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Monitoring, Enforcement and Compliance

Dr. Vlado Vivoda

Centre for Social Responsibility in Mining, Sustainable Minerals Institute,
University of Queensland

Dr. Jonathan Fulcher

T.C. Beirin School of Law, University of Queensland

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About This Series and MLRI

This *Working Papers Series on International Best Practices* is prepared within the scope of the **Mining Legislation Reform Initiative (MLRI)**, a project of the **AUA Center for Responsible Mining**. MLRI is a multi-year effort, funded by the **Tufenkian Foundation**, to improve Armenia's legislation ensuring that mining in Armenia provides sufficient benefits to the country and local communities. The initiative involves drafting and passing legislation that elevates the socio-economic benefits of mining, while reducing the negative environmental and public health impacts. A key component of the MLRI is collaborating and partnering with civil society, advocacy groups, academic institutions, and relevant national and international organizations. MLRI works with the key governmental and legislative bodies in getting the draft legislation passed into law. For more information visit <http://mlri.crm.aua.am>.

About the AUA Center for Responsible Mining

The American University of Armenia (AUA) Center for Responsible Mining promotes the creation and adoption of global best practices in socially, environmentally, and economically responsible Mining in Armenia and the region. To achieve this, the Center conducts research, training, and advocacy engaging all key stakeholders including industry, civil society, financial institutions, and the public sector. For more info, visit <http://crm.aua.am>.

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Introduction

This working paper examines the monitoring, enforcement and compliance of mining regulation in Armenia. It identifies the main gaps, international best practices and proposes practical ways for government to improve mining sector monitoring, enforcement and compliance. Monitoring is the process through which governments track and enforce compliance with regulation. It is the only means of determining if proponents adhere to requirements stipulated in relevant legislation, regulation and contracts. Monitoring and enforcement are essential to ensuring that mining projects proceed in accordance with the legal framework. Monitoring the mining industry includes:

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

For the process to work, monitoring requires participation and cooperation from a range of stakeholders throughout the life of a mining project. By working together, companies, civil society, government and parliament can effectively conduct the oversight necessary to avoid potential social and environmental harms. Governments and companies must share information including not only contracts, but also ongoing project details, such as cost, revenue and production figures. Civil society and parliament can improve governance by scrutinising the activities of both companies and the government.

Current situation in Armenia

A prevailing culture of secrecy limits the opportunities for open, honest and transparent conversations within and between teams, ministries and committees. It also prevents the roles and responsibilities of various organisations to be clearly demarcated. In addition, several regulatory agencies do not have the required technical skills and experience to ensure effective oversight of the sector.

The Ministry of Energy and Mineral Resources (MENR) is responsible for all aspects of mining sector administration and regulation, and mineral sector policy development. The MENR devotes most of its resources to keeping track of mineral balances and assessing permit applications and inspecting companies to verify reserves and production rates and to administer the mineral licensing process. The strong focus and significant human resources devoted to reserves verifications, approvals and inspections does not support a sustainable mineral sector.

The Ministry of Nature Protection (MNP) is responsible for all aspects of policy development and implementation for environmental protection and rational use of natural resources in Armenia. A key issue at the MNP is the lack of human as well as technical capacity. Within the MNP, the Environmental Impact Expertise Centre (EIEC) performs the expert examination of EIA for exploration and mining projects. While the EIA Law requires social aspects to be included in the assessment, the EIEC staff is not qualified to ensure compliance.

The Ministry of Emergency Situations (MES) is responsible for the safety examination of mining permit applications, including the assessment of the technical and safety aspects of tailings dams. The level of technical expertise with regards to tailings dam construction and management is inadequate.¹

International best practice

Over the past three decades, more than one hundred jurisdictions have amended their mining laws and regulations. A parallel surge in sector activity has placed tremendous regulatory burden on governments that lack the required capacity to ensure appropriate oversight of the sector. While mining sector activity has increased dramatically, monitoring and enforcement have not kept pace. Problems with government oversight exist in every country with a substantial mining sector, including the United States, Australia and Canada.

While no country has mastered the challenges, the monitoring gap is especially acute in developing country jurisdictions with weak regulatory systems. Often, the problem is attributed to staffing or capacity, but there is an underlying problem of incentives. In developed and developing jurisdictions alike, political forces have often favoured strong promotional mechanisms and weak oversight. Checks and balances are often written into the rules but unrewarded in practice.² Despite the challenges, good practices are emerging in a number of countries. Key elements of international best practice are summarised in Table 2.

Table 2: Elements of best regulatory practice³

¹ The World Bank (2016), [Armenia: Strategic Mineral Sector Sustainability Assessment](#), April.

² Smith, E., & Rosenblum, P. (2011). [Enforcing the Rules: Government and Citizen Oversight of Mining](#). Revenue Watch Institute.

³ Adapted from Vivoda, V. (2008). Assessment of the governance performance of the regulatory regime governing foreign mining investment in the Philippines. *Minerals & Energy – Raw Materials Report*, 23(3): 127–43; Vivoda, V. (2009). Resource nationalism, bargaining and international oil companies: challenges and change in the new millennium. *New Political Economy*, 14(4): 517–34; O’Callaghan, T. (2010). Patience is a virtue: problems of regulatory governance in the Indonesian mining sector. *Resources Policy*, 35(3): 218–25; Vivoda, V. (2011). Determinants of foreign direct investment in the mining sector in Asia: a comparative analysis between China and India. *Resources Policy*, 36(1): 49–59; O’Callaghan, T., & Vivoda, V. (2015). Problems of regulatory governance in the mining sector in Asia. *Transnational Corporations*, 22(1): 31–57; and Cornish, G., & Vivoda, V. (2016). Myanmar’s extractive industries: an institutional and regulatory assessment. *Extractive Industries and Society*, in press.

Clarity of policy objectives	If overarching sectoral policy objectives act as guiding principles in associated laws and regulations this should facilitate consistency in regulatory oversight.
Uniform legal framework	Effective sector oversight requires clear lines of responsibility between various regulating agencies in order to minimise overlap or uncertainty regarding respective roles in sector administration.
Capacity	A regulating agency should have access to an adequate budget and staff with required level of technical expertise and experience in order to optimally perform oversight functions.
Independence / autonomy	A regulating agency should perform its mandated oversight functions without intervention (or capture) by political or commercial interests / conflict of interests.
Transparency and accountability	Project proponents, affected stakeholders and other interested parties should have access to laws and regulations and be informed about regulatory decisions and decision-making processes. Regulatory decisions can be challenged through the legal system.
Stakeholder participation	Affected stakeholders and other interested parties should be able to participate in regulatory processes through consultation and other formal and informal participatory mechanisms.

National mineral, mining or resource policy is essential for ensuring that development and regulation of the sector hold together and adhere to the overall vision for national development. Mineral policy is the statement of government strategy to maximise revenue and exercise sovereignty. It is often related to a country's more general development policies. The overarching sectoral policy objectives can act as guiding principles in associated laws and regulations, ensuring consistency in regulatory oversight. The policy development process provides an opportunity to build consensus and a shared understanding of issues among various stakeholders.

A mining company's obligations within a country may be defined by a variety of legal instruments. The legal frameworks that determine mining companies' obligations, whether legislative, regulatory, contractual or a combination of all three, must anticipate how those obligations will be monitored and enforced in practice.

In some cases, the company's obligations are defined primarily in laws and regulations. In those cases, the legal framework that governs the mining industry within a country tends to be uniform across companies, with relatively little variation in the obligations from company to company. Uniform legal frameworks help simplify monitoring by providing a single set of rules applicable to all companies operating in the sector. Under a uniform legal framework, government and civil society monitoring actors must learn one common set of company obligations. Uniformity makes it easier for governments and civil society to monitor the contracts because it removes the need to make sense of and monitor multiple regimes. Establishing a company's obligations in law, rather than in individually negotiated contracts, is one way to establish a uniform legal framework. Some countries have used model contracts to cut down on the proliferation of legal frameworks. Because they leave fewer terms open to negotiation than ad hoc contracts, model contracts can reduce transaction costs.

In other cases, companies sign individual contracts with governments, and those contracts define the majority of the companies' obligations, including taxes, environmental requirements and so forth. Contractual regimes can be problematic for a number of reasons. They leave room for corruption by requiring that deals be individually negotiated, and they tend to lead to worse outcomes for governments because government negotiators make concessions to companies during the negotiating process. Separate legal frameworks in contractual regimes can make it more difficult for both government and civil society to effectively monitor companies' obligations.

Clear rules and good administrative architecture facilitate effective sector oversight. Effective sector oversight requires clear lines of responsibility in order to minimise overlap or uncertainty regarding regulatory roles in sector administration. Government obligations and lines of responsibility for monitoring different types of obligations should be established in the legal framework. Wherever a company's obligations are defined (in laws, contracts or regulations), respective roles and responsibilities for ensuring compliance with particular obligations must also be defined to ensure effective oversight.

Clearly defined rules composed of objective factors can be easier to monitor and enforce. For example, following criticism from the World Bank that the lack of standards had hindered effective environmental monitoring and enforcement, Peru passed maximum permissible limits and environmental quality standards. Clear limitations on pollution levels allowed the government to determine whether a company has complied with the law or not.

A key challenge for governments is attracting and retaining enough sufficiently trained staff to conduct the monitoring. A 2010 report from the World Economic Forum surveyed 13 countries in three regions and found that "lack of government capacity to ensure compliance through contract monitoring and implementation/enforcement is a frequently cited

problem.”⁴ The required number of inspectors and inspections is driven primarily by the number of active mining projects and the number of workers employed in the industry. Beyond mere numbers of inspectors, governments must also ensure that inspection officers have the expertise to conduct their monitoring effectively. Capacity deficiencies result in insufficient, inconsistent monitoring of industry operations, which can ultimately lead to reduced compliance.

Ontario, Canada, demonstrates the difficulty of effective administrative oversight of exploration, even for a developed country. Ontario maintains a system of mining permit assessment auditors to ensure that the parameters of the permits are being followed. Ontario receives about 1,000 assessment reports each year, and, by law, the ministry’s three assessment reviewers must review the listed payments to ensure that they qualify as exploration expenses and, if not, challenge the companies’ payments within 90 days. Even a relatively small mining centre with relatively large administrative capacity such as Ontario ends up approving 25 to 40 reports each year without reviewing them. Less than half a percent of the assessment reports is subject to a detailed review in which the companies have to justify each exploration expenditure.

Capacity is also a challenge for civil society. Even when laws and contracts are readily available, civil society may lack the skills necessary to analyse and understand the deals that their government has negotiated with companies and the technical and engineering expertise to determine whether those deals are being complied with.

Regulatory independence / autonomy is the basis for effective oversight and enforcement. Capacity challenges are often exacerbated by conflicts of interests. Mining ministries are often charged with both promoting new investment and regulating ongoing investment. Enforcing laws and provisions against companies can be seen as competing with the goal of promoting investment in the mining sector. A situation in which the same staffers are responsible for approving new mining permit applications and for monitoring ongoing mining operations creates an institutional conflict of interest in that many government agencies favour getting new mining projects off the ground over effectively monitoring existing ongoing projects. Distinct functional groups can be established so no overlap exists between staff responsible for approving new permit applications or reviewing mining plans and the staff responsible for monitoring ongoing mining operations and compliance with legal obligations.

Some public officials have private interests in the mining sector and favour companies that are controlled by themselves, their friends and family, or their political allies. Monitoring the costs of subcontracts, for example, can be undermined if the official has an interest in a

⁴ World Economic Forum (2011). [Stakeholder Perceptions and Suggestions, Responsible Mineral Development Initiative 2010](#).

certain subcontractor receiving a valuable (and possibly inflated) contract. Another personal conflict of interest can arise when mid-rank officials create a bottleneck through a reporting or approval process, establish themselves as the gatekeeper, and collect a “rent” from companies to pass through it. Local content compliance is one example: Companies have to get sign-off, and they must pay or otherwise reward the gatekeeper to get it. The incentive for the gatekeeper becomes capturing the rent rather than enforcing the rules.

In most Organisation for Economic Co-operation and Development (OECD) countries, unified, semiautonomous departments are responsible for administering taxes. These bodies report directly to a government minister and can have a formal management or advisory board. This model of semiautonomous revenue agencies tries to shield the tax administration from public and political pressure. Revenue agencies’ performances improve most when the level of autonomy is relatively high and stable as in Peru, Kenya and South Africa.⁵ Australia relies on a special body, independent of the revenue agency, to report on and oversee tax administration. The Inspector-General of Taxation is an independent agency responsible for reviewing the Australian Taxation Office’s administration of the tax laws.

Effective monitoring relies on access to information, and a lack of transparency can be a challenge for both government and civil society monitoring efforts. Transparency is a condition for effective monitoring as it creates incentives for all stakeholders (government, companies and communities) to play by the rules.

Within executive government and parliament, access to information across departments is essential for effective monitoring. For civil society, access to contracts, ESHIAs, work plans, revenue collection figures and other ongoing project information is essential to monitoring efforts but is often lacking. Governments and companies should publish all essential information for monitoring mining projects, including:

- concession agreements, including contracts, permits or licenses;
- laws and regulations;
- project-specific assessments and reports, including EIAs, SIAs, HIAs, EMPs, work programs and local development plans;
- ongoing data on implementation and monitoring, including production figures, tax and royalty payments and inspection reports.

Companies and governments are increasingly responding to growing pressures to become more transparent and participatory, while civil society organisations are striving to scrutinise deals and respond to threatened harms. The first step in civil society monitoring is to identify the company’s obligations and to determine which of those obligations to monitor. In a

⁵ Robert Taliencio Jr. (2004). [Designing Performance: The Semi-Autonomous Revenue Authority Model in Africa and Latin America](#), World Bank.

contractual regime, this requires access to the contracts. The next step is determining whether those obligations are being met during the company's ongoing operations. The most effective approaches involve partnerships in which government agencies, industry and civil society work together to address monitoring needs and challenges.⁶

Third party rights to sue for environmental damage or enforcement for breaches of environmental law vary from State to State. Under the Environmental Liability Directive of the EU, Article 12 provides that natural or legal persons:

- affected or likely to be affected by environmental damage, or
- having a sufficient interest in environmental decision-making relating to the damage; or alternatively,
- alleging the impairment of a right, where administrative procedural law of a Member State requires as a precondition

are entitled to make submissions and request the competent authority to take action. Various forms of such ability of third parties to take legal action against causers of environmental harm exist to varying degrees in Australia as well.

In Armenia, Division 9 Chapter 60 of the Civil Code provides in article 1058 that "harm caused to the person or property of a citizen and also harm caused to the property of a legal person shall be subject to compensation in full by the person who has caused the harm. The inaction of State bodies which results in harm being caused to citizens or legal persons also gives rise to a right to seek compensation from the relevant body (Article 1063).

Consequently, it is theoretically possible under Armenian law for individuals or corporate entities to sue a person who causes environmental damage. However, it would be better and more closely aligned with at least European practice to more carefully connect these general rights in relation harm to refer specifically to environmental harm.

These third party rights, it should be noted, are in most jurisdictions rights to compel the State authority in charge of environmental regulation to ensure the law is complied with, rather than against the polluter directly. So, in Spain there are third party rights to sue the competent authority on the merits, where in the UK it is only a procedural review which is permitted by the Courts. Some EU Member States have provided interested third parties that have made comments or observations on development (called in Queensland "properly made submissions" on an EIA) rights to join actions to sue alleged polluters (such as Poland and parts of Austria).⁷

⁶ Smith, E., & Rosenblum, P. (2011). [Enforcing the Rules: Government and Citizen Oversight of Mining](#). Revenue Watch Institute.

⁷ It is beyond the scope of these working papers to examine the detail of legal differences between States to any great level of detail. For a comprehensive assessment of the integration of the EU Environmental Liability

Conclusions and recommendations

Past and ongoing initiatives taken by the Armenian regulators to reform the sector have been taken without reference to a policy or longer term strategy. The current regulatory system is an evolving network of intersecting laws and regulating agencies, without clear oversight or direction. The government should embark on a process of developing a harmonised policy and regulatory framework. The first step is to develop a national resource / mineral policy that aims to achieve triple bottom line outcomes. Non-urgent regulatory reforms related to the mining sector should be put on hold during policy development. Any subsequent updates to laws and regulations should reflect strategic policy guidelines.

The *EIA Law* requires additional technical expertise, a high level of coordination and access to financial resources to mainstream new environmental protection practices across government departments. The functions of several sub-departments within MENR overlap and could be better coordinated within one institution. Mechanisms for better collaboration between MENR and MNP need to be identified by focusing on respective roles, responsibilities and objectives. This could emerge through joint development of a resource / mineral policy.

The oversight function is crucial in ensuring that adverse social and environmental impacts are mitigated and benefits enhanced. Lack of capacity is the most obvious challenge to effective monitoring. Several regulatory agencies do not have the required capacity to carry out adequate monitoring. Capacity building and training is urgently needed, and this must also be associated with an effort to close the gap that exists in terms of permitting, controlling tailings facilities and for social impact management.

However, capacity reflects politics and priorities as well as other factors that contribute to sustainable and effective mining sector governance. A prevailing culture of secrecy in the sector hinders meaningful public participation and decision-making based on factual information. Initiatives to make such data publicly available for public scrutiny are therefore needed. The potential EITI candidacy from February 2017 can provide a helpful platform to improve civil society and business participation in government processes. It can alert government ministries that parties in the industry and civil society networks have an interest in how the government operates and genuinely seek to contribute to the country's development. EITI membership necessitates the introduction of systems that mandate revenue accountability and reporting. Regular Multi-Stakeholder Group (MSG) meetings include representatives from civil society organisations, government ministries and mining companies. The EITI process can potentially provide an avenue for Armenia's transition from

Directive (ELD), see Stephens & Bolton LLP, *Study on Analysis of integrating the ELD into 11 national legal frameworks*, 16 December 2013, EU publications, <http://ec.europa.eu/environment/legal/liability/pdf/Final%20report%20-%20ELD.pdf>

the Soviet-style mining sector governance to a system with improved regulatory practice and greater transparency and accountability in decision-making.

Initiatives are also needed to address the cases of conflict of interest where current or formerly elected politicians engage in mining project development. The government should consider drafting and promulgating an anti-corruption law, consistent with the UN Convention against Corruption, which could assist in the effort to improve autonomy and eradicate corrupt practices. Such law could be enforced by the existing Anti-Corruption Council (ACC) and require all members of the executive, judiciary and legislative branches to declare their assets, with severe consequences for corrupt activity for if found guilty. In addition, the Control Chamber of the Republic of Armenia should have the power to independently hold to account government ministries.

Armenia's legal and regulatory framework has not matured to a point in which the governance of mining sector promotes responsible investment and equitable development outcomes. However, the framework is undergoing reform with various laws, regulations and mandates under review or recently promulgated. The emergence of EIA system in 2014 marks an important milestone in the country's efforts to better manage its environment and safeguard the country's future. Reform processes of this nature and scale cannot materialise over a short timeframe. Regulatory reform is only a starting point for changing actual practice. There are organisational hierarchies to overcome and instilled cultural norms to dismantle.

AUA Center for Responsible Mining
American University of Armenia
40 Baghramyan Ave.
Yerevan, Republic of Armenia
+374-60-612520
crm@aua.am
crm.aua.am

mlri.crm.aua.am

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