International Environmental and Human Rights Law Affecting Mining Law Reform

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Introduction

Winds of change are sweeping the worldwide mining industry. The reforms reflect a growing consensus that international environmental and human rights (EHR) laws and standards do apply to mining, are essential to protect stakeholders' interests, and actually promote, rather than impede, sustainable development.

All of this is part of the larger trend of growing legal regulation of the mining, energy, and resource-development industries globally. Most of this increased regulation is occurring at the national level, of course, as more and more countries adopt new mining laws and EHR standards or revise older ones, as Finland is doing.

In this new regulation, international (multinational) EHR law is increasingly a factor. There are no comprehensive international EHR laws directly governing the mining industry.[2] But indirectly, international EHR law is increasing mining regulation – through promotion of more stringent national legislation, encouragement of private sector codes of conduct, and buttressing court rulings. Significantly, leading mining industries support this trend, finding that national mining laws and rulings that protect environmental, human, and cultural values enhance shareholder value, host-country investment

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[2] There are of course specific international treaties governing transnational impacts, marine and freshwater protection, hazardous substances, and other matters in which mining operations can become involved. For details on these see Nanda & Pring.

attractiveness, and the sustainability of businesses in the long term, according to mining industry sources like the Mining, Minerals and Sustainable Development (MMSD) Project.

This is a recent change. Prior to the 1980s, critical attention focused on powerful multinational enterprises (MNEs) engaged in mining taking unfair advantage of developing nations and on their labor-management conflicts. Following the 1980s exploration boom, the focus began shifting to mining's negative environmental, community, and human rights problems and these became "the new yardsticks for assessment and criticism of the industry" (Ballard 7).

In reaction to this, the last decade has seen some dramatic changes in the policies of the mining industry, national governments, and civil society. Factors contributing to the hardening of EHR norms include:

- Vastly increased communication technology and networks.
- The development of "virtual communities" monitoring and advocating for environmental and human rights.
- Expanding stakeholder and consumer awareness.
- Enlarged media coverage and criticism.
- Increasing development and acceptance of international environmental and human rights law – both "hard" and "soft."
- An emerging perception that merely complying with (often lax) local or national requirements is insufficient to protect mining operations from scrutiny and potential liability.
- Maturing of the principles and process of "corporate social responsibility" (such that now leading universities offer advanced business degrees in CSR!)
- The outpouring from private sector mining companies and their associations of progressive corporate codes of conduct, principles, guidelines, best practices, and the like.
- Involvement of international governmental organizations (IGOs, such as the UN, OECD) and national governments (like US, UK) in promoting voluntary mining codes.
- NGO initiatives pressuring for adoption of EHR standards and practices.
- The "greening" of international financial organizations (IFOs, like the World Bank) so that EHR requirements are becoming part of their lending "conditionalities."

(Pring & Noé 11 et seq., Ballard 8).

Application of international law EHR requirements to the mining industry is in its infancy, but constantly evolving. Traditionally, international law applies to states and not private sector corporations like mining companies. However,

international EHR "hard" and "soft" law principles are increasingly being imposed on the minerals industry through a combination of factors, including

- state adoption in national mining law reform, such as is on-going now in Finland,
- corporate adoption in codes of conduct, operating principles, best practices, etc.,
- "soft law" EHR developments by IGOs, IFOs, and other entities that are hardening into law, and
- judicial rulings in cases challenging mining company practices.

After a brief discussion of the concepts of "hard" and "soft" international law, we will examine some of the key EHR developments that should be considered in reforming and evaluating national mining laws in the 21st century. This survey focuses on a representative sample of these international legal documents to provide a solid background for evaluating new mining laws like Finland's, but is not meant to be exhaustive of all the dozens of legal initiatives currently focused on the industry.

"Hard" vs. "Soft" Law

Prior to 1970, international law largely left the mining industry, environment, and human rights alone – recognizing that within their own territories "States have . . . the sovereign right to exploit their own resources" pursuant to their own policies (1972 Stockholm Declaration Principle 21). Sovereigns can of course voluntarily give up portions of their absolute sovereignty, and in so doing create international law through several mechanisms:

- State practice of legal customs (customary international law),
- Entering into binding treaties (conventional international law),
- Evolution of comparable legal principles in many states' national laws (general principles of international law), and
- Judicial decisions and expert commentary (subsidiary means of determining international law).

Rules from these sources are viewed as "hard" law, in the sense that they are legally binding on states.

There is another category of international legal development called "soft" law that is increasingly important, particularly in international EHR law. These norms of conduct are labeled "soft" because they are aspirational – goals which states agree they should aspire or hope to achieve, but which are not intended to be immediately legally binding from signing. Such "legal authorities" are found in

- resolutions, declarations, principles, agendas, draft rules, guidelines, etc. promulgated by the UN, EU, and other IGOs;
- policies, guidance, conditions, etc. of the World Bank and other IFOs;
- codes of conduct, standards, operating rules, best practices, etc. of private sector corporations, industry associations, international standards organizations, financial organizations, insurance underwriters, etc.

Soft law is important because (like wet cement) it can solidify into hard law over time, ultimately becoming accepted as international customary law or becoming incorporated into international conventional law. This "half-way stage in the lawmaking process" is also important because "the soft law process is more dynamic and democratic than traditional lawmaking, embracing a broader range of actors (including scientific organizations, academic specialists, NGOs and industry) and providing a more direct link with the larger society" (Hunter, et al. 250).

The following sections review the major examples of developed and developing international EHR norms which should be considered in any national mining law revision process. A more detailed comparative analysis of the many specific provisions contained in these legal authorities can provide an extensive "checklist" against which the reform law's comprehensiveness and effectiveness can be judged.

International EHR Hard Law and Mining

The international EHR hard law with the most immediate consequences for the mining industry in Finland is the 1998 United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention).[3] Aarhus entered into force in 2001, and Finland has been a party since 2004. It would be hard to overstate the importance of this treaty, since it creates more public rights in relation to mining and other forms of economic development than all previous international law put together (Pring & Noé 28-50). In this treaty,

- Finland and the other 45 state parties pledge to adopt detailed national law guaranteeing all "three pillars" of public participation – public access to (1) information, (2) participation in decisionmaking, and (3) justice, with regard to the environmental aspects of development.
- Its "right to know" provisions require states to freely disseminate detailed lists of documents and information.
- Its participation provisions require states to include the public in decisionmaking – specifically in minerals extraction, production, and

[3] http://www.unece.org/env/pp/welcome.html.

processing developments – in an "adequate, timely and effective manner," to take "due account" of public input, and promptly explain decisions to the public, and covers not only project approvals but legislation and rulemaking as well.

- Its elaborate access to justice provisions require parties to give "wide access" to the "public concerned" before courts of law or other independent adjudication bodies and to provide for "citizen suit" type challenges against acts or omissions of government and private parties.

A close article-by-article analysis of Aarhus will provide a detailed checklist of public rights which should be included in national mining law reform. (For detailed information on the international law of public participation see Pring & Noé.)

A major law reform the US has undertaken in public participation is incorporating environmental conflict resolution (ECR) and collaborative planning and decisionmaking into the work of its planning and permitting agencies. ECR is defined as "third-party assisted conflict resolution and collaborative problem solving in the context of environmental, public lands, or natural resources issues or conflicts, including matters related to energy, transportation, and land use."[4]

The strongest international law recognition of the rights of indigenous peoples applicable to mining is the 1989 International Labor Organization (ILO) Convention No. 169.[5] While in force, it has attracted relative few parties (only 17 not including Finland), yet its standards may be moving into international customary law whereby they could become binding on nonparty states like Finland. Actions like the UN General Assembly 2007 Declaration on the Rights of Indigenous Peoples [6] can accelerate this trend.

Courts are also producing hard law – legal precedents – in relation to EHR and mining, including the European Court of Human Rights (ECHR), the Inter-American Court of Human Rights (IACHR), and others. Two examples will indicate the law-building that is resulting and can be expected to continue from courts. In 2004, some 315 Turkish villagers filed a lawsuit against Turkey for its approval over their objections of a cyanide process at the Ovacik mine in Bergama; the ECHR held unanimously that Turkey had violated of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (right to respect for private and family life) and Article 6 (right to a fair

[4] US Office of Management and Budget & President's Council on Environmental Quality, "Memorandum on Environmental Conflict Resolution," http://www.usdoj.gov/adr/pdf/ombceqjointstmt.pdf; see also the website of the US Institute for Environmental Conflict Resolution, a US government agency, at http://www.ecr.gov.

[5] http://www.unhchr.ch/html/menu3/b/62.htm.

[6] http://www.iwgia.org/sw248.asp.

trial) and awarded damages.[7] In 2007, in a case brought by the Inter-American Commission on Human Rights on behalf of the indigenous Saramaka People against the state of Suriname, the IACHR ruled that Suriname had violated, inter alia, Article 21 of the American Convention on Human Rights (right to property) and Article 25 (right to judicial protection) in granting mining rights on lands traditionally used by the Saramaka. The IACHR based its decision on international law, particularly Article 32 of the UN Declaration on the Rights of Indigenous Peoples, which states that indigenous peoples have the following rights:

- to determine the development and use of their lands
- to be consulted by states in good faith to obtain their free and informed consent prior to any development affecting their lands and resources (specifically such as mining), and
- to be provided by states with effective mechanisms for just and fair redress for adverse EHR impacts.[8]

Significantly for the Finland context, the Court made it clear that the state had failed to adopt adequate national laws to protect the Saramaka.

National courts can also rule on international law issues, with potential persuasive effect on other national courts and governments. An amazing and perhaps illustrative case is the first known court ruling requiring consideration of climate change. In 2007, the full Queensland (Australia) Court of Appeal (a division of the state Supreme Court) reversed and remanded a lower tribunal ruling which had approved a coal mine expansion but failed to consider imposing conditions requiring 100% offset of greenhouse gas emissions (GHGs) from mining, transport, and use of the coal.[9] The ruling was based on natural justice. Another example is the US Alien Tort Claims Act (ATCA), a "long-arm statute" which permits foreign citizens to sue MNEs in US Federal Courts for violations of EHR rights in their operations in other countries, and under which mining and energy MNEs have been sued.[10]

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[7] Ta Kin and Others v. Turkey, http://www.echr.coe.int.

[8] Case of the Saramaka People v. Suriname, http://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.doc (judgment of Nov. 28, 2007); http://www.corteidh.or.cr/docs/casos/articulos/seriec_185_ing.doc (subsequent interpretation of judgment of Aug. 12, 2008).

[9] Queensland Conservation Council Inc. v. Xstrata Coal Queensland P/L & Ors [2007] QCA 338 (07/2235) Brisb, http://www.sclqld.org.au/qjudgment/2007/QCA/338. The Queensland Parliament subsequently adopted legislation allowing the expansion of the mine, preempting rehearing of the case.

[10] An excellent reference guide to the numerous publications on the ATCA can be found at http://www.law.suffolk.edu/library/research/a-z/resguides/atca.cfm.

Another form of hard law – in the sense of legally enforceable requirements – comes from the recent "greening" of IFOs (multilateral development banks (MDBs), bilateral development assistance agencies (DAAs), national export-import agencies (Ex-Ims), and other finance, insurance, and trade entities, public and private). Stung by environmental and human rights disasters they have funded, IFOs have adopted new sustainable development standards, procedures, and contract conditions in their grant and lending programs, imposing a whole new tier of EHR requirements on participating governments, companies, and contractors (Pring and Noé 52-55).

A major shakeup of the World Bank Group (WBG) support for mining came about earlier this decade when it commissioned an independent Extractive Industries Review (EIR) in response to criticisms that the sector was too often associated with poverty, conflict, corruption, and EHR violations. The EIR's highly critical 2004 report[11] confirmed this, recommending a stop to all WBG financing for coal and a phase-out of oil investments. The EIR report listed dozens of recommended reform principles for WBG EI programs in areas of governance, poverty alleviation, human rights and indigenous people, environment, disclosure and transparency, and institutional and procedural change.[12] While the WBG responded that it would continue investments in petroleum and mining, it has adopted a number of the progressive recommendations and is continuing to study and expand the list.[13] Now included in the World Bank's Operational Policies are 10 "Safeguard Policies" to protect environmental and social factors.[14] While IFO standards are not binding on governments and MNEs except on a project-specific basis, a detailed analysis of all such IFO requirements would provide a further checklist of items that should be considered in drafting national mining laws as representative of "international standards."

International EHR Soft Law and Mining

IGO Standards

Several IGOs – of which Finland is a member – have adopted agreed "voluntary" standards and guidelines regarding MNEs and mining activities. While such standards are technically nonbinding (soft law), the IGOs view them as "commitments" and expect them to be taken seriously, as indicated by the

[11] http://go.worldbank.org/T1VB5JCV61.

[12] For a concise listing of the recommended standards, see Environmental Defense Fund, "Extractive Industries Review (EIR) Recommendations to the World Bank," http://www.edf.org/article.cfm?ContentID=3667.

[13] http://go.worldbank.org/PMSHHP27M0.

[14] http://go.worldbank.org/JGRKGSZRD0.

Organization for Economic Co-operation and Development (OECD) concerning its 2000 Guidelines for Multinational Enterprises:[15]

> "The Guidelines are recommendations to international business for conduct in such areas as labour, environment, consumer protect and the fight against corruption. The recommendations are made by the adhering governments and, although not binding, governments are committed to promoting their observance. . . . In seven years, the Guidelines have consolidated their position as one of the world's principal corporate responsibility instruments." [16]

Finland is an "adhering government" for these OECD MNE Guidelines. They call upon states to recommend and implement progressive MNE practices (many relevant to mining development), including:

- contribute to sustainable development
- respect human rights
- encourage local capacity building, human capital formation
- uphold good corporate governance principles and practices
- disclose timely, regular, reliable, and relevant information about their activities
- establish and maintain a system of environmental management
- provide adequate and timely information on potential environment, health, and safety (EHS) impacts
- consult communities directly affected
- follow the precautionary principle
- allow no undue environmental impacts
- provide EHS training to employees.

The UN has instituted a similar program, the UN Global Compact,[17] terming it "the world's largest global corporate citizenship initiative." It too is a voluntary system consisting of 10 "universally accepted principles" in the EHR, labor, and anti-corruption areas and supporting the UN's Millennium Development Goals (MDGs). Its signatories agree to the following EHR principles:

- protection of internationally proclaimed human rights
- non-complicity in human rights abuses
- precautionary approach to environmental challenges
- greater environmental responsibility

[15] http://www.oecd.org/daf/investment/guidelines.

[16] http://www.oecd.org/document/20/0,3343,en_2649_34889_39602772_1_1_1_1_,00.html.

[17] http://www.unglobalcompact.org.

- environmentally friendly technologies.

While the Global Compact is very vague, generalized, and nonenforceable (to some critics mere "bluewashing," in a play on the UN's color), it at least provides authoritative support for states like Finland to develop progressive national mining law provisions based on these concepts.

Corporate Standards

A very important source for developing international EHR standards, surprisingly to some, is the mining industry itself. Private-sector companies and industry associations are increasingly adopting and publishing voluntary "codes of conduct," "environmental management systems (EMS)," "guidelines," "best practices," and the like These are a unique form of international soft law in that they are created, not by states or IGOs, but by the regulated industries themselves. Regardless of their creators' intent that they are to be voluntary and non-binding (to some critics mere public relations "greenwashing"), these actions are contributing to new international EHR law since national governments, IGOs, and courts naturally tend to treat the industry's own pronouncements as the best evidence of the "international standards" to which they and their competitors should be held (Pring & Noé 55-58).

Corporate mining standards began in earnest in 1991 with the UN-initiated "Berlin Guidelines."[18] The current Berlin II Guidelines (2002) present 58 very detailed pages of principles, guidelines, and practices covering the full mining life-cycle from exploration through closure-rehabilitation, as well as appendices covering other international mining standards efforts, research work, and websites. Key principles for governments and the mining industry include:

- high priority for environmental management (EM)
- environmental impact assessments
- pollution control and other preventive and mitigative measures
- monitoring, auditing, and emergency response
- socio-economic impact assessments and social planning
- consideration of gender issues
- highest-level environmental accountability
- staff responsibility and training in EM
- participation of the affected community and other directly interested parties
- adoption of best practices to minimize environmental degradation "notably in the absence of specific environmental regulations"
- environmentally sound technologies
- funding for improving existing mining operations

[18] http://www.mineralresourcesforum.org/workshops/Berlin/index.htm.

- risk analysis and management (RAM)
- avoid regulations that act as barriers to trade and investment
- recognize linkages between ecology, socio-cultural conditions and human health and safety, the local community and the natural environment
- adoption of instruments (such as tax incentives) to encourage pollution reduction and innovative technology
- reduce transboundary pollution
- encourage longterm mining investment by having clear environmental standards and procedures.

The Berlin Guidelines provide more, and in so doing provide another good checklist for successful national mining laws.

Another major force in creating mining industry standards is the International Council on Mining & Metals (ICMM), a CEO-led association of many of the world's leading mining and metals companies and commodity associations headquartered in London.[19] ICMM has developed and its members "have committed to" the 2003 ICMM Sustainable Development Framework, a set of 10 principles plus public reporting and independent assurance undertakings. The principles are based on the work of the Mining, Minerals and Sustainable Development (MMSD) Project, a 2000-2002 mining-industry-supported study of how to integrated sustainable development into the minerals sector. The ICMM principles include:

- ethical business practices and corporate governance
- integration of sustainable development in corporate decisionmaking
- uphold human rights, cultures, customs, and values in dealing with employees and others affected
- implement risk management
- continual improvement of health and safety performance
- continual improvement of environmental performance
- conservation of biodiversity and integrated land use planning
- responsible product design, use, re-use, recycling and disposal
- contribute to the social, economic and institutional development of communities in which we operate
- effective and transparent engagement, communication and independently verified reporting with our stakeholders.

Within each of the 10 principles are numerous detailed subprinciples, making this another excellent checklist for measuring a new mining law.

This year 60 of the world's leading financial institutions celebrated the 5th anniversary of the Equator Principles (EP), voluntary standards for financial

[19] http://www.icmm.com

institutions to manage environmental and social risk in project finance transactions.[20] These nongovernmental principles have become the financial industry's "gold standard" for sustainable project finance, with over 70% of the US$74.6 billion total debt tracked in emerging markets in 2007 subject to the EPs.[21] Members will not provide loans to projects with significant or limited adverse environmental or social impacts where borrowers are unable to comply with the EPs, including:

- environmental and social screening and categorization of potential impacts and risks
- a prior social and environmental assessment process
- overall compliance with applicable industry-specific EHS guidelines
- an action plan and management system for the impacts and risks
- consultation with project-affected communities to ensure their free, prior, and informed participation
- a grievance mechanism
- independent expert social-environmental review
- enforceable covenants linked to compliance
- independent expert social-environmental verification of monitoring and reporting.

While there are many other corporate EHR standard-setting initiatives, one particularly unique one is worth mentioning – the Global Reporting Initiative (GRI).[22] The GRI claims to be "the world's most widely used sustainability reporting framework," a system of principles and indicators that companies and organizations can use to measure and publicly report "their economic, environmental, and social performance." GRI's "G3 Guidelines" can be used to benchmark an entity's compliance with hard and soft laws, codes, performance standards, and voluntary initiatives and thereby demonstrate commitment to sustainability.

NGO Standards

Environmental and human rights NGOs have become increasingly powerful players in the development of EHR standards for the mining industry (Pring and Noé 68-72). International, regional, national, and local organizations advocating all facets of rights – environmental, human, indigenous, social-cultural, community, property, good government, labor, safety, etc. – are active or potential participants in mining projects and mining law developments worldwide.

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[20] http://www.equator-principles.com/principles.shtml.

[21] "Equator Principles Celebrate Five Years of Positive Environmental Impact and Improved Business Practices," http://www.equator-principles.com/index.shtml.

[22] http://www.globalreporting.org.

Such NGOs now often play roles in negotiation and implementation of international law agreements, monitoring mining impacts, providing technical support to local communities and developing countries, drafting language, lobbying, acting as observers, reporting violations, critiquing EHR legal compliance, etc.

Amnesty International (AI) summarizes the minerals industry's "basic responsibilities" for human rights as including:

- protecting human rights within all areas and parties of the operation
- promoting protection of human rights in society
- non-discrimination
- protection of life, liberty, and security
- prevention of slavery, torture and cruel, inhumane, or degrading treatment
- no arbitrary arrest, detention, or exile
- protection of privacy
- protection of property of individuals and communities, without deprivation except by a government authority on just terms with adequate compensation
- respect for the economic self-determination of communities
- no infringement on freedom of religion
- no infringement on freedom of opinions, expression, or association (including collective bargaining)
- labor standards providing safe, healthy, and clean workplace; fair wages; and compliance with the ILO standards and Conventions on Child Labor and Rights of the Child
- compliance with the OECD Convention on Combating Bribery.[23]

AI also states that, in addition to these, "the human rights responsibilities of companies are increasingly being recognized as including respect for:

- national sovereignty – the laws, regulations, values, development objectives, and the social, economic, and cultural policies of the countries in which they operate (insofar as these do not conflict with international human rights standards)
- workers – fair and adequate compensation that ensures a lifestyle worthy of human existence
- local communities – rights to health, adequate food and housing, and other economic, social, and cultural rights such as the right to primary education, rest and leisure, and participation in the cultural life of the community

[23] MMSD, "Report of the Experts Meeting on Human Rights Issues in the Mining and Minerals Sector," Annex I (No. 222 April 2002), http://www.iied.org/mmsd/mmsd_pdfs/222_human.pdf.

- environment – compliance with the national laws, policies, etc. of the countries in which they operate; due regard to relevant international agreements, principles, objectives, and standards; protection of the environment, public health and safety; and acting in a manner than contributes to sustainable development.

Conclusion

International law standards are not an abstract, academic, ignorable issue for the modern minerals industry. When a market-driven industry organization like the Canadian Institute holds a regular conference for mining executives and lawyers on "Managing Global Risks for Mining Operations" (this November 18-19), a majority of its sessions are on topics like

- "How are international standards trying to promote a new paradigm of sustainability?"
- "What are the newest updates on adopting international standards to create an even playing field for the global mining industry?"
- "Understanding how hard laws, such as treaties, impact mining exploration and development"
- "Understanding how soft laws, such as United Nations and other international bodies' guidelines, affect successful project implementation"
- "Understanding international HSE laws"
- "Latest strategies for mining operations to improve their government, stakeholder and local community relations."[24]

International EHR standards have a great deal of value to contribute to mining law reform, as even this nonexhaustive review shows. The next step in the process would be to analyze comparatively all of the relevant standards lists – those discussed here and any others deemed requisite – and to harmonize and combine them into one list of EHR standards that are viewed as authoritative and essential in the consensus view of responsible government, industry, and NGO leaders.

[24] http://www.canadianinstitute.com under the Mining link.

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