

Mining Certification: A Field of Growing Trade Interest

By Marcos A. Orellana

Certification schemes for natural resource extraction have received considerable attention during the last decade. Aware of such schemes' potential restrictions to market access and their influence on the development of non-governmental standards, the trade regime has a particular interest in illuminating the angles of these initiatives, particularly as the applicability of the WTO's Agreement on Technical Barriers to Trade to non-governmental certification schemes still remains the object of debate.

This brief will not attempt to answer these more general questions, but will present two certification designs for mining: the voluntary UNEP Cyanide Code and the governmental certification scheme for raw diamonds. First, however, a short overview of the problems associated with mining and the drivers of certification schemes.

Mining in the Global Economy

Globalisation is visible in the contemporary mining industry. Satellite and engineering technology has enabled mining operations in remote areas, usually inhabited by local communities that depend on a clean environment for water, livelihoods, and survival. Although a source of wealth and value, the extraction of minerals and metals has high impacts on the environment and surrounding communities.

Water pollution by acid mine drainage, sulfuric acid, cyanide, and mercury is dangerous to humans, even in trace amounts. Road construction through pristine forests, with its influx of settlers and alien values, customs and diseases disrupts the social fabric and the conservation of biodiversity. The contamination of the air by dust and fumes from smelters affects agriculture and human health. The forced resettlement of communities, usually without adequate compensation, represents a denial of livelihoods and culture.

These negative impacts have encouraged affected communities to mobilise opposition to mining, many times impeding access to the areas and to the minerals. Mining companies' need for a social license to operate provides the context for the current debate over the appropriate tools in advancing standards and roles. Recently, the limitations of legal strategies arising from bureaucracy, corruption, and from the lack of information and material resources, have placed the focus on alternative mechanisms, such as certification.

To date, certification initiatives include the ISO 14000 series, which deals more with environmental management systems than with substantive standards for mining, certification under the Cyanide Code, and the Kimberly raw diamonds certification scheme. Two NGO-driven initiatives are also underway: WWF Australia is working with Placer Dome on a pilot certification system, and ELI, OXFAM America and SPDA are conducting a project to explore adequate mechanisms of community-based control, including certification, in the Andean Region.

Raw Diamonds Certification

In 1998, the United Nations Security Council imposed sanctions against the purchase of Angola diamonds as the diamond trade was fueling increasing instability and conflict in the region, which resulted in huge losses in life and limb.

A coalition of human rights groups led by Global Witness, Amnesty International, OXFAM, Physicians for Human Rights and Partnership Africa first focused on an explicit consumer education campaign based on hard-hitting action research. Then in May 2000, South Africa, Namibia and Botswana, worried that the campaigns would negatively impact their industries and economies, initiated the Kimberley process by organising a meeting for governments, industry and NGOs. Through a series of ten meetings around the world, this process evolved into an attempt to develop a certification of origin scheme for raw diamonds. Civil society organisations were instrumental in pushing the process forward. In fact, concerned about the slow pace of the process, approximately 200 NGOs signed a petition to speed up the process and threatened to walk out. Soon, the important players in the global diamonds trade, including the World Diamond Council, came to realise that the diamonds industry lives off reputation and stepped up the pace.

In March 2002, 37 countries and the European Union concluded a certification scheme for rough diamonds. This model requires each shipment to be accompanied by a certificate expedited by the competent authority of a participating party. Certificates and containers must be tamper-proof and reveal such information as dates, authorising official, and statements accrediting the validity of the load. In turn, participating states must comply with certain obligations, including the implementation of the certification scheme through domestic laws, and the maintenance of information systems on production, imports, and exports of rough diamonds. More significantly, mining States should set up control systems over mines and mining companies, designed to exclude traffic of conflict diamonds.

The outcome of the Kimberley Process was certainly influenced by other campaigns, including prominently the US campaign led by Amnesty International (AI). The goal of the AI campaign was to draft legislation that would use the market to leverage reform and that would support the Kimberley process. In November 2001, the House of Representatives of the US Congress passed the *Clean Diamond Trade Act* by a vote of 408-6, prohibiting the import of conflict diamonds, establishing reporting requirements and funding for capacity-building of international arrangements, including the Kimberley Process and UN Security Council resolutions. However, the Act has met with the strong opposition from the current Bush administration. In any event, the Kimberley certification scheme is to be implemented on January 1, 2003.

Effectiveness of UNEP's Cyanide Code Questioned

In January 2000, an overflow of mine tailings from Aurul Gold smelter's dam in Baia Mare, Romania, released 100,000 cubic metres of cyanide-tainted waste water within 11 hours into the Lapus and Somes rivers, before crossing the border into Hungary. The cyanide was carried downstream to the Danube in Yugoslavia, devastating local ecosystems. Then in October 2001, villages in western Ghana were also hit by a spill of thousands of cubic meters of mine wastewater contaminated with cyanide when a mining dam ruptured. Earlier similar accidents have been recorded in Guyana, Colorado, and Kyrgyzstan.

Continued on page 8

Mining Certification, continued from page 7

The Baia Mare accident produced widespread trans-boundary contamination and sparked public outrage in Europe, setting the stage for discussions on how to elaborate standards on cyanide management and emergency response. To address these concerns, in May 2000 the United Nations Environment Program (UNEP) and the International Council on Metals and the Environment (ICME) took the lead and chose the members of a Steering Committee for the elaboration of the Code. The Committee consisted of participants mainly from the mining industry, and only some from government, academia, NGOs, labour and financial institutions. For the couple civil society organisations that engaged in the discussions, however, it was soon clear that industry had hijacked the process. The Cyanide Code has been criticised since as greenwash, 'giving the appearance that the regulatory inadequacies have been addressed, without actually requiring the changes necessary to protect communities and the environment.'

The Cyanide Code is not intended to derogate from laws and regulations, but to complement them. Also, compliance is entirely voluntary and does not create enforceable rights or obligations. To administer the Code, a non-profit corporation controlled by the gold mining industry was established: the International Cyanide Management Institute. Gold companies that become signatories to the Code are not required to have all of their operations certified, only those that they have specifically requested. In turn, cyanide suppliers and transporters can become Code supporters and may conduct audits, but cannot become signatories.

The Code is comprised of principles that broadly state voluntary commitments, and standards of practice for the management of cyanide. Independent third-party audits, including site inspections and review of records, will verify every three years whether operations meet the standards of practice and will certify compliance if warranted. Only a summary of the audit report will be made available to the public on the Code's website. Operations that are only in partial compliance will be conditionally certified, subject to the successful implementation of an action plan to be posted on the Code's website. The Institute will develop a procedure for the resolution of disputes regarding auditor credentials or otherwise arising from the certification scheme.

Conclusion

Many questions remain open in the mining certification debate, such as who would set the standards and in what process; how standards would incorporate public participation and access to information; what monitoring and oversight roles for communities; who would verify compliance; what kind of markets could provide a preference for certified products, facilities or companies; and the role of financiers and insurers in a certification scheme. More generally, certification schemes raise issues regarding market access, eco-labelling and the applicable terms of the WTO's TBT Agreement. What is clear is that mining certification is being discussed in a variety of fora. Industry retains a clear interest in distinguishing leaders from laggards, and certification is viewed as a tool for accomplishing this. In contrast, communities are wary of a tool that may serve to green-wash unfulfilled promises by an industry with a meager record of compliance and respect for human and environmental rights.

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Technology Transfer, continued from page 6

drug manufacturing business by packaging imported bulk drugs. Then, they gradually extended into more intricate operations, first by formulating imported raw materials and later, through backward integration, by producing the chemical components. Through this process, they grew in size and in technological capabilities. As a result, local firms accounted for almost 90 percent of the domestic drug market in Korea as compared to 22 percent in Brazil, 47 percent in Argentina, and 30 percent in India in the early 1980s.

During this period, Korea honoured only process patents but not product patents in the chemical, cosmetics, and pharmaceutical industries, opening an avenue for local producers to work around patented processes to produce relatively well known chemical and pharmaceutical products. Were it not for such lax IPRs, it would have been impossible for the local pharmaceutical firms to have achieved so much. Some of them have now advanced technologically to a level where they can undertake serious R&D activities and discover new drug compounds.

Some Lessons

The study offers four important lessons. First, strong IPR protection will hinder rather than facilitate technology transfer and indigenous learning activities in the early stage of industrialisation when learning takes place through reverse engineering and duplicative imitation of mature foreign products. Second, only after countries have accumulated sufficient indigenous capabilities with extensive science and technology infrastructure to undertake creative imitation in the later stage that IPR protection becomes an important element in technology transfer and industrial activities. This suggests that Japan, Korea and Taiwan could not have achieved their current levels of technological sophistication if strong IPR regimes had been forced on them during the early stage of their industrialisation. The same applies to the United States and Western Europe during their industrial revolutions. This article explains how these conclusions were reached.

Third, if adequate protection and enforcement of IPRs is genuinely intended to enhance development, policy makers should seriously consider differentiation in terms of the level of economic development and industrial sectors. Otherwise, the 'one size fits all' approach is a recipe for disaster for developing countries, particularly for the least-developed ones. Fourth, developing countries should work together to change current trends towards a standardised all-encompassing multilateral IPR system. They should strive to make IPR policies more favourable to them in the short term. But they should also strengthen their own absorptive capacity for a long-term solution that would enable them to identify relevant technology available elsewhere, strengthen their bargaining power in its transfer to them in more favourable terms, assimilate it quickly once transferred, produce creatively imitative new products around IPRs, and generate their own IPRs.

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ENDNOTE

¹ Sanjaya Lall and Manuel Albaladejo. 2001. *Indicators of the Relative Importance of IPRS in Developing Countries*. ICTSD/UNCTAD; <http://www.ictsd.org/unctad-ictsd/docs/Lall2001.pdf>. For a summary, see Bridges Year 6, No.3, page 13.