

## **Third submission to the Special Representative of the UN Secretary General on Human Rights and Business**

ICMM supports the development of additional practical measures to strengthen business & human rights outcomes

**November 2007**

### **1. Overview**

The report of the Special Representative of the UN Secretary General (SRSG) expected early next year will play an important role in determining the future direction of efforts to enhance business & human rights outcomes across the globe. ICMM, as the mining industry's leadership group on sustainable development, is interested to see on-the-ground progress in this area, and to help identify practical steps which can achieve this.

ICMM's first two submissions to the SRSG covered substantial ground, including setting out various practical recommendations<sup>1</sup>. This third submission sets out some further ways forward and recommendations. These are focused either on topics which the SRSG has recently flagged as being important in terms of the content of his next report, or which have recently gained in prominence due to external developments (for example the recent adoption by the UN General Assembly of the Declaration on the Rights of Indigenous Peoples – see page 12). Each of the recommendations is accompanied by text boxes providing examples from ICMM member companies and associations. These are for illustrative purposes only, and are just a sample of the activity on different issues across ICMM's membership.

Taken together the recommendations in this submission highlight the importance which ICMM places on further enhancing the effectiveness of voluntary approaches on business and human rights – including both on the part of companies individually and multi-stakeholder initiatives. ICMM believes such approaches hold the key to making timely progress when government capacity to ensure positive human rights outcomes is limited. The recommendations also underscore the need for further practical steps in this area on the part of governments, which retain prime responsibility for upholding human rights, and which need to set the overall agenda.

Among the specific recommendations relating to companies, ICMM supports moves to incorporate human rights issues into key due diligence processes, and also the development and wider use of well-designed and credible grievance & dispute resolution mechanisms. The recommendations for governments include a call for more widespread recognition that effective human rights protection can help attract responsible investment; and also for governments to identify ways to incorporate assessments of mining firms' approach to

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<sup>1</sup> Please see <http://www.icmm.com/project.php?rcd=35>

sustainability issues, including human rights, in their criteria for selecting partners for developing their country's resources. Section 3 sets out these and other recommendations in full.

## **2. Background**

The first two ICMM submissions to the SRSG set some important context to ICMM's thinking in this area. To briefly recap some of the main points:

- *Because the location of mining operations is dictated by geology, major mining firms – more so than companies in many other industrial sectors – operate in some of the poorest countries of world. This creates particular human rights opportunities and challenges for the industry.* If revenues from mining are well-managed, they create the opportunity to generate significant improvements in economic welfare and thereby the realization of many economic and social rights. In countries where governance is also weak, companies may, however, face particular human rights challenges.
- *In recent years, ICMM member companies and associations have helped lead the way within the mining sector in developing & strengthening corporate policies and systems on human rights.* All ICMM member companies are committed to implement the ICMM Sustainable Development Framework, which includes specific policy commitments on human rights, as well as detailed reporting and independent assurance requirements. A variety of other ICMM and company initiatives are helping support on-the-ground human rights outcomes in other ways, as well as spreading good practice across the industry more broadly. ICMM and its members recognize the need to continue their work in this area. At the same time, it should be recognized that for many years existing company programs, such as on HSE or community development, have contributed to human rights in a variety of ways, even if they have not been explicitly described in this way.
- *Underlying many business & human rights challenges is a failure, or incapacity, on the part of host-country governments to protect human rights.* Companies are sometimes alleged to be responsible for outcomes over which they may only have limited influence. An analysis by ICMM of a sample of cases in which mining firms had been criticized over alleged involvement in human rights abuses – see 2<sup>nd</sup> submission – showed that a high proportion related to the behavior of other actors (such as local state bodies) perceived to be linked in some way to the firm's operations, but which were not within their control. In this way, if human rights protection is to be taken up by more of the world's companies and industries as a practical framework for management action, it is important not just that firms' duties are set out clearly, but also that the boundaries of their responsibilities are better delineated.
- *In countries where governance is weak, voluntary actions by firms to strengthen their procedures and also voluntary multi-stakeholder initiatives offer among the most effective ways to enhance protection of human rights.* The promulgation of new global regulatory standards – which some suggest as the answer to the full range of business & human rights challenges – may achieve little in such countries, given that governments often struggle to implement domestic laws, let alone new international norms. Voluntary multi-stakeholder initiatives, by contrast, can be directed precisely

at remedying weaknesses in the protection of human rights thrown up by such governance gaps. They do so by creating a framework for coordinated responses from a variety of different parties. ICMM and its members, as well as strengthening their own procedures, have been leading supporters of a variety of such initiatives, including the Voluntary Principles on Security and Human Rights, the Extractive Industries Transparency Initiative (EITI) and the Kimberley Process. ICMM strongly supports widening the membership of such initiatives to embrace a broader range of companies and governments, and where appropriate strengthening the accountability mechanisms which underlie them.

Also by way of context, a number of general trends have become more apparent since ICMM completed its 2<sup>nd</sup> submission to the SRSG in 2006:

- *Measures have been agreed to strengthen some of the key voluntary initiatives.* While ICMM recognizes that the mechanisms underlying such initiatives are likely to be an ongoing subject of discussion, there have been some notable steps forward recently. For example, membership of the Voluntary Principles is now governed by a recently-agreed set of “participation criteria”; processes have been approved for “validation” of host countries’ implementation of the EITI, while the Government of Norway is the first home country to sign up to the EITI. The EITI has also won endorsement over the last year from both the G20 and G8, signaling growing home government recognition of the importance of such initiatives.
- *Debates about raising the standards of companies with the least advanced human rights approaches have become more intense.* This was an issue raised by ICMM in its previous submissions. According to the SRSG<sup>2</sup>: “evidence suggests that firms operating in only one country and state-owned companies often are worse offenders than their highly-visible private sector transnational counterparts”. In the extractive sector, booming commodity prices have been among the drivers of increased international activity both by small and medium sized firms and by major domestic companies now expanding abroad. Certainly there remains scope for spreading human rights best practices more broadly among such diverse players.
- *ICMM and its members have continued to take forward their own work on human rights.* The examples given in this submission provide an illustration of some of the work underway. ICMM held a workshop for its members on human right issues in October this year, and is currently developing a human rights “good practice note” – covering among other topics, implementation processes for policies on issues such as security and resettlement – so as to facilitate the further spread of best practice across its membership.

ICMM’s 2<sup>nd</sup> submission has already set out a number of practical recommendations. These included that the SRSG should call for more rapid take-up of key voluntary initiatives (as well as for governments to implement their existing international commitments). The SRSG was also called upon to investigate the potential need for strengthened international initiatives focusing on the particular issues of mining and indigenous peoples, and also of artisanal and small scale mining. All these recommendations still stand. The points below represent additional suggestions from ICMM.

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<sup>2</sup> Report by SRSG, 9<sup>th</sup> February 2007, page 3

### **3. Ways forward and recommendations**

These are set out within the three broad categories which the SRSG has publicly indicated is framing his thinking as he develops his next report: the role of governments; the role of companies; and grievance and dispute resolution mechanisms.

#### **3a. The role of governments**

The SRSG has rightly highlighted the role of governments in protecting human rights as a “foundational principle of the international human rights regime”<sup>3</sup>. As noted previously, weak state governance underlies many instances in which companies are alleged, whether fairly or not, to be complicit in abuses of human rights. Also, there are limits to what companies alone can deliver in terms of promoting a broad range of rights. Companies may contribute towards the realization of economic and social rights, for example, but duties to shareholders impose obvious constraints on social-welfare spending. When governments do not fulfill their obligations in this respect, as is often the case in developing countries, expectations on companies may become unrealistically high, leading to local discontent over their activities.

For these reasons, ICMM believes the role of governments on business & human rights issues – and the role of donor agencies in supporting them where appropriate – could be bolstered in a variety of respects. Among other things, this may include: more effective state welfare provision in mining regions (potentially supported by part of the revenue flows from mining), national-level policies to ensure broader economic development from mineral investments<sup>4</sup>, more rapid uptake of key voluntary initiatives by different countries, and also implementation by governments of their existing international human rights policy commitments (as noted previously). Governments also need to provide clear, practical guidance on what such commitments mean for companies operating in their jurisdictions. They also can help facilitate uptake of best practice across different industries. Companies can help support these overall goals for state action: firms clearly need to avoid interfering in domestic political processes, but they can support government advances on human rights in various ways (as ICMM members are doing: see box 1 below).

Importantly it is not just the governments of countries which host the operations of international firms, but also such firms’ home governments which have a critical role to play. For example, home governments should consider signing up to relevant voluntary initiatives themselves (in addition to calling on host governments to do this), for example as Norway has done in relation to the EITI. They also need to become more involved in helping to catalyze on-the-ground partnerships with businesses, local governments and civil society groups to enhance development and human rights outcomes, particularly in weak states. An important corollary is to consider re-orienting aid to strengthening institutional capacity, checks and balances, and accountability mechanisms at the provincial or local government levels in the poorest, least stable developing countries – as this is where business and human rights challenges are often most acute.

This is not to say all proposals for additional government action on business and human rights should be unthinkingly pursued. For example, current calls for governments and courts in home countries to focus on enforcing standards on their international firms on an extra-territorial basis often take too little account of the risk that this will undermine legitimate legal

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<sup>3</sup> SRSG remarks to 12<sup>th</sup> International Business Forum, World Bank, 8-10 October 2007

<sup>4</sup> See ICMM Resource Endowment project: [www.icmm.com/project.php?rcd=16](http://www.icmm.com/project.php?rcd=16)

and dispute resolution processes in host countries, and particularly at the local level. Finding ways to strengthen the role of in-country institutions in protecting human rights should be the main focus of attention. Similarly, questions which have been raised in recent debates about the human rights impacts of host-government agreements and bilateral investment treaties often focus on an overly-narrow set of issues. Whether or not there is scope to strengthen some of these agreements from a human rights' perspective, it needs to be understood that in general they already provide powerful support to a range of economic and social rights precisely by facilitating increased investment in countries which need such capital flows to drive development and poverty reduction.

At the same time, ICMM believes there exist some important opportunities for governments to enhance business and human rights outcomes – and to strengthen positive dynamics between growth in foreign investment and protection of human rights – which have yet to be adequately discussed and addressed:

**3a (i).** *In the minerals sector, host-country governments should identify legitimate ways to incorporate an assessment of mining companies' approaches to sustainable development issues, including human rights, in their criteria for selecting partners for developing their country's resources.*

Governments of resource-rich countries have a growing choice of potential business partners which has been driven by the increased overseas activity of many mining firms (as noted previously). This has in turn given many governments increased latitude in setting the terms of access for mining projects. While this may sometimes lead to less attention being paid to sustainable development issues, it has also created the opportunity for the reverse to be achieved.

Currently sustainability & human rights standards tend to be laid down as basic minima by governments and their regulatory agencies, whether in national law or contracts (and with institutional capacity to actually enforce these minima also sometimes lacking). The opportunity is for performance against such standards to be made – like provision of economic benefits to host countries – a more explicit area of competition between firms seeking access.

ICMM believes host-country governments should investigate more fully the potential for formalizing such an approach to allocating access to resources. This would be a natural corollary to the growing importance countries now attach to enhancing long term sustainable development outcomes from their mineral wealth. It is also an area in which international donor agencies could lend technical assistance to poor developing countries (just as assistance may be needed to bolster their capacity to enforce existing regulatory frameworks).

**3a (ii).** *In general, a broader recognition may be needed among governments that state protection of human rights can often help attract foreign investment; and in cases where state failure to protect human rights goes alongside increased investment, new models of collaboration between governments could be one way to help improve outcomes.*

The mining sector provides many illustrations of the first point. State failure to protect human rights has often rebounded on mining firms in the past, as noted previously. This has made some of the more responsible mining companies more averse to

investing in countries where their reputation and hence their social license to operate may be at risk. By contrast, countries in which governments are known to adopt high standards – for example, in ensuring state security forces in mining regions respect human rights, or in responsibly resolving inter-ethnic tensions, or in providing mechanisms for landless artisanal miners to engage in more formal and less hazardous mining activities, or alternative employment opportunities – will be considered less risky and hence more attractive investment destinations by major mining firms. Stronger recognition by governments of these factors influencing firms' investment decisions could reinforce positive human rights dynamics.

This is not to say countries with weak protection of human rights do not sometimes successfully attract investment. In such countries, it should be recognized, subsequent improvements in the quality of governance, including human rights protection, can occur alongside, and even be encouraged by, growth in foreign investment. But in addition to using aid to accelerate governance improvements, one way to make such dynamics more likely is for new models of collaboration to be developed between governments – including through new fora if these are needed – so as to encourage more rapid international dissemination of standards and approaches on human rights (box 1 notes a few potential fora for this in the mining sector).

Such a collaborative, government-led approach should be contrasted with the development of proposed detailed global principles on business and human rights, at least as this was attempted in the case of the draft UN norms on business & human rights. The process of developing such principles has often involved inadequate early-stage involvement from governments and businesses. If some form of inter-governmental standard-setting is at some stage identified as being useful on an aspect of business and human rights, a better model to aspire to may be the development of the OECD anti-bribery convention. This international mechanism to level the playing field on another business-related topic was successfully developed through negotiation between governments – and also has been supported by many business and civil society groups.

#### **Box 1. The role of governments: potential fora, plus examples of company approaches**

While new mechanisms may be needed to encourage governments to collaborate more on business & human rights issues, in the mining sector various potentially suitable forum for this already exists. These include the *Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development*, the *World Mine Ministries Forum*, the *African Mining Partnership* and the *Mine Ministries of the Americas Conference (CAMMA)*. To give a brief illustration of the work of one of these groups (without downplaying the contribution of the others):

- The *Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development* was established through the Global Dialogue – a partnership initiative of 53 governments – to carry forward its work in promoting the implementation of the priorities for the mining sector as identified in the UN World Summit on Sustainable Development in 2002. The Forum came into effect in February 2005 when 25 governments confirmed their membership – there are now 38 member governments, mostly developing countries. While human rights has so far not been an explicit major theme of the Forum, its annual meeting in September 2007 focused on policies and practices by governments and industry to promote the range of benefits that can be derived from mining both at the national and community levels. A number of governments

have indicated they have put into effect policies and practices as a result of their engagement in the Forum.

In terms of the role of companies in encouraging government action on human rights, they clearly need to be careful not to overstep their legitimate role. At the same time, ICMM members do engage with governments on specific human rights issues related to their operations or as a result of initiatives to which they are committed. For example:

- *Anglo American* and *Rio Tinto* set out in their policy statements broad principles for engaging with governments. *Anglo American* states in its Good Citizenship Principles that “we have the right and responsibility to make our positions known to governments on any matters...associated with our operations”. Also, “whilst the primary responsibility for the protection of human rights lies with governments and international organizations, where it is within our power to do so, we will seek to promote the observance of human rights in the countries where we operate.” *Rio Tinto’s* Human Rights Guidance explores ways for managers to raise human rights issues, emphasizing that they should avoid adopting “a highly political role”. In certain circumstances, for example, “human rights can be raised at private meetings” with officials and politicians, while bearing in mind “diplomatic suggestions may achieve better results than overt criticism.”
- *AngloGold Ashanti* is developing a strategy on artisanal and small-scale mining (ASM) which includes an approach to working with governments, in particular to promote a regulatory environment for ASM that complements large-scale commercial mining, and responsible management of security issues. In Ghana, for example, *Anglo Gold Ashanti* worked with the Chamber of Mines to organize a series of meetings with government officials (and other stakeholders) in late 2006 to discuss law enforcement and human rights issues associated with a government announcement of plans to act against illegal mining activities in several regions of the country.
- *Freeport McMoRan* has been organizing a series of meetings with government officials and local business partners in Indonesia to encourage take-up of the Voluntary Principles on Security and Human Rights. A founding signatory of the Principles, *Freeport’s* work to promote their implementation at the in-country level responds to recent discussions on this subject at the Voluntary Principles’ plenary meeting in May 2007.
- The *Mining Association of Canada* and the *Prospectors and Developers Association of Canada* played a key role in the Canadian government’s ‘National Roundtables on CSR’ as members of a multi-stakeholder Advisory Group responsible for preparing this initiative’s final report. A series of four Roundtables held in 2006 aimed to examine measures for Canadian extractive sector companies operating in developing countries “to meet or exceed leading international CSR standards and best practices”. The Advisory Group’s final report puts forward a set of recommendations currently under consideration by the Canadian government, including national CSR Standards and reporting obligations, an independent ombudsman office and a tripartite Compliance Review Committee.

### **3b. The role of companies**

In addition to the recommendations from previous ICMM submissions, three further points in this area are worth drawing out. The first highlights a mechanism for spreading good corporate practice on human rights which has so far received little attention in external debates and which may be of interest to the SRSG as he develops his recommendations. The second two set out ICMM’s thinking on specific issues which have recently become more prominent as a result of comments made by the SRSG or other external developments. The common theme across all three is the importance of further strengthening voluntary corporate

approaches on human rights (alongside encouraging governments to clearly define and deliver on their obligations in this area):

**3b (i).** *The empowerment of industry bodies can help give stronger impetus to voluntary approaches on business and human rights*

Stronger collaborative mechanisms between companies, not just between governments, may help to accelerate policy diffusion in this area. On sustainability issues in general, collective action problems often hold back progress by individual companies: they may recognize that stronger standards across their particular industry are needed to protect its overall reputation and social license to operate, but in voluntarily stepping ahead of others they risk drawing unwanted attention to themselves and incurring costs avoided by their competitors. Yet the institutional mechanisms for collaboration do not always exist: collaborative industry bodies are often designed to represent the interests of their members, rather than to help develop standards and provide industry leadership.

By contrast, where industry bodies are established and structured with an explicit mandate to work with their members to raise standards – which, to make it work, may require involvement from member firms at the highest level – various benefits may follow. As well as being empowered to develop standards, such bodies are likely to find it easier to give them teeth by setting out explicit requirements for membership. They also will be more easily able to commit their entire membership to abide by relevant multi-stakeholder initiatives, to engage proactively in external debates, and also to help spread standards across their industry as a whole.

ICMM provides a potential example of one such industry body, and there is certainly evidence of policy diffusion on sustainability issues as a result of its activities (see box 2 below). This not to say ICMM has resolved all the challenges facing the mining sector, or that it will be able to do so without further partnerships and action from other stakeholder organizations. Other industry associations also may provide interesting models. But the basic point is that the changes in the structure of industry representation, so far little discussed in human rights debates, should be explored as a potential way to remove barriers to progress in this area.

**Box 2. The role of industry associations in policy diffusion: mining as an example**

As noted above, this is not to downplay ongoing challenges in the mining sector – nor work underway in other sectors – yet the proactive role played by ICMM and other mining associations is certainly helping drive forward the industry’s approach on sustainability issues:

- The reason why *ICMM* has a recognized mandate to help further strengthen the mining sector’s performance in this area (that is, in addition to its representative role) lies in its establishment as an organization. It was set up in 2001 partly to take forward the agenda of the Mining, Minerals and Sustainable Development project – an independent two-year process of stakeholder consultation and research, which concluded with a set of recommendations for the industry as well as other actors. Another key feature of ICMM is that its governing body, the ICMM Council, which meets twice a year, is comprised of the CEOs of all member firms. The core mechanism by which ICMM takes forward its work on sustainability performance is the Sustainable Development Framework. All member companies are required to implement this Framework, which comprises a core set of ten principles, plus requirements for public reporting using the GRI multi-stakeholder process to develop a detailed set of indicators, and also for

independent assurance (see previous submissions to the SRSG for detail on the human rights elements of the Framework). Additional mandatory commitments include to publish taxes and royalties under the aegis of the EITI and not to explore or mine in World Heritage sites.

In addition to implementation of the Sustainable Development Framework (SDF) by ICMM member companies, examples are also emerging of its potential broader uptake. Among them:

- The government of *India* is understood (at the time of writing) to be considering applying ICMM's SDF at a national level as part of the revision of its 1993 minerals policy. This is discussed in the report of the Indian government's High Level Committee on National Mineral Policy released in December 2006. The Committee recommends in its report that two relevant government ministries "jointly set up a working group to prepare a SDF specially tailored to the context of India's mining environment, taking fully into account the work done and being done in ICMM and IUCN. The Indian SDF comprising of principles, reporting initiatives, and good practice guidelines unique to the three sectors in Indian mining, i.e. SME, captive, and large stand alone, can then be made applicable to mining operations in India and a separate structure set up to ensure adherence to such framework ...". Earlier in 2006, ICMM had participated in the Delhi Sustainable Development Summit, organizing a workshop in collaboration with The Energy and Resources Institute on 'Responsible mining', thus helping to introduce the SDF to an Indian audience.
- In *Australia*, the Minerals Council of Australia (MCA) – a national industry association member of ICMM – has developed its own sustainable development framework called 'Enduring Value' which incorporates the ten principles of ICMM's SDF, and provides guidance on their implementation, complemented by a range of tools, guidelines and activities such as training. Commitment to Enduring Value is a condition of MCA's own membership – it currently has 31 member companies – and brings with it various obligations, including progressive implementation of the ICMM principles and annual public reporting of site level performance. MCA has also recently introduced a category of 'international associate' for new members based outside Australia. MCA is currently engaging with possible future members, notably in Chile, China and India. The strong expression of interest of a Chinese mining association in adopting Enduring Value has prompted MCA to consider its translation into Chinese.

Work by other national industry association members of ICMM has also been helping to drive forward standards, aligned with ICMM's SDF. In Canada, for example:

- *The Prospectors and Developers Association of Canada (PDAC)* has developed Environmental Excellence in Exploration (e3), a comprehensive online guidance tool of leading environmental management techniques and practical guidelines for community engagement. It is now available in French, Spanish and Portuguese and has over 2,000 registered users in 40 countries. The PDAC is also currently developing a comprehensive CSR Framework for Exploration. The framework will comprise a set of principles, performance guidelines, performance criteria, reporting guidelines and a verification process. Components of the CSR Framework will be available in the second quarter of 2008.
- Members of *The Mining Association of Canada (MAC)* have developed and implemented Towards Sustainable Mining (TSM), a stewardship initiative aimed at improving the industry's performance. MAC members subscribe to TSM Guiding Principles, a set of commitments that address all aspects of industry performance, including respect for human rights and recognition of the unique role and contribution of Aboriginal peoples. The guiding principles are backed by specific performance indicators, which member companies publicly report against annually. In 2007, member companies took a significant step and implemented third-party assurance – a global first for the mining industry. The TSM initiative is advised by a 14-member Community of Interest Advisory Panel comprised of indigenous, organized labor, NGO and other community representatives.

**3b (ii).** *Strengthening corporate due diligence processes on human rights issues is another important step towards improving outcomes. ICMM supports moves to incorporate human rights issues into Social & Environmental Impact Assessments or similar due diligence processes for all proposed large-scale projects where there is a legitimate concern that human rights may be adversely impacted.*

Developing an understanding at an early stage of the potential social, environmental and human rights impacts of projects is without doubt an important component of corporate best practice. The SRSG has recently flagged his support for human rights impact assessments (HRIAs), arguing that “no single measure would yield more immediate results in the human rights performance of firms than conducting such assessments where appropriate”<sup>5</sup>.

ICMM members have long applied a range of risk assessment processes, such as social and environmental impact assessments (SEIAs), and related baseline studies, which have helped them identify at an early stage potential human rights risks relating to their projects. In this respect human rights are already part of such assessments. In addition, box 3 below highlights a number of due diligence approaches ICMM members have recently developed which explicitly use a human rights framework or which have focused on a particular human rights-related issue. In general, ICMM believes what matters most is finding ways to enhance the human rights outcomes from projects rather than the imposition of a one-size-fits-all methodology for impact assessments.

As a basic principle, ICMM supports moves to incorporate human rights issues into SEIAs or similar due diligence processes for all proposed large-scale projects where there is a legitimate concern that human rights may be adversely impacted. This can be achieved through a stand-alone HRIA or by incorporating human rights into other impact assessment tools – such as SEIAs. In principle it is desirable to integrate different stakeholder interests into a single, albeit multifaceted, assessment process, and a deeper understanding of human rights impacts may result from considering these in the context of interlinked social and stakeholder issues. Importantly, the development of methodologies for stand-alone HRIAs is still at an embryonic stage, with a variety of tools having been recently developed in this area, and no consensus as yet having emerged on which approach to take. Only a tiny number of companies worldwide are believed to have actually ever undertaken stand-alone HRIAs.

ICMM is keen to engage with the ongoing debate on methodologies for HRIAs. Clearly, as mentioned, the focus of attention should be finding practical ways to improve human rights outcomes on the ground, rather than developing elaborate or rigid new processes (especially if these duplicate existing ones). Also any moves to set standards in this area need to ensure that: companies from different jurisdictions face a level playing field in terms of their obligations; and also that attention is paid to defining clear boundaries between the roles of companies and governments in upholding human rights.

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<sup>5</sup> Report by SRSG, 9<sup>th</sup> February 2007, page 21

### Box 3. Building human rights into impact assessment & due diligence processes: examples

In addition to due diligence and impact assessments processes covering social & HSE issues, ICMM members have also adopted various approaches explicitly incorporating human rights issues. For example:

- In 2005, *Newmont* carried out human rights assessments at its operations at Pajingo (Australia) and Yanacocha (Peru) using tools partly based on that of the Danish Institute for Human Rights and the 'draft UN Norms' framework respectively. Among other outcomes, a 23-point action plan resulting from the Yanacocha assessment is being followed up with an ongoing human rights training program for employees and contractors. It is hoped that further human rights assessments will be undertaken during 2008 at sites in Ghana, Indonesia and also again at Yanacocha. Newmont has also taken recent steps to strengthen human rights due diligence at the corporate level by embedding human rights related issues (alongside other possible areas of business risk) into a mainstream risk assessment process for new or expanding projects.
- *Freeport McMoRan* commissioned the independent International Centre for Corporate Accountability (ICCA) to undertake a social and human rights audit in 2004 of the effectiveness of its Social and Human Rights Policy and the extent of the company's compliance with it. The audit involved extensive data collection and over 400 interviews with employees to ascertain their understanding of the Policy and perceptions of compliance. The findings and the company's response are publicly available on the ICCA web site. Freeport reports that the audit resulted in new management and accountability systems, improvements to its human rights training programs, and the appointment of a Senior Human Rights Compliance Officer. A follow-up to the original audit was conducted in 2006, including an assessment of Freeport's implementation of recommended changes from the first audit.
- *Rio Tinto's* states in its Human Rights Guidance that "when a new investment project is planned in a region where there is a context of widespread human rights violations, we should conduct an analysis of the human rights situation in the local area." Other internal procedures relevant to this sort of situation include the obligation on individual operations to develop a 5-year community plan, a process which typically begins with an extensive baseline assessment.
- *BHP Billiton* has developed a Human Rights and Security Self-Assessment Tool, which has been recently updated. This requires operations to assess the level of human rights risk for each of a set of six stakeholder groups, and describes minimum recommended actions – for example, ensuring indigenous and minority groups are adequately engaged in consultation or carrying out security training – corresponding to each risk level. In addition, BHP Billiton has formulated a Social Risk Checklist to help identify and manage social risks for projects both in the exploration phase, and in the planning of more detailed social impact assessments. Among the range of potential issues this tool can help flag are resettlement, security, social conflict, and impacts on vulnerable groups & indigenous peoples.
- *Anglo American* has recently produced an updated version of its Socio-Economic Assessment Toolbox. The process is intended to better understand the local impacts of each mature operation, to ensure a rigorous and structured process of stakeholder engagement and to provide greater accountability to local people. The new version of the SEAT has introduced human rights concepts in to its assessment tools.

All the procedures above encompass a range of issues. In addition, particular human rights issues are often covered by particular due diligence processes within member companies. For example:

- *Security*: Anglo American and separately Anglo Gold Ashanti have both developed implementation guidelines on the Voluntary Principles on Security and Human Rights. These include a risk assessment tool covering, for example, identifying the underlying and specific causes of risk, assessing the human rights record of security forces, and taking preventative steps to safeguard the transfer of equipment.

- *Conflict:* Newmont has conducted conflict assessments at operations in Peru and Indonesia using tools developed by the NGOs Fund for Peace and International Alert respectively. It has since developed an internal Conflict Identification Assessment tool. Progress is being made towards a target for all sites to complete a conflict assessment (using either internal or external tools), at a rate of about four to five assessments per year.
- *Artisanal & Small-Scale Mining (ASM):* Anglo Gold Ashanti has recently initiated external baseline studies of the ASM sector around its operations in the DRC and Ghana, and a review is also underway in Guinea. The studies aim to identify the key issues and challenges facing ASM, and to provide advice on practical interventions to help formalize and regulate the sector in order to facilitate a more mutually beneficial co-existence with large-scale mining.
- *Labor standards:* Due diligence on employee issues within ICMM member companies is covered by a range of long-standing internal policies & procedures. One interesting recent development – focused on labor issues beyond the company – has been the announcement by ICMM member Vale<sup>6</sup> in 2007 that it would stop selling its iron ore to pig iron companies in Brazil which are accused of or prosecuted for using slave labor or violating environmental regulations. This commitment, aimed at helping eradicate slave labor in the country, is supported within Vale by various processes it uses to monitor and seek assurance on the behavior of firms looking to buy its iron ore.

**3b (iii).** *The experience of leading mining firms is that projects are more likely to be successful over the long term if they have the broad support of local communities – including of indigenous peoples – from exploration through to closure. Gaining this support may require significant efforts by firms in terms of consultation, development of partnerships to ensure benefits for local people, and responsiveness to community & indigenous peoples' concerns. At the same time, clarity is needed from governments on companies' obligations in this area, and how to balance local and national needs.*

The passing of the UN Declaration on the Rights of Indigenous People by the UN General Assembly in September 2007 is a significant event. It followed more than two decades of negotiation between indigenous peoples' representatives and governments.

Developing positive relations with indigenous peoples and communities more broadly has long been a focus of work for ICMM members (see also previous submissions). In 2005, ICMM published an overview of the issues and interfaces between mining and Indigenous Peoples<sup>7</sup>. ICMM is currently in the process of finalizing a Position Statement on Mining and Indigenous Peoples Issues (released in draft form in May 2006), based on consultation with a range of external groups and among ICMM members. Taking into account an analysis of latest developments at the UN, and setting out clear commitments on a range of issues, the statement will be published in the first half of 2008.

The aim of this short section is simply to highlight some basic points which may be useful for the SRSG as he develops his final recommendations. The experience of leading mining firms – which may be of relevance to other firms and industries – is that gaining broad community and indigenous peoples' support for projects is an

<sup>6</sup> CVRD (Companhia Vale do Rio Doce) has recently been re-branded as 'Vale'.

<sup>7</sup> See ICMM (2005). Mining and Indigenous Peoples Review: [www.icmm.com/library\\_pub\\_detail.php?rcd=175](http://www.icmm.com/library_pub_detail.php?rcd=175)

important contributor to their long-term success. Also gaining this support may require significant efforts on the part of companies. For example, they need to consult with indigenous people in a fair, timely and culturally appropriate way, incorporate their perspectives wherever possible, and seek to develop meaningful partnerships with them. Box 4 below provides just a few illustrations of the processes ICMM members have put in place to seek broad community support for projects.

Consistent with this, government leadership in this area is critical. For example, only governments can decide how to balance national development needs (which may be seen to require a particular investment project to proceed) with the perspectives of local communities (which may be opposed to this). This is not a contentious proposition in most developed countries in relation to their own development plans. Whether projects require the 'Free, Prior and Informed Consent' of communities is an unresolved policy issue in some countries.

With regard to the UN Declaration – which is non-binding and was voted against by a number of countries – companies are in particular need of clear guidance from governments on what is expected of them across the range of issues and high-level principles set out in its text. ICMM's 2nd submission to the SRSG highlighted the general need for much more engagement by governments in resolving specific challenges in relations between mining companies and indigenous peoples. ICMM is strongly committed to continued dialogue with indigenous peoples' groups (for example, it is planning a second multi-sectoral dialogue meeting on mining and indigenous peoples issues in early 2008). At the same time, governments need to be more at the table – and to provide clear guidance on practical ways forward.

#### **Box 4. Processes to seek broad community and indigenous Peoples' support: examples**

Among the numerous examples from ICMM member companies:

- *BHP Billiton's* HSEC Management Standards require, among other things, that all stakeholders around projects are identified along with their concerns, needs and expectations, with strategies developed to address these issues. This approach can be seen in the company's recent extensive work in gaining the support of the indigenous Dayak people for its Maruwai coal project in Indonesia. It has done this by establishing at a very early stage processes for identifying key stakeholders and developing procedures for their consultation and engagement. Comprehensive socio-economic, public health and cultural impact and baseline studies were undertaken. The objective was from the outset to involve the communities, NGOs and government in the impact assessment research, in the identification of areas for community investment and in the delivery of resulting programs. Recommendations from this work were addressed at consultative meetings, and the resulting agreements, framed as Memoranda of Understanding, defined much of the project's ongoing community investment program.
- *Newmont* has stated that "respect for the social, economic and cultural rights of Indigenous people is the cornerstone of our programs" and places emphasis on "open, transparent and meaningful consultation with [...] communities and other stakeholders". This approach can be seen in Newmont's recent negotiation of a Community Partnership Agreement with the Gnaala Karla Booja People, traditional owners of the land in the area of operations of its Boddington mine in Australia. The Agreement includes the provision of training and employment opportunities throughout the life of the mine, as well as financial assistance from 2009. The Gnaala Karla Booja People held a traditional smoke ceremony in September 2006 to celebrate the signing of the agreement.
- Although dating back to an agreement signed in the early 1980s, the Subsistence Advisory Committee at *Teck Cominco's* Red Dog mine in Alaska still stands as a model for the

responsible development of mineral resources through cooperation with indigenous peoples. The mine is located in the NANA region of Northwest Alaska, home for more than 10,000 years to the ancestors of the Inupiat People and other indigenous groups who continue to rely heavily on subsistence hunting and fishing. The Subsistence Advisory Committee to Teck Cominco, comprised of elder hunters from two native villages, meets quarterly with mine officials to review subsistence related issues and to provide guidance on how to address them. The Committee gives the go-ahead, for example, for the start of the shipping season to avoid conflict with the hunting of marine mammals.

- *Rio Tinto*, in addition to its impact assessment and community procedures mentioned in the previous box, has explicitly recognized in its guidance on consultation with local people that "...this may sometimes result in our not exploring land or developing operations, even if legally permitted to do so" (The Way We Work, p10).

In addition, national association members of ICMM are involved in or leading various initiatives in this area. For example:

- The *Minerals Council of Australia* (MCA) has focused particular attention in recent years on engaging – and developing joint approaches with – indigenous stakeholders. Key elements of its work have been its Indigenous Relations Statement, Indigenous Relations Strategic Framework, and also Indigenous Relations Engagement Strategy. Together these tools have both provided a framework for the MCA, and have also established a nationally consistent foundation from which minerals companies can aim to develop sustainable relationships with indigenous peoples.
- The *Mining Association of Canada* (MAC) has developed a draft Framework on Mining and Aboriginal Peoples as part of its Towards Sustainable Mining (TSM) initiative. Annual reporting against TSM indicators is mandatory for MAC members. Specific commitments in the draft Framework on Mining and Aboriginal Peoples include "undertaking early, timely and culturally appropriate engagement with Aboriginal Peoples throughout the project cycle" and "negotiating agreements for participation, either directly with local Aboriginal peoples or in conjunction with governments, as appropriate". The Framework, while adopted by the MAC Board as policy in November 2006, will remain in draft form over a two-year consultation period (ending in 2008): a recent workshop was attended by five Aboriginal groups, with three more planned for the coming year.

Finally, it is worth noting that ICMM – in addition to its forthcoming position statement on indigenous peoples – has been involved in various related projects. In November 2005, for example, together with the IUCN (the World Conservation Union), it hosted a roundtable on indigenous peoples' issues as part of the wider dialogue on mining and biodiversity. Also ICMM's Community Development Toolkit, developed in partnership with the World Bank, contains numerous tools to help strengthen companies' work on community consultation and development – and also conflict resolution (see next section).

### **3c. Grievance & dispute resolution mechanisms**

This is the third and final category highlighted by the SRSG and has also been the subject of a Harvard University research project to which ICMM has provided input. It is one aspect of the broader issue of accountability mechanisms, which also includes public reporting of non-financial issues (ICMM also has work in hand on this, as described in previous submissions). A single basic point needs to be made in this area (which again fits within this submissions' overall theme of ICMM's support for practical ways to enhance voluntary approaches on business & human rights):

**3c (i).** *The development and wider use of grievance and dispute resolution mechanisms – provided these are well designed and complement rather than*

*undermine the legitimate role of governments – is both an important means to improve human rights outcomes on the ground, and is also in the interests of leading companies*

For as long as protection of human rights on the part of governments is incomplete – and companies face challenges in this area too – grievance and dispute resolution mechanisms have an important role to play in ensuring that individuals adversely impacted have their concerns listened to and adequately addressed.

Such mechanisms can come in a variety of forms, from internal company processes to respond to complaints from employees and local communities (for example, anonymous complaints ‘hotlines’), to mechanisms associated with voluntary multi-stakeholder initiatives which provide means for reporting alleged non-compliance, and also broader forms of mediation and dispute resolution between companies and communities or NGOs which take place outside the formal legal system. One recent area of activity for ICMM members has been developing and strengthening internal grievance procedures, as box 5 illustrates.

#### **Box 5. Grievance & dispute resolution mechanisms: examples**

The strengthening of internal processes to respond fairly and effectively to complaints from employees and local communities is growing area of activity for ICMM members. For example:

- *Anglo American* has recently set out a new ‘complaints and grievance procedure’ tool in its revised ‘Socio-Economic Assessment Toolbox’. This provides guidance to its mine managers on the recording, handling and resolution of complaints submitted by stakeholders. The tool outlines, for example, the main components of a credible complaints procedure (from recording and processing complaints, to mechanisms for adjudicating grievances and appealing judgments), and principles to consider in the handling of complaints (for example, that the complaint may be an indicator of a wider concern).
- *BHP Billiton* requires all operating sites to maintain a ‘complaints register’ to record and track the management of community concerns. Operations are required to investigate complaints and report back to the relevant stakeholders on the outcomes of investigations. Appropriate mechanisms involving consultation and participation directly with the stakeholders concerned are to be put in place to resolve conflicts. The company publishes a breakdown of the number and types of complaints in its annual sustainability report (during 2006, for example, 43 sites received a total of 543 complaints, 43% of which were noise-related). Also, separately from the complaints register, BHP Billiton has established a grievance procedure whereby any employee who has concerns about the company’s business conduct, including those related to human rights and security, can seek to have them resolved or answered.
- *Newmont* has developed a rigorous grievance procedure at its Ahafo mine in Ghana. Key responsibilities are assigned to a ‘resolving officer’ to receive complaints/grievances and propose resolutions, a ‘grievance officer’ to oversee the overall management of the grievance/complaint system, including maintenance of a complaints/grievances database, and a ‘complaints and grievances committee’ to authorize resolutions to cases beyond the authority of the resolving officers and forward cases as appropriate to senior management.
- There are also numerous examples of *anonymous complaints hotlines* now in place in ICMM member companies which make it easier for employees with legitimate concerns about business conduct to come forward. Anglo American’s Speak-Up program, for example, routes concerns and complaints to an external service provider which forwards these in anonymous form to a response team within the company. Similarly, Teck Cominco’s Whistleblower Program and Rio Tinto’s Speak-OUT system are based on a free telephone line available at all

times and handled by independent interviewers. Alcoa, too, has an anonymous hotline for employees.

In addition to such complaints processes developed by member companies themselves, various ICMM members have also been involved in mediation of disputes and other negotiation of disagreement involving third parties. Rio Tinto, for example, was engaged in a multi-party consultation and negotiation process in the early 2000s to resolve community claims relating to the Kelian mine in Indonesia. Also dialogue tables helped to resolve various community complaints against Newmont's Yanacocha mine in Peru has been supported by the work of the Compliance Advisor Ombudsman, the independent recourse mechanism for the IFC.

Finally, an interesting example of national-level mediation on industry-related sustainability issues is arguably the Canadian government's "Roundtables on CSR" mentioned in box 1 (and in which the Mining Association of Canada and the Prospectors and Developers Association of Canada played a key role). The roundtables have helped forge more of a consensus between different stakeholders in Canada on practical ways forward for extractive firms operating abroad – and represent an overall process of dialogue which potentially could be replicated in other countries.

Well-functioning complaints and grievance procedures can work to the advantage of both companies and local communities. They can strengthen levels of mutual trust, help both parties to resolve problems, issues and misunderstandings at an early stage (rather than allowing these to become worse over time); and – in the case of independent mediation of disputes – they may provide a potentially more balanced forum for the resolution of differences than the court of public opinion.

The emphasis is, however, on such community-based procedures being well designed. Among the underlying principles for their design is that they should be accessible to stakeholders, follow a predictable and, wherever possible, transparent process, and also be perceived to be legitimate and fair. Grievance procedures need to be practical to implement by companies. Independent mediation or dispute resolution processes, meanwhile, should be led by open-minded, non-partisan individuals, who have no inherent biases either against, or for, industry. And they should help reinforce, rather than undermine, legitimate existing procedures for communication and engagement between companies and local communities.

In addition – to return to another theme of this submission – grievance or dispute resolution procedures also should complement rather than detract from the legitimate role of governments. Negative outcomes may result, for example, if there are well-functioning and balanced regulatory and judicial mechanisms being developed within the country concerned for ensuring compliance with standards, and these are undermined by such procedures. Inadequate state governance has been identified as the root of many human rights challenges; it would be ironic if measures designed to create a temporary fix to such problems weakened the key to their long-term solution.

### **Concluding remark**

As a final point, linked to the above, ICMM would reiterate its call to the SRSG to lend support to the development and further strengthening of voluntary multi-stakeholder initiatives on human rights issues. While important steps need to be taken in each of the three categories highlighted by the SRSG – the role of governments, the role of companies, and grievance and specific dispute resolution mechanisms – the use of such a neat framework should not

obscure the importance of initiatives focused at the intersection of company, government and other stakeholder interests. As noted previously, it is only through partnerships between different stakeholders (for example, between home and host-country governments, companies and civil society) that the governance weaknesses at the root of many business & human rights challenges are likely to start to be solved for the benefit of local communities within a reasonable time frame.

The SRSG's recent comments and findings appear to lend credence to this point. For example, he has noted that the development of international treaty instruments and other high-level declarations has often involved relatively slow progress, whereas some of the more recent "voluntary" initiatives – though their participants say these require substantial improvements – "have a significant operational impact"<sup>8</sup>.

In line with this, ICMM believes among the most effective ways for the SRSG to accelerate positive "operational impacts" is for him to: continue to urge broader uptake by host and home country governments and companies of initiatives such as the EITI and the Voluntary Principles on Security and Human Rights; to help identify legitimate mechanisms to underpin the accountability of such initiatives based on recent progress in this area; and to investigate the need for new or enhanced multi-stakeholder initiatives on other important business and human rights issues (for example, in the mining sector, on artisanal & small scale mining and relations with indigenous peoples – see 2<sup>nd</sup> submission).

ICMM, for its part, is committed to continue to take forward its work on human rights – including through its forthcoming human rights "good practice note" – and also to continue to engage seriously with such multi-stakeholder initiatives.

ICMM awaits the SRSG's next report with strong interest – but also, as an end note, would like to acknowledge his work so far. The SRSG's strong commitment to his mandate since it began in 2005, as well as his inclusive and thoughtful approach, have already helped create, in ICMM's view, a stronger basis than existed before for consensus on ways forward on business and human rights – both at the level of the international debate and, importantly, in terms of practical steps to strengthen outcomes the ground for local communities.

END

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<sup>8</sup> Report by SRSG, 9<sup>th</sup> February 2007, page 17; also letter from SRSG to ESRC-Net 15<sup>th</sup> October 2007