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Information Availability: A Key to Building Trust in the Minerals Sector

(Review of Systems for Making
Information Available)

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Abstract

Objective of the Review

The present review aims at developing a clearer understanding of existing and proposed mandatory and voluntary systems for making information available to actors participating in or affected by the minerals industry.

Background

Nowadays, as other sectors of industry, and economy as such, the mining and minerals sector is under a growing pressure by the public to operate in an environmentally sustainable and socially responsible manner. Therefore an environment of hospitality is needed by the minerals industry, and it can only be built on trust. A clear prerequisite of this is effective communication with the public, based on mutual understanding and open dialogue on both sides.

This, however, requires first of all information that necessarily flows from the minerals sector to the public; the industry initially establishing the communication, so to say: making “the first move” in this global chess game.

As a result, public disclosure leads to increased community empowerment, better corporate accountability, increased management attention to social issues and eventually, improved environmental and social performance. Access to information – or right to information – is a crucial point in the functioning of the entire system, therefore this review is focusing on relevant access to information models and examples, both mandatory and voluntary, in the cycle of a minerals development.

I Introduction

1.1 Scope of the Review

The scope of the review must be kept reasonably narrow in order to avoid unnecessary duplications, however, must cover a broad enough range of activities to be able to draw relevant consequences for the objective of the review as well. For this purpose the following Table represents the scope of the present review:

Instruments	Existing	Proposed
Mandatory	Planning	Planning
	Financing	Financing
	Permitting	Permitting
	Operating	Operating
Voluntary	Planning	--
	Financing	--
	Permitting	--
	Operating	--

Naturally, all the existing instruments are of relevance, since these form a certain model of actual access to information legislation and policy in the minerals sector. There are numerous regimes that regulate access to information, however, it is simply impossible to review all the existing instruments. Fortunately, the existing regimes can be grouped according to a number of relevant characteristics, a few patterns and models, therefore we are only examining these relevant and typical regulatory patterns and models. It is also suggested by the title of the study: “Review of Systems for Making Information Available”.

In this respect both the mandatory instruments (laws, regulations, etc.) and the voluntary measures (corporate policies, guidelines, etc.) will be reviewed. In order to present a trend in the development of access to information regulation, the proposed measures are reviewed, too, but only the mandatory ones. Finally, within the examination of the categories, at reviewing the existing mandatory instruments a division is applied, following the four major steps of a mineral development project, from planning to operation, through financing and permitting.

1.2 Phases of a Project

A typical “Mine Cycle”¹ has certain standard steps or stages that are universally followed by project developers. These steps are rather technically relevant steps, focusing more on the technically typical actions to be taken in order to implement a full “Mine Cycle”. For a legal research, however, there are four major, legally relevant stages that a development undergoes, namely: Planning, Financing, Permitting and Operation.

Planning

Under the subtitle “Planning” we can distinguish legally binding land use planning and company project planning.

Planning on the side of the project developer begins with the strategic planning within the corporate entity; this stage, however, is not regulated by law, since it is entirely the domain of the company where there is no outside influence – normally the beginning of the company planning process is unknown for the outside world, constituting a basic business secret.

Planning on the side of the administrative agency takes the form of land use planning in those legal systems where central or local governments regulate the use of land through binding norms.

The natural differences between these two instruments (their legally binding nature, etc.) are well reflected in the regulation of access to information in this matter as well.

Financing

In case a mining project is financed by the project developer itself, there is hardly any reason for making it public, since the independent financing of such a project is covered by the notion of ‘Planning’ (project planning). This, of course, is again the realm of corporate business secrets.

Only the financing from outside sources will be reviewed in this study, with major attention paid to international financing institutions, because only this matter involves direct use of public or government resources and only this mode of project financing requires a higher level of transparency towards the public.

Permitting

There are many steps while a mining project is “fully permitted” or all the licenses necessary for a legally sufficient operation are acquired. The types of permits range from land use permits to operation permits, throughout construction permits. Even the construction of a mining facility can be divided into phases where the individual permitting of each phase can be made mandatory.

However, the major permitting regimes are getting alike with the introduction of sophisticated EIA regulations. For this reason, mainly the EIA-relevant regulations of certain legal systems are reviewed here.

For the same reason, we are not examining the certain theoretical, construction, operation permitting and permit renewal regimes, because, on the one hand, the volume of the present review gives us no chance to do so, on the other hand, crucial information in time can be obtained in the environmental assessment process the best.

In this respect, information provision by the project developer and by the government agencies play an important role.

Operation

Again, in the operation phase two information sources, the company and the government agency must be taken into account.

In most of the legal systems, the project operators do not directly report to the public, but via the agency that requires the reporting of certain data upon the operation of the mine. Nevertheless, some companies are directly obliged in some legal systems to directly reach out to the affected public, where it is practicable, instead of indirectly informing the population through the administrative agency.

Where the companies are obliged to report to the government, the governments are mandated to make information available to the public, upon the operation of the mining facilities in question.

2 Access to Information

Public access to environmental information is a cornerstone of establishing adequate systems of public participation, and thus a basic instrument for ensuring effective environmental policy. Not only is it an evident right of all persons to know the situation of the environment in which they live; at the same time access to environmental information promotes greater awareness about the shared responsibility that everyone has to protect the environment and allows all to participate and intervene in its improvement. Thus, on the other hand, freedom of access to environmental information constitutes a basic right, which is beginning to be broadly recognized as an element of participatory democracy, while at the same time, constituting a tool of vital importance for environmental protection.

The necessity of access to information has been internationally recognized. The 1992 United Nations Conference on Environment and Development Declaration, Agenda 21 includes this principle of access to information (Principle 10) by individuals. It spells out the clear link that exists between the ability of citizens to participate in the environmental decision-making process, and a guarantee of effective access to information.

Right to information refers to both the right of access to information (passive) as well as to the right to be informed (active). This right has been laid down in international and regional legal instruments and has been implied – to various extents – in national legislations.

2.1 Existing Mandatory Instruments

This chapter includes those instruments that are adopted on the international, regional or national levels, by a legislative organ, having a binding force in implementation, regarding passive and active access to information.

2.1.1 Planning Phase

This subchapter includes the various forms of planning, ranging from the political decisionmaking process to actual project planning done by project developers. The importance of public participation in this stage is probably the most crucial point of all the public participation regimes, not surprisingly because of its early nature. While post-planning public participation many times is merely an obligatory step for project developers and administration, a real timely participation is necessary for effective consultation between the public and the other two actors of society (business and government). Access to information in this early stage establishes well-based public participation, therefore its role can not be overestimated.

In the planning phase there are two possible players, however, not necessarily coordinating with each other.

The first one is the project developer; its decision about a future project either marks the start of a planning process, or already is the result of a prior planning process (normally this latter case is more usual). The project developer usually keeps this action and the information attached thereto in its own realm.

The other is the administration, setting national, sub-national or local plans either for land use or for natural resource development, etc.

From among the above two, only the second is regulated so far: only the state, the administration is under an obligation to make plans and policies, etc. available to the public, this way giving a chance for the public to influence decisions made upon public assets. Evidently, the project developer can not be obliged to disclose its ideas and plants until they do not form a part of a legally regulated process, e.g. an EIA procedure. Before the project developer reveals its plans, those are undoubtedly business secrets. Keeping these business secrets are sometimes prerequisites of promoting market position and competitiveness on a global market.

The Aarhus Convention

According to Article 7 of the Aarhus convention,

“Each Party shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public.

This provision requires the Member States to ensure that the necessary information is provided to the public. In this respect, the provision is linked to Article 5 Paragraph 3 (c), providing for progressive availability in electronic database of policies, plans and programmes relating to the environment, and to Article 5 Paragraph 7 (a), which obliges Member States to publish the facts and analyses contributing to major environmental policy proposals. This naturally includes the obligation to notify the general public.

Since the starting momentum of planning is not a clearly defined moment in time (contrary to, for instance, the starting of a permitting process, which is marked by the filing of the application document), passive information rights are of minor importance than active ones. Since the administration is the only actor at the time of planning who is being aware of the fact of the preparation of plans, effective information rights require active provision of information, which is the case in the Aarhus Convention.

The EU Directive

The norm of the EU, the Council Directive 90/313/EEC, however, does not contain any specific reference to plans or programmes², except environmental management programs, thus it does not provide a legally sufficient basis for anyone to claim information on plans, especially in the planning phase.

On the contrary, Article 3 Paragraph 3³ makes it possible for an organ otherwise obliged to disclose information to refuse the request, based upon the following reason: “it would involve the supply of unfinished documents or data”. This is clearly less strong a provision than the one of the Aarhus Convention above.

2.1.2 Financing Phase

As it was confirmed above, there is no use to deal with the issue of internal financing of minerals development projects, *viz.* with projects where the necessary funding is available for the project developer itself. In these cases there is no outside financial source involved, and the issue of information disclosure in such cases is covered by access to planning information mentioned above.

If there is an outside funding source for a project, definitely the number of players increases to two. The actors, however, are not in the same position, since – while the project developer is managing its own assets and own financial resources – the financing institutions are accountable towards their stakeholders, and in many instances, towards the general public, especially when they are intergovernmental, international financing institutions. For this reason, from among the two possible players – the project developer and the financing institution – only the latter has importance for the purposes of our research.

The World Bank Group

It is not easy to define a disclosure policy for an international financing institution. The World Bank's work imposes some constraints on disclosure of information, to preserve the integrity of the Bank's deliberative process and its relations with its member countries and to respect the property rights of others. For this reason, the application of the policy is more flexible than that of the legally binding, legislative enactments. It results in a situation when the external release of some information may be precluded on an *ad hoc* basis when, because of its content, wording or timing, disclosure would be detrimental to the interests of the Bank, a member country or Bank staff.

Normally, the InfoShop of the World Bank Group serves as a central contact point for information, also accessible via the Internet.

The IBRD

As for the IBRD funded projects, project information documents must be sent to the InfoShop of the Bank early in project processing, and must be updated before appraisal. The environmental assessment of the project must be disclosed in-country and sent to the Bank before appraisal. The documents are also promptly sent to the InfoShop. In case it is needed, the so-called Resettlement Plans and the Indigenous Peoples Development Plans are also submitted to the Bank prior to the appraisal, incorporated in the Environmental Assessment report and disclosed with it.

The IDA

Almost entirely the same rules apply to the procedures and the disclosure policy of the IDA as mentioned in connection with the IBRD.

A specific attention should be paid to the *Pelosi* Amendment from 1991 that was required by the U.S. Government. It stipulates that the U.S. Executive Director can only vote in a project (regardless of its category, with significant impact on the human environment) that have disclosed the Environment Assessment (and the Resettlement Plan and the Indigenous Peoples Development Plan) in-country, at the InfoShop and to the Board of the Bank.

The IFC

The Corporation's approach to information about its activities embodies a presumption in favor of disclosure where disclosure would not materially harm the business and competitive interests of clients. For this, the basic rule is availability of information, however, there are numerous exceptions, and also a loosely defined discretionary power of the IFC's senior management, enabling *ad hoc* nondisclosure of certain information⁴.

IFC makes available a website on the Internet that gives users a broad and comprehensive overview of IFC activities. Project-related documents are here, such as Summary of Project Information (SPI) or Environmental Assessments (EA). Project sponsors are required to make environmental and social information publicly available at or near the location of the project for all environmental category 'A' and 'B' projects⁵.

SPI's

The Summary of Project Information (SPI) makes project information available to interested parties while a project is still under consideration. The SPI provides a brief factual summary of the main elements of the evolving project: its sponsors, the project company's shareholders, total project cost, the location of the project, a description of the project and its purpose, the environmental category, and a brief summary of any environmental and social issues. Since its origination, the SPI has been expanded to include project sector information, amount of IFC investment, measures to mitigate environmental and social impacts and methods for accessing information in-country. The SPI is updated as necessary to reflect material changes regarding the project that transpire following its initial filing with the InfoShop.

The SPI is designed to make project information available to interested parties prior to a project's consideration by the Board of Directors, but only after IFC Management has determined that the project is likely to be presented to the Board for consideration and the project sponsors have cleared the content of the SPI to verify its factual accuracy and to ensure that it does not inadvertently contain business sensitive confidential information.

The SPI is released no later than thirty (30) days prior to the Board date for projects processed by regular procedure and the closing date for projects processed by streamlined procedure.

EAs

For Category 'A' projects, once IFC has received a copy of a satisfactory Environmental Assessment (EA) report from the project sponsor and obtained permission for its release, IFC releases the EA report to the public in-country and through the World Bank's InfoShop as early as possible and no later than sixty (60) days prior to the proposed Board date (regular procedure), closing date (streamlined procedure) or management approval date (delegated authority).

For Category 'B' projects, on completion of IFC's review of the sponsor's environmental analysis, IFC prepares a summary of the key findings of the environmental review, including the measures to be taken to mitigate, monitor and manage environmental and social issues.

Since project affected people may not have reasonable access to a World Bank or IFC office, the sponsor is also required to release locally the documentation, and the results of any consultations required by IFC, translated into the local language, in a culturally appropriate

manner to facilitate awareness by relevant stakeholders that the information is in the public domain for review.

The MIGA

Public disclosure rules of MIGA also contain a presumption in favor of disclosure where disclosure: “(i) would not harm the business and competitive interests of MIGA's applicants, and (ii) would not violate confidentiality obligations”. But again, there is a long list of possible exceptions from the basic rule of disclosure.

Otherwise, publicly available sources of information about member countries and MIGA-guaranteed projects may be found in MIGA's Annual Report and publications periodically published by MIGA, including its Business Profile, regional brochures, newsletters, and news releases. This, however, does not contain project-specific information, that are always of larger relevance for an affected population.

As for project-related information, MIGA publishes quarterly reports providing a brief summary of the projects insured by MIGA, including name and country of the investor, identity of the host country, amount of the investment, and amount of guarantee and coverages.

For Category ‘A’ projects, MIGA makes the sponsor's Environmental Impact Assessment (EIA) report available through the World Bank's InfoShop a minimum of sixty (60) days prior to Board consideration. MIGA will not underwrite the project unless the sponsors agree to the release of the EIA to the public in accordance with the applicable guidelines. The EIA for a Category ‘A’ project must include an environmental action plan (consisting of the proposed mitigation, management, and monitoring measures required of the project sponsor).

The publicly available information can be obtained at the InfoShop, and also via the Internet.

2.1.3 Permitting Phase

There are numerous permitting regimes all around the World that impose requirements on project developers and financiers. The number of necessary permits for starting a mining operation and the nature thereof vary country by country.

In a permitting system, usually there are two main actors: the administration and the project developer. Both of them can be a source of public information. Naturally, different rules apply to them.

The Aarhus Convention

Elaboration of the Convention was decided on the 3rd Conference of the European Environmental Ministers, held in Sofia (Bulgaria) in 1995. United Nations Economic Commission for Europe (UN ECE) undertook to manage the composition of the text, which was happening between 1996 and 1998. Besides the expert delegates from Europe, North America and Central Asia – firstly in the history of international law – 4 representatives of European environmental NGOs of full rights took part in the negotiations.

The extremely rich and coherently systematic text of the Convention was adopted on June 25, 1998, and it was signed by environmental ministers of 39 countries and the representative of the EU. The main merit of the Convention is that it collected and systematized the elements of public participation, including access to information, earlier existing sporadically in certain domestic laws and in international law.

A system is always more than just the simple summary of its elements. This is absolutely true in law, as well. The three pillars of public participation – access to information, participation in decisionmaking and access to justice – are much more effective together than separately.

Let us have an overview of the main access to information elements of the Convention in a table format!

Access to Environmental Information	A) Passive (upon request) ⁶	
	a) Unnecessity of stating an interest ⁷	
	b) Form of information ⁸	
	c) Deadline for providing the information ⁹	
	d) Fees to be defined for the information	
	e) Exceptions	
	i) Formal ¹⁰	a) Non-existing information ¹¹
		b) Information not completed yet ¹²
		c) Too general or unreasonable request ¹³
	ii) Connected to state interest ¹⁴	d) State secret, service secret
		e) Interest of the judiciary ¹⁵
		f) Interest of the administration ^{16 17}
	iii) Connected to interests of third persons	g) Business secret ¹⁸
		h) Intellectual property ¹⁹
		i) Voluntarily provided information ²⁰
		j) Environmental interest ²¹
	B) Active (state organs and business without request)	
	a) Reports on the state of the environment ²²	
	b) Publicly accessible lists or registers ²³	
	c) Text of legislation on the environment ²⁴	
	d) International environmental obligations ²⁵	
e) Eco-labeling and eco-auditing ²⁶		
f) PRTR ²⁷		
C) Superactive (in case of emergency) ²⁸		

The above Table is presenting far the fullest system of regulating public participation, including access to information, available in the laws of the World.

EU

As for general access to information rules, the respective Council Directive 313/90/EEC deals with access to environmental information and as such, is only concerned about the information pillar of the system of public participation in environmental matters.

It only regulates the passive information rights marked 'A' in the above Table on the Aarhus Convention, basically with the same scope and nature as the Convention, but because of the

8 years difference between the enacting of the two norms, with a lower level of detailedness and less effectively, concerning some of its detailed provisions. Development of a Directive on access to environmental information has been on the agenda already before the signing of the Convention. The current drafts are heavily impacted by the Convention, so active information rights (point 3/B) of the Table) will be regulated, too (see: Proposed Mandatory Instruments).

The IPPC Directive

As a specific norm on environmental permitting, Council Directive 61/96/EC on Integrated Pollution Prevention and Control regulates access to environmental information in the course of the permitting process²⁹ and under operation. As we have already mentioned it, the starting point of a permitting process is the filing of an application document. For this reason, the first information to present to the public is the application, while the final decision of the administrative agency should also be made public, at the end of the process.

Environmental Impact Assessment

Putting the question in a different perspective, in a number of countries and legal systems, the first and most decisive step in implementing a project is the environmental permitting. This has undergone a major development and spread all over the globe, while still not being uniform everywhere. Since the scope of this review is largely environmental, the certain EIA regulations of the World are being examined here, with regard to relevant access to information provisions.

USA

According to the National Environmental Policy Act of 1969, Section 4332,

... all agencies of the Federal Government shall - ... (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on - ...³⁰

It is complemented by a general obligation, *viz.*

Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and the public as provided by section 552 of Title 5, ...

Naturally, this sole provision itself would not be enough for an operating system of access to information in the EIA regime, but in the U.S. more norms, e.g. the Freedom of Information Act, etc. prevail as well.

EU

Also a norm from among the EIA rules is the Council Directive 337/85/EEC on EIA that was modernized and amended by Council Directive 11/97/EC a few years ago. This EU norm contains participation rights in decisionmaking in individual administrative procedures³¹. It only applies to activities indicated on a certain list, being the most important for environmental protection. Its provisions on notifying and involving the concerned communities are substantially poorer than the ones of the Aarhus Convention. On the other

hand, regulation of the EIA is naturally much more than a simple public participation, since also a thorough and interdisciplinary analysis of the expectable impacts of the planned development by the authority is done therein.

Canada

According to the Canadian Environmental Assessment Act 1992, c. 37 55 (1),

For the purpose of facilitating public access to records relating to environmental assessments, a public registry shall be established and operated in a manner to ensure convenient public access to the registry and in accordance with this Act and the regulations in respect of every project for which an environmental assessment is conducted.

This public registry shall contain all records produced, collected, or submitted with respect to the environmental assessment of the project, including

- (a) any report relating to the assessment;
- (b) any comments filed by the public in relation to the assessment;
- (c) any records prepared by the responsible authority;
- (d) any records produced as the result of the implementation of any follow-up program;
- (e) any terms of reference for a mediation or a panel review; and
- (f) any documents requiring mitigation measures to be implemented.

This way the Canadian system makes it even more user-friendly to exercise right to information, through a registry that is centrally gathering data on impact assessments; thus shifting the burden of enforcing reporting obligations to the government agency.

Chile

The Chilean legal framework regarding environmental impact assessment has been completed and became obligatory by the Regulation No. 30, enacted on April 3, 1997, which contains a section on Community Participation in the Process of Evaluation of Environmental Impact.

An excerpt from the Environmental Impact Statement, including a description of the principal adverse environmental effects of the project, must be published in the Official Gazette and in a regional or national newspaper of general circulation within 10 business days following its submission to Conama (National Environmental Commission) or the corresponding Corema (Regional Environmental Commission). Community organizations and individuals that are directly affected by the project have 60 business days to submit observations regarding the Environmental Impact Statement. The Conama or the corresponding Corema must consider such observations when issuing its Resolution upon the project in question. An Environmental Impact Statement in general is a matter of public record.

Hungary

Being a little bit biased, stemming from the nationality of the authors, some citations from the respective Hungarian regulation are mentioned here. According to the Hungarian EIA system, there are two stages, a preliminary and a detailed one in the permitting process.

However, there are no different access to information rules in the two stages³². The Hungarian system combines the passive and active access rules, since the information must be presented by the administrative agencies, but only at certain locations, where the public may have access thereto.

In the assessment procedure, if any data contained in the environmental impact study and constituting compulsory contents of the study fall under state secret or service secret regulation, the provisions of the Act on State and Service Secrets shall apply to the access of the agency thereto. Secrets qualified as such and secrets qualified as business secret by the applicant shall be attached separately, designated as such, and the study made public has to contain substituted information that make the judgment of the activity's expectable environmental impacts possible.

2.1.4 Operating Phase

Depending on the strength of the monitoring system of a given country, the operating phase includes two main actors again, the operator and the administration. The obligations for disclosing information again differ vastly.

USA (Toxics Release Inventory)

In 1986 the Emergency Planning and Community Right-to-Know Act (EPCRA) was enacted, requiring businesses to report the locations and quantities of chemicals stored on-site to state and local governments. Throughout EPCRA, the U.S. Congress mandated that a Toxics Release Inventory (TRI) be made public. TRI provides citizens with information about potentially hazardous chemicals and their use.

Section 313 of EPCRA specifically requires manufactures to report releases of toxic chemicals to the environment. The reports are submitted to the U.S. Environmental Protection Agency and state governments. EPA compiles this data in an on-line publicly accessible national computerized TRI.

Manufacturing facilities and facilities added in 1998 that have the equivalent of 10 or more full-time employees and meet the established thresholds for manufacture, processing, or "otherwise use" of listed chemicals must report their releases and other waste management quantities (including quantities transferred off-site for further waste management). Manufacturing facilities are defined as facilities in Standard Industrial Classification (SIC) codes 20-39, which include, among others: chemicals, petroleum refining, primary metals, fabricated metals, paper, plastics, and transportation equipment. Federal facilities have been required to report since 1994, regardless of their SIC classification.

In May 1997, EPA added seven new industry sectors that began reporting to the TRI for the first time in July 1999 for reporting year 1998. These include metal mines, coal mines, electrical utilities that combust coal or oil, commercial hazardous waste treatment facilities, chemical wholesalers, petroleum bulk terminals and plants, and solvent recovery services.

Reporting requirements for TRI changed in 1991 as a result of the Pollution Prevention Act. Prior to 1991, facilities were required to report toxic substances released into the environment and transferred offsite for treatment or disposal. Beginning in 1991, facilities

were also required to indicate amounts of chemicals that are recycled, used for energy recovery, and treated on-site.

Very specifically relating to the applicability of the above provisions to the mining industry, in a lawsuit³³ a U.S. District Court concluded that mining facilities must report their releases to land, including into landfills. However, this reporting obligation does not simultaneously establish a direct company-community relationship or access of the public to company information because reporting is only mandatory towards the EPA.

Canada (National Pollutant Release Inventory)

In the 1990 “Green Plan”, Canada committed to developing a national database for hazardous pollutants being released from industrial and transportation sources. A Multi-stakeholder Advisory Committee representing industry, labor, NGOs and federal and provincial governments, developed a National Pollutant Release Inventory, which became operational in 1993. Under the authority of the Canadian Environmental Protection Act 1999, owners or operators of facilities that manufacture, process or otherwise use one or more of the National Pollutant Release Inventory-listed substances under prescribed conditions are required to report to the NPRI. The agency, Environment Canada, encourages reporting facilities to submit data electronically.

Australia (National Pollutant Inventory)

In Australia, the National Environmental Protection Measure, contains provisions upon the accessibility and availability of the National Pollutant Inventory. According to this piece of legislation

“access to information collected for the purposes of this Measure should be provided primarily by the Commonwealth through a series of mechanisms including:

Internet access to the NPI database;

production of annual CD ROMs to be circulated to local libraries, universities and educational institutions, and State, Territory and local governments; and

publishing of reports summarizing NPI information.”

It also contains provisions prescribing that

“a summary of information collected for the purposes of this Measure will also be included by the Council in its annual report to Parliaments of all participating jurisdictions. The Council envisages that the Commonwealth will ensure that information disseminated for the purposes of this Measure will:

- (a) be in plain language, simply laid out, and include contextual information to assist in interpretation as agreed between participating jurisdictions;
- (b) be free to the public (access via Internet, libraries, community organizations);
- (c) be nationally available;

- (d) include where practicable a geographic information system to allow information on the NPI database to be viewed by locality, substance, reporting facility, activity or any combination of these factors;
 - i. identify;
 - ii. data reliability;
 - iii. ...;
- (e) the dates describing the reporting period for particular emission data, where this is not a reporting year; and

include where practicable, links and references to direct users to further information or databases.”

EU (European Pollution Emission Register)

As a specific norm on environmental permitting, Council Directive 61/96/EC on IPPC regulates environmental information systems of businesses. It defines a European Pollution Emission Register (EPER)³⁴, however, the EPER defined by the Directive is not prepared for every environmental element and does not contain the entire emission. Additionally, it lacks the regulation of direct company-community communication. This way its impact is far behind the one of the PRTR, supported for instance by the Aarhus Convention.

OECD (Pollution Release and Transfer Register)

In its original 20 of February, 1996 recommendation (C(96)41/Final), the Council of the OECD recommended that “Member countries take steps to establish, as appropriate, implement and make publicly available a pollutant release and transfer register (PRTR) system”.

According to the attached principles, “the results of a PRTR should be made accessible to all affected and interested parties on a timely and regular basis.” The actual implementation of this principle is the matter of further national legislations.

2.2 Existing Voluntary Instruments

The voluntary instruments are either initiatives of certain companies or the policies of international organizations.

Since most of the company and international organization policies do not distinguish between the phases of a project – the voluntary disclosure systems are simply not so developed yet – it is more useful to review them by their sources, and by the level of regulation they use.

2.2.1 Company Voluntary Measures

The corporate voluntary measures range from the simple lack of any disclosure policy to the detailed rules of access to company information for the public. Here, the common feature of all these company policies is that their application is voluntary, is based on trust and goodwill of the companies themselves. The strength of commitments varies accordingly, on a scale as follows:

<p>1. SIMPLE DECLARATION OF READINESS TO COMMUNICATE</p> <p>Good examples of this kind of approach are the <i>Corporate Responsibility Policy</i> of NORANDA³⁵, and the <i>Environmental Policy</i> of PHELPS DODGE³⁶. These policies only loosely define the undertakings of the company, without defining either the community to be informed, or the depth and range of information to be disclosed. Also these policies do not contain reference whether the public should turn to the company or there is a certain way of active information disclosure from the company to the public.</p>
<p>2. UNDERTAKINGS FOR TRANSPARENT OPERATION</p> <p>Some examples are the <i>Social Development Policy</i> of NEWMONT³⁷ and the <i>Transparency, Corporate Governance and Accountability Policy</i> of RIO TINTO³⁸. In these policies the reference to “participation” and to “practice” raises the level of commitment, and also suggests that the company would make active steps towards the community to be informed.</p>
<p>3. COMMITMENT TO INFORM THE COMMUNITY</p> <p>A good example is <i>The Environment Matters</i> policy of the OUTOKUMPU³⁹. This is a rather clear statement of how, what and to whom the company wants to communicate, accompanied by a certain language that gives even more strength and clarity to the commitments.</p>
<p>4. SYSTEMATIC COMMITMENTS FOR TRANSPARENCY</p> <p>Again a good example can be brought from the <i>Sustainability Policy</i> of PLACER DOME⁴⁰. These sentences clearly define:</p> <ul style="list-style-type: none"> to whom and why the company wants to communicate define the persons who are subjects of the communication involve company activity in responding concerns of the public making available actively those information that is normally reported to the administrative organs of the state and local governments only
<p>5. DETAILED DESCRIPTION OF ACCESS TO INFORMATION</p> <p>A good example is the <i>Environmental and Social Policy</i> of FREEPORT-MCMORAN⁴¹. It describes the factual background of minerals development, the possible conflicts of interests, the possible solutions, the undertakings of the company and the possible ways ahead, together with a language and a spirit of the policy that gives credit to the commitments.</p>

It is not easy to call the voluntary nature of the above corporate commitments either an advantage or a disadvantage. What is definite in our view in the above citations and the review of company policies on information disclosure is that they are far less detailed for a consistently operating system of access to information.

As human societies developed over the history of humankind, the importance of personal relations and personal influence got lesser and lesser, and got substituted by clearly defined, legally binding, transparent and accountable institutional settings. It resulted in the diminishing of discretionary powers and the growing importance of pre-set rules and regulations, both substantive and procedural.

As it is apparent in the above cited corporate commitments, there is still not enough detailed rules for access to information for the public. The first step, opening up to the public is clearly made by the mining industry, owing to the growing pressure from local communities, environmental and human rights groups. However, this is far from ensuring effective access to information if compliance with the policies depends on the personal judgment of the corporate management.

For this, the future will definitely bring more detailed regulation to the mining sector, either by way of central government legislation, or by voluntary self-restriction. In the latter case,

the mining industry can also be the leader of changes, hopefully controlling the process and its merits, as well.

2.2.2 *International Organization Voluntary Measures*

In this case the policies or guidelines are set by a specifically focused organization, having the mandate to represent both the corporate and the environmental interests. Being a multi-stakeholder undertaking, one of the best examples of this issue is the Sustainability Reporting Guidelines of the Global Reporting Initiative (GRI).

2.2.3 *GRI*

The GRI has been established in 1997; its most recent June 2000 Guidelines aims to help business organizations report information – *inter alia* –

in a way that provides stakeholders with reliable information that is relevant to their needs and interests and that invites further stakeholder dialogue and enquiry.

This includes the application of certain specific indicators in the Sustainability Reporting Guidelines. In the Report under the section

Profile of the Reporting Organization”, an overview of the reporting organization and scope of the report shall be given, to provide a context for understanding and evaluating information in subsequent sections. This includes under Point 2.15. information on “public accessibility of information or reports about economic, environmental and social aspects of organizational activities, including facility-specific information. How to obtain such information and reports.

Although the entire GRI reporting is organization-focused, contrary for instance to the facility-focused reporting of the PRTR systems, here a certain move towards acknowledging the importance of facility-specific information can be found.

Under “Policies, Organization and Management Systems”, under the subtitle “Stakeholder Relationships”, a number of indicators⁴² are used for assessing transparency and accessibility of business organizations for public.

The GRI reporting system does not impose obligations on the reporting organizations, other than the pressure of publicity. There are no standards for assessing or ranking a business organization according to the GRI guidelines, or evaluating its performance in access to information matters. Nevertheless, this is not even necessary. The experience of the TRI in the USA shows that mere publicity of certain information can have such a deterring impact which is bigger than that of any fine or imprisonment. Simply the publication of company profiles promotes the transparency and willingness of these business entities to increase their communication and improve stakeholder involvement in information issues.

2.2.4 *ISP*

The Inter-American Strategy for the Promotion of Public Participation in Decision-Making for Sustainable Development is undoubtedly a soft law instrument. It has a double feature

this way: it behaves as a legally binding instrument on the one hand, still under preparation, since its text must undergo changes before it becomes mandatory – but today it is a voluntary measure in its final form.

The system of the ISP is gradual, it opens up new layers of issues, presenting more and more details about one particular topic.

One of the most important principles of the ISP is ‘Access’⁴³. ‘Access’ is translated into objectives in this regard as follows:

- a. To encourage adoption of effective communication mechanisms to allow government and civil society to exchange necessary information and experience;”

This is stimulating Policy Recommendations such as:

Create and/or strengthen existing formal and informal communication mechanisms to encourage information sharing, collaboration, and cooperation within and among civil society groups, within and between levels of government, and between all levels of government and civil society.

Which is detailed in the following Recommendations for Action:

- 1.1 Strengthen and develop mechanisms for gathering the necessary information, exchanging it with other stakeholders, and disseminating it to the general public.
 - 1.1.1 Levels of national and subnational government should create and put into practice legal and regulatory frameworks and institutional structures that permit access to information.
 - 1.1.2 Governments and civil society should ensure timely access to pertinent information from the beginning of the decision-making process.
 - 1.1.3 Government agencies and members of civil society should establish clear procedures for requesting, receiving, processing and disseminating information, including opportunities for the public to identify the information required for effective and responsible participation in the decisions-making process.
 - 1.1.4 At all levels of government, mechanisms should be created and contact points established for the exchange of information with civil society.
 - 1.1.5 Governments and civil society should make available human and financial resource to put into practice the procedures for the exchange of information with all stakeholders.
 - 1.1.6 Government agencies with input from civil society organizations, should develop performance indicators to measure the effectiveness of information and communications programs, and should be responsive to user feedback.
 - 1.1.7 Governments and civil society, particularly academic institutions should monitor the quality and scientific basis of information.

- 1.2 Employ various means of communication that allow government and civil society to exchange relevant information on development policies, projects and programs.
 - 1.2.1 Project proponents in government and civil society should introduce elements of a complete information and communication strategy including monitoring, auditing, and reporting, into the various phases of project and to seek and consider comments from the public.
 - 1.2.2 Civil society, governments, and the media should share information about opportunities to participate in decision-making processes, to raise public awareness of specific development projects or programs, and to disseminate to the public at large technical and local knowledge about sustainable development.
 - 1.2.2 Government and civil society should use all appropriate means of communication, including mass and interactive media, in order to communicate and inform about sustainable development issues and should expand their availability and access to grassroots organizations and rural and remote communities.
 - 1.2.4 Governments and civil society should ensure that information disseminated on the environment and other sustainable development issues arrive in the form appropriate to the intended recipients, at the appropriate time, and reaches all parties.
- 1.3 Use information and communication tools that are adapted to the local economic, cultural, social and language conditions in order to engage all stakeholders.
 - 1.3.1 Governments and civil society should recognize the need of guaranteed access to information and communication to all stakeholders who are involved at all stages of the process of decision-making for sustainable development.
 - 1.3.2 Government and civil society and in particular the private sector should consider the communication and information needs of all stakeholders, including isolated communities, when involving the public in each level of the project cycle.
 - 1.3.3 Information should be used as a “leveling” tool to ensure that all stakeholders have adequate knowledge and can participate on equal ground with decision-makers.

The formulation of the objectives, the *quasi* requirements of the ISP do not stop at the mere declaration of the necessity of communication and of access to information. It really intends to ensure that the information is not only collected, processed, presented but reaches the audience, i.e. it includes a certain capacity building component already in its access to information subchapter.

2.2.5 Summary

Again, the value of the voluntary measures depends on the applicability and actual application of such policies. The major lesson for the mining industry to be learnt from the above examples is that to be the leader of the changes is sometimes less painful and provides a good position on the global market of responsible corporate citizens.

2.3 Proposed Mandatory Instruments

Draft EU Directive on Access to Environmental Information

Possibly the most specific initiative of this kind is the draft Directive of the European Parliament and of the Council on public access to environmental information, basically, interpreting the Aarhus Convention into the language of an EU Directive.

The objective of the Directive is

to grant a right of access to environmental information held by or for public authorities and to set out the basic terms and conditions of its exercise; and to ensure that as a matter of course environmental information is made available and disseminated to the public, in particular, by means of available computer telecommunication and/or electronic technology.

According to Article 3 of the Draft Directive,

Member States shall ensure that public authorities are required in accordance with the provisions of this Directive to make available environmental information held by or for them to any applicant at his request and without his having to state an interest.

There are quite special rules worth mentioning in the draft, that mark the development trends of access to information regulation, e.g.

- if the applicant states that he is requesting information for a specific purpose, the public authority concerned shall make reasonable efforts to make available such information within such time-period as is necessary to enable the applicant to fulfill the purpose;
- the supply of any information shall not be made subject to the advance payment of a charge;
- where charges are made, public authorities shall publicize and make available to applicants a schedule of such charges as well as information in the circumstances in which a charge may be levied or waived;
- examination *in situ* of the information requested shall also be free of charge;
- Member States shall take the necessary measures to ensure that public authorities make available and disseminate to the public environmental information held by or for them, by means in particular of available computer telecommunication and/or electronic technology;

- Member States shall, so far as is practicable, ensure that any information made available or disseminated or reports published in accordance with this Article are clear and comprehensible.

Corporate Social Disclosure

The other initiative for a binding reporting instrument is the Corporate Sunshine Working Group's idea to expand the Securities and Exchange Commission Disclosure Requirements for corporate accountability.

The Securities and Exchange Commission was created in the USA after the stock market crash of 1929 in order to ensure the disclosure of adequate and accurate company information, primarily for the benefit of rational and informed financial decision-making. Under the law, every publicly-traded corporation in the United States must file regular public reports with the Securities and Exchange Commission on a variety of financial matters. This information is highly regulated by the SEC, audited by major financial accounting firms, and responsive to investor needs. The SEC's reporting requirements mesh with Generally Accepted Accounting Standards to require companies also to disclose a limited amount of information on environmental and labor issues.

The Corporate Sunshine Working Group (CSWG) is an alliance of investors, environmental organizations, community groups, and labor unions who support expanded corporate social and environmental disclosure requirements mandated by the SEC. In December 1998, one hundred individuals and organizations signed onto a letter to the SEC asking for increased environmental and social disclosure from companies, better enforcement/monitoring of existing regulations, and information sharing between the SEC and EPA on company environmental liabilities.⁴⁴

3 Best Practices

Best practices in this respect and for the purposes of the present review mean best regulatory practices, *viz.* normative regimes worth following, because of their successful, user-friendly, inclusive and/or modern nature. From principle to actual realization, the following 'best regulatory practices' can be collected from the norms examined in the present review:

3.1 Basic Principles

In terms of basic principles, most of the norms reviewed contain provisions at least declaring public access to information, or accessibility of information upon request from the public. On a more sophisticated level, some further rules are established by the following regulations:

- the communication and information needs of all stakeholders, including isolated communities should be considered when involving the public in each level of the project cycle (*point 1.3.2 of the ISP*);
- public access to information, community relations are defined in detail in order to have a clear and transparent process (*Environmental and Social Policy of FREEPORT-MCMORAN*);

- both the application document and the resolution made by the government agency are accessible to the public (*the IPPC Directive of the EU*);
- decision upon a certain development has a precondition that information on the project in question was disclosed properly to the public (*the Pelosi Amendment to the procedures of the IDA*);
- elements of a complete information and communication strategy including monitoring, auditing, and reporting are introduced into the various phases of project (*point 1.2.1 of the ISP*)

3.2 Availability and Accessibility of Information

Under this subtitle, those provisions have relevance that define either the conditions of access to information or the actual and practical way (the technical realization) the information in question can be accessed or obtained by the public. The minimum level of regulation is a simple declaration of availability of information, however, this is far from enough now when actual exercise of the right to information many times depends on detailed technical settings, e.g. whether the affected community has actual access to an information source in a geographical proximity.

- one contact point for every information regarding a project or an organization (*InfoShop of the World Bank Group*);
- contact point established for exchange of information with civil society (*point 1.1.5 of the ISP*);
- locally released project documentation (*IFC sponsoring policy*);
- access to information for grassroots, rural and remote communities (*point 1.2.3 of the ISP*);
- information available at local libraries, universities, educational institutions, etc. (*Australian NPI regulation*);
- public registry containing relevant project information (*Canadian Environmental Assessment Act*);
- relevant project information published in the official gazette (*Chilean EIA regulation*);
- nationally available information on environmental issues (*Australian NPI regulation*)

3.3 Internet

In this context, use of the Internet has a special relevance. As an easily accessible way of communication, probably it is the best way to guarantee adequate access to information otherwise hardly accessible for the public.

- Art. 5 Par. 3 c) of the Aarhus Convention
- computerized TRI in the USA
- electronic data submission to NPRI in Canada
- electronic access to NPI database in Australia

3.4 Charges

The issue of costs and charges in access to information matters is definitely a decisive factor in judging whether there is an inclusive system of access in a given country or international legal regime. As a basic rule, costs do (and should) not exceed a certain rational level, however, the more elaborate regulations are as follows:

- schedule of charges prior publicized (draft EU directive on access to environmental information)
- no advance payment for supplying information (draft EU directive on access to environmental information)
- free in situ examination of information (draft EU directive on access to environmental information)
- free access to information (NPI database in Australia)

3.5 Miscellaneous

Finally, there are certain matters of minor importance that increase or decrease the user-friendly nature of an access to information system. Some examples worth following are:

- information translated in the local language, in a culturally appropriate manner (*IFC sponsoring policy*)
- information in a plain language (*NPI database in Australia*)
- clear and comprehensible information made public (*draft EU directive on access to environmental information*)
- timely information disclosure tailored to the needs of the applicant (*draft EU directive on access to environmental information*)
- state and business secrets substituted by imaginary data made public (*Hungarian EIA regulation*)
- links to further references and databases are included (*NPI database in Australia*)
- GIS attached to the data (*NPI database in Australia*)

4 Conclusion

At the end of the review, having surveyed the relevant and typical systems for making information available, a few concrete conclusions can be drawn for future drafting of mandatory and voluntary measures in access to information matters.

First of all, there are diverse and sometimes very basic examples of granting public access to information, but only a few legal systems are committed enough to support the theoretical declarations by practical arrangements in order to make disclosure of information a regular and real practice.

Secondly, the corporate sector shows certain but definitely not too significant signs of self-regulation in this matter, however, the initiatives of voluntary corporate policies for making information available are simply too generally formulated to provide effective access to information.

Thirdly, modern communication tools are widely encouraged to be used by pieces of legislation, but this is sometimes too far from everyday reality of communities not even having access to the Internet but sometimes fighting high illiteracy rates, especially in areas where mining activities are frequent.

The possible way forward is the active participation of the corporate sector in making information available to the public by means of establishing contact points for disclosure. This requires a prior agreement among the representatives of the sector upon the circle of information to be released, an establishment of contact points with representation from the affected communities, and a state approval of these initiatives, either by granting special rights and allowances to companies acting so, or by simply posting the given companies as models of responsible corporate citizenship.

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Useful websites:

www.europa.eu.int

www.ifc.org

www.miga.org

www.olis.oecd.org

www.worldbank.org

www.ec.gc.ca

www.epa.gov

www.fcx.com

www.newmont.com

www.noranda.com

www.outokumpu.fi

www.phelpsdodge.com

www.placerdome.com

www.riotinto.com

www.foe.org

www.globalreporting.org

www.natlaw.com

Endnotes

¹ Cranstone, Lemieux & Vallee (1994) in Lemieux (2000)

² “Art. 3. 1. Save as provided in this Article, Member States shall ensure that public authorities are required to make available information relating to the environment to any natural or legal person at his request and without his having to prove an interest. Member States shall define the practical arrangements under which such information is effectively made available. Information held by public authorities shall be supplied in part where it is possible to separate out information on items concerning the interests referred to above.”

³ “Art. 3. 3. A request for information may be refused where it would involve the supply of unfinished documents or data or internal communications, or where the request is manifestly unreasonable or formulated in too general a manner.”

⁴ The presumption in favor of disclosure is limited by the need to avoid material harm to the business and competitive interests of IFC's clients. Accordingly, IFC will not disclose non-public documents and information provided to IFC pursuant to confidentiality agreements or in the expectation that they will not be disclosed unless the source consents to disclosure. In addition, IFC will not disclose non-public documents owned by third parties that cannot be disclosed without the consent of the owner. IFC does not disclose information about projects that are at comparatively early stages of consideration, because, if it were known that IFC were considering a project, but then decided not to invest, such information could harm the client's ability to obtain other financing. Likewise, IFC's communications with member governments and their agencies regarding matters arising from its investments are strictly confidential. For this reason, documents that define the Corporation's country strategy, appraisal reports, minutes of Investment Committee meetings and decision meetings, project supervision reports and any internal memoranda and notes of meetings are not publicly available. This description of constraints to IFC's presumption of disclosure is not intended to be comprehensive and exhaustive. Unforeseen circumstances may arise in which IFC's senior management, after careful deliberation, giving due regard to the principles favoring disclosure, may determine that the best interests of the Corporation, its shareholders, or other stakeholders require nondisclosure of specific information.

⁵ A Category ‘A’ project is a project which may result in diverse and significant environmental impacts and requires a full Environmental Assessment (EA). A Category ‘B’ project is a project which may result in specific environmental impacts and require adherence to certain predetermined performance standards.

⁶ “Each Party shall ensure that, subject to the following paragraphs of this article, public authorities, in response to a request for environmental information, make such information available to the public, within the framework of national legislation, including, where requested and subject to subparagraph (b) below, copies of the actual documentation containing or comprising such information:”

⁷ “Without an interest having to be stated;”

⁸ “In the form requested unless:

(i) It is reasonable for the public authority to make it available in another form, in which case reasons shall be given for making it available in that form; or (ii) The information is already publicly available in another form.”

⁹ “The environmental information referred to in paragraph 1 above shall be made available as soon as possible and at the latest within one month after the request has been submitted, unless the volume and the complexity of the information justify an extension of this period up to two months after the request. The applicant shall be informed of any extension and of the reasons justifying it.”

¹⁰ “A request for environmental information may be refused if:”

¹¹ “The public authority to which the request is addressed does not hold the environmental information requested;”

¹² “The request concerns material in the course of completion or concerns internal communications of public authorities where such an exemption is provided for in national law or customary practice, taking into account the public interest served by disclosure.”

¹³ “The request is manifestly unreasonable or formulated in too general a manner;”

¹⁴ “A request for environmental information may be refused if the disclosure would adversely affect:”

¹⁵ “The course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature;”

¹⁶ “International relations, national defense or public security;”

¹⁷ “The confidentiality of the proceedings of public authorities, where such confidentiality is provided for under national law;”

¹⁸ “The confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest. Within this framework, information on emissions which is relevant for the protection of the environment shall be disclosed;”

¹⁹ “Intellectual property rights;”

²⁰ “The interests of a third party which has supplied the information requested without that party being under or capable of being put under a legal obligation to do so, and where that party does not consent to the release of the material;”

²¹ “The environment to which the information relates, such as the breeding sites of rare species.”

²² “Reports on the state of the environment, as referred to in paragraph 4 below;”

²³ “Mandatory systems are established so that there is an adequate flow of information to public authorities about proposed and existing activities which may significantly affect the environment;”

²⁴ “Texts of legislation on or relating to the environment;”

²⁵ “International treaties, conventions and agreements on environmental issues; and other significant international documents on environmental issues, as appropriate.”

²⁶ “Each Party shall encourage operators whose activities have a significant impact on the environment to inform the public regularly of the environmental impact of their activities and products, where appropriate within the framework of voluntary eco-labeling or eco-auditing schemes or by other means.”

²⁷ “Each Party shall take steps to establish progressively, taking into account international processes where appropriate, a coherent, nationwide system of pollution inventories or registers on a structured, computerized and publicly accessible database compiled through standardized reporting. Such a system may include inputs, releases and transfers of a specified range of substances and products, including water, energy and resource use, from a specified range of activities to environmental media and to on-site and off-site treatment and disposal sites.”

²⁸ “In the event of any imminent threat to human health or the environment, whether caused by human activities or due to natural causes, all information which could enable the public to take measures to prevent or mitigate harm arising from the threat and is held by a public authority is disseminated immediately and without delay to members of the public who may be affected.”

²⁹ “Without prejudice to Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment, Member States shall take the necessary measures to ensure that applications for permits for new installations or for substantial changes are made available for an appropriate period of time to the public, to enable it to comment on them before the competent authority reaches its decision. That decision, including at least a copy of the permit, and any subsequent updates, must be made available to the public.”

³⁰ “(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.”

³¹ “2. Member States shall ensure that any request for development consent and any information gathered pursuant to Article 5 are made available to the public within a reasonable time in order to give the public concerned the opportunity to express an opinion before the development consent is granted.

3. The detailed arrangements for such information and consultation shall be determined by the Member States, which may in particular, depending on the particular characteristics of the projects or sites concerned:

—determine the public concerned,

—specify the places where the information can be consulted,

—specify the way in which the public may be informed, for example by bill-posting within a certain radius, publication in local newspapers, organization of exhibitions with plans, drawings, tables, graphs, models,

—determine the manner in which the public is to be consulted, for example, by written submissions, by public enquiry,

—fix appropriate time limits for the various stages of the procedure in order to ensure that a decision is taken within a reasonable period.

Art. 9.

1. When a decision to grant or refuse development consent has been taken, the competent authority or authorities shall inform the public thereof in accordance with the appropriate procedures and shall make available to the public the following information:

—the content of the decision and any conditions attached thereto,

—the main reasons and considerations on which the decision is based,

—a description, where necessary, of the main measures to avoid, reduce and, if possible, offset the major adverse effects.”

³² “In case the inspectorate does not reject the application after its filing, based on the examination of the preliminary study and on the statements of the special authorities, and the activity does not fall under the protection of military secret, the inspectorate is

a) sending the application, the preliminary study, and a partial text of public notice to the clerks of the municipalities (in the Capitol to the district clerks) of the location of siting; the partial text of public notice shall be composed according to paragraph 3 point a) of this Article;

b) notifying the clerks of the neighboring to the location of siting municipalities (in the Capitol the district clerks) about the application, attaching the non-technical summary thereto. The clerk signals the inspectorate the possible affectedness of the municipality within 10 days. The inspectorate is sending the documentation defined under point a) to the clerk immediately after the signal of affectedness.

Clerks of affected municipalities (in the Capitol the district clerks) ensure that the notice of paragraph 3 is made public within 5 days from the arrival of documents for 30 days by means of exposing it, and is made publicly accessible by means of announcing it in public places and in the other locally customary way.

The public notice shall include

a) location of siting and a short description of the activity, according to the application;

b) information about where and when the application and the preliminary study can be seen;

c) a warning that written comments can be made until a deadline defined in paragraph 4 of this Article at the municipality clerk or the inspectorate. Comments can be made to the contents of preliminary study, to privative reasons against the location of siting, to the necessity and aspects of a detailed Environmental Impact Assessment.

The resolution made in the merits of the case shall be exposed to the public in their offices for 15 days

by the inspectorate after making the resolution, and

by the municipality clerk (in the Capitol the district clerk) having participated in the process after receiving the resolution.”

³³ In May 1998, the National Mining Association (NMA) filed a lawsuit challenging EPA's 1997 Industry Expansion rulemaking which added, among others, the mining industry to the universe of facilities subject to section 313 of the Emergency Planning and Community Right-to-Know Act (EPCRA). In its complaint NMA challenged:

(1) EPA's authority to extend section 313 reporting obligations to mining operations;

(2) EPA's interpretation in the 1997 rulemaking that facilities were required to report the extraction and beneficiation of ores, as "processing," on the grounds that the TRI chemicals contained in the ores had been manufactured prior to their extraction and beneficiation; and,

(3) EPA's interpretation that section 313 requires reporting of the quantity of toxic chemicals placed in containment units at mines.

On January 16, 2001, the District Court issued an Order and Opinion, and then a revised Order on March 30, 2001:

The Court upheld EPA's authority to add the mining industry. The Court also upheld EPA's interpretation that mining facilities must report their releases to land including into landfills. The Court set aside EPA's interpretation in its 1997 rulemaking that the extraction and beneficiation of undisturbed ores fall within EPCRA section 313's definition of "processing," on the grounds that "naturally occurring, undisturbed ores are not manufactured within the meaning of [EPCRA section 313]." In its revised Order, the Court made clear that it had not addressed the issue of whether the term manufacture includes extraction and beneficiation activities, and that the Order "merely

addressed the issue of whether naturally occurring undisturbed ores are 'manufactured' within the meaning of [EPCRA section 313]." On April 23, 2001, counsel for NMA submitted a letter to EPA stating that NMA "believes its members presently are not legally required to include, in their calculations of the amount of toxic chemicals that are 'processed' or 'manufactured' at mining facilities, toxic chemicals that are present in ores during extraction and beneficiation activities." Counsel for NMA also expressed their understanding that at the present time, mining facilities are not legally obligated to report on manufacturing that may take place during beneficiation. EPA issued a response to the April 23, 2001 letter to clarify the extent and effect of the Court's Order. In the response, EPA noted that the Agency concluded in its 1997 rulemaking that extraction and beneficiation constituted "preparation" of the toxic chemicals in the ore, and that the Court had not set this finding aside. EPA also noted that the plain language of EPCRA section 313 explicitly identifies "preparation" of a toxic chemical as a threshold activity. EPA's letter does not allocate particular preparatory activities as "manufacturing" or "processing"; rather the Agency intends to initiate a rulemaking to adopt a revised interpretation that will allocate extraction and beneficiation between those two statutory terms. Until this rulemaking is completed, individual facilities will remain responsible for determining whether their preparation of toxic chemicals in ore is better characterized as "manufacturing" or "processing." The response emphasizes that the Court's Order only addresses EPA's interpretation that naturally occurring undisturbed ores had been "manufactured" by natural forces, and that, therefore, the extraction and beneficiation of those ores constitutes the "processing" of the toxic chemicals contained in those ores. The Court explicitly declined to reach the question of whether manufacturing that occurs during the course of extraction and beneficiation is an EPCRA section 313 threshold activity. Accordingly, facilities must continue to consider toward their manufacturing thresholds any toxic chemicals generated during extraction and beneficiation that were not present in the naturally occurring, undisturbed ores. This includes newly generated toxic chemical compounds from another compound within the same listed compound category (e.g., copper sulfate from copper sulfide). Further, just because a particular quantity of a toxic chemical is not considered toward an activity threshold does not mean that releases of that particular quantity of the toxic chemical are not reportable if an activity threshold for that same toxic chemical or chemical category is exceeded elsewhere at the facility.

³⁴ "2. The results of monitoring of releases as required under the permit conditions referred to in Article 9 and held by the competent authority must be made available to the public.

3. An inventory of the principal emissions and sources responsible shall be published every three years by the Commission on the basis of the data supplied by the Member States. The Commission shall establish the format and particulars needed for the transmission of information in accordance with the procedure laid down in Article 19. In accordance with the same procedure, the Commission may propose measures to ensure inter-comparability and complementarity between data concerning the inventory of emissions referred to in the first subparagraph and data from other registers and sources of data on emissions."

³⁵ "... the committee is prepared to advise the local community of any identified potential risks, and will communicate its plans and actions to mitigate those risks."

³⁶ "... Phelps Dodge will maintain a continuing dialogue with interested parties and will seek reasonable resolution of environmental concerns."

³⁷ "... endorses ... promoting transparent participatory approaches;"

³⁸ "We are committed, both in principle and in practice, to the maximum level of transparency consistent with normal business confidentiality."

³⁹ "We communicate openly about our activities. We provide information to our customers about the environmental aspects of our production and use of our products."

⁴⁰ "Communicate with stakeholders and work towards consensus based on honest discussion and a mutual understanding of concerns and needs. Consider as a stakeholder individuals, groups, communities or governments which may be directly affected by our activities, and provide them with information relevant to their concerns. Understand and respond to stakeholders' concerns about specific impacts or risks, our sustainability performance or mining industry practices. Establish credible monitoring and verification programs to measure impacts and to ensure compliance with

legal requirements and with our sustainability policy, and communicate the results in an effective manner.”

⁴¹⁴¹ “Consult with local populations about important operational issues that will impact their communities. For example, PTFI created the Community Affairs Department under Irianese leadership as a focal point for community development. Communication has improved within the company, but information flow is not yet easy and transparent. An internal ombudsman could help. Community Relations: The company has started Communication Action Teams and focused efforts to improve liaison with local people. While improved relations is the responsibility of every employee, PTFI could benefit by designating a few individuals whose chief role is to maintain relations with local communities, *sukus*, and institutions. PTFI relations with the media and outside organizations, including NGOs, have improved. Wider Stakeholder Communication: Over the last year, churches, environmental NGOs, private sector firms, and international donors have each organized a "forum" to discuss and act on development issues in Irian Java. These fora are a basis for improved dialogue among groups in the future. The local Irianese people - the most important voice - still lack a forum. The institutional development assistance concept could help to establish more formal discussions and information exchange among the local people and other stakeholder groups.”

⁴² An overview of the reporting organization and scope of the report to provide a context for understanding and evaluating information in subsequent sections. Public accessibility of information or reports about economic, environmental, and social aspects of organizational activities, including facility-specific information. Policies, Organization, and Management Systems: Central to this section is a discussion of stakeholder engagement. Basis for definition and selection of major stakeholders (e.g., employees, investors, suppliers, managers, customers, local authorities, public interest groups, non-governmental organizations). Sustainability Reporting Guidelines: Approaches to stakeholder consultation (e.g., surveys, focus groups, community panels, corporate advisory panels, written communications). Frequency of such consultations by type. Type of information generated by such consultations. Use of such information (e.g., performance benchmarks and indicators), including use for selecting organization-specific performance indicators.

⁴³ “The involvement of civil society in development decision is essential for lasting solutions. In order to participate effectively, citizens must have timely access, at the various levels of government, to information, to the political process and to the justice system.”

⁴⁴ In the 1970s, the National Resources Defense Council sued the SEC for failing to adequately respond to a petition for rule-making for expanded environmental disclosure. A DC court ruled that the SEC didn't have to promulgate such rules because investors were not interested in social information. Today, twenty-five years later, the socially responsible investing community, the portion of Wall Street that integrates social information into financial decision-making, has grown considerably.