MINING AFTER JOHANNESBURG

AN ASSESSMENT OF POST-WSSD POLITICAL OPTIONS

Written by
Jozsef Feiler

Edited by
Clare Stark

September 2002

MINERAL
POLICY
CENTER

ABOUT THE AUTHOR

The author, Jozsef Feiler, is the Policy Coordinator at CEE Bankwatch Network, a watchdog non-governmental organization that monitors the activities of international financial institutions in Eastern Europe. For the past five years, Mr. Feiler has worked on international development and financing issues related to mining, including the Rosia Montana Mine and the Baia Mare Mine in Romania. Mr. Feiler has a M.A. in History and Archeology from ELTE in Budapest, Hungary, a M.A. in Environmental Science from Manchester University in Manchester, England and a M.A. in International Affairs from Columbia University in New York, USA. He lives in Budapest, Hungary and he can by reached by phone at +36-285-6304, or by email at jozseff@bankwatch.org. Mr. Feiler prepared this paper for the Mineral Policy Center (MPC).

ABOUT MINERAL POLICY CENTER

MPC is a non-profit organization dedicated to protecting communities and the environment from the destructive impacts of mineral development in the U.S. and worldwide. We fulfill our mission by assisting communities and grassroots groups, publicizing the environmental, social, cultural, and economic impacts of mining, and working to improve government policies and corporate practice.

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

APEC GEMEED	Asia-Pacific Economic Cooperation Expert Group on Mineral and Energy Exploration and Development
CAMMA	Mines Ministries of the Americas – a regional forum discussing minerals development issues in the hemisphere
EIR	Extractive Industries Review, World Bank – currently examines extractive industries' impacts on the environment, poverty reduction and economic growth
ECOW	Environmental Cooperation Workshop of the APEC GEMEED
FSC	Forest Stewardship Council
GMC	Global Mining Campaign
GMI	Global Mining Initiative
ICMM	International Council on Mining and Metals
ICOLD	International Commission on Large Dams
IFI	International Financial Institution
IIED	International Institute on Environment and Development
MMSD	The Mining, Minerals and Sustainable Development Project
NRCan	Natural Resources Canada
UNEP DTIE	United Nations Environment Programme, Division of Technology, Industry and Economics
WCD	World Commission on Dams
WSSD	World Summit on Sustainable Development

1. INTRODUCTION

> *"In a system, actions have unintended effects on the actor, others, and the system as a whole, which means that one cannot infer results from desires and expectations and vice-versa."*
> *--- Robert Jervis*

A number of proposals have surfaced for multi-stakeholder engagement or dialogues on mining to follow the World Summit on Sustainable Development (WSSD). This paper intends to provide an initial analysis and assessment of these proposals, to survey other useful political initiatives and processes, and to invite others to participate in a discussion or debate about Post-WSSD activities and actions. This analysis and assessment is from the perspective of the author and Mineral Policy Center (MPC).

The author would like to thank Steve D'Esposito and Clare Stark from MPC for their assistance in preparing this document. Although input has been received from others, this paper does not attempt to speak for anyone else, nor is it considered a complete analysis or survey. Instead, it is an effort to provoke further discussion and debate about these, and potentially other, such processes.

It is hoped that by assessing the potential of post-WSSD outcomes, at least those that are likely to be pursued by the mining industry and governments, that this paper will provide a context for non-governmental organizations (NGOs) to develop effective post-WSSD campaign strategies.

We invite others with views on this subject to submit an analysis to Clare Stark at MPC. She can be reached at cstark@mineralpolicy.org. MPC will post submissions from NGOs and community groups on the Mining News website. The address of the Mining News website is www.globalminingcampaign.org/theminingnews.html.

This analysis begins by looking at a number of campaigns, multi-stakeholder processes, and political processes. There is a particular focus on initiatives that have had previous success in affecting the industry sector on a regional, global or site-specific basis and on current initiatives that have the possibility of setting important regional or global precedents. It compares and evaluates proposals from various stakeholders that have been to-date proposed as post-WSSD activities, at least those that we are currently aware of. These are proposals from Natural Resources Canada (NRCan) and the South African Department of Minerals and Energy, the United Nations Environmental Program (UNEP) and an industry-sponsored study (MMSD).

It is important to note that at this juncture, we find little support for or interest in the type of post-WSSD processes that have been recommended to date. There is growing skepticism in the NGO sector in regard to type II processes, as defined during WSSD.

In regard to specific proposals on mining, most NGOs are interested in achieving concrete results in regard to industry practices and behavior. Most view the current proposals as likely to lead to lowest-common-denominator solutions. There is also a fundamental problem with initiatives that are not multi-stakeholder in their design, planning and conception.

2. AN ASSESSMENT OF PAST AND CURRENT INITIATIVES

What follows is an analysis of a limited number of past and some current multi-stakeholder processes. The purpose of this review is to draw lessons that may prove useful in analyzing the current proposals.

2.1 WHITEHORSE MINING INITIATIVE (WMI)

In September 1992, the Mining Association of Canada, on behalf of the mining industry, together with the mines ministers of all senior governments of Canada, launched a co-sponsored process to "develop a new strategic vision and to create solutions for the 21st century". The Initiative arose in part as a response to the increasing influence of powerful labor rights, aboriginal land claims and wilderness conservation forces in Canada. It was also a time of increasingly competitive economic conditions for the industry. It was during this period that many developing countries began to open up their borders to mineral investment, causing greater competitive pressures on the Canadian domestic mining industry.

The process which began in February 1993 and lasted for eighteen months, included five "sectors" of the Canadian society: the mining industry, senior governments, labour unions, Aboriginal peoples and representatives of the environmental community.

The process had a three-tiered structure, with a Leadership Council, Working Groups and Issue Groups. The Leadership Council was a high-level political body that set the broad direction for the Initiative; the Working Groups took the lead on the detailed research and negotiation of common issues and recommendations. The Working Groups were supported by the Secretariat, which facilitated the Initiative. The Four Issue Groups that were established were drawn from all five of the stakeholder groups. These groups addressed the following topics: Finance/Taxation, Environment, Land Access, and Workforce/Workplace/ Community. Each Issue Group produced a set of principles and objectives and an extended list of more than 150 total recommendations. Drawing from the reports of the Working Groups, the

Leadership Council worked with a group of representatives from all sectors to draft an overarching "Leadership Accord." The language of the accord is non-binding, voluntary and general. The resulting Leadership Accord became the primary public document of the initiative. The final Accord sought to highlight and promote issues and recommendations acceptable to representatives of the participating stakeholder groups. The final Accord is comprised of 16 principles and 65 goals. Various stakeholders signed the Accord, however some noted reservations.

Lessons Learned:

- The primary weakness was that there was no follow-up mechanism; there was no monitoring and accountability mechanism for the "commitments" made by the participants.

- By the end of the process in 1994/1995, economic conditions for the sector and investment in the industry were booming. Due to better economic conditions, the industry has less need to, and less interest in, negotiating on these issues with other stakeholders. Some participants believe that this is why industry has failed to commit to the outcomes of the Accord.

- The Accord did result in some progressive commitments on paper, at least in regard to some of the key issues from that time period.

  For example, the Accord included provisions on protected areas, the use of the precautionary principle, and on mine closure requirements. However, reports indicated that some of the key industry participants were lobbying for weakening environmental standards and the opening up of parks to mining within a few years of having signed the WMI commitments. Thus, both the letter and spirit of the Accord were violated within a relatively short period of time.

- In retrospect, the section on streamlining the regulatory process proved highly problematic for environmental organizations. In fact, the industry later used these provisions as part of their national campaign to deregulate

much of the government oversight of environmental performance in the mining sector. Their ability to selectively promote certain elements such as this, while lobbying against other elements of the Accord (like protected areas) was seen as a major failure of the process. This fueled a deepening level of distrust between NGOs and the mining industry. This distrust may have led many NGOs in North America to boycott or ignore the recently organized Global Mining Initiative (GMI), sponsored by a number of major mining companies.

- Multi-stakeholder processes that do not lead to concrete results, or where commitments are not realized, can actually lead to even greater distrust between industry, governments and civil society groups.

2.2   WORLD COMMISSION ON DAMS

The negative environmental and social impacts of large dams are well known. Anti-dam struggles were waged by dam affected communities and NGOs around the world, in particular those targeting World Bank-funded projects from the 1980s onwards, and most importantly the campaign against World Bank-funding of the Sardar Sarovar dam on India's Narmada River.

In June 1994, as part of NGO activism to mark the World Bank's 50th anniversary, International Rivers Network and the Save the Narmada Movement developed the "Manibeli Declaration" which called for a moratorium on World Bank funding for dams.[1] One of the demands in the declaration, which was endorsed by several hundred groups and coalitions in 44 countries, was for the World Bank to establish an "independent comprehensive review of all Bank funded large dam projects to establish the actual costs, including indirect economic, environmental and social costs, and the actually realized benefits of each project". As a result of this call and after some further struggles, the World Bank together with IUCN offered assistance to establish an evaluation process of large dams. The dam construction industry and critical civil society groups were in agreement about the aforementioned evaluation process. This led to the work of the World Commission on Dams, a commission that evaluated the performance

---

1 The declaration is available at www.irn.org/programs/finance/manibeli.shtml.

and impacts of large dams, offered recommendations and criteria for the construction of future dams within the framework of the commission's work, there were dam/basin case studies, 150 large dams cross check surveys, thematic reviews and 970 submissions and consultations.

The commission completed its work and made critical recommendations and conclusions in its final report in November 2000. This commission established a potentially significant precedent in the international political sphere, where non-state actors sought to establish rules (although non-binding ones) for a sector of economy. The work of the WCD was followed by the establishment of a Dams and Development Unit, housed by the United Nations Environmental Program (UNEP). It was hoped that this unit would optimize the impact of the report by monitoring and disseminating the results of follow-up actions.

Lessons Learned:

- The various stakeholders were able to generally work on equal footing during the WCD process.

- Representation: Channels for civil society participation were generally effective. The body of commissioners was drawn from various sectors, some commissioners were credible to NGOs and affected communities and were in fact chosen by dam-affected communities.

  As a result, buy-in was established from some communities that were generally mistrustful of these sorts of processes. The WCD evolved into a forum in which many, including affected communities could participate, and have a voice. In fact, for some, the WCD became one of the few vehicles for having their voices heard.

- Independence: The World Bank and IUCN convened the WCD, however significant funding also came from other sources. Even though the World Bank made a major contribution to the WCD process, a structure was established so that the World Bank would not have complete control of the

project.   The World Bank had no final say on who served on the commission and on the commission's work program.

- Effective Use of Experts: Some commissioners, particularly those chosen by the industry were not politically oriented, but were engineers—i.e. professionals in the dams business. As such, they operated with a high-degree of independence, rather that serving on the commission to represent the industry. There was evidence that commissioners responded to new information that they gathered on the site-visits.

- Inclusiveness: The work program of the commission was open-ended and allowed for diverse perspectives to be considered. Regional consultations provided an opportunity to gather diverse views. There was a mechanism for public submissions. As these processes unfolded, this served to strengthen the credibility of the WCD.

- Transparency and Pace: There was a good web site, which increased the degree to which all the documents were readily available to interested participants. Unfortunately, language barriers, due to the inadequate translation of the documents, did not allow for more participants to access the process. For non-English speakers and non internet-enabled communities, the process accelerated by internet based communication was too fast and did not allow them the opportunity to give their input.

- Outreach: International Rivers Network (IRN) led a very effective outreach effort for campaign participants and local communities. IRN was also effective at getting the message out to the media. This required considerable capacity and organizing.

- Results: The consensus opinion of the Commission's report resulted from the intensive engagement of commissioners in a long and in-depth process. Those outside of the process did not necessarily support the positions taken in the final report, thus there is a view that the process failed to engineer a broader consensus among many stakeholders. This is likely to reduce the real-world impact of the report.

2.3   FOREST STEWARDSHIP COUNCIL

The Forest Stewardship Council (FSC) was created in 1993 by a diverse group of organizations including environmental and social NGOs, timber and forestry trade groups and forest certification bodies. It is an outgrowth of the SmartWood program of Rainforest Alliance and other initiatives, campaigns and processes. The goal of the FSC is to promote forest management that is environmentally responsible, socially beneficial and economically viable. FSC's Principles and Criteria are used as guidelines and adapted to local circumstances through consultation with stakeholders. Regional and national standards are being created as well. Not all of the Principles and Criteria must be perfectly satisfied for certification to be granted, although major failures in any one Principle would normally result in a failure to qualify for forest management and chain of custody certificates. Firms seeking FSC approval must undergo an audit by one of a few accredited certifiers that can verify compliance with FSC requirements. The FSC also offers 'chain of custody' certification, which traces the amount of certified wood in a product from the forest floor to the consumer shelf.

In eight years, the FSC has certified 3 percent of the world's forests. Currently, demand for FSC certified wood exceeds supply by 10 times – putting a pressure on FSC to increase the area certified. This may create a risk that certification standards could be lowered. While many NGOs such as Rainforest Action Network, Greenpeace, WWF, and the Coastal Rainforest Alliance/Forest Ethics have played a central role in the birth of the FSC, there are critics such as the Rainforest Foundation, who argue that FSC certificates in many cases appear to be awarded on the basis of hoped-for improvement in the management of logging operations rather than on the actual quality of logging operations at the time of assessment.

FSC was, and is, competing with industry-deployed certifications that lack FSC's higher standards, chain of custody approach and transparency, thus their credibility and acceptance are limited. In the United States, the Sustainable Forestry Initiative, which has the backing of the American Forest & Paper Association, competes with FSC. In a recent comparison of the two

schemes, it turned out that of 31 issue areas designated as having "great importance," the schemes addressed only seven "using essentially the same approach." Nine subject areas were addressed by both programs but with different approaches and 15 areas were addressed by one or the other or from fundamentally different approaches.[2]

Lessons Learned:

• Independence: The FSC accepts no funding from industry. It is funded by government and private donors and takes fees from industry for certification.

• Pressure: Independent certification became effective only after NGOs launched a major grass-roots market-pressure campaign against retail giants such as IKEA, Home Depot and Lowe's, operating in North America and Northern Europe, in the late 1990s.

Critics of FSC say that it only addresses a part of the global market and that it gives the impression that forest issues are solved or settled. There are concerns that the FSC is not able to address the problem of bottom feeders and that it is only concerned with those major companies with brand values who would benefit from the certification process. However, proponents counter that the FSC provides the first step for raising standards in a complex industry sector and establishes optimal practices, which can be promoted and are comparably better than current practices. Chain of custody certification is considered essential even if the forest products are not according to FSC criteria, due to the fact that many of the worst practices are coming from the illegal felling and trade of timber. FSC established the upper-end of certification; general (non-ecological criteria based) chain of custody certification is needed in order to limit the industry's worst practices. The FSC process does not include governments.

---

[2] www.merid.org/comparison

2.4   LAND-MINES BAN CAMPAIGN

The Land-Mines Ban Campaign was an international campaign, which culminated in an international convention (Ottawa Convention Banning Landmines) outside the UN. The conventional wisdom is that a process within the UN would not have been able to accomplish a ban. Its essential feature is that it was led by a coalition of NGOs (over 1000 organizations were involved) that set the agenda for the negotiations. The process is seen as a landmark in international relations that has opened up new avenues for international agreements and enhanced the role of non-state actors. It should be noted that the issue and its public message was relatively straightforward in contrast to the challenges that are faced by NGOs in other sectors.

Lessons Learned:

- Civil society groups from diverse constituencies and with diverse mandates united in order to promote the Land-Mines Ban Campaign.

- Some governments supported the treaty with unilateral actions. This provided critical leadership, support and demonstrated that some governments were willing to take action.

- The text of the convention preserved the spirit of transparent language and clear, uncompromising and unambiguous undertakings. Its utter moral and political clarity was an integral part of the campaign and resulted in its effectiveness in reaching the public.

- The threat of banning landmines presented a threat to many of the world's militaries, but it did not represent an overwhelming economic threat to the weapons industry. There was no incentive for a counter-campaign in NATO countries. Most veteran's associations and many military leaders were vocal supporters of the ban.

- A new way of negotiation was established during the process. Instead of consensus seeking that too often leads to lowest-common-denominator solutions and watered-down agreements, the treaty was negotiated among

like-minded   states.

These states accepted the comprehensive and coherent nature of the international NGO position and the refusal of NGOs to compromise on the essentials of the landmines ban. Over the life of the campaign, the number of like-minded states grew to a substantial size. Other states felt the political pressure to join the ban.

- There were a handful of governments willing to work with civil society/NGOs and vice versa, in order to solve the landmines problem. This was an unusual development because usually on other issues many NGOs view governments, or some governments, as adversaries. Sympathetic governments, United Nations institutions and the international NGO movement forged a genuine partnership, especially during the later stages of the ban campaign.

- There was a clear goal/objective and message.

- The geopolitics of the day had an impact. In the post cold-war context, small and medium-sized governments were willing to take risks and work with NGOs. They did not believe that they had to wait for more powerful states to take a position or act.

- There was open information sharing and regular updates and overall transparency of the process and activities.

2.5   LESSONS FROM OTHER INITIATIVES

2.5.1   EXTRACTIVE INDUSTRIES REVIEW (EIR)

As a response to NGO criticism of the World Bank's support for projects in the extractive sectors, the president of the World Bank, James Wolfensohn, announced at the 2000 Annual Meeting of the Bank a process 'similar to the World Commission on Dams' regarding the World Bank's role with

supporting extractive industries. The process was launched in 2001 and planned to commence with a comprehensive report in 2003. However, the process differs significantly from the WCD. There are no commissioners representing various stakeholder groups – only the eminent, Emil Salim, who has authority over the process.

The Secretariat serving the process is seen by many as openly biased towards the World Bank and the industry. The World Bank itself set the pace, tone, process and agenda of the review. As a result, there is growing skepticism amongst NGOs in regard to the review.

2.5.2 PROTOCOL ON ENVIRONMENTAL PROTECTION TO THE ANTARCTICA TREATY

In 1991, the Antarctic Treaty countries approved the protocol on Environmental Protection to the Antarctica Treaty, which effectively bans all mining activity in Antarctica and was at the time of its adoption, the most comprehensive multilateral document adopted on international protection of the environment. The Protocol grew out the of Australian and French opposition to the Convention for the Regulation of Antarctic Mineral Resource Activities, which was adopted in 1988 after six years of negotiations. NGO activities were significant after the rejection of the 1988 convention. During the process of negotiations, IUCN and the Antarctic and Southern Ocean Coalition had an observer status, coupled with strong lobbying efforts by Greenpeace, Foundation Cousteau and others. NGOs were represented within national delegations (e.g. New Zealand, Australia, Denmark). The final text of the protocol reflected several of the NGO concerns and objectives. The role of NGOs in this particular process led to better NGO recognition within the framework of the whole Antarctica Treaty. One important aspect of the issue is that while there was some long-term interest in potential mineral development in Antarctica, there was little immediate interest at that time.

2.5.3 CLIMATE NEGOTIATIONS (UNFCCC KYOTO PROTOCOL)

Within the structure of the United Nations Framework Convention on Climate Change, a specific protocol was approved in Kyoto in 1997. In contrast with the Convention, the Protocol set out binding targets for greenhouse gas

emission reduction for industrialized countries. However, the protocol itself needed detailed interpretation to be agreed upon by the parties. The negotiations on this detailed document were essential for the Protocol to enter into force. Without the common understanding of the words of the protocol, it would have been subject to a wide variety of interpretations and no country responsible for significant- emissions was ready to ratify such an ambiguous document. The negotiations on the understanding of the protocol lasted from 1998 till 2001 and were considered some of the most complex multilateral negotiations ever. NGOs worked closely with some governments and the AOSIS (Alliance of the Small Island States) to create an important and useful role in these negotiations. These parties, although the countries they represented were some of the smallest, managed to play a catalytic role at the climate negotiation process. NGOs also played a significant role in regard to information flow and analysis and were able to play a pivotal role in facilitating information flow among parties outside the channels used by governments.

2.6   TYPES OF POLICY INSTRUMENTS – THEIR MERITS AND PROBLEMS

In general, there are three basic types of policy instruments. It is important to review the se because it is critically important to define, from the outset, the ultimate objective of any multi-stakeholder dialogue or process, so that participants are clear on the purposes of the process.

Regulatory instruments (e.g. emission standards, product bans) whereby public authorities mandate the environmental performance to be achieved, or the technologies to be used by firms).

Economic instruments (e.g. taxes, tradeable permits, refund systems), whereby firms or consumers are given financial incentives to reduce environmental damage.

Voluntary instruments (e.g. voluntary codes, eco-labeling, schemes) whereby firms make commitments to improve their environmental performance beyond what the law demands.

The application of these instruments at the international level is typically more complex and problematic than applying them to a particular country. This is a result both of issues related to the sovereignty of states and the size and complexity of the global community. Sovereignty poses a problem, as no country can be subject (in theory) to the will of another country. Other countries are not supposed to interfere with the internal affairs of a given country.

While national sovereignty is continuously eroding with the increase of globalization, it still presents a significant problem in regard to creating and implementing international policy tools. The number of countries and the size of the globe make it difficult to monitor the fulfillment of commitments. However, this can be also pose a problem within national borders.

2.6.1 REGULATORY INSTRUMENTS

At the international level, there are conventions and treaties that are primarily negotiated among sovereign state actors. There is, however, an increasing role of non-state actors in the formulation of international agreements (NGOs, business interest groups), but their role is not comparable to the role of state-actors.

Non-state actors recently managed to successfully initiate an international convention - the Ottawa Convention Banning Land-Mines. This could be an innovative exception, or it could be the beginning of a new method for formulating international regimes. The process and outcome from the WCD follow this same trend.

However, looking more closely at each of these examples, the role of sympathetic states was essential in such processes. This would likely be true, as well, of any such effort to deploy a regulatory framework or global bans for the mining industry. One only needs to begin to consider the role many governments play today in promoting their resource sectors (e.g. Natural Resources Canada) and the intense conflicts generated by many extractive issues, to reach this conclusion.

It is also typical, that governments' mines ministries or departments are under pressure from and are influenced by pro-industry trade associations and interests. This is true under even some of the most progressive regimes or governments. It is not unusual for governments to appoint people to the environment ministry or department that have progressive, pro-conservation backgrounds and to appoint people with backgrounds in the extractive industries to posts in the mining or resource departments. Thus, a critical element of the potential success of any post-WSSD process on mining issues is likely to be in the interest and orientation of the government ministries involved and those playing a leadership role from governments.

An international regulatory approach to the mining sector is likely to be difficult to implement. This is true both because of the nature of the sector, and those who run key ministries and agencies, and due to the more general fact that the subjects of such protocols are sovereign states.

Additionally, multinational corporations could potentially escape from such a regulatory approach by establishing business operations in a country that is not a signatory of a given treaty. Due to the competition for investment in developing countries and due to their sometimes weak government institutions or oversight capacity, it is questionable whether countries that are the potential target of non-ferrous mining activities see it in their interest to adopt a restrictive international regime on mining. In the case of such countries, the free-rider problem would prevail and could make such a global regime ineffective. To the extent that such a view was prevalent among developing countries and governments with economies in transition, it would tend to undercut efforts to achieve comprehensive and effective global regimes. [3] It should be also noted that monitoring of compliance and the implementation of a sanction-system would also be difficult, particularly in regard to complex multi-issue or sector-wide regimes. [4]

---

[3] It would be different if the OECD would subscribe for binding regulation and would demand it as a prerequisite of investment in any country – as dominant part of FDI originates from OECD countries. The OECD wanted to use this type of leverage to extent the reach of MAI globally despite that it was negotiated within OECD.

[4] From multilateral environmental agreements only the Kyoto-protocol of the UN FCCC has such mechanisms. However, the area of trade under WTO possesses a much stronger and more effective regime from this aspect.

One approach to solving the challenge of complex regimes is to separate their content by issues and develop self-contained protocols on these issues, which are negotiated separately. In the case of mining, such separation of some key issues is possible (e.g. banning mining in "no-go" zones, banning" tailings disposal in water, or certain other "no-go" practices).

2.6.2   ECONOMIC INSTRUMENTS

Economic instruments are also related to state action and very difficult to aggregate on an international level (e.g. tradeable permits under the Kyoto protocol). Such instruments also have the problems of verification as well. However, there are examples of where such approaches have worked effectively on a national level. This approach also fits effectively into the dominant economic ideology of the day, which is driven by markets and the use of economic incentives.

Upon closer inspection, it becomes difficult to imagine how most of the core issues related to mining could be addressed through such an approach because many of these impacts do not easily lend themselves to such instruments. This certainly holds true for environmental concerns like riverine and submarine tailings disposal, cyanide and heavy metals pollution, lack of adequate closure planning and bonding. It is hard to imagine a system that trades a polluted river for some other asset or value, or for a clean river in some other location. Some might argue that economic instruments could be developed to create incentives to prevent mining in protected areas, but such protection is probably bettered managed through outright bans and other restrictions. Again, the idea of trading-away one place for another is fraught with peril. It is also difficult to imagine how such schemes would apply to issues such as community consent, open access to information, and accountability to communities.

Another such issue could be the creation of incentives to not mine—i.e. incentives for re-use, recycling, product substitution, etc. Thus, a company could earn some form of government, economic or image benefit from

pursing non-extractive solutions to fulfill societies needs for minerals and materials.

2.6.3 VOLUNTARY INSTRUMENTS

Voluntary Instruments are defined as tools (e.g. voluntary codes, eco-labeling, schemes) whereby firms make commitments to improve their environmental performance beyond what the law demands. According to critics, voluntary regimes to be useful must include credible regulatory threats or some means of enforceability, credible and reliable monitoring, third party participation and penalties for non-compliance. Such regimes cover four basic categories, with different tools depending upon the participants in the development of the scheme and the circumstances under which it was created:[5]

1. **Public voluntary programs**: involve commitments devised by a governmental or regulatory environmental agency and in which individual firms are invited to participate. Since participation in the voluntary programs is a choice left to individual companies, they can be seen as 'optional regulations' eg. EMAS in the EU.

   The little empirical evidence that is available shows that public voluntary programs do have some positive environmental impacts, although they are likely to be modest. Such programs typically lack the incentives necessary to abate above and beyond existing regulations.

   A company's primary motive to participate in such programs is typically either the existence of (profitable) 'no regret' pollution abatement actions or through receiving the benefit of public recognition. Such motives are not always successful because pollution abatement can become a costly business. In the end, such voluntary programs may lead to lower real environmental improvements than negotiated agreements.

---

[5] The classification and the evaluation of various voluntary instruments is based on: Voluntary Approaches for Environmental Policy. An Assessment. OECD, 1999.

2. **Negotiated agreements** involve commitments for environmental protection developed through bargaining between a public authority and industry. They are frequently signed at the national level between an industry sector and a public authority, although agreements with individual firms are also possible.

   Sometimes targets and monitoring results may be expressed in rather ambiguous terms, and hence, assessment of performance may be difficult. For instance, targets may be expressed in terms of percentage reductions of unspecified qualities whereas reporting data are expressed in absolute terms. Typically, no interim targets are set; hence interim goals attainment evaluation is plainly impossible. This creates a problem of lack of credibility vis-à-vis the public.

   Environmental effectiveness of negotiated agreements appears modest. There is evidence that industry plays too central a role in the target setting process, the scope for free riding is significant, and there is uncertainty over regulatory threats. In the implementation stage, this approach tends to perform poorly due to non-enforceable commitments, poor monitoring and a lack of transparency.

3. The **industry** acting independently without any involvement of a public authority sets **unilateral commitment**s. The Responsible Care program[6] is a well-known example of a unilateral commitment made by the chemical industry in many countries. These commitments are usually responses to regulatory threats and/or to existing or potential legislation. Often these

---

6 Responsible Care - chemical industry: Emerged in Canada and the US after the 1984 disaster that killed some 2500 people and injured many more at a Union Carbide subsidiary in Bhopal, India. By April 2001, chemical industry associations in 46 countries have adopted the initiative, which promotes improvement in environment, health and safety performance for the industry. Public recognition was the primary motivation when the Responsible Care program was initiated. It is based on the presumption that rising abatement costs are partially a function of negative public perception. A 1989 survey found that the chemical industry ranked only above the tobacco industry among ten industries studied in terms of public image. Chemical industry executives agreed that unless something was done to improve public opinion, firms would be increasingly unable to build and operate new plants in the United States. They also considered the possibility that negative public opinion would lead to more stringent regulation, and in turn to higher abatement and operation costs. The first Responsible Care code to be implemented was the Community Awareness & Emergency Response.

regulatory threats derive from public pressure generated by a high-profile spill or environmental accident.

Unilateral commitments mainly target a single sector. There is evidence that US commitments tend to result in greater efforts towards achieving credibility than those in Europe and Japan. Many of these schemes make provisions for third party verification or sanctions, such as dismissal from an industry organization or association, in essence a form of corporate peer pressure. Target formulation is a significant problem. Most of these schemes are qualitative and process oriented in nature, rather than quantitative, and leave significant room for interpretation at the time of implementation.

4. **Private agreements**: reached through direct bargaining between stakeholders: polluters and those impacted or concerned with impacts. These can occur on a location specific basis, for example with those directly impacted or on an industry wide basis. An example of the former is the "Good Neighbor Agreement" negotiated between communities living near a mine in the U.S. state of Montana and the company, the Stillwater Mining Company. In this example, the company was seeking "consent" to expand the mine operation. As part of its negotiation with the community it made a number of legally binding commitments that went beyond statutory or regulatory mandates. It also provided the community with resources that they control, to hire experts to monitor compliance. Private agreements can also seek to be industry-wide in nature.

2.6.4 CERTIFICATION

Certification can be used as a tool in cases of unilateral commitments, as well as in cases of private agreements – depending on the way the scheme is designed. This wider possibility enables companies to foster a more progressive image, by using some elements of third party certification process (private agreement) without meaningful third party involvement (unilateral commitment).

The use of market pressure, or market benefit, through "certification" schemes is a relatively new type of global mechanism, although a direct line can be traced from more traditional boycott strategies (such as those used against the Apartheid system in South Africa) to such systems. This is because the threat of boycott, or of damage to the brand reputation or image of a company is often a central component of the strategy.

Certification schemes, those that seek to "guarantee" that certain practices are followed, have begun to proliferate. They take a number of forms, typically depending on which entity is driving change. It is not unusual for a number of competing schemes to do battle to establish legitimacy.

Certification schemes can be categorized into four types:

1. **First party certification**: a single firm develops its own rules and reports on compliance.

2. **Second party certification**: an industry or trade association fashioning a code of conduct and implementing reporting mechanisms for its members, (Chemical Industry's Responsible Care).

3. **Third-party certification**: involves an external group, often an NGO, imposing its rules and compliance methods on a particular firm or industry (Forestry Stewardship Council) or seeking to accomplish this through direct negotiation with some of those in the sector.

4. **Fourth-party certification**: involves governments or multilateral agencies, (UN Global Compact).

Some fear that certification driven by activists and/or corporations will preempt or supplant altogether the role of states and international governmental organizations in addressing corporate accountability as free trade expands around the globe. Others see this as an important and potentially positive development in a globalizing world, as a way for NGOs to bring concerted pressure to bear on corporations that operate globally in an

era when national governments and international government institutions are ceding authority to corporations. One important issue in their success, or failure, is likely to be the degree to which such schemes are responsive to the concerns and issues faced directly by impacted communities. Many NGOs see such schemes as a complement or even potential leverage for change, rather than a replacement for government oversight. This results from an experience where governments are often less willing to lead, and would rather have various actors in a dispute reach a resolution, that governments then codify. Some see this as preferable because it presents opportunities to set high standards. Thus, third-party certification is seen by some as preferable to fourth-party certification, which is more likely to lead to lowest-common-denominator solutions.

A key element in the potential of any certification scheme is the real and perceived independence of the certifiers. Thus, third-party certification is preferable, but even in this case it is essential that the certifier breakaway from reliance on industry funded contracts. Otherwise, they will be seen as avoiding controversial conclusions, as their living depends on the good will of industry.

---

3.   THE CURRENT PROPOSALS

3.1   CANADIAN/SOUTH AFRICAN PROPOSAL

> ### *"For some civil society groups, minerals and metals are part of the problem, not the solution"*[7]
> ### --- *Martin Walters, NRCan*

Natural Resources Canada and the South African Department of Minerals and Energy are seeking to coordinate and lead a group of governments in proposing an intergovernmental meeting, as a "type 2" partnership, within or outside of the UN framework[8], a year after WSSD. The purpose is to create a forum in which to discuss the key issues related to sustainable development in the mining sector. The idea of the proposal can be tracked back to October 2001, when it was presented at the meeting of GEMEED ECOW, in Acapulco, October 2001.[9]

From an earlier draft and from a review of the current draft text[10] the aim of the proposal is to create an intergovernmental forum, which addresses the issues of the sector from an integrated perspective, and to understand the implications of various decisions and discussions underway in other fora in the sector. Implicit is the idea that such a government- initiated process would create a form of super-structure, in an informal way integrating or absorbing discussion underway in other forums. The rationale of holding

---

[7] From the presentation 'After the World Summit on Sustainable Development. The Way Forward for Minerals and Metals' of Martin Walters, NatRes Canada, ECOW 2001, Acapulco, October 15, 2001.

[8] The intention of the Canadian/South African proposal is unclear from this aspect – it intends to capitalize on the WSSD process as a source of legitimacy, but there was no certainty in earlier stages of the proposal that it is the right way ahead.

[9] 'After the World Summit on Sustainable Development. The Way Forward for Minerals and Metals' of Martin Walters, NatRes Canada, ECOW 2001, Acapulco, October 15, 2001.

[10] NatRes Canada: Sustainable Development in the mining/metals sector. The need of a global dialogue of governments. 11 March 2002.

such an intergovernmental forum is supported by the following arguments: There is an increasing local diversity in the "life cycle of the sector": more and more mining is taking place in developing countries, while the later the stages of the mining life cycle (e.g. processing and product manufacturing) are focused in developed countries. It is argued that governments need to understand how various stages of this life cycle have an impact on each other, on affected communities and on poverty alleviation.

There is scrutiny and pressure on the sector, which has led key actors to examine the sector's contribution to sustainable development. The actors referenced by NRCan and the South African Department of Minerals and Energy include the industry sponsored MMSD research project, the World Bank's EIR, and GMC (a network of NGOs). Governments have established regional processes to consider their role in the industry, but there is a need for governments to enhance cooperation, coordination and synergy within these established fora and to look at their activities on a global scale. The Canadian/South African proponents of the proposal argue that it would help governments to become full participants in the global debates.

The meeting, to be held a year after WSSD, is proposed to evaluate the result of various processes, and to promote more integrated approaches to policies and strategies with existing decisions-making activities or organizations that affect the sector. It also seeks to promote transparency, anti-corruption practices and accountability. The meeting proponents seek to "encourage" the participation of stakeholders. They also call on relevant intergovernmental organizations to participate; *however they list them separately from stakeholders*.

In general the proposal seems based upon a premise that an effort needs to be made to realize the potential synergies of processes and intergovernmental institutions in and related to the mining sector. It responds to the recent proliferation of processes and dialogues on issues related to the mining sector. It is envisioned that governments take this opportunity as a

springboard to seize leadership or control by creating a unified global process of rule setting in mining.[11]

The proposal strives for wide government participation, so it includes a call for capacity building for developing countries as well as countries with economies in transition. The balance and weight of various stakeholders in the proposal is unclear, as the paper is too general. However, keeping in mind the historic interest of the governments of Canada and South African in promoting the mining industry, particularly Canadian companies, and considering the role of Canadian mining companies world-wide, it is very likely that the elaboration of Canada and South Africa's proposal would be, or would be seen to be, more favorable to the industry than to other stakeholder groups.

Also, it will likely draw on increasingly antiquated notions of stakeholder representation – democratically elected governments represent the will of the society in a given country. If the process was housed within the UN system, these problems would be exacerbated by difficulties associated with the practices and challenges associated with operating within the UN system.

In effect, the Canadian/South African proposal appears to assume that the role of governments is to represent these community and civil society interests, rather than creating a process that allows civil society groups to represent themselves in a direct way. While one can see the theory that leads to this assumption, and can understand that a government agency would propose such a solution, is fails to respond to the realities that many stakeholders face today and to the emerging role played by NGOs as a vehicle for public expression.

Too often, industry has more influence over governments than the public, affected communities or civil society. Thus, governments are seen as representing the agenda of the industry sector rather than representing the public interests. It is arguably this very phenomenon that has led to the rise

---

[11] It is an attempt to reverse the process in which the authority and sovereignty of governments is eroding worldwide. Although this process is driven by a group of countries interested in strengthening the position of their companies, which are players in mining worldwide.

of the stature and reputation of civil society groups and to the development of a number of "regulatory" models that work around states. Unfortunately, the Canadian/South African proposal appears to ignore or gloss over this reality.

It also creates the danger of burying potential solutions by creating an empty process for critical stakeholders that fails to lead to concrete commitments or create real incentives for changed behavior in the mining sector. Such an intensive process could consume most of the resources of community-based and civil society participants. And, if history is a precedent, it would likely lead to lowest-common-denominator solutions, if any. Further, the creation of such a process has the potential to hijack other potentially more meaningful processes and could create a false impression, amongst the interested public, the press and decision-makers that the issue is taken care of, although it provides little if any real improvements. [12]

It is important to note that while proposing a process, the Canadian/South African proposal does not define its intent or hoped-for outcomes. Given the current description of the project and its objectives, it is likely that the following results would occur:

- Due to system inertia and the central organizing or convening role played by Mines Ministers, it would likely result in proposals that were minimal in regard to important human rights, community rights and environmental issues.

- It would be likely to encounter the lowest-common-denominator problem associated with negotiations that occur under the auspices of the UN and other intergovernmental negotiations.

- Industry actors are able to exercise greater influence on the process than other stakeholders and the governments that are leading the process would be more sympathetic towards them.

---

[12] The Rio process is a good example of process streaming of various issues with very moderate outcomes in comparison to the needs and promises.

- The process would likely be too wide and shallow in participation and under-resourced (in case of UN setting), for stakeholders to be effective.

Interestingly, the industry is not explicitly supporting this proposal. They may share similar concerns, albeit from a different vantage point, and may fear the potential to lose control of such a process. And, if the industry agenda is to move towards a second-party certification scheme, within a very short time frame, through ICMM, the industry's new global trade association, then such a governmental process threatens to slow-down such efforts. Thus, while the industry is unlikely to publicly oppose the creation of such a process, if such a process were to be established, the industry would be likely to focus on advancing its agenda, irrespective of the nature and pace of a government-sponsored process.

3.2   UNEP PROPOSAL

UNEP proposes a "Global Forum on Mining, Minerals and Metals"[13] for the coming two years as a pilot phase. They propose it to be a platform for multi-stakeholder dialogue on mining, minerals, metals and sustainable development. The tools of the forum for promotion of best practices for sustainable minerals development (sic) would be:

- Information exchange

- Sharing experiences among regions

- Promotion of responsible mineral investment

- Helping measure and verify progress achieved against set targets

It is argued by UNEP that due to difficulties with the implementation, enforcement and lack of sanctions in most multilateral environmental agreements, a new way of interaction is needed for 'improving environmental stewardship and integration of economic and social aspirations into national sustainable development'. It intends to optimize the work of existing regional

---

[13] UNEP, Global Forum on Mining, Minerals and Metals. Draft for Discussion, 25 March 2002

groups (MMSD regional groups, APEC GEMEED, CAMMA etc.) and to expand into other regions.

It is envisioned that the Forum would be facilitated by a coordinating team/secretariat of three people hosted by UNEP, and they would work under the guidance of a multi-stakeholder steering committee of 18-24 people. The composition of the steering committee would have a "governments with a representative mix of developed and developing countries; financial institutions (World Bank, regional development banks and export credit agencies); labor; NGOs (environmental and community); international professional associations (such as ICOLD); academia; and industry representatives." The set up of a steering committee with such proportionality of interest would very likely be unbalanced towards governments (which are represented by the named IFIs as well) and towards industry (professional associations and a large part of academia tends to gravitate in this direction).

The UNEP proposal contains a few interesting elements in its objectives. It emphasizes that the proposed forum would aim to engage all legitimate stakeholders, but it fails to define the boundaries of what they think of as legitimate. It provides an unbalanced approach to various stakeholders when it mentions the use of existing regional and global mechanisms – which due to the current situation, refers mostly to intergovernmental and industry organizations. It also commits to supporting the distribution of MMSD regional reports and related recommendations to all stakeholder groups with the aim that "mining, minerals and metals developments can contribute to sustainable regional development".

The degree to which the UNEP proposal represents a balanced approach is debatable at best. For example, the recommendation to utilize the MMSD regional reports is troubling. Whatever their substantive merits or demerits, they are not viewed as a legitimate basis for discussion amongst all stakeholder groups.

Particularly troubling, is that the work program of the proposal also refers to MMSD recommendations (the global, not the regional ones) as well as WSSD outcomes as the basis and framework for the discussion within the forum.

Why are the MMSD recommendations put on a co-equal basis with WSSD outcomes? How will other input for discussion be factored into the process?

The proposal seeks funding for the activities from foundations and governments in advance of PrepCom IV of the WSSD. UNEP and within it the Division of Technology, Industry and Economics (DTIE), is proposing to be the convener of the forum. This raises at least two concerns: The first of these concerns is credibility amongst stakeholders. Many feel that the track record of UNEP regarding the Cyanide Management Code does not provide assurance for a proper stakeholder process. Along with the approach of UNEP towards the criticized Global Compact of the UN, it can be said that UNEP DTIE looks more favorably on industry than on other stakeholders.

The other ground for concern is the very weak nature of UNEP. It is a UN agency, which permanently suffers from lack of funding, adequate staffing and organizational problems – along with the obvious lack of influence and political power. Even if the UN has the motivation to engage with the industry (e.g. Global Compact), UNEP has a much stronger motivation:

- To find additional sources of financing

- To find additional recognition and some fragments of political influence, by compromising its environmental mandate

3.3   GMI/MMSD

The Global Mining Initiative, first proposed in 1998, was originally founded by nine of the world's largest mining companies, but in its final stage it involved more than 30 mining companies. It had three main components:

Creation of the International Council of Metals and Minerals (a new global industry trade association with a "sustainability" mandate).

The Mines, Minerals and Sustainable Development Project (a two-year research and consultation process that culminated in a recently released report on "mining's contribution to sustainable development).

A global conference, Resourcing the Future, held in Toronto in May 2002, with more than 160 presentations and high-level participation from the mining industry.

The stated purpose of MMSD was to identify the contribution that mining can make to sustainable development and to identify some of the related problems, by reviewing existing knowledge, submissions and research. Four regional processes were also held that lead to the writing of regional reports and the commissioning of 12 country baseline studies.

Civil society groups have criticized the project because it claimed to be a multi-stakeholder process, but was in fact industry-funded, driven, and designed. That said, most civil society groups have no quarrel with an industry-funded self-analysis of these issues and think much of the recently published report has merit, despite a number of major gaps.

The final chapter of the MMSD report is entitled "An Agenda for Change"[14] and includes proposals similar to those being promoted by NRCan and the South African Department of Minerals and Energy and UNEP. However, the members of ICMM do not support the findings and proposals of the final MMSD report unequivocally, thus the proposed initiatives of the report might easily fall short of support from significant sectors of the industry.

Much of the report is in fact contradictory and suffers from the urgency with which the report was prepared. The proposal section of the report contains a mixture of proposals and ideas with varying degrees of concreteness and an uncertain likelihood of being realized. In fact, the proposal section reads like a series of trial balloons.

However, despite the lack of clarity and coherence, this proposal provides evidence of the emerging industry agenda. It is worth noting that only a few

---

[14] . Please note that this analysis was prepared on the basis of a version of the report issued in may 2002, since the MMSD project organizers have produced multiple versions and are well past the expected publishing date for the final report, it is not yet clear to us if this proposal, in the current form or at all, will make it into the version of the report that will be circulated at WSSD.

of the enlisted recommendations found their way to the ICMM Toronto Declaration[15].

There was, however, a new element in the final set of suggestions from the MMSD report: a Forum on Mining, Minerals and Sustainable Development, which in its name bears similarities to the UNEP proposal but in its content closer to the Canadian/South African proposal discussed above. However, it did not find the support of ICMM.

It should also be noted that there is a dichotomy in the motivation of industry actors around ICMM: they want to 'fix the issue' as soon as possible, with quick action, but on the other hand they feel the need of some products, which can be achieved only via longer consultative processes as there is a differing level of interest, even among members of ICMM. Those that ICMM committed to (mostly in a weak, non-binding language) are the following[16]:

- Expansion of the current ICMM Sustainable Development Charter, according to recommendations of the MMSD report (the so called Declaration) and development of best-practice protocols that encourage third-party verification and public reporting (the so called Protocol).

- Attempt to improve community development management tools and systems, with the World Bank and others.

- Creation of an emergency response register for the industry.

- Attempt to resolve the questions associated with protected areas and mining, in partnership with IUCN and others.

---

[15] ICMMM Toronto Declaration. 15 May 20002. URL: www.icmm.com - accessed on 21 May 2002

[16] The listing does not include the enlisted items with the weakest language – which expresses no more than a wish list: constructive dialogue with key constituencies, assist members understanding sustainable development, promote the concept of integrated materials management, promote sound science-based regulatory and material-choice decisions that encourage market access etc.

In fact, an even better source of information, as to likely industry next steps, is the ICMM implementation plan. From a review of this, it is clear that ICMM will seek to list a number of type II partnerships as part of the WSSD process in regard to reporting guidelines, so-called "community development management tools," and biodiversity conservation. These are described in this excerpt from the ICMM implementation paper:

FROM THE ICMM PAPER:
Reporting Guidelines: In partnership with the Global Reporting Initiative and others, initiate a multi-constituency process to develop a harmonized system of reporting guidelines for the mining, minerals, and metals sector. An important component of this reporting system will be designed to disclose information on HIV/AIDS policies, practices, and programs for those companies with operations where this endemic is a significant mining-related community health concern.

Community Development Management Tools: In partnership with the World Bank Group and others, develop management tools to assist industry, governments, and other parties in developing and implementing community development strategies. This joint project was approved recently by the World Bank Group and will be initiated in the near future.

Biodiversity Conservation, Protected Areas and Mining: In partnership with IUCN-The World Conservation Union and other relevant public and private organizations, undertake a program of work to address priority issues such as "no go" areas, with the goal of holding a joint workshop on Biodiversity Conservation, Protected Areas and Mining at the World Parks Congress in Durban, September 2003.

3.3.1 THE DECLARATION AND THE PROTOCOL

The most elaborated proposal from the MMSD report is in regard to the Declaration and Protocol. This is the most important idea that ICMM retained from the MMSD report.

The Global Declaration on Sustainable Development and its follow up process is designed to be an industry driven process. The Declaration is

planned to be a unilateral declaration with the objective of developing a set of commitments that could soon be adopted by companies, to establish a commitment to a longer-term process of "multi-stakeholder engagement, to develop the more comprehensive and specific guidelines for responsible management in the minerals industry". In conclusion, the paper states that immediate action is more important than some kind of independent certification system, a Protocol or a stewardship council.

The process of development is divided into three stages:

A unilateral declaration through which the industry pledges to review ICMM's charter in light of the MMSD conclusions and commitments, to develop a set of measurable criteria which could later on form parts of a modular Protocol, established by ICMM for its members.

Establishment of a detailed protocol with the involvement of key stakeholder groups. The Protocol would address all issues regarding mining and sustainable development down to individual minerals facilities or projects. It would also address a system of third-party verification. Individual parts of the Protocol would be negotiated separately and in case of agreement on a specific issue, it could be adopted without waiting for other pending issues. The whole Protocol is planned to target risk reduction for the industry. It is envisioned as a guarantee of lower risk for investors and insurers.

In this third phase of the application of the protocol, it is envisioned that the discussion would become more involved and consider company-wide applications. In this phase, the issue of "product certification for certain mineral commodities" is raised.

The process of the Declaration and the subsequent Protocol is likely to be highly problematic for many actors (particularly affected communities and civil society groups) as the Declaration is a unilateral product, while the process leading to the elaboration of the Protocol is also industry controlled and stakeholder inputs are not guaranteed to be considered equally. Thus the process is far from providing equal ground for stakeholders. It appears to be driven by a perceived need to get a result in an effort to appear to be

addressing those issues that are negatively affecting the public perception of the industry.

Also, the Protocol intends to be a tool for product diversification (marketing). It would seek to lower risk in the sector. These are the key issues related to the proposed 'higher standards':

- Are these standards satisfactory to affected communities and do they address the core environmental issues and the risks associated with these issues?

  The aim of the industry is to separate those actors who have less risk from those that have more risk. The new branded product will target investors and insurers for better terms. Large multinationals are more likely to get involved in this process than junior companies who have significantly fewer resources and may be unlikely to make the necessary investments.

  Due to the current imperative, with particularly low metals prices, to maximize profit and reduce costs, they will try to balance the costs of risk reduction with potential gains. The net result is that it will be difficult for the industry to establish standards that are high enough to meet the expectations of affected communities and civil society groups. Such standards are unlikely to be set, due to their cost and/or difficulty without considerable pressure.

- Is third party verification reliable? Consultants, who are entrusted with verification, are not always neutral because they earn their living from industry contracts.

- The Declaration and the Protocol may simply provide a tool that allows some companies to isolate themselves from what are perceived to be the worst actors, practices and disasters, without really addressing the fundamental problems that the industry faces. In essence they may seek to use this Protocol in an effort to establish a more positive public image, rather than having that image set by the worst performers. The problem for these companies is that many of them are actually the causes of some

of the worst problems, despite their efforts to point the finger at other operators.

3.3.2   COMMUNITY DEVELOPMENT MANAGEMENT TOOLS

The main theme of community relations is to the establishment of Community Sustainable Development plans, developed on the basis of Integrated Impact Assessments.

Integrated Impact Assessments are described as including all significant social, economic and environmental issues and as a means to identify community concerns. It should be noted that such integrated assessments, are tools that can be easily distorted, as the weighing of various values and issues (e.g. economic gains versus the impact on the environment, economic gains versus the impact on traditional culture), which are based on subjective judgment, are the driving force behind a pro-industry cost-benefit analysis.

According to the MMSD report, Community Sustainable Development plans "should be based on the community's concept of how the mine can best contribute to achieving its social, environmental and economic goals." However, the MMSD text does not give a 'no mine' option for these plans – they can only supplement government action, while it is envisioned that the relationship of company, government and the community are organized through the plan development. On the positive side, it is envisioned that the framework of the plan can provide space for improvements and progressive actions (e.g. revenue sharing, post-closure plans etc.), but by the nature of the framework, community concerns, particularly where the community doesn't want a mine or approval, can be subsumed into a cost-benefit analysis where the community loses.

It is highly problematic that the proposal encourages the World Bank to take the first steps in exploring the possibilities of Community Sustainable Development plans and to clarify the roles and responsibilities of various actors. The Bank has a negative track record on social development issues, advocates uniform solutions for diverse circumstances and lacks the professional capacity to address social issues, in their complexity. Rather than the principal or pivotal group, the World Bank should be one of a number of actors, with an outside, independent agent organizing such a

process. The ICMM declaration does not refer directly to consultations or work with communities on this issue.

3.3.3 EMERGENCY RESPONSE REGISTER

The MMSD report suggests the establishment of an international Emergency Response Facility, which would not require ongoing staff, only a coordinator and a register of experts. Experts could be called on an 'as needed' basis.

The aim of the facility as described is "to supplement government capacity to assess, respond, and control accidents and emergencies or to reduce the chance of them happening". It is questionable that such a facility or register would have a genuine affect on reducing the risk of accidents.

Supplementing the government response capacity in countries that have a low level of capacity would be beneficial, although developing the in-house capacity of governments or promoting cooperative agreements amongst governments in a region, would make an even better contribution. Such an approach can erode governments' authority.

Industry's control in emergency situations can raise similar concerns as voluntary instruments of regulation – as accidents are the industry's worst problem. Further, such a mechanism may create new problems, as those sent in to help respond are seen as agents with a vested interest. The mining industry, rather than independent experts or government officials, are tasked with representing the interest of the public. Unfortunately, whatever the intentions of the authors of the report, such a facility is likely to be seen as a public relations vehicle or a method of responding to bad publicity.

This could manifest itself as a tool deployed to mitigate the negative public perception problem that mining accidents incur. The facility would aid in benefiting the industry (through communication and public relations strategies, along with consultants providing expert opinion that the given company did nothing wrong). Given the experiences of affected communities and civil society organizations in recent years, with such responses to industry accidents, it is hard to imagine such a facility gaining legitimacy if it was run under the auspices of ICMM or a similar body. Their genuine

harm-reduction impact is impaired by the fact that the mobilization of such teams would require time. It is a general rule that in case of emergencies and accidents, that most can be done to minimize impacts within the first few hours after the event. As time goes on, the efficiency of belated emergency response is less and less effective in reality (exponentially decreasing). The usefulness of such a facility is rather limited, but it can provide an efficient tool for public relations activities. It can improve the image of the industry by lessening the negative perception of accidents caused by the industry.

3.3.4 ISSUES OF PROTECTED AREAS AND MINING

The MMSD proposals are rather brief on the issue of protected areas and it emphasizes only the need to increase the collaboration of actors, such as IUCN, governments, and NGOs. The possible issues, which are alternatives, for this collaboration are the following:

- Multi-stakeholder forum to achieve consensus on no-go zones

- Development of a package of 'better practice' guidance on mining and protected areas

- Establishment of criteria that can be used to decide if mining is possible near protected areas

- Improvement of decision-making to make it more transparent, around the assignment of protected areas categories

- Mapping of scale and extent of threats to and opportunities for protected areas posed by mining and other sectoral activities

The proposal should contain options of various types – with a range of a more comprehensive or more limited approach (e.g. more sustainable mining in protected areas) is potentially troubling. This could be read as either an effort to establish a commitment not to mine in protected areas or an effort to promote the development of criteria that would allow such mining to occur.

Due to the brevity of the introduction of the proposal it is not possible to judge the details, but the list provides ample opportunities to establish a process, procedures or a code which would do little good for protected areas but would give an impression that there are rules to follow and if they are followed, things are in order.

3.4 COMPARISON OF THE THREE PROPOSALS

ISSUE	Canada/ South Africa	UNEP	GMI
Who would initiate the process?	Intergovernmental process with unspecified stakeholder input	Multi-stakeholder process	Industry led processes
Is there a definite framework/agenda for the process?	Yes	Yes	Multiple frameworks, but not elaborated
Is there a definite leading group for the process?	Yes: governments	No: multi-stakeholder steering committee	Yes: industry
Are there equal opportunities for various stakeholder groups in the process?	No, governments are dominant	No, governments and industry can have more input and possibly higher representation in the steering committee	No, industry would lead
Which are the stakeholders to be involved in the process?	Industry, labor, indigenous groups, NGOs, governments	Governments, financial institutions, labor, NGOs (environmental and community), international professional associations, academia, industry	Industry, groups like, IUCN, World Bank, unspecified
How is the agenda set for the process?	By governments	By the multi-stakeholder steering committee	By ICMM

ISSUE	Canada/ South Africa	UNEP	GMI
What is the framework/limitations of the agenda?	Discuss mining related issues	Contribution of mining and minerals to sustainable development	Improvements in mining (no basic questions of its legitimacy)
What is the time frame for the process?	Meeting a year from WSSD, then start of process	Two years pilot phase	Unspecified
Possible PR value of the process for industry	Moderate	Moderate	High
Possibility for communities to raise their concerns on an equal footing	Limited	Limited (community NGOs)	Little if any
Possibility for NGOs to raise their concerns on an equal footing	Limited	Limited	Limited to certain groups

The primary shortcoming of all three proposals is that none give equal footing to stakeholders to set the agenda and the rules. All three of them are limited and framed by a given stakeholder/interest group according to its interest with various degrees of effort to present it as a multi-stakeholder process or to seek input into a process that they are designing, not one that is being designed mutually. While the UNEP proposal is the most open to a multi-stakeholder balance, it is unlikely to lead to concrete, positive results. None of them would provide an opportunity for genuine and balanced discussion/progress among stakeholders, but would generally serve the interest of the industry and/or some governments, or at least establish conditions that would allow the process to be driven by the industry. The ICMM/MMSD proposal is the one that incorporates the least effort to create a

multi-stakeholder approach, although the discussion of no-go zones and the elaboration of the 'Protocol' which involve some stakeholder participation. The question of enabling communities and NGOs with enough resources for meaningful participation in the process is not discussed in any of the proposals. In truth, the lack of a balanced approach of the three proposals renders this question irrelevant.

The ICMM/MMSD agenda is the one that has the most cohesion, especially in its most recent manifestation in the ICCM agenda, as the participants in this process are the most focused (mostly industry). It also is not portrayed as a participatory process for gaining legitimacy, although ICMM does seem to want to create some opportunities for input and consultation, which it controls. In essence, stakeholders can contribute to the discussion and may be encouraged to, but the process will be driven by and decisions made by ICMM. The other two are less likely to lead to a concrete result as they would require the involvement of more stakeholders and it would make any kind of agreement more difficult. It is likely that the ICMM/MMSD plan is the one which can be realized fastest and thus it can bring a set of measures which strongly resembles the Responsible Care program of the chemical industry (which focuses primarily on a shift in risk perception and public opinion).

3.5   WSSD PROCESS

The WSSD text under negotiation is to be completed in Johannesburg and is to provide a framework for actions toward sustainable development. The Agenda 21 produced in Rio does not refer to mining as such, however, the current negotiating text has a reference to mining and minerals, although to a very limited extent (in comparison with the size of the full text). The key areas for the focus of current negotiations are: water and sanitation, energy, agricultural productivity, biodiversity and ecosystem management, health.

The discussion of mining and minerals in this process have been promoted by Canada and Australia with an intervention by the G-77 countries in order to have reference to small-scale and artisanal mining. At PrepCom III there was a comprehensive Canadian proposal to amend the negotiation text. The intention of Canada and Australia was to include language to the text, which

acknowledges the contribution of mining, and minerals to sustainable development via economic development. The Canadian proposal also included language that would support and create a basis for the above-mentioned Canadian/South African proposal (e.g.:"build on existing mechanisms and work, enabling interested governments to work more closely with all stakeholders").

It is interesting to note that the EU had two proposals for language: the first tried to expand the reference to mining, minerals and metals sector to the extractive sector (which would effectively widen the Canadian/South African proposal in regard to participation) and the second proposed that in building on current mechanisms, in partnership with industry and other stakeholders, a high standard of regulation and management should be achieved in the sector (i.e. support for regulation in contrast with voluntary approaches). In government negotiations Canada also proposed language that would support its proposal on mining.[17]

For PrepCom IV, the Chairman's text (the basis proposed for further negotiations)[18] includes little on the Canadian and Australian proposal. While the Canadian/South African proposal wanted to 'build' on existing mechanisms, the new text refers to the "use" of these mechanisms and refers to existing "partnership arrangements, to promote greater efforts, transparency and accountability for sustainability of the mining and minerals industry;"[19]. In this way the current Chairman's text would support mechanisms (including partnerships), which will be existent at the time, when the WSSD adopts the final text.

---

[17] Consolidated text on governance, May 15 2002: Role of international institutions, para 19. :[Integrate, as appropriate, programmatic initiatives of the Johannesburg Summit across [the formal jurisdictional boundaries of]*(EU)* sectoral institutions and ensure the involvement of the relevant elements of civil society and the private sector. In this context [establish [mechanisms]*(Canada)*]*(EU)* **modalities** *(Canada)* to follow-up the new partnership arrangements included as part of the Johannesburg outcome. Participation of major groups in this context should be enhanced.]*(Australia)*

[18] Chairman's Text for Negotiation. Advance Unedited Text . Commission on Sustainable Development Acting as the Preparatory Committee for the World Summit for Sustainable Development Fourth Session9 May 2002. para. 41

[19] Ibid.

3.5.1 TYPE 2 ENGAGEMENT

Type 2 engagements are new tools developed by the UN to promote partnerships that are non-negotiated partnerships and initiatives by some stakeholders (major groups) to support the implementation of Agenda 21. Governments, international organizations or major groups can initiate type 2 partnerships. They can be arranged among any combination of partners, including governments, regional groups, non-governmental actors, international institutions and private sector partners. Preferably, they should involve a range of significant actors in a given area of work. There are certain basic requirements that each partnership is expected to fulfill. Such partnerships should be regional or international in their scope. They should clearly define their targets, expected results and timeframe, arrangements for funding, monitoring arrangements, and coordination and implementation mechanisms.

This initiative received strong criticism from many NGOs because such public-private private partnerships would be of a non-binding, non-enforceable nature. They are seen as substitutes for discussions or processes that led to concrete enforceable actions and commitments. The WSSD secretariat presented mining and minerals as one of the possible areas for a type II partnership, despite the fact that Agenda 21 does not address this. [20] According to the WSSD web-site, there is no type 2 partnership registered under minerals and mining as of 20 May 2002. However, it is likely that ICMM will promote at least three.

---

[20] The WSSD homepage lists the following cluster of areas for type 2 partnership: Energy, Freshwater, Oceans/Coastal Areas/Fisheries, Early warning / disaster preparedness, Desertification, Climate Change / Air Pollution, Agriculture / Food Security / Rural Development, Mountains, Biodiversity, Forests, Minerals and Mining. URL: http://www.johannesburgsummit.org/html/sustainable_dev/p2_protecting_managing_resources.html (accessed on 20 May 2002)

4. THE UNEP CN CODE: HOW NOT TO CONDUCT A MUTLI-STAKEHOLDER PROCESS

In May 2002, the United Nations Environment Programme (UNEP) announced the release of a "multi-stakeholder", *voluntary* Cyanide Code of approved practices, for the management of cyanide in mining operations. The effort to develop the "code" was prompted by cyanide spills from mines that have lead to significant environmental damage such as the 1998 spill at the Kumtor Mine in Kyrgyzstan and the spill in January 2002 that devastated a 250-mile stretch of the Danube River system in Central Europe as a result of the release of 100,000 cubic meters of cyanide and metal-laden gold processing wastes.

However, the "code" has come under fire from non-governmental organizations and communities affected by mining. Why? Because despite claims that the "code" was developed through a multi-stakeholder process, the process and the substantive result had major flaws.

Here are some examples of what not to do when conducting a multi-stakeholder process.

- Don't use industry funds to cover most of the expenses associated with the code process. For example, the website www.cyanidecode.org states: "Funding for Code development and industry involvement comes from the gold mining industry, cyanide suppliers and manufacturers."

- Don't rely primarily on UNEP staff funded, or seconded, directly or indirectly from the industry in question.

- Don't rely primarily on consultants and "experts" with industry backgrounds, particularly those that depend on the industry for their livelihoods.

- Don't establish a steering committee dominated by industry representatives and industry consultants.

- Don't hire a code "manager" who used to work in the industry, has served primarily as a consultant to the industry, and is seen by other stakeholders as pro-industry.

- Don't put The Gold Institute, a global industry trade association, in the driver's seat.

- Don't have industry representatives and trade associations play a lead role in the selection of the participants to the kick-off meeting of "stakeholders."

- Don't ignore input from NGOs and input offered from environmental scientists associated with NGOs.

- Don't have the substantive agenda set by industry interests, thereby failing to address the key environmental and public interest issues raised by NGOs. For example: absolute restrictions on cyanide releases into water; restrictions on the siting of cyanide process mines when they would threaten other environmental, natural resource or community values; and the need for iron-clad reclamation plans and guarantees.

The net result of such a process is a deeply flawed, weak "code" that fails to address the issue of concern to most NGOs and communities affected by mining. Consider the following examples: The most glaring failure of the "code" is that it fails to offer a truly independent review mechanism. The "code" fails to address, or adequately address, issues such as independent mine audits, the integrity and construction of tailings facilities and waste heaps, discharge of most of the contaminants in cyanide process fluids, adequate bonding, and mine closure standards. The proposed "code" only recommends testing on one type of cyanide. It proposes to only measure WAD cyanide, which fails to detect cyanates, thiocyanates, most cyanogens,

and all of the stronger metal-cyanide complexes, particularly iron and cobalt cyanides.

In the same regard, discharge of cyanide process solutions is mentioned in the document, and only a brief mention is made of other contaminants that need to be measured, including arsenic, mercury, antimony and a whole host of other metals and contaminants. Testing should be conducted for all contaminants potentially present in cyanide process fluids and the discharge of any contaminants at concentrations that would be detrimental to the environment or health should be banned. The code allows discharge of toxic water that will potentially adversely impact people and aquatic resources downstream. There is literally no mention in the document of the suitability of particular landscapes or ecosystems for mines utilizing cyanide. In areas adjacent to or upstream of important water, ecological, agricultural, cultural or aquatic resources, a mine that uses cyanide may pose too great a risk.

The "code" allows water pollution by allowing mixing zones. Mine facilities should not be allowed mixing zones to dilute mine pollution. Proper standards for the discharge of cyanide solutions should require that aquatic and drinking water standards be met <u>in the water being discharged.</u> The "code" fails to address the issues of mercury and other contaminants (metal oxyanions) mobilized during cyanidization, yet gold mining is one of the largest sources of mercury released into the environment. The "code" fails to adequately address closure issues, despite the fact that closure problems exist in almost every country that has a significant metals mining industry. Problems with closure are significant at modern gold mines that use cyanide as a processing agent.

5. STAKEHOLDER REPRESENTATION – NGO VIEW

The bottom line for participation in official processes varies greatly among NGOs and community groups – reflecting the diversity of the sector itself. Diverse working methods and approaches can strengthen each other if the organizations are able to agree on principles of engagement and stakeholder representation. The view of the author is that any multi-stakeholder or multi-stakeholder dialogue must include the following elements to be effective and that, to date, none of the existing proposals meet this test:

The agenda and the process must be mutually established and agreed by all participants.

- Transparency of the process and all investigation and analysis is critical.

- The process should be results oriented with a clear statement of purpose from the outset.

- A single issue-focused process is better than one that seeks to discuss and grapple with a multitude of issues and an entire sector.

- Governments and corporations must commit to mechanisms to respond to proposals arising from the dialogue process.

- There should be some sort of truly independent assurance process established to monitor any agreements or commitments.

- In case of agreement, there should be mechanisms, which would enable verification.

- In case of agreement, the non-compliance with commitments should be meaningfully sanctioned.

- Sufficient independent resources must be provided, as part of the process, to enable broad NGO and mining-affected community participation and consultations at a regional as well as a global level.

- Sufficient resources must be provided, as part of the process, to enable NGOs and mining-affected communities to undertake independent research.

- The speed and communication in the process should accommodate groups, which are challenged on these features.

- Transparency must be assured.