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Land Use Disputes between Small- and Large-Scale Miners: Improving Conflict Management

JOHN S. ANDREW AND GAVIN M. HILSON

Small-scale mining in developing nations is routinely associated with land use conflicts with other stakeholders, primarily large mining companies. The scale of these disputes (which occasionally involve armed conflict) is usually sufficient to have significant adverse impacts on the natural environment and the local population. These conflicts have proven very difficult to manage, and have imposed great costs on a broad range of stakeholders.

This chapter explores intense land use competition as a source of conflict between small- and large-scale mining parties, using several case studies to illustrate its points. It then proposes mediation as a promising approach to resolving these serious disputes. Finally, it generates recommendations for how this approach to conflict resolution could be tailored to this context in order to make it an effective and efficient process, and increase its potential to produce lasting, consensus-based settlements.

LAND USE COMPETITION IN DEVELOPING COUNTRIES

Throughout history, different parties have competed for land plots. In tropical countries such as Brazil and PNG, where resources are rich and diverse, groups such as loggers, farmers and ranchers are constantly competing for land, contesting for it to be utilized differently. In areas containing minerals, however, parties are in competition for the same resources but deploy different methods for their extraction. In many cases, the ensuing conflicts between the parties are exacerbated by harsh climatic conditions and population pressures.

The poorly enforced legislative processes and accompanying monitoring activities prevalent in the developing world are the main reasons why a number of land use conflicts have occurred in recent years. Specifically, many indigenous

claims to land have been quashed by recent government initiatives undertaken to promote foreign investment and regulate industrialization in rural regions. Unruh (2002, p. 275) puts the issue into perspective:

> The legal problem concerns the ongoing disconnect between formal state law, and customary or traditional law, which governs how a great deal of the world's poor intersect with property. The former allows assets to be fungible and used, as such, by individuals; but the latter – the maintenance and security of community and lineage connections to land in an often risky physical, social, and political environment.

An estimated 20–80% of land delivery in developing countries is informal, and, therefore, does not conform to the legal cadastral system and land use controls (Fourie, 1998). Thus, the actions that have been taken to better regulate rural lands have posed a major problem for locals, who have been forced, often for the first time, to adhere to a more controlling, legislated environment.

LAND USE CONFLICTS BETWEEN SMALL AND LARGE-SCALE MINING PARTIES

In recent years, in an attempt to alleviate financial crises and curb national inflation, several governments have restructured their economies under the tutelage of the World Bank and the IMF. In fact, structural adjustment and stabilization has become the norm across Sub-Saharan Africa and Latin America, where virtually every country has undergone, or is in the process of undergoing, some form of adjustment in line with plans set out by the Bretton Woods Institutions. As Jackson (1999, p. 281) explains, the majority of these programs aim to reduce short-term *macroeconomic equilibria* – "getting the prices right" – but also involve medium-term adjustment of the main productive elements of the economy.

Economic restructuring depends heavily upon inputs from the private sector. In the majority of cases, governments have decreased ownership in domestic industries, and have drafted policies and implemented legislation for the purpose of promoting increased foreign investment. This, however, has had pervasive effects on the livelihood strategies of many people, as their established means of income generation have been seriously disrupted. The decision to promote increased foreign investment has therefore put many developing countries in a vulnerable, more destabilized, socio-economic state.

The mining and minerals sector has been mainly targeted by governments striving to promote foreign investment in their economies. The main strategies pursued have emphasized the divestiture and subsequent privatization of state-owned operations, and the provision of mineral exploration and mining licenses at a minimal expense. In order to *guarantee* adequate availability of land resources to foreign mineral exploration and mining companies, most governments have legalized informal artisanal and small-scale mining industries with the intention of organizing and localizing activities.

However, despite repeated contentions of the need to improve the organization of resident artisanal and small-scale operations, and to ensure that output does not escape through illegal channels, governments appear to have been quick to ignore artisanal and small-scale miners in favour of large companies. It is therefore no surprise that the "relationship between large mining companies and smaller-scale operations has often been characterized by tension and mistrust" (MMSD 2002, p. 324). Many countries are dependent on substantial foreign investment in the mining sector, and, in many cases, this has contributed to conflict. A 2001 survey of mining companies revealed that when such conflict is violent, it often serves as a significant disincentive for mining companies to maintain and make further investments in their operations in the area of unrest (MMSD, 2002).

Many natural resource conflicts are typically severe and debilitating, resulting in *inter alia* violence, resource degradation, the undermining of livelihoods, and the uprooting of communities (Castro & Neilsen, 2001); each party simply wishes to pursue its own interests to the fullest. Such circumstances characterize the mining sector in a number of developing countries, where conflicts have been exacerbated by the cavalier approaches governments have taken toward exploration geology and the demarcation of land plots. Concessions of land are generally awarded to large-scale mining companies, which are then prospected to ascertain the locations of prospective mineral deposits. Often, numerous illegal artisanal operators are found working the land, and, when asked to relocate, disputes occur.

The problem is not only confined to large-scale miners, however. Licensed small-scale miners often "acquire" concessions from the government without any knowledge of mineral content. In many cases, following extensive pitting and trenching, miners realize that awarded areas contain minimal mineral deposits, and are therefore forced to abandon concessions outright. The inevitable encroachment (on neighbouring large-scale mine plots) that follows induces further conflict.

CASE STUDY ANALYSIS

According to the United Nations publication, *Recent Developments in Small-Scale Mining* (United Nations 1996: s. 43), "recently, many large companies seeking to establish operations in developing countries have concerned themselves with the small-scale mining issue, establishing specialized divisions that deal with community relations". Although in certain instances, working partnerships have successfully been forged between large- and small-scale miners, there remains a disproportionately greater percentage of cases of strained relations between the parties. As much of the improvement that has been achieved in this area is now well documented in the literature, it has created the misconception that in most parts of the world, large- and small-scale miners are coexisting in harmony.

The main antagonists continue to be international mining companies, which, despite operating under extremely favourable economic conditions, repeatedly

take advantage of the fact that developing world governments are cash and resource-strapped. More specifically, rather than turning over portions of an awarded concession – that have proven unsuitable for large-scale activity – to artisanal and small-scale mining parties, the management of international mining corporations typically elects to withhold land, and governments, most of which are operating at the mercy of these companies, are forced to comply with their demands.

In fact, in the majority of cases where compromises have been reached between large- and small-scale mining parties, (large-scale) companies have either released land reluctantly, have turned over largely spent and "mined out" portions of a concession, and/or have freed up portions of a concession in exchange for compensation. For example, in the Philippines, the Benguet Corporation has allowed a group of small-scale gold miners to operate legally on a certain portion of its concession largely because of a forged agreement that gives the company exclusive rights to the tailings of small-scale miners (Bugnosen, 2001). Similarly, in the Great Dike area of Zimbabwe, "companies have allowed artisanal miners to *rework* tailings and operate in *abandoned* sections of functional mines, as well as *marginal* areas of the concession, with agreements to sell at least part of the production to the company" (United Nations 1996: s. 45). Ghana Goldfields, which is operating in Tarkwa, western Ghana, has not only been involved in the relocation of local villagers – the associated schemes for which have generated considerable controversy in various circles – but have also established purchasing services for illegal miners operating within their concession, equipping them with identification cards and mandating that they serve as a "police" force to prevent additional artisanal miner encroachment.

CONFLICT PREVENTION *VS.* CONFLICT RESOLUTION

Many researchers and scholars have proposed proactive measures that should be taken to reduce the risk of conflicts arising between small- and large-scale miners. Most of this work to date has placed the onus for taking action on large-scale mining companies. Among the more comprehensive and practical recommendations directed at these firms are the following identified by the International Labour Organization (1999):

1. Provide affordable assaying services.
2. Share geological and other technical information with small-scale miners.
3. Provide practical training and technical advice.
4. Help to establish or sponsor small-scale central processing plants.
5. Provide purchasing services, tools and equipment to local communities.
6. Assist with the procurement and storage of explosives.
7. Provide custom milling services and workshop facilities.
8. Buy and treat tailings.
9. Release land that is sub-optimal for large-scale mining.
10. Provide emergency assistance and mine rescue.

While many companies have implemented a number of these, and related, measures, most have done so strictly for the benefit of the company, rather than small mining parties. Moreover, mining companies have nearly always made these decisions unilaterally, with little, or no, meaningful consultation with key stakeholders, such as small-scale miners, non-governmental organizations (NGOs), foreign aid agencies, environmental groups, human rights groups, and local and national governments.

In principle, strategies to proactively attempt to prevent disputes from arising are more valuable and worthy of attention and resources than methods of conflict *resolution*. However, the intensity of the land use competition and the extreme volatility of the conflicts that ensue make the prevention of these disputes a Herculean task. Until these approaches have had time to evolve and mature, we must be realistic in our expectations of them. At present, it would be irresponsible to devote all of our energy and attention to the prevention side of the equation. Rather, it is essential to address these serious disputes along two parallel tracks: conflict prevention and conflict resolution. Given the considerable attention that the literature has directed at the former (especially in the area of community consultation), this chapter concentrates on the latter.

The remainder of this chapter introduces mediation as a conflict resolution process, establishes the need for mediation in disputes between small- and large-scale mining parties, and discusses features that should be incorporated into a mediation process in order to increase its effectiveness at resolving these conflicts.

INTRODUCTION TO MEDIATION

Mediation is a voluntary, negotiation-based process in which parties involved in a current or potential dispute meet together with the assistance of a neutral mediator for collaborative problem solving and consensus building, with the goal of achieving a mutually acceptable resolution. At the heart of mediation is the process of negotiation or bargaining between stakeholders, in an attempt to resolve issues on which they disagree. Taylor (1992) defines negotiation as "resolving conflict through a process of communication, exchange, and commitment to a course of action. It is intended to reach an agreement that benefits all parties while recognizing that each side will protect and promote its own self interest."

The participation of disputants in mediation is voluntary, including their ability to withdraw from the process at any time. The process is confidential and without prejudice to the legal rights of any party. By entering into mediation, disputants do not surrender their right to later pursue a different conflict resolution channel. Nor do the proceedings have any legal influence on a concurrent or subsequent process. The mediator has no decisionmaking or adjudicatory authority to impose a settlement on the parties. Disputes are resolved only when the parties themselves reach what they consider to be an acceptable resolution. The settlement of issues is based on a consensus of all of the parties, rather than a majority vote.

The mediator is a completely independent, neutral and impartial party, who is normally jointly selected by the disputants. The mediator works with the parties to design a fair process, helps them to obtain the resources they require, organizes and manages the meetings, assists the parties to set and adhere to realistic deadlines, maintains minutes of each session, and coordinates the exchange of information between the parties. In addition to managing the process, the mediator contributes to discussions about the substance of the conflict, shuttles ideas and offers back and forth between the parties, helps each party to formulate proposals that are more likely to be acceptable to the other parties, conducts private caucus sessions with fewer than the full complement of parties (if all parties agree), participates in the generation of creative options, and assists in the writing of the final agreement.

THE NEED FOR MEDIATION IN SMALL-SCALE MINING DISPUTES

A review of the literature on small-scale mining revealed no examples of attempts to resolve land use disputes through mediation, although it is possible that there are cases which have not been documented (Solomon, 2001). Ayling and Kelly (1997) observe that little attention has been directed to the development of mechanisms for managing natural resource conflicts in general, and argue that these are urgently needed to equitably distribute resources and lessen the risk of violence. Epps and Brett (2000) recommend the creation of mechanisms to resolve local mining disputes, although they do not specifically address small-scale mining.

Hilson (2002a) calls for large mining companies to improve their communication with communities (including small-scale miners). Opportunities are needed for a local community to learn information from a company, express its concerns and ideas, have its questions answered, and provide input about various phases of mine development. Hilson also recommends that mining companies provide appropriate compensation packages to local communities adversely impacted by their activities. Since it is essential that compensation meets the specific needs of each community (which has seldom been achieved to date), this requires the company to have clearly identified those needs. Mediation is capable of achieving each of these objectives.

Representatives of local communities in which small-scale mining is prevalent often express frustration with their attempts to negotiate compensation with large, multi-national mining companies (Mining Watch Canada, 2000). In one case in Ghana, consultants working for a Canadian mining company negotiated with local residents being displaced by its mining operation. However, the negotiations occurred despite a tremendous power imbalance; a history of repression of local rights and coercion by the company; and a lack of any alternative process available to the residents (Mining Watch Canada, 2000). It is likely that a skilled mediator could have managed the process to ensure that this power differential, although very real, would not handicap any party at the bargaining

table. The issue of the distribution of power among participants in mediation will be further explored later in this chapter.

Tyler (1999) stresses the importance of making use of a completely neutral, outside mediator in the resolution of natural resource disputes. Epps and Brett (2000) and MMSD (2002) each argue that a neutral party is needed in disputes between small- and large-scale miners, especially when an impasse has been reached. The *Action Plan for Change* developed by MMSD North America establishes the need for dispute resolution mechanisms that can be applied at the project/operation level of mining (MMSD, 2002).

Mediation should also play an important role in the efforts of many countries to develop more comprehensive systems of regulating all mining activities. The advantage of greater regulation of small-scale mining is well documented in the literature, including its potential to reduce conflicts between various types of mining operations (MMSD, 2002). To date, many international initiatives for the regulation of small-scale mining have been designed, yet very few have been successfully implemented by governments (Andrews-Speed et al., 2003). Legislation and licensing, in concert with strict enforcement, would represent significant progress toward preventing future land use conflicts between large mining companies and small-scale miners. However, such efforts have, in the recent past, proven to be catalysts for considerable conflict among stakeholders, especially when companies already hold permits, when there are already conflicting pieces of legislation, or when there are illegal mining operations (Bugnosen et al., 1999).

Employing the services of an independent mediator would be particularly beneficial for bringing about positive changes to the regulatory environment. The effectiveness of any regulatory program will depend on whether the process used to develop it is accountable and transparent, avoids the conflicts of interest associated with local government decisions, and involves the meaningful participation and accommodates the key interests of all stakeholders (Andrews-Speed et al., 2003). As Danielson (2003, p. 98) points out: "Successful approaches will require cooperative and sympathetic methods of solving problems, rather than harsh solutions". Mediation will lessen the risk that small-scale miners will perceive regulation as unfairly prohibitive or punitive, and be further marginalized in an underground economy, exacerbating illegality, land use conflicts and environmental degradation.

DESIGNING EFFECTIVE MEDIATION FOR MINING DISPUTES

Andrew (2003) evaluated land use conflicts arising from small-scale mining with respect to how well they satisfy a set of 19 characteristics of disputes. These are prerequisites for mediation, in the sense that they increase the likelihood that mediation will produce a satisfactory outcome. This analysis found that these disputes would probably satisfy 10 of the 19 preconditions, while the remaining nine may or may not be satisfied. For none of the preconditions could it be predicted with any certainty that these disputes would fail to meet

its requirements. The article concluded that mediation holds enough potential to resolve land use conflicts associated with small-scale mining that it warrants use in this setting, at least on an experimental basis.

Andrew (2001) employed various statistical techniques to test the influence that 17 factors (based on a review of the literature) had on the success of Alternative Dispute Resolution (ADR) processes in 54 waste management disputes. The ADR processes included negotiation, facilitation and mediation. Success was measured using the following four criteria: whether a final settlement of the conflict was achieved; whether the conflict was resolved more quickly and at less cost than a conventional conflict resolution process; participant satisfaction with the process; and the duration of the process. Unlike Andrew (2003), this article included not only characteristics of the conflict, but also characteristics of the ADR process. Of the 13 characteristics of either the ADR process alone (10) or of the process and the conflict combined (3), seven were found to influence the outcome of the process. They were: the number of people directly involved in the process, the participation of all stakeholders in the dispute, the participation of the government (if it was required to approve a final settlement), the type of representatives, the overall effectiveness of party participation (a blend of nine sub-factors), the joint design and control of the ADR process, and the neutrality of the facilitator or mediator.

Andrew (2001) concluded that fewer characteristics of ADR processes are actually important to successful outcomes that are widely claimed in the literature. For those characteristics found to influence ADR success, the degree of that influence was usually less than expected. Nevertheless, these findings, many of which contradicted previous research by others (most of which was not empirically based) were used to generate recommendations for designing more effective ADR processes. These recommendations pertain to good ADR practice, and are easily adapted to the mediation of land use disputes between large- and small-scale miners. This study suggests that for mediation to be effective in addressing this type of dispute, its process must be designed with the following points in mind.

While it is essential to include representatives of all parties that hold a stake in the outcome of the dispute, it is also important to balance this with the need to limit the number of individuals present at the bargaining table. This may involve an early identification by the mediator of the parties which represent genuinely different interests, as well as opportunities for coalitions to be formed to allow multiple parties to be represented by a single negotiator. In many cases, the number of representatives per party may need to be restricted. The participation of any government department or agency that will be responsible for approving any settlement reached must also be directly involved in the mediation process. Contrary to a conventional viewpoint in the mediation literature, stakeholders should be represented by professional advocates trained and experienced in negotiation (such as lawyers or technical consultants), rather than by the principals themselves.

Overall effectiveness of party participation was comprised of nine components in the Andrew (2001) study. Adapted to mining disputes, the findings

suggest that all parties should have:

- Adequate financial resources to hire any professional assistance required;
- Sufficient opportunities to express their opinions and to actually influence decision;
- Adequate access to usable information about the conflict and the mediation process;
- A good understanding of the process itself;
- Representatives with the full authority to represent their constituencies;
- Representative with strong negotiation skill;
- Flexibility and willingness to negotiate in good faith; and
- Cohesiveness within the constituency itself.

The mediation process should include provisions that permit the early and direct participation of the disputants in jointly designing the process itself, as well as the cooperative management of the process throughout its duration. Finally, the complete neutrality and impartiality of the mediator is essential to an effective mediation process.

In addition to the factors identified in the research by Andrew (2001) as being important features of an effective ADR process, the authors believe that there are a number of characteristics of mediation that will increase its effectiveness in attempts to resolve land use disputes between small- and large-scale miners in developing countries. These have been adapted from an extensive review of the conflict management literature and from the authors' professional experience. The following discusses these 10 key features of mediation and elaborates on some of the characteristics of the process that have already been identified. We do not include in this discussion most of the fundamental rules of mediation that are frequently discussed in the literature and widely accepted. Many of these (*e.g.* consensus agreements rather than majority rule, the mediator having no adjudicatory authority, etc.) have been mentioned in the earlier section of this chapter that introduced mediation. Those that are discussed in the following (*e.g.* voluntary participation, confidentiality, etc.) are included because they are not always observed in practice and/or may not be matters on which there is currently a consensus of opinions among scholars and practitioners. The following also intentionally omits any discussion of characteristics of the mediator (other than neutrality and impartiality), an area of analysis which is beyond the scope of this chapter.

1. Role of government

The unique position of various levels of government in developing nations as regulators of the mining sector carries with it the responsibility to effectively manage small-scale mining disputes. These governments also have a moral obligation to encourage and make the necessary arrangements for key stakeholders to participate in an equitable and efficient mediation process. The principle of *subsidiarity* holds that any governance function is best carried out by the lowest level of government capable of doing so. However, in the case of

resolving mining disputes, this is superseded by the greater importance of the accountability, neutrality and impartiality of the process. Consistent with this are Epps and Brett's (2000) recommended mechanisms for handling mining conflicts, which involve local government initiating and managing mediation processes, and national government stepping in when disputes cannot be locally managed. Hilson (2002b) cites the example of Ghana in recommending that national governments expand their role in resolving land use conflicts. While not specifically addressing conflict resolution, Andrews-Speed et al. (2003) propose for China the creation of an agency of the central and provincial governments to provide "one stop" regulation and administration services to small-scale mining. Regardless of which level of government oversees the process, it is important that the mediation sessions be held in the local community or communities where the dispute exists.

2. *Complete neutrality and impartiality of the mediator*

The typical conflict characteristics of contentious interparty relationships and an imbalance of power between stakeholders make it essential that mediation services be provided by a completely independent neutral entity. A mediator must be entirely neutral and impartial, and be perceived as such by each stakeholder. Neutrality requires that the mediator has no past, present, or likely future relationship with any of the parties, and does not stand to gain anything from any possible outcome. Impartiality depends on the mediator having no bias or preference for any party or position. While this does not imply that the mediator cannot and will not hold personal opinions on the matters in dispute, he or she must separate those from the management of the process and the substance of the discussions. This does not necessarily require that the disputants jointly pay for the mediation process. There are various types of innovative financial mechanisms that can make it possible for one type of party to pay a greater proportion of these costs, without compromising the integrity of the process. In some cases, it is appropriate for mediation processes to be financed by a government or international agency, with the disputants bearing none of the cost burden.

Despite their important functions as proponents and managers of conflict resolution processes, it is nearly always inappropriate for governments to assume the role of mediator (MMSD, 2002). Governments are usually stakeholders in these disputes. In some cases, they enforce claims granted to mining companies at the expense of small-scale miners. In many developing nations, governments fail to provide equitable justice and legal systems, and may be associated with corruption and human rights violations. In short, parties in mining disputes often have little trust or confidence in their government. Government officials rarely have formal training or experience in conflict resolution. Finally, governments may also lack sufficient resources or legal authority to provide effective mediation services (MMSD, 2002).

In many cases, it will be necessary to contract with an independent organization offering professional conflict management services, in order to ensure

the independence and impartiality of the mediator. In some cases, the need for independence will require the employment of foreign-based expertise. One such organization is Oxfam, which, in 2000, established the position of Community Aid Abroad Mining Ombudsman for Australia-based mining companies (MMSD, 2002). One of the roles of the Ombudsman is that of a mediator of mining disputes. This is really just an extension of one of the functions that Oxfam Community Aid Abroad was already carrying out in a few cases, including the following two recent disputes in Indonesia: the Indo Muro Gold Mine in Central Kalimantan, and the Kelian Gold Mine in East Kalimantan (Oxfam Mining Ombudsman Annual Report, 2000). In other mining conflicts, Oxfam was less directly involved, observing negotiation meetings, encouraging parties to negotiate, and providing support to communities and non-governmental organizations (NGOs).

In some conflicts, it may prove difficult to find a neutral organization that is acceptable to all of the parties, which may provide further need for a mediator from outside of the country (MMSD, 2002). In the longer term, the mining industry should establish an international agency to co-ordinate and supervise all conflict resolution processes world-wide. This agency would operate at arm's length of any country, company or mining group. It would be funded by all governments and mining companies, and governed by a board with representation from all stakeholders in the global mining community. Such an agency could provide mediation services based at the regional small-scale mining support centres, as suggested in Chapter 8 of this volume.

There is sufficient evidence from other conflict settings that the use of an entirely independent mediation service can help to provide many of the other conditions necessary for effective mediation that are discussed in the following sections, including (*inter alia*) the willingness of key stakeholders to participate in the process and negotiate in good faith, a balance of relative power between the parties, and the ability of all participants to negotiate effectively.

3. *Inclusion of all stakeholders*

It is essential that any mediation process applied to a mining conflict be open to the participation of any parties with a stake in (*i.e.* affected by) the outcome (Johnson & Duinker, 1993; Australian EPA, 1995; Epps & Brett, 2000). This is important because it allows the interests, values and concerns of all relevant parties to be incorporated into the decisionmaking (MMSD, 2002). Suliman (1999, p. 290) asserts that "in localized conflicts local leaders should be the major actors in conflict resolution." Commonly involved stakeholders include mining companies, small-scale miners, local communities, governments (local, regional and national), NGOs, foreign aid agencies, international governmental organizations (*e.g.* specialized agencies of the United Nations and World Bank) and industry associations.

In some disputes it may be difficult for the mediator to identify all of the relevant parties, and to then ensure their participation. While the known

parties may assist in this regard, in some cases, they will intentionally fail to identify other stakeholders that should be present. Due diligence in identifying stakeholders before commencing the mediation process is an essential responsibility of the mediator and the parties that have already committed to their participation. Although it is advisable to include *bona fide* stakeholders that may emerge after the mediation process has begun, this may be quite disruptive. Epps and Brett (2000) address the significant long term costs that may be associated with failing to include stakeholders. Perhaps the most significant of these is the considerable risk that a (voluntarily or otherwise) excluded party will obstruct the implementation of any settlement reached.

4. Voluntary participation of stakeholders

It is critically important that the participation of all parties be completely voluntary. Parties must be free to choose whether it is in their best interests to enter into the process, and must be at liberty to exit the process at any time without suffering any sanctions or repercussions. In order to believe that mediation is the option most likely to meet its interests (including achieving a settlement), a stakeholder must believe that there is, in fact, a conflict that needs resolving. A dispute must have "matured" to the point where the stakeholders are sufficiently motivated to negotiate; yet, have not become so volatile (or even violent) that calm, rational negotiations in a "safe" environment with a fair balance of power are impossible (Castro & Nielsen, 2001).

In many types of disputes for which mediation is an alternative to a more traditional and formal legal adjudication process (often litigation), the disputants are required to attempt mediation before they can gain access to the legal process. However, mandatory mediation is inappropriate for most disputes between small- and large-scale miners in developing countries, for several reasons. First, in many of these disputes, there is no institutionalized legal system to deal with claims. In fact, in some situations the only alternative is a violent confrontation. Second, if mediation is mandatory, there is less incentive for all of the parties and the mediator to establish the kinds of favourable conditions for reluctant disputants to voluntarily participate. In other words, if disputants are aware that the mediation process is a good one (in terms of its efficiency, equity, accountability, integrity, etc.), most will freely decide to participate. If, at any time, they believe that the mediation process is unlikely to protect their rights and meet their main interests, they will withdraw from it. An effective, fair mediation process need not be mandatory to ensure participation. Third, mandatory mediation programs are often unsuccessful, simply because there is never any effective way of forcing a reluctant party to negotiate earnestly, and in good faith.

Similarly, it is inappropriate to require that disputants attempt to resolve a dispute on their own prior to requesting mediation. In many conflicts, factors such as power imbalances, a history of violence, or a weak regulatory/legal environment preclude the existence of any other reasonable, productive means of parties negotiating on their differences.

5. Disputant involvement in the design of the mediation process

It is important that all of parties jointly design all aspects of the mediation process, with the assistance of the mediator. This includes planning the format of the negotiation sessions (which may become fairly detailed), the location of the sessions, scheduling and setting deadlines for various phases of the process, and establishing the ground rules for conducting the process and for participant behaviour (Johnson & Duinker, 1993). All parties must agree to all aspects of these logistical matters before proceeding with the mediation process. There must also be a consensus on the need for a mediator; and who that should be and the nature of their role and responsibilities.

There is considerable evidence in the literature that parties are more likely to negotiate productively, and to respect a final settlement, when they are able to adopt a sense of ownership of both the process and its outcome (Australian EPA, 1995). Consensus-based process design also has a powerful side benefit – by tackling this relatively easy challenge at the beginning, the parties gain confidence in their ability to work together and make mutual decisions, which establishes a positive environment for the remainder of the process.

6. Confidentiality of the process

At the beginning of a mediation process, the participants must agree (by signed consent) on the degree of confidentiality of the process, and what sanctions will be brought to bear on violators of this policy. Decisions about confidentiality include whether the sessions will be open to the public and/or the media or closed (*in camera*), whether the participants will be allowed to discuss the substance of what is discussed with persons not involved, whether the deliberations will remain confidential after the process has ended, whether a final settlement will be confidential, and whether official minutes will be kept (and who will have access to them). In most cases, it is beneficial for the parties to keep all discussions confidential, at least until the process has ended (hopefully with a signed agreement). Parties should normally conduct closed mediation sessions (if permitted by law), and appoint a single spokesperson (usually the mediator) as the only point of contact for the media. It is often advisable to avoid any official record of what is discussed, and for the mediator (and maybe even the negotiating parties) to destroy their notes after each session. We also recommend that all parties agree that all discussions will be without prejudice, meaning that no party can be held to anything they said in mediation (even in a subsequent legal process should mediation fail) until a final agreement has been signed. Finally, the participants should agree that if they are successful in achieving a final signed agreement, all of the signatory parties will be legally bound to it.

7. Balance of power

The effectiveness of a mediation process relies in part on there being a reasonably balanced distribution of power among the stakeholders (Epps & Brett, 2000; Castro & Nielsen, 2001; MMSD, 2002). The perception of the participants

in mediation about a balance or imbalance of power is more important than the actual distribution of that power (if the latter could even be determined). Parties that feel they are at a significant power imbalance will often be unwilling to enter into a voluntary conflict resolution process, sceptical about its ability to produce an outcome that is acceptable to them (MMSD, 2002). However, in some cases, a party may feel so impotent that it believes it has no other reasonable opportunities to have its interests heard, and will therefore elect to participate in mediation in spite of its perceived lack of power.

One of the important functions of the mediator is to work to "level the playing field" as much as possible, by reducing any perceived power imbalances. A skilled and trusted mediator running a sound conflict resolution process can lessen many parties' concerns about power imbalances (MMSD, 2002) and establish conditions for more productive negotiations. The subject of power is complex and well beyond the scope of this chapter. However, in considering techniques that mediators may use to try to improve the balance of power between parties, it is helpful to consider some of the commonly accepted sources of that power that may be relevant in any mining dispute. The freedom of a party to either not participate in mediation or to "walk away" if it chooses is often suggested as the single greatest provider of power. This is the important concept of the *Best Alternative To a Negotiated Agreement* (BATNA), first put forth by Fisher and Ury (1981). A mediator can often reduce disparities in parties' perceived power by separately assisting each in determining their BATNA. Parties often do not realize going into a mediation how much having their own interests met depends on the cooperation of the other parties. They often overestimate their ability to achieve a good outcome for themselves through some other channel. The mediator may be able to help them adopt a more realistic assessment of their BATNA, and therefore increase their incentive to negotiate in a collaborative manner.

One source of power that may be particularly relevant to land use disputes between small- and large-scale miners is access to good technical information and the ability to make use of it in order to make decisions. Based on mediation experience in other types of disputes, it is clear that the mediator can play an important role in ensuring that parties share this type of information with each other, and that all parties have access to similar levels of hired technical expertise. The important role of information in mediation will be addressed in a subsequent section below.

These are just two examples of how the power balance issue may be effectively managed, often through the actions of the mediator. Each of the following other potential sources of perceived power suggests other measures that the mediator and the parties may take to ensure that an imbalance of power does not compromise the consensus-building process.

Other potential sources of party power:

- Having the ability to allow other parties to meet their needs (increases their cooperation).
- The ability to impose sanctions or costs on other parties.

- The ability to make credible threats to other parties (especially violence).
- The level of negotiation skill of the representative(s) (e.g. persuasiveness, charisma, etc).
- The ability to exert control over the mediation process.
- The ability to control information (and/or professional expertise).
- Having political influence (*e.g.* by monetary contributions, providing employment, etc.)
- Possessing authoritative power (*e.g.* legislation, policy, international support, etc.).
- Possessing moral power (*e.g.* accepted norms, the status quo, appeal to principles, etc.).

8. Party representation and negotiation skill

A good mediation process will include at the table negotiators who truly represent the interests of the identified stakeholders and who have the skill and experience to advance the interests of their constituencies. Parties must be allowed to select their own representatives, and should employ democratic methods for doing so (Castro & Nielsen, 2001; MMSD, 2002). Each representative must have full authority to speak for its party and commit it to agreements (ideally without need for ratification). However, this does not supersede the need for representatives to remain accountable to their constituencies at all times (MMSD, 2002), and to communicate regularly and openly about the substance of the negotiations.

In disputes involving large- and small-scale mining, the level of experience and skill with negotiation-based processes usually varies greatly between parties. These disparities are especially large when the stakeholders include indigenous peoples. Parties that are politically marginalized or which lack resources (as commonly found in developing nations) are often unable to represent their interests effectively (MMSD, 2002). In such situations, the mediator should assist disadvantaged parties to better understand the conflict resolution process and their legal rights, to communicate their interests to the other parties, and to understand other parties' interests. In principled negotiation (on which good mediation is based), it is in all of the participants' best interests for stakeholders to be skilfully represented. Since there are limits to a mediator's ability to correct deficiencies in the representation of some parties, it may be necessary for more advantaged parties to pay for the others to hire professional representation.

Marieke Heemskerk and Rachael van der Kooye observe in this volume (Chapter 36) that small-scale miners sometimes form negotiating coalitions to properly represent their collective interests. The example they provide is of a dispute in Suriname between Maroon miners and the Canadian mining company Golden Star Resources.

In the case of the Kelian Gold Mine in Indonesia, the Oxfam Mining Ombudsman was acting as a facilitator of negotiations between the mining company (Rio Tinto Indonesia/PT Kelian Equatorial Mining) and the local community. Late in the process, a government official became involved as a party, thereby violating an earlier agreement between the other two parties.

The company also began negotiating with a separate party (Team Murni), which claimed to represent the community. However, Team Murni lacked the endorsement of the Council for People's Prosperity, Mining and Environment (LKMTL), an organization formed to represent local interests in a meeting of more than 2,000 people from affected communities; this was extremely disruptive to the negotiations. Eventually, the company brought in an independent mediator from the Australian Federal Court, and negotiations resumed. Oxfam recommended (*inter alia*) that the company recognize LKMTL as the only *bona fide* representative of local community interests (Oxfam Mining Ombudsman Annual Report, 2000). These two examples illustrate the important role that representation issues play in the mediation of mining disputes.

9. Information

As was the case for party representation and negotiation skill, disputes between small- and large-scale miners often involve problematic differences in the abilities of stakeholders to manage information pertinent to the situation and proposed solutions. This often proves to be a significant impediment to productive mediation. Enabling all of the parties to understand and make effective use of the information that is collectively available increases the probability that the disputants will be successful in resolving their differences. The mediator and the more sophisticated parties share the responsibility of ensuring that parties with less experience and fewer resources (typically small-scale miners and indigenous communities) are not disadvantaged in the process by their lesser capacity to utilize information.

Parties in possession of relevant information must be required to share it with others, in a format that is useful to them. The mediator is responsible for ensuring that proper disclosure and exchange of information occurs (Australian EPA, 1995). In many cases, it is necessary for technical consultants to be made available to disadvantaged parties, even if this cost is met by other parties (Castro & Nielsen, 2001). The same applies to legal expertise, since legal information is often of great value. It may also be prudent to begin the mediation process with a program to jointly educate all of the parties about certain issues, especially those concerning the environmental impacts of mining activities. This may be one of the functions of the government or the mediator (Epps & Brett, 2000). Fostering collaborative behaviour with respect to collecting and analyzing information is in the best interests of all parties. As Epps and Brett (2000, pp. 5–21) point out: "... the more people co-operate with each other in dealing with uncertainty, sharing information and committing themselves to reciprocal plans of action, the less uncertainty everyone has to face".

10. Understanding party values, rights and interests

Recognizing that differences in fundamental values and principles contribute to many conflicts between large- and small-scale miners, Suliman (1999) warns that "outsiders", such as foreign-based mining companies, must understand that

in some cultures (*e.g.* traditional African societies), the right to use land is more important than the right of formal ownership of that land. Epps and Brett (2000) discuss the importance of protecting community rights when dealing with mining disputes. This is particularly important for indigenous peoples, who are often important stakeholders in disputes between large- and small-scale mining (MMSD, 2002). The 1992 United Nations Draft Universal Declaration of the Rights of Indigenous Peoples (Paragraph 20) states that: "Indigenous peoples have the right to require that States and domestic and transnational corporations consult with them and obtain their free and informed consent prior to the commencement of any large-scale projects". The Mining and Indigenous Peoples Consultation held in 1996 advanced the United Nations' opinion by "demand[ing] that Indigenous Peoples be consulted with, and full and comprehensive information be provided in a timely manner, when mining activities are being considered for sites located on Indigenous Peoples' lands ..." (in Epps & Brett, 2000).

One of the tasks of the mediator at the outset of the mediation process is to ensure that all stakeholders recognize the legitimacy of the values, rights and interests of the other parties (Epps & Brett, 2000; MMSD, 2002). This may be particularly challenging in small-scale mining disputes, in which the stakeholders often hold conflicting values and opinions regarding fundamental issues such as land ownership and access, traditions, ancestral rights, human rights, environmental protection, sustainability, and means of resolving conflict.

CONCLUSION

There is a clear need for mediation as a process to attempt to resolve land use disputes between small- and large scale miners, and often also involving other stakeholders. Caused chiefly by competition for the use of land, these conflicts have proven to be particularly troublesome, and typically have a great impact on the local population and environment. Mediation has sufficient potential in this challenging context that it should be strongly encouraged by governments, mining companies and international agencies with a stake in the mining industry and the well-being of local populations in areas where small-scale mining occurs. In addition to reiterating many of the recommendations of Andrew (2001), this chapter has generated recommendations for designing mediation to maximize its effectiveness and efficiency, and its likelihood of producing good, enduring settlements.

While governments have a responsibility to encourage and provide logistical support to mediation, they are seldom in an appropriate position to assume the role of mediator. It is often necessary to employ the mediation services of an independent (often foreign-based) organization. The mining industry should work toward the establishment of an international, independent agency to co-ordinate and supervise all conflict resolution processes globally.

The mediator and the key disputants share the responsibility of ensuring that all stakeholders in the conflict have the opportunity to participate in the

mediation. However, it is essential that all parties participate voluntarily, with no sanctions brought to bear if they choose either not to enter or to withdraw during the process. All parties must agree that there exists a conflict requiring resolution, and its stage of development must be amenable to mediation. The disputants having attempted to resolve the dispute on their own should not be a prerequisite for mediation. The parties should all be involved in the planning of all aspects of the mediation process, including the need for, and selection of, a mediator. There also needs to be consensus on a number of decisions concerning the confidentiality of the process.

A reasonable balance between stakeholders in the distribution of power, levels of negotiation skill and experience, and ability to manage information is necessary for productive mediation. Although these can vary considerably between parties (especially when indigenous peoples are involved), an effective mediator has many tools at his or her disposal to assist disadvantaged or marginalized parties, and help to "level the playing field." This chapter has made a number of recommendations in this area. Negotiators at the table must be truly representative of the interests of their constituencies, have open lines of communications with them, and be fully authorized to commit their parties. Because of its importance to productive mediation, the ability of each party to negotiate effectively is in the best interests of everyone involved in the mediation process. More sophisticated parties should help to ensure that parties with less experience and fewer resources (typically small-scale miners and indigenous communities) are not disadvantaged in mediation. This may involve contributing to the cost of providing weaker parties with professional expertise. Finally, all participants must recognize the legitimacy of the values, rights and interests of the other stakeholders.

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4

Key Issues in Illegal Mining and Marketing in the Small-Scale Mining Industry

STEPHENS KAMBANI

This chapter discusses major issues concerning illegal mining and marketing in the small-scale mining (SSM) sector in developing countries (DCs). Causes of these undesirable activities are analyzed, and possible interventions to minimize or eradicate them are presented.

Illegal mining can best be described as any form of mineral extraction without legal title to the prospect being worked where required by the authorities. The major target of illegal miners are high unit value minerals offering a prospect of high returns, such as diamonds, colored gemstones, gold, and, to a much lesser extent, relatively low value minerals. An added advantage of high unit value minerals is that their transportation does not require an elaborate infrastructure. Thus, many illegal mining operations are found in locations lacking basic infrastructure (Cramer, 1990).

The illegal marketing of minerals involves the selling of product outside legally accepted channels. The predominant sources of minerals sold illegally originate from illegal mining activities. However, as is discussed later in the chapter, because of a variety of reasons, some legal mines are also involved in illegal trading. Available information indicates that most gold and gemstones produced in DCs by small-scale miners are sold illegally.

With regard to the distribution of illegal activities by mineral commodity, it is apparent that high unit value minerals such as gold and gemstones (including gem diamond) have the highest concentration of illegal mining and marketing activities, both by value of output and numbers of people involved.

Therefore, the common feature of minerals mined and traded illegally by small-scale miners is their high unit value. Because of this, they require less transportation infrastructure. In addition, these minerals generally require minimal processing technology, an attribute that does not offer a barrier to illegal miners. For instance, gold is recovered using simple mercury amalgamation processes,

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