

**DRAFT FOR DISCUSSION\***

# **A SURVEY OF CORRUPTION ISSUES IN THE MINING & MINERAL SECTOR**

*Ian E. Marshall\* \**

\*\* Ian E. Marshall is an international business consultant based in Vancouver, Canada. Prior to becoming a consultant, he was Associate General Counsel at an international mining company, Placer Dome Inc., with whom he worked in various capacities in sixteen different countries. He is a member of the bars of both British Columbia and Ontario and is a member of the Board of Directors of the Canadian Chapter of Transparency International. He received his B.A. from Carleton University in Ottawa and his LL.B. from Queen's University in Kingston, Ontario. He can be contacted at [iemarshall2@telus.net](mailto:iemarshall2@telus.net).

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## **EXECUTIVE SUMMARY**

Recognising the international nature of the mining and mineral sector and the moral value of consistent examples of principled action, 'corruption' is defined broadly in this paper to include both private and public corruption and matters that are not necessarily unlawful. For the purposes of analysis, a distinction is drawn between 'supply-side' and 'demand-side' corruption.

On the supply-side, the sector has certain characteristics that make it especially susceptible to corruption including: the requirement for large capital expenditures; the high level of Government regulation; lack of choice of location; its sudden wealth and easy money image; the local people's previous experiences with companies from the sector; and the particular sense of entitlement that the local people have with respect to mineral wealth generated in, or near, their community. Also discussed is the significance to supply-side corruption of: the respective motives of the different actors in the sector; corporate controls, including codes of conduct; the 'Global Village'; local partners and agents; the expanding legislative framework; and the effects of the increasing emphasis on sustainable development.

The sector frequently operates in countries that are widely perceived to have high levels of demand-side corruption. While the existence of a large natural resource project can affect the level of demand-side corruption in a country, such corruption is also affected by legal, bureaucratic and political factors such as ministerial and bureaucratic discretion, transparency and freedom of the press.

The sector is facing scrutiny from an increasing number of national and international Non-Governmental Organisations ('NGOs') concerned with sustainable development. In such circles, Mining has a negative reputation that can best be addressed by the sector taking collective action. The International Council on Mining and Metals could form the basis for such collective action by promoting: (i) the development of sector anti-corruption standards or certification procedures; and (ii) the building of working partnerships on a country specific basis with NGOs, Governments and other interested multinational corporations to encourage an increase in transparency and accountability in the Governments of targeted countries.

## **INTRODUCTION**

Much has been written on the subject of corruption generally, but very little on corruption in relation to the mining and minerals sector. The purpose of this paper is to provide a survey of corruption issues as they relate to mineral exploration, development and mining operations (referred collectively as 'Mining'). Given (a) that this is a background paper for a seminar involving participants from both outside and inside the Mining sector, and (b) the wide-ranging subject matter to be covered, this paper will necessarily be focussed on describing issues, rather than definitively exploring and making recommendations for solving them. It is expected that the seminar participants will make their own recommendations after their discussions.

# **DRAWING THE LINE : DEFINING CORRUPTION**

## **1. General**

In order to discuss the significant corruption issues affecting Mining, the meaning of 'corruption' must first be clarified. A dictionary definition of 'corruption' simply states "use of corrupt practices, especially bribery or fraud" (Canadian Oxford 1998, p.317). This rather sparse definition is not very helpful as (with the exception of bribery and fraud) it contains little that will assist the reader to identify corruption when it occurs (see examples of corruption in Appendix 1).

While there are many descriptive definitions of corruption in the literature (see Appendix 2), for the purposes of this paper, 'corruption' will be defined as *'circumventing formally agreed or implicit rules for decision-making (in the public or private sector) by use of personal inducements in order to achieve institutional and/or personal objectives.'*

The reader will notice that the definition used in this paper includes

(i) private corruption as well as public corruption; and (ii) matters that are not necessarily unlawful, depending on the jurisdiction involved, but which do contravene either the laws of other jurisdictions, or other generally agreed principles of fair behaviour. This definition seems particularly well suited for use by the international Mining sector as it conveys the need for a more consistent standard than may be provided by the domestic laws of the host countries.

In this era of widespread privatisation of Government services and former Government owned monopolies, the issue of corruption involving employees of corporations providing essential services such as telephones, electricity and water, has become more important than ever before. If a Mining company is to have a comprehensive policy for its employees on corruption, it should clearly include the abuse of private office for private gain. This would also cover Mining company employees enriching themselves by use of their corporate positions (e.g. procurement kickbacks, etc.).

The issue of whether a Mining company, or any other corporation operating in different international legal jurisdictions ('Multinational Corporations' or 'MNCs'), should define corruption to include matters not covered by the law is more complex. "The law is a minimalist approach to governing. It provides a floor for Government action and behaviour" (Foster 2001, p.2). The law can also only provide a floor with respect to an international Mining company's operations. This raises the issue of whether Mining companies should be operating at the level of that legal floor or above it. The issue is probably best illustrated by the debate about 'grease payments'.

## **2. The 'Grease' Debate**

The United States' Foreign Corrupt Practices Act ('FCPA') and the OECD's 1997 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the 'OECD Convention') both draw the legal floor so as to omit what are often referred to as 'grease payments', 'speed money', 'facilitating payments', or 'expediting payments'. These types of payments are made for the

purpose of ensuring timely delivery of goods and services to which the public is rightfully entitled, such as permits and licences.

The FCPA provides for an exemption from the general prohibition on bribing foreign officials for any facilitating or expediting payment "the purpose of which is to expedite or secure the performance of a routine governmental action" (15 United States Code Section 78dd-2(b)) by such officials.

Paragraph 1 of the OECD Convention defines the offence of bribery of foreign public officials in such a way as to require the inducement to be offered "in order to obtain or retain business or other improper advantage in the conduct of international business." The official commentaries on the OECD Convention state "Small 'facilitation' payments do not constitute payments made 'to obtain or retain business or other improper advantage' within the meaning of paragraph 1 and, accordingly, are also not an offence."(OECD Commentaries 1997, Article 1, Section 9).

The Corruption of Foreign Public Officials Act (Statutes of Canada 1998, c.34), which was enacted to fulfill Canada's obligations pursuant to the OECD Convention, is instructive by being even more explicit about 'grease' payments.

(4) ... a payment is not a loan, reward, advantage or benefit to obtain or retain an advantage in the course of business, if it is made to expedite or secure the performance by a foreign public official of any act of a routine nature that is part of the foreign public official's duties or functions, including

- a. the issuance of a permit, licence or other document to qualify a person to do business;
- b. the processing of official documents, such as visa's and work permits;
- c. the provision of services normally offered to the public, such as mail pick-up and delivery, telecommunication services and power and water supply; and
- d. the provision of services normally provided as required, such as police protection, loading and unloading of cargo, the protection of perishable products or commodities from deterioration or the scheduling of inspections related to contract performance or transit of goods.

(5) for greater certainty, "an act of a routine nature" does not include a decision to award new business or continue business with a particular party, including a decision on the terms of that business, or encouraging another person to make any such decision. (Ibid, Section 3 (4) and (5)).

These facilitation payments to foreign public officials are permitted by the laws of the home jurisdictions of many Western Mining companies, even though they are generally illegal in the foreign country concerned. Of course, in many of those foreign countries, where lack of enforcement of the domestic law is the norm, facilitation payments are commonplace. But, does this mean that an international Mining company should allow its employees to practice abroad what is clearly illegal if

practised on domestic officials at home? Should such employees be allowed to break the law in a foreign country, even if it is not generally enforced there, because such acts are sanctioned in the law of the Mining company's home country? These questions can be answered in a number of different ways.

- a. From a moral point of view, corruption of any kind has a corrosive effect on the public's confidence in the legal process and encourages a lack of accountability which can over time lead to a breakdown of the rule of law. It can be argued that, by participating in facilitation payments, an otherwise respectable foreign corporation can reinforce the local view that this is the way things are done in business around the world. This would appear to be the exact opposite of moral leadership. "When companies adhere to the highest ethical standards across borders, they push local companies to lift standards and in so doing, bring benefits to the lives of many people beyond their immediate sphere of influence."(Morrison 2001, p.70).
- b. Another view is that low level public officials in many developing countries are grossly underpaid and the only way of keeping the system functioning is with 'user pay' facilitation payments. In this view, moral leadership is not then a matter of not paying facilitation payments, but attempting to change the remuneration structure of the system .
- c. A third view is that a foreign company attempting to encourage and assist in reforming the civil service remuneration system will appear to be patronising to the host country. In this view, if it is decided that it is impossible to operate in the country in question without making facilitation and other payments, the company has to decide whether it wants to do business there. A decision not to invest could, in these circumstances, be one of moral leadership.

However, in reality, the decision is often not defined so clearly. Mining companies may face internal disagreement on whether or not one can operate in a particular country without submitting to bribery, including 'grease payments'. Their decision may be made on second hand knowledge that, due to the obfuscating nature of corruption, may not be entirely accurate. The initial visits by company geologists to a country with a prospective mine site may be coloured by the fact that everyone they speak to is attempting to encourage the Mining company to invest in the country. The need for accurate information and informed decision-making at this point in the process, is one that Mining companies must be careful to address.

This last-mentioned caveat is especially true when deciding on partners. In the Mining business, one of the traditional ways of obtaining a property from a private owner is to offer him a joint venture interest in the property. Usually, the major Mining company offers to provide most of the funding, especially during the exploration stage, as an inducement to the property owner to surrender operating control of the property to the major. The amount of funding, and exactly what is to be funded, are points to be negotiated between the parties. Often Governments holding properties are interested in similar arrangements where they obtain a self-funding interest in the property.

In any event, the partner often wishes to play a role in the exploration and development process and, indeed, the international Mining company often wishes to have the local knowledge and connections that a local partner can bring to the table. Obtaining accurate intelligence on the reputation and practices of such a partner

before commitments are made is obviously a matter of critical importance to the success of a foreign Mining operation. If the property owner does not have the necessary knowledge, connections and a good reputation, then his role should be limited and an additional qualified local partner should be sought.

Once the decision is made to enter the country and start work on a Mining project, the project gains a momentum that is very hard to stop. Engineers and geologists start becoming engaged and excited by the project and money is often being spent at a very fast rate. Investor Relations personnel pass on this enthusiasm to the investment community. The project can easily be billed as being likely to be the company's 'next great mine'. It is at this time that the real conditions of corruption in the host country may start to manifest themselves. In these circumstances, a decision to pull out of a project, for other than technical reasons, will not be judged favourably by the investment community. It may result in the Mining company having to write down the value of its investment to date. But more significantly to the corporate culture and the investment community, it may be viewed as a result of 'bad management'.

In practice, some companies have taken the route of advising their employees that they are opposed to the making of facilitation payments and instructing them to make every effort to resist or minimise them. However, if there is no reasonable alternative to making them and certain other conditions are met, the employees are permitted to make them. The alternative is to operate above the legal floor and have a complete prohibition on 'grease payments'. Aside from how this may affect the competitive position of the company, there is a potential danger that, despite such a prohibition, an employee may take it on himself or herself to pay the 'grease money' out of his or her own pocket and never advise the company. In this way, such employees may think they can enhance their professional reputation by being the sort of person "that gets things done".

### **3. The Value of Consistency**

Aside from the ethical issues raised by the 'grease' debate, are there any other reasons why a Mining company should operate at a level above the legal floor of the host country?

In today's world, a mine developer's record of operations abroad will become public knowledge and questions will be asked. It is very difficult to explain to citizens of the host country, why a Mining company should operate to a lesser standard in their country than it does in the Mining company's home country and still be considered a good corporate citizen. It may be even more difficult to explain this satisfactorily to the citizens of the Mining company's home country or those of another country with high standards.

Broken Hill Proprietary Co. Ltd ('BHP') experienced this in 1996 at a federal Government environmental hearing for their proposed new diamond mine in Canada's North West Territories. The Dene people in the area communicated with people in Papua New Guinea ('PNG'), and arranged for an indigenous clan leader to come to testify at the hearing in Yellowknife about BHP's environmental record at the Ok Tedi Mine in PNG (Damsell 1996).

As a result of the implementation of the OECD Convention by its member nations, many countries now have legislation on the bribery of foreign public officials that apply extraterritorially to their citizens. Mining companies often have employees of many different countries working on off-shore projects. It would be difficult to administer a system that only required an employee to meet the legal standard of the country of which he or she was a citizen. Ease of administration alone, suggests the desirability of setting a corporate standard that meets the highest standards internationally.

If a Mining company is going to have a corporate code of business conduct ('Code of Conduct') that it can hold out to the world as a demonstration of its good citizenship, then it must have some moral authority. "Moral authority is the product of legitimacy. Legitimacy ... is a reflection of public trust and confidence. Such trust and confidence derives from respect and is best assured by the leadership that comes from setting a consistent example of principled action" (Foster 2001, p. 2). With this in mind, it makes sense to define corruption in relation to the highest common denominator, rather than the lowest.

## **'SUPPLY-SIDE' CORRUPTION ISSUES IN THE MINING INDUSTRY**

A useful way of analysing corruption is to examine the behaviour of 'the payer' or 'the supplier', and the reasons for his behaviour, separately from the behaviour of 'the taker' or 'the demander' and the reasons for his behaviour. The Mining industry, as with most other MNCs, is generally considered to be on 'supply-side' of corruption and bureaucrats or politicians on the 'demand-side'. The nomenclature is not intended to indicate where the initial intention of corruption occurred, but only who supplies the private gain and to whom it passes. Either side can initiate a corrupt act. However, there are certain reasons why the Mining sector is especially vulnerable to finding itself involved in corruption.

### **1. What Makes the Mining Industry Different?**

#### *a. General Characteristics*

The Mining sector has a unique combination of characteristics. Mineral resources are buried beneath the earth's surface and finding an economic mineral deposit is difficult. Locating, developing and constructing a modern mine usually requires hundreds of millions of dollars in capital investment. Exploration often lasts five to ten years, with preliminary assessment, feasibility study preparation and ongoing stakeholder consultations leading to the necessary Government approvals, taking an additional two to three years. Construction can take one to three years depending on the size and nature of the mine. There can also be extensive up-front development costs incurred before the mining of any of the ore commences i.e. (i) to remove overburden, in the case of an open pit mine; or (ii) to provide access for testing purposes, in the case of an underground mine. All this occurs before the Mining company sees any payback of external financing and return on its investment.

When operations finally commence, they are finite in nature, often lasting ten to twenty years, although occasionally much longer. At the end of all this, the Mining

company has further financial and operational responsibilities which it must discharge. Mine closure can last one to two years and, afterwards, rehabilitation of the mine site can last one to four years with the longer periods being more applicable to open pit mines, as opposed to underground mines. Sometimes responsibilities will continue much longer when ongoing problems, such as neutralisation of acid rock drainage, require long term treatment.

Solely from a technical point of view, Mining is a risky investment. Minerals may be found in every part of the world, but seldom with the two requisites for mining: an economic grade of ore ; and a total volume large enough to repay the investment and allow a profit. Unlike a manufacturing business, a modern mine does not have the option of starting small and, if things go well, expanding. To achieve the economies of scale required, a modern mine must start large with the associated large capital cost.

Although mineral occurrences are numerous, only a few will appear to have economic potential and they must be tested extensively. Although absolute proof of viability

... is impossible to establish beforehand, the mine developer strives to approach this standard by preparing a feasibility report, a theoretical plan which projects all aspects of the potential mine's operation on paper. For instance, a mine should be designed and built to operate in the lower end of the global cost scale. This tends to assure that, over its life the mine's cost structure will be able to absorb cyclical prices since demand and prices will rise and fall without regard to any single supplier. Anything and everything which could influence the proposed mine's costs is measured weighed and estimated. Such diverse considerations as the sources of financing and the most efficient metallurgical processes are also explored in the feasibility report (Placer Dome 1997, p.28)

Given these general characteristics, the following are some of the specific factors that make the Mining industry especially vulnerable to supply-side corruption.

*b. Time is Money*

A positive feasibility report, showing a clear and reasonable expectation of a satisfactory return on the investment, is the basis on which financing is usually obtained for the construction of the mine. Since mine construction is so capital intensive, some sort of outside financing is usually required or desirable. Such financing must not only cover the cost of building the mine, but provide the initial working capital to allow the mine to operate until cash flow from the sale of minerals is established on a regular basis. The loan should also provide funds to cover initial payments on the interest incurred on borrowings made during the construction period. Often financing involves the giving of guarantees to the lenders that the project will be built by a certain date and will perform in accordance with certain specified standards consistent with the feasibility study.

Consequently, for a company constructing a mine, speed becomes a critical factor.

If construction is financed by loans, interest costs begin to grow immediately [as soon as the] first money is drawn from the lender and will continue through the mine's development and well into the production phase until the loan is repaid. Even if development funds come from the shareholders or joint venture partners, there is a need to bring the investment to production, establish a cash flow and commence dividends as rapidly as possible (Ibid, p.28-9)

This need for speed makes mine developers especially susceptible to underpaid or venal bureaucrats who have the power to prevent, delay or halt the approval or construction process.

### *c. Government Regulation*

The Mining industry is also much more highly regulated by Government than many other industries. There are several reasons for this:

- (i) Nationalism - Mineral wealth (especially gold and precious minerals) is considered to be part of the 'National Patrimony' in many countries. The populace consider these minerals as forming part of a national 'treasure chest' that belongs to the people and should be exploited for the benefit of the people. In these circumstances, the people expect that the Government will protect their treasure and ensure that it is developed properly and that benefits will flow to them. Since in most jurisdictions, the minerals are owned by the state, Governments regulate the acquisition of the rights to explore for and develop minerals. Certain metals may also be subject to particular Government control e.g. gold (the central bank may have the right to purchase all or some production) or 'strategic metals' e.g. uranium.
- (ii) Financial Impact - Modern mining practice allows the development of low grade mineral deposits by mining large amounts of ore, thereby lowering unit costs . Given the capital intensive nature of Mining, this can mean that the sums of money involved are huge and totally out of proportion to the overall wealth in the countries where the operations are situated (Eigen 1998). Naturally, the host Government wants to obtain its share of this wealth by means of taxes, royalties and perhaps a direct carried interest in the mine.
- (iii) Environmental Impact - While the environmental impact of exploration is relatively minor compared to that of an operating mine, the impact does cover an extensive area, some of which may be of a pristine nature or have other values that society wants protected. The environmental effect of a mine can pose a hazard to the environment or to human health in local areas, if adequate precautions are not taken. Government approvals often require baseline studies and ongoing monitoring by both the company and Government to ensure the impact to the ecosystem is as predicted. Some of the areas that are regulated are discharge of effluents, water quality in local waterways, acid rock drainage, air quality, and tailings. impoundment. Reclamation and rehabilitation of all disturbances caused by the mine is another area regulated by Government.

- (iv) Social Impact - Mines are often located in remote or rural areas where a traditional way of life prevails. In such circumstances, the impact of bringing in numerous outsiders to work at the mine and paying them at rates much higher than those historically earned by the traditional residents is bound to affect the local community. The following issues need to be decided with adequate consultation from local stakeholders: how new housing and families are to be integrated into the community and its school system; how the health of residents may be affected by the project's operations if there are emissions or ambient dust problems; and whether there would be less disruption by using a 'fly-in fly-out' operation. For political reasons among others, Governments often want to ensure by regulation that adequate consultation has taken place and that the approvals they are being asked to give are consistent with a broad based consensus.
- (v) Safety and Unions - Mines, particularly underground mines, are inherently dangerous places. Ground stability and use of explosives and large equipment makes safety a priority. A history of major accidents involving the loss of large numbers of lives, particularly in the coal sector, has resulted in heavy Government regulation governing safety and union representation of the workers. Associated labour relations laws add yet another layer of regulation to the industry.
- (vi) Impact on Indigenous Communities - Since mines are often located in remote areas where indigenous people are likely to live and be affected, the Mining industry frequently has to deal with special laws designed to protect these peoples rights.
- (vii) Transport Requirements - Mines are heavy users of roads, railways and ports. The development of a mine often involves the development or upgrading of such facilities. Once again, the mine developers must deal with another set of officials that other types of investors may be able to avoid.
- (viii) Energy Requirements - Mines are energy intensive and often have to negotiate to secure adequate power from regulated utilities.

For the eight reasons mentioned above, Mining has become a heavily regulated industry. Because of the many approvals required from public officials for exploration, development, construction and operation of a mine, the Mining industry has greater potential exposure to corruption involving public officials than many other industries.

#### *d. Lack of Choice of Location*

In the manufacturing industry, potential investors can look at a national market and decide whether or not they wish to locate a plant in that country. If they decide to proceed, they have choices about the region or community in which they will construct their plant and the scale of their investment. If they encounter problems with corruption in their planning stage, they can always threaten to locate elsewhere.

In the Mining industry, available economic mineral deposits are so few in number that there are tremendous pressures to proceed to explore and develop them, even if they

are located in countries that are very difficult in which to do business. Of 32 leading mining countries listed in *Appendix 3* to this paper, only 9 have a score above 5.0 on the 2001 Transparency International ('TI') Corruption Perception Index ('CPI'), where a maximum score is 10. The remaining 23 (72%) have scores of 4.8 or less. Furthermore, the mine must be located where the deposit is found. It is often in a region or near a community that is not optimal for mine development. Consequently, the Mining industry operates not only in some of the most corrupt countries in the world, but often in difficult locations where companies in other industries would not choose to invest. In these circumstances, it would not be surprising to find mining companies being targeted for favours by underpaid or venal public officials.

*e. Sudden Wealth and Easy Money Image*

Given the capital intensive nature of Mining, the large scale operations of modern mines and the existing poverty in many of the countries in which Mining companies operate, Mining often has a very high profile, especially in underdeveloped countries. Once it is known that a major Mining company is attempting to acquire exploration or mining rights, the local populace has 'dreams of untold wealth'. There is often a feeling that this is a once in a lifetime opportunity to enrich oneself. Since very little is known about the mineral deposit at this stage, there is no limit to the riches that can be conceived by the human imagination. This optimism (known as 'Blue Sky' in the securities business and a 'Gold Rush mentality' in the Mining sector) attracts both legitimate entrepreneurs and others who are prepared to enrich themselves by whatever means are necessary.

This sudden wealth effect is enhanced by the fact that many people consider Mining and oil and gas as 'found' wealth rather than 'created' wealth. Consequently, these people often take the view that the minerals are there for the taking by any one, and not just the foreign company that has acquired the exploration rights, funded the exploration and developed the mine, thereby actually 'creating' the wealth.

*f. Previous Experience*

Often a major Mining company acquires a mineral prospect from a junior exploration company or obtains the property from Government after the property has been held by a junior exploration company. Many such companies, but certainly not all, are formed to acquire exploration properties with no intention to fully explore and develop them into mines. Instead, they hope to do just enough work on them to pique the interest of a major Mining company. This is a high risk investment since very few such properties are ever developed.

While these companies do have some exploration expertise, many do not have the technical knowledge or financial resources to develop a modern mine. Many are looking for a quick turn-over of the property and not the long-term relationship with local people and Government that necessarily accompanies the operation of a mine. Some of these companies have shown a tendency to take the expedient way and bribe public officials to obtain exploration rights or other approvals to which they would not otherwise be entitled. Others have a more complacent attitude about doing business according to the norms of the local culture.

If a major Mining company acquires a property from such a company or after such a company has dropped the property, the expectations of the local people are often that such activity by foreigners is normal and will continue. The expectation that the major Mining company will make corrupt payments may be very high. Moreover, even if the successor company resists such expectations, its reputation may be tarnished by the actions of the previous owner.

*g. Sense of Entitlement*

Local peoples in the surrounding community or region around the mine site often feel that they are particularly entitled to something from the project. Their view is often that this is their community or region and if someone is going to make huge sums of money utilising the community's or region's resources, they should benefit. This is the local expression of the 'National Patrimony' described above under GOVERNMENT REGULATION. It may be especially prevalent where the federal or national Government is somewhat alienated from the local community or region. This often occurs in a highly centralised form of national Government, where the local regions do not feel adequately represented or are not receiving their 'fair share' of national revenues from mineral resources in their region. The argument is made that since the local region must bear the brunt of the significant impact that the mine will have on the environment and their traditional way of life, the locals are entitled benefits. If they are not going to be received by some legal mechanism, they argue that it is not morally wrong to obtain them by other means.

## **2. The State of Knowledge of the Nature and Significance of Corruption**

While it appears that the Mining sector is particularly exposed to corruption, what can be said about the amount and nature of corruption in the sector? Due to the obfuscating nature of corruption, most of the information concerning corruption is anecdotal, whether in the Mining sector or any other sector.

How can one measure corruption when corruption, by its nature prefers to operate in darkness and avoid transparency? Since bribery and some other forms of corruption are classified as criminal offences in most countries of the world, participants are loath to admit that they have been actively involved in this form of activity. However, in recent years, surveys have become increasingly useful in throwing light on the probable dimensions of the problem, even though many people are not prepared to admit to this type of conduct in a survey.

There are, however, some categories of people that can be surveyed effectively, those where individuals see themselves as "victims" rather than as willing conspirators, as being exposed to "extortion" rather than participating in consensual corruption.

Thus, international business ... has been willing to be polled. So, too, have local businesses, and ordinary people (as customers of government services). However, although these groups of people know something about corruption levels, this knowledge, beyond that based on their immediate experience, is decidedly unreliable and really falls into the area of "perceptions".(Pope 2000, p.288).

In 1995, Transparency International, an international organisation based in Berlin dedicated to fighting corruption in international business, introduced its Corruption Perception Index . This poll of polls has since been released annually. The CPI 2001, released on June 27, 2001, draws on 14 surveys from seven independent institutions reflecting the perceptions of business people, academics and country analysts. This survey ranked 91 countries on a scale of one to ten (ten being the least corrupt) ranging from Finland with a score of 9.9 to Bangladesh at 0.4 (Transparency International 2001a).

A review of the CPI 2001 will quickly reveal that, with the exception of Greece (which received a ranking of 4.2), every country that received a ranking 5.0 or less (55 out of a total of 91), was located in Asia, Africa, South or Central America or the former Soviet Block. This has led to criticism that the TI CPI is biased against the 'South', 'East' and 'less developed' countries as it suggests that the problem is largely confined to those areas. In an article entitled "Business Ethics: East vs. West: Myths and Realities" Khera has argued that:

business corruption is more universal than Westerners are generally willing to accept. The major differences are that corruption in the East is practised so blatantly that it makes major news. Western businesses, on the other hand, have, over time, developed sophisticated techniques whereby corruption becomes almost invisible. (2001, p.29)

In response to this criticism of the one-sided nature of the CPI, in 1999, TI came out with a Bribe Payers Survey which included attempts to measure the supply-side of corruption entitled the 'Bribe Payers Index' or 'BPI'. A copy of the 1999 BPI (the latest available) is attached in Appendix 4.

It surveyed a cross section of elites in a number of emerging markets to ascertain, from those most likely to know (businessmen, bankers, lawyers etc.), from where bribes were most likely to come. This painted a depressing picture of the involvement in corruption of the exporters from many of the world's leading exporting countries. The data from this survey can be regarded as being very reliable since it targeted a specific elite audience, and an audience that is prepared to be surveyed again to measure the extent and pace of any changes (Pope 2000, p.289).

The Bribe Payers Survey also included a survey of business executives and business professionals in leading emerging market economies regarding the business sectors in their countries from which senior public officials would be likely to accept or extort bribes. Unfortunately, 'mining' was not shown separately, but included with 'industry' which was perceived as the fourth most corrupt sector out of a total of 9 sectors (see Appendix 4).

But what is the significance of these surveys in terms of corruption in the mining sector? It appears to confirm that many of the countries in which international mining companies do business are subject to high rates of corruption. Since by its nature, bribery involves a 'payer' and a 'taker', the BPI confirms that corporations from the 'North' and 'developed' countries are involved in the 'supply-side' of corruption.

These indices also have provided information that has and can be used by researchers to further explore the nature of corruption. For example, the TI CPI 2000 has been used in the Economic Freedom of the World: Annual Report 2001 (Gwartney et al.). This report is primarily concerned with updating the Economic Freedom Index ("EFI"). The EFI is comprised of

21 components designed to identify the consistency of institutional arrangements. and policies with economic freedom in seven major areas. The seven major areas covered by the index are as follows: (I) size of government, (II) economic structure and use of markets, (III) monetary policy and price stability, (IV) freedom to use alternative currencies, (V) legal structure and security of private ownership, (VI) freedom to trade with foreigners, and (VII) freedom of exchange in capital markets (Gwartney et al. 2001, p.5).

The EFI contains many of the elements that companies review when deciding whether or not to make a direct investment in a country in which they have not previously done business. While the Report demonstrates that more economic freedom is strongly related to individually higher levels of income and economic growth, the aforementioned Report also finds that more economic freedom correlates with less corruption as measured by the TI CPI 2000 (Ibid, p. 8-9). Since the Report contains individual values for each country for each of the seven major areas of economic freedom, there is also an opportunity for more work to determine the correlation of the CPI to both the size of government and rule of law components of the EFI.

This example suggests that, if surveys specific to the Mining sector and corruption could be initiated, they could provide a useful tool for further research to help the sector better understand the amount, significance of and possible remedies for corruption in the sector. Without data specifically related to the Mining sector (or, perhaps, specific segments of the Mining sector), only generalisations can be made which may or may not be accurate for that sector. If the Mining sector wishes to pursue the measurement of corruption, it may wish to consider consulting with the World Bank which is now offering diagnostic tools to measure and combat corruption in member countries (Wamey 1999).

### **3. Different Constraints on Different Actors within the Mining Sector**

The composition of the Mining sector is commonly described as being composed of 'Senior' and 'Junior' companies. Another description is of 'explorers for minerals' and 'mine developers and operators'. But what do these terms really mean and do they reflect a fundamental difference in their approach to doing business? What significance does this have on their approach to corruption?

The term 'Senior' versus 'Junior' has come to indicate amongst other things, 'large' versus relatively 'small'. It also suggests that the 'Senior' has at least one, and probably more, large operating mines. Most Seniors also have an Exploration Department which does exploration work in the area of its mines and often in many other locations both nationally and internationally. The type of exploration done by a Senior can vary considerably. Some restrict themselves to acquiring mid-term exploration properties from Juniors where the 'grassroots' exploration has located a mineral deposit and some significant work has been completed defining the parameters of the

deposit. Others do this in some areas, but run a 'grassroots' or 'greenfield' exploration programmes in other areas. Needless to say, there are many possible permutations when a Senior decides on its exploration philosophy. Seniors often finance their activities by way of 'cash flow' and/or debt financing. They have the financial and technical capability to conduct the advanced exploration, development and operations required for a large modern mine.

Juniors are smaller companies than Seniors, but they too can be operated with vastly different philosophies. Many such companies are public companies formed to raise money in the capital markets to acquire and explore properties with no intention to complete all the exploration and development work necessary to bring a property into production as an operating mine. Instead, their philosophy is to only do sufficient work to attract the interest of a Senior and, at the appropriate time, sell the property (or their shares in the Junior) for cash (or, less desirably, shares in the Senior) and, in the case of a cash property sale, a possible royalty or other carried interest in the property. This desire is based on the belief that the greatest capital gains occur during the exploration phase before a feasibility study quantifies the deposit. It is during this period that the size of the mineral deposit is open to speculation. As mentioned earlier, while this type of Junior may have exploration expertise, many do not have the technical knowledge or financial resources to develop a modern large scale mine. For financing, they must rely on the venture capital market as they do not have adequate cash flow from existing mines to secure debt financing. This type of Junior will be referred to as a 'Type One Junior'.

Within the Type One Junior category of Mining company, there are at least two sub-categories. There are the 'Promotional Juniors' that typically secure their capital on a junior venture capital exchange such as the Canadian Venture Exchange and then appear to focus on promotion and commodity prices rather than in-house geological expertise. In some extreme cases, these companies are not Mining companies at all and have contributed extensively to the bad press associated with Junior Mining companies.

There is also the sub-category of Type One Junior that:

- a. have serious in-house expertise in exploration geology;
- b. raise their capital on a junior venture exchange or a more senior one, such as The Toronto Stock Exchange; and
- c. perform most of the essential, but high risk, grassroots exploration function in the Mining sector. Their small size and relatively informal 'corporate systems' allow them to maintain the necessary flexibility to meet the ever-changing risks of generative exploration. This and their relatively low cost structure gives these 'Exploration Juniors' their competitive advantage in this area over the Seniors. Unfortunately, as we will see later, it can also be a source of weakness.

There are, however, other more ambitious Juniors. These Juniors often take the view that the longer that they can hold onto control of the property during the exploration and development process, the more value will be added. Indeed, their philosophy is to try to hold onto a controlling interest in the operating mine. This is an ambitious goal and very few achieve it. This type of Junior is liable to have more in-house expertise,

and often will acquire more such expertise as the process continues. This type of Junior will be referred to this as a 'Type Two Junior'.

The basic difference in approach between a Type One Junior on the one hand and a Senior or Type Two Junior on the other, is one of time. The Type One Junior is involved in the exploration process on a property for the short term and expects to realise relatively quick gains and move on to something else. The Senior and Type Two Junior are both committed to a much longer time horizon with respect to the property.

The implications of this different approach are far reaching. A Type One Junior does not have as much pressure to place a great amount of importance on issues such as long term reputation and long term relationships with the local community, region and national Government. In such circumstances, the intense competition to secure exploration rights and various associated permits and approvals can increase the apparent attractiveness of taking 'short cuts' by using bribes and other corrupt inducements to attain the desired objectives. At the same time, the informality of corporate systems that helps to give the Type One Exploration Junior its competitive advantage, also leaves it more open to the use of corrupt practices.

A Senior or Type Two Junior, intends to be involved with the project for many years or even decades. It cannot afford to have bribery scandals arise in future years if it wishes to maintain the respect of and a successful relationship with the local community, region and national Government. This does not mean that Seniors or Type Two Juniors have not and will not become involved in corruption. While, in recent years, the importance of reputation and long term relationships appears to have been recognised by most CEO's of these type of companies, their organisations have had varying success in conveying this message to their employees. Despite education programs and Codes of Conduct to the contrary, there may always be some 'rogue' employees who think that they are helping the company to achieve its objectives by resorting to corruption or who will do so for personal advantage (i.e. improving one's chances of promotion by becoming known as someone "who can get things done").

Such 'rogue' employees only serve to illustrate the need for ongoing education of employees on the value of ethical practices to ultimate business success. The objective should be to make ethical practices an integral part of the Mining company's corporate culture. Coupled with the appropriate corporate systems, an ethically grounded corporate culture can be very determinative of patterns of employee behaviour, thereby making Mining companies even less subject to individual's foibles.

#### **4. Codes of Conduct and Other Corporate Controls**

In recent years, Mining companies have been writing or rewriting their Codes of Conduct for employees. Aside from changes in the law prohibiting the bribery of foreign public officials, mining companies are increasingly recognising that corporate values are vital to competitiveness (Vogel 2001). A corporate Code of Conduct is seen as a key element in a wider corporate integrity management program that will often involve accountability, education, communication and monitoring ('Corporate Integrity Management' or 'CIM').

These Codes of Conduct typically go beyond what is required by the law alone. One major Mining company CEO explained this as follows:

We want to achieve our corporate objectives in a way that complies not only with the laws and regulations of the countries where we do business, but also by observing a spirit of high moral conduct. The responsibility for this lies with every employee.

All of our actions should bring lasting benefits to the Company rather than merely the creation of a short-term business advantage. For that reason, integrity is an integral part of our business success. Over the long term, proper business conduct engenders loyalty and trust among employees, customers, communities where we operate, and among stakeholders - including, of course, our shareholders. (Placer Dome Inc. 1998 , p. ii).

Usually, these codes are applied on a world-wide basis by Senior Mining companies so as to represent the corporate values in a consistent manner wherever the company has, or is contemplating, operations. Typically, they deal with topics such as compliance with laws, dealing with public officials, political contributions and activities, giving of gifts or benefits, receiving gifts or benefits, conflicts of interest, confidential and proprietary information, insider trading, information systems, financial controls and records, ore reserves, sustainability, employee harassment or discrimination, occupational health and safety and compliance with the code. They sometimes also include a section on human rights.

One of the unique topics often included in a Mining company's Code of Conduct is a section dealing with ore reserves. Since ore reserves form one of the key bases for valuation of a Mining company's shares, accurate and timely disclosure of ore reserve and mineral resource data is critical to the integrity of the company within the investment community.

But do these codes have any real beneficial effect? Speaking about Codes of Conduct in general Jeremy Pope concludes:

Generally speaking, research on corporate codes of conduct is incomplete. The research suggests that codes have, indeed, had some positive influence, but such a broad conclusion still lacks a firm empirical base. The research indicates that the degree to which the code of conduct becomes "embedded", or a part of the corporate culture, will have some positive effects on employee behaviour. However, determining precisely what "embeddedness" means in terms of organisational structures and managerial leadership, remains elusive. The key determinant in achieving organisational adherence to a code appears to be training, monitoring and enforcement activities - another conclusion more intuitive than scientific (Pope 2000, p.150 - 151).

As mentioned, training, communication, monitoring and enforcement are essential to an effective Code of Conduct. They should be included in any Corporate Integrity Management program adopted by a Mining company. Since new employees are continuously joining the company as part of normal employee turnover, the requirement for communicating the existence of the Code and its contents is, necessarily, an on-going one.

The Internal Audit Department is often responsible for implementing systems to ensure that the Code is being followed by employees, including monitoring. Such systems include having each management employee annually sign a statement that they are not aware of any activities in the past year that have violated the corporate Code of Conduct, or if they are aware of such activities to declare them. Such statements and declarations can be kept at the mine site and would normally be included within the scope of any company internal audit of that site. Any declarations would be followed up with mine site senior management and, if necessary, be referred to legal counsel for the applicable country or region. Usually the Audit Committee or the Corporate Governance Committee of the company's Board of Directors plays the role of overseer with the Internal Audit Department bringing matters to its attention.

There does not appear to be any evidence that companies in the Mining sector are different from those of other sectors when it comes to implementing Codes of Conduct. Some do it more effectively than others.

## **5. The Effects of the "Global Village" on the Mining Sector**

The effect of modern technological improvements in communication and, in particular, the internet has had a significant effect on the way business is carried on by MNC's in the Mining sector. This has introduced a new era of global accountability. As previously mentioned, this was dramatically illustrated when BHP was seeking an approval for a diamond mine in Canada's far north a few years ago. The local Dene people surprised BHP by sponsoring the attendance of a PNG indigenous clan leader to testify as to BHP's mining record at its Ok Tedi Mine in PNG (Damsell 1996). There is no place to hide in the 'Global Village'.

With the end of the cold war, the interest of the world community has become much more focussed on trade and foreign direct investment. A concerted effort has been made to grow the economies of the world by increasing the amount of trade, thereby utilising the benefits of comparative advantage between countries. The main approach taken has been to try and reduce impediments to trade. The GATT has been replaced by the WTO and treaties, such as the North American Free Trade Agreement, have been signed. In order to gain the full advantage of free trade, it is also necessary that the competitors compete on a level playing field .

One of the impediments to more trade and foreign direct investment has been recognised as corruption.

President Bush clearly enunciated the problem in a message sent in May, 2001 to the Second Global Forum on Fighting Corruption , which was held in The Hague. The President stated:

"The corruption of governmental institutions threatens the common aspirations of all honest members of the international community. It threatens our common interests in promoting political and economic stability, upholding core democratic values, ending the reign of dictators, and creating a level playing field for lawful business activities." (U.S. Department of State 2001)

Corruption can clearly distort free competition. Led by the U.S., whose Foreign Corrupt Practices Act has been in place since 1977, the Governments of the Americas, the OECD countries and others have, in the last few years, entered into treaties designed to make a co-ordinated attack on corruption. However, this increased awareness of corruption has extended much further than Governments.

NGOs have taken advantage of the internet and other technological improvements in communications to keep a close eye on the record of business from a wider perspective than the law. They have often focussed on a corporation's social or moral responsibility. They have coupled their increased ability to perform a watchdog function around the world with their increased ability to co-ordinate protests, and have become potentially formidable opponents to any corporation seeking public approval for any aspect of their business. Poll conscious politicians have also taken note, giving these NGOs political weight as well.

This increased accountability provided by NGOs has meant that MNC's in the Mining sector must have global standards of conduct to avoid inappropriate activity in one part of the world causing problems in another part of the world.

Without universal standards that are rigidly enforced, multinational companies risk jeopardizing their reputations in their home countries, and other markets that are important to them. As well, individual leaders risk derailing their careers when they engage in activities that would be unacceptable on a multi-country basis. They may lead in Country A where their conduct is accepted, but will never lead in Country B, or Country C (Morrison 2001, p. 68).

This applies to all aspects of a corporation's activities that may be judged on the basis of whether the corporation is meeting its social responsibilities. But is especially true in the area of corruption. The increased power of NGOs to report to the court of public opinion through improved communications and, consequently, more international contacts and political power, is a new reality that a modern Mining company can only ignore at its peril. Indeed, since one Mining company's failure to meet its social responsibilities can often affect people's views of the whole industry, this new reality places increased pressure on the Mining industry to develop and agree on minimum international standards for its members.

## **6. Local Knowledge, Partners and Lack of 'Intelligence'**

A Mining company from the developed world proposing to do business in a country in which it has little knowledge, often seeks a local partner who has the contacts necessary "to get things done" in that country. We have seen how important speed can be to a Mining company, so having a partner or consultant who can lead one through the bureaucratic (and sometimes political) maze of this highly regulated industry, can be extremely beneficial.

This, however, can raise two potential problems. The first is how to find a partner or consultant that is honest, has a good reputation and has the necessary knowledge and contacts to legitimately guide the project through the regulatory and/or political jungle. The second is what to do when the seller of the property has retained an

interest in the property and says he has the necessary knowledge and contacts. The problem may not be just one's partner, but one's partner's partner or consultant.

While solving the first problem may be difficult, it will probably be easier than solving the second problem. At least, with the first problem one can start with a clean slate. Embassy officials of a corporation's home country may be able to supply information or direct one to where one can get it. Obvious sources of helpful information are representatives of international accounting and legal firms, local Chambers of Commerce or business associations, international banks and other foreign corporations that have done business in the country.

Uncovering information on one's partner, or the person he or she recommends, may be more difficult. Such a person may not be well known in general business circles and be virtually unknown to the people canvassed by the Mining company. He or she may have a reputation for 'settling scores' that makes people loath to speak ill of him or her. Where can a company turn to get the real story? Are those that really know prepared to risk civil legal action for slander or libel if their information turns out to be incorrect? Due to the less than transparent nature of criminal activity, are potential informants liable to have anything more than rumour and unsubstantiated allegations to support a negative assessment?

Should national intelligence organisations assist their MNC's by providing advice on potential partners from their files? These organisations have access to INTERPOL files amongst other things. However, there appear to be good legal reasons why such an organisation would be reluctant to release this information (i.e. potential libel and slander actions where there is no proof of the alleged wrongdoing that would be accepted in court). But, it is not difficult to imagine a scenario where a Mining company in good faith enters into agreement with a partner, who brings in a local partner who is well known to INTERPOL but had never been convicted of anything. Normal due diligence, including a check for a criminal record, reveals nothing. Such a scenario could lead to no end of problems for the legitimate Mining company trying to do the right thing. A prudent company might be forced to assume the worst and attempt to build structures to protect its reputation, its assets and employees against the possible predilections of a corrupt 'quasi-partner'.

## **7. The Expanding Legislative Framework**

In 1977, the United States passed the FCPA that imposed extraterritorial obligations on its citizens and corporations, including foreign corporations listed on U.S. Stock exchanges, with respect to the bribery of foreign public officials. This was groundbreaking legislation. While most countries considered bribery of domestic public officials a serious offence, it does not appear that, prior to this legislation, any had legislation specifically aimed at outlawing bribery of foreign public officials (George, Lacey, & Birmele, *The OECD Convention*, p.485).

This, naturally led to criticism from U.S. corporations that they were being forced to do business abroad on an 'unlevel playing field', as they alleged that they were losing contracts to companies from other industrialised countries that had no equivalent legislation to the FCPA. In the 1988 amendments to the FCPA, the legislation required the U.S President to negotiate with OECD members and report back to

Congress (George et al. 2000). The OECD members were apparently selected because they were and are the home countries of most of the corporations that compete with U.S. firms. This led to U.S. pressure on other OECD member Governments. Coupled with the end of the Cold War, a gradual realisation of the negative economic effects of corruption, and the increased profile given to corruption by NGOs such as Transparency International, resulted in international action.

In 1994, the OECD Council on Bribery in International Business Transactions passed a non-binding recommendation encouraging member countries to criminalise the making of bribes to foreign public officials in connection with international business transactions. In 1996, the OECD adopted a recommendation that members that still permitted corporate tax deductions of bribery payments made by business, reject or abolish such tax deductions (Ibid).

The culmination of this, was the signing of the OECD Convention by the 29 member nations of the OECD. The OECD Convention, as its title suggests, is primarily concerned with bribery, although it also deals with money laundering (Article 7) and the maintenance of improper books for the purpose of bribing foreign public officials or of hiding such bribery (Article 8). However, the key part of the OECD Convention is contained in the two sections of Article 1:

1. Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for any third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.
2. Each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party (Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997).

The OECD Convention only deals with the offence committed by the person who gives or promises the bribe and not with the corruption committed by the official who accepts or receives the bribe. It is restricted to the 'supply-side' of bribery. The approach taken by the OECD Convention is to ensure "a functional equivalence among the measures taken by the Parties to sanction bribery of foreign public officials, without requiring uniformity or changes in the fundamental principles of a Party's legal system." (Commentaries on the OECD Convention, paragraph. 2).

By signing the OECD Convention, "...the participating countries committed themselves to ratify and implement the OECD Convention as national legislation by December 31, 1998." (George et al. 2000, p.493). The Convention came into force on February 15, 1999 (*OECD Online: Anti-Corruption Division - Frequently Asked Questions*, 2001). What this has meant in practice, is that each country has fitted the principles contained in the OECD Convention into its national legislation in the

manner least disruptive to its existing legal system. For instance, if a country already had a general conspiracy section applying to its criminal law, making bribery of a foreign public official a criminal offence, would make conspiring to bribe a foreign public official an offence without any further amendments to the law.

As of June 28,2001, the effect of this has been that, with the exception of Ireland and Chile, all 34 signatories to the OECD Convention (including some non-OECD countries) have ratified the convention, and of those that have ratified, only Brazil, Turkey and the U.K, have not passed implementing legislation. The 34 signatory countries, covering many of the world's largest trading partners, are Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States, Argentina, Brazil, Bulgaria, Chile and Slovak Republic. (*OECD Online: Anti-Corruption Division - Country by Country Status*,2001)

It should be noted that such bribery is, as previously discussed only one aspect of corruption. Indeed, like the FCPA, this Convention does not even criminalise facilitation payments as they are not made to obtain or retain business or other improper advantage. However, the OECD Convention's peer monitoring and surveillance procedures carried out by the Working Group on Bribery are a significant advance in ensuring that the signatories are living up to all their obligations under the convention. "This is a rigorous process that examines each country's legislation to assess how well it meets the standard set by the Convention. The Working Group evaluates each country's performance and makes recommendations that will be forwarded to the Ministers of all participating countries" (*OECD Online: Anti-Corruption Division - Frequently Asked Questions*, 2001).

While the OECD Convention played a high profile role in expanding the legislative framework aimed at fighting corruption in international business, it was only one force amongst many. "In 1996 the Organisation of American States was the first regional forum to put in place an anti-corruption agreement, and later the same year the UN made a similar declaration. The European Union and the G7 soon followed " (Blackett 2000). Also in the mid 1990's, the World Bank and International Monetary Fund ('IMF') began to raise the issues of corruption and in 1995 Transparency International published its first Corruption Perceptions Index. In short, the issue of corruption is now clearly on the international agenda both among Governments, NGOs and other members of civil society.

Since corruption in international business is such a broad issue, and since only the first legislative steps have been taken in one area, it seems clear that the pressure for further international agreements resulting in domestic legislative action is likely to continue for some time to come. Those involved in international business, including the Mining sector, should expect that as consensus continues to be reached internationally on certain minimum standards, national anti-corruption legislation will increase.

## **8. The Effects of The Sustainable Development Movement**

The "sustainable development" movement had its origins in the Brundtland 1987 report. (Encyclopedia of Atmospheric Environment, 2000) The term means many things to many people. For the purpose of this paper, 'sustainable development' is defined as utilising resources today with respect for or without compromising the needs of future generations. It is often argued that mining, being the exploitation of a non-renewable resource, is fundamentally incompatible with sustainable development.

The Mining sector's reply to this argument is well represented by the following.

We in fact practice sustainable development by endeavouring to achieve the most efficient and least wasteful level of production, the highest degree of environmental protection and the most equitable distribution of social benefits from our projects. That essentially is the definition of sustainable development: a balanced integration of high quality economic, environmental and social performance (Cooney 1995, p.5).

For miners, the facts are that the earth's store of most minerals is beyond counting, the ability to achieve high levels of recyclability of metals has been demonstrated, the ratio of economic value created to land disturbed is extraordinarily high and the capacity to generate long-term wealth for developed and developing communities alike is a matter of record (Morgan 1999, p.4)

However, it needs to be said that Mining, historically, would not be viewed by an independent observer as having contributed effectively to sustainable development. There are various reasons for this including:

- a. weak environmental standards in many jurisdictions;
- b. lack of long term planning, especially post-closure; and
- c. much of the wealth generated by mining has been squandered by corrupt Governments and especially by corrupt political leaders.

But who is to be the judge of whether a Mining company currently practises sustainable development? Traditionally, Governments have seen themselves in the role of protector of the public interest. However, partially as a result of the failure of Government to adequately protect citizens, numerous NGOs have been formed and are trying to use the court of public opinion to bring political pressure to bear to achieve results that they view as fair and proper in the circumstances.

The proliferation of NGOs and their influence has been facilitated by a number of factors, but probably the most important is the availability of inexpensive communication and sources of information through the internet. International networking has become possible for even small relatively poorly funded groups. These groups are often concerned about projects in their communities such as a proposed mine. They are concerned about environmental protection, economic development and ensuring that the Mining company fulfils its social responsibility to the community.

The NGOs have broadcast the concept of sustainable development to the world. They have brought issues of corporate environmental and social responsibility to the front pages of their local newspapers. The fact that a mine will make a significant economic contribution to the community as a result of the creation of jobs and infrastructure is now only one factor to be considered. As mentioned, communities' expectations also include meeting certain minimum standards of environmental and social responsibility. Sustainable development is perceived as being all about the equitable distribution of funds, stakeholder engagement and reaching agreement on what is equitable. Corruption is perceived as being inconsistent with sustainable development since it skews the equitable distribution of benefits, often in the direction of the least deserving.

These expectations raise numerous challenges to the Mining industry. How to balance these community expectations with the expectations of shareholders that management will provide them with an adequate rate of return on the funds they have invested in the company? How to communicate with the local stakeholders and NGOs to determine the nature of their concerns and take them into account in the planning process? How to communicate to those stakeholders that their particular concern must be balanced against other concerns? How to convince stakeholders that a Mining company genuinely wants to work with them to find a reasonable solution to their concerns?

While some of these challenges have been around for some time, the rise of the sustainability movement has made them more pertinent than ever. In an age of instant communication, every failed tailing dam or other environmental disaster in a remote corner of the world receives widespread press coverage. Every such incident increases the suspicion that modern mines cannot be operated safely, or that the risk is too high given the potential consequences. Every such incident makes NGOs even more challenging partners with whom to work.

Again, it appears that one way to try and convince the public that the Mining industry is committed to the principles of sustainable development, is to adopt a set of principles that would govern the industry. What the principles should include would, of course, be subject to debate within the mining sector. However, if the sector is to change its current public image, that debate will need to consider a wide range of new ideas and initiatives such as, for example, incorporating the concept of full transparency in all corporate-government relations and financial flows. While it may be difficult for the sector to agree on such principles, the risk of not doing so, is that the Mining sector may lose the battle to convince the public that it practises sustainable development.

## **'DEMAND-SIDE' CORRUPTION ISSUES IN THE MINING INDUSTRY**

In the absence of empirical evidence, the Mining industry, for a variety of reasons, can be viewed as being high on the 'supply-side' of corruption. However, many of the countries in which Mining companies operate have very poor ratings in the Transparency International CPI. Traditionally, this has been taken to mean that such

countries are perceived as being high on the demand-side of corruption. Again, it should be emphasised that being on either the demand-side or the supply-side of corruption does not say anything about who initiated the corrupt actions. The fact of the matter is that, in the case of bribery, the act requires both sides to act outside globally accepted norms and, in most cases, unlawfully under the law of the host country.

The high levels of perceived demand-side corruption in many of the countries in which the Mining sector operates, has led to questions as to whether the Mining sector itself is responsible for these high levels? While there does not seem to be any research done on the Mining sector *per se*, Leite and Weidman (1999) have investigated the connections between natural resources generally, corruption and economic growth with the following results:

- i. capital intensive natural resources are a major determinant of corruption;
- ii. the existence of corruption always reduced growth compared to the non-corruption case, but in less developed economies (where there is less likelihood of a significant industrial sector), this effect was more pronounced;
- iii. rapid growth (such as may be sparked by a resources boom) induces an increase in corruption;
- iv. the effectiveness of following anti-corruption policies also depended on the state of development of the economy. Institution building, i.e. improvements in monitoring technology, tends to be more effective in developing countries, while stricter enforcement, i.e. increases in penalties, are predicted to be more effective in more developed countries.

They conclude that both their theoretical and empirical results:

...stress the importance of strong (or at least strengthened) institutions in the wake of natural resource discoveries as a way to curb the negative growth effects of corruption. This is especially true in less developed countries where natural resource discoveries have a much higher relative impact on both the capital stock and the extent of corruption, and are confronted with generally weaker and less adaptable institutions (Ibid, p.31).

What this research suggests is that while the existence of a large natural resource project can affect the level of corruption in a country, other factors are also relevant. The following are some of the factors that appear to make countries in which Mining companies operate more conducive to demand-side corruption.

## **1. Legal Factors**

The quality of a country's legal system is, of course, a major factor. As always the probability of getting caught and punished has a deterring effect on those tempted to break the law. In some countries, the probability of that occurring is very low and corruption is widespread. There are at least five necessary elements that must be present to have an effective legal system.

- a. The laws prohibiting the corrupt activity have to be in place. For example, while bribery may be universally illegal, legislation covering conflicts of interest and election campaign financing is not.
- b. There has to be an effective police force to investigate and recommend that charges be laid against corrupt offenders. In less developed countries, even if the police have adequate manpower, they often do not have adequate training or equipment to perform their duties satisfactorily. They also may be grossly underpaid which makes them particularly susceptible to corruption. Once they succumb to corruption, the police quickly lose respect and credibility within their community.
- c. There must be an effective prosecuting arm of the law. It must make the tough choices on when to prosecute and when not to prosecute. Again, any hint of corruption will destroy the public confidence in the justice system's ability to ensure that the guilty are punished.
- d. The judiciary must be seen to act in a fair and impartial manner. Once again, if there is any hint of favouritism in the judges' decisions or sentences, corruption may be suspected. If the judiciary lose the respect of the population, corruption will flourish.
- e. An example must come from the top. The Attorney General or Minister of Justice, as the case may be, should be a respected person who is recognised as having principles. In a political appointment, this may be a challenge.

Besides political unrest, there is probably nothing that will discourage foreign investment by Mining companies more than a situation where the rule of law has broken down. As previously mentioned, Mining involves a capital intensive long-term investment. That investment is primarily protected by agreements that the Mining company has in place both with the private sector and the Government. Aside from political risk which can be insured against, if the rights the Mining company has under a myriad of agreements cannot be enforced, it may lose all or a large portion of its investment. While political risk insurance is written to cover such matters as expropriation of assets, blockage of transfer of funds and damage to facilities, it normally provides no coverage against corruption. While some protection can be achieved by providing for arbitration by a neutral body outside the jurisdiction, in many cases, there remains the problem of enforcement of the judgement within the jurisdiction.

Given the potential wealth-generating effects of a Mining project, a country with a corrupt legal system is a dangerous environment in which to operate a mine. While it may be a never-ending quest, one cannot expect to achieve good governance when the law enforcement community and judiciary are incompetent, ineffective or corrupt.

## **2. Bureaucratic Factors**

Daniel Kaufmann in addressing the 8<sup>th</sup> International Anti-Corruption Conference (1998), made the following points about the relationship between bureaucracy and corruption.

- a. In settings with higher regulatory and state bureaucratic interference in business, the incidence of corrupt practices is significantly higher.

- b. In countries with higher incidence of corrupt practices firms tend to spend a higher share of management time with bureaucrats.
- c. Evidence from various countries indicates that a positive relationship exists between the extent of bribery and the amount of time that an enterprise's manager spends with public officials.
- d. There is evidence that corruption slows foreign direct investment.
- e. Trade openness and product competition reduce corruption and that liberalising an economy delivers even-more corruption-reduction where judicial institutions are not yet well developed.

In summary, the incidence of corruption appears to be higher where state involvement in the economy and bureaucratic interventions are at high levels. This is hardly surprising, as more Government rules and regulations provide a greater opportunity for exploitation by public officials for corrupt purposes. The size of rewards and penalties under a bureaucrat's control, the amount of discretion they have as to how to allocate those rewards and penalties and the lack of accountability for their decisions and actions, are all factors in bureaucratic corruption. The level of civil servants wages can also be a factor.

In many less developed countries civil service pay scales are far lower than in the private sector. Furthermore, civil servants are often not paid on time. Often the individuals employed by the Government are relatively well educated and have had training abroad. Salaries are so low that often it is impossible to support one's family. In these circumstances, it is not surprising that otherwise honest employees begin to look for other ways to support their needs.

Typically, civil services go through various stages of development. The first stage is led by the elite leaders who established the nation and brings with it a sense of idealism. The second stage is characterised by patronage (Klingner and Campos 2001)

The third stage, if it occurs, is a transition from patronage to merit systems, marked by the passage of a civil service law, creation of a civil service agency, and the development of personnel policies and procedures. It happens due to internal pressures for efficiency (modernization) and human rights (democratization). Often international lenders and donor governments add external pressures that emphasize government capacity, transparency, and citizen participation (Ibid, p.4).

In fact the World Bank has been involved with civil service reform for years. "However, the Bank's experience in assisting civil service reform in more than sixty countries has shown that progress in this area tends to be slow." (The World Bank 1997, p.40). While this is discouraging, it reinforces the continuing need for the Mining sector to develop a consistent and comprehensive strategy to deal with bureaucratic corruption.

As stated earlier, Mining is a heavily regulated industry. There are permits, approvals and exemptions required for exploration, development, construction, operations, mine closure and reclamation. These permits, approvals and exemptions may be concerned with environmental and social impacts, efficiency of the exploitation of the resource,

foreign exchange, imports and exports, employment of local nationals, safety, and numerous forms of taxation. These may involve negotiations as, often in less developed countries, the existing regulations do not contemplate such large Mining projects. Furthermore, frequently the mining legislation contains Ministerial and/or bureaucratic discretion when it comes to the granting of mineral title and the development permit for a mining project.

The problem of ministerial and bureaucratic discretion deserves special mention in the context of the Mining legislation. Corruption in the public sector has been described as a function of the size of the rewards under a public official's control, the discretion that official has in allocating those rewards, and the accountability that official faces for his or her decisions (Ibid, p.12). As discretion increases and accountability decreases, the potential for corruption grows. Reforming Mining and other relevant legislation to minimise discretion is obviously an important issue for the Mining sector. Anecdotal evidence suggests that the most likely times for grand corruption to occur in the development of a Mining project is upon granting of mineral title and when the development permit for the project is required.

When this bureaucratic regime, including ministerial and/or bureaucratic discretion, is superimposed on:

- i. the capital intensive nature of Mining and the consequent need of the Mining industry to develop and construct mines as quickly as possible; and
- ii. the lack of choice of choosing the location once an economic mineral deposit is located;

bureaucratic corruption poses a real problem for the Mining industry.

Now that most major Mining companies are prohibited from bribing foreign public officials by their home country's domestic legislation passed in compliance with the OECD Convention, they can use that law as an excuse to deflect direct requests for bribes. However, in these circumstances, bureaucrats are less likely to ask for a bribe as to doing nothing and hope that the delay will result in some favour coming their way. In some ways, this may be worse for the Mining company trying to get something done because, at first, they may not realise the official is corrupt and may waste valuable time waiting for that official to perform in accordance with his or her statutory duties.

Once it is realised that an official is improperly delaying the process, the Mining company can try to get the individual's superiors to hold him or her accountable. However, the process would be much easier if civil servants were operating pursuant to legislation that minimised discretion and the civil service had built in measures, such as monitoring and audits, that were effectively applied. This higher level of accountability is what many World Bank programs in less developed countries are attempting to achieve.

### **3. Political Factors, including Transparency and Freedom of the Press**

Even in the most developed of democracies, a change of Government often occurs when one political party has governed for a long time and the public perception is that sleaze and corruption are becoming rampant. A new Government is elected and

attempts to clean up the corruption. Often, after a number of years the process repeats itself.

What is it that allows a mature democracy to renew its Government when corruption reaches unacceptable levels? There are many factors including strong democratic structures and institutions, but a *sine qua non* is 'information'. If the public doesn't know what is going on, they will not have an opinion on it, let alone a political position. In order to obtain information, citizens (individually or in organised groups, such as NGOs or opposition political parties) and the press, need to have access to information. Coupled with freedom of association and freedom of the press to publish what they discover, access to information is what allows democratic institutions to operate in a manner that keeps democratic governments accountable to the public.

Historically, the press and other media were considered to be the great guardian of our freedoms. While they are now having to share that role, they are still crucial to our access to information. Government politicians and administrators do not like to be embarrassed and, without legislation requiring them to disclose, they tend to exercise their discretion in such a way as to give themselves the benefit of the doubt. Consequently, lack of transparency in government became, and continues to be, an obstacle to having an informed public.

Freedom of Information ('FOI') legislation has been found to be an effective way of requiring more transparency in government. Since corruption always prefers to work in the dark, such legislation cannot but help to reduce corruption.

It can reverse the usual presumption of secrecy. Citizens are given the legal right of access to government documents without having first to prove special interest, and the burden of justifying non-disclosure falls on the government administration. (Pope 2000, p. 236).

In recent years FOI legislation and investigative reporting by a free press has led to the uncovering of numerous scandals and corruption. FOI legislation and access to the internet have also greatly assisted NGOs in their work to hold governments, politicians and administrators accountable. It has also encouraged transparency in government decisions involving the approval of privately owned projects, such as mines. In countries with a free press, adequate FOI legislation and an independent judicial system to enforce it, secret government concessions and the corruption often associated with them, will not be possible or will not stay secret for long. Unfortunately, in many less developed countries in which the international Mining sector operates, there are limitations on freedom of the press, no FOI legislation and judicial systems that lack adequate independence.

Government monitoring in the form of audits is another element of good governance that can assist in keeping the demand-side of corruption to a minimum. The Auditor General, who performs the role of external auditor to the Government, is responsible for audits that are designed to detect and thereby reduce corruption. He should report to the legislature rather than the executive arm of government and be as independent of government as possible. His role is to hold public officials accountable for their stewardship of public funds and assets.

Another approach is to establish an Inspector-General or Anti-Corruption Commission. These independent bodies typically have the power to investigate corruption and bring cases to trial. Alternatively, independent Ombudsmen have been established that can hear citizen complaints about various bureaucratic failures, including corruption, and can refer cases to prosecutors and police.

Subject to one caveat, as FOI and conflict of interest legislation, campaign finance laws, effective auditors general, ombudsmen, corruption commissions and more private ownership of the media are gradually introduced and take hold in less developed countries, transparency should increase and the demand-side of corruption should gradually start to decline. The caveat is that the country must also have an effective legal system.

Laws declaring "freedom of expression" require support from the courts. An independent judiciary is the protector of a free press. Without an independent judiciary, press freedom is likely to be illusory. A prerequisite for building a free press, therefore, is a legal system that is independent of political influence and which has a firm constitutional direction supporting the concept of a free press (Stapenhurst 2000, p. 17).

Another political factor arises from the nationalism associated with mineral wealth. As previously mentioned, in many countries mineral wealth (especially gold and precious minerals) is considered to be part of the 'National Patrimony' or national 'treasure chest' that belongs to the people and should be exploited for the benefit of the people. Political leaders often feel the need to demonstrate their respect for these views by personally exercising their control over the nation's mineral resources. In many less developed countries, this personal involvement, combined with a less than desirable level of transparency in Government, opens the door to political corruption.

In summary, the political factors affecting demand-side corruption suggest that demand-side corruption will continue since it is more difficult to fight than supply-side corruption. There are more players to monitor and those players are not yet subject to the same level of pressure as those on the supply-side. And yet, in the case of bribery in international business, there is a small glimmer of hope since the reduction on the supply-side will result in less success on the demand-side. If the new laws against bribery are enforced by OECD countries, bribery should decrease (except for 'grease payments', which are not covered by the legislation) because if one side won't pay, the other side won't receive.

If corrupt demands in international business transactions are refused often enough, this should eventually result in fewer demands being made.

#### **4. The Privatisation Factor**

As a result of an increasingly competitive world economy and pressure by the IMF and the World Bank, some less developed countries have been privatising various aspects of their respective economies. Privatisation has been particularly extensive in the countries that formally formed part of the Soviet Union. As a result, foreign Mining companies are increasingly having to deal with private companies to obtain essential services formerly provided by the Government e.g. telephone service, electrical power and transport requirements. Unfortunately, in cultures used to public

sector corruption, demand-side corruption often seems to continue to thrive when an organisation moves to the private sector. While the private sector organisation may not have a formal monopoly, given time and quality constraints on the purchaser, the seller's employees may still be in a position to extract monetary 'inducements' from the situation. The lack of accountability in newly privatised firms without adequate financial controls, allows employees to take personal advantage of their corporate position in the same way that lack of accountability in the public sector allows civil servants to abuse their public sector positions for personal gain.

## **5. The Innovative Factor**

Demand-side corruption is nothing if not innovative. For example, "In India, one high-level civil servant who had been bribed could not process an approval any faster given the multiple bureaucrats involved in the process, yet he willingly offered his services to slow the approval process for rival companies." (Kaufmann 1998, p. 2-3).

As more industrialised countries make bribing of foreign public officials a criminal offence, creative and more sophisticated ways will be found to gain personal advantage without resorting to explicit bribery. Corporations may find explicit requests for bribes easy to recognise and refuse. More sophisticated means of obtaining personal gain are harder for a corporation to understand and respond to appropriately. In Indonesia, under the Suharto government, numerous charitable foundations called "Yayasans" were established, ostensibly for such worthwhile causes as hospitals for retired civil servants. A Mining company seeking mining exploration or exploitation rights would often be told that an application would be looked on more favourably if a donation were made to a named charity. While the Mining company might suspect that a large part of the money might make its way to some official or member of the Suharto family, they were unable, despite conducting extensive investigations or 'due diligence', to discover any connection between the named 'Yayasan' and any officials or members of the Suharto family. Only in the aftermath of the dictator's fall has this connection been exposed. Other officials in the Government also benefited from such parallel systems.

The ability to innovate more sophisticated forms of corrupt payments impervious to existing legislation means that the fight against corruption will require continued vigilance and innovation by those opposed to it. Sophisticated systems of corruption are often very country specific and in such cases need country specific solutions. Given the countries in which the Mining sector operates, the sector will doubtlessly continue to be in the forefront of those that have to deal with the latest forms of demand-side corruption.

## **THE WAY FORWARD**

The international Mining sector must live and prosper within the environment in which it finds itself. Part of that environment is society's attitude towards corruption. In the past, different nations had vastly different levels of tolerance towards corruption. While vast differences remain, in recent years it appears that corruption has moved from being a national issue to becoming both a national issue and an international issue.

## **1. Increased Participation by Civil Society**

With the fall of Communism, it has been generally accepted that a free market economy is the only viable model for organising efficient and productive economies (Cragg 1999). As a result, there has been an increased emphasis on opening up those economies to the benefits of freer and more open trade. More and more corporations are setting up international operations to achieve global economies of scale and tap new markets. The global market place is increasingly dictating the types of the products and development that companies pursue. This globalisation, has led many people to feel that international corporations are making decisions that affect their lives without adequate consideration of the impact that they have on their quality of life and community's values. It is also felt that many of these problems go beyond the reach of the nation state.

As previously mentioned, the availability of better and less costly means of communication and information gathering (i.e. the internet) has led to international coalitions of like-minded NGOs. Coupled with the increasing tensions and alienation caused by globalisation, this has led to the formation of growing numbers of international NGOs. These NGOs have realised that the involvement of civil society is an integral part of any successful fight against the issues that concern them. Increasingly, they are becoming the watchdogs of corporate sector promises and actions and are demanding independent monitoring to ensure their social principles are being met.

## **2. Collective Action**

If the Mining sector is to move forward in addressing corruption issues, it appears there must be a collective approach. First, there must be collective approach within the sector itself. We have seen how difficult this will be due to the different constraints on different actors within the Mining sector. However, the sector must organise itself before it can organise a collective approach with others.

The formation of the International Council on Mining and Metals ('ICMM'), in May 2001, was an encouraging start. There are many initiatives involving collective action that the ICMM could support.

One initiative would be to provide advice to interested countries on how their mining legislation could be revised to reduce the amount of ministerial and bureaucratic discretion to the minimum necessary for the proper administration of the countries' mineral resources. This could be done through the auspices of the World Bank.

Another, more complicated initiative would involve the ICMM forming the basis for common standards or certification of Seniors and Type Two Juniors as 'practitioners' or 'supporters' of sustainable development, including being a 'practitioner' or 'supporter' of corruption-free practices. In order to have such common standards on anti-corruption measures or a 'corruption-free practices' ('CFP') certification procedure, information would have to be gathered about current industry practices, minimum Codes of Conduct would have to be drafted and, in the case of certification, procedures for certification and decertification would have to be agreed upon by members of the Mining sector.

In the same way that NGOs have realised that the involvement of civil society is an integral part of any successful fight against the issues that concern them, they have also realised that for dealing with such overwhelming problems as corruption "... the best position for civil society is within a broader coalition consisting of three key pillars : government, the private sector and civil society" (Eigen 1998, p. 2). For example, a Code of Conduct "will wither in a climate where corruption is systemic, where government is not accountable and where the private or public decision-making process is perverted by bribery and extortion." (Ibid, p.3).

It seems therefore, that there is an opportunity for the Mining sector to reach out and form coalitions with NGOs such as Transparency International, developmental NGOs, human rights NGOs and environmental NGOs, and work with them and Governments.

A note of caution must be introduced here. NGOs suffer from a lack of accountability themselves. A successful NGO can become a large organisation with internal pressures and external expectations to be met. Lack of resources for adequate verification or lack of professionalism may result in unfounded accusations about Mining companies or others. Some NGOs have become so credible that international financing may be difficult to obtain unless such unfounded allegations of wrongdoing by such an NGO are withdrawn. There is a natural reluctance on the part of some NGO's to move quickly enough to minimise the damage where the NGOs credibility is at stake. With power should come responsibility.

An example of where this could have been a factor involves the Bulyanhulu gold property in Tanzania. Amnesty International's Report 1997 contained the following statements (the italics is this quote and subsequent quotes are the author's):

In August, over 50 gold-miners *were killed* in what may have been *extrajudicial executions* during evictions from disputed land in an operation involving the police, regional authorities in Shinyanga and a Canadian mining company. *The men were buried alive when the Canadian company, guarded by police, bulldozed small-scale mines in Bulyanhulu,* despite on-the-spot appeals from distraught villagers, in advance of the company taking possession of the land for industrial mining. The bulldozing was authorized by regional authorities 12 hours after a court order halting evictions pending further investigations was announced over the radio. The bodies had not been recovered by the end of the year and criminal investigations appeared to have been discontinued (Amnesty International 1997).

In its 1998 Annual Report, Amnesty International stated that: "In response to a letter received in August from the Minister of Foreign Affairs, Amnesty International was *investigating further the alleged killing* in August of 1996 of 50 gold-miners in Bulyanhulu, Shinyanga region" (Amnesty International 1998). And in its 1999 Annual Report it stated: "In May Amnesty International delegates visited the country *to investigate conflicting accounts* of the *alleged* deaths of gold-miners in Bulyankulu, western Tanzania, in 1996 .... Amnesty International's memorandum to the government in December recommended the establishment of an independent commission of *inquiry into the incident*" (Amnesty International 1999).

Finally, three years after it reported this matter as fact, Amnesty International stated in its Annual Report 2000:

In April the government replied to AI's 1998 memorandum about the alleged deaths of small-scale gold-miners in Bulyanhulu in Shinyanga region in 1996. The *government denied that there had been any deaths* and rejected AI's call to open an independent judicial inquiry. AI maintained its criticism of local officials who had violated a court injunction by ordering the mines to be filled, but was *unable to substantiate the allegations of deaths* (Amnesty International 2000).

Meanwhile the Mining company in question could very well have been seeking major financing during this period to fully develop the property itself. However, for whatever reason, no such financing was obtained and in the spring of 1999, management recommended that shareholders accept an offer from a major Mining company.

At the very least, the above-mentioned incident demonstrates the potential harm that a NGO can cause. Perhaps, what is needed is a new independent watchdog for NGOs that acts as a type of Ombudsman for people who have been allegedly wronged by NGOs. However, until that is established, Mining companies must realise that NGOs are human organisations and subject to many of the same weaknesses a corporate organisation would have, if not held accountable to society in general.

Returning to the subject of possible ICMM certification, if such certification is to have any significance, it is also necessary that Governments should be involved in some way in the process. It would be desirable that Governments recognise that holders of this certification are liable to be better corporate citizens than those that don't. Hopefully, Governments, if convinced of the worthiness of this certification, would introduce incentives for those that don't have the certification to acquire it. If Mining companies are going to make the effort to acquire this certification, they would like to see their efforts recognised and hopefully rewarded in some way by an appreciative Government. This would increase the attractiveness of the certification and attract more Mining companies to seek certification.

Similarly, relevant NGOs should also be involved in the process. If they can be convinced that the CFP certification procedure goes some way to addressing their concerns, they will become supporters of certification. This again will attract more Mining companies to the certification process. Indeed, if the Mining industry can be seen by NGOs and Governments as a leader in the fight against international business corruption, it may assist the industry to improve its general public image. Furthermore, holders of the certification will now have a means to differentiate themselves from other Mining companies that are revealed to be involved in corruption, but do not hold a CFP certification.

The other obvious group that should be involved in the development of common standards or certification are multilateral organisations such as the World Bank, the IMF and multilateral development banks. Again, if these organisations can be

persuaded of the value of ICMM's anti-corruption standards or CFP certification process, they may decide to require it for Mining projects they are financing.

The World Bank, in particular, has been doing a lot of work on corruption and assisting countries in various ways to fight it. One of the ways it assists countries is to provide them with diagnostic tools to measure corruption (Wamey 1999). It seems likely that if the ICMM approached the World Bank, some of their diagnostic tools could be used to collect significant information by surveys on how corruption is affecting the Mining sector.

### **3. Methods To Reduce Opportunities For Corruption**

Aside from building coalitions with stakeholders in the fight against corruption, individual Mining companies can take measures on their own to reduce the opportunities for corruption. Many of these are well known and already practised by some Mining companies.

The company should take reasonable measures to ensure that no part of an agent's commission is passed on by the agent as a bribe. This can be accomplished in a number of ways.

- a. It should be company policy to only hire reputable firms, with compensation limited to what is reasonable for the services to be performed (Davies 2000).
- b. The agent's contract should expressly prohibit the payment of bribes, should require the submission of regularly scheduled detailed agent activity reports to a company employee and should contain audit rights for the company (Ibid).
- c. Before the contract is signed, the agent should be the subject of a thorough interview and a background check, including his or her reputation in the local business community, with the embassy (Ibid) and with international firms doing business in the country.
- d. Only agents that demonstrate personal integrity and personal competence should be hired.
- e. After the agent is appointed, his or her activity and reports should be monitored by a company employee.

As part of the general introduction of the company to the most senior level of Government representative, it should be explained that it is company policy to follow a path of high integrity. Consequently, the company should request that a procedure be established that can be followed when matters are delayed by officials without valid reasons. The Government representative should receive a copy of the corporation's minutes of the meeting.

As mentioned earlier, these measures should be reinforced by a company Code of Conduct that sets high standards for employees. Employee education on these standards and monitoring by way of audits, etc. are also essential to a comprehensive company integrity management approach to corruption.

None of these measures will assure a Mining company that it will not be caught in the often tangled web of corruption. However, they do establish a record of good intentions which may serve the company well if a wayward employee or agent succumbs to corruption.

One possible strategy for reducing the impact of corruption on government revenue is to provide for direct expenditure on public sector needs. An example of such a system can be found in Papua New Guinea. There, the Government has instituted a 'Tax Credit Infrastructure' programme to allow Mining companies to hold back a portion of taxes owed and to spend the money directly on infrastructure projects under the direction of Government and community officials. The Tax Credit Infrastructure programme was not introduced explicitly to deal with corruption, but rather to achieve a higher level of efficiency in the application of mine-generated revenues to infrastructure projects. Nevertheless, amongst other things, it clearly reduces the opportunities for public sector corruption.

This sort of imaginative approach is something that Mining companies need to be involved in more frequently. Of course, conceiving of such a proposal is only the first step. The more difficult step may be persuading the various stakeholders of its merit. That also requires an imaginative approach. No longer is Mining a profession where everything has an engineering solution. In today's world, and more importantly, in tomorrow's, the biggest stumbling blocks to mine development are often of a social nature where a 'holistic' approach combined with good communication skills are key elements in any success story.

## **CONCLUSIONS**

The Mining sector has certain characteristics that make it especially vulnerable to corruption, including: the requirement for large initial capital expenditures; lack of choice in location; its sudden wealth and easy money image; the local nationals' previous experience with Mining companies; the particular sense of entitlement that local people have with respect to the wealth generated; and the high level of Government regulation.

Notwithstanding this, due to the obfuscating nature of corruption, there is very little empirical evidence of actual levels of corruption in the Mining sector. Obtaining a comprehensive global picture of corruption may be too ambitious and it may be more appropriate to focus on specific countries or regions as the first stage of any analysis. In recent years, organisations such as Transparency International have published surveys of perceptions of corruption levels in various countries. The World Bank is offering diagnostic tools to measure corruption in its member countries. In order to act effectively against corruption, the Mining sector must first collect data on the scope and nature of the problem within the sector. The Mining sector, through an industry organisation such as the newly established ICMM, should consider approaching the World Bank to determine whether their diagnostic tools could assist the sector to collect the necessary empirical data.

The diverse nature of the different actors involved in the Mining sector and the different constraints affecting them, make collective action difficult to achieve.

Perhaps with the formation of the ICMM in May of 2001, the sector has a new opportunity to try to achieve some minimum goals for the Mining industry. This will require the recognition of the role of the Juniors within the industry and the factors which give them a competitive advantage in generative and early stage exploration. Any collective principles, or form of certification of corruption free practices, will have to be flexible enough to allow the Juniors to retain their competitive advantage, or any hope of collective action by the Senior and Junior mining companies will be lost.

The Mining sector will face scrutiny from an increasing number of international NGOs that will be taking advantage of improved communications via the internet. The international Mining sector may also be exposed to public alienation caused by the perceived or presumed negative side-effects of globalisation. The Mining industry's actions will be tested against the requirements for sustainable development, a central element of which is transparency or the lack of corruption. NGOs will lobby for independent verification of corporate social responsibility. Facing this, the Mining sector must take the initiative and work with the appropriate NGOs to both educate them about the industry and be educated by them about the NGO's concerns and issues with a view to devising reasonable solutions acceptable to all parties.

Corruption will continue to be an issue for the Mining sector for the foreseeable future. While some progress has been made in fighting corruption on the supply-side, by putting in place legislation to make bribery of foreign public officials a crime in companies' home countries, similar progress has not been made on the demand-side of corruption. Given the poor ratings of many of the countries in which Mining companies operate and the innovative nature of demand-side corruption, Mining companies should be considering how to address demand-side corruption issues and to optimise the political impact of their collective action.

Possible actions could include working in co-operation with the World Bank and Transparency International to encourage transparency in Government in certain countries that are particularly relevant to the Mining industry (the author acknowledges his association with TI as a Director of the Canadian Chapter, but believes this to be an objectively based recommendation). Such joint action could include the encouragement of both legislative reform to reduce ministerial and bureaucratic discretion and the necessary accompaniments to transparency, such as freedom of the press, an independent judiciary, an efficient corruption-free police system and civil service reform. Other types of projects that support transparency in Government could also be considered, such as the 'Visible Candidates' and 'Visible Congress' programmes run by some Latin American Chapters of TI (Transparency International 2001b)

Obviously, the Mining sector cannot bear this burden alone and expect to achieve meaningful results in all or any of these areas. By forming coalitions (either formal or informal) with MNCs in other industries (in relation to specific countries), TI and the World Bank, and in co-operation with the local national Government, the Mining sector could possibly have a measurable impact on a targeted country. For the Mining sector to be associated with such an initiative cannot but improve the sector's reputation with respect to corruption.

In order to initiate such partnerships, the Mining sector should consider approaching the potential partners with something in addition to a promise of funding. The sector could make a significant gesture to demonstrate both its commitment to such a process and its leadership role. An example of such a gesture would be the Mining sector agreeing to practise full transparency in all corporate-government relations and financial flows. This would entail the annual disclosure on a mine specific basis of the monies paid to Government.

Another possible initiative would be the establishment of a country-specific fund for providing adequate remuneration for the civil service of the country in question. To be effective, such a fund should operate in conjunction with a broader programme of civil service reform designed to achieve more accountability and transparency. Such a programme would have to be established by a coalition of parties that had an interest in the targeted country and would work in co-operation with the local national Government.

To achieve significant results and improve the Mining sector's public image, a significant portion of the Mining sector representing both Juniors and Seniors must agree on collective action. This may be the most difficult challenge of all. Only by collective action will the Mining sector be in a position to improve its collective reputation on corruption issues.

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## APPENDIX 1

### Examples of Types of Corruption

- a. Illicit payments of 'speed money' or 'grease' to officials for the timely delivery of goods and services to which the public is rightfully entitled, such as permits and licences.
- b. Illicit payments to officials to facilitate access to goods, services, and/or information to which the public is not entitled.
- c. The theft or embezzlement of public property and monies.
- d. Extortion and the abuse of public office, such as using the threat of a tax audit or legal sanctions to extract personal favours.
- e. The sale of official posts, positions, or promotions; nepotism; or other actions that undermine the creation of a professional, meritocratic civil service.
- f. Illicit payments to prevent the application of rules and regulations in a fair and consistent manner, particularly in areas such as public safety, law enforcement or revenue collection.
- g. The design or selection of uneconomic projects because of opportunities for financial kickbacks or political patronage.
- h. Procurement fraud, including, kickbacks, collusion, overcharging, misrepresentation, the delivery of substandard goods and services (Asian Development Bank 1999).

## APPENDIX 2

Listed below is a sampling of various definitions of 'corruption', starting with the most narrow and generally becoming more encompassing as one descends down the list.

- a. "Corruption involves behaviour on the part of officials in the public sector, whether politicians or civil servants, in which they improperly and unlawfully enrich themselves, or those close to them, by the misuse of the power entrusted to them."(Asian Development Bank 1999, slide 3). Item (b) contains a shorter definition of this that does not, however, specifically require unlawful behaviour.
- b. "The abuse of public office for private gain" (Ibid, slide2).
- c. "The abuse of public or private office for private gain" (Ibid, slide 2).
- d. " the misuse of entrusted power for private benefit. In this there are three elements (i) a misuse of power; (ii) a power that is entrusted (i.e. it can be in the private sector just as much as in the public); and (iii) a private benefit (i.e. not necessary personal to the person misusing the power, but including as well members of his or her immediate family and friends." (Pope 2000,p.1).

### APPENDIX 3

#### 2001 Transparency International Corruption Perceptions Index \* Rankings & Scores of Leading Mining Countries

Country Rank	Country	2001 CPI Score
1	Finland	9.9
6	Sweden	9.0
7	Canada	8.9
11	Australia	8.5
16	U.S.A.	7.6
18	Chile	7.5
20	Germany	7.4
26	Botswana	6.0
30	Namibia	5.4
38	South Africa	4.8
44	Peru	4.1
44	Poland	4.1
46	Brazil	4.0
51	Mexico	3.7
54	Turkey	3.6
57	Argentina	3.5
57	China	3.5
59	Ghana	3.4
65	Philippines	2.9
65	Zimbabwe	2.9
69	Venezuela	2.8
71	India	2.7
71	Kazakhstan	2.7
71	Uzbekistan	2.7
75	Zambia	2.6
77	Cote d'Ivoire	2.4
79	Ecuador	2.3
79	Russia	2.3
82	Tanzania	2.2
83	Ukraine	2.1
84	Bolivia	2.0
88	Indonesia	1.9

\* Extracted from Transparency International Press Release, 27 June 2001. Available: <http://www.smh.com.au/news/0007/01/review/review3.html> [1 July, 2001]

## APPENDIX 4

**Transparency International 1999  
Bribe Payers Index \*\***

**Bribery in Business Sectors \*\***

On a 0 to 10 basis, a score of 10 represents extremely low levels of corruption				
Rank	Country	1999 BPI Score	Emerging Market Economies Business Sectors	Score
1	Sweden	8.3	Agriculture	6.0
2	Australia	8.1	Banking & finance	5.3
2	Canada	8.1	Civilian aerospace	5.0
4	Austria	7.8	Telecommunications, post (equipment & services)	4.6
5	Switzerland	7.7	Industry (including mining)	4.2
6	Netherlands	7.4	Power (including petroleum & energy)	3.5
7	United Kingdom	7.2	Arms & defence industry	2.0
8	Belgium	6.8	Public works contracts & construction	1.5
9	Germany	6.2		
9	United States	6.2		
11	Singapore	5.7		
12	Spain	5.3		
13	France	5.2		
14	Japan	5.1		
15	Malaysia	3.9		
16	Italy	3.7		
17	Taiwan	3.5		
18	South Korea	3.4		
19	China (including Hong Kong)	3.1		

\*\* Transparency International - The Transparency International Bribe Payers Survey, 2000. [Online], Available: <http://www.transparency.org/documents/cpi/index.html> [23 August, 2001]