

## **The Case for an International Mining Law**

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### Abstract

State ownership of minerals results in domestic legislation regulating mining operations. The mining industry today is dominated by a number of transnational companies, each subject to internal and external pressures for a more responsible approach to resource management. Thirty to forty major companies are responsible for the bulk of the world's mineral production with the balance coming from state-owned, second tier and junior companies and from artisanal miners.

Mining companies operating within competitive commercial environments formerly focussed on mineral production. Companies worked to standards and expectations then current which largely failed to recognize the impact of mining activities on community interests. The mining industry acquired a reputation for arrogance, and for placing profitability ahead of issues considered equally or more important by local communities. Current perceptions continue to reflect disquiet about industry attitudes towards traditional land-owners and access to their lands, to environmental contamination, handling and storage of waste materials, utilization of water and electricity, and to rehabilitation of worked out areas.

Major international mining companies concerned at continuing criticism, sponsored a series of initiatives with the objective of providing guidance on working harmoniously within the community. Industry commissioned studies, performed through the agency of disinterested parties, resulted in May 2002, in a Declaration being issued at an International Conference in Toronto. The Declaration was based on, but did not reflect all of the recommendations of the MMSD Report, *'Breaking New Ground'*.

This paper considers whether benefits would result from the negotiation of a legally binding and enforceable international protocol encompassing the objectives of the MMSD report or the Toronto Declaration. It attempts to identify the problems associated with implementing and enforcing international mining law, should it be introduced. Aspects of mining operations having cover under customary international law are reviewed, as are rights, obligations and remedies for breaches of national mining law. Conclusions are drawn based on established procedures relating to implementing international agreements. The continuing ability of mining companies to operate within communities will result from each satisfying the community's expectations rather than by complying with largely unenforceable legislation.

### **INTRODUCTION AND OBJECTIVES**

The international community has been dependent on the products of mining for some hundreds of years. The use of metals in crude form has been reported as far back as 500 BC and zinc, for example was produced in India in the 13<sup>th</sup> century, well ahead of its use in Europe. Evolving mining and mineral processing technology produces commodities contributing to the quality of life of many individuals throughout the world.

Until comparatively recently mining companies operating within competitive commercial environments focussed on mineral production. Companies worked to contemporary industry standards giving little thought to the impact of their activities on competing community interests. The mining industry acquired a reputation for placing profitability ahead of community concerns. Current perceptions still reflect these concerns, now also including relationships with traditional land-owners and access to their lands, of environmental contamination, handling and storage of waste materials, utilization of water and electricity, and rehabilitation of worked out areas.

Ownership of minerals by the state results in domestic legislation regulating mining operations. Through acquisition and merger activities, the industry today is dominated by a relatively small number of companies, each operating on a broad international base, and subject to internal and external pressures for a more responsible approach to resource management. Thirty to forty major companies are responsible for the bulk of the world's mineral production. The balance comes from state-owned, second tier and junior companies, and from artisanal miners. The top 150 international minerals companies have a combined capitalization less than that of Microsoft (IIED, 2002).

Trans-boundary problems have been subject to adjudication in international tribunals. International agreements relating to the environment, to sustainable development, to human and land rights, and to the 'Deep Sea' and the Antarctic, ensure that mining industry operations comply with international community expectations. Concurrently the major international mining groups have recognised that industry practices have attracted justified in addition to, unjustified criticism. Under initiatives sponsored by these companies, and performed through the agency of disinterested parties, a Declaration (ICCM, 2002), reflecting a set of industry objectives was issued following the Toronto Conference.

This paper considers whether a legally binding and enforceable international protocol, encompassing, as a minimum the objectives of the Toronto Declaration should be agreed signed and enforced, making all miners subject to international law, where domestic law is inappropriate or fails to address matters of significance to stakeholders and interested parties.

## **CONVENTIONS, COURTS AND CASES**

### **Conventions**

There are no international conventions, declarations, protocols or treaties applicable to issues peculiar to mining and mineral processing. Specific reference to mining occurs only in treaties relating to the international areas of Antarctica (Dixon and McCorquodale, 2003) and the Deep Sea (Dixon and McCorquodale, 2003). Issues of direct relevance are embodied in conventions and protocols relating to the environment, and are included in the following declarations, treaties and conventions:

- Antarctic Treaty 1959 and Antarctic Treaty Protocol on Environmental Protection 1991
- Conference of the Parties to the Framework Convention on Climate Change (Kyoto Protocol) 1998
- Convention on Biological Diversity 1992
- Convention on the Continental Shelf 1958
- Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1996 (ICSID Convention)
- Framework Convention on Climate Change 1992
- International Court of Justice Statute 1945
- Law of the Sea Convention 1982 and the 1994 Agreement (Deep Sea Bed)
- North American Agreement on Environmental Cooperation 1994
- Rio Declaration on Environment and Development 1992
- Stockholm Declaration on the Human Environment 1972
- Treaty of Rome 1957 (EEC Treaty)
- Vienna Convention on the Law of Treaties 1969
- World Summit on Sustainable Development, Johannesburg 2002.

These treaties have been negotiated, signed and entered into force under the sponsorship of the United Nations and embody UN Charter obligations. Treaty obligations only apply to signatory countries, limiting their general applicability.

### **Courts**

International law enforcement processes are less prescriptive than are those for domestic law. The effectiveness of international law results from a commitment by countries signatory to negotiated treaties complying with and enjoying treaty rights and benefits. Unsatisfied international obligations or breached agreements may be subject to litigation or arbitration in international forums, each operating within guidelines set by the parties responsible for its establishment. Individual countries initiate actions and respondents may not agree to submit to the jurisdiction of the Court. A country may not be held accountable for failing to comply with a treaty to which it is not a party, despite the treaty being consistent with customary international law.

### *The International Court of Justice (ICJ)*

Created in 1945, Article 92 of the UN Charter describes the ICJ as 'the principal judicial organ of the United Nations ...' (Dixon and McCorquodale, 2003), the ICJ operates under the Statute of the International Court of Justice and its jurisdiction includes:

- interpretation of treaties
- questions of international law
- the existence of any fact which may constitute a breach of international obligations
- remedies for breaches of international obligations.

### *International Centre for the Settlement of Investment Disputes (ICSID)*

ICSID was established in 1966 as a specialised agency of the World Bank. It provides facilities for arbitration and settlement of investment disputes between states. Under its Additional Facility Rules, disputes between states and parties of states not signatories to the ICSID may be subject to arbitration and conciliation. Disputes not arising from investments, provided that the underlying transaction is not an 'ordinary commercial one' and one party is a state party or a national of a state party to the ICSID, may also be settled. Five mining disputes have been submitted to ICSID (Onorato, Fox and Strongman, 1998).

### *The European Court of Justice (ECJ)*

The ECJ was constituted under the Treaty of Rome (1957), and is 'the final interpreter of European Union law'. National implementation of European law and determination of inconsistencies between this and national law is undertaken by individual states. European Union laws are binding on member states because of their commitment to obligations included in ratified treaties. European law is interpreted as international law (Dixon and McCorquodale, 2003).

### **Cases**

Cases relating to specific mining industry activities have been adjudicated under international treaties in different forums, each forum having its own area of responsibility and enforcement regime. These include:

#### *Australia (Mabo v Queensland No.2)*

Issues: Human Rights, Cultural and Indigenous Peoples Issues, Land Access

The Australian High Court ruled that 'unjust and discriminatory doctrine.... can no longer be accepted'. The Court found that territories inhabited by tribes or peoples having a social and political organization could not be considered to be *terra nullius*. The finding concluded ... '[I]t is contrary to both international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organization of the indigenous inhabitants of a settled colony, denies them the right to occupy their traditional lands' (Dixon and McCorquodale, 2003).

#### *Portugal v Australia (East Timor Case)*

Issues: Access to Land

Following recognition of the incorporation by Indonesia of East Timor, Australia and Indonesia entered into the Timor Gap Treaty for the delimitation of the continental shelf between Australia and East Timor. Portugal brought a case before the International Court of Justice claiming East Timor was non-self governing, and that the Timor Gap treaty should not have been concluded in the absence of an act of self-determination. Neither Indonesia nor East Timor were parties to the dispute. Australia, claiming no dispute with Portugal existed asked the Court to rule it lacked jurisdiction to decide the Portuguese claims. The Court said that as a pre-requisite to any ruling on whether Australia had violated its international obligations it would have to rule on the lawfulness of Indonesia's annexation of East Timor. Although adjudicating in a similar dispute earlier, the Court ruled that it could not exercise jurisdiction (ICJ, 1995).

### *European Community (Romania, Hungary & Federal Republic of Yugoslavia)*

Issues: Use of Chemicals in Processing, Waste Emissions, Water Pollution

In January 2000 after heavy, but not unusual rain and snowfall, a tailings pond at Baia Mare in Romania overflowed, allowing tailings water containing cyanide to flow into the Lapis River. In March 2000 the Baia Borsa plant, also in Romania, allowed water and tailings sludge containing heavy metals to discharge into the Tisa River. Both rivers contaminated by these incidents are part of the Danube River system and the discharges affected water quality in Romania, Hungary and the Federal Republic of Yugoslavia. A UNEP/OCHA team conducted a rapid assessment and the government of each country conducted an inquiry. An international task force established by the European Union (EU, 2000) recommended that:

- investigations into similar sites be initiated as a matter of urgency
- open tailings management facilities employing cyanide, be not permitted in future
- there is a clear need for a central industry Guidance Document which sets out and clarifies the many different regulatory requirements relating to the mining, extractive and ore-processing industries ... contained in a wide range of EU and national legislation
- a recent EU Water Framework Directive, calling for protection of the European water resources by responsible river basin authorities, be implemented.

### *US v Canada (Trail Smelter Arbitration)*

Issues: Air Pollution

In 1995 the *Trail Smelter Arbitration* case was brought before the ICSID Arbitral Tribunal. The choice of arbitration for the settlement of a dispute between a state and an international corporation puts the dispute outside the courts of the state with which it has contracted. The case concerned damage in the State of Washington (US) due to emissions of sulphur dioxide from a smelter in British Columbia. The smelter commenced production in 1896 and damage occurred from 1925 to at least 1937. Canada did not dispute responsibility for the damage. The finding concluded that: '... no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another...'. Obligations described in both the Stockholm Declaration (Principle 21) and the Rio Declaration (Principle 2), referred to as the 'preventative principle' imposing on states responsibility for trans-boundary environmental damage were invoked. The Tribunal decreed a financial settlement (Dixon and McCorquodale, 2003).

### *Australia v Nauru (Certain Phosphate Lands in Nauru Case)*

Issues: Rehabilitation and Restoration

A claim brought by Nauru before the International Court against Australia for failing to remedy the environmental damage caused by mining phosphates was ultimately settled under an agreement negotiated by the parties prior to the court giving full consideration to the case. Australia had argued that both New Zealand and the United Kingdom (joint-administering authorities of Nauru as a trust territory) should be parties to the dispute and in their absence, the case was outside the jurisdiction of the court. The court said it would rule on the merits of the case (Dixon and McCorquodale, 2003).

## **EXISTING MINING LAW**

Mining is generally carried out in accordance with the national law of the mineral producing country. Ownership of minerals by the state ensures that the benefits from their development and exploitation are retained by the state. International law is directed towards establishing trans-boundary conditions or reinforcing UN Charter obligations.

### **Domestic law**

Resource development in Australia is constitutionally a state responsibility and state legislation governs mining activities. In Victoria, the Mineral Resources Development Act (Victorian Government, 1990) establishes the 'rules' for mining operations. The MRDA refers to two other acts essential to the administration of resource development, the Planning and Environment Act 1987 and the Environment Assessment Act 1978. Implementation and enforcement is a function of the Victorian Government under Victorian law.

Other states and territories administer activities within their jurisdiction. Foreign ownership of an operator is irrelevant in administering mining legislation.

### **Domestic (Foreign) law**

In most countries the state retains ownership of its minerals. Legislation is tailored to the perceived needs of the individual country, and frequently incorporates incentives to attract investment. In Indonesia, mining companies work as contractors to the Government, under Contracts of Work (CoW), which set out conditions for development and require divestment within specified time periods (Sigit, 1995). A once highly regarded system has fallen into disrepute as more and increasingly rigid requirements relating to licensing and to environmental and ecological issues have been introduced, and administration has devolved to local levels. In India opening up a central economy to private investment has allowed access to resources previously reserved exclusively for government owned corporations (Jhringran, 1994). Local and international companies, and joint ventures of these, have learned to operate within a modified legal environment.

### **International law**

Definitive parameters in respect of mining are only included in the Law of the Sea and the Antarctic Treaty. The UN Law of the Sea is a multilateral treaty of considerable significance. Although the 1982 Convention and the subsequent 1994 Agreement have not been ratified by all countries (the US being one such exclusion, participating in the International Seabed Authority as an observer only), it is now considered customary international law and provides a basis for international dispute settling. Subject to domestic law it provides for a territorial limit of 12 miles and establishes the continental shelf as extending 200 miles from the shoreline. The convention confirms the rights of a state to explore and exploit natural resources within this area, prohibiting others access without express consent. The 1982 Convention relating to the Deep Sea describes this area, beyond the continental shelf and beyond the limits of national jurisdiction, as 'the common heritage of mankind. .... and ... the benefits of any mining activity must be shared in some measure with all members of the international community, not just among those willing and able to undertake deep sea mining' (Dixon and McCorquodale, 2003).

The Antarctic Treaty originally signed by the seven claimant countries to Antarctic territory and the subsequent Protocol (now having 45 signatories) states, *inter alia*: 'Any activity relating to mineral resources, other than scientific research, shall be prohibited.' While the Protocol is only binding on signatories and those who later committed to it, it is now recognised as customary international law (Dixon and McCorquodale, 2003).

Failing voluntary compliance with such fragmented law as is in place, action in an international forum must be initiated by a sovereign state, a signatory to the law or protocol alleged to have been violated. Precedent is of major significance in common law. In international law it only provides guidance on issues similar to those previously considered. Issues which are frequently approached in an adversarial manner in domestic law are subject a more conciliatory approach in international forums.

### *Stockholm 1972*

The Stockholm Declaration (UNEP, 1972) provides the clearest indication of international opinion on the future responsibilities of the mining industry in its broadest context. The first of the 26 principles states:

'Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well being, and he bears a solemn responsibility to protect and improve the environment for the present and future generations. In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated.'

Principles having direct relevance to mining emphasise the following obligations:

- Safeguarding natural resources for the benefit of future generations
- Maintaining or improving the capacity of the earth to produce vital renewable resources
- Wisely managing heritage wildlife habitat
- Employing non-renewable earth resources so as to guarantee continuing benefits to mankind
- Restricting atmospheric discharges to limit ecosystem damage
- Prevention of pollution of the seas
- Development compatible with enhancing the quality of life of emerging countries
- Provision of technological assistance to underdeveloped countries employing 'polluting' technology
- Promoting price stability to permit realistic and reliable social planning
- Environmental policies to complement enhancement of living standards
- Provision in the planning of development to sustain and improve the environment
- Demographic policies to reflect basic human rights
- Technology and research to be applied to identification and avoidance of environmental risks
- Education and communication in matters relevant to enterprise development
- Adherence to the UN Charter where states have responsibility to develop their own resources
- A commitment to further develop international law in respect of transgressions and damage
- Co-operation through multilateral or bilateral arrangements to control, prevent, reduce and eliminate adverse environmental effects of activities.

#### *Rio de Janeiro 1992*

The Rio Declaration on Environment and Development (UNEP, 1992) further emphasised and committed participants to Stockholm outcomes, particularly those relating to sustainable development and to environmental protection. Principle 12 states:

'States should cooperate to promote a supportive and open economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation. Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing trans-boundary or global environmental problems should, as far as possible, be based on an international consensus.'

The Rio Declaration introduced, for the first time, the concept of the 'precautionary approach'; citing lack of scientific certainty as not being a reason for postponing measures to prevent environmental degradation. It further urged states to cooperate 'in an expeditious and more determined manner to develop further international law for adverse effects of environmental damage ... to areas beyond their jurisdiction.'

#### *Kyoto 1998*

As of July 2002 the Kyoto Protocol (Dixon and McCorquodale, 2003) had been ratified by 74 states. The Protocol is specific in its objective of putting in place a mechanism to ensure that listed parties shall (Art.3):

'... individually or jointly, ensure that their aggregate anthropogenic carbon dioxide emissions of the greenhouse gases ... do not exceed their assigned amounts ... with a view to reducing their overall emissions of such gases by at least 5% below the 1990 levels in the commitment period 2008 to 2012.'

Australia's refusal to sign, as distinct from agreeing to comply (declaring that signing is not in the national interest) may be seen as removing the country from international jurisdiction if protocol obligations are not satisfied. National interest governs many decisions concerning international commitments where sovereignty is involved. The US has adopted a similar position, the global implications of which are significantly greater.

## *Johannesburg 2002*

Ten years after Rio, the United Nations World Summit on Sustainable Development was held in Johannesburg, South Africa. It set out to review progress against the Rio objectives and initiate a comprehensive set of programs designed to refresh the commitment to sustainable development. It was to be 'one of the most important meetings ever held on the integration of economic, environmental and social decision-making'. The Johannesburg Declaration (EN/DEV/J/3, 2002) re-affirmed the commitment to Agenda 21, as adopted at Rio. The Declaration stated, *inter alia*, that: 'poverty eradication, changing consumption and production patterns, protecting and managing the natural resource base for economic and social development were overarching objectives of, and essential requirements for, sustainable development.' Johannesburg established government and private sector partnerships to realise Agenda 21 objectives and made a strong appeal for countries that had not done so to sign the Kyoto Protocol. The Declaration included few new initiatives but did make reference to renewed efforts to prevent damage resulting from trans-boundary movement and disposal of hazardous chemicals and wastes.

In concluding discussions the United States referred back to the Rio Declaration obligating developed states to bear differentiated responsibility in 'the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technological and financial resources they command.' The US refused to accept any interpretation of this Principle 7 'that would imply a recognition by the United States of any international obligations or any diminution of the responsibilities of developing countries under international law.'

### **INDUSTRY ATTITUDES AND ACTIONS**

A consequence of globalization is the emergence of a number of major transnational companies, each having broad geographical interests. Mergers and acquisitions have resulted in the disappearance of a number of medium sized companies, but many remain. These, together with smaller or 'junior companies, some State Owned Enterprises and a large number of artisanal or small-scale miners, comprise the industry.

The industry is conscious that it is widely perceived as a major contributor to ecological degradation. This perception is a legacy of past generations of operators when legislative requirements, technology and community expectations fell far short of the standards of today. Some of the criticism is justified, as abandoned mines and degraded 'orphan' minesites bear testimony. Today, most mining companies work diligently to ensure that past operational shortcomings do not re-occur and to demonstrate responsible attitudes towards local ecosystems, but in this they have been only partially successful. Despite the efforts of some larger companies, a number of recorded and publicised industry incidents have generated continuing criticism from interested and partisan organisations. The activities of small-scale and artisanal miners operating, often illegally and with outdated technology and equipment, compound broader industry problems. Their activities may be equated with subsistence farming and their 'treatment' invokes issues identified with human rights.

### **The Global Mining Initiative and Mining Minerals and Sustainable Development**

In late 1998, a number of the larger international mining companies launched the Global Mining Initiative (GMI). The program included a rigorous study of the societal issues faced by the industry. Through the World Business Council for Sustainable Development, an independent non-profit research institute, the International Institute for Environment and Development (IIED) was commissioned to undertake a study to identify the global challenges facing the industry. The original ten companies and some 33 other interested parties (including UNEP and World Bank) sponsored the two-year study. The sponsor group's role was limited to providing input. An 'Assurance Group' drawn from outside the industry and including some of its most trenchant critics was formed to oversee the project. In May 2002, the Mining and Minerals Sustainable Development (MMSD) project team presented their report (*Breaking New Ground*) at the Toronto Conference. Industry, governments, NGOs and United Nations agencies were represented. The report (IIED, 2002) identified nine key challenges.

These were:

- Viability of the Mining Industry
- The Control, Use and Management of Land
- Minerals and Economic Development
- Local Communities and Mines
- Mining, Minerals and the Environment
- An Integrated Approach to using Minerals
- Access to Information
- Artisanal and Small-Scale Mining
- Sector Governance: Roles, Responsibilities, and Instruments for Change.

International participation in the study by independent groups ensured that issues of relevance to governments, the community and industry were considered in the context of regional activities and aspirations.

Statements of principle enunciated by the MMSD report team (IIED, 2002) included:

‘A Global Declaration of a Protocol

The minerals industry should consider adopting a Declaration on Sustainable Development and establishing a Protocol to support its commitment. This would simplify the current multiple codes of conduct and sources of guidance by providing a way to bring these together over time into one management system. It would start by building on the recently adopted Sustainable Development charter of ICMM.’

IIED made no recommendation in respect of this Protocol passing into or being adopted as international law. IIED did identify a number of existing international conventions, declarations, compacts and guidelines that are relevant and are candidates for inclusion in a mining industry protocol. These include:

- Rio Declaration
- The United Nations Global Compact
- Environmental, social and economic guidelines on corporate reporting (GMI)
- OECD Guidelines for Multinational Enterprises
- World Bank Operational Guidelines (including Environmental Assessment, Involuntary Resettlement, Indigenous Peoples, Projects in Disputed Areas)
- OECD Convention on Combating Bribery of Foreign Officials
- ILO Conventions (No 98, Right to Organize and Collective Bargaining; No 169, Concerning Indigenous and Tribal Peoples in Independent Countries; No 176, Safety and Health in Mines; and Recommendation No 183)
- Voluntary Principles on Security and Human Rights.

#### *The Toronto Declaration*

At the Cairns CMMI Congress Littlewood (2002) quoting from The Toronto Declaration stated it ‘recognises that its [ICMM] members must move beyond a regulatory-compliance based mindset to effectively manage the complex trade-offs of economic, environmental and social issues.’

The ICMM Declaration failed to endorse all of the recommendations of the MMSD report. The Declaration (ICCM, 2002) did not address the call for an international protocol, but broadly endorsed the principles that a protocol would or should embrace. Omission of any comment concerning an agreement might be interpreted as the industry not being willing to progress in this direction. The Declaration pledged that the ICMM would:

- Expand its Sustainable Development Charter
- Develop best-practice protocols that encourage third-party verification and public reporting
- Engage in constructive dialogue with key constituencies
- Assist members in understanding the concepts and application of sustainable development
- Together with the World Bank and others, seek to enhance effective community development management tools and systems

- Promote the concept of integrated materials management throughout the minerals value chain wherever relevant
- Promote sound science-based regulatory and material-choice decisions that encourage market access and the safe use, reuse and recycling of metals and minerals
- Create an emergency response regional register for the global mining, metals and minerals industry
- In partnership with the IUCN -The World Conservation Union and others seek to resolve the questions associated with protected areas and mining.

The Declaration also noted (Littlewood, 2002) that: 'issues surrounding artisanal and small scale mining and orphan site legacy problems are important and complex but argues that they are beyond the capacity of ICMM to resolve and calls upon governments and international agencies to take the lead.'

In 2003 the ICMM Chairman, Sir Robert Wilson (ICMM, 2003) announced that its members committed to recognise existing world heritage properties as 'no go' areas, and acknowledged that 'mining projects cannot proceed because unique and sensitive biological or cultural values would be compromised if they did.'

## **NGOS: ATTITUDES, BATTLES AND CONTRIBUTIONS**

### **Non Government Organisations (NGOs)**

Non Government Organisations (NGOs) are perceived as committed to the single and (in some instances) seemingly obsessive interests of their members. NGOs are private organisations, relying on community (and government) support in their efforts to modify the behaviour of private sector companies and governments. This is especially true in the mining sector. Highly visible NGOs such as Greenpeace, WWF Australia (formerly World Wildlife Fund), Australian Conservation Foundation, Oxfam Community Aid Abroad, and International Institute for Sustainable Development are vocal critics of aspects of mining operations which fail to satisfy their expectations. Legacies of an industry performing over a long period to criteria unacceptable by present day standards, has conferred some credibility on their arguments.

### **Involvement and acceptance of NGOs in international forums**

The legitimacy of some responsible groupings is acknowledged by roles in international conventions with the International Red Cross and Amnesty International, for example contributing positively on human rights issues. NGOs participated in the Johannesburg Summit where 'world business leaders together with representatives of non-governmental organisations and labour unions, as well as government officials' (UNWSSD, 2002) discussed sustainable development. Outcomes of the summit reinforced and built on Agenda 21 and included ongoing commitments to, *inter alia*, a broad range of environmental and development issues including climate change and energy. The Declaration re-stated the commitment of participants to 'strengthen the interdependent and mutually reinforcing pillars of sustainable development – at the local, national, regional and global levels'.

### **NGOs and the mining industry**

NGOs have been among the most trenchant of the industry's critics. They have identified a number of situations where operators have failed to satisfy current obligations, highlighting situations where the rights of individuals and communities were infringed, of physical environmental damage, and of degradation having lasting impact on bio-diversity. The industry, conscious of continuing criticism set out to improve its image so that NGO initiated criticism would be unsustainable. In spite of NGO activism, a number of smaller companies and artisanal miners have yet to consistently achieve satisfactory and acceptable environmental outcomes.

The significant involvement of NGOs in identifying the issues addressed in the Toronto Declaration and to which firm industry commitments have now been made demonstrates the acceptance of (some) NGO values in an industry Code of Conduct.

It represents a major shift from attitudes prevalent a few years earlier where adversarial approaches were commonplace and dialogue between the parties was acrimonious and unhelpful. Some highly visible NGOs for unspecified reasons declined a role in the MMSD project.

### **The mining industry – an NGO perspective**

Significant contributions have been made by NGOs to the resolution of many aspects of global inequality. Benefits have been generated for many peoples, including large numbers from mining communities. Benefits have been realised without compromising strongly held NGO views. Attitudes to mining industry practices are exemplified by the publication *Principles for the Conduct of Company Operations within the Minerals Industry* (AAPMN, 1998) which includes the views of the Australian Conservation Foundation, WWF, Mineral Policy Institute, Amnesty International, the Construction, and Forestry Mining and Energy Union and other NGOs. The document addresses industry specific issues including:

- General principles
- Land rights, land ownership and indigenous issues
- Environmental standards
- Human rights, including civil, political and social rights issues
- Labour standards and workers' rights
- Independent monitoring, auditing and reporting.

Mining companies would consider some of its 'principles' unacceptable, for example, the principle inhibiting companies from involvement in mining, milling or processing of uranium. As published the principles are excessively prescriptive and could only be considered as a position paper (which is what they purport to be). The stated purpose is to 'provide a useful resource document for governments, communities and non-government organisations which are dealing with mineral companies, environmental and human rights issues.' The authors have referred to existing international protocols, treaties and declarations that are relevant and include a recommendation that 'an internationally binding code of conduct should be developed for Trans National Corporations'.

Oxfam recently addressed similar issues (Oxfam CAA, 2003a) and proposed a framework for a mining industry complaints mechanism. Oxfam identified:

- allegations of human rights violations and environmental degradation
- failure of policies of self-regulation
- lack of legal recourse for affected communities
- full retention of profits from overseas mining operations.

Oxfam's agenda would obviously be debated by industry, but it proposes methodology to bring to account companies that fail the test of best-practice, using existing, accessible legal systems. Oxfam later (Oxfam CAA, 2003b) drew attention to the inadequate international performance of a number of Australian mining companies, citing specific instances to reinforce their earlier call for a formal conflict resolution procedure.

### **NGOs and the future**

The involvement of a number of NGOs in the MMSD project resulted in participating groups developing a closer relationship with the industry. While obvious philosophical differences remain, the concept of a code, protocol or convention incorporating as nearly as possible the aspirations of all with procedures for implementation and enforcement merits consideration. The attitude of involved NGOs would indicate that, subject to negotiation, agreement on acceptable document with reservations might be possible. The attitude of non-participating NGOs is a matter of conjecture. Practical considerations would determine if international law provides the most appropriate vehicle for such a regulatory regime.

## EXISTING INTERNATIONAL LAW AND THE MINING INDUSTRY

The MMSD Report (IIED, 2002) made reference to a number of 'new conventions or protocols to existing conventions that have been adopted in many areas relative to sustainable development.' A number of other treaties, conventions, declarations and protocols also refer to specific activities routinely associated with resources development, including human rights, labour obligations and discharges of waste and contaminants across borders and into the atmosphere.

Entry into force of international instruments is not accomplished until incorporated into national law by individual states. Some remain unsigned, or are subject to reservations limiting their effectiveness. Negotiation and commitment to international protocols by countries is on the basis of self-interest; decisions being generally related to the political, economic or commercial impact of specific treaty obligations.

### Application of existing law

International law prescribes the relations between states. Recently it has begun to take an interest in the conduct of the state towards individuals. Bedjaoui (1991) for UNESCO, asserts that 'the [s]tate which had been for so long the exclusive and sacrosanct subject of international law is... no more than a community of human beings and that an international society is no more than a community of peoples. This discovery... restores to international law its essential finality which is the service of human beings.'

The Stockholm Declaration (UNEP, 1972) extended this principle to issues relating to the development and utilization of natural resources. It acknowledged the obligation to ensure that the interests of future generations were not compromised by current actions or planned developments, placing mining companies' activities clearly in the international arena. NGOs, with their limited international acceptance and legitimacy while contributing significantly to these initiatives were severely restricted in subsequent activities, being ineligible to formally participate in their own right.

Actions initiated in relation to breaches of international treaty obligations result from state initiatives. An action would only be contemplated if that state's interests were perceived as being compromised. The ability of an NGO to intervene and of a corporation to respond is at the discretion of the adjudicating tribunal. The limited number of cases adjudicated by international tribunals reflects the constraints imposed by the system.

Ruda (1991) describes international law as '... a body of legal rules governing relations between [s]tates – legal rules which imply rights and obligations mutually binding on those [s]tates'. Inherent in the principles under which international law is administered is the concept of an international legal personality. The emphasis placed on states as the foundation of international law and the international legal system limits the acceptability of other diverse groups.

Existing international law fails to provide an implementation and enforcement mechanism which satisfies the industry's critics. A state must act to mobilize relevant international legislation, and only in cases such as the *Baia Mare* (EU, 2000) incident has this occurred. It is improbable that a state would initiate actions based on current protocols. NGOs and others, critical of industry performance, are unable to initiate actions and their ability to influence a State to proceed would depend on the magnitude of the incident, its economic impact and community expectations. If international regulations were introduced, their utility would be constrained by the requirement for a state to initiate an action. The scenario appears inadequate and unsatisfactory, and obviously unacceptable to NGOs.

### Sovereignty and international law

The fundamental principle of international relations is that the government of a state has an exclusive right to govern within its own territory, and its jurisdiction to enforce its domestic law is exclusively territorial. States may exercise extraterritorial jurisdiction in respect of the actions of its nationals where its domestic law has been infringed and no action has been initiated under the prevailing regime in the state where the incident was committed.

Based on these accepted principles of sovereignty regulation of mining company activities is strictly a national responsibility. In respect of transnational corporations there are questions of recognition by other states of the status conferred on a corporation by its state of origin, and what rights and activities it may exercise under the legal system of states in which it does not have national status. International conventions have laid down the conditions for mutual recognition of the legal status of corporations.

NGOs have recently called for countries in which companies operating extra-territorially are registered to take action and enforce national policies in respect of alleged offshore transgressions. Oxfam CAA (2003b) recently identified eight international projects in which Australian controlled companies have performed to 'unacceptable' standards' which (Oxfam states) would not be tolerated under Australian law. Government action is unlikely although there is a recent precedent in an unrelated field of the Australian Government taking action in respect of the activities of nationals abroad under the Crimes Act.

## **AN INDUSTRY PROTOCOL – PRACTICAL, REALISTIC OR ACHIEVABLE**

### **The MMSD view**

'*Breaking New Ground*' (IIED, 2002) identifies a need for a Declaration on Sustainable Development, complementing not replacing, initiatives identified in the report. It would commit individual companies to an international code of practice and industry guidelines pending the development of the protocol. The content should be such that all companies, small and large could subscribe to them. The Toronto Declaration (ICCM, 2002) lacks a specific reference to a protocol while generally endorsing the principles set out in the report. There is a strong implication that the industry does not favour a prescriptive regime that would allow its activities to be subject to scrutiny in international tribunals. Many stakeholders would not share this view, particularly activist NGOs who see a requirement for a legally required level of governance as a minimum. The critics of the industry who point to present-day performance in support of their arguments consider self-regulation principles totally inadequate.

Participant interest in a protocol would be broad and varied. To become international law, it would need to be supported by the member states of the UN. Only some member states are minerals' producers, but most express their interest in and opinion on pollution, biodiversity, environmental degradation and human rights. The economic impact on the national economy by constraints on industry would be a significant factor, as indicated by Australia's position on Kyoto. Industry interest would be identified with transnational corporations, national companies, small and artisanal miners, state owned enterprises and their representative organisations. NGOs and international agencies such as the World Bank and International Finance Corporation (IFC) would expect their interests to be adequately represented. The agenda of a number of these groups is already in the public domain, and despite the recent rapprochement of some of the less extreme NGOs and the industry, achieving complete agreement on a prescriptive protocol would prove difficult. If it were to be accomplished, states' issues would predominate, and with the range of interests of key countries, a meaningful agreement would be difficult to achieve.

### **An industry protocol.**

Assuming that the will exists to develop a protocol having the force of international law, the Minerals Council of Australia Code for Environmental Management (MCA, 2002) and the Draft Codes of the Minerals Policy Institute (AAPMN, 1998) and Oxfam CAA (2003) would constitute useful position papers. In their present form the NGO prepared documents would be unacceptable to industry. The MCA code, to which major Australian companies have committed, is directed towards '(A) valued Australian minerals industry achieving outstanding environmental, social and economic performance', and the Code Mission is: '[T]o achieve continual improvement in the environmental performance and accountability of the Australian minerals industry through implementation of the Code'. Coverage of the Code extends to 'all of the signatories activities wherever they operate'. It requires signatory companies to encourage adherence to code principles to 'operations in which they hold a non-controlling interest'.

Self-regulation is anathema to industry critics who point to ongoing transgressions (including some by Code signatories) as a demonstration of the 'value' of such an approach. The opinion of these critics is that enforceable regulatory action is the only effective means of ensuring conformity with established and accepted norms.

Negotiation of a protocol would require agreement between states on a number of contentious issues that have no ready solutions. Human rights are believed adequately dealt with under existing, enforceable treaties. In 2000, the World Bank cancelled, by mutual agreement, a major loan to Coal India Limited (CIL), an Indian Government State Owned Enterprise (Garner, 2001). The loan was terminated because CIL failed to adhere to loan conditions pertaining to the re-settlement of displaced villagers. The parties opted out rather than enter into a judicial situation.

An even more difficult problem relates to the role of small and artisanal miners. These 'illegals' are generally unlicensed, operate with crude, outdated and often dangerous technology and equipment but provide a livelihood for the participants. The illegal sale of their crude product contributes nothing to the state and their legacy comprises low minerals recovery, unrehabilitated workings and contamination of water supplies. The problem is great in many countries, Indonesia being typical and recent reports confirm the problems are ongoing. Local governments are tolerant because of the employment created and are in conflict with national governments responsible for the orderly development of resources. 'Illegals' are often landholders, adding to the complexity of the situation. In China local governments re-opening mines frustrate moves by the Central Government to close small and unsafe coal-mines in remote provinces. Such activities contribute to China's horrendous safety record, as national regulations on mine safety are not enforced in such mines. These are representative of the problems associated with small mines and no acceptable and workable solution is in sight. It is an issue that should be part of an international protocol, but agreement between states is no assurance that these problems would be resolved.

For many years the World Bank has been providing assistance to developing countries to enhance their capacity to manage a domestic minerals sector. Project development funding has been replaced with institutional strengthening packages, as under present policies commercial type activities are considered the prerogative of the private sector. The focus of aid is now poverty alleviation. In a recent address on globalization, Fischer (2003) stated that '.... the surest route to sustained poverty reduction is economic growth.' A protocol, having Bank support, would provide guidance for developing countries, ensuring that subsequent commercial activities were conducted to standards equating with best practice.

A protocol resulting from the negotiations of interested states, and attracting additional signatories, would have significance for mining companies worldwide. For it to be effective it would have to be ratified by signatory states and enacted as national law. Countries with inadequate existing legislation could then subscribe to common mining laws and require transnational and national companies to operate to acceptable international standards. Claims by transnationals that their (in-house) standards exceed regulatory requirements would no longer be significant, as legally enforceable standards would be in place worldwide. The scepticism such operator statements attract would no longer be sustainable.

### **Enforcement of a mining industry protocol.**

Despite the benefits which might accrue from an industry protocol, its development appears problematical. Should it eventuate, its enforcement would bring its own set of problems. Kirgis (ASIL, 1996) discusses the enforcement of international law, referring to the commonly held assumption that it cannot be enforced. Enforcement procedures are those enshrined in UN Security Council capabilities and include trade sanctions, embargoes, suspension etc. Sanctions against a state for a transgression of international law by a mining operator are difficult to contemplate. Specialized agencies have a capacity to withhold funding, but this is only relevant in specific circumstances. Kirgis concludes:

'The enforcement tools of international law are thus imperfect. Not only are they applied unevenly in some cases, but also they frequently work slowly if at all. The bodies that apply them are not necessarily fully representative of the international community.

Despite all this there are international enforcement mechanisms that do work in ways that may not always be obvious. In particular, the international community, no less than domestic society within any nation-state, conducts much of its daily business on the basis of self-enforcing norms that never make the headlines. Enlightened self-interest makes those norms effective.'

Access to international tribunals for the resolution of disputes is restricted to parties to the agreement relevant to the alleged violation. Assuming a protocol had been negotiated and rendered effective, an action would have to be initiated by a State. Such an initiative is conceivable when there are trans-boundary implications of a breach of the protocol, such as the *Baia Mare* spill of contaminated water with its implications for neighboring countries. While the claimant and respondent are states, the 'offender' is a company (albeit one in which a state held an interest) and subsequent domestic action is required to discipline the offender. Other trans-boundary cases have been actioned previously under law then in place.

Existing procedures inhibit parties most likely to want action taken against a recalcitrant operator from formally initiating or participating in an action concerning the contravention of an existing (or a proposed) international law. Lobbying by interest groups, while frequently effective in a national context in relation to national laws, is unlikely to achieve the same result in the international arena. The value of a protocol is diminished if it is unable to be effectively implemented and enforced, and its value reverts to the obligation imposed on operators to comply, simply because it is recognised as law. National law is more readily accessible, works faster (and probably more effectively), and its use could lead to better outcomes.

Established tribunals would not appear to be practical venue for enforcing a protocol should one be put in place. Enforcement procedures appropriate for the situations envisaged and with access to technical expertise when required, would require inclusion in a protocol. A useful model might be the International Centre for the Settlement of Investment Disputes (Onorato, Fox and Strongman, 1998).

The WTO has in place an effective vehicle for the resolution of international trade disputes, but WTO tribunals are inappropriate for resolving mining industry disputes. Exceptions to WTO procedural requirements exist in trade cases relating to the protection of human life, health, of plant life or the conservation of natural resources. A trading nation could seek to enforce penalties against a supplier operating outside accepted criteria. In a case tested under the GATT regime, the Panel found that 'a contracting party may not restrict imports of a product merely because it originates in a country with environmental policies different from its own' (Dixon and McCorquodale, 2003). The value of the WTO dispute settlement procedure would be restricted to its use as a model for incorporation in a new focussed mining industry protocol.

## CONCLUSION

Mining operations impact on the lives of peoples in many countries and on the ecosystems of producing countries and neighboring countries. The industry, despite its apparent best efforts, is still not perceived as performing to standards acceptable to sections of the international community. A strong case can be made for a set of international standards of performance applicable to all mining company operations.

Third party organisations and stakeholders with interests in some area of mining activity see the solution in the form of an international protocol, capable of enforcement and imposing penalties for transgressions. The notion of industry self-regulation is dismissed as ineffective, on-going 'incidents' and complaints being cited in justification of this conclusion. There are also concerns over the variation in the interpretation of laws within countries and the diligence of their respective regulatory and enforcement agencies. Problems associated with small-scale miners are seen as peoples' issues with individuals' rights seemingly being of more concern than damage to health and the environment, and international law exists which addresses these issues.

Recent initiatives have brought (some sections of) the 'anti-mining' lobby and industry closer together, but a wide difference of opinion remains, not so much about the performance of mining operations and their interaction with the environment, but about the regulatory structure under which such operations should take place. Some special interest groups have declined to be involved in the process, casting doubts on their willingness to participate in formulating constructive solutions. There are a number of issues on which the views of the proponents are so divergent that full agreement will not readily be achieved. This is not unusual when entering into negotiations, but a common position might be reached if parties negotiate with a view to concluding an acceptable agreement.

The industry has given no indication that a declaration having the force of law is a desirable outcome. Advocates for the legal option can expect industry's view will not change and that no initiative will be forthcoming to promote this concept. Industry is likely to agree its own code and make formal commitments to it, but enforcement and penal provisions would not be included. An industry-developed code would not satisfy those aiming to regulate and control the industry's operations and to hold them publicly accountable.

The development of a protocol having the force of law requires the initiative being taken by countries prepared to negotiate, agree and enforce regulations under which industry would operate. Negotiating states would have to see some benefit for themselves, economically or electorally, before contemplating such a course of action. This review has not identified the benefits that an individual state would consider appropriate and states' initiatives are unlikely. The downstream problems are complex. There is no existing effective forum to adjudicate on complaints. A declaration would have to establish a tribunal (with enforcement capability), the ICDIS or WTO model may be suitable, but complaints would have to be brought by states and again, self-interest would strongly influence the nature and form of any action.

Existing international law provides access for cases of human rights abuses. International law now also addresses environmental and sustainable development issues. The Stockholm Agreement puts into perspective our responsibilities to future generations. These issues are now capable of being addressed in international forums. The UN Charter respects the sovereignty of states, and states have responsibility for regulating their mineral industry operations. Today's perceived problems would be greatly alleviated if every producing country had in place comprehensive, appropriate and as far as practicable, standardized mineral development law which confirmed ownership of a state's minerals and its rights to their economic management. Enforcement procedures would be faster and more effective than in an international tribunal. Mining operations issues would attract a low priority in UN General Assembly deliberations, which in any case is not an appropriate forum for resolving such. The World Bank has produced a guideline mining code (Onorato, Fox and Strongman, 1998) which incorporates controls on many issues of concern and this is being promoted to developing countries receiving assistance in establishing a mining bureaucracy.

As the Toronto Declaration notes, the problems associated with artisanal miners cannot be solved by the industry. These are societal problems in the countries where the problems exist and actions have to be taken within the country by the government of the country. The entrepreneurial nature of these activities makes their control difficult but loss of revenue, environmental degradation, health issues and the wasteful utilization of resources, together with the rights of the individuals concerned, are ample justification for governments to address the problem. The solution may require formation of cooperatives or of 'sponsorship' by a nearby commercial mining group, but the present situation is economically, socially and environmentally unacceptable.

It is concluded that the development of a new comprehensive international mining law, however desirable, will not provide solutions to real or to perceived problems. Strengthening of existing law, its enforcement, and commitments by all mining companies to work to internationally recognised codes of practice, properly referenced in domestic law, can enhance the industry's image and performance. The contribution of cooperating NGOs in making recommendations to industry in respect of its future direction has added value to the debate. NGOs have made a valuable contribution and their ongoing involvement is of substantial benefit. Their independence, visibility and access to government warrant their continuing involvement.

Unless the mining industry is able to conclusively demonstrate the effectiveness of codes and procedures derived from the extensive consultation process nearing completion, calls for greater accountability will persist. The challenge for the industry is to demonstrate that self-regulation does work and that additional and international legislation with its slow, cumbersome and expensive enforcement procedures is not justified.

### ACKNOWLEDGEMENT

This paper is adapted from a research paper (Garner, 2003) originally prepared for the School of Business and Law, Deakin University, Melbourne.

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