United Nations Development Programme

Extracting Good Practices

A Guide for Governments and Partners to Integrate Environment and Human Rights into the Governance of the Mining Sector

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A Guide for Governments and Partners to Integrate Environment and Human Rights into the Governance of the Mining Sector

Margaret Wachenfeld,
Themis Research

With support from:
Kathryn Sturman,
University of Queensland,
Centre for Social Responsibility
in Mining

Foreword

Achieving the 2030 Agenda and the Sustainable Development Goals represents both a tremendous challenge and opportunity. Land degradation has reached critical levels and threatens the livelihoods of over 3 billion people. We are losing species 1000 times faster than at the natural extinction rate. Reversing these and similar trends requires a paradigm shift in the way we prioritize investments and balance short-term economic growth with social development and environmental protection.

Mining can make a significant contribution to economic development. Minerals and metals are needed for advancing durable growth and developing green technologies required for a low-carbon future. If managed well, the sector can contribute to accelerating progress towards achieving multiple SDGs, including in the Least Developed Countries and fragile states.

Large-scale mining, however, can also cause great environmental and social harm. It can damage ecosystem services which provide women and men with water, food, fuel, medicine and shelter. Land degradation, and water and air pollution caused by mining often affect community health and livelihoods. Mining also has a large carbon emission footprint at odds with climate goals, and the exploitation of metals and minerals often exacerbates and sustains social and violent conflicts around the globe. These negative impacts harm those who are already furthest behind and have the least power to influence decision-making and demand accountability and redress.
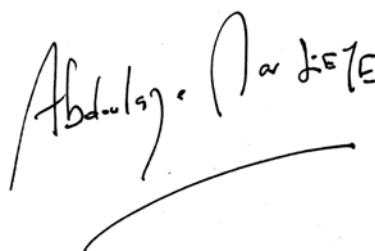
As the demand for metals and minerals continues to grow, greater efforts are needed to protect human rights as well as the biodiversity and ecosystems on which local communities and society more broadly depend.

This joint Guide by the Swedish Environmental Protection Agency and the United Nations Development Programme seeks to support governments and other stakeholders to better manage the environmental and social aspects of mining, in a way that rebalances relations in favour of more just and sustainable outcomes for local communities and vulnerable groups, including women and children, now and in the future.

The Guide provides an overview of tools and approaches for governing the human rights and environmental impacts of the sector in a more integrated and holistic manner. We hope that users of this Guide will find it a valuable tool in their efforts to chart a more inclusive and sustainable course for governance of the mining sector.

Martin Eriksson
Director, Swedish Environmental
Protection Agency

Abdoulaye Mar Dieye
United Nations Assistant Secretary-General
Director, Bureau for Policy and Programme
Support, UNDP

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Glossary

Aarhus Convention

The United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998) establishes a number of rights of the public (individuals and their representative associations) with regard to the environment. The Aarhus Convention puts Principle 10 of the Rio Declaration on Environment and Development into practice and paves the way for its universal application, as the convention is open to accession from all countries and not just those in Europe. (See below and see Backgrounder 1.):

→ The right of everyone to receive environmental information that is held by public authorities (access to environmental information)

→ The right to participate in environmental decision-making (public participation in environmental decision-making)

→ The right to review procedures to challenge public decisions that have been made without respecting access to information or public participation rights or environmental law in general (access to justice)

Artisanal and small-scale mining

Artisanal and Artisanal and small-scale mining (ASM) ranges from informal individual miners seeking a subsistence livelihood, to small-scale formal commercial mining entities producing minerals in a responsible way. For many countries, ASM is an important source of livelihoods and of environmental damage. There is now a growing and recognized need to enhance the quality of life for ASM miners working outside of formal legal and economic systems, to help them transition to the formal system and to enhance the contribution of the sector to sustainable development.[1]

Impact Assessments

→ Impact assessment is the process of identifying the future consequences of a current or proposed action.[2] Impact assessments can be used to look at policies, plans, programmes or projects.

→ Environmental and Social Impact Assessment (ESIA): refers to the assessment of the environmental and social impacts of a potential project, including the interaction between the two types of impacts.

→ Environmental, Social and Human Rights Assessment (ESHR): refers to the integrated assessment of environmental, social and human rights impacts of proposed projects.

→ Strategic Environmental Impact Assessment (SIA): refers to a range of analytical and participatory approaches that aim to integrate environmental considerations into policies, plans and programmes and evaluate the interlinkages with economic and social considerations.[3]

→ Strategic Environmental and Social Assessment (SESA): adds the social element more specifically to a strategic environmental impact assessment, looking at the potential environmental and social impacts of policies, plans and programmes.

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1   The International Institute for Sustainable Development, IGF Guidance for Governments: Managing artisanal and small-scale mining (2017), http://igfmining.org/resources/asm-guidance-document

2   The International Association of Impact Assessment, http://www.iaia.org

3   OECD, "Applying Strategic Environmental Assessment: Good Practice Guidance for Development Co-operation," (2006), http://www.oecd.org/dac/environment-development/36451340.pdf

Environmental authorities	The term 'environmental authorities' is used in this Guidance Note to indicate ministries or authorities or agencies responsible for all areas of environmental protection.
Environmental and Social Management Systems (ESMS)	Drawing on the elements of the established business management process of 'plan, do, check, and act', an ESMS is the system mining copies put in place to manage environmental and social risks and impacts in a structured way on an ongoing basis. A good ESMS appropriate to the nature and scale of the mining project promotes sound and sustainable environmental and social performance, and can lead to improved financial, social, and environmental outcomes.[4]
Free, Prior and Informed Consent (FPIC)	The principle of free, prior and informed consent is a term used in international law (ILO Convention 169 and the UN Declaration on the Rights of Indigenous Peoples) to describe the conditions under which indigenous peoples participate in decision-making with government authorities and the private sector, including mining companies, with respect to a decisions that have important implications for their lives – including the management of their traditional lands and natural resources, the control and protection of sacred sites, and any proposed resettlement. It is closely related to the right to self-determination of indigenous peoples that is compatible with the territorial integrity of states.
Gender Equality and Women's Empowerment	Gender equality and the empowerment of women includes advocating for the equal rights of women and girls, combatting discriminatory practices, challenging roles and stereotypes the can lead to inequality and exclusion, and removing barriers to women's engagement. It can involve gender-specific, targeted interventions and/or mainstreaming attention to gender throughout government actions.
Government Authorities with a Human Rights Mandate	The phrase 'government authorities with human rights mandates' is used in this Guide to indicate ministries or authorities or agencies: (i) charged specifically with a human rights mandate – such as a Ministry of Justice, National Human Rights Institution (NHRI), Ombudsperson, etc.; and (ii) those (NHRI), Ombudsperson, etc.; and (ii) those responsible for the human rights of workers – i.e., labour ministries/authorities; and (iii) those that have a mandate to protect particular groups of the population – such as women, children or minorities. There may be an overlap with government authorities addressing 'social' issues – it all depends on how each government is set up and organizes its internal regulation.
Human Rights-Based Approach (HRBA) to Mining	The phrase 'human rights-based approach to governance' refers to the process and substance of policymaking and its implementation: policies, laws, regulations, etc. are developed through processes grounded in human rights principles – with active participation of those potentially affected, in a transparent and inclusive manner and in a manner that builds accountability of the government to those governed – for example, by reporting back to the public how comments have been taken into account in shaping policy. In addition, the substance of the policies, laws, regulations, etc. reflect the government's human rights obligations. Some laws and regulations, such

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4   IFC Performance Standard 1, "Assessment and Management of Environmental and Social Risks and Impacts," (2012), http://www.ifc.org/wps/wcm/connect/3be1a68049a78dc8b7e4f7a8c6a8312a/PS1_English_2012.pdf?MOD=AJPERES

as those with respect to health, education and justice, are part of the government's approach to fulfilling and protecting those rights. In other areas such as mining, policies, laws and regulations should protect rights that could be impacted by mining – such as the rights of mine workers and the community's right to water – and ensure that, at a minimum, any actions by government authorities and the companies operating in the sector respect human rights. Other areas of policymaking, such as investment, can at first glance appear to have nothing to do with human rights, but broader macroeconomic policy can in fact have significant impacts on, for example, exacerbating or diminishing inequalities in the country. Taking a human rights approach to policymaking should highlight these potential impacts and help governments, together with the participation of stakeholders, identify alternatives that reinforce the government's human rights obligations.

Human Rights-Based Approach (HRBA) Principles

These are general principles that underpin a human rights-based approach: (i) meaningful participation and inclusion; (ii) non-discrimination and equality; and (iii) accountability and the rule of law.

Indigenous Peoples

The United Nations does not define 'indigenous peoples', as it is impossible to capture the full range and diversity of indigenous peoples around the world. Instead, it uses certain criteria to identity indigenous peoples. 'Self-identification' by indigenous peoples themselves is a key criterion. These include:
→ Self-identification as belonging to an indigenous people, nation or community
→ A common ancestry and historical continuity with pre-colonial or pre-settler societies
→ A special relationship with ancestral lands, which often forms the basis of the cultural distinctiveness of indigenous peoples
→ Distinct social, economic and political systems, as well as a distinct language, culture, beliefs and customary law
→ Formation of non-dominant groups within society
→ Determination to preserve, develop and transmit to future generations their ancestral territories and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.[5]

International Investment Agreements (IIAs)

International investment agreements (IIAs) are agreements between two or more countries or regions regarding promotion and protection of investments made by investors from each respective country or region in each other's territory.

Large-scale Mining (LSM)

Large-scale mining (LSM) refers to commercial mining that is carried out by larger mining companies. LSM is often contrasted with ASM.

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5   Inter-Parliamentary Union, & UN DESA, UNPFII, OHCHR, UNDP, IFAD, "Implementing the UN Declaration on the Rights of Indigenous Peoples – A Handbook for Parliamentarians" (2014), http://www.undp.org/content/dam/undp/library/Democratic Governance/Human Rights/RightsOfIndigenousPeoples-HandbookForParliamentarians-EN.pdf

Meaningful Participation

For processes to be truly participatory, they should provide for active, free and meaningful participation. This means going beyond one-time, technical consultations on limited issues to making ongoing efforts to involve citizens in decisions that affect them, listening to and taking account of their views and responding to those views with reasoned explanations of how their views were taken into account or not. While ESIA processes are a well-recognized opportunity for public participation, as this Guide points out, there should be other points in the mining cycle for public participation and other mechanisms of participation (for example, through community monitoring committees). Public participation mechanisms need to be fit for purpose to ensure that those most affected by mining are represented, empowered and protected through the mining cycle. As explained above, this kind of participation is a core part of the human rights-based approach (HRBA).

Mining Cycle

As used in this Guide, this refers to the full cycle of government policymaking and regulation of LSM – from setting in place the policy framework for the extraction of natural resources, to regulating exploration, licensing, operations, all the way through to closure and the post-closure phase. The Guide does not cover the final steps of government use of financial resources gained from mining – this dimension of extractive resource governance is addressed through other initiatives, such as the Extractives Industry Transparency Initiative.[6]

National Gender Machineries

These are different institutions, offices or other mechanisms that focus on gender equality. They often involved in coordinating, facilitating and monitoring policy formulation to ensure the incorporation of women's empowerment perspectives and facilitating the exchange and sharing of experiences, information and best practices on promoting substantive equality.

Principle 10

Principle 10 of the Rio Declaration on Environment and Development issued during the 1992 United Nations Conference on Environment and Development (UNCED), informally known as the 'Earth Summit', acknowledges the key role the following important procedural rights play in the transition towards environmentally sound and sustainable development:

→ The right of everyone to receive environmental information that is held by public authorities (access to environmental information)
→ The right to participate in environmental decision-making (public participation in environmental decision-making)
→ The right to review procedures to challenge public decisions that have been made without respecting access to information or public participation rights or environmental law in general (access to justice)

See also Aarhus Convention above and Backgrounder 1.

Procedural Rights

Within the context of environmental governance, this refers to the three rights covered by Principle 10 and their corresponding human rights (see Principle 10 above and also Annex I Backgrounder on Principle 10).[7]

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6   Extractive Industries Transparency Initiative (EITI), http://www.eiti.org

7   Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, A/HRC/34/49, (2017), http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/34/49

Rule of Law	The phrase 'rule of law' refers to the principle that that nations should be governed by laws that are put in place through democratic processes, rather than be governed by individual persons and their individual decisions. The rule of law is a fundamental principle that is part of a broader set of principles on 'good governance' that views governance as ruling for the public good – rather than for only individuals or groups within society.
Social Authorities	The phrase 'social authorities' is used in this Guide to indicate two groups of ministries or authorities or agencies: (i) those responsible for social welfare and social protection; and (ii) those responsible for social segments of the population – women, children, indigenous peoples, minorities, disabled people.
Stakeholders	Stakeholders are people or organizations that may be affected by or have an interest in a project, a broader policy or a development. There may be a wide range of stakeholders within a country that are interested in the development of a new mining policy, for example. 'Potentially affected stakeholders' are those who may be more immediately affected by a mining project and include workers and local communities and the organizations that represent them.
Substantive Rights	With respect to the environment, these include the rights that may be particularly affected by environmental harms – rights to life, health, food, water, culture and non- discrimination[8]

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8   Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, A/HRC/34/49, (2017), http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/34/49

Abbreviations

ASM	Artisanal and Small-Scale Mining
AU	African Union
COP21	The 2015 United Nations Climate Change Conference of the Parties to the 1992 United Nations Framework Convention on Climate Change, 21st session
EDI	Environmental Democracy Index
ESHR	Environmental, Social and Human Rights
ESIA	Environmental and Social Impact Assessment
ESMP	Environmental and Social Management Plan
ESMS	Environmental and Social Management Systems
EU	European Union
FDI	Foreign Direct Investment
EDI	Environmental Democracy Index
GEWE	Gender Equality and Women's Empowerment
IGF	InterGovernmental Forum on Mining, Minerals, Metals and Sustainable Development
IFC	International Finance Corporation
IIA	International Investment Agreement
IPs	Indigenous Peoples
LSM	Large-Scale Mining
NHRI	National Human Rights Institution
Map-X	An initiative of UN Environment, the World Bank and the Global Resource Information Database (GRID-Geneva) to capitalize on the use of new digital technologies and cloud computing in the sustainable management of natural resources
MPF	InterGovernmental Forum on Mining, Minerals, Metals and Sustainable Development (the IGF's Mining Policy Framework
MinGov	the World Bank Mining Investment and Governance Review (MinGov)
NRGI	Natural Resources Governance Institute
OGP	Open Government Partnership
OHCHR	United Nations Office of the High Commissioner for Human Rights
RoL	Rule of Law
RoLPA	Rule of Law for Public Administrations
SDGs	Sustainable Development Goals
SEEA	System of Environmental-Economic Accounting
SESA	Strategic Environmental and Social Assessment
SEPA	Swedish Environmental Protection Agency
TOR	Terms of Reference
UNDP	United Nations Development Programme
UNGP	United Nations Guiding Principles on Business and Human Rights

Executive Summary

What is the Challenge?

Mining provides vital commodities for a wide range of products and services and has done so through the centuries. The sector occupies the position at the start of the resource supply chain for many other industries. Managed well, mining creates jobs for lower and higher skilled workers and can "spur innovation and bring investment and infrastructure at a game-changing scale over long time horizons."[9] Mining has historically often been viewed solely through the lens of the sector's contribution to economic growth, without considering the broader environmental and social impacts and their associated costs, but that is changing. Large-scale mining has a large footprint that significantly changes the immediate and surrounding environment and community dynamics, with the potential for environmental degradation, exacerbating inequality, increased tensions and even conflict. Some types of mining are significant contributors to climate change, compromising the global community's commitment to reducing carbon dioxide emissions and other greenhouse gases. As a result, governments and the industry have been under increasing scrutiny, driven by concerns around the environmental, social and human rights impacts of the sector as well as concerns about the impacts of the sector on broader governance and rule of law issues, including its contribution to conflict and corruption.

What is the Opportunity?

Society is calling for a net positive contribution from the mining sector over the long term. In the interim, the protection of the environment and human rights should be core minimum goals for the governance of the sector. The Sustainable Development Goals (SDGs) provide an opportunity to re-evaluate mining governance within its broader context. The mining industry can impact positively and negatively across the SDGs. It can make significant contributions to the SDGs by providing decent employment, spurring local business development, developing infrastructure links and providing revenues that governments can use to provide public services such health and education and thereby fulfil their human rights obligations. But mining also contributes to many of the challenges that the SDGs are trying to address – environmental degradation, water scarcity, negative impacts on human rights, displacement of populations, worsening economic and social inequality, armed conflicts, gender inequality and gender-based violence, tax evasion and corruption, and increased risk for many health problems.[10] The SDGs' broader framework implies two important messages for the governance of the sector: (i) the importance of rebalancing – giving equal weight to the management of the environmental and social impacts of the sector as has been given to economic impacts in the past; and (ii) the importance of interlinkages – the inextricable links among all three dimensions points to the necessity, but also the effectiveness, of managing these impacts in a more integrated manner. Doing so will move the sector closer to the long-term vision of a net positive contribution.

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9   UNDP, World Economic Forum, Columbia Center on Sustainable Investment, the Sustainable Development Solutions Network, "Mapping Mining to the Sustainable Development Goals: An Atlas," (2016), http://www3.weforum.org/docs/IP/2016/IU/Mapping_Mining_SDGs_An_Atlas.pdf

10 Id.

How does the Guide Help Governments Respond?

This Guide helps governments and other stakeholders respond to this demand for net positive benefit from the sector. Committed governments, mining companies, mining initiatives and civil society organizations are moving in that direction. The Guide aims to help government authorities – particularly mining, environmental and human rights authorities – to continue moving in the direction of managing the mining sector to deliver sustainable outcomes by bringing together a wide range of materials in a step-by-step approach that follows the mining cycle. The government authorities responsible for governance of the mining sector increasingly need to have more than technical knowledge of mining regulations; they need a broad understanding of the economic, environmental, social and human rights issues at every stage of the mining cycle. They also need practical guidance on particular environmental, social and human rights risks at each step and particular tools and approaches to managing those risks and balancing competing interests. This Guide brings together promising tools and approaches that are building blocks of a more holistic approach to the environmental and human rights governance of the sector. It recognizes that there is often no 'best answer' as to how to integrate these tools and approaches to improve mining governance in each country – they must fit within each government's overall strategy and its international obligations.

The Guide in particular prompts government authorities to:

→ Integrate the substance of **environmental and human rights standards into the regulatory fabric of the sector (**its **policies, laws and regulations)** to make these obligations part and parcel of the way the sector is governed, managed and operated

→ **Actively engage** the **affected public** to participate in rulemaking, licensing and monitoring of the sector, acknowledging the value of communities' and civil society participation in improving the governance of the mining sector and strengthening enforcement

→ Put in place **a range of processes and mechanisms** for holding **government and mining companies accountable** to the public, including mechanisms that can help resolve disputes and provide effective remedies

b) Core Concepts and Core Definitions Used in the Guide

Three Core 'Pillars' of the Guide

The Guide builds on and integrates these three pillars (see Box 3 below for a further explanation of each pillar):

Better Environmental & Human Rights Governance of Mining

**1.
Protection of the Environment**

**2.
Protection of Human Rights**

**3.
Principle 10 Environmental Procedural Rights**

What Does the 'Environmental & Human Rights Governance of the Mining Sector' Mean?

The 'governance of the mining sector' refers to the overall regulatory management of the sector – the institutions and their policies, laws and regulations that play a role in the oversight of the mining sector. The 'environmental and human rights governance' of the sector refers to those institutions, policies, laws and regulations that play a role in governing and managing *the impacts of the sector* – in particular on the local environment, on local communities and all the people in them, and on workers but also, where relevant, on the broader environment (considering issues such as climate change, for example) and broader society. As noted above, those impacts can be positive and negative. There is typically a range of ministries and related authorities or agencies that have jurisdiction over the mining sector, starting with a mining ministry, but also include notably environment, labour, social ministries and other government authorities with human rights responsibilities. Environmental governance[11] focuses on protecting the natural environment before, during and after mining operations.

A human rights-based approach to governing seeks to ensure that the regulatory framework and its implementation serve the public interest, making the protection of human rights against harm from the sector an integral part of managing the sector. Governance is also about how the participants in the sector – local communities, civil society organizations (CSOs), trade unions, mining companies and other stakeholders – play a role in shaping the rules through formal and informal processes. The processes by which environmental and human rights rules emerge play an important role in establishing their legitimacy. Legitimacy leads to greater compliance and ultimately greater protection. Environmental procedural rights (referred to as 'Principle 10 rights' for shorthand) – participation, in a transparent and informed way, that reinforces government accountability and provides access to justice to seek redress where harms do occur – should underpin those processes. Together, these approaches reinforce the sustainable governance and management of the mining sector.

Box 1

Brief Overview of Links Between the Environment & Human Rights

Enjoyment of many human rights is linked to better protection of the environment; conversely, environmental violations can constitute a serious threat to numerous human rights	⟷	The protection of ecosystems and the services they provide – food, water, disease management, climate regulation – is a core part of the enjoyment of many human rights (rights to health, water and food)
Promoting environmental sustainability is more effective when it is done within supportive legal frameworks	⟷	Better legal frameworks are informed by the exercise of certain human rights – rights to information, public participation in decision-making, access to justice, freedom of speech and assembly
Conflicts fuel environmental degradations & impacts on human rights	⟷	Environmental degradation & impacts on human rights fuel conflict

11   http://staging.unep.org/delc/EnvironmentalGovernance/tabid/54638/Default.aspx

Why Does it Make Sense to Address these Environmental and Human Rights Protection Together?

The Guide builds on the increasing recognition of the interlinkages between the environmental and human rights/social impacts of mining.[12] These two dimensions of impacts are inextricably interlinked (see Box 1 below) and therefore managing them in a more integrated manner makes sense – it is more efficient and effective and provides greater legitimacy to efforts to improve mining governance.

What Dimensions of Mining Governance Are Not Covered in the Guide?

There are other dimensions to mining (and broader extractive sector) governance that are very relevant to determining whether the sector ultimately contributes to a nation's development or undermines it through the 'resource curse'. The management of the substantial revenues that the sector can generate is a crucial part of the overall extractive sector value chain, but this is not the focus of this Guide. Although this important dimension is covered only briefly here, it is the subject of far more extensive guidance elsewhere.[13]

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12   See, for example, the work of the UN Environment Agency on the links between environment and human rights:
     http://89.31.103.110/explore-topics/environmental-governance/what-we-do/strengthening-institutions/human-rights-and

13   See, for example, the Extractive Industries Transparency Initiative, www.eiti.org, and Cameron, P. and Stanley, M., "Oil, Gas and Mining – A Sourcebook for the Extractives Industries," World Bank Group 2017, https://openknowledge.worldbank.org/handle/10986/26130

c) Key Messages and Takeaways

The appropriate governance and management of the environmental, social and human rights impacts from mining **start from the initial decision to extract mineral resources, rather than leaving them in the ground, and continue through to post-closure**.

Governments need to **make decisions at each point in the mining cycle about how the costs and benefits associated with those impacts are allocated** among the government, companies and society. Failing to make those decisions does not mean the costs of the impacts disappear. Instead, it means the costs are externalized, often falling on those least responsible for them and least able to manage – on society and the environment – rather than being allocated to the companies that generated the impacts or to the government. Appropriate governance of the sector requires allocating the costs and benefits associated with mining more equitably – across all parties, across the country and across generations, recognizing that mining deprives future generations of these non-renewable natural resources, who should be taken into account.

Too often, human rights and environmental concerns are considered to be separate from the governance of the sectors that drive a country's economy.

These decisions should be guided by an approach that integrates environmental and human rights protection into the policy, legal and institutional frameworks that translate the government's international human rights and environmental obligations into the context of the mining sector. Too often, human rights and environmental concerns are considered to be separate from the governance of the sectors that drive a country's economy. This Guide focuses on demonstrating how these obligations can and should be integrated into the governance of the sector.

The Guide also highlights that **environmental and human rights issues** can – and should – be **managed together**, in an integrated manner, because the impacts are so often **interlinked**.

There are **numerous tools and approaches that governments can use to make these decisions and balance** the long-term contributions of mining to the national economy with **competing uses** for land and resources, localized preferences for development, a changing context of demography, climate change, etc. As important as some well-known regulatory tools, such as ESIAs, are for mining, these are just one tool in the 'toolbox' set out in the Guide.

The **purpose of taking a human rights-based approach** to the mining sector **is to ensure that the public interest is the primary consideration**, grounded in the state's human rights obligations. This Guide highlights mechanisms for doing so throughout the mining cycle, from participatory land planning at the beginning of the cycle through to multi-functional advisory committees that oversee closure at the end of the cycle. Making sure that the voices and rights of all – women, children, indigenous peoples, minorities – are considered in these processes is a core part of a human rights approach. The other significant dimension of a rights-based approach is a focus on accountability, so the Guide highlights different mechanisms to reinforce accountability for delivering on the protection of rights.

The **significance of taking an environmental approach** to the mining sector **is to understand that the long-term viability of the sector is inextricably linked to how well its environmental footprint is managed**. The environmental footprints of mines are increasingly seen not only in terms of their local effects, but also in terms of their impact on a country's ability to meet its international environmental obligations regarding climate change, water and biodiversity in particular.

The **significance of international obligations** and of an increasing range of **international standards and initiatives** on the mining sector is that there are increasingly **clear expectations about the way the mining sector should be governed and managed to deliver more sustainable outcomes**. This brings ever more clarity on what should be done, shifting the **focus to implementation by governments and by mining companies**. They also provide new tools for the affected public and civil society to hold governments and companies to account.

d) Document Overview

Target Audiences:

→ **Primary audience**: Government authorities responsible for the regulation of the mining industry, including its environmental, social and human rights impacts (at national, regional and local level): mining, environmental, social[14] and human rights[15] authorities.

→ **Secondary audience**: Civil society representatives, indigenous peoples and their representatives, national human rights institutions (NHRIs), national gender machineries and other development partners and practitioners.

→ **Not private sector mining companies in particular**, although they may find the Guide useful. There is a wealth of other material that is specifically targeted to mining companies (some of which is referenced in the Guide and its annexes).

Types of Mining Covered:

→ Large-scale mining (LSM)

→ Artisanal and small-scale mining (ASM) is only tangentially addressed, recognizing that all scales of mining may benefit from improvements in governance. In addition, ASM relationships with LSM are addressed.

Kinds of Issues Covered:

Box 2 below lists the typical issues and rights impacted by the mining sector. There may be additional issues, depending on the specific mining operation. The table below gives an idea of the types of issues that the Guide means by 'environmental, social and human rights (ESHR)' issues. The Guide does not cover each of these issues individually or in depth and often refers to whole groups of issues.

A note on terminology: These issues can be and sometimes are named or grouped differently, particularly in the 'human rights' column. These issues may often be grouped under the heading 'social' or 'social' and 'labour', but many, if not all, of these issues are international human rights that may be covered by a country's international obligations (see Box 3 below), national constitutions or national laws.

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14 In many countries, responsibility for 'social' issues is spread across a number of ministries with a wide range of names. The term 'social authorities', as used in this Guide, indicates two groups of ministries or authorities or agencies: (i) those responsible for social welfare and social protection; and (ii) those responsible for social segments of the population – women, children, indigenous peoples, minorities, disabled people.

15 The term 'government authorities with human rights mandates' is used in this Guide to indicate those ministries or authorities or agencies: (i) charged specifically with a human rights mandate – such as a Ministry of Justice, National Human Rights Institution (NHRI), Ombudsperson, etc.; (ii) responsible for the human rights of workers – i.e., labour ministries/authorities; and (iii) having a mandate to protect particular groups of the population – such as women, children or minorities. There may be an overlap among government authorities addressing 'social' issues, depending on how a given government is set up and organizes its internal regulation.

Box 2

Typical Areas of Environmental, Social & Human Rights Issues in the Mining Sector – referred to as 'ESHR' issues in the Guide

Environmental Issues
→ Water contamination & limiting water availability
→ Dam bursts and flooding
→ Waste production
→ Air pollution
→ Soil erosion and contamination
→ Stream sedimentation
→ Ecosystem destruction
→ Biodiversity impacts
→ Radioactive radiation
→ Submarine/riverine tailings disposal
→ Acid Mine Drainage (AMD)
→ Long-term impact on environmental capital
→ Increased noise, light and dust levels
→ Opening new areas to illegal logging and poaching

Human Rights Issues
Procedural rights
→ Access to information, public participation, access to justice & access to remedy
Substantive rights
→ Right to life
→ Right to an adequate standard of living, livelihoods and related land rights to pursue land-based livelihoods
→ Right to food
→ Right to water
→ Right to health
→ Right to housing & resettlement
→ Right to social security/social protection
→ Rights to freedom of expression, association & assembly
→ Women's rights
→ Children's rights
→ Indigenous peoples' rights, minority rights
→ Disability rights
→ Cultural rights and the protection of cultural property
Human Rights Principles
→ Accountability and the rule of law
→ Participation and inclusion

Broader Social Issues with Links to Mining & Human Rights
→ Community development
→ Impacts of in-migration on social cohesion and social services
→ Other impacts on social capital
→ Social conflict

Labour Issues (Human Rights Issues of Workers)
→ Health & safety
→ Forced labour/unfair working conditions
→ Vulnerable migrant and temporary workers
→ Child labour
→ Non-discrimination
→ Unequal pay for unequal work, unpaid care work
→ Sexual harassment

Box 3

Brief Explanation of the International Frameworks behind the Three Core Pillars of the Guide

Pillar 1: International Environmental Law Framework

International environmental law has evolved into a large body of binding treaties, key concepts and principles of environmental law and non-binding instruments covering a wide range of issues, including:

- **Multilateral Environmental Agreements**[16] covering a wide range of environmental topics from biodiversity to chemicals to climate change at the global level.
- **Region-Specific Environmental Agreements**[17] covering regional-specific issues such as the protection of species found in particular areas, the protection of particular habitats or specific pollution in regional areas.
- **Key concepts and principles of international environmental law**, such as sustainable development, intergenerational and intragenerational equity, the precautionary principle, the 'polluter pays' principle, access and benefit-sharing regarding natural resources, common heritage and common concern of humankind. They provide guidance in interpreting legal norms, constitute fundamental norms, fill in gaps in the law and underpin international and national approaches to environmental protection.[18]

Pillar 2: The International Human Rights Framework

International human rights law has evolved into a large body of binding treaties and non-binding instruments covering a wide range of issues. They include:

- The **International Bill of Human Rights**, consisting of the Universal Declaration of Human Rights (UDHR), and the two binding international conventions based on the UDHR: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[19]
- **Seven further core conventions**[20] cover the following areas and are supported by monitoring bodies: (i) the elimination of all forms of racial discrimination; (ii) the elimination of all forms of discrimination against women; (iii) the prohibition of torture and other cruel and inhuman or degrading treatment and punishment; (iv) the rights of the child; (v) the protection of the rights of migrant workers and their families; (vi) the protection from enforced disappearance; and (vii) the rights of persons with disabilities.
- **Other universal human rights instruments** cover a wide range of topics, such as business and human rights, that also apply to mining companies. Some are binding and others are non-binding guidance.[21]
- **Regional human rights instruments** such as the European Convention on Human Rights, the Inter-American Convention on Human Rights, the African Charter on Human and Peoples' Rights and other instruments that have been adopted at the regional level, all reflect the particular human rights concerns of the region and provide for specific mechanisms of protection.[22]

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16 See https://www.informea.org/en/treaties

17 Id. See also https://www.ecolex.org/

18 http://web.unep.org/divisions/delc/our-work/environmental-law/international-environmental-law

19 http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf

20 http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx

21 http://www.ohchr.org/EN/ProfessionalInterest/Pages/UniversalHumanRightsInstruments.aspx

22 http://bangkok.ohchr.org/programme/other-regional-systems.aspx

- **Human rights principles underpinning a human rights-based approach to development**: The following principles have been defined in the jurisprudence of international human rights: (i) universality and inalienability; (ii) indivisibility; (iii) interdependence and interrelatedness; (iii) equality and non-discrimination; (iv) participation and inclusion; and (v) accountability and rule of law.

Human Rights Law:
Includes:

- **Procedural rights** in relation to the environment decision-making, including those covered in Principle 10 (see below)
- **Substantive rights** that can be impacted by environmental damage, including the rights to life, health, food, water, culture and non-discrimination.[23]

Sets out a three-tiered set of obligations:[24]

- The **obligation to respect** means that States must refrain from interfering with or curtailing the enjoyment of human rights.
- The **obligation to protect** requires States to protect individuals and groups against human rights abuses, including abuses by businesses.
- The **obligation to fulfil** means that States must take positive action to facilitate the enjoyment of basic human rights; this can be disaggregated into the obligations to facilitate, promote and provide.[25]

Pillar 3: Principle 10 of the 1992 Rio Declaration on Environment and Development[26]

Principle 10 of the Rio Declaration on Environment and Development was adopted as part of the 1992 United Nations 'Conference on Environment and Development' (UNCED), informally known as the 'Earth Summit'. The Principle has become a globally recognized framework for the development of national standards and laws on three core procedural rights important to improving environmental governance; these are the most visible expression of the interlinkage between one area of human rights (procedural rights) and environmental protection.[27] They have been translated into regional conventions that turn Principle 10 into binding obligations.[28] In many countries, these goals are enshrined as constitutional protections of the rights to a healthy environment, life, health and an adequate standard of living as well as the rights of freedom of expression and association.

- **Access to Information** about the environment ensures that members of the public are able to know and understand what is happening in the environment around them and can participate meaningfully in public affairs and make informed decisions about their lives. It is therefore important in its own right as well as in the role it plays in enabling meaningful public participation. Rights to information are increasingly recognized more broadly in constitutions, national legislation – often under the heading 'freedom of information' – and initiatives such as the Open Government Partnership.[29]

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23   Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, A/HRC/34/49, (2017), http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/34/49

24   http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx

25   See, for example, CESCR, "General Comment No. 15 (2002): The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)," E/C.12/2002/11, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2002%2f11&Lang=en

26   U.N.G.A., A/CONF.151/26 (Vol. I), 12 August 1992, Annex I.

27   Summarized from: UNEP, "Putting Principle 10 Into Action: Implementation Guide for the UNEP Bali Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters," pp. 9-10, (2015), http://wedocs.unep.org/handle/20.500.11822/11201 and from the Aarhus Implementation Guide (2nd Edition) (2014), https://www.unece.org/env/pp/implementation_guide.html

28   See the Aarhus Convention, which, as of early 2018, is the only legally binding international instrument on environmental democracy that put Principle 10 of the Rio Declaration on Environment and Development into practice; see https://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf. Latin American and Caribbean countries are negotiating a regional instrument on access to information, participation and justice in environmental matters; see https://www.cepal.org/en/subsidiary-bodies/reunion-comite-negociacion-principio-10-america-latina-caribe

29   The OGP also has a natural resources working group; see https://www.opengovpartnership.org

- **Public Participation** is a human right that benefits citizens and governments alike. Citizens have the opportunity to voice their concerns and have their views taken into account in policymaking, contributing information, analysis and considerations to better decision-making.
- The **Access to Justice** component promotes accountability and the rule of law through the use of fair and impartial administrative and judicial mechanisms. It backs up these rights with access to justice provisions that go some way towards putting 'teeth' into these principles.

A Quick Note on Implementation of the Three Pillars of the Guide:

Each of these three pillars is in turn comprised of policies, laws and standards that set out the content of *what* governments should do and often how they should implement them to improve governance in the mining sector.
- Governments take on **international legal obligations** when they sign international treaties in the environmental and human rights field. They are expected to honour the requirements of those treaties.
- **International standards and principles** provide more guidance on protection in particular circumstances. Examples in the environmental area include Principle 10 of the Rio Declaration and well-known principles and concepts of environmental law such as the 'polluter pays' principle. As another example, the UN Guiding Principles on Business and Human Rights provides guidance to governments and companies, including mining companies, on how to protect and respect human rights in the context of business operations, such as mining. Some are binding and some are not.

- Governments adopt **constitutions and national policies, laws and regulations** that incorporate their international obligations and provide more detailed requirements.
- Governments and mining companies may also participate in and agree to apply **voluntary standards regarding environmental and human rights issues in the mining sector.**
- **An important note on human rights** – A fundamental attribute of human rights is that they belong to every human being, – wherever they are in the world, whatever country, political grouping, race, social network, gender, etc. they belong to. They apply to every member of the human family, everywhere. This is the case regardless of whether a given government has formally accepted the principles of or ratified either or both of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. So, while many governments have accepted legally binding obligations on human rights that provide more formal avenues to hold governments accountable, people affected by mining operations also have human rights regardless of whether they are specifically covered by national laws or not. Governments and businesses are expected at a minimum to respect human rights.

Organization of the Document

Step 1

Regulations, Institutions and Rule of Law: Highlights the pre-conditions for sound governance of the mining sector for sustainable development, including a sound policy and regulatory framework, strong institutions and rule of law that can deliver enforcement of the rules and access to justice.

Step 2

Planning: Highlights the importance of early integrated and participatory land use planning that seeks to balance existing and future uses of land from this early phase of planning mining developments.

Step 3

Exploration: Highlights the importance of addressing environmental, social and human rights issues already at exploration, as this can set the tone for long-term relationships around mining sites.

Step 4

Feasibility & Licensing: Highlights the importance of integrating environmental, social and human rights considerations into each step within the approvals process.

Step 5

Development & Construction: Highlights the significant environmental, social and human rights impacts of this phase, which requires regular monitoring and a systematic approach to engaging with the local community.

Step 6

Production: Highlights the importance of regularly monitoring and managing change that can have significant environmental, social and human rights impacts during the production process and of consulting with stakeholders when changes are significant.

Step 7

Closure: Highlights the need to start planning for closure from the beginning of the mining cycle and involving local communities and environmental groups in the process.

Step 8

Post-closure: Highlights the need for clear environmental and social targets for relinquishment that meet community expectations so that authorities and the mining company can close the mine site and turn it to new uses.

Annex I

Backgrounder on Principle 10 of the Rio Declaration on Environment and Development issued during the 1992 United Nations Conference on Environment and Development (UNCED), informally known as the 'Earth Summit' (see Box 2).

Annex II

On Using the Ecosystem Services Approach For Assessing the Mining, Ecosystems and Human Rights Nexus.

Annex III

On International Standards and Good Practice Guidance for the Mining Sector.

Step 01

Establish the Foundations for Resource Stewardship: Policy, Regulations, Institutions and the Rule of Law

In this first step, the government builds the foundations for good governance and stewardship of mineral resources. It is making strategic choices about managing its mining resources, translating those strategic choices into policy and legal frameworks and strengthening institutions to deliver on the mining strategy. It is entering into trade and investment agreements to attract investment to the mining sector. While sustainable development used to be an afterthought, it is now increasingly at the centre of creating mining strategies at this critical stage.

Primary Target Audience

→ Mining Authorities
→ Government team setting national strategies
→ Government team negotiating
   trade and investment agreements

Additional Targets

→ Environmental
→ Social and Human Rights Authorities
→ Gender Machineries
→ Justice Authorities

Summary of Step 1: Establishing the Foundations

	KEY ACTIONS IN THIS STEP	KEY MESSAGES
A	**Develop an Overarching Resource Vision or Strategy – Considering the Full Costs and Benefits**	The government should develop, together with its stakeholders, an overall vision for managing the country's national resources that transforms its resource wealth into inclusive, sustainable development. This starts with the question of whether to access resources or leave them in the ground in light of the wider environmental, social and human rights costs and benefits to the country, including for future generations.
B	**Establish Mineral Resources Ownership and Endowment**	In order to manage the country's mineral resources, the government must first establish what mineral endowments it has and then provide clarity in law and in practice (such as through clear mining cadasters) about who owns the country's mineral resources. It should also clarify how ownership of mineral rights interacts with other rights, particularly surface rights to land.
C	**Update Mining Policy and Legal Framework**	Governments should consider undertaking a benchmarking exercise to assess whether their mining policy and legal frameworks are updated and aligned with international standards and commitments and fit for purpose in light of their mineral resource endowments.

D **Develop an Investment Strategy to Attract Responsible Mining Investments**

The country's approach to attracting investment can constrain – or promote – more responsible foreign mining investment in the country. Governments should ensure that their investment policies and agreements are updated and aligned with their sustainable development approaches to lay the groundwork for appropriately regulating incoming foreign investment in the mining sector.

E **Strengthen the Coherence and Coordination among Institutions**

There are likely to be various national, regional and local authorities responsible for governing and managing some dimension of mining operations. Clear mandates to avoid overlapping responsibilities and coordinating across relevant government institutions responsible for environmental, social and human rights regulation of mining operations can improve the efficiency and effectiveness of enforcement, even in low-capacity environments.

F **Strengthen Enforcement by Authorities**

Governments will typically have or should create a range of options to provide the right incentives and disincentives so that mining companies comply with the law and licensing obligations. Where government capacity for enforcement is limited, authorities can look for additional options to reinforce capacity, including working with environmental, human rights, trade union and community organizations that take an active interest in monitoring mining operations.

G **Reinforce Access to Information, Public Participation and Access to Justice**

This foundation stage sets the overall direction for mineral development and is therefore a core stage for government to reinforce Principle 10 procedural rights. There should be a legal and institutional framework that ensures transparent and available information on the management and impacts of natural resource exploitation, provides opportunities for an informed public to participate in decision-making on natural resource management, and provides mechanisms to hold decision makers and mining companies accountable to an informed public.[30]

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30 This is reinforced through Principle 10 as well as international standards on resource governance. See the Natural Resource Charter, Precept 2, http://www.resourcegovernance.org/approach/natural-resource-charter

A Develop an Overarching Resource Strategy Considering the Full Costs and Benefits of Mineral Extraction

A resource strategy should set out the vision for transforming resource wealth into inclusive, sustainable development, starting with the question of whether to access resources or leave them in the ground in light of the wider environmental, social and human rights costs and benefits to the country. The SDGs prompt countries to rethink their approach to managing their industrial sectors and to take account of the country's commitment to climate change and other international environmental and human rights obligations. (See Figure 1 – SDGs and Mining.)

Develop a National Strategy for the Management of Mineral Resources

Does the government have a resource strategy that sets out its vision of how mineral (or other extractive) resources should be used?

- Does the government have an overall strategy or policy for the mining sector or extractive sector or the natural resources sector that is focused on sustainable development rather than focusing exclusively on the economic rents from the sector? (See Box 4 on the IGF Mining Policy Framework and the Natural Resource Charter Benchmark Framework as examples.)
- Is this strategy coherent with or part of the government's longer-term development strategy?
  → The mining strategy might usefully be included as part of other broader strategies, such as the National Development Strategy (see Box 5 for an example from Kenya of including the extractive sector in its overall Development Plan) and/or its SDG Action Plan, or its National Action Plan on Business and Human Rights (see Box 6 on the UN Guiding Principles on Business and Human Rights), especially if the mining sector is a significant contributor to the national economy.
- Is it coherent with wider mining strategies for its region (see Box 7 on Regional Mining Strategies)?

Understand Mining's Contribution to the National Economy

Does the government have a realistic and sound understanding of the mining sector's contribution to its economic development?

- Does the government have an overview of the direct and indirect contributions from the sector, including the distribution of those contributions?
  → The International Council on Mining & Metals' (ICMM) Mining Contribution Index[31] sets out an approach to measuring mining's contributions to national economies, concluding that "the contribution to national economies varies greatly between countries." In many lower middle-income countries, mining accounts for 60 percent to 90 percent of total foreign direct investment.
  → The potential employment creation of mining investments, should consider not only the number of jobs created, but also their timing, quality and security, likely beneficiaries, impact on livelihoods, and other socio-economic effects.[32]

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31 ICMM, Mining Contribution Index (2014), p. 4, https://www.icmm.com/website/publications/pdfs/8264.pdf

32 P. Toledano, O. Östensson and K. Cordes, "Parsing the myth and reality of employment creation through resource investments," Columbia FDI Perspectives, No. 213, November 20, 2017. Columbia Center on Sustainable Investment (www.ccsi.columbia.edu) and see: Redqueen, S. & IFC, "Effects of Oil, Gas & Mining Investments on Jobs: Literature review & estimation tools for Ghana and Peru," (2017), https://www.commdev. org/wp-content/uploads/2015/05/P_Effects_oil_gas_mining_investments_jobs-Literature_review_Estimation_tool_for_Ghana_and_Peru_31012017.pdf

Consider Trade-Offs and Total Costs & Benefits

Does the resource strategy specifically consider the range of trade-offs that must be made and does it consider the full costs and benefits of the positive and negative impacts of exploitation when making decisions about whether to extract?

- Does the strategy acknowledge and address trade-offs between stewardship of mining resources and stewardship of other natural resources – land, water, air and biodiversity?
- Does the strategy acknowledge and address the trade-offs between current consumption of non-renewable natural resources and the rights and impacts on future generations?
- Does the strategy acknowledge and address the impact of the sector on the government's commitments to climate change?
- Have the mining and environmental and human rights authorities specifically recognized the potential for conflicts around uses of land and agreed on an overall approach to balancing competing uses and competing interests, particularly in countries where mining may be a significant contributor to development?
  - → The relationship between mining and the environment and society is complex and is made even more so because technology and social expectations have changed far more rapidly than other areas of mining (financial, economic or geological issues). Laws and regulations authorizing and governing mining and those protecting the environment and society meet and potentially clash around the use of land in particular and especially where land titles are not well-defined or secure. While improvements in mining management and technology will reduce mining's impacts, they will not resolve all these conflicts.[33]
- Does the strategy take account of the full set of potential environmental, social and human rights (ESHR) costs and benefits of mining?[34] For example, improved valuation techniques and information on ecosystem services demonstrate that, although many individuals benefit from biodiversity loss and ecosystem change through extracting mineral resources, the costs of such changes borne by society as a whole are often higher.[35]
  - → Approaches to quantifying, measuring and weighing the full cost of industrial sectors to society and the environment are still being developed. In governments with lower capacity, some of these tools may be out of their reach without further support, but may nonetheless provide information on the types of tools available that can be implemented over time.
  - → Interministerial dialogue and coordination are vital to consider new approaches and tools that help address mining and environmental/societal aims.[36]
    - → The recently developed System of Environmental-Economic Accounting (SEEA) measures impacts at the national level (see Box 8 for a short overview of the System of Environmental-Economic Accounting).
    - → Other tools are available to assess some types of impacts (see, for example, Annex III on biodiversity), but not all, though there is increasing work on new methodologies.[37]

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33   See in particular, J. Southalan, "Mining Law and Policy – International Perspectives" (2010).

34   Chatham House, "Conflict and Coexistence in the Extractive Industries," (2013) https://www.chathamhouse.org/publications/papers/view/195670

35   The Millennium Ecosystem Assessment, Ecosystems and Human Well-Being Biodiversity Synthesis Report, (2005), Key Messages, p. vi, https://www.millenniumassessment.org/documents/document.354.aspx.pdf

36   See in particular, J. Southalan, "Mining Law and Policy – International Perspectives" (2010).

37   See for example, the Resource Impact Dashboard, http://www.resource-impact.org/Research-Strategy/

> → For example, resettlement would seem to be an obvious area where the full cost of the process should be measured and included in project costs for a mining operation, but even this area of measurement approaches is not very advanced.[38]

Figure 1: Mining and the SDGs[39]

38   See the University of Queensland, Centre for Social Responsibility and Mining initiative on mining and resettlement: http://www.miningresettlement.org

39   UNDP, Columbia Center on Sustainable Investment, UN Sustainable Development Solutions Network, World Economic Forum, "Mapping Mining to the Sustainable Development Goals: An Atlas," (2016), p. 5, https://www.commdev.org/mapping-mining-to-the-sustainable-development-goals-an-atlas/

Box 4

IGF Mining Policy Framework & Natural Resource Charter Benchmarking Framework

The Intergovernmental Forum on Mining, Minerals & Sustainable Development (IGF) – Mining Policy Framework

The IGF is a global intergovernmental policy forum on mining and sustainable development with membership open to all member countries of the UN that have an interest in effectively managing their mining/metal sector for development benefits. The objectives of the Forum are to improve, enhance and promote the contribution of the mining, mineral and metals sector to sustainable development and poverty reduction. The **IGF Mining Policy Framework** is intended to provide a comprehensive model that, progressively implemented, will allow mining to make its maximum contribution to the sustainable development of developing countries. It provides guidance on:
(i) the legal and policy environment; (ii) financial benefit optimization; (iii) socio-economic benefit optimization; (iv) environmental management; (v) post-mining transition; and (vi) artisanal and small-scale mining.

The Natural Resource Charter[40] is a set of principles for governments and societies on how to best harness the opportunities created by extractive resources for development. The Charter was developed by a group of independent experts and practitioners together with the Natural Resources Governance Institute (NRGI). The **Natural Resource Charter Benchmarking Framework** is a tool for benchmarking a country's management of oil, gas and minerals against global best practices. The framework draws on the policy options and practical advice of the Natural Resource Charter and consists of a series of questions that government officials, concerned citizens or actors in the international community can use to structure research, discussions and strategic planning.

Box 5

Kenya: Including the Mining Sector within a Government's Medium- and Long-Term Plans

Kenya Vision 2030 is the country's development blueprint that covers the period from 2008 to 2030.[41] Vision 2030 aims to transform Kenya into an industrializing, middle-income country by the year 2030. In 2007, the Vision 2030 mapped out six sectors whose growth and employment creation potential were seen as key in driving the country's economy, but the extractive sector was not one of them. However, in late 2013, after the discovery of oil, Vision 2030 earmarked oil and gas and a re-vamped mineral sector as the seventh sector. Even though the sector has traditionally accounted for minuscule levels of GDP and total export earnings, recent discoveries pointed to an increasing importance of the sector in contributing to increased export earnings, higher GDP growth, broader social development, infrastructure development and job creation, which merited adding it to the National Development Plan.[42]

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40   Extractive industries are included in the Vision's second medium-term plan (2013-2017) as the seventh sector of the economic pillar. The Government of the Republic of Kenya, "Kenya Vision 2030." http://www.vision2030.go.ke/index.php/pillars/

41   NRGI, "Natural Resource Charter Benchmarking Framework," (2016), http://www.resourcegovernance.org/analysis-tools/tools/natural-resource-charter-benchmarking-framework

42   Institute of Economic Affairs, "A Primer to the Emerging Extractive Sector in Kenya," (2014), p. 19, http://www.ieakenya.or.ke/downloads.php?page=Extractive-Sector-In-Kenya.pdf

Box 6

The Government Duty to Protect Human Rights in the Business Context – The UN Guiding Principles on Business and Human Rights (UNGPs)

The UN Guiding Principles on Business and Human Rights, endorsed by the UN Human Rights Council in 2011, are based on a three-'pillar structure:

- **Pillar I: The State Duty to Protect** against human rights abuses by third parties, including businesses, means that the State should adopt effective policies, legislation, regulations and adjudication to prevent, investigate, punish and redress human rights abuses as a result of business operations.
- **Pillar II: The Corporate Responsibility to Respect** human rights, means that companies should avoid infringing on the human rights of others and address negative impacts with which they are involved. (See Box 41 for an explanation of the application of the UNGPs to mining companies.)
- **Pillar III: Access to Effective Remedy** for victims of business-related human rights abuses should be provided through judicial and non-judicial means

For governments, Pillar I re-emphasizes the State's international human rights obligations to incorporate the protection of human rights into its relevant regulatory framework, including for the mining sector. This Guides highlights a wide range of approaches and tools to support governments in doing so.

Some governments are also adopting 'National Action Plans on Business and Human Rights' that set out the government's laws, initiatives and forthcoming plans to strengthen attention to human rights in the business context and ensure that those whose human rights have been negatively impacted by business, including mining operations, have access to remedy – through the courts or other non-judicial mechanisms, including NHRIs.[43] Kenya is the first African country to start to develop a Business and Human Rights National Action Plan and is planning to include the extractive sector as a focal sector in the plan.

Box 7

Regional Mining Frameworks to Help Support National Frameworks

African Union – Africa Mining Vision

The Africa Mining Vision,[44] formulated by African nations, sets out a vision about how mining can be used to drive continental development and provides guidance to African governments in developing their own mining policies. The vision is of: *"Transparent, equitable and optimal exploitation of mineral resources to underpin broad-based sustainable growth and socio-economic development"*. The 2011 Action Plan sets out nine areas of action.[45]

Asia – ASEAN Minerals Cooperation Action Plan[46]

The ASEAN mining vision seeks to support ASEAN governments to *"[c]reate a vibrant and competitive*

ASEAN mineral sector for the well-being of the ASEAN people through enhancing trade and investment and strengthening cooperation and capacity for sustainable mineral development in the region". The four strategic areas for work are: (i) facilitating and enhancing trade and investment in minerals; (ii) promoting environmentally and socially sustainable mineral development; (iii) strengthening institutional and human capacities in the ASEAN minerals sector; and (iv) maintaining an efficient and up-to-date ASEAN minerals database, including its infrastructure towards achieving integration in the minerals sector.

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43   See Business and Human Rights resource Centre, National Action Plans, https://www.business-humanrights.org/en/
un-guiding-principles/implementation-tools-examples/implementation-by-governments/by-type-of-initiative/national-action-plans

44   See United Nations Economic Commission for Africa, Africa Mining Vision, http://www.africaminingvision.org/

45   Ayoup Elrashdi - African Union Commission, "Sustainable Mining: Policy options and partnerships in Agenda 2063", IGF (2015),
http://igfmining.org/wp-content/uploads/2015/10/Ayoup-Zaid-Elrashdi-AU-PresentationIGF.pdf

46   ASEAN Minerals Cooperation Action Plan, 2016-2025, http://www.asean.org/storage/2015/12/AMEM/AMCAP-III-(2016-2025)-Phase-1-
(Final)2.pdf

The System of Environmental-Economic Accounting (SEEA)[47]

The SEEA is an internationally agreed framework that helps policymakers and stakeholders understand the links between the environment and economy through standardized national accounts. It brings together basic environment statistics such as on natural resources (water, energy, forest, flows of materials and pollutants) to inform integrated policies, evaluate trade-offs between different policies and evaluate their impacts across domains of the economy, the environment and society. Indicators derived from the accounts help answer following policy questions:

- Who benefits from natural resource use? What are the impacts on the state of the environment and on other sectors of the economy?
- How does depletion of natural resources affect measures of the real income of a nation? Are the depletion costs recovered by the government? What is the composition of the wealth of a nation?
- Are current trends in production and consumption of resources sustainable? What economic instruments are in place?

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47 United Nations Statistic Division, Environmental-Economic Accounts, https://unstats.un.org/unsd/envAccounting/default.asp

B Establish Mineral Resources Ownership and Endowment[48]

In most jurisdictions, mineral ownership is vested in the State as custodian for the country and its future generations, rather than in private hands. In order to manage the country's mineral resources, there are some fundamental questions that the government, together with interested stakeholders, should explicitly consider and address in the strategy, policy and legal framework:

Clarify Ownership

Who owns the country's mineral resources? Who controls and manages the mineral resources?

- Is it clear who owns sub-surface rights (mineral rights)? Is it clear who can own and have rights with respect to surface (land rights)? Is it clear how the two interact? For example, does ownership of sub-surface mineral rights give automatic access to the land or does this need to be negotiated with the owner of the land?
  - → Establishing clarity about who owns the country's mineral resources is a first step. In many countries, the government owns sub-surface mineral rights. This may be set out in the constitution.
  - → How those interact with surface rights to land and natural resources is one of the fundamental steps in establishing a workable mining framework. Surface rights to land, land use and other natural resource use are allocated to private parties or to a combination of private parties and communal titles. Or there may be an uncertain mix of legal title and traditional titles or customary ownership/use patterns by indigenous or other land-based communities that do not provide clarity on ownership or use about land rights or mineral rights.
- Is it clear who has responsibility for managing mineral resources within the central government? Between the central government and regional governments?
  - → This is potentially much more important than the question of ownership because the power to legislate and regulate natural-resources development determines the rights, and the limits of the rights, of ownership. This may also be linked to the right to collect revenues from the exploitation of natural resources, but this does not have to be the case.[49]

Understand the Country's Mineral Resource Endowment

Does the government have a well-informed understanding of the country's mineral resources?

- Does it have a mining cadastre that covers the whole country?
- Is that cadastre publicly available and easy to access?
- Does the government regularly update the public mining cadastre using information submitted by exploration companies?
- Who owns the data in the cadastre – the government or mining companies?
- Does the ministry in charge of mining have geospatial information on areas that cannot be licensed for mining, such as protected areas?

48　This section draws heavily on the NRGI, "Natural Resource Charter Benchmarking Framework," (2016), http://www.resourcegovernance.org/analysis-tools/tools/natural-resource-charter-benchmarking-framework

49　N. Haysom and S. Kayne, "Negotiating natural resources for peace: Ownership, control and wealth-sharing," (2009), http://comparativeconstitutionsproject.org/files/resources_peace.pdf

- Does it have information on areas where additional studies or processes (such as processes to obtain free, prior and informed consent (FPIC)) must be carried out before any mining can be licensed, such as where there are populations of indigenous peoples? (See Step 2 on Planning.)

C Update the Mining Policy and Legal Framework

This section is about whether the government's mining strategy is reflected in clear and coherent operational policies, laws and regulations applicable to the mining sector.[50] These are particularly relevant to the mining, environment and social/ labour ministries that oversee mining, and to any parliamentary committees and NHRIs or other mechanisms used to resolve disputes or provide remedies for breaches or harms by mining companies or the government.

Coherence with Sustainable Development Objectives

Is the mining policy and legal framework updated to bring it in line with new thinking around sustainable development?

- Has the government benchmarked its mining-specific policies, laws and codes to govern the sector against new, authoritative frameworks that incorporate sustainable development approaches?
  → The InterGovernmental Forum on Mining, Minerals, Metals and Sustainable Development (the IGF)'s Mining Policy Framework (MPF) presents an updated compendium of best practices for governments on good governance and sustainable development (see Box 9 for the IGF's Mining Policy Framework). One of the core suggestions of the MPF is the revision and periodic updating of mining codes and standards to reflect changing knowledge and best practice.[51]
  → The World Bank Mining Investment and Governance Review (MinGov) provides an assessment framework to help governments identify areas to strengthen governance of the sector, attract mining investment and improve the use of resource revenues for sustainable national development. (See Box 9 for the MinGov Framework.)

Coherence with International Obligations

Has the government benchmarked national laws against international environmental, social and human rights (ESHR) standards to understand whether there are major gaps within the existing legal framework?

- Has the government taken advantage of the numerous organizations – international and national – that provide guidance on translating international standards into national law and on model laws that states can adapt to their own national circumstances, or of comparative analysis that helps governments understand different options and build on experiences from other countries? (See Box 10 on support services for governments on extractive industries and Box 11 on extractive industries knowledge hubs.)

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50   See in general, Extractives Hub, "Mineral Policy," (2017), https://beta.extractiveshub.org/topic/view/ID/16

51   IGF, "Mining Policy Framework - Legal and Policy Environment Chapter," (2013), http://igfmining.org/mining-policy-framework/

Coherence Across All Areas of Policy and Law that apply to the Mining Sector

Are the mining policies and laws coherent with other national laws that are relevant to the sector?

- Has the government assessed whether the policies and laws that apply to the mining sector are coherent?
  - → This should start with consideration of relevant constitutional provisions, such as those on environmental protection. As of 2016, 103 countries have adopted constitutional or statutory provisions guaranteeing the right to a healthy and safe environment, the majority (64) of which were adopted since 1992.[52]
  - → It should consider how the laws governing the fuller set of ESHR issues impacted by the mining sector apply to the sector. Governments usually have in place a far wider set of policies and laws that are relevant to promoting the economic and social development benefits of the sector while preventing or mitigating the negative impacts – on environmental protection, human rights protection, labour law protection, laws on gender equality, on child protection, on land allocations, etc.[53]
  - → Such a review also provides an opportunity for governments to adopt approaches on promoting human rights in the sector – i.e., actively highlighting how human rights can be protected and, in some cases, fulfilled as a result of the operation of the sector with the public and in discussions with mining companies. However, as noted elsewhere, the government should developed a balanced assessment and provide full, fair and balanced information. This could include, for example, decent work opportunities, enhanced water supplies through shared water infrastructure and health services provided through newly established health clinics. However, unlike environmental areas where offsetting of environmental damage – to the climate, to biodiversity – is acceptable under certain defined and controlled circumstances set out in the relevant international climate change and biodiversity conventions (and subsequent implementing texts), offsetting is not appropriate for human rights impacts. It is not acceptable to tolerate child labour in mining operations in exchange for a health clinic, for example. Each set of human rights impacts must be dealt with separately through prevention, mitigation or remediation.
  - → At a minimum, mining authorities should check to ensure that these other laws relevant to the mining sector do not conflict with the mining laws and regulations.

Developing a Mining Framework that is Fit for Purpose for the Types of Mining in the Country

Does the government have an approach to mineral development that is fit for purpose for the type of minerals and mining in the country?

- Does the government have a 'one-size-fits-all' approach to mining or are its mining policies and laws adapted to the different types of mining in the country?
- Mining policy, law and regulation in many countries have been framed often with only large-scale mining in mind. Yet mining activities often take place across a wide range of minerals (see Box 12 on different segments of the mining sector), with significant differences among minerals and mining operations, each with particular environmental or social characteristics.
- A more targeted regulatory regime approach means regulators are better able to manage the key ESHR risks that are typical to each segment.

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52   UNEP, Environmental Law Institute, "Environmental Rule of Law Discussion Paper," (Dec 2016), p. 3. (on file)

53   IISD, "The Mining Policy Framework: Assessing the implementation readiness of member states of the InterGovernmental Forum on Mining, Minerals, Metals and Sustainable Development - Synthesis Report," (2015), http://www.iisd.org/sites/default/files/publications/mining-policy-framework-synthesis-report.pdf

Identifying Gaps in the Framework

If there are gaps in the legal and regulatory structure applicable to mining, do the authorities have an idea of how the gaps are being filled?

- Has the government assessed whether there are specific gaps in its policy and legal framework that are often a source of conflict with local communities or CSOs and/or that result in repeated incidents or repeated patterns of harm? In other words, does it have a way of recording and analysing patterns or trends in conflicts or complaints around mining operations that will help it diagnose and address root causes?
  - → There are some typical gaps that can generate significant concerns and harms to consider:
    - → Resettlement: even though large-scale mining can result in the resettlement of local communities (sometimes on a significant scale), many countries do not have a legal framework in place or even guidance on resettlement.
    - → Biodiversity: there may be little guidance on how to assess and then prevent or mitigate biodiversity impacts of mining. (See Annex III on Biodiversity.)
    - → Community development: requires the interaction of various social services with mining operations, but many governments do not have a strategic vision or guidance about how mining companies should address community development other than through local procurement/local content requirements. Some governments and initiatives have started to develop more standardized approaches to community development agreements[54] and to benefit-sharing.[55]
- If there are gaps, are the mining/environmental authorities specifically encouraging companies to apply good international practices in the interim? (See Annex II on International Standards for Mining Companies.)
  - → Typically, gaps will be filled by good (or poor) private sector mining practices; even where governments do not have the frameworks in place to fill those gaps, they can still make clear and public their expectations to mining companies and the broader public that mining companies apply international standards to guide their operations.

54　See CCSI, "Emerging Practices in Community Development Agreements," (2016) http://ccsi.columbia.edu/files/2016/02/Emerging-practices-in-CDAs-Feb-2016-sml.pdf and World Bank, "Mining Community Development Agreements : Source Book," (2012), https://openknowledge.worldbank.org/handle/10986/12641

55　IFC Discussion Paper, "The Art and Science of Benefit Sharing in the Natural Resources Sector," (2015), https://commdev.org/wp-content/uploads/2015/07/IFC-Art-and-Science-of-Benefits-Sharing-Final.pdf

Box 9

World Bank Mining Investment and Governance Review & IGF Mining Policy Framework Assessments – Tools to Support Implementation of Many of the Areas Covered in this Guide[56]

Both of the assessment frameworks below can feed into an existing law and policy revision process or provide the impetus needed to start one. They can provide a comprehensive review of mining laws and policies, a greater understanding of how they compare to international best practice, and the knowledge and tools required to improve mining governance.

1. **The Mining Investment and Governance Review (MInGov)** helps participating countries identify areas to strengthen governance of the sector, attract mining investment and improve the use of resource revenues for sustainable national development. The methodology provides a detailed set of indicators and questions to help governments further develop their policy and legal frameworks on the areas covered in this Guide. The actual review is performed through a combination of desk research and in-country interviews with sector experts and stakeholders. It offers actionable steps for reform, supports transparency and informs investment decision-making and debate among interested stakeholders. The World Bank has conducted reviews of a number of countries, including Kenya and Mozambique.[57]

The MinGov assessment framework covers the following areas:
- **Policy, Legislation and Regulation**: measuring the scope and quality (compared to good practice) of mining sector rules.
- **Accountability and Inclusiveness**: measures the quality of accountability and transparency practices, the extent to which the public are involved in governance, and the gap between intended (*de jure*) and actual (*de facto*) accountability and inclusiveness.
- **Institutional Capacity and Effectiveness**: measures the quality of government organizations and their ability to effectively govern, including particularly the extent to which the *de jure* intent of the rules is applied in practice (*de facto*).

- **Economic Environment**: reviews broader economic factors, including cost competitiveness, economic stability, the general investment climate, and skills and human capital.
- **Political Environment**: measures political risks relevant to the mining sector.
- **Sustainable Development**: covers development planning, local supplier development, economic diversification and leveraging infrastructure.
- **Mining Sector Importance**: measures the potential for mining led growth.

2. The IGF also has an assessment process to assess how well governments are implementing the **IGF Mining Policy Framework**. The **Mining Policy Framework Assessments** are carried out by expert teams led by the IGF Secretariat. The assessments are demand-driven and are undertaken with the support and participation of the country's ministry in charge of mining. They are broken into two main phases:
- **Phase I: Assessment**: Working closely with government counterparts, the assessment team – through a combination of desk and field research in consultation with stakeholders and mine site visits – uses the best practice standards of the MPF to identify key strengths, weaknesses and gaps in the country's existing mining laws, policies and regulations.
- **Phase II: Capacity-building**: In this phase, the IGF brings a group of expert trainers to meet with key stakeholders, including the government, with a focus on giving stakeholders the knowledge and tools they need to address key weaknesses and improve mining sector governance.

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56   The World Bank, "The Mining Investment and Governance Review (MInGov)", http://www.worldbank.org/en/programs/mingov

57   As of the date of this Guide, the country reports were not yet available. http://www.worldbank.org/en/programs/mingov - 2

Box 10

Extractive Sector Support Services for Governments

In addition to IGF and the World Bank (see above), there are a range of other organizations providing support services to governments to improve the mining sector:

- **Columbia Center for Sustainable Investment**: hosts a **Negotiations Support Portal for Host Governments**[58] and provides regular trainings for government officials in the sector.[59]
- **Natural Resources Governance Institute** provides a wide range of targeted regional training for government officials.[60]

- **International Institute for Sustainable Development, Annual Forum of Developing Country Investment Negotiators**[61] is a platform for developing country government officials to discuss trends and perspectives in investment-related negotiations.
- **The Extractives Hub**,[62] supported by UK Aid, collects updated information on the extractives sector from expert sources & provides information a panel of technical that provide specific, short-term consultancy services to governments in 30 focus countries free of charge.

Box 11

GOXI and Knowledge Hubs on the Extractive Sector

GOXI is a space for dialogue and platform for innovation and collaboration serving those actively working on governance issues in the extractive industries. Co-managed by the World Bank and UNDP,[63] the website brings together extractive initiatives, listing of events and organizations, a weekly newsletter and a wide range of other initiatives.

- It has a specific sub-group on Environmental Governance of the Mining Sector[64] that brings together knowledge products around particular topics such as biodiversity and human rights, mining waste, community monitoring, etc.[65]

In addition, there are several other very useful 'knowledge hubs' that provide a wide range of extractives information:

- Extractive Industries Sourcebook[66] – is managed and updated by the World Bank
- The Extractives Hub[67]
- Sustainable Mining Institute[68]
- Africa Minerals Development Centre[69]
- Africa Mining Legislation Atlas[70]
- Kenya: Extractives Baraza[71]

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58 http://negotiationsupport.org

59 http://ccsi.columbia.edu/work/projects/exectraining/

60 http://www.resourcegovernance.org/learning/training/

61 http://www.iisd.org/project/annual-forum-developing-country-investment-negotiators

62 https://beta.extractiveshub.org/

63 http://goxi.org/group/egp

64 http://goxi.org/group/egp

65 http://goxi.org/group/egp/page/knowledge-products

66 http://www.eisourcebook.org/

67 https://www.extractiveshub.org/

68 http://www.smi.uq.edu.au/

69 http://www.uneca.org/amdc

70 https://a-mla.org/

71 http://extractives-baraza.com/about-us

Box 12

Considering All Segments of the Mining Sector

Contemporary mining frameworks are becoming more specifically targeted and tailored to developing and managing different segments of the mining sector such as:

- **Development Minerals**: The UNDP-ACP – EU Development Minerals Program is a capacity-building initiative for mining authorities to improve the management of development minerals (industrial minerals, construction materials, dimension stones and semi-precious stones).[72]
- **Artisanal and small-scale mining (ASM)** is often seen as an unwelcome activity that degrades the environment and has a negative impact on communities. The sector, however, directly involves an estimated 25 million people (and indirectly supports 150 million) and provides essential livelihoods in some of the world's poorest and most marginalized regions. Several organizations and initiatives are working on developing appropriate governance structures and support to governments in better managing the subsector so that it becomes a contributor to sustainable development.[73] (See further Step 6 on Production).

D Develop an Investment Strategy to Attract Responsible Mining Investments

The government's approach to multilateral or bilateral investment treaties can set the boundaries around what the government can and cannot do with respect to regulating foreign mining companies, depending on the terms of the treaty. The government may tie its own hands with respect to regulating foreign mining investors even before they enter the country just by the provisions that are in investment treaties. These issues are particularly relevant to the ministries negotiating trade and investment deals, but are also relevant to the ministries dealing with environmental, social and human rights issues and to the government's legal department that develops model agreements and negotiates the agreements.

Asking the Right Question

Does the government ask, "How can we attract more mining, oil or gas investment?" or "How can we attract the *right kind of responsible* mining companies?"[74]

- Does the government draw on lessons learned from other countries in attracting mining companies (see Box 13 on lessons learned on attracting and benefiting from responsible mining investment gathered by UNCTAD) and consider points that mining companies view as important (see Box 14 for an annual survey of what mining investors consider)?

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72   http://www.undp.org/content/brussels/en/home/ourwork/sustainable-development/in_depth/capacity-development-of-mineral-institutions-and-of-small-scale-.html

73   See, for example, the IGF work on artisanal and small-scale mining: http://igfmining.org/artisanal-and-small-scale-mining/ and the work of the International Institute on Environment and Development's programme on artisanal and small scale mining: http://www.iied.org/iied-shines-light-small-scale-mining

74   See UNCTAD, http://investmentpolicyhub.unctad.org/publicdocs/annotations.htm - IA2

> → For example, research shows that mining companies typically want stringent social and environment regulation to decrease these risks and the risk of arbitration. Unclear regulations tend to discourage companies from investing.[75]
>
> → Integrating these perspectives into its investment approach requires interministerial coordination and in particular the participation of environment authorities and other authorities such as gender ministries in devising a comprehensive investment strategy for the extractive industries.
>
> • Home governments can also play a role in setting clear expectations that mining companies based in their jurisdiction respect international standards, including human rights, when operating abroad.[76] They have a number of tools at their disposal to do so.[77]

Investment Strategy & Policy Aligned with Sustainable Development

Are the government's investment policy and investment agreements up to date and aligned with the new approaches in this area?

• Has the government's investment strategy been updated to take into account the 'new generation' of investment policies that is emerging?

→ 'New generation' investment policies place inclusive growth and sustainable development at the heart of efforts to attract and benefit from foreign direct investment (FDI) and aim to balance the rights and obligations of countries and investors. They also include responsible business conduct as part of investment process. (See Box 41 on the application of the UNGPs to mining companies and See Annex III on international standards and good practices on responsible mining.) There is also an increased focus on using investment policies to attract specific investments that will help deliver on the SDGs.[78]

• Has the government reviewed the international investment agreement (IIA) model that it is using and does it understand the strengths and weaknesses of its model?

→ Most existing IIA models remain silent on environmental and social issues that apply to incoming foreign direct investment (FDI), including the mining sector, or lock in the regulatory structure that was in place at the time the IIA is negotiated.[79] Using older generation IIA models can significantly constrain the government's 'regulatory space' to regulate ESHR issues with respect to foreign mining companies even before the mining licensing process begins[80] and subject it to costly arbitration[81] if it tries to do so. This comes at the same time that recent analysis indicates a significant rise in arbitration between governments and the extractive sector in recent years under IIA.[82]

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75 STRADE, "European Policy Brief Strategic Dialogue on Sustainable Raw Materials for Europe (STRADE): Attracting mineral investors: The fundamentals of investor decisions," (2017), http://stradeproject.eu/fileadmin/user_upload/pdf/STRADE_PB05-2017_D2-5_AttractMinInvestors-FundamentalsInvestDecisions_May2017_FINAL.pdf

76 For example, the Canadian Government recently established the Canadian Ombudsperson for Responsible Enterprise to investigate allegations of human rights abuses arising from Canadian corporate activity abroad (including mining companies), recommend solutions and monitor implementation of those recommendations. https://www.canada.ca/en/global-affairs/news/2018/01/advancing_canadasapproachonresponsiblebusinessconductabroad.html

77 Institute for Human Rights and Business, "Home Government Series – Tools for to incentivise responsible business conduct of extractive companies operating abroad," https://www.ihrb.org/focus-areas/commodities/home-government-incentives-toward-responsible-business

78 UNCTAD, World Investment Report 2014: Investing in the SDGs – An Action Plan, http://investmentpolicyhub.unctad.org/Publications/Details/117

79 L. Cotula, "Foreign investment, law and sustainable development: A handbook on agriculture and extractive industries," (2016), p. 26, http://pubs.iied.org/pdfs/12587IIED.pdf

80 In contrast, governments should consider using UNCTAD's Investment Policy Framework to develop improved national models to attract mining investments. The Framework consists of: (i) a set of core principles for investment policymaking, (ii) guidelines for national investment policies and (iii) guidance for national policymakers on how to engage in the international investment policy regime. It provides options for the design and use of IIAs that incorporates lessons learned on what policies and measures work well, or not so well, under specific circumstances.

81 See, for example, the Investment Treaty News, which tracks key international investment law developments and arbitration, including those involving mining companies, http://www.iisd.org/itn/

82 Chatham House, "Conflict & Coexistence in the Extractives Industry - The Chatham House Arbitration Database" (CHAD), https://www.chathamhouse.org/sites/files/chathamhouse/field/field_document/chr_coc1113sup.pdf

- Has the government taken the following steps before negotiating a new IIA to attract foreign mining companies?
  → Understood the advantages and disadvantages of its IIA model and the current trends in addressing these issues.[83] (See Box 15 on Trends in International IIAs Relevant to Investment Protection in the Mining Sector.)
  → Reviewed whether its model IIA promotes or constrains sustainable development objectives, safeguards the right to regulate, while protecting and promoting foreign investment.[84]
  → Introduced or strengthened clauses about the protection of the environment and human rights in its IIAs.
  → If a dispute occurs, ensured that dispute settlement tribunal has relevant environmental or human rights expertise, and required access for third parties to the arbitration.[85]
  → Considered getting support in developing their investment frameworks and treaties in line with sustainable development from specialist sources?[86]

Box 13

UNCTAD 'Best Practice' Guide for Governments on How to Attract and Benefit from Responsible Investment in the Mining Sector: Lessons from Canada and Chile[87]

This **'Best Practice Guide' from UNCTAD** is targeted to governments seeking to attract mining investments and draws on lessons learned from Canada and Chile. It highlights that **policies to promote positive impact of FDI in mining** include:

- Supporting the public availability of geological data and enhance these databases through public investment and the encouragement of private exploration.
- Proactively addressing the water, energy and transportation needs of major mines through high-level interaction between the government and the industry.
- Assuring foreign investors of that regime stability using both policy instruments such as constitutional guarantees of property rights and security of tenure, tax and regulatory stability

contracts with the government, and international investment agreements, as well as using multi-stakeholder consultations to create social and political consensus on the general direction of mining policy.

- Requiring comprehensive environmental and social impact assessments (ESIAs) for project approval and ensure government follow-up on commitments by project developers.
- Implementing a legal framework that protects the rights of local communities and ensures their participation in mineral development.
- Incorporating international mining companies with leading environmental and social practices into private sector organizations and government policy processes.

83   UNCTAD, Investment Policy Framework, p. 73, http://investmentpolicyhub.unctad.org/ipfsd. For example, taking environmental action involving a mine site may be deemed to constitute 'indirect expropriation' requiring governments to compensate investors for losses unless specifically clarified in the text of the IIA. See L Cotula, " Foreign investment, law and sustainable development: A handbook on agriculture and extractive industries," (2016), p. 98, http://pubs.iied.org/pdfs/12587IIED.pdf

84   See: IISD, "UNCTAD's International Investment Agreements Conference 2016: Taking IIA Reform to the Next Level", (December 2016), http://www.iisd.org/itn/2016/12/12/unctads-international-investment-agreements-conference-2016-taking-iia-reform-to-the-next-level-james-zhan-diana-rosert/

85   L. Cotula, IIED Briefing, "Rethinking investment treaties to advance human rights," p. 1, (September 2016), http://pubs.iied.org/17376IIED

86   See the Columbia Center for Sustainable Investment's Negotiations Support Portal for Host Governments. This Portal aims to strengthen the accessibility and visibility of available tools & resources and technical support to assist host governments planning, preparing for, negotiating, monitoring and implementing large-scale investment projects in the extractive industry, land & agriculture and infrastructure sector: http://negotiationsupport.org; International Institute for Sustainable Development, Annual Forum of Developing Country Investment Negotiators, http://www.iisd.org/project/annual-forum-developing-country-investment-negotiators; and UNCTAD, Investment Policy Framework, http://investmentpolicyhub.unctad.org/ipfsd

87   UNCTAD, "Best Practices in Investment for Development: How to Attract and Benefit from FDI in Mining - Lessons from Canada and Chile," (2011), http://unctad.org/en/pages/PublicationArchive.aspx?publicationid=453

Box 14

Fraser Annual Survey: What Do Mining Investors Consider?

Respondents to the Fraser Institute's Annual Survey of Mining Companies consistently report that about 60 percent of their decisions on whether to invest come from a jurisdiction's pure mineral potential. However, the other 40 percent of the decision comes from policy-related factors. Competitive policies are those that impose low costs on firms while effectively addressing non-economic policy goals, such as environmental responsibility. The findings highlight that, when policies are unclear and uncertain, they can increase the compliance costs for firms wishing to explore.[88]

Box 15

Trends in International Investment Agreements (IIA) relevant to Investment Protection in the Mining Sector

There are **four general areas of evolution in IIAs** that are **improving the balance** between **investment protection** and **sustainable development**:[89]

1. Incorporating concrete commitments to promote and facilitate investment for sustainable development

2. Balancing country commitments with investor obligations and promoting responsible investment
3. Ensuring an appropriate balance between investment protection and regulatory space
4. Reforming the investor-state dispute settlement (ISDS) rules to shield host countries from unjustified liabilities and high procedural costs

E Strengthening the Coherence and Coordination among Institutions to Manage ESHR Issues

Managing LSM across the range of ESHR issues highlighted in this Guide is complex; there will typically be a range of government authorities with a mandate to cover various dimensions ESHR impacts of mining operations. Some countries allocate management of all ESHR impacts to the mining authorities; others may choose to share the management of mining impacts between the mining authority and these other government authorities, including local authorities.[90]

There is no 'best answer' as to which approach is better – each must fit within the overall governmental structure. What is crucial is that the legal regime provides clear lines of responsibility and accountability, that the staff with responsibility for the issues have the relevant expertise and that there is an approach to achieving coherence among the various government authorities.

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88   Fraser Institute, "Permit Times for Mining Exploration: How Long Are They?", p. 3 (2015), https://www.fraserinstitute.org/studies/permit-times-for-mining-exploration-how-long-are-they

89   UNCTAD, Investment Policy Framework, 2015, http://investmentpolicyhub.unctad.org/ipfsd

90   Extractives Hub, "Mining Institutions," (2017), p. 2, https://beta.extractiveshub.org/resource/view/id/6291

Clarity of Mandates

Has the government made a clear allocation of mandates for institutions responsible for mining and the ESHR impacts of mining – or are there overlaps, inconsistencies and/or gaps?

- Is it clear who has the mandate to control or manages mineral resources among government authorities and between central and regional or local governments?
  → Coherence must be achieved at numerous levels, but it should start with clarity around the mandates of the different ministries and authorities involved with the mining sector – mining, environment, health, social, labour, gender, human rights, etc. Formal decisions to clarify overlapping responsibilities helps relevant institutions fulfil their formal mandates clearly and through the correct institutions.[91]
  → The gaps identified in the legal framework may be a good place to start to think about gaps or overlaps in mandates.

Coherence & Coordination

Are there government coordination mechanisms, horizontal and vertical?

- *Horizontal*: Does the government have systems in place to ensure coherence in the management of mining across the relevant branches of government (horizontally)?
  → Such as through appointing a lead office in the president's/prime minister's office to co-ordinate, appointing a ministry lead, such as the ministry of mining or planning to coordinate across ministries with jurisdiction over the mining sector, or interministerial working groups, or focal points.
- *Vertical*: Is there a system to manage vertical coherence, coordinating between central and regional and local authorities (see Step 2)? Do local authorities have any capacity or knowledge to interact with and manage mining operations?
  → Many countries have decentralized public administration, but are without appropriate resources (human and financial) to carry out some of the significant and complex tasks that may be required to supervise mining operations, such as the complex assessment of compliance with environmental and social management plans (ESMP) by mining companies.
  → Has the central government addressed capacity-building needs for regional and local governments in mining regions?
- *Informally*: Recognizing that there are often contrasting agendas, interests, commitments and power distribution among different governmental institutions, do the weaker government institutions have a champion or other informal mechanisms to 'make their case'?

Operational Relationships

Do mining authorities have an operational working relationship with the other authorities with responsibilities for mining operations?

- Do the mining authorities have or have access to the relevant expertise? I.e., if the mining authority is responsible for the ESHR impacts of mining, then it should have the relevant expertise rather than entrust environmental or human rights issues to mining engineers with technical expertise in ore extraction.
- Does the mining authority interact regularly with:
  → The Ministry of Labour that is responsible for mine workers? Does the mining authority have a good idea of working conditions in the mines and of key areas of concerns, or is it only informed once there is something as disruptive as a strike at the mines?

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91   Extractives Hub, "Mining Institutions," (2017), p. 12, https://beta.extractiveshub.org/resource/view/id/6291

→ The Ministry for Women's Affairs to strengthen attention to gender equality and women's empowerment throughout the steps of the mining cycle? (See Box 16 on approaches to taking a gender specific approach to mining.)

→ The Ministry of Environment and the departments or authorities in charge of environmental reviews of mining operations? Is it aware of key environmental concerns at key mines?

→ Regional and local authorities where mines are located? Is it clear who is responsible for first response if there is an emergency? Does it communicate and collaborate regularly with the territorial authorities about community concerns around mine sites so that it has a good overview of key concerns across the country?

→ The country's human rights ombudsman or NHRI? Do they communicate and collaborate about community concerns around mine sites?

→ The Ministry of Health with respect to health-related impacts from extraction, processing, transport, etc.?

→ The country's security forces with respect to the protection of mining assets and their interaction with private security forces?

Box 16

Strengthening Attention to Gender in Mining Processes

Taking a specific gender-responsive approach to mining should be built in throughout the mining cycle and can by particularly reinforced at this design stage by:

- Ensuring that consultations carried out as part of any policymaking and rulemaking processes (and subsequent consultations carried out as part of the ESIA process around specific mining projects) include specific and targeted consultations with a cross-section of women from various social-strata of the community, to ensure that their voices and priorities are taken into account.

- Undertaking a review of legislation with a particular impact on women such as inheritance, land titling and ownership laws or laws on access to finance in order to understand what steps are needed bring the national legal framework in line with women's rights to equality and non-discrimination.

- Considering preferential procurement policies for women-owned businesses

- Draw on good practice examples – see, for example,

  → GIZ, 'Encyclopedia of Gender and Mining: Key Initiatives, Best Practices and Actors' in the area of gender and mining globally[92]

  → World Bank, 'Gender Dimensions of the Extractive Industries: Mining for Equity'[93]

  → Rio Tinto, 'Why Gender Matters – A resource guide for integrating gender considerations into communities work at Rio Tinto'[94]

  → Publish What you Pay, 'Extracting Equality – A Guide'[95]

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92 http://goxi.org/profiles/blogs/encyclopedia-of-gender-and-mining-key-initiatives-best-practices

93 https://www.commdev.org/gender-dimensions-of-the-extractive-industries-mining-for-equity/

94 Rio Tinto, "Why gender matters: A resource guide for integrating gender considerations into communities work at Rio Tinto," (2009), http://www.riotinto.com/documents/ReportsPublications/Rio_Tinto_gender_guide.pdf

95 http://www.publishwhatyoupay.org/pwyp-resources/extracting-equality-a-guide/

F Strengthen Enforcement by Authorities

Conflicts in and around mining operations are generally on the rise.[96] Another key role for government is to provide credible systems for enforcement and dispute resolution. Environmental, social/labour and mining authorities will typically have a range of options to enforce the laws and the mining contract/license: specialized mining, environmental, labour laws, more general criminal and administrative laws, and, if mining contracts are used, then in a well-crafted mining contract. Which options are available will depend on the law in the jurisdiction and what is provided for in the specific contract/license.

Using Criminal Law As Appropriate

Does the law provide for criminal sanctions on mining companies or mining company executives for serious violations ESHR laws?

- Where there are serious violations of the law involving significant environmental or social harms (severe environmental pollution, serious health and safety violations, use of forced labour, serious accidents), does the law provide that companies (as legal entities) and/or the managers of companies (as individuals) may be prosecuted?

  There are often a range of penalties that may be relevant to mining scenarios:
  → Financial penalties
  → Payment of compensation to victims
  → Temporary or permanent injunctions to cease activities and prohibit further activity
  → 'Blacklisting' – prohibiting access in the future to mining licenses or government procurement opportunities
  → Placing restrictions on the ability of the company to operate in certain economic areas
  → Requiring the company to publicize the conviction and penalties imposed
  → Confiscation of property and, in extreme cases, compulsory winding up Imprisonment for individual managers

Using Administrative Law

Does the law provide the authorities with a range of tools for enforcing ESHR laws?

- There is likely to be a range of enforcement actions that are relevant in mining scenarios to address violations of ESHR laws:
  → Injunctions to cease activities and prohibit further activities – such as where serious pollution is ongoing or imminent
  → Clean-up or restoration of the environment
  → Compensating workers or community members for harms caused
  → Restoration of property to landowners
  → Offsetting irreversible biodiversity losses
  → Restoring damage to cultural heritage sites
  → Payment of financial penalties
  → Payment from financial assurance arrangements
  → Freezing assets of the mining company in the country to ensure payment for damages caused

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96   T. Andrews, B. Elizalde, P. Le Billon, C.H. Oh, D. Reyes, I. Thomson, "The Rise in Conflict Associated with Mining Operations: What Lies Beneath?", (2016), http://cirdi.ca/wp-content/uploads/2017/02/Conflict-Full-Layout.pdf

Using Criminal Law As Appropriate

Does the law, permitting process or mining contract provide for specific requirements to provide financial assurance? And are the conditions for triggering the use of the financial assurance specified?

→ In addition to the requirement to provide financial assurance to cover closure (see Step 7 on financial assurance), does the law, license or contract require mining companies to provide financial assurance more generally to cover potential ESHR costs?

This could include:

→ Posting an environmental bond
→ Paying deposits into dedicated funds
→ Securing guarantees from a parent company or other institution
→ Obtaining insurance for environmental or, more typically, general liabilities

There should be clear conditions set for the triggering, use and return of any unused funds, bearing in mind that the use of the funds may be required long after the termination of the mining contract (sometimes by decades). This means that there may need to be an end-date on the financial assurance that is later than the actual closure; it is likely to be on the date of relinquishment (see Step 8).

Strengthening Capacity/Building on Alternatives

Has the government considered other avenues to strengthen enforcement?

• Where government capacity for enforcement is limited, authorities can look for additional avenues, including:

→ Earmarking a percentage of project costs or mining revenues to pay for regular, independent monitoring of operations
→ Requiring regular monitoring reports from the mining company or independent third party
→ Developing a centralized system for reporting information so that several authorities can access the same information, rather than requiring separate collection of information
→ Working with environmental, human rights, trade unions and community organizations (CSOs) that take an active interest in monitoring mining operations
→ Seeking training and capacity-building support from international organizations such as UNDP, other donors and other organizations providing specialized support to governments to manage their extractive industries (see Box 10 on extractive sector support services for governments)
→ Joining multi-stakeholder initiatives for the mining sector, recognizing that this requires some up-front investment but provides longer-term benefits in terms of access to expertise, support and active participation from national stakeholders committed to supporting sustainability in mining in the country. These include, for example, the EITI, the IGF, the Voluntary Principles on Security and Human Rights

G Reinforce Access to Information, Inclusive Participation and Access to Justice and the Rule of Law

The increasing attention to natural resource governance in the past decades is translating into demands for good governance, transparency and accountability in mining governance and management. Given some of the unique characteristics of extractive industries – the high dependency of some countries on the sector, the significant investment required to address ESHR impacts in a technically competent but competitive manner, the significant revenues – it is easy to imagine that there will be attempts by different actors at 'policy capture' during these strategic moments

of designing the mining policy framework, laws, policies and regulations. 'Policy capture' describes situations where public decisions over policies are consistently or repeatedly directed away from the public interest towards a specific interest – specific government officials, specific groups within the country, specific companies. This can exacerbate inequalities and undermine democratic values, economic growth and trust in government. Policy capture can be mitigated through the approaches set out in Principle 10 and by reinforcing the rule of law.

Box 17

Comparing Countries Across Principle 10 & Other Environmental Topics

The Environmental Democracy Index (EDI)[97] evaluates 70 countries, across 75 legal indicators, based on objective and internationally recognized standards established by the Bali Guidelines on Principle 10 (information, participation and access to justice). It serves as a useful tool for governments, as it provides specific and targeted information on areas for improvement. It provides:

- **In-Depth Country Information** and scoring looks at what the country is doing well and areas for improvement – providing an accessible and immediate list of recommendations for environmental agencies in particular to consider.
  - → Colombia
  - → Kenya
  - → Mongolia
  - → Mozambique (no data)

- **Country Comparisons** allow users to compare countries' performances at multiple levels and download data on environmental democracy measures.
- **Rankings**. Countries around the world are ranked on their national laws according to their progress in legislating environmental democracy.

Initiatives providing comparative information across countries & environmental topics
The ECOLEX[98] database of UNEP, FAO and IUCN collects environmental legislation from around the world and publicizes it electronically.
The UN Special Rapporteur on Human Rights and the Environment has developed the Environmental Rights Database,[99] which has collected over 100 good practices on using human rights to protect the environment.

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97 http://www.environmentaldemocracyindex.org/

98 http://www.ecolex.org

99 http://environmentalrightsdatabase.org

a Access to Information

The growing consensus behind the need for further transparency and access to information about extractive industries is responding to prompts from several directions. Related to Principle 10, there are a number of initiatives on national freedom of information laws and disclosure laws. In the governance area, there are governance initiatives seeking to strengthen transparency and accountability of governance of mineral rich countries[100] such as the EITI and OGP. And finally, there continues to be research and advocacy from a wide range of environmental and human rights NGOs, internationally and nationally that are increasingly focused on access to information.

But the push also has a more logical link to national constitutions: as the sovereign owners of country's natural resources, citizens have a right to know how decisions over mineral extraction are made, how they are supervised, how much their government receives from mining companies and how revenues are being spent.[101] Access to information serves multiple purposes: it is a human right and covered in Principle 10; it contributes to better decision-making by providing the information that stakeholders need to probe policies and processes; and it underpins social accountability and activates public scrutiny in support of environmental and human rights protection.

Meeting International Standards	**Does the government's policies, laws, processes and practices meeting international standards on access to environmental information?** • See Annex I – Backgrounder on Principle 10 for a specific checklist on access to information
Transparent Information on Mineral Resources and Mining	**Does the government provide open access to information it holds about the mining resources of the country? Does it make available a wide range of information on mining?** • Information likely to be of interest includes: → Disclosure of data and reports on licenses, geological surveys and reserves → The national mining cadastre and a national data bank → Disclosure of national and local level mining contracts or concessions → Disclosure of environmental and social impact assessments (ESIAs) on existing and forthcoming mining projects → Disclosure and enforcement of environmental and social management plans (ESMPs) → Environmental licenses or permits for mining operations → Air, water and hazardous waste release or storage permits → Permits to use water or forest timber → Regular audits of production and export volumes → Disclosure of the names of companies operating and beneficial owners → Disclosure of mining revenue data at an appropriate level of disaggregation such a location, project and product type → Regular audits and reconciliations of the government's accounts and of companies' financial statements → Regular disclosure of revenues generated by mining activities → Participation in international initiatives such as the Extractive Industries Transparency Initiative (EITI)

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100 P. Cameron and M. Stanley, World Bank Group, "Oil, Gas and Mining: A Sourcebook for Understanding the Extractive Industries," (2017), Chapter 8 on Transparency and Accountability," https://openknowledge.worldbank.org/bitstream/handle/10986/26130/9780821396582.pdf?sequence=2

101 UNDP, "Responsible Mining Training Manual in Mongolia," https://www.slideshare.net/ByambajavDalaibuyan/training-module-on-responsible-mining

Transparent & Proactive Information on Mining & Mining Impacts

Does the government proactively make information about mining and mining impacts publicly available/transparent or is it available only on request?

- Are government authorities required to proactively make information publicly available? Does it share information using new technologies such as data portals, making GIS mapping available as well as active databases that can combine a variety of information about mining in the country?[102]
- Do the mining authorities and other relevant authorities provide access to the right information, when and where needed?
  - → For transparency to be effective, information disclosures must be *relevant*, *accessible*, *timely*, and *accurate*.[103]
    - → To be *relevant* and *accessible*, the information should be presented in plain language and in formats appropriate for multiple stakeholders. For example, disaggregating information so that it can be localized to particular areas relevant to local communities or to particular groups such as women can make the information much more useful.
    - → To be *timely* and *accurate*, the information must be provided in a form and timeframe that allows stakeholders to analyse and respond to the data to inform relevant decisions or advocacy.
- Are the information needs of local communities taken into account and responded to?
  - → The impacts and benefits of mining are often immediate and distinct at the local level. Consequently, the needs for information are often specific and localized. Local communities most affected by mining projects often receive very little information about potential impacts and benefits at their level – aggregated information, like national production and overall economic growth, can lead to misunderstanding and mistrust towards mining operations at the local level. Company disclosures of thick environmental reports and aggregated financial figures often do little to help the local community understand the real impacts and benefits of the company's activities.
  - → They are likely to be more interested in information specific to their local context:
    - → Transparency of licenses and license allocations and the beneficial owners (natural persons who directly or indirectly ultimately owns or controls the corporate entity), information on environmental and social impacts, transparency around local agreements and local benefit-sharing, requirements for local hiring or local contracting (local content)
- Does the government make resources available to communities to participate in consultations, including funding to support hiring experts, to help communities understand government proposals, the potential arrival of mining in their communities[104] and to respond?
  - → Particularly for local communities in mining designated region with no experience and expertise in understanding mining operations, they will need support to develop and express their own vision for a sustainable future and to understand the structure of the extractives industry, the national legal and policy framework, and the international normative frameworks and practices. Enabling citizens to engage more effectively and constructively with companies and government, tensions and conflicts may be significantly reduced, providing longer-term benefit for the upfront investment in time and resources to build capacity.

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102 OGP Natural Resources Working Group Issue Brief, Disclosing environmental information in the natural resource sector," (2016), http://www.opengovpartnership.org/sites/default/files/FIN OGP Issue Brief Env Disc.pdf

103 NRGI Reader, "Transparency Mechanisms and Movements – Tools to Foster Openness and Accountability," https://resourcegovernance.org/sites/default/files/documents/nrgi_primer_transparency-mechanisms.pdf

104 See, for example, Cordaid, "When Oil, Gas or Mining Arrives in Your Area: A Practical Guide for Communities, Civil Society and Local Government on the Social Aspects of Oil, Gas and Mining," (2016), https://www.commdev.org/wp-content/uploads/2017/07/P_2016-Oil-Gas-Mining-Practical-Guidebook-on-Social-Aspects-Cordaid.pdf

Protecting the Role of Organizations that Make Mining Information Accessible and Relevant

Does the government support and protect the role of organizations that help the public understand mining information and promote accountability in the sector?

- Government institutions and public and private companies may disclose a lot of information, but in order to turn the transparency into accountability to hold the government and mining companies to account, the information must be useful and used.
    - → Independent research organizations, NGOs and mass media can have an important role in processing and making publicly available relevant information to the critical mass of citizens who may not have the sufficient capacity and time to access and process information from public records. Until journalists and citizens can use information for public debate and to query governments, transparency will not translate into accountability and capture the full benefits of the sector for the nation.
- In contrast to the overall trend towards transparency and participation, in some countries, there are developments pushing in the opposite direction – suppressing opposition to mining under the guise that it is 'anti-development', 'anti-national', 'politically motivated' and even 'against national security' and threatening environmental and human rights defenders and a closing space for civic dialogue, civil society and media to operate. (See Box 21 on closing civil society space and human rights and environmental defenders.)
- Recognizing that such actions can cause deeper polarization, leading to less secure, more fragile and divisive societies in the long-term and that such actions often violate the country's human rights obligations to protect freedom of expression, assembly and association, freedom of the press, government should instead protect these roles and the individuals who perform them from intimidation or harm by public or private actors.[105]

Box 18

Facilitating Access to Environmental Information

There are numerous examples of countries using new technology to provide relevant information to citizens:

Real-time information on environmental pollution

- In China, users can consult mobile devices daily to check on local levels of a range of pollutants and air quality measurements.[106]

Compiled information across public administration authorities on mining and other industrial projects

- Using Chile's SEA web platform provided by the environmental authorities, stakeholders can monitor the government's interactions with private and public actors in an environmental licensing procedure for industrial projects, including mining, by entering a project or company name.[107]

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105 See the actions set out in the report of the UN Special Rapporteur on Human Rights Defenders, "Analysis on the situation of environmental human rights defenders and concrete recommendations to better protect them," A/71/281, (2016), https://www. protecting-defenders.org/sites/protecting-defenders.org/files/environmentaldefenders_0.pdf

106 AQI, "Beijing Air Pollution: Real-time Air Quality Index (AQI)", http://www.aqicn.org

107 http://www.sea.gob.cl

Box 19

Natural Resources Governance Index

This index measures the quality of resource governance in 81 countries. While it does not look at environmental information as the Environmental Democracy Index (EDI) does (see Box 17 on the EDI – comparing countries across Principle 10), it does measures two important ingredients for citizens seeking to hold their governments to account: transparency and 'civic space', the freedom and ability of citizens to influence the political and social structures around them. As the latest index notes, "[t]he open data revolution is making these data more accessible; the challenge now is to use them to help inform better policy decisions and improve governance and corruption control."[108]

b Public Participation

Establishing the mining framework, developing the laws and issuing the licenses are ultimately political because they have significant environmental, social and political consequences. It is therefore important that community members and their representatives, civil society and other stakeholders have the right and the opportunities to participate through formal and informal processes to help shape the decisions about the social and natural environment they live and work in and thus the development path the country should take. Providing processes to encourage and enable a wide range of stakeholders and the organizations that represent them to participate in decision-making about mining can result in: (i) better quality decisions, based upon a greater range of information; (ii) an increased sense of ownership over outcomes, thereby enhancing the legitimacy of decision-making, particularly if it can be demonstrated that public concerns were adequately addressed; (iii) greater social cohesion by showing respect for the rights of citizens and the public and promoting further dialogue and public involvement in civic affairs; and (iv) governments' balancing of intergenerational considerations of resource depletion, as the sector involves the depletion of non-renewable resources.

Meeting International Standards	**Does the government's policies, laws, processes and practices meeting international standards on public participation in environmental decision-making?**[108] • See Annex I – Backgrounder on Principle 10 for a specific checklist on public participation
Structured Participation Processes to Engage the Public in Mining Decision-making & Proactive, Ongoing Dialogues	**Does the government have formal processes for public participation at appropriate times through the mining cycle?** • Does the government meet international good practices for its public participation processes (see Annex I on Principle 10 for a checklist)? • There will be specific points in the mining cycle when the government should have formal processes for public participation in decision-making: → On the overall mining vision/strategy/policy → On mining laws and regulations → With local communities to be affected by mining, typically through the ESIA process → In planning for mine closure → On final mine relinquishment

108 NRGI, "2017 Resource Governance Index," p. 24, http://api.resourcegovernanceindex.org/system/documents/documents/000/000/046/original/2017_Resource_Governance_Index.pdf?1498599435

Mining Dialogues & Other Avenues for Discussion

Do the mining and environmental authorities provide other avenues for dialogue on mining issues in addition to providing formal avenues for participation?

- Have the authorities set up alternative processes, avenues or mechanisms for structured discussions to help build trust, address concerns, act as an early alert for building tensions and address unrealistic expectations from citizens about how quickly benefits will flow to the country and to regions where mining takes place?
  → At the national level to address strategic concerns across the sector in a multistakeholder approach (see Box 20 on mining dialogue roundtables)
  → For project affected people to voice and address concerns at the local level about mining operations

Ensuring Inclusive Participation Processes, including Women, Indigenous Peoples and Marginalized Communities

Does the government have guidance and processes in place to ensure that participation processes are inclusive, that is, that they cover the full scope of the population, including women, marginalized and populations with rights to specific engagement (i.e., indigenous peoples)?

- Does the government make active efforts to notify relevant stakeholders about the processes and to engage them?
  → Without active efforts to make these processes known and relevant to those potentially affected by mining, these processes risk becoming a 'paper exercise' – done for the purpose of ticking a box and potentially reinforcing political capture of the sector without addressing its impacts.
- Does the government recognize and have guidance and processes for engaging women and their representatives in discussions about mining policy and rulemaking and around mining projects?
  → Women have historically been exposed to greater risks and captured fewer of the benefits from the mining sector. We know that the direct benefits for the local community (for example, employment and income) go mostly to men, whereas the risks tend to fall on women and the families whom they care for (such as social stresses, cultural damage and environmental harm).
  → Particularly in societies where women are excluded or marginalized from decision making processes in their family situation, in their community, the workplace and/or the political sphere, specific consultations with diverse groups of women may be necessary to engage and understand the gendered impacts of mining and how they can be addressed through policymaking and rulemaking (and subsequently at the project level). Governments should draw on specific gender expertise in designing and conducting the engagements and follow-up. (See Box 16 on strengthening attention to gender in mining, Step 2 - Participatory Planning, for more on women and mining and the forthcoming UNDP Guide on Women and Mining.)
- Does the government recognize and have guidance and processes for engaging indigenous peoples and their representatives in discussions about mining policymaking and rulemaking and mining projects?
  → The UN Declaration on the Rights of Indigenous Peoples (UNDRIP) provides that indigenous peoples have the right to determine their own economic, social and cultural development and to manage, for their own benefit, their own natural resources. The duties to consult with indigenous peoples and to obtain their free, prior and informed consent (FPIC) are crucial elements of the right to self-determination.[109] Their involvement may also be required under the national constitution, national law or its jurisprudence. (See also Step 2 – Participatory Planning for more on indigenous peoples.)

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109 Expert Mechanism on the Rights of Indigenous Peoples, "Final report of the study on indigenous peoples and the right to participate in decision-making" (A/HRC/EMRIP/2011/2).

- Does the government recognize and have guidance and processes for engaging marginalized groups and their representatives in discussions about mining policymaking and rulemaking and mining projects?
  - → In addition to indigenous peoples, there may well be a range of other communities who rely heavily on the land and natural resources that would be impacted by mining. They, too, should be included in any consultations that may affect their livelihoods and are also likely to require specific, targeted outreach and consultation to understand their concerns and perspectives and address their vulnerabilities – in policymaking and rulemaking and at the project level.

Reaching out to NHRI and NGO to Play a Role

Does the government engage with NHRI and CSOs as part of the consultation process and to reach wider sets of stakeholders?

- Does the government seek out the NHRI and knowledgeable CSOs as part of its consultation processes to ensure that it is getting a wider picture of concerns and also tapping into expertise on mining and its potential impacts on the environment and communities?
  - → NGOs and NHRIs can play a particularly valuable role in helping disseminate information, provide informed input and act as a go-between in engaging potentially affected communities and their constituents – including women, youth and children – in consultations on wider policy initiatives for the sector.
- Is the government alert to threats to environmental and human rights defenders or CSOs who are expressing concerns about mining through the exercising their human rights to freedom of expression and assembly? Does it have a policy and take action to respond to threats and protect citizen voice and democratic participation in the mining sector?
  - → CSOs and human rights/environmental defenders can articulate and acting on citizen aspirations, play important roles in interrogate the reasons behind policy choices, co-create solutions to development challenges and challenge vested interests (see Boxes 21 & 39 on Human Rights and Environmental Defenders).

Box 20

Mining Dialogues

The AU has been engaging in a series of in-country dialogues to understand how the African Mining Vision has been incorporated into different African country mining policies.[110]
In Colombia, the Avina Foundation convenes the Permanent Dialogue Committee on Responsible Mining to develop trust between the mining sector and civic organizations in order to create a new mining model based on responsible use of natural resources, human dignity and economic development that benefits society.[111]

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110 http://www.africaminingvision.org/

111 See, Fundación Avina's permanent dialogue roundtable on responsible mining at http://mesadedialogopermanente.org/grupo-de-dialogo-latinoamericano

Box 21

Constructive Dialogue in Place of Tensions and Conflicts – Maintaining Civil Society Space and Protecting Human Rights and Environmental Defenders

Where neither companies nor governments provide opportunities for dialogue and engagement, this can lead to rising tensions and conflicts. There is an increasing and documented trend of conflicts in the mining sector.[112] At the same time, recent years have witnessed a 'closing civil society space' – a closing of space in many countries for citizens and civil society groups to raise their concerns about mining projects, the adoption of specific policies to suppress dissent and a rise in attacks on human rights and environmental defenders.[113] (See Box 39 on Human Rights and Environmental Defenders.) This is occurring despite the fact that many of those same governments have affirmed through the SDGs, commitments to international and regional treaties and their own constitutions that citizens and civil society are a vital part of how national governments and regional institutions will achieve their development aspirations.

Undermining constructive dialogue can also be subtler – through governments using consultation processes to provide an appearance of consultation rather than constituting a meaningful process to strengthen public engagement and the social contract between government and citizen.[114] Real decisions and distribution of power often happen outside these processes and are managed in many different ways by government – through more hidden means such as political lobbying or outright corruption in obtaining mining licenses/contracts. Governments that are sincere in their desire to build a more open and sustainable mining sector need to be alert to avenues of influencing and undermining their processes. Increasing transparency of processes is an important step in bringing clarity and regularity to processes (see Boxes 43, 44 and 45 on Corruption).

Recognizing these concerns, the EITI has a CSO Protocol[115] that requires that CSO representatives be able to engage in public debate related to the EITI process and express opinions without restraint, coercion or reprisal, to operate freely in relation to the EITI process, to communicate and cooperate, and to have access to public decision-making. The Open Government Partnership (OGP), which has a natural resources working group, also has a policy to respond to a range of concerns that may inhibit those working to promote open governance: (i) restricted access to information; (ii) limits on the space for non-governmental organizations to work independently, voice critiques, and/or receive funding from domestic or international sources; and (iii) limits on the enjoyment of fundamental freedoms, notably freedom of expression and peaceful assembly, and association; and/or media freedom and independence.[116]

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112 T. Andrews, B. Elizalde, P. Le Billon, C.H. Oh, D. Reyes, I. Thomson, "The Rise in Conflict Associated with Mining Operations: What Lies Beneath?," (2016), http://cirdi.ca/wp-content/uploads/2017/02/Conflict-Full-Layout.pdf

113 "A deadly undertaking" – UN experts urge all governments to protect environmental rights defenders - See more at: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20052&LangID=E - sthash.j5IFyCyd.dpuf

114 Araddhya Mehtta, "Dissent, exclusion and action," in Oxfam International State of Civil Society Report (2016).

115 https://eiti.org/document/eiti-protocol-participation-of-civil-society

116 https://www.opengovpartnership.org/ogp-response-policy/faqs-about-response-policy

c Access to Justice

Conflicts in and around mining operations are generally on the rise.[117] Providing access to justice for all stakeholders (including women, indigenous peoples, minorities, youth and their representatives such as CSOs) to enforce ESHR laws, is an important dimension of a government's commitments to Principle 10 and its international human rights obligations (including as part of Pillar III of the UN Guiding Principles on Business and Human Rights). (See Box 22 on the access to remedy pillar of the UNGPs.) Citizen enforcement or actio popularis cases that allow the public, including CSOs, to challenge decisions, acts or omissions by public authorities or private actors and to seek remedy for harms or violations under ESHR issues, is one of the most effective mechanisms for taking advantage of the presence, awareness and power of the public to uphold ESHR laws. This is especially the case in low-capacity environments where the authorities do not have the capacity to continually monitor and enforce ESHR laws. For each of these mechanisms, it will be important to consider whether these mechanisms are independent and impartial and provide appropriate access to the mechanisms for stakeholders.

Meeting International Standards

Do the government's policies, laws, processes and practices meet international standards on access to justice?
- See Annex I – Backgrounder on Principle 10 for a specific checklist on public participation

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Judicial Mechanisms

Does the country have judicial mechanisms that are accessible to stakeholders to bring claims about ESHR issues related to mining operations?
- Are there multiple avenues for citizens and affected stakeholders to bring a claim to a court for access to information, public participation or, more broadly, violations of ESHR laws, remedy for damages or other harms under ESHR laws?
  → States should accord 'legal standing' to appropriate public interest and community groups, including NGOs promoting environmental protection, human rights and women's rights, to bring cases to court to enforce ESHR laws.
  → Most jurisdictions give victims of crime the right to initiate criminal legal investigations in one way or another (e.g., by reporting an offence to the authorities or by making a formal request for an investigation).[118]
  → Stakeholders should be able to bring claims against the public authorities if those authorities have shirked or improperly performed their duties, e.g., failing to require an ESIA.
  → Stakeholders should be able to bring cases to ask the court to temporarily or permanently halt activities to avoid irreversible damage (this is often referred to as 'injunctive relief').
  → Stakeholders are also likely to have available causes of action directly against mining companies for harms caused under private/civil law.

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117 T. Andrews, B. Elizalde, P. Le Billon, C.H. Oh, D. Reyes, I. Thomson, "The Rise in Conflict Associated with Mining Operations: What Lies Beneath?," (2016), http://cirdi.ca/wp-content/uploads/2017/02/Conflict-Full-Layout.pdf

118 Dr. Jennifer Zerk, "Corporate liability for gross human rights abuses - Towards a fairer and more effective system of domestic law remedies - A report prepared for the Office of the UN High Commissioner for Human Rights," (2014), p. 41, http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticLawRemedies.pdf

Specialist Tribunals

Does the country have specialist tribunals that are relevant to mining that are accessible to stakeholders?

- Does the country have specialized environmental tribunals and/or land tribunals that can address claims about mining operations?
  - → Environmental courts and tribunals (ECTs) are different from general courts because they specialize in environmental cases and have adjudicators trained in environmental law. The decision-making process often incorporates lawyers and scientific/technical experts and relies on alternative dispute resolution and open-standing, streamlined case review.[119]
  - → Similarly, land tribunals have specialized expertise in land matters and seek to provide speedier resolution of land disputes. (See Box 23 on the UNEP Guide on ECTs.)
  - → These types of specialized tribunals with relevant expertise are likely to be better able to address some of the complex ESHR issues involved in mining. They are well placed to help develop methodologies and jurisprudence for calculating and assessing damages in ESHR areas and for appropriate responses in remedying the harms.

Administrative Mechanisms

Does the administrative law provide access to stakeholders to prompt administrative authorities to take enforcement actions against mining companies?

- Can individuals or groups petition the authorities responsible for protecting workers, the environment or public health to act – such as by enforcing environmental permitting conditions, carrying out inspections, etc.?
  - → In many countries, the statutory regimes in areas relevant to mining – around ESHR issues and land – have opened these avenues for stakeholders.[120] A failure by authorities to react can lead to increasing conflicts around mining operations. (See Box 25 for an example from Colombia.)

Non-Judicial Mechanisms

Are there non-judicial mechanisms accessible to stakeholders to address claims concerning mining operations?

- Does the country have state-based non-judicial mechanisms accessible to stakeholders for dispute resolution?
  - → Non-judicial mechanisms are characterized by certain features:
    - → They are administered and answerable to the executive (i.e., ministerial) rather than to the judicial branch of government or they may be independent mechanisms that do not report to either the executive or the judicial branch of government.[121]
    - → Their decision-making panels can be designed to provide a mix of legal, technical, lay and specialist expertise.
    - → They have been established pursuant to a regulatory regime (e.g., a regime for the protection of employment rights or the environment).
    - → They use alternative dispute resolution methods such as conciliation or mediation.[122]

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119 G. & C. Pring & UNEP, "Environmental Courts and Tribunals: A Guide for Policymakers." (2016), http://wedocs.unep.org/bitstream/handle/20.500.11822/10001/environmental-courts-tribunals.pdf?sequence=1&isAllowed=y

120 UNEP, "Putting Principle 10 Into Action: Implementation Guide for the UNEP Bali Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters," pp. 9-10, (2015), http://wedocs.unep.org/handle/20.500.11822/11201 and from the Aarhus Implementation Guide (2nd Edition) (2014), https://www.unece.org/env/pp/implementation_guide.html

121 For example, for NHRIs, the "Paris Principles relating to the status of national institutions - Competence and responsibilities," (1993) https://nhri.ohchr.org/EN/AboutUs/Pages/ParisPrinciples.aspx. They set out the international benchmarks against which national human rights institutions (NHRIs) can be accredited. The Paris Principles set out six main criteria that NHRIs must meet: (i) mandate and competence: a broad mandate, based on universal human rights norms and standards; (ii) autonomy from government; (iii) independence guaranteed by statute or constitution; (iv) pluralism; (v) adequate resources; and (vi) adequate powers of investigation.

122 OHCHR, Access to remedy for business-related human rights abuses: A scoping paper on State-based non-judicial mechanisms relevant for the respect by business enterprises for human rights: current issues, practices and challenges, (2017), https://www.business-humanrights.org/sites/default/files/images/ARPII_FINAL Scoping Paper.pdf

> → These may include a range of different mechanisms:
>> → Complaints mechanisms
>> → Inspectorates
>> → Ombudsman services
>> → Mediation or conciliation services
>> → Arbitration and specialized tribunals

- Is the country's National Human Rights Institution (NHRI)[123] authorized to address complaints against individual businesses, such as mining companies?
  - → Even if the NHRI is not authorized to consider complaints against individual businesses, most NHRIs can carry out studies or investigations that highlight human rights concerns by sector or theme – such as in the mining sector or with respect to the right to water. (See Box 26 explaining the various actions that the Mongolian NHRI has taken with respect to the mining sector, demonstrating the multifaceted role that NHRIs can play.)
- Has the mining project has been financed by one or more of the multilateral development banks?
  - → These banks will have their own ESHR requirements that apply to the project. They also have their own 'independent accountability mechanisms'[124] that handle complaints by stakeholders about projects financed by the bank.
- Is the mining company from an OECD country?
  - → Then the OECD Guidelines on Multinational Enterprises[125] apply to its operations anywhere in the world. OECD countries are obliged to set up a 'National Contact Point' to handle complaints against companies for failure to apply the Guidelines.[126]

Investor-State Dispute Settlement (ISDS) under IIA

Does the country's IIA provide for investor-state dispute settlement (ISDS) through international arbitration?

- Has the country reviewed its IIA and the dispute settlement procedures to understand whether it has sufficient regulatory space to regulate foreign mining companies without the threat of a claim brought against it in an ISDS procedure?
  - → ISDS allows investors to bring a case directly against the country in which they have invested before an arbitration tribunal. That means that foreign mining investors in a country can bring a claim against the host government in the event that the government changes the laws applicable to the mining operations, including ESHR laws, if it has not exempted these changes from the scope of the IIA. Mining companies have brought numerous claims against governments in arbitration proceedings.[127]
  - → One of several criticisms of the existing ISDS process is that, although it provides an avenue for access to justice for foreign mining companies, it is not available to domestic investors in mining, nor to those who might be affected by the foreign mining company – workers, local communities, etc.[128]

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123 http://nhri.ohchr.org/EN/Themes/BusinessHR/Pages/Home.aspx

124 http://independentaccountabilitymechanism.net/

125 http://mneguidelines.oecd.org/

126 http://mneguidelines.oecd.org/ncps/

127 See https://iisd.org/itn/tag/mining/

128 L. Cotula, IIED Briefing, "Rethinking investment treaties to advance human rights," p. 1, (September 2016), http://pubs.iied.org/17376IIED

Box 22

Pillar III of the UN Guiding Principles on Business and Human Rights (UNGPs) and Access to Remedy for Claims Against Mining Companies for Human Rights Harms

Under Pillar III of the UNGPs, **governments** are expected to ensure, through judicial, administrative, legislative or other appropriate means, that, when human rights harms by companies occur within their territory and/or jurisdiction, those affected have access to effective remedy. This means having judicial and non-judicial mechanisms such as courts (for criminal and civil actions) and can include specialized tribunals such as ECTs, labour tribunals, NHRIs, ombudsperson offices and government-run complaints offices.[129]

As to companies, including **mining companies**, the UNGPs call on them to cooperate in the remediation of human rights harms. Companies may set up 'operational-level grievance mechanisms' to address grievances early and remediated directly – but such mechanisms should also be effective. The UN Guiding Principles establish a set of '**effectiveness criteria**' for grievance mechanisms to test whether they can be effective and legitimate in dealing with human rights abuses.[130] A number of mining companies and mining organizations (and other organizations) have developed guidance and reviews of existing company mechanisms that can help companies set up their procedures and that can help governments prompt mining companies to set up effective grievance mechanisms that can remedy environmental harms.[131]

Box 23

UNEP Guide for Policymakers on Environmental Courts and Tribunals[132]

States are increasingly putting in place a range of judicial and non-judicial mechanisms – environmental courts and tribunals (ECT) that specialize in dealing with environmental matters. There are many different models of ECTs around the world. The UNEP Guide for Policymakers: Environmental Courts and Tribunals (2016)[133] sets out the many different models, considerations and examples from around the world to implement access to justice in a more effective, accountable and transparent way.

In 2012, Kenya became the first nation in the world to include an environmental court in its Constitution. As of 2015, it had 16 operating environmental courts and it plans to establish at least one in each of its 47 counties.[134]

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129 UNGPs, Principles 25-27, http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

130 See Article 31, http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

131 See, for example, Access Facility, which has collected a range of guidance materials: http://accessfacility.org/resources/search?keys=&field_resources_type_tid=47 and the ICRC-DCAF Toolkit on Addressing Security and Human Rights Challenges in Complex Environments, Community Chapter http://www.securityhumanrightshub.org/content/working-communities

132 G & C Pring, "Environmental Courts and Tribunals – a Guide for Policymakers," (2016), http://wedocs.unep.org/bitstream/handle/20.500.11822/10001/environmental-courts-tribunals.pdf?sequence=1&isAllowed=y

133 http://wedocs.unep.org/bitstream/handle/20.500.11822/10001/environmental-courts-tribunals.pdf?sequence=1&isAllowed=y

134 See: G. Pring, "Twenty-first century environmental dispute resolution - is there an 'ECT' in your future?," Journal of Energy & Natural Resources Law, (2015) Vol 33, No I, p. 11, https://dx.doi.org/10.1080/02646811.2015.1008846 and D. Kaniaru, "Environmental Courts and Tribunals: The Case of Kenya," Pace Environmental Law Review, Vol. 29 (2012), http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1697&context=pelr

Box 24

Using Mediation to Address Natural Resource Conflicts[135]

Given the rising conflicts around natural resources, including mining, renewed attention needs to be paid to mechanisms for mitigating and resolving natural resource disputes. One particularly useful tool is mediation, a non-adversarial and collaborative process through which an impartial third party helps disputants reach a resolution through interest-based negotiations. This Guide from UNEP provides practical advice for mediation professionals and supporting institutions involved in localized or transboundary natural resource disputes.

Box 25

Example from Colombia – Reducing Conflict around Mining Operations

A recent sector-wide impact assessment (SWIA) of the mining sector in Colombia that reviewed the sector's impacts on human rights in the country developed a "typology of conflicts" around mining operations involving all sizes of mining operations – from large-scale to small-scale. The mapping revealed that, for more than 60 percent of the conflicts, the source of the conflict was an action or failure to take action on the part of authorities.[136] In addition to conflicts derived from contradictory actions and decisions between government authorities, it was found that, in all scenarios, the main drivers of conflict in these scenarios were (1) the absence of sufficient, available and understandable information on the sector, including titling, land use plans, regulations and (2) the absence of effective spaces for communities to engage in relevant and timely dialogues with government authorities and, where relevant, mining companies. Systemically, predictably and legitimately addressing conflicts and strengthening conflict resolution mechanisms are not only essential to ensuring the viability of the mining sector, but they are also equally important to implementing the Colombian peace accords in mining scenarios.

Box 26

The Roles Played by the Mongolian NHRI in Strengthening Protection of Human Rights in the Mongolian Mining Sector

Mongolia has had a burgeoning mining sector since the early 2000s following a dramatic rise in foreign investment in the sector. At the same time, at least one half of the Mongolian population still lives in the 21 provinces making a living mostly by traditional livestock herding. Thus there are numerous and repeated interactions between herders and local communities and mining companies and a predictable rise in human rights impacts and grievances. The National Human Rights Commission of Mongolia has played and continues to play an active role in the sector, demonstrating the multiple roles that an NHRI can play in improving protection of human rights in mining:

- **Raising awareness**: The NHRI organized an international conference entitled 'Mining and Human Rights in Mongolia' bringing together over 200 participants, including high-level representatives of the state, regional and local administrative bodies, herders, artisanal miners, mining companies, CSOs, media, academics and

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135 United Nations Department of Political Affairs and UNEP, (2015), http://web.unep.org/disastersandconflicts/natural-resources-and-conflicts-guide-mediation-practitioners

136 Centro Regional de Empresas y Emprendimientos Responsables, "Sector Wide Impact Assessment on Human Rights: Mining Unseen," see (in Spanish) "Las Evaluaciones Integrales Sectoriales de Impactos (EISI)," (2016), http://creer-ihrb.org/proyectos-eisi/

UN bodies to address key developments in the sector and related human rights concerns and to prepare a set of specific recommendations for government, business and CSOs.

- **Conducting inquiries into the human rights implications of mining**: The NHRI recently conducted an inquiry covering several provinces heavily affected by mining, identifying a range of human rights impacts typical in the mining sector, but also highlighting the impacts on the unique cultural practices of nomadic pastoralism that make up the base of the Mongolian economy and way of life.
- **Proactive interventions with mining companies**: The NHRI proactively makes recommendations to relevant mining companies and government authorities, urging them to change policies or practices that may lead to human rights violations. It is also authorized to demand the cessation of activities resulting in human rights violations and to provide remedy to restore human rights.
- **Litigation to enforce its demands** to cease activities violating human rights: The NHRI has the power to bring cases against the government and companies through the courts.
- **Providing conciliation** between mining companies and local communities to resolve grievances: The NHRI facilitates conciliation to remedy human rights violations, working with companies and communities.

d Strengthening the Rule of Law to Reinforce Principle 10 and Improve Environmental and Human Rights Governance

The rule of law is a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are (i) publicly promulgated, (ii) equally enforced, (iii) independently adjudicated and (iv) consistent with international human rights norms and standards. While these principles regarding the rule of law are not environment-specific, they do overlap significantly with the same approach to governance behind Principle 10. Thus, reinforcing the rule of law in the mining context reinforces improved governance. Rule of law principles and Principle 10 promote the same open approach to governance that relies on open and transparent information, the participation of citizens and access to remedy.

Rule of Law (RoL)

Have the authorities assessed whether they meet the basic rule of law principles?

→ The six rule of law principles (see Box 27 on the rule of law principles for public administrations) emphasize the 'demand' side of public administration: how government authorities interact with the users of governments services.[137]

→ The RoLPA Tool (see Box 27 for an explanation of the RoLPA toolkit for environmental and mining authorities) turns these principles into a specific set of questions for mining authorities to help them determine whether they are meeting the rule of law principles in governing the environmental dimensions of the mining sector. It therefore 'translates' what these principles mean for a mining authority and prompts them with questions to help them and their users assess their performance and identify areas for improvement.

Box 27

Rule of Law (RoL) in Public Administration

RoL Principle	The Principle:
Legality	Requires that public administrative agencies abide by the law and that all their decisions and content have a basis in law. This includes the equal treatment of different groups of citizens, including women and men.
Accessibility	Means that everyone should have access to public administration and that public authorities have a duty to accept and deal with different groups of citizens' requests and questions properly, including by providing practical access for women and men and using a language that can be understood by the general public.
Right to be Heard	Means that the public authorities must hear an individual before taking a decision that affects his or her rights and interests, including the opportunity to submit facts, arguments or evidence before a decision is taken and informing the persons concerned of the official decision within a reasonable time.
Transparency	Ensures that the work of public authorities and civil servants is conducted openly, providing information about their work and ensuring access to laws, acts and administrative documents on request, subject only to the limitations necessary in a democratic society for the protection of legitimate public interests or privacy.
Right to Appeal	Allows the individual to seek redress against administrative decisions, through internal review processes or judicial review by the ordinary courts or specialized administrative courts.
Accountability	Ensures that public officials and administrative agencies are held to account for wrongful actions and to improve how an agency conducts its work through mechanisms such as disciplinary measures, internal reviews, internal audits, ethics boards and external supervision/oversight.

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137 The principles are derived from international and human rights law in addition to national laws, established practice, legal precedent and jurisprudence. See UNDP and Folke Bernadotte Academy, Swedish Agency for Peace, Security and Development, "Users Guide for Assessing Rule of Law in Public Administration," (2015), https://fba.se/en/how-we-work/research-policy-analysis-and-development/publications/users-guide-for-assessing-rule-of-law-in-public-administration/. The Users' Guide is a self-assessment tool that has been developed with a particular focus on local governance of service delivery and on public service acutely involved with decision-making that affects the rights and interests of individuals.

Box 28

User's Guide for Environmental Public Administration of the Mining Sector

This Rule of Law User's Guide applies to the full set of public administration roles and processes in managing environmental, social and human rights issues at mines over all the stages of the mining cycle.[138] The User's Guide includes a questionnaire that agencies can use to determine whether they are meeting the core rule of law principles of legality, accessibility, transparency, appeal, participation and accountability when they are carrying out their regulatory tasks in governing the mining sector. This helps relevant government agencies at all levels identify and address governance gaps resulting from the way they are currently manag-

ing mining operations that can then lead to better protection of the environment, ecosystems and local communities. By improving public agencies awareness of and delivery of their services to the public, the User's Guide is intended to contribute to strengthening trust in public agencies, and potentially preventing social conflict around mining activities. The pilot User's Guide was tested in Colombia, Mozambique, and Mongolia to ensure it can be used in different geographical contexts by mining and environmental authorities in particular to address key environmental and social issues in the mining sector.

138 The ROLPA (Rule of Law in Public Administration) assessment tool was previously designed for service delivery agencies by UNDP and the Folke Bernadotte Academy of Sweden (FBA) and has now been redesigned to increase the focus on environmental governance of the mining sector.

Step 02

Participatory Planning For Extractives from Exploration to Closure

In this second step, relevant departments and levels of government and affected populations should come together to plan where mining should and should not be carried out in the country. Integrated land use planning is a political and administrative process to guide the orderly and sustainable use of land that avoids decision-making in isolation by considering different present and future uses of land together and addressing trade-offs explicitly and early.[139] By making this a participatory that includes the wide range of stakeholders using or potentially using the land – women farmers, local communities, local businesses, environmental groups – governments are not only giving people a voice in determining the kind of social and natural environment they want to see develop, but are also providing for a potentially deeper and longer-lasting legitimacy to dealing with a challenge often at the heart of conflicts around mining operations.

Primary Target Audience

→ Land Use Authorities (at different levels of government – national, regional, local)
→ Mining Authorities
→ Environmental Authorities

Additional Targets

→ Social Authorities
→ Human Rights Authorities
→ Local Government

Summary of Step 2: Planning

KEY ACTIONS IN THIS STEP

A **Use Participatory & Integrating Land Use Planning Approaches to Help Identify Appropriate Areas for Mining**

KEY MESSAGES

Integrated and participatory land use planning seeks to balance out the different uses of land from the earliest stages of planning mining developments, including after mine closure, so that land is used sustainably. By being explicit about the need to manage competing interests, and explicitly including ESHR issues as relevant considerations, governments, together with stakeholders, can start to address relevant trade-offs openly and early and build in appropriate design considerations from the start of mine planning.

139 J. Southalan, Mining Law and Policy – International Perspectives, p. 73 (2011).

B   **Integrate Indigenous Peoples' Rights When Planning Mining in Indigenous Peoples' Territories**

As a result of mining operations in many areas of the world, indigenous peoples (IPs) have experienced widespread negative impacts, including environmental degradation and limitations of their social and cultural life and of their possibilities for economic survival. Protecting and respecting IP rights starts from the land use planning stage in considering IPs' rights to land and natural resources that engages IP communities in a process of meaningful, free, prior and informed consent (FPIC) that lays the groundwork for more sustainable relationships with the government and eventually any mining companies.[140]

C   **Integrate Women's Rights When Planning Land Use**

Women may be more adversely affected by land use changes and may have fewer options to defend their often weak or non-existent land tenure or access rights. An inclusive land use planning process first consults with women about their views on potential land use planning changes and considers the differentiated control, access and use of land by women and the potential differentiated impacts on women.

D   **Use Strategic Assessment Tools to Understand the Bigger Picture**

A Strategic Environmental Assessment (SEA) or Strategic Environmental and Social Assessment (SESA) is a tool to assess the potential ESHR impacts of potential programmes and plans (such as plans to develop or reform the mining sector) already at the planning stage. Given the often extensive and well-documented ESHR impacts of mining and the conflicts this can create with local communities, a SESA for the mining sector, if done well, provides early opportunities to understand stakeholders' concerns and to respond to them in planning and permitting subsequent mining operations, paving the way for more sustainable solutions from the design stage.

E   **Address Misalignments between Sectoral and Territorial Planning**

Where sectoral mine planning and licensing do not involve coordination with the territorial/regional development plans and regional/local authorities where mining will take place, a clash of objectives for territorial/regional land use can arise. Governments should establish mechanisms to ensure vertical coherence in overall land use planning for mining between central – regional and local governments.

F   **Include Planning for Closure as Part of the Land Use Planning Process**

Land use planning should already consider whether the long-term land uses of the surrounding areas are capable of replacing the mine's contributions once the planned mine is closed. This is the first step in planning for mine closure from the beginning of the mining cycle.

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140 UN General Assembly, "Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya", Summary of activities: Progress report on study on extractive industries, A/HRC/21/47 (6 July 2012)

A Use Participatory & Integrating Land Use Planning to Help Identify Appropriate Areas for Mining

Land use planning is a vital tool for managing competing interests and mitigating conflict over scarce natural resources and, therefore, economic, socio-cultural, environmental and institutional considerations should be included in the analysis. This means excluding mining from environmental or socially sensitive areas and areas important for other uses, such as long-term food security, but also reserving mineral-rich areas and allocating other economic activities to non-mineral-rich territories. Regional and local government should be involved in land use planning for mining to participate in balancing competing land uses and environmental and social concerns in the region under their jurisdiction and planning infrastructure and economic linkages.

Integrated Planning

Have the land use planning authorities coordinated with the mining authorities to help assess the balance of the economic opportunities of mineral development with environmental and social considerations and competing use of natural resources in national and regional planning processes?[141]

- Do the authorities have the following in place for integrated land use planning?
  - → An accurate picture of current land use, ownership and rights, including formal legal title and rights to use, and customary ownership and use
  - → Updated geological information to feed into the land use planning process
  - → Projections on future potential and expected land use, considering future changes in demography, climate and other factors that affect the relative competition among users for the resource
    - → For example, an area may currently appear suitable for mining, given the area's current socio-environmental context, but future climate changes with a negative effect on ground water supplies may change that, especially in a context of rapid population growth.
  - → A good understanding of other competing uses for land and water and the impacts that mining can have on them, particular direct and indirect impacts on agriculture, which is often a major source of livelihoods in many countries
- Do they have policies and procedures for reconciling conflicting objectives on land use and conflict proposed uses?
  - → See Box 29 on competing uses for land and water and Box 30 for an example from Portugal.
- While ideally land use planning should cover the entire country, it may be necessary to start with priority areas and build expertise, data systems (such as for land and mining cadastres) and institutional cooperation over time.
  - → The increasing availability of web-based GIS tools may make the mechanics of developing more comprehensive databases easier and cheaper while recognizing that addressing the political economy of vested interests who want to maintain the status quo of opaque information on the distribution of land and mineral resources will often be far harder than technical fixes to promote transparency.

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141 See for example https://www.min-guide.eu/project-results

Excluded Areas for Mining

Do the land use planning authorities have a clear idea of what areas should be excluded from mining consideration?

- Have the land use authorities developed criteria or a process to ensure that mining is not sited in the heart of a designated conservation or other legally protected areas and close to residential or food-producing areas or areas with high biodiversity values or providing ecosystem services or that are important for livelihoods?
- **Excluded areas**: Have the authorities mapped out what areas of the country should be off-limits to mining? This would include:
  → An environmentally protected area under the government's international commitments (such as an IUCN Protected Area)[142] or under national law
  → A culturally protected area under international or national law (such a designated UNESCO World Heritage Site)[143]
- **Sensitive areas**: Have the authorities mapped out sensitive areas of the country where industrial projects such as mining should be limited or require more detailed engagement and assessment? This would include areas that:
  → Provide important ecosystem services, such as major water reservoir or river heads
    → For the mining sector, early and explicit consideration of potential impacts on biodiversity and ecosystem services, including water, in particular, in the land use planning process can help eliminate cumulative conflicts that could span the whole mining cycle.
  → Host indigenous populations (see Key Action 2 below)
  → Host particularly vulnerable local communities who rely on the land and water resources for their livelihoods
  → Are a significant source of the region or country's food security
  → Are residential/urban areas, at risk of mining-induced resettlement

Cumulative Impacts

Does the integrated land use planning process consider cumulative impacts of a series of mining operations (or other industrial activities) in a particular region or subregion?

- Contemporary EIA laws often require consideration of cumulative impacts – does the country's EIA law cover these?
  → **Cumulative impacts**: Cumulative impacts are the successive, incremental and combined environmental and social impacts (including those on human rights) from multiple projects or multiple activities located in the same region or affecting the same resource (e.g., a watershed or an air shed).[144] They can be greater than the sum of each individual project's impact.
- Issues to consider:
  → Managing cumulative impacts across a series of mining operations is challenging. Recognizing the possibility of such impacts and addressing them as part of the planning process is a good start. (See Box 31 for a brief explanation of cumulative impacts in the mining sector.)
  → There can be environmental, social and human rights cumulative impacts.[145] For example, the compounding effects of multiple mine closures create a 'reverse' cumulative impact caused by the cessation of activities. (See Step 7 on Closure and Step 8 on Post-closure.)

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142 IUCN, "Protected Areas Categories", https://www.iucn.org/theme/protected-areas/about/protected-areas-categories

143 World heritage Convention, http://whc.unesco.org/en/list

144 D. Franks, D. Brereton and D. Moran, "Cumulative Social Impacts," in Vanclay and Esteves (eds.), New Directions in Social Impact Assessment: Conceptual and Methodological Advances, (2011). They are sometimes also referred to as 'collective impacts'. See also, D. Franks, D. Brereton, C. Moran, T. Sarker, and T. Cohen, "Cumulative Impacts - A Good Practice Guide for the Australian Coal Mining Industry." (2010) Centre for Social Responsibility in Mining & Centre for Water in the Minerals Industry, Sustainable Minerals Institute, The University of Queensland. Australian Coal Association Research Program.

145 For an example of this analysis in the oil & gas sector, see, MCRB, "Sector Wide Impact Assessment of the Oil & Gas Sector in Myanmar," (2014), chapter on cumulative impacts, http://www.myanmar-responsiblebusiness.org/pdf/SWIA/Oil-Gas/15-Cumulative-Level-Impacts.pdf

Shared Infrastructure

Does the integrated land use planning process consider opportunities for developing shared use of infrastructure needed for mining?

- Does the integrated land use planning consider the opportunities to develop shared infrastructure when considering potential areas for mining? Does it also consider the wider ESHR impacts of the infrastructure?
  - → Traditionally, mining companies have adopted an 'enclave approach' to infrastructure development,[146] creating basic infrastructure to ensure that they have the power and transportation services needed to serve their operations. But this misses the opportunity to leverage extractive industry-related investment to fill broader infrastructure gaps through the use of shared infrastructure.
  - → Better integration between mines' investment plans and governments' infrastructure plans to enable shared use of mining-related infrastructure, including rail, ports, power, water, internet and telecommunications, is also a way to turn natural resources into long-term assets that will support sustainable and inclusive growth.[147]

Participatory Land Use Planning

Has the government opened the land use planning process to public participation?

- Is there a process in place to involve stakeholders and regional governments in the land use planning process?
  - → To ensure that the consultation is participatory, authorities should seek to include a wide range of stakeholders impacted by potential changes in land use – including women (for example, women farmers), youth, indigenous communities and vulnerable community members, such as the disabled and their representatives.
  - → Recognizing that local communities are not always the best advocates for protection of environmental values, as they may be more interested in job opportunities from potential mining projects, it is important to encourage participation from a wide range of groups and interests early in the process so that competing views and interests are brought out into the open early and can be discussed and addressed as part of the planning process.
- Are consultation processes accompanied by relevant information?
  - → There should be full and balanced information about potential positive and negative impacts that can help set realistic expectations for local communities, in particular about the kinds of benefits they may receive (jobs, budget allocations, community investment, infrastructure, etc.) and the kind of negative impacts (on the environment, on health, on social capital, etc.) that may occur. Providing one-sided information that addresses only the benefits risks creating longer-term conflict as the more permanent impacts of mining in local communities unfold. A realistic aim for land use planning should be for acceptable coexistence.
  - → As planning discussions can become quite technical, using a range of mediums, including through maps and visual aids, can highlight potential future changes in a way that makes sense to stakeholders.
- **The IGF Mining Policy Framework** (see Boxes 4 and 9 for more explanation on the IGF Mining Policy Framework) recommends:
  - → Ongoing generation of baseline geological, topographical and other information for national land use planning
  - → Making that information available to individuals, communities and other civil society actors with equal access to ensure that consultations between different parties can take place on an equal footing.[148]

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146 See CCSI, Leveraging Mining-Related Infrastructure Investments for Development, http://ccsi.columbia.edu/work/projects/leveraging-infrastructure-investments-for-development/

147 Nicolas Maennling et al., "A Framework to Approach Shared Use of Mining-Related Infrastructure," (March 2014), http://ccsi.columbia.edu/files/2014/05/Case-Study_Mozambique-March-2014.pdf

148 IGF, Mining Policy Framework, Legal and Policy Framework chapter, p. 7, http://igfmining.org/mining-policy-framework/

Box 29

Considering Competing Uses for Water – Mining & Agriculture

Mining not only directly displaces agriculture from land, but it can also indirectly affect agriculture that remains in the surrounding areas as a result of mining's impact on water. The water dependency of agriculture makes it among the sectors that may be most severely affected by mining. Among the effects of mining on water for agriculture are:

- Reduced quantity for irrigation and to enhance soil moisture
- Negative effects on water volume (e.g., through sinking ground water levels)
- Negative effects on water quality (e.g., directly by contamination of water or indirectly though

sinking ground water levels such that lower levels cause the inflow of substances, such as salt, that harm drinking water)

- Spatial distribution of the water (e.g., when dams or other direct regulation of the water flow changes waterways or, indirectly, by other changes in land use, such as deforestation, that may diminish the availability of water)
- Changes in water flow across the year, accidental flows such as those due to errors or accidents in the water regulatory activities (e.g., dam breaks or above-normal release of water from dams, e.g., due to heavy precipitation)

Box 30

An Example Of Integrated Mining & Land Use Planning in Portugal

The Portuguese Mining Authority's land use planning policy and related laws apply the principle of parity and co-existence of mineral resources next to other natural resource uses (i.e., mining land uses compared to other land use types, such as forestry

or agriculture).[149] The Mining Authority participates in the land use planning management system at three levels (national, regional and municipal) and ensures that plans properly cover mining and quarrying activities as well as other potential uses.

Box 31

Cumulative Impacts in the Mining Sector

Each project (i.e., different projects or different phases of the same project) adds incremental impacts to other existing, planned or reasonably predictable future projects and developments, leading to an accumulation of impacts. Environmental and social impacts from one project alone are not always significant. Instead:

- The building up of smaller impacts over time, or within the same physical footprint, has a cumulative effect. Sometimes, a series of smaller events can trigger a much bigger environmental or social response if a tipping point is reached,

changing the situation abruptly (for example, where there is a rapid influx of people seeking jobs at, or in the vicinity of, newly established projects (the 'boomtown effect').

- They can also be triggered by poorly designed policies that prompt companies to make the same mistakes over and over again.[150]

More recent approaches to managing cumulative impacts rely on the ongoing management of impacts from a cumulative perspective over the whole life cycle of projects.[151]

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149 http://www.dgeg.pt. For a further summary, see: A. Endl, E. Thomas Mulholland & G. Berger, "Minerals policy governance in Europe: good practice examples in EU Member States," (December 2016), http://www.min-guide.eu/sites/default/files/project_result/MIN-GUIDE_D2 2 policy governance frameworks_final.pdf

150 IFC, "Good Practice Handbook on Good Practice Handbook, Cumulative Impact Assessment and Management: Guidance for the Private Sector in Emerging Markets," (2013), http://www.ifc.org/wps/wcm/connect/3aebf50041c11f8383ba8700caa2aa08/IFC_GoodPracticeHandbook_CumulativeImpactAssessment.pdf?MOD=AJPERES

151 D. Franks, D. Brereton and D. Moran, "Cumulative Social Impacts," in Vanclay and Esteves (eds.), New Directions in Social Impact Assessment: Conceptual and Methodological Advances, (2011), pp. 640-647. They are sometimes also referred to as 'collective impacts'.

Box 32

Considering Competing Uses for Water – Mining & Agriculture

Effective planning tools that use geospatial technology (GIS) and community engagement can assist in the design of infrastructure corridors that are sensitive to environmental and social factors; they also enable the active participation of impacted communities. Case studies of the East Kutai and South Konaw regions in Indonesia conducted by the Centre for Social Responsibility in Mining at the University of Queensland and the Bandung institute of Technology in 2015 used a framework for community engagement in mineral infrastructure planning. Local communities were asked:

- To identify current and future infrastructure needs
- To select appropriate social and environmental factors for the planning process, via surveys and focus groups
- To collect data through participatory mapping exercise
- To develop and debate scenarios for infrastructure corridor development

Data selected by the community respondents for GIS mapping identified: population settlements, community agriculture, plantation crops (e.g., cocoa), water bodies, protected areas, mining concessions and existing sea ports, roads and airports.

B Integrate Indigenous Peoples' Rights When Planning Mining in Indigenous Peoples' Territories

The ILO Convention 169[152] and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP)[153] reaffirm IPs' rights to self-governance, ownership and control of their lands, territories and natural resources; to cultural integrity; to their own models of development; and to free prior and informed consent (FPIC). For governments with IP populations that are planning mining operations, protecting IPs' rights in the context of natural resource extraction and the sustainable use of natural resources starts at this planning stage.

A continuous, open and meaningful engagement of governments and IP communities constitutes the *sine qua non* for FPIC to fulfil its purpose of enabling IPs to set their own priorities and strategies for development. While FPIC is a concept in international law associated with the protection of IP rights, there recently has been a growing movement to apply FPIC to a wider set of marginalized and vulnerable local communities who are also land-dependent, such as small-scale farmers.[154]

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152 http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312314

153 http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

154 See, for example, http://beta.fpic.info/en/and Oxfam Community Consent Index https://www.oxfam.org/en/research/community-consent-index-2015

Recognizing IPs & Their Territories

Does the government recognize any IPs within its borders? Does the government have policy or laws on the protection of IPs?

- Does the government recognize that it has IPs in its territories? Does it have specific criteria that must be met before groups are recognized as IPs under national law and entitled to specific rights or can IPs self-identify?
    - → Self-identification as IPs is the starting basis for identifying IPs according to international law.
- Does it have policies or laws on IPs? Has the government recognized and demarcated IP lands, resources and territories that are traditionally owned or under customary use even where IPs may not possess legal title to these lands as defined by national law?
    - → A broader framework of IP rights starts with the recognition of IPs, their rights to determine their own development path within the state's broader framework of development and a demarcation of their territories. There is also a wider set of safeguards, including recognition of IP rights to provide free, prior and informed consent (FPIC), the use of impact assessments, prevention and mitigation measures, benefit-sharing and compensation schemes that should accompany any mining in indigenous areas. (See Box 33 for a further explanation of FPIC.)
        - → In order to respect and promote their own models of development, wherever possible, priority should be given to indigenous-owned enterprises.[155] Some governments specifically designate indigenous mining zones where only indigenous communities may mine.

Engaging with IP – Putting FPIC into Practice

Does the government engage with IPs to obtain their free, prior and informed consent (FPIC) before designating any areas for potential mining activities?

- Does the government actively reach out to IP communities when planning land use changes that may affect IP lands – such as designating mining areas? Does it have a legal requirement or other procedure in place to work with IP communities to obtain FPIC for use of their territories or resources?
    - → The process of agreeing on FPIC is likely to be more productive on all sides if the process takes a long-term approach, rather than just viewing it as a one-off, early consultation – an 'all-or-nothing' approach.
    - → The process of reaching FPIC can include, for example, agreeing on how often IPs should be consulted as part of land use planning and then, if mining is proposed in IP territory, on how often they will be consulted during the project lifecycle if a project is agreed and whether the outcome of each consultation should be binding.
    - → The process should involve IPs' representative bodies and organizations (e.g., councils of elders or village councils) and provide sufficient time for IP decision-making processes, while also providing opportunities for meaningful participation from those who may be excluded from traditional structures – such as women and youth.[156]
    - → There should be sufficient information in an understandable format (which may mean translating relevant info into indigenous languages) to be able to make informed decisions about whether, and under what conditions, mining could be authorized. Impartial, accurate and up-to-date information is key – lack of information and misunderstandings between actors are common sources of conflict with IP populations. IPs are likely to lack a technical understanding of the mining sector. IP or-

155 UN General Assembly, "Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya", Summary of activities: Progress report on study on extractive industries, A/HRC/21/47 (6 July 2012)

156 Jiménez, A., Cortobius, M., Kjellén, M., Working with indigenous peoples in rural water and sanitation: Recommendations for an intercultural approach (2014). Stockholm: SIWI. http://watergovernance.org/resources/working-with-indigenous-peoples-in-rural-water-and-sanitation

ganizations may require technical advice and operational support. In order to help build trust, governments may consider providing resources to IP communities to hire experts, allowing the communities to choose their own experts, rather than having to accept a government- or company-provided expert.

→ The government must also be prepared to deal with the more fundamental circumstance, including reconsidering mining development, where IPs boycott consultations to demonstrate a lack of agreement with the process.

→ Where there is agreement, FPIC can and should lead to long-lasting agreements based on genuine partnerships between the government and IPs, but that may also include mining companies.[157]

Box 33

Examples of Legal Protection & Processes around FPIC

Some governments have gone quite far in recognizing IP rights, with a group of countries enshrining the protection of IP rights in national law.[158] At the other end of the spectrum, many countries do not accept that they have any IPs in their territory. In between, there is an often uneasy set of relationships between the national governments, local governments, mining companies and IPs that has resulted in quite widespread conflicts around mining in indigenous areas.[159]

In Latin America, Peru adopted a Law on Prior Consultation in 2011. According to Peru's Vice-Ministry of Intercultural Affairs, as of 2014, two processes of consultation had been completed, 13 were being implemented and another was about to be initiated.[160] In Colombia, the Ministry of Interior has established its own process for consultation with pre-consultation, consultation and post-consultation phases[161] and so far has conducted over 5,000 consultation processes with IPs based on constitutional jurisprudence. In Mexico, the National Commission for the

Development of Indigenous Peoples (CDI) reports over 30 consultation processes with IPs, although these consultations do not deal with natural resource extraction specifically.[162]

Many African States do not recognize the concept of 'indigenous peoples', arguing that all Africans are indigenous. Nonetheless, the Economic Community of West African States (ECOWAS) in 2009 issued a Directive on Mining, which included the principle of FPIC to apply to all communities in Africa. This is particularly relevant on the African continent, where there are many land-based communities, but few officially recognized indigenous groups. Some governments, such as the Government of Kenya, has specifically recognized marginalized groups in their constitutions and has adopted a recent land law that provides for protection of community land but allows the law to be overridden in the national interest for mining projects.[163]

157 UN General Assembly, "Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya", Summary of activities: Progress report on study on extractive industries, A/HRC/21/47 (6 July 2012)

158 For example, the Colombian Ley (Law) 70/1993 seeks to protect the rights of Afro-Colombian communities in land policy. The Colombian Constitutional Court declared Law 1382 on mining code reform unconstitutional because it had not been consulted with indigenous peoples and Afro-American communities.

159 Jiménez, A., Molina, M. F. & Le Deunff, H., Indigenous peoples and industry water users: Mapping the conflicts worldwide. Aquatic Procedia, (2015), pp. 69 – 80.

160 For further information see the Consulta Previa (Ministerio de Cultura) website: http://consultaprevia.cultura.gob.pe/

161 For more information, see: https://goo.gl/yF03cJ

162 For further details, see the Comisión Nacional para el Desarrollo de los Pueblos Indígenas website: http://www.gob.mx/cdi

163 Institute for Human Rights and Business, "Human Rights in Kenya's Extractive Sector: Exploring the Terrain," (2016), Chapter 2, Sections 2.3.1 and 2.4.1. https://www.ihrb.org/uploads/reports/IHRB,_Human_Rights_in_Kenyas_Extractive_Sector_-_Exploring_the_Terrain,_Dec_2016.pdf

C Integrate Women's Rights When Planning Land Use

Women play a vital role in the rural economy as food producers, water and fuel gatherers, agricultural workers and unpaid caregivers, yet many women have no rights to the land that they tend and rely on to support their families. In some places, women have a claim to land only through a male relative and, even where there is formal recognition of equal tenure rights for women, as a matter of practice women continue to be excluded from property rights or allocated land of poorer quality/productivity or closer to mining sites. Women's decision-making authority may be particularly limited because land is still viewed in many countries as the domain of men and male decision-making and this gender bias often locks women into a cycle of vulnerability and poverty.

Meaningful Participation of Women

Does the land use planning process involve separate consultations with diverse groups of women and women's organizations?
- Are the land use planning authorities alert to the barriers that women can face in consultation and ready to organize consultations that respond to these concerns?
    → Separate consultations can ensure that women have a safe space to express their opinions and to provide information about potential impacts and opportunities that could result from land use choices. This should be the case particularly if they find that participation and discussions at consultations are male-dominated.
    → Those organizing consultations should be alert to the barriers women face to participating from time constraints, childcare responsibilities, safety and access considerations, to cultural norms and biases, to risks of social isolation and discrimination against participants.
    → Participation is often understood by government authorities as 'being there' or 'taking part' without questioning the quality of the participation. For example, if 50 percent of participants are women and if they do not say anything or if what they say is considered to have limited value or ignored, then participation is missing out on vital priorities and perspectives that could ensure the sustainability of outcomes and new approaches should be tried to engaging women.
    → Meaningful participation of women must ensure that diverse groups of women are included in consultations. Not all women share the same economic and social concerns and care must be taken not to include only politically connected, elite or influential women from the community. Women from various backgrounds – including the poorest and most vulnerable in the community – should be included to ensure that diverse perspectives and priorities are included.

Gender-responsive Land Use Planning

Does the land use planning process take into account the potentially specific impacts on women?
- The process should specifically take account of the potentially differentiated impacts on women if land use is changed, for example:
    → Women may be particularly dependent on land-based livelihoods that would be eliminated by land use changes. For example, some land use changes may mean smaller plots and/or land that is further away and not easily accessible to women.

→ Women may be less likely to be literate and less mobile due to traditional societal limitations and expectations and thus unable to participate in new livelihoods opportunities without additional support.

→ Given the traditionally low level of women employed in mining, this is unlikely to provide substitute occupations for women who are land-dependent.

D Use Strategic Assessment Tools to Understand the Bigger Picture

A Strategic Environmental Assessment (SEA)[164] and Strategic Environmental and Social Assessment (SESA)[165] have different characteristics,[166] but both seek to provide an impact assessment approach at a more strategic level by looking at a proposed plan or programme in a sector to identify the likely significant effects on the environment and society, including human rights. The processes can help ensure that: (i) key information is introduced into considerations early on, including the interests and concerns of major stakeholders around ESHR issues that might otherwise not be considered as part of an economic planning exercise for the mining sector; and (ii) assessments for the sector carefully analyse broader impacts and the trade-offs, such as competition with agriculture, depletion of ground water, etc., at a very early stage in order to prevent costly mistakes by alerting decision makers to potentially unsustainable development options.[167]

Consider an SESA

Has the government considered conducting an SEA or SESA?
- Useful trigger points for carrying out an SESA include:
  → Planned changes to the mining policy or major laws
  → Major revisions of land use plans or revisions of the land or mining cadastre
  → Mining in new regions of the county
  → Up-scaling of mining activities in light of new discoveries
- SESAs can:
  → Increase attention to environmental and social priorities associated with mining development
  → Strengthen environmental and social constituencies
  → Improve social accountability by making the mining policy process more transparent
  → Enhance sector capacity for managing environmental and socio-political risks associated with mining sector development[168]
  → Help identify the appropriate sequencing of mining, deciding when to mine in what areas

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164 See the early OECD Guidance on Strategic Environmental Assessments http://www.oecd.org/dac/environment-development/strategicenvironmentalassessment.htm. SEAs are used by numerous countries and the EU. See the European Union approach to Strategic Environmental Assessments: http://ec.europa.eu/environment/eia/sea-legalcontext.htm

165 See the World Bank Guidance – Mining Sector Strategic Environmental and Social Assessment (SESA) (2010), http://documents.worldbank.org/curated/en/286421468182666050/pdf/536070BRI0ENV01Box345621B001PUBLIC1.pdf

166 SESA is a type of strategic environmental assessment (SEA) at the policy level where social assessment is given an equal footing with environmental assessment. SESAs have been used in particular by the World Bank and UNDP.

167 OECD, "Strategic Environmental Assessment in Development Practice: A Review of Recent Experience," (2012), http://www.oecd-ilibrary.org/development/strategic-environmental-assessment-in-development-practice_9789264166745-en

168 See the World Bank Guidance – Mining Sector Strategic Environmental and Social Assessment (SESA) (2010), http://documents.worldbank.org/curated/en/286421468182666050/pdf/536070BRI0ENV01Box345621B001PUBLIC1.pdf

- Has the Ministry of Mining considered that, where SEAs or SESAs are absent, the public often attempts to conduct policy battles further down the road at the project level often as part of the EIA process? This can create frustrations both for project developers who are not well placed to address wider concerns about the mining governance framework and for those with concerns who have no other outlet to express wider concerns with the mining sector and its governance.
  - → A consultation process at this strategic stage that involves a wide set of stakeholders in an active discussion where choices are discussed and wider trade-offs justified, is likely to build a more sustainable approach to future mining operations and to better protect the environment and stakeholder rights.
  - → Understanding and communicating options for involvement in the different levels of decision-making (SESA as compared to an ESIA for a particular project) and opportunities for the public to participate in the different levels of decision-making are important.[169]
  - → Wider, open consultation with a range of stakeholders at an early stage can also help create appropriate political economy drivers that helps government agencies avoid policy capture of the sector by political elites or powerful interest groups that can happen when decisions are made behind closed doors.

Involve Government Actors

Has the government involved relevant ministries and authorities, including relevant regional/local authorities where mining is likely to take place in the SESA consultation process?

- As the idea of an SEA/SESA is to look at the wider impacts of the sector, it is important to engage a wider set of ministries and regional/local authorities from the beginning of the process to promote better:
  - → Integration of key objectives from other sectors or ministries – such as health and environmental protection objectives;
  - → Intersectoral coordination among the different agencies that intervene
  - → Programme buy-in by local authorities and communities
  - → Clarify which institutional gaps are most critical in leading to environmental degradation and social exclusion in mining

Public Participation

Has the government encouraged active engagement of the public and civil society in the SESA process?

- As this is should be a national level consultation, has the mining authority considered:
  - → There needs to be broad, proactive public dissemination of notifications and relevant information that is in an understandable format for a wide range of stakeholders – ranging from expert analysis to more general public information
  - → It may be useful to employ different methods to convey information about the sector to demonstrate the importance of geological resources to the broader public and, in particular, to local communities.
  - → It is very important that the process be inclusive so that different voices are heard at this early, strategic stage. This means reaching out to organizations representing women, youth, IP and minority populations to ensure that their perspectives are heard and that participatory rights are respected.

169 UNEP, "Putting Principle 10 Into Action: Implementation Guide for the UNEP Bali Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters," pp. 12-13, (2015), http://wedocs.unep.org/handle/20.500.11822/11201

→ This is the type of participation in which civil society organizations (CSOs) may play a particularly important role to 'translate' strategic options so that they can be better understood by their constituents.

→ These early consultations on mining strategy through an SEA/SESA process should establish a framework and relationships for long-term policy dialogue that continues throughout implementation.

Box 34

SESA of the Mining Sector in Kenya

UNDP supported the Government of Kenya (through the National Environment Management Authority (NEMA), the Ministry of Environment and Forestry, the Ministry of Petroleum and Mining, the Kenya National Commission on Human Rights, and the Council of Governors) to carry out a Strategic Environmental Social Assessment (SESA) of the mining sector. The purpose of the policy SESA was to assess ways in which the governance and in particular the environmental administration of the mining sector as recently amended through the Mining and Minerals Policy (2016), the Mining Act (2016) and the subsidiary mining regulations (2017) are likely to affect the environment, social and human rights impacts of the sector at both the national and community levels. The aim of the SESA was to identify opportunities for managing environmental and social risks and strengthening social accountability. Kenya's Environmental Management and Coordination Act (1999) (amended in 2015) and its subsidiary regulations, the Environmental (Impact Assessment and Audit) Regulations (2003) include a legal obligation on the NEMA to monitor the implementation of the recommendations of the SESA. To complement the SESA and to help communities that host large-scale mining operations better understand mining and their rights, UNDP has helped develop 'Community guide to lage scale mining in Kenya' document that provides useful information about community engagement requirements at each stage of the mining lifecycle, identifying the issues about which they should be engaged or consulted. The information can help communities to know what to expect, from whom and how they can be involved. It explains requirements of Kenya's Mining Law (2016), the subsequent mining regulations and other relevant environmental and land laws.

E Address Misalignments between Sectoral and Regional/Territorial Planning

In many countries, there is a lack of alignment between sectoral policies (mining policy) and regional/territorial policies and plans. These misalignments can lead to an overall impact on governance in the territories: if regional or local authorities have no say, this can affect their ability to maintain their legitimacy with their communities, as the communities believe that the author- ities cannot address local concerns and are thus complicit in the impacts of mining; by the same token, if local authorities can halt mining operations on their own authority, this can override expectations or even contractual obligations created by the mining ministry. (See Box 35 for an example from Colombia.)

Coherence Between Sectoral and Territorial Planning

Does the government have a process for vertical coherence – coordinating sectoral mining plans with territorial plans?

- Are the regional government authorities in charge of planning the use of their territories consulted in the mining planning process about authorizing mining in their territories? Do they have a say in the final decision?
- Is there a process for balancing out different land uses in the territories/regions? Which ministry has the final say?
- Are regional governments notified when mining exploration or operations permits are given in their territories?

Vertical Coherence with Other Authorities

Do the relevant authorities covering ESHR issues (environmental authorities, gender ministries, etc.) have regional offices in the main regions where mining takes place?

- Are they consulted about mining plans in their territories? Do they have a say in the final decision?

Box 35

Misalignment Between Mining Planning and Territorial Planning – An Example from Colombia

Planning the use of subsoil resources as a process independent of territorial planning has not only been a constant source of conflicts between communities and authorities, but has also brought uncertainty and complications to mining investment in Colombia. The Sector-Wide Impact Assessment on Human Rights in the Mining Sector (SWIA) in Colombia, carried out by Centro Regional de Empresas y Emprendimientos Responsables (CREER) in 2016,[170] drew attention to this situation due to its implications for the collective rights of the communities in these territories and to the long-term viability of mining activities in the country. Since the 2016 Colombian Constitutional Court[171] decision demanding that the State and mining authorities ensure the principles of coordination and concurrence with the territorial planning when granting mining titles and licenses, some consultations have led to rejection of mining in some municipalities and the termination of licensed projects.

In April 2017, a public consultation conducted by the municipality of Cajamarca halted the largest gold project – still only in the feasibility stage – in Colombia. This AngloGold Ashanti project, known as 'La Colosa', was in its seventh year and had already cost hundreds of millions dollars for exploration work.[172] Yet, in all those years, the company had never had a structured dialogue with the communities and with the mediation of legitimate government authorities. Nor had the mining and environmental authorities had discussions with communities based on evidence of impacts from exploration. Instead, the binding consultation was driven more by information based on other mining projects in Colombia and elsewhere, activism and understandable fears. This experience highlights the importance of having clear mechanisms for mineral management that adequately include the visions and expectations of the communities living in the territories where mining is expected to take place.

F Include Planning for Closure as part of the Land Use Planning Process

Mineral resources are non-renewable and all extractive projects come to an end. This reality should be discussed widely and planned for from the outset. Land use plans should already consider whether the long-term land uses of the surrounding areas are capable of replacing the economic activities/contributions once the mine(s) is closed.[173] Mine restoration plans should be incorporated within these wider land use plans, including the cessation and transfer of mining facilities and property (e.g., water storage reservoirs and mine buildings) to the local community. (See Step 7 on Closure and Step 8 on Post-Closure.)

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170 Centro Regional de Empresas y Emprendimientos Responsables, "Sector Wide Impact Assessment on Human Rights: Mining Unseen," See (in Spanish) Las Evaluaciones Integrales Sectoriales de Impactos (EISI) (2016), http://creer-ihrb.org/proyectos-eisi/

171 See ruling T-445/16 of the Colombian Constitutional Court stating that municipalities have the right to regulate the use of lands 'suelos', even if this entails banning mining activities that so far had been under the jurisdiction of the national mining authority.

172 BNAmericas, "AngloGold Ashanti suspends Colombia's US$2bn La Colosa project", (April 2017), https://www.bnamericas.com/en/news/mining/anglogold-ashanti-suspends-colombias-us2bn-la-colosa-project

173 J. Southalan, Mining Law and Policy – International Perspectives, p. 73 (2011).

Step 03

Exploration

This third step exploration companies gather information and discover deposits suitable for mining. Early prospecting typically involves large areas of land using very small field teams made up primarily of geologists. It is often carried out by junior (small) exploration companies operating with limited resources that usually hope to sell their discoveries to larger companies that will develop and administer a producing mine. This is not only the first, but also an important step for addressing ESHR issues.

Primary Target Audience

→ Mining Authorities

Additional Targets

→ Environmental Authorities
→ Social Authorities
→ Human Rights Authorities

Summary of Step 3: Exploration

	KEY ACTIONS IN THIS STEP	KEY MESSAGES
A	**Address ESHR Issues at the Exploration Stage**	Exploration activities (including drilling, excavation and material handling and transport) can adversely impact the environment and communities, depending on how invasive the techniques are,[174] and can affect relations well into the life of the mine. While the extent of ESHR conditions attached to exploration permits varies greatly across countries, the trend is towards including basic requirements for the management of ESHR issues.
B	**Engage with Communities and Other Stakeholders**	Exploration companies should be required to provide basic information to local communities and other interested stakeholders about their activities. Mining authorities and local authorities also have a role to play in providing balanced information that people can trust, presenting realistic information about potential negative and positive impacts.

174 Mineral exploration and evaluation techniques range from the most environmentally benign, such as remote sensing from satellites, to more invasive, such as close-spaced intensive drilling.

A Address ESHR Issues at the Exploration Stage

In most jurisdictions, prospecting and exploration requires a permit that typically allows the company to explore for mineral deposits. In the exploration stage, the authorities are likely dealing with a wide range of small companies, potentially operating in the country on a very short-term basis, with the possibility that many of the companies will not be successful and therefore may not remain. Exploration comes with considerable risk: as noted in one estimate, "[i]t sometimes […] takes 500 –1,000 grassroots exploration projects to identify 100 targets for advanced exploration, which in turn lead to 10 development projects, 1 of which becomes a profitable mine."[175] Companies will therefore want to minimize time and resources spent on meeting ESHR requirements. The challenge is to regulate exploration adequately without deterring prospectors who could uncover future development potential for the country.[176]

ESHR Requirements – ESIA or Permit Requirements

Do the mining authorities have requirements for some level of ESHR assessment for the exploration phase that is tied to the potential level of impacts?

- Do the authorities require an ESIA or at least have criteria for when an ESIA for exploration would be required?
  → ESIA requirements that provide specific criteria for when an ESIA is required for exploration (depending, for example on the scope and scale and invasiveness of the techniques used) help provide predictability to the ESIA process for exploration.
- Even if an ESIA or other assessment in advance of carrying out exploration activities is not required, do the mining or environmental authorities nonetheless impose basic ESHR conditions as part of an exploration permit? (See Box 35 for an example from Kenya's recent mining regulations.)
  → The extent of ESHR conditions attached to exploration permits varies greatly across countries. Because the exploration stage is a high-risk, low-reward activity, mining authorities should seek to apply appropriate, but not overly costly ESHR requirements where exploration techniques are not expected to have a high environmental or social impact.[177]
  → Including some requirements at this early stage also signals to mining companies that these issues are important to the mining authority.
- Exploration permits should serve to:
  → Provide permission to carry out the activities
  → Ensure that the exploration activities will not pose a significant or unnecessary threat to the environment
  → Require consultation with local communities

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175 Fraser Institute, "Permit Times for Mining Exploration: How Long Are They?," p. 1 (2016), https://www.fraserinstitute.org/sites/default/files/permit-times-for-mining-exploration-how-long-are-they.pdf

176 J. Southalan, "Mining Law and Policy – International Perspectives," (2012), p. 109. If the permitting process lacks transparency or is uncertain, it adds additional risk and therefore additional costs to exploration for companies, thereby potentially reducing a jurisdiction's competitiveness.

177 J. Southalan, "Mining Law and Policy – International Perspectives," (2012), p. 111.

International Good Practice

Even if the mining authorities do not have national ESHR requirements at the exploration stage, do they instead require or set expectations about applying international standards with respect to ESHR impacts for exploration?

- Where the mining authorities do not have national requirements for exploration, they can nonetheless consider setting out clear expectations that exploration companies abide by international good practices concerning due diligence to anticipate and manage their potential impacts.
- There is an increasing range of guidance materials specifically directed to exploration companies, including junior, small-scale mining exploration companies, to improve their ESHR practices, recognizing that they are unlikely to have the expertise, resources or policies and practices of larger-scale mining companies. (See Box 37 for a sample TOR for a mining ESIA.)
  - → These guidance materials are often grounded in lessons learned 'the hard way' – from repeated experiences about the costs of failing to take such steps – and are developed by mining organizations or well-known mining countries.

Box 36

Kenya Mining Regulations (2016) – Environmental & Social Requirements as a Condition of Permitting for Exploration and Prospecting

Application for an exploration license
- Section 59(2)(h): an environmental and social screening report comprising a plan describing how, on an ongoing basis, local government traditional authorities and communities will be informed and consulted about those reconnaissance operations that require physical entry onto the land within their jurisdiction.

Application for a prospecting license
- 68(2) (j) & Section 72 (2) (k): details of any significant adverse effects that carrying out the programme of prospecting operations is likely to have on the environment, gender impact and on any monument, cultural heritage, artefacts or relic in the proposed prospecting area, measures to be taken to mitigate such effects and an estimate of the cost of mitigating such impacts.

Box 37

Example Terms of Reference (TOR) for a Mining ESIA at the Exploration Phase – Central America

As part of the environmental cooperation agreements under the Central America and Dominican Republic Free Trade Agreements with the United States, regional experts prepared a guidance TOR for each of the exploration and exploitation phases for non-metal and metal mining projects. The TOR is intended for use by the countries to adopt or adapt for their EIA program requirements.[178] It sets out a detailed list of issues to be covered for an ESIA for the exploration phase.

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178 United States Environmental Protection Agency (U.S. EPA), U.S. Agency for International Development (U.S. AID), and/or the Central American Commission on Environment and Development (CCAD), "EIA Technical Review Guideline: Non-Metal and Metal Mining, Volume I Part 2: Example Terms of Reference," (2011), https://www.epa.gov/sites/production/files/2014-04/documents/miningvol1part2.pdf

B Engage with Communities and Stakeholders

The exploration stage is the first step in interaction with communities about the potential for mining in their areas. Poor early environmental and community relations practices by exploration companies that do not have a vested interested in the longer term can affect relations well into the life of the mine. As such, exploration companies can prompt rising and unrealistic community expectations about immediate benefits or fears and misconceptions. The absence of information from either the government or companies may be filled in by rumour and speculation that may have little relationship to reality. (For further discussion, see Step 5 - Mine Development and Construction - Key Action 3 on Community Engagement and Managing Conflict.)

Expected community engagement

Do the mining authorities specifically require or encourage exploration companies to engage with local communities during exploration, beyond whatever transactional engagement is necessary to gain access to land?

- The mining authorities should consider setting clear expectations, if not requirements, about community engagement so that dialogues start early about the potential trajectory of mining development.
- Where IPs are involved the process of obtaining FPIC starts already at this early stage.
- They should encourage exploration companies to engage with all segments of the population, including women, youth, any marginalized and IP groups, to ensure their views are heard. (See Step 2- Participatory Planning, Key Action 2 on integrating IP rights.)

Provide access to information

Is the process of exploration licensing transparent to local communities who may be impacted or other interested stakeholders? Do they have access to information about the permitting process?

- Given the uncertainties involved in exploration, public consultation will not always be required as part of the exploration permitting process. However, even if there is no public participation at this stage, mining authorities can develop internet platforms that provide a full range of permitting information, the identity and information about the companies granted exploration permits, and the conditions attached to the permit.
- It is the government role to provide balanced information that people can trust, presenting realistic, evidence-based information about potential negative and positive impacts, particularly where such information from exploration companies is lacking or unbalanced.

Addressing Community Expectations

Do the mining, environmental, social and human rights authorities engage with local communities to help address community expectation and concerns?

- The mining or other authorities may consider a number of mechanisms for addressing expectations and community concerns about the impacts of exploration, the potential for future development and potential opportunities for communities to benefit if the resource is developed:
  - → NHRIs and ombudsman are often trusted intermediaries.

Addressing Community Expectations

→ Providing spaces for dialogue early in the process when exploration becomes more invasive can help build understanding, highlight concerns and explore options for alternatives when potential changes can be made and before positions become entrenched or large amounts of funds spent. (See Box 34 on an example from Colombia (AngloGold).) These spaces can provide an early-warning sign to governments and companies about deeply rooted community concerns that should be taken into account and addressed early, even before the launch of major studies. They need to be prepared to address community expectations early, including differentiated community expectations from women and youth, for example.

Protecting the Human Rights of Communities during Protests

Are the authorities (including mining and local authorities) and security services aware of and trained in protecting human rights during social protests? Has the government made clear statements about protecting environmental and human rights defenders even when they are advocating against further mining or other economically significant sectors of the economy?

- Governments and companies must be prepared to manage interactions with communities in line with their international human rights commitments, including the right to freedom of expression and assembly.
- Governments should be prepared to address social protest and even potentially violent conflict around mining operations in a manner that protects communities from harm, including environmental activists/human rights defenders,[179] while addressing their underlying concerns and respecting their rights.[180] (See Boxes 21 and 40 on increasing threats to human rights defenders.)
- Given the increasing trends of conflict around mining, a number of initiatives focus on improving security of operations in a manner that respects and protects human rights. (See Box 68 on initiatives and toolkits to help manage security concerns around extractive operations.)

Box 38

International Good Practice Guidance for Exploration Companies on Environmental, Social and Human Rights Issues at the Exploration Stage

Prospectors and Developers Association of Canada
- **e3 Plus: A Framework for Responsible Exploration** was developed to help exploration companies continuously improve their social, environmental, and health and safety performance.[181]
- **First Engagement – A Field Guide for Explorers** (2015)[182] specifically focuses on community engagement at the exploration stage.

IFC – '**A Strategic Approach to Early Stakeholder Engagement - A Good Practice Handbook for Junior Companies in the Extractive Industries**' also focuses on community engagement during the exploration phase.[183]
Australian Centre for Sustainable Mining Practices, '**Leading Practice Sustainable Development Program for the Mining Industry**'[184] (2011) contains a chapter on exploration.

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179 OHCHR, "Report on the Situation of human rights defenders working in the field of business and human rights", (October 2017), http://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/ReportBusinessHR.aspx

180 See also the Human Rights Council Resolution (res 31/32), which requires States to ensure the rights and safety of human rights defenders working towards the realization of economic, social and cultural rights.

181 http://www.pdac.ca/programs/e3-plus/principles

182 http://www.pdac.ca/pdf-viewer?doc=/docs/default-source/default-document-library/first-engagement---a-field-guide-for-explorers.pdf

183 https://www.commdev.org/userfiles/FINAL_IFC_131208_ESSE Handbook_web 1013.pdf

184 https://industry.gov.au/resource/Programs/LPSD/Pages/default.aspx

Box 39

Examples of Transparent Exploration Licensing Process

When Mongolia first started implementing the EITI in 2005, the government managed its licenses using a handwritten-ledger license register, operating a first-come-first-served system highly prone to human discretion. It now has a cadastral portal and a one-window registration service for exploration license applications, providing for real-time public oversight of the status of applications. But online systems, while more transparent, are not without risks: UNDP's June 2016 report on corruption risks in Mongolia's mining sector noted risks in the license allocation and approval processes.[185]

Box 40

Increasing Threats to Environmental and Human Rights Defenders

The UN and numerous organizations have noted the rise in threats, attacks and murders of human rights defenders – individuals and groups who, in their personal or professional capacity and in a peaceful manner, work to protect and promote human rights relating to the environment, including water, air, land, flora and fauna.[186] They are characterized by their actions to protect environmental and land rights. In many cases, they are indigenous leaders or community members who defend their traditional lands from use for other purposes, including mining.

As the global demand for natural resources grows, the protection of the environment and traditional livelihoods is becoming a source of conflict and contention. This Guide highlights the importance of providing meaningful avenues for social dialogue and debate as part of the government's implementation of Principle 10 about the important choices to be made in deciding whether to mine, where and how. In addition to the actions highlighted throughout the Guide that will help support constructive engagement and shared solutions, recent trends indicate the need for governments to take active, targeted measures to protect human rights and environmental defenders that can build on good practices.[187]

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185 Summarized from EITI, "Managing mining leases in Mongolia," (2017) - https://eiti.org/news/managing-mining-leases-in-mongolia

186 UN Special Rapporteur on Human Rights Defenders, "Environmental human rights defenders," (2016), Report A/71/281, http://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/AnnualReports.aspx

187 UN Special Rapporteur on Human Rights Defenders, "Good Practices in the Protection of Human Rights Defenders," A/HRC/31/55, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/015/56/PDF/G1601556.pdf?OpenElement

Step 04

Feasibility and Licensing

At this fourth step, all major studies for mining operations are conducted, including the ESIA and the feasibility study, both of which will help shape the management of ESHR impacts for the life of the mine. Permitting is underway and any agreements with governments and communities are being negotiated. It is also at this stage that the government may be selecting and contracting mining companies competitively – providing an important opportunity to emphasize the government's expectation that it is looking for responsible mining partners. This is a key point in the mining cycle, as it provides clear and accessible information to stakeholders about the mining operations and involves them through robust public participation processes aligned with Principle 10 and in fulfilment of their procedural rights.

Primary Target Audience

→ Mining Authorities
→ Environmental Authorities
→ Social Authorities & Human Rights Authorities

Summary of Step 4: Feasibility and Licensing

	KEY ACTIONS IN THIS STEP	KEY MESSAGES
A	**Know and Understand What is in the Law (and What is Not)**	Officials in the mining, environment and relevant labour/social authorities should have a basic understanding of what is in their laws on controlling the ESHR impacts of mining and what is not, compared to good international regulatory practice. This can be facilitated by regularly sharing information and approaches across authorities.
B	**Know and Understand the Companies Seeking to Invest**	When governments get to the point of licensing for long-term mineral development, they are looking at mining companies that may be operating in their country for decades. Mining authorities are often rightfully focused on technical competence in extracting minerals, but they should also be asking questions that help them judge the companies' approach to and capacity for responsible ESHR management of mining operations.
C	**Know and Understand What is in Company Proposals (and What is Not)**	This is a key moment for understanding the specific details of a company's approach to developing and operating the mine. The country's legal framework and the specific regulations or TORs for ESIA and feasibility studies will to a large extent determine the scope and coverage of the studies presented for consideration – and hence the need to ensure they remain up-to-date and aligned with the country's vision on sustainable mining. This is also a key moment for inclusive and meaningful public participation in the important ESIA process.

D **Know and Understand What is in the License/Contract (and What is Not)**

While the trend is to move towards standard-form licensing for mining, some countries use negotiated contracts to fill gaps in legal frameworks, but they need the necessary capacity and resources to negotiate and implement the deals to ensure that they benefit wider society. Disclosing mining contracts is an important step in improving transparency and accountability in the sector and provides an important way of putting relevant information on the governance of the sector into the public domain.

E **Know and Understand the Local Context Where Mining Will Take Place**

Where central mining authorities are permitting mining operations in areas where they have little information about the local context or local governance, this can lead to conflicts between central and local governments. While land use planning in Step 2 should help to reduce such conflicts, there should be coordination between local and central levels.

A Know and Understand What is in the Law (and What is Not)

Government licensing authorities should well understand what is in their laws on controlling the ESHR impacts of mining and what is not – i.e., what the gaps are compared to good international regulatory practice. Gaps in the national legal framework can potentially be addressed by including requirements in the license/contract. If the issues are not covered in the law or license/contracts, officials must encourage and rely on mining companies' own commitments (if any) to address these impacts.

Benchmarking to Identify Strengths and Weaknesses

Have the authorities benchmarked their national framework against relevant international standards?

- Have the authorities benchmarked their national mining policy framework to understand the comparison with international frameworks and to identify gaps?
  - → There is an increasing wealth of information available on-line from specialist information sources, highlighted in this Guide. (See, in particular, Annex II, which lists many of the relevant international standards to consider and Box 10 that lists support services for governments on the extractive sector.)
- Has the government requested an assessment from several sources? This would include:
  - → A Mining Policy Framework Assessment from IGF. (See Box 9 on the IGF Framework and assessments.)
  - → A Mining Investment and Governance Review from the World Bank. (See Box 9 on the World Bank Framework and Assessments.)

B Know and Understand the Companies Seeking to Invest

Mineral extraction is a long-term process and it is in the country's interest to have a responsible partner. While technical competence and financial soundness are clearly important, governments should be actively and carefully assessing the companies behind the proposals, their commitment to environmental and social sustainability and their track record on ESHR issues. Companies that do not have existing commitments to and practices governing ESHR issues will, at best, be on a steep learning curve and, at worst, pose a risk to the environment and communities.

Information to Request from Bidders

Do mining authorities ask the following questions of companies seeking to invest?

- Who owns the company? Is it private, publically listed or state-owned? Who are the beneficial owners (the ultimate owners) of the company? Is this transparent or is it difficult to find out who will ultimately profit?
- Where is it registered? What are the relevant laws in the jurisdiction where the company is registered relating, for example, to taxation, foreign bribery and labour laws?
- How long has the company operated? Does it have a history of speculative investments or 'flipping' mining concessions?
- Does the company have appropriate policies on sustainability, human rights and gender equality[188] – for example, a thorough management system to manage ESHR issues? (See Box 41 on company environmental and social systems and Box 42 on the application of the UNGPs to mining companies.) What is its ESHR track record in other countries? What is the company's safety record?
- Does the company report on its sustainability performance? Are the reports independently verified or ensured?
- Who is financing the company? Is that difficult to find out?
- Is the project partially financed by a multilateral development bank that has its own detailed environmental and social requirements, such as the International Finance Corporation (IFC),[189] the African Development Bank[190] or a private sector bank that is part of the Equator Principles[191] that apply the IFC requirements applicable to the mining company?
  - → This provides extra assurance that there will be a third party (the bank) also reviewing the company's compliance with the international environmental and social performance standards.

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188 For example, the Women's Empowerment Principles, http://www.weprinciples.org/

189 IFC Environmental and Social Performance Standards http://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+sustainability/our+approach/risk+management/performance+standards/environmental+and+social+performance+standards+and+guidance+notes, and the World Bank Group Environmental, Health and Safety Guidelines for Mining http://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+sustainability/our+approach/risk+management/ehsguidelines

190 AfDB Integrated Safeguards System, https://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/December_2013_-_AfDB%E2%80%99S_Integrated_Safeguards_System__-_Policy_Statement_and_Operational_Safeguards.pdf

191 http://equator-principles.com/

Government Due Diligence on Bidders

Has the mining authority done its own due diligence on companies seeking to invest?

- Mining authorities should also consider doing their own due diligence for major investments, looking into:
  - → The company's ability to perform its obligations, such as the company's financial capacity to fund the mining project, its level of expertise and experience, including on managing ESHR issues and its capacity to reimburse financing.
  - → The company's commitment to extracting the resource rather than to just treating it is a speculative investment opportunity.[192]
  - → Red-flag items signal warnings that, once identified, should prompt further investigation, including interviewing the company management, auditors and lawyers:[193]
    - → Large unfunded reserves for potential losses
    - → Ongoing criminal investigations concerning corruption, money laundering or other alleged crimes
    - → Credible allegations of human rights abuses or environmental pollution
    - → Other reputational, financial or legal issues
    - → Corruption (see Box 43 on Twelve Red Flags on Corruption in Natural Resource Transactions, Box 44 on Combatting Corruption and Box 45 on Resources to Address Corruption in the Extractive Sector)

Consider ESHR Issues in the Bidding

Are ESHR requirements included as part of bidding and pre-qualification requirements?

- Has the government considered including specific ESHR requirements in bidding or pre-qualification requirements? Doing so:
  - → Sends a signal early on to potential bidders that the government considers these issues important
  - → Provides a basis for obtaining information from bidders about whether they have any ESHR policies and processes.
  - → Provides an opportunity to ask about the company's history of EHSR performance in other countries – past accidents, legal claims, significant protests against their operations in other countries, etc.
  - → Provides a legitimate basis for comparing performance on these issues across companies as part of the scoring system

Guarding against Bribery and Corruption

Does the government have rules and guidance to limit the possibility of bribery and corruption throughout the mining cycle?

- The natural resources sector can be a high revenue-generating sector – regardless of whether that revenue is generated and used legally or illegally. Some of the unique characteristics of extractive industries, such as the volume of financial resources involved, the high level of discretionary political control, limited competition, opaque contractual arrangements, etc., make the industry particularly vulnerable to corruption and illicit financial transactions.[194]
- Does the government provide transparency about requirements for all by reducing the possibilities of corruption associated with closed-door negotiations?

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192 As NRGI points out, countries should also consider whether the company is purchasing extraction rights to speculate on their value rather than extract the resource. NRGI Reader: "Granting Rights to Natural Resources: Determining Who Takes Natural Resources Out of the Ground," (2015), http://www.resourcegovernance.org/sites/default/files/nrgi_Granting-Rights.pdf

193 From Revenue Watch, et al., "Mining Contracts How to Read Them," https://eiti.org/sites/default/files/documents/mining-contracts-how-to-read-and-understand-them.pdf

194 UNDP, "A Practitioner's Guide For Corruption Risk Mitigation In Extractive Industries," (201x), p. 3, www.xxx [UNDP TO PROVIDE LINK]

→ Initiatives to bring maximum transparency to the sector, such as the EITI (which is expanding its focus on improving transparency across the whole extractive sector value chain), play an important role in limiting the opportunities for bribery and corruption.

→ Additional steps to specifically address bribery and corruption can be built into each step of the mining cycle and be part of the government's approach to strengthening the rule of law. (See Box 43 on Twelve Red Flags on Corruption in Natural Resource Transactions, Box 44 on Combatting Corruption and Box 45 on Resources to Address Corruption in the Extractive Sector.)

- Corruption also has an impact on the ESHR governance of the sector:
  → Bribery to obtain environmental approvals has an impact on the environment and the rule of law.
  → Closed-door contracting can increase the risk of important ESHR requirements being negotiated away.

Box 41

Company-Integrated Environmental and Social Management Systems (ESMS)

Many mining companies, particularly the larger ones, have developed integrated management systems to address sustainability issues that often started with an environmental management system, but have expanded to deal with other sustainability issues in a more integrated way: health and safety, social issues including community relations, indigenous peoples, gender, security, health and, more recently, human rights.

These systems may be audited regularly by internal auditors or by external auditors commissioned by the company and may also be audited by the lending institutions funding mining operations.[195]

There is significant industry,[196] academic[197] and civil society[198] interest and attention to the development and performance of mining companies' ESMS. However, while an ESIA might be the most visible and systematic investigation of the issues, within the mining cycle, this is often well after companies have started interacting with communities and workers – and having impacts. An ESMS should also include processes to identify and manage ESHR issues from these early stages.

195 See, for example, IFC guidance on environmental and social management systems, which provides a very basic explanation for companies just starting to develop their ESMS and which may be relevant for smaller, local mining companies. LSM companies will have far more detailed and specific ESMS. http://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+sustainability/learning+and+adapting/knowledge+products/publications/publications_handbook_esms-general

196 See, for example, ICMM: http://www.icmm.com/en-gb/about-us/member-commitments/icmm-10-principles/the-principles and PDAC: http://www.pdac.ca/programs/e3-plus/principles

197 See, for example, the Sustainable Mineral Institute at the University of Queensland: http://www.smi.uq.edu.au/

198 See, for example, the Business and Human Rights Resources Centre pages on the mining sector: https://business-humanrights.org/en/sectors/natural-resources/mining

Box 42

The UN Guiding Principles on Business and Human Rights (UNGPs) and the Mining Sector (see also Boxes 6 and 22 on the UNGPs)

The adoption of the UN Guiding Principles on Business and Human Rights in 2011[199] ushered in a new global standard of expected conduct that all businesses, including mining companies, should respect human rights. This is also incorporated into the OECD Guidelines on Multinational Enterprises[200] that apply to the operations of mining companies headquartered in an OECD country, wherever they have operations. The normative expectation is that businesses do no harm to human rights – but this is not equivalent to doing nothing. This means that companies are expected to develop a proactive and systematic approach to respecting human rights that includes: [201]

- Adopting **a policy commitment to respecting human rights** that then steers the company's approach
- Carrying out **human rights due diligence** to assess whether they may have actual or potential adverse impacts on human rights and, if so, to act on these findings, track the results and communicate about how the were addressed. As mining companies are routinely required to carry out ESIAs and have ESMS to support these processes, many have taken the approach of integrating human rights issues into these processes (see below).

- **Providing or collaborating in remedy for negative human rights impacts** where prevention or mitigation has not been successful (see Step 9, Key Action 3).

ICMM, a global mining association, has developed guidance to help mining companies implement this step of the UN Guiding Principles by incorporating human rights due diligence into corporate risk management processes, including ESIAs:[202] '**Human rights in the mining and metals industry: Integrating human rights due diligence into corporate risk management processes**' (2012).

Human rights and environmental organizations, investors and other stakeholders of the mining sector[203] are taking an increasing interest in mining company performance on human rights. The largest mining companies are now being individually benchmarked on their commitments and practices on human rights and other environmental, social and governance issues.[204]

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199 See http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

200 http://mneguidelines.oecd.org/themes/human-rights.htm

201 For a detailed explanation of the UN Guiding Principles and their application to the oil & gas sector (there is no similar comprehensive guide for mining but this gives an overview that could be adapted by mining companies), see: European Commission, "Oil and Gas Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights," (2013), http://bookshop.europa.eu/en/oil-and-gas-sector-guide-on-implementing-the-un-guiding-principles-on-business-and-human-rights-pbNB0413166/

202 https://www.icmm.com/website/publications/pdfs/3308.pdf

203 See https://business-humanrights.org/en/sectors/natural-resources/mining

204 See the Corporate Human Rights Benchmark, which ranks the largest global extractive companies on their human rights policies and performance, https://www.corporatebenchmark.org/extractives, and the forthcoming Responsible Mining Index, which will transparently rank the performance of some of the world's largest mining companies on economic, environmental, social and governance (EESG) issues, http://responsibleminingindex.org/index/

Box 43

Twelve Red Flags: Corruption Risks in the Award of Extractive Sector Licenses and Contracts[205]

NRGI recently examined over 100 real-world cases of license or contract awards in the oil, gas and mining sectors in which accusations of corruption arose. Based on this work, it developed a list of 12 'red flags' of corruption in extractive sector license and contract awards:

1. The government allows a **seemingly unqualified company** to compete for, or win an award.
2. A company or individual with a **history of controversy or criminal behaviour** competes for, or wins, an award.
3. A competing or winning company has a **shareholder or other business relationship** with a **politically exposed person (PEP)** or with a company in which a PEP has an interest.
4. A competing or winning company shows signs of having a **PEP as a hidden beneficial owner**.
5. An official **intervenes in the award process**, resulting in benefit to a particular company.
6. A company provides **payments, gifts or favours to a PEP with influence over the selection process**.
7. An official with influence over the selection process has a **conflict of interest**.
8. **Competition** is **deliberately constrained** in the award process.
9. A company uses a **third-party intermediary to gain an advantage** in the award.
10. A **payment** made by the winning company is **diverted** away from the appropriate government account.
11. The **agreed terms of the award deviate significantly** from industry or market norms.
12. The winning company or its owners **sell out for a large profit without having done substantial work**.

Box 44

Combatting Corruption in Mining Approvals: Assessing the Risks in 18 Resource-Rich Countries[206]

This global snapshot from Transparency International explores where and how corruption can get a foothold in mining approvals processes – before ground is even broken. It found that vulnerabilities to corruption exist in the mining approval regimes of jurisdictions across the world, irrespective of their stage of economic development, political context, geographic region or the size and maturity of their mining sectors. The report is framed around six key questions that help identify where and how an approvals regime is vulnerable to corruption and gives a series of indicators for each that highlight risks.

1. **Who benefits from mining approval decisions?**
- Decisions about whether to approve a particular mining project must put the public interest first and conflicts of interest need to be declared and addressed.

2. **How ethical and fair is the process for opening land to mining?**
- Decisions about which land is opened to mining and under what conditions have flow-on effects for the integrity of licencing decisions and other mining-related approvals.

3. **How fair and transparent is the licencing process?**
- A fair and transparent licencing process has clear rules and effective institutions, with a complete and accurate register of licences (mining cadastre). If information in the mining cadastre is incomplete, officials can manipulate applications and breach the 'first come, first served' principle for granting licences.

4. **Who gets the right to mine?**
- Governments need to conduct effective due diligence on the past conduct and compliance, financial resources, beneficial owners and technical capacity of licence applicants and their principals.

205 NRGI, https://www.resourcegovernance.org/sites/default/files/documents/corruption-risks-in-the-award-of-extractive-sector-licenses-and-contracts.pdf

206 Transparency International, https://www.transparency.org/news/feature/unearthing_corruption_risks_in_mining_approvals

Otherwise, companies can deliberately provide misleading information and mining rights can fall into the wrong hands.

5. How accountable are companies for their environmental and social impacts?

- Effective verification of environmental and social impact assessments (ESIAs) is needed to guard against the risk of licence applicants knowingly providing incorrect information

about the potential impacts of their projects.

6. How meaningful is community consultation?

- Ensuring genuine consultation and negotiations with communities is critical to securing the legitimacy of mining approvals. If there are no clear or binding requirements for consultation, it is more likely that the duty to consult will be ignored or carried out superficially.

Box 45

Resources to Address Corruption in the Extractive Sector

OECD, Corruption in the Extractive Value Chain - Typology of Risks, *Mitigation Measures and Incentives*
This report is intended to help policymakers, law enforcement officials and stakeholders strengthen prevention efforts at the public and private levels through improved understanding and enhanced awareness of corruption risk and mechanisms to address those risks.[207]

I4MDC, Constructing a Diagnostic Framework on Corruption Risks in Mining Sector Licensing[208]
Breaking down mining sector licensing into its key components, each section of the paper contains two sets of suggested questions that can be used by mining authorities to construct a 'traffic light' approach to highlight where corruption risks may be at their greatest in the mining licensing process (red lights), through to areas that demonstrate very low corruption risks (green lights).

C Know and Understand What is in Company Proposals (and What is Not)

Feasibility studies and ESIAs for larger mines set out the considerations and approaches a mining company plans to take in developing the mine and provides far more detailed indications of how companies will address ESHR issues. While the regulatory frameworks are a core part of the process, the assessments and the participation processes that go with them are a significant safeguard to protect society's broader interest in a balanced outcome and "help avoid biases towards the groups most represented in the formal regulatory processes or the groups with more voice or power."[209] Participation and the public accountability that come with it are key mechanisms for social inclusion and are an important, and practical expression of the protection of human rights.

207 OECD, "Corruption in the Extractive Value Chain - Typology of Risks, Mitigation Measures and Incentives," (2016), http://www.oecd.org/dev/Corruption-in-the-extractive-value-chain.pdf

208 A. Wolfe, A. Williams. "Constructing a Diagnostic Framework on Corruption Risks in Mining Sector Licensing," (2015), http://im4dc.org/wp-content/uploads/2015/07/Corruption-Risks-in-the-Mining-Chain-Final-Completed-Report.pdf

209 D. Arbelaez-Ruiz, J.M. Benavidez, B. Oñate Santibáñez, R. Ramsay, "Institutional and Political Frameworks of Environmental Licensing Processes," (2013), p. 7, http://im4dc.org/wp-content/uploads/2013/09/Institutional-and-Political-Frameworks-of-Environmental-Licencing-Processes1.pdf

Consider ESHR Issues in Feasibility Studies/Investment Proposals

Are ESHR risks and benefits included as part of the formal evaluation of mining investment proposals or feasibility studies? Has the government updated the TORs for feasibility studies to include relevant ESHR issues?

- This stage typically includes a detailed ESIA & the accompanying environmental and social management plan (ESMP) and additional relevant ESHR studies plans, such as resettlement plans, indigenous people's plans and emergency plans. There would typically be numerous agencies involved in reviewing the feasibility study for relevant ESHR issues:
    → Environmental authorities are reviewing the ESIA and ESMP and the reclamation and closure plan.
    → The ministry in charge of labour is reviewing the training, recruitment and employment plans and closure plan.
    → Public health authorities are reviewing the ESIA and ESMP for potential health impacts and reviewing design plans for clinics and health facilities.
    → The ministry in charge of women's affairs is addressing the gender analysis and proposals in the studies.
    → The ministry in charge of infrastructure and/or local government is overseeing any plans for changes to road, township, water supply and sanitary systems.[210]
- Does the government have a process for coordinating the review and decision-making on the feasibility study so that:
    → It is assured of a comprehensive review without topics falling 'between the cracks'? This can also be an opportunity to build further understanding and links across all government departments dealing with mining.
    → Alternatives are considered and evaluated at this stage. This is a crucial moment for choosing among options; authorities must review and considered how well supported the preferred option is, whether sufficient evidence has been put forward and whether there has been sufficient consultation on the options that have provided stakeholders with credible and thorough information to understand options and express a choice.
    → It has a process to capture all the requirements from the review in one place so that requirements are reflected as appropriate in licensing/contracting and monitoring.
    → Governments may also consider conducting their own feasibility study to be better informed for negotiations with mining companies.[211]

Include Environmental and Social Costs

Does the government require the inclusion of environmental and social costs as part of the feasibility study and estimates of mineral reserve?

- Regardless of who makes the evaluation of a mineral reserve, be it the mining company or the mining authorities, this should include estimated environmental and social costs already from the first estimations of the size of the mineral reserve. For large-scale mining, ESHR management costs may be a significant component of overall project costs. When the mineral reserve is revised due to more available information, the environmental and social costs may also need to be revised.
    → Mining authorities should be aware of the risk that cost estimates might be too low in the early evaluations, with a corresponding overestimation of the mineral reserve, as it will be difficult to correct later on.
- The challenge is to ensure that correct and transparent estimations of the environmental and social costs based on the policies, laws and regulations of the country are used for evaluating the mineral reserve from the start.

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210 See section on feasibility studies in Mining Contracts: How to Read and Understand Them, (2013), https://eiti.org/sites/default/files/documents/mining-contracts-how-to-read-and-understand-them.pdf

211 Negotiation Support Portal for Host Governments, Feasibility Study Stage, http://negotiationsupport.org/roadmap/conduct-feasibility-studies

→ The basis for making the estimates, including assumptions, should be explained clearly in the feasibility study.

→ The permitting process should make clear what obligations, expectations and corresponding costs follow the project and will be covered as part of the project cost.

→ Project costs should also cover all costs related with closure and the cost of mining waste – from the design of mine waste facilities to ensure safe and orderly closure once mining has ceased through to post-closure.[212] (See Box 49 on Closure Issues to Cover in Feasibility Studies.)

- In addition, particularly in countries where the laws governing the mining sector have not been updated, complying with the law may not be sufficient for a project to address the full scope of mining impacts and thus estimated costs based on national law alone may not be sufficient. In the absence of robust national laws, mining companies should be required or at least encouraged to apply relevant international standards (see Annex II on International Standards and Guidance) to ensure that they are addressing sustainability issues in line with good international industry practice and to make their cost estimates based on those standards.

→ The cost estimates for meeting these standards can also be included in a transparent manner in feasibility studies to ensure that these costs are also considered as part of overall project costs.

- This is an area where more work needs to be done to develop tools and methodologies to provide more robust and comparable calculations of the costs of environmental and social compliance.

→ The uncertainties around costs translate directly into budgets and whether funds are available to address ESHR issues, particularly later in the production cycle.

→ Given these uncertainties, this is all the more reason to require clear and transparent information about the calculations made and to consider engaging independent experts to review mining proposals. This will at least help mining authorities gain a better understanding of the magnitude of uncertainties. (See Box 48 for a short explanation of CIRSCO.)

- Governments also need sound assessments of the proposed benefits projected in feasibility studies.

→ For example, the potential employment creation of mining investments should consider not only the number of jobs created, but also their timing, quality and security, likely beneficiaries, impact on livelihoods, and other socio-economic effects.[213]

Coverage of ESHR Issues in the ESIA TOR

Has the government updated its ESIA laws or regulations/TOR for ESIAs?

- Has the government updated its ESIA laws and procedures recently?

→ If not, it should consider doing so in light of the increasing range of materials available that are particularly focused on the mining sector, to ensure that it is building on good international practice for the sector. (See Box 50 on Resources to Improve ESIAs in the Mining Sector.)

- Is it up to date on the expanded scope of issues included within ESIAs since the early days of EIA practice, which focused exclusively on environmental issues?

→ They now routinely cover social and health issues and, more recently, human rights issues, even if they are not always labelled as 'human rights' such as gender, indigenous peoples' rights, land & water rights,

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212 See Goxi Learning Series, "Management of Mining Waste and Design for Closure," (2017), http://api.ning.com/files/zBuX APjY2N7fQLQH6Hwmus3kO3S*zOZsqiRG4kkRfw0eN2kfX9UvHnhvBzdwUTsEozw0KloSAV-nwnoB4jwQOn6tv2mqP*gf/ EGPKnowledgeProductwebinaronmanagamentofminingwaste.pdf

213 P. Toledano, O. Östensson and K. Cordes, "Parsing the myth and reality of employment creation through resource investments," Columbia FDI Perspectives, No. 213, November 20, 2017. Columbia Center on Sustainable Investment, http://www.ccsi.columbia.edu

security and protection from harm, right to participation and express opinions, other vulnerable groups, etc. Mining companies and mining associations are also beginning to routinely incorporate human rights into their assessments.[214]

→ In particular, there has been growing recognition of the need to address the mining sector's impacts on women (see Box 46 on Addressing Mining Impacts on Women) and, more recently, children (see Box 47 on Addressing Mining Impacts on Children), which often starts with an appropriate gender analysis in the ESIA.

- Does the ESIA process cover all relevant ESHR issues or just those topics that are listed in the ESIA regulation/TOR?

    → ESIA regulations/TORs should include a wide range of indicative issues to be considered, but specify that all ESHR issues relevant to the local context should be covered see Box 2 on Typical ESHR Issues for the Mining Sector), regardless of whether they have been identified in the TOR.

    → It will be important for the authorities to require the mining company to develop a full baseline (with information disaggregated by sex and other relevant markers of identify, such as age) about the communities and others likely to be affected by the mining operations and the associated infrastructure (including all the projected ESHR impacts – project-affected people) to provide solid evidence of the pre-mining state and as a starting point for assessing potential impacts and developing prevention and mitigation steps. The baseline will also play an important role in monitoring (see Steps 5-8), providing an evidence base to measure changes as a result of mining operations.

    → The ESIA should assess and address ESHR impacts on the different populations who may be impacted directly and indirectly by the mining operations – women, children/youth, IPs, land-based marginalized communities, etc. The ESMP also develop actions to strengthen positive impacts. (See Box 45 on Addressing Mining Impacts on Women and Box 47 on Addressing Mining Impacts on Children.)

    → A thorough ESIA should identify early on issues that, if unaddressed, could develop into more difficult issues to resolve once project construction or operations are underway – such as the presence of indigenous peoples, the long-standing use by communities of water and grazing in the proposed mining area, the potential to spread disease through construction practices, etc.

Access to Information, Public Participation and Access to Justice in Connection with ESIAs

Do the law and practice provide for meaningful public access to information, participation and access to justice in connection with ESIAs? (See also Annex I – Backgrounder on Principle 10 for more specific information and questions on this topic.)

- Do the law and practice reflect international law and international good practice on access to information around ESIAs?

    → ESIA laws should provide for access to draft and then final ESIAs, including draft and final ESMPs so that there is an opportunity to comment on the assessment and the proposed prevention and mitigation measures

        → Yet a recent comparison found that governments generally do not provide easy access to comprehensive information on mining operations or related environmental and social impacts and a majority of countries provided limited or no access to ESIAs.[215] (See Box 17 on the Environmental Democracy Index.)

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214 See for example, ICMM, "Integrating human rights due diligence into corporate risk management processes," (2012), https://www.icmm.com/website/publications/pdfs/3308.pdf

215 Environmental Democracy Index, http://www.environmentaldemocracyindex.org/

→ Feasibility studies and ESIA/ESMP for large mines are lengthy and techni-cal – and therefore difficult for all but trained specialists to understand. It will be particularly important for there to be non-technical explanations of the full scope of ESIAs and wider feasibility studies in local languag-es as necessary to ensure access to relevant information and support participation.

→ Who provides the information and who delivers the message is impor-tant. Will stakeholders see the government or the project proponent as the more legitimate source of information? The government role should be to ensure transparency, accountability and participation in the pro-cess, but that will depend on the local context. Where distrust is high, neutral third parties may be required to ensure that participation is meaningful and balanced, rather than a tick-box exercise.

- Do the law and practice reflect international law and international good practice on public participation around ESIAs?

  → Public participation in ESIA studies before feasibility studies and licens-es/contracts are approved is important to give project-affected peoples and the wider public a chance to influence decision-making before final decisions are made about the plans for the mine.

  → Participation should be inclusive. The baseline can be used to identify particular groups within the community that may require specific meas-ures to engage them in the consultation. This will include not only wom-en and children/youth, but also other persons or groups within the com-munity that might be vulnerable to impacts, e.g., marginalized groups and disabled persons.

  → If there are IPs that may be affected, consultations with this group re-quire particular processes to engage in FPIC (see Step 2 on Participation Planning, Key Action 2 on IP).

  → Consultations should also be open to representatives of these groups, community-based organizations and CSOs with an interest in the project.

  → The company and the authorities should provide feedback to explain how concerns have been taken into account or, if they have not been taken into account, why.

- Does the law reflect international law and international good practice on access to justice around ESIAs?

  → Can anyone who has been denied or restricted information on the ESIAs or from participating in an ESIA by public authorities ask for a review? Is the review heard by a court of law or other independent, impartial body?

  → Can anyone bring an action to prompt the mining authority to require an ESIA where it was required by the law to do so but did not?

Box 46

Assessing and Addressing Mining Impacts on Women and Opportunities for Gender Empowerment

There is an increasing range of guidance for and about the gender dimensions of the mining sector for governments and companies to draw on in improving attention to impacts on women and improving opportunities for gender empowerment within the sector and the businesses supplying the sector. (See also Box 16 on a gender-sensitive approach to mining.) Steps include:

- Undertaking a gender-responsive baseline survey and social mapping exercise to understand the gender-related impacts of extractive industry operations, drawing on specific guidance on the impacts of extractive industries on women and men, boys and girls
- Analysing the implications of policies that encourage women to go into the formal workforce and understanding how these interact with household level needs

- Ensuring that consultations as part of the ESIA process around specific mining projects include specific and targeted consultations with a cross-section of women from various social strata of the community, to ensure that their voices and priorities are taken into account
- Ensuring that the ESIA & ESMP or associated action plans assess and address gender-related impacts of mining such as the prevalence of gender-based discrimination and violence, risks of women's time poverty,[216] resettlement and compensation plans and putting in place gender-responsive steps
- The ESIA & ESMP should also identify where women's empowerment may be specifically enhanced, such as local content plans/local procurement requirements with specific hiring targets for women, and community development agreements where there can be specific commitments to supporting women's enterprises.[217]

Box 47

Assessing and Addressing Mining Impacts on Children – UNICEF Child Rights and Mining Toolkit[218]

Currently, the range of impacts of mining on children is not well understood by the mining industry or mining authorities and, as such, are not being managed. The exception to this is around child labour, which is less of a risk in industrial mining itself, given the skilled demands of the job, but is more of a risk in supply chain management, particularly during the construction phase of a mine, when more third parties, e.g., labour brokers, commonly become involved.

Recent research has shown that children are more vulnerable to the impacts of mining than adults, particularly between birth and 5 years when expe-

riencing formative physical development. These impacts occur in relation to resettlement, in-migration, environment, safety and security, among other issues. The **UNICEF Child Rights and Mining Toolkit** is particularly targeted to mining companies, but also provides very relevant information for environmental, health and child protection authorities and ministries in charge of child welfare. The Toolkit highlights that children's vulnerabilities and the specific impacts they experience as a result of mining activities are regularly overlooked by companies in their environmental, social and human rights due diligence practices, including the associated impact assessments.

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216 IFC and Lonmin, "Women in Mining, A Guide to Integrating Women into the Workforce,"(2009), and Minerals Council of Australia, "Unearthing new resources: attracting and retaining women in the Australian minerals industry," (2000).

217 Keenan, J. C. and D. L. Kemp (2014). Mining and local-level development: Examining the gender dimensions of agreements between companies and communities. Brisbane, Australia: Centre for Social Responsibility in Mining, The University of Queensland, https://www.csrm.uq.edu.au/component/content/article/15-publications/684-mining-and-local-level-development-examining-the-gender-dimensions-of-agreements-between-companies-and-communities?highlight=WyJnZW5kZXIiXQ==

218 UNICEF, Child Rights and Mining Toolkit (2017), https://www.unicef.org/csr/files/FINAL_Child_Rights_and_Mining_Toolkit_060217.pdf. These are based on the children's rights and business principles. http://childrenandbusiness.org/

Box 48

Committee for Mineral Reserves International Reporting Standards (CRIRSCO)

The aim of CRIRSCO is to promote high standards of reporting of mineral deposit estimates ('Mineral Resources' and 'Mineral Reserves') and exploration progress ('Exploration Results') for investors or potential investors and their advisers.[219] This includes reporting through annual and quarterly company reports, press releases, information memoranda, technical papers, website postings and public presentations.

The CRIRSCO International Reporting Template[220] is a guideline that helps countries establish their own reporting standard and helps promote harmonized approaches to reporting on key terms. With respect to the environmental and social dimensions of mining, these are not currently analysed in sufficient detail, given the growing impact that they have on the potential viability, development and sustainability of projects.[221] The reported results may therefore not accurately reflect the environmental and social costs of mining operations – something that national authorities should consider.

Box 49

Closure Issues to Cover in Feasibility Studies

Typical closure issues that should be included in a feasibility assessment include:

- Regulatory requirements for design and closure
- Potential area of disturbance
- Environmental sensitivity of flora and fauna, surface and groundwater quality
- Characterization, volumes and types of wastes to be stored, including waste rock and tailings
- Appropriate locations and required capacity of

water storage facilities for potable consumption, process supply and site water management
- Geotechnical stability of ground surface and engineered structures
- Proposed designs for waste storage facilities and costs to rehabilitate and close
- Social and economic development and sustainability issues, such as local enterprise, post-closure use of land and infrastructure, and other community development programmes[222]

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219 http://crirsco.com/welcome.asp

220 http://crirsco.com/templates/international_reporting_template_november_2013.pdf

221 For work on the Australian reporting code, see J. Heyes, G. Corder, "Strengthening the community and environmental aspects of the JORC and VALMIN Codes – Providing guidance on community and environmental aspects for professionals applying JORC and VALMIN," Bulletin Magazine, December 2015.

222 Australia, "Leading Practice Sustainable Development Program for the Mining Industry – Mine Closure Handbook," (2016), https://industry.gov.au/resource/Programs/LPSD/Pages/LPSDhandbooks.aspx

Box 50

Resources to Improve ESIAs in the Mining Sector

- **Example Terms of Reference (TOR) for a Mining ESIA – Central America**: Regional experts prepared a guidance TOR for each of the exploration and exploitation phases for non-metal and metal mining projects. The TOR is intended for use by the countries to adopt or adapt for their EIA programme requirements.[223]
- **Subnational level**: the **Mining and Environmental Impact Guide from the Gauteng Department of Agriculture, Environment and Conservation**, Gauteng Provincial Government of South Africa provides a detailed explanation of mining operations, their impacts and the environmental laws that apply.

The manual is particularly targeted to providing important information regarding the environmental issues and impacts of the mining industry in Gauteng and to help their environmental officers to evaluate mining license applications.[224]
- **Guidebook for Evaluating Mining Project EIAs**: The Guidebook explains how to understand the EIA process and how to review mining project EIAs, with an emphasis on environmental and social issues.[225]
- **A Comparison of EIA Laws** can be found here: https://www.elaw.org/elm

D Know and Understand What is in the License/Contract (and What is Not)

Licenses or contracts are the legal documents that govern the rights and responsibilities of the government and companies for mining projects and allocate the risks between them for the duration of the investment (some countries may use both). It is important that those involved in the negotiations understand which type of document is used, how it fits within the broader legal framework in the country and the legal and political considerations and implications behind the choices. (See Box 50 on considerations in developing a licensing or contracting system and Boxes 51 & 52 on tools for government negotiators and good international practice on mining contracts). These license/contracts are particularly important when the State party's legal framework is underdeveloped. In such situations, contracts often either supplement or supplant the legal framework and provide an opportunity to include additional ESHR requirements or in worst case scenarios, override national ESHR requirements.

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223 United States Environmental Protection Agency (U.S. EPA), U.S. Agency for International Development (U.S. AID), and/or the Central American Commission on Environment and Development (CCAD), "EIA Technical Review Guideline: Non-Metal and Metal Mining, Volume I Part 2: Example Terms of Reference," (2011), https://www.epa.gov/sites/production/files/2014-04/documents/miningvol1part2.pdf

224 http://www.gdard.gpg.gov.za/Documents1/MiningandEnvironmentalImpactGuide.pdf

225 See also regional specific guidance for the Mekong region: https://www.earthrights.org/sites/default/files/documents/eia_manual_final_0.pdf

Updated & Aligned with Sustainable Development Commitments

Has the government updated its standard form license/contracts so that they are aligned with its approach to sustainable development?

- If standard form licenses/contract (concession, service, investment agreements) are not updated periodically, they may be out of step with the government's commitments to sustainable development, good international practice and updates in its own domestic framework covering ESHR issues. There is a range of support tools for governments seeking to improve their contracting models and approaches[226] and approaches to supporting licensing in resource-constrained countries.[227]
- Where governments do not have well-developed domestic frameworks in place governing the ESHR dimensions of mining, they can consider:
  → Adopting a model contract with clearly defined ESHR provisions. This will reduce the risk of these obligations being open for negotiation between companies and government and potentially being negotiated away.
    → Including contractual requirements to comply with well-established international environmental and social standards, such as the IFC Environmental & Social Performance Standards which are well-known to extractive companies and the banks that finance them. (See Annex II.)
- As noted in Step 1 – Establishing the Foundations, Key Action 4, governments must also consider what they include in their international investment agreements (IIA), including with respect to investor-state dispute settlements (ISDS), as these will also potentially constrain a government's approach to include sustainable development requirements in mining contracts.

Coverage of ESHR Issues

If national laws on ESHR are not well developed, does the license/contract cover ESHR issues? (See also Box 54 on the provisions in the IGF Mining Policy Framework on Licensing and Permitting.)

- The terms should include ESHR requirements or refer to national law requirements or international standards around these issues, including: [228]
  → Requirements to properly prepare or procure the ESIA, required management of all issues in the ESIA/EMP
  → Environmental and social compliance,[229] which might include requirements to comply with national ESHR laws and specific international standards such as the IFC Environmental & Social Performance Standards
  → General requirement to prevent, control, mitigate, rehabilitate, remediate and compensate for the negative impact of mining activities
  → Additional social and economic responsibilities, such as gender hiring targets
  → Health and safety standards
  → Infrastructure & sharing of infrastructure
  → Land acquisition
  → Any resettlement and expected standards of resettlement

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226 H. Mann (IISD), WIISD Handbook on Mining Contract Negotiations for Developing Countries Volume 1: Preparing for Success," (2015), http://www.iisd.org/library/iisd-handbook-mining-contract-negotiations-developing-countries-volume-1-preparing-success

227 See EITI blog on mining licensing in Sierra Leone, "Wanted: Reputable Mining Investors in Sierra Leone," (2017), https://eiti.org/blog/wanted-reputable-mining-investors-in-sierra-leone

228 See the Negotiations Support Portal, which aims to strengthen the accessibility and visibility of available tools & resources and technical support to assist host governments planning, preparing for, negotiating, monitoring and implementing large-scale investment projects in the extractive industry, land & agriculture and infrastructure sectors. http://negotiationsupport.org/ See also "Mining Contracts – How to Read and Understand Them," https://eiti.org/sites/default/files/documents/mining-contracts-how-to-read-and-understand-them.pdf

229 If compliance with environmental and social requirements is included in a mining contract, then a breach of those laws is considered to be a breach of the mining contract, with a potential loss of mining rights. Alternatively, mining authorities can request a obtaining a legally binding commitment from the project proponent that the approved ESIA will be implemented as presented. Such a commitment adds to the legal enforceability of the outcomes of the EIA process. See, for example, United States Environmental Protection Agency (U.S. EPA), U.S. Agency for International Development (U.S. AID) and/or the Central American Commission on Environment and Development (CCAD), "EIA Technical Review Guideline: Non-Metal and Metal Mining, Volume I Part 2: Example Terms of Reference," (2011), https://www.epa.gov/sites/production/files/2014-04/documents/miningvol1part2.pdf

→ Community engagement
→ Community safety and security
→ Benefit-sharing
→ Indigenous peoples
→ Other ethnic groups or vulnerable/disadvantaged groups and individuals
→ Cultural heritage
→ Company-based grievance mechanisms
→ Closure/post-closure environmental rehabilitation, retraining and community development
→ Arrangements to cover the financial cost of closure/post-closure
→ Oversight/monitoring by the government and other monitoring arrangements such as independent third parties, community monitoring
→ Access to land and water, including compensation for use of these resources, considerations of balancing use with communities or compensating communities (such as through replacement water resources)
→ Use of security forces and their compliance with human rights standards or specific international standards such as the Voluntary Principles on Security and Human Rights or use only of security firms that are members of the International Code of Conduct for Private Security Providers. (See Box 68 on initiatives and toolkits to help manage security around extractive operations.)

Providing Access to Mining Licenses/Contracts

Does the government make the mining license/investment contracts or at least their key terms available to the public?

- There is a growing body of international guidance calling for the disclosure of contract terms with only limited exceptions. (See Box 55 on recent trends in mining contract disclosure.)
- This is an important step in ensuring that the public, and particularly project-affected people, have access to the terms and conditions being granted for access to the country's mineral resources. Such transparency:
  → Gives the public tools to assess and discuss whether the government has negotiated a good deal for the country
  → Helps reduce corruption and makes it more likely that rights are allocated on the basis of merit (see Boxes 43, 44 and 45 on corruption red flags in mining licensing and permitting)
  → Provides a basis for holding mining companies accountable, as it makes transparent the commitments that a company has made, including on ESHR and community issues

Box 51

What are Some of the Considerations in Developing a Licensing System or Negotiating a Mining Contract?

- **A license (or permit)** is typically a standard-form legal document that the state uses to grant exploration or extraction rights according to a generally applicable set of terms, with limited variation from one project to another.

- **A contract (or agreement)** is a negotiated agreement. Contracts are often created from standard templates, but, in contrast to licenses, many resource-rich countries negotiate contracts that deviate substantially from potentially applicable rules in the laws, regulations or model contracts.[230]

230 From NRGI, NRGI Reader: "Granting Rights to Natural Resources: Determining Who Takes Natural Resources Out of the Ground," (2015), p. 1.

When significant geological data is available and investor interest is high, governments often conduct competitive auctions. But, when geological information is limited or not immediately encouraging, governments often resort to an open-door, first-come-first-served licensing procedure or to direct negotiation with a limited number of companies.[231]

A recent study found that countries with a well-developed legal system typically grant licenses with little, if any, room for negotiation of key provisions.

At the other end of the spectrum, and particularly in countries with weak or inadequate legal frameworks, countries may grant mineral rights to mining companies through individually negotiated contracts that contain most, if not all, the rights and obligations of the parties. In such cases, countries "regularly end up with poorly negotiated deals that confer limited benefits to the country and the communities affected by the mining investment."[232] For this reason, among others, countries increasingly favour licensing regimes that limit the types of and extent to which terms can be negotiated.

Box 52

Tools for Government Negotiators on Integrating Environmental & Human Rights Risks into Contracts with Investors

The Sustainability Toolkit for Trade Negotiators,[233] developed by UNEP and the International Institute for Sustainable Development, is targeted to the trade and environment ministries. It explains the major areas of any trade or investment agreement that will have environmental implications, whether intentionally or incidentally, and tries to identify what could be considered best practices and provides an assessment of the various options available, their strengths and their weaknesses.

The Principles for Responsible Contracts: Integrating the Management Of Human Rights Risks into State-Investor Contract Negotiations: Guidance For Negotiators[234] identifies 10 key principles to help integrate the management of human rights risks into contract negotiations on investment projects between host State entities and foreign business investors. It is targeted to government teams negotiating investment agreements.

231 From NRGI, NRGI Reader: "Granting Rights to Natural Resources: Determining Who Takes Natural Resources Out of the Ground," (2015), p. 1.

232 German Federal Ministry for Economic Cooperation and Development, "Natural Resource Contracts as a Tool for Managing the Mining Sector," p. 1, http://ccsi.columbia.edu/files/2015/07/Natural-Resource-Contracts-as-a-Tool-for-Managing-the-Mining-Sector.pdf

233 https://www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/

234 http://www.ohchr.org/Documents/Publications/Principles_ResponsibleContracts_HR_PUB_15_1_EN.pdf

Box 53

Good International Practice on Mining Contracts

There are a number of places to look for guidance on the types of ESHR clauses to include in mining contracts:

- The International Bar Association's **Model Mining Development Agreement** (available in multiple languages) for mining companies and host governments is aimed primarily as a tool for use with and in developing countries that have no mature mining code.[235]
- **ResourceContracts.org is a repository of publicly available oil, gas and mining contracts** that provides plain-language summaries

of each contract's key ESHR and fiscal and operational terms, and tools for searching and comparing contracts.

- **Guidance on Reading and Understanding Mining Contracts: Mining Contracts: How to Read and Understand Them** (2013) is a general guide to mining contracts that highlights strong contract clauses and explores how weaker clauses can be improved. It goes beyond legal considerations to explore the policy questions and company interests underlying contract provisions.[236]

Box 54

IGF Mining Policy Framework on Licenses and Permitting

The IGF Framework provides that a permitting process should require:

- Mining entities, in preparing their applications for a mining permit, to **consult with communities and other stakeholders at all stages** of the assessment and planning process and to document the nature and results of their engagement programme in the permit application
- The submission of **integrated social, economic and environmental assessments**. In addition to a baseline description of current conditions, permit submissions should describe possible risks and impacts of the mining activities together with proposed mitigation or management measures.
- The permit submissions to identify and quantify opportunities and propose programmes that lead to the creation of **sustainable benefits over the life of the project**

- The permit application to be considered complete only when it includes acceptable plans for the eventual **closure of the mine and the provision of adequate financial assurance** to cover the costs of closure and any ongoing monitoring
- The permit applications, when applicable, to address **indigenous peoples, cultural heritage, resettlement, and community safety and security issues**
- Mining entities to have a process of **consultation** that provides **affected communities** with an opportunity to express **their views on project risks and impacts** and to be consulted on the development of **mitigation measures**
- **Completion of the process** in a timely, transparent, unambiguous and consistent manner[237]

235 http://www.mmdaproject.org/

236 https://s3.amazonaws.com/s3.documentcloud.org/documents/1279596/mining-contracts-how-to-read-and-understand-them.pdf

237 IGF, Mining Policy Framework (2013), Legal and Policy Environment Chapter, http://igfmining.org/mining-policy-framework/

Box 55

International Developments on Mining Contract Disclosure and Reporting

More and more international standards and governments require the disclosure of natural resource contracts with only narrowly defined exceptions for non-disclosure of particular provisions:

- The **EITI Standard**, requires countries to publish: a registry of all license holders, the location and duration of licenses, information on licensing processes, and encourages the publication of information on beneficial ownership[238]

- The **Open Government Partnership**[239]
- The **IFC's Policy on Environmental and Social Sustainability**[240]
- The **UN Principles for Responsible Contracts**[241]
- An increasing number of **governments**,[242] and the EU[243] **require reporting on payments to governments by extractive companies**[244]

E Know and Understand the Local Context Where Mining Will Take Place

When the licensing processes for large mining projects are carried out by national agencies with little presence in the territories, far away from where the mining takes place, this can hamper access to information necessary for an appropriate understanding of the kinds of environmental or social conditions in which the mining will take place. It may also hamper a clear understanding of complex political and institutional forces at play that may mean that these processes are not considered sufficient or relevant to those opposing projects.[245]

For all these reasons, it will also be important that participation processes be actively inclusive with respect to where the consultations are held – i.e., national government authorities should facilitate regional, municipal and local-level consultation to ensure that local perspectives and consensus are the grounding for national strategies. Governments may have to protect stakeholders as part of their obligations to protect the rights of freedom of expression and association, including from threats by private actors. Those seeking to express opposition to mining projects are often targeted, harassed and even killed. States should take affirmative steps to protect them, including by investigating threats and by prosecuting violations.

238 https://eiti.org/sites/default/files/documents/english-eiti-standard_0.pdf, EITI Standard 2.

239 See on the Open Government Partnership's Natural Resources Working Group, which focuses on: (a) disclosure of contracts, beneficial ownership and environmental data / information, (b) adherence to data standards, and (c) implementation of the Extractive Industries Transparency Initiative (EITI). https://www.opengovpartnership.org/groups/naturalresources. See also: https://www.opengovpartnership.org/blog/marie-lintzer/2016/02/26/great-ideas-ogp-action-plans-improving-resource-governance

240 See para. 49-50, http://www.ifc.org/wps/wcm/connect/7540778049a792dcb87efaa8c6a8312a/SP_English_2012.pdf?MOD=AJPERES

241 http://www.ohchr.org/Documents/Publications/Principles_ResponsibleContracts_HR_PUB_15_1_EN.pdf

242 http://www.resourcecontracts.org/ and see IHRB, "Home Government Series: Reporting Requirements," (2017), https://www.ihrb.org/focus-areas/commodities/home-governments-series-reporting-requirements

243 http://ec.europa.eu/internal_market/accounting/country-reporting/index_en.htm

244 http://www.nrcan.gc.ca/mining-materials/estma/18198

245 D. Arbelaez-Ruiz, J.M. Benavidez, B. Oñate Santibáñez, R. Ramsay, "Institutional and Political Frameworks of Environmental Licensing Processes," (2013), p. 8, http://im4dc.org/wp-content/uploads/2013/09/Institutional-and-Political-Frameworks-of-Environmental-Licencing-Processes1.pdf

Relevant Knowledge about Where Mining will take place

Do the mining and environment and social authorities try to improve their knowledge of key ESHR issues of concern in the areas around where mining will take place in order to better anticipate and then regulate the forthcoming stages in light of the operating context?

- Do the authorities:
  - → Commission or consult independent studies in addition to the ESIA to gain a better understanding of ESHR issues?
  - → Have access to environmental and social baseline data on the areas where mining will take place? Is the data disaggregated by sex and age to permit more refined analysis of potential impacts?
  - → Have access to GIS data or baseline data? If not or if it is outdated and neither the national government nor the local government has resources to conduct studies covering all potential mining areas, do the mining authorities carry out local consultation to acquire such localized understanding? For example, integrated ecosystem valuations may require local participation.
  - → Tap into local and indigenous knowledge of the environment and social issues in the areas where mining will take place?
  - → Work with local authorities (see Step 2 – Planning on the misalignment between Sectorial and Territorial Planning) to understand local issues and local concerns?
  - → Use the ESIA process to open contacts with stakeholders to better understand concerns and potential prevention and mitigation steps – issues such as concerns about water use, infrastructure use, jobs for local community members, etc.?
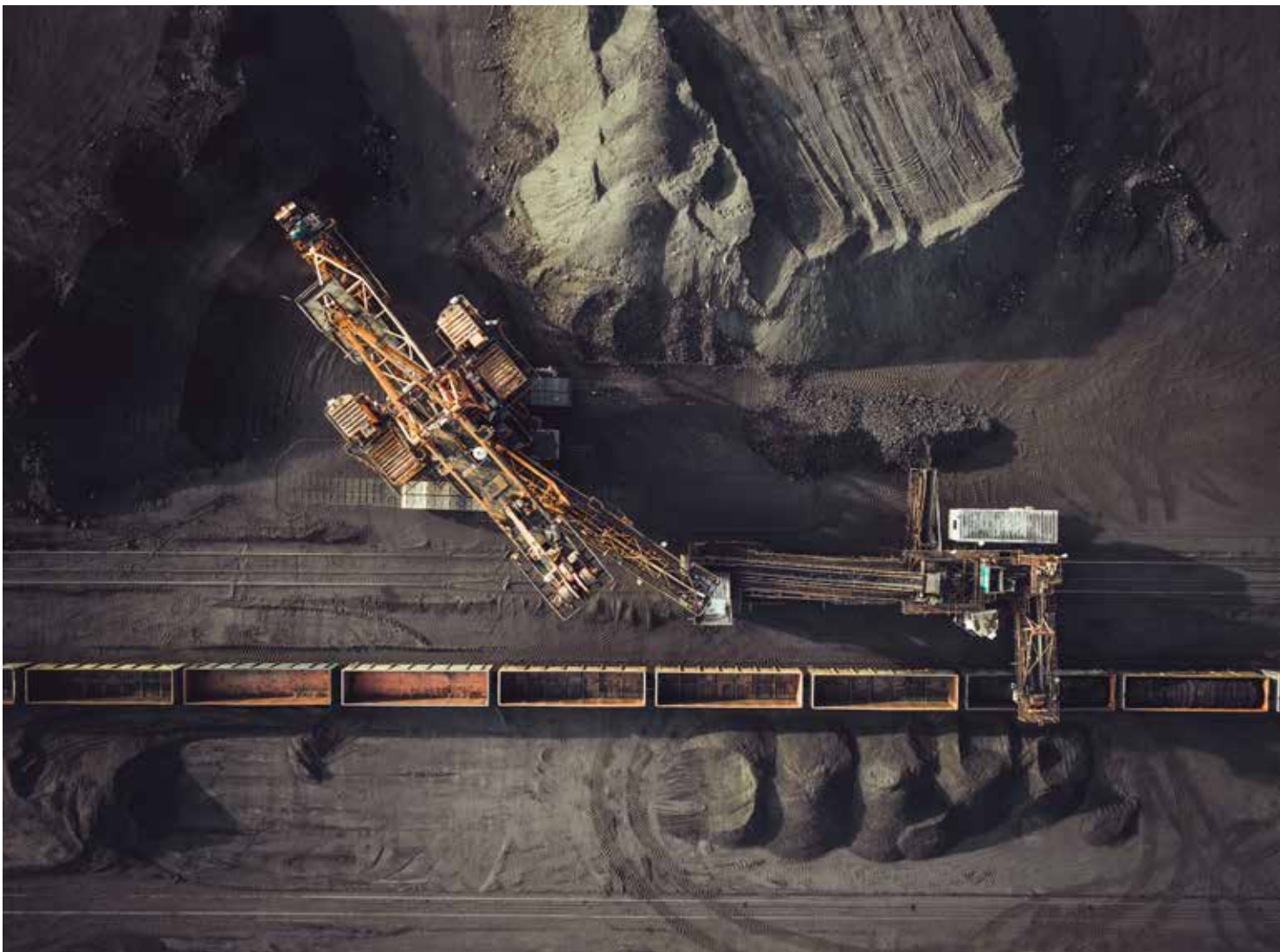
Step 05

Mine Development and Construction

At this fifth step, the development and construction phase of a mine can often determine how sustainable the subsequent operational phase will be. This is also the step at which infrastructure, ancillary facilities and access works are constructed (for transport, power and water supply, storage and waste handling). Construction creates significant and visible changes and impacts on the environment and communities and is therefore likely to be the phase with the most intense ESHR impacts. This phase therefore requires clear requirements around ESHR issues, active monitoring from the authorities and regular engagement with the local communities by the authorities and the company.

Primary Target Audience

→ Mining Authorities
→ Environmental Authorities
→ Social Authorities & Human Rights Authorities

Summary of Step 5: Mine Development and Construction

	KEY ACTIONS IN THIS STEP	KEY MESSAGES
A	**Set ESHR Requirements for the Construction Phase**	A well-scoped ESIA should cover the potential ESHR impacts at each phase, starting with the construction phase, including impacts associated with the construction of ancillary facilities and infrastructure. Authorities should remain alert to impacts that are more difficult to anticipate, including in-migration and cumulative impacts. Given the range of authorities involved, a coordination mechanism to facilitate coordinated decision-making and monitoring can be useful.
B	**Conduct Regular Monitoring of ESHR Impacts of Construction**	Given the wide range of impacts at the construction phase, there should be proportionately scaled-up monitoring of the mining company and its subcontractors. Informing and involving local communities in monitoring can build trust in monitoring outcomes, can augment scarce governmental capacity and is a very direct approach to providing the right to access to information and public participation.
C	**Regularize Community Engagement**	The mining company and the government should be actively engaging with affected communities and other stakeholders to provide updated information on developments, to address impacts and to respond to concerns and grievances, setting up regular feedback loops to respond to the community and to manage expectations. If not already done, this is a time to develop systematic and sustainable approaches to community development.

A Set ESHR Requirements for the Construction Phase

Construction is the step in the mining process with the potential for some of the highest, if not the highest ESHR impacts because workforce levels and surface disturbance often peak at this stage. Impacts on the environment and on local communities are often highly visible. For the mining company, the project management team may be under high pressure, with strict budgetary and infrastructure completion goals rather than sustainability goals.[246] For the authorities, there can be a complex range of risks to manage and monitor that involve various government bodies at various levels.

Inter-authority Coordination to Oversee Linkages Between Risks

Do the relevant authorities have an approach to managing the complex interaction of ESHR risks typical in major mining operations?

- Do the authorities have a workable inter-authority coordination that helps them address the complex linkages between the different types of risks?
  - → What may look like purely environmental risks can quickly turn into health and social risks if they impact communities.
  - → Community reaction can, in turn, impact on the economics of the project if protests close down operations.
  - → Political imperatives to develop mining assets quickly or corruption can mean bypassing environmental and social safeguards, jeopardizing longer-term sustainability.
  - → Impacts on other economic activities, such as agriculture, fishing, forest harvesting and tourism, that can harm local livelihoods.
  - → Impacts on social cohesion, such as in areas inhabited by populations historically marginalized, discriminated against or excluded, as mining can disrupt the social fabric and even the existence of local communities.
- Well-scoped and well-designed ESIA and ESMP that have specific chapters on the development and construction phase provide important information for this task.

Full Scope of ESHR Impacts during Mine Development & Construction

Do the ESIA and subsequent ESMP cover the full scope of ESHR issues involved in the construction and development of the mine?

- Do the ESIA and accompanying ESMP cover the full range of ESHR issues at the construction phase?
  - → Standard ESIA TORs developed by environment ministries may be weak on social impacts and often fail to mention gender and human rights impacts altogether, although this is slowly changing. If the gaps were not addressed in the ESIA/ESMP, then authorities should be particularly alert, as these areas/issues are more likely to be poorly managed during the high-impact construction phase.
  - → Depending on the context, the ESMP may need to be complemented by a series of more specialized action plans, such as construction phase action plans, biodiversity action plans, resettlement action plans or indigenous people's plans.
- Is there a national law, framework or guidance on resettlement? (See Box 56 on Managing the ESHR Impacts of Resettlement.)

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246 Australia Guide to Leading Sustainable Practices in Mining, (2011), Chapter 3 on Construction and Development, https://industry.gov.au/resource/Documents/LPSDP/guideLPSD.pdf

→ Resettlement is often not well covered in national law, if at all. Yet resettlement is a predictable activity associated with large-scale mining (LSM) and can have severe human rights and social impacts as well as environmental impacts.

→ Unlike other industries, mining companies face high levels of uncertainty around their land requirements and, as a result, resettlement may happen during exploration, project design and planning, construction or operations, the latter of which occurs through incremental project expansion.[247] It is therefore likely to require attention, potentially throughout the life of the mine.

→ In the absence of appropriate national laws, authorities and mining companies apply relevant international standards and guidance on resettlement planning while taking account of the sobering and consistent evidence from mining studies that mining displacement often produces high levels of impoverishment and long-term hardship as well as adverse socio-economic and environmental impacts.[248]

Ancillary Facilities & Infrastructure

Do the ESIA and subsequent ESMP cover all related infrastructure and facilities?

• Have the mining authorities (and other relevant authorities) agreed on shared use of infrastructure with the mining companies? Have the authorities planned for mining infrastructure already at the land use planning stage? (See Step 2 on Participatory Planning.)

→ Infrastructure can be one of the most direct benefits to local communities if it is accessible to them and designed with community use in mind. (See Figure 1 on Mining and the SDGs.)

→ Ancillary infrastructure can help to deliver on public services that also correspond to government obligations to deliver on human rights, particularly the right to water and/or the right to health. (See Box 57 on shared water infrastructure.)

• Are the authorities incorporating ESHR impacts of ancillary infrastructure and facilities into the ESIA & ESMP and monitoring during construction?

→ These facilities have ESHR impacts of their own that should not be overlooked.

In-migration

Does the government have an approach for managing in-migration around mining projects? Is it covered in the ESIA & ESMP? (See Box 58 on good international practices in managing in-migration.)

• Have the mining authorities addressed in-migration issues in coordination with regional and local authorities?

→ In-migration of workers for mining operations and ancillary services is a common phenomenon for large-scale mining projects that should be considered and addressed as part of a thorough ESIA and ESMP.

→ In-migration can have significant adverse ESHR impacts over the short and long terms – on communities, the environment and the workers.

→ Where there are several mining projects in the same area, the cumulative impact of in-migration can have very significant impacts on the environment and social fabric if not managed well.

→ Managing these influxes requires active and coordinated steps with the mining company and its sub-contractors as well. (See Box 58 on good international practices in managing in-migration.)

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247 J. Owen and D. Kemp, "Mining-induced displacement and resettlement: a critical appraisal," (2014), Journal of Cleaner Production 87 (2015), p. 481

248 See Mining and Resettlement Hub at the Centre for Social Responsibility in Mining, which hosts an e-library of resources on mining and resettlement, http://www.miningresettlement.org/elibrary

- Impacts include:
  - → On the local community – a sudden influx can have significant negative impacts on social capital, cultural heritage, community safety and access to ecosystem services
  - → On local services – in terms of straining resources for existing community members, but also potential unavailability of services such as the right to education for migrant children
  - → On the workers and families who have migrated – temporary construction workers, particularly those several layers down the sub-contracting chain, may be at risk of exploitation, as may be children and adult temporary workers, male and female.

Life of Mine – Constructing with Closure in Mind

Does the ESMP for the construction phase take account of short-term and long-term closure?
- Mines can close at any phase of the cycle – including the construction phase.
- Construction activities should be carried out while bearing in mind the implications for the short-term or longer-term eventual closure of the mine,[249] including:
  - → Environmental impacts – for example, proper storage of fuels and lubricants during construction can reduce long-term contamination, opening up areas can have irreversible impacts on biodiversity
  - → Social impacts – for example, the introduction of communicable diseases by construction workers that takes extensive time to address

Box 56

Managing the ESHR Impacts of Resettlement

Recent studies have identified that "there is little evidence to suggest that mining companies agree that investing in social safeguards makes 'good business sense'. On the contrary, many mining companies fail to calculate the full cost of resettlement and tend to defer allocating the necessary resources."[250]

Thus, relying solely on mining companies to manage resettlement in the absence of national standards can leave too wide a margin of discretion for an activity that has the potential for such severe impacts, even though there is increasing guidance[251] and experience for mining companies to draw on.[252] Instead, if governments do not yet have their own resettlement laws in place, they can use international standards to fill the gap:

- Apply **World Bank Resettlement Safeguards** to guide their own actions[253]
- Require mining companies to apply **IFC Performance Standard 5 on Land Acquisition and Involuntary Resettlement** as part of the licensing/permitting/agreements when planning and executing displacement and resettlement. Through the provision of adequate housing with security of tenure at resettlement sites, IFC Performance Standard 5 sets out requirements for the processes and outcomes to improve or to restore the livelihoods and standards of living of physically displaced persons and the livelihoods of economically displaced persons.[254]

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249 Australia Guide to Leading Sustainable Practices in Mining, (2011), Chapter 3 on Construction and Development, https://industry.gov.au/resource/Documents/LPSDP/guideLPSD.pdf

250 J. Owen and D. Kemp, "The weakness of resettlement safeguards in mining," FMR Review (May 2016), p. 79, http://www.miningresettlement.org/elibrary/the-weakness-of-resettlement-safeguards-in-mining

251 ICMM, "Land Acquisition and Resettlement: Lessons Learned," http://hub.icmm.com/document/9714

252 See Mining and Resettlement Hub at the Centre for Social Responsibility in Mining, which hosts on e-library of resources on mining and resettlement, http://www.miningresettlement.org/elibrary

253 The World Bank, "Involuntary Resettlement," (December 2001), https://policies.worldbank.org/sites/ppf3/PPFDocuments/Forms/DispPage.aspx?docid=1572&ver=current

254 IFC Performance Standard 5 – Land Acquisition and Involuntary Resettlement, http://www.ifc.org/wps/wcm/connect/3d82c70049a79073b82cfaa8c6a8312a/PS5_English_2012.pdf?MOD=AJPERES

Box 57

Shared Water Infrastructure

With increasing water scarcity, the impacts of mining operations on the availability and quality of water and therefore on communities' right to water are likely to cause increasing conflicts between mining operations and local communities. At the same time, careful planning can reduce use and impacts and provide opportunities to leverage mining investments in water infrastructure. The Columbia Center for Sustainable Investment's recent study of water use by mining operations provides the following **recommendations** to develop a careful and purposeful allocation of water rights with a view to incentivize shared use and to recognize communities' right to water:

- Assess the actual demand for water from the mines, taking into account that mines can implement water efficiency mechanisms and potentially use alternative water sources.
- Once the actual water supply and demand have been estimated, allocate water rights to satisfy the unmet demand, but devise a priority plan with review mechanisms.
- When mines build additional water infrastructure to serve their needs, adopt a sustainable operational model to ensure that communities benefit from the extra capacity delivered by this infrastructure.
- Ensure an adequate institutional framework to regulate, monitor and enforce water rights.[255]

Box 58

Good International Practice on In-migration

For the mining company, the ESIA & ESMP should anticipate and set out steps to manage in-migration. For the government, this takes forward planning and coordination between central and local government to ensure that local governments are prepared and equipped to manage the environmental and social impacts and to provide services as necessary to the influx. In-migration can also result in cumulative human rights impacts.[256]

The **IFC Guidance 'Projects and People: A Handbook for Addressing Project-Induced In-Migration'** from 2009 remains the most widely recognized guidance to date,[257] but it has not been updated. While the IFC Guidance is addressed to private companies involved in projects that might induce significant in-migration, much of it is also relevant to government authorities.[258]

255 See, P. Toledano, C. Roord, "Leveraging Mining Investments in Water Infrastructure for Broad Economic Development: Models, Opportunities and Challenges," (2014), http://ccsi.columbia.edu/files/2014/05/CCSI-Policy-Paper-Leveraging-Mining-Related-Water-Infrastructure-for-Development-March-2014.pdf

256 For an example of this analysis in the oil & gas sector see, MCRB, "Sector Wide Impact Assessment of the Oil & Gas Sector in Myanmar," (2014), chapter on cumulative impacts, http://www.myanmar-responsiblebusiness.org/pdf/SWIA/Oil-Gas/15-Cumulative-Level-Impacts.pdf

257 Bainton et al. (2017). Project-Induced In-Migration and Large-Scale Mining: A Scoping Study. Centre for Social Responsibility in Mining (CSRM), The University of Queensland: Brisbane.

258 https://www.commdev.org/projects-and-people-a-handbook-for-addressing-project-induced-in-migration/

B Conduct Regular ESHR Monitoring of Construction

Monitoring provides the evidence base to better understand whether construction activities are complying with EHSR requirements and having an impact on neighbouring communities and the broader environment. Yet monitoring is often a weak spot in many countries' enforcement – efforts are often heavily weighted on preparing and processing ESIAs, with less emphasis on follow-up, lack of capacity at the regional and local levels, and potential disincentives for mining companies to make information transparent if that information exposes them to fines. Even where monitoring information is made available by public authorities or mining companies, it may not be trusted, thus defeating the purpose of monitoring. Mining, environment and social authorities should realistically assess potential constraints on monitoring capacity and consider alternative models, particularly those that recognize and integrate the rights of communities to information and participation that can simultaneously make monitoring more effective.

Monitoring Compliance with Plans

Do the mining, environmental and social authorities have a coherent plan for monitoring compliance with the ESMP and other plans developed as part of the ESIA?

- Does the ESMP (and additional management plans) include monitoring plans covering short-term, medium-term and life-of-mine plans that can provide a basis for coordinating government monitoring?
    → A comprehensive monitoring programme that gathers in one place all monitoring requirements and assigns accountability across different authorities and different levels of government can be more efficient for the mining company while also improving coordination across agencies and different levels of government.
    → Monitoring will need to be coordinated across potentially a wide range of public authorities, from the national level down to the local level – with some issues dealt with by local authorities with little mining or technical expertise – and will typically include mining, environment, water (if separate), social, labour and potentially agencies dealing with women and children, culture and indigenous affairs.
- Is monitoring scaled according to the intensity of activities and impacts?
    → Given the often-intensive nature of construction activities, there may need to be more frequent and more intensive monitoring at this stage compared to other mining phases.
    → Monitoring should build on the baseline established as part of the ESIA in Step 4 – Feasibility and Licensing.
- Does the monitoring cover sub-contractors?
    → The construction phase will very typically involve a potentially wide range of sub-contractors, including with several layers of sub-contracting. The authorities should ensure that the mining company is legally responsible for the management and impacts of sub-contractors and includes them as part of its overall monitoring and reporting.
    → Authorities should be able to directly monitor sub-contractors as well.

Monitoring Compliance with the Law

Do the relevant authorities understand what additional monitoring requirements are necessary outside of the ESMP to comply with relevant laws?

- There may be additional monitoring requirements under national law to assess environmental impacts of construction covering – air, water, land, waste and hazardous materials, biodiversity impacts, noise, traffic, etc. (See Box 59 on biodiversity monitoring.)
- Similarly, labour monitoring and inspections should be attuned to typical issues for construction phases – there may be a high number of sub-contractors with often-significant temporary work forces that may include vulnerable groups of workers including women, children and forced labour.
- Authorities should be alert to unanticipated ESHR impacts that are not part of ESMP or other management plans or are outside the requirements of the mining operator's responsibilities but nonetheless linked to the mining operations – such as the ESHR impacts of in-migration. (See Box 58 on Good International Practice on In-migration.)

Informing the Public & Making Information Accessible

Does the law/license/mining agreement and/or the ESMP require that monitoring information be made publicly available?

- Is there easy-to-access and regularly updated information about the project plans (for example, about when the roads will be watered to keep down dust)?
  - → The ESIAs and EMPs will provide important, structured information, but communities will likely be looking for information and answers on a more real-time basis that provides responses to local impacts.
- Have the environmental authorities established environmental information systems that ensure a regular flow of information from mining operators and the authorities own monitoring systems directly to the public?
  - → This can be achieved by imposing reporting requirements on mining operators for data such as air and water emissions and waste disposal and by requiring that it be made publicly available.
  - → Developing web-enabled platforms for environmental and other information and data on mining operations allows many different users far more publicly accessible and understandable access to information.[259] It can also create efficiencies in public administration if different agencies can use the same info for different purposes. (See Box 86 on the UNEP Map-X tool that gathers a wide range of information on mining operations into a web-accessible platform.)
- Do the environmental authorities (or other relevant authorities) compare the monitoring results from mining companies to their own monitoring results? Is the comparison made public?
  - → Making both sets of monitoring information public with a comparison and explanation of the differences can build transparency and develop trust in government authorities.

Public Participation in Monitoring

Are the relevant authorities exploring new ways to improve the efficiency and effectiveness of monitoring, including through involving the public?

- Involving local communities in monitoring can improve transparency and trust and is also a way for directly improving the public's access to information and public participation in environmental decision-making that can make an immediate difference in citizen's lives.

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259 See Open Government Partnership Brief, "Disclosing environmental information in the natural resource sector," (2016),
   http://www.opengovpartnership.org/sites/default/files/FIN OGP Issue Brief Env Disc.pdfh

→ Monitoring is very often seen as a purely technical issue, ignoring the significant social dimensions and related tensions and conflicts that may arise when local communities do not trust the monitoring results of the company and/or the government. Community monitoring can be an important tool for conflict prevention, as the community is more empowered and therefore more inclined to negotiate instead of initiating conflicts.[260]

- Government authorities, together with mining companies, are finding new ways to carry out monitoring of ESHR impacts with stakeholders that are:
  → More transparent – including by providing real-time monitoring information
  → More understandable – such as by developing maps or 'report cards' on water use that are simply presented and easy to understand
  → More collaborative – such as sample collection and analysis of pollution levels – with affected stakeholders to build trust in the measurements. (See Box 60 on examples of public participation in water monitoring.)

- Where monitoring capacity is limited and significant impacts during construction and operations are expected, particularly where there are polarized views and great distrust, authorities can consider requiring operators to pay for independent monitoring to ensure that full and accurate information is gathered and analysed.

Linking Monitoring to Consequences & Access to Justice

Does the law/license/agreement provide for consequences when monitoring indicate that ESHR requirements have been breached?

- Monitoring should be the most systematic route to understanding if there has been non-compliance with the law or with licensing/permitting requirements. Attaching consequences to non-compliance, including a failure to report or false reporting, is an important dimension of implementation and enforcement.
  → Consequences may include fines or penalties, obligations to restore the environment and, for more serious breaches, suspension of operations. (See Step 1 – Laying the Foundations, Key Action 6 on enforcement.)

- Requiring that monitoring information be put into the public domain (see above) can significantly support the role of the public in the general enforcement of environmental law by bringing attention to violations of substantive or procedural laws.

- But access to remedy can also be delivered in a more real-time, operational manner where mining companies set up an 'operational-level grievance mechanism' to address grievances and provide feedback about how those issues have been dealt with.[261] (See Box 22 on Pillar III of the UNGPs on access to remedy.)
  → These mechanisms should provide easy access to communities to raise grievances about construction that can be dealt with swiftly – at a time when nuisance is highest – for example, to address complaints about excessive noise or dust.

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260 See http://goxi.org/profiles/blogs/challenges-and-opportunities-in-environmental-monitoring-of, https://www.youtube.com/watch?v=n_pl_XXHaho&feature=youtu.be

261 See Table 3.2 for a succinct overview of engagement scenarios – Australia Guide to Leading Sustainable Practices in Mining, (2011), pp. 70-71, https://industry.gov.au/resource/Documents/LPSDP/guideLPSD.pdf

Box 59

Monitoring Specific Types of Impacts – Mining & Biodiversity – Example from South Africa

The **Mining and Biodiversity Guideline: mainstreaming biodiversity into the mining sector** from South Africa has been formally endorsed by the Ministers of Environmental Affairs and Mineral Resources as well as the CEO of the Chamber of Mines. It interprets the best available biodiversity knowledge and science in terms of the implications and risks for mining and 'translates' this into a practical guideline and user-friendly decision support tool for industry and regulators to ensure that biodiversity issues are consistently incorporated into the decision-making and monitoring processes for mining projects.[262]

Box 60

Examples of Public Participation in Monitoring in the Mining Sector

There is an increasing range of examples of community monitoring in the mining sector:

• See various examples highlighted in: IFC & ICMM 'Shared Water, Shared Responsibility, Shared Approach: Water in the Mining Sector' (2017), including in Mongolia's Gobi Desert, where participating mining companies agreed to adopt the Voluntary Code of Practice that includes setting up participatory water monitoring programmes.[263]
• See resources on Goxi on Environmental Monitoring in mining[264]

C Regularize Community Engagement & Community Development

Meaningful community engagement goes well beyond a one-off, 'transactional' approach to engagement that is about satisfying the public participation requirement for the ESIA process. Instead, it is about ongoing, constructive dialogue with authorities and mining companies to address and resolve concerns and develop opportunities for communities around mining operations. Community engagement has become increasingly intertwined with discussions around community development – not only do communities want a voice in addressing how negative impacts are addressed, they want to share in the short-term and long-term benefits of resource extraction.

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262 http://biodiversityadvisor.sanbi.org/industry-and-conservation/conservation-and-mining/understand-2/mining-and-biodiversity-guideline/

263 p. 21, http://www.ifc.org/wps/wcm/connect/ee079cb5-222c-4fe7-8844-8210ac77f0dc/170321_ICMM-IFC_shared-water-shared-responsibility+FINAL+FINAL+FINAL.pdf?MOD=AJPERES&ContentCache=NONE

264 See: http://goxi.org/profiles/blogs/challenges-and-opportunities-in-environmental-monitoring-of. See for links to the webinar and presentations: http://nbsapforum.net/ - read-thread/3013

Mining Dialogues & Other Avenues for Discussion

Do the mining and environmental authorities provide other avenues for dialogue on mining issues in addition to providing formal avenues for participation in mining ESIA processes?

- Have the authorities set up alternative processes, avenues or mechanisms for structured discussions to help build trust, address concerns and act as an early alert about building tensions to address citizens' unrealistic expectations about how quickly benefits will flow to the country and to regions where mining takes place?
  - → This may be through dialogue roundtables, community committees, regular town hall meetings, etc.[265]
- This has also become an increasing focus of private sector mining companies, some of which have come to recognize that maintaining community relations is an ongoing process and that the long-term success of their operations critically depends on building and maintaining positive relationships with communities.[266]

Managing Social Conflict

Does the government have procedures to manage social conflict around proposed (or actual) mining sites? Or is it dealt with in an *ad hoc* manner?

- Many countries have seen a rise in tensions and conflict around mining and mining projects. There are numerous approaches that governments can put in place to reduce and diffuse such tensions, including:
  - → Providing relevant and accurate information about potential mining operations and their impacts
  - → Providing opportunities for meaningful participation at relevant points throughout the mining cycle – formal and informal
  - → Providing various avenues to bring complaints and resolve disputes before tensions build to the point of conflict. This can be through the government, independent mechanisms such as NHRIs or natural resource mediation (see Box 24 on mediating natural resource conflicts) or by requiring mining companies to set up operational level grievance mechanisms in line with the UNGPs (see Box 22 on grievance mechanisms).
- Many countries have seen a rise in social protest around potential or actual mining sites. There has also been a wide range of responses from countries.
  - → At one end of the spectrum, the UN has noted a concerning increase in the killings and injury of environmental and human rights defenders and a "closing of civil society space", which refers to using various methods to make it harder for CSOs working on environmental and human rights issues to register and operate (see Boxes 21 and 40 on closing civil society space and threats to human rights and environmental defenders).
  - → At the other end, some governments are training security forces at extractive operations in human rights issues,[267] protecting environmental and human rights defenders and keeping CSO space open to discuss the extractives sector.

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265 See: http://www.securityhumanrightshub.org/content/general-guidance-stakeholder-engagement

266 See, for example, ICMM, "Understanding Company-4 Community Relations Toolkit," (2015), https://www.icmm.com/website/publications/pdfs/9670.pdf

267 See the Voluntary Principles on Security and Human Rights Initiative for the extractive sector, which brings together governments, business and civil society to maintain the safety and security of their operations within an operating framework that encourages respect for human rights. http://www.voluntaryprinciples.org/what-are-the-voluntary-principles/

Making Community Development and Benefit-Sharing More Systematic

Has the government put putting laws and frameworks in place on community development or benefit-sharing?

- A key objective is to move towards more systematic and sustainable systems of benefit-sharing that can provide for long-term developments that outlast short-term commodity cycles and in light of the often significant time-lag between the negative impacts of construction and the potential for revenue flows many years later.[268]
- This is an area where there have been many experiments and a wide range of approaches taken by governments:
  → Localized revenue-sharing
  → Local content requirements
  → Mandated community investment projects
  → The formalized use of community development agreements. (See Box 61 on sources of information on community development approaches and agreements.)
- Government authorities should ensure a careful separation between compliance and community development:
  → Ensure that community development or corporate social responsibility (CSR) projects are not used to substitute for compliance with ESHR requirements.
  → Community development projects and benefit-sharing supplement – and should not masquerade as responses to – ESHR requirements.

Good International Practice

Do the mining authorities require or at least encourage mining companies to apply good international practices in community engagement?

- By the construction phase, mining companies should have a community engagement strategy, process and staff in place for engagement and grievance handling, as it is likely to be a phase with many complaints and grievances.
- There is an increasing set of materials specifically for mining companies to engage stakeholders in line with good international practice. (See Box 62 on guidance on community engagement.)
  → This should emphasize inclusive engagement, with particular emphasis on engaging with diverse groups of women in the community, taking into account women's traditional domestic and childcare responsibilities.
- Government authorities should:
  → Monitor whether regular, meaningful stakeholder engagement by mining companies is taking place.
  → Require or at least encourage companies to establish processes to handle grievances in line with international standards. (See Box 22 on grievance mechanisms under the UNGPs.)

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268 See Extractives Hub, "Community Development," (2017), https://beta.extractiveshub.org/resource/view/id/6274 and other resources here: http://www.securityhumanrightshub.org/content/general-guidance-stakeholder-engagement

Box 61

Sources on Community Development Approaches

On Community Development Approaches in the Extractive Sector:
- CommDev: Community Investments and Partnerships[269]
- ICMM Community Development Toolkit[270] and Understanding Company Community Relations Toolkit[271]

For more information about Community Development Agreements in the Extractive Sector:
- Agreements, Treaties and Negotiated Settlement Project[272]
- Impact Benefit Agreement (IBA) Research Network[273]
- Sustainable Development Strategies Group CDA Library[274]

Box 62

International Good Practice Guidance on Community Engagement for Mining Companies

Stakeholder engagement has become an expected part of extractive sector operations[275] that is grounded in an efficiency argument for companies[276] and recognition of the rights of stakeholders to a voice in activities that are likely to have a significant impact on them.

- OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector[277]

- IFC Stakeholder Engagement: A Good Practice Handbook for Companies Doing Business in Emerging Markets[278]
- IFC – A Strategic Approach to Early Stakeholder Engagement – A Good Practice Handbook for Junior Companies in the Extractive Industries[279]
- First Engagement – A Field Guide for Explorers[280]

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269 https://www.commdev.org/topics/community-investment-and-partnerships/

270 http://hub.icmm.com/document/4080

271 https://www.icmm.com/website/publications/pdfs/9670.pdf

272 http://www.atns.net.au/

273 http://www.impactandbenefit.com/IBA_Database_List/

274 http://www.sdsg.org/archives/cda-library/

275 See, for example, the AU LSDP, pp. 93-94

276 See, for example, OECD, "OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector," (2017), https://mneguidelines.oecd.org/stakeholder-engagement-extractive-industries.htm

277 https://mneguidelines.oecd.org/stakeholder-engagement-extractive-industries.htm

278 http://www.ifc.org/wps/wcm/connect/938f1a0048855805beacfe6a6515bb18/IFC_StakeholderEngagement.pdf?MOD=AJPERES

279 https://www.commdev.org/userfiles/FINAL_IFC_131208_ESSE Handbook_web 1013.pdf

280 http://www.pdac.ca/pdf-viewer?doc=/docs/default-source/default-document-library/first-engagement---a-field-guide-for-explorers.pdf

Step 06

Production

At this sixth step, the operations phase of the mine can last decades or, in some cases, centuries. It is also the phase when the ESHR planning proves its value, as the mining company will have ESHR impacts to manage over the long term. Given the long-term nature of mining, a mine site will predictably be subject to changes over the life of the mine, so it is important that the authorities and the mining company have clear procedures to continually review and update mining management processes to manage changes and to consult with stakeholders when changes are significant.

Primary Target Audience

→ Mining Authorities
→ Environmental Authorities
→ Social Authorities & Human Rights Authorities

Summary of Step 6: Production

	KEY ACTIONS IN THIS STEP	KEY MESSAGES
A	**Update ESHR Requirements Throughout the Production Phase**	Given the high level of uncertainty inherent in mining, strengthening capacities and processes for managing change and the potential ESHR impacts that may accompany change should be given a high priority.
B	**Conduct Regular Monitoring of ESHR Impacts Throughout the Production Phase**	The longer-term monitoring required during the production phase provides the opportunity to set up coordinated and integrated approaches to monitoring and to build longer-term approaches to stakeholder involvement in monitoring.
C	**Manage ESHR Impact Events**	Mining is a high-risk sector and needs to be managed accordingly. In addition to managing ongoing impacts of production, authorities and the mining companies should be prepared to manage sporadic events that can have significant ESHR impacts – including emergency and security events.

D | **Address Relationships with ASM**

There is often a significant artisanal and small-scale mining (ASM) sector in many mining countries, often neighbouring or even interwoven with large-scale mining (LSM) enterprises. While, in the past, ASM mining has been discouraged or even criminalized, governments and larger mining companies are beginning to recognize that ASM is often a significant source of livelihood that should be supported to improve rather than being further marginalized.

A Update ESHR Requirements throughout the Production Phase

This is the stage when the mining operations move into longer-term operations, with the greatest potential impacts on the environment and the community over the long term. It is also the phase when the benefits or costs of the planning decisions implemented during the earlier phases are realized.[281] But, even with appropriate planning, unlike many other industries, mining companies often face high levels of uncertainty around the scope of their operations and, subsequently, their land requirements,[282] which is often the source of many of the significant ESHR impacts of mining. It is therefore inevitable that many changes in operations will occur – expansion, contraction, new infrastructure, new resettlement – that need to be managed and regulated appropriately.

Mechan Isms for Coordination

Do the authorities charged with supervision have coordinated approach to regulating the mining operations?

- The operations phase will typically have a wide range of negative ESHR impacts that become particularly evident and must be managed over the course of operations. (See Box 63 on Typical ESHR Impacts at the Production Stage.)
- The mine operations will have to comply with:
  - → The ESIA/ESMP
  - → The mining license/contract
  - → Potentially a wide range of other ESHR laws
  - → In addition, mining companies may also have their own policies and procedures that set additional requirements for managing ESHR impacts.
- As a result, there will be multiple regulatory frameworks that apply to the mining operations with a range of authorities supervising compliance who are not familiar with all ESHR requirements and, in particular, how impacts in one area can raise the risk in other areas of operations.
  - → Such a mix leaves the opportunity for issues to 'fall between the cracks' or for a lack of coordination to increase risks of conflict. While sometimes a crisis is needed to prompt better coordination (see Box 64 on the follow up to the Marikana massacre), a better approach is to take advantage of extensive learning and support to build more coordinated approaches to managing the ESHR impacts of mining.

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281 Australia Guide to Leading Sustainable Practices in Mining, (2011), p. 62, https://industry.gov.au/resource/Documents/LPSDP/guideLPSD.pdf

282 J. Owen and D. Kemp, "Mining-induced displacement and resettlement: a critical appraisal," (2014), Journal of Cleaner Production 87 (2015) p. 481

Managing expansion

Do the authorities and the company have a process for managing significant expansions or other changes in operations that can have ESHR impacts? Is there a process for informing and involving stakeholders?

- Over the course of the life of a large-scale mine, there is likely to be a range of planned and unplanned changes that can have significant ESHR impacts:
  - → *Ad hoc* land acquisition, potentially with associated resettlement
  - → Moving into areas with significant ASM activity (see Key Action 3 below)
  - → Unexpected impacts on habitats, etc.
- If the changes are significant enough, do they trigger a new ESIA and new ESMP accompanied by consultation that provides a structured process for involving the community and other stakeholders?
  - → Are there clear criteria for when a new ESIA should be triggered? Do the criteria cover only environmental issues? What happens when there may be significant social or human rights impacts?
- What happens if the changes do not require formal review where communication and consultation about the changes with authorities and stakeholders are likely to be more ad hoc and potentially carried out under pressure to complete the changes.
  - → The authorities and the companies should have ongoing processes for engaging with local communities, particularly where IPs are involved. It may be necessary to update consent with other stakeholders such as environmental groups.

Managing Cumulative Impacts

Do the relevant authorities have an approach to monitoring the cumulative impacts of multiple mining operations?

- Step 2 highlighted the importance of considering possible cumulative impacts when planning various mining operations (see Box 74 on cumulative impacts).
- At this production stage, if there are multiple mining or other operations in the same area, monitoring should be alert to potential cumulative impacts.
  - → Monitoring programmes that are geared to one mining operation will not pick up the cumulative burden on the environment and communities.

Managing for closure

Do the authorities and the company have a process for managing for closure during production?

- Progressive rehabilitation of mining areas during operations enables rehabilitation work to proceed while there is an operational cash flow and management and financial resources available.[283]

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283 Australia Guide to Leading Sustainable Practices in Mining, (2011), p. 68, https://industry.gov.au/resource/Documents/LPSDP/guideLPSD.pdf
Aus Leading Practices

Box 63

Typical ESHR Impacts of Mining at the Production Phase

Land	• *Short- and long-term impacts on topography and landform*: Temporary changes include access and haul roads, laydown and hardstand areas, topsoil stock-piles, process plant sites and support infrastructure. Permanent changes include open pit voids, waste rock landforms, tailings storage facilities (TSFs) and permanent water flow diversions. • *Soil contamination*: Chemical reactions in waste rock and tailings can result in the contamination of surface soils.
Water	• Mining is a water-dependent and water-demanding industry that impacts on water quality and quantity. These are among the most contentious aspects of mining projects. Impacts include: • *On surface water hydrology and groundwater*: The development of open pits, stockpiles, waste rock landforms, TSFs, processing plant and other infrastructure often interrupts natural drainage paths. • *Water contamination*: Chemical reactions in waste rock and tailings can contaminate groundwater and surface water. Eliminating acid mine drainage is a key issue. • *On the cultural and environmental values* of water used by communities • *On the availability of water for other uses & other livelihoods*: particularly those related to agriculture • *On local and regional economies*: through changing water patterns and the availability of water for other sectors that contribute to local development • *On public health (see below)* • *On national security*: as a result of social conflict among competing water users, with the potential to escalate as climate change impacts worsen
Waste	• ***Waste management and disposal***, including tailings waste, rock waste, hazardous disposal waste, slurry waste
Hazardous Substances	• *Transport, storage and use of a range of hazardous materials*, including fuels, process reagents, lubricants, detergents, explosives, solvents and paints, use of cyanide, mercury and other hazardous substances, which, if not properly managed, can cause atmospheric, soil or water contamination and could pose ongoing risks to human health and the environment.
Air	• *Air pollution* from hazardous substance use, dust, transport activities • *Climate change impacts* through lost CO_2 uptake by forests and vegetation that is cleared, CO_2 emissions from machinery (e.g., diesel powered heavy vehicles) involved in extracting and transporting ore, and from the processing of ore into metal
Biodiversity/ Ecosystem	• *On flora*: Direct impacts on floral communities occur mainly through clearing for the mine, waste rock landforms, processing plant, TSFs and associated infrastructure[284] • *On fauna*: The primary impact is the direct destruction of habitats through land clearing and earthmoving. Secondary impacts relate to activities, with varying degrees of disturbance beyond the immediate location where mining is taking place, such as access and haul roads; power lines; pipeline and transport corridors; other infrastructure; introductions of feral animals or increases in their numbers; and general workforce activities. • *Ecosystem services* where activities pose unacceptable risks to ecological services relied upon by surrounding populations

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284 Australia Guide to Leading Sustainable Practices in Mining, (2011), p. 73-74, https://industry.gov.au/resource/Documents/LPSDP/guideLPSD.pdf

Nuisance	• Increased *dust*, *noise*, *light*, *vibration* and *traffic*
Workers	• *Occupational health and safety* • *Forced and child labour* and exploitation of temporary and vulnerable work forces directly or through contracting value chains • Restrictions on *freedom of association and collective bargaining* • *Poor working/employment conditions* – such as low pay, long hours of work without overtime pay, only temporary contracts • *Gender discrimination* in hiring, training and/or promotion
Culture & Cultural Heritage	• Direct impacts on *cultural resources* from construction and other mining activities, affecting sacred landscapes, historical infrastructures and natural landmarks and indirect impacts can result from soil erosion and restricting accessibility to sites. • *Unauthorized removal of artifacts or vandalism* as a result of increased access to previously inaccessible areas • *Visual impacts* due to clearing of vegetation, large excavations, dust and the presence of operations
Social Cohesion	• Introduction of a *cash economy* into formerly rural-based economies • *Inflation* that puts pressure on local resources and local salaries • *Influx* of new populations with different cultures suddenly affects quality of life and the physical, mental and social well-being of local communities. • *Influx* of new populations that have not been planned for, resulting in an overburdening of public services
Community Safety & Security	• *Mining accidents* with an impact on community health and safety • *Violent or abusive acts* by private or public security forces • Increasing *crime*, *drugs*, *alcohol*, *prostitution* and *trafficking*
Public Health	• *Water*: Surface and ground water contamination with metals and elements; microbiological contamination from sewage and wastes in campsites and mine worker residential areas • *Air*: Exposure to high concentrations of sulphur dioxide, particulate matter, heavy metals, including lead, mercury and cadmium • *Soil*: Deposition of toxic elements • *Food security*: Improvised mining towns and camps often threaten food availability and safety, increasing the risk of malnourishment. • *Disease*: Increased threat of communicable diseases
Indigenous Peoples & Ethnic Minorities	• *Rights of participation and self-determination*, rights to property, culture, religion and non-discrimination in relation to lands, territories and natural resources, including sacred places and objects • Rights to *health and physical well-being* in relation to a clean and healthy environment • The right of indigenous peoples to *set and pursue their own priorities for development*, including with regard to natural resources • Rights to *freedom of expression and to participation*, good faith consultations with indigenous peoples in efforts to reach agreement or FPIC • *Freedom from reprisals and violence*

Human Rights	• In addition to the issues already noted above (labour rights, women's rights, indigenous peoples' rights, non-discrimination), in particular: • Right to *information*, *participation*, freedom of expression, assembly and association • Right to *health*, *food*, *housing*, an *adequate standard of living* • Right to *life and security* • *Access to justice and an effective remedy*[285]

Box 64

Marikana – Example of Inter-Authority Coordination on Mining

During the 2012 Marikana massacre at the Lonmin platinum mine, the South African Police Service opened fire on a crowd of striking mineworkers at Marikana, killing 34 mineworkers, wounding 78 and arresting more than 250 people. The protesting mineworkers were demanding a wage increase.

In response, the South African Government established an Inter-Ministerial Committee for the Revitalisation of Distressed Mining Communities, which coordinates policy on the social and human rights impacts on mining communities.

B Conduct Regular Monitoring of ESHR Impacts throughout the Production Phase (see Step 5 for a more detailed discussion on monitoring)

Mining, environmental and labour/social authorities will need to continue the programme of monitoring started during the construction phase, moving into longer-term monitoring that can expand regular interaction with mine operators to ensure that ESHR monitoring is effectively linked to management strategies within the operator's ESMS. A cooperative and iterative approach assures the community that environmental and social concerns are being adequately managed.[286] In addition, the long-term production phase provides the opportunity to solidify or initiate new joint or community-based monitoring. Authorities may consider approaches to coordinating monitoring that help the authorities deliver a 'whole-of-government' approach to solving problems. (See Box 65 on establishing cross-functional monitoring boards.)

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285 See, in addition, OECD, OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractives Sector (2016), Table 4 on Identifying Potential Human Rights Impacts of Extractive Activities, http://www.oecd-ilibrary.org/governance/oecd-due-diligence-guidance-for-meaningful-stakeholder-engagement-in-the-extractive-sector_9789264252462-en

286 Australia Guide to Leading Sustainable Practices in Mining, (2011), p. 23, https://industry.gov.au/resource/Documents/LPSDP/guideLPSD.pdf LP

Box 65

Establishing Cross-Functional Monitoring Boards

Some countries have established 'Environment Boards' that are located in regions close to where mining takes place, comprised of different authorities with relevant mandates for monitoring mining operations – social welfare, labour, environment, mining, justice and treasury -- may sit on such a Board. These Boards review ESIAs and help to monitor progress and can make collective decisions when ESHR issues arise.[287]

C Manage ESHR Impact Events

Mining accidents have the potential to cause significant damage to the environment and loss of human life – through collapsing tailing dams, spills of toxic chemicals, explosions, etc. – and to a significant loss of reputation for the companies involved. It is also a sector with potentially high-value assets with legitimate interests for both mining companies and the government in protecting the security of facilities, assets and personnel. For mining operations, this may eventually include a large contingent of private security guards, and/or depending on the context and arrangements, there may also be deployment of public security forces (local police forces and/or military).

Managing Emergencies

Do the mining or environmental authorities and mine operators have emergency plans in place?

- Emergency preparedness plans to deal with a range of accidents should be an integral part of the planning process and adapted to each phase, starting with the construction phase, and adapted throughout the operating phase as the risk profile of operations change. (See Box 66 on emergency planning.)
- Regular monitoring of emergency preparedness, testing of systems through test drills and periodic updating of plans to account for changing circumstances will be needed.
- Mining companies should be required to notify the authorities of incidents causing or threatening environmental harm or health and safety threats to the surrounding community.

Involving the Public in Emergency Planning

Do the mining or environmental authorities have a system to disseminate information immediately to the public in the event of an imminent threat of harm to human health or the environment resulting from mining operations?[288]

- Emergency planning should also include public participation in the planning for higher risk mining operations – in the establishment of emergency plans and in any testing of the systems.

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287 Extractives Hub, Mineral Policy, (2017), p. 25, https://beta.extractiveshub.org/topic/view/ID/16

288 Bali Guideline 6: In the event of an imminent threat of harm to human health or the environment, States should ensure that all information that would enable the public to take measures to prevent such harm is disseminated immediately. UNEP, "Putting Rio Principle 10 into Action: An Implementation Guide for the UNEP Bali Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters," (2015), http://wedocs.unep.org/handle/20.500.11822/11201

- Authorities should have an alert system to:
  - → Warn about imminent threats, via various media, depending upon local circumstances, which may include radio, television, public warning systems and the internet
  - → Provide information during the course of any emergencies on safety measures and behaviour in the event of a major accident
  - → After the emergency, provide information about what is being done to address the incident and avoid repetition
- The specific information that public authorities should release includes all information that could enable the public to take protective action to avoid or minimize harm.

Managing Security-Related Incidents

Do the public security forces and the mining companies have an approach to managing security incidents in a manner that protects human rights?

- Given the potential for conflicts with local communities (see Step 5 – Mine Development and Construction, Key Action 3 on community engagement), the interaction of public and private security forces with local communities has been a high profile topic for the extractive sector for many years.
  - → Whether dealing with theft or other crimes or managing protests, private and public security forces should act in a manner consistent with human rights, with any response being proportional to the threat.
  - → Proactive communication, community engagement and grievance redress are central to this approach. (See Boxes 67 and 68 on addressing security and human rights.)
- While many companies already assess the types and likelihood of security threats posed to their operations by their operating environment, they are increasingly called upon to consider the impacts that their security arrangements might have on local communities, including on those communities' human rights.[289]

Box 66

IGF Recommendations on Emergency Plans

- Requiring all mining operations to have an emergency preparedness and response programme prior to commencement of operations and ensuring that the programme be reviewed, tested and updated on a regular basis
- Basing all elements of the emergency preparedness programme on ongoing consultation and cooperation with local and other stakeholders and government
- Ensuring that monitoring of the effectiveness and responsiveness of the emergency preparedness programme is conducted by companies in cooperation with communities and all levels of government
- Ensuring that mine emergency plans are comprehensive and meet current best practice standards, specifically by:
  - → Requiring the development of emergency preparedness programmes as part of an environmental impact assessment for any new operation
  - → Requiring regular review and updating of such programmes
  - → Requiring consultation and cooperation with local, regional, national and, as appropriate, trans-boundary stakeholders in the development and maintenance of emergency preparedness programmes
  - → Endorsing and promoting international best practices, such as the APELL process, at national or regional levels to better coordinate emergency preparedness between mining entities, local authorities and local populations
  - → Ensuring that appropriate government departments and agencies at the national, regional and local levels are aware of and prepared to cooperate with mining company response actions

Box 67

IGF Recommendations on Security

Address potential security issues by:

- "Working with entities to address issues that may give rise to security concerns before issuing permits or commencing operations. Governments and entities should consider using the tools and programmes of the socio-economic plan to resolve or reduce the potential for disputes and be guided in their actions by international norms such as those represented by the International Finance Corporation Performance Standards on Social and Environmental Sustainability and the Voluntary Principles on Security and Human Rights

- Not issuing permits when a deposit to be mined is in an area of active armed conflict. When there is already active development or an operating mine when conflict breaks out, governments and operating entities should act to protect human rights and ensure the safety of miners, their families and communities in accordance with the OECD Guidelines. If this does not prove possible, governments may consider removing the mine operation from the dynamics of the conflict by any means possible, including by revoking the mine permit and shutting the mine down."[290]

Box 68

Initiatives and Toolkits to Help Manage Security Concerns Around Extractive Operations in a Manner Aligned with Human Rights

- **IFC, Good Practice Handbook on the Use of Security Forces: Assessing and Managing Risks and Impacts – Guidance for the Private Sector in Emerging Markets** (2017) provides guidance to private sector operators on engaging with public and private security and are therefore relevant to public sector authorities in considering how their security forces are trained and deployed when guarding mining operations.[291]

- **Voluntary Principles on Security and Human Rights – for mining companies and governments**. The Voluntary Principles on Security and Human Rights are a set of principles designed to guide extractive companies in maintaining the safety and security of their operations within an operating framework that encourages respect for human rights while helping companies work

effectively with governments that seek to protect human rights. While designed for companies, the Voluntary Principles are a useful tool for all governments with interests in the operations of the extractive industries. They can contribute to the protection of human rights and the prevention of conflict.[292]

- **DCAF-ICRC Toolkit on Addressing Security and Human Rights Challenges in Complex Environments**[293] has the form of an overall guidance document, with references to a selection of the most relevant existing resources and tools covering the following issues: 1) working with host governments, 2) working with public security forces, 3) working with private security providers and 4) working with communities.

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290 IGF "Mining Policy Framework" (2013), http://igfmining.org/mining-policy-framework/

291 http://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+sustainability/learning+and+adapting/knowledge+products/publications/publications_handbook_securityforces

292 See: http://www.voluntaryprinciples.org/wp-content/uploads/2014/06/Voluntary_Principles_government_Fact_Sheet_2014.pdf

293 http://www.securityhumanrightshub.org/content/toolkit

D Address Relationships with ASM

The artisanal and small-scale mining (ASM) sector can occur at each stage of the mining life cycle and is often carried out in areas adjacent to or within large-scale mining (LSM) concessions. Because ASM operations are often interwoven with LSM operations, they can be ignored neither by authorities nor by mining companies running large-scale operations. Instead, appropriate man- agement of LSM-ASM relationships can provide another avenue for sharing benefits through ca- pacity-building. This starts with having a mining policy that is appropriately scaled and targeted to the ASM sector rather than regulatory frame- works that are the same regardless of size and social context ('one size fits all').

Updating ASM Approaches

Has the government reviewed its ASM policy in light of its commit- ments to sustainable development and newly emerging guidance for the sector?

- New approaches to policymaking recognize that a more comprehensive and fit-for-purpose approach is necessary to:
  - → Improve the sustainable development outcomes of ASM through tar- geted policymaking and support so that ASM can continue to provide livelihoods for millions of miners and their families but in a manner that better protects the environment and workers
  - → Reduce conflicts and improve synergies with LSM operations. (See Box 69 on Changing Attitudes to ASM and 70 on IGF guidance on managing the ASM sector.)
- Has the government moved from a one-size-fits-all framework that treats all mining alike to a progressive compliance approach that provides technical assistance and support to small-scale miners?
  - → Developing requirements that are fit for purpose for ASM can help per- suade informal miners to come into the formal system (see Box 71 for an example from Colombia), whereas imposing the same requirements as for LSM can create perverse incentive that discourages formalization of ASM miners.

Including ASM Voices in Updating Its Approach

Has the government taken an inclusive approach to developing its pol- icy and approach to ASM?

- ASM often involves marginalized, informal populations operating outside formal structures. By involving ASM communities in the dialogue around needed changes, governments can create consensus on a new agenda for change, bring unheard voices to the debate and ensure that new approach- es are fit for purpose.
- In particular, given the high percentage of women and children in the sec- tor, with many involved in insecure, dangerous work, particular attention should be paid to bringing their voices into the discussion and specifically to considering the particular impacts on women[294] and children[295] that should be addressed as part of a renewed approach to ASM.[296]

294 See: World Bank, "Women and Artisanal and Small-Scale Mining (ASM)," Nairobi Note 4, https://olc.worldbank.org/sites/default/files/WB_ Nairobi_Notes_4_RD3_0.pdf and World Bank, "Gender Dimensions of Artisanal and Small-Scale Mining A Rapid Assessment Toolkit," (2012), http://siteresources.worldbank.org/INTOGMC/Resources/toolkit-web.pdf

295 See, for example, UNICEF, Child Rights and Mining Toolkit (2017), https://www.unicef.org/csr/files/FINAL_Child_Rights_and_Mining_ Toolkit_060217.pdf

296 African Minerals Development Centre, "African Woman in Artisanal and Small Scale Mining," (2015), http://commdev.org/wp-content/ uploads/2015/05/P_African_Women_In_Artisanal_and_Small_Scale_Mining.pdf

• Several countries have state-sponsored programmes to assist indigenous peoples to manage natural resources or develop their own income-generating enterprises, providing various kinds of support, such as grants, loans, favourable tax treatment, advisory services, skills training and scholarships. Resource extraction carried out by indigenous peoples themselves maximizes the possibility of such extraction being pursued in manners respectful of the rights and interests of indigenous peoples.[297]

Managing LSM-ASM Relationships

Do the mining authorities encourage LSM adjacent to ASM to appropriately manage relationships with ASM?

• LSM companies operating side-by-side with ASM are recognizing that working with ASM rather than ignoring or even trying to repress ASM can result in benefits for the LSM and ASM if managed well. For the LSM, building better relationships with ASM can have the following benefits for LSM:
  → Risk minimization and improved security
  → Maximizing community development opportunities
  → Improved mine closure planning

• Support to improving the sustainability of ASM and improving the lives of ASM miners and their dependents ASM can include (see Box 72 on good practices on developing the ASM-LSM relationship):
  → Skills training
  → Technology transfers to improve EHS
  → Support for formalization
  → Purchasing programmes from ASM
  → Employment opportunities and alternative livelihoods,
  → Support for moving to certified ASM[298]

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297 See Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya on "Extractive industries and indigenous peoples," A/HRC/24/41 (2013), pp. 5-6.

298 See, for example, the Alliance for Responsible Mining and its Fairmined Certification for ASMs, http://www.responsiblemines.org/

Box 69

Changing Attitudes to ASM

ASM is increasingly being seen for what it is – a source of livelihood for a significant number of the world's miners and therefore an appropriate focus of development. ASM produces about 85 percent of the world's gemstones and 20 to 25 percent of all gold. The sector provides jobs and income for 20 million to 30 million of the world's poorest people and supports the livelihoods of many more – more than 10 times the number employed in LSM. It is a source of and supplement to meagre livelihoods.[299] The exact scale of ASM worldwide is unknown, given that much of ASM operates outside formal economic and legal structures and in remote, rural areas.

The ASM sector "is a paradox — productive but undervalued, conspicuous yet overlooked, and 'small-scale' but economically and socially significant."[300] ASM often involves severe pollution and harsh working conditions. The miners very often lack access to rights and rights protection, access to finance, skills and technology, to make ASM

a prosperous economic activity with reduced environmental and social impacts. ASM is often indiscriminately criminalized, further eroding rights and protections. And as a result, many are often driven to operate illegally.

However, government and LSM approaches to the ASM sector[301] are evolving, recognizing that ASM has been around for centuries, providing livelihood opportunities with the potential to contribute to sustainable rural development. Policies to date have often been poorly designed or implemented or even repressive or too often take a 'one-size-fits-all' approach that is modelled on LSM and wholly inappropriate to ASM. Government treatment of ASM has varied from earlier approaches of ignoring the sector or trying to eliminate the sector entirely to more recent approaches of formalization and, finally, most recently recognizing ASM as a sustainable development issue – focusing on environmental and social as well as economic impacts.[302]

Box 70

IGF Objectives & Guidance for Governments on Managing Artisanal and Small-Scale Mining (ASM)

The IGF's Mining Policy Framework outlines three key ways in which countries can govern their ASM sectors to contribute to the their sustainable development:

1. Integrate informal ASM activities into the legal system
2. Integrate informal ASM activities into the formal economic system
3. Reduce the social and environmental impacts of ASM

The more detailed **IGF Guidance on ASM**[303] presents a step-by-step process for governments to develop, implement and monitor an effective ASM Management Strategy. The guidance includes direction on how to ensure effective, inclusive strategy development and implementation, as well as effective governance of the process overall. The guidance is designed for the local, subnational and national governments of countries where ASM takes place.

299 See: http://artisanalmining.org/

300 IIED, "IIED shines a light on small-scale mining", (2013), https://www.iied.org/iied-shines-light-small-scale-mining

301 IIED, "IIED shines a light on small-scale mining", (2013), https://www.iied.org/iied-shines-light-small-scale-mining. See also: ICMM & World Bank Group, "Working Together How large-scale mining can engage with artisanal and small-scale miners," (2018), https://commdev.org/userfiles/files/2018_file_Working_Together_FINAL_PILOT_VERSION.pdf

302 http://goxi.org/profiles/blog/show?id=5786733%3ABlogPost%3A48631&commentId=5786733%3AComment%3A49412

303 IGF, "ASM Guidance Document", http://igfmining.org/resources/asm-guidance-document/

Box 71

Developing a Fit-for-Purpose Policy and Legal Framework for the Different Segments of the Mining Sector – An Example from Colombia

The Sector-Wide Impact Assessment on Human Rights in the Mining Sector (SWIA)[304] in Colombia found that one of the main gaps of the sector in Colombia is a comprehensive and inclusive policy that is attuned to the realities of the populations and the differences in mining activities given size and mineral. A constant complaint of small and medium-sized miners was about a one-size-fits-all policy regarding technical end environmental standards. The financial, knowledge and administrative hurdles discourage entering into the legal and formal path mining. Instead, these miners prefer the risk of being informal because the hurdles to formalization are too high. A progressive compliance approach to substitute the rigid current framework that is scaled to capacities and impacts would provide better incentives to formalize.

Box 72

Good Practices to Promote LSM and ASM Working Together[305]

The 'Working Together' guidance document from ICMM and the World Bank Group "evolved out of a growing sense that more mutually beneficial engagement between mining companies and ASM operators is needed."[306] It brings together a number of approaches and tools for companies to engage with ASM. While it is aimed primarily at LSM, recognizing that ASM is an issue for joint management with government, many of the good practices identified can also be used by government to support ASM – such as support for formalization, job training and alternative livelihood programmes.

304 Centro Regional de Empresas y Emprendimientos Responsables, "Sector-Wide Impact Assessment on Human Rights: Mining Unseen". See (in Spanish) Las Evaluaciones Integrales Sectoriales de Impactos (EISI) (2016), http://creer-ihrb.org/proyectos-eisi/

305 See the updated version: ICMM & World Bank Group, "Working Together How large-scale mining can engage with artisanal and small-scale miners," (2018), https://commdev.org/userfiles/files/2018_file_Working_Together_FINAL_PILOT_VERSION.pdf

306 http://www.miningfacts.org/Communities/What-is-Artisanal-and-Small-Scale-Mining/

Step 07

Closure

At this seventh step mines are wound down, operations are closed and rehabilitation is accelerated. All mines close and many close prematurely, so it is important that mine closure planning start from the beginning of the mining cycle. Progressive rehabilitation of areas no longer needed should start during operations rather than during final closure. An integrated approach to mine closure planning integrates environmental, social and economic planning and involves local communities and other stakeholders throughout the process.

Primary Target Audience

→ Mining Authorities
→ Environmental Authorities
→ Social Authorities & Human Rights Authorities & Local Government

Summary of Step 7: Closure

	KEY ACTIONS IN THIS STEP	KEY MESSAGES
A	**Plan for Closure and Post-Closure in an Integrated Manner**	Integrating ESHR management decisions into strategic closure planning from the start can achieve more effective mine closure and completion. The objective of closure should be to prevent or minimize adverse long-term environmental, physical, social and economic impacts, to create a stable land form suitable for some agreed subsequent land use and to maximize social benefits.
B	**Involve Stakeholders as a Core Part of the Closure Process**	Community engagement from the earliest possible time and throughout the closure planning process is both an important expression of the right of the public to participation, but is also essential to effective closure planning. The goal should be community ownership of the closure plan, as the community will eventually inherit the project area.
C	**Carry Out Progressive Closure throughout Mine Operation**	Actions that are part of closure will start in the production phase (Step 6) as progressive rehabilitation of areas no longer needed gets underway. Monitoring these actions to understand their effectiveness and using the results to refine future rehabilitation efforts will be important and should continue through post-closures (Step 8).

A Plan for Closure and Post-Closure in an Integrated Manner

Planning for closure and post-closure is most usefully done from the very start of considering mining and at each stage of the mining cycle while recognising that mines can close at any point in the cycle, including at the construction phase.

Mine closure today is less of a technical challenge and more of a management challenge. An integrated approach combines the economic dimensions of closure with ESHR considerations.[307]

Setting the Foundations (Step 1)

Does the country's mining policy and legal framework cover closure and post-closure?

- As a first step, mining policy should set out the government's objectives on closure and post-closure that are implemented through mining laws and regulations, licensing/mining agreements and key approval regimes (particularly environment, planning and mining-related legislation).[308]
- In addition, authorities should consider how specifically targeted legislation can be enhanced or coordinated with closure requirements to improve protection, including environmental requirements around contamination; the protection of flora and fauna; landfills; controlled waste; dangerous goods; land management; and social requirements including labour, social protection, gender equality, non-discrimination and indigenous peoples.
- In low-capacity environments, requiring that mining companies apply international standards,[309] combined with independent monitoring and reporting, can compensate for a lack of internal capacity.

Land Use Planning (Step 2)

Has the land use planning process considered the issue of closure and post-closure?

- The aim of integrated land use planning is to produce land use (spatial) plans to guide the development of mining settlements and ensure that the long-term land uses of the surrounding areas are capable of replacing the economic activities and contributions once the mine(s) is closed. This should include the management of mine waste.

Exploration (Step 3)

Do the exploration requirements/permits address any relevant closure steps?

- Closure planning could commence at exploration. Unless there are specific requirements to do so, there are often disincentives for exploration companies to address closure, but growing international practice to draw on.[310]

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307 See http://api.ning.com/files/zBuXAPjY2N7fQLQH6Hwmus3kO3S*zOZsqiRG4kkRfw0eN2kfX9UvHnhvBzdwUTsEozw0KIoSAV-nwnoB4jwQOn6tv2mqP*gf/EGPKnowledgeProductwebinaronmanagamentofminingwaste.pdf

308 See in particular the Asia Pacific Economic Commission, "Mine Closure: Checklist for Governments," https://mail.google.com/mail/u/0/#label/4.+UNDP/15f07a05ba4de500?projector=1. The objective of the Mine Closure Checklist for Governments is to provide policymakers in the APEC region with the essential elements of a successful mine closure governance framework based on leading international guidelines and standards, as well as international experience. This checklist is designed to provide a logical, sequential series of steps that will allow policymakers to identify gaps in their current mine closure framework and identify how to address those gaps.

309 See, for example, Australia, "Leading Practice Sustainable Development Program for the Mining Industry – Mine Closure Handbook," (2016), https://industry.gov.au/resource/Programs/LPSD/Pages/LPSDhandbooks.aspx

310 PDAC, E3Plus Toolkit – Module on Reclamation and Disclosure, http://www.pdac.ca/programs/e3-plus/toolkits/environmental-stewardship/reclamation-and-closure

Feasibility and Licensing (Step 4)

Do the authorities require that feasibility studies cover closure and provide a preliminary closure plan?

- Authorities should consider the following steps:
  - → Make the ESHR impacts of closure an integral part of the ESIA/ESMP, complemented by a separate comprehensive closure plan that starts with a preliminary plan and is revised over time, including plans for sudden or unexpected closure. (See Box 73 for IGF recommendations on closure plans.)
  - → Make the ESHR impacts of closure an integral part of the feasibility study. (See Box 49 on closure issues that should be covered in feasibility studies.) Once the preparation of the feasibility studies have yielded baseline and projected impact information (after environmental and socio-economic studies have been completed), mine design principles to support certain closure outcomes[311] can be incorporated into the design.

Do the mining contract/license impose closure requirements?

- Require a closure plan and adequate financial assurance before the requisite mining permits for a new mine are approved so that the appropriate funds (or guarantee of funds) are put aside from the beginning of the mining operation.
- The funds or guarantee should ensure that the operator has sufficient funds to close the mine and carry out environmental and social reclamation, or, if the operator is unable or unavailable to complete the work, that the funds are made available to the government for third-party contractors to complete the work. (See Box 74 for IGR recommendations on financial assurance.) The mining authorities should address:
  - → Where is this money held (in country or off shore)?
  - → Who is accountability for it – i.e., who has access to it and what are the criteria for accessing and spending the funds?
  - → What happens when these funds are not sufficient either because the closure came sooner than expected or funds were calculated as a share of profit and there was not sufficient profit?
  - → Should the government set up a fund for affected communities for remediation of long-term impacts as a part of a closure plan or should these costs be covered by the company?
- Do the contracts impose legal obligations (in addition to financial obligations) on companies beyond the lifetime of the project into final relinquishment at post-closure? (See also Step 8 on Post-Closure.)

How do the authorities deal with changes in ownership/mergers & acquisitions?

- Increasingly mines change owners at least once – and perhaps several times during a mine's life and, with it, the burden of closure.[312] Authorities should ensure that new owners are required to take over any closure requirements. They will need to keep a close eye on planning and budgeting for closure during the course of approving ownership changes.

Construction (Step 5)

Were the mining operations and ancillary facilities and infrastructure constructed with post-closure in mind?

- During the construction phase, many long-term decisions are made, all of which influence final decommissioning and closure. Construction activities should be carried out while bearing in mind the implications for the short-term or longer-term eventual closure of the mine.[313]

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311 ICMM, Planning for Integrated Mine Closure Toolkit (2008), p. 48, http://www.icmm.com/website/publications/pdfs/310.pdf

312 ICMM, Planning for Integrated Mine Closure Toolkit (2008), p. 48, http://www.icmm.com/website/publications/pdfs/310.pdf, noting that management at a mine site may, quite pragmatically, preferentially allocate resources to production targets rather than closure – an activity that may not be the current owner's responsibility in future years

313 Australia Guide to Leading Sustainable Practices in Mining, (2011), Chapter 3 on Construction and Development, https://industry.gov.au/resource/Documents/LPSDP/guideLPSD.pdf

- This should include considerations of:
  - → Elements that are especially subject to changes during construction and affect (primarily) environmental closure issues: tailings dams, water supply infrastructure, catchment water management, roads and transport infrastructure and creek and river diversions[314]
  - → Social impacts: for example, the impact of the reduction in construction workforces as part of longer-term retraining programmes

Production (Step 6)

Are closure plans and activities updated throughout the production cycle?

- Closure planning should be subject to periodic review and, as necessary, adjusted in response to relevant changes in conditions, regulations or expectations of the community or other stakeholders during lifetime of the mine (see Box 75 on planning for sudden closures).
- Requiring progressive rehabilitation as mining areas are closed helps limit the ESHR footprint and reduces future closure costs.
- The final step is the effective transition to closure, which should be set out in a detailed decommissioning and post-closure plan (see Step 8 – Post-Closure).

Box 73

IGF Recommendations on Closure Plans

- Requiring the use of external experts by entities to contribute to the development of closure plans and to validate the risk assessments, studies and activities associated with high-risk elements such as tailings dams, waste dumps and acid rock drainage
- Requiring that internationally accepted guidelines and best practices (such as IFC Performance Standards on Social & Environmental Sustainability) be followed
- Requiring the periodic reassessment and

independent auditing of closure plans: more frequently for mines with an expected short operating life, less frequently for large operations with economic life expectancies measured in decades
- Putting in place a framework to encourage progressive rehabilitation in mining areas as soon as the disturbed area is no longer needed for mining. This would reduce future closure liabilities and reverse or minimize future environmental, economic and social impacts[315]

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314 ICMM, Planning for Integrated Mine Closure Toolkit (2008), p. 28, http://www.icmm.com/website/publications/pdfs/310.pdf

315 IGF, "Mining Policy Framework - Post-Mining Transition Section," (2013), pp. 13-15, http://igfmining.org/mining-policy-framework/

Box 74

IGF Recommendations on Financial Assurance for Closure and Post-Closure

Ensuring that financial assurance for closure and post-closure expenses is present and adequate to the task and by adopting legislation, regulations and guidelines for financial assurance. This would:

- Require an adequate level of financial assurance based on realistic estimates to cover the cost of all outstanding work programmes at any time, including premature closure and the conduct of closure programmes by third-party contractors in the event that the mine operator is unable or unavailable to complete the work
- Require that each closure plan and its cost estimates be validated or approved by the responsible authorities

- Establish appropriate forms of financial security (bonds, insurance, etc.), including their specific details and conditions
- Require that the financial securities be issued or held only by qualified and approved financial institutions
- Give governments, based on their sole discretion, the right to gain immediate and unencumbered access to the full amount of the financial assurance securities
- Allow the draw-down or release of security instruments only as each work programme or other requirement is satisfied[316]

Box 75

The Need to Plan for Sudden Closure as Part of Closure Planning

Circumstances such as economic or market downturns, technical problems or civil unrest may cause an operation to close suddenly, perhaps several years or decades before its scheduled closure. Sudden closure can have serious ESHR impacts. Being prepared for sudden closure relies on having

an updated detailed closure plan, to provide a good basis for decision-making. Issues that cannot be resolved during the short timespan of sudden closure should be folded into an ongoing care and maintenance program until a closure plan can be implemented.[317]

Box 75

Key Issues to Consider When Closing – Goxi Learning Series

The Goxi Learning Series on mine waste and design for closure highlighted the following technical and administrative issues that need to be addressed when closing a mine, most of which have financial implications:

- Cost estimates require expertise and experience from the point of view of the regulators and the mining companies.
- Any environmental guarantee or bond that is set aside must be guarded against potential effects

of inflation and exchange rate fluctuations.
- The cost of closure of a mine is dependent on the set objective and will change over time. The availability of funds needs to be ensured and protected and should not be allowed to be used for addressing any other issues.
- Closure of a mine can be a difficult process. It is important to guarantee the availability of expertise.

316 IGF, "Mining Policy Framework - Post-Mining Transition Section," (2013), pp. 13-15, http://igfmining.org/mining-policy-framework/

317 ICMM, Planning for Integrated Mine Closure Toolkit (2008), p. 38, http://www.icmm.com/website/publications/pdfs/310.pdf

B Involve Stakeholders as a Core Part of the Closure Process

In addition to the mining company itself, a combination of authorities is likely to be involved in closure planning, as both sides play an important role in closure planning, engagement and activities. Local, provincial and national governments provide the institutional capacity and can offer important perspectives on local and national economies and the sustainability of social closure outcomes.[318] Whereas many environmental closure outcomes rely on the mining company's expertise to conceptualize and deliver results for social closure programmes, the communities and local governments have the most local history, knowledge and interest to inform the development of social closure outcomes.

Public Participation in Planning for Closure

Do the authorities engage and require the mining company to engage with the affected communities and other stakeholders periodically in the development and revision of closure and post-closure planning?

- Communities surrounding mines are unlikely to understand the concept of mine closure, so it is particularly important that this concept be explored with the community early and that closure planning involve community throughout – and not just at the initial ESIA stage. This will help minimize long-term legacies of unrealized expectations post-closure.[319] Communities that have different levels of dependence on the operation that must be addressed – dependent communities will be much more sensitive to the presence or absence of the operation.

- Public participation in closure planning and decision-making should be programmed in at the following stages:
  → At the **feasibility stage**, when preliminary plans for closure are being prepared. This includes agreement on the objectives of closure, including around achieving lasting benefits at local and regional levels.
  → As part of the **finalization of the initial closure** plan that is submitted as part of **the approval process**, with an agreed set of closure objectives and completion criteria that the company must meet to relinquish the site in a manner that meets regulatory requirements and community expectations.
  → Periodically **during operations** as part of the review and update of the closure plan.
  → More intensely as part of the development of the **decommissioning and post-closure plan** to help communities prepare for changes to their environment. A key focus is on preparing workers and local communities for the intended closure date – workers can plan to find alternative employment and the community can work with the mine to ensure sustainable benefits from the mining activities.

- Participation will need to take a **variety of different forms**:
  → Potentially **core community liaison or advisory groups** specifically for the mining project and/or closure. (See Box 77 for a case example of community involvement in closure planning.)
  → **Expert meetings** focused on particular topics such as biodiversity or water reclamation

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318 See in particular Australia, "Leading Practice Sustainable Development Program for the Mining Industry – Mine Closure Handbook," (2016), https://industry.gov.au/resource/Programs/LPSD/Pages/LPSDhandbooks.aspx#

319 Id.

→ Consultations with **workers and their representatives**
→ Consultations with diverse groups of **women** to understand their perspectives, and analysis of the gender-related impacts of closure and to design appropriate mitigation measures
→ Consultations with **vulnerable groups** to understand the differentiated impacts on them and to design appropriate mitigation measures
→ Broader information sessions and consultations with the **general public** to explain key issues

Accessible Information

Do the authorities make available or require the mining company to make available relevant information on closure impacts?

- There will likely be a range of information that stakeholders should see, given the likely range of interests:
  → For environmental groups, this is likely to be full sets of plans for environmental and biodiversity remediation & monitoring reports of existing rehabilitation/reclamation activities.
  → Local communities and trade unions are likely to be interested plans on job-retraining, microfinance schemes, other support services and relocation options.
  → A wide range of stakeholders will likely be interested in planned land and infrastructure re-use options for the area.
  → The risk of temporary or permanent closure for unexpected reasons, such as the fall of commodity prices, natural disasters or social unrest
- Authorities and the mining company should be prepared to communicate plans in a variety of ways and formats to make sure they are understandable and accessible.

Box 77

Case Study of Community Involvement in Closure Planning

One of the initial steps taken by the mining company in the preparation of the rehabilitation plan was to develop an overall closure philosophy together with an active community consultative group (CCG) comprised of local government, representatives of landowners and business and conservation groups. To assist the community's consideration of various rehabilitation concepts, the company prepared visual impressions of preferred options. Following option selection, the CCG also assisted in identifying key issues to be dealt with in the implementation process and provided a communication channel for the government to obtain feedback on aspects of the plan. The CCG set up an independent audit of progress against the rehabilitation plan based on a protocol that it had developed.[320]

C Carry Out Progressive Closure throughout Mine Operation

Monitor rehabilitation steps during operations to fine-tune closure and post-closure approaches. This is covered in more detail in Step 8 – Post-Closure.

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320 This case study was adapted from: Australia, "Leading Practice Sustainable Development Program for the Mining Industry – Mine Closure Handbook," (2016), p. 83, https://industry.gov.au/resource/Programs/LPSD/Pages/LPSDhandbooks.aspx

Step 08

Post-Closure

At this eighth and final step in the final phase of mining operations, monitoring confirms that all relinquishment targets are met and liabilities are discharged. After they have been, the mining site is turned over to the government and can be put to its planned re-use. For mines that were not closed properly – abandoned or orphaned mines – the government will need to devise a strategy to close them, potentially in partnership with other actors.

Primary Target Audience

→ Mining Authorities
→ Environmental Authorities
→ Social Authorities & Human Rights Authorities & Local Government

Summary of Step 8: Post-Closure

	KEY ACTIONS IN THIS STEP	KEY MESSAGES
A	**Monitor the ESHR Impacts of Closure**	Monitoring remains a key activity throughout the post-closure period to ensure that the closure and post-closure activities meet their ESHR goals. Involving local communities, environmental organizations and trade unions in monitoring of closure plan completion is one way to build buy-in and trust in the outcomes and is a model of public participation in closure.
B	**Incorporate ESHR Targets into Relinquishment Conditions**	Putting in place clear criteria for relinquishment that meet regulatory and community expectations and include appropriate ESHR conditions is important not only to give mining companies certainty about the targets that they must meet, but also to ensure that the national and local governments are not left with unfulfilled environmental and social liabilities. There should be appropriate safeguards to ensure accountability for closure and post-closure planning. Community participation is an important part of the relinquishment process.
C	**Take a Leadership Role for Orphaned or Abandoned Mines**	The government should lead in addressing orphaned and abandoned mines, building partnerships with other actors – including the sector, other governments and international organizations – to develop technological solutions (including the reprocessing of mining wastes) or to contribute expertise or other resources to resolve the legacy issue of orphaned or abandoned mines.

A Monitor the ESHR Impacts of Closure

There is a wide range of activities that may take place in the post-closure phase (see Box 78 on Typical Post-Closure Activities). The closure plan should identify the types of monitoring programmes needed to verify that the closure planning process is meeting the goals set out in the plan. Having the right information to make the best technical and social decisions in closure planning requires the collection, assessment and management of ESHR and economic data early during planning so that this information can feed into refining closure and post-closure planning and activities. Seeking to incorporate international good practices into the process prevents new generations of mining personnel from having to relearn what is already known about effective closure.

Set in Place a Monitoring Programme from the Earliest Stages

Do the authorities require environmental and socio-economic monitoring for closure and post-closure?

- The ESMP and the closure plan should include a coordinated monitoring programme that specifically covers closure and post-closure. Data on baseline conditions before mining collected as part of the ESIA plays an important role in determining the degree to which restoration activities have brought the site back to baseline conditions and/or determining the differences between baseline conditions and the agreed post-mining land use (see Box 79 on monitoring programmes to support closure).
- Monitoring in the first few years of rehabilitation activities during the production phase:
  → Is useful in evaluating the initial establishment success of programmes and fine-tuning as needed – Is the microfinance programme taking root and being used to support diversified small and medium-sized enterprises (SME) development, including women-owned businesses? Is the rehabilitation of disturbed land and stabilization of creeks and drainage channels working as expected?
  → Can help refine long-term rehabilitation programmes that continue into the post-closure period
- By the time of decommissioning and post-closure, detailed monitoring should be tracking progress against decommissioning objectives and relinquishment targets, asking questions such as:
  → Is the rehabilitated ecosystem likely to be sustainable over the long term?
  → Will communities have diversified their economic base sufficiently to continue as a community post-closure?
  → Will social services be able to continue operating in the communities or will they have to be consolidated in neighbouring communities?

Revisit the Post-Closure Goals and Outcomes on a Periodic Basis

Do the authorities require periodic reassessment of the post-closure plans and accompanying monitoring plans?

- Requiring periodic reassessment of the post-closure goals and outcomes in light of changing environmental, social or economic circumstances and community expectations will be necessary to make sure the closure and post-closure actions meet their overall objectives.

Involve Communities and Other Stakeholder in Monitoring

Do the authorities involve communities and other stakeholders in post-closure monitoring?

- For local communities, the impact of mining does not end until the mine site is rehabilitated and returned to the agreed next land use. They will therefore maintain an interest in the outcomes of monitoring on a regular basis. The authorities and the mining company should continue to make monitoring information and updates available on a regular basis throughout post-closure
- Involving local communities, environmental organizations and trade unions in monitoring of closure plan completion is one way to build buy-in and trust in the outcomes and is a model of public participation in closure that can take a number of forms:
  → Citizen advisory bodies that oversee the closure and post-closure monitoring programme
  → Conducting or engaging in independent audits
  → Becoming directly involved in joint monitoring programmes established with the authorities and/or the mining company

Box 78

Typical Post-Closure Activities

Activities (which can run for some years) in this phase include:
- Demolition and removal of infrastructure
- Consolidation and decommissioning of the tailings facilities
- Reshaping of remaining mining landforms
- Re-establishment of surface hydrology and drainage systems
- Treatment, discharge or disposal of poor-quality water
- Completing the rehabilitation and remediation processes

- Managing, monitoring, recording and documenting closure processes
- Measuring the performance of closure activities against the agreed closure objectives and criteria and reporting that performance
- Inspections, consultation and reporting to stakeholders on progress
- Staged and progressive community and government sign-off[321]

Box 79

Typical Monitoring Programmes That Support a Mine Closure Programme

- Baseline monitoring in the early life of the mine to define the values that need to be protected or re-established, including by identifying or establishing unmined reference areas during pre-mining mapping and surveys
- Understanding, monitoring and recording all potential impacts during the operational phase

- Documenting rehabilitation operations to confirm that agreed procedures have been implemented and to aid the interpretation of later rehabilitation monitoring results
- Assessing early monitoring data from research and field trials implemented during progressive rehabilitation to determine the best techniques, identify problems and develop solutions.[322]

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321 This is reproduced directly from Australia, "Leading Practice Sustainable Development Program for the Mining Industry – Mine Closure Handbook," (2016), https://industry.gov.au/resource/Programs/LPSD/Pages/LPSDhandbooks.aspx#

322 Australia, "Leading Practice Sustainable Development Program for the Mining Industry – Mine Closure Handbook," (2016), https://industry.gov.au/resource/Programs/LPSD/Pages/LPSDhandbooks.aspx#

B Incorporate ESHR Targets into Relinquishment Conditions

When an operation has been successfully closed, the site has been reclaimed according to the desired condition and the regular monitoring of the site according to the agreed monitoring conditions has established that there are no apparent issues remaining, the mining company should be able to relinquish the mine site to the authorities. When this happens, the mining company can be absolved of any further liability and financial responsibility associated with the site. Clear, measurable and auditable conditions need to be agreed between companies and regulators that will allow relinquishment of obligations to be planned for and achieved.[323]

Establishing Clear ESHR Conditions for Relinquishment

Do the authorities have a clear approach to relinquishment that includes appropriate ESHR conditions?

- The authorities should have included within the permitting requirements clear relinquishment conditions. The precise nature of the relinquishment conditions is unlikely to be known at the permitting stage, particularly for longer-term mines. Instead, these conditions should be established closer to closure, but focus on the final objectives for post-closure with respect to environmental and social conditions. (See Box 80 on post-closure legal requirements.)
- Communities and community values change over decades. It will be important for the authorities and the mining company to maintain community acceptance for the post closure conditions that will prevail in order to finally get to relinquishment through community participation in the decision-making.
- Where post-closure involves re-training programmes, trade unions and other worker representatives should be involved.
- For the public authorities, it will be important that all final conditions are met before relinquishment is agreed and financial assurance is released so that the authorities are not left with uncompensated environmental and social liabilities for the site.

Accountability for Closure & Post-Closure

Do the authorities have in place appropriate safeguards to ensure accountability for closure & post-closure planning and execution?

- The authorities should have a number of mechanisms for addressing a company failure to comply with the closure and post-closure plan or ESHR laws:
  - → Contractual, licensing or permitting requirements that require compliance with the closure plan(s)
  - → Financial assurance put in place as a condition of permitting
  - → Enforcement tools under ESHR laws
- The financial assurance arrangements should not be released until relinquishment conditions are met. (See Box 74 on IGF recommendations on financial assurance mechanisms.)

323 ICMM, Planning for Integrated Mine Closure Toolkit (2008), p. 48

Are there mechanisms for stakeholders to hold the authorities or the mining company accountable for a failure to comply with agreed closure plans?

- Members of the public concerned should have access to a court of law or other independent and impartial body or administrative procedures to challenge any decision, act or omission by public authorities or private actors that affects the environment or violates ESHR laws including around closure. [324]
- While stakeholders should be able to challenge closure & post-closure activities that fail to comply with the law, whether they can directly challenge a failure to comply with the closure or post-closure plan will depend on whether it is a condition of permitting or licensing that can be challenged by the public.
- Where the completion of the closure plan is not subject to direct challenge, the authorities might agree on other approaches to assess compliance, such as an independent audit. (See Box 77 case study in Step 7 for an example of using an independent audit.)

Box 80

Post-Closure Legal Requirements on the Use and Discharge of Water

A recent study compares the legal and regulatory frameworks governing the use and discharge of water by the copper and gold mining sectors in a selected sample of resource rich jurisdictions. The study maps out how water issues are regulated prior to and during mining operations and post-mine closure, including the enforcement actions available to different stakeholders, and identifies the key institutions and legislation regulating water use and discharge in mining. The study provides a useful tool for regulators who seek to understand how water reclamation, including during closure and post-closure, is dealt with in other jurisdictions. [325]

C Take a Leadership Role for Orphaned and Abandoned Mines

Given the large number of abandoned mine sites in many mineral-rich jurisdictions, the government should start with establishing and managing a database on these sites and progress through a series of steps that builds a systematic approach to managing orphaned and abandoned mines and potentially leads to innovative solutions to address impacts and harness value from the sites. (See Box 81 on IGF Recommendations on Orphaned and Abandoned Mines.) Public participation in identifying abandoned mine sites should be encouraged. Plans for rehabilitation of abandoned mines should review and prioritize sites for rehabilitation based on criteria ranking social and environmental risks, as well as prospects for their future commercialization. [326]

324 Bali Guideline and developed from: UNEP, "Putting Principle 10 Into Action: Implementation Guide for the UNEP Bali Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters," Guideline 17, (2015), http://wedocs.unep.org/handle/20.500.11822/11201

325 CCSI, "Assessing Water Related Legal Risks in the Mining Sector," http://ccsi.columbia.edu/work/projects/assessing-water-related-legal-risks-in-the-mining-sector/

326 See the discussion on financing remediation of abandoned mines in the Asia Pacific Economic Commission, "Mine Closure: Checklist for Governments," https://mail.google.com/mail/u/0/#label/4.+UNDP/15f07a05ba4de500?projector=1

Box 81

IGF Recommendations on Orphaned and Abandoned Mines

- Working in partnership with entities that collectively constitute the mining industry to explore options for developing technological solutions (including the reprocessing of mining wastes) or contributing expertise or other resources to help resolve the legacy issue of orphaned or abandoned mines
- Working in partnership with those countries whose economies benefited from the flow of low-cost industrial inputs that came at least in part from mines that are now orphaned or abandoned

- Using targeted fiscal arrangements to encourage the re-activation of those mines to create economic activity and fund remediation and provide for post-closure management in cases where such a mine or its wastes have economic potential
- Seeking recognition by multilateral agencies and organizations that the historical and legal situation of such mines, particularly in developing countries, requires their leadership in managerial, advisory, hortatory and financial forms[327]

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327 IGF, "Mining Policy Framework," (2013), http://igfmining.org/mining-policy-framework/

Annex I

Backgrounder – Access to Information, Participation, Access to Remedy

Brief Background: Principle 10 of the 1992 Rio Declaration on Environment and Development[328]

The Rio Declaration on Environment and Development from the 1992 United Nations 'Conference on Environment and Development' (UNCED), informally known as the 'Earth Summit', included Principle 10. Principle 10 has become a globally recognized framework for the development of national standards and laws for access to information, public participation in decision-making and justice in environmental matters.[329] Many States incorporate these goals into their constitutions as constitutional protections of the right to a healthy environment and other rights, such as the rights to life, health, an adequate standard of living and freedom of expression and association.

→ **Access to Information** about the environment ensures that members of the public are able to know and understand what is happening in the environment around them. It also ensures that the public can participate meaningfully in public affairs and make informed decisions about their lives. Access to environmental information is therefore important in its own right as well as in the role it plays in enabling meaningful public participation. Rights to information are increasingly being recognized more broadly in constitutions, national legislation, often under the heading of freedom of information, and initiatives such as the Open Government Partnership (OGP).[330]

→ **Public Participation** is a human right that benefits citizens and governments. Citizens have the opportunity to voice their concerns and have their views taken into account in policymaking, bringing information, analysis and considerations as a contribution to better quality decision-making. From the point of view of public authorities, public participation: (i) means authorities gain access to information not otherwise available, which can help diagnose problems and needs, develop alternative solutions and evaluate the consequences of alternatives; (2) builds capacities, empowers citizens, legitimizes the

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328 U.N.G.A., A/CONF.151/26 (Vol. I), 12 August 1992, Annex I.

329 Summarized from: UNEP, "Putting Principle 10 Into Action: Implementation Guide for the UNEP Bali Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters," pp. 9-10, (2015), http://wedocs.unep.org/handle/20.500.11822/11201 and from the Aarhus Implementation Guide (2nd Edition) (2014), https://www.unece.org/env/pp/implementation_guide.html

330 https://www.opengovpartnership.org

authority's role and the role of stakeholders and develops confidence and trust; and (3) defuses conflicts by providing an outlet to highlight and potentially resolve conflicting approaches in advance of decisions around policies or projects.

→ The **Access to Justice** component promotes accountability and the rule of law through the use of fair and impartial administrative and judicial mechanisms. Without adequate legal protection of the rights to information and public participation, the rights do not have much meaning. It backs up these rights with access to justice provisions that go some way towards putting 'teeth' into these principles. It involves access to justice and access to substantive remedies.

Box 82

Principle 10 of the Rio Declaration on Environment and Development & the Bali Guidelines

"Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

The 'Bali Guidelines' for the Development of National Legislation on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters[331] assist countries in putting in place a legal framework to facilitate broad access to information, public participation and access to justice in environmental matters.

Box 83

The Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (1998)

UN Environment has called the Arhus Convention an "advanced articulation" of Principle 10. It is a new kind of international environmental agreement, linking environmental rights and human rights and linking government accountability and environmental protection. The Aarhus Convention and its Protocol set out requirements that empower people with the rights to access easily information, participate effectively in decision-making in environmental matters and seek justice if their rights are violated. The Aarhus Convention is open for accession to all countries.[332]

331 UNEP, "Putting Principle 10 Into Action: Implementation Guide for the UNEP Bali Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters," pp. 9-10, (2015), http://wedocs.unep.org/handle/20.500.11822/11201

332 https://www.unece.org/env/pp/contentofaarhus.html

Access to Information

As of 2016, 103 countries have adopted constitutional or statutory provisions guaranteeing the right to a healthy and safe environment, the majority (64) of which were adopted since 1992, and 112 countries have freedom of information laws (see Box 84 on regional model laws on access to information).[333] The Bali Guidelines (see Box 82 for a short explanation of the Bali Guidelines) on Principle 10 and the increasing range of other tools available help support governments and stakeholders to implement these existing constitutional provisions and related obligations under international human rights instruments recognizing these rights.[334]

Principle 10 covers the reactive and proactive obligations of governments: 1) to react to requests for environmental information by providing access to information held by public authorities; and 2) to proactively gather and structure information in publicly accessible databases and publicly disseminating environmental information. (See Box 85 on the Mexican Government's commitment to making information available in indigenous languages.)

This includes information from environmental information systems based upon reporting and monitoring data related to air, water, soil, wastes and chemicals, EIA, SEA and integrated permitting, etc. With the advent of advanced information technology, it is becoming easier to present information in an accessible and relevant manner by using data visualization tools that display data in visually understandable and relevant ways for stakeholders (see Box 86 on Map-X from UNEP as an example of presenting a wide range of information on mine sites in a web-accessible format).

While the focus of Rio Principle 10 applies to information held by public authorities, States are beginning to require private sector mining companies to publicly report environmental, social and human rights (ESHR) information and the mining sector itself is starting to voluntarily report such information. There is a range of initiatives that have developed reporting standards for the mining sector. (See Box 87 on reporting initiatives for and about private sector mining companies.)

Bali Guideline No.[335]	Guiding Questions to Assess Access to Environmental Information in National Law
1 – Access	**Does the government provide access to environmental information held by public authorities relevant to the mining sector?** • Is access provided to 'any person' without having to show an interest/reason for requesting the information? • Can the information be accessed in a timely, affordable and effective way?
2 – Type	**What environmental information is in the public domain relevant to the mining sector?** • About environmental quality? • About environmental impacts on health and factors affecting the local population? • Information about law and policy relevant to the governance of the mining sector? • Meta-information across the sector?

333 UNEP and the Environmental Law Institute, "Environmental Rule of Law – Discussion Paper," December 2016 (on file).

334 For example, the Inter-American Court of Human Rights, interpreting the American Convention on Human Rights in the case of Claude-Reyes v. Chile, stated: '[T]he right to freedom of thought and expression includes "not only the right and freedom to express one's own thoughts, but also the right and freedom to seek, receive and impart information and ideas of all kinds." The International Covenant on Civil and Political Rights, establish a positive right to seek and receive information. (Article 13).

335 These questions are based on the Bali Guidelines and developed from: UNEP, "Putting Principle 10 Into Action: Implementation Guide for the UNEP Bali Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters," pp. 12-13, (2015), http://wedocs.unep.org/handle/20.500.11822/11201

3 – Refusal of Access	**Does national law provide for only specific, limited and legitimate grounds for the environmental/mining authorities to refuse to provide information relevant to the environmental dimension of the mining sector?** • Are the limitations specified and applied according to the law? • Are they interpreted narrowly in an attempt to strike a fair balance between granting the public access to information held by public authorities and protecting such legitimate, legally recognized rights and interests of mining companies (such as legitimate commercially confidential information of mining companies)?
4 – Collection	**Do the environmental/mining authorities collect and update various types of environmental information relevant to the mining sector?** • Are there mandatory systems that ensure that adequate information is provided to public authorities about proposed and existing mining activities that may significantly affect environment? • Is information on environmental performance and compliance by mining sector operators readily available?
5 – Reporting	**Does the government report on the state of the environment, including as a result of mining activities?** • Is the information reported at reasonable intervals and is it up to date? • Does it include information about the quality and pressures on environment that help the public understand the environmental impact of mining?
6 – Emergencies	**Is there a system of disseminating relevant information in event of imminent threat to human health or environment?** • Are there public systems for collection and dissemination of information related to potential emergencies and emergency preparedness? Are mining operators required to provide this information? • Are there emergency response systems to respond to accidents such as a tailings dam collapse or a mining shaft collapse?
7 – Capacity	**Does the government provide means for and encourage capacity-building in environmental awareness for public authorities and the public?**

Box 84

Regional Model Law on Access to Information

A number of regional organizations have developed model laws on access to information that help governments and stakeholders develop appropriate national laws:

- Model Inter-American Law on Freedom of Information (2010)[336]
- Model Law on Access to Information for Africa[337]
- EU Access to Environmental Information Directive[338]

336 www.oas.org

337 http://www.achpr.org/files/news/2013/04/d84/model_law.pdf

338 http://ec.europa.eu/environment/aarhus/legislation.htm

Box 85

Access to Information for Indigenous Peoples

Mexico has committed to providing environmental information in the languages of its indigenous populations. The Mexican Federal Institute for Access to Information and Data Protection (IFAI) and the National Institute of Indigenous Languages

(INALI) signed a cooperation agreement in 2011 to guarantee right of access to information for the 7 million persons who speak indigenous languages in the country, many of them as their sole language.[339]

Box 86

Map-X – Providing authoritative information on the Extractive Sector in a User Friendly Format[340]

A new web platform called Map-X (Mapping and Assessing the Performance of the Extractives Sector) is being developed by UN Environment and the World Bank to help local stakeholders access, share, analyse and visualize authoritative information about extractive projects to inform dialogue, decision-making and compliance monitoring. It

is a tool that can reinforce the implementation of national transparency commitments, such as those under EITI as well as National Action Plans of the Open Government Partnership providing open access to information to all stakeholders, including environmental and mining authorities.

Box 87

Reporting by Private Sector Mining Companies

There are numerous initiatives setting out an increasing range of information that mining companies can be expected or are required to report. These include:
- Global Reporting Initiative (GRI) – Mining Supplement[341]
- The mining companies that are members of the International Council on Mining & Metals commit to independent external assurance of their sustainability reporting practices on *social and environmental performance.*[342]

- Committee for Mineral Reserves International CRIRSCO International Reporting Template[343]

Other initiatives that are looking at the reporting of extractive companies around human rights issue and comparing a ranking mining companies:
Responsible Mining Index[344]
Corporate Human Rights Benchmark – section on extractive companies[345]
UN Guiding Principles Reporting Framework – section on extractive companies[346]

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339 Economic Commission for Latin America and the Caribbean (ECLAC) (2013), Access to information, participation and justice in environmental matters in Latin America and the Caribbean: Current situation, outlooks and examples of best practices. ECLAC-UNITED NATIONS. LC/L.3549/REV.2.

340 *https://www.mapx.io/ - about*

341 https://www.globalreporting.org/resourcelibrary/GRI-G4-Mining-and-Metals-Sector-Disclosures.pdf

342 http://www.icmm.com/en-gb/about-us

343 http://www.crirsco.com

344 http://responsibleminingindex.org

345 https://business-humanrights.org/en/corporate-human-rights-benchmark

346 http://www.ungpreporting.org

Public Participation in Environmental Decision-making

Public participation in environmental decision-making is one of the key means for introducing community values into decision-making. Given the potentially extensive impacts of the mining sector on the environment and society, both positively and negatively, providing for public participation in the governance of the sector, from the policy level to post-closure, is the most legitimate means for taking into account long-term societal relations around the sector. Given that large-scale mining projects can be long-term, sometimes resulting in significant environmental and social changes, public participation processes can improve the general understanding of issues associated with mining. In addition, as the sector involves the depletion of non-renewable resources, public participation may be one of the few means to prompt governments to balance intergenerational considerations of resource depletion.

Public participation has become a core part of environmental decision-making as: 1) a right for those potentially affected by a particular proposal for decision-making; and 2) an administrative tool for better decision-making, based upon a greater range of information, including local knowledge that can help design more robust solutions that will work in local operating environments. The process of dialogue in public participation can increase public acceptance and support of final decisions, especially where public concerns are adequately addressed. Public participation supports social cohesion, promoting further dialogue and public involvement in civic affairs. It can help find common ground, but also makes trade-offs more visible.

The forms and characteristics of public participation in environmental decision-making differ, depending on the nature of the decision. Principle 10 highlights participation along a continuum of types of public authorities' actions – from developing sector-level strategies (at the level of plans, programmes, policies and legally binding rules) down to decisions around particular projects to decisions around localized monitoring. Whereas access to environmental information should be available to 'any person', public participation in environmental decision-making is particularly aimed at the 'public concerned', –giving priority to those who are most affected by the outcome of the decision-making or policymaking who should have a greater chance to influence the outcome (see Box 88 on the public concerned). Participation itself also can take place along a continuum of the levels of participation – ranging from one-way conveying of information (such as through an information session) to active participation (such as consultations on an EIA) to designing solutions through collaboration (such as jointly designing mine site transport routes) to empowering the public to take its own actions (such as local community monitoring of mine-site water emissions).

Any participation should be meaningful: 1) undertaken at a time when proposals are still at a formative stage; 2) providing sufficient information and reasoning to allow those consulted to give intelligent consideration and response; 3) adequate time must be given for consultation and response; and 4) the output of consultation must be given serious consideration when the ultimate decision is made. Participants who are exercising their right to freedom of expression should be protected from risks associated with participation, including from threats by private actors. (See Boxes 21 and 40 on threats to environmental and human rights defenders.) Public participation that is merely pro forma – i.e., that takes place when options are already closed or the authorities have no intention of taking views of the public into account – can diminish the chances for successful implementation because the process has not been legitimate.

The public participation pillar emphasizes the proactive involvement of public authorities in promoting public participation. Authorities are increasingly including provisions in law that place obligations on project proponents to also consult with stakeholders, in addition to the growing range of initiatives from mining industry itself (see Annex III on international standards and initiatives on the mining sector). At the other end of the spectrum, environmental and mining authorities must guard against efforts by project proponents to stay under decision-making thresholds in an effort to avoid public participation (such as by engaging in activities through separate small enterprises in order to keep under size limits).

Bali Guideline No.	General Requirements
8 – Opportunities	**Are there opportunities for public participation in environmental decision-making relevant to the mining sector?** • Are they early on in the process of setting environmental and mining policies? This should be when all options are still open so that public participation procedures are not a mere formality. • Is there an opportunity for the public to participate effectively? This includes opportunities such as legislative hearings at various levels of government, strategic environmental assessment (SEA), spatial planning, sectoral planning down to the level of planning permit, and project-specific EIAs. • Is the concerned public informed in a way that is likely to reach them? Do these notification methods take into consideration local communities and local language requirements?
9 – Proactive	**Do the environmental/mining authorities do more than just make opportunities available – do they proactively promote public participation?** • Do the authorities make efforts to be consultative? • Are they transparent about consultation opportunities or are they only open to selective participants? • Do the authorities know and maintain relationships with many of the environmental and human rights groups in the country and keep them informed of consultations? • Are the authorities alert to the types of incentives and disincentives in place for the public administration to engage in public participation? Are public authorities more responsive to those who are perceived to be in positions of power and influence and inclined to automatically discount the interests of the general public?
10 – Information	**Do the environmental/mining authorities make relevant information available so that the public can participate effectively?** • Is the information objective & balanced? Understandable? For more complex projects, is a non-technical summary available? • Is information provided well enough in advance so that people and groups have enough time to consider it and consult their own stakeholders? • Is the information actively communicated to stakeholders who might be interested in participating? • Is the information available free of charge? • Do the authorities make available all information – for example, not just selected parts of EIA documentation, but the full set of EIA documentation, even information held by the project developers? • Do the authorities take into account the specific circumstances of specific groups and individuals, such as levels of literacy and the use of various minority or non-official languages or the need to set the locations of meetings and consultations in order to reach groups or individuals that are potentially affected?
11 – Due Account	**Do the environmental authorities take due account of public comments as a matter of policy and practice?** • Are final decisions about environmental policies and laws, EIAs, contracting/concessions, etc. made public? • Are they actively disseminated to those who participated in a consultation? • Do the authorities give a reasoned explanation of how they generally took public comments into account and, if not, why not? Does it include the reasoning upon which a decision was based and provide explanation and evidence on how the outcomes of the public participation procedure were taken into account?

12 – Changes	**If major changes are made or decisions are to be reviewed, does the environmental/mining authority invite public participation again?**
	• As the approval process for larger mining projects is often quite complex – for example, requiring a cluster of permits – is there public participation in each relevant phase?
	• Does this happen around mining licenses – for example, where previously unconsidered circumstances have arisen? Or if there are environmentally significant changes?
	• Or is it more ad hoc, to the extent that circumstances permit?
13 – Input	**Do the environmental/mining authorities ensure public input into preparation of legally binding rules and policies, plans and programmes?**
	• Is there public participation in the process of developing policies, plans and programmes relating to environment?
	• For rules for the mining sector that might have a significant effect on environment?
14 – Public Awareness	**Do the environmental/mining authorities provide capacity-building to promote public participation in environmental decision-making?**
	• Do the authorities provide or encourage environmental education and/or awareness-raising?

Box 88

Identifying Projects with a Significant Impact on the Environment that Require Public Participation

The Arhus Convention has a two-part system for identifying projects that are presumed to have a potentially significant effect on the environment and therefore the permitting processes should be open to public participation:

- Annex I contains a list of projects including certain energy, metals and mining sector projects, large-scale animal husbandry, dams, extractives projects and others. It therefore provides a quick reference list for public participation in permitting decisions.
- A second-part catch-all requirement: even if a project is not listed, the permitting procedure should be open to public participation if a project is expected to have a significant impact on the environment.[347]

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347 Arhus Convention, Annex 1, https://www.unece.org/env/pp/welcome.html

Access to Justice

Implementing the access to justice component requires that procedures and remedies be provided to members of the public concerning rights of access to environmental information and rights and opportunities to participate in environmental decision-making. It also opens the way to the public to pursue other protections guaranteed under national laws relating to the environment, such as bringing actions to stop damaging construction or to prompt environmental authorities to take action. If the authorities do nothing to protect the environment when there is a duty to act, then this may also be grounds for complaint. This is one of the most effective mechanisms for taking advantage of the presence, awareness and power of the public to uphold environmental laws and move towards sustainability. Under the Arhus Convention, for example, states must grant 'standing' to environmental NGOs to allow them to bring a claim on behalf of the public and the environment. (See Box 89 on the EDI on access to justice.)

The objective of any administrative or judicial review process is to have erroneous decisions, acts and omissions corrected and remedied. Reviews may look at 'substantive legality' – the legal correctness in substance – i.e., whether the decision is correctly based on the law or an error of law. 'Procedural legality' considers whether the decision maker has failed to act with procedural fairness or in accordance with procedural rules.

Access to justice introduces the involvement of a separate branch of government – the judicial branch. A general characteristic of courts and court-like bodies is that they act independently and impartially outside the administration, i.e., are not instructed by the executive bodies on how to decide a specific case. (See Box 90 on the UNEP Judges Programme.) Because environmental matters are often complex and may require specialized expertise, many countries have established special environmental tribunals. As of 2014, 41 countries around the world had some kind of specialized environmental tribunal. But environmental claims can often also be heard by another type of other independent and impartial body, such as an ombudsman or information commissioner. (See Box 91 on the Costa Rican Ombudsman's actions on environmental issues and Box 92 on the Aarhus Convention Task Force on Access to Justice.)

'Adequate' remedy means the remedy should compensate fully past damage, prevent future damage and perhaps also require restoration. In environmental cases, remedies such as compensation and restitution are often insufficient for full restoration of ecological services, given the irreversible impacts of many environmentally hazardous acts and activities. Provisional measures, such as injunctive relief – orders to stop projects or to stop authorities from taking actions – are therefore important remedies to avoid irreversible damage. The valuation of environmental losses for compensation purposes is a difficult and controversial task. International agreements such as the UN Convention on the Law of the Sea contain detailed legal provisions concerning compensation for environmental harm.

Bali Guideline No.	General Requirements on Access to Justice
15 – Review for Information Requests	**Do the environmental/mining authorities provide access to review procedures relating to information requests?** • Can anyone who has made a request for environmental information ask for a review of a decision to deny or withhold information? • Is the review heard by a court of law or other independent, impartial body?
16 - Review for Public Participation	**Do the environmental/mining authorities provide access to review procedures relating to public participation?** • Can anyone who has been denied or restricting from public participation by public authorities ask for a review – for substantive and procedural legality? • Is the review heard by a court of law or other independent, impartial body? • Does this cover not only acts or decisions of the authorities, but also omissions?

17 – Review of Environmental Violations	**Do the environmental/mining authorities provide access to review procedures relating to public or private actors affecting the environment or allegedly violating substantive or procedural legal requirements relating to protection of the environment?** • Can anyone ask for a review – for substantive and procedural legality? • Is the review heard by a court of law or other independent, impartial body? • Does this cover not only acts or decisions of the authorities, but also omissions?
19 – Standing to Bring an Environmental Claim	**Does the law permit a wide range of people to bring a claim to public authorities about environmental protection so as to provide effective access to justice?** • Does the law provide for a review of decisions taken about the environmental that is effective and timely? • Can the claim be brought by environmental NGOs? • Is the review fair, open, transparent and equitable – steps to 'level the playing field' for especially vulnerable individuals or relatively powerless groups who bring a claim?
20 – Removing Barriers to Access to Justice	**Are access to justice procedures available at a minimum cost and is assistance available?** • As the environment does not have the capacity to defend itself in court, it is often up to private people to bring claims to defend the environment. In cases of high environmental importance, is there a reduction or elimination of fees? • Have the authorities removed other barriers such as around timing, cost and requirements for representation to make it easier for people to bring environmental claims?
21 – Remedies	**Are there 'prompt, adequate and effective remedies' available for environmental damage?** • Does that include injunctive relief (orders to stop an activity) where the environment may be threatened? • Is there a possibility to obtain compensation for environmental harm or restitution of the situation?
22 – Enforcement	**Is there timely and effective enforcement of decisions taken?** • Do the environment/mining administrations have the authority they need to follow up on orders to stop environmental damage or to order payment for compensation?
23 – Information about Access to Justice	**Is information provided about access to justice procedures for environmental issues made available?** • Is there adequate information about access to justice provided to the public? And is it provided proactively? This may include using radio, television and internet.
24 – Information about Decisions	**Are decisions about environmental justice matters made publicly available in accordance with the law?** • Is information provided to the public proactively? Are judgments at least publicly available?
25 – Capacity-Building	**Does the government promote capacity-building programmes around access to justice on a regular basis?** • Does it provide training on environmental issues not only for regular judges, but also for specialized environmental tribunals?

26 – Alternative Mechanisms for Dispute Resolution on Environmental Matters

Is alternative dispute resolution for environmental issues promoted where appropriate?

- 'Alternative dispute resolution' refers to settling disputes outside the judicial or administrative process, such as through mediation, conciliation, negotiation or arbitration. This could also involve an ombudsman who closely resembles an arbitrator or mediator. Are any of these mechanisms available?

Box 89

The Environmental Democracy Index (EDI) on Access to Justice

In 2015, The Access Initiative and the World Resources Institute launched the Environmental Democracy Index (EDI), the first global benchmark of laws protecting access to information, participation and access to justice in environmental decision-making. EDI consists of 75 legal indicators and 24 practice indicators that score how well a country's national laws measure up to the UNEP Bali Guidelines on Principle 10 while also providing a snapshot of how effective some of these laws are in practice. Through consistent, accessible and credible evidence, EDI aims to catalyse civil society and governments to identify and address environmental democracy weaknesses within a nation's laws and policies. The index will be conducted every two years to allow benchmarking and the developers intend to expand its scope to 100+ countries by 2016.[348]

Box 90

The UNEP Judges Programme

The UNEP's Judges Programme produces materials for national or regional training programmes for judges and other legal professionals. These include the UNEP 'Training Manual on International Environmental Law', the UNEP 'Judges' Handbook on Environmental Law', the UNEP 'Guide to Global Trends in the Application of Environmental Law by National Courts and Tribunals', and the UNEP 'Compendia of Summaries of Judgments in Environment-Related Cases'.[349]

Box 91

Costa Rican Ombudsperson's Environmental Actions

The Office of the Ombudsperson is an independent body of the Costa Rican Legislature that has the general responsibility of protecting the rights and interests of Costa Ricans by ensuring that the public sector meets standards set by the Constitution, statutes, conventions, treaties and general principles of law, as well as standards of morality and justice. It has the authority to investigate, either on its own initiative or upon request, complaints of alleged human rights violations by public authorities, can initiate judicial or administrative proceedings to address such violations and can also participate in the legislative process, in order to promote the human rights of citizens. Much of the work of the Ombudsperson in recent years has concerned environmental issues.[350]

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348 http://www.wri.org/tai

349 http://www.unep.org/delc/JudicialTrainingModulesEnvironmentalLaw/tabid/102283/Default.aspx

350 From the UN Special Rapporteur on Human Rights and the Environment's Environmental Rights Database, http://environmentalrightsdatabase.org/costa-rican-ombudspersons-environmental-actions/

Box 92

Arhus Convention Task Force on Access to Justice

The Task Force on Access to Justice to support the implementation of the third pillar of the Convention carries out a number of functions, including providing a platform for sharing of information, experiences and good practices related to access to justice (through e.g., collection and dissemination of relevant practices and establishment of portal for the relevant jurisprudence); providing capacity-building and training; and examining how remedies are handled in representative countries.[351]

351 http://www.unece.org/environmental-policy/treaties/public-participation/aarhus-convention/envpptfwg/ envppatoj/background.html

Annex II

Using the Ecosystem Services Approach for Assessing the Mining, Ecosystems and Human Rights Nexus[352]

This Annex focuses on the linkages between ecosystems services, human well-being and human rights. Human well-being and thus human rights hinge on ecosystem services. Globally, there is a growing demand for ecosystem services and the associated challenges are compounded by increasingly serious degradation in the capability of ecosystems to provide these services. One challenge for decision makers is that mining often poses an increasing demand for ecosystem services such as water and at the same time; it also seriously degrades biodiversity and ecosystems.

This Annex highlights tools that can help decision makers assess the connections between ecosystems services and human rights for safeguarding biodiversity, healthy ecosystems and human well-being in the context of the mining sector.

Biodiversity refers to the diversity of life on Earth. It is essential for the functioning of ecosystems that underpin ecosystem services that, in turn, ultimately affect human well-being. Ecosystem services are the benefits people obtain from ecosystems.

Box 93

Further Explanations of Terminology

Biodiversity is defined more specifically in the Convention on Biological Diversity – the international convention established to conserve biodiversity, manage sustainable use and ensure the fair and equitable sharing of the benefits – as "the variability among living organisms from all sources, including terrestrial, marine, and other aquatic eco-systems and the ecological complexes of which they are part; this includes diversity within species, between species, and of ecosystems."[353]

The importance of the definition is that it:
- Draws attention to the **many dimensions of biodiversity** – diversity at multiple scales of biological organization (genes, populations, species and ecosystems) that can be considered at any geographic scale (local, regional or global)
- Includes all ecosystems – managed or unmanaged, so this includes plantations, farms, croplands, aquaculture sites, rangelands or even urban parks and urban ecosystems, as they have their own biodiversity

- Highlights that species diversity in and of itself, for example, is valuable because the presence of a variety of species helps to increase the capability of an ecosystem to be resilient in the face of a changing environment and, at the same time, an individual component of that diversity, such as a particular food plant species, may be valuable as a biological resource. It also recognizes intrinsic values of biodiversity i.e., beyond their use value, they have a value in themselves as part of nature.

Ecosystem services are the benefits people obtain from ecosystems, categorized as:

- **Provisioning services** such as medicines, timber for construction and fuel, food and water
- **Regulating services** such as climate regulation, floods, disease, wastes and water quality
- **Cultural services** such as the spiritual enrichment, cultural heritage, recreation and tourism and aesthetic benefits
- **Supporting services** such as nutrient cycling, water cycling soil formation and photosynthesis.

For example, aside from regulating carbon dioxide levels in the atmosphere, forests play an important role in retaining sediment and maintaining clean water for downstream populations that rely on rivers and streams for their drinking water. They are also important in helping maintain dry-season base flows. Mangroves and other coastal habitats play an important role in protecting people who live along the coast from storms, which may be exacerbated by climate change.

Resilience

- Refers to the capacity of a socio-ecological system to support human well-being in complex and dynamic changes to the system, including in a context of sudden and unexpected events.[354] More diverse ecosystems are more resilient to unexpected and sudden events such as disasters events of natural or/and man-made sort as well as to the long-term and progressive threats posed by climate change.[355]

The Ecosystem and Well-being Framework and Its Application to Mining

The Ecosystems and Well-being (ES) Framework (see Figure 1) was developed as part of the Millennium Ecosystem Assessment (MEA) that assessed the consequences of ecosystem change for human well-being. From 2001 to 2005, the MEA involved the work of more than 1,360 experts worldwide to produce a state-of-the-art scientific appraisal of the condition and trends in the world's ecosystems and the services they provide, as well as the scientific basis for action to conserve and use them sustainably.[356] By examining the environment through the framework of ecosystem services, it becomes much easier to identify how changes in ecosystems influence human well-being and to provide information in a form that decision-makers can weigh alongside other social and economic information. The ES Framework:

→ Places **human well-being as the central focus for assessment** while recognizing that biodiversity and ecosystems also have intrinsic value and that people take decisions concerning ecosystems based on considerations of well-being and intrinsic value.

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354 Biggs, R., Schlüter M., and Schoon, M. L. (2015) Principles for Building Resilience: Sustaining Ecosystem Services in Social-Ecological Systems. Cambridge University Press

355 World Health Organization and Secretariat of the Convention on Biological Diversity (2015), Connecting Global Priorities: Biodiversity and Human Health — a State of Knowledge Review, Geneva

356 See: https://www.millenniumassessment.org/en/index.html

Highlights that **biodiversity contributes directly** (through provisioning, regulating and cultural ecosystem services) and indirectly (through supporting ecosystem services) to many constituents of human well-being, including security, basic material for a good life, health, good social relations, and freedom of choice and action.

Focuses on the **interconnections** between ecosystem services and different dimensions of human well-being, as they are **affected by changes in environmental quality and quantity**.

Figure 2: The ES Framework as applied to extractive industries (red rings exemplify effects from mining on ecosystem services to human well-being, while the breadth and colour of arrows are kept intact from the general MEA framework and hence are not adopted to the case of extractive industries)

Source: Millennium Ecosystem Assessment Framework adapted by the authors

Box 94
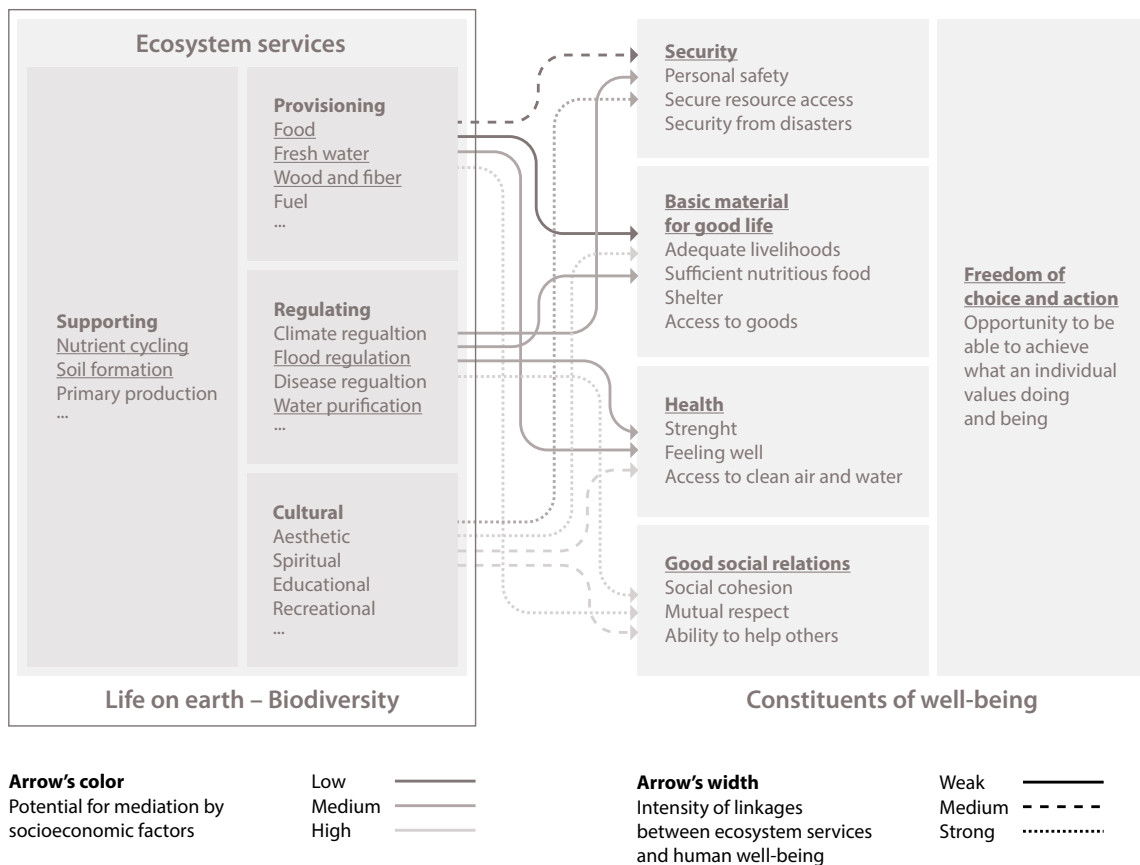
Further Explanations of the ES Framework from the Millennium Ecosystem Assessment

Ecosystem changes affect human well-being in the following ways:

- **Security** is affected by changes in provisioning services, which affect supplies of food and other goods and the likelihood of conflict over declining resources, and by changes in regulating services, which could influence the frequency and magnitude of floods, droughts, landslides or other catastrophes. It can also be affected by changes in cultural services such as when the loss of important ceremonial or spiritual attributes of ecosystems weakens social relations in a community. These changes, in turn, affect material well-being, health, freedom and choice, security and good social relations.
- **Access to basic material for a good life** is strongly linked to provisioning services such as food and fibre production and regulating services, including water purification.
- **Health** is strongly linked to provisioning services such as food production and regulating services, including those that influence the distribution of disease-transmitting insects and of irritants and pathogens in water and air. Health can also be linked to cultural services through recreational and spiritual benefits.
- **Social relations** are affected by changes to cultural services, which affect the quality of human experience.
- **Freedoms and choice** are largely predicated on the existence of the other components of well-being and are thus influenced by changes in provisioning, regulating or cultural services from ecosystems.[357]

This framework's visual tools are relatively pedagogical and easily understood as compared to other extensions of the ES Framework. Yet they include the main social-ecological dynamics and complexities. These are crucial for sound analysis and multi-actor dialogue between rights-holders and duty bearers such as governments in distinct sectors, the mining industry and institutions that finance mining and related infrastructure such as dams for water provision.

Going a Step Further – Applying the ES Framework to Understand and Act upon the Impacts on Human Rights

The Millennium Ecosystem Assessment helped to build bridges highlighting the links between ecosystem services and human well-being. In parallel, the Rio Declaration and subsequent developments sparked development of the links between human rights and environmental protection more generally (see Annex I on Principle 10).

In 2017, the UN Special Rapporteur on Human Rights and the Environment, Professor John Knox,[358] made a further step in linking biodiversity and related ecosystem services to the full enjoyment of substantive and procedural human rights.[359]

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357 MEA (2005), Ecosystems and Human Well-being – A Framework for Assessment, p. 13, https://www.millenniumassessment.org/en/Framework.html

358 For biographical details and information on the work of the Special Rapporteur, see http://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/JohnKnox.aspx

359 Knox, J. (2017), Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, A/HRC/34/49. http://srenvironment.org/2017/01/19/report-on-biodiversity-and-human-rights/

Substantive obligations: Using the example the right to water and impacts of mining

Biodiversity underpins healthy ecosystems and continued provision of ecosystem services, in turn affecting substantive human rights such as the right to water and the right to health, e.g., growing evidence shows that contact with diverse habitats and many distinct species has important positive impacts for human health, a constituent of well-being.

Among the many distinct connections between ecosystem services and substantive human rights, here we will focus on highlighting the nexus of mining impacts on ecosystem services and the right to water. The mining industry typically has significant impacts on water, but is also strongly reliant on water for processing and for hydroelectric plants supporting its high demand for energy. But water also provides vital ecosystem services as highlighted above in Figure 1. Given its importance to many dimensions of human well-being, the UN in 2010 specifically recognized the human right to safe drinking water and sanitation as a separate right; it is also an important component of the right to an adequate standard of living. Regional human rights mechanisms such as the African Commission on Human and People's Rights, the European Court of Human Rights and the Inter-American Court of Human Rights have also contributed to interpreting the content of the water-related obligations, as have various courts under national law.[360]

But what does 'the right to water' mean? The right to water is a right for personal use. It does not apply to companies or operations like the mining sector. Instead, decision makers must consider the mining sector's demand for water use in light of the rights of individuals and the communities to water. The UN Committee on Economic, Social and Cultural Rights, in its General Comment No. 15 (2002), emphasizes that, as with other human rights, the right to water includes obligations to respect, protect and fulfil human rights:[361]

→ **Respect** human rights that require States from refrain from interfering directly or in-

directly with the enjoyment of the right to water such as by arbitrarily interfering with customary or traditional arrangements for water allocation or unlawfully diminishing or polluting watersheds and water-related ecosystems through waste from State-owned mining companies

→ **Protect** human rights that require States to prevent third parties such as non-state owned (i.e., private) mining companies from interfering with the enjoyment of the right to water

→ **Fulfil** human rights that require States to adopt the necessary measures such as sufficient recognition of this right within the national political and legal systems, preferably by way of legislative implementation; adopt a national water strategy and plan of action to realize this right; ensure that water is affordable for everyone; and facilitate improved and sustainable access to water, particularly in rural and deprived urban areas

In order to help governments and others set parameters around the right to water, the UN Committee on Economic, Social and Cultural Rights also sets out the different aspects of the right to water:

→ **Availability** – whether there is a sufficient amount of water available within a given geographical area (e.g., a country, a district or a village) and whether there is a regular supply of water over time. It is an objective criterion that can be measured through quantitative data (e.g., amounts of water and duration of water cuts).

→ **Accessibility** – has at least four dimensions – (i) *physical accessibility* means that water must be within physical reach and that it can be accessed without physical threats; (ii) *economic accessibility* is often referred to as 'affordability'; (iii) *information*

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360 WaterLex and WASH United 2014, The human rights to water and sanitation in courts worldwide. A selection of national, regional and international case law, http://www.waterlex.org/new/wp-content/uploads/2015/01/Case-Law-Compilation.pdf

361 See the General Comment on water, UN Doc, E/C.12/2002/11 (2003), http://www2.ohchr.org/english/issues/water/docs/CESCR_GC_15.pdf

accessibility of information on water; and (iv) *non-discrimination*, which cuts across all dimensions of accessibility.

→ **Acceptability** – refers to consumer acceptability of water in terms of colour, odour, taste and cultural acceptability.

→ **Quality – water** must be safe; the state must prevent, control and treat water-related diseases; and water facilities and services must be of sufficient quality. This can be defined by reference to water quality standards issued by technically competent, internationally recognized authorities – WHO or UNICEF.[362]

Procedural obligations

Substantive rights such as right to water and right to health often depend on procedural rights. The procedural human rights obligations of States in relation to the environment include the three rights covered by Principle 10 (access to information, public participation and access to justice, including remedy) (see Annex I). For example, States have specific procedural obligations before granting a mining concession or authorizing a dam that would cause the degradation or loss of biodiversity. These obligations include assessing the environmental and social impacts of the proposal, including through the ESIA processes, and facilitating people's exercise of their rights to freedom of expression and association and public participation in the decision-making processes. Operationalizing the rights to public participation can contribute to better-informed decision-making about ecosystem services (see d) below). Procedural rights also include the right to access effective legal remedies for those who claim that their rights have been violated.[363] Hence, from a human-rights perspective, a key focus is how distinct and interdependent rights are affected by mining and how to manage ecosystem services in a way that secure equality, dignity and well-being for all.

Obligations concerning people in vulnerable situations

Adverse impacts to ecosystems by mining activities may have disproportionately severe effects on the enjoyment of human rights of members of minorities or indigenous peoples who rely directly on the ecosystems through traditional activities such as fishing. In these cases, States have heightened procedural obligations such as positive legal measures to ensure the effective participation of members of minority communities in decisions that adversely affect their relationship with the ecosystems they depend on as well as obligations concerning substantive rights such as the protection of the ecosystems themselves. Sometimes, whole groups, such as indigenous peoples or ethnic minorities, can be in a vulnerable situation, but so can be sub-populations, such as women and children and the landless. In communities who depend directly on the ecosystems for their livelihoods, women and children often must fetch water. Restrictions on the physi-

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362 See also Holst Jensen, M., Villumsen, M. Døcker Petersen, The AAAQ Framework and the Right to Water, (2014), https://www.humanrights.dk/publications/aaaq-framework-right-water-international-indicators

363 Knox, J., (2013) Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, Compilation of good practices, A/HRC/28/61; Ituarte-Lima, C., (2017) Transformative biodiversity law and Agenda 2030: mainstreaming biodiversity and justice through human rights in Butter, B. Risk, Resilience, Inequality and Environmental Law, Edward Elgar Publishing, pp. 84-107.

cal accessibility of clean water can affect the possibilities particularly of girls to attend school and hence affect the conditions of a specific group to exercise their rights to education.[364]

Ecosystem degradation often has its most direct and severe impact on people under poverty conditions in rural settings. Wealthier segments of the population control access to a greater share of ecosystem services and can often purchase alternative access to services or offset local losses of ecosystem services by shifting production and harvest to other regions. For rural people in poverty situations, who are often the most affected by mining, substitutes for access to biodiversity and ecosystem services and alternative choices are often very limited. This has led to many conflicts between competing social groups or individuals over access to and use of biological products and ecosystem services. For these reasons, disaggregating the ecosystem services used by different sections of society and understanding and addressing how they will be impacted by mining operations can support the operationalization of the human rights principle of equality and non-discrimination.[365]

Drawing attention to inclusive building of knowledge of ecosystem services

In many countries, knowledge of ecosystems services is intimately interlinked with populations who use the ecosystem services every day. They often possess an indigenous knowledge of the biodiversity and ecosystem services that is not otherwise accessible to decision makers.

Using the ES Framework to understand and act upon the impacts of mining on ecosystem services and impacts on human rights – Using the right to water as an example

Using the right to water as an example and referring to Figure 1, Table 1 gives an example of how the ES Framework can also be used to understand and act upon the impacts of mining on ecosystem services and impacts on human rights. The ES Framework can help identifying different ecosystem services such as protection against erosion and purification of water as well as how mining affects the human rights of different groups.

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364 For more discussion on water, environment and justice nexus, see Hey, E. (2009) 'Distributive justice and procedural fairness in global water law', in J. Ebbesson & P. Okawa (eds.), Environmental Law and Justice in Context, Cambridge University Press.

365 See Daw, T., Brown, K., Rosendo, S. and Pomeroy,R., (2011) Applying the ecosystem services concept to poverty alleviation: the need to disaggregate human well-being, Environmental Conservation 38 (4), 370–379 and Ituarte-Lima, C., Schultz, M., Hahn, T., McDermott, C., and Cornell, S. (2014) Biodiversity financing and safeguards: lessons learned and proposed guidelines, Stockholm: SwedBio/Stockholm Resilience Centre at Stockholm University, Information Document UNEP/CBD/COP/12/INF/27 for the 12th Conference of the Parties of the Convention on Biological Diversity in Pyeongchang, Korea

Table 1

Using the ES Framework to Consider the Right to Water in Mining (examples)

Ecosystem Service	Direct or Indirect Impact of Mining	Using the ES Framework can highlight how mining affects human well-being through:	Associated links to human rights[366]
Provisioning	Depletion of groundwater/ unsustainable extraction of surface water	• A **strong link** between the provisioning service provided by **water → negative impact on basic material for good life as a dimension of human well-being**, would be indicated by the broad arrow. • A **low potential** for **mediation by socio-economic factors** between the provisioning service **water purificationà basic material for good life as a dimension of human well-being**, would be indicated by the light colour of the arrow.	*Right to an adequate standard of living, Right to water, Right to food and Right to education* Mining impacts can limit the **physical accessibility** of clean water e.g., by diverting rivers in order to provide for dammed water used in hydroelectric plants for mining operations • Which limits use for productive purposes such as agriculture, affecting the right to food • Which can affect the time spent to collect water and hence the possibilities particularly of girls to attend school and to exercise their rights to education.[367]
Regulating	Contamination of watersheds	• A **strong link** between the provisioning service provided by **water → negative health impact as a dimension of human well-being**, would be indicated by a broad arrow. • A **weak potential** for **mediation by socio-economic factors** between the provisioning service provided by **water → health** would be indicated by light colour of the arrow. This would mean that it is not possible to substitute the water with something else in order to keep the impact on human well-being unchanged.	*Right to life, Right to health & Right to water* Water pollution by mining may affect: • **Quality** of water drinking polluted water may impact the health or life of people; pregnant women and children may be at a greater risk. • Colour, odour and taste of water used for personal or domestic use with impacts on **acceptability** of the water. This, in turn, may prompt people to resort to unsafe water alternatives.

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366 As set out in the International Covenant on Economic, Social and Cultural Rights (1976) http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx

367 For more discussion on water, environment and justice nexus, see Hey, E. (2009) 'Distributive justice and procedural fairness in global water law', in J. Ebbesson & P. Okawa (eds.), Environmental Law and Justice in Context, Cambridge University Press

| Regulating	Deforestation in order to enable open-pit mining reduces the flood regulation ecosystem service	• A **strong link** between the regulating service **flood regulation → security as a dimension of human well-being**, would be indicated by a broad arrow. • A **weak potential** for **mediation by socio-economic** factors between the provisioning service provided by **water purification → security from flooding** would be indicated by light colour of the arrow. This would mean that it is not possible to substitute the flood control with something else in order to keep the impact on human well-being unchanged.	*Right to an adequate standard of living & Right to Food & Right to adequate housing* • Mining impacts can prompt flooding such as by dam breaks – for example, when these dams are not strong enough to withstand torrential currents during the typhoon season, earthquakes or emergency releases, or through deforestation that reduces nature's own flood control. These impacts can, in turn, affect local cultivation grounds, causing food insecurity and also affecting residential areas.
Cultural	Contamination of watersheds and inundation of land for dams to provide water for mining	• A **strong link** between the cultural service **spiritual aspects → possibly all aspects of human well-being, including health and good social relations as a dimension of human well-being**, would be indicated by a broad arrow. • A **weak potential** for **mediation by socio-economic factors** between the cultural service provided by **the spiritual aspects → possibly all aspects of human well-being** would be indicated by light colour of the arrow. This would mean that it is not possible to substitute the spiritual aspects from the ecosystem service with something else in order to keep the impact on human well-being unchanged.	*Indigenous peoples and local communities rights to ownership and control over their ancestral lands and resources* • Inundation and siltation by large-scale corporate mining and associated dams can cause the dislocation of indigenous peoples and local communities from their ancestral lands and traditional livelihoods such as swiddens, hunting, grazing livestock, household gardens with vegetables and traditional medicinal plants.

Going another Step Further – Adding Other Dimensions to the Analysis

The additional conceptual framework from the Millennium Ecosystem Assessment (see Figure 2) adds to the ES Framework above by nesting the considerations of impacts on ecosystem services within an even broader framework that introduces consideration of:

→ **Time horizons** (short-term, medium-term and long-term)

→ **Spatial dynamics/scales** (local, regional, global) (for example, a global market may lead to regional loss of forest that increases flood magnitude along a local stretch of a river)

→ **Factors** that **indirectly affect ecosystems**, such as population, technology and lifestyle (*upper right corner*) that can lead to **changes in factors directly affecting ecosystems**, such as the catch of fisheries or the application of fertilizers to increase food production (*lower right corner*).

→ The resulting changes in the **ecosystem** (*lower left corner*) cause the ecosystem services to change

→ Thereby **affect human well-being** (*top left-hand corner*)

Figure 3: Millennium Ecosystem Assessment Conceptual Framework of Interactions among Biodiversity, Ecosystem Services, Human Well-being and Drivers of Change

Source: Adaption from MEA (2005) by the authors
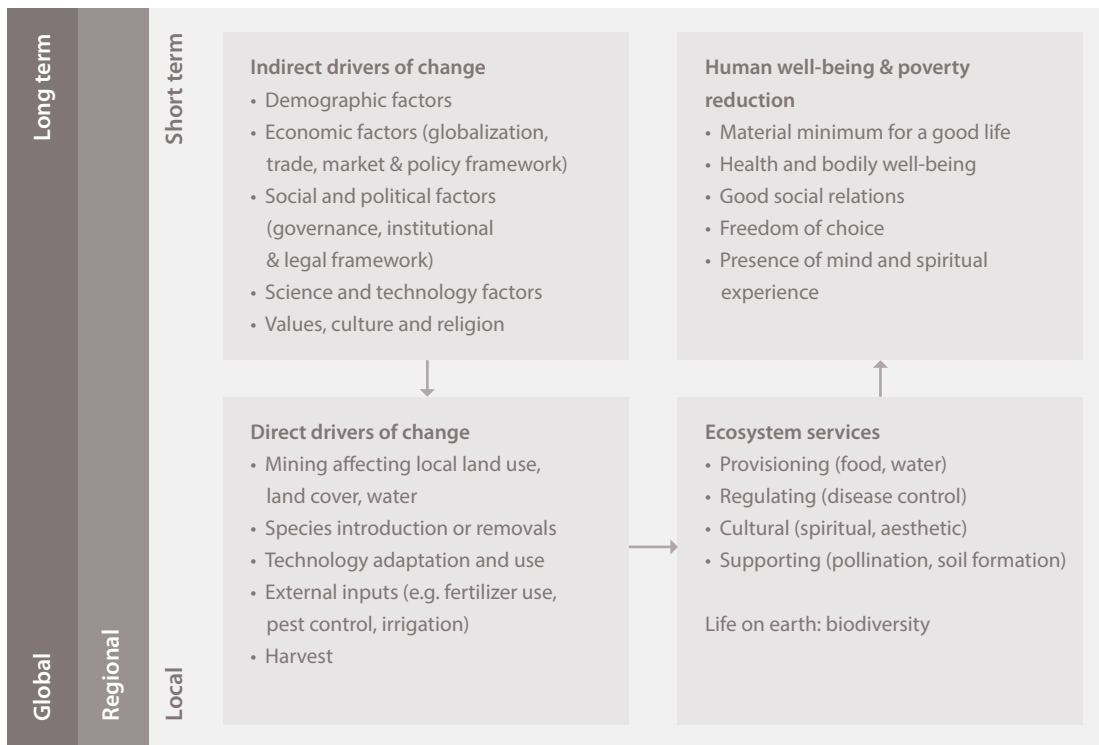
The Framework emphasizes that, in order to implement the ecosystem approach, decision makers need to understand the multiple effects on an ecosystem of any management or policy change and to consider the consequences of changes for multiple sectors. For example, providing a subsidy for fertilizers may increase food production, but sound decision-making also requires information on whether the potential reduction in the harvests of downstream fisheries as a result of water quality degradation from the might outweighs those benefits.[368] Applied to the mining sector, the broader Framework can help decision makers structure an assessment and decision-making process that takes account of this broader systems analysis when considering whether to permit mining, to use the areas for other uses or to protect the area's nature. When society has multiple goals, many of which depend on biodiversity, ecosystem services and the many constituents of well-being, difficult decisions involving trade-offs among competing goals have to be made.

Mining impacts on, for example, water have wide spatial distribution and often wide-ranging and irreversible effects over time (see Box 3). Therefore, what may appear as a sound use of water today needs to be assessed through the lens of the full user chain of water today and in the future, locally and beyond. Hence, mining needs to be carefully considered in the broader context of how it may affect such important matters of national security as the current and future ability of the country to supply its population with sufficient water and food, and the long term-prospects of local and regional economies. Such effects on water can be of substantial importance for local livelihoods, but may also have regional, national or even international relevance.

Box 95

Examples of Spatial and Temporal (Time) Impacts of Mining – the Case of Water

Spatial impacts	Mining can influence the local and regional hydrology by altering ground water and river regimes:
	• Through the construction of dams, and then from seepage, above-normal release of water from dams e.g., due to heavy precipitation, collapse of dams
	• Through road construction and other infrastructure that themselves affect water
	• Due to excavations that cause seepage into the groundwater
	• Drying up nearby streams or wells through extraction
	• Earth displacement may also cut across and thereby connect underground aquifers
	• Through increased use of water by the influx of migrant workers and support services to the mining operations and to the families of these mining workers.[369]
	• Indirectly by other land use changes such as deforestation which eliminates the forest's water buffering and water purifying ecosystem services
	Mining affects the surface water quality that then has extended spatial impacts throughout river basins and through:
	• Pollution such as acid mine drainage, metal contamination, etc.
	• Increased sediment levels and increased contaminated sediments in streams from its processes[370]

368 UNEP (2010), Ecosystems And Human Well-Being, http://www.unep.org/publications/

369 If managed with sustainability in mind, mining can indeed contribute positively to water issues by building appropriate water supply infrastructure to local populations.

370 UNEP (2010) Ecosystems and Human Well-Being, El Maghara, Northern Sinai, Egypt, http://wedocs.unep.org/handle/20.500.11822/7604

	These challenges increases when mining operations occur in difficult geographical settings and in challenging climate zones, containing fragile ecosystems and exposed human settlements.[371]
Impacts over time	Decision makers also need to consider the temporal impacts of mining on water, considering the rights and interests of future generations to such a vital resource.[372] In doing so, they must consider factors such as:
	• Future supply and demand for water in a mining context
	• There are already evident efforts of the mining industry to secure access to future water sources for their mining operations in a context of anticipated increased competition for this resource, especially in a context of climate change. Authorities have the obligation to prevent State- and non-state-owned mining companies from interfering in any way with the enjoyment of the right to water in short and long terms.

Using the ES Framework – Further Explanations, Tools and References

The ES Framework has several advantages:

→ The ES Framework is intrinsically multidisciplinary, making explicit how the environment contributes to human well-being.

→ Its systemic approach allows to first join an economic activity such as mining to the framework, and subsequently to assess the full range of possible effects that such activity has on the environment and on human well-being, through time and across space.

→ The ES Framework is well-known and has a large buy-in amongst practitioners (e.g., ES is already stipulated in Colombian national mining regulation and in international law such as the CBD).

→ As is argued here, because the ES Framework explicitly has human well-being in contrast to environmental quality as an end point in the analysis, the framework provides a direct entry to assessing human rights impacts.

The ES Conceptual Framework is typically applied to help design assessments of projects to understand their impacts on biodiversity and ecosystem services and, in turn, the effects that they may have on human well-being.

Applying the Framework to mining can help decision makers:

→ The ES Framework can serve as a tool to operationalize fundamental human rights principles. It can support the identification of how the ecosystem alterations caused by mining affect the constituencies of human well-being that are linked to human rights.

→ The Framework helps to assess the impact and trade-offs that different economic activities have on human welfare. This is done for each ecosystem service, asking whether it is affected by the mining venture and, if so, in what way, to which degree and how it affects other economic activity or house-

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371 ICMM (2013) Adapting to a changing climate: implications for the mining and metals industry. International Council on Mining & Metals. http://www.icmm.com/document/5173

372 UN CESCR General Comment 15, General Comment No. 15 (2002) The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), http://www2.ohchr.org/english/issues/water/docs/CESCR_GC_15.pdf

holds. This provides a transparent common ground for multistakeholder dialogue and further detailing of the nexus between mining, human well-being and human rights, through different localities and over time. A trade-off occurs when the extraction and use of one service has an impact on the benefits that can be realized from another service or another economic use.

→ Finally, the Framework can help make explicit and therefore transparent the trade-offs across different locations and time.

→ An example applying the ES framework to mining: UNEP (2010) Ecosystems and Human Well-Being, El Maghara, Northern Sinai, Egypt.[373]

Further Reading

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373 http://wedocs.unep.org/handle/20.500.11822/7604

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Annex III

Selected International Standards and International Good Practice Guidance

Selected International Standards and Guidance for Governments On Mining

Standard	Description	Website
Environmental Procedural Rights		
Principle 10	Principle 10 of the Rio Declaration on Environment and Development issued during the 1992 United Nations Conference on Environment and Development (UNCED), informally known as the 'Earth Summit', acknowledges the key role that the following important procedural rights play in the transition towards environmentally sound and sustainable develop: • The right of everyone to receive environmental information that is held by public authorities (access to environmental information) • The right to participate in environmental decision-making (public participation in environmental decision-making) • The right to review procedures to challenge public decisions that have been made without respecting access to information or public participation rights or environmental law in general (access to justice)	http://www.unep.org/stories/story/unep-implementing-principle-10-rio-declaration
Aarhus Convention	The United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998) (the Aarhus Convention) covers the three rights covered by Principle 10, putting them into a legally binding convention. It paves the way for their universal application as the Aarhus Convention is open to accession from all countries and not just those in Europe.	https://www.unece.org/env/pp/introduction.html
Mining / Natural Resource Specific Standards & Guidance		
Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF) – Mining Policy Framework (MPF)	The IGF is a global, intergovernmental policy forum on mining and sustainable development with membership open to all member countries of the UN that have an interest in effectively managing their mining/metal sector for development benefits. The objectives of the Forum are to improve, enhance and promote the contribution of the mining, mineral and metals sector to sustainable development and poverty reduction. The Mining Policy Framework is intended to provide a comprehensive model that, progressively	http://igfmining.org http://igfmining.org/mining-policy-framework/

	implemented, will allow mining to make its maximum contribution to the sustainable development of developing countries. A wide range of labour rights standards that cover the human rights of workers developed through the ILO. It provides guidance on: (i) the legal and policy environment; (ii) financial benefit optimization; (iii) socio-economic benefit optimization; (iv) environmental management; (v) post-mining transition; and (vi) artisanal and small-scale mining. The IGF Secretariat leads expert teams in conducting demand-driven Mining Policy Assessments to support governments in improving their mining policy and legal frameworks.	
The World Bank Mining Investment and Governance Review (MinGov)	The MinGov review provides an assessment framework to help governments identify areas to strengthen governance of the sector, attract mining investment and improve the use of resource revenues for sustainable national development. The methodology provides a detailed set of indicators and questions to help governments further develop their policy and legal frameworks on the areas covered in this Guide. The MinGov assessment framework covers the following areas: (i) policy, legislation and regulation; (ii) accountability and inclusiveness; institutional capacity and effectiveness; (iii) economic environment; (iv) political environment; (v) sustainable development; and (vi) mining sector importance.	http://www.worldbank.org/en/programs/mingov
African Union – Africa Mining Vision (AMV)	The AMV has been formulated by African nations and sets out a vision about how mining can be used to drive continental development and provides guidance to African governments in developing their own mining policies. The vision is of: "Transparent, equitable and optimal exploitation of mineral resources to underpin broad-based sustainable growth and socio-economic development". The AMV 2011 Action Plan sets out nine areas of action.	http://www.africaminingvision.org
Asia – ASEAN Minerals Cooperation Action Plan	The Action Plan seeks to support ASEAN governments to "*[c]reate a vibrant and competitive ASEAN mineral sector for the well-being of the ASEAN people through enhancing trade and investment and strengthening cooperation and capacity for sustainable mineral development in the region*". The four strategic areas for work are: (i) facilitating and enhancing trade and investment in minerals; (ii) promoting environmentally and socially sustainable mineral development; (iii) strengthening institutional and human capacities in the ASEAN minerals sector; and (iv) maintaining an efficient and up-to-date ASEAN minerals database, including its infrastructure towards achieving integration in the minerals sector.	http://www.asean.org/storage/2015/12/AMEM/AMCAP-III-(2016-2025)-Phase-1-(Final)2.pdf
Natural Resources Governance Institute's Natural Resource Charter & Benchmark Framework	The Natural Resource Charter is a set of principles to guide governments and societies on harnessing the opportunities created by extractive resources for development. The Natural Resource Charter Benchmarking Framework is a tool for benchmarking a country's management of oil, gas and minerals against global best practices. The Framework draws on the policy options and practical advice of the Natural Resource Charter and consists of a series of questions that can use to structure research, discussions and strategic planning.	https://resourcegovernance.org/approach/natural-resource-charter http://www.resourcegovernance.org/analysis-tools/tools/natural-resource-charter-benchmarking-framework
The UNDP-ACP – EU Development Minerals Program	This is a capacity-building initiative for national mining authorities to improve the management of development minerals: industrial minerals, construction materials, dimension stones, and semi-precious stones.	http://www.undp.org/content/brussels/en/home/ourwork/sustainable-development/in_depth/capacity-development-of-mineral-institutions-and-of-small-scale-.html

Committee for Mineral Reserves International Reporting Standards (CRIRSCO)	The CRIRSCO International Reporting Template is a guideline that helps countries establish their own reporting standard that mining companies should use to report mineral deposit estimates and exploration progress for the purpose of informing investors or potential investors and their advisers.	http://crirsco.com/welcome.asp http://crirsco.com/templates/international_reporting_template_november_2013.pdf

Sustainable Development and Human Rights		
Sustainable Development Goals	The Sustainable Development Goals (SDGs) are a universal call to action to end poverty, protect the planet and ensure that all people enjoy peace and prosperity. The 17 Goals of the SDGs including goals on areas such as climate change, economic inequality, innovation, sustainable consumption, peace and justice, among other priorities. The Goals are interconnected – often the key to success on one will involve tackling issues more commonly associated with another. They provide guidelines and targets for all countries to adopt in accordance with their own priorities and the environmental challenges of the world at large.	http://www.un.org/sustainabledevelopment/sustainable-development-goals/

International Human Rights Instruments	There are a number of layers of international human rights instruments:
	1. **The International Bill of Human Rights**, consisting of the
	• Universal Declaration of Human Rights (UDHR), which all states are expected to comply with, and
	• The two binding international conventions based the UDHR that most states have signed and ratified:
	  → The International Covenant on Civil and Political Rights (ICCPR), (169 states as of 2017)
	  → The International Covenant on Economic, Social and Cultural Rights (ICESCR) (164 states as of 2017)
	2. **Seven further "core conventions"** cover: (i) the elimination of all forms of racial discrimination; (ii) the elimination of all forms of discrimination against women; (iii) the prohibition of torture and other cruel and inhuman or degrading treatment and punishment; (iv) the rights of the child; (v) protection of the rights of migrant workers and their families; (vi) protection from enforced disappearance; and (vii) the rights of persons with disabilities. Each of these conventions is binding only on those states that have signed and ratified that convention.
	3. The ILO has designated **four "core labour standards"**: (i) freedom of association and the effective recognition of the right to collective bargaining (ii) the elimination of forced or compulsory labour; (iii) the abolition of child labour; and (iv) the elimination of discrimination in respect of employment and occupation, which that should be protected by all ILO member states, even if they have not adopted the specific conventions.
	4. Other human rights instruments:
	• **Other universal human rights instruments**: There are numerous other human rights instruments covering a wide range of topics, some of which are binding and others of which are non-binding guidance. OHCHR supports the development of these instruments.
	• A wide range of labour rights standards that cover the **human rights of workers** developed through the ILO.
		http://www.ohchr.org/Documents/Publications/FactSheet-2Rev.1en.pdf
		
		http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx
		
		http://www.ilo.org/declaration/lang--en/index.htm
		
		http://www.ohchr.org/EN/ProfessionalInterest/Pages/UniversalHumanRightsInstruments.aspx
		
		http://www.ilo.org/global/standards/lang--en/index.htm
		
		http://bangkok.ohchr.org/programme/other-regional-systems.aspx

	Regional human rights instruments such as the European Convention on Human Rights, the Inter-American Convention on Human Rights, the African Charter on Human and Peoples' Rights and other instruments that have been adopted at the regional level reflecting the particular human rights concerns of the region and providing for specific mechanisms of protection.	
ILO Convention 169 and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP)	Both of these international law instruments reaffirm indigenous peoples rights to self-governance, ownership and control of their lands, territories and natural resources, to cultural integrity, to their own models of development and and to free prior and informed consent (FPIC). The ILO Convention is legally binding for the countries that have chosen to sign and ratify it, whereas the UN Declaration, though not a legally binding convention, sets expectations that countries comply with it; some parts of are contained in international binding international human rights instruments and some reflect customary international law.	http://www.ilo.org/global/top-ics/indigenous-tribal/lang--en/index.htm https://www.un.org/develop-ment/desa/indigenouspeoples/declaration-on-the-rights-of-in-digenous-peoples.html
Multilateral Development Bank Environmental and Social Standards, including for Mining Policy & Projects		
Multilateral Development Bank Environmental and Social Safeguard Standards	When the multilateral development banks provide funding to governments to support their extractive sectors, there are typically a set of environmental and social safeguards that apply as a condition of the lending, including identification, monitoring and mitigation of issues throughout a project's lifecycle. • World Bank's Environmental and Social Framework includes 10 Environmental and Social Standards that set out the mandatory requirements for the World Bank in relation to the projects it supports. • African Development Bank's Integrated Safeguards System Policy Statement and Operatlonal Safeguards • Asian Development Bank's Environmental and Social Safeguards • Inter-American Development Bank's Environmental and Social Safeguards	http://www.worldbank.org/en/programs/environmen-tal-and-social-policies-for-pro-jects/brief/the-environmen-tal-and-social-framework-esf https://www.afdb.org/file-admin/uploads/afdb/Docu-ments/Policy-Documents/December_2013_-_AfDB'S_In-tegrated_Safeguards_Sys-tem__-_Policy_Statement_and_Operational_Safeguards.pdf https://www.adb.org/site/safe-guards/main http://www.iadb.org/en/about-us/sustainability-and-safe-guards,18753.html
Standards and Guidance for Addressing Sustainable Development in International Investment and Trade Agreement		
UNCTAD Investment Policy Framework for Sustainable Development	The framework is addressed to government trade/investment ministries and consists of a set of core principles for investment policymaking and translates them into: guidelines for national investment policies, and options and provisions for the design and use of International Investment Agreements (IIAs).	http://unctad.org/en/Pages/DIAE/International Investment Agreements (IIA)/IIA-IPFSD.aspx
Sustainability Toolkit for Trade Negotiators	The toolkit is targeted to government environment and trade ministries. It explains the major areas of any trade or investment agreement that will have environmental implications, whether intentionally or incidentally, and identifies what could be considered best practices or provides an assessment of the various options for addressing environmental protection within trade and investment agreements.	https://www.iisd.org/toolkits/sustainabili-ty-toolkit-for-trade-negotia-tors/

| The Principles for Responsible Contracts: Integrating the Management of Human Rights Risks Into State-Investor Contract Negotiations | This guidance document is targeted to government negotiators who negotiate international investment agreements. This set of 10 key principles help integrate the management of human rights risks into contract negotiations on investment projects between host State entities and foreign business investors. It is targeted to government teams negotiating investment agreements. | http://www.ohchr.org/Documents/Publications/Principles_ResponsibleContracts_HR_PUB_15_1_EN.pdf |

Selected International Standards and Guidance Addressed to Governments & Mining Companies*

Standard	Description	Website
International Standards to Prompt Transparency concerning Extractive Projects & Revenue		
Extractive Industries Transparency Initiative (EITI) Standard	The EITI is open to governments that complete a designated set of five sign-up steps that relate to the commitment of the government, company and civil society, the establishment of a multistakeholder group and agreement on an EITI work plan. Companies can also voluntarily become EITI supporters. However, extractive companies that operate in EITI countries are covered by the implementation of the Standard, regardless of whether they are voluntary members. At its core, the Standard requires companies to publish payments to governments and governments to publish payments received from extractive companies, followed by a reconciliation of the reported amounts to identify discrepancies. The EITI global standard promotes the open and accountable management of oil, gas and mineral resources and has been updated and revised periodically to require publication of a much wider range of information on the operation of the extractive sector as highlighted in this Guide. The organization and the implementation of the Standard are operated on a multistakeholder basis involving governments, companies and civil society.	https://eiti.org/sites/default/files/documents/english-eiti-standard_0.pdf
Open Government Partnership (OGP)	The Open Government Partnership is open to governments that endorse a high-level Open Government Declaration, deliver a country action plan developed with public consultation and commit to independent reporting on their progress. The OGP's Natural Resources Working Group focuses on: (a) disclosure of contracts, beneficial ownership and environmental data/information; (b) adherence to data standards; and (c) implementation of the Extractive Industries Transparency Initiative (EITI). It is a multilateral initiative that aims to secure concrete commitments from governments to promote transparency, empower citizens, fight corruption and harness new technologies to strengthen governance.	https://www.opengovpartnership.org/about/about-ogp https://www.opengovpartnership.org/groups/naturalresources

International Standard on Security and Human Rights for Extractive Sector Companies		
Voluntary Principles on Security and Human Rights – for Mining Companies and Governments	The Voluntary Principles on Security and Human Rights (VPs) are a set of principles designed to guide extractive companies in maintaining the safety and security of their operations within an operating framework that encourages respect for human rights, while helping companies work effectively with governments that seek to protect human rights. While designed for companies, the Voluntary Principles are a useful tool for all governments with interests in the operations of the extractive industries and can help contribute to the protection of human rights and the prevention of conflict. The VPs are developed and led by a multistakeholder initiative of governments, extractive companies and civil society organisations.	http://www.voluntaryp-rinciples.org/wp-content/uploads/2014/06/Voluntary_Principles_Government_Fact_Sheet_2014.pdf
International Standards on Responsible Business Conduct for All Businesses, Including Mining Companies *While these standards or guidance are typically addressed to companies, these documents may also contain specific guidance for government participants. In addition, they set out what could be considered reasonable expectations by governments of mining companies seeking to invest in their country.*		
UN Guiding Principles on Business and Human Rights (UNGPs)	The UN Guiding Principles on Business and Human Rights is a framework of principles endorsed by the UN Human Rights Council that has gained wide acceptance since its adoption in 2011 and is addressed to governments and business: (i) the state duty to protect against human rights abuses by third parties, including businesses, means the state should adopt effective policies, legislation, regulations and adjudication to prevent, investigate, punish and redress human rights abuses as a result of business operations; (ii) the corporate responsibility to respect human rights means that companies should avoid infringing on the human rights of others and address negative impacts with which they are involved; and (iii) access to effective remedy for victims of business-related human rights abuses should be provided through judicial and non-judicial means.	http://www.ohchr.org/Docu-ments/Publications/Guiding-PriniplesBusinessHR_EN.pdf
OECD Guidelines on Multinational Enterprises	These Guidelines have been adopted by OECD governments and set out a set of guidelines across a range of environmental, social, human rights and corruption issues. The guidelines apply to any company based in an OECD country (including mining companies) wherever in the world the company operates.	http://mneguidelines.oecd.org/guidelines/

Selected International Standards and Guidance Addressed to Large-Scale Mining Companies

Australian Centre for Sustainable Mining Practices, 'Leading Practice Sustainable Development Programme for the Mining Industry'	The target audience for Leading Practice Sustainable Development Programme for the Mining Industry series of handbooks is the mine manager and his/her team who have the responsibility to assess risk, identify opportunities and take action to enhance the value of the operation. The handbooks have been produced to share Australia's world-leading experience and expertise in mine management and planning. They provide practical guidance on environmental, economic and social aspects through all phases of mineral extraction, from exploration to mine construction, operation and closure.	https://industry.gov.au/re-source/Programs/LPSD/Pages/default.aspx

Canadian 'Towards Sustainable Mining' Programme (TSM)	Towards Sustainable Mining (TSM) is the Mining Association of Canada's set of tools and indicators to drive performance and ensure that key mining risks are managed responsibly by Canadian mining companies that are members of the Mining Association. There is a set of TSM Guiding Principles with 23 indicators that members must report against. Each member facility's results are publicly available and are externally verified every three years.	http://mining.ca/towards-sustainable-mining
International Council on Mining & Metals' (ICMM) Standards and Guidance	This is an industry association that currently includes 23 major mining companies and associated mining associations that commit to the 10 ICMM principles and guidelines for most environmental protection areas, social and human rights issues. ICMM has issued a wide range of guidance documents on mining issues, including: • Guidance on relevant environmental, social and human rights issues for the mining sector • ICMM Mining Contribution Index, which sets out an approach to measuring mining's contributions to national economies	https://www.icmm.com/
International Finance Corporation (World Bank Group) (IFC)	IFC finances projects in the extractive sector. When it finances mining projects, they must meet its environmental & social performance standards and the EHS Guidelines for the Mining Sector • Environmental & social performance standards set out international standards for environmental and social performance for all industries, including the mining sector. • Environmental, health and safety guidelines on mining set out general and industry-specific examples of good international industry practice (GIIP) for the mining sector • A Handbook for Addressing Project-Induced In-Migration • Handbook on Preparing a Resettlement Action Plan • Good Practice Handbook on the Use of Security Forces: Assessing and Managing Risks and Impacts – Guidance for the Private Sector in Emerging Markets	http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/Sustainability-At-IFC/Policies-Standards/Performance-Standards http://www.ifc.org/wps/wcm/connect/1f4dc28048855af-4879cd76a6515bb18/Final+-+Mining.pdf?MOD=AJPERES&id=1323153264157 http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/Sustainability-At-IFC/Publications/
The Initiative for Responsible Mining (IRMA)	IRMA members are CSO, communities, mining companies and downstream companies. It is developing a best-practice standard for large-scale mining. IRMA will launch an independently verifiable responsible mining assurance system in 2018, offering mines an opportunity to apply for recognition of achievement in environmental and social responsibility.	http://www.responsiblemining.net
China Chamber of Commerce of Metals Minerals and Chemicals Importers and Exporters (CCCMC) Guidelines for Social Responsibility in Chinese Outbound Mining Investments	These the first industry-specific guidelines on social responsibility for the Chinese mining industry and are structured along eight social responsibility issues. They are for Chinese mining companies to integrate social and environmental factors into their investment decision-making and operations abroad and to continuously improve their economic, social and environmental performance.	https://www.emm-network.org/case_study/sustainable-mining-in-china/

Mineral-specific standards and guidance	There are a series of mineral-specific standards or guidance that are often developed through multistakeholder initiatives (involving companies and CSOs) or industry associations. There have been several reviews of mining initiatives that summarize their content and compare the approaches: • The International Institute for Sustainable Development and the State of Sustainability Initiatives prepared an overview of voluntary initiatives in the mining sector for the 2017 IGF • The Centre for Social Responsibility in Mining examined the interoperability of mineral sustainability initiatives • The Strategic Dialogue for Sustainable Raw Materials for Europe programme review provides a basic understanding of the landscape of legally non-binding initiatives and their principles for social and socio-economic sustainability • The World Economic Forum and Resolve on Voluntary Responsible Mining is based on a survey of informed stakeholders' views and experiences of voluntary responsible mining initiatives conducted in late 2015.	http://igfmining.org/wp-content/uploads/2017/10/Session-6-State-of-Sustainability-Initiatives.pdf http://stradeproject.eu/index.php?id=7 https://www.csrm.uq.edu.au/publications/leveraging-greater-impact-of-mineral-sustainability-initiatives-an-assessment-of-interoperability https://www.commdev.org/voluntary-responsible-mining-initiatives/
Guidance Specifically for Mining Exploration Companies		
e3 Plus: Framework for Responsible Exploration	The framework for exploration companies was developed to help them continuously improve their social, environmental, health and safety performance.	http://www.pdac.ca/programs/e3-plus/principles
First Engagement – A Field Guide for Explorers	This guidance for exploration companies specifically focuses on community engagement at the exploration stage.	http://www.pdac.ca/programs/e3-plus/principles
IFC – 'A Strategic Approach to Early Stakeholder Engagement - A Good Practice Handbook for Junior Companies in the Extractive Industries'	This guidance for exploration companies also focuses on community engagement at the exploration phase	https://www.commdev.org/userfiles/FINAL_IFC_131208_ESSE Handbook_web 1013.pdf
Guidance on Conflict Minerals		
OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas and Related Conflict Minerals Guidance	The guidance is addressed to companies and provides a framework for detailed due diligence as a basis for responsible supply chain management of minerals, including tin, tantalum, tungsten, gold, and all other mineral resources.	http://www.oecd.org/daf/inv/mne/OECD-Due-Diligence-Guidance-Minerals-Edition3.pdf

| China Chamber of Commerce of Metals Minerals and Chemicals Importers and Exporters (CCCMC) | The purpose of the Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains is to operationalize and provide detail to the clause in CCCMC Guidelines for Social Responsibility in Outbound Mining Investments on conflict minerals. These Guidelines assist companies undertaking outbound mining investment, cooperation and trade to identify, prevent and mitigate their risks of contributing to conflict, serious human rights abuses and risks of serious misconduct. They are aligned with the OECD Due Diligence Guidance on Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas and have been developed with OECD. | http://www.cccmc.org.cn/docs/2016-05/20160503161408153738.pdf |

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