3.
Areas of Good Practice

Despite the many challenges associated with monitoring the mining industry, there are some strategies governments and civil society groups can use to help improve their efforts. This section presents policy options and areas of good practice that have been proposed or implemented in resource-rich countries throughout the world. Section 3.1 discusses how government agencies can structure their administrative architecture to achieve better monitoring. Section 3.2 discusses how legal frameworks—including laws, contracts and regulations—can be written to enable better monitoring throughout the life of the project. Section 3.3 discusses the role government oversight institutions can play in conducting their own monitoring of the extractive industries and in reviewing the executive branch's monitoring. Sections 3.4 and 3.5 discuss the value and importance of various monitoring partnerships, both within and outside of government. Finally, Section 3.6 reviews a series of options for how governments and civil society can use the information obtained through monitoring efforts to support better company compliance in the future.

3.1 Administrative Architecture

Government agencies have the primary responsibility for monitoring companies' operations to ensure they are fulfilling their obligations under the country's laws, regulations and contracts. These institutions must be structured in a way that encourages and allows effective monitoring to take place. In response to capacity and incentive challenges, some new administrative structures have been proposed and implemented, such as providing dedicated monitoring staff that are not involved in fulfilling other ministry functions. In tax and revenue collection, several countries have experience implementing innovative new administrative structures, including the creation of specialized large taxpayer units and semiautonomous revenue authorities. These policy options and examples of how they have been implemented are discussed in the following sections.

Separating Monitoring and Enforcement from Other Ministry Activities to Avoid Conflicts of Interest

As noted above in Section 2.3, government staff often face conflicting priorities in pursuing their work, and monitoring activities may take a back seat to investment promotion activities, such as permit approvals. To combat this problem, distinct functional groups may be established so no overlap exists between staff responsible for approving new permit applications or reviewing mining plans and the staff responsible for monitoring ongoing mining operations and compliance with legal obligations. Providing separate staff helps ensure that monitoring will take place and that important monitoring resources will not be pulled away for other priorities. After a recent audit of prospecting operations in South Africa, DMR officials report that they plan to provide separate dedicated staff for compliance monitoring to reduce the problem of having individual staff members spending too little time on monitoring when their other responsibilities conflict.

Box 5 | Change Management Challenges

Policymakers should note that making changes to administrative architecture might not always be entirely straightforward. Ministry leadership and staff may be resistant to change and may not want to share information or coordinate with other ministries. Furthermore, when changes are made, policymakers should make sure that the appropriate staff, information and resources are in place before transitioning monitoring responsibilities into new departments. Peru's experience with environmental monitoring highlights this point.

Peru transferred responsibility for environmental monitoring of the mining industry to a new government agency, the Organismo de Evaluación y Fiscalización Ambiental (OEFA), in June 2010. OEFA gained three responsibilities during this transition period: evaluation, supervision and oversight/control. In light of the close link between environmental harms and social conflict, OEFA's creation was widely celebrated. But its responsibilities were ill-defined, as was its authority vis-à-vis other government agencies. Furthermore, OEFA has not been given the resources to conduct meaningful environmental monitoring. Not only is OEFA underfunded, but also the Organismo Supervisor de la Inversión en Energía y Minería (OSINERGMIN)—the organization that previously managed environmental monitoring—reportedly refused to transfer staff or even case files to OEFA as part of the transition, at least partly because OSINERGMIN did not want to give up its staff to OEFA. Furthermore, although OSINERGMIN receives a percentage of what citizens pay for electricity, it also refused to transfer any of these funds to OEFA. So the results have been a disappointment. Despite hope for reform, for some the situation exacerbates a cynical perception that the government and mining sector will not tolerate serious encroachments on the industry's power.

Devoting Specialized Resources to Large Taxpayers to Maximize Returns

Traditionally, many revenue agencies were organized by "type of tax," meaning there were separate departments for each tax (e.g., corporate income tax, property tax, etc.), and the departments operated independently of each other. But recently there has been a trend, at least in developed countries, to organize the agency based on taxpayer segment.[53] As part of this move, some countries have created specialized large taxpayer units, or LTUs.[54] Many countries also specialize within their LTUs by industry, so that auditors can become familiar with the unique fiscal instruments and tax avoidance risks a particular industry presents.[55] Australia has an Energy and Resources Group for coal, gold, nickel, petroleum and gas companies; Ireland has a Mining & Energy Business Unit; and the United States has a department for Natural Resources and Construction.[56]

Creating specialized LTUs lets tax authorities devote special attention to some of the unique characteristics of large taxpayers, including:[57]

- *Revenue Concentration:* Large taxpayers can account for 30 to 70 percent of a country's fiscal revenues due to the large size of their operations and the multiple tax types they are required to pay.[58] As such they are an important source of revenue—and they also have a strong incentive to exploit tax loopholes wherever possible.
- *Complex businesses and tax arrangements:* Large taxpayers may have complex organizational structures, multinational transactions and complex financing arrangements.
- *Professional or dedicated tax advisors:* Because of the size of their businesses and their potential tax obligations, many large taxpayers employ professional tax advisors, while

53 Forum on Tax Administration, *Tax Administration in OECD and Selected Non-OECD Countries: Comparative Information Series (2008)*, OECD, 2009, 34, www.oecd.org/dataoecd/57/23/42012907.pdf.

54 A 2010 OECD survey reported that around 84 percent of revenue bodies surveyed had established a dedicated unit for large taxpayers. Forum on Tax Administration, *Tax Administration in OECD and Selected Non-OECD Countries: Comparative Information Series (2010)*, OECD, 2011, 40, www.oecd.org/dataoecd/2/37/47228941.pdf.

55 Forum on Tax Administration, 2011, 56.

56 Forum on Tax Administration, 2009, 47.

57 Forum on Tax Administration, 2011, 54-55.

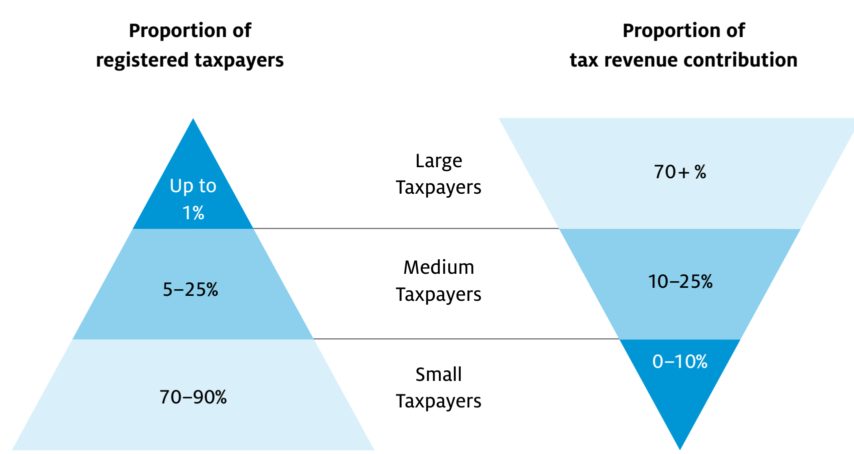
58 Junaid Limalia, "The Role of Large Taxpayer Units," *African Tax Administration Newsletter*, May 6, 2011, http://atafax.net/news/newsletters/ataf-newsletter-articles/the-role-of-large-taxpayer-units.aspx.

others have dedicated in-house tax organizations. These advisors sometimes push the companies they advise toward aggressive tax structures, which require closer government monitoring to prevent potential abuses.

LTUs have several benefits, including improving compliance among the largest taxpayers, improving speed of collection, and improving the business climate by providing more sophisticated tax administration services for large companies.[59] Although there are typically only a small number of large taxpayers, their relative contribution to tax revenues is high. For example, 1.2 percent of Ghana's taxpayers contributed 63 percent of its tax revenue in 2009.[60] Figure 5 below illustrates this phenomenon. Establishing an LTU allows countries to devote auditing resources specifically to the largest taxpayers and to train auditors to specialize in the unique challenges of taxes for large companies. Because of the scale of large taxpayers' contribution to tax revenues, even a small increase in their tax compliance can have a large impact on revenues.

figure 5:

Taxpayer Segments and Relative Contributions to Tax Revenue



Source: David Kloeden, *Revenue Administration Reforms in Anglophone Africa Since the Early 1990s*, International Monetary Fund (IMF), Working Paper WP/11/162, 2011, 26, www.imf.org/external/pubs/ft/wp/2011/wp11162.pdf.

In some resource-rich countries, there may be only handful of active, large-scale mining projects. For example, Zambia currently has eight large mining companies. An official in the Mining Unit of the Large Taxpayer Office of the Zambian Revenue Authority (ZRA) reports that they have gotten to know the companies well because of the frequency of interaction. This arrangement is helpful not only in developing good relationships with company counterparts, but also in identifying potential transfer pricing issues. Because there are only a small number of companies, the auditors know them and their corporate structures well. This allows the auditors to more easily identify related party transactions that they should scrutinize more closely for transfer pricing-related concerns.

59 William McCarten, *Focusing on the Few: The Role of Large Taxpayer Units in the Revenue Strategies of Developing Countries*, 2004, 12, aysps.gsu.edu/isp/files/0444_McCartenv2.pdf.

60 David Kloeden, *Revenue Administration Reforms in Anglophone Africa Since the Early 1990s*, IMF, Working Paper WP/11/162, 2011, 26, www.imf.org/external/pubs/ft/wp/2011/wp11162.pdf.

The DRC provides a counterexample. Rather than a centralized organization, multiple agencies are responsible for tax collection. The Office des Douanes et Accises (OFIDA) collects customs, duties and export taxes; the Direction Générale des Recettes Administratives, Domaniales et de Participations (DGRAD) collects mining royalties, various fees and surface rents on behalf of the Ministry of Mines; the Direction Générale des Impôts (DGI) is responsible for assessment and administration of the value-added tax (VAT) and taxes on profits and dividends. Moreover, other smaller agencies collect other fees and smaller taxes.[61] These authorities do not have the resources or capacity to conduct their tax collection effectively. A 2009 study by a commission of the Congolese Senate identified more than $450 million in lost revenues in the mining sector alone.[62] While consolidating tax collection within a single unit is neither inherently good nor bad, the division of scarce resources across multiple agencies may further exacerbate capacity constraints.

Creating Semiautonomous Revenue Authorities to Increase Accountability and Improve Performance

One major consideration for countries is how their tax departments are organized with respect to the rest of the government institutions. In a few developed countries, the tax administration is a semiautonomous body, or collection of bodies, within the ministry of finance and is responsible not only for tax collection but also for customs administration.[63] In a significant number of Organisation for Economic Co-operation and Development (OECD) countries, unified, semiautonomous departments are responsible for administering taxes. These bodies report directly to a government minister and can have a formal management or advisory board.[64] Other characteristics include hiring personnel outside the traditional civil service and making the department independent or self-financing. The financing can often come from a percentage of gross collections.[65] This model has also been adopted by many developing countries, including Malaysia, Ghana, South Africa, Tanzania, Zambia and Bolivia.[66]

This model of semiautonomous revenue agencies, or SARAs, tries to shield the tax administration from public and political pressure, and can contain its own accountability system. Accountability can be a particularly acute problem in countries where staff appointments are made as a result of political patronage, which tends to result in under-qualified staff, corruption and high turnover rates. For example, an estimated three quarters of Bolivia's internal revenue agency staff was replaced after a change in government in 1997.[67] Semiautonomous revenue systems are also attractive because they can be funded independently, rather than receive funding as part of a government ministry.[68]

Another benefit is in hiring professional employees; tax agencies contained within the general civil service may be unable to hire the specialized professionals needed for tax administration. A related benefit is that SARAs can help prevent situations in which revenue agencies are also partially responsible for oversight of other aspects of the mining project. This conflates the tax administrators' duties with those of other government regulators and further complicates an already difficult job.[69]

61 World Bank, *Democratic Republic of Congo: Growth with Governance in the Mining Sector*, 2008, 25, http://siteresources.worldbank.org/INTOGMC/Resources/336099-1156955107170/drcgrowthgovernanceenglish.pdf.

62 Commission d'Enquête sur le Secteur Minier, 96, 98-99.

63 Open Society Institute of Southern Africa et al., *Breaking the Curse: How Transparent Taxation and Fair Taxes can Turn Africa's Mineral Wealth into Development*, 2009, 43-44, http://documents.twnafrica.org/breaking-the-curse-march2009.pdf.

64 Forum on Tax Administration, 2009, 9.

65 Arthur J. Mann, *Are Semi-Autonomous Revenue Authorities the Answer to Tax Administration Problems in Developing Countries? A Practical Guide*, Fiscal Reform in Support of Trade Liberalization Project, 2004, 1, pdf.usaid.gov/pdf_docs/Pnadc978.pdf.

66 Robert Taliercio Jr., *Designing Performance: The Semi-Autonomous Revenue Authority Model in Africa and Latin America*, World Bank, 2004, 2, http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2004/10/27/000160016_20041027132024/Rendered/PDF/wps3423.pdf.

67 Taliercio, 5-6.

68 Taliercio, 4.

69 Jack Calder, "Resource Tax Administration: The Implications of Alternative Policy Choices," in *The Taxation of Petroleum and Minerals: Principles, Problems, and Practice*, ed. Philip Daniel et al., (New York: IMF and Routledge, 2010), 329-30.

One study has found that revenue agencies' performances improve most when the level of autonomy is relatively high and stable, and it cites Peru, Kenya and South Africa as prime examples.[70] According to the study, greater agency autonomy has had the most positive effect on human resource management. Pre-reform agencies had tremendous trouble attracting, training and retaining high-caliber staff, which can be a problem for countries trying to enforce complex mining taxes. Salaries for tax employees have increased, sometimes dramatically, though this can often be coupled with harsh downsizing. Another difficulty has been somewhat higher turnover as a result of "poaching" from the private sector. But improvements in performance have not resulted in substantially higher costs; rather, collection costs are comparable to, or less than, those of nonautonomous tax agencies in developing countries. Most SARAs have also been successful in increasing tax revenues, though the reasons for this are difficult to measure.[71]

Implementing SARAs frequently results in the creation of advisory boards, comprised of nontax professionals. The idea is to create an additional level of oversight and independent guidance. For example, the Canada Revenue Agency (CRA) is overseen by a board of management, which has most of its members nominated by the provinces and territories. The board oversees organization and management, including development of the agency's business plan and management of policies related to resources, services and personnel.[72]

Australia, the United States and others rely on special bodies independent of the revenue agency to report on and oversee tax administration. The Inspector-General of Taxation is an independent agency responsible for reviewing the Australian Taxation Office's administration of the tax laws. The agency's purpose is to report and recommend improvements to the government.[73]

However, despite some success stories, the overall effect of autonomy is difficult to measure, and studies differ as to how much of a country's recent improvements can be attributed to the establishment of a SARA. It is clear that autonomy by itself is not sufficient to solve a country's tax and auditing problems and that autonomous agencies may present their own challenges.[74] For example, some have argued that treating the tax agency differently could have negative impacts on other parts of government by causing other civil servants to resent the tax authority, which may create challenges for cooperation.[75] Furthermore, the ultimate goal of the model is to develop the revenue authority's autonomy from the ministry of finance, which can be difficult to achieve. Finance ministers tend to retain power and influence in several key areas, including making appointments to the revenue authority's board, determining tax policy, and providing funding.[76]

3.2 Legal Frameworks

The legal frameworks that determine mining companies' obligations, whether legislative, regulatory, contractual or a combination of all three, must anticipate how those obligations will be monitored and enforced in practice. Uniform legal frameworks help simplify monitoring by providing a single set of rules applicable to all companies operating in the sector. Government accountability for monitoring different types of obligations should be established in the legal frameworks. When those responsibilities are not defined up front, effective monitoring will be less likely to take place over the course of the project. Companies' obligations should also be clearly defined so government and civil society monitoring agents can determine whether an obligation has been fulfilled or not: clearly defined rules will be easier to enforce than vague standards. By considering these factors before granting mining rights, governments can improve their chances of successfully managing the mining sector in the future.

70 Taliercio, 11-12. The study does note, however, the difficulty in evaluating tax administrations: "It is difficult to measure with precision the marginal impact of tax administration reform on outcomes like revenue and debt collection, as many exogenous factors exert causal influence on these and other related outcomes." Even measuring autonomy itself is tricky.

71 Taliercio, 13-30.

72 Forum on Tax Administration, 2009, 19-20.

73 Forum on Tax Administration, 2009, 20.

74 Mann, 59.

75 Taliercio, 9.

76 Kloeden, 12-13

Defining a Uniform Set of Obligations to Simplify Monitoring Efforts

As noted above, the proliferation of multiple legal frameworks within a country's mining industry can make monitoring even more difficult because government and civil society monitoring actors must analyze each company's agreement individually to identify that company's obligations. By contrast, establishing a uniform framework for all mining projects simplifies monitoring efforts. Under a uniform legal framework, government and civil society monitoring actors must learn one common set of company obligations.[77] Establishing a company's obligations in law, rather than in individually negotiated contracts, is one way to establish a uniform legal framework. Using model contracts is another.

Model Contracts

Some countries have adopted model contracts that aim to improve the stability and uniformity of extractive contracts by limiting the number of contract terms that are open to negotiation. These contracts are most commonly used in the petroleum sector, but are increasingly being used by governments to regulate the mining sector as well. While they are not a substitute for a clear, effective mining code, model contracts offer potential improvements to the stability, transparency and equity of a country's extractive sector.

There is considerable variation in the way that these model agreements are drafted and what their roles are in the country's overall regulatory scheme. In countries where the mining sector is well regulated by a thorough, effective mining code, a model contract can be a short licensing document that provides a few project-specific terms and reaffirms the existing fiscal and dispute resolution mechanisms. At the other end of the spectrum are countries whose model contracts are lengthy documents that spell out every detail of a prospective mining or drilling operation. Because they uniformly establish many of the important terms of an agreement, model contracts can aid efforts to monitor mineral projects even when the actual contracts are not publicly disclosed.

Some countries have adopted model contracts that aim to improve the stability and uniformity of extractive contracts by limiting the number of contract terms that are open to negotiation.

Additionally, the way in which model contracts are incorporated into a legal system varies from country to country. In many cases, they are not formally adopted by the country's parliament, but instead are developed as a matter of policy by the mining ministry. In other rarer cases, model contracts are established through specific legislation that introduces the model agreement and lays out the rules and requirements for its use. The relationship the model contract has with the existing mining code and other regulations varies as well, though ideally when the contract is passed via legislation, the implementing legislation will specify when the model contract explicitly overturns existing legislative and regulatory provisions. Generally, the model contract will address only certain aspects of the regulation and will work in combination with the existing mining code to propound a complete regime.

For example, Mauritania adopted its model mining agreement by passing Law No. 2002/02, which sets out the economic, customs, fiscal and foreign exchange rules for mining projects, but does not change any of the titling, renewal or transfer provisions of the mining code of 1999. It also allows a company to revert to the fiscal terms established in the code at any time. In contrast, some countries' model contracts can add confusion to the regulatory regime by making no reference to the previous code and neglecting to clarify any ambiguity between the old and the new rules.

77 Note that some project-specific obligations, such as those defined in EMPs, will always remain, as discussed in Section 1.2.

How Do Model Contracts Improve Monitoring?

As discussed in Section 1.2, the legal context for extractive projects can vary considerably in complexity and variability, ranging from regimes in which the national mining code dictates most of the terms of an agreement and restricts derogations, to a model contract with one fiscal term as a variable, to lengthy mineral development agreements in which all terms are negotiable. In countries where a well-developed mining code is lacking or ineffective, model contracts provide increased uniformity of agreements. They also have the related benefits of improving transparency and reducing the cost and technical challenges of oversight for governments and civil society.

Uniformity Improves Oversight and Reduces Transaction Costs

In contrast to legal regimes in which each contract defines a separate and unique legal framework—thereby creating as many legal regimes as there are mining projects—model contracts offer some uniformity and clarify the terms and governing framework for the sector. This uniformity makes it easier for governments and civil society to monitor the contracts because it removes the need to make sense of and monitor multiple regimes.

Because they leave fewer terms open to negotiation than ad hoc contracts, model contracts can also reduce transaction costs. Negotiating complex mining agreements can require significant government resources, but having a model contract as the basis for negotiations reduces this toll and frees up government staff time for other activities, such as monitoring.

Transparency Enables Better Public Monitoring

When model contracts are publicly disclosed and reviewed by legislatures, as they should be, they can also play an important role in improving transparency. Model contracts that are available to the public and have very few variables left open to negotiation can provide most of the information relevant to monitoring efforts, such as the length of the contract period, fiscal terms, dispute resolution mechanisms and other key provisions. By setting the majority of the terms of present and future agreements and making them public, model contracts can also reduce opportunities for and suspicion of corruption in government negotiations. Conversely, significant deviations from the model agreement in actual contracts, while not conclusive evidence of corruption, may raise suspicions that special favors were negotiated.

Establishing Clear Monitoring Roles and Responsibilities to Increase Accountability

Government roles and responsibilities for monitoring and enforcement must be clearly defined. If no one is assigned to monitor the implementation of particular types of obligations, they are likely to slip through the cracks in terms of government oversight. This challenge is especially pronounced in MDAs, or large-scale contracts that define a range of company obligations with respect to a project, including social obligations. For example, Liberia's MDA with China-Union contains a section requiring the company to provide medical care. The full text of the contractual obligation is provided in Box 6. Although the mining, health and labor ministries are all possible candidates to monitor China-Union's compliance with this obligation, it is unclear who is ultimately responsible. Unless the Ministry of Health and Social Welfare was directly involved in the contract's negotiation, it is unlikely to even be aware of this provision, let alone be able to set aside sufficient resources to monitor its implementation.

Box 6 | Sample Contract Provision Requiring Company to Provide Medical Care

During its Operations, the Concessionaire shall maintain and operate or cause to be operated, health facilities to ensure the availability in each Production Area of medical treatment, care and attention in accordance with applicable Law, and such other improved standards as may be agreed between the parties. Such treatment, care and attention shall be free of charge for the Concessionaire's employees and their resident spouses and dependents. Government officials and/or employees assigned to and regularly employed in the Production Area in an official capacity, and resident in or adjacent to the Production Area, and their resident spouses and dependants, shall, during the time of such assignment, employment and residence, also be entitled to receive medical care on the same basis as Concessionaire employees. The Concessionaire shall further provide reasonable access to such health facilities to members of local communities for ambulatory or emergency care. It is understood that "reasonable access" may include the imposition of fees that are reasonable in light of the economic level of such communities, it being understood that such fees are unlikely to cover the cost of service.

Source: Mineral Development Agreement between the Government of the Republic of Liberia, China-Union (Hong Kong) Mining Co. Ltd. and China-Union Investment (Liberia) Bong Mines Co. Ltd., 2009, Section 10—MEDICAL CARE, http://www.leiti.org.lr/doc/Bong_Range_Signed_MDA_and_Schedules.pdf.

In these situations, it is unlikely that the communities, employees and government officials intended to benefit from the provision will see its full impact. This risk is particularly acute for a contract that remains confidential because the intended beneficiaries of the provision will be unaware that it exists and therefore unable to supplement government monitoring responsibilities with their own pressure for the company to fulfill its obligation. Wherever a company's obligations are defined—whether in laws, contracts or regulations—the government should also clearly identify which government ministries will be responsible for ensuring compliance with particular obligations.

Providing Clearly Defined Rules to Simplify Monitoring and Enforcement

Government and civil society monitoring and enforcement are made even more difficult when a company's legal obligations are vague or unclear. For example, while it will be relatively easy to determine whether a company has submitted a required report (they have either submitted it or they have not), it will be much more difficult to determine whether a company has provided "reasonable access" to medical care to communities surrounding a mine, as is required in the provision from Liberia's China-Union contract in Box 6 above.

Clearly defined rules composed of objective factors can be easier to monitor and enforce. Although such rules will not always be feasible, they can be implemented effectively in many situations. For example, Peru recently passed maximum permissible limits and environmental quality standards, which are expected to improve air quality and water pollution problems, along with citizens' quality of life. The World Bank reported that the prior lack of standards had hindered effective environmental monitoring and enforcement.[78] Clear limitations on pollution levels will allow the government to determine whether a company has complied with the law or not.

One of the biggest monitoring challenges for many countries is transfer pricing, defined in more detail in Box 7. The scale of the problem is enormous. Christian Aid estimates that developing countries lose $160 billion each year to transfer mispricing and false invoicing.[79] To combat some of the problems associated with monitoring transfer pricing, some countries have established clear, specific rules addressing how companies can calculate costs and prices for the purposes of calculating taxes and royalties. Using reference prices that both companies and governments agree on helps ensure more equitable tax calculations. Table 1 presents some transfer pricing challenges and rules that have been enacted to combat them.

78 World Bank, *Program Document for a Proposed Environmental Development Policy Loan in the Amount of US330 Million to the Republic of Peru*, 2009, 53, http://imas2010.files.wordpress.com/2010/07/program-document-wb-environmental-governance-loan.pdf.

79 Hogg, et al., 2.

Box 7 | Transfer Pricing and Its Monitoring Challenges

Large multinational companies often consist of groups of associated subsidiary companies located in different countries. These companies conduct transactions with each other, buying and selling minerals, providing services, lending money and so on. Transfer pricing refers to the "price, adopted for book-keeping purposes, which is used to value transactions between affiliated enterprises integrated under the same management."[80]

These transactions are a normal part of conducting cross-border business. However, transfer pricing becomes a concern for governments because it affects how much profit multinational companies report in the jurisdictions where they operate, and therefore the taxes the governments are able to collect. Abusive transfer pricing, in which companies set prices at artificially high or low levels in order to avoid paying taxes in higher tax jurisdictions, can result in large losses of revenue.

Transactions between related companies should comply with the arm's-length principle, which means that the "conditions of commercial and financial transactions between associated enterprises should not differ from the conditions that would be made between independent enterprises in comparable circumstances."[81] However, subsidiary companies may conduct cross-border transactions at distorted prices in order to make less profit in high-tax jurisdictions and more profit in low-tax jurisdictions thus reducing the overall tax burden of the multinational company.[82]

Similar problems can arise in transactions between companies and their subcontractors. Companies have incentives to artificially inflate subcontractor prices in order to reduce their tax liabilities. Because many companies and subcontractors are repeat players in the industry, they can collude to agree to higher than arm's-length prices for the subcontracts while working out private side agreements between themselves to represent a fairer allocation of the subcontract's true cost.

In the following excerpt, an OECD task force identifies the difficulties faced by developing countries in monitoring transfer pricing:

- in building tax administration expertise and experience in transfer pricing to enable them to carry out effective audits—especially when faced with experienced and well-advised taxpayers. The difficulty is likely to be particularly acute in applying transfer pricing rules to complex transactions, such as those involving intangible assets or some forms of services;
- with applying rules that require taxpayer and tax administration discretion in application. Transfer pricing is not an exact science and audits in practice may have to be resolved through negotiation and compromise settlement;
- in obtaining the information needed from taxpayers in order to select cases for audit or carry out an effective audit. Access to data on intra-group transactions, including the respective functions of the parties to those transactions, and their economic and commercial context, is vital to carrying out a reliable transfer pricing analysis. Tax administrations typically obtain such information through transfer pricing documentation, return requirements or information powers (which may be specific to transfer pricing or of more general application). Obtaining this type of information may be problematic for developing countries, especially in the context of an audit of a domestic company that is a subsidiary of an international group;
- in obtaining public information on arm's length conditions i.e. the conditions (for example, price or profit margin) in place for independent enterprises conducting comparable transactions under comparable circumstances. This is an issue that is repeatedly cited by developing countries as a significant difficulty to the implementation of transfer pricing rules.[83]

80 OECD, "Glossary of Statistical Terms: Transfer Price," http://stats.oecd.org/glossary/detail.asp?ID=2757.

81 Informal Task Force on Tax and Development, *Draft: Objectives of the Sub Group on Transfer Pricing*, OECD, 2011, 5, http://www.oecd.org/dataoecd/56/26/47521605.pdf.

82 Informal Task Force on Tax and Development, 5-6.

83 Informal Task Force on Tax and Development, 7-8.

TABLE 1 | **RULES TO ADDRESS TRANSFER PRICING CHALLENGES**

Transfer Pricing Challenges	Possible Solutions	Examples
A parent company finances a local project with an unduly high amount of debt. The interest payments on the debt reduce the local company's taxable profits.	Limit the percentage of project capital that can be financed through debt.	"Where a foreign controlled resident company has a foreign debt-to-equity ratio in excess of 3 to 1 at any time during the year of assessment, the amount of interest paid by the resident company during that year on that part of the debt that exceeds the ratio shall be disallowed as a deduction and an amount so disallowed shall be treated and taxed as a dividend." Botswana, Income Tax Act, 1995, 12th Schedule, paragraph 6.
A local company sells minerals to an affiliated company at a low price, reducing the value of the mineral for royalty calculations.	Calculate royalties based on international market price for a mineral, rather than the price at which the company sold the mineral.	"The base for calculating mining royalties is the gross sales value. The gross sales value is understood to be the amount that results from multiplying the weight of the refined mineral or metal content by its official price quote listed in U.S. dollars. "The official price quote is the bi-weekly average determined by the Executive based on the lowest daily price for spot transactions recorded on the London Metal Exchange, or, in its absence, on international metals exchanges or other exchanges, or in specialized publications of recognized international prestige, according to the regulations. "In the absence of official quotation for any mineral or metal, the gross sales value is the value stated in the bill of sale, Single Export Declaration, or equivalent document." Bolivia, Law No. 3787, 2007, Article 97.
A parent company charges a local company a significant amount of money for administrative services provided by the parent company, reducing the local company's taxable profits.	Limit the amount that can be deducted for home office costs.	"For the purpose of computing the chargeable income for any year of assessment of a holder of a mineral right there shall be deducted all outgoings and expenses which are exclusively and necessarily incurred by the holder for the purpose of exercising his rights under the mining lease and which are allowable deduction under the Income Tax Act calculated in the manner provided under that Act: Except that (a) in the case of head office expenses such expenses shall not exceed 1.5% of sales."[84] Sierra Leone, Mines and Minerals Decree, 1994, Article 103.

84 A better practice is to limit head office expenses to a percentage of costs, rather than to a percentage of sales. When the limit is based on sales, a company's allowable head office charges increase as its sales increase even though the head office expenses have not grown.

The provisions in Table 1 can be contrasted with more general transfer pricing provisions, which typically state that a commissioner can recharacterize transactions to reflect arm's-length prices. It is much easier for a tax official or a citizen to determine whether a company has charged more than a legally specified percentage of its costs for home office expenses than it is for those same individuals to determine whether a particular charge for home office expenses reflects arm's-length prices. Although these rules may be imperfect approximations of a fair arm's-length price, any errors at the margin are a small price in comparison with the certainty and enforceability they provide.

Additional resources on transfer pricing and tax advocacy:

- *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2010*, www.oecd.org/ctp/tp/guidelines.
- Christian Aid and SOMO, *Tax Justice Advocacy: A Toolkit for Civil Society*, 2011, www.christianaid.org.uk/images/completetaxadvocacytoolkit.pdf.
- Open Society Institute of Southern Africa et al., *Breaking the Curse: How Transparent Taxation and Fair Taxes can Turn Africa's Mineral Wealth into Development*, 2009, http://documents.twnafrica.org/breaking-the-curse-march2009.pdf.

Requiring Company Self-Reporting to Reduce Government Monitoring Burdens

Company self-reporting has become a common part of government monitoring structures. Instead of government agencies gathering all of the required monitoring information themselves, the government requires mining companies to calculate their own tax payments, conduct their own investigations, and to report to the government on their operations and compliance with their obligations. Government agencies then review the information the companies have provided and conduct any necessary follow-up. However, in order to enable meaningful monitoring, governments should require that these reports be:

- Based on internationally accepted reporting standards
- Regular and timely
- Transparent
- Open to auditing and requests for additional detail

The conditions listed above help ensure that governments have access to the information they need with the level of detail and in the format they need, at the appropriate points in time. For example, for tax and royalty figures, governments must ensure they have enough detailed information to make their own calculations about what a company owes. In order to identify and correct transfer pricing issues, auditors will want to know which companies were involved in particular transactions, what goods or services were involved in the transactions, and what prices were paid. Aggregate financial figures will not permit these kinds of calculations. When government inspectors need access to particular types of information, they should ensure that their reporting requirements reflect those needs. This may include detailed financial reporting as well as copies of contracts for significant transactions between related parties.

Another good practice is requiring companies to publicly disclose production volumes, costs and sales by mine, on a monthly basis. This detail should be provided for transactions that involved affiliated companies and those that did not. Such disclosure allows the public to monitor transfer pricing issues and makes it easier to expose manipulation.

Internationally accepted reporting standards, such as the Mining and Metals Sector Supplement to the Global Reporting Initiative's G3 Guidelines, are available to guide companies and governments in these efforts. The G3 Guidelines provide reporting principles and performance indicators for economic, social and environmental indicators. To support transparency, the EITI provides a framework for companies and governments to publicly disclose their tax payments and receipts.

Governments may also ask companies to report on areas of particular concern to enable better monitoring and tracking of high-risk issues. For example, in response to a rise in mine deaths, South Africa's DMR began requiring mining companies to provide health and safety reports.[85]

Third-Party Verification of Company Reporting

Although company self-reporting is a useful tool to assist with government monitoring, it does not eliminate the need for government agencies to rigorously review company reports and conduct independent investigations. There are two potential risks when companies report on themselves:

- The information provided may not be accurate.
- The reported information may not indicate compliance with the company's legal obligations.

Requiring third-party verification of company reports helps address both of these challenges. Governments can require that a third party verify the results of the company's report before it is submitted to the government. The government may also enlist the help of these third parties to ensure company reports are in the format and contain the level of detail the government needs in order to reduce time spent reviewing these reports. The government can specify what kinds of third parties are acceptable and may require certain certifications or credentials of the individuals or companies that verify results. Requiring particular credentials helps ensure that the third parties will provide meaningful, quality reviews, and requiring certification provides increased incentives to the third-party reviewers to act professionally and ethically since their certifications can be withdrawn for cases of malpractice.

Stock exchanges require third-party verification of securities disclosures to help ensure accuracy to protect investors. The scandal that helped lead to the third-party verification requirement for the Toronto Stock Exchange (TSX) is summarized in Box 8.

Box 8 | The Bre-X Scandal and Expert Verification of Reports on the Toronto Stock Exchange

In the mid 1990s, the Canadian company Bre-X Minerals Ltd. claimed it had found the world's largest gold deposit in Indonesia. Bre-X was publicly listed on the TSX, and investors flocked to get a piece of the company; the company's share prices nearly quadrupled in four months. But before production could even begin, the public discovered that the company had falsified samples and that its concession area in Indonesia contained only insignificant amounts of gold. It was one of the biggest stock market scandals in Canadian history. Bre-X stock plummeted, and investors lost billions of dollars.

The fact that the company had been able to raise significant amounts of money on the stock exchange—based on false information—alarmed investors. The TSX was a crucial market for junior mining companies to raise the money necessary for mineral exploration, and its value to the industry appeared to be in jeopardy.

To help protect investors, and ultimately the mining industry as well, National Instrument 43-101 established standards of disclosure for mining projects, including how mineral resources and reserves can be reported. The new rules required that mining company reports under the new instrument be written by or under the supervision of a "qualified person" who has no ties to the company. This requirement helps ensure that mining companies are not reporting false information about their mineral reserves. Investors do not have the time or resources to verify the information that companies provide via their stock exchange disclosures, but private third-party verification helps do so.

85 Ruona Agbroko, "SA to require miners to submit health and safety reports," *Mineweb*, April 21, 2011, http://www.mineweb.com/mineweb/view/mineweb/en/page504?oid=125571&sn=Detail&pid=92730.

figure 6

The Process and its Players

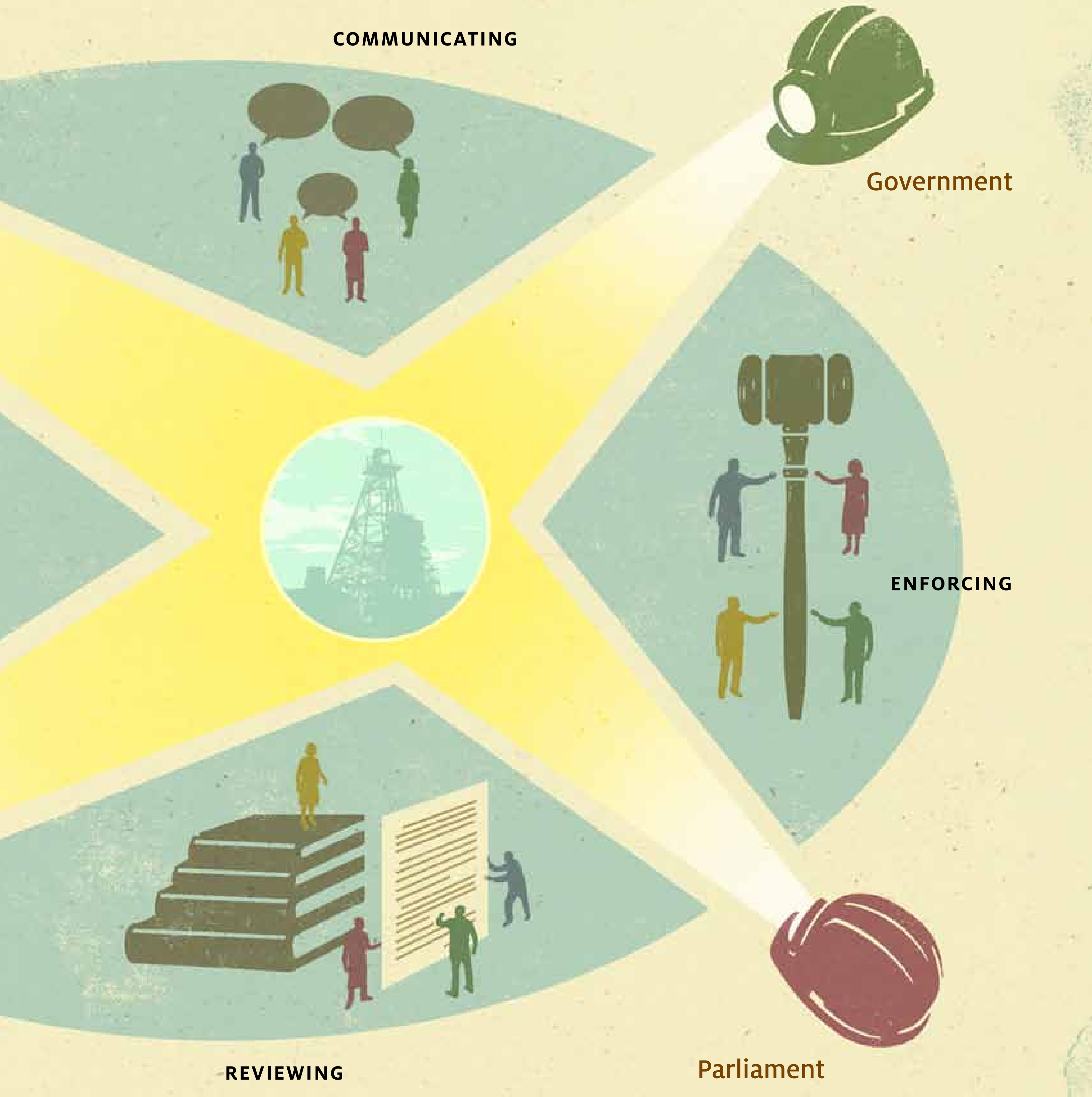
Monitoring the mining industry includes several actions, each linked to the others. They include:

- reviewing laws and contracts to understand companies' obligations,
- monitoring companies' activities to determine compliance with those obligations,
- communicating information to address any areas of non-compliance, and
- enforcing laws and contracts when companies fail to comply.

For the process to work, monitoring requires participation and cooperation from a range of actors throughout the life of a mining project. By working together, companies, civil society, parliament and government can effectively conduct the oversight necessary to avoid potential social and environmental harms.

All actors must examine contracts and laws to understand companies' obligations. Governments and companies must share information including not only contracts, but also ongoing project details, such as cost, revenue and production figures. Civil society and parliament can improve governance by scrutinizing the activities of both companies and the government.

Not least, all parties must communicate to see that companies fulfill their legal obligations and the countries involved fully benefit from their resource wealth.


COMMUNICATING
Government
ENFORCING
REVIEWING
Parliament

Designing Tax Regimes to Maximize Returns and Ease Enforcement

Certain tax systems are better suited for developing countries trying to maximize the value of their mining resources. Different taxes include: corporate income tax; progressive profit tax; resource rent tax; import duties; VAT; royalties; and various nontax instruments. Some of these are easier to administer and thus can be more attractive to countries with limited auditing capabilities. But ease of administration should not be the dominant policy; if the potential gains from a complex tax system outweigh the losses from inefficiencies in the administration of such a system, it should still be strongly considered.[86] There are a number of factors for governments to consider, including the specificity and uniformity of the tax regime; ease of administration and reduced costs; and ways to limit opportunities for corruption.[87] Whatever tax regime a country chooses, a uniform regime eases the administrative burden.

The standard corporate income tax has substantial benefits in terms of ease of administration. This is largely because it does not require a separate tax regime, so tax officials will already be familiar with the framework and administrative procedures. However, other considerations may predominate; for example, since many mining ventures operate as projects rather than as firms, ring-fencing has to be taken into account.[88] With this tax, corporations also find it easy to avoid tax liability through techniques such as transfer pricing.[89]

Some tax regimes include a progressive profit tax, which allows countries a greater share in the upside of highly profitable mining projects. However, since these are often done on an ad hoc basis and require additional oversight, it can increase the burden on the tax administration. Part of the difficulty lies in calculating which revenues are applicable—determining whether to include ancillary income, financial income, gains on disposal of license interests and so on. Further complications involve determining applicable costs, for example, how depreciation should be calculated.[90]

In designing a tax regime, officials should consider the specificity and uniformity of the tax regime, ease of administration and reduced costs, and ways to limit opportunities for corruption.

The same can be said of resource rent taxes, which effectively act as a back-loaded tax on profitability over and above an investor's return on investment.[91] While implementation of such a tax can be burdensome on unsophisticated revenue agencies, this should not be automatically disqualified. Furthermore, the basic skills for enforcing a resource rent tax are comparable to those required for a basic income tax. Administrative burdens can be minimized by measures that simplify the auditing process. These include consolidation of tax sub-regimes, use of standardized contracts, reliance on familiar industry and accounting standards, coordination of various tax rules, and simplification and reduction of particular provisions in the tax code.[92]

VATs have frequently been introduced. Since they generally target domestic consumption, various mechanisms, such as refunds, have been used to ensure that export-oriented industries, including mining, are shielded from the VAT burden. However, monitoring and implementing these mechanisms can be burdensome on under-funded or under-staffed revenue agencies, which may be unable to pay refunds in a timely fashion. VAT refunds can be quite substantial, particularly during investment periods. Faced with such administrative hurdles, some countries often take shortcuts in granting exemptions, which create loopholes for companies to exploit.[93]

86 Calder, 324.

87 Otto et al., 10-12.

88 Ring-fencing is the practice of taxing separate mining projects individually rather than allowing a single company to combine all of its projects within a country for tax purposes. Ring-fencing is beneficial to the government because it prevents a mining company from writing off costs of one project against revenues from another in order to pay lower overall taxes.

89 Thomas Baunsgaard, *A Primer on Mineral Taxation*, IMF, Working Paper WP/01/129, 2001, 6, www.imf.org/external/pubs/ft/wp/2001/wp01139.pdf.

90 Baunsgaard, 7-8; Calder, 321.

91 Baunsgaard, 8.

92 Calder, 326-27.

93 Baunsgaard, 11.

Royalties are an important method for governments to recoup the value of the country's natural resources. Royalties are fees based on the quantity of material produced, or its value. Royalties guarantee income up front, even if the project is not profitable. With regard to administration and auditing, many types of royalties are easy to administer and difficult to evade because revenue agencies are able to determine a company's liability based only upon a company's total sales or amount of production. This has the benefit of lowering administrative costs—including those associated with higher expertise—as well as reducing corporations' incentives to attempt to shirk responsibility. The simplicity of calculating royalties can also limit opportunities for corruption.[94]

Royalties can take different forms. The *ad valorem* form, which takes a percentage of a mineral's value, is presently the most popular. However, unit-based royalties, which set a fixed charge per unit, are often applied to industrial minerals. Some countries with more competent revenue agencies have been moving toward profit- or income-based taxes. For example, nearly all Canadian provinces have replaced traditional royalties with adjusted income taxes. The U.S. state of Nevada and the Northern Territory in Australia have made similar moves.[95]

However, these types of royalties may not be best for countries with less administrative ability. Unit and ad valorem taxes do not require cost accounting and are therefore easier to enforce and less vulnerable to manipulation than systems based on profits or net income. For example, calculating the profit base can be very complicated, especially since this profit can be different from financial accounting profit; thus, companies can be required to keep a separate set of accounts and accounting systems, which can be conducive to error or intentional misrepresentation. This in turn creates additional labor-intensive work for auditors, and potentially heightened legal costs as a result of more litigation. Meanwhile, unit-based royalties may be more appropriate for low-value bulk commodities, which have less price volatility. By the same token, ad valorem royalties may be preferable for higher-value commodities, or large-volume operations.[96]

An additional element of taxation regimes is the form in which payments are accepted, particularly the distinction between in-kind and cash payments. Some governments accept royalties in kind, meaning royalties paid in resources—typically oil or gas—as opposed to cash payments. Payments in kind present additional administrative and auditing challenges in that the resources received must be carefully measured and accounted for, a requirement that caused serious concern in the United States's royalty in-kind program. It was discontinued in 2010 as part of a "'commitment to ensuring that royalty collection on behalf of the American people is conducted transparently, accurately and fairly.'"[97] In-kind payments also raise transparency concerns; the payments are often the subject of special contracts between industry and government, which are rarely released for public scrutiny.[98]

3.3 Government Oversight Institutions

Nonexecutive branch government officials can and should play a significant role in ensuring that the mining industry is managed effectively. Parliaments, supreme audit institutions, ombudsmen and human rights commissions have all taken on monitoring roles in various countries. Their reports and advocacy efforts can help provide more information to civil society and to improve executive branch monitoring effectiveness by calling attention to concerns and shortcomings.

94 Baunsgaard, 10; Otto et al., 1, 11.

95 Otto et al., 37.

96 Otto et al., 38, 66-70.

97 "Interior Completing Close-Out of Royalty in Kind Program" (press release), U.S. Department of the Interior, Sept. 24, 2010, http://www.doi.gov/news/pressreleases/Interior-Completing-Close-Out-of-Royalty-in-Kind-Program.cfm. On the challenges with the U.S. royalty in kind program, see Project on Government Oversight, *Drilling the Taxpayer: Department of Interior's Royalty-In-Kind Program*," 2008, http://pogoarchives.org/m/nr/rik/report-20080918.pdf.

98 Testimony of Danielle Brian before the House Committee on Natural Resources, Sept. 17, 2009, http://www.pogo.org/pogo-files/testimony/natural-resources/nr-rik-20090917.html.

Parliament: Increasing Transparency and Accountability

Parliaments in resource-rich countries can play an important role in working to increase accountability in how the executive branch manages the extractive sector. Members of parliament can push for more transparency and can share the information they have with citizens who are leading monitoring efforts. In some cases, parliaments have also conducted special investigations to understand governance concerns in their countries' natural resource sectors, with the ultimate goal of improving how they are managed.

Democratic Republic of Congo—Scrutinizing the Executive Branch

Following the presentation of the DRC's budget in 2008, the country's senate noted that the government's receipts from mining had been quite weak. As a result, the senate created a special commission to investigate the mining industry with an ultimate goal of improving revenue collection to bolster the country's budget. The commission, headed by Sen. David Mutamba, collected information and statistics, carried out investigations, and conducted surveys and interviews to identify and understand problems in the country's mining industry. Through its investigation, the commission made several interesting findings, including:

- **Underreporting of production volumes,** which affects taxes and royalties: In a one-month period, the mineral quantities reported on transport documents were systematically reduced by 10 times for certain exporters compared with the quantities reported in loading documents.[99]
- **Undercollection of surface rents:** The government collected only 31.37 percent of all surface rents and therefore missed out on more than $30 million.[100]
- **Insufficient statistics:** Government ministries did not collect necessary statistics; therefore they could not identify the operators active in the country or the volume and quality of their mineral production.[101]
- **Illegal tax breaks:** Mining and finance ministers reduced tax rates illegally, in violation of the Constitution and to the detriment of the treasury.[102]

The Mutamba Commission's mandate and ability to access information about the mining ministry allowed it to bring to light some alarming problems facing the country. Armed with this information, parliamentarians and citizens can work to hold their executive branch officials accountable for their shortfalls in monitoring and managing the mining industry.

South Africa—Parliamentary Questions

South Africa's Constitution gives the national assembly authority for passing legislation and scrutinizing and overseeing the executive branch.[103] Officials in the executive branch must answer questions they receive from Parliament, and, because Parliament's activities are public, this mechanism is an important way of holding the executive branch accountable to the people.[104] Parliamentarians can use this oversight mechanism to monitor the executive branch's management of the mining sector and to ensure it is enforcing companies' obligations. For example, in May 2011, the Minister of Water and Environmental Affairs received a question about a coal mining company's environmental transgressions, whether the company had been fined, and whether the company had paid any relevant fines. The Department of Environmental Affairs responded to the question in writing, noting that the company had been fined more than 9 million rand and that the payment had been received.[105]

99 Commission d'Enquête sur le Secteur Minier, 41.
100 Commission d'Enquête sur le Secteur Minier, 37.
101 Commission d'Enquête sur le Secteur Minier, 126.
102 Commission d'Enquête sur le Secteur Minier, 127.
103 South Africa, Constitution, 1996, art. 42(3).
104 Parliament of the Republic of South Africa, "Oversight," http://www.parliament.gov.za/live/content.php?Item_ID=27.
105 South Africa, Department of Environmental Affairs, "Question 1405," May 2011, http://www.environment.gov.za/ParliamentUpdate/2011/may/question1405.pdf.

One official in the DMR noted that citizens can go through their representatives to use this parliamentary question mechanism to get information about the mining industry, and that this method may be faster and more reliable than using the country's access to information law.

Judiciary: Enforcing Obligations in Situations of Noncompliance

Capacity challenges within government are not solely a problem for the executive branch. In the judiciary, judges, prosecutors and magistrates all must be educated and empowered to actively oversee the extractive industries. Zambia's Copperbelt Environmental Project, which works to improve how the government manages the environmental impacts of the country's mining sector, has included trainings for the judicial branch to ensure that environmental violations are taken seriously and are prosecuted effectively.

Lack of this sort of training can have a serious impact. One region in South Africa had no successful prosecutions for health and safety violations in the last eight years even though the lead inspector recommended 13 cases for prosecution in 2010 alone. This low rate could be attributed to having prosecutors assigned to the DMR located in another province and lacking the technical experience necessary to understand the nature of mine accidents.

To partner effectively with the judiciary, government agencies must also train their own staff on legal issues. DMR inspection engineers with technical background and knowledge of relevant legislation would be better able to identify incidents when someone from the mining company may be liable and to gather sufficient information during their inquiries to support a later legal prosecution.

Government agencies that want to improve enforcement of mining companies' obligations should consider the judiciary as a partner in this process and can train judges, magistrates and prosecutors to help achieve this goal. Civil society groups can also work with the judiciary to help its members better understand the unique aspects of the mining industry to improve overall enforcement.

Supreme Audit Institutions: Investigating Government's Management of the Mining Sector

Supreme audit institutions (SAIs) conduct independent audits of governmental bodies. They typically investigate the use of public resources, which often involves analyzing the efficiency of government agencies and the quality of their work, including the government's management of the natural resources sector. Since SAIs often publish the reports of their findings publicly, their conclusions and the information they gather through their investigations are available to the government ministries audited and to the public at large. The investigations can help improve how the government manages the mining sector by giving government agencies an independent assessment of their work and recommendations for areas for improvement, and by publicizing the results, allowing citizens to understand shortcomings in the government's management of the sector and to demand better government accountability.

A 2005 report by the auditor general of the Canadian province of Ontario looked into the provincial government's mines and minerals program. One of the audit's objectives was to determine whether the Ministry of Northern Development and Mines had adequate procedures in place to ensure compliance with provincial policies and legislation. The resulting audit report identified several problems with the management of the mineral sector and made corresponding recommendations for how the ministry could improve its performance in the future. The report also included the government's response to each recommendation.[106]

INTOSAI, the International Organization of Supreme Audit Institutions, has formed a working group on environmental auditing to encourage SAIs to examine concerns related to environmental protection and sustainable development. The group recently produced a report specific to mining

106 Office of the Auditor General of Ontario, 184-85.

that includes stories of institutions that have audited environmental concerns related to mining.[107] One of the stories was about Indonesia's SAI, which conducted an audit of two tin companies to ensure they were fulfilling their legal and contractual obligations. The SAI based the audit on the government's mining and environmental laws, and found that both companies had failed to conduct appropriate reclamation efforts at some of their mining sites.[108]

Human Rights Commissions and Ombudsman Offices: Providing a Voice for Citizens

Human rights commissions and ombudsman offices can help protect communities from negative impacts of mining. Commissions often hear complaints from citizens, and will work with companies and citizens or communities to help resolve the underlying concerns. In Zambia, for example, the human rights commission hears a large number of complaints related to employment concerns in the mines. The commission investigates each complaint and identifies appropriate remediation strategies. In Peru, where mining is the number one cause of social conflicts, the country's ombudsman hears and helps mediate many complaints that communities file against mining projects every year.

Besides investigating and mediating individual complaints, human rights commissions may also make recommendations to other government agencies based on their investigations. The Philippines' Commission on Human Rights recently recommended that the government withdraw OceanaGold Ltd.'s mining right due to violations of indigenous people's rights. Loretta Ann Rosales, the head of the commission, reported that the company had violated indigenous peoples' rights to adequate housing and freedom of movement, as well as their right to culture and identity.[109]

3.4 National and Government Partnerships

Partnerships can help address some of the challenges created by problems of capacity, transparency and incentives. Partnerships can draw from the capacities or resources of the better endowed partner—typically industry—to shape a mechanism intended to allow the other partners to develop capacity and confidence in the process. Partnerships can also involve would-be competitors. Some governments require oil companies to operate in JVs with each other so minority company partners can monitor the operating partner's operations, including for transfer pricing issues that can be extremely difficult for governments to monitor effectively. Involving communities and civil society organizations offers an opportunity to confront contrasting interests and incentives.

To be effective, the checks and balances in partnerships must be carefully calibrated and monitored over time to ensure that potential benefits are reached. Otherwise, partnerships can be undermined when one partner dominates, or can lose legitimacy for other reasons. National and government partnerships are addressed in this section, while local and community partnerships are presented in Section 3.5.

Partnering with Private Sector to Enhance Public Sector Capacity

When government ability to monitor is weak, some countries, including Zambia and Angola, have asked private companies for assistance.

Private Financial Audit in Zambia

In 2009, the Zambian government hired Grant Thornton LLP and Econ Pöyry to conduct financial audits of mining companies, including Mopani Copper Mines (MCM), which is jointly owned by Glencore and First Quantum Minerals.[110] The MCM audit, which was leaked, identified several irregularities in MCM's tax payments. Most notably, the mine's costs had increased significantly

107 Working Group on Environmental Auditing, *Auditing Mining: Guidance for Supreme Audit Institutions*, INTOSAI, 2010, http://www.environmental-auditing.org/LinkClick.aspx?fileticket=Ffqb%2f3zmeZ8%3d&tabid=128&mid=568.

108 Working Group on Environmental Auditing, 47.

109 Manny Mogato, "Govt. should consider withdrawing OceanaGold's mining rights—rights commission," *Mineweb*, Jan. 17, 2011, http://www.mineweb.com/mineweb/view/mineweb/en/page504?oid=118629&sn=Detail&pid=110649.

110 Ed Stoddard and Chris Mfula, "Tax issues at Konkola Copper Mines, First Quantum—Zambian Finance Minister," *Mineweb*, June 17, 2011, http://www.mineweb.com/mineweb/view/mineweb/en/page67?oid=129525&sn=Detail.

between 2005 and 2007, and many of these increases could not be explained, including $50 million in increased labor costs. The overall costs in 2007 were $381.21 million higher than what the auditors estimated costs should have been based on 2005 figures and estimated increases based on production figures and index prices.

In addition to identifying particular areas of concern in MCM's accounting, the auditing companies made the following recommendations to the Zambian parliament and the ZRA:

- The pilot audit has shown that there is a great need for a determined effort at collecting the taxes that are assessed under the laws implemented by the Zambian parliament.
- The pilot audit has shown that ZRA needs the Ministry of Mines to follow up production volumes . . . on a more consistent and comprehensive basis in order for the calculation of royalty to be reliable.
- The pilot audit has shown that there is a high need for implementing punitive measures against
  - companies that do not pay their taxes on time
  - companies that does [sic] not cooperate with the ZRA and make audits more expensive and lengthier than needed.[111]

The reasons behind the government's decision to conduct private audits are not known, and indeed the results of the MCM audit are known only because the report was leaked. It seems likely that the government either had particular suspicions about the companies, or it wanted to conduct random or systematic audits of mining companies to supplement its own ongoing monitoring efforts. In either case, the MCM audit uncovered several important issues, and the Zambian government is reportedly now working to recover the taxes identified.[112]

Spending time and money on tax auditing is a wise investment that can improve the government's ability to collect tax revenues, providing more resources in the future. When governments have reason to be suspicious of a company, they can normally conduct their own in-depth audits. However, when a government agency suspects wrongdoing but does not have the time or the resources to investigate further, hiring a private auditor may be a useful solution.

Private Inspections in Peru

Peru's OSINERGMIN is responsible for, among other things, monitoring health and safety issues in the mining industry. OSINERGMIN uses private companies that work exclusively with the agency to conduct its health and safety inspections. The mining companies pay the costs of these private audits through OSINERGMIN, so there have not been financial constraints on the agency's ability to conduct the necessary inspections. OSINERGMIN identifies the mines for inspection, and the private companies create a budget. OSINERGMIN sends this to the mining company, which is required to pay the full costs to the agency. If the company does not pay on time, OSINERGMIN has the authority to withdraw the company's authorizations to mine.

The private companies that conduct the inspections are selected based on merit, as determined through a public contest. The companies are required to take tests on subject areas for which OSINERGMIN requires inspections, and one company is chosen for each inspection subject area.

Officials in OSINERGMIN report that this system has been very effective in providing high quality, professional inspections. Having the mining companies cover the costs of the inspections should reduce the financial pressure on the agency. And having the companies pay inspection costs directly to OSINERGMIN should reduce risks of corruption or payoffs.

This arrangement has its critics. They suggest that OSINERGMIN may have gone too far in its effort to distance itself from substantive engagement with monitoring. According to one informed lawyer, the cost structure still leads to hasty, insubstantial audits, frequently without site visits.

111 Grant Thornton and Econ Pöyry, *Pilot Audit Report—Mopani Copper Mines Plc*, 2010, 9.

112 Chris Mfula, "Zambia asks Glencore subsidiary for 'underpaid' mining taxes," *Mineweb*, June 7, 2011, http://www.mineweb.com/mineweb/view/mineweb/en/page72068?oid=128735&sn=Detail&pid=72068.

Requiring companies to disclose more information about their tax payments across jurisdictions can help countries better monitor financial obligations. Understanding where a company pays taxes and how large its tax commitments are in various jurisdictions can help government auditors and civil society monitoring groups identify potential areas of concern.

Private Tax Collection Assistance in Angola

The government of Angola has been working with Aupec, a private economic consulting firm, since 2001 on its tax administration and financial planning for the oil sector. Part of Aupec's involvement included working in the petroleum unit of the country's income tax administration to help monitor companies and collect taxes. To do this, the firm participated directly in the ongoing tax administration and trained Angolan officials to take over tax administration in the future. Angola also hired Deloitte & Touche, a large international accounting and auditing company, to conduct tax audits and to train Angolan tax officials in auditing techniques.[113] This arrangement provided Angolan officials top-notch, on-the-job training to improve the country's capacity and performance for the future—while also improving monitoring and tax collection in the present.

Partnering Internationally to Combat Transfer Pricing

When companies operate in multiple countries, they may be able to shift costs and profits between jurisdictions to minimize their tax burden. Transfer pricing is discussed in more detail in Box 7 in Section 3.2. As noted there, some of the key challenges for monitoring transfer pricing issues are capacity and access to information.

International partnerships among governments can help address some of the information challenges associated with transfer pricing and multijurisdictional tax questions. International tax treaties that facilitate sharing information across jurisdictions and a recent multinational cooperative audit of a brewing company are both discussed below.

In addition to agreements among country governments, home country disclosure requirements can also contribute to financial monitoring efforts. The recent Dodd-Frank Wall Street Reform Act in the United States requires U.S.-listed companies to disclose project-by-project revenue data through their stock exchange disclosures. More information on the disclosures that act requires is provided in Appendix 3.

Other countries are considering similar measures. Requiring companies to disclose more information about their tax payments across the jurisdictions in which they operate can help countries better monitor the financial obligations. Understanding where a company pays taxes and how large its tax commitments are in various jurisdictions can help government auditors and civil society monitoring groups identify potential areas of concern. As these requirements become more common, stock exchange disclosures are likely to become an increasingly important source of information.

Sharing Information Internationally

Some types of international treaties provide for sharing information for tax purposes: double taxation agreements (DTAs) and tax information exchange agreements (TIEAs). DTAs are agreements between two states that prevent profits from international business activities from being taxed in both countries (i.e., they prevent the same profits from being taxed twice). These agreements are primarily intended to attract foreign investment, but they also facilitate the monitoring of taxation issues across borders.[114] The OECD has created the Model Convention with Respect to Taxes on Income and on Capital that serves as the basis for many DTAs. Its information-sharing provision is provided in Box 9. TIEAs are focused exclusively on sharing tax information and are thus narrower than DTAs. They typically provide rules and procedures for how tax information will be shared.[115] The OECD has also developed a model TIEA, the Agreement on Exchange of Information on Tax Matters.[116]

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113 Patrick Heller, "Turning Wealth into Development: Comparison of Angola and Nigeria" (paper presented at Oil Dependent Producer States conference at the Center for Democracy, Development and the Rule of Law, Stanford University, May 2007), 51-52.

114 Tax Justice Network, *Tax Information Exchange Agreements*, 2009, 1, http://www.taxjustice.net/cms/upload/pdf/TJN_0903_Exchange_of_Info_Briefing_draft.pdf.

115 Tax Justice Network, 2.

116 Global Forum Working Group on Effective Exchange of Information, *Agreement on Exchange of Information on Tax Matters*, OECD, 2002, http://www.oecd.org/document/37/0,3746,en_21571361_43854757_44270949_1_1_1_1,00.html.

Box 9 | Exchange of Information Provision from the OECD's Model Tax Convention

Article 26

EXCHANGE OF INFORMATION

1. The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws concerning taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to the Convention. The exchange of information is not restricted by Articles 1 and 2.
2. Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, the determination of appeals in relation to the taxes referred to in paragraph 1, or the oversight of the above. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions.
3. In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting State the obligation:
    a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;
    b) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;
    c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information the disclosure of which would be contrary to public policy (*ordre public*).
4. If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other State may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject to the limitations of paragraph 3 but in no case shall such limitations be construed to permit a Contracting State to decline to supply information solely because it has no domestic interest in such information.
5. In no case shall the provisions of paragraph 3 be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.

OECD, *Articles of the Model Convention with Respect to Taxes on Income and on Capital*, 2008, http://www.oecd.org/dataoecd/43/57/42219418.pdf.

Although many TIEAs and DTAs are currently in force, creating the potential for widespread sharing of tax information, there are several problems with the implementation of these agreements and with their effectiveness. As explained in the Tax Justice Network's briefing paper on TIEAs, these problems include:

- Because these agreements are signed between states, they do not cover all jurisdictions: information must be shared only between countries that have signed an agreement with each other.
- Developing countries tend to get left out of these agreements because they do not have enough leverage to strike good deals with large developed countries.
- Information is not exchanged automatically. Instead, governments must request specific information from other governments, and there are strict conditions on the form such requests must take. These rules and technicalities make it difficult to exchange information.

- Relevant information may be unavailable or difficult to collect. Jurisdictions do not collect uniform information on tax payments and underlying data, and the information requested may not be available from the jurisdiction that would need to provide the information.[117]

Governments should work to improve the information-sharing procedures already in place through existing DTAs and TI EAs in order to help enhance their ability to monitor transfer pricing issues. Given the current challenges, the Tax Justice Network recommends moving toward automatic multilateral information exchanges.[118]

Multinational Audit—SABMiller in Africa

Extractive companies are not the only multinational entities that create transfer pricing challenges. A 2010 report from ActionAid UK called attention to potential tax evasion by SABMiller, a multinational brewing company based in England.[119] According to the report, the cost to governments could be as high as £20 million per year, or more than $32 million. In May 2011, the African Tax Administration Forum announced its intention to coordinate a multinational, five-country audit of the brewer's operations across Ghana, Mauritius, South Africa, Tanzania and Zambia.[120]

This multinational audit represents an innovative step in the battle against transfer mispricing. The tax administrations in the five countries will be able to work together to share information and to build mutual capacity for auditing transfer pricing issues. While it is too early to know where this audit will lead, the idea of multinational partnerships for auditing may be interesting to pursue in the extractive sector as well.

Partnering with Unions to Improve Health and Safety Monitoring

Unions can be valuable partners in monitoring ongoing operations at mining sites, particularly with regard to occupational health and safety requirements. Union representatives are already at the sites, and they have an interest in ensuring safer working conditions for their members.

In South Africa, union representatives reportedly accompany government health and safety inspectors during their visits to the mines but are not always able to independently identify safety issues. Furthermore, they may not feel empowered to raise their concerns to government inspectors, or they may fear that doing so could put their jobs in danger.

Governments can work to realize the benefits of partnering with unions by:

- Training union representatives on health and safety standards, and how to identify potential risks and violations.
- Providing a mechanism for union representatives to report possible violations to government health and safety inspectors, and following up by inspecting the reported concerns.
- Protecting union representatives against reprisals for reporting possible health and safety violations.

Companies can also partner with unions to improve health and safety monitoring. In 2008, steel company ArcelorMittal worked together with unions to form the Joint Global Health and Safety Committee to respond to concerns about workplace fatalities. The agreement "recognise[d] the key role that trade unions can play in addressing health and safety issues and encourage[d] union management partnerships to improve standards and participation in order to raise health and safety

117 Tax Justice Network, 2-4.

118 Tax Justice Network, 5-6.

119 Martin Hearson and Richard Brooks, *Calling Time: Why SABMiller Should Stop Dodging Taxes in Africa*, ActionAid UK, 2010, http://www.actionaid.org.uk/doc_lib/calling_time_on_tax_avoidance.pdf.

120 Ethel Hazelhurst, "Global brewer under tax lens," (South Africa) *BusinessReport*, May 6, 2011, http://www.iol.co.za/business/companies/global-brewer-under-tax-lens-1.1065154. The African Tax Administration Forum, established in 2009, "is a platform to promote and facilitate mutual cooperation among African Tax Administrations and other relevant and interested stakeholders with the aim of improving the efficiency of their tax legislation and administration. The Forum brings together Heads of African Tax Administrations and their representatives to discuss the progress made, challenges faced and possible new direction for African tax policy and administration in the 21st Century." African Tax Administration Forum, "Overview," http://www.ataftax.net/about-us/overview.aspx.

standards."[121] It required each work site to meet certain standards, including the establishment of a joint health and safety committee, comprised of both management and workers, to follow up on accidents, perform regular inspections, and identify training needs for workers. The joint approach has had a positive impact on the number of workplace accidents, and fatalities have been reduced by one-third.[122]

Partnering within Government to Combat Capacity Shortages

In cases of reduced government capacity, partnering across government agencies may provide some benefits. As an initial step, agencies can ensure they are sharing necessary information with their counterparts to enable better monitoring across all parts of government. When this is not already taking place, agencies can communicate to identify their information needs, what information they already collect, and how to implement regular processes for sharing useful information among agencies.

Beyond sharing information, however, agencies can also coordinate inspections or other enforcement work. For example, government agencies in Zambia report that they share information across agencies about when they will visit mine sites. Coordinating visits to the mines may allow inspectors from different agencies to travel together, reducing the challenge of insufficient vehicles. Such coordination may be particularly valuable when a government agency has only one central office but is required to visit mining sites throughout the country. The Zambian agencies have improved their coordination through joint patrols and joint monitoring, in which multiple agencies visit the same mine site all at once. If not all agencies are able to participate in an inspection, they can submit particular questions or information requests for the other agencies' inspectors to look into while they are on site. Although joint inspections may not be feasible in all cases and individual agency inspectors tend to be stretched to capacity even without taking on additional work from other agencies, such ideas are worth considering and discussing as there may be opportunities for saving time and resources in the future through improved coordination.

In addition to its inter-ministerial coordination efforts, the ECZ has partnered with local water utilities. It installed simple pH meters on the water utility pumps so they shut off if the pH level gets too low, i.e., if the water becomes too acidic. This partnership helps the water utility ensure it is getting clean water and also helps the ECZ monitor the acid levels in water.

Furthermore, ministries might consider partnering on areas of shared concern. South Africa formed an Inter-Ministerial Committee on acid mine drainage, which included personnel from the ministries of mineral resources, water affairs, science and technology, and national planning.[123] Forming a joint committee allows the different agencies to share information and to approach shared problems jointly and strategically.

Requiring Company Partnerships to Create Private Monitoring Incentives and Increase Government Access to Information

Some governments have reported that requiring companies to form joint ventures has resulted in improved government monitoring. This approach has been used in the hydrocarbons sector in Angola, Norway, and Trinidad and Tobago.

In Trinidad and Tobago, the hydrocarbons sector had some ventures that were run by a single operator, while others were run by a primary operating company in conjunction with other nonoperating partner companies. The government noticed that the financial reports from joint ventures provided more comprehensive information than the reports from the single operator ventures, particularly on financial issues. The minority companies in the joint ventures demanded more information from the operating company in order to protect their own investment. This additional

121 ArcelorMittal et al., *Agreement on Minimum Requirements for Plant Level Joint H&S Committees*, 2008, http://www.imfmetal.org/files/08060311121679/AgreementArcelorMittalOHS.pdf.

122 International Metalworkers' Federation et al., *Together for Safety: Global Scope—Local Impact: Joint Global Health and Safety Committee Review Report*, 2011, http://www.imfmetal.org/files/11081515505779/ArceloMittal_IMF_Report_HS_En.pdf.

123 "Inter ministerial committee report on acid mine drainage and mine water management in the Witwatersrand Goldfields," *Environment*, Feb. 28, 2011, http://www.environment.co.za/acid-mine-drainage-amd/inter-ministerial-committee-report-on-acid-mine-drainage-and-mine-water-management-in-the-witwatersrand-goldfields.html.

information allowed the government to monitor the joint ventures' operations more closely. It also showed the government, which was relatively inexperienced in the hydrocarbons sector at the time, the kinds of information it might expect or demand of all the oil sector projects in the country. An additional benefit was that the nonoperating partners conducted their own monitoring of the venture's operating partner, helping to police and improve transfer pricing issues, even without the government's interventions. Because the minority partners wanted to ensure their investment was profitable, their incentive lined up with the government's incentive to ensure that the local venture was profitable.[124]

To help realize these improved monitoring benefits, the government established a joint venture in the late 1980s with three multinational companies. It selected the nonoperating partners for their experience in the sector and their ability to monitor and audit the operating partner. The companies shared the results of the audits with all partners in the venture, including the government.[125]

Having companies monitor operating partners in joint venture arrangements is not a substitute for careful, engaged government monitoring, but the experience of Trinidad and Tobago demonstrates that it can help strengthen government monitoring efforts. By requiring companies to form partnerships, the government aligned the minority partners' interests with its own. To reduce opportunities for companies to collude in such partnerships, governments can select the partner companies themselves rather than allowing the companies to select their own partners.

Multi-Stakeholder Monitoring Partnerships

Multi-stakeholder monitoring partnerships have also been gaining ground in the extractive industries. These allow governments, companies and civil society to work together, and to share information and concerns to address issues jointly. Government, company and civil society actors offer different skill sets and access to different kinds of information, and multi-stakeholder partnerships can benefit from the sharing and collaboration that occurs among these diverse stakeholders.

Perhaps most notably, EITI requires implementing countries to constitute a multi-stakeholder group that includes members from government, companies and civil society. The group helps guide the implementation of the EITI process in the country, including determining what information is included in EITI reporting templates and selecting the organization that reconciles the reports. More information on EITI is available in Appendix 3.

Having companies monitor operating partners in joint venture arrangements is not a substitute for careful, engaged government monitoring, but the experience of Trinidad and Tobago demonstrates that it can help strengthen government monitoring efforts.

In 2010, the World Bank Institute, together with the World Bank Africa Region, convened a working group on contract monitoring. They have conducted multi-stakeholder workshops in West and East Africa to identify pilot projects to improve the monitoring of government contracts, including those in the extractive industries. Companies, government officials and civil society advocates have all participated in these workshops. One of the pilot project ideas is a national public contract monitoring mechanism in Sierra Leone that would bring together government, media, civil society and companies to monitor and report on the implementation of mining projects. The project is projected to last three years.

3.5 Local and Community Partnerships

Communities often have specific concerns when it comes to mining projects taking place near their homes. They will most often be interested in those aspects of the mining operations that have the largest direct impact on them, which typically includes the companies' social and environmental

124 Neal Richardson, *Making Equity Work: Structuring State Ownership in the Mining Sector*, Revenue Watch Institute, 2010, 8-9.

125 Richardson, 8-9.

obligations. Therefore, community monitoring partnerships tend to focus more on monitoring social and environmental commitments. Particularly with respect to these two areas, communities bring to a monitoring process the advantages of incentive and access. They have the incentive to monitor the operations that affect their lives and livelihoods. Their proximity to the mine gives them access to information about those operations: they can see whether mine construction is taking place or whether a school has been built, and they can walk to nearby water sources to observe and measure pollution levels.

Companies have long recognized the necessity of engaging with communities, building good relations, and obtaining their support. Increasingly, they recognize that these efforts must be linked with aspects of monitoring—ongoing processes to collect and exchange information, and to enable the community to voice concerns. For many, this is an essential element in efforts to mitigate tensions and prevent conflict.

There are a variety of ways in which community partnerships can meet monitoring needs:

- Companies can partner with communities to identify areas of concern to the community and to jointly monitor the companies' efforts to address those concerns.
- Governments can train community monitors to gather and pass along information that the government needs in order to effectively oversee companies' operations.
- Communities can independently monitor areas of concern and can report their findings to the company or government to seek to improve areas of noncompliance.

These three models are currently being used in Canada, Peru and Afghanistan, respectively. While the value of community monitoring is clear, it remains a delicate subject. As the World Resources Institute noted in a 2009 guide, "There are numerous examples of community engagement gone wrong or not existing at all. Companies and financial institutions are often hesitant to put forth their projects as examples of good practices because of the increased scrutiny that this attracts."[126] The examples below suggest possible avenues without underestimating the complexities involved in building trust and meeting the multiple concerns of a community.

Additional Resources:

The International Council on Mining and Metals (ICMM) has developed the *Mining: Partnerships for Development Toolkit*, which provides a detailed methodology for evaluating the social and economic effects of mining projects.[127] It is a useful guide for companies and civil society advocates interested in exploring partnerships to monitor the impacts of mining. The toolkit urges partnerships and identifies the following six partnerships themes:

1. mining and poverty reduction
2. mining and economic development: revenue management
3. mining and economic development: regional development planning
4. mining and economic development: local content
5. mining and social investment
6. mining and dispute resolution

Another useful resource is the World Resources Institute's *Breaking Ground* report on community consultation. It includes recommendations for community consultation and contains a section on participatory monitoring by local communities.[128]

Impact and Benefit Agreements in Canada

Some mining companies in Canada have signed impact and benefit agreements (IBAs) with aboriginal communities surrounding mining sites. An IBA is a contractual agreement in which an aboriginal community consents to mining operations in its traditional territory, and a company

126 Kirk Herbertson et al., *Breaking Ground: Engaging Communities in Extractive and Infrastructure Projects*, World Resources Institute, 2009, 5, http://www.wri.org/publication/breaking-ground-engaging-communities.

127 ICMM, *Mining: Partnerships for Development Toolkit*, 2011, www.icmm.com/document/1945.

128 Herbertson et al.

makes commitments to the community in exchange for that consent. An IBA is separate from the permits and licenses the company must get from the government in order to conduct its mining operations; it is a private agreement between the community and the company.

The content of IBAs varies depending on what an individual community and company agree to, but typical provisions include economic incentives for the community (e.g., cash transfers or profit sharing arrangements) as well as commitments related to hiring local workers and contracting firms, education, environmental protection and cultural protection.

IBAs may also contain provisions addressing how implementation of the agreement will be monitored over time, or the parties may form a separate agreement related to monitoring the company's commitments in the area. For example, the Diavik diamond mining project in Canada's Northwest Territories included a socioeconomic monitoring agreement, which was signed by the company, the government and the affected aboriginal communities.[129] Under this agreement, the parties established an advisory board, which included representatives from the company, the Northwest Territories government and five aboriginal groups. The advisory board works together to monitor employment, training and other socioeconomic commitments.[130] Diavik releases annual reports indicating its compliance with the community agreements.[131]

The Diavik monitoring structure is an interesting model for other communities that want to partner more directly with mining companies in order to realize the benefits mining can bring to the area. The structure has encouraged more transparency around the company's social and economic commitments to the communities, and the advisory board structure has encouraged the partners to talk to each other. This model demonstrates that communities can become engaged partners in monitoring the implementation of commitments the mining company has made.

Additional Resources on IBAs

- Ginger Gibson and Ciaran O'Faircheallaigh, *IBA Community Toolkit*, 2010, http://www.ibacommunitytoolkit.ca/index.html.
- Peter Siebenmorgen, "Developing an Ideal Mining Agenda: Impact and Benefit Agreements as Instruments of Community Development in Northern Ontario" (master's thesis, University of Guelph), 2009, http://www.impactandbenefit.com/kr/One.aspx?objectId=10486936&contextId=677979&lastCat=10486919.
- IBA Research Network, http://www.impactandbenefit.com/home/.

Social Monitoring in Azerbaijan

As part of its operations in Azerbaijan, British Petroleum (BP) established the Azerbaijan Social Review Commission (ASRC) to advise the oil company on its social performance within the country. The ASRC is made up of local and international academics and civil society leaders. They produce a report each year that addresses issues such as BP's operational impacts, community programs and engagement with Azerbaijan society. BP responds to each annual report. Both the ASRC reports and BP's responses are available via BP's website.[132] BP helps the ASRC make annual visits to the regions affected by the company's operations. This structure increases transparency in BP's operations and encourages civil society to act as an engaged partner in BP's operations in the area. BP's website also includes reports from national nongovernmental organizations (NGOs), along with the company's responses to each report.[133]

129 A copy of the agreement is available online at http://www.atns.net.au/agreement.asp?EntityID=1877.

130 *Diavik Diamonds Project Socio-Economic Monitoring Agreement*, 1999, art. 2.1.2(c), http://www.atns.net.au/agreement.asp?EntityID=1877.

131 The reports are available at http://www.diavik.ca/1131_reports_and_publications.asp.

132 British Petroleum, "Azerbaijan Social Review Commission," http://www.bp.com/genericarticle.do?categoryId=9006625&contentId=7037156.

133 British Petroleum, "Monitoring by National NGOs," http://www.bp.com/genericarticle.do?categoryId=9006625&contentId=7013552.

Participative Monitoring with Communities in Peru

Peru's experience with community monitoring demonstrates both the opportunities and the difficulties of establishing credible participative monitoring. Although its mining law includes provisions for community monitoring of environmental impacts, there are no details on how this should take place.[134] Social conflict has been a serious problem for mining throughout Peru. One recurrent issue has been the impact of mining on land use and, in particular, the quality and supply of water. Beginning in about 2000, there have been more than half a dozen significant multi-stakeholder initiatives to mediate disputes, identify sources of emerging conflict, and engage communities in ongoing monitoring.

A number of participative monitoring efforts have taken the form of a *mesa de dialogo* (table or platform for dialogue), and civil society, industry and some other stakeholders have participated. They all involve some combination of international and domestic NGOs working with companies and local communities. The Compliance Advisor/Ombudsman (CAO) of the International Finance Corporation (IFC) has been involved in some of these initiatives. While municipal governments have also been involved, the central and regional governments have played a much less significant role.

One of the most well-regarded mechanisms has been the mesa de dialogo of the Tintaya copper mine in the Cusco region.[135] The process was initiated by local NGOs acting through Oxfam Australia—based in the same country as the mine's initial owners, BHP Billiton, which later sold its share to Xstrata. Over the years, the mesa's committees have investigated and helped settle claims related to land, environment, human rights and sustainability. At the same time, the mesa has not erased tensions with the community. There have been periods of discord with the owners and eruptions of violence that have required intensive efforts to sustain the process. Nevertheless, the mesa survives with support from the company and active engagement from a range of community actors.

The story of community monitoring at the Yanacocha mine in Cajamarca has been more problematic. Yanacocha, one of the world's largest gold mines, is owned primarily by Newmont Mining Corp. The CAO became involved after receiving complaints from local community groups about the mining project, in which the IFC was a minority investor. From 2000 to 2006, the CAO worked through the *Mesa de Dialogo y Consenso-CAO Cajamarca* to mediate complaints and, increasingly, to implement a participative water monitoring project. But independent studies and interviews conducted for this report suggest that the company and the CAO never gained the community's trust, nor were they able to overcome suspicions about the integrity of water monitoring. The CAO ended its involvement in the mesa in 2006. Yanacocha's continued efforts to involve the community in monitoring and responding to water-related problems are now dismissed by local government and NGOs, who see it as an effort to co-opt rather than collaborate with the community. In addition to historical issues of mistrust, observers also note problems related to the monitoring itself: the absence of scientific rigor, limited access to sites around the mine and the absence of independent lab analysis.[136]

Community distrust has been the result of many factors, some of which were beyond the immediate control of the company. But it has been exacerbated by poor relations with the company. At the outset of Newmont's review of community relations, the company realized that it had failed

134 Peru, *Decreto Supremo* (Supreme Decree) No. 028-2008-EM, *Reglamento de Participación Ciudadana en el Sub Sector Minero* (Regulation of Citizen Participation in the Mining Sector); Peru, *Resolución Ministerial* (Ministerial Resolution) No. 304-2008-MEM/DM, *Aprueban Normas que regulan el Proceso de Participación Ciudadana en el Subsector Minero* (Approved Rules governing the Process of Public Participation in the Mining Sector).

135 Isabelle Anguelovski, "Understanding the Dynamics of Community Engagement of Corporations in Communities: The Iterative Relationship between Dialogue Processes and Local Protest at Tintaya Copper Mine in Peru," *Society and Natural Resources* 24 (2011): 384-99; Oxfam Australia, "Tintaya, Peru," http://www.oxfam.org.au/explore/mining/our-work-with-communities/tintaya-peru.

136 A number of these issues are addressed in the CAO's 2008 Advisory Note on participatory water monitoring, which draws on the CAO's experience in Cajamarca and seven other locations in Peru and elsewhere, although it does not discuss those experiences directly. Office of the Compliance Advisor/Ombudsman, *Participatory Water Monitoring: A Guide for Preventing and Managing Conflict*, 2008, http://www.cao-ombudsman.org/howwework/advisor/documents/watermoneng.pdf.

to keep track of its own commitments to the community.[137] The long-term situation in Cajamarca remains fraught, and a major source of social tension stems from the community's fear of environmental damage from expanded mining. Efforts to engage the community and monitor conditions remain urgent.

One lesson from these two experiences—which is noted both in the studies commissioned by Newmont and in the work of the CAO—is that building trust with the community is an essential element and can easily be undermined by external factors and the conduct of the company. Balancing community involvement with methodically convincing environmental analysis has been difficult as well.

Community Infrastructure Monitoring in Afghanistan

Integrity Watch Afghanistan (IWA) has developed a community-based monitoring program to monitor reconstruction projects throughout the country. The program does not relate to mining, but it does demonstrate a possible community approach to monitoring the infrastructure components of some mining deals. It relies on volunteers from communities to gather information on reconstruction projects and to report back to the community, the construction company, local government and IWA on their findings.[138]

For example, in east Afghanistan's Nangahar Province, IWA trained two local people to monitor the construction of a new school building. They learned basic engineering standards, and IWA provided technical assistance to support the monitoring efforts. The Turkish International Cooperation and Development Agency (TIKA) was funding the construction and agreed to give the monitors access to the site. There, the monitors noticed two issues: electrical wires were not covered or protected, which would lead to increased maintenance costs, and the project used poor-quality bricks, thus reducing the life expectancy of the school by 80 percent. The monitors shared their findings with the project's head engineer, who was receptive. Even with limited training, these two community members were able to make suggestions that improved the standards of the building and contributed to the students' welfare.[139]

IWA's experience reflects the monitoring challenges addressed earlier in the report:

- *Capacity:* Even with a small amount of training, community members can make valuable contributions through their monitoring efforts.
- *Transparency:* TIKA's willingness to provide access to the construction site enabled the community monitoring efforts. Communities must be able to access information in order to monitor effectively.
- *Incentives:* Community members were willing to volunteer to monitor the construction projects because they had a vested interest in local development.

3.6 Enforcement and Advocacy Mechanisms

Government and civil society have a number of tools available to improve compliance when information obtained through monitoring efforts indicates that a company may not be fulfilling its obligations.

Government Enforcement Mechanisms

Governments can enforce compliance through a variety of methods that range in severity from reporting noncompliance and ordering improvement up through revoking permits and filing criminal charges.

Penalties and sanctions against a company that is not abiding by the laws not only punish that individual company but also deter all companies from failing to comply in the future. A report by the U.S. Environmental Protection Agency (EPA) notes that penalties and sanctions "play an

137 Newmont Mining Corp., *Building Effective Community Relationships: Final Report of the Advisory Panel to Newmont's Community Relationships Review*, 2009, appendix 1E: Minera Yanachocha, Peru, http://www.beyondthemine.com/2010/pdf/CRRAdvisoryPanel-EnglishFINAL.pdf.

138 Integrity Watch Afghanistan, "Community Based Monitoring," http://www.iwaweb.org/community_based_monitoring.html.

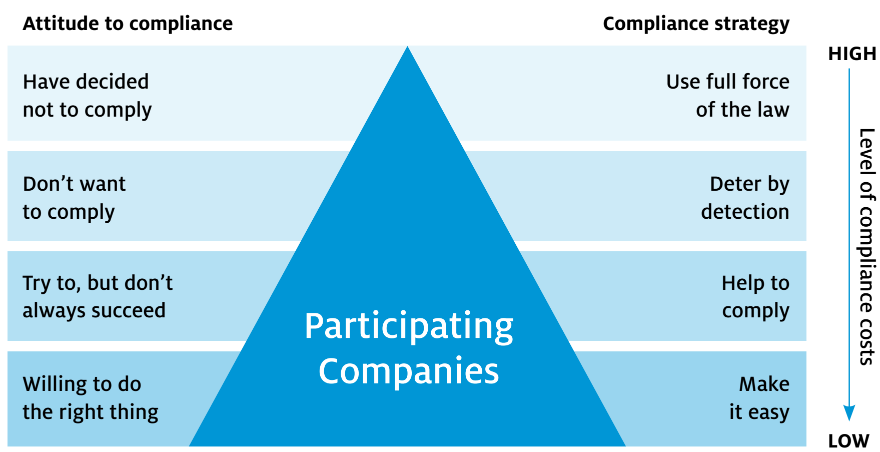
139 Integrity Watch Afghanistan, *Case Study: Community Mobilisation—Succeeding in Impacting Your Future*, 2011, http://www.iwaweb.org/Doc/CBM/CaseStudies/CBM%20-%20CS11%20-%20Community%20Mobilisation.pdf.

important role in an effective enforcement program by creating deterrence. Deterrence of noncompliance is achieved through: 1) a credible likelihood of detection of a violation, 2) a timely enforcement response, 3) the likelihood and appropriateness of the sanction, and 4) the perception of the first three factors within the regulated community."[140]

Australia's Taxation Office has developed a compliance model to help identify responses that are appropriate to the causes of noncompliance, the level of cooperation the agency receives, and the nature and level of risk involved (see Figure 7). As the model demonstrates, the taxation office uses more cooperative approaches with companies that are willing to pay their taxes and a more penal approach with companies that do not comply.

figure 7:

Compliance Model



The government's goal is to make compliance easy for companies by lowering costs and encouraging a positive attitude.

Source: Australian Government, *Large Businesses and Tax Compliance*, 2010, 6, http://www.ato.gov.au/content/downloads/bus33802nat8675062010.pdf.

Figure 7 illustrates how different approaches to enforcing laws, regulations and contracts against mining companies may differ depending on the company and the circumstances. It also illustrates that government's goal is to encourage companies to move toward voluntary compliance.

Review Company Reports and Assessments

Government agencies should review company reports and assessments to ensure the company's self-reported information indicates compliance with its obligations and that assessments meet the country's required standards.

Under Ontario's mining act, companies must meet certain exploration expenditure targets in order to maintain their exploration claims in good standing, and they must submit assessment reports indicating their compliance with this requirement. The 2005 auditor general's audit found that in 2004, the ministry received more than 1,000 assessment reports. Under the act, the ministry has 90 days to review each report and to reject any reported costs it deems invalid, or to request additional information. Reports not reviewed in that time frame are deemed to have been approved.

140 Steven A. Herman, *Oversight of State and Local Penalty Assessments: Revisions to the Policy Framework for State/EPA Agreements*, U.S. Environmental Protection Agency, 1993, 1, www.epa.gov/compliance/resources/policies/state/oversgt-penal-mem.pdf.

The auditor general found that while most of the reports were reviewed within the 90-day time frame, typically 25 to 40 of them were approved each year without anyone reviewing them. In an audit of those reports, the auditor general found that several contained unreasonable costs or insufficient information to comply with legal requirements.[141] The following excerpt from the report provides recommendations to address these concerns:

- develop procedures to ensure that all assessment files are reviewed for reasonableness;
- review the adequacy of the number of files selected for detailed expenditure verification, and consider implementing a random selection process;
- assess whether the current level of inspections and prosecutions provides an effective deterrent to filing false information to retain mining rights; and
- consider disqualifying holders of forfeited claims from re-staking the same land until an appropriate period of time has passed.[142]

As the Ontario case demonstrates, deemed approvals can present a challenge for many countries, particularly when there are not enough staff to review reports within the allotted time frames. Many codes and regulations specify time frames within which company reports and assessments must be reviewed, and the documents are deemed to have been approved at the end of that period regardless of whether government officials have reviewed the reports. Deemed approval mechanisms help speed the process of granting new mining rights, and they can also reduce corruption in cases when government officials may have demanded payment in order to approve an application or to approve it within a reasonable time frame. However, they also create a risk that government officials will be unable to review some documents at all. The time frame must be adequate to allow officials to carefully review documents. For example, in the same Ontario audit, the auditor general noted that the ministry has just 45 days to review closure plans, "which is an extremely short time frame, given the complex nature of many closure plans and the numerous steps required to process these plans."[143]

Report and assessment reviews are also important to ensure companies are adequately planning for the unique needs and risks of a particular project. In South Africa, the government reported that some prospecting work plans and even environmental impact assessments had clearly been copied and pasted from other mining projects: they referred to waterways, wildlife and geographical features that were not even present on the proposed mining site. Such bogus reports present serious risks if governments are unable to adequately assess the environmental and social risks or the likely mineral reserves implicated in the project. Anecdotal evidence indicates that other countries have received similarly bogus company reports.

Having companies report on themselves is useful to assist with a government's monitoring efforts. However, it is only a first step in assuring compliance. Governments must also ensure that the reported information indicates compliance with a company's obligations and that the reported information accurately reflects how operations are proceeding.

Investigations

Government investigations help assess whether a company is complying with its obligations in its ongoing operations at the mine. Government inspectors across disciplines—tax, occupational health and safety, and environment—should visit mining companies regularly to supervise their operations and to identify possible gaps in compliance.

There is no established guidance on how often mine sites should be inspected, but most sources recommend a regular schedule, ensuring each mine is inspected at least once during

141 Office of the Auditor General of Ontario, 184-85.
142 Office of the Auditor General of Ontario, 186.
143 Office of the Auditor General of Ontario, 194.

a specified time frame. Some countries use a risk-based approach to determine how often particular mines should be inspected, visiting higher risk mines more frequently and lower risk mines less frequently.

Box 10 provides an excerpt from the auditor general of Ontario's audit of the Mines and Minerals Program, highlighting some of the key priorities for investigations of mine rehabilitation and closure activities.

Box 10 | Excerpt from Office of the Auditor General of Ontario's Report on Investigations by the Province's Mines and Minerals Program

We reviewed the Ministry's monitoring and inspection of ongoing mine-rehabilitation and mine-closure activities. . . .[W]e noted a number of areas where the monitoring and inspection process could be improved:

- A ministry report indicated that more than 200 inspections or site visits had been performed over the past five years. However, we noted that the Ministry's list of the work that had been done was neither accurate nor complete. An accurate list of inspections and site visits is a valuable tool to enable management to monitor overall inspection activity.
- The Ministry informed us that it attempts to inspect every site over a two-to-three-year period. We noted that, based on the information provided, almost half the sites had not been inspected in the past five years.
- The Ministry employed an informal risk-based approach to selecting mine sites for inspections. A more formal approach would ensure that all sites are inspected at least once over a specified time frame and that inspection efforts are directed to those sites that pose the greatest risk to public health and safety and the environment.
- Inspection documentation needs to be improved to demonstrate to ministry management that inspections have considered all the requirements of the Mine Rehabilitation Code. In addition, there was insufficient evidence that all the concerns noted during inspections were followed up on and resolved.[144]

The results of government investigations should be communicated to the company, with particular attention to areas of noncompliance. Governments should then conduct follow-up inspections to ensure areas of concern have been addressed.

In recognition of a failure to effectively monitor mining company compliance on a consistent and ongoing basis, some countries have recently announced or conducted mass industry-wide audits of mining permits to determine the state of compliance with laws. For example, Indonesia's finance minister announced in May 2011 that the country would audit more than 8,000 existing mining permits to ensure compliance with mining and environmental laws.[145] Timor-Leste has recently enhanced its scrutiny of foreign oil companies and discovered tens of millions of dollars in unpaid taxes. It has begun demanding back pay from a number of multinational corporations, including ConocoPhillips, Inpex and Santos.[146] These large-scale audits demonstrate recognition of deficiencies in existing monitoring structures and the dangers caused by a lack of monitoring. At the same time, they represent a commitment to improving monitoring and enforcement going forward. Audits in South Africa and the Philippines are discussed in Box 11.

144 Office of the Auditor General of Ontario, 194.

145 Rieka Rahadiana and Adriana Nina Kusuma, "Indonesia to review all existing mining permits as new mining regulations passed," *Mineweb*, May 23, 2011, http://www.mineweb.com/mineweb/view/mineweb/en/page72068?oid=127699&sn=Detail&pid=110649.

146 "Making the Oil Companies Pay What They Owe," *La'o Hamutuk* (Timor-Leste Institute for Development Monitoring and Analysis), Dec. 10, 2010, http://www.laohamutuk.org/Oil/tax/10BackTaxes.htm.

Box 11 | Large-Scale Mining Industry Audits

South Africa

In 2010, South Africa's Minister of Natural Resources Susan Shabangu issued a moratorium on new applications for prospecting rights in order to conduct a massive audit of all prospecting rights granted since South Africa's MPRDA took effect in 2002.[147] The audit uncovered a series of challenges in the granting of rights and in the ongoing monitoring and management of mining activities, including an "inability to conduct proper compliance inspections to ensure compliance with undertakings and commitments of right holders" and an "increase in complaints from communities arising in part from the failure by some mining companies to implement their Social and Labour Plan commitments."[148]

Preliminary results of the audit found:

- Companies that were not complying with their obligations to begin prospecting activities within 120 days.
- Applicants who were not serious about mining and did not even know where their rights were geographically located.
- Applicants who had engaged in extensive drilling without amending their work programs or financial provisions, thus exposing the government to increased financial risk.
- Occurrences of illegal drilling, leading to increased hazards to communities and landowners.[149]

The DMR indicated that it would notify rights holders of cases of noncompliance and would follow procedures to cancel rights in those cases.[150]

In March 2011, Minister Shabangu discussed the ongoing reform efforts within the DMR and highlighted the following areas that require attention:[151]

- Clarifying the consultation process that must take place before applicants can submit applications for mineral rights and before the DMR can grant such rights.
- Streamlining of the application process, including through the launch of an online cadastre system.
- Strengthening provisions that sanction noncompliance.
- Strengthening provisions to improve working conditions.

The Philippines

In January 2011, the government of the Philippines suspended all large-scale mining applications while the government reviews pending and inactive mining claims. The government's new Environment and Natural Resources Secretary Ramon Paje promised to "clean the process of mining claims." He quickly ordered all regional directors of the Mines and Geosciences Bureau to stop accepting and processing new mining applications. He also began canceling existing permits.[152]

At the time of Paje's accession, there were 2,800 mining claims. After immediately canceling about 500 permits that were inactive or incomplete, he set deadlines for regional officials of Feb. 20, 2011, to "cleanse" their regions of 50 percent of pending and inactive mining applications, and December 2011 to cleanse the remaining 50 percent. This first deadline was met: 1,150 mining applications

Continued on next page

147 South Africa, Department of Mineral Resources, "Minister Susan Shabangu's Statement on the New Electronic Mineral Management System and Its Implications for the Regulatory Environment," Feb. 7, 2011, http://www.dmr.gov.za/Media_Room/Documents/Speeches/Speech%20Mining%20Indaba%20Online%20Apps.docx.

148 South Africa, Department of Mineral Resources, "Address by the Minister of Mineral Resources, Ms Susan Shabangu, MP," Nov. 2, 2010, http://www.dmr.gov.za/Media_Room/MINISTRY%20OF%20MINERAL%20RESOURCES.docx%20Website%20speech.docx.

149 South Africa, Department of Mineral Resources, "Address by the Minister of Mineral Resources, Ms Susan Shabangu, MP."

150 South Africa, Department of Mineral Resources, "Address by the Minister of Mineral Resources, Ms Susan Shabangu, MP."

151 André Janse van Vuuren, "Shabangu responds to Fraser findings," *Miningmx*, March 8, 2011, http://www.miningmx.com/news/markets/Shabangu-responds-to-Fraser-findings.htm.

152 Philippines Department of Environment and Natural Resources, "DENR Suspends Issuance of New Mining Permits" (press release), Feb. 28, 2011, http://www.gov.ph/2011/02/18/denr-suspends-issuance-of-new-mining-permits-2/.

Box 11, continued from previous page

were reviewed, and more than 900 were rejected or disapproved. Around 250 were approved.[153] In addition to pending mining applications, Secretary Paje also said the Mines and Geosciences Bureau would be looking at exploration contracts that expired more than five years ago, mining contracts whose three-year work programs have not been implemented for two consecutive years, as well as mineral production sharing agreements, industrial sand and gravel permits, and financial and technical assistance projects.[154]

In March 2011 the Department of Environment and Natural Resources (DENR) announced that an applicant for a small-scale mining agreement could face criminal and administrative charges for conducting mining operations while his or her permit application was still pending.[155]

These measures constitute part of the government's new "use it or lose it" policy—which in turn is a part of general reforms that the DENR started using in earnest in 2010.[156] The second impetus behind these measures is that the government has also become increasingly concerned about cleaning up its image, which is perceived as corrupt and bureaucratic.[157] Under the policy, the department seeks to cancel mining applications that do not comply with government requirements, including projects that have remained inactive and unproductive or that do not acquire free, prior and informed consent (FPIC) from indigenous groups. Another measure includes designating a senior official to head the Internal Audit and Anti-Corruption Office, to strengthen the DENR's anti-corruption program.[158]

Fines

Fines serve as sanctions against companies that do not comply with their obligations. Fines also have a deterrent effect—companies are more likely to comply if they risk being fined for noncompliance. The U.S. EPA recommends that fines should be fair and proportionate to the offense and should, at a minimum, recover "the economic benefit of noncompliance plus some appreciable portion reflecting the gravity of the violation."[159]

In the 2011 revisions to Zambia's Environmental Management Act, the country's ECZ revised the scale of fines for exceeding permissible emissions. Under the old system, a company would pay a single flat fine for exceeding permissible emissions, regardless of whether it exceeded the limit by a very small or very large amount. Under the new system, fines will be based on the amount of overage.

Enforcing tax laws relies heavily on the extent to which penalties are levied for evasion or fraud. For failure to file returns or pay taxes on time, the most common penalty is a fine. Failure to correctly report tax liabilities incurs penalties that vary according to the seriousness of the infraction. The United Kingdom, for example, has a range of penalties: "careless" errors range from 0 to 30 percent of the amount evaded; "deliberate and concealed" mis-reporting ranges from 30 to 100 percent. Some countries have criminal penalties as well.[160]

153 Philippines Department of Environment and Natural Resources, "Paje Reports Initial Success in Cleaning Pending Mining Applications" (press release), March 28, 2011, http://www.denr.gov.ph/index.php/news-and-features/latest-news/113-paje-reports-initial-success-in-cleansing-pending-mining-applications-.html.

154 Philippines Department of Environment and Natural Resources, "DENR suspends issuance of new mining permits"; Kristine L. Alave, "DENR starts purge of mine applications," *Philippine Daily Inquirer*, Feb. 19, 2011, http://newsinfo.inquirer.net/breakingnews/regions/view/20110219-321117/DENR-starts-purge-of-mine-applications.

155 U.S. News Agency/Asian, "Small-scale mining applicant under fire in Ilocos Norte," *U.S. News Las Vegas*, March 22, 2011, http://www.usnewslasvegas.com/provincial/%EF%BB%BFsmall-scale-mining-applicant-under-fire-in-ilocos-norte/.

156 Some of the other measures are protecting investments, industrializing industry, streamlining the permitting system, engaging in proactive information campaigns, promoting transparency in government transactions and establishing a proactive public-private partnership. Ricardo Fian, "Mining Reforms in the Philippines," Philippines Department of Energy and Natural Resources, 2010, http://www.denr.gov.ph/index.php/news-and-features/features/15-mining-reforms-in-the-philippines.html.

157 Alave; Michael Punongbayan, "DENR: 903 mining applications junked," *Philippine Star*, March 28, 2011, http://www.philstar.com/Article.aspx?articleId=670481&publicationSubCategoryId=63.

158 Philippines Department of Environment and Natural Resources, "Paje Fortifies Anti-Corruption Program in DENR" (press release), March 31, 2011, http://www.denr.gov.ph/index.php/news-and-features/latest-news/121-paje-fortifies-anti-corruption-program-in-denr.html.

159 Herman, 3.

160 Forum on Tax Administration, 2009, 128-29, 143, 145.

In enforcing revenue laws, many countries allow some flexibility to take the unique challenges of the mining industry into account, particularly in the payment of royalties. Many mining projects have a negative cash flow during the early phases because mining requires large upfront investments well before mineral production begins. It takes time for the revenues from mining to repay those initial costs. Because royalties are typically assessed based on mineral production, rather than a company's profits, companies may owe royalties even before they earn a profit. Paying royalties can thus be a challenge and may lead to insolvency. To combat this challenge, tax regimes in some African countries, and also developed countries like Australia, allow companies to defer royalties. Some nations, like Ghana, even allow for special royalty regimes for extraordinary investments.[161]

Mine Shutdowns

Countries are increasingly introducing or strengthening enforcement sanctions that allow them to close mines that present an unacceptable level of risk, particularly for workers.

A new mining law in Queensland, Australia, allows enforcement officials to seek injunctions from the district court in cases of actual or attempted violations of worker safety laws. The injunctions allow the government to shut down mining operations until the risks have been addressed.[162]

South Africa's inspectors have also used work stoppages to address worker safety issues. In 2009, they ordered AngloGold Ashanti to suspend sections of their operations 44 times and Anglo-Platinum 61 times.[163]

In the United States, the Mine Improvement and New Emergency Response Act (MINER Act) of 2006 reintroduced a long dormant enforcement practice—use of "pattern of violations"—whereby the Mine Safety and Health Administration evaluates mines twice a year to determine if a mine should be placed on a pattern review process. If a mine has a pattern of violations, it enters into a 90-day probation period and must develop a plan to address identified risks and lower its violations. Any violations of mandatory standards within 90 days of the notice result in closing that area of the mine until the violation has abated.[164]

Criminal Charges

In cases of severe legal violations, countries may also seek criminal charges against company officials. These cases tend to arise most often for violations related to the environment or health and safety, and only apply for particularly egregious violations.

Authorities in Honduras filed criminal charges against two senior officials of a mining company, Entremares, for water contamination and environmental damage. A local stream contained high acidity and dangerous levels of metal contamination. The officials could face up to six years in prison if they are found guilty of the charges, which were filed under Article 181 of Honduras's criminal code. Authorities also filed charges against a former senior official in the Honduran Department for the Administration of Mineral Resources for breach of official duties for failing to act on evidence of pollution. These charges were filed under Article 349 of the criminal code and could result in up to three years along with disqualification from public office. The criminal charges reportedly stemmed from information gathered by CAFOD, a Catholic aid agency in England and Wales.[165]

The U.S. Justice Department is conducting a criminal investigation of officials at Massey Energy. The company was found to have kept two sets of books on safety conditions at its mining site. One set reflected the true safety conditions and was used for internal mine management, while the other set was for federal inspectors and had been sanitized to reduce scrutiny of known safety

161 Otto et al., 76.

162 McCullough Robertson, "Queensland Mining Safety Legislation Update—Systems, Penalty and Administration Changes," *Resources*, Dec. 22, 2010, http://www.mccullough.com.au/publications/publications.aspx?p=47&itm=3060.

163 Jeffrey Sparshott, "Mine safety shutdowns fuel tensions in South Africa," *Wall Street Journal*, March 11, 2010.

164 Mark E. Heath and Timothy D. Houston, "Increased Enforcement and Higher Penalties Under the MINER Act: Do They Improve Worker Safety?" *Energy & Mineral Law Foundation* 30 (2009): chap. 10.

165 Indigenous Peoples Issues & Resources, "Goldcorp Staff Face Criminal Charges Over Mine Pollution After CAFOD Investigation," Aug. 16, 2010, http://indigenouspeoplesissues.com/index.php?option=com_content&view=article&id=6301:goldcorp-staff-face-criminal-charges-over-mine-pollution-after-cafod-investigation&catid=60:central-american-and-caribbean-indigenous-peoples&Itemid=82.

issues.[166] An explosion at the mine in April 2010 killed 29 people, and some of the safety risks that had been removed from the records provided to federal inspectors are believed to have contributed to the explosion.[167]

Revocation of License

Governments can revoke mining licenses in some instances. When a company holds a prospecting or exploration license but fails to comply with operational and production requirements, the government often reserves the right to revoke that company's license. Provisions granting the government the right to revoke in such instances are sometimes referred to as "use it or lose it" provisions. In the examples from South Africa and Philippines discussed in Box 11, the governments revoked licenses after audits identified companies that had not complied with their legal requirements.

Civil Society Advocacy Mechanisms

Although civil society groups are unable to revoke mining rights or assess fines like government agencies can, they have several paths available to pursue accountability. Civil society advocacy mechanisms can be broadly divided into the following categories:

- Working through government mechanisms to improve enforcement of laws, regulations and contracts
- Leveraging public opinion and company reputational concerns to improve compliance

Company Grievance Mechanisms

More and more companies are beginning to provide grievance mechanisms through which communities can raise concerns directly with the company itself. When these mechanisms exist, they are a useful first step for engaging directly with companies to resolve issues. For example, Newmont Mining Co. has established a grievance mechanism for its Ahafo South Project in Ghana. The project involved resettling communities and individuals affected by the mining project, and the grievance mechanism was developed to resolve issues around resettlement and compensation. The mechanism allows for different levels of procedure, depending on the complexity of a complaint.[168]

More information on company grievance mechanisms is available from BASESwiki at http://baseswiki.org/en/Main_Page.

Complaints to Parliament/Government

When civil society advocates identify areas of noncompliance, sharing that information with the government agencies responsible for enforcing the companies' obligations allows those agencies to conduct independent investigations and to sanction the companies when appropriate. When government officials are not responsive, citizens can also complain to their members of parliament, who may be able to provide a voice for citizens' concerns and/or question the executive branch's management of the sector.

Third-Party Suit

Taking companies or government agencies to court may be another method of working to improve company and government accountability. Because court cases tend to be adversarial and very expensive, litigation is typically a last effort after other advocacy mechanisms have failed. However, some advocates have successfully used the courts to seek better management of their countries' mining sectors.

A group of Canadian organizations won a case against the federal government in 2011. It had been refusing to conduct comprehensive environmental assessments of some large mining

166 Tim Huber and Vicki Smith, "Feds show fake safety records in W.Va. mine blast," *Washington Times*, June 29, 2011, http://www.washingtontimes.com/news/2011/jun/29/feds-fake-safety-records-west-virginia-mine-blast/.

167 Howard Berkes, "Officials: W.Va. mine operator kept two sets of safety records," *National Public Radio*, June 29, 2011, http://www.npr.org/blogs/thetwo-way/2011/06/29/137493009/w-va-mine-operator-kept-two-sets-of-safety-records-investigators-say.

168 Business and Society Exploring Solutions (BASES) wiki, "Ahafo South Project, Newmont Mining Corporation, Ghana," http://baseswiki.org/en/Ahafo_South_Project,_Newmont_Mining_Corporation,_Ghana.

projects. The Supreme Court of Canada found that the government's actions violated the Canadian Environmental Assessment Act.[169]

In Papua New Guinea, a 2011 court decision ordered a Malaysian logging company to pay 225.5 million kina ($97 million) to four tribes for massive environmental damage caused by illegal logging. An environmental group, Centre for Environmental Law and Community Rights, represented the tribes in court. The decision was based on statements from tribe members and expert evidence presented by three environmental scientists who conducted audits in the affected areas. The judgment reportedly compensated the tribes for trespass, loss of trees and breach of constitutional rights.[170]

Other recent cases have yet to be decided but demonstrate how some groups have chosen to use the courts to enforce their country's laws. A group of Armenian ecologists recently sued their government for failing to prevent a mining company from dumping polluted waste into a river.[171] In Chile, 31 of the 33 miners who spent 69 days trapped underground after a mine collapse have sued Chile's National Geology and Mines Bureau for negligence, alleging that the government agency did not conduct proper safety inspections of the mine.[172]

Media Coverage

Civil society groups have long used the media to educate the public about the extractive industries and related governance concerns, and to encourage better compliance and accountability. Most large multinational mining companies are conscious of their reputations, and continuing media coverage of mining projects can be an effective tool in encouraging compliance. The coverage also helps educate other citizens about mining sector management within the country, which allows citizens to better hold their governments accountable for good governance. Civil society advocates can develop their own reports to share information obtained through monitoring efforts, and they can develop press releases and work with journalists to help publicize the information.

Complaints to Home Governments—Anticorruption Laws

Many countries that are home to a large number of mining companies have laws that can be used to combat corruption. Laws on the books in the United States, Canada, the United Kingdom and Australia may provide additional checks beyond host countries' anticorruption laws.

The U.S. Foreign Corrupt Practices Act (FCPA)

The FCPA has two main sets of provisions. The first are the anti-bribery provisions that forbid companies or any intermediaries or subsidiaries from offering anything of value to a "government official" for the purpose of obtaining an "improper advantage." The second are the accounting provisions. Under these, companies must maintain accurate books and records that reflect transactions with government officials. Moreover, they must maintain a sufficient system of internal oversight over these transactions.[173]

The law applies to both foreign and domestic companies. For example, in 2008 Siemens AG settled with the U.S. Department of Justice, the U.S. Securities and Exchange Commission and German authorities, agreeing to pay penalties of $1.6 billion for bribing government officials to win contracts and for improperly characterizing those payments on its books.[174] Half of the total amount, $800 million, was attributable to violations of the FCPA.

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169 Ecojustice, MiningWatch Canada and Canadian Environmental Law Association, "Supreme Court of Canada gives public a voice on major industrial projects—Court ensures meaningful environmental assessments across country," Jan. 21, 2010, http://www.miningwatch.ca/en/supreme-court-canada-gives-public-voice-major-industrial-projects-court-ensures-meaningful-environme.

170 Harlyne Joku, "Asian logging firm fined K225.5m," *Papua New Guinea Post-Courier Online*, June 23, 2011, http://www.postcourier.com.pg/20110623/news.htm.

171 Ararat Davtyan, "Ecologists take ministry to court over polluted river," *Armtown.com*, Feb. 24, 2011, http://www.armtown.com/news/en/htq/20110224/2011022411/.

172 Kosich.

173 PricewaterhouseCoopers, "The US Foreign Corrupt Practices Act—What Canadian Directors Need to Know," 2011, http://www.pwc.com/ca/en/directorconnect/foreign-corrupt-practices-act.jhtml.

174 "Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines" (press release), U.S. Department of Justice, Dec. 15, 2008, http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html.

Most multinational mining companies are conscious of their reputations, and continuing media coverage of their projects can be an effective tool in encouraging compliance. The coverage also helps educate citizens about mining sector management, so they can better hold their governments accountable for good governance.

Enforcement of the statute has increased in recent years. In 2009, Mark Mendelsohn, the U.S. Department of Justice's deputy chief prosecutor responsible for FCPA cases, said that the all-time high level of enforcement would remain in place.[175]

Canada's Corruption of Foreign Public Officials Act (CFPOA)

The CFPOA forbids bribing foreign public officials. Although it was infrequently used in its first decade, enforcement has picked up; there are now 23 ongoing investigations of violations of the CFPOA.[176] In one case, a number of NGOs have submitted a complaint against Blackfire Exploration for acts the mining company and its Mexican subsidiary committed in Mexico.[177]

Penalties for violating the CFPOA are stiff. The act can only be enforced through criminal sanctions, which can be up to five years in prison for an individual.[178] There is also no legal limit on the amount of fines, which are left to the court's discretion. Nor is there a statute of limitations on when actions can be brought. Finally, companies can be ordered to forfeit all profits and proceeds from the transaction.

The UK Bribery Act

The Bribery Act took effect in July 2011. The law replaces England's old and often-criticized bribery laws. The law is similar to those in the United States and Canada, and includes liability for corporations that fail to prevent bribery and corruption of foreign officials.[179] The offenses can be prosecuted if they have been conducted by British nationals or corporations, or by those who are ordinarily UK residents, regardless of where the act took place. This includes third-party contractors.[180] Moreover, it applies to any corporation that has a business presence in the country, regardless of where the bribe is paid or where the company is based. Penalties can be quite severe. The act allows judges to impose criminal penalties, with jail time of up to 10 years and an unlimited fine.[181]

Australia's Bribery of Foreign Public Officials Act

Australia's version of anti-bribery legislation is a recent amendment to the criminal code, which includes the offense of bribing a foreign public official. Under the statute, a corporation can be held criminally liable for bribery, or even for failing to create and maintain a culture that requires compliance with the law.[182] "Bribery" and "foreign public official" are defined broadly, as in other home countries' anticorruption legislation. The maximum penalty for an individual is up to 10 years in prison and up to $1 million in fines. A corporation can be liable for $11 million, or three times the value of the benefit obtained from committing the offense, whichever is greater.[183] The act covers Australian individuals or corporations.[184]

Human Rights Complaint Mechanisms

In addition to the legal and contractual obligations discussed throughout this report, companies

175 PricewaterhouseCoopers.

176 "With 23 RCMP Corruption Investigations Underway, Corporations Will Welcome TICanada's Anti-Corruption Compliance Checklist" (press release), Transparency International Canada, Jan. 31, 2011, http://www.transparency.ca/New/Files/TI-Canada_Anti-Corruption_Compliance_Checklist-Press_Release.pdf.

177 MiningWatch Canada, "Corruption and Oppression in Chiapas, Mexico," July 18, 2010, http://www.miningwatch.ca/en/corruption-and-oppression-chiapas-mexico.

178 Mark Morrison et al., "Canada's Corruption of Foreign Public Officials Act: What You Need to Know and Why," Blakes, 2009, http://www.blakes.com/english/view_disc.asp?ID=3437.

179 Arnondo Chakrabarti et al., "UK Bribery Act 2010," Allan & Overy, 2011, http://www.allenovery.com/AOWEB/Knowledge/Editorial.aspx?contentTypeID=1&itemID=55579&prefLangID=410.

180 Richard Orange, "Britain's new Bribery Act will encourage firms to avoid the London Stock Exchange," *Telegraph*, Sept. 20, 2010, http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/8012137/Britains-new-Bribery-Act-will-encourage-firms-to-avoid-London-Stock-Exchange.html.

181 Chakrabarti et al.

182 Gayle Hill, *Australian Laws Prohibiting Foreign Bribery*, Transparency International Australia, 2000, http://www.transparency.org.au/documents/Australian%20Laws%20Prohibiting%20Foreign%20Bribery.pdf.

183 Ernst & Young, *Upping the Ante: Bribery and Corruption Back on the Agenda*, 2010, http://www.ey.com/Publication/vwLUAssets/Upping_the_ante/$FILE/Upping_the_ante_Bribery_corruption.pdf.

184 Brett Cowell, "Bribery of Foreign Officials," CowellClarke, 2010, http://www.cowellclarke.com.au/docfiles/Bribery%20of%20Foreign%20Officials%20April%202010.pdf.

and governments also have obligations with regard to international human rights. Mining operations often raise serious human rights concerns, particularly related to community consultation, forced relocation and the use of private security forces. While this report generally does not focus on human rights obligations of mining companies and is not intended as a comprehensive guide to human rights complaint mechanisms, the following pages present some of the international mechanisms most relevant to communities affected by mining: the OECD's Guidelines for Multinational Enterprises, the Voluntary Principles on Security and Human Rights, and International Labour Organization (ILO) Convention 169, the Indigenous and Tribal Peoples Convention.

Additional Resource:
More information on human rights recourse mechanisms is available in a recent guidebook from the International Federation for Human Rights (FIDH).[185]

OECD

The OECD is an international forum for governments to work together to promote global economic and social well-being. It has created a set of Guidelines for Multinational Enterprises covering areas such as the environment, bribery, employment and human rights, and has helped establish a set of National Contact Points (NCPs) to hear complaints related to the implementation of the guidelines in specific cases.[186] OECD Watch is a network of civil society organizations that may be able to provide support to communities or civil society activists interested in using the OECD guidelines in their work.[187] Groups have used them to address concerns related to community relocation and tax evasion at MCM in Zambia, and groups in Argentina recently filed a case regarding environmental pollution at a mine operated by the Canadian company Barrick Gold Corp.[188]

Community Relocation

In 2001, Oxfam Canada and the Zambian NGO DECOP filed a complaint with Canada's NCP against MCM regarding the company's eviction of squatter communities that had been using land on the mining concession for small-scale farming. Zambia's mines had historically been owned by the state through Zambia Consolidated Copper Mines Ltd., and the state company had been allowing former workers to farm the land. However, the country's mines were privatized in the late 1990s and early 2000s, and the Mopani mine became jointly owned by First Quantum Minerals, a Canadian company, and Glencore International, a Swiss company. When they took over, they began evicting the farmers.[189]

Canada's NCP organized in-person meetings among Oxfam, local Zambian NGOs and First Quantum to discuss the complaint. The mining company promised to stop the evictions, to continue working with DECOP and the local council to identify a long-term solution, and to continue working with civil society.[190]

Tax Evasion

A government-commissioned private audit in 2010 found that MCM was evading its tax obligations in Zambia.[191] The audit, which was leaked to the public, sparked outrage among civil society groups.[192] In 2011, a group of five NGOs filed a complaint with the Canadian and Swiss NCPs against

185 FIDH, *Corporate Accountability for Human Rights Abuses: A Guide for Victims and NGOs on Recourse Mechanisms*, 2010, http://www.fidh.org/Corporate-Accountability-for-Human-Rights-Abuses.

186 For more information on the OECD guidelines and the available complaint mechanisms, see FIDH, sec. III.

187 OECD Watch, http://oecdwatch.org/.

188 OECD Watch, "Environmental Pollution at Barrick's Gold Mines in Argentina," http://oecdwatch.org/cases/Case_221/@@casesearchview?type=Issue&search=en_Environmental%20pollution%20at%20Barrick%E2%80%99s%20gold%20mines%20in%20Argentina. The complaint was filed June 9, 2011.

189 OECD Watch, "Oxfam Canada vs. First Quantum Mining," http://oecdwatch.org/cases/Case_19.

190 OECD Watch, "Oxfam Canada vs. First Quantum Mining."

191 Grant Thornton and Econ Pöyry. The audit is discussed in more detail in Section 3.4 of this report.

192 OECD Watch, "Sherpa et al vs. Glencore International AG," http://oecdwatch.org/cases/Case_208.

Glencore and First Quantum. The complaint alleged tax evasion at MCM and used the private audit to support its claims. The complainants are awaiting the NCPs' initial assessment.

Security Forces and Human Rights

The use of security forces at mining sites has raised concerns regarding violence and human rights violations. For example, a recent Human Rights Watch (HRW) report details staggering human rights abuses in the Porgera gold mine in Papua New Guinea, owned by Barrick Gold Corp. The private security forces that Barrick hired were responsible for grave abuses, including gang rape, murder and violent abuse of artisanal miners.[193]

Civil society in the country had not been able to draw attention to the human rights abuses at Porgera, nor were they able to get the mining company and the government to act. When HRW began conducting field research for its report, however, Barrick was open and receptive to the researchers, with whom they "carried on a sustained dialogue."[194] Pressured by the pending HRW report and concerned about its international image, Barrick aligned itself with international norms like the Voluntary Principles on Security and Human Rights (VPs) in 2010. It also dismissed the employees linked to the human rights abuses.

The VPs give the extractive industry guidance on using security forces properly and outline general human rights obligations. Companies and governments can sign on the VPs, which means that they agree to support the principles and report annually to the international steering committee on their efforts to implement them. So far 18 extractive companies have done so, including Barrick, Rio Tinto Group, Newmont and AngloGold Ashanti. By signing on to the principles, a company:

- recognizes its international human rights obligations, including the Universal Declaration of Human Rights
- commits to abide by domestic laws
- commits to meaningful engagement with civil society

The VPs address both public and private security forces and recommend that mining companies incorporate the VPs directly into contracts with private ones. The obligations contained in the VPs fall into three main categories: risk assessment, relations with public security and relations with private security. Some of the relevant VP obligations include:

- committing to ensuring that private security forces will abide by international laws and obligations
- instituting monitoring mechanisms for private security forces or hiring a third party to do so
- creating mechanisms for investigating human rights complaints and recording all human rights abuses

When companies and/or governments that have signed on to the VPs appear to be violating them, the steering committee can revoke membership. This is likely to generate national and international attention. When companies and/or governments have not yet signed on, civil society advocacy encouraging them to join may be productive.

Community Consultation and Consent Requirements

Because community consultation and consent are complex and developing areas of international practice, activists interested in pursuing claims regarding lack of proper consultation or consent should research the relevant laws and precedents within their countries. This section provides general information on how FPIC can be and has been defended in courts, with a focus on Latin America.[195]

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193 Human Rights Watch, *Gold's Costly Dividend: Human Rights Impacts of Papua New Guinea's Porgera Gold Mine*, 2011, http://www.hrw.org/en/reports/2011/02/01/gold-s-costly-dividend-0.

194 Human Rights Watch, 10.

195 Jurisprudence from this region represents the most extensive enforcement of these rights by domestic courts and regional human rights bodies. The ILO has compiled a comprehensive casebook on the region's jurisprudence in *Application of Convention No. 169 by Domestic and International Courts in Latin America*, 2009, http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_123946.pdf.

FPIC is a widely recognized principle that gives some communities the right to consent before certain types of activity can take place on their land. It is recognized in national and international law, and FPIC violations are actionable in domestic and international forums through a wide range of actions, including actions for the protection of constitutional rights, claims of unconstitutionality and actions in administrative, civil and criminal proceedings. Such suits can be brought by the affected indigenous or tribal community, its members or representatives, as well as by ombudsmen and domestic human rights institutions. They can also be brought before regional human rights bodies.

The following cases provide examples of how communities have successfully challenged their right to prior consultation and FPIC:

- *Colombia—consultation required prior to grant of environmental license:* In 2009 communities filed suit against several government ministries for violation of their collective right to consultation prior to mining exploration activities. The Constitutional Court found that the Muriel Mining Corporation had not conducted appropriate consultation on the environmental and cultural impact of the mines. It ordered the company to suspend all activity until it could hold new consultations after conducting environmental impact studies.[196]
- *Ecuador—constitutional right to prior consultation upheld despite absence of implementing regulations:* The ombudsman brought a lawsuit in 2002 regarding the protection of communities' constitutional rights to consultation prior to the grant of a mining concession. The Constitutional Court suspended the challenged concession, holding that the state as signatory to ILO Convention No. 169 must establish consultation procedures to assess the effects of the exploitation of resources on the lands of these communities.[197] It also upheld the constitutional right to consultation even in the absence of implementing regulations.[198]
- *Ecuador—requirement for consultation with authorized community representatives:* In 2000 an organization representing the Shuar people in Ecuador successfully brought an action against a privately owned oil company for violation of constitutional rights and ILO Convention No. 169. The Constitutional Court held that the company disrupted the community's collective rights and interests when it attempted to enter the community's territory without the permission of its authorities and sign agreements with unauthorized members of the community.[199]
- *Costa Rica—requirement to undertake prescribed consultation procedures:* In 2000 indigenous community development associations in Costa Rica successfully filed a claim for protection against the Ministry of Environment and Energy's grant of a hydrocarbon exploration and operation concession because it failed to meet the procedural requirements for prior consultation. The Constitutional Chamber of the Supreme Court held that the ministry did not follow the mandatory procedure of a consultation summons and that the announcement of a bidding process in the national media did not fulfill the requirements of an appropriate consultation process under ILO Convention No. 169.[200]

Box-Ticking

The focus of this report has been on ensuring compliance with companies' legal obligations, but even full compliance with obligations may not always be enough. Although a good legal framework is meaningless if it is not enforced, blind enforcement of a bad legal framework is also problematic.

196 *DOMINICO y otros contra el Ministerio del Interior y de Justicia y otros* (DOMINICO and others v. the Ministries of the Interior and Justice and others), Expediente T-2315944, Colombian Supreme Court, Sentence T-769 (2009); Amazon Watch, "The Right to Decide: The Importance of Respecting Free, Prior and Informed Consent," 2011, http://amazonwatch.org/assets/files/fpic-the-right-to-decide.pdf; Bar Human Rights Committee of England and Wales, Letter to the Constitutional Court of Colombia, Jun. 29, 2009, http://justiciaypazcolombia.com/IMG/pdf/Carta_de_bar_human_rights_committee.pdf; Interamerican Association for Environmental Defense, "EcoAméricas Interview: AIDA Co-Director Sees Climate Urgency in Mining Issues," 2011, http://www.aida-americas.org/en/ecoamericas_interview.

197 ILO Convention No. 169 recognizes the principle of FPIC and protects the fundamental rights of indigenous and tribal people to their land and resources. It is discussed in more detail in Appendix 2.

198 ILO, *Application of Convention No. 169 by Domestic and International Courts in Latin America*, 148.

199 ILO, *Application of Convention No. 169 by Domestic and International Courts in Latin America*, 144.

200 ILO, *Application of Convention No. 169 by Domestic and International Courts in Latin America*, 134.

The ultimate goal is a good legal framework that is well enforced. To that end, ongoing management of the natural resource sector should include some flexibility to review contracts, laws and regulations to ensure that their continued enforcement is contributing to the country's overall long-term goals for the sector.

Several recent legal reform and contract renegotiation efforts indicate that governments and civil society are conducting this kind of ongoing periodic review. South Africa's experience with its Mining Charter and SLPs highlights some of the challenges.

After the end of apartheid, the new South African government set out to make the country's economy more inclusive. In 2002, the DMR (then known as the DME) and several mining industry stakeholders, including the Chamber of Mines, South African Mining Development Association and the National Union of Mine Workers, signed the Mining Charter. It included several provisions designed to improve the economic participation of historically disadvantaged South Africans (HDSAs) in the mining industry, including specific targets for the year 2009. The participants in the Charter's development agreed to conduct a review in 2009 to determine whether the industry was meeting those targets. One such target was to fill 40 percent of management positions with HDSAs, but the review identified challenges with the implementation. If 50 percent of a company's lower management positions were filled by HDSAs but upper management had just 20 percent, the company would meet the Charter's technical requirement but not the true objective of equality throughout all levels of the company. Following the review, the revised Mining Charter requires 40 percent participation at all levels of management. The review is an example of how stakeholders can work together to ensure better achievement of a policy objective, rather than mere technical compliance with an obligation.

South Africa's experience with SLPs, on the other hand, appears to be less successful. Companies are required to submit SLPs as a part of their applications for mining rights and to submit new five-year SLPs every five years. The DMR defines what subjects must be covered in the SLPs, including infrastructure and poverty eradication programs. However, some companies report that the SLP requirement has become a mere technicality, in which companies seek to check off the boxes required by an SLP without really working closely with a particular community to identify and meet their highest priority needs. In this situation, even when a company complies with all of its legal obligations, the ultimate goal of the SLP process—ensuring a more equitable allocation of the risks and benefits of mining—may not be met.

Two factors contribute to this problem. First, SLPs are private plans the companies submit to the government; they are not typically shared with the communities affected. Second, because the DMR defines particular categories companies must address in their SLPs, companies have less flexibility and incentive to identify and prioritize the needs of a particular community in which they work. In summary, even though community consultation is required during the process of developing an SLP, the lack of transparency of the ultimate outcome reduces the company's accountability to the community, and the lack of flexibility reduces their ability to meet the community's particular needs.

This experience can be contrasted with Canada's IBAs, which are private agreements signed between companies and communities. IBAs have reportedly been quite innovative in terms of the types of obligations they include, ranging from types of local foods provided to local workers to education and local employment targets. There are at least two key differences between SLPs and IBAs. First, IBAs are directly negotiated with and signed by the affected communities, and the resulting agreement is public within the community. Second, the contents of IBAs are not mandated by law but can be determined instead by companies and communities collaboratively during the consultation and negotiation process.

The ultimate test of whether any legal framework is successful is whether it is meeting its original goals, be they protecting the environment, ensuring community participation in monitoring, protecting workers' health and safety, or collecting a fair rate of return. Periodic reviews of laws and/or contracts can help ensure that they are on track to do so.

Low- and middle-income countries have a huge stake—and face a greater challenge—in ensuring effective monitoring to collect much-needed revenues and to avoid harm. Because institutional and individual capacity is often lacking, innovative partnerships are critical. They help counter problems of capacity, imbalanced incentives and deficient access, but not without careful attention to checks and balances.