



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

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 Index³¹ 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

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

32 P. Toledano, O. Östenson 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

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 SDGs³⁹



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.commddev.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 Charter⁴⁰ 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

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 Guide 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 Plan⁴⁶

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.

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 Ayouf Elrashdi - African Union Commission, "Sustainable Mining: Policy options and partnerships in Agenda 2063", IGF (2015), <http://igfmining.org/wp-content/uploads/2015/10/Ayoub-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](http://www.asean.org/storage/2015/12/AMEM/AMCAP-III-(2016-2025)-Phase-1-(Final)2.pdf)

Box 6

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?



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

B Establish Mineral Resources Ownership and Endowment⁴⁸

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 NRG, "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.)

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 develop 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.

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 agreements⁵⁴ 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>

World Bank Mining Investment and Governance Review & IGF Mining Policy Framework Assessments – Tools to Support Implementation of Many of the Areas Covered in this Guide⁵⁶

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.⁵⁶

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.

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 Sector⁶⁴ 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 Sourcebook⁶⁶ – is managed and updated by the World Bank
- The Extractives Hub⁶⁷
- Sustainable Mining Institute⁶⁸
- Africa Minerals Development Centre⁶⁹
- Africa Mining Legislation Atlas⁷⁰
- Kenya: Extractives Baraza⁷¹

58 <http://negotiationsupport.org>

59 <http://ccsi.columbia.edu/work/projects/exctraining/>

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>

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)?

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 begins⁸⁰ and subject it to costly arbitration⁸¹ 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

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_canasapproachonresponsiblebusinessconductabroad.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 Chile⁸⁷

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-ia-reform-to-the-next-level-james-zhanna-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.

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?

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 be 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 globally⁹²
 - 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

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

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://circi.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 ECOLEX⁹⁸ 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.

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 countries¹⁰⁰ 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)

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 communities¹⁰⁴ 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.

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 NRG 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.commddev.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

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>

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 measure 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 meet 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 NRG, “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.)

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

110 <http://www.africaminingvision.org/>

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

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 Protocol¹¹⁵ 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

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://ciridi.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 Mehta, “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 deci-

sions, 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

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.

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

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 Enterprises¹²⁵ 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

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 Tribunals¹³²

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

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 1, 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=pehr>

Box 24

Using Mediation to Address Natural Resource Conflicts¹³⁵

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

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 en-

vironment-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. |

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.



¹³⁸The 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.