in recent years to the role of policy, law, and regulations as determining factors in where companies decide to invest and do business. We all know that tax systems, labor laws, systems of exploration and mining concessions, land tenure laws, compensation systems, judicial systems and a host of other legal and regulatory issues are extremely important in determining how attractive a particular country or region is to investors.

Indeed, there has been a very systematic approach, much of it supported by the World Bank Group, to creating modern frameworks that will encourage and attract investment. An excellent summary with citation to principal references is J. Otto, *Creating a Positive International Mining Investment Climate*, Special Institute 2003 Apr (Mining Law & Investment In Latin America).

“Government attitude shifts toward their mineral sectors over the past decade have resulted in numerous changes to mining policies, laws and approaches to agreements. ... since 1985, over 110 countries have either adopted new mineral sector laws, made a major revision to existing laws, or are currently working on draft legislation.”¹⁷

In determining what kinds of provisions are most crucial in attracting mining investment, researchers and practitioners have largely relied on a series of in depth surveys of mining companies and their executives. In addition to those described by Otto, there are some excellent published references from the World Bank Group,¹⁸ and the well-known surveys of the Fraser Institute.¹⁹ There is at least one good general description of the trends in sector legislation over recent decades.²⁰

¹⁷ J. Otto, *Creating a Positive International Mining Investment Climate*, Special Institute 2003 Apr (Mining Law & Investment In Latin America) at 84.

¹⁸ K. Naito, F. Remy, J.P. Williams, *REVIEW OF LEGAL AND FISCAL FRAMEWORKS FOR EXPLORATION AND MINING* (Mining Journal Books, Ltd. 2001); and K. Naito and F. Remy, *MINING SECTOR REFORM AND INVESTMENT: RESULTS OF A GLOBAL SURVEY* (Mining Journal Books, Ltd. 2001). See also Mining Unit, *STRATEGY FOR AFRICAN MINING*, (IBRD 1992) (Executive Summary online at http://www.worldbank.org/html/fpd/mining/m3_files/ienim/ams.htm); J. Strongman, *Strategies to Attract New Investment for African Mining*, (World Bank, June 2004); Industry and Mining Division, *A MINING STRATEGY FOR LATIN AMERICA AND THE CARIBBEAN*, (IBRD 1996). See also *BREAKING NEW GROUND*, supra note 1, Table 8-1 at 178.

¹⁹ L. Fredricksen, *et al.*, *Annual Survey of Mining Companies 2003/2004* (January 2004). The Fraser Institute web site is <http://www.fraserinstitute.ca/>

The limitations of this approach have now become clear. The focus has been very heavily on what mining companies think are ideal conditions for doing business. This process, unlike the real world, is not necessarily constrained by the existence of other social actors whose agendas – whatever they are -- do not begin and end with creating ideal conditions for mining investment.

There is a danger therefore of going too far: of imagining that we are legislating some artificial ‘Miner’s Heaven.’ In this land of delights, there are no taxes. All land use conflicts are resolved in favor of mining. Administrative decisions are all nondiscretionary, and all must be taken within short and inflexible deadlines, with the minimum of public participation. Where there is a conflict between the mining law and other legislation, the mining law always prevails. And all of this is backed up by ‘stabilization agreements’²¹ giving mining investors a form of insurance against the processes of change that confront everyone else in society.²²

If however we see the principal challenges to the future of mining as coming not from inadequate legislation but from unresolved social conflicts and negative public attitudes toward the industry, the problem will only be exacerbated by adopting legislation that appears to call all conflicts in favor of what industry wants, without being based on any true social consensus. The underlying demands of those who feel that minerals development does not benefit them – or worse, that it threatens what little they have – need to be addressed. If they are not addressed and resolved within the legal framework, they will not disappear, but surface somewhere else. It is naïve to think that the industry’s interests are always best served by the shortest possible period between permit application and permits granted, or the lowest possible taxes, if the price is alienating people who are in a position to block or retard industry objectives.

The fact that it is something beyond simply the language of legislation at work is illustrated by the most recent Fraser Institute survey.²³ In the survey’s “policy potential index,” the U.S. State of Nevada receives the highest score of any jurisdiction in the world: a score of 89 out of a possible 100. The State of Colorado, subject to the same federal mining laws, the same federal public lands laws, and the same federal environmental legislation, receives one of the lowest scores in the world: 29.²⁴ Indeed, even comparing the state level legislation it is very hard indeed to see any laws or regulations

²⁰ J.Otto and J. Cordes, *THE REGULATION OF MINERAL ENTERPRISES: A GLOBAL PERSPECTIVE ON ECONOMICS, LAW AND POLICY* (Rocky Mountain Mineral Law Foundation 2002).

²¹ A “stabilization clause has been defined as “contract language which freezes the provisions of a national system of law chosen as the law of the contract as of the date of the contract, in order to prevent the application to the contract of any future alterations of this system.” *Amoco International Finance v. Iran*, 15 Iran-U.S. C.T.R. 189, 239, quoted in R. Doak Bishop, *International Arbitration Of Petroleum Disputes: The Development Of A Lex Petrolea*, Special Institute\2002 Feb (International Energy and Minerals Arbitration).

²² “[S]tabilization may take the form of an “agreement” entered into by the government and the company. Such an agreement usually will state that the agreed tax rate or incentive is stabilized for a given time period, that no new taxes or imposts will be imposed, and that if the rate does go up, or the incentive is removed, or a new tax is imposed, that the company is exempt, and if not found to be exempt, that the government will compensate or indemnify the investor.” J. Otto, *Creating a Positive International Mining Investment Climate*, Special Institute\2003 Apr (Mining Law & Investment In Latin America).

²³ L. Fredericksen et al., *The Fraser Institute: Annual Survey of Mining Companies 2003/2004* (2004).

²⁴ *Id.* At 5-6. The scores are based on “exploration of government policies including uncertainty concerning the administration, interpretation and enforcement of existing regulations, environmental regulations, regulatory duplication and inconsistencies, taxation, uncertainty concerning native land claims and protected areas, infrastructure, socioeconomic agreements, political stability, labour issues and geological database.”

on the books that would justify this dramatic difference. The explanation must lie in something beyond the letter of the law.

This suggests that the issue is rooted not in the provisions of the law but in unresolved differences over whether citizens believe themselves better off with or without mineral development.

There is a growing body of research that questions the extent to which countries are benefiting from the process of mining code reform.

“[O]ur hypothesis is that the process of economic reform of the African mining sector over the last twenty years to create a more favourable foreign investment environment has entailed profound modifications to the role of local states, and that these modifications have not been given sufficient attention. Moreover, the manner in which deregulation measures and forms of re-regulation and facilitation were introduced in the 1980s and 1990s may not necessarily be compatible with, may even impede, meeting the development challenges of the countries concerned.”²⁵

While many countries continue to pursue investment, and to overhaul policies that deter investors, we now have enough experience to draw some lessons from this trend. One lesson is that nothing is permanent. Speaking of the ‘concept of the obsolescing bargain,’ Philip Crowson has said:

“The pendulum has recently swung strongly in favour of foreign investors in most countries, but it is important to recognize that there is a pendulum. Where it settles in any country depends partly on global trends and fashions, but mainly on internal social and economic conditions. *It will also be affected by the behaviour of the mining companies themselves.*”²⁶

A. A More Sober Assessment

In the late 1960s and early 1970s, a relatively small part of the world was considered truly safe and attractive to mining investors. As developing countries attempted to meet their citizens’ demands for a better life, they adopted policies that, while attempting to capture more of the benefits of mining for development, had the effect of making foreign investment in the sector much less attractive. Nationalization, high tax rates, limits on repatriation of profits, mandatory participation of nationals in ownership, barriers to importing supplies and the like may in the short run have achieved some benefits but in the longer run choked off investment.²⁷

Starting in the 1980s with the fall of the Communist system and the opening of the East Bloc economies, a series of events seemed to be opening one after another economy to foreign investment in general and mining investment in particular. By the mid 1990s, optimists were starting to see favorable investment conditions springing up everywhere. Mining investors had more and more

²⁵ Bonnie Campbell, REGULATING MINING IN AFRICA: FOR WHOSE BENEFIT? Nordiska Afrikansitutet (2004) at 8.

²⁶ Quoted from pages 1-55 to 56 of J. Otto and J. Cordes, *supra* note 20. *Emphasis supplied.*

²⁷ *See generally* J. Otto and J. Cordes, *supra* note 20 at 1-35 through 1-52.

apparent options to choose from. Countries made increasing concessions in order to try to stay competitive. There was a “triumph of the market” over state-directed development policies.²⁸

It now appears that we are in a period of rethinking policies, and a number of things may have become more clear:

- ❑ Liberalization of investment conditions has not led to a great wave of foreign investment in most of the world. Results have disappointed some countries.
- ❑ Even where attempts to attract mining investment have succeeded, we are finding that attracting investment, as necessary as it is for development, does not automatically make people better off. In some cases, it has worked and has clearly made national economies and communities better off. In others, it is very hard to demonstrate that mining investment has resulted in an increase in well-being, especially one with lasting benefits.
- ❑ Fundamental political forces are reasserting themselves. Where there are unresolved political issues, or social conflicts, it is now evident that modernizing mining codes has not made these go away, or solved the problems that create risk for investors. Where there are unmet social and economic needs, the quest for a way to meet these by extracting more benefit from the industry has not ended.
- ❑ The perception of many is that the number of places where investors can really feel comfortable developing projects is not as great as many of us have recently thought. Those countries that are attractive destinations for investment are sensing that they can successfully ask more of investors; this together with higher commodity prices has created at least a modest shift in the balance of power between host governments and foreign investors.

“In many countries the foundations of the new policies appear shallow, and liable to shake when the immediate needs have passed. An apparently welcoming government, a suitable mining code, and an internationally competitive tax system are all necessary, but they are nowhere near sufficient to attract and retain stable long-term investment.”²⁹

1. The Boom in Investment Has Largely Failed to Appear

The mining industry has always been subject to important price cycles. One of the factors that has led many countries to reap less investment than anticipated from their efforts has simply been that following the great wave of opening of economies to investment in the mid 1990s, prices of many commodities tumbled and spending on exploration and new mine development fell. In addition, what investment did occur was spread over a larger group of eligible countries.³⁰

More recently there is also a considerable focus on whether companies are finding it easier, cheaper, and quicker to obtain new reserves by mergers and acquisitions than through long and risky processes of exploration and mine development.

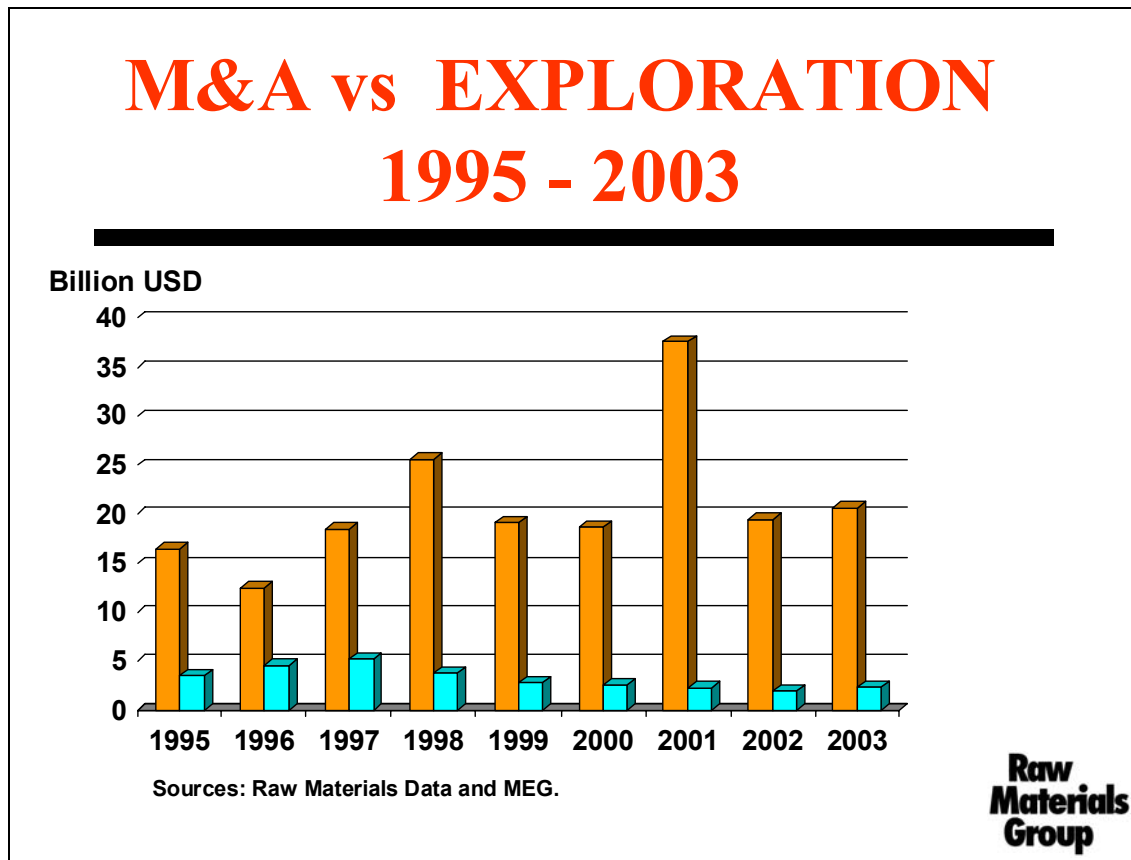
²⁸ *Id.* at 1-54.

²⁹ Philip Crowson, quoted in page 1-55 of J. Otto and J. Cordes, *supra* note 20.

³⁰ See generally J. Otto, Creating a Positive International Mining Investment Climate, Special Institute\2003 Apr (Mining Law & Investment In Latin America).

Fig. 3 Mergers and Acquisition vs. Exploration³¹

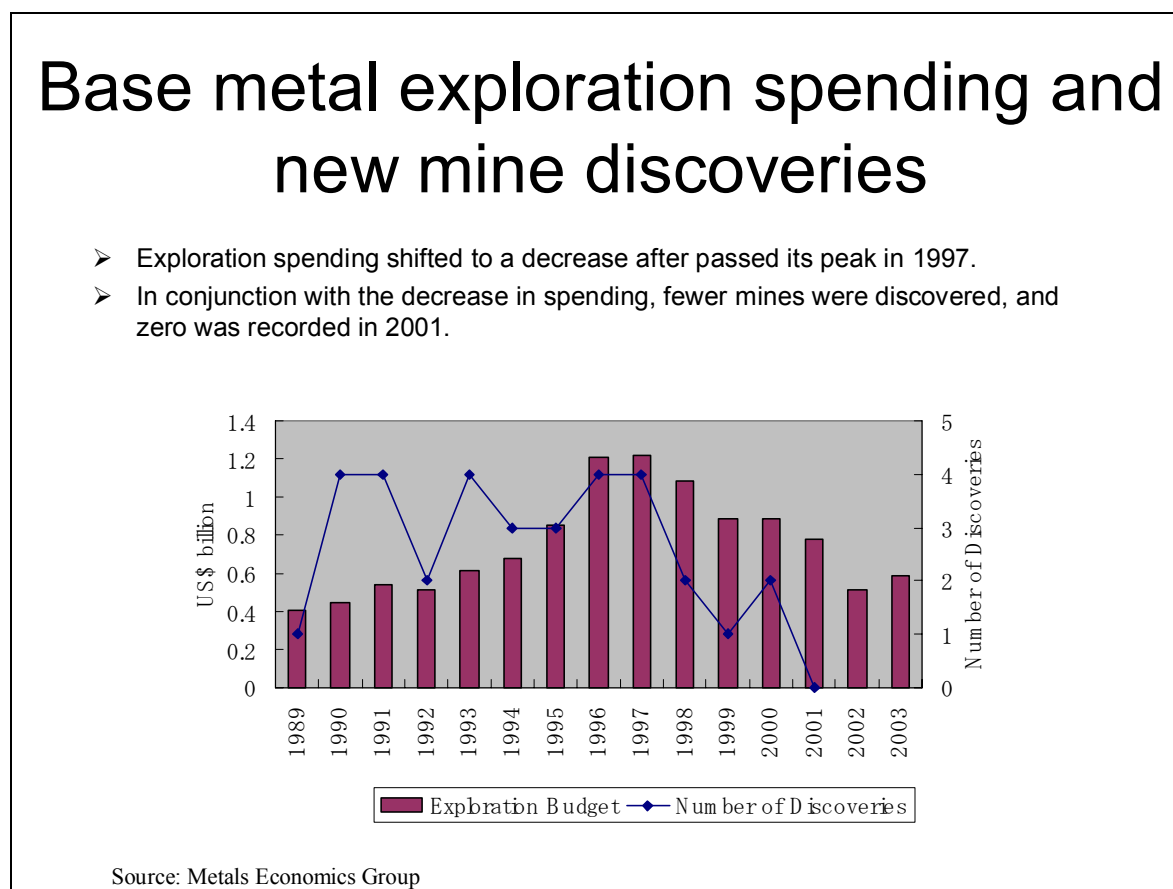
Left columns represent merger & acquisition spending, right columns exploration.



Despite the recovery of many mineral prices and the increased number of projects, there have been relatively few new starts on major projects, particularly large base metal mines..

³¹ Figure courtesy of Magnus Ericsson, Raw Materials Group, Stockholm.

Fig. 4 ³²



2. Even Where There is Investment, Benefits Have Sometimes Failed to Appear

There is a very considerable debate, stoked most recently by the Extractive Industries Review, over whether investment in mining and exploration are creating benefits in host countries, either at the level of the national economy, or the level of the communities most heavily affected by projects. These debates – there is actually a series of more or less related issues – are slowly allowing the cloud of assertions and claims to be challenged and evaluated. What seems to be emerging is the conclusion that there are clearly places where minerals investment has led to economic and social progress, and that there are clearly places where the process of development has not worked, or even gone backward.

It is not enough simply to assume that host countries are somehow benefiting from mining investment, or that anyone who questions the existence of benefits is a heretic. The industry and its proponents will have to confront these issues directly with facts. Views such as these are multiplying:

- ❑ “Mining seldom creates much employment directly ...”³³
- ❑ “[W]hile, in gross terms, mining is the country’s leading foreign-exchange

³² Courtesy of Ministry of Economy, Trade and Industry, Japan

³³ Philip Crowson, *Mining During the Next 25 Years: Issues and Challenges*. *Natural Resources Forum* 21(4) (1997) at 231-38, quoted in J. Otto and J. Cordes, *supra* note 20, at 1-56.

earner, *its net foreign-exchange contribution to Ghana's national economy has been minimal thanks to generous and tax breaks given to investors and the fact that mining companies retain on the average about 75 percent of their export earnings in off-shore accounts for various purposes.*"³⁴

- ❑ "One important, if unpopular and even heretical question is whether competitive bidding for a limited amount of investible funds has driven tax rates below the levels required for the long-run sustainability of mining in individual countries."³⁵
- ❑ "[S]tates with a high ratio of natural resource exports to GDP in 1971 had abnormally slow growth rates between 1971 and 1989."³⁶
- ❑ "The study notes that companies have in fact negotiated individual retention levels far above the minimum requirement. Thus, although mineral exports form a significant part of the country's exports, the contribution of this sector to GDP is as low as 2%."³⁷
- ❑ "Does this mean extractive industries can never play a positive role in a nation's economy? No, it simply means that the only evidence of such a positive role we could find took place after a country's democratic governance had developed to such a degree that the poorest could see some of the benefits. Before the fundamental building blocks of good governance - a free press, a functioning judiciary, respect for human rights, free and fair elections and so on - are put in place, *the development of these industries only aggravates the situation for the poorest.*"³⁸

Certainly the news is not all negative. But the concerns are sufficient, and raised from a wide enough range of sources, that they cannot be ignored, or drowned out. The industry needs a positive vision of its role in development, and a legal framework that maximizes the probability of success in development and minimizes the risk of truly poor outcomes. And this is, or should be, a serious concern for individual companies and their associations. "Flying below the radar" and hoping that a company's activities are not noticed is an increasingly difficult strategy, fraught with risk.

The development outcomes, and the success or failure of individual projects, are not random. We are learning what approaches increase the chance of positive development outcomes, and how we can greatly reduce the chance of failure. But the mining investment regime of the future is likely to require a much higher degree of assurance that there will be demonstrable benefits to the host country

³⁴ SAPRIN, *The Policy Roots of Economic Crisis and Poverty*. Washington, DC (2002). Available from: http://www.saprin.org/SAPRI_Findings.pdf. Ch. 7, *The Socioeconomic and Environmental Impact of Mining Sector Reform*, at 134. *Emphasis in original*.

³⁵ Philip Crowson, *Mining During the Next 25 Years: Issues and Challenges*. *Natural Resources Forum* 21(4) (1997) at 231-38, quoted in J. Otto and J. Cordes, *supra* note 20, at 1-56.

³⁶ M. Ross, *The Political Economy of the Resource Curse*, discussing J. Sachs and A. Warner, *Natural Resource Abundance and Economic Growth*.

³⁷ B. Campbell, *REGULATING MINING IN AFRICA: FOR WHOSE BENEFIT?* Nordiska Afrikansitutet (2004) at 12.

³⁸ E. Salim, *World Bank Must Reform on Extractive Industries*, *Financial Times*, June 16, 2004, emphasis supplied.

as a condition of a favorable treatment of investors. This is only rational: who would enter into a bargain without some idea that real, visible benefits would accrue?

We have taken the first step, to attract investment. We need to take the second step, to increase the likelihood that investment in this sector makes people better off, both at the national level and in the localities where projects exist.

The recent generation of reform and restructuring of mining laws has been heavily based on research focused on what mining companies seek and expect when they invest. Perhaps moving the emphasis to the expectations of other actors in the process will help identify the elements that have sometimes been missing.

3. Fundamental Political Forces Reassert Themselves

Countries have long-term political objectives, and underlying problems they must find ways to solve. A mining code may sometimes give the impression that these issues are resolved, but where this is not based on a true consensus among the various interest groups, the issues will tend to resurface.

While taxation may deter some investment, there is considerable feeling in many countries that the minerals industries must pay their share of the tax burden. If the industry is not taxed to some level, the rationale for trying to attract it is weakened. Similarly, the continuing transition away from apartheid relationships in South Africa is necessary and inevitable. Resolving all protected area controversies to benefit mining investors might be the way to maximize investment. But there are constituencies that benefit from protected areas that want their desires to be accommodated as well. There are many examples.

Most of the mining code reform has focused heavily on what mining investors say they need and want. This is understandable, and necessary. But if we are going to expect that investment to bring sustainable development benefits, we have to start listening more deeply to other social elements as laws and regulations are conceived and implemented.

If that is the case, then it might suggest some very different approaches. While Fig. 4 may paint the picture in an unfairly simplistic way, it is intended to illustrate the need to accommodate competing social actors in the interest of a more predictable, durable and conflict –free result.

Fig. 5 POTENTIAL NEW APPROACHES TO LEGISLATION		
Issue	The Supposedly "Investor Friendly" Approach	The "Sustainable Approach"
Taxes	Taxes are reduced as low as possible, approaching or reaching zero	Taxes are based on the concept of a "fair share" of the cost of supporting government
Public Participation	Not eliminated, but kept to a minimum, and limited in time	Based not on a "checklist" approach, but on achieving real engagement and dialogue
Indigenous Land Claims	Not recognized except perhaps in a few carefully defined areas; many indigenous organizations still deeply dissatisfied	Legislation based on basic agreement between government and indigenous groups on core issues and ongoing process to resolve conflicts

Central Government – Local Government Conflict Over Share of Revenues	Revenues go to central government and investors need not concern themselves over what if anything is received locally	Legislation is based on seeking agreement between central and local government over sharing of revenues
Protected Areas	Entire national territory, including most protected areas, is legally available for mining and exploration	Legislation based on something like the ICMM member declaration on protected areas ³⁹

The real issue here is this. Legislation based on the concepts in the middle column would almost certainly win approval ‘hands down’ in most of the polls and surveys. But it is reasonable to question whether such legislation simply creates a surface appearance of being attractive to investors while in fact leading them into a series of potentially problematic conflicts. Maybe the industry needs to develop a deeper and more realistic concept of what is in its own long-term interest: trying to create a ‘Miner’s Heaven’ may so alienate other elements of society that it is impossible to achieve in practice.

Further, it is at least worth looking at the question of whether the industry does better in the long run under legislation more like the ideas presented in the right hand column.

- What are the key development objectives of communities in which this activity occurs? *What are communities telling us?*
- What are the key problems of inefficient use of resources on damage to the environment? *What are our researchers and citizens saying?*
- What infrastructure do we need? *What do local people think they want?*
- How do we try to promote lasting sustainable gains in health, education, housing, or human skills? *How do we set realistic goals and measure progress toward them?*

4. The Balance of Power Between Host Governments and Investors

Ideally, host governments and mining investors have enough common interests that they see their relationship as a partnership. In any partnership, there are likely to be some adjustments in the terms of the relationship over time, as partners become conscious of differing concerns, and enjoy different levels of success. In past years, when at the peak of the wave of optimism it seemed that investors could go almost anywhere, they appeared to have a relative increase in bargaining power. They could – and did – ask for considerable concessions from host governments.

The perception of many has been changing. The literature abounds with discussions of the pitfalls of investing in one or another country.

“It has become increasingly more difficult to mine in most developed nations. ... [T]he USA, Japan, and others in the OECD have continued to use mining acts and laws created long ago. ... [T]he interaction of the mining act and other law does not provide an efficient way to undertake exploration and mining activities. For example, the mine permitting process in the United States and Canada, which involves multiple statutes, requires authorization from many agencies and can typically take upwards of several years. Additionally, discretionary administrative powers are increasingly being used to generate negative decisions as public concerns about mining are

³⁹ See 20 August 2003, *Landmark ‘no-go’ pledge from leading mining companies*, at <http://www.icmm.com/news/158ICMMPressRelease-nogoareas-20August03.pdf>

raised by local communities, NGOs and others. The level of public participation has steadily increased⁴⁰

Requiring a significant – perhaps a majority -- black ownership for new mining projects in South Africa has been a concern to some potential investors.⁴¹ “The South African government will stick to its guns on a decision to insist that only black-controlled mining companies will be granted exploration or mining licences on undeveloped mining properties.”⁴²

The Philippine Supreme Court decision calling into question any majority foreign ownership of mining ventures⁴³ has certainly discouraged some potential investment. The recent uncertainty over the impact of decentralization legislation and forestry laws in Indonesia⁴⁴ will need new legislation to resolve. Chile⁴⁵ and Peru⁴⁶ are adopting new royalty requirements that some investors feel are unjustified. The list is a long one.

The list of places that are considered ideal to invest is in this climate a rather short one. Those countries that are still attracting mineral investment may well believe that this – perhaps together with high commodity prices -- gives them the opportunity to be somewhat more demanding of investors.⁴⁷

This does not mean that countries – especially their mines ministries – are not seeking investment. Nor does it mean there is a great fundamental change in the host country-investor relationship. As Philip Crowson has observed, we have yet to see how far the pendulum will swing, and the industry’s behavior will have a considerable influence on the results. The debate over royalties in Chile, for example, was catalyzed because “Chileans were scandalised ... when Exxon Mobil, an American firm, sold Disputada de las Condes, a copper company, to Anglo American for \$1.3 billion; for the previous quarter-century Disputada had reported losses, so Exxon paid virtually no tax.”⁴⁸

⁴⁰ J. Otto and J. Cordes, *supra* note 20, at 3-3.

⁴¹ See South Africa - Miscellaneous: Black Economic Empowerment, MBendi, <http://www.mbendi.co.za/indy/misc/blck/af/sa/p0005.htm>; 21 May 2004, Key empowerment charters, http://www.southafrica.info/doing_business/trends/empowerment/charters.htm

⁴² S. Bailey, “SA Government sticks to its guns on 51 percent requirement,” Mineweb, 21-JUN-04 http://www.mineweb.net/sections/mining_finance/330340.htm

⁴³ L. Agcaoili, BOI Limits Incentives to 60% Filipino-Owned Mining Firms, TODAY (May 19, 2004).

⁴⁴ Pui-Kwan Tse, THE MINERALS INDUSTRY OF INDONESIA 2000; W. Pugh, *Indonesia Mining at Crossroads as new Law Looms*, Reuters May 17, 2004.

⁴⁵ “BHP Billiton Says Proposed Chilean Charge Would Hurt Earnings,” Bloomberg, July 6, 2004, http://quote.bloomberg.com/apps/news?pid=10000086&refer=latin_america&sid=aWSLV06Ujhtc

⁴⁶ “Peru's top mining lobby remains firmly opposed to royalty payments but is working with lawmakers to try to make the best of a bad job if the levy finally goes ahead, its president said on Friday.” J. Webber, “Peru miners seek best of bad job with royalty plan,” Reuters, 21 May 2004. See <http://www.natural-resources.org/minerals/law/news.htm#315>.

⁴⁷ Reuters, *Developing Nations Want More Out of Mining Industry*, June 9, 2004.

⁴⁸ A Right Royal Row , THE ECONOMIST, Jul 1st 2004

B. Greater Balance Between Export Orientation and Production for Domestic Use

There have been many efforts by mining countries – most of them unsuccessful – to ensure that more of the value is added to products domestically. The obstacles to establishing more of the value chain within a minerals-producing developing country are several and are treated in more depth elsewhere.⁴⁹

But there is a way to capture more benefits of value added. This is to increase the focus on the part of the industry whose products are generally not exported -- construction materials. Since most of them never leave their country of origin, essentially all value added is added domestically.

Today these industries are typically facing a host of problems, that heavily affect the societies that depend on them –

- Construction is slowed as quality material became unavailable or expensive
- Those with low incomes have little access to adequate shelter
- Poor quality or even unsafe construction from poor quality materials and poor quality control are a real obstacle
- Informality and inadequate legal framework prevent attempts to improve conditions
- Vital materials are being lost to poorly managed urban development
- Unacceptable environmental impacts and unsafe working conditions are Prevalent

The reigning economic dogma can be said to have been ‘export, export, export.’ This has been reflected in the amount of attention given to creating modern and efficient legal structures for the part of the minerals industry whose products are most often destined for export: metals, and above all the nonferrous metals. As countries see the need to balance the focus on export industries with a focus on materials needed by their own economies, they will be giving increasing attention to the legal and policy framework for industrial, fertilizer and construction minerals.

C. Taking on the Question of Mine Closure Planning

While the subject can get immensely complicated, the basic issues involved in mine closure planning are well known.⁵⁰ The costs and revenues to a company developing a mining project usually occur somewhat as in Figure 6. There is a period of some years in which the company spends considerable capital in defining the deposit, building infrastructure, and developing a mine. If this is successful, then there is some period of years – which may range from a few years to many decades – when the mine yields revenues. At some point, because of technical obsolescence, exhaustion of resources, collapse of commodity prices or some other factor, the mine becomes unprofitable, and ultimately closes. But in a properly run operation, there are a number of costs incurred after that point. Relocation of workers, environmental stabilization, safeguarding the site against hazards to the public, and long term monitoring are some common examples.

If these costs are not paid by the company, they will fall on someone else. They may fall on government, just at the point then decreased tax revenues reduce resources available to

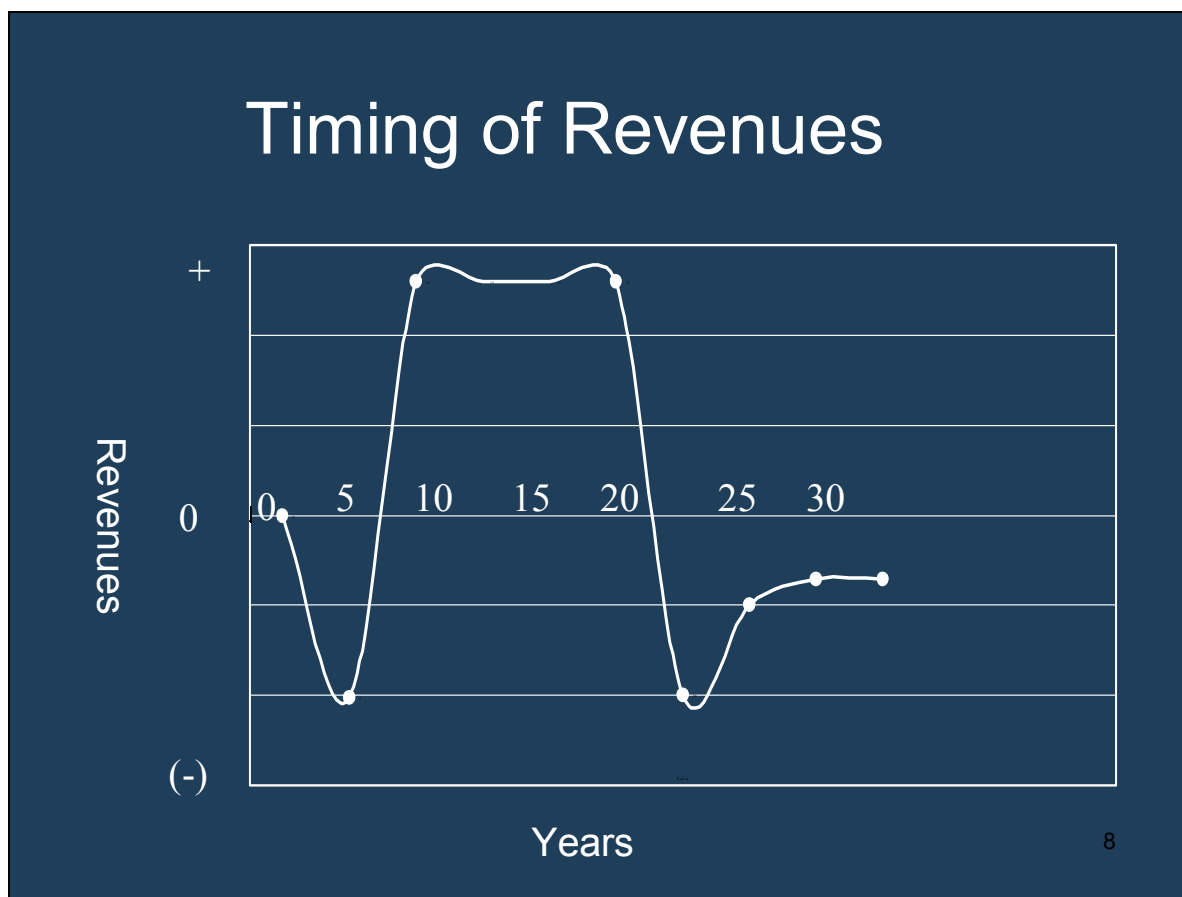
⁴⁹ See BREAKING NEW GROUND at 176-181, and Box 8-1 at 181.

⁵⁰ See generally A. Warhurst and L. Noronha, eds., ENVIRONMENTAL POLICY IN MINING: CORPORATE STRATEGY AND PLANNING FOR CLOSURE (CRC Press 2000).

government. They may fall on individuals from workers to teachers who need to pay their own costs of relocation, or on local businesses that collapse. They may fall on the public through decreased productivity of ecosystems. Since the poor are often the most dependent on the flow of free 'ecosystem goods' for their livelihoods, they may well be the most impacted, through loss of fishing, loss of use of water, or the like.

In many cases in the past, companies simply did not pay these costs, for a variety of reasons. This is how the industry's "environmental legacy" has accumulated. Perhaps closure resulted from the business failure of the company. Perhaps there was no expectation that the company pay such costs. Perhaps there was no mechanism to define what should be absorbed by the company, as opposed to what should reasonably be paid by others. Most of the industrialized countries have now developed legislation that through permitting systems defines what is expected of the company and guarantees that funds will be available to meet closure and post-closure obligations.⁵¹

Fig. 5



⁵¹ See for example *L. Danielson and M. Nixon, Current Regulatory Approaches to Mine Closure in the United States*, in A. Warhurst and L. Noronha, eds., *ENVIRONMENTAL POLICY IN MINING: CORPORATE STRATEGY AND PLANNING FOR CLOSURE* (CRC Press 2000).

However, these systems have not spread to developing countries. While the best companies, operating in countries with aware host governments, are doing a much better job of dealing with the problem, the behavior at the low end of the industry is continuing to accumulate a negative environmental and social legacy at an unacceptable rate. This is a classic case where some form of government action is needed for at least two reasons: (1) to ensure a ‘level playing field’ on which those who are performing well are not at some great competitive disadvantage, and (2) to ensure that those at the bottom are not leaving host countries and local communities worse off in the long run– the antithesis of sustainable development. Good behavior by the best is not enough to get the job done.

Host countries are becoming more aware of the pitfalls of failing to formalize closure planning processes. Future national mining legislation is likely to focus more closely on this subject. Some kind of internationally accepted practice may need to be better defined, so that countries do not feel that they are being disadvantaged in the competition for investment.

The World Bank Extractive Industries Review strongly recommends a move toward integrated closure planning in which environmental, social and economic costs of closure are all considered and planned for.⁵² While the Review has become something of a bogeyman in many quarters, this is clearly an instance in which its conclusions are correct, and deserve to be acted on. They are quite congruent with the conclusions of the Mining Minerals and Sustainable Development Project on the same subject.⁵³ Indeed, there is no great difference of opinion among any of the recent studies that have seriously examined this subject.

D. Government Revenues: Paying for Capacity Building

Everyone now recognizes increased capacity in government to be fundamental to success of development. To use just one example, Chile is rightly regarded as one of a number of success stories in development based on mining. One of the most prominent and attractive features of the Chilean landscape is a capable and well-administered state apparatus and strong rule of law. Some of this state apparatus has been paid for through the earnings of a state owned copper sector.

One of the key arguments of *Striking a Better Balance*,⁵⁴ the final report of the Extractive Industries Review, is that where there is little tradition of respect for law, the regulatory framework is weak, and state institutions lack capacity, investment in resource industries is unlikely to lead to successful patterns of development.

If a capable and reasonably well-managed state apparatus is a necessary prerequisite for successful development, where are the resources to support this to come from?

If this apparatus has to be in place before, rather than after investment starts to flow into the country, the problem becomes even more difficult. Yet this is what the Extractive Industries Review calls for. The World Bank has often argued that the place to find revenue for institution building is in revenues from natural resource projects, and that capacity strengthening and project development therefore need to proceed together, hand in hand. The EIR finds this inadequate.

⁵² STRIKING A BETTER BALANCE, the report of the Extractive Industries Review, Vol. 1 at 57.

⁵³ BREAKING NEW GROUND, supra note 3 at 243-47.

⁵⁴ Available at <http://www.eireview.org/>

But if the country needs resources to build capacity *before* it starts the development of a mining sector, or even *while* it is doing so, where are the resources to come from? The revenues in general do not start flowing until there is production, some years down the road, when many mistakes can already have been made.

Some have suggested some form of “borrowing” against future tax revenues. Even this solution is problematic:

- ❑ It starts making it very hard for the government to put on the brakes if it does not like the direction that development is heading.
- ❑ It presumes there will be some future tax revenues to borrow against, whereas in the most “competitive” national frameworks, taxes are low or nonexistent.⁵⁵

Some countries are likely to seek increased taxation of the industry. Others may at some stage reexamine the question of whether there might not be some positive role for the state sector.

VII. THE SECOND LINK: EMERGING INTERNATIONAL EXPECTATIONS AND STANDARDS

Many policies that form an important part of the investment framework are now being formulated at the international level. Even where mining is welcomed by the legal framework of an individual economy, and is fully complying with national requirements, projects can still get in trouble if they fail to comply with emerging international standards.

The body of international requirements is still in the process of formation. Much of it is unclear and subject to change – for example what if anything will result from the various recommendations of the Extractive Industries Review. But the direction of movement toward stronger and clearer rules to be applied globally by lenders, insurers, investors, or customers is unmistakable.

A. What Is Driving Creation of These Standards?

There are several drivers for the emergence of international norms for investment. These include of course the concern that a completely unbridled competition for investment and opportunities between countries and between companies will lead to a ‘race to the bottom’ in which environmental, social, human rights and community development performance all sink to the level of the lowest performer.

But a major force is also that highly visible players such as financial institutions will more and more be called on to describe, explain and justify their approaches to these issues. This almost requires that there is some set of articulated expectations.

As time goes on, companies are finding them useful in a number of ways. First, it creates some clear targets for what needs to be done. Second, it provides some assurance of a level playing field – that competitors have to follow the same rules. Third, it provides some protection to the company in those cases where results are less than desired – compliance with standard practice is easier to urge as a defense when there is a standard practice.

⁵⁵ “[I]n Chile in particular, many mining companies pay almost no tax, because the law allows big write-offs for “accelerated depreciation” and other loopholes.” A Right Royal Row , THE ECONOMIST, Jul 1st 2004

Most important in the long run may simply be standardization of practice: a certain number of institutions that the company has to deal with become used to seeing information on certain subjects provided in a certain way, and those who do it differently run an increase risk of delay in processing or misunderstanding of what they are trying to do.

The world is full of standards that have never been adopted as a rule by any sovereign, but arise through commercial acceptance and the broadly recognized need that there be a standard.⁵⁶

B. Company Positioning

There is a limited number of ways that a company can react to the emergence of a standard. It can ignore it and decide for itself what objectives and performance it seeks. It can adopt it. And it can hold itself out as performing at a level higher than the standard.

One of the challenges is that in the current environment there are certainly more suggested standards or norms than most companies can keep track of. They are not all consistent, and some clearly are more favorable to the interests of certain types of competitors than are others.

Therefore companies need to decide where to position themselves, where they want to develop their own internal guidance, and where it makes sense to adhere to externally developed principles or requirements.

C. The Equator Principles

1. The Principles and Their Consequences

It is becoming increasingly hard to develop mining projects without paying attention to the Equator Principles. See www.equator-principles.org. Because these are the most prominent and widely applied of the emerging standards, they will be discussed in some depth.

The banks and other financial institutions that have adhered to these principles agree not to “provide loans directly to projects where the borrower will not or is unable to comply with [the prescribed] environmental and social policies and processes.”⁵⁷

Principally, these include three things:

- (1) the Safeguard Policies,⁵⁸ developed by the International Finance Corporation;
- (2) the requirement, under the Safeguard Policy on Environmental Assessment, that all major projects go through a process of environmental assessment; and
- (3) the Pollution Prevention and Abatement Handbook (1998),⁵⁹ which provides relatively detailed guidance for environmental performance.

⁵⁶ For a compilation and analysis see J. Walker and S. Howard, FINDING THE WAY FORWARD: HOW COULD VOLUNTARY ACTION MOVE MINING TOWARD SUSTAINABLE DEVELOPMENT? IIED and WBCSD (2002).

⁵⁷ <http://www.equator-principles.com/principles.shtml>

⁵⁸ <http://lnweb18.worldbank.org/ESSD/sdvext.nsf/52ByDocName/SafeguardPolicies>

⁵⁹ <http://lnweb18.worldbank.org/ESSD/envext.nsf/51ByDocName/PollutionPreventionandAbatementHandbook>

“[T]he 23 banks ... which have adopted the Equator Principles arranged \$55.1 billion of project loans in 2003, representing 75% of \$73.5 billion project loan market volume in 2002.”⁶⁰

Fig. 7

CURRENT IFC SAFEGUARD POLICIES

Environmental Assessment (OP 4.01)	Natural Habitats (OP 4.04)
Pest Management (OP 4.09)	Forestry (OP 4.36)
Safety of Dams (OP 4.37)	Indigenous Peoples (OD 4.20)
Involuntary Resettlement (OP 4.30)	Cultural Properties (OPN 11.03)
Child and Forced Labor (Policy Statement)	International Waterways (OP 7.50)
Others under development include human rights. The report of the Extractive Industries Review calls, inter alia, for anew Safeguard Policy on access to impartial dispute resolution	

Therefore, it would seem that any lawyer advising a company that is developing a project must in one way or another confront the requirements of the Equator Principles. While it may still be possible to develop a major project without complying with their requirements, it is not easy, and it is getting less so.

The principal reason that some of the private banks that do not formally adhere to the Equator Principles have stayed out may well be a concern that formal adoption might be used in litigation to establish a standard of care to which they would be held. This means that even if they do not formally apply the Principles, they may very well use them informally. Indeed, it was the fact that the Safeguard Policies and PPAH were so widely used by private banks as guidance for lending decisions that made it relatively easy to get most of them to formalize this requirement.

Fig. 8

BANKS ADOPTING THE EQUATOR PRINCIPLES

ABN AMRO Bank, N.V. Bank of America Barclays plc BBVA Calyon CIBC Citigroup, Inc.	ING Group KBC MCC Mizuho Corporate Bank Rabobank Group Royal Bank of Canada Standard Chartered Bank
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⁶⁰ “Dealogic Says Equator Banks Arranged 75% of Project Loans in 2003,” <http://www.equator-principles.com/>

Credit Suisse Group Dexia Group Dresdner Bank EKF HSBC Group HVB Group	The Royal Bank of Scotland Unibanco WestLB AG Westpac Banking Corporation
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One key to getting financing quickly and on favorable terms is to create comfort on the part of the lenders. As more institutions get increasingly accustomed to seeing a standard kind of information presented in a standard format, the companies that want to come up with their own approaches and submit things in their own format are likely to find that the institutions they submit their requests to are increasingly skeptical.

A decision to develop a project without complying with the Equator Principles should therefore only be made by the client in a considered, highly informed manner. It should never be made by inadvertence because the client or its legal counsel was not sufficiently knowledgeable about these requirements.

The Equator Principles are hardly the end of the story.

2. Change and Ferment in the World Bank Group and Elsewhere

The World Bank Extractive Industries Review could lead to significant reevaluation of World Bank Group operations in oil, gas and mining. The World Bank Group has played a crucial role in the growth of the oil, gas and mining sectors – the ‘extractive industries’ in the developing countries. The influence of Bank policy and programs goes far beyond the relatively small number of projects in which the Bank has played a direct role as lender or guarantor.⁶¹

The Bank’s Safeguard Policies are as shown above becoming a *de facto* standard. Thus any proposals for dramatic changes in the thrust of World Bank Group policy in the extractive industries are likely to have ripple effects into policies of other lenders, legal and regulatory programs of governments, and elsewhere.

The report of the Review calls for various changes (i) to *strengthen environmental assessment* and increase public participation, (ii) the strengthening of some Safeguard Policies, and (iii) the *development of some wholly new ones*. These would include a Safeguard Policy on access to impartial dispute resolution, as well as a potential Safeguard Policy on human rights.

The Extractive Industries Review is just one of several other processes and studies which propose significant change in the way the World Bank Group operates in the extractive industries:

- The International Finance Corporation is “reviewing and updating its 1998 Safeguard Policies and Policy on Disclosure of Information.”⁶² Obviously, any changes in these policies would very likely have an influence far broader than the Bank’s recommendations.

⁶¹ It has through technical assistance programs and support for institutional strengthening had a profound impact on the legal and regulatory structures governing foreign investment in these sectors and the government organs that administer them. Through loans and syndications from the International Finance Corporation, and guarantees from MIGA it has often led the way for foreign direct investment into countries and regions where private capital has been hesitant to enter.

⁶² <http://www.ifc.org/policyreview>

- A recently completed set of studies of the World Bank Group's activities in the extractive industries by the internal bodies that provide review and evaluation of the three principal members of the World Bank Group, IBRD/IDA, IFC, and MIGA. The conclusions and recommendations are presented in *Extractive Industries and Sustainable Development: An Evaluation of the World Bank Experience*.⁶³
- A recent review by the independent Compliance Advisor/Ombudsman of the International Finance Corporation on the results of recent IFC and MIGA extractive industries projects, *Extracting Sustainable Advantage? A Review of How Sustainability Issues Have Been Dealt With in Recent IFC and MIGA Extractive Industries Projects*.⁶⁴
- In 2002, a 2 ½ year study of the impact of the mining and minerals industries on sustainable development, the Mining Minerals and Sustainable Development Project,⁶⁵ came to an end with the publication of its final report, *Breaking New Ground*.⁶⁶ This very extensive worldwide effort led to a significant body of recommendations directed to the World Bank Group.

Given this mass of recommendations to the World Bank Group, significant changes appear inevitable. It would be surprising if what emerged was 'business as usual.' A change in direction at the Bank can as explained above be expected to influence a wide variety of other institutions.

There is also a clear convergence among the environmental standards applied by all OECD Export Credit Agencies, including the U.S. Export-Import Bank⁶⁷ This emerging "common approach" in the area of the environment appears to be converging with the World Bank norms.⁶⁸

Some private banks are not willing simply to put these issues entirely in the hands of the World Bank Group, but are developing their own set of approaches. For example, "Citigroup has adopted a comprehensive environmental policy that [it says] sets a new standard for the financial services industry. The policy provides a long-term framework for Citigroup to promote higher environmental standards through its business practices. The policy sets standards related to endangered ecosystems, illegal logging, ecologically sustainable development and climate change."⁶⁹ There is a campaign by

⁶³ July 29, 2003, World Bank Report No. 26373.

⁶⁴ (April 2003). This report builds on another recent study by the Office of the Compliance Advisor/Ombudsman, *A Review of IFC's Safeguard Policies* (January 2003).

⁶⁵ The project was managed by the International Institute for Environment and Development in London. Its report and a significant body of background materials are available at www.iied.org/mmsd

⁶⁶ *Supra* note 3.

⁶⁷ *Draft Recommendation on Common Approaches on Environment and Officially Supported Export Credits: Revision 6 [Common Approaches]* can be downloaded and printed in pdf format at <http://www.oecd.org/dataoecd/2/32/2726700.pdf>.

⁶⁸ *Common Approaches* states at page 5 that "when an EIA is required, it should address the relevant issues referred to in the guidelines of International Financial Institutions", which according to Footnote 1 on pg. 5 would include examples such as "the World Bank Group, Regional Development Banks, (in particular EBRD, AfDB, ADB, and IADB) or a Member's Development Agency."

⁶⁹ Jan. 22, 2004, Rainforest Action Network and Citigroup Announce Enhanced Citigroup Environmental Policy, <http://www.citigroup.com/citigroup/press/2004/040122a.htm>

some environmental groups for adoption of these “expanded” or “tougher” standards by private banks, that may well be having some effect.⁷⁰

D. Other Principles and Guidelines

There are a very considerable number of other principles and guidelines being brought forward by a variety of organizations to be applied to a variety of sets of problems. Some of these are listed in J. Walker and S. Howard, *Finding the Way Forward: How Could Voluntary Action Move Mining Towards Sustainable Development?*

The fact is that there are a very substantial number of guidelines, standards, norms and possible benchmarks of performance. Indeed, the number is so great that it is difficult indeed for responsible companies and their counsel to sort through them all, and make rational, informed decisions about how to approach them, and whether to use them, formally or informally.

Possible company reactions to these various standard setting processes range from direct participation in the process by the company top participation through industry associations, to deciding not to participate, or even actively campaign against some processes. The issues are several:

- ❑ **Does the company need standards or guidelines on this subject?** Increasingly, it may be hard to convince third parties that a company takes an issue like human rights or access to information seriously if it has no stated policy or guidelines. And it is hard to imagine how some of these issues can be satisfactorily managed internally if senior management has not articulated the standards it expects of field personnel.
- ❑ **Should the company articulate its own approach or join with others?** Except in those cases where the company wants to position itself as a visible “industry leader,” most companies see safety in numbers. In addition, many of the developing standards represent a considerable input of time, thought, research and discussion, that is costly and expensive for an individual company to duplicate.
- ❑ **What is gained and what is lost?** There needs to be a clear assessment of how adhering to a standard can benefit the company and what potential pitfalls might exist. This is neither the place for hypercautious legal warnings “there could be some sort of problem and inaction is therefore safer” nor for rosy optimism that announcing adherence to a standard will suddenly cause potential critics to announce their deep affection for the company. There should be a plan to get maximum benefit from adhering to a standard.
- ❑ **Can the company do it?** The biggest pitfall may be to announce adherence to a set of norms that the company does not understand and has no internal capability to implement, measure, or report on, internally or externally.

There are many sets of rules of the road out there clamoring for attention. Prominent among those with immediate application to the mining industry are:

- The Global Compact

⁷⁰ “Drawing one of RAN’s [Rainforest action Network’s] shortest campaigns to a close and providing evidence that the marketplace responds to citizen demand for change, Bank of America agreed on May 3 to adopt historic new environmental and social policies that provide one more stepping stone on the path towards reconciling economy with ecology. On the eve of a National Day of Action and the launch of the “No Way BofA” campaign on May 4, BofA scrambled to put into place policies that will set new industry best practices for the reduction of greenhouse gas emissions, protection of intact forest ecosystems, and transparent public accountability to all stakeholders, including indigenous peoples.” http://www.ran.org/ran_campaigns/global_finance/

- Reporting Initiative⁷¹
- The Extractive Industries Transparency Initiative⁷²
- The Voluntary Principles on Security and Human Rights⁷³
- ICMM Position Statement on Mining and Protected Areas

1. *The Global Compact*

“In an address to The World Economic Forum on 31 January 1999, United Nation Secretary-General Kofi Annan challenged business leaders to join an international initiative – the Global Compact – that would bring companies together with UN agencies, labour and civil society to support nine principles in the areas of human rights, labour and the environment. The Global Compact’s operational phase was launched at UN Headquarters in New York on 26 July 2000. During the first Global Compact Leaders Summit, held on 24 June 2004 at UN Headquarters in New York, the Secretary-General announced the addition of a tenth principle against corruption. This measure followed a long consultation process with all Global Compact participants.”⁷⁴

The Global Compact asks companies to embrace, support and enact, within their sphere of influence, a set of core values in the areas of human rights, labour standards and the environment. The principles are as follows:

Human Rights

- Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; and
- Principle 2: make sure that they are not complicit in human rights abuses.

Labour Standards

- Principle 3: Businesses should uphold the 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.

Environment

- Principle 7: Businesses should 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

⁷¹ See <http://www.globalreporting.org/about/brief.asp>

⁷² See http://www.dfid.gov.uk/News/News/files/eiti_intro.htm

⁷³ <http://www.state.gov/g/drl/rls/2931.htm>

⁷⁴ See <http://www.unglobalcompact.org/Portal/Default.asp>

technologies

Anti-Corruption

- Principle 10: Businesses should work against all forms of corruption, including extortion and bribery.

2. *The Global Reporting Initiative*

“The Global Reporting Initiative (GRI) is a multi-stakeholder process and independent institution whose mission is to develop and disseminate globally applicable Sustainability Reporting Guidelines. These Guidelines are for voluntary use by organisations for reporting on the economic, environmental, and social dimensions of their activities, products, and services. The GRI incorporates the active participation of representatives from business, accountancy, investment, environmental, human rights, research and labour organisations from around the world. Started in 1997, GRI became independent in 2002, and is an official collaborating centre of the United Nations Environment Programme (UNEP) and works in cooperation with UN Secretary-General Kofi Annan’s Global Compact.”⁷⁵

The Global Reporting Initiative has established a set of general reporting guidelines applicable to a broad variety of industries, and intended to be “broadly relevant to all organisations regardless of size, sector, or location,” the Sustainability Reporting Guidelines 2002.⁷⁶

It is however recognized that continued development, elaboration and improvement of the guidelines will require some greater specificity to deal with issues of particular industries. The mining sector has been one of the leaders in developing sector-specific guidelines. “GRI partnered with the International Council on Mining and Metals (ICMM) to create a Mining and Metals Sector Supplement to the 2002 Sustainability Reporting Guidelines.”

This supplement exists in draft and is now out for public comment.⁷⁷

3. *Extractive Industries Transparency Initiative*

“The Extractive Industries Transparency Initiative was launched by Prime Minister Tony Blair at the World Summit on Sustainable Development in Johannesburg, September 2002. Its aim is to increase transparency over payments by companies and revenues to governments in the extractive industries.”⁷⁸ Its core is a statement of principles and agreed actions.⁷⁹

⁷⁵ <http://www.globalreporting.org/about/brief.asp>

⁷⁶ <http://www.globalreporting.org/guidelines/2002.asp>

⁷⁷ See <http://www.globalreporting.org/guidelines/sectors/mining.asp>

⁷⁸ http://www.dfid.gov.uk/News/News/files/eiti_intro.htm

⁷⁹ See http://www.dfid.gov.uk/News/News/files/eiti_statement.htm

Mining companies which have shown leadership in promoting this “publish what you pay” approach to control of corruption include Anglo American, Rio Tinto, and Newmont.⁸⁰ It has been endorsed by the World Bank Group.⁸¹ This suggests that – particularly since the issue has also been highlighted by the Extractive Industries Transparency Initiative – there is likely at some point to be some sort of articulation between the EITI and the various guidelines of the International Finance Corporation – and perhaps through that to the Equator Principles.

4. The Voluntary Principles on Security and Human Rights

These are a “set of voluntary principles to guide Companies in maintaining the safety and security of their operations within an operating framework that ensures respect for human rights and fundamental freedoms.”⁸²

They were developed by the Governments of the United States and the United Kingdom, companies in the extractive and energy sectors, and non-governmental organizations. Again, a number of leading mining companies have been among the developers and promoters of these principles.

5. Mining and Protected Areas

On August 20, 2003, the International Council on Mining and Metals announced the adoption of a set of principles and commitments regarding exploration and mining in protected areas.⁸³ These come out of a dialogue held between the ICMM and the International Union for the Conservation of Nature.⁸⁴

Under the terms of these commitments, companies have agreed to respect certain areas as “no go” zones for exploration and mining.⁸⁵

6. Cyanide Management Code

“The Code is an industry voluntary program for gold mining companies. It focuses exclusively on the safe management of cyanide and cyanidation mill tailings and leach solutions. Companies that adopt the code must have their mining operations that use cyanide to recover gold audited by an independent third party to determine the status of Code implementation. Those operations that meet the Code requirements can be certified. A unique trademark symbol can then be utilized by the certified operation. Audit reports are made public to inform stakeholders of the status of cyanide management practices at the certified operation.”⁸⁶

⁸⁰ See <http://www.publishwhatyoupay.org/eiti/>

⁸¹

<http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20143509~menuPK:34463~pagePK:64003015~piPK:64003012~theSitePK:4607,00.html>

⁸² <http://www.state.gov/g/drl/rls/2931.htm>

⁸³ See www.icmm.com/news/158ICMMPressRelease-nogoareas-20August03.pdf

⁸⁴ See <http://www.iucn.org/themes/business/mining/miniucnicmmtorfin.pdf>. See also <http://www.icmm.com/newsletter/160ICMMNewsletter-Vol2No4-Sept03.pdf>

⁸⁵ See <http://www.icmm.com/newsletter/160ICMMNewsletter-Vol2No4-Sept03.pdf>

⁸⁶ Mineral Resources Forum, Voluntary Industry Code for Management of Cyanide in Mining, <http://www.mineralresourcesforum.org/initiatives/cyanide/>. See also Cyanide Management Code, <http://www.cyanidecode.org/>

7. What Does This All Mean?

Remember that the emerging standards mentioned here are the tip of a bigger iceberg: the third party audit system of the Mining Association of Canada, the new requirements of the Minerals Council of Australia, the ICMM Sustainable Development Charter, new tailings dam safety requirements, more stringent environmental and social guidance from the regional development banks – the list goes on and one.

But what is the practical consequence to a company of adhering or not adhering to any or all of these international principles or guidelines?

If these principles and guidelines were to freeze where they are, the change would probably not be dramatic. But most observers seem to think that where we are today is but an early step in a process that will eventually weave a quite coherent set of international guidelines, and one that will have very deep consequences for the industry.

Already, it may be starting to get awkward for companies that try to resettle local populations without complying with the Safeguard Policy on resettlement, which is made applicable to private lenders through the Safeguard Principles. It may be uncomfortable for a gold company to explain why it is not complying with the Cyanide Management Code.

But the real danger to a company's position is that as these requirements become more complex. Complying with them will get harder. The consequence of not complying will be much greater. And the effort needed to "jump start" compliance for those who have not slowly been building their knowledge and capacity will become greater. Eventually, companies that do not take these issues seriously may well be in a position where they are losing very important opportunities because they are not integrated into the system, and have not built their capacity to manage for this kind of results. In the meantime, they will pay a price in reputation for not visibly adhering to the criteria that the industry leaders are willing to accept.

Out of the norms described above, and other proposed sets of principles, such as the much-discussed OECD investment guidelines, are emerging a common set of practices and principles. These are going to be woven together with some other sources of this new international set of requirements, into a web that will be tighter and brighter with each passing year. Among these other sources of rules will be:

- ❑ Laws of the country of origin of the investing company that have extraterritorial effects. One of many examples is the U.S. Foreign Corrupt Practices Act. It is hardly the only one: the U.K. anticorruption legislation or Sarbanes-Oxley will also be part of the mix.
- ❑ Stock exchange disclosure requirements.
- ❑ New accounting principles and disclosure requirements that will inform investors much better of issues that are now often fairly invisible: serious closure liabilities, social and community problems that threaten the viability of projects, competing claims to land from indigenous organizations, etc.

It seems likely that over the next five years:

- ❑ Some current sets of voluntary standards will disappear;
- ❑ Other current norms will be very broadly adopted and increasingly important to investors and large customers;

- ❑ There will be much better articulation among different sets of standards as various users adopt systems developed by others and integrate them into their own processes;
- ❑ Detailed and substantive private voluntary standards such as the Equator Principles will be in almost universal use by mainstream lenders;
- ❑ They will be used by most insurers as one tool for evaluating risk, and will affect premiums charged; and
- ❑ They may be used by major customers for supply chain assurance.

The net result therefore may well be a set of standards that creates an increasingly visible distinction between those who choose to comply and those who are below the bar, to the serious disadvantage of the latter.

E. Emerging Questions

As this body of international norms becomes more important and more widely adopted, a number of questions very familiar to lawyers are starting to be asked. These principles are in fact part of a new system of governance. As with any system, of governance, it is appropriate and important to ask:

- Who is establishing these standards and to whom are these ‘legislators’ accountable?
- Who performs the ‘judicial’ function of deciding whether there is or isn’t compliance?
- What is the reward for compliance or the sanction for noncompliance?

One principal question will be whether national authorities – particularly those in of developing economies – have a significant role in articulating and applying these rules. There will be a considerable clamor on the part of all kinds of interests who want to be a part of defining and applying the body of international standards. We will find that some have much easier and effective access to the process than do others. As is usual in such things, developing countries, and organizations from developing countries, are likely to have much greater trouble being heard than the rich countries. Developing countries will continue to be frustrated that their legitimately elected representatives are accorded less space in the process than NGOs that are elected by and accountable to no one.

But public processes, development of investment standards, and guidelines on the global level are not going to go away. The pressures that create these things will grow, not diminish. Those who simply reject them will be increasingly isolated.

At the same time, if there is not to be constant conflict between emerging international norms and national legal systems, there has to be a space in these processes for the legitimate representatives of government. Participation by government, especially governments of developing countries, has been barely visible in some recent policy making processes.

Broader participation in the process of defining and applying standards will lead us to much better results but will increasingly require different interest groups to become more sophisticated in:

- ❑ Understanding which of these processes to intervene in and how;
- ❑ Understanding how to become increasingly effective in that participation; and
- ❑ Finding a way for government to sit in dialogue with those who are not the legitimate representatives of sovereign peoples, but who nevertheless have important contributions to make;

A common international framework – a convergence of approaches among economies -- can have many benefits in making it easier for countries to adopt policies that ensure more effective and sustainable development without being told “you will lose the competition for investment.” The danger of a ‘race to the bottom’ is real. The effective policy is not to resist the very idea of international norms, but to participate effectively and help guide this process.

VIII. THE THIRD LINK: LOCAL VIEWS AND EXPECTATIONS

Even where projects are successfully complying with the emerging international norms and are welcomed by national legislation, they can still fail if they are rejected by the local communities that are most impacted by their operations. Often, neither those who administer international standards nor those charged with applying national law speak for those communities. And communities frequently see international institutions such as the World Bank, large multinational companies, and their own national governments as in league to promote their various interests at the expense of local communities.

These local communities may be particularly vulnerable in ways that are increasingly being understood:

- ❑ They may have a social and cultural fabric that makes it very hard for individuals to function outside that framework. Companies and national authorities who are accustomed to the global culture of rampant individualism may create tremendous disruption to these traditional structures simply by dealing with people as individuals, and being unconscious of the social networks in which they live – giving compensation to individuals for loss of land that the community regards as a common asset, or sharing out benefits in a way that competes with structures of traditional authority;
- ❑ The poor have much less room for error than the rest of us. They must often be risk averse because their margin of survival is so much thinner. Processes of dramatic change may provide new opportunities, but they can be profoundly threatening to those without accumulated resources or any ‘safety net’ to fall back on.
- ❑ The poor are generally more directly dependent on ecosystem goods – firewood, fish, game, plants gathered from forests – than the majority culture. Things that affect the productivity of ecosystems therefore may affect them more dramatically.
- ❑ There are millions of people – the kind written about by Hernando de Soto in *The Mystery of Capital*⁸⁷ – who do not have recognized legal rights to be where they are, live in the houses they occupy, farm the fields they farm, or use the ecosystem goods they appropriate, yet who have clearly understood rights and rules among themselves. The coming of development projects that bring legal systems and ways of doing things that ignore these understandings and claims of right are profoundly threatening to people in this position.
- ❑ Where local people are of an ethnic group different from those who run the government and generally receive the most benefits from its activities, this can greatly exacerbate tensions and difficulties of development. See Amy Chua, *World On Fire*.⁸⁸

All this being said, the local standards are the hardest of the three sets of requirements to generalize about, because this comprehends such a wide variety of experience. Further, often the local

⁸⁷ Black Swan Books (2000).

⁸⁸ Doubleday (2003).

mechanisms and institutions which determine what is or is not acceptable are very hard for outsiders to identify, understand and work with.

This is a preliminary framework for understanding some of the most prevalent and difficult issues: dealing with people whose claimed rights are not fully recognized by law; national-local sharing of revenues; prior informed consent; access to information; local level dispute resolution; and the relationship between local interests and international standards.

A. Claims of Rights Widely Regarded as Just But Not Fully Recognized by Law

Some of the more prominent issues arise where groups of people assert rights that are not fully recognized by their own national systems of law:

- **Informal occupants** of land who may lack legal title but have clear expectations that their occupancy will somehow be recognized. They may have a deep sense of injustice if they are removed, especially without agreement on compensation. In some places the clear majority of the population have no legally recognized rights to live where they live; if the ‘rule of law’ means that they are all subject to dispossession without compensation, the rule of law will be resisted.
- Communities who regard themselves as **indigenous**, and have strong traditional attachment to certain lands, even if they have no legal land tenure and no legal recognition as an indigenous group.⁸⁹
- **Artisanal or small-scale miners**,⁹⁰ who may have no other equivalent livelihood, but may lack legal recognition of their mineral rights or any recognition of a right to operate where they are operating. In some cases the very activity may be illegal.
- **Traditional communities**, for which the abundance of nature – for example fish, wild game, gathered plants, or fuel wood – plays a critical role in subsistence livelihoods, but who may lack legal recognition of any right to use these resources
- **Local leadership**, which may reflect a widely shared expectation that local people will somehow be better off as a result of project development even where they have no legal right to any specific benefits.

We need to respect national sovereignty and law. But we also need to realize that on the positive side, the active cooperation of communities is necessary to achieve the full benefits of development. And on the negative side, if their expectations are frustrated and they are treated in ways they regard as unfair, this can result in failure of projects that can hurt all parties.

As lawyers we must recognize that the history of the law is the gradual recognition and acceptance of *de facto* claims. After all, the U.S. Mining Law of 1872 is largely a recognition of a system of ownership developed by miners themselves without official permission from government, without any right to make laws, and without any authority to establish binding legal requirements. Most people see

⁸⁹ See generally IIED, FINDING COMMON GROUND: INDIGENOUS PEOPLES AND THEIR ASSOCIATION WITH THE MINING SECTOR (IIED 2003); V. Weitzner, CUTTING EDGE POLICIES ON INDIGENOUS PEOPLES AND MINING: KEY LESSONS FOR THE WORLD SUMMIT AND BEYOND (North-South Institute 2002).

⁹⁰ See generally T. Hentschel, F. Hruschka, and M. Priester, ARTISANAL AND SMALL-SCALE MINING: CHALLENGES AND OPPORTUNITIES (IIED 2003).

some real justice on the side of the poor informal occupant, and many legal systems recognize some form of adverse possession, though it may take access to some kind of court system – which is often lacking – to assert these rights.

The problems can take many forms; the above are only indicative of the more generalized issue of people who assert rights that may not be recognized fully by the legal system. Other examples abound. One is performing environmental assessments that do not mention the presence of people who live on or adjacent to the project site, on the ground that they have no right to be there, so that impacts on them need not be disclosed.

We need to find ways of accommodating what are largely seen as just claims, rather than the unfortunately common approach of saying that in the absence of legal recognition, companies have no obligation to deal with informal claimants. Fairness and compassion for the poor aside, a foreign multinational using its connections with national government agencies, superior access to the judicial system, and economic power to dispossess the rural poor turns out to be bad business. It can create so much local opposition that the project becomes very hard to do, serve as grist for the mills of campaigning NGOs, and jeopardize financing, by violating the Safeguard Policy on resettlement, or simply because lending institutions are averse to themselves becoming campaign targets.

B. Sharing of Revenues

There is probably no more accurate indicator of potential problems for a project than failure to have achieved some agreement on sharing of revenues between the national and local levels.⁹¹

While there is probably no universally ‘fair’ formula, it seems very broadly true that no matter the Constitutional or statutory arguments in favor of all the revenue accruing to the national authorities, in practice this will result in deep dissatisfaction and risk to the success of the project.

It is also something approaching a system of ‘double taxation.’ Where the company pays taxes or other payments to the national authority, and none of this is shared, local interests will almost always approach the company asking for assistance at the local level. In general, they will find ways to convince the company, grudgingly or willingly, to pay.

Where none of the government revenue reaches the local level, opportunities for development will be missed. At the local level is the only place where certain kinds of benefits can be captured: the opportunity for improved training, shared infrastructure, cooperation in eradication of endemic diseases, improved water supplies, electrification and so forth. If government is willing to invest nothing at all to complement what private investment is doing, the results will usually be disappointing.

There are dislocations and burdens associated with development. These will inevitably fall most heavily at the local level. Where there are no corresponding benefits, local opposition to the project can almost be guaranteed. One of the issues at the Tambo Grande project was, for example, the lack of confidence at the local level that they would ever see any of the revenues paid to the central government.

Where there is a deep ethnic or political divide between local people and the central authorities, this can lead as far as armed conflict,⁹² sometimes based on ethnicity. This creates levels of risk that most investors see as unacceptable, and is destructive of any sort of development potential.

⁹¹ See BREAKING NEW GROUND, *supra* note 3, at 182 and 209.

⁹² See J. Switzer, *Natural Resources and Armed Conflict: The Case of the Minerals Sector* (IIED 2001); available at http://www.iied.org/mmsd/mmsd_pdfs/jason_switzer.pdf; Workshop Report on Natural Resources

C. Prior Informed Consent

There is no current topic that is hotter than ‘prior informed consent,’ one of the key recommendations of the Extractive Industries Review.⁹³ The concept seems so attractive and right to so many people that it has developed a considerable momentum.⁹⁴

The problem with the concept is that it is most of the time almost devoid of content.⁹⁵ Sadly, this obfuscation has sometimes been intentional: the concept has seemed to some to be more politically useful if it is kept deliberately vague. On some understandings of the idea, it should be acceptable to industry. On others, it would be anathema.

“The debate over the principle of ‘prior informed consent freely given’ may be somewhat off track until and unless it can be clearly defined in practice. Which communities are entitled to this right, what kind of groundwork needs to be done to make consent ‘informed,’ when and how we know that consent has been given, whether majority approval is sufficient, whether consent can be withdrawn once given, and a host of other serious and practical issues need to be discussed openly and resolved if the principles of ‘prior informed consent’ is to gain wider acceptance. *Endorsing ‘prior informed consent’ while being unwilling to talk about what it means in practice is not progress.*”⁹⁶

These issues are complex.⁹⁷ Among the issues are:

- ❑ **Is ‘prior informed consent’ a way of dealing with the specific concerns of indigenous peoples, or does it apply to all project affected communities?** Some of the basic agreements from which the concept springs see it as a way of dealing with the impacts on indigenous communities.⁹⁸ Others, including the Extractive Industries Review, suggest it should be applied to all communities.

and Armed Conflict: The Case of the Minerals Sector (IIED 2001); available at http://www.iied.org/mmsd/mmsd_pdfs/armed_conflict.pdf; see also <http://lnweb18.worldbank.org/ESSD/sdvext.nsf/67ByDocName/ConflictPreventionandReconstruction>.

⁹⁷ See J. Cress and C. Dalupan, *Sustainable Development and Mining Laws: Is a ‘Mine Veto’ Needed?* 17 *Natural Resources and Environment* 154 (2003).

⁹⁸ Environmental Law Institute, *PRIOR INFORMED CONSENT AND MINING* (2004); V. Weitzner, *Through Indigenous Eyes: Toward Appropriate Decision-Making Processes regarding Mining On or Near Ancestral Lands*, (North-South Institute 2001).

⁹⁵ One of the noble exceptions to this rule is the work of the World Commission on Dams. See *DAMS AND DEVELOPMENT* at chapter 8 (2000).

⁹⁶ See L. Danielson, Foreword to IIED, *FINDING COMMON GROUND: INDIGENOUS PEOPLES AND THEIR ASSOCIATION WITH THE MINING SECTOR* (IIED 2003) at xi, emphasis in original.

⁹⁷ One of the more detailed attempts to address the question is R. Goodland, *SUSTAINABLE DEVELOPMENT SOURCEBOOK FOR THE WORLD BANK’S EXTRACTIVE INDUSTRIES REVIEW* (2003).

⁹⁸ See, e.g., International Labour Organisation Convention 169, *Concerning Indigenous and Tribal Peoples in Independent Countries*.

- ❑ **How much impact on a community must there be before the process of ‘prior informed consent’ is invoked? Who decides?** Some suggest that communities have the right to decide for themselves whether they are sufficiently impacted that their consent is required. Whoever makes the decision, it is not clear what standard is applied.
- ❑ **Does every affected community have to give its consent?** A pipeline, electric line, road corridor, railroad or the like may pass near dozens of what are generally regarded as separate communities. Does each and every one of these have to express its ‘prior informed consent?’
- ❑ **“How does a community determine and express its consent?”**⁹⁹ There are those who, in the interest of strengthening cultural ties in indigenous or traditional communities say that consent is valid only if determined and expressed by the traditional authorities and decisionmaking structures, whatever they may be. Others argue that respect for democratic principles require a majority support, regardless of the position of elders or traditional authorities. What if traditional decisionmaking excludes some defined group, e.g. women? “[I]t is essential that truly legitimate representatives be sought and involved in PIC, rather than the usual easier-to-identify village elites.”¹⁰⁰ What precisely does this mean?
- ❑ **Can consent be withdrawn? “Is PIC perpetual, or can PIC be revoked when necessary?”**¹⁰¹ Under what circumstances can consent be revoked? What is the consequence? Must a project shut down if, for example, a community along the transportation corridor withdraws consent?
- ❑ **Whose job is it to seek consent?** “As genuine PIC is difficult and time consuming to obtain, it is probably best sought by reputable and independent agents, rather than either by the proponent, the government, or the WBG.”¹⁰²

The debate over what ‘prior informed consent freely given’ means is quite elliptical, given the potential consequences of adopting and attempting to apply this phrase. It is also mostly sterile, for several reasons. One is simply fear: the issue is so charged that many do not want to face the hostility and abuse that seems likely to land on those of any perspective who speak their minds. Further, there is a lack of a clear concept of what the debate is about, and lack of experience in applying the ideas. The only significant effort to apply this concept has been in the Philippines; the results of that effort are not widely enough known, and should be studied and reported.¹⁰³

At the same time, it is too easy to say that the concept should simply be rejected because of all these difficulties. The fact is that local communities have to be involved in any project in a positive way if we are to take advantage of the development opportunities such projects represent. “Top down” development, where all kinds of outside parties decide for local people what is good for the local

⁹⁹ Environmental Law Institute, PRIOR INFORMED CONSENT AND MINING (2004) at 4.

¹⁰⁰ R. Goodland, SUSTAINABLE DEVELOPMENT SOURCEBOOK FOR THE WORLD BANK’S EXTRACTIVE INDUSTRIES REVIEW (2003), at 16.

¹⁰¹ *Id.* at 18.

¹⁰² *Id.*

¹⁰³ There is a good if brief discussion in J. Cress and C. Dalupan, *Sustainable Development and Mining Laws: Is a ‘Mine Veto’ Needed?* 17 *Natural Resources and Environment* 154 at 166 *et seq.* (2003).

community, is largely discredited. The alternative is involving local people from the outset in project planning. This implies some degree of decisionmaking power.

Put otherwise, local people will – even where government is willing to use armed force to suppress them – have a considerable amount of say in project success. The question then is simply whether this ‘say’ is exercised within some structure of dialogue with more or less understood rules.

D. Access to information

There is no more universal complaint by local communities than the lack of access to reliable, trusted information about the consequences of the process of change unleashed by development. The Aarhus Convention is being promoted widely as a framework for approaching this issue.¹⁰⁴

There is as yet no understood and consistently applied solution to this problem. The issue is clearly more than simply providing information: it goes to creating means through which the community gets to decide what information it gets, and is able to create means of obtaining that information that it is willing to trust. There is no surer indicator that a project is in trouble than management that sees manipulation of information as some kind of game.

Local publics have an uncanny radar system for detecting any kind of game playing with information. There is no surer way to create distrust that will poison all dealings with the affected communities. Where a project has a good story to tell, and a willingness to engage with the communities, it has everything to gain by assuring ready access to all relevant information, and everything to lose by creating the impression that any information less than completely positive will be suppressed.¹⁰⁵

E. Local Level Dispute Resolution

Without effective governance, there is relatively little foreign direct investment in the natural resource industries. International finance institutions are simply not willing to risk large amounts of capital in fixed, immobile physical assets in regions where basic law and order are not present. Nor is there likely to be substantial foreign direct investment where assets are subject to nationalization, or arbitrary action by government authorities that deprives investors of the value of their investment. Should these things occur, it is vital to investors that they have some effective forum in which to bring complaints for redress.

In many areas of the world, investors do not believe that national court systems can effectively fill this role. Building adequate investor confidence requires something beyond national courts to turn to when there is a dispute with the host country.

Concerns with the local court systems range from lack of confidence in their impartiality, fears that they are subject to political influence or corruption, failure to follow procedures that meet internationally recognized standards of due process, lack of training of judges, or lack of written standards of procedure, to backlogs of cases that will prevent a case from being heard for many years, even decades.

¹⁰⁴ See the very useful Zillman *et al.*, HUMAN RIGHTS IN NATURAL RESOURCE DEVELOPMENT (Oxford University 2002).

¹⁰⁵ See BREAKING NEW GROUND, *supra* note 3, Chapter 12 at 291.

Investors therefore have largely eschewed trusting their important interests to local court systems, and have insisted, as a condition of their investment, on the creation of independent arbitration mechanisms. The growing body of law and experience in arbitrating disputes between foreign investors and host governments has created a sense of confidence that has been an important element in increasing the flow of private investment to developing countries.

Investment, particularly in large natural resource projects in remote rural areas, is a powerful agent of change. It affects many people in dramatic ways. In some cases, it may result in damage to the economic or other interests of local people, failure to receive prompt and fair compensation for private property taken for project purposes, accidents resulting in personal injury, or the like.

Reports of conditions at project sites all too frequently indicate that local people have no idea to whom to take these problems for resolution. They often have local traditional dispute resolution mechanisms, but project developers generally may not even know these exist, and are rarely willing to subject themselves to their process or decisions. And to local people, the project developer may be no more than a blur of different faces.

There is a considerable and growing view that project-level *complaint management* and *dispute resolution mechanisms* can contribute to successful management of major natural resource projects in developing countries. It is time to start testing that idea.

It is only to be expected that large, complex projects may generate a variety of disputes, ranging from challenges by competing parties to title to resources to impacts of truck traffic on local residents. A key element of effective governance is availability of systems by which parties with differing views can reach relatively speedy, efficient and impartial resolution of disputes in a way that is generally accepted as fair -- resolution with some sense of justice and finality. Where this key element of governance is missing -- as it is in some rural areas of developing countries -- projects and the people affected by them, including their sponsors, are subject to increased risks of undesirable outcomes.

The existence of some forum in which problems can be solved with some finality is an important self-correcting mechanism that keeps projects from getting too far off track. Several recent studies concur strongly in this view.¹⁰⁶ Assessment of local dispute resolution mechanisms and, where advisable, creating supplementary avenues of dispute resolution, is repeatedly being proposed as a way around some of the obstacles of developing commercially successful projects in a sustainable development framework.

¹⁰⁶ Creation of project level dispute resolution mechanisms is one of the most prominent recommendations coming out of the Mining Minerals and Sustainable Development Project. The final report of that project, *Breaking New Ground*, outlines the potential role of such mechanisms and proposes their creation. See pages 359, 368, and 400. Creation of such mechanisms is also the lead recommendation of the very recently completed *BEYOND COMPLIANCE? AN EXTERNAL REVIEW TEAM REPORT ON THE COMPLIANCE ADVISOR/OMBUDSMAN OFFICE OF IFC AND MIGA* (July 24, 2003), page v. The recently released final report of the report of the World Bank Extractive Industries Review, *STRIKING A BETTER BALANCE*, makes such a recommendation repeatedly and specifically urges the Bank to assure that there is an effective local complaints and dispute resolution system in place in affected communities where the World Bank Group is supporting an extractive project. www.eireview.org.

Conceptually a *complaints or grievance mechanism* is distinct from a *dispute resolution mechanism*. The former is internal to a company or other organization. It is simply a formalized way in which the organization assures that complaints of third parties about company activities reach the people inside the organization capable of responding to them, and that they are dealt with promptly, consistently, in a way that conforms to the organization's policies. The purpose is to respond to such complaints in a way that reduces rather than increases risk of future conflict.

Dispute resolution mechanisms by contrast are managed by a party external to the company, generally someone who is considered by most of those potentially involved as neutral and capable of impartial decisions. Examples might include judges in a well-functioning court system, mutually selected arbitrators, or some kinds of traditional authorities.

Since a key objective is to strengthen rather than supplant the existing legal system or other dispute resolution mechanisms, a first step in establishing such mechanisms must be an *assessment* of the existing ways disputes can be resolved, evaluating them against a reasonable and objective set of criteria.

Once it is clear what kind of disputes are likely to arise for which there currently is no adequate forum, work in the community, almost certainly best done through some neutral facilitator, can bring the principal local parties together to seek some consensus on how the defined category of problems will be resolved during the project life.

This agreement can be embodied in a contractual agreement for arbitration or mediation, given recognition by local legal systems, or otherwise be formalized as appropriate.

F. Alliance Between Local and International Interests

We have to acknowledge that there has at times been some alienation between some local community groups and national authorities. When they have not got what they want from their own authorities, some community groups have turned to the international processes and standard-setters

The alliance of international institutions, sometimes showing lack of respect for sovereignty, with local interests, willing to seek foreign support to obtain what they cannot achieve within their own countries, has sometimes been very disturbing to developing countries. But the way forward is not to attempt to deny these interests exist, any more than we can pretend the international pressures do not exist.

Their interests are real interests. Their concerns are sometimes valid concerns. They are often the poor, who are supposed to be benefiting from the process of development. They are our fellow passengers in the lifeboat. We need to learn how to work toward common objectives.

It will not work to let local communities make all the decisions to the exclusion of everyone else. But if we cannot accommodate many of their expectations, projects will tend to be difficult, expensive, unprofitable and not very good for development. If national authorities are absent when the difficulties need to be resolved, it is not surprising if grievances are taken somewhere else to be resolved.

The challenge of the next wave of mining legislation is to ensure there is a way to have this dialogue at the national level within the framework of national law and policy. This is the best way to reduce the need, or the temptation, to take these issues to global institutions. And it puts national leadership where it needs to be – in the middle of the process. If the state is not leading the process, it does not mean local interests will cease to exist. It means they will simply go elsewhere to be recognized.

IX. CONCLUSION

Where we see projects that are good for the investor, good for the host country, good for local communities, good for the environment, -- good for everyone -- it is because *they are successfully managing at all three of these levels.*

This is a real challenge. National legal requirements are not always clear. But they are much clearer than the emerging international policies. And even these are very clear compared to local expectations.

Many companies have considerable difficulty in the internal management of these issues, and ensuring that their actions at each of these levels are consistent and mutually reinforcing. The tendency to shoot oneself in the foot is observable more frequently than anyone would like.

Increased clarity of requirements is an important objective. Investors like clarity.

Another thing that investors like is not to be put in impossible positions: where national law requires one thing, but international standards or the expectations of local communities require something quite different. Therefore, *increased convergence* among national legal standards, international policies and local expectations is also important.

This means being able to say legitimately three things:

- ❑ *at the national level* that national legislation is aware of and responding to the concerns that have led to the development of international standards;
- ❑ *at the international level*, that we are ensuring that the voices of developing governments are being heard in a constructive way, in the development of international standards; and
- ❑ *at the local level*, that our legislation, our procedures, and our officials are all geared to ensuring that affected communities will in fact have some voice in their future, and that they will benefit from development, rather than simply being sacrificed to some presumed greater national good.