TRANSNATIONAL LAW AND LOCAL STRUGGLES

The global spread of transnational mining investment, which has been taking place since the 1990s, has led to often volatile conflicts with local communities. This book examines the regulation of these conflicts through national, transnational and local legal processes. In doing so, it examines how legal authority is being redistributed among public and private actors, as well as national and transnational actors, as a result of globalising forces.

The book presents a case study concerning the negotiation of land transfer and resettlement between a transnational mining enterprise and indigenous peasants in the Andes of Peru. The case study is used to explore the intensely local dynamics involved in negotiations between corporate and community representatives and the role played by legal ordering in these relations. In particular, the book examines the operation of a transnational legal regime managed by the World Bank to remedy the social and environmental impacts of projects which receive Bank assistance. The book explores the nature and character of the World Bank regime and the multiple consequences of this projection of transnational law into a local dispute.

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Transnational Law and Local Struggles

Mining, Communities and the World Bank

DAVID SZABLOWSKI

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Contents

Introduction

TRANSNATIONAL INFLUENCES IN AN ANDEAN VALLEY

Relatively early in my field research, I became preoccupied with unseen forces. I was staying in a small Andean town on the floor of a mountain valley high in a remote corner of the Peruvian highlands. Each day, I walked up the district's dirt roads and winding footpaths to the surrounding villages to carry out interviews. What struck me initially on these journeys was how removed this steep landscape of potato fields and clustered adobe dwellings seemed from the activity that I knew was taking place not so far away in the upper highlands.

High above, amid the mountain peaks and upper grassland areas of the district, construction was underway on what was to become one of the world's largest copper mines. An army of contracting companies, co-ordinated by a giant transnational engineering firm, was at work. The scale of these operations was enormous. A mountain lake would be drained, a dam erected, a vast open pit mine dug, and facilities for power generation, a concentrator plant, and living quarters for thousands of temporary workers would all be constructed. The mine site would be linked to the outside world by a private asphalted road and a pipeline that, once operations began, would funnel mineral concentrate across hundreds of kilometres and two mountain ranges to ships waiting in newly constructed port facilities on the Pacific coast. Accomplishing these tasks in an area without any pre-existing infra-structure and at altitudes of over 4,000 metres would involve state of the art technology and the investment of more than a billion US dollars.

Little evidence of this activity was visible in the lower villages. Like many areas of the rural Andes, this region was remote and neglected, with much of its economy based on subsistence farming, and its people marginalised within national society. The gulf between the lives of the indigenous peasant farmers (*campesinos*) of the region and the First World outpost of capital and technology being constructed above seemed immense. Yet, although the mine itself was not visible, its presence was everywhere. My interviews had made this clear. Residents of the district were locked in a bitter conflict over the

company's acquisition of the extensive highland territories it now occupied. *Campesinos* and company representatives were expressing starkly different views of the dispute and, at that time, I was focusing my interviews in order to understand this divide.

As I uncovered this story however, it became apparent that a dispute resolution process was in motion. Local actors told me that a delegation from the World Bank had recently visited the district. The district municipality had received an official letter from the Vice President of a World Bank agency in Washington. A research team had recently come to collect information from complainants. These events were the result of a letter of complaint sent by the district mayor to the President of the World Bank some months earlier. Given that similar letters to government officials had gone unanswered, local actors were surprised and pleased by this attention to their grievances, even though they did not seem to know quite what to make of it.

Local actors had become aware of a transnational legal regime that was at work in their environment. World Bank involvement in project financing meant that the project owners had made contractual commitments to comply with the Bank's social and environmental rules. The visible involvement of the Bank in local affairs resulted from a concern that the company could be in breach of its contractual commitments to its consortium of lenders and insurers. However, local actors were unaware that that regime had been involved in regulating matters in the district for some time. From early on in its interactions with local actors, the company had been required to apply these rules and report to the Bank on its compliance.

Interviews with local actors suggested that the World Bank's regime constituted a second, largely unseen force in the local environment. Much like the construction project above, its presence was known but its activities were mysterious. *Campesinos* could describe their differences with the company in terms of either the promises made to them by company representatives or the requirements of Peruvian law. However they could not do so with respect to the World Bank regime: they were unaware of its content, of the rights and duties it created, or even of the processes through which it might address their disputes. In one sense there was nothing strange about this. The arrival of the mining company in their midst was preceded and facilitated by an invisible infrastructure of transnational legal obligations. These include a private regulatory stabilisation agreement with the government of Peru, a globe-spanning network of financing and construction contracts, and a series of letters of intent between the International Monetary Fund and the Peruvian government concerning privatisation and liberalisation of the mining sector.[1] Although many of these had significant local implications,

[1] H Mainhardt-Gibbs, *The Role of Structural Reform Programs Towards Sustainable Development Outcomes* (Washington, DC, Extractive Industries Review, 2003) available at www.eireview.org.

most were unknown locally. Here, however, was a transnational legal obligation associated with project development that was designed for their benefit. What would it bring?

As the title suggests, this book is concerned with the intersection between transnational law and local struggles arising from globalising economic activity. Transnational law is being developed in sites around the world in order to address governance gaps and opportunities. This represents a significant and continuing shift in how governance is taking place around the globe. It is a shift that raises important questions concerning legitimacy and democratic governance. This book focuses on a particular type of transnational law, one that seeks to bridge the gap between the transnational and the local by exercising a direct regulatory influence in local environments.

MINING AND COMMUNITY CONFLICTS

Disputes between local communities and transnational mining firms have emerged in the past 15 years as a highly contested arena of global conflict. These are complex and multifaceted disputes that defy easy resolution. Typically they pit against one another actors from opposite ends of the global economy: high-technology transnational enterprises on the one hand versus marginalised and often indigenous rural peoples on the other. Further, they often take place in remote areas in the Global South where state presence may be historically slight. These disputes can also involve significant normative and inter-cultural conflicts. Corporate norms, local custom and state law all tend to differ in important ways, complicating the essential question of who is to engage with whom over what.

While these conflicts are intensely local in many respects, they also have taken on significant transnational dimensions. In part, this is because these conflicts have been occurring across the globe for some time. The current wave originates from the accelerated globalisation of mining investment that has taken place since the early 1990s. Over this period, NGOs and advocacy networks have become ever more active in support of local communities, and industry actors have increasingly had to engage with the contention that they bear a special responsibility to protect local interests and rights.

As a result, mining and community issues have emerged as a global policy arena. An intense and globalised debate has been taking place in a great diversity of sites around the world concerning how mining and community conflicts should be regulated. The debate has drawn in actors involved in all aspects of the industry, including commercial lenders, host and home country states, international financial institutions, insurers, industry associations, consultants, indigenous peoples' groups, NGOs and mining-affected communities.

Governments, particularly in the Global South, have often been ineffective

regulators of these conflicts. Bound by ties of economic dependency on large mining projects, by the need to maintain an investor-friendly environment, and often by constraints on regulatory capacity, many states have been reluctant or ineffective providers of solutions to these conflicts. Instead regulatory innovations have come from a range of non-state actors, including mining enterprises, financial institutions and NGOs. For reasons that will be explored in subsequent chapters, these entities have sought to establish different regimes for defining and regulating responsibilities for the social mediation of mining development. Thus, at present, the global policy arena relating to corporate and community conflicts in the mining sector is characterised by contesting regimes of transnational law.

WHAT IS TRANSNATIONAL LAW?

Here 'transnational law' will be used to refer to legal regimes which operate across national borders or which regulate actions or events that transcend national borders.

Transnational law is far from a new concept. Fifty years ago, Philip Jessup developed the term in order to challenge the idea that law was confined by the boundaries of nation states, whether as state (national) law or as interstate (international) law.[2] However it is with globalisation that the transnational concept of law is truly coming of age. In part, this is due to the fact that globalising forces are promoting transnational phenomena that appear highly legal in character. It is also due to the fact that these same forces are undermining traditional thinking about law that has served to keep a transnational concept of law outside the conventional frame.

Globalising forces shorten distances, expand social spaces and create opportunities for the intensification and spread of social, economic and cultural interaction.[3] The proliferation of this kind of activity, both within and across national borders, is associated with a crisis in the conventional model of national and international law. In the standard model, law is propounded exclusively by nation states, with each state exercising sovereign and hierarchically dominant authority over a distinct territory.[4] International law, in its classical formulation, respects and reinforces the principle of sovereign territorial authority.[5] International law, again classically speaking,

[2] Jessup's definition of transnational law includes 'all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories': P Jessup, *Transnational Law* (New Haven, Conn, Yale University Press, 1956).

[3] DA Held, A McGrew, D Goldblatt and J Perraton, *Global Transformations: Politics, Economics and Culture* (Cambridge, Polity Press, 1999).

[4] On the territoriality of law see R Ford, 'Law's Territory (A History of Jurisdiction)' (1999) 97 *Michigan Law Review* 843.

[5] D Held, 'Law of States, Law of Peoples: Three Models of Sovereignty' (2002) 8 *Legal Theory* 1.

does not penetrate national boundaries. Instead, its rules are akin to those of a private club made up of the community of nation states. International legal obligations are created solely by states themselves through custom or agreement. Further, an obligation will not exercise a regulatory influence on the ground until it is integrated into the state's own territorial system of legal ordering.[6] Thus, in this model, sovereign states are presumed to be in authoritative control of all aspects of law-making and enforcement within their formal spheres of influence.

Whatever its other merits, the conventional model of state-centred law fails to describe our world as we know it. As William Twining has remarked, '[i]n so far as our stock of theories of law assumes that municipal legal systems are self-contained or that public international law is concerned solely with external relations between states, such theories just do not fit the modern facts'.[7] Globalisation has drawn attention to this discrepancy, not least by providing actors of all sorts with abundant opportunities to perform functions that conflict with traditional notions of state sovereignty. Consequently, NGOs such as Human Rights Watch play a vital role in the functioning of the international human rights system,[8] corporations such as Motorola shape both national and global telecommunications standards,[9] and credit rating agencies such as Moody's regulate states themselves.[10]

Recognition of these shifts has led many political scientists to develop new approaches to government authority and its influence on ordering. 'Governing', it is observed, 'has become a more complex and volatile process' than it once was.[11] States are now said to be enmeshed in webs of 'complex interdependence',[12] 'complex multilateralism'[13] and 'multilayered governance'[14] that shape their behaviour. Rather than ordering national societies

[6] As Held indicates, this classical view of the inter-state system has been steadily undermined since the Second World War. The post-war period has seen concerted attempts to extend limits on the exercise of public power into the international sphere, chiefly through the development of new standards of legitimacy on nation states. Increasingly, respect for overriding principles such as democracy, self-determination and human rights has been seen as the proper basis of state sovereignty: Held, n 5 above.

[7] W Twining, *Globalisation and Legal Theory* (Evanston, Ill, Northwestern University Press, 2000) at 51.

[8] J Mertus, 'Considering Nonstate Actors in the New Millenium: Toward Expanded Participation in Norm Generation and Norm Application' (2000) 32 *Journal of International Law and Politics* 537.

[9] J Braithwaite and P Drahos, *Global Business Regulation* (Cambridge, Cambridge Univesity Press, 2000) at 3–4.

[10] C Scott, 'Private Regulation of the Public Sector: A Neglected Facet of Contemporary Governance' (2002) 29 *Journal of Law and Society* 56.

[11] D Held and A McGrew (eds), *Governing Globalization* (Cambridge, Polity Press, 2002) at 8.

[12] R Keohane, *Power and Governance in a Partially Globalized World* (London, Routledge, 2002) at 2.

[13] R O'Brien, AM Goetz, JA Scholte and M Williams, *Contesting Global Governance: Multilateral Economic Institutions and Global Social Movements* (Cambridge, Cambridge University Press, 2000).

[14] Held and McGrew (eds), n 11 above, at 9.

authoritatively, state institutions exert their regulatory influences alongside those of a great diversity of other actors. Thus '[r]ealizing cherished domestic political goals, delivering core policy programmes and resolving domestic crises increasingly involve the state in a negotiated order between diverse agencies, both public and private, within and beyond the state'.[15]

For many socio-legal scholars, particularly those working in the legal pluralist tradition, globalisation has merely drawn attention to dynamics that have always existed. These scholars have long argued that the legal ideology of the liberal democratic state is not capable of living up to its claims of universality, effectiveness and hierarchical dominance of other forms of ordering. The law of the state has never succeeded in monopolising ordering within its borders.[16] Drawing from rich work in anthropology and legal sociology, these scholars have sought to explore legality as a plural phenomenon, involving norm generation and enforcement emerging from multiple social spaces with overlapping influences upon social life.[17]

Transnational law, then, depends upon a shift from the restricted conceptual framework that has been conventionally used to define legality. Such a shift is being explored by a diverse and growing number of scholars who are involved in developing an expanded understanding of law in light of globalisation.[18] These perspectives are developing the conceptual space

[15] Ibid, at 8. The focus on governance, as a term wider than government, has allowed political science to capture and attend to a broader set of regulatory phenomena.

[16] M Galanter, 'Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law' (1981) 19 *Journal of Legal Pluralism* 1, B de Sousa Santos, *Towards a New Common Sense* (New York, Routledge, 1995) at 95, SF Moore, *Law as Process: An Anthropological Approach* (London, Routledge & Kegan Paul, 1978).

[17] For explorations of legal pluralism see SE Merry, 'Legal Pluralism' (1988) 22 *Law & Society Revie*w 869, Galanter, n 16 above, HW Arthurs, *'Without the Law': Administrative Justice and Legal Pluralism in Nineteenth-Century England* (Toronto, University of Toronto Press, 1985), B Z Tamanaha, 'The Folly of the "Social Scientific" Concept of Legal Pluralism' (1993) 20 *Journal of Law and Society* 192, G Teubner, 'The Two Faces of Janus: Rethinking Legal Pluralism' (1992) 13 *Cardozo Law Review* 1443, RA Macdonald, 'Metaphors of Multiplicity: Civil Society, Regimes and Legal Pluralism' (1998) 15 *Arizona Journal of International and Comparative Law* 69, Santos, n 16 above.

[18] See, eg, HW Arthurs, 'Globalization of the Mind: Canadian Elites and the Restructuring of Legal Fields' (1997) 12 *Canadian Journal of Law & Society* 219, Braithwaite and Drahos, n 9 above, Y Dezalay and BG Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (Chicago, Ill, University of Chicago Press, 1996), PH Glenn, 'A Transnational Concept of Law' in P Cane and M Tushnet (eds), *The Oxford Handbook of Legal Studies* (Oxford, Oxford University Press, 2003), B Kingsbury, N Krisch and R Stewart, 'The Emergence of Global Administrative Law', IILJ Working Paper 2004/1, available at www.iilj.org/, H-H Koh, 'Transnational Legal Process' (1996) 75 *Nebraska Law Review* 181, O Perez, 'Normative Creativity and Global Legal Pluralism: Reflections on the Democratic Critique of Transnational Law' (2003) 10 *Indiana Journal of Global Legal Studies* 25, Santos n15, C Scott and R Wai, 'Transnational Governance of Corporate Conduct Through the Migration of Human Rights Norms: The Potential of Transnational 'Private' Litigation' C Joerges, I Sand, and G Teubner (eds) *Transnational Governance and Constitutionalism* (Oxford, Hart Publishing, 2004), F Snyder, 'Governing Economic Globalization: Global Legal Pluralism and European Law' (1999) 5 *European Law Journal* 334, G Teubner (ed), Global Law Without a State (Aldershot, Dartmouth, 1997), Twining, n 7 above, P Zumbansen, 'Transnational Law' in J Smits (ed), *Encyclopedia of Comparative Law* (Cheltenham, Edward Elgar Publishing, forthcoming).

required to accommodate a broader spectrum of normative ordering into legal scholarship, including regimes that may be transnational, deterritorialised, suppletive[19] and characterised by non-coercive 'soft law' mechanisms of persuasive enforcement. These regimes may be public, private or hybrid in nature and they may involve states, private actors or international organisations in their processes.

Such a framework helps to illuminate a number of features of transnational law-making. Globalisation has created both new regulatory needs and new capacities for strategic actors interested in exercising regulatory influences across national borders. The desire for transnational forms of co-ordination is strong in a great many areas. Certainly, actors of all sorts have become involved in the creation of transnational legal institutions. Some of these regimes have emerged from the interstate system where new legal instruments have been created with transnational characteristics, such as the investor–state arbitration mechanism provided under NAFTA. Others are the product of entrepreneurial professional networks, such as the system of non-state norms underlying international commercial arbitration.[20] Others result from the networking activities of state regulators, such as central bankers.[21] Others still are produced by private and public actors intent on exerting a global regulatory influence in such areas as standardisation,[22] sectoral environmental regulation[23] or Internet governance.[24] In many instances, these regimes constitute highly influential elements of the legal infrastructure that underpins our current global order.

[19] Suppletive law is law which is at the disposition of parties rather than binding upon them. Glenn, n 18 above, at 849.

[20] Commercial lawyers have invented an autonomous body of law, comparable to the medieval 'law merchant', to create an independent transnational regime for the resolution of 'international' commercial disputes through various forms and venues of arbitration: Dezalay and Garth, n 18 above, P Zumbansen, 'Piercing the Legal Veil: Commercial Arbitration and Transnational Law' (2002) 8 *European Law Journal* 400.

[21] Eg, the Basel Committee on Banking Supervision provides a forum for central bankers from the world's wealthiest countries to develop policy and standards regarding the regulation of commercial banking: Y Dezalay, 'Between the State, Law, and the Market: The Social and Professional Stakes in the Construction and Definition of a Regulatory Arena' in W Bratton, J McCahery, S Picciotto and C Scott (eds) *International Regulatory Competition and Coordination* (Oxford, Clarendon Press, 1996), AM Slaughter, 'The Accountability of Government Networks' (2001) 8 *Indiana Journal of Global Legal Studies* 347.

[22] The International Organisation for Standardisation (ISO) is a private non-state body that acts as a worldwide federation of national standardisation bodies. It develops technical standards in a wide range of areas (see the International Organisation for Standardisation's website at www.iso.org/).

[23] The Forest Stewardship Council is a non-state transnational legal regime involved in the environmental goverannce of forestry practices in countries around the world: see B Cashore, G Auld and D Newsom, *Governing Through Markets: Forest Certification and the Emergence of Non-state Authority* (New Haven, Conn, Yale University Press, 2004), available at www.fsc.org/.

[24] The Internet Corporation for Assigned Names and Numbers (ICANN) is a non-profit-making US corporation designated as the transnational regulatory authority governing the domain name system, a key element of the architecture of the Internet (see the ICANN website at www.icann.org/).

The issue of transnational law raises a number of concerns regarding the changing shape of governance in world affairs. To the extent that democratic guarantees are concentrated within nation states, the decentring of state influence involves a similar decentring of those guarantees. Transnational law presents a significant challenge to the theory and practice of democratic governance. Forms of autonomous ordering that are able to leapfrog national borders essentially evade the checks and balances provided by national democratic processes.

THE ORGANISATION OF THIS BOOK

The book will explore two principal areas of inquiry. The first concerns the development of transnational legal regimes and their relationship to other forms of law. In the absence of overarching structures for establishing legal authority in the transnational sphere, how is transnational law being formed? How is it being contested? What kinds of legitimation strategies are being employed to support transnational assertions of authority? How do these efforts to construct legitimacy influence the structure of the regime itself? How is legal authority being distributed between national and transnational legal regimes?

The first four chapters of the book will examine these questions in relation to the global policy arena relating to mining and community conflicts. The first chapter provides a theoretical discussion of the practice of legitimation in law. Chapter 2 will outline the predicament faced by weak states in the Global South in relation to mining and community conflicts. Chapter 3 will describe the competing law-making efforts of transnational mining enterprises and industry critics and their failed attempts to establish a definitive regulatory model for governing mining and community conflicts. Chapter 4 will examine the World Bank's safeguard policy regime: perhaps the most well-developed and significant transnational legal regime operating in this area. This chapter explores the structure and characteristics of the regime in order to assess its regulatory credibility.

The second area of inquiry concerns the practical influence of transnational legal ordering in regulating local environments. Socio-legal scholarship has long shown that the attempt to exert a strong and consistent regulatory influence in a local setting using formal legal instruments is often a complex enterprise prone to unexpected outcomes. Conventionally, this is explained by legal pluralists as due to the presence of informally generated normative systems on the ground, which may oppose or may simply pervert the intentions of a formal regulatory regime.[25] The introduction of transnational law, however, adds a further twist and raises a series of questions. How does trans-

[25] Moore, n 16 above.

national law interact with local informal ordering regimes? How do the transnational aspects of the regime make a difference in accomplishing the goals set?

These questions will be examined using a detailed case study presented in Chapter 6. The case study concerns the introduction of a large copper-zinc mining operation in the Peruvian Andes. Particular attention will be paid to the regulatory role played by the World Bank safeguard regime in this case study. The case study will be preceded by a discussion in Chapter 5 designed to introduce the reader to issues and perspectives relating to both indigenous peasant communities in the Andes and transnational mining enterprises. The case study is followed by an extended assessment in Chapter 7 of the performance of the World Bank regime.

1

Understanding Regulation and Legitimation: The Challenges for Transnational Law

This chapter will provide a theoretical discussion of the two central problems to be examined in this book: regulation and legitimation. Both will be examined first in general terms as the key products of law. Subsequently, the specific ramifications arising from legal regimes that operate transnationally will be addressed. The first part of the chapter, a quite brief section, will deal with the challenges involved in exercising a regulatory influence in a local environment. The second part, comprising the bulk of the chapter, will examine the means for establishing legal authority in the transnational sphere.

UNDERSTANDING REGULATION: THE INTERACTION OF TWO KINDS OF LAW

Socio-legal scholars have long recognised that the enterprise of ordering behaviour using formal rules and sanctions is rarely straightforward. Efforts to regulate behaviour with formal legal institutions can often have perverse effects, ranging from simple non-compliance to, on occasion, entirely unexpected results. Reconciling the divide between law and practice, sometimes referred to as the gap between law-in-the-books and law-in-action, is a persistent challenge. Why is this? One of the most fruitful explanations characterises the situation as the product of an encounter between two different kinds of legal regimes, one formal and the other informal.

Light can be shed on this issue by outlining the two general camps that social scientists fall into when it comes to describing law.[1] One group, exemplified by Weber, identifies law as a normative regime that is generated

[1] BZ Tamanaha, 'An Analytical Map of Social Scientific Approaches to the Concept of Law' (1995) 15 *Oxford Journal of Legal Studies* 501.

from (or recognised by) a formal institutional context and is intended to be enforced by a bureaucratic coercive apparatus. Thus, for Weber,[2] the term 'law' applies to any kind of institutionalised norm creation and associated enforcement.[3] The second group, exemplified by Ehrlich[4] and Malinowski,[5] focuses on human behaviour rather than on formal institutions. Codified official law, they argue, tells you little about how people actually live. Instead, it is the study of patterns of behaviour that reveals the actual rules that govern social life: the 'living law'. These lived norms are generated and enforced in everyday social interactions taking place in different social settings. They form the basis of what colloquially may be called customary law, social practice or 'how things are done around here'.

The point to be made is not that one perspective is correct and the other mistaken. Rather, each camp is describing a quite different socio-legal phenomenon: (1) institutionalised processes of norm generation and associated enforcement, and (2) informal processes in which norm generation and norm compliance are closely bound together through social interaction.[6] How do the two differ? Regimes in the first category are consciously designed formal regulatory instruments intended to govern the actions of others. Such regimes seek to impose order hierarchically and can be designed by the few with a view to regulating the many. We may think of these two groups as legal officials and legal subjects, or more simply as law-makers and law-takers. These regimes offer the promise of realising social change towards formally identified goals. However, due to their separation from the processes of everyday social life, actual compliance with such regimes may be piecemeal or limited. This phenomenon has been famously characterised as the gap between 'law on the books' and 'law in action'.[7]

[2] M Weber, *The Theory of Social and Economic Organization* (New York, The Free Press, 1947).

[3] A distinction should be made between enforcement efforts and actual compliance. Institutionalised enforcement can take place with little or no resulting social compliance. For many theorists who use institutionalised enforcement as the key identifier of legality, a lack of compliance does not necessarily alter a regime's character as 'law'.

[4] E Ehrlich, *Fundamental Principles of the Sociology of Law* (New York, Russell & Russell, 1962).

[5] B Malinowski, *Argonauts of the Western Pacific: an Account of Native Enterprise and Adventure in the Archipelagoes of Melanesian New Guinea* (New York, Routledge & Keagan Paul, 1964).

[6] Tamanaha, n 1 above.

[7] As Tamanaha (ibid) points out, there is not only a gap between formal law and actual practice. among legal subjects. There is also a considerable gap between the formal rules governing the operation of a legal regime and what legal officials do in practice. This is due to the fact that law-makers have their own informal rules and practices governing how they carry out their functions: P Bourdieu , 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38 *Hastings Law Journal* 805. Oliver Wendell Holmes acknowledged this gap between formal rules and judicial practice when he defined the law as 'the prophecies of what the courts will do in fact': Holmes 1897: 461.

Regimes in the second category are of a fundamentally different nature. These regimes are produced by diffuse social processes and are under no one's overall control. Due to their close connection to daily social life, they exhibit a very high degree of compliance. Compliance tends not to be secured through coercion, but rather by positive inducement. Following the rules is a path by which approval and co-operation of others may be gained. Of course, these informal norms are also socially contested and are the subject of continuous struggles taking place in daily life.[8] Actors encounter these regimes constantly in their interactions with others, and it is through these interactions that the content and meaning of these regimes are asserted, affirmed and renegotiated over time.[9]

Accordingly, the regulatory challenge faced by institutionalised forms of norm enforcement is due to the fact that they are not the only legal influence on social behaviour. Informal legal regimes, generated within different social settings, also govern behaviour, and may do so according to norms quite different from those asserted by a particular formal regime. In her classic study on the subject, SF Moore shows that informal regimes can to varying degrees either adopt or resist outside legal influences. She shows how labour relations in a particular sector of the New York garment business were substantially governed by informal norms based on reciprocity rather than the strict terms of collective agreements. Formal law, she argues, is likely to be most effective if its norms are internalised into the informal legal processes that generate and maintain local legality.[10]

This, then, illustrates something of the challenge for transnational legal regimes that propose to exert a regulatory influence in very local affairs. A regime that operates on a transnational scale is far removed from local realities, local detail and local informal law-making processes.[11] This distance and the differences in perspective that accompany changes of scale complicate productive engagement between the transnational regime and local systems of ordering. This increases the chances of normative conflict rather than co-operation.

CONSTITUTING LEGAL AUTHORITY THROUGH LEGITIMATION

Discursive theories of law point out law's nature as a system of communication, a particular kind of shared symbolic language, that is generated and

[8] SE Merry, 'Law, Culture, and Cultural Appropriation' (1998) 10 *Yale Journal of Law and the Humanities* 575.

[9] Here, all are potentially law-makers and law-takers. An actor can take on the role of law-maker if that actor is engaged in an effort to contest and redefine aspects of an informal legal regime. For an interesting example of this kind of struggle see T Li, 'Images of Community: Discourse and Strategy in Property Relations' (1996) 27 *Development and Change* 501.

[10] SF Moore, *Law as Process: An Anthropological Approach* (London, Routledge & Kegan Paul, 1978).

[11] B de Sousa Santos, *Towards a New Common Sense* (New York, Routledge, 1995) at 463–5.

managed among social actors.[12] Law is produced within social spaces characterised by regular communication and interaction.[13] It is sustained by communities of discourse[14] to serve a twofold purpose. On a collective level it produces stability and predictability in relations, while on an individual level it provides the means to legitimate and secure recognition of an actor's social and material entitlements. Law is therefore both a common good and a strategic resource.

Carol Rose illustrates this perspective in her discussion of property regimes.[15] A regime of property is made up of a set of common understandings regarding individual and group entitlements to things. These understandings are supported by a language of symbols familiar to the regime's membership. The regime provides its members with a logic of rights, duties and relations with respect to a set of social and material entitlements. It thereby permits complex planning and exchange, and provides actors with a set of common expectations with which to avoid or manage disputes. In this sense, Rose observes that a property regime is itself a form of collectively managed property. That is to say, it is an intangible common asset that provides a much-needed service within its community of operation. Although it is in this sense a common good, such a regime is also likely to favour some interests in its community of operation, while oppressing others. Whether it is enforced by agencies of the state or by informal customary institutions, a property regime holds together on the basis of adherence to a collectively maintained language of meaning, symbol and practice.[16]

The proponents of a prospective formal legal regime aspire to mobilise actors into three overlapping groups: those who participate in the production of legal decisions, those who are regulated, and those who constitute the desired audiences for legitimation. The successful construction of such a regime involves surmounting the challenges presented by these three mobilisations. Those actors needed to participate in decision-making must be

[12] J Black, 'Regulatory Conversations' (2002) 29 *Journal of Law and Society* 163, G Teubner, 'The Two Faces of Janus: Rethinking Legal Pluralism' (1992) 13 *Cardozo Law Review* 1443, G Teubner (ed), *Global Law Without a State* (Aldershot, Dartmouth, 1997).

[13] J Brunnee and S J Toope, 'International Law and Constructivism: Elements of an Interactional Theory of International Law' (2000) 39 *Columbia Journal of Transnational Law* 19.

[14] The literary theorist Stanley Fish has developed the term 'interpretive community' to refer to groups that share interpretive conventions and understandings. Fish observes that the ability of a person to recognise a text as a poem will depend upon whether or not she is familiar with the set of conventions that govern poetry reading. If not, she is apt to mistake the poem for some other kind of text: perhaps a letter, a diary entry or a random scribbling. The conventions of poetry reading are maintained by a social group of readers and writers who generally share them. New ways of reading or writing poems are propagated through the formation of new interpretive communities or by changing the conventions accepted by existing communities: S Fish, *Is There a Text in this Class? The Authority of Interpretive Communities* (Cambridge, Harvard University Press, 1980).

[15] CM Rose, Property and Persuasion (Boulder, Col, Westview Press, 1994).

[16] Ibid, at 5.

persuaded to take on their assigned roles. The targets of regulation must be influenced to the extent desired. And the regime must project a sense of its own legitimacy into particular audiences.

This formulation draws upon Latour's notion of power or authority as arising from enrolment.[17] In Latour's view, authority is created when others are successfully mobilised into particular roles that suit the authority figure's purposes. What enrolment strategies do law-makers use to encourage law-takers to acknowledge their authority and obey their decisions? Socio-legal scholarship has focused upon three strategies used by law-making communities: strategies of coercion, reward and legitimation.[18] The behaviour of actors is thought to be guided by rational (and sometimes irrational) judgements based on a combination of interest, values, identity concerns and habit.[19] Enrolment strategies must appeal to—and find points of leverage among—these factors.

Typically, formal legal regimes rely upon more than one type of strategy to promote enrolment in legal relations. Coercive measures stand in the wings in support of many regimes, and a certain level of reward is common—if only via the utility of the public service provided by the operation of a regime itself.[20] However, behavioural research suggests that an over-emphasis on either coercion or reward-based strategies can produce undesirable responses from law-takers. Heavy-handed coercive treatment can induce actors to resist or subvert attempts at regulation—a response psychologists call 'reactance'.[21] An excessive emphasis on strategies of reward can focus attention on narrow rent-seeking behaviour rather than respect for authority or compliance.[22] Furthermore, as a regulatory community becomes larger and more diverse, coercion and reward are more difficult to apply: coercion can more easily miss its target, while rewards may be distributed without much assurance that they are in fact buying loyalty. Accordingly, strategies of legitimation are

[17] B Latour, 'The powers of association' in J Law (ed), *Power, Action and Belief. A New Sociology of Knowledge?* (London, Boston, Mass & Henley, Routledge & Kegan Paul, 1986).

[18] T Tyler and G Mitchell, 'Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights' (1994) 43 *Duke Law Journal* 703 at 734.

[19] E Mertz, 'A New Social Constructionism for Sociolegal Studies' (1994) 28 *Law and Society Review* 1243.

[20] Coercive measures include informal methods of community coercion as well as institutionalised forms of physical and economic coercion. A 'voluntary' legal regime concerning economic relations between private actors may be undergirded by the ability of actors to take economic reprisals against one another for defection. See S Macaulay, 'Non-Contractual Relations in Business: A Preliminary Study' (1963) 28 *American Sociological Review* 55, J-G Belley, 'L'entreprise, l'approvisionnement et le droit. Vers une théorie pluraliste du contrat' (1991) 32 *Les Cahiers de Droit* 253.

[21] According to the theory of reactance, certain intentions to control behaviour are read as attempts to limit our freedom, which lead us to reassert that freedom by acting contrary to the direction of control. This theory helps to explain why attempts at regulation can inspire behaviour that is exactly opposed to that desired. See J Braithwaite, 'Rewards and Regulation' (2002) 29 *Journal of Law and Society* 12 at 16–9.

[22] Ibid, n 19.

attributed a major role in the promotion of the respect for legal authority and legal compliance. The legitimacy of a rule or a legal order is the effective belief in its binding or obligatory quality.[23] This is not necessarily the same as moral agreement with a social order or a particular rule; legitimacy refers only to the belief that the rule or order is considered binding.

The importance of legitimacy as a factor in establishing legal authority has been contested in an influential article written by Alan Hyde in the early 1980s. Hyde's article attacks a tendency among scholars to make extravagant claims on behalf of the ideological power of legitimation strategies, despite the absence of empirical work establishing the effects alleged.[24] In particular, Hyde criticises as unsubstantiated the 'general theory . . . [prevalent among many US socio-legal scholars] that the procedures, rituals, ideology, and substantive decisions of legal institutions, particularly judicial institutions, measurably shape American popular beliefs in the legitimacy of government and the American sense of obligation and loyalty to the nation'.[25] However, since the appearance of Hyde's article, substantial empirical work has been published regarding the effect of perceptions of legitimacy on beliefs regarding legal authority and on behavioural compliance. Contrary to Hyde's conclusion that 'rational calculation' plays the primary role in promoting legal compliance and respect for the authority of legal officials, these studies show that perceptions of legitimacy exert an even greater influence on law-takers' beliefs and behaviour.[26]

Three Sources of Perceptions of Legitimacy

Three factors are thought to act as potential sources of perceptions of legitimacy among law-takers. These are: outcome favourability (whether a legal

[23] Weber, n 2 above, at 124–5.

[24] Quite correctly, Hyde has pointed out that such a theory of legitimation cannot assume perfect communication between the judiciary and the general public. Judicial action cannot be simply assumed directly to affect popular belief. Instead, legitimation theory must consider how messages are transmitted from law-makers to law-takers regarding the substance of legal decisions and the procedure used to arrive at them.

[25] A Hyde, 'The Concept of Legitimation in the Sociology of Law' [1983] *Wisconsin Law Review* 379 at 383. In part, Hyde is reacting to a brand of scholarly criticism that subjects liberal legalism to a catch 22 analysis. He observes that indiscriminate use of the concept of legitimation creates a simplistic view of law in liberal democratic societies: elements of the law that support class domination are naturally to be expected, while those elements that counter or mitigate domination are explained away as necessary for legitimacy. Thus 'no aspect of capitalist law can fail to be perfidious' (Hyde at 418). This kind of seamless functionalism does injury to a more complex understanding of the development of legal institutions. Whatever the law is, it is not an airtight class conspiracy.

[26] See Tyler and Mitchell, n 18 above, at 710, TR Tyler and SL Blader, *Cooperation in Groups: Procedural Justice, Social Identity, and Behavioural Engagement* (Philadelphia, Penn, Psychology Press, 2000). See also TM Franck, *The Power of Legitimacy Among Nations* (Oxford, Oxford University Press, 1990) at 19–21.

decision favours an observer's interests), substantive fairness (whether the decision is perceived to produce a fair result according to the observer's values) and procedural fairness (whether the decision was arrived at through a procedure that considered by the observer to be proper in the circumstances).[27] Where law is intended to regulate the behaviour of large, heterogeneous groups and/or complex situations, the first two factors are likely to be of limited use in supporting the authority of legal officials. Where populations are diverse and regulatory questions are complex, those involved in law-making will be unable to craft decisions that favour all interests or accord with all values. Furthermore, decisions may need to be taken that offend interests or values that are widespread. Accordingly, the key to supporting decision-making authority in these circumstances depends upon the development and dissemination of ideas regarding 'right process' in the making of legal decisions.[28]

If widely and strongly held, conceptions of proper decision-making process offer the possibility of promoting acceptance and compliance with legal decisions with which people would otherwise disagree. This is a vital property of law, the importance of which to social co-ordination can hardly be overstated. Fortified by ideas of right process, law can act as a philosopher's stone by transforming claims into legitimated (and therefore durable) social and material entitlements that can be recognised within regulatory communities and their legal fields of operation. This also helps to explain the incentives to law-takers to co-operate with many of the legal regimes that affect their lives. Law-takers need the legitimacy created by legal regimes in order to support their entitlements. Thus law-takers have an incentive to recognise and help reproduce a legal regime even if they see it as sub-optimal. In this sense, law represents a specialised social technology by which legitimacy can be manufactured and endowed upon certain entitlements.

Legitimation Strategies and the Psychology of Rule Makers

The give and take of legitimation strategies are significantly influenced by the essential obscurity of processes of legitimation. The legitimacy of an institution is not only hard to measure, it is also difficult to know which precisely of the various strategies of legitimation, coercion and reward employed in support of a legal institution are responsible for its durability. In retrospect,

[27] Tyler and Mitchell, n 18 above, at 733–4. Risse unites the first two categories calling them 'output legitimacy' (legitimacy based on the results of decisions), while he refers to the third as 'input legitimacy' (based on the decision-making process): T Risse, 'Transnational Governance and Legitimacy' (2004), available at www.atasp.de/en/pub/autoren.php?aut=4.

[28] Indeed Thomas Franck restricts his definition of legitimacy exclusively to the compliance pull caused by appeals to 'right process' by rules or rule-making institutions: Franck, n 26 above, at 24.

no one is shocked by the fact that the communist regimes of the Eastern Bloc collapsed once the threat of Soviet intervention was lifted from Eastern Europe. However, at the time, more than a few analysts were surprised to find the bonds of legitimacy supporting those regimes to be so fragile. The task of assessing legitimacy is particularly challenging to law-makers who, in the absence of continual research on confidence in their performance, are often reduced to indirect and anecdotal measures—striving to detect the public mood like monarchs listening from the palace balcony. Thus legitimation strategies involve theory and guesswork on the part of law-makers, and the examination of these strategies begins with an inquiry into the psychology and behavioural models employed by law-makers themselves.

Studies of law-makers generally reveal that they have their own theories of legitimation. Law-makers are influenced by their own impressions of what is required to maintain their image of authority in the minds of law-takers.[29] Sometimes legal authorities will explicitly state the legitimation theories that influence their actions. For example in *Planned Parenthood of Southeastern Pennsylvania v Casey*, the majority of the US Supreme Court based its decision upon the argument that careful respect for precedent in areas of great political controversy was necessary to maintain the confidence of the American public in the Court as an institution.[30] Of course, it is not at all clear that law-makers are right in their models and calculations. This fundamental indeterminacy is a key element of the game of enrolment played between law-makers and law-takers.

All legitimation strategies share one fundamental characteristic: they seek to justify the exercise of power by claiming to set certain constraints upon its exercise. These legitimating constraints are based upon socially prevalent ideas of fairness and appropriate behaviour. However, the relation between the actual application of these constraints and the practical success of a legitimation strategy is disputed. To put it bluntly, it is not clear just how closely the constraints need to be followed in practice to produce a desired quantity of legitimacy.[31] Thompson contends that the ideological effectiveness of the rule

[29] EP Thompson, *Whigs and Hunters* (New York, Pantheon Books, 1975) at 263.

[30] 112 S Ct 2791 (1992). In this case, the US Supreme Court was required to consider whether it would overturn *Roe v Wade* 410 US 113 (1973) and thereby end constitutional protection of limited abortion rights. Briefly the Court held that overruling a prior Supreme Court decision in a controversial area in other than the most compelling of circumstances would threaten the Court's legitimacy: it would give the appearance of surrender to political pressure rather than of decision-making based on principled justification. Respect for precedent and *stare decisis* in these circumstances were held to be vital to the preservation of the Court's 'institutional integrity'. See the discussion in Tyler and Mitchell, n 18 above, at 714–7.

[31] Trubek, eg, criticises Balbus for assuming that relatively minor changes in criminal procedure during race riots in the 1960s were capable of affecting public perceptions of the legitimacy of the US legal system. DM Trubek, 'Complexity and Contradiction in the Legal Order: Balbus and the Challenge of Critical Social Thought About Law' (1977) 11 *Law & Society Review* 529.

of law as legitimation has relied to some extent upon the actual realisation of its claims of independence from gross manipulation and its appearance of justice. Its legitimating effect depends upon both its adherence to 'its own logic and criteria of equity, [and] on occasion [its] actually *being* just'.[32] Thompson does attribute the possibility of cultural power to legal processes, holding that they may 'disguise the true realities of power' even as they may 'curb that power and check its intrusions'.[33] However, he argues that success at 'disguising' is related to demonstrated effectiveness of 'curbing and checking'.

Insightfully, Thompson also notes that law-takers are not the only targets of legitimation strategies. Law-makers themselves also tend to need to believe in what they are doing:

> [I]t is not often the case that a ruling ideology [such as the rule of law] can be dismissed as mere hypocrisy; even rulers find a need to legitimize their power, to moralize their functions, to feel themselves to be useful and just. In the case of an ancient historical formation like the law, a discipline which requires years of exacting study to master, there will always be some men who actively believe in their own procedures and in the logic of justice. The law may be rhetoric, but it need not be empty rhetoric.[34]

In this regard, law-makers may engage in legitimation strategies that are directed at justifying their role to themselves and their peers.[35]

Legitimation and Power: Organised and Disorganised Audiences

Legitimation is an extended and uncertain conversation between law-makers and law-takers. For legitimation to function, law-makers must first, as we have seen, successfully deploy strategies that speak to ideas prevalent within the law-taking community. Secondly, law-takers must believe that the legitimating constraints on decision-making appealed to by law-makers are, at least for the most part, actually being observed in practice. Both of these processes depend on the quality of communication that takes place between the two groups. In large, heterogeneous societies, the two groups typically have only limited direct interaction with one another, and thus makers are often reduced to guesswork about the beliefs of takers, while takers tend to rely upon messages conveyed by intermediaries and secondary sources. These

[32] Thompson, n 29 above, at 263. Italics in the original.
[33] Ibid, at 265.
[34] Ibid, at 263.
[35] Furthermore Thompson points out that it is often from the legitimating rhetoric propounded by an elite 'that a radical critique of the society is developed: the reformers of the 1790s appeared, first of all, clothed in the rhetoric of Locke and of Blackstone'. Ibid, at 265.

challenges are potentially all the greater in a transnational context in which the advantages of geographic proximity are not available.

Legitimation is further complicated by the fact that it is not performed in the same way for all audiences of law-takers. Power affects how legitimation strategies are both deployed and carried out in practice. Groups of law-takers who are more attentive to law-making activities and better able to pose a threat to the authority of law-makers may receive special attention. In contrast, 'disorganised' audiences of law-takers who are less able to be vigilant or influential are likely to be regarded quite differently by law-makers in their design and adoption of legitimation strategies.

Categorising Concepts of 'Right Process'

The previous discussion has sought to portray legitimation as a continuous and often imperfect conversation between law-makers and law-takers in which ideology, attention and influence play important roles. Crucially, the process relies upon the existence of legitimating ideas among law-taking populations—particularly concepts of 'right process' which have the capability of generating legitimacy even where decisions may conflict with interests and values found within a target audience. To facilitate further empirical and normative inquiry into democratic legitimacy and transnational legal ordering, I will set out a typology of concepts of 'right process' (or procedurally just decision-making) that I believe to be prevalent in many contemporary societies. Four broad categories are described here for consideration. They are:

1. Decision-making by appropriate authorities;
2. The autonomy of private decision-making;
3. Public participation in decision-making; and
4. Expert decision-making.

A widespread category of concepts of 'right process' vest decision-making power in a properly constituted authority. The legitimacy of these decision-making processes depends upon the nature of the decision-maker's authority. It also depends upon whether the issue in question falls within the authority's jurisdiction. Thus an ecclesiastical matter would be decided by a religious official, a municipal matter by a town council, a commercial dispute by an arbitrator, and a tribal matter by a meeting of elders. Decision-makers operating under this concept of right process tend to have internal rules and procedures governing their behaviour and often have accountability mechanisms. Even in circumstances where the authority in question is not a public one, use of this form of decision-making has an aura of publicness, in that decision-making power is claimed on the basis of an authority status

recognised within a sphere of social life. Furthermore, the right to exercise decision-making power is in theory open to question by a challenger who can show that the authority claimed is in fact not validly constituted. The town councillors must be elected, the religious official ordained and appointed, the arbitrator agreed upon by the parties, and the elders' status confirmed by tribal law. With the spread of liberal democratic ideology, power exercised on the basis of authority status is increasingly subject to accountability pressures.

A second concept of right process is connected to the idea that individuals and groups should be free to conduct certain affairs without undue outside interference. This sphere of private autonomy is particularly enshrined in liberal theory; however, it is a value also found to varying degrees in a wide variety of cultures. Accordingly, the types of interference considered 'undue' will vary from one social setting to another. The legitimacy of decision-making power in this sphere is based upon the notion that one is free to govern one's own affairs and to deal with whom one wishes within the boundaries established by one's civic responsibilities. Decision-making processes will be governed by regimes of private relations including formal contract law, informal reciprocity arrangements, etc. The claim of decision-making power made pursuant to this idea of 'right process' is based upon a right to private relations rather than upon an authority status.

Notions of 'right process' that assert a right to public participation in decision-making have deep and multiple roots in cultures around the globe.[36] There are two general branches to this category. The first concerns the right of those subject to rules to have a say in the constitution and development of those rules. The second concerns the right of an individual or group whose

[36] Pring and Noe trace democratic-participatory decision-making forms to multiple practices and traditions including:

> 'prehistoric New Guinea Highland villages in which information and decision-making are both communal, classical Athenian democracy of the Fifth Century BC characterised by the direct participation of citizens, Confucius' teachings of the responsibility of sovereign to subject, Aristotle's maxim two centuries later that 'liberty and equality . . . will be best attained when all persons alike share in the government to the utmost', the whole Norse community meeting annually in the 900s AD to make and receive laws in the oldest democracy in Northern Europe—the Allthing of Iceland, the 'right to petition' the Crown first appearing in English law in the Tenth Century Andover Code of Edgar the Peaceful, dyke-building regulations in the Low Countries invoking it in 1100 AD, English barons forcing the Magna Carta on King John in 1215, North American Indian council practices at the time of Columbus, the European Enlightenment of the Eighteenth Century and the political revolutions it spawned, the American Declaration of Independence in 1776, the French Revolution of 1789, the amendment of the US Constitution to guarantee the 'right to petition Government' in 1791, Sweden's incorporation of public participation in its laws in the Eighteenth Century, and on.'

G Pring and SY Noe, 'The Emerging International Law of Public Participation Affecting Global Mining, Energy, and Resources Development' in DN Zillman, AR Lucas and G Pring (eds), *Human Rights in Natural Resource Development* (Oxford, Oxford University Press, 2002) at 17–18 (notes omitted).

entitlements stand to be significantly affected by a decision somehow to participate in the making of that decision. The content of participatory concepts of 'right process' (including the emphasis placed upon facilitative measures such as access to justice or access to information) will of course vary from one social setting to another. Much of the thinking behind rights of public participation is grounded upon the Enlightenment idea of the individual as a rational, autonomous, rights-bearing agent entitled to appropriate involvement in matters that concern her welfare. Notions of due process, political democracy, human rights and personal responsibility for one's actions all flow from this conception of the individual. In general, claims for processes of public participation have been most successful against public authorities rather than private actors. However, the global 'participation explosion' that has been taking place in recent decades has seen the dramatic expansion of participation processes into areas previously identified as private, especially with regard to environmental issues.[37]

The last category of 'right process' concepts to be addressed here concerns the delegation of decision-making power to persons with special knowledge and expertise. On its surface, this category may resemble the first: processes of expert decision-making delegate power based on the status conferred by an expert's credentials. However, the expectations placed on the expert are quite different from those applied to the authority. Experts are asked to address 'technical' questions whose resolution requires specialised knowledge and practices of information gathering. The application of expert processes of decision-making suggests that there are no political choices to be made with regard to the matter in question. Technical questions are believed to have a single solution, or at least a small number of correct solutions. The validity of the expert's work should be verifiable through peer review. In contrast to authority-based decision-making processes, processes of expert decision-making are particularly resistant to claims for public participation. Public participation presumes a political and subjective element to decision-making, while expert-based processes are founded upon the idea that no such elements exist.

These four categories provide a useful framework for identifying and unpacking different legitimation strategies based on right process concepts. However, they also reveal the challenges facing normative analysis. Taking a democratic perspective on governance does not entail simply favouring one category over the others. It should not be up to the town council to determine how residents should prepare breakfast any more than that one citizen should be able to defy municipal zoning rules on the basis of a claim to personal autonomy. Equally, just as policy on nuclear safety should not be decided without the assistance of qualified experts, the siting of a nuclear waste

[37] Pring and Noe, n 36 above, at 11–15.

facility should not be decided without public input. No one category of decision-making processes is inherently more democratic that the others. Instead all four are necessary to the project of democratic governance.

Furthermore, an overall democratic perspective on governance cannot be achieved simply by adopting a democratic perspective on each category. Observers may agree in general that authority should be based upon a democratic mandate and robust accountability mechanisms; that private autonomy should be respected where it does not conflict with civic responsibilities; that public participation ought to be accessible and extensive; and that expert participation should not be used to subvert deliberations that are political in nature. This, however, does not tell us much. The practical meaning of these points hangs on the answers provided to two questions: what is a public versus a private matter?[38] What is a technical versus a political question? The major task to be faced in developing a normative framework for assessing pro-democratic legitimacy claims entails deciding when processes from one category ought to apply in place of another: where should the borders be drawn?

Challenges for Democratic Governance: Drawing Boundaries in a Transnational World

The contentious matter of drawing these boundaries has occupied the state since its inception. In the last 200 years, what has been considered an area appropriate for public intervention or expert decision-making has varied considerably with the development of new state regulatory capacities, changes in public consciousness, the rise and fall of ideologies of administration, and various boom and bust cycles of expert credibility.[39] Unsurprisingly, no abstract, historically invariant solution has been found.

In addition, globalising forces are responsible for further distorting the already blurry distinctions between public and private, and technical and

[38] The word 'public' will be used here as shorthand to refer to decision-making processes that fall within the jurisdiction of an authority. For the purposes of the remainder of this section, the term 'public' is not intended to be synonymous with the state or with an inter-state analogue.

[39] For a brief history of administrative attitudes of the nation-state see J Braithwaite, 'The New Regulatory State and the Transformation of Criminology' (2000) 40 *British Journal of Criminology* 222. For an analysis of the development of new administrative technologies and ideologies see HW Arthurs, *'Without the Law': Administrative Justice and Legal Pluralism in Nineteenth-Century England* (Toronto, University of Toronto Press, 1985) and J C Scott, *Seeing Like a State* (New Haven, Conn, Yale University Press, 1998). For an account of the rise and fall of the Keynesian school of economics see D Yergin and J Stanislaw, *The Commanding* Heights (New York, Free Press, 2002). See also Y Dezalay and B G Garth, *The Internationalization of Palace Wars. Lawyers, Economists, and the Contest to Transform Latin American States* (Chicago, Ill, University of Chicago Press, 2002) for an insightful history of the widespread displacement of legal expertise by economic expertise in the last several decades.

political. While some observers have long pointed to the incoherence of the public/private distinction, there is an increasing consensus that globalisation is changing the familiar relationships established between authority-based ordering processes (especially those of the state) and private governance.[40] Globalising forces are 'drawing states and non-state entities into a range of partnerships and hybrid forms of governance' in which functions thought of as public are increasingly delegated to private entities.[41] With regard to the technical/political question, globalising forces are vigorously promoting claims based on either side of the equation. The influence of experts in a range of fields is dramatically expanding as a result of new networking possibilities, new technical needs, and the opening up of new transnational domains.[42] At the same time, through the spread of democratic and self-determination ideologies, globalisation is also significantly responsible for the 'explosion' in claims for public participation that is taking place worldwide.[43]

[40] Kennedy argues that the distinction between public and private matters is simply incoherent.

> 'When the City of Detroit decides to condemn the whole Poletown neighborhood and then virtually gives it to an auto company as a plant site, there is a big argument about whether or not this is a taking for a 'public' or a 'private' purpose. Don't you feel, dear reader, a sensation of ennui, even of sleepiness, at the thought that I might actually tell you what they said? It's not just that the arguments are obvious. It's worse than that. The arguments deployed by Detroit in support of the publicness of this venture could be deployed in support of virtually any venture one can imagine. If, on the other hand, we take seriously the arguments against publicness deployed by the lawyers for Poletown, it is hard to imagine anything except a courthouse that would justify a taking'

D Kennedy, 'The Stages of Decline of the Public/Private Distinction' (1982) 130 *University of Pennsylvania Law Review* 1349 at 1353–4.

Freeman argues that the project of administrative law reform requires the jettisoning of the public/private distinction due to its failure to correspond with administrative realities:

> 'Virtually any example of service provision or regulation reveals a deep interdependence among public and private actors in accomplishing the business of governance. This interdependence shatters the notion of public power that animates the legitimacy crisis in administrative law'

J Freeman, 'The Private Role in Public Governance' (2000) 75 *New York University Law Review* 543 at 547.

[41] AC Aman, 'Globalization, Democracy, and the Need for a New Administrative Law' (2002) 49 *UCLA Law Review* 1687 at 1694.

[42] Eg, lawyers from the Global North have been very successful in promoting themselves as transnational experts capable of providing a range of governance solutions on a global basis. Dezalay and Garth describe the entrepreneurial role played by European and US lawyers in the development of the modern *lex mercatoria*, or international commercial arbitration: Y Dezalay and BG Garth, *Dealing in Virtue. International Commerical Arbitration and the Construction of a Transnational Legal Order* (Chicago, Ill, University of Chicago Press, 1996). De Lisle describes the influence exercised by American lawyers and legal academics in the new legal reform projects promoted in the post-Soviet era. J De Lisle, 'Lex Americana? United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond' (1999) 20 *University of Pennsylvania Journal of International Economic Law* 179.

[43] Pring and Noe, n 36 above.

Thus, globalisation is further muddying waters already not known for their clarity. How does this mean we can proceed? A cue can be taken from the advice of Freeman writing on the need to transcend the public/private distinction in order to devise accountability mechanisms that address the reality of interdependent governance. Freeman argues that the conventional instruments of US administrative law are inadequate because there is 'no center of decision making in administrative law as we tend to suppose'—instead 'we find a variety of actors making collections of decisions in a web of relationships'.[44] However, once the shackles of traditional models of accountability are discarded, 'there is no handy alternative . . . against which to evaluate a given decision-making regime'.[45] Faced with this situation, Freeman argues:

> The appropriate response to shared governance instead requires highly contextual, specific analyses of both the benefits and the dangers of different administrative arrangements, together with a willingness to look for informal, nontraditional, and nongovernmental mechanisms for ensuring accountability.[46]

This is the position that will be adopted here. New times require new measures, and the project of developing evaluative criteria of new administrative arrangements—or of transnational legal orders—and their claims of legitimacy should begin with careful field-based analyses of their performance, with an emphasis on thick description.

To Freeman's prescription I will add one further evaluative strategy to inform an inquiry into the 'benefits and dangers' of particular instances of transnational legal ordering. This will consist of a focus on how these instances of ordering serve to construct the political identity of their subjects.[47] The ideologies and practices of liberal democratic state governance have created a particular kind of political identity: the national citizen. Based on Enlightenment notions of rationality, independence and respect for individual agency, this political identity has had important emancipatory effects.[48] Globalisation waters down, without of course dissolving, the citizenship guarantees of the state. With the retreat of one form of identity, another advances: engaged with the state, we are citizens; engaged with the market, the bulk of us are consumers; engaged with the labour market, most are workers. If transnational law is proliferating, one way to approach an

[44] Freeman, n 40 above, at 673.
[45] Ibid, at 672.
[46] Ibid, at 665.
[47] For a discussion of the role of law in identity construction see Mertz, n 19 above, and CJ Greenhouse, 'Constructive Approaches to Law, Culture, and Identity' (1994) 28 *Law & Society Review* 1231.
[48] Of course this project has had both positive and negative consequences. It has permitted the expansion of democratic controls and human welfare within many parts of the world, while simultaneously restricting many of these benefits within the political spaces of the Global North.

evaluation of the benefits and dangers presented by its processes of regulation and legitimation is to inquire into the form of political identity these processes imply. What kinds of engagement are being promoted? What rights and duties are created? What does a transnational legal order offer by way of an emancipatory ideology and practice? What is asked of us and what is offered in return? The answers to these questions will provide a normative guide that will be used to inform the inquiry of the chapters that follow.

2

The Selective Absence of the State: Delegating Responsibility for Mining and Community Conflicts

This chapter identifies and describes a major contextual factor affecting the development of transnational law-making efforts relating to mining and community conflicts: the role played by nation states. Mineral-rich states, particularly in the Global South, face to varying degrees a common predicament as a result of the contemporary phase of transnational mining investment. For these countries, foreign direct investment in the mining sector provides urgently needed hard currency and exports. However, it also provokes internal political pressures that can range from the inconvenient to the intense. These may involve claims for the recognition of indigenous rights, calls for increased environmental protection, demands for benefits sharing, or accusations of internal colonialism.

The central difficulty for state actors arises from the fact that their ability to respond to these pressures is circumscribed by the legal and practical conditions required to attract foreign investment in the global market place. With little room to manœuvre, states must develop coping strategies that can respond to, if not reconcile, these competing internal and external pressures. In many instances, this involves a formal award of rights to the investor accompanied by an informal delegation of local regulatory responsibilities. Accordingly, it appears that states themselves are involved in transferring legal authority to mineral enterprises to manage social mediation. It is this selective absence of states from key aspects of the regulation of mining and community conflicts that is giving transnational law-making efforts part of their contemporary character.

Understanding the contemporary position of developing country states *vis-à-vis* conflicts between mining companies and local communities requires an explanation of two parallel developments that have taken place in recent decades: first the evolution of relations between states in the Global South and the transnational mining industry, and, secondly changes that have taken place in civil society approaches to both the state and extractive industry

development. This chapter will undertake both of these tasks, first by providing an overview of global trends in these areas and then by addressing how global trends have influenced developments in Peru, the country where the case study is located.

The final part of the chapter will examine how the Peruvian state has addressed this predicament in its formal legislative framework—in particular those regimes dealing with the allocation and exchange of property rights and with environmental assessment. The principal coping strategy demonstrated by these regimes is one of *selective absence*. While the state plays a clear regulatory role in some areas, it operates through an indirect delegation of authority in others. Through the regulatory sleight of hand afforded by these strategies, the Peruvian state aims to offload many of the economic and political costs associated with mediating mineral development without prejudicing its position within the international economic order.

THE SOCIAL MEDIATION OF MINING DEVELOPMENT

A key concept used in this chapter is the idea of the 'social mediation' of mining development. The phrase will be used in a very general sense to refer to the task of addressing community and civil society calls for the construction of a new framework for governing the distribution of the costs and benefits generated by mining activity. These grassroots pressures for change may arise from new forms of political consciousness, higher levels of education and literacy among local actors, and changes in the existing governance framework arising from the reorganisation of mineral extraction activities or from a new awareness of impacts and benefits. The content of what is required to accomplish social mediation is therefore not static. Social mediation is a moving target that has shifted historically along with the rise and fall of social movements, political ideologies, foreign and state involvement in mining activity, and the practical evolution of the governing framework. Carrying out social mediation does not imply simply acceding to grassroots pressures. Calls for change are not necessarily either politically feasible or consistent with one another. A social mediation strategy will typically involve creating institutions that respond to and shape some demands while suppressing others in an effort to construct a new governance framework that meets with a certain level of acceptance. Social mediation may be undertaken by any actor with influence over governance, including government, industry, finance and civil society organisations themselves. A principal focus of this chapter will be on state attempts to deal with calls for social mediation since the 1990s.

HISTORICAL BACKGROUND TO THE PREDICAMENT

Historically, the regulation of mining investment in the Global South has gone through three general phases. These are an initial colonial period during which home country enterprises were granted extensive rights over mineral resources and labour. After the Second World War, this was followed by a post-colonial period characterised by a general swing towards developmentalist and economic nationalist policies. The contemporary shift towards neoliberal restructuring and a return to foreign private sector leadership of the industry began towards the end of the 1980s.[1]

Legal arrangements during the colonial period facilitated the complete domination of the mining sector in Africa, Asia and Latin America by multinational enterprises from the Global North. These firms were granted extremely favourable concession agreements that imposed few obligations on the concessionaire in exchange for extensive rights—including very low rates of taxation. The concession agreements tended to carve out independent enclaves in which foreign companies ruled with little outside oversight. Even in independent countries in the South, these enclaves often reproduced colonial relations in which only foreigners had access to skilled or management positions. Thus it is not surprising that these concessions became associated with 'underdevelopment, exploitation and political dominance' and with growing national resentment.[2]

This was very much the case in Peru. The country had gained independence from the Spanish Crown in 1821. Nevertheless, the arrival of large-scale investment from US copper mining interests in the late nineteenth century prompted a relationship that followed the colonial pattern. Foreign domination of the mining sector was welcomed by Peru's elites who formed strategic alliances with US investors. Peruvian elites—referred to as 'the oligarchy'—had little interest in seeing an interventionist or economically nationalist state develop.[3] From their perspective, the state played an important role in maintaining order and a liberal investment regime attractive to foreign capital. However the opportunities to profit through co-operation with foreign business meant that elites sought power by investing in direct relationships with foreign investors, rather than by seeking to exercise influence through capable state institutions.[4] As a result of this alliance, Peru maintained a *laissez faire* state, which accepted relatively

[1] The following discussion relies significantly on J Otto and J Cordes, *The Regulation of Mineral Enterprises: A Global Perspective on Economics, Law and Policy* (Westminster, Colo, Rocky Mountain Mineral Law Foundation, 2002) at 1.32–1.52.

[2] Ibid, at 1.34.

[3] D Becker, *The New Bourgeoisie and the Limits of Dependency: Mining, Class, and Power in 'Revolutionary' Peru* (Princeton, NJ, Princeton University Press, 1983) at 47.

[4] R Thorp and F Durand, 'A Historical View of Business-State Relations: Colombia, Peru, and Venezuela Compared' in S Maxfield and B R Schneider (eds), *Business and the State in Developing Countries* (Ithaca, NY, Cornell University Press, 1997) at 224.

unrestricted foreign management of its mining industry for a longer period than many other independent states in the South, particularly in Latin America. Under this regime, US companies like the giant Cerro de Pasco Copper Corporation operated for many years 'as a sort of state-within-a-state', generating in the process substantial popular resentment in the minds of many Peruvians.[5]

Beginning roughly in the 1940s and spreading unevenly across the Global South thereafter,[6] the post-colonial era was ushered in by decolonisation in Africa and Asia and by new political movements sweeping the developing world in general. Marked by strong economic and political nationalism, this period saw an ideological convergence emerge that linked rising post-colonial elites in the South with proponents of new developmentalist policies gaining influence in both international institutions and governments in the North. In the view broadly shared by these groups, the South was underdeveloped as a result of exploitation and neglect; it remained in the thrall of backward practices and stultifying traditions, and the solutions to poverty, hunger and social injustice would be found in the capacity of the state to carry out modernising projects of social and physical engineering.[7] Intensive government intervention in the economy was necessary to bring in the required amounts of capital, technology and expertise while ensuring a focus on the overall national interest. The domestic and foreign private sectors—often characterised as short-sighted and oriented towards foreign interests—were perceived to be not up to these tasks.

In those countries with extensive mineral resources, the assertion of national control over the mining sector was viewed as a fundamental priority. Foreign domination needed to be broken in order for the sector to serve as an instrument of national industrialisation and development. Taxes were increased, restrictions were placed on the repatriation of profits, require-

[5] Becker, n 3 above, at 126.

[6] In some countries, notably Mexico and Chile, state intervention in industrial policy took place even earlier in the 1930s. R Thorp, *Progress, Poverty and Exclusion: An Economic History of Latin America in the Twentieth Century* (Washington, DC, Inter-American Development Bank, 1998) at 111–2.

[7] For two insightful views of these developments see A Escobar, *Encountering Development* (Princeton, NJ, Princeton University Press, 1995) and J C Scott, *Seeing Like a State* (New Haven, Conn, Yale University Press, 1998). The dominant thinking behind the developmentalist perspective was first informed by modernisation theory and later by dependency theory. Both of these paradigms stressed need for an active interventionist state to break with the past and promote national progress. They differed in that modernisation theory supposed that, with the right institutional structures in place, a state would naturally progress through evolutionary stages of development. In contrast, dependency theory believed that the 'natural order' that had been established by the industrialised nations was stacked against the developing world in order to keep it in a dependent position. Accordingly dependency theorists emphasised the need to change those elements of the national and international order that contributed to the subordination of developing country states. For a further discussion see B Z Tamanaha, 'The Lessons of Law and Development Studies' (1995) 89 *American Journal of International Law* 470.

ments were imposed for the 'indigenisation' of the managerial and skilled workforce, and mining approvals became dependent upon the investor showing that a proposed project would yield development benefits.[8] In addition, many foreign-owned operations were either nationalised or made subject to mandatory equity participation by the state.[9] In the international sphere, developing country states pressed for recognition of permanent sovereignty over natural resources.

In Peru, the power of the alliance between foreign investors and the oligarchy was such that developmentalist and nationalist economic policies did not surface until the late 1960s, when General Juan Velasco seized power with a left-wing military coup. Once in government, the military was determined to reverse the course taken by Peru in the past. It sought a 'structural transformation' of the country's economy and society, and proceeded to apply its measures 'with a determination previously unknown in Peru'.[10] In keeping with thinking from the emerging dependency school, the military government sought to break the power of both foreign firms and the oligarchy in order to promote national progress.[11]

In the mining sector, the Velasco regime carried out a number of reforms designed to encourage an increase in mining development and social investment together with the continued participation of foreign capital. These included capital controls, increased taxation, improvements in housing in mining camps and the government take-over of metals marketing. However, foreign firms proved unwilling to commit capital under the terms offered by the military.[12] In response, the government resorted to nationalisations of unworked deposits and later of many existing operations, including nearly all of the Peruvian holdings of the Cerro de Pasco Copper Corporation.[13] The results of these actions proved to be disappointing for the government. Most of the expropriated enterprises were either 'perennial loss-makers' or had been decapitalised by their foreign parent companies

[8] DN Smith and LT Wells, 'Mineral Agreements in Developing Countries: Structures and Substance' (1975) 69 *American Journal of International Law* 560.

[9] Otto and Cordes, n 1 above, at 1.35–47.

[10] R Thorp and G Bertram, *Peru 1890–1977: Growth and Policy in an Open Economy* (New York, Columbia University Press, 1978) at 301.

[11] Thorp and Bertram, n 11 above, at 301, LJ Seligmann, 'The Burden of Visions Amidst Reform: Peasant Relations to Law in the Peruvian Andes' (1993) 20 *American Ethnologist* 25.

[12] Thorp and Bertram, n 11 above, at 308.

[13] Becker, n 3 above, at 125–34. When the Cerro de Pasco Copper Corporation was nationalised in 1974, the government declared:

> 'All of us remember how Cerro used to buy consciences, authorities, senators, deputies, newspapermen . . . it shared in the booty that old-time Peru represented . . . Cerro was no longer just a company. It was a name, a symbol, an evil and repudiated way of life a. . . that pierced Peru's heart. Cerro . . . was a cancer' (quoted in Becker, n 3 above, at 132).

prior to expropriation. Thus in most cases, after nationalisation the state 'found itself faced with a heavy bill for urgently needed investments, combined often with large compensation payments' to the expropriated firms.[14] Substantial foreign borrowing increased the vulnerability of the regime while it sought vainly to promote growth in the export sectors. As the country's economic situation worsened, Velasco was replaced in 1975 with the more moderate General Morales Bermudez, and the more radical features of the revolution were modified or jettisoned.[15] In 1980, the country was returned to civilian rule.

The economic nationalist model widely adopted in the Global South appeared to function well for several decades. Mining-dependent countries were buoyed by sustained high mineral prices through the 1960s and 1970s which allowed rapid growth in per capita income.[16] However, the global recession of the early 1980s delivered a triple shock for these countries: metal prices collapsed, the US dollar (in which much foreign debt was denominated) appreciated significantly against Southern currencies, and interest rates skyrocketed. Thus debt servicing imposed a huge burden on many developing country states, whose access to foreign currency was sharply diminished.[17] In addition, the debt crisis brought to light other economic weaknesses in the nationalist model, often including inefficient and corrupt state enterprises.[18] While public enterprises had been intended to outperform or at least match the private sector, in practice state-owned companies were seldom able to gain the independence required to do so.[19] Instead, these companies were prone to succumb to political pressures which undermined their economic performance. A lack of effective oversight meant that many were also undermined by nepotism and corruption. In addition, during this period transnational mining enterprises largely withdrew from the economically nationalist countries of the South, thereby also withdrawing the benefit of their access to capital, technology and expertise. Instead, these enterprises concentrated their investments in the more secure regions of the Global North, including Australia, Canada and the US.[20]

Interventionist government in the Global South was dealt a formidable ideological blow due to its failure to deliver on its promises during the crises of the 1980s. However a fair assessment should also note the reluctance of much of the transnational private sector to reach new accommodations with

[14] Thorp and Bertram, n 11 above, at 310.
[15] Ibid, at 317.
[16] Otto and Cordes, n 1 above, at 1.47.
[17] Thorp, n 6 above, at 216–7.
[18] Otto and Cordes, n 1 above, at 1.47.
[19] Chile's state-owned copper producer CODELCO is a notable exception.
[20] Otto and Cordes, n 1 above, at 1.47–50.

developing country states.[21] Nevertheless similar economic and ideological crises in the Global North and South (although differing greatly in degree) set the stage for the sweeping influence of neoliberal economic policies that began in the 1980s. Empowered by these crises, new groups of policy entrepreneurs were able to challenge the Keynesian orthodoxy found in both Northern and Southern governments, think tanks, and universities, as well as in international financial institutions.[22] The neoliberal policy prescription emitted from these sources soon came to be called the 'Washington Consensus' after its use by economist John Williamson to refer to an emerging understanding on economic reform policy broadly shared by key actors in Washington, including the US Treasury Department, the International Monetary Fund (IMF), the World Bank, and the Inter-American Development Bank (IDB).[23] However, far from being an exclusively Northern invention, as Dezalay and Garth show, this agenda was developed and consolidated through exchange between like-minded reformist outsiders in the North and South who contributed to one another's influence.[24]

[21] In defence of the policies undertaken in the post-colonial period, Otto and Cordes observe that these efforts did have a 'cleansing effect' that wiped away the destructive earlier order. With regard to the failure of the post-colonial policies to ensure enduring growth they note that some measure of blame can also be attributed to 'the reluctance of [the transnational] companies to flexibly respond to a rapidly changing world'. They add that '[i]n retrospect, both governments and investors probably could have adopted more accommodating strategies to deal with the [post-colonial] transition': ibid, at 1.50.

[22] Y Dezalay and BG Garth, *The Internationalization of Palace Wars. Lawyers, Economists, and the Contest to Transform Latin American States* (Chicago, Ill, University of Chicago Press, 2002).

[23] P-P Kuczynski, 'Setting the Stage' in P-P Kuczynski and J Williamson (eds), *After the Washington Consensus* (Washington, DC, Institute for International Economics, 2003) at 24. Williamson has since regretted coining the term:

> 'This was a godsend to all those unreconstructed opponents of reform who yearned for socialism or import-substituting industrialisation or a state in which they could play a leading role. The term fed the desire to believe that reforms were designed by the United States in its own interests and imposed by Washington-based international financial institutions under its thumb . . . Anyone with a smidgen of anti-Americanism could be persuaded to foam at the mouth with indignation at the idea that Washington was seeking to impose its interests, and then they would, it was hoped, be easy to recruit to the antireform cause'

J Williamson, 'Our Agenda and the Washington Consensus' in ibid, at 325–6).

Williamson also argues that his initial agenda differed greatly from the neoliberal set of ideas associated with Milton Friedman and Friedrich von Hayek that has been typically attributed to the Washington Consensus. He argues, 'I never claimed to detect a consensus in favor of free capital movements, monetarism, minimal tax rates . . . or the minimal state that accepts no responsibility for correcting income distribution or internalizing externalities': ibid, at 326. Williamson does observe, however, that the neoliberal usage of the term 'was to some extent legitimized by the fact that at least for a period in the 1990s some of the Washington institutions—the IMF and key agencies of the US government like the Treasury Department—did indeed urge parts of this extended agenda': ibid, at 326–7.

[24] Dezalay and Garth show how the power base for the neoliberal agenda was initially created through alliances and exchanges between North and South America. Neoliberal economists from the Chicago School were involved in USAID-funded programmes that allowed them to export their ideas to universities in Chile during the 1950s. Connections maintained between

The Consensus advocated a comprehensive restructuring of the state and its role in the economy.[25] The neoliberal view essentially inverted the formula propounded during the developmentalist era: now the state was the problem and economic growth could be ensured only by an unfettered private sector. Accordingly, the state was to abandon its interventionist role and focus instead on newly identified core responsibilities: ensuring macroeconomic stability, creating an enabling environment for the private sector, encouraging foreign investment, and providing basic services including education, health care and infrastructure. More extreme versions of this vision advocated a minimalist state, with low taxation, that allowed economic and social decision-making to take place through market mechanisms.[26]

With regard to the mineral-rich countries, the new policy agenda stressed the need to return economic leadership of the domestic mining sector to transnational enterprises. Foreign direct investment was regarded as the solution to the lack of new capital and technology that plagued the domestic mining industries of the Global South. To this end, the new agenda advocated comprehensive privatisation of state companies, an end to restrictions on foreign ownership and the repatriation of profits, lowering rates of taxation and royalties, restructuring labour laws to permit greater flexibility, and the termination of performance requirements such as those mandating local sourcing or local hiring. In addition, mining legislation had to be rationalised, administrative processes simplified, technical services to the industry (such as modernisation of the mining cadastre) improved, and 'subjective' elements of bureaucratic discretion removed from the permitting and approvals processes.[27] In short, government was to cease being an owner-operator pursuing social or political goals through its operational involvement in the mining industry. It was instead to become an efficient and 'apolitical' regulator focused upon the facilitation of private investment and the technical aspects of permitting and regulation. Significantly, full adoption of the neoliberal reform package was presented explicitly as a question of regulatory competition in the race to attract investment. Efforts to promote the neoliberal reform agenda emphasised the idea that early reformers were ahead of their rivals.[28] Levels of taxation in

former students and teachers supported the Chilean disciples so that 'they were ready' when Pinochet came to power in 1973. The success of 'shock treatment' in Chile helped to build the international credibility of the emerging principles of the Washington Consensus 'and to provide the basis for structural adjustment after the debt crisis and the Reagan election in the 1980s': Dezalay and Garth, n 23 above, at 44–6.

[25] Thorp, n 6 above, at 226–31.

[26] See Williamson, n 24 above, at 323–7.

[27] World Bank, *A Mining Strategy for Latin America and the Caribbean*, World Bank Technical Paper No 345, (Washington, DC, World Bank, 1996).

[28] World Bank, *Characteristics of Successful Mining Legal and Investment Regimes in Latin America and the Caribbean Region* (Washington, DC, World Bank, 1995), available at www.worldbank.org/html/fpd/mining/m3_files/ienim/remyla2.htm.

particular were presented as subject to regulatory competition in this regard.[29]

Thus, in the late 1980s and early 1990s, countries struggling under significant debt burdens were steered towards the neoliberal reform agenda through a combination of internal and external pressures. External forces such as the IMF and the World Bank applied a range of facilitative and coercive measures, while would-be reformers within developing country states often gained influence and prestige from their alignment with the new orthodoxy being propounded from the North.[30] Since the late 1980s, nearly every mineral economy has significantly changed its mineral investment laws and policies in line with the new paradigm.[31] In the 1990s, these legal changes contributed to a global boom in mineral investment in which transnational enterprises have greatly expanded their worldwide operations.

In Peru, the shift to the neoliberal model occurred in the context of a particularly acute state crisis. After the return to civilian rule, successive regimes in the 1980s presided over a further deterioration in the national economy, sparking the growth of hyperinflation and unmanageable debt. Also during this period, the Maoist Shining Path insurgency spread from a minor provincial conflict into a bloody and brutally fought war that embroiled nearly the whole country.[32] By 1990, Peru was on the edge of collapse. The annual rate of inflation was 7,650 per cent. [33] Refugees from the conflict in the Andes were flooding into the shanty towns of Lima. The Shining Path campaign of terror, 'armed strikes' and sabotage threatened to plunge the country into further chaos.[34]

Near the height of the crisis in 1990, Alberto Fujimori, a political outsider without either a party apparatus or ties to established constituencies, was elected President of the Republic. Fujimori had run on a moderate platform; however, once in office he was reportedly in search of a policy programme.[35] A meeting in New York with the presidents of the IMF, the World Bank and the IDB, arranged by the Peruvian UN secretary-general Perez de Cuellar, convinced Fujimori of the need for a neoliberal solution to Peru's economic problems.[36] Given that the crises in Peru had essentially wiped out the

[29] World Bank, n 28 above.

[30] The World Bank, eg, provided loans and technical assistance to countries pursuing neoliberal reforms: World Bank, n 29 above, World Bank, n 28 above. Both the World Bank and the IMF tied other forms of assistance to a country's performance in meeting stipulated reform targets: H Mainhardt-Gibbs, *The Role of Structural Reform Programs Towards Sustainable Development Outcomes* (Washington, DC, Extractive Industries Review, 2003).

[31] Otto and Cordes, n 1 above, at 1.50.

[32] The full name of the movement is the Communist Party of Peru on the Shining Path of José Carlos Mariategui (Partido Comunista del Perú por el Sendero Luminoso de José Carlos Mariategui).

[33] E Gonzales de Olarte, *El Neoliberalismo a la Peruana* (Lima, IEP, 1998) at 9–14.

[34] Comisión ìde la Verdad y Reconciliacioìn, *Informe Final* (Lima, CVR, 2003).

[35] S Bowen, *The Fujimori File* (Lima, Peru Monitor 2000).

[36] Bowen, n 36 above, de Olarte, n 34 above, at 22.

credibility of all existing political parties and social movements, Fujimori was able to implement a drastic structural adjustment programme—dubbed *Fujishock*—virtually without opposition.[37] Fujimori also forged a close alliance with the military that allowed him to consolidate power with a 'self-coup' in 1992. This paved the way for Fujimori to gain approval of a new constitution in 1993 and obtain a loyal majority in the new congress.[38] Fujimori's political capital was vastly increased by the taming of hyperinflation in the early 1990s and by the capture of the Shining Path leader, Abimael Guzman, in 1992.

With regard to the mining sector, the structural adjustment programme implemented in Peru followed the neoliberal pattern described above. It sought to return the sector to large-scale private foreign investment while transforming the state role to that of an efficient regulator focused upon narrowly defined technical issues.[39] The dual task of creating an investor-friendly environment and transforming the state apparatus involved substantial reforms to the formal state regulation of the mining sector. These included the elimination of restrictions on remittances of profits, royalties and capital, the streamlining of licensing procedures, the elimination of performance requirements for foreign investments, the enactment of new labour legislation that sharply reduced the influence of unions, changes to indigenous land tenure, the lowering of taxes and the elimination of mining royalties, and the comprehensive privatisation of state enterprises and concessions.[40] In addition, new large-scale mining projects were offered stabilisation agreements guaranteeing the application of current statutes on taxes, labour issues, environmental regulations and other matters for a period of 10 to 15 years.[41] The restructuring programme was sponsored by loans and technical assistance provided by the IMF and World Bank. These two agencies reinforced each other's influence by linking continued funding to progress indicators found in each other's programs.[42]

The prevailing deregulatory tide during the period of structural reform was reversed in one significant area. While the early 1990s saw a substantial general decrease in formal state responsibilities with regard to the mining

[37] M Tanaka, 'Del movimiento a la media-política: cambios en las relaciones entre la sociedad y la política en el Perú de Fujimori' in J Crabtree and J Thomas (eds), *El Perú de Fujimori: 1990–1998* (Lima, Universidad del Pacifico, 1999).

[38] de Olarte, n 34 above, at 23–4.

[39] J Aste Daffós, *Transnacionalización de la minería peruana* (Lima, Friedrich Ebert Siftung, 1997) at 43–4.

[40] Aste, n 40 above, at 48–53, Mainhardt-Gibbs, n 31 above.

[41] Ibid.

[42] In addition, the IMF not only 'repeatedly attached the sale of state mining assets as structural benchmarks for continued lending' but 'IMF letters of intent from the [government of Peru] specified further expectations to keep pushing forward on privatizing the mining sector, including the sale of all remaining public mining enterprises and the awarding of concessions for exploration in at least eleven mining fields of [the state companies] Centromin and Mineroperu': ibid.

sector, in the area of environmental regulation the state's role was expanded. The World Bank programme for sectoral reform stressed the importance of environmental management in the Americas and signalled that environmental matters fell into the sphere of technical responsibilities of government.[43] Pursuant to the pressures, incentives and technical assistance programmes provided by international financial institutions, the government of Peru was encouraged to enact new legal instruments for environmental management of mining activities.[44]

THE RISE OF LOCAL CLAIMS FOR THE SOCIAL MEDIATION OF MINING INVESTMENT

We turn now to the second series of developments that has led to the predicament faced by many states in the Global South with regard to mining and community issues: the rise of strong local claims for the social mediation of extractive industry development.

Ideological Shifts, Transnational Linkages

In many respects, the post-colonial period has been marked by a steady erosion of faith in the power of the state to promote equitable development. This has taken place not only as a result of the state's developmentalist failures but also due to experience in many parts of the world with corruption, ethnicised rule, the oppression of minorities and indigenous peoples, and unequal development.[45] These factors have helped to alienate certain domestic populations (especially minorities and marginalised groups) from the nation-building projects of their respective countries. In turn this alienation appears to have contributed to a global increase in local and indigenous identifications.

A similar disenchantment in the Global North with top-down development efforts has lead to a new sympathy for local and community-based initiatives as well as towards indigenous claims. Whereas once the state was seen as a pre-eminent modernising force, today there is an increased tendency

[43] World Bank, n 28 above.

[44] M Pulgar-Vidal and A Aurazo (eds), *Mejorando la Participación Ciudadana en el Proceso de Evaluación de Impacto Ambiental en Minería* (Ottawa, IDRC, 2003) at 13, ibid.

[45] For various different perspectives, see A Chua, 'Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development' (1998) 108 *Yale Law Journal* 1, PL Martin, *The Globalization of Contentious Politics: The Amazonian Indigenous Rights Movement* (New York, Routledge, 2003), B Nietschmann, 'The Third World War' (1987) 11 *Cultural Survival Quarterly* 1, and D Yashar, *Contesting Citizenship in Latin America: The Rise of Indigenous Movements and the Postliberal Challenge* (Cambridge, Cambridge University Press, 2005).

to view 'the local' as the site of authentic and effective representation, identity and governance. These ideas are prevalent among many actors in the North involved in various forms of North–South co-operation or solidarity: particularly the areas of international development, conservation and human rights. As McCay observes:

> The special place of 'community' in resource management and rural development is the outcome of a loosely woven transnational movement unified by goals such as social justice, environmental health, and sustainability. It has a complex and multi-stranded history. Its sources include frustrations of conservationists forced to recognize the need to involve local people in order to protect biodiversity and valued habitats, attempts to empower local groups against state and transnational forces, indigenous rights claims, and more.[46]

Perhaps most significant of all has been the emergence of the international indigenous movement and its support of local claims for self-determination in the face of government attempts to appropriate land and resources.[47] This movement has exported a powerful globalising discourse and strategic rhetorical resources that have been taken up and adapted in local struggles.[48]

These developments in both the Global South and North are to a certain extent mutually reinforcing. A politics of identity tied to 'the local' can be an effective way of mobilising allies both domestically and transnationally in support of new political claims. Large-scale foreign mining investment can further provoke this dynamic in a number of ways. Mining projects compete with local populations for access to scarce resources, in particular land and water. Further, they cause negative social and environmental impacts that are experienced locally, whereas the benefits created by mining activity are exported elsewhere.

The Evolution of Mining and Community Conflicts in Peru

The Andes have always been difficult to control, and their history has been marked by periodic land invasions, regional rebellions, protests, road blockages and armed conflict. Local identifications in the Andes have

[46] BJ McCay, 'Community and the Commons. Romantic and Other Views' in A Agrawal and CC Gibson (eds), *Communities and the Environment. Ethnicity, Gender, and the State in Community-Based Conservation* (New Brunswick, NJ, Rutgers University Press, 2001) at 183–4.

[47] See A Muehlebach, 'What Self in Self-Determination? Notes from the Frontiers of Transnational Indigenous Activism' (2003) 10 *Identities: Global Studies in Culture and Power* 241 and R Niezen, The Origins of Indigenism (Berkeley, Cal, University of California Press, 2003).

[48] TM Li, 'Articulating Indigenous Identity in Indonesia: Resource Politics and the Tribal Slot' (2000) 42 *Comparative Studies in Society and History* 149.

presented a persistent threat to state-building efforts. Since these identifications provide a potential basis for broad political organisation and mobilisation—particularly given the divides connecting race, class and geography that have so marked Peru—the history of Peru has seen repeated attempts to channel and subsume them into a greater imperial or national project.

During the Spanish colonial period, the integration of Andean groups into the imperial project was accomplished by recognising special communal rights to land and limited autonomy in indigenous communities under traditional leadership.[49] The Republic, however, regarded the rural Andes with profound ambivalence due to the conflict between its liberal ideology and its commitment to ethnic rule by Spanish-descended Creoles on the country's coast. For much of its history, the Republic has been hostile to the idea of extending either colonially derived indigenous rights or liberal citizenship rights to the bulk of its population.[50] As a result, over the greater part of the republican period, the rural Andes remained under a quasi-feudal informal legal order managed by local landlords and merchants, in which Andean peasants were tied to the land in conditions of racialised serfdom.[51] This order, maintained with the support of the government in Lima, opposed the expression of either indigenous or citizenship rights. Andean communities that continued to exercise de facto communal tenure faced significant enclosure pressures from local landlords and little support in local courts.[52] On a national level, Quechua and Aymara-speaking Andean peasants were excluded from participation in elections by successive constitutions that limited suffrage to persons who were literate in Spanish and not employed as servants.[53] The Andean landowning and merchant classes were supported by the Creole-controlled state in Lima—with repressive measures when

[49] The Spanish Crown also imposed special burdens on indigenous subjects during the colonial order. For a description of the arduous nature of the responsibilities imposed Indian households under the colonial regime see E Mayer, *The Articulated Peasant: Household Economics in the Andes* (Boulder, Colo, Westview Press, 2002), 75–102.

[50] See, eg, M Thurner, 'Historicizing "the Postcolonial" from Nineteenth Century Peru' (1996) 9 *Journal of Historical Sociology* 1 and M Thurner, '"Republicanos" and "la Comunidad de Peruanos": Unimagined Political Communities in Postcolonial Andean Peru' (1995) 27 *Journal of Latin American Studies* 291.

[51] P Gose, 'Embodied Violence: Racial Identity and the Semiotics of Property in Huaquirca, Antabamba (Apurímac)' in D Poole (ed), *Unruly Order: Violence, Power, and Cultural Identity in the High Provinces of Southern Peru* (Boulder, Colo, Westview Press, 1994).

[52] Drzewieniecki notes that Andean people nevertheless did at times use the courts in their battles over land and, although the odds were stacked against them, they could also score important victories in these arenas in certain circumstances. J Drzewieniecki, 'Indigenous People, Law, and Politics in Peru', paper presented to Latin American Studies Association,1995.

[53] D Urquieta, *De Campesino a Ciudadano* (Cusco, Centro de Estudios Regionales Andinos 'Bartolomé de las Casas', 1993).

necessary—in exchange for their ability to maintain control over and guarantee the loyalty of these restive regions.[54]

This order disintegrated slowly over the twentieth century until it was dealt a series of final blows in the 1970s that dramatically expanded both the local communal rights of Andean peasants and their rights of national citizenship. First, the Agrarian Reform programme implemented by the military government from 1969 to 1975 broke the power of the Andean landlord classes and contributed to the massive registration of Andean communities exercising communal tenure and community self-governance.[55] Secondly, with the return to civilian rule, the new Constitution of 1979 extended the right to vote for the first time to all those of at least 18 years of age, without regard to literacy or social station. The reforms of the 1970s not only expanded the power of local forms of organisation; they also sought to contain it and place it in the context of the national project. The military regime did away with the official, and highly derogatory, terms *indio* and *indigena*, and instead addressed Andean peoples as 'peasants' (*campesinos*), inviting them to form legally recognised *peasant* (rather than indigenous) communities and to join Peruvian society.

These efforts were broadly successful in integrating much of Peru's population into the national project.[56] New freedoms, together with large-scale migration to the metropolitan coast, contributed to unprecedented participation in nationally oriented mass-based political movements in Peru. During the 1970s and 1980s both national peasant federations and labour unions were very active on the political stage. Since the 1980s, however, organised and active mass participation in politics has declined drastically. Together with nearly all established participants in the political system, the peasant and labour movements lost their credibility as a result of the political, economic and security crises of the late 1980s and early 1990s.[57] Furthermore, the revelation of systematic corruption and human rights abuses by the Fujimori regime, culminating in Fujimori's flight into exile in

[54] F E Mallon, 'Indian Communities, Political Cultures, and the State in Latin America 1780–1990' (1992) 24 *Journal of Latin Studies* 35 at 45.

[55] See E Mayer, 'De la Hacienda a la Comunidad: El Impacto de la Reforma Agraria en la Provincia de Paucartambo, Cusco' in R Matos Mendieta (ed), *Sociedad Andina: Pasado y Presente* (Lima, Fomciencias, 1988), LJ Seligmann, 'The Burden of Visions Amidst Reform: Peasant Relations to Law in the Peruvian Andes' (1993) 20 *American Ethnologist* 25. Indigenous rights to communal land were first recognised by the Republic in 1920. Nevertheless the continuing power of dominant order ruling the Andean countryside prevented many peasants from registering communities until the Agrarian Reform of the 1970s.

[56] Urquieta, n 54 above.

[57] Fujimori's legal reforms also decimated the union movement. Furthermore, throughout the 1990s, the Fujimori regime vigorously opposed efforts to mobilise against government policies, making liberal use of both accusations of terrorism and the security services: see Bowen, n 36 above. Instead, mobilisations have occurred chiefly *ad hoc* in response to local or issue-specific matters: see A Diez, 'Diversidades, alternativas y ambigüedades: instituciones, comportamientos y mentalidades en la sociedad rural' in V Ágreda, A Diez, and M Glave (eds), *Perú: el problema agrario en debate* (Lima, SEPIA, 1999).

2000, compounded political cynicism in the country and a profound distrust in its leaders.

Although security was restored with the defeat of the Shining Path, the 1990s inaugurated what appears to be a prolonged period of social instability and disillusionment in Peru. The economic promise of Peru's neoliberal reform efforts failed to materialise.[58] The traditional agricultural sector of the economy, ignored or penalised through repeated efforts to favour the much smaller modern sector, has fallen further and further behind in an already deeply divided country.[59] Thus the collapse of national developmentalist dreams in the countryside, coupled with the massive increase in prospecting by foreign firms during the mining boom of the 1990s, set the stage for new levels of local militancy in defence of local interests.[60]

Conflicts involving mining projects have been taking place in various parts of the Andes throughout recorded history. Particularly when mining has been conducted on a large-scale, it has often competed with local agricultural and pastoral activities for scarce land, water and labour resources. However, for hundreds of years, struggles over labour have tended to overshadow these other conflicts. Historically, mining operations have provided an important economic and social resource to many Andean peasants, especially in the form of seasonal migratory work.[61] In the central Andes, the proletarian-

[58] The neoliberal structural adjustment reforms of the early 1990s were successful in stabilising Peru's economy and in producing an initial burst of growth. By 1997, however, Peru's economic performance deteriorated as a result of external shocks—especially the collapse of world metal prices (Mainhardt-Gibbs, n 31 above). The structural reforms had significantly increased Peru's vulnerability to external terms of trade shocks of this kind. This is a criticism currently being applied to explain the widespread failure of the policies of the Washington Consensus to produce sustained economic growth in Latin America over the 1990s. In a book addressing this issue, key advocates of the Washington Consensus argue that one major failing was that liberalising reforms left Latin American countries too prone to externally generated crises: P-P Kuczynski and J Williamson (eds), *After the Washington Consensus* (Washington, DC, Institute for International Economics, 2003.

[59] M Cameron and L North, 'Development Paths at a Crossroads. Peru in Light of the East Asian Experience' (1998) 25 *Latin American Perspectives* 50 at 55–9.

[60] Whereas in 1992, the area in Peru subject to exploration and exploitation activities was 4 million hectares, by 2000 this figure had risen to 22 million hectares. According to one estimate in 2000, mineral exploitation was taking place within the territory of 250 peasant communities. CONACAMI, *El Rostro de la Minería en las Comunidades del Perú* (Lima, CONACAMI, 2000) at 76.

[61] J Deustua, 'Mining Markets, Peasants, and Power in Nineteenth-Century Peru' (1994) 29 Latin American Research Review 29 and FE Mallon, *The Defense of Community in Peru's Central Highlands: Peasant Struggle and Capitalist Transition, 1860–1940* (Princeton, NJ, Princeton University Press, 1983) at 247–50. Mallon describes the transition that occurred in the operations of the Cerro de Pasco Copper Corporation in the central Andes during the first decades of the twentieth century:

> 'From the point of view of the company, therefore, it was not necessary to invest in safety precautions, medical care, schools, or any other benefit if the labor force was transitory and unskilled. It was more profitable to farm out the mine work to *contratistas* or pay an *enganchador* [who would enlist workers through forms of debt peonage] to provide a constant supply of cheap labor. But the company soon found that violent confrontations

isation of many Andean peasants in the twentieth century brought about by large-scale capitalist enterprises lead to a vigorous union movement by the 1980s.

The new mining operations being developed since the boom of the 1990s essentially do not require local labour. This has contributed significantly to the militancy of contemporary mining and community conflicts. On one level, communities are denied an important source of the benefits and opportunities that are expected to arise from mining activity. On another, the absence of work has highlighted other sources of conflict that have often been overshadowed in mining development: conflicts over access to resources, the marginalisation of local people, socio-economic impacts and environmental degradation.[62]

In response to this situation, Andean communities have made increasingly strong demands for a more favourable form of social mediation of mining development to alleviate local costs while providing access to local benefits. These demands, which in some cases have included calls for the termination of mining activity, have been made both to individual enterprises and to the state. By the end of the 1990s, national NGOs and transnational allies such as Oxfam had facilitated the formation of a national co-ordinating organisation of mining-affected communities: CONACAMI (*Coordinadora Nacional de Comunidades del Perú Afectadas por la Minería*).[63] CONACAMI was founded in 1999, with a national congress in Lima attended by over 300 community delegates from all over Peru. This has been a highly significant development. Since its inception, CONACAMI has served to raise the profile of individual struggles and to press for change at the national level, particularly in the areas of community rights to land, decentralisation, public participation in environmental decision-making, and the local distribution of tax revenues from mining.[64] CONACAMI has adopted the language of indigenous rights in its transnational advocacy efforts, and it has also commenced a claim for recognition of indigenous Andean land rights against the government of Peru at the Inter-American Court of Human Rights.[65]

> between recalcitrant peasants on one side, and *contratistas* and *enganchadores* on the other, made these methods more expensive and problematic than they seemed at first glance . . . [These and other developments] forced a transformation of the mining industry in the 1920s. With the construction of the Oroya smelter, the corporation generated the need for a permanent and more highly skilled labor force. At the same time, the combination of smoke damage and internal differentiation cut off alternatives for peasants in their villages. Thus the conditions, motivation, and permanence of labor migrations changed dramatically': ibid, at 253–4.

[62] M MacFarlane, 'Mining and Social Impacts and their Assessment', MERN Working Paper No 134 (Bath, MERN, 1998).

[63] See the CONACAMI website at: www.conacami.org/.

[64] CONACAMI, n 61 above, at 25–61 and 76–77.

[65] 'Comunidades afectadas por la minería denuncian al estado ante la CIDH' (2003) 20 *SERVINDI—Servicio de Información Indígena* 5 at 5.

THE PREDICAMENT OF THE STATE

For many mineral-rich countries, the strains placed on government from repeated economic crises and from neoliberal fiscal priorities have vastly increased the importance placed upon transnational mining investment in relation to other sectors of the economy. This is notwithstanding the fact that the contribution of the mining sector may not, by some measure, be extraordinary. In Peru, for example, the employment provided by the mining sector is relatively small and its contribution to GDP is similar to that of other sectors.[66] However, mining is a major source of both tax revenue and foreign exchange: scarce commodities that are badly needed by states in the Global South. Some 34 countries worldwide (mainly in the Global South) rely on the mining sector for at least 25 per cent of their total merchandise exports.[67] In Peru, mining accounts for roughly 45 per cent of the country's exports,[68] and over 7 per cent of its tax revenue.[69] Particularly when a state is in the grip of a macroeconomic straightjacket and is struggling to pay its foreign debt, the access to foreign exchange provided by the mining sector is vital. Quite simply, mining often enables debt-heavy and cash-poor states to continue functioning as states.[70]

In contrast, small-scale, low-tech agricultural production—the activity supporting much of the rural population in the Andes—cannot compete for the state's attention on these terms. Traditional agriculture may provide work and subsistence for many; however, its fiscal contribution to the government is minimal. Nevertheless, as we have seen, this sector of society can cause political problems for the state by appealing to domestic nationalist sympathies, by mobilising transnational allies, and by organising protests and other forms of direct action against mining investment.

Thus the predicament faced by the governments of developing countries like Peru can be stated as follows. With the expanding activity of transnational mining enterprises, these states have become subject to strong new social claims from local communities demanding new forms of social

[66] Between 1992 and 2002 mineral extraction in Peru varied between 4 and 5.7% of GDP. In comparison, the agiculture and silviculture sector provided between 7 and 7.7% of GDP over the same period: Instituto Nacional de Estadística e Informática, Government of Peru National Statistics Institute website at www.inei.gob.pe/.

[67] MMSD, *Breaking New Ground: Mining, Minerals and Sustainable Development* (London, Earthscan, 2002) at 45.

[68] Ibid, at 46.

[69] Tax revenue (including income, production, and consumption taxes) collected from the mining sector between August 2003 and August 2004 amounted to 1,168.8 million soles or 7.26% of total domestic tax revenue in Peru. SUNAT, 'Ingresos recaudados por la SUNAT – Tributos Internos por Actividad Economica: 2003–2004' (2004) 13 *Nota Tributaria* 49.

[70] In Latin America, eg, mining is a vital source of foreign exchange for governments. Bolivia gets 3.6% of its GDP and 32% of the value of its national exports from mining. In Brazil, mining activities (including oil and gas extraction) account for 8.5% of the GDP and 32% of national exports. Chile obtains 10.3% of its GDP and 44% of the value of its national exports from mining: MMSD, n 68 above, at 46.

mediation of the costs and benefits of mining development. These new demands cannot be easily ignored. The new militancy of local communities often takes place in remote regions where the state may be relatively weak. Communities may also be able to mobilise both nationalist sentiment and transnational support for their claims against a foreign enterprise. However, several factors prevent such states from acceding to these demands.

First, as a result of their historical trajectory across the twentieth century, these states lack the resources, the regulatory capacity, and often the will to socialise the costs of mediation and provide local communities with the type of assistance and support required to remedy the local impacts of mineral development. Secondly, the reigning neoliberal order governing international investment in the Global South prevents these states from taking regulatory action in favour of a community and then explicitly passing on the cost to the foreign mining enterprise responsible for the project. The state's adherence to this order is policed by both formal and informal means. On the formal side, stabilisation clauses in the investment agreements made between states in the Global South and the foreign owners of large-scale mining projects foreclose the possibility of imposing greater regulatory obligations than those agreed.[71] Bilateral investment treaties also prohibit such action with regard to investors from the signatory countries. On the informal side, the reformed state's reputation as a 'market-friendly environment', and thus its capacity to attract further investment in the future, depends upon its continued adherence to neoliberal policies. Any action interpreted as overly aggressive or interventionist could discourage future foreign investment.

Thus states are faced with a dilemma. Ignoring or suppressing local claims can entail significant political costs. Yet, cash-strapped and in general retreat under the fiscal and ideological pressures of structural adjustment, governments in the Global South are highly reluctant to take a visible, assertive role in mediating relations between companies and local communities. The neoliberal framework established in many of these countries provides little room for manœuvre. Due to their legal commitments and their position in the international economic order, these states are largely prevented from instructing foreign enterprises to take on the costs of social mediation. And once directly involved in the fray, state agencies are prone to become the target of social claims from local communities, perhaps even with the quiet backing of foreign enterprises. Furthermore, by taking a seat at the table, the state risks lending legitimacy to claims for autonomy or local rights being articulated by local or indigenous actors. And, lastly, the weakness of the state faced with local claims on the one hand and the economic power of foreign enterprises on the other raises the issue of state sovereignty. State ideology

[71] TW Waelde and G Ndi, 'Stabilizing International Investment Commitments: International Law Versus Contract Interpretation' (1996) 31 *Texas International Law Journal* 215.

and legitimacy require that, whatever steps are taken to deal with this predicament, the supremacy of state legal authority must be asserted.

What, then, is a state to do when faced with this predicament? The final part of this chapter will examine the political and economic coping strategies adopted by the Peruvian government in its formal legal regulation.

PERU'S RESPONSE TO THE PREDICAMENT: A STRATEGY OF SELECTIVE ABSENCE

How did the government of Peru respond to the predicament it faced as a result of its liberalisation of mining investment? In the following discussion, I propose to show how the state developed a particular kind of legal coping strategy for dealing with competing internal and external pressures. While state legal regimes appeared to mediate between investor and community interests, in practice the state absented itself from substantial parts of the process. Furthermore, the legal framework established by the state effectively delegated informal responsibility to mining firms to bear the cost of responding to local claims for social mediation.

The discussion will focus on two state legal regimes involving the mediation of corporate and community claims: first, the law relating to the tenure of land required for mine development and, secondly, the law relating to environmental assessment.

The Sale of Land Required for Mine Development

Throughout Latin America and in many parts of the world, rights to mineral resources are severed from land ownership in state legal regimes. Mineral rights belong to the state, while conventional owners have rights only to the land's surface.[72] Mineral tenure is therefore acquired from the state in accordance with specific legislation, typically a Mining Code.[73] Surface rights, on the other hand, must be acquired from their owner. However, this is often not allowed to take place through free contractual negotiation. Liberal states with extensive mineral resources will typically not allow a land owner to hold out for the best offer that a mining enterprise is prepared to pay. Property that is required for a 'public purpose' may be expropriated in order to prevent the owner from either blocking a desired project or bargaining for a disproportionate share of the project's expected returns.[74] In such cases, a forced sale will take place at fair market value, and the property will be transferred to the

[72] In Peru, the relevant provisions are found in Art 66 Constitution of Peru; Art 9, *Ley General de Minería* DS No 014-92-EM.

[73] See ibid.

[74] CM Rose, *Property and Persuasion* (Boulder, Colo, Westview Press, 1994) at 750.

project proponent. In many jurisdictions, the notion of public purpose has been expanded to include forms of private sector economic development that are deemed to confer a benefit on the public.[75]

This general framework was adopted in Peru with the enactment of its land law in 1995. Where agreement with regard to the sale of surface rights to land required for mine development is not forthcoming, the concessionaire is entitled to apply to the state for a servitude which, if granted, will essentially expropriate the owner's interest in the land. The servitude provides the mining enterprise with the right to unrestricted use of the land in exchange for compensation paid to the owner as set by the Ministry of Agriculture.[76] Thus, through the servitude mechanism the concessionaire will be able to acquire the rights necessary to develop mining operations upon the owner's land without an actual transfer of title.

In a second dramatic move, Fujimori's reforms removed the longstanding prohibition on the sale of collective *campesino* community lands. Beginning in 1920, Peru's constitutions have provided that land owned in common by *campesino* communities could neither be sold, mortgaged nor lost through adverse possession. The ban was reversed by Fujimori's constitutional changes in 1993. Subsequent legislation provided that common lands owned by Andean peasant communities could be sold if authorised by a vote of two thirds of registered community members.[77] However, right to apply for a mining servitude was also extended to concessionaires seeking access to communal land owned by peasant communities.

However, in practice, the situation is more complex than it appears on paper. Throughout the 1990s, Peru's Ministry of Energy and Mines showed considerable reluctance to involve itself directly in mining and community conflicts by granting mining servitudes. In fact, no mining servitudes were granted over this period.[78] While the servitude law has remained on the books, the ability of a concessionaire to rely on it in practice has remained ambiguous.

[75] JM Klemetsrud, 'The Use of Eminent Domain for Economic Development' (1999) 75 *North Dakota Law Review* 783.

[76] Art 7, *Ley de Tierras* No 26505 as modified by law No 26570; Reg of Art 7 of Law No 26505, DS No 017-96-AG. In May of 2003, two significant amendments were passed to the regulations governing the servitude process: DS No 014-2003-AG. These amendments have increased the level of compensation owed to land owners in exchange for the grant of a servitude. They have also established a conciliation process that must take place before a request for a servitude can be made.

[77] Art 11, *Ley de Tierras* No 26505.

[78] The only mining servitude to be granted under the existing law took place in Mar of 2002, during the presidency of Alejandro Toledo. The *campesino* community of Collanac, located in the department of Lima, lost 402 hectares of its communal land to the mining company Inversiones Portland SA as a result of the servitude: see CONACAMI, 'Plataforma Regional', available at www.conacami.org/plataformaregional.

Implications from the State Perspective

Together, the privatisation of indigenous communal lands and the mining servitude law serve several purposes. First and foremost, they facilitate mineral development by opening up land for acquisition and by promising potential investors the means to acquire secure tenure with reduced transaction costs. Transaction costs are generally reduced by limiting the number of bargainers and by limiting their bargaining power. Peru's state land law achieves both objectives. Under this law, only formally recognised owners are provided with bargaining rights. Those with informal use-rights are invisible to the land tenure regime, are not provided with state recognition of their rights and are not formally included as bargainers. The servitude law undercuts the bargaining power of land owners by providing the possibility of expropriation for a low purchase price. Thus the security of tenure of these actors is sacrificed in order to provide for expedited and inexpensive mining development. Secondly, by limiting rights to property required for mining development, the state has reinforced the primacy of its sovereign authority over the sector. This measure ensures that, in formal terms at least, only the state is in a position to veto a project and that no other entity has a claim on mineral rents prior to the state.

However, the reluctance of the government to award mining servitudes throughout the 1990s reveals that more is going on here. If the state's only goals over this period were to maintain sovereignty and accelerate mining development, this could have been achieved by simply granting large numbers of servitudes at low levels of compensation. Instead, the government has chosen to play a passive role, designed to avoid the intense confrontations that land expropriations would provoke in various parts of the country. In lieu of taking on an active role, the government's strategy has involved essentially delegating regulatory responsibility and discretion to mining enterprises. By putting the mining servitude on the books, the state has provided mining companies with an important symbolic resource that gives them an upper hand in what is already an asymmetric negotiation in terms of knowledge, resources, legal representation, economic power, etc. However by generally refusing to grant servitude applications, the state has also encouraged these firms voluntarily to appease community interests in order to obtain contracts of sale (the low level of compensation provided by the servitude law would help to make the informal deals provided by the company appear more attractive to local actors). In this way, mining enterprises have been prompted to bear the cost of any further inducements or actions necessary to secure agreement, without this being precisely mandated by the state. The state then preserves its goal of avoiding direct involvement as much as possible, and thereby limits the risks to its legitimacy among the national public. At the same time, the state is able to present an investor-friendly legal regime to the watchful audience of foreign trading, investment and financial interests.

Environmental Assessment

Environmental regulation provides a different regulatory take upon the construction of mining and community relations from property and contract regimes. While the private law regimes of property and contract aim to facilitate market relations, environmental regulation is designed to curb negative impacts or 'externalities' that are not effectively regulated by markets. Economists argue that the market economy is not able to regulate environmental performance where there are no mechanisms to ensure that the costs of environmental impacts are assigned to the activities responsible for them. Where such costs are not internalised, third parties are involuntarily made to bear the burden of environmental impacts, while those responsible for the damage are able to profit by escaping the cost burden. Government intervention is therefore required to correct these market failures, whether by mandating environmental standards, implementing market-based regulatory instruments or through other strategies.[79] Thus, unlike the facilitative regimes of property and contract, environmental regulation tends to involve administrative processes—such as permitting and regulatory approvals—that require a certain degree of visible government involvement.

The principal state legal instrument used in Peru for the environmental management of mining development is Environmental Impact Assessment (EIA).[80] The basic EIA framework was first established in the United States in 1970, and has since spread to most countries in the world.[81] Its prevalence in Latin America dates from the early 1990s when international financial institutions pressed for adoption of the EIA regulatory model.[82] In Peru, EIA was first adopted in 1990 in the *Código del Medio Ambiente y los Recursos*

[79] Orts provides an introduction to the major strategies of government intervention in environmental protection including command-and-control regulation, market-based efforts, and reflexive regulation. EW Orts, 'Reflexive Environmental Law' (1995) 89 *Northwestern University Law Review* 1227.

[80] New mining development is regulated by the EIA regime, while existing operations fall under the PAMA (*Programa de Adecuacion de Manejo Ambiental*) regime involving the submission of periodic environmental management plans: Art 9–19, DS No 016-93-EM. Other formal environmental management tools used by the government of Peru to regulate mining include regulatory standards and permitting processes: see Environmental Law Institute, *Pollution Prevention and Mining: A Proposed Framework for the Americas* (Washington, DC, ELI, 2000).

[81] The US National Environmental Policy Act 1969 came into force on 1 Jan 1970 and has provided the model for EIA legislation around the world. According to Barrow, '[b]y the early 1990s, over 40 countries had established environmental impact assessment programmes and by 1995, probably about half the world's nations required environmental impact assessment in some form': CJ Barrow, *Environmental and Social Impact Assessment* (London, Arnold, 1997) at 170. EIA has also been adopted by international development co-operation agencies such as USAID and multilateral organisations such as the World Bank. Canada's federal EIA legislation, precursor to the current *Canadian Environmental Assessment Act,* was first enacted in 1973: J Benidickson, *Environmental Law* (Toronto, Irwin Law, 2002) at 214.

[82] Pulgar-Vidal and Aurazo, n 45 above, at 13.

Naturales (hereinafter, Environmental Code).[83] EIA involves systematic analysis and planning, conducted in advance of project development, which is intended to predict negative impacts arising from development and either avoid or mitigate them. Peru's legislation follows the basic globalised framework for EIA. The developer of a project subject to the legislation[84] is required to commission and pay for a comprehensive written technical evaluation, called an Environmental Impact Study (EIS), which sets down the project's likely impacts along with proposed measures for impact avoidance and mitigation.[85] The EIS must then be submitted to the appropriate government agency for review. Approval of a project's EIS is required before the project will be allowed to proceed. Subsequent to approval, the government is responsible for ensuring that the project continues to comply with its EIS.

Accordingly, EIA legislation creates a major arena in which the social mediation of mining development could take place. In contrast to the property regime reviewed above, EIA establishes a public arena in which government is more prominently involved in an administrative capacity. The importance of this arena to the possibility of social mediation is increased by the presence of two additional features found in more progressive EIA regimes: first, a requirement that 'social' impacts are considered alongside environmental ones and, secondly the presence of mechanisms for ensuring public participation in the EIA decision-making process. While both of these features are to some extent present in Peru's EIA regime, the following discussion will illustrate how in Peru their potential contribution is undermined in practice, and how the limited regulatory capacity of the Peruvian government in the environmental field belies the promise that appears to be extended by EIA.

The Evaluation of Social Impacts

The evaluation of social impacts in EIA has arisen from the expansion of the definition of the environment to include a 'social component'.[86] While by no means universal, this perspective has been reinforced by the widely accepted

[83] *Código del Medio Ambiente y los Recursos Naturales* DL No 613.

[84] In Peru an EIS is required when a mining enterprise seeks to develop a new project or expand mineral production or facilities of an existing operation by 50%: DS No 050-92-EM; DS No 016-93-EM, modified by DS No 059-93-EM; DS No 029-99-EM; and DS No 058-99-EM. In 1998, mining exploration activities were also made subject to environmental assessment in a manner similar to the EIA process: DS No 038-98-PCM.

[85] Art 9, *Código del Medio Ambiente y los Recursos Naturales*, DL No 613 and Ministerio de Energía y Minas, *Guía para Elaborar Estudios de Impacto Ambiental* (Lima, Government of Peru, 1994).

[86] RJ Burdge and F Vanclay, 'Social Impact Assessment: a Contribution to the State of the Art Series' (1996) 14 *Impact Assessment* 59 at 64.

definition of sustainable development provided by the Brundtland Report as including economic, social and environmental concerns.[87] Social impact assessment is mandated in Peru by guidelines published by the government of Peru for the preparation of EISs in the mining sector. These guidelines require mining enterprises to analyse and evaluate the 'socio-economic environment' in addition to the physical and biological environment.[88]

Large-scale projects are associated with potentially significant social as well as environmental impacts. The literature on mining-related social impacts suggests that they are highly diverse and context-dependent. They can include deepened impoverishment through lost access to resources and local inflation, cultural marginalisation of the local population, increased social conflict, disintegration of traditional authority structures, gendered impacts such as increased socio-economic burdens on women, and decreased access to public services as a result of large-scale migration to the new mining area.[89] Thus the inclusion of social impacts in the EIA process has the potential to expand significantly the sphere of mining-related externalities that will be prevented or diminished.

However, social impacts and their inclusion in EIA are somewhat hazy in two respects. First, what constitutes a social impact is rarely defined and can depend greatly upon the perspective taken by an observer.[90] Second, even

[88] Brundtland Commission, *Our Common Future* (Oxford, Oxford University Press, 1987).

[88] Peru's EIA guide for mining enterprises establishes 4 environmental categories for analysis and evaluation in an EIS: the physical environment, the biological environment, the socio-economic environment, and the environment 'of interest to humanity'—ie relating to cultural and scientific resources: Ministerio de Energía y Minas, n 86 above, at 1 and 17–20. Strictly speaking, the guidelines are not obligatory. Furthermore, the EIA regulations which *do* set out the obligatory content of an EIS do not require a project proponent to consider social impacts: Annex 2, DSN. No 016-93-EM, published 1 May 2003, modified by DS No 059-93-EM, published 13 Dec 1993). However the EIS guidelines for mining are given some legislative force by Art 7, DS No 053-99-EM which provides that the structure of an EIS must follow the structure set out in the guidelines set by the Ministry of Energy and Mines.

[89] MacFarlane, n 63.

[90] While Peru's EIA legislation does not define what constitutes a social impact, the EIA guidelines call for an assessment of impacts upon such factors as differentiation and conflict within communities, control over local resources, gendered effects, access to social services, employment, and the demand for infrastructure: Ministerio de Energia y Minas, n 86 above, at 38–42. According to the Interorganisational Committee on Guidelines and Principles for Social Impact Assessment, social impacts are:

> 'the consequences to human populations of any public or private actions—that alter the ways in which people live, work, play, relate to one another, organize to meet their needs, and generally cope as members of society. The term also includes cultural impacts involving changes to the norms, values, and beliefs that guide and rationalize their cognition of themselves and their society.'

Interorganisational Committee on Guidelines and Principles for Social Impact Assessment, 'Guidelines and Principles for Social Impact Assessment' (1995) 15 *Environmental Impact Assessment Review* 11 at 11.

Despite the work of the ICGP, surprisingly little critical clarity exists with regard to the conceptualisation of social impacts. See F Vanclay, 'Conceptualising Social Impacts' (2002) 22 *Environmental Impact Assessment Review* 183.

where there is agreement on a list of likely impacts, there is no consensus regarding which impacts should be addressed by a private sector developer and which ought to be dealt with by government. Most of the examples of impacts cited above fall into what is conventionally regarded as the sphere of governmental responsibility. Addressing social and economic inequality, cultural marginalisation or an increased demand for public services is not, from a liberal perspective, considered to be the legal responsibility of the private sector. Thus, the extent to which identified impacts must be mitigated by a private sector project is also obscure. This obscurity is compounded by the fact that EIA decision-making is based upon a cost-benefit analysis in which the sum of the project's identified negative impacts (after proposed mitigation measures) are compared to its overall, usually economic, benefits.[91] Thus EIA offers no guarantee that identified impacts will be mitigated, only that overall optimal outcomes will be pursued.[92]

In practice, responsibilities for social impacts are often regarded rather loosely by both mining enterprises and governments. Despite its potential, social impact assessment remains 'the orphan of the assessment process',[93] the 'poorer cousin' of environmental impact assessment.[94] The reasons behind this will be discussed in greater length in Chapter 4. For now it is enough to note that the social components of EIA often have significant deficiencies. Social impact assessments (SIAs) are often under-funded and treated perfunctorily by project proponents. According to Burdge and Vanclay, both of whom are leading scholars and practitioners in the area of SIA, even in countries where social impact assessments are required 'there is seldom a requirement for the results of SIAs to be seriously considered. SIAs often go unread, at least unheeded, and mitigation measures seldom taken seriously'.[95]

Public Participation in EIA Decision-making

Accordingly, EIA provides no easy solutions to essentially political questions concerning the distribution of the costs and benefits of private sector development. At best EIA can provide a forum in which informed actors, experts and public authorities may deliberate the facts and issues. Involving concerned and affected members of the public in EIA decision-making is

[91] See, eg, Ministerio de Energia y Minas, n 86 above, at 49–50.
[92] Otto and Cordes, n 1 above, at 8–14.
[93] RJ Burdge, 'Why is Social Impact Assessment the Orphan of the Assessment Process?' (2002) 20 *Impact Assessment and Project Appraisal* 3.
[94] S Lockie, 'SIA in Review: Setting the Agenda for Impact Assessment in the 21st Century' (2001) 19 *Impact Assessment and Project Appraisal* 277.
[95] Burdge and Vanclay, n 87 above, at 68.

often seen as an important way to improve these deliberations.[96] Effective public participation depends on the quality of measures taken to provide both public access to information and a right to be heard within the decision-making process. The legislative framework in Peru addresses these needs, first, by providing a right of public access to the project's EIS once it is submitted,[97] and, secondly, by providing a right to participation in a public hearing concerning the EIS prior to its approval.[98]

The public hearing is overseen by the relevant regulatory authority, the Ministry of Energy and Mines (MEM), and is intended to provide the public with further information and an opportunity to make comments.[99] First, a presentation is made by the project developer and the contractor responsible for preparing the EIS.[100] Questions are subsequently taken from the assembled participants; and the presenters are then provided with time to give responses.[101] At the end of the event, participants are given the opportunity to provide written submissions to the Ministry.[102] The questions, responses and submissions made during the process are to be taken into account by the authority in its subsequent decision whether or not to approve, reject or require revisions to the project's EIS.[103]

For the bulk of the time since their enactment in 1996, the rules governing these processes have been particularly restrictive.[104] Originally, public hearings were conducted at the MEM offices in Lima[105] and questions could only be submitted in writing.[106] Furthermore, project developers were

[96] Pulgar-Vidal and Aurazo, n 45 and Pring and Noe, n 10.

[97] The project's EIS is made available to the public in 3 locations: the offices of Ministry of Energy and Mines (MEM) in Lima, the appropriate regional MEM office, and the District Municipality in which the Public Meeting will be held. Members of the public may receive a copy of the EIS in exchange for the costs of reproduction: Art 8, *Reglamento de Consulta y Participación Ciudadana*, RM No 596-2002-EM/DM.

[98] In 2002, the government of Peru enacted regulations requiring the project proponent and the Ministry of Energy and Mines (MEM) to conduct consultation processes in the area of project impact: Art 3, RM No 596-2002-EM/DM. These include meetings to be conducted before and during the preparation of the EIS. At the discretion of the MEM, cost of any consultation processes and public hearings will be paid for by the project proponent: Art 12, RM No 596-2002-EM/DM. These regulations came into force on 12 Dec 2002 and apply only to projects seeking approval of an EIS after that date.

[99] Art 3.2, RM No 596-2002-EM/DM.

[100] Ibid, Art 6.6.

[101] Ibid, Art 6.7.

[102] Ibid, Art 6.9.

[103] Ibid, Art 6.10.

[104] The 3 versions of the regulations governing public participation in environmental assessment hearings are RM 335-96-EM/SG (published 25 July 1996), which was replaced by RM No 728-99-EM/VMM (published 9Jan 2000), which was itself replaced by RM No 596-2002-EM/DM (published 21 Dec 2002).

[105] In 1999, the regulations were revised to provide that, where possible, a public hearing *could* be held in the project area itself: Art 2, RM No 728-99-EM/VMM.

[106] Art 8, RM 335-96-EM/SG; Art 11, RM No 728-99-EM/VMM. The 1996 regulations also limit participation in a first round of questions to those persons who have officially registered in advance with the MEM within 8 days of publication of notice of the hearing: Art 4 and 8, RM 335-96-EM/SG. The need for advance registration was removed from the 1999 regulations.

required to give only 12 days of public notice in advance of a hearing.[107] New regulations enacted in December of 2002 have substantially loosened these restrictions. These regulations provide that the timing and location of a hearing should take into consideration the population centre closest to the project and factors likely to maximise attendance.[108] They further provide that questions may be posed orally or in writing during a hearing.[109] They have also increased the minimum public notice period for a hearing to 40 days.[110]

Notwithstanding the 2002 reforms, the Peruvian EIA regime provides a relatively limited opportunity for public engagement in the deliberation of the socio-environmental consequences of a project. Public engagement takes place chiefly after the EIS has been prepared and is largely limited to a single hearing in which the opportunities for thoughtful and informed exchange are limited.[111] However, the greatest challenges to effective public participation presented by this framework arise from its failure to provide either the time, resources or independent access to technical expertise that could enable participants to engage meaningfully with the project's EIS.[112] The EIS of a large mining project is a complex technical document, prepared over many months by several teams of experts. It is usually several hundreds of pages in length. No resources or technical support are made available to participant groups in order to improve the quality of their involvement in the process.

Significant barriers tend to stand in the way of community actors in the Global South who seek to intervene in the EIA process. Community actors typically lack information and experience concerning what to expect from large mining development.[113] Furthermore, many people in such rural environments are marginalised within official settings and may have a lesser capacity to express themselves effectively. Certainly, it is a significant challenge for even the most capable local actors to use the EIA regime's participatory mechanisms to present informed arguments, much less contest the factual assertions or the analysis presented in the EIS. Instead, a

[107] Art 3, RM 335-96-EM/SG. In 1999, this notice period was extended to 20 days: Art 5, RM No 728-99-EM/VMM.

[108] Art 4, RM No 596-2002-EM/DM.

[109] Ibid, Art 6.7.

[110] Ibid, Art 5.1.

[111] The new consultation requirements enacted in late 2002 may go some way towards addressing these defects. See nn 99 and 129 aove for further context and commentary.

[112] Pulgar-Vidal, a noted environmental lawyer in Peru, observes that given these problems:

> '. . . it is very difficult to conduct a real evaluation of an EIS through the public hearing process. Further, the lack of any procedure to ensure that participants' submissions are considered means that the public hearing is of little use.'

M Pulgar-Vidal, *La evaluación del impacto ambiental en el Perú* (Lima, Sociedad Peruana de Derecho Ambiental, 2000) at 86 (my translation).

[113] Previous experience with large mine development from an earlier era can be very misleading, as has been the case in Peru.

mechanism such as Peru's public hearing process is likely to provide a forum for local concerns based on supposition and rumour, rather than informed dialogue on project-related risks and regulatory options. Furthermore, Pulgar-Vidal and Aurazo observe that, despite its official existence in state law, the promise of public participation in EIA decision-making is undercut by the fact that it is still not fully trusted in Peru. The implementation of existing public participation processes continues to encounter difficulties as a result of both a failure to be sensitive to the benefits of these processes and a fear of the politicisation of EIA mechanisms.[114]

Limitations on State Administrative and Regulatory Capacity

After a decade of experience and capacity-building, the capability of the Peruvian government to play an effective regulatory role with regard to environmental management in the mining sector remains exceedingly weak.[115] One reason for this weakness arises from the fact that responsibility for the approval and enforcement of EIAs has been given to the Ministry of Energy and Mines (MEM) rather than to the National Environmental Council (CONAM),[116] the government agency generally responsible for environmental matters.[117] The MEM is also responsible for promoting investment and awarding concessions in the mining, oil and gas sectors. The conflict of interest created by the union of these two functions within a single institution appears to have negatively affected the regulation of environmental issues.[118]

A second related reason for weak administrative capacity in this area is the shortage of funds dedicated to environmental matters. The MEM unit in charge of environmental issues is severely understaffed.[119] Budgetary restrictions in times of fiscal crisis tend to impact disproportionately upon sectoral approaches to environmental management. When combined with a context of growth in sectoral investment—as has been the case in the mining sector—this dynamic leads to an overloaded administrative apparatus.[120]

[114] Pulgar-Vidal and Aurazo, n 45 above, at 97.

[115] Mainhardt-Gibbs, n 31 above, at 37.

[116] The *Consejo Nacional de Medio Ambiente* (CONAM) (see *Ley de Consejo Nacional de Medio Ambiente*, No 26410).

[117] Art 51, *Ley Marco para el Crecimiento de la Inversión Privada*, DL 757; article 1, DS 53-99-EM .

[118] Mainhardt-Gibbs, n 31 above, at 46.

[119] Mainhardt-Gibbs quotes a Peruvian extractive industry consultant as saying that it would be 'impossible for MEM to handle the post reform investment boom and the large size of the mining and hydrocarbon sectors in Peru with such a small environmental staff': Mainhardt-Gibbs, n 31 above, at 46.

[120] Pulgar-Vidal, n 113 above, at 90. Mainhardt-Gibbs, commenting on World Bank efforts to promote regulatory reform in the Peruvian mining sector, observes that 'efforts to improve environmental management have been unable to keep up with the pace of [extractive industry] expansion': Mainhardt-Gibbs, n 31 above, at 36.

Furthermore, by providing mining investors with certain guarantees of prompt regulatory decision-making, the legislation governing EIA approvals has probably added to the burden on environmental regulators. Once an EIS has been submitted to the MEM for a proposed mining project, the Ministry has 90 days in which to provide its comments to the project proponent. Failure to meet this deadline results in automatic approval of the EIS.[121] After receiving the proponent's written response to its comments, the MEM has a maximum of 30 days in which to reply to the proponent. Again, failure to do so constitutes automatic approval.[122] While such efficiency guarantees can contribute to good government, their practical impact must be considered in the context of the resources made available for regulatory oversight and enforcement.

Lastly, the policies of reduced government asserted during the structural reform process and historical accusations of corruption in governmental inspections have led to the adoption of a privatised system for environmental compliance monitoring by the MEM.[123] EIS compliance is monitored by private auditing firms on behalf of the MEM that are chosen from a government registry. The fee of the auditing firm is paid by MEM which is then reimbursed by the operator of the inspected project.[124]

Implications from the State Perspective

Given the earlier analysis of the predicament of the state, it would appear at first that the EIA regime puts a state with weak regulatory capacity and strong neoliberal constraints in a highly undesirable situation. EIA would appear to require government to engage in precisely the form of very visible regulatory decision-making which these states would rather avoid. Instead, I will argue that the EIA regime serves several important purposes that allow weak neoliberal states in the Global South to cope with the predicament caused to them by mining and community conflicts. Simply stated, the argument is that, due to their nature and structure, EIA regimes contribute to state legitimacy while imposing relatively limited regulatory responsibilities on government. Indeed, EIA regimes, particularly when implemented by weak neoliberal states, provide governments with the opportunity to unload responsibilities informally upon a large-scale mining project while drawing a curtain over their own functions and duties.

EIA contributes to state legitimacy in two important ways. First, EIA is increasingly seen as a global standard for sound environmental management

[121] Art 4, DS No 053-99-EM.
[122] Ibid, Art 6.
[123] Pulgar Vidal, n 113 above, at 42.
[124] Art 5, *Ley de Fiscalización de las Actividades Mineras*, No 27474.

and as a requirement for responsible government. By operating an EIA regime, a state is presenting itself to both domestic and transnational audiences as a capable entity in touch with the responsibilities of modern government. Secondly, the use of EIA helps to assert the government's sovereign authority over public policy decisions with respect to mining activity and the environment within its national territory. Government sits at the apex of the EIA decision-making structure, where it is ultimately responsible for the balancing of relevant societal interests. Thus, operating an EIA regime, particularly with regard to a politically sensitive and environmentally risky area such as extractive industry development, helps to project an image of responsible, capable and sovereign government.

A notable feature about EIA, however, is that its contributions to government legitimacy arrive at a reduced cost in regulatory responsibility. This is true, first, in simple financial terms. Under the EIA framework, the substantial expense of environmental data collection and analysis that is involved in preparing an EIS is outsourced onto the proponent of the mining project. While this represents a reduced financial burden on government, it is not usually the subject of complaint by project proponents. The expense involved in being made responsible for commissioning an EIS is more than offset by the degree of control this affords over both project design and the EIA process.[125] In addition, in Peru, as we have seen, the cost of regulatory inspections is also borne by the inspected projects themselves. Government responsibilities are limited to the oversight of these processes and the making of decisions based upon the information that they provide. Accordingly, the financial costs to government of operating an EIA regime are diminished as a result of how responsibilities are allocated by the decision-making architecture created by EIA.

Regulatory responsibility is also reduced by EIA in a second manner that is perhaps even more valuable to embattled developing country states. The EIA regime helps weak states to deal with the political pressures upon them by facilitating a considerable delegation of regulatory authority to the project proponent, while simultaneously obscuring the issue of governmental responsibility. In essence, EIA constitutes a self-regulatory regime in which government is called on to assess, approve and enforce the findings and

[125] This is not to say that there are not good reasons for allowing project proponents to design their own EISs. Project design and environmental planning and assessment are intimately connected. Where design issues arising from economic, geological, technical, social, and environmental factors are considered together, substantial efficiency gains are possible. However, McKillop and Brown suggest that the industry is not effective at integrating environmental and other considerations in project planning. They note that environmental assessment is too often done after project design in the mining industry. Separating EIA and project design teams, they argue, is a mistake which undercuts many of the alleged benefits of the EIA process: J McKillop and AL Brown, 'Linking Project Appraisal and Development: The Performance of EIA in Large-Scale Mining Projects' (1999) 1 *Journal of Environmental Assessment Policy and Management* 407.

recommendations made by a project proponent. Government provides rules and guidelines to structure this process but, particularly with regard to the contested field of responsibility for social issues and impacts, a great deal of discretion remains.[126] Thus in Peru's EIA regime, the proponent of a mining project is encouraged to make a plan for addressing social issues. While no clear obligations are articulated regarding the degree of responsibility that should be assumed for identified impacts, project proponents are no doubt aware that more generous treatment will be favourably viewed by government assessors of the EIS. In other words, through EIA, a government is able to encourage a project proponent to assume responsibility, on a voluntary basis, for measures aimed at the mediation of social conflicts arising from mining development. The conferment of discretion through EIA is crucial to this process. Since the responsibility for social mediation has not been dictated to the proponent through mandatory standards or performance requirements, it does not run afoul of the state's commitments under either international treaties or state-investor investment agreements.

However, perhaps the most significant feature of the EIA regime in this regard is that it does not have any mechanism for fixing the 'social responsibility' of government. The EIA process is uniquely focused upon the project, its impacts and its responsibilities. This omission is particularly salient, given that a private sector proponent is expected to produce a socially optimal outcome rather than fully to mitigate all identified impacts. The decision-making architecture of EIA provides no place for discussing the issue of governmental responsibility for social and environmental burdens that will not be assumed by the project proponent. Thus, by focusing EIA processes steadfastly on whether or not to internalise certain social and environmental costs into a project, the issue of socialising these costs is not raised. Instead, the EIA process concludes with a decision that the project has or has not adequately discharged its responsibility to society—thereby clouding a similar inquiry into the government's performance.

However, a significant deficiency of the EIA regime for both mining enterprises and states relates to its ability to offer widespread legitimacy. EIA regimes have persistent problems persuading sceptical audiences that a project will in fact produce environmentally and socially acceptable results over time. This scepticism is particularly notable among local audiences. In a multi-country comparative study of EIA in the Americas, Pulgar-Vidal and Aurazo argue that the public in these countries of both the North and South remains suspicious of EIA processes.[127] This dynamic of pervasive scepticism and its implications will be discussed at greater length in the next chapter.

[126] Indeed this discretion is widened by the state's weak regulatory capacity.
[127] Pulgar-Vidal and Aurazo, n 45 above.

CONCLUSION: STATE ABSENCES AND THE PROMOTION OF LOCAL AND TRANSNATIONAL LEGAL ORDERING

With the two legal regimes outlined above, the government of Peru has provided mining enterprises with formal mechanisms to assist them in establishing relatively swift, secure and inexpensive control over the entitlements necessary for project development. This is generally achieved at the expense of those entitlements either held or desired by community actors. Local property rights and livelihood interests are curtailed, and the power to negotiate effectively with the mining enterprise regarding the terms of its entry into the local environment is restricted. However, this state support for mining development relies upon a strategy of selective absence. While formal regulatory frameworks favour mining interests, mining enterprises are delegated significant degrees of both informal regulatory authority and responsibility for the social mediation of mining development. It is the mining enterprise that is left to negotiate contracts of sale with community actors and to determine the local commitments that will be assumed in its environmental impact statement. Meanwhile, the state appears removed from these processes, seeking both to preserve its image as a sovereign neutral arbiter of the public interest and to avoid the responsibility and expense involved in direct mediation of the local costs of mine development.[128]

So long as states in the Global South are bound by neoliberal ideological and legal commitments, state actors may have little choice other than to adopt these sorts of hidden delegations. The state's supreme authority is

[128] Recent legislative developments in Peru point to an increase in government oversight of these processes. The increasing effectiveness of CONACAMI and several high-profile cases mismanagement of community relations issues by foreign mining enterprises appear to have prompted regulatory changes that have increased the state's role in the social mediation of mining and community conflicts. Eg, the Canadian junior firm Manhattan Minerals provoked both large-scale local opposition and a vociferous transnational campaign against its plan for a gold mine in the agricultural community of Tambogrande: see Oxfam America, *The Promise of Gold: Tambogrande, Peru* (Boston, Mass, Oxfam America, 2004). The Yanacocha gold mine, owned by the US company, Newmont, has also fuelled protests concerning its mishandling of a mercury spill: Project Underground, 'Mercury Spill Poisons Villagers Near the Yanacocha Mine in Peru' (2000) 5(11) *Drillbits & Tailings*, available at www.moles.org/ProjectUnderground/drillbits, and its controversial plans to appropriate local water resources: 'Peru protests halt Yanacocha gold search at Quilish', Reuters (6 Sep 2004), available at http://yahoo.reuters.com/financeQuoteCompanyNewsArticle.jhtml?duid=mtfh01906_2004–09–06_22-02–15_n06536547_newsml). Changes to EIA regulations in Dec 2002 now require the Ministry of Energy and Mines (MEM) to organise local informational and consultative workshops together with the project proponent both before and during the preparation of an EIS for a major mining project: Art 3.1, RM No 596-2002-EM/DM. Changes to the mining servitude regulations in May 2003 have established a government-sponsored conciliation process that must be conducted before a concessionaire will be able to apply for a servitude: DS No 014-2003-AG. These efforts (which apply only to future projects) appear to reflect a concern that more needs to be done to ensure that corporate mishanding of community relations does not provoke further internal unrest and poison the investment climate. The practical impact of these regulatory changes and the degree to which they indicate a trend towards more active state involvement in mining and community conflicts remains to be seen.

symbolically upheld in formal legislative frameworks. However, economic dependence and limited capacity often belie the exercise of its allegedly sovereign power. As we have seen, transnational mining enterprises during the colonial and imperial eras were often able to operate in the Global South as 'a state-within-a-state', exercising near-absolute rule within their enclaves. Those days are over. However, what we are seeing today is an increased (and often reluctant) assumption of state-like responsibilities by transnational mining enterprises at the discreet behest of weak governments. This state strategy has two effects that will be examined at some length in this book, one local and the other transnational.

First, the state's relative absence from the local sphere effectively encourages mining enterprises to develop a local space of informal legal ordering in order to deal with local interests. As we have seen, engaging in this kind of activity stands to help the enterprise to secure environmental approval and to avoid relying upon the servitude process to gain access to land. The state is absent from this sphere of local negotiation, neither providing compulsory standards for it,[129] nor enforcing obligations taken within it.[130] The absence of hard and fast rules means that enterprises are free to benchmark their efforts on the degree of risk they perceive to arise from the local situation. Mining firms are thus presented with formally effective mechanisms to gain control of necessary entitlements and the freedom to design additional instruments for regulating local issues to the extent that this is deemed necessary. Community actors, on the other hand, are likely to face significant challenges in these local arenas. The state legal regimes reviewed above ensure that the formal rights of community actors are highly circumscribed and their bargaining endowments limited. Community actors must rely upon their own resources—those that can be mobilised locally or through external allies—to achieve their aims. Thus state retreat from the local arena reinforces a dynamic of local law-making in which both corporate and community actors are enmeshed.

Secondly, in designing their actions in the local setting, mining enterprises will also remain conscious of their needs within national and transnational spheres. Local communities are only one type of the audiences for the legitimation activities undertaken by mining enterprises. These enterprises will also direct certain efforts towards appeasing such diverse groups as national elites and the national public, the project's direct financial stakeholders and the broader community of financial observers, as well as those capable of

[129] In 2001, Peru's Ministry of Energy and Mines published a non-mandatory community relations guide for mining enterprises: Ministerio de Energía y Minas, *Guía de Relaciones Comunitarias* (Lima, Government of Peru, 2001).

[130] Strictly, those commitments made in the project's EIS become formal requirements subject to state enforcement. However, in practice regulatory authorities often regard them as voluntary commitments (particularly those in the social chapter of the EIS) and will easily allow the project to modify its plans based on 'changing circumstances'.

transmitting information to general audiences in the Global North, including international journalists and NGOs. As we shall see, the transnational dimension of legitimation brought on by globalisation has prompted the development of global policy arenas and has sparked the need for transnational law-making, with far-reaching consequences.

Looming large behind all of these developments is a profound state crisis—a crisis whose dimensions are vastly magnified in the Global South. While the post-war state has struggled with its capacity to provide effective regulation for its citizens, as globalisation has picked up steam it is the neoliberal state's ability to offer legitimacy through its legal processes that has come into question. For example, mining enterprises operating in the Global South are not able to respond to their critics, either locally or transnationally, with the simple assertion that their responsibilities begin and end with compliance with a host state's legal requirements. It may be that in a globalising era, for many audiences, states appear too weak or too complicit to offer a convincing check on the actions of corporate giants. Or perhaps, curiously, the retreat of the state from the mediation of socio-economic relations has left private enterprise increasingly subject to social claims. If enterprises from the Global North have, according to a line of popular thinking, displaced the state as the engines of economic development, they appear to be increasingly called upon to share their secrets with the disenfranchised. For whatever reason, explicit private regulation of corporate and community relations in mining is a game that both local actors and extra-local audiences appear to be willing to play. The challenges that this presents will, in the coming chapters, be used to illustrate the complexities and contradictions involved in developing transnational legal ordering.

3

Transnational Law-making in a Global Policy Arena: Addressing Mining and Community Conflicts

INTRODUCTION

This chapter will examine the development of transnational legal orders that propose to regulate mining and community conflicts. As we have seen in the previous chapter, state regulation in the Global South, as exemplified by the case of Peru, has often avoided assuming responsibility for the social mediation of mining development. Instead formal state law has tended to encourage private actors to deal with the unresolved conflicts in this field, thereby leaving the door open to both local and transnational law-making initiatives. The present chapter will begin with an analysis of the global context of transnational law formation with regard to the social and environmental performance of globalising industries. Why is it that certain actors are seeking to develop transnational legal regimes? The insights drawn from this analysis will be used to examine transnational law-making efforts taking place in two sites: first, efforts within the mining industry to organise industry-wide self-regulation; and, secondly, regulation that has emerged from the agencies of the World Bank Group.

This chapter illustrates the challenges facing private sector enterprises in organising private legal responses to collective problems. Despite strong incentives to address mining and community conflicts, the mining industry has been unable to overcome obstacles to comprehensive and credible certification. In contrast, due to its unique characteristics, the World Bank Group (WBG) has served as a strategic arena in which complex formal legal regimes have been developed for addressing the task of socio-environmental regulation of large projects. Initially developed as a response to transnational protests concerning the local effects of public sector megaprojects, these regimes have since come to be applied to the private sector, including the transnational mining industry. Forged through prolonged confrontation and

engagement with civil society critics of the Bank, these are comparatively mature regimes which reflect an evolving compromise struck between opposing forces both inside and outside the WBG. The substantial investments made over time by actors involved in contesting these legal regimes have resulted in the development of a regulatory model that is gaining in influence. Indeed, the WBG model is globalising and appears likely to eclipse or strongly influence the continuing efforts to organise self-regulation in the mining industry. Given the significance of the WBG model, both in general and with regard to the case study in particular, this chapter will examine its characteristics in depth.

TRANSNATIONAL LAW-MAKING AND CORPORATE ACCOUNTABILITY IN GLOBALISING INDUSTRIES

Developing a Taxonomy of these Transnational Legal Regimes

The widespread development of formal codified non-state legal regimes for regulating globalising industries has in recent years become a familiar feature of the governance landscape. Appearing in industry after industry, such regimes have become prevalent in major sectors of manufacturing (including clothing and motor vehicles), agricultural production (including coffee and organic food), resource extraction (including petroleum and forestry), and infrastructure development (including large dams and nuclear power).[1] These diverse legal regimes address a wide variety of issues including labour rights, environmental management, human and indigenous rights, trading practices and production methods. They differ widely in terms of their formal structure and their regulatory rigour.

[1] A number of codes of conduct, dealing principally with labour issues, are prevalent in the garment industry. See, eg, 'Clean Clothes Campaign' (www.cleanclothes.org/). The major US motor vehicle manufacturers have adopted ISO 14000, the voluntary environmental management system established by the International Organisation for Standardisation (ISO): R Garcia-Johnson, 'Certification Institutions in the Protection of the Environment: Exploring Implications for Governance' (Paper presented to the Association for Public Policy, Analysis and Management, 2001), available at www.env.duke.edu/solutions/research-envcert.html. Certification institutions established for the coffee trade include those certifying fair trade, shade-grown and organic production. In the forestry industry, no fewer than five major environmental certification institutions are competing for attention: E Sasser, 'Gaming Leverage: NGO Influence on Certification Institutions in the Forest Products Sector' in L Teeter, B Cashore and D Zhong (eds), *Forest Policy for Private Forestry* (Wallingford, CABI Press, 2003). The nuclear power industry in the US has employed a self-regulatory safety certification institution called the Institute of Nuclear Power Operations (INPO) since 1979, the year of the Three Mile Island accident. Established in 1989, the World Association of Nuclear Operators (WANO) plays a similar role on a transnational basis: see 'What is WANO?', available at www.waNoorg.uk/WANO_Documents/What_is_WaNoasp.

The literature dealing with these legal regimes has developed a variety of labels to refer to them, including codes of conduct,[2] voluntary initiatives,[3] management systems,[4] industry self-regulation,[5] and non-state market-driven governance.[6] In a useful overview of the field, Garcia-Johnson, Gereffi and Sasser[7] have dubbed all of these legal phenomena 'certification institutions'. They use this term to refer to any regime that features both a written 'set of rules, principles, or guidelines' and a 'reporting or monitoring mechanism' that publicly certifies compliance.[8] They divide the field of regimes into categories according to the degree to which rule-production and compliance monitoring/reporting are conducted by entities independent of the industry being regulated.

In first-party institutions the regulated firm conducts the two tasks itself with no outside oversight. Second-party institutions are those in which rule-making and compliance reporting are carried out by a number of firms in common, usually through an industry organisation. Third-party institutions confer authority on an external entity, independent of industry control, in order to generate rules and report on firm compliance. Fourth-party institutions involve government or the inter-state system in rule-setting and reporting.[9] Many institutions, however, are of a mixed type and may feature, for example, second-party rules and first-party reporting. Certification institutions differ from command and control governmental regulation in two respects. First, they are not mandatorily imposed upon firms operating within a territory. Only firms that have opted into the system are regulated. Secondly, certification institutions lack the administrative and criminal sanctioning apparatus available to state agencies. These regimes rely heavily upon the sanctioning mechanisms provided by informal law (including dialogue, shaming and community pressure), often backed up by an ultimate

[2] A Blackett, 'Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct' (2001) 8 *Indiana Journal of Global Legal Studies* 401.

[3] N Gunningham and D Sinclair, *Voluntary Approaches to Environmental Protection: Lessons from the Mining and Forestry Sectors* (Paris, OECD Environment Directorate, 2001).

[4] EW Orts, 'Reflexive Environmental Law' (1995) 89 *Northwestern University Law Review* 1227.

[5] KA King and MJ Lenox, 'Industry Self-Regulation Without Sanctions: The Chemical Industry's Responsible Care Program' (2000) 43 *Academy of Management Journal* 698.

[6] B Cashore, G Auld and D Newsom, *Governing Through Markets: Forest Certification and the Emergence of Non-state Authority* (New Haven, Conn, Yale University Press, 2004).

[7] These three academics are collaborating on the Duke Project on Social and Environmental Certification, financed by the Ford Foundation. See www.nicholas.duke.edu/solutions/research-envcert.html.

[8] R Garcia-Johnson, G Gereffi and E Sasser, *Certification Institution Emergence: Explaining Variation' Duke Project on Social and Environmental Certification* (Durham, NC, Duke University, 2001).

[9] R Garcia-Johnson, 'Beyond Corporate Culture: Reputation, Rules, and the Role of Social and Environmental Certification Institutions', Duke Project on Environmental and Social Certification Working Paper No 1 (Durham, NC, Duke University, 2001) at 2.

threat of expulsion from the regime and the forfeiture of the reputational or other benefits provided by participation.[10]

Certification institutions can also be distinguished from one another according to the nature and complexity of their regulatory processes: whether these are based primarily on broad principles, management processes or performance requirements.[11] Principles-based certification institutions set out broad guiding principles and statements of intent for the firms that subscribe to them. These principles are intended to establish a common policy direction and a broad framework for action by individual firms. The Global Compact established by the United Nations Secretary General is an example of such a regime.[12] In contrast, management process-based regimes focus upon structuring a firm's internal procedures in order to encourage it effectively to manage a particular issue and to achieve 'continual improvement' in the firm's performance. These regimes allow regulated firms to set their own performance targets and to identify their individual opportunities for improvement. ISO 14000, the environmental standard established by the International Organisation for Standardisation (ISO), is the best-known example of a process-based environmental management system.[13] Lastly, performance-based certification institutions establish minimum levels of performance that must be met by regulated firms. These performance requirements may take the form of technical standards or best practice guidelines. The Forest Stewardship Council is an example of a performance-based regime.[14]

GLOBALISATION BACKLASH AND THE RISE OF CERTIFICATION INSTITUTIONS

Voluntary participation within a certification institution is understood to be the product of strategic behaviour on the part of private sector firms. Garcia-Johnson *et al* reason that these legal regimes 'are established to

[10] King and Lenox, n 5 above.

[11] G Greene, *Industry Codes of Practice and Other Voluntary Initiatives: Their Application to the Mining and Metals Sector* (London, IIED and WBCSD, 2002) at 6–7.

[12] The UN Global Compact is based on 10 principles relating to human rights, labour issues and the environment: see 'The Global Compact', available at www.unglobalcompact.org/. Launched in 2000, the Compact invites companies to subscribe to the principles in order to encourage responsible corporate citizenship. The Compact lacks any monitoring or enforcement mechanism. Instead it aims to promote behaviour change through processes of dialogue and engagement.

[13] The ISO is a non-governmental organisation. Its members are public and private sector standard-setting organisations from 148 countries. See the ISO website at www.iso.org/.

[14] Founded in 1993, the Forest Stewardship Council is an environmental certification institution established for the forestry industry by a coalition of environmental NGOs. See the Forest Stewardship Council website at www.fsc.org/, and B Cashore, G Auld and D Newsom, *Governing Through Markets: Forest Certification and the Emergence of Non-state Authority* (New Haven, Conn, Yale University Press, 2004).

provide benefits for their creators' and that the creators 'bear the costs of institution creation and maintenance to mitigate some other costs'.[15] One of the principal costs imposed by certification institutions is a presumed loss of autonomy and discretion resulting from the compliance requirements of the regime. Involvement in regime creation is also likely to make costly demands in terms of both staff time and external consultancies. Moreover, both of these costs are increased where more independent forms of certification are adopted. Creating more independent institutions is likely to entail greater transaction costs as consensus must be reached with outside parties. More independent institutions are also likely to entail even greater restrictions upon a firm's autonomy and discretion in the conduct of its affairs. What benefits do certification institutions offer their participants that can make these costs palatable?

Certification institutions need to be understood within the wider context of a global legal politics that has emerged around the world concerning the legitimate rights and the regulatory responsibilities of the private sector. This global legal politics has surfaced in its contemporary form as a result of two opposing dynamics: first, the new power acquired by private sector enterprises—and especially by transnational firms—through economic globalisation; and secondly, an anti-globalisation backlash fuelled by a suspicion of the expanding influence of the private sector.[16] I refer to the multitude of debates provoked in sites all over the world by these dynamics as a global *legal* politics because it concerns the always-ambiguous interconnection of regulation and legitimacy discussed in Chapter 1. What is being debated is the regulatory terms on which different audiences are willing to find that the entitlements of transnational enterprises will be deemed legitimate.

Globalisation has offered firms in many industries new opportunities to expand their entitlements and increase their freedom of action. As we have seen in Chapters 1 and 2, factors such as the liberalisation of trade and investment, the pressures of regulatory competition among states, the spread of deregulatory policies, and the limits of government capacity have helped to shift the post-war balance struck between forms of governmental control and regulation by markets.[17] This has translated into significant gains in discretion and power for many firms operating both transnationally and within their home jurisdictions. Through globalisation, enterprises have been

[15] Garcia-Johnson, n 9 above, at 4.

[16] 'Anti-globalisation' is too stark a term for much of this movement, which has moved in large part from simple opposition to globalisation initiatives to a positive agenda of alternatives to neoliberal forms of globalisation. The writer Georges Monbiot has proposed the term the 'Global Justice Movement', while others prefer the 'Alternative Globalisation Movement' or the 'Movement of Movements'. G Monbiot, *The Age of Consent: a Manifesto for a New World Order* (Toronto, HarperCollins Canada, 2004).

[17] JG Ruggie, 'Taking Embedded Liberalism Global: The Corporate Connection', Institute for International Law and Justice Working Paper 2003/02 (New York, New York University, 2003).

able to reorganise production in many sectors into global commodity chains in which the processes of resource extraction, manufacturing, design, marketing and retailing have been disaggregated and dispersed geographically.[18] Very often geographic dispersal is accompanied by fragmented ownership: commodity chains are typically made up of a large number of legally distinct firms whose relations are governed by private legal instruments, especially contract.[19] However, dispersed ownership does not necessarily mean dispersed control: power in these supply chains tends to be concentrated in firms that are able to control global brands and/or access to wealthy markets in the North, allowing them to benefit by provoking competition throughout the rest of the chain.[20] Accordingly, these structures limit the degree to which responsibilities for social and environmental costs can be internalised within production processes through government regulation and passed on to economic actors further up the chain. Thus these transnational private arrangements limit the possibilities of national regulation in the country hosting the production site and reflect a transfer of power to transnational enterprise.

And yet over this same period, for many sectors of the private economy, a new global political context has emerged capable of threatening the gains that have been realised by private sector enterprises. Globalisation has provoked a backlash in which the claims of the new era can often be viewed with public suspicion. In addition, advances in the globalisation of communications have increased the ability of activist critics to form transnational advocacy networks aimed at highlighting corporate malfeasance and stimulating further distrust of private sector power.[21] Diverse campaigns attacking the environmental, human rights or labour rights performance of firms and industries share a basic critique of the structure of contemporary economic globalisation. They argue that the private sector has been allowed to abuse the power and freedom it has gained through contemporary arrangements—that due to the lack of proper restraints, private firms are harming vital public interests.[22] In this vein, anti-globalisation campaigners have developed powerful critiques of the effects

[18] A 'commodity chain' is 'a network of labor and production processes whose end result is a finished commodity': TK Hopkins and I Wallerstein, 'Commodity Chains in the World-Economy Prior to 1800' (1986) 10 *Review* 157 at 159. Global commodity chains tend to be 'strongly connected to specific systems of production and to involve particular patterns of coordinated trade': F Snyder, 'Governing Economic Globalization: Global Legal Pluralism and European Law' (1999) *5 European Law Journal* 334.

[19] G Gereffi, 'The Organization of Buyer-Driven Global Commodity Chains: How US Retailers Shape Overseas Production Networks' in G. Gereffi and M. Korzeniewicz (eds), *Commodity Chains and Global Capitalism* (Westport, Conn, Greenwood Press, 1994).

[20] Ibid and Synder, n 18 above.

[21] ME Keck and K Sikkink, *Activists Beyond Borders* (Ithaca, NY, Cornell University Press, 1999).

[22] The anti-(or alternative)globalisation literature is large and diverse. Notable texts include N Klein, *No Logo* (New York, Picador, 2002), D Korten, *When Corporations Rule the World* (San Francisco, Cal, Berrett-Koehler, 2001), JE Stiglitz, *Globalization and its Discontents* (New York, Norton, 2003), RJ Barnett and J Cavanaugh, *Global Dreams* (Touchstone, 1995); and Monbiot, n 16 above.

of unchecked corporate influence in the global economy that have entered both popular thinking and mainstream political discourse. These include the ability of transnational enterprises to provoke a 'race to the bottom' in social and environmental regulation, and to profit from the repression of human rights and labour standards in authoritarian low-regulation havens in various parts of the world.[23]

Significantly, the efforts of transnational advocacy networks have become increasingly sophisticated as they have combined reputational attacks with attempts to find points of leverage capable of affecting firms and entire industries.[24] Since the 1990s, NGO campaigners have skilfully used consumer information and boycott campaigns to target highly visible and concentrated segments of global supply chains in order to effect change on a transnational level. Campaigns directed against branded firms such as Nike and Starbucks have been effective in influencing the policies of these firms towards their suppliers around the world. In the forest products industry, consumer campaigns in the US and Europe have successfully targeted the highly concentrated retail segment of the commodity chain in order to exercise an influence over the very large number of anonymous logging firms operating worldwide. By putting consumer pressure upon a relatively small number of retailers, environmental campaigners learned how to have an impact upon the rest of the chain.[25]

In addition, advocates have learned how to increase the power of their messages by making symbolic use of accidents, scandals and compelling images that can be used to highlight the injustices that motivate the campaign. Thus, worker deaths caused by fires in locked factories in China have been spotlighted by advocacy networks to draw attention to labour rights abuses;[26] and similarly campaigns to protest at the arrest and execution of environmental protestors in Nigeria were used to communicate the plight of local peoples caught between government repression and environmental disaster at the hands of the foreign-controlled oil industry.[27] In short, transnational

[23] In an example of an early and effective use of this critique, in 1992 Harper's published the payslip of a worker in Indonesia employed by a Korean firm to make Nike shoes. The accompanying commentary provided by labour activist Jeffrey Ballinger pointed out the meagre wages paid (14 US cents an hour) and described Nike's practice of using contractors and of moving production facilities to minimise labour costs: J Ballinger, 'The New Free Trade Heel', *Harper's Magazine*, Aug 1992, 46.

[24] Keck and Sikkink, n 21 above, and E Sasser, 'Gaining Leverage: NGO Influence on Certification Institutions in the Forest Products Sector' in L Teeter, B Cashore and D Zhang (eds), *Forest Policy for Private Forestry* (Wallingford, CABI Press, 2003).

[25] Gunningham and Sinclair, n 3 above. In the words of one Greenpeace activist, 'stumbling upon market campaigning was like 'discovering gunpowder for environmentalists'' (quoted in Sasser, n 24 above).

[26] See, eg, 'Shoe Factory Fire Claims Five Lives', available at www.laborrightsnow.org/.

[27] The Nigerian activist Ken Saro Wiwa was executed in 1995 by the military regime anxious to stem local anger in at environmental and human rights abuses in oil producing areas: see A Goldman, 'Who Benefits from Africa's Oil?', *BBC News* website at http://news.bbc.co.uk/2/hi/africa/3542901.stm (last accessed 9 March 2004).

advocacy networks have learned from experience and one another how to mobilise information, leverage and symbolic resources—all in a context of minimal resources—in order to push for increased corporate accountability for social and environmental injustices.[28]

Activist Threats and Legal Responses

The threat posed by these campaigns to transnational enterprises is often referred to as reputational.[29] Certainly the reputations of firms and industries are being attacked by critics; however, the loss of reputation is not feared in itself but for its potential consequences. Firms depend upon a host of actors in order to reproduce the entitlements that allow them to prosper. Depending upon the industry in question, these actors include retail customers, corporate suppliers and purchasers, employees, shareholders, lenders, insurers, government procurement offices, state regulators, and export credit agencies. Naturally, firms dedicate time and effort to maintaining favourable relationships with these actors, recognising that together they produce the regulatory environment which allows the firm to carry on its business. NGO campaigns threaten to change these relationships by pressuring or persuading one or more of these actor groups to take action against the targeted firm or industry. Reputational assaults are used to undermine the legitimacy of the target and to convince other actors to withdraw their support for their entitlements. This may take place through consumer boycotts, lobbying for legislative change, picketing retail outlets or corporate headquarters, lobbying large institutional investors such as public pension funds, developing public awareness through media campaigns, or raising issues at shareholder meetings. Particularly in a competitive economic environment, the threat to corporate entitlements posed by NGO success with even one actor group can be enough to affect a company's bottom line.[30]

[28] Keck and Sikkink, n 21 above, at 16.

[29] Garcia-Johnson, n 9 above.

[30] This has been called 'the new boomerang effect', in an adaptation of the term used initially by Keck and Sikkink to describe transnational human rights advocacy methods: n 21 above. Keck and Sikkink apply the term to refer to the mobilisation of transnational alliances in order to influence the human rights performance of governments that are capable of resisting local demands for change. In the boomerang model, local activists unable to influence their own governments develop links with foreign allies who lobby their own states to pressure the target government. In Sasser's new boomerang effect, environmental activists unable to persuade forest products retailers to change their policies turn instead to consumers to exert the necessary pressure. This is followed by 'the ricochet effect' in which successful campaigns against retailers are translated into demands from those retailers for primary and secondary processors to supply them with products that conform to a particular environmental standard. Thus pressure exerted at a point of vulnerability in the supply chain can ricochet up the line in order to affect logging practices, and thereby influence the real targets of campaigning: Sasser, n 24 above. To labour activists, for whom indirect tactics such as secondary picketing and sympathy strikes have a long history of use, these rediscoveries may of course seem less than novel.

Thus certification institutions are often adopted by firms in an effort to resist and defuse the power of actual or potential regulatory initiatives launched against them by critics. Just as the attacks of critics aim to regulate the firm by undermining its legitimacy, so do certification institutions aim to reinforce the firm's legitimacy by asserting that it is already properly regulated. Given the preference of economic actors for unfettered discretion in the conduct of their affairs, efforts are generally made to acquire the necessary legitimacy at the lowest cost in restrictive regulation. Thus, industry has generally not turned to government in order to solve its legitimacy problems. Inviting government to enter the field would threaten the gains made through globalisation without necessarily providing effective solutions from a private sector point of view. Government regulation tends to be unwieldy, unpredictable and armed with a coercive apparatus. Also, state regulatory efforts are often insufficient to address problems of transnational scope. And, lastly, as set out in Chapter 2, regulation by governments that are strongly identified with foreign business interests may provide few dividends in terms of legitimation. In contrast, private initiatives offer industry actors a greater degree of flexibility in their search for solutions. Indeed, Garcia-Johnson notes that there is a consensus that certification institutions are created, in part, to pre-empt the development of government regulation.[31]

A point often obscured in the discussion of certification institutions is that transnational advocacy campaigns managed by NGOs, grassroots organisations, and their allies are themselves organised efforts to regulate industry. They explicitly seek to pressure enterprises to adopt certain courses of action such as purchasing fair trade products,[32] halting the practice of clear-cutting or requiring their production facilities to adhere to international labour standards. Indeed, in conducting such campaigns, advocates often meet the two requirements set out by Garcia *et al* for constituting a certification institution: advocates tend both to list a set of principles or standards that are expected of the targeted firm or industry and to report publicly upon the target's record of (non-)compliance. These efforts differ from certification institutions only in that they are overtly resisted by their targets. Given their attempts to undermine firm legitimacy, we may call them *de-certification institutions*.

Indeed, to focus exclusively on the formal existence of certification institutions is to miss half the picture of the legal processes at work in these situations. Certification institutions are the explicit, visible half of a continuing and often ad hoc legal dialogue taking place between civil society

[31] Garcia-Johnson, n 9 above, at 5.

[32] Fair Trade institutions certify that the producers of certified goods have been paid a price that covers the cost of production, the costs of 'sustainable production and living' plus 'a premium that producers can invest in development': see 'Fairtrade Standards in General', available at www.fairtrade.net/sites/standards/general.html.

critics and industry. Together, certification institutions and the regulatory efforts of civil society de-certifiers are interlocking parts of a single legal mechanism. This is true of first and second party institutions just as much as it is of third party institutions. First and second party institutions formally exclude outsider critics from their rule-making and reporting functions in order to design a legal structure more responsive to industry priorities. However, critics continue to exercise an influence over the processes of regime formation and development. Just as the institution was created in response to the threat of the barbarians at the gate, in its operation the regime remains sensitive to the continued presence and actions of the de-certifiers. Furthermore, critics are likely to include aspects of the certification institution in their campaigns: they may highlight deficiencies in the industry's disclosure commitments, the lack of a corporate human rights policy, the absence of independent verification, or a firm's failure to apply its own rules when they are called for. Accordingly, first and second party certification institutions create structures in which important regulatory conversations occur outside the formal structures of the regimes themselves. Third party institutions, to the extent that they include both industry actors and critics in their processes, provide a theatre for much more dense and engaged regulatory conversations. This greatly expands the possibility of productive dialogue that can lead to inter-subjective regulatory understandings. Here informal law is developed chiefly within the formal structure of the regime. Of course, third party initiatives may include only some more moderate critics, thereby leaving a number of more radical barbarians at the gate to continue to exercise outside pressure.

Explaining Variation in Certification Institutions

With regard to certification institutions, firms, critics and observers appear to share a basic legitimation theory: that greater legitimacy comes with the greater constraint that is presumed to be offered by more independent forms of regulation. Firms have generally resisted third-party certification until it has appeared that lesser efforts are insufficient to solve their legitimacy problems. Firms show a similar resistance to performance-based regimes, preferring the discretion provided by either principles-based or management process-based regimes. For their part, critics have generally rejected first or second party institutions and have argued that only third party certification—usually backed by solid performance requirements—can offer credibility.[33] Accordingly, the willingness of industry actors to adopt more independent and rigid forms of certification is directly related to the perceived level of threat that civil society is able to exercise over that

[33] Blackett, n 2 above.

industry.[34] The greater the threat, the more likely these actors will be willing to adopt these more constraining regimes.[35]

Garcia-Johnson *et al* argue that the ability of firms to institute certification depends upon two further variables: the nature of an industry's reputation and the degree of concentration within an industry.[36] Where the reputation of an industry is largely collective, that is to say where the reputations of individual firms are significantly affected by the performance of the industry as a whole, reputational problems must be met with collective solutions. Aggressive regulatory action by an individual firm will not address its problems if it continues to be judged by the performance of its neighbours. Furthermore, 'free riders' who do not invest in self-regulation may be able to undercut their more responsible competitors. The ease with which collective solutions to reputational problems may be organised is affected by the number of firms operating in an industry and the degree of differentiation between them. Where an industry is dominated by a small number of large firms with similar interests, certification is easiest to organise. Where an industry is made of a great many actors of different sizes and perspectives, enrolling all of these actors within a certification institution will be especially difficult.

Regulation and Legitimacy in Certification

The proponents of a prospective legal regime aspire to mobilise actors into three overlapping groups: those who participate in the production of legal decisions, those who are regulated, and those who constitute the desired audiences for legitimation. The successful construction of a particular legal regime involves surmounting the challenges presented by these three mobilisations. Those actors needed to participate in decision-making must be persuaded to take on their assigned roles, the targets of regulation must be influenced to the extent desired, and legitimacy must be produced within the desired audiences. The success of a legal regime is therefore to be measured on two scales, first according to its success in completing these enrolments and, secondly, the degree to which these enrolments (which may be weak or strong) favour the interests and projects pursued by one group of actors or another.

The efforts of industry actors and their critics to enrol one another in a desired set of legal relations are complicated by a fundamental difference in the objectives of these two broad groups. Civil society organisations are primarily looking for ways to overcome the regulatory problems they detect

[34] Garcia-Johnson *et al*, n 8 above, at 1.
[35] Sasser, n 24 above.
[36] Garcia-Johnson *et al*, n 8 above.

in their areas of concern. Private enterprises on the other hand are primarily looking for ways to deal with the legitimation challenges that have been presented to them. As we have seen in Chapter 1, regulation and legitimation have an ambiguous relationship in legal ordering. While it has been argued that success in legitimation is to some extent dependent upon effective compliance with regulatory norms, it is clear that depending upon the circumstances, different legal arrangements can have variable regulatory and legitimation effects.[37]

In one of the very few empirical studies conducted of certification institution performance, King and Lenox found no evidence to show that the Responsible Care programme of the US Chemical Manufacturers' Association had positively affected the rate of environmental improvement of its members.[38] Indeed, over a period in which the industry as a whole in the US made significant strides in environmental management, members of Responsible Care improved at a slower rate than non-members.[39] Responsible Care is a second-party, management process-based certification institution that allows firms to set their own benchmarks for improving environmental performance. To promote compliance, the regime relies chiefly upon creating opportunities for informal pressure and learning among members. However, these mechanisms are not backed by credible sanctions—in practice, certification is not withdrawn from industry laggards. The study results suggest that these dialogic mechanisms alone have failed to make a difference and that Responsible Care has helped to shield poor performers within the industry.

Although the study suggests that Responsible Care has had negligible or negative regulatory effects, the regime has apparently performed more successfully in the field of legitimation. Despite the failure to deal with the problem of free riders on the part of Responsible Care, membership of the institution is favourably looked upon by some environmental ratings organisations as evidence of good intentions.[40] King and Lenox emphasise that certification institutions such as Responsible Care may fail to protect the physical commons (clean air, water, healthy ecosystems) that is the alleged concern of collective action, yet nevertheless succeed in shoring up the vital reputational commons that is relied upon by industry actors. Such institutions will still be useful to industry if they address public perception of a problem rather than the problem itself. This is the danger feared by transnational advocates: that certification institutions will help to legitimate

[37] EP Thompson, *Whigs and Hunters* (New York, Pantheon Books, 1975).

[38] Responsible Care is a second party certification institution which lacks effective sanctioning mechanisms. King and Lenox note that the programme is evolving due to criticism and is moving towards a system of independent third-party verification: King and Lenox, n 5 above, at 714.

[39] Ibid, at 709.

[40] Ibid, at 711.

corporate entitlements while resulting in weak regulation. As we have seen in Chapter 1, legitimacy and regulation are ambiguously interdependent products of legal processes. Both depend on the nature of communicative processes (between law-makers, law-takers, and other relevant audiences) and vitally upon existing ideas of legitimacy.

The Global Stakes Involved in Certification: the Globalisation of Legal Models

The globalisation of legal models is a widespread phenomenon in which actors in one jurisdiction are likely to approach a new problem by copying a legal regime already adopted in another jurisdiction.[41] If copied sufficiently, a particular legal model can acquire momentum until it becomes a near universal standard. The spread of environmental assessment discussed in Chapter 2 conforms to this pattern. Accordingly, firms have reason to fear the dissemination of certification institutions that they view as undesirable. If these institutions gain sufficient numbers of adherents, they may in the future become unstoppable. Particularly in a novel area of regulation, the model established by a certification institution can have an important agenda-setting effect and potentially affect the future shape of both public and private law-making.[42] Accordingly, just as certification institutions are often adopted in order to forestall undesirable government regulation, in certain areas they are also being adopted strategically with a view to countering the spread of undesirable alternative institutions.

As a result, competing certification initiatives have been launched in various areas in a battle to define the dominant regulatory model. For example, ISO 14000, the environmental management system standard propounded by the International Standards Organisation, was created in part as a response to the potential diffusion of the model represented by the European Union's Eco-Management and Audit Scheme (EMAS). In process and content, EMAS is significantly more rigorous than ISO 14000.[43] In the forestry sector, at least 23 different certification institutions are currently vying for adherents. All of them emerged after the development of the Forest Stewardship Council (FSC) certification institution by a coalition of environmental NGOs in 1993. Many rival institutions such as the American Forest and Paper Association's Sustainable Forestry Initiative (SFI), launched in

[41] J Braithwaite and P Drahos, *Global Business Regulation* (Cambridge, Cambridge University Press, 2000).
[42] Braithwaite and Drahos, n 41 above, at 582.
[43] Garcia-Johnson, n 9 above, at 5.

1994, adopt a management systems approach to regulation rather than the FSC's performance standards approach, thereby catering to an industry preference for flexibility.[44]

TRANSNATIONAL LAW-MAKING AND MINING AND COMMUNITY CONFLICTS

The remainder of this chapter will examine how and where transnational legal regimes have emerged with regard to corporate and community conflicts in the transnational mining sector. The mining industry has to date been unable to mobilise a sufficient consensus among its ranks to establish a rigorous industry-wide regime relating to project-affected communities. The issue is controversial not only between firms but within them, and there is little agreement on what substantive and procedural commitments would constitute appropriate sacrifices capable of solving the industry's problems. Instead, many individual firms have adopted a self-regulatory model that appears to have relatively weak regulation and legitimation effects.

The design and operation of a legal regime for regulating the local impacts of large projects that is capable of commanding degrees of respect and legitimacy among a relatively widespread audience is a Herculean task. However, this is what has taken place within the World Bank. The third remaining section of the chapter concerns the story of these processes of regime-formation that have taken place among the agencies of the World Bank Group. The key to the Bank's successes in forming a regime capable of achieving certain strategic ends appears to have been the Bank's engagement with its critics. Although the Bank initially sought to make its rules and policies an internal matter, it has not been able to maintain this position. Instead, the shape and content of the Bank's regimes have been inexorably influenced by sustained engagement with the lobbying efforts and campaigns of advocacy coalitions. As the Bank has been required to respond to demands for greater openness and transparency, this engagement has become progressively institutionalised. This has taken place to the point where certain longstanding Bank critics act as 'regime insiders' who serve important functions within the regime, including representing claimant communities and engaging in dialogue over policy reforms. These changes at the Bank appear to have been key to the survival of its involvement in project finance. Developed over a period of 20 years, the Bank's regimes have become an important model in the field of project finance and development. The chapter concludes with a discussion of why the World Bank has served as a strategic arena within which this development has taken place.

CERTIFICATION AND THE MINING INDUSTRY

Industry Perspectives: Globalising Opportunities and Threats

The early 1990s inaugurated a new era for the transnational mining industry. The liberalising reforms that took place in country after country provided companies with new access to large territories that had long been off-limits to investors.[45] Furthermore, the effect of this access was magnified by technological change that permitted exploration and development in far more remote regions than had previously been possible. In the words of one executive, the new availability of potential mining sites was viewed as a 'once-for-all opportunity for mining companies that they could not afford to pass up'.[46] Mineral exploration soared in the 1990s, sustained by high metals prices until 1997, most significantly in Latin America and the countries of the Pacific Rim.[47] Remote regions around the globe were scoured by junior exploration companies, state mineral assets were bought up in competitive auctions, and new mining projects began to be developed wherever rich deposits, market calculations and risk assessments yielded positive results.

The period since the early 1990s has also been marked by a dramatic series of accidents and local conflicts that have badly tarnished the image of the mining industry. As discussed in Chapter 2, the militancy of local communities in many parts of the world is on the rise. Typically poor, indigenous, and marginalised, community members are usually excluded from any property right in the great wealth being drawn from their lands, yet they are nevertheless subject to its destructive economic, cultural and environmental impacts.[48] Conflicts surrounding mining development have resulted in protests, violence, human rights abuses and rebellion.[49] In perhaps the most

[44] Sasser, n 24 above. For a discussion of FSC competitors see Cashore *et al*, n 6 above, at 15–19.

[45] J Otto and J Cordes, *The Regulation of Mineral Enterprises: A Global Perspective on Economics, Law and Policy* (Westminster, Colo, Rocky Mountain Mineral Law Foundation. 2002) at 1.50–1.

[46] D Humphreys, 'Sustainable Development: Can the Mining Industry Afford it?' (2001) 27 *Resources Policy* 1 at 5.

[47] Natural Resources Canada, *Overview of Trends in Canadian Mineral Exploration* (Ottawa, Natural Resources Canada, 1998).

[48] M MacFarlane, 'Mining and Social Impacts and their Assessment', MERN Working Paper No 134 (Bath, MERN, 1998) and V Weitzner, *Cutting-Edge Policies on Indigenous Peoples and Mining: Key Lessons for the World Summit and Beyond* (Ottawa, North-South Institute, 2002).

[49] See, eg, CONACAMI, *El Rostro de la Minería en las Comunidades del Perú* (Lima, CONACAMI, 2000), G Evans, J Goodman and N Lansbury (eds), *Moving Mountains: Communities Confront Mining and Globalisation* (Otford, Kuala Lumpur and Dili, Otford Press, 2001), G McMahon (ed), *Mining and the Community: Results of the Quito Conference* (Washington, DC, World Bank, 1998), I Macdonald and B Ross, *Mining Ombudsman Annual Report 2001–2002* (Victoria, Oxfam Community Aid Abroad, 2002), Oxfam America, *The Promise of Gold: Tambogrande, Peru* (Boston, Mass, Oxfam America, 2004), E Press, 'Freeport-McMoRan at Home & Abroad', *The Nation*, 31 July 1995, 125, and 'Peru protests

notorious case, rebels on the island of Bougainville in Papua New Guinea, incited by the environmental damage and social chaos caused to communities by the giant Panguna mine, demanded and eventually forced its closure in 1989.[50] Since then the area has been mired in separatist conflict.[51] The 1990s also saw a series of very serious environmental accidents resulting from mining operations. These include cyanide and tailings spills at Cambior's Omai gold mine in Guyana and the Placer Dome Marcopper project in the Philippines.[52]

In addition, the 1990s witnessed a significant upsurge in environmental and social activism directed against the mining industry. Over this period a number of large NGOs, including Oxfam and Friends of the Earth International, dedicated resources to campaigns targeting the mining industry;[53] smaller NGOs in the North and South have begun to focus much or all of their activities on mining and community issues;[54] labour unions have increased their networking to promote global agreements with mining transnationals;[55] major foundations, including the Ford Foundation, have become involved in supporting advocacy networks for mining-affected communities; and NGOs, grassroots community organisations and other civil society actors have greatly intensified their networking capacities and initiatives.[56] Mining-related transnational advocacy networks have also shown a degree of innovation in their campaigning activities, including the use of transnational

halt Yanacocha gold search at Quilish', *Reuters*, 6 September 2004, available at http://yahoo.reuters.com/financeQuoteCompanyNewsArticle.jhtml?duid=mtfh01906_2004–09–06_22-02–15_n06536547_newsml.

[50] C Filer, 'The Bougainville Rebellion, The Mining Industry and the Process of Social Disintegration in Papua New Guinea' (1990) 13 *Canberra Anthropology* 1.

[51] S Dinnen, 'Militaristic Solutions in a Weak State: Internal Security, Private Contractors, and Political Leadership in Papua New Guinea' (1999) 11 *The Contemporary Pacific* 279. In the year of its closure, the Panguna mine (owned by BHP, Rio Tinto, and the PNG government) had a market capitalisation of US$1.5 billion and provided the PNG government with 17% of its revenue. Filer, n 50 above, D Humphreys, 'A Business Perspective on Community Relations in Mining' (2000) 26 *Resources Policy* 127 at 128.

[52] For an account of several major environmental accidents connected to Canadian mining companies in the 1990s, see the feature produced by CBC's 'The National' called 'The Ugly Canadian', available at www.tv.cbc.ca/national/pgminfo/ugly/.

[53] See FoEI 'Mining Campaign', available at www.foei.org/mining/background.html; Oxfam America 'Oil, Gas, and Mining', available at www.oxfamamerica.org/advocacy/art2605.html; Oxfam Australia/CAA 'The Mining Campaign', available at www.caa.org.au/campaigns/mining/index.html.

[54] See the MiningWatch Canada website at www.miningwatch.ca; the Project Underground website at www.moles.org; 'Environmental Mining Council of British Columbia' www.emcbc.miningwatch.org; 'Mineral Policy Institute' www.mpi.org.au

[55] The International Federation of Chemical, Energy, Mine and General Workers Unions (ICEM), a federation of some 400 trade unions in 108 countries, is involved with negotiating and monitoring global agreements with transnational mining companies. Its activities include the promotion of environmental protection: MMSD, *Breaking New Ground: Mining, Minerals and Sustainable Development* (London, Earthscan, 2002) at 65.

[56] See the Global Mining Campaign website at www.globalminingcampaign.org.

lawsuits and the development of an ombudsman function by Oxfam/ Community Aid Abroad.[57] In addition, these civil society groups are networked with a broader circle of NGO allies working on more general issues of indigenous rights, the environment and human rights.

There is a feeling within the mining industry that it is losing an important battle for public opinion. One senior industry figure argues that mining has fallen 'into increasing public disfavour', that it is seen at best as 'a necessary evil' and as 'incompatible with sustainable development'. He warns further that '[c]urrent perceptions, if left unchecked, will have a continuing adverse effect on the industry'.[58] In the words of another executive, '[i]t is critical to turn things around—to change the rules of the game soon – before mining loses any chance of recovery'.[59] What dangers does the industry face? The chief threat is one of re-regulation: that if the industry is redefined as a public menace to be kept under control, one or more of the entities which currently provide mining enterprises with a favourable context in which to carry on business (host and home governments, commercial lenders, multilateral development banks, export credit agencies, perhaps even customers[60]) may be persuaded to impose new conditions or restrictions on their operations. Individual penalties may be imposed on 'bad players' (environmental liability, regulatory refusals, limited access to new concessions, more difficult access to capital) or regulatory action may be taken against the industry as a whole, causing it to lose its hard-won privileges. Given the developing climate, it is feared by some in the industry that mining is in danger of 'slipping behind . . . in [its] basic right to do business'.[61]

A Snapshot of the Global Mining Industry: Capacity for Self-organisation to Defend a Reputational Commons

Transnational mining enterprises, therefore, are faced with a legitimacy problem. State-managed legal regimes offer these firms the means to acquire offically sanctioned property tenure, regulatory stability and certification of the discharge of environmental and community responsibilities, generally within cost and time parameters viewed as acceptable. However, this does not

[57] Macdonald and Ross, n 49 above.

[58] R Wilson, 'The Global Mining Initiative' (2000) 8:3 *ICME Newsletter.*

[59] PM James, 'The Miner and Sustainable Development' (1999) 51 *Mining Engineering* 89 at 89.

[60] Customers may appear to be one of the least likely drivers of change within the industry; however, some commentators have found reason to suggest otherwise. At least one large copper user is reported to be showing an interest in the conditions in which its product is produced; and increased customer demand for supply reliability (due to the spread of just-in-time warehousing and supply techniques) may create a market advantage to those producers able to limit production delays associated with community conflicts: Humphreys, n 46 above.

[61] James, n 59 above, at 89.

seem to be enough to protect mining enterprises from their critics. The weakness of many states has limited their capacity to serve as unquestioned sources of legitimacy for the transnational private sector.[62] In addition, it appears that the reputation of the mining industry is collective to a significant degree. Thus, stories concerning local conflicts or environmental disasters tend to discredit the industry as a whole, not simply the company involved. How effectively is the industry able to organise itself to address this problem? The following discussion will show that the industry faces considerable challenges in this regard. The global mining sector is both diverse and fragmented. It is divided into groups of large, medium, and small players whose interests and perspectives with regard to mining and community issues differ significantly.

Large transnational enterprises, sometimes referred to as seniors, represent some 30 to 40 companies worldwide, including a handful of global giants that dwarf the others in this category (these include BHP Billiton, Rio Tinto, and Anglo American).[63] These companies have a diversity of mining operations around the world, although some maintain a strategic focus upon a particular commodity. Consolidation among seniors has taken place in recent years with a wave of mergers and acquisitions in the late 1990s and early 2000s. These mergers have been prompted by a range of motives, including a response to slow growth in the industry, the desire to diversify risks geographically, and the need to maintain stock market visibility for large institutional investors.[64] Consolidation also appears to be linked to the expectation that increasing social and environmental expectations imposed on the industry will be better absorbed by larger, well-financed firms able to establish a proven track record.[65] Senior mining companies are high-profile organisations that are concerned with protecting their reputational capital.[66] Given their size and visibility within the industry, seniors often have been the principal targets of activist campaigns. Accordingly, they tend to be the strongest supporters of collective forms of self-regulation within the global industry.

Middle-sized players in the sector include both intermediate transnational enterprises and nationally based producers. A typical intermediate firm operates several small to medium-sized mines, possibly in a number of

[62] G Holden, 'Address', Paper presented to Resourcing the Future: The Global Mining Initiative Conference, Toronto, Canada, 14 May 2002.

[63] A MacDonald, *Industry in Transition: A Profile of the North American Mining Sector*, Report prepared for MMSD North America (Winnipeg, IISD, 2002) at 41.

[64] With regard to stock market visibility, Humphreys notes that '[m]any brokers find it hard to justify maintaining research into companies with a market capitalisation of less that $5 billion'. Only 13 mining companies met this threshold in 2002: D Humphreys, 'Corporate Strategies in the Global Mining Industry' (2002) 12:9 *CEPMLP Internet Journal*, available at http://www.dundee.ac.uk/ceplmp/journal

[65] Humphreys, n 46 above.

[66] MMSD, n 55 above, at 62.

countries.[67] Also included here are so-called 'expansionary juniors', companies that are in the process of moving from the small to the middle-sized category. These firms have managed to discover one or two valuable deposits and to bring them into production without diluting their control of the projects.[68] Intermediate firms trade on their reputations to a much lesser degree than seniors. Since they are smaller operations, they are individually less likely to be targeted by industry critics.

The small end of the scale is occupied by exploration juniors and small nationally based producers. Small domestic producers are often family owned enterprises found throughout Latin America, Asia and parts of Europe.[69] Exploration juniors are in the business of finding new ore bodies and selling them to larger companies. Most junior firms are run by a small group of experienced geologists or financiers, who often forsake a guaranteed salary in exchange for equity positions in the firm.[70] Canada is a major centre for junior exploration and is home to over 1,000 of these companies, many of which are involved in Latin America.[71] This concentration of exploration companies is due to both the presence of experienced technicians within the country and the global importance of Canadian stock exchanges as vehicles for raising mining capital.[72] Given their small size and their venture capital outlook, a majority of junior companies regard sustainable development as 'a big company game' that has little relevance to them.[73]

Despite their differences, junior and senior companies are highly interdependent, carrying out a division of labour from which both profit. While seniors and intermediates handle production and longer-range planning, juniors are the conduit through which venture capital is translated into valuable new mining properties. Within the mining industry as a whole, juniors are responsible for developing the largest number of viable projects to the pre-feasibility level. In addition, juniors also discover the majority of 'elephant' finds: deposits whose geological characteristics make them unusually valuable. Thus the global giant firms, many with head offices in London, maintain exploration and development offices in Vancouver and/or Toronto in order to interface with the large number of juniors in each city.[74]

Thus while reputation in the global industry is to a significant degree collective, the incentives created for a firm by reputational issues differ depending upon the firm's size. Seniors have the highest profile of industry

[67] Ibid, at 62.
[68] MacDonald, n 63 above, at 34.
[69] MMSD, n 55 above, at 63.
[70] MacDonald, n 63 above, at 35.
[71] MMSD, n 55 above, at 63.
[72] MacDonald, n 63 above, at 27–8.
[73] MMSD, n 55 above, at 63.
[74] MacDonald, n 63 above, at 31, 35, 39–42.

actors, and they tend to run the largest, most expensive and most vulnerable mines that will stay in operation for the longest time. These firms are investing in dealing with collective reputational problems, as we shall see below. In contrast, middle-sized firms often lack the capital and the commitment to make similar investments. They make smaller targets, however, due to the fact that they run fewer operations that are more modestly sized and have shorter timelines from exploration to closure. In addition, they are simply less well-known and tracked to a lesser extent by NGOs. As a result, these firms are often prepared to assume greater risks in order to improve their economic performance.[75] Exploration juniors are motivated by an even more profound culture of corporate risk-taking, which is largely a product of the place they occupy in the production chain. Fuelled solely by venture capital, juniors must carefully control expenditures of both time and money in order to maximise the chances of financial success. Juniors are generally unknown to the outside world and have adopted a strategy of 'flying under the radar' in an attempt to escape notice.[76]

Thus the interest of seniors in developing collective solutions to the industry's reputational problems is undercut by the willingness of many smaller firms to tolerate a certain level of risk while using strategies to avoid being individually targeted. This preference is explained in part by the relatively low profitability of the mining sector in general and by the culture of risk-taking within the industry. [77] It is further reinforced by a certain amount of industry hostility towards social and environmental criticism. As MacDonald observes, actors in the mining sector have often adopted one of two positions with regard to criticisms of the industry's social and environmental performance: either 'offended denial or outright avoidance of issues'. When discussing sustainable development and community issues, industry members often come off being 'extremely defensive', adopting an 'us vs. them' attitude.[78] Echoing the somewhat bizarre industry myth of powerful

[75] MMSD, n 55 above, at 63.

[76] MacDonald, n 63 above, at 102–6.

[77] P Crowson, 'Mining Industry Profitability?' (2001) 27 *Resources Policy* 33. As Humphreys observes:

> 'The history of the mining industry is a history of chronic over-investment, a fact which it is reasonable to assume has played a central part in the industry's poor profitability. The past few years have witnessed an explicit acknowledgement amongst many mining companies that their past investment behaviour has been self-destructive and that to provide for better conditions in the future they will need to be more realistic in their market assumptions, more rigorous in their investment appraisal, and more systematic in their assessment of the relevant risks.'

Humphreys, n 46 above.

[78] MacDonald further characterises this attitude of the mining industry: '[w]hen it is confronted with its environmental or social record, it replies en masse with an analogy: "*Try driving to work without minerals and metals*" (the less charitable and more confrontational saying refers to an iteration of "*Let them freeze in the dark*")': MacDonald, n 63 above, at 101.

and wealthy NGOs, MacDonald argues that industry actors assume an oppositional stance 'because they are frustrated that they have little effective voice against well funded, cohesively organised and "plugged in" NGOs'.[79] Indeed, the ostensible conversion of the global giants and of many senior mining companies onto the path of sustainable development should not be allowed to disguise the existence of significant scepticism among the rank and file within these organisations. Particularly with regard to social and indigenous issues, a very wide gulf separates many industry actors from their critics, leading to emotional responses that cloud the possibility of useful dialogue.

The strategies adopted by many middle-sized and junior firms do not help to deter the collective threat of re-regulation that is faced by the industry as a whole. However, it appears that at present, significant segments of the global mining sector prefer to maintain this somewhat nebulous level of collective risk rather than embark on the costly and uncertain project of addressing it. Furthermore, it shows that transnational advocacy efforts have been unable to develop the kind of leverage over the industry to create relatively certain, demonstrable costs arising from non-compliance with defined social and environmental standards. Unlike the situation in the forestry sector, consumer power has not been harnessed in such a way as to present mining firms with unavoidable costs in the market place. Instead, the 'business case for sustainable development' in the mining industry is presented in terms of risk management. The difficulty of assessing levels of risk is compounded by the absence of research that shows that adoption of corporate 'best practices' pays quantifiable dividends.[80] Thus industry actors promoting collective solutions to reputational problems have not been able to define a mechanism for persuading the industry in general to agree to internalise certain risks on a collective basis.

Thus without a clear industry consensus on the nature of the problem and on the proven effectiveness of measures to address it, industry actors have shown little appetite for reponding to challenges to their legitimacy in ways which entail significant regulatory costs. Instead, they generally prefer initiatives which propose to legitimate their behaviour while maximising their own freedom of action. This preference increases progressively as one descends the industry pyramid, from the giants at the top to the juniors at the bottom. Indeed nearly all of the activity around certification over the last 15 years has come from senior firms, and especially the global giants. Furthermore, even these largest firms have been highly resistant to assuming community-related

[79] Ibid, at 110–1.

[80] Indeed, MacDonald notes 'the inability of the industry to prove to its members, in terms they understand, that sustainable development is not a "soft" issue, nor a net cost to industry, but rather research and development for tomorrow's successful mining firm': ibid, at 110.

reponsibilities the definition and implementation of which are not under their exclusive control.

During the 1990s, most senior mining companies began to publish corporate responsibility policies or codes of conduct relating to environmental, health and safety, and community issues. With regard to community issues, these policies and codes have typically consisted of several broadly worded principles expressing 'good neighbour' sentiments, and avoid the language of rights and responsibilities. These policies fall into both stronger and weaker varieties. Weaker policies make very general pledges, such as the need to 'respect local interests, cultures and customs'.[81] Stronger policies offer more active commitments to community engagement, such as a recognition of the need for local consultation and contributions to community development.[82] By the late 1990s, senior firms increasingly began publishing special annual reports dealing with corporate social and environmental performance.[83] In recent years, some firms have commissioned large transnational accounting firms to verify the accuracy of their reports.[84]

Broader Industry Initiatives: the Australian Minerals Code

In 1996, the Minerals Council of Australia (MCA), the national industry association of that country, launched the Australian Minerals Industry Code for Environmental Management. Substantially revised in 1999, the Code provides a principles-based framework with regard to environmental and community-related matters, allowing firms to implement its principles in the way that they feel is appropriate.[85] Although signatories commit themselves to 'continual improvement', this provides no guarantee of the quality of performance. Critics note that the Code does not enable observers to distinguish 'between good, bad, and indifferent performers'.[86] In 2002, adherence to the Code was made mandatory for members of the MCA, and the Code's application was extended to cover the international operations of signatories.[87] Compliance assessment under the Code is carried out by the firm itself, and these self-assessments are reviewed by an accredited auditor at least

[81] Billiton, *Statement of Business Principles* (London, Billiton, 2000).

[82] Eg, Rio Algom, 1999 Environment, Health, Safety & Community Report (Toronto, Rio Algom, 2000), WMC Limited, Sustainability Report (Victoria, WMC Limited, 2001).

[83] Eg, Ango American, the South African mining giant, published its first *Safety, Health and Environment Report* in 2001 (London, Anglo American, 2001), while the Canadian senior firm, Rio Algom (now part of the giant BHP-Billiton), began annual 'environmental, health, safety and community' reporting in 1995 (Rio Algom, n 82 above).

[84] Eg, Anglo American, n 83 above, WMC, n 82 above.

[85] Greene, n 11 above, at 10.

[86] M Rae and A Rouse, *Mining Certification Evaluation Project: Independent Certification of Environmental and Social Performance in the Mining Sector* (Melbourne, WWF-Australia, 2001) at 10.

[87] Greene, n 11 above, at 11.

once every three years. The MCA Code appears to have been successful in two respects. First, its adoption in Australia is widespread, such that the Code covers approximately 90 per cent of Australian mineral production. Secondly, the Code is credited with driving public environmental reporting by Australian mining companies.[88] However, neither of these factors offers guarantees of actual improvements in corporate performance. Critics remain sceptical of the Code's principles-based regulatory framework and the absence of third party verification.[89]

The Global Mining Initiative and the ICMM Sustainable Development Framework

Beginning in 1998, nine of the world's largest mining companies operating within the World Business Council for Sustainable Development (WBCSD) elected to collaborate in order to develop a joint agenda for addressing the industry's reputational, environmental and social concerns under the rubric of sustainable development. Together they formed a group called the 'Global Mining Initiative'. By pooling their influence and resources, these firms have sought to exercise an agenda-setting influence upon both the mining industry and its critics.

In 1999, the International Council on Metals and the Environment (ICME), a Toronto-based transnational industry association supported by many GMI members, developed an Environmental Charter, consisting of 32 broad management principles relating to environmental management, product stewardship, community responsibility, ethical business practices, and public reporting.[90] However, member companies were not required to adhere to the Charter and it did not provide for verification or public reporting. Furthermore, ICME's membership was small—consisting of fewer than 30 firms, most of them seniors—and only a small portion of the global

[88] Ibid, at 11–12.
[89] Ibid, Rae and Rouse, n 86 above.
[90] The four community responsibility principles included commitments to:

— 'Respect the cultures, customs and values of individuals and groups whose livelihoods may be affected by exploration, mining and processing.
— Recognize local communities as stakeholders and engage with them in an effective process of consultation and communication.
— Contribute to and participate in the social, economic and institutional development of the communities where operations are located and mitigate adverse effects in these communities to the greatest practical extent.
— Respect the authority of national and regional governments and integrate activities with their development objectives.'

ICME, Sustainable Develoment Charter (Toronto, ICME, 1999).

industry actively supported the Charter.[91] In its form at that time, ICME was not capable of exercising a strong influence over the industry.

In 2000, the GMI began its major initiative which would shake up the entire industry and result in the transformation and relocation of ICME. GMI took the first step in this process when it commissioned the International Institute for Environment and Development (IIED), a London-based environmental think-tank, to co-ordinate a two-year global research and consultation process entitled the Mining, Minerals and Sustainable Development (MMSD) project. The purpose of the project was '[t]o assess the global mining and minerals sector in terms of the transition to sustainable development'.[92] Multi-country stakeholder consultations were subsequently conducted in four continents and a large body of research was commissioned on a wide range of topics. IIED's work was conducted at arm's length from its corporate sponsors and the independence of the process was overseen by a multi-stakeholder 'Assurance Group'.[93] The MMSD project culminated in the publication of a 400-page report. In chapters addressing subjects such as land management, local communities, economic development, environmental issues and sectoral governance, the report identifies and discusses the key issues, presenting both conflicting and consensus views. In doing so, it provides a particular snapshot of contemporary debates without attempting to settle them. The report concludes with a suggested agenda of actions and processes designed to move actors forward. The recommendations for industry emphasise the need for creating a common sustainable development policy that can serve as the basis for internal management systems.[94]

After the completion of the MMSD report, the GMI held a multi-stakeholder conference in Toronto which once again addressed the issues.[95] This led to the adoption of the 'Toronto Declaration' by the International Council on Mining and Metals (ICMM), the newly formed successor organisation to the ICME, now based in London and charged with carrying forward the GMI agenda.[96] The Declaration includes pledges to expand the ICMM sustainable development charter to include appropriate recommendations from the MMSD Report,[97] to engage in constructive dialogue with key constituencies,

[91] Greene, n 11 above, at 9.
[92] MMSD, n 55 above, at 5.
[93] Ibid, at 8.
[94] Ibid, at 393–4.
[95] Later in 2003, ICMM used elements of the MMSD report as the basis for its submissions to the Rio +10 conference concerning the mining industry's role in the transition to sustainable development.
[96] ICMM, *Sustainable Development Framework* (London, ICMM, 2003), available at: www.icmm.com/.
[97] In Mar 2003, ICMM issued 10 new principles for comment in its draft Sustainable Development Charter.

and to '[d]evelop best-practice protocols that encourage third-party verification and public reporting'.[98]

In 2003, the ICMM substantially revised ICME's Sustainable Development Charter, and re-issued it as the Sustainable Development Framework. The Framework is composed of 10 general principles relating to various aspects of sustainable development, including environmental management, human rights, health and safety, community development, and product stewardship.[99] Membership of ICMM entails a commitment to measure corporate performance against the principles of the Framework. The final principle requires implementation of independently verified reporting arrangements. In addition, ICMM is currently involved in developing protocols for sustainability reporting in collaboration with the Global Reporting Initiative, an organisation sponsored by the United Nations Environmental Programme (UNEP). This is an effort to design reporting standards appropriate for mining operations.[100]

GMI, MMSD and ICMM have each had significant difficulties persuading both industry actors and critics to participate in their initiatives in the manner desired. Although both the MMSD global consultation and the closing conference were meant to involve both NGOs and grassroots organisations, these initiatives stimulated significant resistance among these groups. Civil society organisations that had been targeting the industry were highly suspicious of the MMSD and saw it as an opportunity for corporate interests to claim NGO and community endorsement of their own agenda. Many civil society organisations declined to participate and denounced the process.[101] During the MMSD process, a coalition of NGOs and grassroots organisations formed an alternative, community-oriented association, called the Global Mining Campaign,[102] designed to increase networking among advocacy and community groups. Dissent within the mining industry has been more difficult to track; however, ICMM's small membership (ICMM counts only

[98] ICMM, *Toronto Declaration* (London, ICMM, 2002), available at: www.icmm.com/.

[99] The principles that apply to community relations include (ICMM 2003):

— 'Uphold fundamental human rights and respect cultures, customs and values in dealings with employees and others who are affected by our activities.
— Contribute to the social, economic and institutional development of the communities in which we operate.
— Implement effective and transparent engagement, communication and independently verified reporting arrangements with our stakeholders.'

The text of the entire ICMM *Sustainable Development Framework* is available at www.icmm.com/.

[100] For a discussion of sustainability reporting see Global Reporting Initiative, *The GRI: An Overview* (Amsterdam, Global Reporting Initiative, 2002), available at www.globalreporting.org..

[101] D Kennedy and V Tauli Corpuz, 'Native Reluctance to Join Mining Industry Initiatives: an Activist Perspective' (2001) 25.1 *Cultural Survival Quarterly* 48.

[102] See the Global Mining Campaign website at www.globalminingcampaign.org.

15 mining enterprises, all of them senior firms, as members)[103] suggests that buy-in from the industry in general has been limited. The world's largest copper producer, the Chilean state-owned firm CODELCO, has withdrawn from ICMM apparently due to its dissatisfaction with the organisation's continuing efforts. These various processes remain in motion, and their eventual success or failure at regime formation has yet to be seen.

Conclusions Regarding Mining Industry Certification Efforts

Both individually and collectively, mining enterprises face significant risks arising from community conflicts. However, the efforts of industry actors to address this problem through certification have produced limited results thus far. Organising a collective response in a fragmented and highly differentiated industry has proved to be very difficult. Industry actors are unable to reach consensus regarding the wisdom, effectiveness and economic feasibility of designing legal responses to the problem. A major factor in this has been the failure of industry critics and transnational advocacy networks to translate the generalised risk they are able to generate for firms into clear and reliable leverage over industry entitlements. So long as the risks engendered by critics are relatively amorphous and hard to quantify, a significant part of the industry appears unwilling to take on the challenge and considerable expense of designing legal institutions that are capable of generating relatively widespread legitimacy.[104]

The certification models that are being produced as a result of the efforts of large firms are careful not to use the language of rights or obligations. Instead, these actors have launched principles-based regimes that leave questions of interpretation and implementation to the firm's discretion. The form of legitimacy being claimed by such efforts is based upon one of the notions of 'right process' set out in Chapter 1: the autonomy of private decision-making. Despite rhetorical acceptance that the industry needs to 'do more' to gain the acceptance of society in the new global political climate, the position demonstrated by existing corporate-driven certification institutions is that the questions of 'what' and 'how' ought ultimately to be decided by industry. In contrast, the claims often asserted by critics and local community actors imply that the power exercised by large mining enterprises over local

[103] See 'About ICMM. Council Members', available at www.icmm.com/html/about_council.php.

[104] In this regard, mining enterprises are probably strongly influenced by one of the concepts of 'right process' identified in Ch 1: the autonomy of private decision-making. This is overwhelmingly the dominant idea of legitimate ordering within the mining industry: that firms should be free to govern their own activities as they see fit, within the boundaries of certain limited civic responsibilities. As MacDonald observes, industry actors respond with hostility to the idea that the industry should shoulder additional social and environmental responsibilities: MacDonald, n 63 above, at 110–1. Mining enterprises have no desire to take on the social functions of government or to have their discretion constrained by obligations to local actors.

environments causes them to attract both special responsibilities and special constraints on their decision-making.

TRANSNATIONAL LAW-MAKING AT THE WORLD BANK

The World Bank as a Site of Global Norm Production

The World Bank, over the last 15 years, has stood at the centre of the transnational political and legal struggles surrounding economic globalisation. Due to its enthusiastic championing of the Washington Consensus, its aggressive enforcement of programmes for structural adjustment in the Global South, and its support for large-scale infrastructure and energy projects that have proved to be hugely destructive at a local level, the World Bank has been one of the global institutions most associated with furthering a neoliberal globalisation agenda. It has also been a major target of the anti-globalisation backlash, serving as a lightning rod for activism and attracting sustained criticism from a wide range of sources.[105] The following account will explain how the World Bank over this period came to serve first as a strategic arena for conflicts surrounding large-scale development projects in the Global South, and subsequently as a laboratory for developing relatively complex legal approaches to these issues.

The discussion will focus on the following points: first, how sustained critique over time allowed a network of outside actors to develop and exploit periodic opportunities in which substantial leverage could be exercised over the Bank; secondly, how these dynamics and the particular characteristics of the Bank allowed an internal group of 'insider reformers' to gain influence within Bank agencies; and thirdly, how the continued development of law-making within the Bank has been propelled by the reciprocal interaction between outside pressure and the efforts of insider reformers. These mutually reinforcing dynamics have created a situation in which relatively intense engagement has been promoted among insiders, outsiders, reformers and conservatives. Critics and Bank actors have enrolled one another into regulatory communities which, despite differences in goals and perspectives, have developed shared vocabularies and understandings.

[105] JA Fox and LD Brown (eds), *The Struggle for Accountability, The World Bank, NGOs and Grassroots Movements* (Cambridge, Mass, MIT Press, 1998), S Ostry, 'The WTO after Seattle: Something's Happening Here, What it is ain't Exactly Clear', Paper presented at American Economic Association, 2001, JE Stiglitz, 'Democratizing the International Monetary Fund and the World Bank: Governance and Accountability' (2003) 16 Governance 111.

How Leverage was Developed to Move the Bank

Outside pressure on the Bank has taken many forms. Key, however, have been the repeated campaigns waged since the early 1980s by transnational advocacy networks with regard to environmentally and socially damaging World Bank-funded projects. These campaigns have relied on classic transnational advocacy strategies to develop leverage, linking Washington-based NGOs with grassroots protest groups in project-impacted countries and with allies in other donor countries.[106] Thus advocacy networks have been able to mobilise simultaneously credible information regarding project impacts, local legitimacy, pressure from sympathetic donor governments, and the growing political knowledge of the World Bank being developed by Washington-based NGOs.[107] Furthermore, the critique fielded by transnational advocates attacked the core of the Bank's understanding of its mission and its model of development. By showing that its projects could produce disastrous effects for the lives of hundreds of thousands of poor people, critics were able to call into question the Bank's capacity to function as a development institution. The conventional development rationale applied by the Bank at that time—that large projects contribute to national infrastructure, GDP, and therefore to development—did not constitute a credible response. Bank management was unable to argue that the direct victims of its projects were not its concern.

However, Washington-based Bank critics discovered true leverage when they found they could mobilise these persuasive resources against a key institutional pressure point: donor funding. Contributions to the International Development Association (IDA), the World Bank's low-cost lending arm to very poor countries, require approval from donor governments every three years, thereby creating a regular cycle of lobbying opportunities for NGO campaigns. Gaining in knowledge and experience, NGOs were able to pose a threat to US foreign aid appropriations for the World Bank through the skilful use of Washington politics.[108]

Fox and Brown argue that these tactics empowered insider reformers to propose a new agenda. The concrete threat posed to donor funding 'directly led [the Bank's] management to start listening more closely to a small group of insider environmental professionals that had been quietly developing

[106] Fox and Brown, n 105 above.

[107] The Washington-based NGOs functioned in larger transnational coalitions in which Southern groups provided local project information and legitimacy, while Northern advocacy groups lobbied donor governments to push for reform through their representation on the Bank's board of directors. Fox and Brown note that different members of these coalitions pursued different goals: 'Northern groups tended to be more focused on changing the Bank, whereas Southern groups were often more concerned with creating the political space needed to challenge their own government's development strategies.' ibid, n 105 above, at 6–7.

[108] Ibid, at 5–6.

reform policy proposals'.[109] The agenda proposed by these insider reformers would, over time, result in the development of a complex transnational legal regime for the social mediation of large projects. This regime would include formal rules regarding information disclosure and transparency, the identification, mitigation and compensation of project-related livelihood impacts, and special considerations with regard to indigenous peoples. Furthermore, the legal model produced by these efforts would eventually become a globalising model with the potential to redraw the conventional obligations ascribed to private sector development.

Development of the Safeguard Policy Regime: 1980s to mid-1990s

The progress of reform within the Bank has been slow. In their analysis of reform efforts, Fox and Brown note a strong preference within the Bank for adaptive change over institutional learning.[110] As Haas observes, 'adaptive behaviour is common [in international organisations], whereas true learning is rare. The very nature of institutions is such that the dice are loaded in favor of the less demanding behavior associated with adaptation.'[111] Since the 1980s, reform within the Bank has become an issue of struggle between pro- and anti-reform camps, with outside pressure constituting a key strategic resource for the reformers.[112]

The reform struggles within the Bank have taken place in stages: first focusing upon the adoption and consolidation of policies, and later upon ensuring their implementation through the creation of accountability mechanisms. The policies developed by the World Bank have been strongly influenced by particular criticisms directed against Bank projects by transnational advocacy networks. Repeated criticism of poor environmental performance, disastrous consequences for indigenous peoples, and the impoverishment of hundreds of thousands forcibly displaced by World Bank projects has resulted in policies on Environmental Assessment, Indigenous Peoples and Involuntary Resettlement.[113] When first adopted in the 1980s

[109] Ibid.

[110] Ibid, at 11.

[111] E B Haas, *When Knowledge is Power* (Berkeley, Cal, University of California Press, 1990) at 37, cited in Fox and Brown, n 105 above, at 11.

[112] In reference to the changing rhetoric within the Bank, Stiglitz, a former chief economist at the World Bank, comments '[i]t is not easy for those who entered the Bank when the Washington consensus reigned supreme to buy into the new Bank. They see all the new rhetoric as soft fluff, distracting the Bank from its *core* mission involving tough and often painful decisions': Stiglitz, n 105 above.

[113] Kingsbury notes that the Bank adopted its first policy on indigenous peoples in 1982 'after internal and external condemnation of the disastrous experiences of indigenous groups in Bank-financed projects in the Amazon region': B Kingsbury, 'Operational Policies of International Institutions as Part of the Law-Making Process: The World Bank and Indigenous Peoples' in GS Goodwin-Gill and S Talmon (eds), *The Reality of International Law. Essays in*

these policies were both confidential and discretionary. By the 1990s, however, sustained pressure by outside critics helped to ensure that these policies became public documents with mandatory application. These have become known as the World Bank's 'safeguard policies', mandatory standards applied to all projects receiving assistance from the Bank.[114] Revisions to the safeguard policies have, since 1990, involved public consultation similar to notice and comment procedures required of certain government rule-making agencies.[115]

By the 1990s, transnational advocacy networks had shifted their tactics, and began to target World Bank projects for their failure to comply with the Bank's own policies. The Narmada Dam project in India (also known as the Sardar Sarovar dam) proved to be a watershed case. Intense international campaigning led the Bank's board of directors to commission a high-level independent review of the project. The review panel travelled to India and conducted an intensive first-hand investigation of the project, interviewing staff, national officials and affected populations. In 1992, the review concluded that the Bank's environmental and resettlement policies had been flouted and advised that the Bank 'step back' from the project.[116] The profound crisis that ensued within the Bank provided opportunities for both reformist insiders and external critics. Insiders were able to push for a comprehensive review of resettlement policy implementation in past projects. When complete, the pattern of systemic non-compliance with the resettlement policy revealed by the review would bolster their arguments for reforms.[117] Outsiders, on the other hand, mobilised their leverage over donor government funding to the IDA[118] in order to provoke the creation in 1993

Honour of Ian Brownlie (Oxford, Clarendon Press, 1999) at 324.

Fox and Brown state that the increased influence of reformist insiders resulting from NGO coalition pressure on US foreign aid appropriations for the World Bank resulted in 'the precedent-setting establishment of an environmental assessment policy in 1989 and its subsequent strengthening in 1991': Fox and Brown, n 105 above, at 5–6. Fox remarks that 'Bank social scientists developed the 1980 [Involuntary Resettlement] policy partly in response to the mass resistance to projects that forced evictions in authoritarian Brazil and the Philippines': JA Fox, 'When does reform policy influence practice? Lessons from the Bankwide Resettlement Review' in JA Fox and LD Brown (eds), *The Struggle for Accountability, The World Bank, NGOs and Grassroots Movements* (Cambridge, Mass, MIT Press, 1998) at 308.

[115] For a list of all current IBRD/IDA safeguard policies see 'Safeguard Policies', available at http://wbln0018.worldbank.org/institutional/manuals/opmanual.nsf/.

[115] Kingsbury, n 113 above, at 324–5. Kingsbury notes that 'the Bank system relies on internal staff dynamics, pressure from executive directors, and criticism from bodies ranging from NGOs to the US Congress to maintain and enhance the quality and integrity of policies': ibid, at 332.

[116] Fox and Brown, n 105 above, at 8.

[117] Fox, n 112 above, World Bank, *Resettlement and Development: the Bankwide Review of Projects Involving Involuntary Resettlement, 1986–1993* (Washington, DC, World Bank, 1996).

[118] The International Development Agency—the World Bank's low-cost lending arm to very poor countries.

of the World Bank's Inspection Panel, a quasi-independent appeals mechanism for people affected by Bank-funded projects.[119]

The Inspection Panel is a startling innovation which provides project-affected claimants from borrowing countries with direct recourse against the Bank when harm is caused as a result of non-compliance with safeguard policies.[120] While the Panel operates autonomously of Bank management and with significant public transparency, it lacks the independence of a judicial institution. Approval of the Bank's board of directors must be obtained in order to investigate a claim, and the Panel's decision-making power is limited to that of providing recommendations to the board. Nevertheless, as Fox notes, 'the panel's very existence challenges key assumptions of national sovereignty' by allowing the citizens of borrowing countries to present their claims directly before an international organisation.[121]

However, successes in these areas have been followed by several backlashes.[122] Borrower governments represented on the World Bank's board of directors, led by Brazil and India, have acted to curtail some of the Inspection Panel's powers. Bank management began a process of 'reformatting' safeguard policies, ostensibly to improve their clarity;, however, external watchdogs and insider Bank reformers agree that some important policies have been diluted in this process.[123] Project staff within the Bank have responded to the creation of the Inspection Panel with a strategy (dubbed 'panel proofing' by insiders) to create a paper trail demonstrating

[119] Fox and Brown report that the 1993 establishment of the Inspection Panel was directly negotiated with the US congressional leaders who controlled IDA funding: Fox and Brown, n 105 above, at 8. 'In 1993, during the course of negotiations by donor countries regarding the Tenth Replenishment of the IDA, a process for replenishing IDA funds, the United States linked its willingness to contribute to the IDA with the establishment of an independent inspection function by the Bank': S Schlemmer-Schulte, 'The World Bank Inspection Panel: A Record of the First International Accountability Mechanism and Its Role for Human Rights' (1998) 6:2 *Human Rights Brief*. Fox observes that '[e]ven official Bank discourse acknowledges that the panel was created in direct response to international environmental and human rights campaigns'. He also notes the strategic opportunity for leverage politics available to campaigners at that time since '[n]ot only did Democrats control both the presidency and Congress during a brief 1992–1994 window, but an internationalist reformer—Congressman Barney Frank—controlled a key House banking subcommittee': JA Fox, 'The World Bank Inspection Panel: Lessons from the First Five Years' (2000) 6 *Global Governance* 279.

[120] DL Clark, *A Citizen's Guide to the World Bank Inspection Panel* (Washington, DC, CIEL, 1999).

[121] Fox, n 118 above. An example of a similar, and much more far-reaching, challenge to traditional sovereignty is provided by the investor remedy in ch 11 of NAFTA. This remedy provides foreign investors from NAFTA party states with a direct cause of action for violation of NAFTA obligations to investors against a signatory government to be settled by the unappealable decision of an international arbitral tribunal: see D Schneiderman, 'NAFTA's Takings Rule: American Constitutionalism Comes to Canada' (1996) 46 *University of Toronto Law Journal* 499.

[122] Fox, n 118 above.

[123] Eg, see CIEL, *Comments on Draft OP/BP 4.12: Involuntary Resettlement* (Washington, DC, CIEL, 1999), available at: www.ciel.org.

policy compliance. While this practice can lead to increased compliance in some areas, in others it tends to promote the pro forma fulfillment of administrative requirements rather than attention to on-the-ground results.[124] However, what remains clear is that the safeguard policy regime remains a critical battlefield for players inside and outside the Bank in their struggles to shape the emerging rules of globalising economic activity.

The Spread of the Safeguard Policy Regime to Private Sector Projects: mid-1990s to the Present

Although the World Bank is often perceived as a single monolithic entity, it is in fact part of a group of related organisations with different missions. Our narrative hitherto has dealt with the activities of two organisations: the International Bank of Reconstruction and Development (IBRD) and the International Development Association (IDA). This pair of organisations, which are commonly referred to collectively as the World Bank, engage in policy and public sector development activities with governments in the Global South. They provide advice and capital for public sector infrastructure projects and structural adjustment. However, the World Bank Group also includes two institutions that deal exclusively with the private sector: these are the International Finance Corporation (IFC) and the Multilateral Guarantee Agency (MIGA).[125] Created in 1957 and 1988 respectively, these latter two agencies are mandated to pursue poverty reduction in the developing world through the promotion of private sector development. IFC acts as a banker and investor, providing loans and equity investments to private sector projects.[126] MIGA is a loan guarantor that provides insurance against political risks in developing countries, such as the risk of expropriation. As members of the World Bank Group, they are required to apply safeguard policies to those projects that receive their support, although the Inspection Panel does not have oversight of IFC or MIGA projects.

Until the mid-1990s, compliance with safeguard policies was an issue principally for the public sector side of the activities of the World Bank Group. The major conflicts over the activities of these agencies have arisen from the construction of large hydroelectric dams and other public infra-

[124] See Fox's assessment of the Panel's first 5 years. He concludes that '[t]he Inspection Panel is a paradigm case both of the influence of transnational advocacy networks over international norms and policies and of their limited leverage over institutional behaviour in practice': Fox, n 118 above.

[125] The World Bank Group includes one further organisation called the International Centre for the Settlement of Investment Disputes (ICSID). ICSID's mandate is concerned with the arbitration of international investment disputes. It is not otherwise involved in the financing or approval of projects.

[126] See 'About IFC', available at www.ifc.org/about/; 'About MIGA', available at www.miga.org/screens/about/about.htm.

structure projects—such as road building in the Amazon—that were financed by the IBRD and carried out by developing country governments. However, in the 1990s, NGO attention began to focus upon private sector projects that received assistance from either IFC or MIGA, particularly with respect to extractive industries such as oil, gas and mining projects.

Since their inception, both IFC and MIGA have been highly involved in the promotion of environmentally and socially risky projects in the Global South, including foreign direct investment in extractive industries and energy projects. Development of formal procedures and internal capacity to address social and environmental issues has been slow, no doubt due to the limited attention that IFC or MIGA received from transnational advocacy networks until the mid-1990s. In the 1980s IFC had no formal environmental or social approach or capacity. Environmental reviews of IFC projects were outsourced to the World Bank.[127] In 1989, IFC hired its first environmental advisor to perform 'relatively informal and ad hoc' oversight of projects.[128] A formal environmental and social review procedure was adopted only four years later in 1993. During this period, World Bank safeguard policies were used as non-mandatory guidance for project preparation.

The pace of change was dramatically accelerated in 1995 when IFC experienced its own Narmada-type crisis. The conflict arose with respect to the Pangue Hydroelectric dam project on the Bio Bio river in Chile. The project, which had received a US$150 million loan from IFC, threatened the livelihoods of thousands of indigenous people.[129] The crisis followed the familiar script established by previous transnational advocacy efforts. Again, organised pressure from a network of NGOs and grassroots organisations provoked an independent review which, when it delivered its report, made a wide range of recommendations concerning IFC's handling of environmental and social matters.[130] When the report was presented to the World Bank president in 1997, NGOs used the fallout of the crisis to push for institutional change within the private sector agencies of the World Bank Group and to

[127] Compliance Advisor/Ombudsman, *A Review of IFC's Safeguard Policies* (Washington, DC, CAO, 2003) at 13, available at www.cao-ombudsman.org/

[128] International Finance Corporation, *The Environmental and Social Challenges of Private Sector Projects: IFC's Experience* (Washington, DC, IFC, 2002) at 30.

[129] Friends of the Earth, *Dubious Development. How the World Bank's Private Arm is Failing the Poor and the Environment* (Washington, DC, Friends of the Earth, 2000).

[130] The independent review of the Pangue dam project came as a result of a claim filed in Nov 1995 by Grupo Accion del Bio Bio (GABB), a Chilean organisation representing environmentalists and indigenous peoples concerned about the project. Recognising that the Inspection Panel process did not apply to IFC-financed projects, the claimants requested that the IFC president authorise the Bank's Inspection Panel to investigate the claim and that the IFC executive directors adopt the inspection panel mechanism. The directors subsequently agreed to launch an internal investigation of the claim and to consider extending the Bank Panel's jurisdiction to the IFC: CIEL, *Discussion Paper on Extension of Inspection Panel to IFC and MIGA* (Washington, DC, CIEL, Undated), available at www.ciel.org/ifc.html. See also International Finance Corporation, n 127 above, at 31.

argue that the jursidiction of the Inspection Panel should be extended to cover IFC and MIGA projects.[131]

In 1998 and 1999 respectively, IFC and MIGA adopted their own mandatory safeguard policies, using in most cases text identical to that of the IBRD/IDA.[132] However, the expansion of the jurisdiction of the Inspection Panel was resisted. In 2000, the office of the Compliance Advisor/Ombudsman was established to provide an accountability mechanism for IFC- and MIGA-assisted projects.[133] A third measure of reform can be found in the relative growth of social and environmental departments in IFC and MIGA. IFC's human resources investment in environmental and social issues has grown from one advisor in 1989 to a department of 80 staff members, including environmental specialists, social specialists, environmental engineers, lawyers and analysts in 2002.[134] MIGA, however, which was affected by the Bio Bio Project crisis but not targeted by it, has made a substantially smaller investment in environmental and social staff. In 2000, MIGA's department comprised only three officers.

Why has Law-making Occurred at the Bank?

The legal model established by the World Bank Group Safeguard Policy regime will be analysed at greater length in the following chapter. For the purposes of the present discussion, it is enough to note that it is, using the nomenclature of Garcia-Johnson *et al*, an example of a third party certification institution whose rule-making and reporting processes are managed at arm's length from the firm the performance of which is being regulated. The rules provided by the safeguard policies consist of performance standards as well as process standards and some general principles. The regime is reinforced by the presence of formal contractual sanctioning powers for non-compliance and by an independent accountability apparatus consisting of the Inspection Panel for public projects and the Compliance Advisor/Ombudsman for private sector projects. Compliance reporting for private sector projects takes place in two ways. First, IFC and MIGA must certify that the projects that receive their loans and guarantees are made to comply with their safeguard policies. Secondly, key project documents such as a project's environmental assessment are made available to the public in

[131] Rather than comply with IFCs environmental and social requirements the parent company of Pangue chose to prepay its US$150 million loan to the IFC: CIEL, n 129 above.

[132] International Finance Corporation, n 127 above.

[133] Compliance Advisor/Ombudsman, *Operational Guidelines* (Washington, DC, CAO, 2000), available at www.cao-ombudsman.org/.

[134] International Finance Corporation, n 127 above, at 31.

accordance with the review disclosure policies of the relevant WBG agency.[135]

Indeed, compared with the initiatives that have emerged from the mining industry and the commercial financial sector, law-making within the World Bank Group has been particularly intense and prolific. Several reasons for this can be advanced.

The first factor is leverage. As we have seen, NGO coalitions have over time succeeded in outmanœuvring Bank management both by the strength of their critique and by the leverage gained from powerful allies. The de-certification institutions developed by transnational advocacy networks have been very powerful. Unable to escape, Bank management has been enrolled to engage with critics in part on their own discursive terrain. Since the 1980s, the agencies of the Bank Group have become accustomed to 'talking the talk' of population displacement, community consultation, local impacts, environmental assessment, etc.

The second factor identified thus far has been the creation of a mutually reinforcing system of outside lobbying and internal competition within the bureaucracy of World Bank agencies. The Bank's experience suggests that the internal crises provoked by critics' leverage can create opportunities for reformist insiders. When faced with a novel crisis that defies conventional responses, 'old knowledge' is devalued while the possessors of 'new knowledge' with potential for providing solutions gain in authority.[136] The crisis-driven influence provided to insider reformers allowed them to propose a new regulatory model that eventually became the safeguard policy regime.[137] This helpful by-product of leverage may be easier to provoke in a very large and porous organisation like the World Bank. With some 7,000 employees engaged in a wide variety of development-related activities, substantial scope exists within the Bank for diversity and competition based on internal coalitions.[138] It should be noted, however, that although outsider critics and insider reformers may be helpful to one another, their goals and perspectives are not necessarily congruent. For the reforming organisation, insider reformers provide recommendations that are a *substitute* for the less palatable demands of outsider critics.

[135] PJ Nelson, *Access and Influence: Tensions and Ambiguities in the World Bank's Expanding Relationship with Civil Society Organizations* (Ottawa, North-South Institute, 2002). Also see IFC Environmental and Social Review Procedure, Dec 1998, available at http://ifcln1.ifc.org/ifcext/enviro.nsf/Content/ESRP; IFC Disclosure Policy, Sept 1998, available at http://ifcln1.ifc.org/ifcext/enviro.nsf/Content/Disclosure; MIGA Disclosure Policy, available at www.miga.org/screens/projects/disclose/disclose.htm.

[136] PM Haas, *Saving the Mediterranean* (New York, Columbia University Press, 1990).

[137] This is a pattern identified by Braithwaite and Drahos in their study of how globalisating regulatory changes take place: a crisis which undermines the legitimacy of an existing regulatory model creates an opening for policy enterpreneurs to gain acceptance of a ready-made regulatory innovation. As a result, the new model is adopted: Braithwaite and Drahos, n 41 above, at 561–2.

[138] Ostry, n 105 above.

A third factor concerns the Bank's lack of competitors. Although regional development banks exist, the agencies of the World Bank Group are, given their size and missions, essentially unique. As a result, law-formation at the World Bank has not been complicated by the need to enrol competitors into a shaky collective enterprise. Instead the formal governance instruments of Bank Group agencies can easily be put to the tasks involved in co-ordinating policy creation, approval and implementation.

A fourth factor has been suggested by the experience of the commercial banking sector: the seemingly prohibitive cost and difficulty involved in developing social standards. As a large and well-funded development bureaucracy, the Bank possesses the necessary means, the institutional inclination and certain incentives to invest in the development of detailed and formal legal regimes. Unlike commercial financial institutions, the Bank can justify this investment as an important aspect of its central mission. Furthermore, the Bank's emphasis on social and environmental results in development can also be used as a selling point with donors (referred to within the Bank as its 'shareholders'), thereby increasing the security of its fund-raising.[139] Where the Bank has experienced problems is on the 'client' side, particularly with the more powerful and vocal borrowing countries such as India and Brazil.[140] These countries are sensitive to interference in their internal affairs and are prone to view the imposition of onerous environmental and social considerations as unjustified restrictions on their development.

A fifth factor concerns the particular juridical character of some of the features of the Safeguard Policy regime. Garcia-Johnson *et al* suggest that more independent legal regimes are likely to be adopted when critics are able to acquire significant leverage over an organisation.[141] This appears to have been the case at the Bank. However, certain aspects of the legal model developed at the World Bank appear to spring from the cultural and institutional environment in which nearly all of the key players are located: Washington, DC. The approach taken—involving mandatory policies and procedures, mechanisms for transparency and accountability, stakeholder engagement in policy-making, and even a form of judicial review—appears to have borrowed its script from a familiar problem within this environment: how to promote accountability and constrain discretion within a government administrative agency. The legal culture of common law countries has developed a particular series of formal constraints to be applied to the exercise of public administrative power, including judicial review of decision-making, and notice-and-comment procedures with regard to the design of new rules. These mechanisms are exceedingly familiar to the

[139] Stiglitz observes that donor countries are called 'shareholders' while borrowers are called 'clients': JE Stiglitz, 'Democratizing the International Monetary Fund and the World Bank: Governance and Accountability' (2003) 16 *Governance* 111.

[140] Fox, n 119 above.

[141] Garcia-Johnson *et al*, n 8 above.

environmental NGOs pressing for change, to their congressional allies, and to the lawyers and bureaucrats within Bank Group agencies. Interestingly however, application of this borrowed accountability model suggests a growing recognition of the public nature of the World Bank's functions. Rather than base its attempts to legitimate itself solely upon the notion of the autonomy of private decision-making, the World Bank Group agencies have accepted to some degree that they possess a form of public authority that needs to be properly constrained in order to be exercised with legitimacy.

Lastly, a substantial number of reformist outsider critics (in contrast to those who aim simply to abolish the Bank) have been disposed to engage with the World Bank Group along the terms proposed by the safeguard policy regimes. The continuing institutionalisation of the regimes offers the Bank's Washington-based critics the opportunity to expand their advocacy work. They have participated in the Bank's notice and comment procedures. They have channelled complaints to the Inspection Panel and represented complainants before Panel hearings. Such high-profile activities have also possibly been useful to NGOs in their attempts to secure further funding from institutional donors such as the large foundations. The Safeguard Policy regimes of the World Bank Group provide a clear role for these critics as principled watchdogs and long term interlocutors engaged within the system.

A NOTE ON THE GLOBALISATION OF THE WORLD BANK'S REGULATORY MODEL

In recent years, commercial lenders involved in mine finance have become increasingly aware of new forms of risk faced by these projects. As we have seen, social and environmental issues can threaten the viability of mining projects with unexpected liabilities, costly delays in construction or production activities, problems with government regulators, and even with the possibility of shutdown. All of these factors add to the risk that project loans and interest will not be paid. However, commercial banks have also become aware of new avenues of risk that could impose direct liabilities upon them as a result of their involvement in project finance. Case law and legislation in the US and elsewhere have raised the possibility that, in the future, liability could be imposed upon lenders and insurers for the environmental consequences of projects.[142]

Reputational risk has also emerged very recently as a concern to major commercial banks. Transnational protestors opposing an oil pipeline project being developed in the Ecuadorian Amazon by Canada's Occidental Petroleum have in the last several years begun targeting the lenders to the

[142] N Hughes and A Warhurst, 'Financing the Global Minining Industry: Project Finance' MERN Working Paper No 142 (Bath, MERN, 1998), E Schrage, 'Emerging Threat: Human Rights Claims', *Harvard Business Review* (August 2003) 16.

project, including Germany's WestLB and the American firm, Citibank.[143] Such tactics as NGO-sponsored street protests and television advertisements criticising the banks have revealed the possible vulnerability of project lenders to market-based campaigns capable of influencing their retail customers.[144]

In 2003, a substantial consortium of commercial financial institutions responded to these pressures by announcing its adoption of the 'Equator Principles', a regime explicitly based on the World Bank model of social and environmental regulation. Commercial banks involved in project finance had been regulating their clients' environmental performance along these lines since the 1990s. Indeed, in the absence of alternative reputable global standards, many commercial banks have simply borrowed the Bank's own environmental standards and incorporated them into loan agreements. With the Equator Principles, however, the adopting banks made a public pledge to require their borrowers to comply with both the social and environmental policies of the World Bank.[145]

The concentration of the project finance market and the common interest of commercial bankers in risk management has facilitated the efforts of organisers to bring a significant portion of the market into the regime. When the 10 original adopting banks launched the initiative in 2003, they represented roughly 30 per cent of the global project loan syndication market. By May 2004, 21 banks, representing 75 per cent of the market, had adopted the Equator Principles.[146]

The adoption of the Equator Principles shows the increasing significance of the World Bank's safeguard policy regime as a globalising model. The adoption of the regime by the Equator Banks is very likely a shrewd borrowing. While the regime developed by World Bank agencies does not provide a comprehensive treatment of all reputational risks that a financial

[143] N Drost and K Stewart, 'Ecana in Ecuador: The Canadian Oil Patch Goes to the Amazon' in L North, T D Clark, and V Patroni (eds), *Community Rights and Corporate Responsibility: Canadian Mining and Oil Companies in Latin America* (Toronto, Between the Lines, 2006).

[144] T Nelthorpe, 'Principled Finance? Do the Equator Principles Need More Teeth?', *Project Finance Magazine*, June 2003, 20.

[145] The Equator Principles are applied to projects greater than US$50 million in size. The specific World Bank policies adopted under the Principles are those applied by the World Bank's International Finance Corporation.

[146] Equator Principles, Press Release, 'Dealogic Says Equator Banks Arranged 75% of Project Loans in 2003', 4 June 2004, available at www.equator-principles.com. As of 12 April 2006, the following 41 banks had adopted the Equator Principles: ABN AMRO Bank, NV, Banco Bradesco, Banco do Brasil, Banco Itaú, Banco Itaú BBA, Bank of America, BMO Financial Group, BTMU, Barclays plc, BBVA, BES Group, Calyon, CIBC, Citigroup Inc, Credit Suisse Group, Caja Navarra, Dexia Group, Dresdner Bank, EKF, FMO, Fortis, HSBC Group, HVB Group, ING Group, JPMorgan Chase, KBC, Manulife, MCC, Mizuho Corporate Bank, Millennium bcp, Nedbank Group, Rabobank Group, Royal Bank of Canada, Scotiabank, Standard Chartered Bank, SMBC, The Royal Bank of Scotland, Unibanco, Wells Fargo, WestLB AG, and Westpac Banking Corporation. See the Equator Principles, available at www.equator-principles.com.

institution may face, it does constitute a regulatory defence mechanism developed through nearly two decades of confrontation and engagement with NGOs. One might expect that, as a result, the defensive characteristics of the World Bank legal model would be most highly developed in those areas most vulnerable to transnational campaigns. Nevertheless, its characteristics also owe a great deal to the shape of struggles that have taken place within and among World Bank agencies and to the development of new types of professional knowledge associated with bank-related operations.

CONCLUSIONS REGARDING THE DEVELOPMENT OF TRANSNATIONAL LEGAL REGIMES FOR ADDRESSING MINING AND COMMUNITY CONFLICTS

This chapter began with a description of how the backlash against economic globalisation has led to a global legal politics concerning the appropriate shape of private sector authority in global governance. Networked critics and private sector actors are involved in clashes and engagements in arenas around the world, as these two actor groups contend with one another over the legitimacy of private sector entitlements. The certification institutions being adopted by transnational firms in a large number of sectors need to be understood as part and parcel of this overarching dynamic. Certification institutions represent the visible portion of legal regimes that are also constituted by the patterned 'de-certification' practices of industry critics. Through the creation of contending certification and de-certification efforts, industry actors and critics are also competing for prominence in the market place of ideas. Each aims to develop a globalising legal model capable of influencing regulatory reform efforts worldwide.

The development of transnational legal regimes addressing mining and community conflicts has taken place in multiple sites, although with very different results. In the mining sector, transnational advocacy networks have been able to provoke a crisis of confidence within the industry. However, the particular characteristics of the mining sector as a whole—including its fragmentation and its ideological resistance to certain claims—have presented significant obstacles to the efforts of critics to develop leverage and to the efforts of industry reformers to enrol other industry actors into collective institutions. As a result, both of the factors identified by Garcia-Johson *et al* for the development of strong and independent certification institutions have been missing: a clear, quantifiable civil society threat and the capacity for industry to organise a collective response.[147] Many industry actors apparently prefer to brave the elevated risk posed by the activities of transnational critics rather than face the cost, challenge and potential

[147] Garcia-Johnson *et al*, n 8 above.

consequences of designing a legal response to the problem. Industry initiatives such as the GMI and the ICMM may eventually produce more significant results, as may the efforts of transnational advocacy networks. However, all of this remains to be seen.

In contrast, the World Bank has been a site of intense law-production over the past 20 years. As we have seen, this has been due to a combination of factors including the strategic development of leverage by critics, crisis-driven competition between reformers and conservatives within Bank agencies, and the ideological predispositions of actors involved in certification and de-certification efforts surrounding the Bank. This has produced a legal model that is receiving increasing global recognition.

The adoption of the World Bank model by commercial financial institutions represents a considerable expansion of the model's influence, both in terms of the number of projects affected and with regard to its influence upon thinking. This further globalisation of the model suggests its potential for hegemonic spread among the professions and institutions involved in project finance. Notably, the regime proposes a schema of substantive rights and duties and a governance structure that is markedly different from that provided by most states. Unlike corporate self-regulatory initiatives, the World Bank model proposes to give substantive and procedural definition to the term 'social responsibility' and thereby both create new obligations and close off further claims. Accordingly, the model represents one influential attempt to arrive at a new, post-liberal social contract with regard to the development of large-scale projects in the Global South. The characteristics and implications of this model will be explored in the next chapter.

4

The World Bank Safeguard Policy Regime: A Globalising Regulatory Model

WHAT IS THE SOCIAL RESPONSIBILITY OF LARGE PROJECT DEVELOPERS? THE WORLD BANK GROUP'S ANSWER

The World Bank Group (WBG) has developed a relatively complex, formal and bureaucratic legal regime for regulating the social and environmental performance of the public and private sector projects that receive its assistance. As we have seen in the previous chapter, this development has been the product of intense engagement with transnational advocacy networks that have sought to promote structural change within the WBG over the past two decades. The regime represents one account of the responsibilities that proponents must fulfil, over and above the legal requirements established by a host government, in order for their projects to be certified as acceptable in a globalising world. This has the effect of both creating new obligations and closing off further claims. It is hardly surprising that the regime has continued to attract controversy, given the lack of consensus over the proper scope of public and private social responsibility in the context of global economic development.

Interestingly, this legal regime has no overall name for itself. Instead, both outside commentators and regime participants tend to discuss its components individually—including its policies, formal procedures and accountability mechanisms—without reference to the whole that is formed by the sum of these parts. Given the fact that the regime has grown up around the development of the WBG's 'safeguard policies'—policies which deal with particular issues of social and environmental concern—the legal regime will be referred to here as the WBG's safeguard policy regime. This chapter will outline and discuss the characteristics of this overall regime with regard to a particularly important and controvertial safeguard policy: the WBG Policy on Involuntary Resettlement (IR Policy). It will also examine the implications

this regime presents when it is applied to large mine development by the private sector.

OVERVIEW OF THE WORLD BANK SAFEGUARD POLICY REGIME

How the Regime is Organised

In their efforts to regulate the projects that contract for their services, World Bank Group agencies employ a formal framework similar to that used by commercial financial institutions. Like such institutions, IFC and MIGA organise their efforts in two principal stages: first, appraisal of the proposed project, and, secondly (assuming the project is approved), monitoring and supervision of the project in accordance with the sponsor's compliance and reporting duties set out in the financial contracts. Unlike most commercial institutions, World Bank agencies have instituted a third stage of formal procedures that are designed to address public complaints. For public sector projects supported by the IBRD/IDA a form of adjudicative recourse is allowed via the Inspection Panel. For IFC and MIGA-assisted projects, public complaints may be addressed to a specialised office called the Compliance Advisor/Ombudsman.

Appraisal

The initial appraisal of a proposed project is conducted when a sponsor applies to either IFC or MIGA in order to contract for its financial services.[1] Project appraisal consists of evaluation of the project's business potential and of its social and environmental performance.[2] It is conducted by an interdisciplinary staff team assembled from the WBG agency. For IFC, the appraisal team will usually consist of an investment officer, a technical specialist, an

[1] MIGA has a two-step application process. First a Preliminary Application for Guarantee is submitted which contains basic information on the prospective project for a preliminary screening. If this screening is positive, the project sponsor may submit a Definitive Application for Guarantee: *MIGA Social and Environmental and Social Review Procedures*, July 1999 (hereinafter *MIGA ESRP*), paras 18–21, available at www.miga.org/screens/projects/disclose/soc_rev.htm .

[2] As international organisations, IFC and MIGA have each been created by an international treaty setting out their respective objectives, responsibilities and powers. Both of these treaties establish that the primary mission of each agency is the promotion of economic development. However, neither treaty states directly that either IFC or MIGA has the responsibility or the power to regulate the environmental or social dimensions of projects. MIGA is required to satisfy itself as to 'the economic soundness of the investment [being financed] and its contribution to the development of the host country': see Art 12(d), Convention Establishing the Multilateral Investment Guarantee Agency, 11 Oct 1985 (hereinafter MIGA Convention). Similarly, IFC is charged with 'further[ing] economic development by encouraging productive private enterprise in member countries': Art 1, International Finance Corporation. Articles of

economist, a lawyer, an insurance specialist, an environmental specialist and, where appropriate, a social development specialist.[3] At MIGA, this team is lead by a guarantee officer and will usually include a lawyer, an environmental officer and a guarantee officer from the region hosting the prospective project.[4]

The social and environmental aspects of project appraisal are conducted in line with the applicable safeguard policies and environmental guidelines adopted by the agency. The central safeguard policy in this analysis is the policy on Environmental Assessment.[5] The EA Policy provides a general framework within which the environmental and social impacts of the project are evaluated. Through an initial screening process, projects are assigned a category—either A, B or C—based upon the potential degree of impact, and therefore the level of scrutiny to which the project will be subject. Category A projects are those likely to have significant adverse social and environmental impacts, and are subject to full Environmental Impact Assessment. Category B projects are characterised by less adverse impacts and are subject to a less intensive assessment procedure. Category C projects have minimal or no adverse impacts and are not assessed beyond the initial screening.[6]

Additional, issue-specific safeguard policies provide more detailed instruction regarding how to approach matters of particular concern including: involuntary resettlement, indigenous peoples, natural habitats, pest management, cultural property, dam safety, forestry and international waterways.[7] Further standards and guidelines relating to environmental, health and safety, and similar issues are provided by the World Bank Group's

Agreement and Explanatory Memorandum, 11 Apr 1955 (hereinafter IFC Articles of Agreement). Despite the absence of treaty provisions mandating an environmental or social regulation function on the part of either organisation, both agencies have incorporated this function into their mission. MIGA argues that acceptable environmental performance and social soundness are critical both to the 'economic soundness' of an investment and to its 'development contribution', thereby bringing these activities within Art 12(d) of its Convention (*MIGA ESRP*, para 5). IFC has included the promotion of sustainable development in its mission statement and has made reference to environmental and social evaluation in documents approved by its board of directors. See 'Mission Statement' at www.ifc.org/ifcext/about.nsf/Content/MissionStatement (accessed 1 Oct 2006); and Compliance Advisor/Ombudsman, *Extracting Sustainable Advantage? A Review of How Sustainability Issues have been Addressed in Recent IFC/MIGA Extractive Industry Projects* (Washington, DC, CAO, 2003) at 1.

[3] IFC *Environmental and Social Review Procedure*, Dec 1998 (hereinafter *IFC ESRP*), para 13. In Apr 2006, IFC adopted a revised ESRP that does not mention the typical makeup of appraisal teams: see IFC, *Environmental and Social Review Procedure*, Apr 2006 (hereinafter *IFC ESRP 2006*), para 3.2.4, available at www.ifc.org/ifcext/enviro.nsf/Context/ESRP.

[4] *MIGA ESRP*, para 21; Informant Interview No 78, Dec 2000.

[5] IFC Performance Standard 1: Social and Environmental Assessment and Management System (Apr 2006) (heeinafter IFC PS 1), available at www.ifc.org/ifcext/enviro.nsf/Content/PerformanceStandards; MGA Environmental Assessment Policy, July 1999 (hereinafter MIGA EA Policy), available at www.miga.org/index.cfm?aid=271 (accessed 1 Oct 2006).

[6] IFC Policy on Social and Environmental Sustainability (Apr 2006) (hereinafter IFC PSES), para 18, available at www.ifc.org/ifcext/enviro.nsf/Content/SustainabilityPolicy (accessed 1 Oct 2006); *MIGA ERSP*, n 1 above, para 8.

Pollution Prevention and Abatement Handbook, the WBG's *Occupational Health and Safety Guidelines*, and by a number of technical papers, manuals and sector-specific guidelines published by the WBG.[8]

Compliance Monitoring

Once appraisal is complete and project financing has been approved by the agency's board, the project sponsor is required to provide warranties regarding the project's continuing compliance with relevant safeguard policies and guidelines. These warranties, along with reporting requirements and penalties for non-compliance, are written into the financial contracts between the sponsor and the agency. In the event of non-compliance, MIGA is entitled to cancel its insurance coverage and retain the premiums that it has received,[9] while IFC will be entitled to recall its loan. As in the case of commercial financial institutions, compliance monitoring can be supplemented by use of an Independent Engineer (IE), an environmental engineering firm named in the financial contract and paid for by the project sponsor. The IE is responsible for periodic monitoring and reporting to project lenders and insurers on the project's compliance with environmental and social warranties.

Dispute Settlement and Disclosure

Since 1999, IFC and MIGA have, through the office of the Compliance Advisor/Ombudsman (CAO), instituted a formal mechanism for addressing public complaints relating to non-compliance with WBG policies. The CAO is charged with responding to complaints from affected persons and helping to settle policy compliance-related disputes, using a flexible approach, usually beginning with informal dialogue, mediation and conciliation. Where these approaches are not successful, it may adopt a more formal compliance review approach and conduct a formal investigation. This may result in a settlement agreement being negotiated between the complainant(s) and the agency. Where no agreement is reached, the CAO will submit a report to the WBG president with possible recommendations. The CAO has no formal powers to compel agency compliance with its recommendations. Rather it functions as a specialised interlocutor with IFC, MIGA and the WBG

[7] IFC PSES, n 6 above, para 3; *MIGA ESRP*, n 1 above, para 8. As indicated above, MIGA has two sets of policies that are applied to projects. For projects approved between 1998 and 2002, the policies applied by MIGA are essentially the same as those applied by IFC. With regard to projects approved after 21 May 2002, MIGA applies its 'interim' safeguard policies. See 'MIGA's Interim Issue Specific Safeguard Policies', available at www.miga.org/index.cfm?aid=271 (accessed 1 Oct 2006)

[8] IFC PSES, n 6 above, para 41; *MIGA ESRP*, n 1 above, para 12–15.

[9] Multilateral Investment Guarantee Agency, 'Standard Contract of Guarantee' (2001), available from MIGA, 1818 H Street NW, Washington, DC 20433, USA.

president on private sector environmental and social issues.[10] In addition to its ombudsman function, the CAO is responsible for providing advice and feedback to IFC and MIGA on environmental and social matters and for conducting independent audits of IFC and MIGA policy compliance.[11]

Indigenous Peoples Policies

The WBG has developed two principal safeguard policies designed to address social issues arising from project development: these are the WBG policies on Indigenous Peoples and Involuntary Resettlement. As stated above, the Involuntary Resettlement Policy will constitute the main focus of this chapter, and will be used to illuminate the nature and characteristics of the WBG safeguard policy regime. This analysis will develop a general critique of the safeguard regime and its decision-making structure. However, given the significance of the Policy on Indigenous Peoples within the WBG safeguard policy regime, a brief summary of its content is provided here.

The WBG Policy on Indigenous Peoples[12] provides guidelines designed to ensure that indigenous peoples affected by WBG-assisted projects do not suffer adverse effects as a result of the project and that they receive culturally compatible social and economic benefits.[13] Accordingly, the sponsor of a project that affects indigenous peoples is required to prepare a formal Indigenous Peoples Development Plan (IPD Plan) which sets out anticipated

[10] Although housed at IFC, the CAO reports directly to the WBG president and is not part of the line management system of either IFC or MIGA: Compliance Advisor/Ombudsman, *Operational Guidelines* (Washington, DC, CAO, 2000), available at www.cao-ombudsman.org/.

[11] Compliance Advisor/Ombudsman, n 10 above, B Dysart, T Murphy and A Chayes, *Beyond Compliance? An External Review Team Report on the Compliance Advisor/Ombudsman Office of IFC and MIGA* (Washington, DC, CAO, 2003).

[12] At present, there are two versions of the Policy on Indigenous Peoples used by WBG agencies. Since July 2005, IBRD/IDA apply Operational Policy/Bank Procedure 4.10: Indigenous Peoples (OP/BP 4.10), available at http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTSAFEPOL/O,,content/MDK:20543990~menuPK:1286666~pagePK:64168445~piPK:64168309~theSitePK:584435,00.html (accessed 1 Oct 2006). Since Apr 2006, IFC has applied its Performance Standard 7: Indigenous Peoples (IFC PS7), available at www.ifc.org/ifcext/enviro.nsf/Content/PerformanceStandards (accessed 1 Oct 2006). Since 2002, MIGA has applied its *Interim Indigenous Peoples Policy* (hereinafter *MIGA IIPP*), available at www.miga.org/index.cfm?aid=271 (accessed 1 Oct 2006).

[13] WBG Indigenous Peoples Policies acknowledge the inadequacy of universal definitions of indigeneity. These policies provide that indigenous peoples can be identified 'by the presence in varying degrees of the following characteristics:

a) self-identification as members of a distinct indigenous group and identification by others;
b) collective attachment to geopgraphically distinct habitats or ancestral territories in the project and to the natural resources in these habitats and territories;
c) customary cultural, economic, social, or political institutions that are separate from those of the dominant society and culture; and
d) an indigenous language, often different from the official language of the country or region.

adverse trends, measures for avoiding or mitigating harm, and project components designed to provide benefits.[14] The IPD Plan is to be based upon socio-economic baseline data prepared by qualified experts and upon the informed participation of indigenous people in decision making, and must be submitted to the WBG agency prior to project appraisal.

Policy Divergence Within the World Bank Group

There was a brief period—between 1998 and 2001—in which the texts of the safeguard policies applied by all of these agencies were essentially identical. However, even at that time dynamics internal to each organisation were at work that would set them on different paths. In 1998, the IBRD/IDA was already involved in a drawn-out and contentious process of policy revision, with various drafts in circulation for public commentary. For their part, IFC and MIGA were highly conscious that the policies bequeathed to them by their sister agencies had been drafted to apply to government-sponsored projects rather than with their own private sector clients in mind. Accordingly IFC soon began its own review process for redesigning safeguard policies appropriate for the private sector. MIGA, a significantly smaller organisation that IFC, elected to wait for the results of IFC's review before deciding whether it should establish its own policies.[15]

Today, IBRD/IDA, IFC and MIGA all employ different versions of the safeguard policies. IBRD/IDA's new policies came into force in January 2002. In 2002, MIGA's board adopted a set of interim policies pending the outcome of IFC's policy review process. IFC's revised policies, now called performance standards, were approved not long before publication of this book. They apply to all projects approved by IFC after April 2006.

Despite the divergence, there remains a significant degreee of convergence in the agencies' policies and approaches and, in particular, with regard to the essential characteristics of the regulatory model of the safeguard policy regime. Accordingly, the discussion of the Involuntary Resttlement Policy will be illustrated with references drawn from each of the current versions of the

IFC PS7, n 12 above, para 5; OP 4.10, n 12 above, para 4; MIGA IIPP, n 12 above, para 3.

[14] The MIGA Interim Safeguard Policies are exceptional in a number of respects. In general, they are weaker than other safeguard policies. Under the Interim Indigenous Peoples Policy, MIGA-supported projects are required to provide indigenous peoples with opportunties to derive benefits where the projects in question involve the commercial exploitation of indigenous cultural resources or natural resources located on indigenous lands (*MIGA Interim IP Policy*, paras 11 and 12).

[15] MIGA has also expressed concerns that, due to the nature of its business as an insurer to the private sector, it may possess insufficient leverage over the design of projects and may therefore have to develop its own approach to policy implementation: see Multilateral Investment Guarantee Agency, 'Framework for Safeguard Policies at MIGA', available at www.miga.org/index.cfm?aid=271 (accessed 1 Oct 2006).

policy in addition to their common 'parent' Operational Directive 4.30 on Involuntary Resettlement (or OD 4.30).[16] The thrust of the critique presented in this paper concerns a structural element found in all versions of the WBG's IR Policies.

INVOLUNTARY RESETTLEMENT

The Formal Provisions of WBG IR Policy

Initially drafted in the 1980s and revised several times over the past two decades, the policy on Involuntary Resettlement (IR Policy) was the first social safeguard policy created by the World Bank.[17] The World Bank's IR Policy is an attempt to address problems caused by land acquisition that is conducted without the free and informed consent of its owners, users and occupiers. As outlined in Chapter 2, states conventionally facilitate involuntary land transfers in certain circumstances. Under its power of eminent domain, a liberal state reserves the right to force a sale of land that is required in the public interest.[18] Many states permit such expropriations to facilitate mining development.[19] Payment of fair market compensation when land is required in the public interest is deemed to be sufficient to remedy the infringement of property rights through the forced sale.[20] 'The implicit basic minimum objective of the law is to make an expropriated owner economically whole.'[21]

[16] The IR Policy currently applied by IBRD/IDA is Operational Policy and Bank Policy 4.12 (OP/BP 4.12), available at http://wbln0018.worldbank.org/Institutional/Manuals/OpManual.nsf/284229c803270fad8525705a00112597/864bbbc199d9d202853570c90030386e?OpenDocument&Start=5 (accessed 1 Oct 2006). MIGA currently applies its Interim Involuntary Resettlement Policy (MIGA IIRP), which is available at www.miga.org/index.cfm?aid=271 (accessed 1 Oct 2006). All of these policies are derived from Operational Directive 4.30 on Involuntary Resettlement (OD 4.30). OD 4.30 was in force at IBRD/IDA from 1991 to 2002. It continues to be applied by MIGA and IFC with regard to projects approved before their own policy changes were made in 2002 and 2006 respectively. OD 4.30 is available at www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol-Resettlements/$FILE/OD430_InvoluntaryResettlement.pdf (accessed 1 Oct 2006).

[17] JA Fox, 'When does Reform Policy Influence Practice? Lessons from the Bankwide Resettlement Review' in JA Fox and LD Brown (eds), *The Struggle for Accountability, The World Bank, NGOs and Grassroots Movements* (Cambridge, MIT Press, 1998) at 304.

[18] See generally EC Todd, *The Law of Expropriation and Compensation in Canada* (Toronto, Carswell, 1992).

[19] JM Klemetsrud, 'The Use of Eminent Domain for Economic Development' (1999) 75 *North Dakota Law Review* 783, J Otto and J Cordes, *The Regulation of Mineral Enterprises: A Global Perspective on Economics, Law and Policy* (Westminster, Colo, Rocky Mountain Mineral Law Foundation. 2002) at 3.51–2.

[20] Eg, the Fifth Amendment to the US Constitution grants federal and state governments the authority to take private property for a public use provided that just compensation is paid: Klemetsrud, n 19 above. In Canada however, property rights are not afforded constitutional protection in the Charter of Rights and Freedoms. Property rights are protected in the Canadian

Despite their stated intentions, these state-mandated land transfer and compensation schemes are often highly problematic in practice. In case after case they have failed to ensure that the livelihoods of displaced persons are protected. According to a substantial body of research, land acquisition that takes place according to these schemes leaves rural and indigenous peoples significantly poorer than they were before and beset by new social, economic and environmental problems.[22]

The reasons for this are straightforward. Throughout the Global South, the state land tenure regimes tend to bear a very limited relation to the usually informal legal regimes that govern actual patterns of rural land and resource use. Rural environments are characterised by highly complex and site-specific relations with respect to land, resources and labour. Property relations on the ground are governed by a dense web of use-rights, common property, customary law and social networks, upon which rural livelihoods are actually based. Furthermore these local customs do not exist as a code; they are better understood 'as a living, negotiated tissue of practices which are continually being adapted to new ecological and social circumstances—including, of course, power relations'.[23] State laws, cadastral maps and land registries establishing freehold tenure all too often present a convenient legal fiction. Modern states willfully ignore the confusing realities of actual rural land tenure in favour of a simplified map designed for adminstrative convenience. As Scott argues:

> The fiscal or administrative goal toward which all modern states aspire is to measure, codify, and simplify land tenure . . . Accomodating the luxuriant variety

Bill of Rights (1960), yet this 'does not protect against the expropriation of property by the passage of unambiguous legislation': *Authorson v Canada (Attorney General)* [2003] SCC 39, para 51. Parliament is entitled to expropriate property without providing just compensation so long as its intention to do so is 'clear and unambiguous'. Nevertheless, both federal and provincial governments have enacted legislation for providing property owners with compensation for land expropriated for public uses: see ECE Todd, *The Law of Expropriation and Compensation in Canada* (Toronto, Carswell, 1992).

[21] Ibid, at 2. It should be noted, however, that some states, including Canada, Australia, the US, and a number of Pacific nations, recognise certain rights of indigenous peoples to land which are not subject to expropriation.

[22] MM Cernea (ed), *The Economics of Involuntary Resettlement* (Washington, DC, World Bank, 1999), M M Cernea, 'The Risks and Reconstruction Model for Resettling Displaced Populations' (1997) 25 *World Development* 1569, MM Cernea, *Involuntary Resettlement in Development Projects*, World Bank Technical Paper No 80 (Washington, DC, World Bank, 1988), MM Cernea and C McDowell (eds), *Risks and Reconstruction: Experiences of Resettlers and Refugees* (Washington, DC, World Bank, 2000), TE Downing, 'Avoiding New Poverty: Mining-Induced Displacement and Resettlement', MMSD Background Paper (London, IIED, 2002), C McDowell, *Understanding Impoverishment: The Consequences of Development-induced Displacement* (Oxford, Bergham Books, 1996), and World Bank, *Resettlement and Development: the Bankwide Review of Projects Involving Involuntary Resettlement, 1986–1993* (Washington DC, World Bank, 1996).

[23] JC Scott, *Seeing Like a State* (New Haven, Conn, Yale University Press, 1998) at 34.

> of customary land tenure was simply inconceivable. The historical solution, at least for the liberal state, has typically been the heroic simplification of individual freehold tenure. Land is owned by a legal individual who possesses wide powers of use, inheritance, or sale and whose ownership is represented by a uniform deed of title enforced through the judicial and police institutions of the state . . . How much easier it then becomes to assess such property and its owner [for taxation purposes] on the basis of its acreage, its soil class, the crops it normally bears, and its assumed yield than to untangle the thicket of common property and mixed forms of tenure.[24]

State land tenure regimes also provide a legal mechanism for facilitating enclosure, a process in which common and customary rights based on informal community institutions are delegitimated by and subordinated to officially recognised exclusive rights to land. Scholarly understandings of enclosure have shifted significantly over the years: in the modern tradition, it has been associated with economic progress;[25] later assessments by historians and social scientists have linked it to class and social struggle;[26] and more recent work has characterised enclosure as social impoverishment, associating it with the extinguishment of local institutions for livelihood support and resource management.[27]

The practical myopia of state-mandated compensation schemes produces two sets of perverse effects. First, they neglect entire categories of loss inflicted on disrupted communities. These may include lost access to informal property (including gathering rights and use rights) and to the social networks crucial to agricultural production systems.[28] Furthermore, under state legal regimes certain populations, including indigenous peoples, urban squatters and semi-nomadic 'slash and burn' or swidden farmers, may not possess any recognised rights at all to the lands that support their livelihoods. Once people are relocated, they also face significant startup costs and can be effectively de-skilled as a result of the move. Agricultural producers rely upon a sophisticated knowledge of local ecological conditions (including soil types, weather patterns, cropping practices) for their survival. In a new location, this accumulated knowledge can become useless and must be slowly re-gained.[29] Secondly, state-mandated schemes assume that cash is an uncomplicated form of compensation that can be easily translated by rural people

[24] Scott, n 23 above, at 36.

[25] G Hardin, 'The Tragedy of the Commons' (1968) 162 *Science* 1243.

[26] EP Thompson, *Whigs and Hunters* (New York, Pantheon Books, 1975), JC Scott, *Weapons of the Weak* (New Haven, Conn, Yale University Press, 1985).

[27] E Ostrom, *Governing the Commons* (New York, Cambridge University Press, 1990), G Kibreab, 'Common Property Resources and Resettlement' in MM Cernea and C McDowell (eds), *Risks and Reconstruction. Experiences of Resettlers and Refugees* (Washington, DC, World Bank, 2000).

[28] MM Cernea, 'Risks, Safeguards, and Reconstruction: a Model for Population Displacement and Resettlement' in MM Cernea and C McDowell (eds), *Risks and Reconstruction: Experiences of Resettlers and Refugees* (Washington, DC, World Bank, 2000).

into new productive assets. However, money is a very scarce commodity in many rural areas in the Global South, and tends to be used in small amounts and for specific purposes within household economies.[30] Local capacities and opportunities for money management may vary greatly among a rural population and are often very limited. Widespread cash payments for land also create local inflationary effects that can significantly reduce the purchasing power of the sums received.

The standard diagnostic model of displacement-related impacts identifies eight risks which are posed to displaced persons: landlessness, joblessness, homelessness, marginalisation, food insecurity, increased morbidity, loss of access to common property resources and community disarticulation.[31] To these, other researchers have added two further risks: the loss of civil and human rights and the loss of access to public services including the disruption of formal education opportunities.[32] Poor populations already living on the margins of subsistence can little afford to absorb these additional losses to their livelihood entitlements. When they do so for the benefit of the development of a large project, these populations are in practical terms providing a subsidy that flows from their own meagre livelihoods to support the project's bottom line.

WBG IR Policy is designed to address these deficiencies of government legal regimes. The procedural and substantive requirements of the Policy are centred upon two key commitments. The first is to 'do no harm'. Involuntary resettlement should be avoided or minimised where possible, exploring all viable alternatives.[33] Losses experienced as a result of land acquisition should be compensated for, and affected livelihoods and entitlements should be restored to their pre-project levels. The second commitment contained within IR Policies is to provide net benefits for displaced persons by leaving them better off than they were before. World Bank Involuntary Resettlement Policy aims to 'ensure that the population displaced by a project receives benefits from it'.[34] However, IR Policy texts make it clear that 'doing good' is an aspirational 'soft goal', whereas avoiding harm constitutes the central

[29] Scott, n 23 above, at 316–9.

[30] E Mayer and M Glave, 'Alguito para ganar (a little something to earn): profits and losses in peasant economies' (1999) 26 *American Ethnologist* 344.

[31] Cernea, n 28 above. The 'Risk and Rehabilitation Model' was developed by Michael Cernea, the senior social policy advisor to the World Bank and his team during their portfolio-wide review of the Bank's implementation of its IR Policy: Downing, n 22 above, at 8. Cernea was the first non-economist social scientist to be hired at the IBRD and has been a prominent proponent of reform: Fox, n 17 above, at 308. See World Bank, *Resettlement and Development: the Bankwide Review of Projects Involving Involuntary Resettlement, 1986–1993* (Washington DC, World Bank, 1996).

[32] Downing, n 22 above, at 8.

[33] OD 4.30, n 16 above, para 3; OP 4.12, n 16 above, para 2(a). IFC PS5, n 16 above, para 7, is somewhat weaker. It provides that alternative project-designs must be considered to 'avoid or at least minimize physical or economic displacement, while balancing environmental, social and financial costs and benefits'.

requirement. This is evidenced in the key provision that displaced persons[35] should be 'assisted in their efforts to improve their former living standards, income earning capacity, and production levels *or at least to restore them*'.[36] In order to acheive these goals, the project sponsor is directed to structure its plans for land acquisition as a participatory development intervention. This intervention, called a 'Resettlement Plan', must be designed, managed and monitored by qualified experts.[37] Effective compensatory measures must guard against the threat of impoverishment for displaced persons and should permit them to increase their standard of living.[38]

Thus the basic objectives of IR Policy are not so different from those asserted by the doctrine of eminent domain. The two differ considerably, however, in their approach to the problem of remedying the harms created by displacement. IR Policy asserts a very different logic from the liberal, market-oriented rationality used both by states and enterprises in property transactions. It reads like a version of eminent domain conceived by social scientists and rural development professionals. IR Policy seeks to base compensation on a more comprehensive socio-economic accounting of community assets and project-related impacts. To this end, it directs the project sponsor to treat formal and informal property equally;[39] it emphasises the need to facilitate the reconstruction of damaged social components of local production systems; it focuses attention on the impacts

[34] OD 4.30, n 16 above, para 3; OP 4.12, n 16 above, provides that 'resettlement activities should be conceived and executed as sustainable development programs, providing sufficient investment resources to enable the persons displaced by the project to share in the project benefits': ibid, para 2(b).

[35] OD 4.30, n 16 above, does not define the term 'displaced persons' and at times uses other phrases such as 'adversely affected population'. OP 4.12, n 16 above, is more precise with its terminology. Entitlement to assistance under the policy is restricted to 'displaced persons' defined as those who suffer 'direct economic and social impacts' that result from the 'involuntary taking of land' resulting in (i) relocation or loss of shelter, (ii) loss of assets or access to assets; or (iii) loss of income sources or means of livelihood, whether or not the affected person must move to another location. Persons may also be 'displaced' within the meaning of the policy due to adverse livelihood impacts resulting from the loss of access to legally designated parks: OP 4.12, n 16 above, para 3, n 3. 'Involuntary' is defined as 'actions that may be taken without the displaced person's informed consent or power of choice': ibid, n 7. IFC PS5, n 16 above, at para 20, provides that the policy applies to both cases of physical and economic displacement. The latter takes place where land acquisition causes loss of income or livelihood regardless of whether the affected people are physically displaced.

[36] OD 4.30, n 16 above, para 3; OP 4.12, n 16 above, para 2(c) 'Displaced persons should be assisted in their efforts to improve their livelihoods and standards of living or at least to restore them'.

[37] OD 4.30, n 16 above, paras 6, 22, 23; OP 4.12, n 16 above, para 19. IFC PS5, n 16 above, paras 11–13.

[38] OD 4.30, n 16 above, paras 3–5; OP 4.12, n 16 above, paras 2, 3; IFC PS5, n 16 above, paras 8 and 20.

[39] Unlike OD 4.30, OP 4.12, n 16 above, makes a distinction between holders of legal title and those with informal livelihood interests in land. Those with rights recognised by the state (or with a claim to such rights) are entitled to compensation for the land they lose and other resettlement assistance. Those without state-recognised rights, who nevertheless count as 'displaced people' due to their livelihood reliance upon the lands taken, are not entitled to

of lost income earning opportunities and lost access to public services.[40] It emphasises the need to tailor compensation carefully to the target population and to view the situation overall as a development opportunity. The basket of compensatory measures available to rebuild and improve local living standards includes asset replacement, cash compensation, development projects to improve physical assets (eg land reclamation, irrigation projects), development projects to improve human capacities (eg training), and the provision of employment opportunities.[41] In the case of rural populations, IR Policy strongly favours land-for-land exchanges over exchanges of cash-for-land.[42] Furthermore, it views the full remedying of harm (ie the restoration of pre-existing livelihoods) as the *minimum* level of acceptable compensation.[43] The resettlement policy also draws attention to equity issues, calling upon the project sponsor to identify 'vulnerable groups' within the affected population (which may be women, indigenous people, landless peasants, etc) and to ensure that such groups are properly included in the compensation framework.[44] And, finally, the resettlement policy requires that planning, execution and follow-up of resettlement activities be

compensation for land. Instead they are provided with 'resettlement assistance' and 'other assistance, as necessary, to achieve the objectives set out in this policy': OP 4.12, n 16 above, para 16. However, restricting land compensation to holders of legal title does not affect the responsibility under the policy to ensure livelihood restoration and improvement for all displaced persons. Therefore in theory, the distinction need not result in significant differences in compensation between title holders and other displaced persons. The policy provides that '[r]esettlement assistance may consist of land, other assets, cash, employment, and so on, as appropriate': ibid, n 20. It remains to be seen how the distinction is managed in practice. IFC PS5, n 16 above, paras 14 and 17–18 make a similar distinction between those with and without legal rights capable of official recognition. Those without recognisable rights are not entitles to replacement land. However, they are still entitled to adequate replacement housing with security of tenure, compensation for lost assets, etc.

[40] OD 4.30, n 16 above, paras 2, 3, 4, 17; OP 4.12, n 16 above, paras 6, 13.

[41] OD 4.30, n 16 above, paras 13–18; OP 4.12, n 16 above, paras 6, 11, 12, 13(b). See also IFC Guidance Notes: Land Acquisition and Involuntary Resettlement (IFC GN5), available at www.ifc.org/ifcext/enviro.nsf/Content/GuidanceNotes (accessed on 1 Oct 2006).

[42] OD 4.30, n 16 above, para 13; OP 4.12 specifies that land-based resettlement strategies should be preferred for both indigenous peoples with traditional land-based modes of production and for displaced persons whose livelihoods are land-based: ibid, paras 9, 11. Non land-based options (involving both cash and employment or self-employment opportunities) may be considered where this is the preferred option of displaced persons, where provision of land would affect the sustainability of a park or protected area, or where sufficient land is not available at a reasonable price (the lack of such land must be demonstrated to the Bank's satisfaction): ibid, para 11. Para 12 provides that cash compensation for lost assets may be appropriate where livelihoods are not land-based, where active markets for land, housing and labour exist, or where land taken for the project is a small fraction of the affected asset and the residual is economically viable. For similar provisions, see IFC PS5, n 16 above, paras 8, 18 and 20.

[43] OD 4.30, n 16 above, para 3; OP 4.12, n 16 above, para 2(c); IFC PS5, n 16 above, para 8. This in particular is very different from the perspective of state compensation systems. IR Policy views overshooting the compensatory mark as desirable, and full restoration as the floor.

conducted with the participation of both the affected population and any 'host' communities to which it may be relocated.[45]

IR Policy represents a considerable normative challenge to how business is conventionally transacted by a private sector mining enterprise. First, it argues for much broader conceptions of property and compensation than those specified within state legal regimes. Secondly, and more fundamentally, the policy calls for a wholesale reconstruction of the relationship occasioned by a property transaction. In a liberal market framework, the responsibilities of the parties to one another usually end with the exchange of land for compensation. The resettlement policy, however, holds the project sponsor responsible for the *economic outcomes* of its transactions with local people. The company is directed to ensure that its compensation actually does 'at least [. . .] restore' to pre-project levels the 'living standards, income earning capacity, and production levels' of 'displaced persons'. A company that is required to implement this policy is cast into an unfamiliar role as a fiduciary with considerable paternalistic responsibilities and powers. This is a foreseeable site of normative conflict. Organisations do not easily reverse their established practices. In attempting to exercise a strong influence over corporate behaviour in the face of the prevailing logic of conventional business relations, the IR Policy legal regime faces a considerable challenge.

The IR Policy Regime's Decision-making Architecture

The legal regime charged with implementing IR Policy is faced with two principal challenges: first, that of actually regulating firm behaviour and, secondly, that of conferring legitimacy upon the WBG and its activities. The shape and character of the regime's formal decision-making structures are vital to achieving these goals. Such terms as 'living standards', 'displaced persons' and 'participation' are far from self-defining, particularly when transplanted into different socio-economic environments. What forms of harm are compensatable? When is a harm considered to be remedied? Who counts as displaced? What is a valid participatory process? Both the regulatory impact of the IR Policy legal regime and its capacity to legitimate will to a large extent depend upon the mechanisms through which the Policy is interpreted and applied in the local environment. This decision-making

[44] OD 4.30, n 16 above, paras 8 and 16; OP 4.12, n 16 above, para 8 lists among potentially vulnerable groups 'those below the poverty line, the landless, the elderly, women and children, indigenous peoples, ethnic minorities, or other displaced persons who may not be protected through national land compensation legislation'. The IFC requires special measures with regard to consultation of indigenous peoples (IFC PS7) and vulnerable groups. See IFC, n 41 above, at G16.

[45] OD 4.30, n 16 above, paras 7–10, 13; OP 4.12, n 16 above, paras 6(a), 9, 13(a); IFC PS5, n 16 above, para 9.

architecture is set out in the text of the IR Policy itself, in the sponsor's contract with the IFC or MIGA, and is engineered into the planning and permitting processes that accompany project design and development. These documents and the institutional practices that accompany them assign to various parties the roles they are to play in legal decision-making. These structures set out the standard pattern of discursive processes—Black's 'regulatory conversations'—through which the rules are interpreted and applied in practice.

The various responsibilities of policy implementation, including fact-gathering, local consultation and Resettlement Plan design, are assigned to the project sponsor. The WBG agency plays a supervisory role. It is responsible for ensuring that the sponsor is aware of its duties under the appropriate safeguard policies, for reviewing and approving the sponsor's Resettlement Plan, and for ensuring continuing compliance. The Resettlement Plan is evaluated by IFC or MIGA staff in Washington, DC during the project appraisal stage. These staff members rely upon the written reports generated by the project sponsor, including the Plan itself and the project's Environmental Impact Assessment (EIA). In the words of one World Bank Group specialist, the EIA provides the 'legal facts' relied upon in project appraisal.[46] In the case of a large mining project, this desk review will be supplemented by a visit to the project site before the project can be approved for financial assistance. The site visit provides the opportunity to verify basic facts, to look for issues that have been missed, and to get a sense of how the project's environmental and social team approaches its work.[47] Monitoring of continuing compliance with IR Policy is carried out by MIGA and IFC by reviewing the regular reports provided by the project sponsor. Monitoring may also be contracted out to an environmental engineering firm assigned to act as the project's Independent Engineer. Since 2000, an additional level of potential project oversight has been provided by the office of the Compliance Advisor/Ombudsman (CAO) in Washington, DC.

What are the implications of this structure? One of the most striking is the relative marginalisation of the project-affected population within the process of interpreting and applying the IR Policy. The IR Policy neglects to require that basic measures be taken to enable informed local involvement in decision-making processes. The sponsor is not required to provide local people with copies of the IR Policy, nor is it required to ensure that local people are aware of the broader fact that a set of rules exist which are binding upon the project sponsor and which provide local people with certain entitlements with respect to their property and livelihoods.[48] Furthermore, the policy does not require that local people be informed of the existence of IFC, MIGA, the Independent Engineer or the CAO or of how they can be

[46] Interview No 80, Dec 2000.
[47] Interview No 78, Dec 2000.

contacted. Instead, the form and extent of their involvement are determined by the company's participatory process and their input is mediated by the supervising agency via the company's reports. In contrast, IR Policy provides IFC and MIGA with a positive duty to inform its customer, the project sponsor, of the policy text[49] and to finance technical assistance to enable the customer to carry out its resettlement responsibilities.[50]

However, despite the absence of alternative input, the representations outlined in the sponsor's reports will provide—as observed by the Bank specialist quoted above—the authoritative legal facts describing the local environment, its economic and social structures, the nature of displacement-related impacts, and the needs and entitlements found to exist among local people. Fact-finding is essentially delegated by the WBG agency to the project sponsor. Reviewers at the Bank agency and the Independent Engineer are able to check for reasonableness, methodological soundness and consistency, but are largely limited to the facts as presented. Subsequent discussions regarding the interpretation of IR Policy in these local circumstances are conducted exclusively among the company and the reviewing WBG agencies. The decision-making structure established for IR Policy effectively creates regulatory conversations that do not meaningfully involve local people. Is this an accurate picture of the functioning of the IR Policy regime? And, if so, what mechanisms does the regime use to accomplish its regulatory and legitimation goals?

DECISION-MAKING STRUCTURES AND LEGITIMATION STRATEGIES IN THE WBG SAFEGUARD POLICY REGIME

As we have seen in Chapter 1, the formal decision-making architecture of a legal regime is central to the regime's functioning in two respects. First, by

[48] In contrast to OD 4.30's silence on the issue, OP 4.12 does require that 'measures' be taken to ensure that 'displaced persons' are 'informed about their options and rights pertaining to resettlement': n 16 above, para 6(a)(i). This is an improvement. However, if the passage is intended to ensure that displaced persons are fully informed of how the IR Policy regime works and what it means for them, it could be much clearer. Requiring that copies of OP/BP 4.12 be distributed in local languages would be a plausible start. Furthermore, what constitute appropriate and adequate 'measures' is precisely the issue. IFC in its Performance Standard 1: Social and Environmental Assessment and Management Systems (IFC PS1) and its accompanying Guidance Note 1 (IFC GN1) have relatively extensive provisions on community engagement, grievance handling and disclosure of information (see paras 19–23 and G.43–54). These provisions emphasise the need for timely, accessible, understandable and appropriate forms of engagement, taking into account the challenges and barriers by community actors. However, neitherdocument discusses, for example, the need for community actors to be informed of the content of the policies themselves. IFC PS2 is available at www.ifc.org/ifcext/enviro.nsf/Content/PerformanceStandards (accessed on 1 Oct 2006).

[49] OD 4.30, n 16 above, para 24; BP 4.12, n 16 above, para 2.

[50] OD 4.30, n 16 above, para 23; OP 4.12, n 16 above, para 32(b) provides the Bank may 'at a borrower's request' provide 'financing of technical assistance to strengthen the capacities of agencies responsible for resettlement or of affected people to participate more effectively in resettlement operations'.

helping to structure what kinds of actors play what kind of roles in legal decision-making processes, it influences how regime participants (or regulatory communities) develop conventions and understandings regarding how rules are to be applied in practice. Secondly, the decision-making architecture of a legal regime is also important in legitimating the regime itself and its legal decisions. Studies have shown that people are more likely to respect a decision and an institution if they believe that it operates in a way that they feel is fair.[51] Furthermore, weaknesses in the procedural legitimacy of a legal regime can leave it open to attack by opponents who seek to undermine its authority.

Chapter 1 set out four general categories of legitimate process with regard to how legal decisions are made. The categories are decision-making through:

1. duly constituted and constrained authority;
2. autonomous private action;
3. public involvement; and
4. expert involvement.

Each category is believed to be appropriate in different—although not necessarily mutually exclusive—circumstances. Decision-making by an authority is felt to be appropriate with regard to a matter that is in some way public and that falls within the authority's responsibility. The exercise of authority is restricted by rules governing the proper exercise of the office-holder's power. Autonomous private decision-making takes place when a matter is understood to fall within a sphere of action that ought to be protected from outside interference. Respect for private autonomy usually requires that the matter in question does not infringe upon the civic responsibilities of the actors involved. Public participation in decision-making is often called upon either where certain individuals have a pressing interest in the result or when the issue in question is a matter of general public importance. Expert involvement in decision-making is relied upon when a matter requires specialised input within the professional's sphere of expertise.

This list of categories is certainly not exhaustive. However, it serves to illustrate a pair of important tensions commonly found in many contemporary social fields: the tension between civic responsibility and civil autonomy, on the one hand, and that between popular and expert involvement in decision-making, on the other. These four categories will be used to unpack the various legitimation strategies implicit in the decision-making structures of the WBG safeguard policy regime.

[51] TR Tyler and G Mitchell, 'Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights' (1994) 43 *Duke Law Journal* 703.

Public Participation in Decision-making: Contrasting Liberal Legal Approaches with Safeguard Policy Regime Approaches

The analysis of the IR Policy regime's decision-making structure concluded that the regime has marginalised the role played by project-affected groups. This is markedly different from the role played by public participation in the schema of liberal legal relations. Liberal legal systems base a significant part of their legitimacy on a conceptualisation of the individual as an active, rights-bearing agent who is protected from arbitrary government action by the rule of law and by principles of fair process. When a person stands to be dispossessed by a public authority, she is not only often entitled to economic rights of compensation, she is also entitled to political and civil rights designed to allow her to protect her own interests.[52] Variously referred to as rights of due process, natural justice and procedural fairness, these principles establish that a person is entitled to certain process standards of fair decision-making.[53] At a minimum these provide that a person has the right to be heard: she must be allowed to present facts and arguments in support of her own case. As a corollary, this includes the right to know the rules that are being applied. The requirements of procedural fairness will vary depending upon the circumstances, including the nature of the decision being made and the effect of the decision upon the person's rights.[54] Within the liberal legal framework, abuse of these rights de-legitimises the result. Common law courts have the power to declare that decisions arrived at in violation of the principles of procedural fairness are simply beyond the power the authority which made them and are therefore void.[55] Thus, in these circumstances, the framework established by liberal legal systems makes the exercise of authority subject to certain public participation requirements.

In the liberal legal framework, due process and fairness guarantees are not only intended to respect individual dignity and rights of self-determination. In addition, they are believed to contribute to the integrity and effectiveness of decision-making. Nevertheless, the judicialised approach to fair process taken by liberal legalism is recognised to suffer from systemic problems that can affect its integrity and effectiveness. To name but a few: repeat players are

[52] DJ Mullan, *Administrative Law* (Toronto, Carswell, 1996) at 200.

[53] The common law tradition relating to the principles of 'natural justice' was first developed by courts in the UK in the nineteenth century as a code of administrative procedure. In both the UK and Canada this early doctrine was modernised in the 1960s and 1970s under the new label of 'procedural fairness': DP Jones and AS de Villars, *Principles of Administrative Law* (Toronto, Carswell, 1994), 187–208. In the US, the history and development of what is known as 'due process' are based upon the 5th and 14th amendments of the American Constitution which provide that neither the federal nor the state governments shall deprive a person of 'life, liberty, or property, without due process of law' (for a discussion see AC Aman and WT Mayton, *Administrative Law* (St Paul, Minn, West Group, 2001) at 151–4).

[54] *Indian Head School Division No 19 (Saskatchewan Board of Education) v Knight* [1990] 1 SCR 653.

[55] Jones and de Villars, above n 53, at 179–87.

believed to have a general advantage over time,[56] complex procedure may favour those who have the resources and capacity to take advantage of it, patterns of judicialised decision-making may be influenced by bureaucratic controls over decision-makers,[57] purely adjudicative decision-making is poorly equipped to address 'poly centric' problems involving many interconnected interests,[58] and procedure may be used by a conservative judiciary to stifle progressive initiatives.[59]

Are the specific due process requirements of liberal legalism appropriate for IR Policy decision-making? Just as the liberal legal view often misunderstands and misrepresents the intricate property tenure arrangements found in rural environments, so we may expect that the analytical and practical tools applied by liberal legalism to address fair process concerns will fail to ensure that people in the Global South are enabled to protect their interests in the safeguard policy regime. Marginalised indigenous and local peoples face considerable obstacles to effective involvement that are unlikely to be adequately addressed by procedural rights alone. We have seen that the IR Policy regime represents an attempt to address certain socio-economic deficiencies of liberal legal approaches to expropriation. One might also think that the IR Policy regime would seek to address the problems in the political and civil framework of liberal legal decision-making. Such an initiative would supplement procedural guarantees with expanded mechanisms designed to promote a more effective expression of the rights of communities to protect their own interests and to ensure the accuracy and integrity of decision-making.

The IR Policy regime does not take this course. In contrast to the liberal legal approach to the legitimate exercise of authority, the regime circumscribes the role played by local people as actors, and casts them instead as passive subjects. While project-affected populations are to provide information and to be consulted as to their preferences, principally they are expected to act as the subjects of expert study. Interpretive conclusions are drawn by experts who elicit and use the input of local people alongside other raw information.

Certain due process mechanisms have been developed as a result of the efforts of the WBG's insider reformers and outsider critics through the establishment of the Inspection Panel and the CAO. This reflects a shift towards public participation processes that are inspired by liberal notions of due

[56] M Galanter, 'Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change' (1974) 9 *Law & Society Review* 95.

[57] J Mashaw, *Bureaucratic Justice* (New Haven, Conn, Yale University Press, 1983).

[58] L Fuller, 'The Forms and Limits of Adjudication' (1978) 92 *Harvard Law Review* 353.

[59] HW Arthurs, *'Without the Law': Administrative Justice and Legal Pluralism in Nineteenth-Century England* (Toronto, University of Toronto Press, 1985). In the industrialised Global North, periodic reforms have been instituted—such as legal aid and other access to justice measures, class actions, reform of judicial appointment processes—to address these and other issues.

process. Under the recently created CAO complaint procedures, local people can gain some measure of active participation once something has gone seriously wrong. However, initiating such a complaint and exercising any control over its resolution require knowledge of the structure and procedures of the IR Policy legal regime. As one might expect, this knowledge can be quite difficult for local people to obtain. This is a long-acknowledged problem within the liberal legal approach that is typically addressed in the states of the Global North with 'access to justice' programmes and public information efforts. The IR Policy regime lacks such measures at present.

Private Autonomy and the Marginalisation of Project-affected Groups in Decision-making (or Navigating between Due Process and Privity of Contract)

The position taken by the agencies of the World Bank Group is that neither the safeguard policies nor the accountability mechanisms used to help enforce them provide project-affected populations with actual rights. This argument rests upon the WBG's characterisation of the safeguard policy regime as a private rather than a public matter. The reasoning is illustrated by the following passage written by a senior counsel to the World Bank who has been closely involved with the Inspection Panel:

> It must be emphasized, however, that implementation of the Bank's policy standards in projects does not result in substantive rights that individuals in borrowing countries may claim against the Bank, nor does the Inspection Panel represent a legal remedy mechanism through which positions described in the Bank's policies or rights referred to in the Resolution could be enforced against the Bank. The Bank's policies are internal instructions, which Bank managers issue to staff members for their guidance. These guidelines are binding on staff, and the standards embodied in the policies create a duty for staff to exert their best efforts to achieve them. Their actual achievement, however, depends primarily on the action of other parties, most notably the borrower. The policies become binding on the Bank's borrowing member countries when they are incorporated in loan documentation that binds borrowers. They do not give enforceable rights against the Bank to the people potentially affected by Bank-financed projects, as the Bank does not enter into a contractual relationship with these people.[60]

The passage confirms that safeguard policies are binding upon both Bank staff and the project sponsor and that the policies require each of these parties to fulfil obligations to persons affected by projects. Nevertheless it concludes that project-affected persons have no right to insist upon these obligations because they are not parties to the private contractual relationship that exists

[60] S Schlemmer-Schulte, 'The World Bank Inspection Panel: A Record of the First International Accountability Mechanism and Its Role for Human Rights' (1998) 6:2 *Human Rights Brief* 1.

between the WBG agency and its client. Construing the IR Policy as a purely private contractual obligation is an attempt to place the Bank's activity in a different category within the liberal legal tradition. Due process or procedural fairness requirements arise only when a public authority makes an administrative decision that affects those rights, privileges or interests recognised by law.[61] In contrast, when two or more persons make a private agreement, they are not normally required to involve third parties who stand to be affected by their decision-making unless they are compelled to do so by a regulatory requirement. A sphere of autonomy (again in recognition of the rights of individuals to manage their own civil affairs) is presumed to surround private action. Even if a contract is made between two parties for the benefit of a third, the common law doctrine of privity of contract provides that in conventional circumstances the third party is a stranger to the contract and will not usually be able to enforce it in court.[62]

The credibility of the case for the 'privateness' of the safeguard policy regime is certainly questionable, even within the liberal legal paradigm. The bright line dividing public from private activity is considerably blurrier than it was once considered to be.[63] A number of common law jurisdictions recognise that private authority can attract procedural fairness obligations in certain circumstances.[64] In addition, some legal scholars argue that innovations are necessary, given that, with the progress of globalisation, public functions of government are increasingly being delegated to private entities or to public–private partnerships.[65] These include not only service delivery, but standard-setting, rule implementation and enforcement. Administrative law, it is argued, must find ways to reckon with private power 'or risk irrelevance as a discipline'.[66]

In addition, a more traditional argument can be made. World Bank Group agencies are international organisations, funded with public money, that are pursuing the eminently public goal of development. WBG activities are not only funded and carried out at the behest of public authorities but, in the case of MIGA for example, an investment will not be insured without the formal

[61] *Cardinal v Kent Institution (Director)* [1985] 2 SCR 643.

[62] GHL Fridman, *The Law of Contract in Canada* (Toronto, Carswell, 1999) at 187–8.

[63] Kennedy suggests that the public/private distinction is in an advanced state of decline rendering it next to incapable of providing coherent explanations or justifications: D Kennedy, 'The Stages of Decline of the Public/Private Distinction' (1982) 130 *University of Pennsylvania Law Review* 1349.

[64] Wade and Forsyth cite a number of UK and Australian cases in which procedural fairness obligations are imposed on private actors: W Wade and C Forsyth, *Administrative Law* (Oxford, Clarendon Press, 1994) at 469. For further discussion of administrative law doctrine and the public/private distinction see AC Aman, 'The Globalizing State: a Future Oriented Perspective on the Public/Private Distinction, Federalism, and Democracy' (1998) 31 *Vanderbilt Journal of Transnational Law* 769 and J Freeman, 'The Private Role in Public Governance' (2000) 75 *New York University Law Review* 543.

[65] AC Aman, 'Globalization, Democracy, and the Need for a New Administrative Law' (2002) 49 *UCLA Law Review* 1687.

[66] Freeman, n 64 above.

agreement of the host country.[67] By providing financial assistance to large projects, WBG agencies are enabling those projects to unleash both positive and negative development effects within countries and localities. The WBG safeguard policy regime represents an effort to control negative effects and thereby facilitate and legitimate the agency's mission. In doing so, the regime aims to identify and remedy substantial losses that are experienced by local people and communities, but not necessarily addressed by national law. These are often vital entitlements for the local population and can mean the difference between remaining above or falling below subsistence levels. In addressing these issues, the affected population is entirely within the power of the sponsor and the WBG agency. With their aid, harms may be forestalled or remedied; without their aid, losses are likely to be considerable. Given the nature of the activity, the importance of the interests at stake, the power relation between the parties, and the involvement of states and state-sponsored actors, a strong case can be made on a conceptual level in favour of the need for effective safeguards to permit fair and accountable decision-making.

Given that World Bank agencies have created mandatory policies for the benefit of project-affected peoples, the idea that the WBG has created a regime without rights is something of a pretence, with several underlying motivations. First, institutional culture at the Bank has often rejected use of the 'R-word'. The Bank has argued for some time that it is forbidden to consider or enforce international human rights obligations pursuant to its Articles of Agreement.[68] Secondly, while WBG agencies are in the business of regulating states (through structural adjustment programmes, technical assistance, sectoral loans, etc) they have to be careful to maintain the legal fiction of absolute national sovereignty. Formal acknowledgement of certain realities risks provoking the wrath of borrowing countries. Talk of rights-creation across national boundaries would suggest a clear encroachment upon state sovereignty. Thirdly, the denial may be prompted by a concern that if safeguard policies state that local people have explicit rights, this may lead to actions in US courts in which affected populations seek to enforce the benefits due to them as third party beneficiaries of the WBG's financial contracts.[69] Accordingly, the rejection of rights-talk and the application of the privity of contract doctrine appear to represent both an ideological and a legal line of defence.

[67] Host country approval for an investment must be formally obtained before MIGA will issue a contract of guarantee: *MIGA ERSP*, n 1 above, para 26.

[68] S 10 of Art IV of the IBRD Articles of Agreement prohibits interference in the political affairs of Bank members, while s 5(b) of Art III provides that only economic considerations are of relevance to the Bank's decision-making processes and operational activities. For a thorough discussion of these matters see F MacKay, 'Universal Rights or a Universe unto Itself? Indigenous People's Human Rights and the World Bank's Draft Operational Policy 4.10 on Indigenous Peoples' (2002) 17 *American University International Law Review* 527 (arguing that World Bank agencies are obliged to apply international human rights standards).

However, in practice, the WBG has not been able to rely entirely upon the notion of private autonomy to protect it from attacks upon its legitimacy. It seems that neither the WBG's critics nor its supporters wholly accept the argument for 'privateness'. To date, WBG agencies have, with varying degrees of success, been able to reject both rights-talk and formal concepts of fair procedure as appropriate legitimating constraints upon safeguard policy decision-making.[70] Given the power of these two discourses, this is no small feat. However, this rejection nevertheless leaves the IR Policy regime with a significant problem. Its decision-making structure places a very significant amount of decision-making authority in the hands of the project proponent. This would appear to leave the regime open both to regulatory abuse and to de-legitimating attacks. What mechanisms does the regime use to deal with this fox-guarding-the-henhouse situation? The remaining sections of the chapter will describe and examine the implications of the two strategies deployed by the regime to promote the legitimacy, accuracy and integrity of its decision-making processes: the use of, first, participatory development methodologies and, secondly, expert professionals.

USING 'PARTICIPATION' TO STRUCTURE PUBLIC INVOLVEMENT IN DECISION-MAKING

IR Policy imposes a duty on the project sponsor to ensure the 'participation' of displaced persons and host populations in planning and decision-making.[71] So far in the discussion I have been using 'participation' as a generic term to refer to any means of structuring the involvement of third party members of the public in legal decision-making. From this analytical perspective, participation encompasses such formal and informal mechanisms as the use of a jury in a judicial process, using a show-of-hands vote of

[69] Several exceptions to the common law doctrine of privity of contract exist whereby third parties will be allowed to enforce contractual provisions intended for their benefit: Fridman, n 62 above. With regard to the scope of the American rule, the *Second Restatement of the Law of Contracts* (St Paul, Minn, Americal Law Institute Publishers, 1981) § 302(1) provides that:

> 'In order to qualify as an intended beneficiary [with third-party rights to sue under the contract], one must meet two requirements. First, one must show that 'recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties.' Secondly, one must show that either
>
> (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
> (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.'

[70] Certain relatively strong procedural guarantees have been obtained through the Inspection Panel process applied to IBRD and IDA projects. WBG dissatisfaction with the Panel has led to the creation of an informal dispute resolution process for IFC and MIGA through the CAO.

workers to decide whether to start a wildcat strike, or exercising the right granted to adult community members to speak in a village assembly. In each case, public input is structured in a particular way in order to instill a measure of democratic legitimacy and constraint over the making of decisions. In contrast to this general analytical category, the WBG's use of the term 'participation' refers to a particular set of approaches to structuring public involvement that have arisen within the development industry. The question to be addressed in this discussion is whether the WBG's use of this approach provides it with an effective regulatory and legitimation strategy in IR Policy decision-making.

The notion of participatory development emerged as part of a reform movement among development agencies and donors that gathered steam in the 1980s. This was provoked by a widespread crisis in credibility within the development field as a result of the increasingly evident shortcomings of top-down, expert-led approaches to development.[72] Expert-led approaches are associated with command-and-control attempts at social engineering that ignored local realities, local knowledge and local preferences in an effort to impose modernisation and development. As Cowrie remarks, 'participatory approaches have been incorporated into the programming of development largely because funding agencies in the past have been so poor at implementing effective long-term self-sustaining projects and programs'.[73] Vocal adoption of participatory approaches to development has enabled the development industry as a whole to distance itself from the large-scale failures associated with this earlier model. Indeed, participation has become an orthodoxy within the development field and is expected by practitioners, development agencies and donors alike.[74] As with many of these actors, '[t]he concept of participation has become central to the reperatoire with which the [World] Bank has sought to remake its public face'.[75] Indeed, the 'participation explosion' that has been taking place at a global level over the last several decades extends well beyond the development field and illustrates just how pervasively democracy expectations have expanded worldwide.[76]

[71] When OD 4.30 was drafted, the term 'participation' was deliberately chosen over the weaker alternative 'consultation': D. Jane Pratt, personal communication. While this represented a victory for advocates of the social perspective within the World Bank, as the following discussion illustrates, the issue soon became one of defining what participation means in practice.

[72] World Bank, *The World Bank Participation Sourcebook* (Washington, DC, World Bank, 1996).

[73] W Cowrie, 'Introduction' (2000) XXI *Canadian Journal of Development Studies* 401 at 405.

[74] B Cooke and U Kothari (eds), *Participation: The New Tyranny?* (London, Zed Books, 2001).

[75] P Francis, 'Participatory Development at the World Bank: The Primacy of Process' in ibid, at 72.

[76] Pring and Noe attribute the acceleration of public participation in decision-making to seven factors: (1) democratisation trends in the 1990s in Africa, Asia, Latin America and the former Soviet Bloc; (2) adoption of the paradigm of sustainable development which includes public participation as a central tenet; (3) the international environmental movement; (4) public

The practice of participation is based on a set of influential writers who have argued that people have to be made central to development by involving them in project decision-making.[77] Participatory methods are expected to provide development projects with better information, to increase local commitment to projects, and to produce emancipatory and protective outcomes for marginalised local people by involving them in interventions over which they previously had little influence.[78] Participatory approaches have brought important benefits to development decision-making. However, participation as it is understood in the development field exhibits two key systemic weaknesses. These are, first, its heavy reliance on unstructured expert discretion and, secondly, its lack of accountability and other mechanisms for dealing with imbalances of power. These weaknesses are particularly serious in the context of displacement induced by private sector development.

The first weakness of participatory approaches relates in part to their lack of a formal structure of rules or procedures. A wide variety of tools and techniques have been developed, such as Rapid Rural Appraisal (RRA), Participatory Action Research (PAR), Participatory Rural Appraisal (PRA) and the Social Mobilisation Approach (SMA); however, these are noted for their flexibility and the wide discretion they provide to practitioners.[79] Flexibility is certainly important, particularly given the highly diverse social settings in which the approach is intended to be applied. Furthermore, formal rules and procedures are no panacea in and of themselves. After all, the failings of liberal legal approaches to due process arise from an obsession with procedure, often at the expense of substantive results. However, appropriate checks and balances can be promoted by the existence of an effective formal framework for governing decision-making. As some critics have argued, the enthusiasm shown by actors in the development field for participatory development may stem from the freedom of action it permits them in practice and from 'the fact that "participation" is a nebulous term which does not impose any specific set of obligations on donors and governments'.[80]

As a result of this flexibility, participatory approaches are heavily expert-driven. There is of course an irony here. The participatory approach

participation requirements established by international financial institutions such as the World Bank; (5) human rights law; (6) increasing recognition of the rights of indigenous peoples and local communities; and (7) the Internet: G Pring and SY Noe, 'The Emerging International Law of Public Participation Affecting Global Mining, Energy, and Resources Development' in DN Zillman, AR Lucas and G Pring (eds), *Human Rights in Natural Resource Development* (Oxford, Oxford University Press, 2002) at 13.

[77] Cooke and Kothari, n 74 above, at 5.

[78] F Cleaver, 'Institutions, Agency and the Limitations of Participatory Approaches to Development' in ibid, at 37.

[79] Cowrie, n 73 above, at 405.

[80] P Feeney, *Accountable Aid: Local Participation in Major Projects* (London, Oxfam, 1998) at 9.

has supposedly distinguished itself by emphasising the degree to which it has moved away from expert-managed development. The World Bank's *Participation Sourcebook*, for example, contrasts 'the participatory stance' with 'the external expert stance'.[81] External experts may listen to beneficiaries but they do not meaningfully involve them in decision-making. In contrast, participatory practitioners are expected to design appropriate processes (using workshops, meetings, etc) for ensuring such involvement. In doing so, however, these practitioners cede none of their ultimate decision-making power over process content. The practical meaning of participation in any given situation is determined by the practitioner, based on her assessment of what is appropriate to local circumstances and the issues in question.[82] The *Participation Sourcebook* emphasises that 'no "perfect model" for participation exists' and that the form it takes 'is highly influenced by the overall circumstances and the unique social context in which the action is being taken'.[83]

Just as there are few formal rules governing participatory approaches in the development field, so is there a lack of informal consensus regarding the required content of participation. The question of what may be a valid and effective means of participation in a given set of circumstances remains highly contested.[84] Durst, for example, calls it an ideology 'devoid of a shared meaning and a common methodology'.[85] It is often argued that much participation is tokenistic, involving no real impact upon decision-making.[86] Certainly a wide spectrum of perspectives and practices is encompassed within the category of participation. Discussions of participation often present scales or ladders which extend from information or consultation at the bottom to partnership or control nearer the top. Wiebe observes that the 'nature and degree' of beneficiary involvement in participatory projects 'can vary greatly; the term is used for everything from perfunctory consultation with target groups at one end of the continuum, to projects initiated and controlled by people's organisations on the other'.[87] Thus, depending upon the decisions made by those charged with implementing participatory

[81] World Bank, n 72 above, at 3–8.

[82] SH Davis and LT Soeftestad, *Participation and Indigenous Peoples*, World Bank Environment Department Paper No 021 (Washington DC, World Bank, 1995).

[83] The *Sourcebook* subsequently adds that 'participation must involve some degree of shared control': World Bank, n 72 above, at 9, 11.

[84] I Guijt and M Kaul Shah, *The Myth of the Community* (London, Intermediate Technology Publications, 1998).

[85] D Durst, ''Heavy Sledding': Barriers to Community Participation in Beaufort Sea Hydrocarbon Developments' (1994) 29 *Community Development Journal* 62 at 62.

[86] LM Cooper and JA Elliot, 'Public Participation and Social Acceptability in the Philippine EIA Process' (2000) 2 *Journal of Environmental Assessment Policy and Management* 339, N Hildyard, P Hegde, P Wolvekamp and S Reddy, 'Same Platform, Different Train: The Politics of Participation [1998] *Unasylva* 26.

[87] A Wiebe, 'Who Participates? Determinants of Participation in a Community Development Project in Guatemala' (2000) XXI *Canadian Journal of Development Studies* 579 at 579–81.

strategies, participation may involve rigorous public involvement in decision-making procedures, or it may not.[88]

The second major weakness of participatory approaches to development arises from their tendency to fail to address power relations.[89] Recent critiques of participatory approaches observe that 'the proponents of participatory development have generally been naive about the complexities of power and power relations'.[90] This is true both with regard to intra-community power politics and with respect to the conflicts of interest that arise between beneficiaries on the one hand and donors and development NGOs on the other. According to Cleaver, focusing on local differences of interest among beneficiaries is often regarded as divisive and counter-productive by participatory development professionals.[91] Indeed, through participatory approaches, 'the people' or 'the poor' are 'all too often regarded as an undifferentiated mass'.[92] Mosse, on the other hand, uses the example of a rural development project in India which employed a fairly intense level of participation to demonstrate the tendency for participatory activities to be used to construct local needs in line with the goals, priorities and timetables of donors.[93] The liberal legal paradigm of fair procedure, despite its other failings, acknowledges the need for some protections against conflicts of interest and—through legal aid and other access to justice mechanisms—imbalances of power. In contrast, participatory discourse often obscures both.

These two weaknesses make participation a poor regulatory instrument for ensuring effective IR Policy decision-making. The requirement of

[88] Compare, eg, the approach set out in the IFC Environment Division: International Finance Corporation, *Doing Better Business Through Effective Consultation and Disclosure* (Washington, DC, IFC, 1998), with the nuanced analysis suggested by Carter: AS Carter, 'Community Participation as an Indicator of Social Performance at International Mining Projects', MERN Working Paper No 131 (Bath, MERN, 1998) and the emphasis on accountability in Feeney, n 80 above. Furthermore, Cowrie observes that the tools and techniques developed for practitioners offer few guarantees of robust involvement given that these methodologies 'can be employed anywhere along the mild/strong continuum': Cowrie, n 73 above, at 405.

[89] Guijt and Shah, n 84 above.

[90] Cooke and Kothari, n 74 above, at 1, 14.

[91] Cleaver, n 78 above, at 36. Guijt and Shah argue that:

> 'in many cases where participation has been pursued something is going wrong. Despite the stated intentions of social inclusion, it has become clear that many participatory development initiatives do not deal well with the complexity of community differences, including age, economic, religious, caste, ethnic and, in particular gender.'

Guijt and Shah, n 84 above, at 1. In a study of a participatory development project in rural Guatemala, Wiebe observes that participatory methods responded mainly to the needs of the middle class in rural communities: Wiebe, n 87 above.

[92] A Vaino-Mattila, 'The Seduction and Significance of Participation for Development Interventions' (2000) XXI *Canadian Journal of Development Studies* 431 at 439.

[93] D Mosse, ''People's Knowledge', Participation and Patronage: Operations and Representations in Rural Development' in B Cooke and U Kothari (eds), *Participation: The New Tyranny?* (London, Zed Books, 2001).

participation in the IR Policy regime is a highly ambiguous one which provides few concrete guarantees regarding how decision-making will be influenced by participant input. Furthermore, given the decision-making architecture of the IR Policy regime, the degree and manner of local involvement in the decision-making process are factors that will be determined to a large extent by the expert practitioners hired by the project sponsor. It is worth recalling that the implementation of IR Policy in the context of extractive industry development differs significantly from the general field of development interventions for which the participatory approach was initially conceived. The capacity for harm of these latter projects is reasonably limited. Development schemes that go awry may fail to provide local benefits but are, one would hope, unlikely to cause large-scale and lasting damage to community health, resources and livelihoods. In contrast, IR Policy applied in the mining context must confront a significant risk of local harm. Furthermore the identification of local harm and the implementation of measures to address it will have significant cost implications for the private sector enterprise entrusted with carrying out the Policy. Accordingly, in extractive industry development, the practical risks faced by local people are much greater and the conflict of interest is considerably starker. The need for effective safeguards is therefore even more evident. As we have seen, mechanisms for public participation in the IR Policy regime do not provide such safeguards. Instead, their influence is dependent upon the regime's principal regulatory and legitimative safeguard: expert involvement in decision-making.

EXPERT INVOLVEMENT IN IR POLICY DECISION-MAKING: THE ROLE OF THE SOCIAL SPECIALIST

The Emergence of a New Form of Professional Knowledge

What then is intended to ensure the integrity and legitimacy of the IR Policy regime's decision-making processes? It is the expertise of the professionals hired to run it.[94] Interpretation in the IR Policy regime is presented as a technical activity rather than a political or contestable one. Specialised personnel are employed by both the mining company and the IFC/MIGA. Research, analysis, participatory design and resettlement planning are performed by the company's specialists and reviewed by the WBG agency's specialists. These tasks are presumably assessed on the basis of a shared

[94] OD 4.30, n 16 above, paras 22 and 25; OP 4.12, n 16 above, paras 19, 32; BP 4.12, n 16 above, para 2.

professional perspective on standards of practice, accepted procedures and mutually recognised norms. It is a process analogous to scientific peer review: the adequacy of the practitioner's credentials and methodology, the thoroughness of the procedures, and the reasonableness of her conclusions within the accepted parameters of a professional discourse all attest to the validity of the work done. In the same spirit, the interpretation of terms such as 'participation', 'displaced person', 'living standards', 'resettlement' and 'restoration' ultimately derive their content from these shared professional practices, standards and judgements. The integrity and legitimacy of these interpretations therefore rest upon the premise that they will be produced by disinterested and autonomous technical professionals who are free to apply their scientifically validated professional norms and judgements.

The term 'social specialist' here is used to refer to expert professionals hired by mining companies, environmental consulting firms and World Bank agencies to frame and address issues relating to project-affected communities. They play a key role in the construction of who and what is 'the community': its geographical and political scope, its social, cultural and economic character, its legitimate needs and entitlements. The conclusions of social specialists are invested with the authority of their individual academic and professional credentials. In the World Bank Group's social safeguard policy regime, social specialists play a role analogous to that of lawyers within national legal systems: they are the regime's specialised interpreters. Just as legal training is required in order to translate a controversy into the language and logic of a lawsuit (and to transform it in the process),[95] so it is the particular task of the social specialist to phrase project-related social conflicts in the language and conceptual categories of social acceptability. Accordingly, the development of the WBG's safeguard policy regime is interlinked with the development of a new form of professional knowledge and practice.

Accordingly, basic choices made in the construction of social specialist knowledge and practices stand to make a considerable difference with regard to the regulatory effects of the IR regime. For example, the decision to make the basic unit of social analysis either the village, the household or the individual carries far-reaching effects. Equally, decisions concerning the indicators chosen for assessing entitlements, the criteria for qualifying as 'displaced', and the length of time over which livelihoods will be monitored are significant matters. Each of these decisions implies certain costs for the project sponsor as against certain benefits for the regime's beneficiaries. IR Policy is silent as to these choices. The requirements implied by the policy are determined by the interpretations made by social specialists.

Social specialists do not exercise their interpretive functions in a vacuum. Both the development of social specialist knowledge and its capacity to

[95] P Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38 *Hastings Law Journal* 805 at 833.

influence project decision-making will be greatly affected by the institutional context within which it is located. In the case of the application of IR Policy to large mine development, social specialists are located in three institutions: mining enterprises, environmental consulting firms and World Bank Group agencies. As we have seen, specialists engaged by the first two institutions are responsible for the initial collection and presentation of data, along with the design and execution of resettlement planning. Specialists at WBG agencies supervise these activities at long range and may be called upon to provide advice or other assistance. The capacity of these professionals to perform the functions assigned to them by the IR Policy regime will depend upon the power and interpretive authority they are able to exercise within their respective organisations.

Social Specialists and Mining Enterprises

In the mining industry, the activities of social specialists are integrated within the hierarchical planning and decision-making structure of the enterprise itself. Social specialists are typically grouped within a department responsible for 'community relations', which either employs them as staff or retains them as external consultants. Decisions taken by the department must be co-ordinated with other corporate departments and ultimately approved by senior management. Land acquisition and resettlement planning, for example, will also involve staff from departments responsible for legal compliance, environmental issues, operations, etc, and must be structured within the overall budgeting and timetabling processes for planning and project development. The design and construction of a large mining project is a highly complex activity involving a great many competing considerations addressed by different professionals, including engineers, geologists, economists, lawyers and accountants. In order to carry out their responsibilities as they would wish, social specialists must convince management to provide them with the budget, personnel, time and decision-making influence they require.

The previous discussion argued that the implementation of IR Policy demands that mining enterprises adopt a very different and unfamiliar approach to land acquisition. This suggests a series of questions related to the issue of the degree to which social specialists are able to affect 'business as usual'. What authority or influence is exercised by social specialists within this organisational structure? To what extent, and in what circumstances, do social specialists possess the authority required to assert interpretations and representations that will be carried out in practice? How strong is the interpretive authority of social specialists within mining enterprises and consulting firms, as compared with that of other actors with competing

interests? There are a number of compelling reasons to question the depth of social specialist influence and interpretive authority.

First, there is a lack of consensus within the mining industry concerning the legitimacy of social responsibility concerns. Strong feelings exist throughout the industry that it has been the victim of unfair and misinformed criticism.[96] According to this view, the creation of these policies and of community relations departments represents an unreasonable concession to political correctness. Hard-line proponents of this view are likely to contend that community activities should consist chiefly of public relations efforts rather than promotion of substantive changes. A less extreme version of this line of thought places social issues at the periphery of a mining company's important concerns: they may have to be addressed, but must not get in the way of 'real' work.

Secondly, both mining companies and environmental consulting firms are dominated by professionals from physical science disciplines such as geology, biology and engineering. Social scientists working on interdisciplinary impact assessment teams have identified among many physical scientists a tendency towards a 'disciplinary chauvinsm' characterised by a lack of understanding of or respect for the premises, methodologies and results of social science inquiry.[97] These attitudes, particularly if they are held by senior decision-makers or 'research brokers', may result in the under-funding of social research ('[w]hat is it you guys really do to use all that money?') and the failure to contract qualified personnel to address social issues ('[a]nyone can determine the social consequences of development').[98]

Thirdly, there are strong structural motivations in the industry for continuing with 'business as usual'—particularly with regard to diminishing the impact of social responsibility requirements on the timing and cost of other operations. Strict control of production costs and timetables is a paramount value within the mining industry. Metals prices are established on

[96] R Wilson, 'The Global Mining Initiative' (2000) 8:3 *ICME Newsletter*, available at www.icmm.com/library_pub_detail.php?rcd=106, A MacDonald, *Industry in Transition: A Profile of the North American Mining Sector. Report prepared for MMSD North America* (Winnipeg, IISD, 2002) at 101, 110–1.

[97] Describing the role of the social scientist in rural development initiatives, Rickson and Rickson note that 'the working relationship between economists and other social scientists is often quite as strained as between, say, sociologists and technical specialists': RE Rickson and ST Rickson, 'Assessing Rural Development: The Role of the Social Scientist' (1990) 10 *Environmental Impact Assessment Review* 103 at 106. See also RJ Burdge and F Vanclay, 'Social Impact Assessment: a Contribution to the State of the Art Series' (1996) 14 *Impact Assessment* 59, RJ Burdge and P Opreyszek, 'On Mixing Apples and Oranges: the Sociologist does Impact Assessment with Biologists and Economists' in RJ Burdge (ed), *A Conceptual Approach to Social Impact Assessment* (Middleton, Wis, Social Ecology Press, 1994). And see for a discussion of the perspectives of engineers, A Chase, 'Anthropology and Impact Assessment: Development Pressures and Indigenous Interests in Australia' (1990) 10 *Environmental Impact Assessment Review* 11.

[98] The quotations, characterisations of 'disciplinary chauvinist' attitudes, are from Burdge and Opreyszek, n 97 above, at 170 and Burdge and Vanclay, n 97 above, at 69 respectively.

volatile world markets, and the success of a mining enterprise depends on achieving production at the lowest possible cost. In addition, the need for considerable borrowing in order to develop a large mine places a high premium on the efficient use of time: the faster a mine can become productive, the less debt servicing will be necessary. These values are deeply embedded in a company's institutional culture as well as in the individual professional cultures of its staff. The capacity of social specialists to insist on action that increases costs or requires delays may be limited by both overt policy and the natural dispositions of company personnel active in the decision-making process. These dispositions may also be internalised by social specialists, particularly where the specialist's career path is tied to future employment with mining enterprises.

Finally, the social specialist profession remains poorly institutionalised and offers little to bolster the interpretive authority of individual practitioners. It is not a professional category with accreditation, compulsory professional standards, or disciplinary self-regulation. It is not clear what qualifications are required for someone to be considered a social specialist. While many who are hired in this capacity are anthropologists or sociologists, others may be physical scientists or managers who have acquired some practical experience with community issues. In Peru it is not uncommon to find Peruvian mining engineers ('old hands' at dealing with communities) or even former industry-side labour negotiators in senior positions in community relations departments. Not surprisingly, little foundation exists for the creation of interpretive consenses which may help to consolidate a profession's[99] specialised authority.[100]

These observations call into question two assumptions concerning the capacity of social specialists to ensure the integrity and legitimacy of regulatory decisions produced by the IR Policy legal regime. It is not clear that

[99] There are some indications of development of a professional specialisation in resettlement issues. While much of this development has taken place within the World Bank, the International Network on Displacement and Resettlement (INDR) 'provides a virtual, global communications network of scholars, practitioners, and policy makers attempting to prevent development-induced impoverishment': see the INDR website, available at www.displacement.net/.

[100] See Burdge and Vanclay, n 97 above, at 66–70. For a contrary view see K Finsterbusch, 'In Praise of SIA – a Personal Review of the Field of Social Impact Assessment: Feasibility, Justification, History, Methods, Issues' (1995) 13 *Impact Assessment* 229. Finsterbusch argues the case for the autonomy and institutionalised recognition of the field developed by social assessment practitioners. His argument differs chiefly from those of critical or reformist practitioners not in its substance but in its emphasis: after all the cup that is criticised for being half empty is also half full. Finsterbusch stresses the profession's achievements, particularly in developing common methodologies and in obtaining recognition for the value of its work. Finsterbusch has to qualify these claims; and these qualifications are revealing. Of the 6 methodological steps he identifies as 'necessary for a *minimal but adequate SIA*': ibid, at 247, emphasis added, he points out that two are either mostly not done, or 'often neglected and shortchanged': ibid, at 242. While he argues that 'the field has matured and earned sufficient legitimacy to become a standard intellectual tool for decision making', he also notes that:

social specialists operating within the mining industry have a strong sense of shared professional standards and judgements to serve as authoritative and reviewable guidance in interpreting and applying IR Policy. In addition, these observations suggest that social specialists may have difficulty in formulating or asserting interpretations that are carried into practice if they conflict with the dominant logics, assumptions and practices which prevail elsewhere within the company. In the words of a social consultant with substantial mining industry experience: '[t]he difficulty for consultants of providing objective and complete assessments of the potential impacts from project development when they are being paid to assist a company to develop a project can be quite extreme'.[101] In addition, the influence of individual social specialists can be diminished by those higher up in the decision-making structure. Consultants who collect field information can often be several steps removed from those who write the general conclusions of a study.[102] How these conclusions are drafted is typically subject to great scrutiny by corporate clients.

In an article criticising a deeply flawed environmental assessment of the Three Gorges Dam project in China,[103] Fearnside argues that certain practices relating to project assessment must be changed in order to deal with the problem of 'expert prostitution'. These include the anonymous authorship of assessments, the confidentiality agreements used to bind consultants, and the short timelines allowed for assessment work. He also contends that individual consultants may write critically and frankly of a

> 'its acceptance, however, is still incomplete. SIA is opposed by some economists and engineers who are not convinced that its benefits will be greater than its costs'

Ibid, at 243. His discussion also alludes to other challenges faced by the profession. Eg, he refers at one point to 'the typical social impact assessor who is in the midst of an underbudgeted SIA': ibid, at 244. As a principled practitioner, Finsterbusch argues that more needs to be done in the way of professional oversight and control. He advocates a deepened professionalisation of SIA, and argues for a decision-making model that features external review of SIA work by outside experts. He is also in favour of a greater reliance on professional standards and judgement over rigid written requirements. Finsterbusch wants to see the profession take greater responsibility for itself and its field. He stresses that it is 'the obligation of the SIA community' to assert itself further in order to police the frontiers of its field of practice and 'to use political and bureaucratic influence to attain the adoption of professional standards so that fraudulent SIAs are more difficult to get away with': ibid, at 246. For evidence of growing institutionalisation of professional standards see Interorganisational Committee on Guidelines and Principles for Social Impact Assessment, 'Guidelines and Principles for Social Impact Assessment' (1995) 15 *Environmental Impact Assessment Review* 11 and the International Association for Impact Assessment website, available at www.iaia.org/.

[101] S Joyce and M MacFarlane, 'Social Impact Assessment in the Mining Industry: Current Situation and Future Directions', MMSD Background document (London, IIED, 2001) at 8.

[102] PM Fearnside, 'The Canadian Feasibility Study of the Three Gorges Dam Proposed for China's Yangzi River: A Grave Embarrassment to the Impact Assessment Profession' (1994) 12 *Impact Assessment* 21.

[103] The study was funded by the Canadian International Development Agency (CIDA) and was carried out by Canadian consultants. Fearnside argues that their study is so dramatically flawed that it 'invites the question of what level of impact would be judged unacceptable if this one is not': Fearnside, n 102 above, at 21.

project, and yet 'the end effect is often the same as if they had only reported positive aspects of the project: the final conclusions used in decision-making remain the same, such as the executive summary and the public announcement of overall project endorsement'. Fearnside argues that '[t]he oath of secrecy, together with the realization of all consultants that their future prospects for contracts depend on discretion, ensure that any inconsistencies between the detailed findings and the conclusions remain interred'.[104] While the problems raised by Fearnside may be atypical in their severity, they speak in general of a weak profession subject to domination by its clients.[105]

Social Specialists and the World Bank Group

In some ways, social specialists at World Bank Group agencies have considerable advantages over their counterparts in the private sector. They enjoy much greater security of employment and are part of a larger and more tight-knit professional community. Furthermore, the WBG offers opportunities for social specialists further to institutionalise their profession through networking and exchange. Nevertheless, a review of the literature suggests that specialists at WBG agencies confront similar challenges that are likely to structure the development of their professional knowledge, practices and decision-making influence.

Social specialists at World Bank Group agencies play the role of regulator, working to ensure compliance with social safeguard policies. How is their performance of this task influenced by the characteristics of their institutional setting? Social specialists have the opportunity to affect projects through their inclusion in project appraisal teams and their subsequent assignment to project supervision. During project appraisal, the social specialist assigned to a particular appraisal team will review the reports produced by the project

[104] Ibid, at 50–1.

[105] Jobes provides an even starker assessment of the role of social specialists performing social impact assessment (SIA) in the US:

> SIA is a mechanism of social control. Sociologists assist government and private enterprise in exploiting resources despite negative impacts imposed on local residents. This strain-producing dirty work is facilitated by professionalizing the impact analysis process under the presumption that experts will assure unbiased data analyses and theoretical interpretations. Social-impact research fails to accomplish either goal for several reasons. First, the potential variety of information and perspective are so grand and the resources for research so limited that rarely are adequate methods and theory used. Secondly, the rational/economic model for evaluating induced social change used in most SIAs tacitly invalidates what may be the most important qualities from the viewpoint of an impacted population. Third, SIA is performed for organisations under the assumption that development will occur, thus excluding much valid and critical information.

PC Jobes, 'Social Control of Dirty Work: Conflict Avoidance in Social-Impact Assessment' (1985) 5 *The Rural Sociologist* 104 at 104.

sponsor. On the basis of the facts provided, she must assess the validity of the sponsor's own interpretation of its obligations under the social safeguard policies. The specialist will also be in touch with her counterparts at the sponsoring firm and will be able to raise issues and make recommendations with respect to policy compliance. Together with the evaluation team, the social specialist will contribute to a report which provides an overall assessment of the project.

In performing these tasks, social specialists within World Bank Group agencies face many of the same issues identified with regard to specialists operating outside the WBG. A similar picture is painted of challenges related to institutional resistance to change, inter-disciplinary tensions, lack of institutionalisation of the profession, and the overriding by management of social specialist decisions. Social specialists working in the public sector side of the World Bank have had to struggle against the marginalisation of their influence upon actual practice.[106] Factors identified as contributing to this marginalisation include the economist-led corporate culture of the Bank and institutional disincentives to rigorous application of social safeguard policies. The Bank's 'culture of approval' rewards managers who complete loans expeditiously. Painstaking application of onerous social requirements tends to stand in the way of a manager's personal advancement.[107]

A recent CAO study suggests that these kinds of interdisciplinary tensions are also signficant within IFC. The study cites dissatisfaction among IFC investment staff with regard to the exercise of professional discretion by social specialists. Investment staff argue that the parameters for the flexible interpretation of safeguard policies are not transparent and that social specialists feel they do not need to explain or justify their policy interpretations 'irrespective of the impact on project costs'.[108] The study also cites the concern of environmental and social staff at IFC regarding the efforts of investment staff to limit the influence of safeguard policies over certain projects. The specialists complained that investment officers would keep certain projects under wraps until advanced stages of development so as to limit the options available to environmental and social staff concerned with applying safeguard policies.[109] These kinds of dynamics have lead to the development of a 'bunker mentality' prevalent among social and environmental specialists at IFC.[110]

Doubtless, these struggles reflect the relative novelty of social specialist expertise within WBG agencies and a continuing uncertainty regarding the

[106] Fox, n 17 above, P Francis and S Jacobs, 'Institutionalizing Social Analysis at the World Bank' (1999) 19 *Environmental Impact Assessment Review* 341.

[107] Fox, n 17 above, at 320, D Gopinath, 'The Greening of the World Bank', *Infrastructure Finance*, Sept 1996, 42.

[108] Compliance Advisor/Ombudsman, n 2 above, at 26.

[109] Ibid, at 28.

proper scope and capacity of social specialist knowledge. As discussed in Chapter 3, external pressures from NGO critics and their allies have been instrumental in providing insider social specialists with opportunities to increase their stature as problem-solvers within Bank institutions.[111] The World Bank hired its first social specialist, Michael Cernea, in 1974.[112] The first social specialist hired by IFC was engaged in 1996 in the wake of the Pangue Dam debacle.[113] At the time research interviews were conducted for this study in 2000, MIGA did not yet have a social specialist on staff. What appears evident is that the influence in practice of social specialists upon IR Policy decision-making is far from certain, particularly in the absence of strong outside opposition to bolster their authority.

CLOSING SUMMARY

WBG IR Policy calls for project sponsors to carry out land acquisition in a manner that is generally alien to conventional practices and understandings within the private sector. At the same time, the regime confers a substantial degree of discretionary control over regime decision-making on the project sponsor. This leads to an evident fox-guarding-the-henhouse problem entailing two considerable challenges: first, that of exercising an effective regulatory influence over the project and, secondly, that of convincing others of the legitimacy of the regime's operation. In addressing these challenges, the IR Policy regime pointedly avoids using one of the fundamental regulatory and legitimation strategies of liberal legal systems: that of conferring rights of due process on those members of the public with significant personal interests at stake in the decision. WBG agencies aim to avoid the gravitational pull of 'rights-talk' by claiming that the operation of the

[110] Ibid, at 7. Also, some evidence suggests the lack of professional consensus among social specialists. The CAO study found variance among specialists with regard to definitions: ibid, at 24.

[111] Fox and Brown have suggested that external pressure on the Bank can help to increase the authority and reform opportunities available to social staff within the Bank: JA Fox and LD Brown (eds), *The Struggle for Accountability, the World Bank, NGOs and Grassroots Movements* (Cambridge, Mass, MIT Press, 1998). Informants interviewed within the social departments of World Bank agencies agreed with this suggestion: they felt that the presence of outside pressure helped to increase their standing within their organisations. As community issues become more important problems, those qualified to address them gain greater importance and authority. This dynamic is likely to apply as well to the social departments working within mining companies: that the authority of social specialists will be strongly influenced by the relative presence, absence and form of outside pressure and scrutiny of the process.

[112] Cernea rose to become senior social scientist and the 'doyen of social science' at the Bank: Francis, n 75 above, at 74. He has been one of the principal proponents of socially oriented reforms, especially with regard to resettlement: ibid, at 308.

[113] Compliance Advisor/Ombudsman, n 2 above, at 13.

safeguard policy regime is a private matter that formally concerns only the agency and its client.

In the place of due process guarantees, the IR Policy regime sets out two strategies that are intended to ensure the integrity of its decision-making processes. First, projects are required to employ participatory methodologies borrowed from the development field in designing their plans. Secondly, IR Policy decision-making is to be carried out by qualified experts, called social specialists, employed both by the project and by the WBG agency. On examination, the first strategy turns out to offer little of substance on its own and is reliant instead on the effectiveness of the second. Given the breadth of practice among actors in the development field, the content of participatory methodologies is largely dependent upon the decisions made by expert practitioners. Thus, in the end the IR Policy regime depends to a large degree upon a single mechanism for ensuring its regulatory integrity and legitimation effects: the exercise of a robust form of professional expertise through the role given to the social specialist. The final sections of this chapter have examined this new form of professional knowledge. Substantial concerns have been identified with regard to the capacity of social specialists either within or outside WBG agencies to act as guarantors of the legitimacy and integrity of the IR Policy regime. In the chapters that follow, the case study will be outlined and analysed. This will offer an opportunity to assess both the overall performance of the IR Policy regime in practice and the effectiveness of the social specialist mechanism in accomplishing the task assigned to it by the regime.

5

Communities and Corporations

APPROACHING THE CONCEPTS OF CORPORATION AND COMMUNITY

At the core of this book is a case study concerning the arrival of a large foreign-owned mining operation in a small rural district high up in the northern Peruvian Andes. This case study is found in the next chapter. In the present chapter I will provide a general introductory discussion intended to assist the reader in understanding the behaviour and motivations of the principal actors in this story; that is to say, community actors in the rural Andes and corporate actors involved in the transnational mining industry.

A review of the literature on development-related corporate and community conflicts suggests that there is a need to problematise the ideas of 'community' and 'corporation'. Too often each is presented as if it were a 'black box'—a monolithic entity without internal dynamics of significance. The two are understood to represent very different kinds of human associations—described famously by Tonnies as *Gemeinschaft* (community) and *Gesellschaft* (purposive association).[1] Furthermore, it is no exaggeration to say that corporate and community actors involved in encounters such as the one presented in the case study exist in different worlds. Each nevertheless shares a number of characteristics. At the most basic level, each is a form of association featuring its own social universe of competing and co-operating actors and interests. Each social universe contains its own schema of ways of understanding the world, of goals and challenges, of continuing struggles to establish and maintain desired sets of entitlements. To understand the behaviour of either corporate or community actors, these internal and external dynamics and their historical development must also be understood.

[1] F Tonnies, *Community and Civil Society* (Cambridge, Cambridge University Press, 2001).

QUESTIONING COMMUNITY

Of the two terms, community is perhaps the more frequently misrepresented. Community is often believed to be a straightforward social and political entity—a natural feature of human ordering in which a certain population occupying a particular territory shares values and interests as well as an identity and a culture.[2] The notion of community is strongly influenced by traditional anthropology which once sought to classify ethnic and cultural groups into clearly demarcated entities.[3] While this reflects an ethnocentric simplification of the idea of culture, it also supports a simplified approach to the community's involvement in governance. It makes what were once called 'primitive cultures' straightforward, knowable and, in theory at least, easily governable. In this view they are static, driven by unchanging tradition, and automatically solidaristic. As a result, the community can be represented by a single voice—that of either a traditional leader or an 'authentic' representative member. Mertz points out that governments and colonisers have repeatedly sought to elevate a single indigenous voice capable of speaking for entire cultures and communities.[4]

This view of community is mistaken and highly misleading. The term 'community' will be used in two ways in this text. 'The community'—or often 'community actors'—will be used to designate the ensemble of local people directly affected by a proposed or existing mining project. The community, in this sense, may refer to a highly differentiated population living in a number of different villages and towns in the vicinity of mining operations. This use of the term should not be taken to imply that a community of identity or interest necessarily exists among those so described. On the other hand, the existence of community among local actors refers to the presence of shared identities and common institutions that provide the basis for collective action.

In studying the presence of community within the community, we must be aware of two dangers: that of romanticising the concept of community and that of essentialising it. Community is for many Western and other observers an appealing, romantic idea. Discussing the attraction that pre-modern communities and collective resource use institutions have for conservationists, McCay argues that this romantic appeal 'is doubtless part of the old Western suspicion that "individualism" is flawed, and that a better way of life

[2] I Guijt and M Kaul Shah, *The Myth of Community* (London, Intermediate Technology Publications, 1998).

[3] J Clifford, *The Predicament of Culture: Twentieth-Century Ethnography, Literature, and Art* (Cambridge, Mass, Harvard University Press, 1988), RJ Coombe, *The Cultural Life of Intellectual Properties* (Durham, NC, Duke University Press, 1998), A Gupta and J Ferguson, 'Beyond "Culture": Space, Identity, and the Politics of Difference' (1992) 7 *Cultural Anthropology* 6.

[4] E Mertz, 'A New Social Constructionism for Sociolegal Studies' (1994) 28 *Law & Society Review* 1243.

could be found in small rural communities where people shared in common even the very land upon which they depended'.[5] She observes that this romanticism at times clouded the judgement of conservationists and led many 'to find conservation value for all "traditional" resource use systems even when they are in fact organised for other purposes'.[6]

A second form of romanticism asserts that communities are harmonious and solidaristic entities that exhibit definite boundaries. Recent work in rural environments shows quite clearly that this is not the case. Social groupings within rural environments 'are neither homogeneous in composition and concerns, nor necessarily harmonious in their relations'.[7] On the contrary, these groupings are sites of continuing social struggle over power, meaning and entitlements, often expressed in forms of everyday behaviour.[8] This is the case in even the most famously harmonious of societies. Describing her development work in rural Bali, Kindon observes:

> By including the less-educated, worse-off and lower caste women and men in the ... discussion groups, considerable tension, and sometimes conflict, arose. Different interests emerged, and various groups or individuals struggled for dominance. Such conflict contrasted sharply with the well-documented image of Balinese people's gentle and harmonious relationships. Divisions and use of power were particularly evident along caste and class lines.[9]

The boundaries of communities are also contested. Ethnic-, cultural-, kinship- and residency-based dimensions of belonging are stretched and tested by migration, intermarriage and social conflicts, as well as by differing accounts of how informal rules and priniciples ought to be applied.

Essentialising community—that is, viewing the characteristics of a social group as natural or immutable—is another pitfall. Viewed ahistorically, aspects of community livelihoods and lifestyles can appear to be essential and permanent aspects of the community's way of being. This is particularly true of indigenous peoples who are often strongly tied to particular lands and social practices. An understanding of the practical importance of these ties to the health and welfare of indigenous peoples does not mean, however, that an observer ought to define these peoples solely according to current practices. Occupying a subsistence niche, for example, has often been misread as an unchanging part of a people's being rather than as the result of historical

[5] BJ McCay, 'Community and the Commons. Romantic and Other Views' in A Agrawal and CC Gibson (eds), *Communities and the Environment. Ethnicity, Gender, and the State in Community-Based Conservation* (New Brunswick, NJ, Rutgers University Press, 2001) at 181.

[6] McCay, n 5 above, at 182.

[7] Guijt and Shah, n 2 above, at 8, S Kindon, 'Of Mothers and Men: Questioning Gender and Community Myths in Bali' in ibid.

[8] SE Merry, 'Law, Culture, and Cultural Appropriation' (1998) 10 *Yale Journal of Law and the Humanities* 575.

[9] S Kindon, n 7 above, at 159.

struggles over power and resources. As Li observes, '[p]overty, powerlessness, and exclusion from valuable resources are integrally related'.[10] It is no accident, for example, that, as we have seen in Chapter 2, marginalised peasants in the Peruvian Andes are deemed by the state not to possess any property right in the considerable mineral wealth that may underlie their lands. When profitable resources are discovered within the environmental niches occupied by marginalised people, they are often excluded from these new sources of wealth. So long as the forces which have helped to construct and maintain aspects of their (powerless, poor) identity remain in place, vigorous efforts will be made to identify them in a manner that 'renders them ineligible as beneficiaries' of newly valuable resources.[11] Typically, there is an interesting story to be learned with regard to how any group has come to occupy a particular economic and social niche. Gaining an understanding of the social construction of motivations and goals among community actors requires a historical view of how local community and identity have been and are currently being defined.

Community is not a natural event occurring evenly and spontaneously throughout the world. Shared identities and common institutions do not emerge out of nowhere, nor are they straightforwardly tied to clearly demarcated territorial or ethnic lines. They are projects that arise in response to the challenges and goals faced by populations within their social settings. They rely on the historical development of shared experience, and the weaving together of ideology and myth.[12] Divisions and solidarities are the cultural materials that constitute communities. Far from being static, these tend to be processes in flux, in which the meanings of local identities and institutions are contested in continuing social processes.[13]

Community identifications do not arise automatically within rural or indigenous populations.[14] The creation of the common identities that underlie local solidarities has tended to arise from the need for co-ordinated action to solve common problems. Perhaps the strongest of such identifications result from efforts to resist outside domination. Other authors have noted the vital role often played by the state in community formation, first by provoking organised local resistance, and, secondly, through its ordering of local environments into administrative units.[15] Community in this sense is an evolving entity that must be constantly constructed and re-made in response

[10] TM Li, 'Boundary Work: Community, Market, and State Reconsidered' in Agrawal and Gibson, n 5 above, at 161.

[11] Ibid, at 161.

[12] S Hall, 'Negotiating Caribbean Identities' (1995) 209 *New Left Review* 3.

[13] Merry, n 8 above, JC Scott, *Weapons of the Weak* (New Haven, Conn, Yale University Press, 1985).

[14] TM Li, 'Articulating Indigenous Identity in Indonesia: Resource Politics and the Tribal Slot' (2000) 42 *Comparative Studies in Society and History* 149.

[15] P Vandergeest and NL Peluso, 'Territorialization and State Power in Thailand' (1995) 24 *Theory and Society* 385.

to current circumstances. This is a familiar process. We are accustomed to observe, for example, that some new challenges may fortify a sense of community within a population, while others may weaken it.

Understanding the history and characteristics of community in the Peruvian Andes is important for our purposes for two reasons. First, the nature of social identities open to local actors will influence the goals that they define for themselves when confronted by the prospect of mining development. Needs and aspirations are socially constructed, that is to say they are as much a function of one's place in the social environment as in the physical one. Secondly, with the arrival of a large mining enterprise, community can be an important resource for local actors. Depending upon the characteristics of local institutions and identities, these may be adapted by local actors in order to pursue their projects. Equally, the characteristics of local institutions may prove to be a barrier to the realisation of the goals of local actors.

COMMUNITY, IDENTITY AND AUTHORITY IN THE PERUVIAN ANDES

Actors in rural settings in the Peruvian Andes are simultaneously linked to and divided from one another by overlapping and opposing solidarities. Historical conflicts over land, resources, and cultural, economic and political power are continuing among indigenous peasant communities, members of local kinship networks, *mestizo* (mixed) townspeople, and members of former estate-owning families. Each of these groups is highly differentiated and subject to both internal conflicts and shifting external alliances. Moreover, all of these groups are struggling to adapt to the enormous socio-economic transformations taking place in rural and metropolitan Peru.[16] The discussion that follows will outline a short history of the development of principal lines of solidarity and division in the rural Peruvian Andes. This is a very general institutional and political history of Andean rural environments that seeks to explain how contemporary boundaries are drawn and what community means in these settings. This will be used to explain the opportunities among community actors for collective action as well as the likely options and strategies adopted by actors. These issues will be addressed in a discussion of the following questions:

— Are Andean rural populations solidaristic?
— Are they defined by subsistence livelihoods?

[16] A Diez, 'Diversidades, alternativas y ambigüedades: instituciones, comportamientos y mentalidades en la sociedad rural' in V Ágreda, A Diez and M Glave (eds), *Perú: el problema agrario en debate* (Lima, SEPIA, 1999), K Paerregaard, 'The Dark Side of the Moon. Conceptual and Methodological Problems in Studying Rural and Urban Worlds in Peru' (1998) 100 *American Anthropologist* 397.

— Are they isolated?
— Do Andean peoples identify themselves as indigenous?

Are Andean Populations Solidaristic? Essentialised Visions of Andean Society

Particularly for outsiders, community in the Andes is often associated with traditional associations rooted in the pre-hispanic civilisation of the Inca. This common conceptual framework establishes a series of dualities in which indigenous features of the social landscape are juxtaposed with their foreign and imposed counterparts. Thus, Spanish heritage and institutions are opposed to indigenous Andean culture; capitalist exchange relations are opposed to relations based on reciprocity; common land use is opposed to private exploitation of land; the traditional and mysterious world of the Andes is opposed to the modern, metropolitan world of Peru's coastal cities; and, finally, the solidaristic *campesino* community—an association based on affective, kinship, and traditional ties—is opposed to the technologically advanced capitalist firm.

This division is either celebrated or condemned, but rarely questioned. Indigenist accounts exalt the traditional and decry the 'penetration' of capitalist market relations into Andean communities.[17] Liberal economic perspectives on the other hand have often portrayed traditional practices and institutions as obstacles to progress.[18] Both of these discourses tend to essentialise their subjects, and neither provides a very reliable guide to understanding actual behaviour. They paint a simplistic picture of the contemporary Andes based upon who its residents 'are'—whether because of culture, ethnicity or race. Either Andean peoples are the noble and abused inheritors of the Inca or the ignorant and stubborn Indian peasantry whose backward ways will not allow the country to advance.

However, it should be trite to say that nearly five centuries of colonial and post-colonial history have transformed Andean rural institutions and have provided the populations of the contemporary Andes with a spectrum of socio-cultural resources and economic strategies to choose from.[19] Events in recent decades in particular have made the pervasive dualism through which Peruvian society is often seen as being harder and harder to sustain. This fact, however, has not diminished its ubiquity in political and social discourse.

[17] A Bebbington, 'Modernization from Below: an Alternative Indigenous Development?' (1993) 69 *Economic Geography* 274.
[18] M Berman, *All That is Solid Melts Into Air* (New York, Penguin, 1983).
[19] Bebbington, n 17 above, A Bebbington, 'Globalized Andes? Livelihoods, Landscapes and Development' (2001) 8 *Ecumene* 414, E Mayer, *The Articulated Peasant: Household Economies in the Andes* (Boulder, Colo, Westview Press, 2002).

The Historical Origins of Solidarities and Divisions in the Rural Andes

Contemporary concepts of community in the Andes have their origins in the colonial period. After its conquest of the territories held by the Inca in the sixteenth century, the Spanish Crown divided its subjects in Peru into two legal categories, Spanish and Indian.[20] Each was conceived as a different nation that received different rights and owed different duties to the Spanish emperor.[21] Indian communities were subject to special controls and tributary responsibilities. They were also provided with common rights involving limited self-rule and protection of their lands from appropriation by outsiders.[22] These rights to collective organisation and common land came under increasing assault in the nineteenth century. Pressures from local landlords and expansionist *haciendas* sought to enclose common lands and convert Andean peasants into dependent *colonos*, serfs in the service of the all-powerful *hacendado*. At independence in 1821, the new republic officially abolished Indian status. Indian privileges and obligations were dissolved by decree in Lima in accordance with the liberal doctrines and capitalist interests of the new rulers. In practice, this affected the balance of power in local struggles in the Andes without determining their results. The official privatisation of Indian lands certainly facilitated their enclosure in many regions. However, many communities managed to retain de facto collective land tenure, although this was unrecognised by law. In general, access to the privileges of Indian status was weakened, while the special obligations tied to this status continued to be imposed in different forms.

From the nineteenth through to much of the twentieth century, the Andean countryside was ruled through a quasi-feudal order maintained by a class of landowners and merchants who typically monopolised local state offices (mayor, governor, judge, etc), controlled local markets, and dominated the significant means of production.[23] This was the era of the *gamonales*, who dominated local regions in the Andes through a fusion of local economic and political power. Much of the agricultural land was absorbed by *haciendas*. The nineteenth and twentieth centuries can be seen as long battles between 'free' communities and *haciendas* for land, water and power. The state played a limited role in mediating these conflicts. Although

[20] J Collier, 'Law, Social Contract Theory, and the Construction of Colonial Hierarchies' in BG Garth and A Sarat (eds), *How Does Law Matter?* (Evanston, Ill, Northwestern University Press, 1998).

[21] M Thurner, '"Republicanos" and "la Comunidad de Peruanos". Unimagined Political Communities in Postcolonial Andean Peru' (1995) 27 *Journal of Latin American Studies* 291.

[22] T Abercrombie, 'To be Indian, to Be Bolivian: "Ethnic" and "National" Discourses of Identity' in G Urban and J Sherzer (eds), *Nation-States and Indians in Latin America* (Austin, Tex, University of Texas Press, 1991) at 102–3.

[23] P Gose, 'Embodied Violence: Racial Identity and the Semiotics of Property in Huaquirca, Antabamba (Apurímac)' in D Poole (ed), *Unruly Order: Violence, Power, and Cultural Identity in the High Provinces of Southern Peru* (Boulder, Colo, Westview Press, 1994).

ostensibly a liberal republic, throughout much of its post-independence history Peru effectively denied meaningful civil rights to the majority of its population. Peruvian citizens not literate in Spanish were denied the right to vote until the passage of the 1979 Constitution.[24] The *gamonales* ensured the stability and political loyalty of their regions; in return, the repressive support of the state was available to them in times of civil revolt.[25]

A distinctive element of the *gamonal* system of power relied upon maintaining and expanding upon concepts of racialised difference that underlay the colonial legal system. The *gamonales* perpetuated an informal system in which dominance and servility were racially determined activities. As *mestizos*, the *gamonales* claimed to rule by virtue of their mixture of Spanish and Indian blood. As part Indians, the *gamonales* participated in traditional institutions; they played ceremonial roles in agrarian festivals; they were powerful patrons with whom it was important to cultivate traditional ties. As part Spanish, the *gamonales* were transgressive of community ties and community boundaries. Gose argues that the deliberate and dramatic violation of 'Indianness' was crucial to validating Hispanic identity. The *gamonales* 'developed a style of personal domination based on spectacular acts of violence, which became their trademark'.[26] Stein notes, however, that the Indian-*mestizo* boundary is a largely incoherent dividing line from the perspective of anything other than power relations. It ignores hundreds of years of mutual transformation, inter-marriage and cultural hybridity in order to project a theatrical construction premised upon the continued existence of the original (Spanish and Indian) parties to an emblematic colonial encounter.

The power of the gamonal regime was steadily eroded across the twentieth century. However, it persisted to a significant degree until the revolutionary government of General Juan Velasco seized power in 1968, and soon implemented a sweeping land reform programme. The Agrarian Reform dismantled the *haciendas* and distributed the lands to *campesino* (peasant) communities made up of the ex-*colonos*, now called *comuneros* (community members). This resulted in the widespread creation of new *campesino* communities and the amplification and formalisation of many existing ones. With the chief source of their former power broken, many *mestizos* and their families found ways to adapt to the new situation by becoming economic intermediaries, shopkeepers, municipal officials and teachers. As townspeople and local and regional officials, many *mestizo* families who remained have been able to maintain authority and privilege within the rural Andes.[27]

[24] D Urquieta, *De Campesino a Ciudadano* (Cusco, Centro de Estudios Regionales Andinos 'Bartolomé de las Casas', 1993).

[25] FE Mallon, *The Defense of Community in Peru's Central Highlands: Peasant Struggle and Capitalist Transition, 1860–1940* (Princeton, NJ, Princeton University Press, 1983) at 45 and Thurner, n 20.

[26] Gose, n 23 above, at 166.

[27] Ibid.

Implications of Andean Identity Politics for the Construction of Community Solidarity

In the *gamonal* era we can see the development of three lines of solidarity and division that continue to mark the rural Andean social landscape. These are, first, the reinforcement of traditional community institutions in defence against outside aggression; secondly, the cultivation of patron-client networks across community and other boundaries in order to link families and individuals with powerful patrons; and, thirdly, the affirmation of individual power through the transgression of community institutions and responsibilities. Two of these social narratives are contradictory: the first characterises community solidarity as a source of strength, whereas the third presents it as a form of weakness.

Together the three narratives suggest a tendency towards both deference to and deep suspicion of those with power. This is likely to complicate the relations between potential community leaders and their constituencies. With the profound social change that has been in progress since the collapse of the *gamonal* era, the responsibilities of the powerful have become murkier.[28] At present, the political scene in much of rural Peru is marked by a competition for power at the top between leaders with clientistic pretentions, while a generalised distrust pervades attitudes of those at the base.[29] This suggests that community actors in the Andes are likely to have difficulty organising collective responses to the arrival of mining activity; that multiple leaders will seek to compete for authority in dealing with the enterprise; and that many *campesinos* will be motivated by strategic factors and suspicion in their choice of alliances. In these circumstances, solidarity may be a scarce resource.

Are Andean Populations Defined by Subsistence Livelihoods?

The livelihood strategies and socio-economic goals pursued by people located within rural Andean environments are diverse and span different economic and social spaces. Subsistence agricultural production in the Andes, for example, relies upon the simultaneous use of traditional, non-mercantile systems of relations together with participation in regional, national and international markets.[30] These two different rationalities are complementary to each other and are both necessary for economic reproduction in the

[28] G Salas Carreño, *Dinámica social, reciprocidad y reestructuración de sistemas de acceso a recursos: Las familias pastoras de Yanacancha y la presencia del Proyecto Antamina* (Honours Thesis in Anthropology, Pontificia Universidad Católica del Perú, 2002) at ch 4.

[29] Diez, n 16 above.

[30] A Figueroa, *La Economia Campesina de la Sierra del Perú* (Lima, Pontificia Universidad Católica del Perú, 1989).

contemporary Andes.[31] *Campesino* families maintain various different networks of reciprocity involving close and extended families, neighbours, community members and others. These can involve non-mercantile exchanges, including labour for labour, as well as food and goods for labour.[32]

Reciprocity relations in the Andes are highly developed and specific in nature. Each form of reciprocal exchange has a name, as well as a specified code of conduct.[33] Exchanges involving goods take place according to locally defined traditional prices that do not correspond with market values. *Campesino* agriculture is characterised by very low productivity based on the exploitation of marginal resources. The non-mercantile economy helps to make up for this productivity disadvantage by effectively subsidising *campesino* production that is destined for the market. Many families can only produce goods capable of being sold on the market through obtaining 'free' goods and services (ie for which a market price does not have to be paid) through the non-mercantile economy.[34] Furthermore, certain elements necessary for subsistence, such as commercial fertilisers, must be obtained through the cash economy.[35] Over 20 years ago, using data from the southern Peruvian Andes, Figueroa estimated that half of a *campesino* family's economic activity is directed towards market involvement.[36] This includes not only the sale of agricultural goods, but seasonal migration for salaried labour and remittances from family members who have migrated to the coast.

This flexible management of market and non-market rationalities means that *campesino* families can take advantage of changing economic conditions. They are able either to shift to greater participation in the market when opportunities present themselves, or to retreat from the market when its conditions are unfavourable. This can be an important strategy given the instability of Peru's national economy over the past several decades. Campesinos are flexible adopters of multiple economic strategies.[37] For *campesino* families, 'tradition' and 'modernity' are not contradictory modes of existence. They are resources to be exploited in a complementary fashion in the constant struggle for subsistence.

[31] J Golte and M de la Cadena, *La Codeterminación de la reprodución social andina* (Lima, IEP, 1983).

[32] G Alberti and E Mayer, *Reciprocidad e Intercambio en los Andes Peruanos* (Lima, Instituto de Estudios Peruanos, 1974).

[33] Ibid.

[34] Golte and de la Cadena, n 31 above.

[35] E Mayer and M Glave, 'Alguito para ganar (a little something to earn): profits and losses in peasant economies' (1999) 26 *American Ethnologist* 344.

[36] Figueroa, n 30 above.

[37] E Mayer and M de la Cadena, *Cooperación y Conflicto en la Comunidad Andina, Zonas de Producción y Organización Social* (Lima, Instituto de Estudios Peruanos, 1989).

Are Andean Populations Isolated?

Andean extended families span Peru's urban and rural spaces in networks that stretch from remote mountain villages to the metropolitan coast. In the late twentieth century, three factors have contributed to the massive migration of Andean peoples to the coast: the new freedoms produced by Agrarian Reform in the early 1970s, political violence in the late 1980s and early 1990s connected with the Shinning Path insurgency, and the hardship presented by persistent economic crises since the 1970s that have affected the ability of Andean agriculture to support the expanding rural population. The effect of this migration on Peruvian society is hard to overstate. It has essentially shattered the two 'solitudes' that have characterised the country through much of its history. Nowhere is this more evident than in Lima. Peru's capital has been transformed from a quaint Creole metropole of some 650,000 inhabitants in 1940 to a burgeoning multi-racial metropolis of 6.4 million in 1993, comprising nearly one-third of the country's total population.[38] Land invasions organised in the 1970s and 1980s founded many of Lima's sprawling shanty-towns, and the city itself has become overwhelmed with informal commerce.[39] Although millions of Andean migrants have installed themselves on the coast, they continue to face considerable challenges with economic and social marginalisation.[40] The rural Andes have been transformed as well by a constant flow of returning and visiting migrants with profound and continuing effects upon Andean social and political institutions.[41] As a result, even the most apparently remote corners of the Andes are closely and continuously articulated with the urban world.[42]

This articulation and the spanning by migrants of spaces with different and evolving rationalities put into question and into play the meaning of Andean identities. They open for *campesinos* the possibility of social and economic transformation, of greater access to the benefits of the modern, metropolitan world. Nevertheless, rural Andean spaces continue to play important roles within extended families and within the national economy itself. For families they provide an important tie to place, history, culture and identity. They also provide ways of life and livelihoods that are somewhat sheltered from the periodic crises of the national economy. A migrant who fails to establish himself in the city may be able to return to his village and farm his family's plots. While the subsistence economy contributes little to national GDP, it

[38] Instituto Nacional de Estadística e Informática, *Censos nacionales de 1993* (Lima, Government of Peru, 1994).

[39] H De Soto, *The Other Path* (New York, Harper & Row, 1989).

[40] CG Mendez, 'Incas si, indios no: notes on Peruvian Creole nationalism and its contemporary crisis' (1996) 28 *Journal of Latin American Studies* 197.

[41] Diez, n 16 above.

[42] Paerregaard, n 16 above.

plays a major role in supporting a significant portion of the country's population. Large-scale unemployment means that neither the official nor the the informal economy is able to assume the role played by subsistence agriculture in supporting livelihoods.

Do Andean Peoples in Peru Call Themselves Indigenous?

The word *indio*, or Indian, is regarded as a racist insult in Peru. *Indigena* was the official word used by the Republic of Peru for indigenous people in the Andes throughout the nineteenth and much of the twentieth centuries. In the late 1960s and early 1970s, however, the military government under Velasco adopted and popularised the word *campesino*, or peasant, which suited its de-ethnicised project for modernising the nation. Although the military regime disappeared with the return to democracy in 1980, the term *campesino* has stuck and is now both the official and commonly used descriptor applied throughout the Peruvian Andes. In this way, Andean peoples in Peru constrast with their neighbours in both Bolivia and Ecuador who readily identify themselves as indigenous.

Andean peoples in Peru, just as in Bolivia and Ecuador, are recognised in international debates (and by international organisations such as the World Bank) as indigenous peoples.[43] However, until recently, indigenous politics in Peru have been confined to the country's Amazonian peoples who are represented by two large indigenous federations. The only comparable mass organisations in the Andes are the national peasant federations whose collective star has fallen considerably since the heyday of these organisations in the 1970s and 1980s. In the Andes, new issue-specific civil society associations (addressing matters such as the privatisation of utilities or mining issues) have sprung up as new political actors in the wake of the political disorganisation and cynicism that characterised much of the Fujimori period. As a result of linkages with the international indigenous movement, some of these organisations are seeing the strategic benefits to be gained abroad by articulating social claims or claims to land in the language of indigenous rights. In this manner, explicit identification with indigeneity is on the rise in particular politicised circles. However, this kind of identification is not part of routine social discourse in Andean Peru to the extent that it is in neighbouring countries.

[43] Eg, see B Kingsbury, 'Operational Policies of International Institutions as Part of the Law-making Process: The World Bank and Indigenous Peoples' in GS Goodwin-Gill and S Talmon (eds), *The Reality of International Law. Essays in Honour of Ian Brownlie* (Oxford, Clarendon Press, 1999).

A Hypothesis Regarding the Goals and Behaviour of Community Actors

The previous discussion has argued that rural Andean populations do not have a unified character. These populations bridge divides and fluidly occupy social spaces that are often thought of as separate. The needs and aspirations found among rural Andean actors are not easily defined by looking at simply one side of a set of supposedly polar opposites: residency that is either wholly rural or urban, a way of life that is either traditional or modern, social ties that are either communitarian or individualist, economic behaviour that is either capitalist or non-mercantile, politics that are either based on concepts of indigeneity or national citizenship. In extended kinship networks, individuals and groups can be found that occupy virtually any position on a continuum between each of these poles. Perhaps the one nearly universal characteristic shared among those with strong ties to the rural Andes in Peru is the need for creativity in the face of degrees of economic crisis and social marginalisation.

Given these circumstances, we can see that the prospect of the construction of a large-scale mine in a rural Andean setting presents community actors with both significant risks and opportunities. New economic opportunities are badly needed and keenly desired—all the more so because of their potentially transformative power. A mining project offers the prospect of capturing the social and economic benefits of the modern advanced economy. With a job in the mine, a young man is no longer a *campesino* tied to the land or an informal street vendor in the distant city. Instead, he is a salaried employee in one of the most important enterprises in the country. He is capable of sponsoring the education of his siblings and bringing prestige to his family. The arrival of a modern technological project into a 'forgotten zone' of the Andes carries with it the suggestion of development, progress and opportunity.

However, the arrival of the mine also presents dangers. Most Peruvians are familiar with the country's experience with foreign large-scale mining in the early twentieth century. These investments occurred chiefly in the central Andean departments of Pasco and Junin. Foreign-owned mining enterprises dominated this region for the better part of the last century. While many thousands were proletarianised and many communities received increased incomes, these companies were also a neighbour to be feared. They proved capable of appropriating agricultural lands, corrupting local leaders, poisoning rivers and lakes, and devastating entire areas with toxic fumes.[44] Although mining development may offer the possibility of new economic opportunities, a powerful mining enterprise is also capable of appropriating or destroying the existing basis of rural livelihoods and ways of life.

[44] Mallon, n 25 above; D Becker, *The New Bourgeoisie and the Limits of Dependency: Mining, Class and Power in 'Revolutionary' Peru* (Princeton, NJ, Princeton Univcersity Press, 1983).

As a result, we might expect a diverse and differentiated Andean population faced with the prospect of large mine development to be preoccupied by two conflicting considerations: the hope for new and transformative economic opportunities and the fear of losing the basis of existing livelihood strategies and ways of life. Members of Andean communities, depending upon their circumstances, will give these considerations different weight. Some may see themselves as unable to take advantage of new opportunities (eg, due to age), while others may place little value on existing local livelihood strategies (perhaps because of aspirations to migrate to the coast). The degree to which either consideration is given priority by individuals and groups will vary. However, it is likely that both will be present.

The chief problem then faced by local actors is a regulatory one: how can the corporation be influenced to meet with local goals? How can it be persuaded, for example, either to refrain from mine development or to conduct its operations in a way that either minimises negative impacts or maximises local benefits (or both)? Community participation in regulatory conversations relating to the company's operations are therefore likely to grapple with the question of how to gain some measure of influence over the behaviour of the firm. To achieve this, community actors have very few strategic resources. They have minimal information, little support from the state, and few outside allies. However, groups within Andean populations do have the socio-cultural resources available for solidaristic action in support of common goals. As has been observed above, the effective use of these resources in support of one social project or another can be made problematic by the existence of persistent social divisions and by weaknesses in leadership institutions.

PROBLEMATISING THE CORPORATION: UNDERSTANDING TRANSNATIONAL MINING PROJECTS

How Do We Think About Companies?

Quite naturally, we think of corporations and communities in very different terms. This conceptual divide is illuminated by Ford's identification of two contrasting ideal types of human associations: synthetic associations and organic ones.[45] Organic associations are those which have a distinct and deeply meaningful character. This character is often tied to personal identity, place and culture. These associations tend to have unquantifiable emotional

[45] R Ford, 'Law's Territory (A History of Jurisdiction)' (1999) 97 *Michigan Law Review* 843 at 858–61.

value. The classic example is the family; however, many broader associations, such as ethnic, religious, regional and national ties, also tend to have a significant organic nature. Synthetic associations, on the other hand, are simply a matter of convenience. They are not invested with any particular meaning and are easily interchangeable. Associational units such as congressional districts in the US, for example, tend to be regarded in instrumental rather than emotional terms. If 'community'—particularly indigenous community—is one of the premier examples of organic association, the modern capitalist corporation represents the epitome of the synthetic end of the spectrum.

The synthetic view of the corporation corresponds to the classical understanding of what corporations are for and how they are supposed to work. Corporations are constructions whose ideological and cultural roots lie in the development of nineteenth century European capitalism. Classically, they are viewed as purely utilitarian associations, in which individuals agree to have their activities managed in exchange for remuneration. The firm is not an instrument for expressing and realising the particular goals and values of its members. Instead, individuals employed by the firm agree to subordinate their own preferences to work towards achieving the goals of the corporation. Decision-making is rational, bureaucratic and hierarchical. Employees are interchangeable instruments. The corporation, both at law and by virtue of its powers of internal supervision and control, is regarded as a single entity which speaks with a single voice. Properly authorised, an individual can speak for and bind the firm. Corporations are modern, rational and utility-maximising. They are the engines of economic progress and innovation. Those that fail in a competitive market will dissolve. Their employees will re-enter the labour market and join successful companies.

All this, however, is 'black box' thinking. The classical idea of how corporations are supposed to work may be an important factor in actual corporate behaviour; but the gap between theory and practice is large. Corporations and markets are in fact highly influenced by emotional considerations, cultural dynamics, and the construction and valorisation of different kinds of knowledge. People develop professional and personal identities through their work and their association with particular firms. Firms possess identifiable institutional cultures that shape decision-making. Employees and managers are enmeshed in collegial links and webs of personal, departmental and corporate loyalties. Old boys' networks and biases influence hiring patterns. A host of socially constructed factors, including the development of trust and business confidence, help both to maintain and to shape the operation of markets. The mere fact that a course of action is economically 'rational' is no guarantee that a corporation or indeed an industry will successfully identify it, understand it or undertake it.

This is not to say that corporations and, for example, indigenous communities are cut from the same cloth. Rather, the point being made here is that all

associations exhibit different elements of 'organic-ness' and 'synthetic-ness', and the degree to which either characterises an association cannot simply be taken for granted. The purpose of the remainder of this chapter is to revisit certain preconceptions about corporate behaviour and to provide a more nuanced picture of the internal dynamics among corporate actors involved in the development of a large mining project that are relevant to community relations decision-making.

The key issues that affect how a corporation addresses the question of community relations can be placed under three different headings: commitment, conceptualisation and communication/control. The first relates to the existence of commitment within the firm to address community relations issues. To what extent are community relations issues a priority for the firm? The second concerns how the firm's community relations responsibilities are conceptualised. Are community relations a question of charity? Of compensation? Of human rights? Are they an illegitimate concession to wrongheaded environmentalists? What competing conceptualisations exist within the firm? The third group of issues concerns effective communication among and control of the firm's agents and employees. How are priorities and conceptualisations regarding community relations communicated within the firm? What means of supervision and control have been developed to ensure compliance with company policy? What mechanisms exist to communicate messages and learning from ground-level staff to management?

The sections that follow will address the interlocking issues of corporate commitment, conceptualisation and communication and control with regard to community relations in a discussion of the following questions:

— Do mining enterprises make rational decisions about community relations?
— Does the mining project speak with one voice?
— Do corporate systems of communication and control within the mining industry necessarily project corporate policy on community relations?

Do Companies Only Care About Money? Modelling Regulatory Conversations within the Firm

But first, a preliminary question with regard to understanding corporate behaviour: do companies care only about money? Economic rationality is certainly a primary motivation among business actors. It is the principal yardstick against which decisions are measured. However, it is not the only value that influences decision-making within private sector corporations. In his fieldwork on patterns of corporate crime and legal compliance, John Braithwaite observes that corporate actors are not always motivated by economically rational considerations. Other social values can also be

important, including those suggested by the personal identity of executives as law-abiding or ethical persons and an institutional culture of social responsibility. Writing with Ian Ayres, Braithwaite argues:

> It is one thing to analyze these fieldwork notes [in which corporate executives express commitment to social values] and observe that there is other evidence that this actor is not sincere in a belief about doing what is right whatever the cost. It is another to insist that business executives are motivated only by money when they say otherwise, and when there is evidence of economically irrational compliance with the law. Such insistence will build a science on foundations immune from empirical refutation. We should not scoff at a top pharmaceutical executive who says that concern for improving human health motivates her and her staff to maintain high standards more than the fear of regulatory sanctions, where this is a company that can be observed to maintain fairly high standards in a Third World country that effectively has no pharmaceuticals regulation.[46]

Ayres and Braithwaite press this point in order to advocate a general perspective on regulatory enforcement that recognises the possibility of alternative motivations within companies and expects neither the best nor the worst from business actors until experience has shown otherwise.[47] Similarly, accounting for corporate behaviour must also make room for the possibility of economically irrational decision-making in pursuit of non-economic values.

What types of regulatory conversations occur within a firm? Decision-making in a bureaucratic corporation does not occur in a contextual vacuum. Taking a particular course of action must be discussed with superiors and subordinates and justified according to reasoning perceived as legitimate within the firm. Of course, both workers and managers also have spheres of personal discretion for which they do not require the approval of others. However, even here, the firm's officers and employees may be influenced by the possibility that in the future they may be called upon to justify their actions or overall performance. Three forms of legitimate reasoning which may be used in this internal dialogue within the firm are proposed here. The first argument asserts that an impugned course of action is not economically rational. The second holds that it is illegal (or that it is otherwise condemned by expert, professional opinion). And the third states that it is not 'how we do things here'. In this schema, a firm may decide against implementing a particular policy, even though it is economically rational to do so, for two reasons: either because the action would contravene the law laid down by a state or non-state regulatory authority (even though the benefit of breaking

[46] I Ayres and J Braithwaite, *Responsive Regulation* (Oxford, Oxford University Press, 1992) at 23.

[47] Ibid, at 20–35.

the law outweighs the risk of sanction) or because the action would conflict with certain internal norms and values of the corporation.

Do Mining Enterprises make Rational Decisions about Community Relations?

Economically rational behaviour is the vital guiding principle of corporate activity. Without it, a private company is not likely to be able to exist for long in a competitive market. However, in order to make economically rational decisions, an actor needs to be able to prioritise the issues s/he confronts by estimating the costs and benefits of different courses of action. For mining enterprises, this is not straightforward exercise with regard to community relations activities.

Traditional thinking about mine development identifies a number of basic organisational priorities which are derived from the project's structural situation. First are the issues of rights and entitlements. Establishing a viable mining project in a foreign country requires the enterprise to gain a particular set of secure and stable rights, at a controlled cost and within a reasonable and determined timeline. Security of tenure and regulatory stability are of paramount importance.[48] Mining activities are highly expensive ventures that are by necessity fixed to particular geographic locations. As a result, they are vulnerable in ways that other globalised industries are not. The very large investments required to develop a project often require years of construction and operation before they are repaid. Faced with changes in the project's regulatory environment, such as loss of title to land or new taxes, mining projects cannot simply pick up their stakes and leave without also abandoning these investments. Without a minimum level of security of rights and regulatory entitlements, mining investment becomes an unacceptably risky enterprise. Second are the issues of cost and time. Mining enterprises are highly sensitive to cost issues and time requirements.[49] While these are important for the private sector in general, the mining industry is subject to certain conditions that magnify their significance. The profitability of a mining project is almost exclusively dependent upon its ability to keep production costs low. Metals prices are established on volatile world markets that are beyond the control of individual producers. Unlike manufacturers and globally branded companies such as Nike, mining enterprises are unable to increase the value of their product through investments in marketing or design improvements. Accordingly, a company that finds ways to trim costs further is more likely to weather price downturns and realise greater profits

[48] E Batista, 'A Review of the Concept of Security of Mineral Tenure: Issues and Challenges' (2000) 7:17 *CEPMLP Internet Journal*, available at http://www.dundee.ac.uk/ceplmp/journal.

[49] D Humphreys, 'A Business Perspective on Community Relations in Mining' (2000) 26 *Resources Policy* 127.

when prices climb. The importance of cost reduction also places a premium upon the efficient use of time. Mining projects must either borrow or invest very large sums of capital that are typically repaid only after several years of production. The faster a mine can become productive, the less it will pay to service its debt and the sooner capital can be freed up for other projects. Accordingly, we may expect mining enterprises to emphasise low cost and time efficiency as key organisational priorities.

Traditionally, these concerns have led mining companies to rely upon a familiar set of practices in order to accomplish their objectives. These include the pursuit of efficiency through engineering design, the pursuit of security through legal and financial arrangements, and the pursuit of business viability through management and planning. In turn, this has valorised within mining enterprises the knowledge and status of those professionally qualified to execute these strategies: that is to say engineers, geologists, lawyers, economists, and business managers. The capacity of each of these groups of professionals effectively to solve problems within their own field of expertise (the physical environment, the state, the market, the business world) is a relatively known quantity within the industry. However, the rise of community relations issues in relation to mining projects has presented a challenge to the status quo within mining enterprises.

New thinking in the mining industry has come to prioritise a new set of issues relating to engagement with local communities. This has been discussed in Chapter 3. In the words of one industry actor, community relations have been pushed to the forefront of the mining industry's thinking because the industry has had little choice: '[t]he costs of not doing more on the communities' front had become too high'.[50] Particularly among larger firms, effective community relations activities are thought to increase the security of both present and future mining operations. Productive engagement with local communities may, in the words of some commentators, provide the enterprise with a 'social licence' to carry out extractive activities in the region in question.[51] Community relations spending can therefore be thought of as a form of informal insurance against problems that could affect project viability—thereby mitigating 'community risk' and enhancing the project's security.[52] Where community issues are effectively addressed, the project is unlikely to become the target of local opposition or transnational advocacy campaigns. Furthermore, community support may be of assistance in obtaining regulatory approvals.[53] The reputational benefits of good community relations may also pay dividends in the future. The growing

[50] Ibid, at 127.

[51] G McMahon and F Remy (eds), *Larges Mines and the Community* (Washington, DC & Ottawa, World Bank & IDRC, 2001) at 33.

[52] P Crowson, 'Environmental and Community Issues and the Mining Industry' (1998) 22 *Natural Resources Forum* 127.

[53] Humphreys, n 49 above.

importance of community issues may mean that a good corporate reputation in this area could facilitate an enterprise's access to capital and favourable regulatory treatment by host governments with regard to future projects.

However, while community relations activities may help to achieve a mining enterprise's first set of priorities (increasing project security and mitigating risk), they can run afoul of the second set of organisational priorities relating to cost and time considerations. Carrying out community relations activities requires policy to be developed in this area, staff and consultants to be engaged, overall activities to be budgeted for, and these to be accounted for in the mine development timetable. The problem is that the supposed benefits of community relations activities are amorphous and hard to measure while the advance costs in terms of time and money are readily identifiable. Rational economic decision-making is difficult to achieve in these circumstances. This is further complicated by the lack of expertise in community issues within the traditional mining enterprise. As discussed in Chapter 4, a new form of professional expertise relating to local communities—the 'social specialist'—has recently gained prominence in the mining industry. Learning how to valorise and use this new kind of professional knowledge is a challenge for the engineers, geologists, lawyers, economists and business managers within mining enterprises. Are social specialists truly uniquely qualified to deal with community relations issues in the same manner that engineers are able to address problems with project design? Or are social specialists simply vendors of a new and expensive form of snake oil?

Are mining enterprises able to make straightforward economically rational decisions concerning their community relations activities? Effective economic reasoning is severely hampered by deficits in both information and the means for evaluating it. However, mining companies must nevertheless make fundamental decisions: how much to spend on community engagement (both in terms of money and time) and on what kinds of activities. If economically rational decision-making is difficult, reasoning based on legal requirements provides little additional guidance. Here, one imagines, the absence of hard-and-fast requirements by government authorities must be particularly challenging to company functionaries charged with setting and carrying out community relations policy. Without such requirements, company staffers are deprived of one set of arguments with which to justify their choice of activities to senior management and their colleagues in other departments. Regulatory requirements from other sources viewed as reputable within the industry (such as the World Bank Group), whether mandatory or used on a voluntary basis, are likely to be useful as benchmarks. Similarly, a corporation's institutional culture and values regarding community relations activities will provide limited guidance if the firm has little previous experience or is seeking to wholly revamp its community relations practices. The translation of relatively vague principles (such as good neighbour or social responsibility policies) into internally acceptable

practices with cost implications is easier once a track record and corporate experience have been allowed to develop.

In the absence of clear mandatory requirements, compelling information regarding local risk, authoritative and trusted expertise, or established practices within mining enterprises concerning community relations activities, it is likely that much decision-making will be conservative. Conservative is used here in the sense of disturbing conventional practices as little as possible, limiting the added costs that community relations activities will impose on the project and interfering as little as possible with project timetables and regular decision-making. Within these constraints, decision-making is likely to be based on guesses about what is economically rational, estimates on how to value social specialist opinion, approximations of how to translate available rules and principles into practice, and value-judgements about 'how we do things here'.

Does the Mining Project either Think with one Brain or Speak with One Voice?

The development of a large mine is a huge enterprise involving many different actors including contractors, consultants, and departments within the mining company itself. From the perspective of community actors, all of the outsiders and foreigners who arrive in their four-wheel-drive vehicles, wearing hard hats, etc, are members of a single corporate group: 'the company'. Nevertheless, the people involved in developing a large mining project are a diverse group, with different legal and professional ties to the project. Attitudes and beliefs among mining industry actors concerning community relations issues are also prone to diversity. Efforts are made to manage the activities of employees and contractors through the instruments of bureaucratic communication and supervision and contract.

Who is Working for the Project at Any Given Time?

Mine development is divided into several stages: exploration, evaluation, development, exploitation and closure. The number and type of personnel employed by the mining company and the activities they carry out are determined by the stage of development of the overall project. The first three stages involve progressively more intensive investigations into the feasibility and value of the proposed project. Each stage involves a successively greater number of personnel and activities engaged in determining whether various physical, legal, economic and other conditions warrant progressing to the next stage and investing further time and money in the project. Exploration is conducted by small teams of engineers. In the evaluation stage, a substantially

greater number of specialised personnel must be employed who are experienced in the technical aspects of mine design and construction. Development will require the services of both contractors and internal departments specialising in legal affairs, design and construction, environmental matters, finance and community relations. Mine construction is typically delegated to a transnational engineering firm which may itself employ many dozens of smaller contractors. When construction is complete and the mine enters the production phase, the number of firms and personnel involved in the project drops considerably, perhaps to only several hundred.

Are Community Relations Issues Effectively Integrated into Project Planning Processes?

Project planning in the mining industry is shaped by a template of traditional practices involving mining enterprises, engineering firms, environmental experts and other teams of consultants. Planning activities are centred upon the creation of two key documents: the Feasibility Study and the Environmental Impact Statement (EIS). Concerns exist regarding the degree to which these activities and the teams responsible for carrying them out are effectively co-ordinated with one another. Given the number of actors and tasks involved, appropriate networking can present a challenge.

The Feasibility Study is a large confidential internal document containing the key information used to evaluate the project's overall viability. It is prepared in the evaluation stage, once initial studies are determined to be favourable. The Feasibility Study provides a comprehensive treatment of all technical aspects of the project, including its design, the construction schedule, and cost and revenue expectations. Typically it also includes some information regarding political and legal matters. The feasibility study is the key document examined by potential lenders, investors and insurers to determine whether or not to become involved with the project.

The Environmental Impact Study (EIS) is the major planning instrument relating to the management of the project's environmental and social impacts. It contains a statement of the expected environmental and social impacts of the project and any mitigation measures proposed by the firm. The EIS is a public document, typically created pursuant to domestic Environmental Assessment legislation and filed with the relevant government ministry. It is prepared after the evaluation phase is complete in order to obtain government permission for the project.

Some observers have noted that the relatively late timing of environmental assessment can lead to a failure properly to integrate environmental considerations into project design. In their study of environmental planning in mining projects, McKillop and Brown observe that the creation of a Feasibility Study during the evaluation phase firmly establishes the direction a project is likely

to take and many of the parameters of project design.[54] Since information on environmental and social impacts is not collected until the subsequent development stage, this information does not influence initial project design. Furthermore, Feasibility Studies and EIAs are often carried out by different consultants. Mckillop and Brown note that in the case studies they examine, poor communication between different actors involved in project development presented obstacles to the effective integration of environmental issues into project planning.[55]

Are Attitudes within the Mining Industry towards Community Relations Uniform?

Over the last several years, official acceptance within large transnational mining enterprises that something serious must be done with regard to community relations has grown considerably.[56] However, attitudes among persons working with or for the mining industry at all levels are far from uniform on community issues. Some are converts to the new way of doing things, whereas others may be thought of as members of the 'old school', in which community relations are viewed as an unfortunate concession to political correctness. Others still may be waverers, capable of switching from convert to old school status depending upon the institutional culture of their firm or department and the pressures they experience on the job.

Old school attitudes are fuelled by several factors. Among them is a persistent impression within the industry that its image problems result not from poor performance but from a gullible public too easily swayed by fictitious horror stories. Critical views of mining are often believed to arise from misinformation disseminated by anti-mining groups.[57] From this perspective, the social claims of local communities are presumptively illegitimate and are thought to be stirred up by outsiders and self-interested malcontents. However, even those who do not share these views may doubt the wisdom of encouraging community engagement. Many mining executives fear that, with community engagement, they risk opening both a pandora's box of responsibilities and the floodgates of local need. The concern is that, thus exposed,

[54] J McKillop and AL Brown, 'Linking Project Appraisal and Development: The Performance of EIA in Large-Scale Mining Projects' (1999) 1 *Journal of Environmental Assessment Policy and Management* 407.

[55] Ibid, at 423.

[56] Humphreys, n 49 above, ICMM, *Sustainable Development Framework* (London, ICMM, 2003), available at www.icmm.com/, MMSD, *Breaking New Ground: Mining, Minerals and Sustainable Development* (London, Earthscan, 2002).

[57] A MacDonald, *Industry in Transition: A Profile of the North American Mining Sector*, Report prepared for MMSD North America (Winnipeg, IISD, 2002) at 110–1, R Wilson, 'The Global Mining Initiative' (2000) 8:3 *ICME Newsletter*, available at www.icmm.com/library_pub_detail.php?rcd=106.

mining enterprises will be left open to local extortion and will find themselves being substituted for the ineffectual or absent state.[58]

Convert attitudes are seen to be most prevalent among the largest mining transnationals.[59] These companies are generally acknowledged to be the chief promoters of such attitudes within the industry. Both old school and convert attitudes also vary in their content from region to region, particularly among national mining industries in countries which have developed their own corporate and professional cultures. This is pronounced in Peru, which has had a highly developed industrial and professional culture surrounding mining since the initial boom in foreign mining investment in the early part of the twentieth century.

People in Peru speak of the old school of mining (*la escuela de la vieja mineria*) to refer to the bad old days in which foreign-owned enterprises were able to pollute and appropriate lands with impunity. Old school community relations strategies involved bribery and use of influence over community leaders, municipal and government authorities, and the judiciary. However, old school identifications can also be a badge of pride among engineers whose professional culture was first developed through the experience of early foreign-owned operations. One informant with long experience in the Peruvian mining industry asserted that some engineers identify themselves as being from the 'Cerro de Pasco school' (*la escuela Cerro de Pasco*), referring to the giant US mining company that dominated a significant part of Peru's central Andes for the better part of the twentieth century. This is meant to suggest a 'can do' no-nonsense attitude in which the engineer gets the company what it wants within the time required. In Peru, as elsewhere, these attitudes are often associated with a view of local and indigenous people as stubborn obstacles to national development whose way of life has little intrinsic value. The old school approach is typically characterised by an arrogant and domineering attitude towards Andean peasants.

Thus attitudes towards community relations issues among personnel involved in transnational mine development are far from uniform. Personnel are not only likely to be divided by professional perspectives (eg engineers and geologists versus social scientists) and personal perspectives (eg convert versus old school) relating to community relations. They may also be divided according to national cultures and attitudes.

[58] B Labonne, 'The Mining Industry and the Community: Joining Forces for Sustainable Social Development' (1999) 23 *Natural Resources Forum* 315 at 317.

[59] R Everett and A Gilboy, *Impact of the World Bank Group's Social and Environmental Policies on Extractive Companies and Financial Institutions* (Washington, DC, EIR Secretariat, 2003) at p. iv.

Incentives, Co-ordination, Control and Community Relations Policy

Coordination among actors involved in planning and constructing a mine is a challenge. Mine project development involves a diversity of actors with different functional roles and specialisations, each of whom is focused upon completing their own contractual responsibilities. Timely information exchange may be problematic and conflicts between actors are not uncommon. In addition, each actor has strong incentives to meet the deadlines assigned to them by mine schedules. Given the large amount of capital borrowed for a project, delays can entail significant costs. Contracts often include bonuses attached to completing projects within set timelines.[60] Internal departments and those who manage them are reluctant to be seen to be holding up the project timetable.

As we have seen, the mining enterprise is a many-headed beast. Although overall it is subject to hierarchical planning and management processes, in the day-to-day operational decision-making that takes place during project development, each 'head' is highly preoccupied with its own problems and with the need to arrive at expedient, effective solutions. As a result, community actors are likely to come into contact with a number of different teams and persons associated with the mine, each of whom may have different concerns, attitudes and priorities. Any and all of these persons are likely to be taken as representatives of the company, whether they are contractors or employees, designated spokesmen or exploration engineers. Unless co-ordinated in some way, each of these company actors is likely to interact with community members in a way that s/he feels will make his or her job easier. In addition, actors have strong incentives to meet the deadlines assigned to them by mine schedules.

Hypotheses Regarding Motivations and Challenges within Mining Enterprises

In conclusion, one could expect the legal needs and wishes of mining enterprises to be as follows. Mining enterprises would prefer legal ordering that offers them the ability to obtain secure, legitimate entitlements at low cost and in an expedient manner. It appears that at present most developers of large-scale mining projects agree that some kind of additional costs will have to be paid to ensure greater legitimacy before both local and transnational audiences. Although the goal may be clear and the willingness to commit resources may be real, mining enterprises are presented with significant

[60] O Perez, 'Using Private–Public Linkages to Regulate Environmental Conflicts: The Case of International Construction Contracts' (2002) 29 *Journal of Law and Society* 77.

challenges to their ability to address community issues rationally, coherently and consistently.

First, rational action is impeded by simple uncertainty. Mining companies will have a hard time deciding what are the costs that they should be willing to pay in terms of money and time in order to obtain greater local legitimacy and security. Investing in community relations asks business actors within a highly cost-sensitive industry to weigh concrete expenses against uncertain or even unmeasurable gains, with few guidelines on how to make such decisions. Secondly, coherent and consistent action on the part of mining enterprises and their agents is limited by a number of factors. These include the very large number of departments, consultants and contractor firms working in the project area, the existence of strong differences of opinion within the industry regarding community relations, and the functional separation of teams and units responsible for different aspects of project planning and development. Overarching systems of communication and control will have to be very effective to ensure that corporate policy on community relations is observed by this diversity of actors in practice.

CONCLUDING REMARKS

This chapter has presented a brief contextualised analysis of the perspectives and challenges facing rural Andean communities and transnational mining enterprises involved in private sector development encounters. In doing so, it has sought to dispel both overly romantic views of Andean communities and overly rational views of transnational enterprises. The chapter that follows will present a case study concerning the arrival of a transnationally owned mining project into a remote rural area in the Peruvian Andes. This case study will provide the opportunity to examine in practice the validity of the various hypotheses presented in this chapter concerning the goals and capacities of corporate and community actors in such an encounter.

6

Case Study: Antamina in San Marcos

INTRODUCTION

This case study examines the initial stages of corporate and community engagement that took place during the introduction of the Compañía Minera Antamina (CMA), the proponent of a large-scale transnational mining project, into a remote and impoverished rural district in the Peruvian Andes called San Marcos. Specifically, it focuses upon corporate–community interactions surrounding the acquisition of local land and resettlement.

According to conventional perspectives on corporate social responsibility, these early stages of the continuing encounter between CMA and community actors in San Marcos should have been a success story. From early on, CMA articulated a strong commitment to socially responsible behaviour in the region and promised to make substantial expenditures with regard to community relations issues in terms of time, funds and personnel. Furthermore, the project was subject to several layers of regulatory supervision with regard to community issues. Due to World Bank Group involvement in the project's financial arrangements, the project's environmental and social performance was not only regulated by Peruvian state authorities but also by the safeguard policies and regulators of the Bank Group in Washington. Accordingly, CMA was initially very well received in San Marcos. In general, community actors were highly receptive to the company's messages and the company was able to acquire title to the territory it required in a context of local popularity. However, when the company sought to take possession of the purchased lands, it met with a seemingly abrupt reversal of fortune. CMA's last minute change of its resettlement plans proved to be the first of a series of events that triggered escalating local outrage in San Marcos. Soon, the company came to be known locally as deceitful and destructive and as the object of profound distrust. This rupture in relations was followed by an extended and uneasy stand-off, after which corporate and community actors became involved in processes of dispute settlement and re-engagement.

The present chapter traces the construction and eventual breakdown of

relations between CMA and community actors in San Marcos. Corporate and community actors assert conflicting accounts of why these events took place. While CMA representatives contend that the company has met or exceeded its formal legal responsibilities, community actors stress the company's dishonest and irresponsible behaviour. One of the objectives of this chapter is to provide the reader with a nuanced understanding of the dynamics that underlie these two different groups of accounts.

A further objective is to explain how and when different legal orders had practical regulatory effects on relations between corporate and community actors. In particular, this chapter provides the opportunity to examine the functioning of a transnational legal order in a local environment. The legal order in question is the World Bank Involuntary Resettlement Policy regime which came into play due to the involvement of the World Bank's Multilateral Investment Guarantee Agency (MIGA) in the financing of the Antamina project.

A central theme that emerges from the story told in this chapter concerns the development of an informal legal order by corporate and community actors. Actors involved in negotiations regarding the sale of land found that, in order to deal with one another, they had to invent the basic terms of a legal regime through which the parties could credibly expect to achieve certain objectives. Relations thrived when this legal order was being constructed. Conversely, relations declined and eventually collapsed when the company began to act in ways contrary to these principles. Thus a key factor leading to the breakdown in relations stems from a fundamental difference in corporate and community views regarding the legitimate legal ordering of their relations. On the community side, the local informal legal order was accorded considerable weight as a source of binding obligation. On the corporate side, however, actors within CMA considered their compulsory legal obligations to be owed to non-local actors such as government regulators and MIGA. In contrast, the local legal order—if it was seen at all by company actors—was viewed as a set of essentially non-binding or flexible commitments that could be revised at the company's discretion.

One possibly surprising aspect of this narrative for the reader may be the conspicuous absence of the World Bank Group Involuntary Resettlement Policy (IR Policy) regime from the arena of negotiations undertaken by corporate and community actors. In the telling of how CMA representatives and community actors in San Marcos constructed their relations, the IR Policy regime rapidly fades into the background. While it was used by corporate actors to orient their own behaviour, the regime was for the most part not overtly deployed to exert either a strong regulatory or legitimation influence over community actors. Community actors were kept largely unaware of the existence of the IR Policy, much less the specific content of its regulatory requirements. In their interactions with local actors in San Marcos, CMA representatives neither invoked the regime to justify their

actions, nor appealled to it to circumscribe the ambit of the company's responsibilities.

The IR Policy regime comes to the fore in the story told in the last part of this chapter: how corporate and community actors became involved in processes of re-engagement and dispute resolution regarding land acquisition and resettlement issues. Community actors succeeded in provoking an end to their impasse with CMA by—almost inadvertently—triggering a compliance audit by MIGA of CMA's implementation of its responsibilities under the IR Policy. In the processes that followed this event, the local legal order—the order upon which community grievances were based—was soon eclipsed. Instead the IR Policy regime was asserted as the dominant order according to which local rights and wrongs were defined.

The chapter is organised in three parts. Part I of the chapter will introduce the corporate and community actors involved in this story. It will also outline the principal formal legal regimes used by these actors to orient their behaviour and expectations. Part II of the chapter will describe the processes of land acquisition and resettlement that occurred in San Marcos with the arrival of CMA. Part III will set out the processes of formal dispute resolution that were set in motion following the collapse of the informal understandings established during land acquisition.

PART I: INTRODUCTIONS TO THE ACTORS

A Snapshot of the District of San Marcos

In this section, my aim is to provide the reader with certain contextual information about San Marcos required to understand the story that follows. This includes basic information about its geography, its people, their institutions, and their social and economic position in the Peruvian republic. Also required is an explanation of local customary land tenure and use arrangements in relation to the territories that the mining company sought to acquire.

Geography, Demography and Politics

The district of San Marcos is found in the Conchucos canyon region, in the department of Ancash, in the northern Peruvian Andes. Conchucos is a long and narrow valley enclosed by two mountain ranges: the snow-capped peaks of the Cordillera Blanca to the east and an extension of the Cordillera Huayhuash to the west. A winding unpaved road runs the length of the valley and then climbs to an elevation of 4,550 metres to cross the Cordillera Blanca to connect Conchucos with the neighbouring canyon that contains the city of

Huaraz, the departmental capital. Due to the canyon's impressive geography and its previously limited economic importance, Conchucos has long been regarded as an isolated region within Peru.

The town of San Marcos, the district capital, is located on the valley floor of the Conchucos canyon, on the bank of the river Mosna, at 2,900 metres above sea level. The district itself encompasses the eastern side of the river basin, reaching from the fertile valley to the upper highlands at more than 4,300 metres. The district is predominantly rural, with 11,660 inhabitants, of whom only 2,784 live in the town according to the 1993 national census.[1] San Marcos is among the poorest of districts in Peru. According to the 1993 national census, illiteracy in San Marcos is 35.1 per cent, exceeding both the provincial average of 32.6 per cent and the overall average for the department of Ancash of 21.1 per cent. The 'map of poverty' of Peru, which ranks the country's districts from least to most poor, places San Marcos toward the bottom—1,199th out of 1,793 districts nationwide—and classifies it as 'very poor'.[2]

The town of San Marcos is the political and economic centre of the district. It houses the church, the municipal building, the district's major schools, a branch of the National Bank, the police station, a public health centre, numerous small shops, and the principal market of the region. The town is set around a modest square featuring a central fountain and the district's most prominent buildings, as well as several shops and restaurants. The district capital is the preserve of the district's *mestizo* class, comprising shopkeepers, landowners, members of former *hacienda*-owning families, municipal authorities and traders. The majority of the district's inhabitants are *campesinos*—indigenous peasants—who live in small hamlets set within a patchwork of small maize and potato fields that climb the steep landscape. *Campesinos* descend from mountain hamlets in large numbers every Sunday to buy and sell goods in the town market, to take care of official matters, to meet *compadres* in the town, and to socialise.

The hamlets and villages that are spread across the rural parts of the district consist of small collections of houses, usually featuring two or three small shops selling household goods. Some of the larger villages have a medical post, visited by staff from the health centre in the valley, and a primary and a secondary school with permanent staff. The most populated villages lie perhaps an hour's walk from the town, while communities in the district's upper reaches require a journey of some eight to 10 hours up winding footpaths.[3]

[1] Instituto Nacional de Estadística e Informática, *Censos nacionales de 1993* (Lima, Government of Peru, 1994).

[2] FONCODES, *Mapa de la Pobreza del Perú* (Lima, FONCODES, 1998).

[3] With the arrival of the mine, a major road was constructed up to the highest reaches of the district. This has significantly improved the accessibility of some communities. Eg, Ayash is now served by a twice-daily bus service which cuts the travel time to a few hours only.

Politics in San Marcos are centred upon a longstanding conflict between two feuding factions of former landowners in the district.[4] The families of both factions once owned or ran the district's *haciendas*. During the Agrarian Reform in the early 1970s, both lost the greater part of these lands to the district's *campesino* communities: Huaripampa and the newly formed Ango Raju. Despite these losses, members of both factions have found ways to preserve their influence in local affairs. They maintain strong links with rural families and community authorities by cultivating traditional patronage networks. As traders and landowners, they act as economic intermediaries between local *campesino* production and the outside market. The two factions compete against one another in electoral politics for control of the district municipality.

It is worth noting as well that the Shining Path insurgency also had a significant effect upon political and social institutions in San Marcos. During the late 1980s and early 1990s, San Marcos was considered a 'red zone' lost to state control. Both Shining Path guerillas and government soliders would pass through the area, looking for supporters of their opponents. Needless to say, this was a very perilous time for those who remained in the district. Municipal and governmental authorities fled the region, while ex-landlords and local notables formed small private armies to defend themselves. [5] Leaders of the two *campesino* communities organised civil patrols (*rondas campesinas*) to withstand repressive measures from both the guerrillas and the armed forces. [6] Many peasants—and especially peasant leaders—were killed during these years. However, community solidarity appears to have been strengthened by the organisation of collective defence.[7] Nationally some 69,000 people are estimated to have been killed or disappeared in the

[4] This section draws on GRADE, *Evaluación del Proceso de Reubicación y del Programa de Post-Reubicación en Antamina* (Lima, GRADE, 2000) (Unpublished report on file with author) and G Salas Carreño, *Dinámica social, reciprocidad y reestructuración de sistemas de acceso a recursos: Las familias pastoras de Yanacancha y la presencia del Proyecto Antamina* (Honours Thesis in Anthropology, Pontificia Universidad Católica del Perú, 2002), as well as upon several interviews with local informants in San Marcos: Interview No 58, Oct, 2000; Interview No 59, Oct, 2000; Interview No 70, Oct, 2000; Interview No 110, June, 2002; Interview No 113, June, 2002; Interview No 117, June, 2002).

[5] G Damonte, 'Global Economic Responses to Local Post-Conflict "Opportunities"', Paper presented to Latin American Studies Association, 2003.

[6] Damonte, n 5 above.

[7] Damonte, ibid, reports that the conflict cost the *campesino* community of Huaripampa almost one generation of leaders. However, he notes:

> 'In the aftermath of the war, *comuneros* proudly remember their resistance against both [the Shinning Path] and the [armed forces]. They claim that it was possible because of communal unity, "*como comunidad somos fuertes, somos más, nadie puede vencernos*" [as a community we are strong, we are greater, no one can defeat us].'

Damonte observes that the conflict appears to have 'strengthened communal discourse based on their historic political resistance and communal land tenure and use'.

conflict (1980–92), with roughly half of the killings attributed to the Shining Path and one third to the army.[8]

Agricultural and Pastoral Production Systems

The great majority of inhabitants of the district are farmers and pastoralists engaged in subsistence production. The practice of Andean agriculture varies according to the different opportunities presented by changes in elevation and micro-climate. Andean farmers use the different ecological levels available in their environment to develop distinct production zones, each one suited to different kinds of agricultural and/or pastoral uses.[9] In San Marcos, five production zones are identifiable in which different agricultural and pastoral activities are practised (see Table 6.1). Potatoes and maize are grown in both the irrigated lowlands near the valley floor and the unirrigated slopes reaching to an elevation of roughly 3,400 metres. Cereals, including wheat, barley and *choclo*, are grown at higher altitude, roughly 3,400 to 3,700 metres. Highland tubers are found higher still at 3,700 to 3,900 metres. At

Table 6.1: Production Zones in San Marcos[a]

Production Zone	Principal Activities	Altitude (m above sea level)
V	Highland pastural zone: herding sheep, andean camelids, and horses.	3,900–4,400
IV	Highland tuber production zone: cultivation of highland potatoes; seasonal pasturing of sheep.	3,700–3,900
III	Cereal production zone: cultivation of wheat, barley, *olluco*, potatoes, *choclo*.	3,400–3,700
II	Unirrigated lowlands: maize, potatoes.	3,100–3,400
I	Irrigated lowlands: maize, potatoes.	2,900–3,200
Town	Urban space.	2,900

Source: Salas, note 4 above.
[a]Salas provides information only with regard to the watershed of the river Carash which flows through San Marcos to reach the Mosna river. San Marcos includes several other watersheds; however, there is little reason to believe that there is a great difference in the production zones.

[8] The remainder consists of killings that are either unattributed or believed to be the responsibility of militias and smaller insurgent groups. Comisión de la Verdad y Reconciliación, *Informe Final* (Lima, CVR, 2003), available atwww.cverdad.org.pe/ifinal/ index.php.

[9] E Mayer, *The Articulated Peasant: Household Economies in the Andes* (Boulder, Colo, Westview Press, 2002).

the highest altitude, among the district's windswept upper reaches are pastured sheep, llamas and alpacas, from 3,900 to perhaps 4,400 metres.[10]

Each production zone is managed by the activities of *campesino* farmers and pastoralists and each zone forms part of an interlocking system of production and exchange that supports local livelihoods in the district. [11] Families tend to own land in more than one production zone in order to diversify their production and to insure against losses from inclement weather.[12] Andean farming and pastoralism are highly interdependent activities. Traditional forms of reciprocal exchange (of both labour and goods) are vital to the practice of both and are used by *campesino* households to ensure access to a diverse basket of goods from various production zones.[13]

Most of the agricultural production of the district is directed towards subsistence and exchange within the informal economy based on barter and reciprocity. Low productivity and elevated transportation costs mean that most agricultural goods produced cannot be sold on profitable terms on either regional or national markets.[14] Only the lowest production zone, a relatively small area of irrigated terrain in the valley lowlands, is capable of producing agricultural goods that can be sold profitably on the market.[15] These lands are also prized for their capacity to produce two harvests a year as against one harvest for rain-fed fields. The residents of the town are involved chiefly in business and petty commerce, although many also possess agricultural lands.

Sheep, and to a lesser extent other animals such as llamas and alpacas, are predominantly herded in the highest production zone, called the *puna*. This is an area of wide-open spaces, rocky peaks and harsh climatic conditions. It is an area typically viewed as wild and savage by lowlanders, and is sparsely populated by families of pastoralists. The *puna* plays a key role in the household economies of San Marcos. Since animals are always marketable, they provide ready access to cash when it is required.[16] Money is a very scarce

[10] Salas, n 4 above.

[11] Mayer, n 9 above.

[12] A Figueroa, *La Economia Campesina de la Sierra del Perú* (Lima, Pontificia Universidad Católica del Perú, 1989).

[13] G Alberti and E Mayer, *Reciprocidad e Intercambio en los Andes Peruanos* (Lima, Instituto de Estudios Peruanos, 1974).

[14] GRADE, *Propuestas para el desarrollo sostenible en las localidades vecinas a las operaciones de la Compañía Minera Antamina—Informe Final* (Lima, GRADE, 1999) (Unpublished report on file with author).

[15] Salas, n 4.

[16] Several interviews underlined this point: '[l]ivestock is similar to a bank . . . At whatever time you can gather your animals and sell them for cash to buy something, no?' (*'[L]a ganaderia es un banco, o casi similar . . . Cualquier momento agarran a sus animales y lo venden y tiene plata para que compren cualquier cosa, no?*') Interview No 32 (Sept 2000). 'When you need to you can sell . . . When you are in need, when you lack something, they can be sold . . . Like money in the bank, you can go and sell at whatever time: it is like a bank' (*'A la hora que necessitan, venden . .] Es al la hora que necesitas, a la hora que faltan tus cosas y venden . . . Como la plata que tienes en banco, van y venden igualito para cualquier momento: es como un banco*). Interview No 27 (Sept 2000).

commodity in Andean peasant households that is urgently needed for agricultural inputs, for health care needs, for the education of children, and for emergencies.[17] A family which has sufficient animals kept in highland pastures can respond to these needs as they arise. The *puna* also provides access to meat, milk and wool through networks of reciprocal exchange. Wool is used for artisanal work, practised chiefly by men working on household looms.

Law Governing Ownership, Use and Exchange of Highland Pastures in San Marcos

The Antamina copper-zinc deposit is located at an elevation of 4,300 metres beneath a mountain lake, within the *puna*, the district's highest production zone. To exploit the deposit, Compañía Minera Antamina (CMA) sought to acquire some 7,000 hectares of land in this area.[18] Official ownership of high altitude lands in the district was divided roughly evenly between the two *campesino* communities on the one hand and some 14 groups of private owners on the other. The *campesino* communities had obtained legal title to their territories in the *puna* during the Agrarian reform of the 1970s. Privately held lands had been purchased by *campesinos* some three generations ago and were owned and used by their descendants.[19]

The lands sought by CMA make up a considerable part of the high-altitude productive land available in the district. CMA's land requirements included 74 per cent of the high altitude land owned by Huaripampa, all of the *puna* owned by Ango-Raju, and 85 per cent of the high altitude land belonging to *campesino* families. This translates into an overall reduction of the land suitable for high-altitude production zones (pastoralism and high-altitude tuber cultivation) available in the district by roughly 83 per cent.[20]

Naturally, given the importance of these production zones to the local economy, this reduction could be expected to produce a considerable socio-economic impact in the district. However, to understand the specifics of how individuals, families and communities would be affected by such a loss, an explanation of the legal regulation of ownership and use of *puna* resources is required.

The lands of the *puna* in San Marcos are subject to two overlapping legal orders that relate to rights of use and ownership. In addition to the official

[17] E Mayer and M Glave, 'Alguito para ganar (a little something to earn): profits and losses in peasant economies', (1999) 26 *American Ethnologist* 344.

[18] A Pasco-Font, A Diez, G Damonte, R Fort and G Salas, 'Aprendiendo Mientras se Trabaja' in G McMahon and F Remy (eds), *Grandes Minas y la Comunidad* (Washington, DC & Ottawa, World Bank & IDRC, 2001). Although chiefly a pastoral area for herding animals, the territory sought by the company also included some areas used for cultivating high-altitude tubers.

[19] GRADE, n 4 above, at app. 3.

[20] Ibid, Salas, n 4 above.

state regime, a local or customary legal regime is maintained that assigns a quite different series of rights and duties with respect to land use. At the time of CMA's arrival in the district, the unofficial legal order was dominant in determining rights of access, use and transfer of land. While the unofficial order has governed everyday practice, the official land tenancy regime has had a very important historical influence. On several occasions since the first decades of the twentieth century, the official regime has been used to transfer rights from one group of users to another. These transactions include the transfers mandated by the Agrarian Reform in the 1970s and several purchases of *puna* land by *campesinos* some three generations ago. Apart from these cases, before the arrival of CMA, land in San Marcos has generally not been transferred through market exchange. Instead, as we shall see, rights to land in the district have been acquired chiefly through marriage or inheritance. Accordingly, no market for land has existed in the district.[21]

The basic features of the official land tenancy regime in Peru as it relates to mining have been outlined in Chapter 2. Accordingly, the following sections will set out the characteristics of the informal legal regimes governing the use of highland resources. This will be done, first, with regard to the privately held lands and, secondly, with regard to those owned by the *campesino* communities.[22]

[21] Pasco-Font *et al*, n 18 above.

[22] In the following sections I am indebted to the anthropological work done by Salas regarding the patterns of highland land use and residency in San Marcos for his undergraduate thesis in anthropology at the *Universidad Catolica* in Peru (Salas, n 4 above). As a consultant employed to do fieldwork for the EIS of the Antamina project, and later as a member of CMA's Community Development team involved in assisting resettled families, Salas has had the benefit of prolonged engagement with highland pastoralists both before and after their removal from the lands acquired by the company. Salas' position as a CMA employee in San Marcos no doubt complicated his relations with highland actors. However, he has nevertheless provided a clear-sighted view of social relations to highland pastures in the district. Salas' work lends local specificity to the well-established pattern of socio-economic arrangements between Andean pastoralists and agriculturalists in the Andes identified in the general literature: J A Flores-Ochoa, *Pastoralists of the Andes* (Philedelphia, Penn, Institute for the Study of Human Issues, 1979), B Orlove, *Alpacas, Sheep, and Men: The Wool Export Economy and Regional Society in Southern Peru* (New York, Academic Press, 1977), P Morlon (ed), *Comprender la agricultura campesina en los Andes centrales: Perú—Bolivia* (Lima, Institut Français d'Études Andines, 1997), D Pinedo, 'Manejo comunal de pastos, equidad y sostenabilidad en una comunidad de la cordillera Huayhuash' in I Hurtado, C Trivelli and A Brack (eds), *Perú: El Problema Agrario en Debate. SEPIA VIII* (Lima, SEPIA, 2000), B Rios Ocsa, *Ganaderia y Economia Campesina* (Cusco, Centro de Estudios Regionales Andinos 'Bartolomé de las Casas', 1992). In particular, Salas has contributed insight into how population is 'exported' from the *puna* and how use-rights evolve over time depending in part upon kinship proximity to full-time pastoralists. Salas' work also adds detail and depth to similar although less extended studies of the use of highland pastures in San Marcos: GRADE, n 4. Both GRADE and Salas divide the population of those with economic ties to highland pastures into 3 groups. I have chosen to adopt Salas' convenient terms for these groups: full-time families, alternating families, and visiting families. The discussion presented in the following sections relies heavily upon these 3 invaluable resources: Salas, GRADE, and the general literature. In addition, I conducted as part of my fieldwork a number of informant interviews with *campesinos* in San Marcos regarding the land use, tenure, and exchange arrangements: Interview No 21, Sept 2000;

Highland Pastures Owned by Campesino Families

In practice, privately owned lands are the property of extended families; however, the manner in which use rights (and impliedly the right to dispose of the overall property interest) are distributed within these families differs greatly from the way that these rights are assigned by the state's official land tenure regime. The *puna* is inhabited by a relatively small number of shepherd families whose herds include animals tended for others who live elsewhere. Pasturage in the *puna* is an important and relatively scarce resource for families in San Marcos.[23] Families who do not live in the *puna* gain access to its benefits on the basis of their kinship and relational proximity to shepherd families. The terms upon which livestock are kept will depend upon the closeness of these ties. The animals of immediate relatives who do not live in the *puna* are generally kept according to tacit co-operative arrangements. Exchange among close relatives is routine and takes place according to a logic of implicit reciprocity characteristic of close-knit groups. Families from the valley bring provisions during their visits to the *puna*. They will also house children of their *puna*-dwelling relatives when they go to school in the valley. Accounts are not kept of these exchanges. More distant relations who seek to have animals in the *puna* are involved in less fluid and more explicit reciprocal relations with shepherd families. The terms of the exchange relationship depend both upon the extent of the non-resident's right to access to the *puna* and the degree of involvement and surveillance s/he is willing to undertake. Extended families with rights to the *puna* may have their animals kept either in exchange for half the animals born in a season or for regular gifts of provisions, clothing and other goods brought during visits.[24] Persons without established rights to the *puna* may have a small number of animals kept (perhaps ten) in exchange for set amounts of goods and provisions. These exchanges of labour and goods follow the different logics of reciprocity established in the region. Each party performs his or her side of the bargain in the form of an unsolicited gift.[25]

Interview No 23, Sept 2000; Interview No 27, Sept 2000; Interview No 32, Sept 2000. While these interviews have been useful in verifying the applicability of the above-noted sources, they do not constitute a systematic or comprehensive inquiry into local land-use arrangements in the district.

[23] The highlands in this region provide low quality pastures and are generally overgrazed. See Pinedo, n 22 above, for a discussion of the challenges of communal resource management in a community in a region neighbouring Conchucos.

[24] Payment of half the seasonal births is more advantageous to the shepherd, and reflects a less active interest in *puna* production on the part of the owner of the animals. Payment in goods, which is more economically advantageous to the owner, requires more visits both to supervise the shepherd and to ensure the maintenance of good relations.

[25] Alberti and Mayer, n 13 above.

There are three categories of families with use-rights to the *puna*.

— *Full-time Shepherd Families*. These families keep their own animals and maintain those of others in a common herd. These families typically own several plots of agricultural land in lower production zones. While they reside in the *puna*, they often have a secondary residence in the valley, typically occupied by family members.
— *Alternating Families*. These families divide their time between agricultural activities in the lowlands and pastoralism in the *puna*. Their animals are typically kept by the family of either a parent or an adult sibling who is a full-time shepherd. Part of the alternating family travels to the *puna* every weekend and during the school vacations to help tend the common herd. These families maintain relations of close co-ordination with the full-time shepherds. Many alternators also assume responsibilities in the *puna* on a rotational basis in conjunction with the families of three or four adult siblings. Each family will care for the common herd for three to four months until the next family takes over.
— *Visting Families*. These families live permanently in the valley or in urban centres on the Peruvian coast. The valley-dwellers dedicate most of their time to lowland agriculture and travel to the highlands perhaps once or twice a month, or even as little as once a year. Visiting families living on the coast may return to San Marcos and make the trip to the *puna* at one year intervals.

In order to understand how rights of access to the *puna* evolve with time, it is helpful to think of highland pastoral zones both as economic resources and as exporters of population that are articulated within an extended family network. This network connects the *puna* with the valley of San Marcos and the distant metropolitan coast in webs of economic, affective and relational ties.

The productive capacity of the highland zones is limited. Only so many animals can graze on its pastures and only a certain number of independent families can be supported by this territory. As a result, the majority of the children born to shepherd families must eventually migrate to the lowlands or elsewhere. The transition is a gradual one which follows a general pattern. Children are born to a nuclear shepherd family and spend their early years living and working in the *puna*. Most attend a rudimentary primary school established in the highlands. As they get older, some children will be lodged with relatives in the valley to attend secondary school. During their adolescence, almost all children from the highlands will travel at least once during their vacations to visit relatives established either in Lima or in the coastal zone to the north of the capital. There the children earn pocket money, gain some knowledge of the codes of the city, and provide their relatives with labour in their shops and small businesses.

As young adults, some members of the shepherd family will migrate to these coastal areas, seeking to live there permanently. This is a risky shift. It is generally attempted before taking on the responsibilities of a family. Those migrants who fail to establish themselves will return. Those who succeed in the urban environment may retain animals in the *puna* of San Marcos in the care of their parents or a sibling. They may return once a year or even every few years, bringing gifts and provisions and celebrating with their relatives. For these families, retaining a connection to the highlands and to those relatives still resident there is often an important emotional issue. Having animals in the *puna* does not constitute an important economic resource in itself for individuals on the coast. However, maintaining reciprocity links with extended family in San Marcos does facilitate access to inexpensive and trustworthy seasonal workers who can assist the migrant in her business activities on the coast.

Of the sibilings who remain in San Marcos, most will marry a partner from the valley and gain rights to agricultural fields in the lowlands through the family of their spouse. These new families will typically begin a slow process of separation from the *puna*. Initially they may reside in the *puna* with the shepherding parents. However, soon they are likely to shift to an alternating lifestyle where time is divided between tending lowland plots and close involvement in highland pastoralism. As the years pass, many alternating families will become visiting families who are less occupied with shepherding. A minority of families will cease to have economic ties with the *puna* altogether. These families will be firmly established as lowland agriculturalists in San Marcos or will have migrated to the urban coast.

Of the children born to a full-time shepherd family, only a few will remain in the *puna* as full-time shepherds themselves—generally younger siblings who take over gradually as the parents age and space in the *puna* opens up. The parents typically stay in the *puna* through their old age. Access to highland pastures in the next generation will depend upon kinship proximity to the new shepherd families.

Some extended families may choose to leave the *puna* altogether. As the parents reach old age, younger sibilings may decide not to stay in the highlands and instead engage a hired shepherd to tend the family herd. This is usually a mark of economic success and indicates that the extended family has managed to install itself entirely in the valley (or on the coast) advantageously. In theory, a family in this situation with growing economic interests in other sectors will gradually lessen its ties to the *puna* and cede greater and greater autonomy to the hired shepherd family. As the years pass, the shepherd family will gain greater and greater capacity to pass on use rights through kinship and relational networks according to the patterns established by the customary legal order. This represents a potential mechanism through which the customary legal order could effect a wholesale transfer of land use from one extended family to another.

Highland Pastures Owned by Campesino Communities

The customary land use regime set out above closely resembles the regimes governing highland pastures owned by the *campesino* communities. Under the Agrarian Reform, Huaripampa and Ango Raju gained official title to highland pastures formerly belonging to several *haciendas* in the area. Neither community had previous experience with collective management of access to pastures on a community level. Many of the new *comuneros* of Ango-Raju had long been involved in kinship and reciprocity networks with highland shepherd families. However, the newly formed community lacked any community-level institutions capable of displacing the idea of kinship-level management. For their part, the *comuneros* of Huaripampa lacked any previous links to the *puna* highlands. Geographically, Huaripampa is located in a separate watershed from the one in which the lowland residents of Ango Raju and the shepherds of the *puna* are articulated.

Neither community sought to displace the shepherd families that were established in these lands. Instead, relations were developed with these families in order that they continue their activities according to their own resource management practices. Both communities established communal herds that were installed in the highlands under the care of the shepherd families. These herds provided a source of income used for community administration. In addition, each community sought to have the shepherd families become *comuneros* and charged each family a price paid annually in sheep for use of the pastures. This worked smoothly in the lands owned by Ango Raju, but conflicts erupted over pricing in the lands acquired by Huaripampa. The shepherds in these lands refused to become *comuneros*. However, they continued to occupy and use the highland pastures.

Apart from the installation of community herds and the annual payment to be made for land use, the situation of the shepherd families of the former *haciendas* differed little from that of the shepherds on the privately owned lands. Some of the grazing space previously occupied by the sheep of the *hacendados* was dedicated to these new responsibilities, but the greater part of this available space was filled by establishing kin-based co-operative and reciprocity networks in the pattern established by their neighbours on privately owned land. In other words, overall management of the highland pastures was conducted by these shepherd families according to the prevailing customary legal order.

The Interaction of Customary and State Legal Orders

What, then, can be concluded from this analysis of customary patterns of land use and tenure of highland pastures? Use rights flow from kinship. However, in order to be maintained, these rights must be renewed by continuous use. A failure to exercise rights represents a moving away from involvement in the

puna, and the space that is made available as a result is likely to be taken up by another. Accordingly, this implies that a nuclear family which moves from the *puna* will have difficulty returning, and that a family which significantly diminishes its herd will have difficulty in significantly expanding it. A lesser degree of personal involvement in the highlands also tends to mean that a person's animals are kept on less advantageous terms. The animals of an active alternating family are herded as part of a continuous reciprocal exchange with full-time shepherds, whereas more distant and less involved relations must either journey to the *puna* on a regular basis with gifts or else agree that the shepherding family is entitled to half of the newborns of the herd.

Under the customary regime then, rights to the *puna* are inherited from current users and diminish in extent and quality with disuse. They also diminish over time with the birth of new generations and the gradual dilution of kinship ties to current *puna* occupants. This state of affairs arises as a result of two factors. First, highland pastoral resources are used to capacity, in fact over-use is the norm.[26] Grazing rights that are freed up are likely soon to be occupied. Secondly, the *puna* is a distant space that is unfamiliar to most valley-dwellers and is hard to supervise. Accordingly it is difficult for valley-based families either to hold a shepherd to account or to insist on particularly favourable terms without cultivating good relations and making relatively frequent journeys into the highlands. Investment of time and effort in highland pastoralism is therefore necessary to maintain rights. However, while the use-based order provides a baseline, it is not the only determinant of how many animals a person may have in the *puna*. Some visiting families may own a larger part of the common herd than either alternating families or full-time shepherds in the same extended family. Power, wealth and status are important factors that can expand an individual's access to grazing rights.

These elements should be considered alongside another important aspect of Andean and coastal social spaces. While it is desirable to have access to animals in the *puna* in general, life in the highlands does not represent a sought-after social or economic niche. The area is wild and sparsely populated with harsh weather conditions. Education and medical services in the highlands are very limited. Furthermore, valley-dwellers tend to view the *puna* as a brutish, savage and mystical place. From this point of view, living in the *puna* is more 'Indian' than living in the valley or the town. Indeed, greatest prestige flows from living outside the Andes altogether, on the urban coast. Although shepherd families themselves appreciate and value life in the *puna*, they occupy one of the lowest rungs of social status within extended family networks and social spaces in San Marcos generally. The power they derive often flows chiefly from their use of 'weapons of the weak'

[26] See Pinedo, n 22 above.

and the difficulty valley-dwellers experience in closely supervising their actions.[27]

Various aspects of the customary legal order contrast sharply with the official land tenure regime applied by the state. Under the state regime, the right to make decisions about land use and occupation flow from official ownership. In the case of the *puna* lands belonging to *campesino* families, rights of ownership are inherited from the original purchaser of each *fundo*, several generations back. As may be expected, the descendants entitled to inherit these lands form a large and disparate group. Some of these are full-time shepherds or alternating families in San Marcos. Others are visiting families or families with no economic relation to the *puna*, living either in the valley or the distant coast. The official regime regards each of these inheritors to be owners of the land in common. Accordingly, transfer of the land to another owner will require their unanimous formal agreement to sell.[28] With respect to the lands owned by *campesino* communities, there is an equally large disjunction between the resource management decision-making power nominally provided to owners by the official legal order and the customary access rights which operate *de facto* in the local environment.

In practical terms, persons with ownership rights under the official legal regime are not able to use these rights in order to dictate how *puna* lands will be used. The customary regime excludes the operation of the official one in this respect.[29] In general, however, the customary legal order has maintained a relatively symbiotic relationship with the official land tenure regime. The customary order has not precluded the transfer of title (with resulting effects upon usage rights) through the official land tenure regime. In fact those who used and occupied the *puna* lands before the arrival of CMA owed these rights in large part to transactions that had taken place according to the official system. The official legal order has been used to establish an externally recognised status (official ownership by an extended family or a *campesino* community) which has allowed the internal customary legal order to exist. In turn, the internal legal order manages land use without disturbing the outward forms of the official order so long as internal autonomy is maintained.

[27] JC Scott, *Weapons of the Weak* (New Haven, Conn, Yale University Press, 1985).

[28] Art 971, *Código Civil* DL 295.

[29] When all members of an extended family leave the *puna*, a shepherd is hired who lacks any vested rights in the land. The shepherd is a low status retainer with few entitlements. Land-use in these circumstances is dictated by the non-shepherds, according to the precedence of their customary rights. However, as noted previously, with occupation and use the rights of this shepherd are likely to increase gradually according the pattern established by the customary legal order.

A Snapshot of the Compañía Minera Antamina

The sections that follow will provide a different kind of snapshot of a different kind of actor, the transnationally owned mining corporation that sought to establish a large-scale mining operation in the district: the Compañía Minera Antamina. This profile will outline the company's corporate organisation, its ownership, the terms on which rights to the deposit were acquired, and the nature and scope of the project itself. It will also describe some of the internal dynamics of the corporation relating to the development and pursuit of community relations policy. Lastly, in a section roughly corresponding to the preceding discussion of the governance of highland land tenure, I will outline the three main legal regimes applied by CMA to govern its land acquisition activities and define its responsibilities to local actors.

A History of Mining in San Marcos

Artisanal and small-scale mining has a long history in San Marcos. Evidence exists of small pre-colonial mines in the region, and mining on a small scale was also practised in colonial times. The naturalist Antonio Raimondi visited the area in 1860 and recorded the presence of a small smelter producing lead and silver ingots.[30] One of the district's *hacienda*-owning families operated small artisanal mines in the region that were worked by serfs brought from the family's plantations. Before the arrival of CMA, however, large-scale modern mining was unknown in San Marcos and the surrounding region.[31] Nevertheless, residents have been aware of the Antamina deposit for decades and this knowledge has fuelled hopes in some circles for the future development of the region.

The history of the Antamina concession, a copper-zinc deposit located in one of the highest parts of the district of San Marcos, begins in 1952 when the Cerro de Pasco Corporation acquired the rights to the deposit. Cerro explored the property intermittently, however, it never developed the deposit. In 1970, when the military government expropriated all unworked foreign-held concessions, rights to the Antamina concession were transferred to a state-owned company, Mineroperu.[32] Between 1970 and the mid-1990s,

[30] A Raimondi, *El Perú: Itinerarios de Viajes* (Lima, Torres Aguirre, 1929).

[31] From the 1980s to the early 1990s, a small mine known as Contonga was exploited in San Marcos by a Peruvian company called the Sociedad Minera Gran Bretaña. Contonga was a low-technology operation which employed local labour and which acquired supplies from local agriculturalists and pastoralists.

[32] Thorp and Bertram argue that Antamina, like other deposits held by foreign mining companies in the 1960s, was not developed due to an 'investment strike' during which the transnationals held off new projects until they could obtain better terms from the Peruvian government. However, the military coup in 1968 resulted in a hardening of terms, followed by further confrontation, and ending in the nationalisation of many foreign-owned enterprises: R Thorp and G Bertram, *Peru 1890–1977: Growth and Policy in an Open Economy* (New York, Columbia University Press, 1978) at 219, 308–9.

the Antamina concession remained essentially dormant.[33] Structural adjustment and the liberalisation of Peru's economy in the 1990s rekindled foreign interest in the mining sector, and the Fujimori administration soon placed the concession on the list of state assets to be put up for auction.[34]

The Formation of the Company

In September 1996, after a competitive bidding process, rights to the Antamina copper-zinc concession were sold to a consortium formed by two Canadian mining companies, Rio Algom and Inmet. Together the companies formed the Compañía Minera Antamina SA (CMA), a Peruvian corporation wholly owned by the two consortium members.

In their winning bid for the concession, Rio Algom and Inmet paid US$20 million up front and pledged to invest not less than US$2.5 billion in the mining operation by September 2002. If this target was not met, the companies agreed to pay a 30 per cent penalty on any shortfall. The contract made with the Peruvian government stipulated that the companies had a two-year grace period during which they could pull out of their investment commitment with no strings.[35] This provided the consortium with a two-year window within which to ascertain the feasibility of all aspects of the project. Accordingly, the consortium's strategy was a calculated gamble.[36] Twenty million dollars was put at risk in the hope that the mineral deposit was at least as valuable as suspected.

The Scope of the Antamina Project

Exploration activities were commenced in San Marcos in August of 1996 and continued for nearly a year. The results revealed that the investors' gamble had paid off: known mineable reserves were almost four times greater than predicted.[37] Soon, an enormous project was planned. It would eventually involve the construction of mine, mill and related facilities at altitudes of between 3,500 and 4,500 metres, two new road segments, and a pipeline to carry mineral concentrate across 302 km of mountainous terrain to a new

[33] A joint venture with a Romanian state mining agency to develop the concession resulted in some six years of exploration in the 1970s. However, the venture fell through in 1978 due to a lack of financing: D Becker, *The New Bourgeoisie and the Limits of Dependency: Mining, Class and Power in 'Revolutionary' Peru* (Princeton, NJ, Princeton University Press, 1983) at 137.

[34] Before its privatisation, the Antamina concession was transferred from Mineroperu to a second state mining company, Centromin: ibid.

[35] 'Antamina go-ahead', *Mining Journal*, 18 September 1998.

[36] A Moel and P Tufano, 'Bidding for Antamina: Incentives in a Real Option Framework' in S Grenadier (ed), *Game Choices: The Intersection of Real Options and Game Theory* (London, Risk Books, 1997).

[37] M Watkins, 'Private Insurers Come Out', *Project Finance*, September 1999, 19.

port facility that would be built on the coast.[38] The project was expected to require an overall investment of US$2.3 billion, US$1.32 billion of which was eventually raised from a consortium of lenders.[39] This would amount to the largest mine financing ever arranged.[40] Production was initially planned to commence in 2002. The project planners would beat this deadline and bring Antamina into production by November 2001.

From early on, it became clear that the Antamina project would be of major importance to the Peruvian economy. It is the largest investment made in the country's mining sector during the 1990s. In 2000, the consortium predicted that when the project began full production, it would single-handedly increase national mineral exports by 30 per cent and add 1.8 per cent to the country's gross domestic product. Regionally, its impact would be even larger, representing fully 70 per cent of the GDP of the department of Ancash.[41] Given the precarious fiscal position of the Peruvian state, the mining sector is of vital importance to its stability and viability. At the time that the Antamina project was being developed in 1998, the mining sector as a whole contributed 7.5 per cent of Peru's GNP, further, it accounted for 48 per cent of the country's exports and 13 per cent of tax revenues.[42] After the Antamina mine achieved full production capacity in November 2001, it was officially opened by Peru's new president, Alejandro Toledo.[43]

CMA's Owners

The corporate ownership structure of CMA has changed a number of times since 1996. Due to financing problems and corporate acquisitions, neither of the initial partners in the venture is currently part of CMA's consortium of owners

The initial rearrangements were brought about by the demands of financing the project. First, Inmet, a company which was having troubles at that time with its other operations, sold its interest in the project in July 1998. Inmet's investment was taken up by two other Canadian mining companies, Noranda and Teck Corporation. The two joined Rio Algom as shareholders in CMA.[44] While project financing was being arranged in 1999, the Japanese company Mitsubishi also joined the group, assuming a 10 per cent interest in the project.

[38] Apoyo Comunicaciones, *Las Relaciones de los Proyectos de Inversión con la Administración Publica* (Lima, Compañía Minera Antamina SA, 2000).

[39] 'Rio Algom, Teck, Noranda announce Antamina plans', *Financial Post*, 23 January 1999, D2.

[40] Watkins, n 37 above.

[41] Apoyo Communications, n 38 above, at 13.

[42] Pasco-Font *et al*, n 18 above.

[43] CooperAcción, 'Se inaguró el mega proyecto Antamina', (2001) 32 *Boletin Minero* 11.

[44] At that time, both Rio Algom and Noranda assumed a 37.5% interest in CMA, while Teck took up the remaining 25%. Watkins, n 37 above.

Several subsequent changes in CMA's ownership have taken place since 1999. These changes reflect the consolidations that were taking place at that time in the global mining industry. A number of companies sought to expand in size through a heated period of mergers and acquisitions that took place in the late 1990s and the early 2000s. In 2000, Noranda made a bid to acquire Rio Algom. Management at Rio Algom was able to fend off the bid by arranging for a friendly takeover by Billiton, a large UK-based mining company. In 2001, Billiton merged with the Australian mining giant BHP and, subsequently, Teck merged with Cominco, another Canadian firm. Thus, at the time of writing, CMA is owned by BHP-Billiton (33.75 per cent), Noranda Inc. (33.75 per cent), Teck Cominco (22.5 per cent), and Mitsubishi (10 per cent).

Corporate Organisation and Actors Involved in Project Development

Between 1996 and 1997, CMA consisted of little more than its exploration teams that were working in San Marcos. Beginning in 1996, CMA's exploration engineers negotiated access with local landowners and occupants and began exploration drilling to determine the characteristics of the deposit and the basic feasibility of the project. The positive results yielded by these initial studies convinced Rio Algom and Inmet to build up the company. By August 1997, CMA began to hire staff, set up its offices and establish relations with contractors. The transnational construction giant, Bechtel, had been contracted to conduct the project's feasibility study and would later manage construction of the project itself. A Canadian engineering and environmental consulting firm was engaged to carry out the project's environmental assessment. The financial consortium backing the project would eventually include major US, Canadian, European and Peruvian commercial banks as well as export credit agencies from Japan, Canada, Finland and Germany. Loan guarantees would be provided by the Multilateral Investment Guarantee Agency (MIGA) of the World Bank Group (WBG) as well as by Japanese and Canadian export credit agencies and commercial insurers.[45]

[45] The Antamina project's US$1.32 million in debt financing is divided into two parts. First, US$680 million is provided by a group of export credit agencies including: '$245 million from Jexim, $200 million from Kreditanstalt fur Wiederaufbau (KfW) backed by the German government, $135 million from the Export Development Corporation (EDC), and a facility provided by Leonia and ABB Export Bank backed by Finnvera ($100 million)'. Secondly, US$640 is provided by commercial banks

> '. . . under two syndicated bank loans arranged by ABN AMRo, ANZ, Bank of Montreal, Barclays, CIBC, Citibank, Deutsche and The Bank of Nova Scotia. Some $335 million of the loan is covered by political risk insurance provided under a common policy provided by EDC, Office National due Ducroire, Miga, Sovereign Risk Insurance and Zurich US. Tranche A is a $535 million commercial bank facility and tranche B is a $105 million Jexim

Both Rio Algom and Inmet were newcomers to the Peruvian scene. Lacking political experience and contacts, CMA's owners soon formed a strategic alliance with members of the country's well-connected mining elite. A leading member of one of these families was hired in August 1997 to serve as CMA's president. This individual was the president of a successful middle-sized Peruvian mining enterprise. He was also president at that time of the National Society of Petroleum, Energy and Mining, the major industry association representing these sectors in Peru. Underneath CMA's president, four directorates were established: Institutional Relations, Operations, Construction, and Environment, Health and Safety.[46] Engagement with local actors in San Marcos was the responsibility of the Community Relations Department which fell under the Director of Institutional Relations.

Internal Conflicts Over Community Relations

All of the key drivers of corporate commitment to positive community relations are present in the Antamina case: it is a very large project, located in a country with a history of instability, sponsored by senior transnational firms with reputations worth protecting, and it is reliant upon significant amounts of commercial financing. Furthermore, since MIGA is involved in the project's financial consortium, the project is subject not only to regulation by Peruvian state authorities but also to regulation by the safeguard policy regime of the World Bank Group (WBG). Accordingly, it is no surprise that CMA articulated a strong commitment to corporate social responsibility and positive community relations from its earliest days.

However, it is also no surprise that the translation of community relations policy into practice has been the subject of normative conflict within both the company and its contractors. As the case study will illustrate, this conflict has several dimensions. It involves a struggle over inter-departmental jurisdiction and authority, a contest between those espousing 'old school' and 'new school' attitudes towards community relations, and a competition over the weight accorded to professional knowledge—especially social specialist expertise—in the corporate decision-making process.

co-financing facility with a political risk guarantee risk guarantee provided by Jexim. BoT-Mitsubishi and Fuji are Jexim agents. Banks joining during syndication include: Banco de Credito del Peru, Banco Continental del Peru, Banco de Lima-Sudameris, DaiIchi Kangyo, Dresdner, Royal Bank of Canada, SG, Toronto Dominion and WestLB.'

Watkins, n 37 above.

[46] Salas, n 4 above.

Legal Regimes Governing CMA's Community Relations Planning

CMA's community relations planning was oriented by three formal legal orders. These are the Peruvian official legal orders regarding the purchase and sale of land and Environmental Impact Assessment (EIA), and the Involuntary Resettlement Policy regime administered by the the Multilateral Investment Gurantantee Agency (MIGA) of the World Bank. Each of these legal orders has been discussed in some detail in Chapters 2 and 4. Accordingly only a brief summary of the requirements of each legal regime will be outlined below.[47]

Peruvian Law on Purchase and Sale of Land

In Peruvian law, mineral rights belong to the state and can be granted to private actors by concession.[48] However, to establish a mine, a concession-holder must also obtain the 'surface rights' to required land from its legal owners. This is conventionally done through contractual negotiations. Where land is collectively owned by an Andean *campesino* community, an act authorising the sale must also be passed by a two thirds majority vote in a general assembly of community members (*comuneros*).[49] However, if a landowner does not agree to the concession-holder's offer, the concession-holder is entitled to apply to the state for an easement. If granted, such an easement effectively expropriates the landowner's surface rights in exchange for a minimal level of compensation set by the Ministry of Agriculture.[50]

However, throughout the 1990s, Peru's Ministry of Energy and Mines showed considerable reluctance to involve itself directly in mining and community conflicts by granting mining easements.[51] While the easement law has remained on the books, the ability of a concession-holder to rely on it in practice has remained politically ambiguous. A further administrative complication arises from the need to ascertain and register title to land. Some 80 per cent of land in Peru either lacks formal title or does not have title registered.[52]

Peru's Environmental Impact Assessment Regime

This regime required CMA to submit a comprehensive technical evaluation—called an Environmental Impact Study (EIS)—of the project's likely

[47] The law outlined here is those provisions in force at the time that the relevant events in the case study occurred.

[48] Art 66, *Constitution of Peru*; Art 9, *Ley General de Mineria* DS No 014-92-EM.

[49] Art 11, *Ley de Tierras* No 26505.

[50] Art 7, *Ley de Tierras* No 26505, as modified by law No 26570; Reg of Art 7 of Law No 26505, DS No 017-96-AG.

[51] In fact, no mining easements were granted over this period. That is not to say that such an important project as Antamina would necessarily have been denied this kind of state intervention on its behalf.

[52] A Laos and H Palomino Enriquez, *Para Titular Tierras Comunales y Predios Rurales* (Lima, SER, 1997) at 6.

environmental and social impacts. The EIS must also set out proposed measures for avoiding or mitigating the impacts identified. Government approval of this large and complex document must be obtained from the Ministry of Energy and Mines (MEM) before a large mining project will be allowed to proceed.[53] Local input into the approval process can take place during a public hearing held in Lima during which questions may be submitted to the project proponents.[54]

World Bank Involuntary Resettlement Policy

The Antamina project is required to comply with the safeguard policies of the Multilateral Investment Guarantee Agency (MIGA) due to MIGA's involvement in the project's financing consortium of lenders and insurers. Non-compliance with MIGA's safeguard policies could lead to cancellation of investment insurance coverage and thereby provoke difficulties with the project's consortium of lenders, investors and insurers.[55] MIGA's IR Policy, called Operational Directive 4.30 (OD 4.30 or the Directive[56]), applies where land is acquired without the free and informed consent of those who have a direct economic dependence upon it.[57] It requires that compensation be based on a comprehensive socio-economic assessment of direct livelihood interests in land, including both formal and informal entitlements. It further provides that compensation measures must take the form of a planned participatory development intervention designed to restore affected livelihoods and living standards to their pre-project levels, and that the project sponsor must engage in continuous monitoring of the displaced population in order to ensure that the intervention is effective. In addition to other compensation measures (such as training, employment, land reclamation projects, etc), the Directive specifically encourages land-for-land exchanges for people with land-based livelihoods. While the Directive provides that these measures should ideally be designed to improve the situation of displaced persons, its minimum requirement is the restoration of pre-project livelihoods. The Directive also stipulates that its requirements should be carried out alongside those established by host state legal regimes.

[53] *Codigo del Medio Ambiente y los Recursos Naturales*, DL No 613.

[54] *Reglamento de Participación Ciudadana*, RM No 728-99-EM/VMM.

[55] Multilateral Investment Guarantee Agency, 'Standard Contract of Guarantee' (2001), available from MIGA, 1818 H Street NW, Washington, DC 20433, USA.

[56] OD 4.30 was established by the public sector arms of the World Bank in 1990 and remained in force until 2001. Projects approved by the World Bank's public sector agencies since 1 Jan 2002 are subject to a revised policy contained in two documents: Operational Policy 4.12 and Bank Procedure 4.12 (OP/BP 4.12): see 'Involuntary Resettlement & The World Bank', available at http://lnweb18.worldbank.org/essd/essd.nsf/Resettlement/home. MIGA adopted OD 4.30 in 1998. However, MIGA has declined to adopt the new revised policies and instead, on 21 May 2002 it approved its own interim involuntary resettlement policy pending the results of an outside review of its safeguard policy system: see 'MIGA's Interim Issue Specific Safeguard Policies', available at www.miga.org/screens/policies/safeguard/background.htm.

[57] Negotiations for the sale of land that take place under the threat of expropriation, eg, are not voluntary.

CMA's Community Relations Plans

CMA divided its community relations plans into three activities: land acquisition, development and resettlement. Each activity was regarded as conceptually distinct from the others, and each was oriented towards compliance with one of the legal regimes set out above.

Acquisition of Land
This process would be carried out through negotiated contracts of sale with local landowners. Once CMA established a baseline price per hectare, this price would be offered to all owners. The mining servitude law would be invoked to encourage reluctant vendors and discourage efforts to blackmail the company into paying exorbitant prices. CMA's offering price per hectare would be a generous one in order to encourage sales and to promote a positive image for the company. In addition, the company would refrain from taking possession of a section of the purchased lands, thereby displacing its occupants, until that section was needed for construction purposes.

Local Development
CMA's local development plans were detailed in the project's EIS in response to the project's social impacts. The socio-economic chapter of the EIS of the Antamina project sets out a number of expected positive and negative impacts. On the positive side, these include a contribution to national and regional Gross Domestic Product (GDP), an expansion of the local and regional tax base, increased demand for goods and services, and the creation of employment. Negative impacts identified include a local loss of agricultural and pastoral lands and pressure on existing health and educational facilities from immigration.[58]

The EIS contains two sets of commitments designed to address these issues. First, it affirms that resettlement will be conducted in line with World Bank safeguard policies in order to offset the loss of land. Secondly, the EIS provides a Development Plan consisting of a list of local development projects to be conducted by CMA between 1998 and 2001 in the four districts neighbouring the project, including San Marcos.[59] The Development Plan aims to improve those public services (education and health) expected to be strained by project-related local immigration. It also includes a number of projects designed to promote economic development (such as technical assistance to agriculturalists), as well as projects directed at heritage conservation. All told, CMA pledged in its EIS to spend over US$4 million on development projects in Conchucos between 1998 and

[58] Klohn Crippen, *Environmental Impact Statement—Compañía Minera Antamina SA*, submitted to Peru Ministry of Energy & Mines, Mar 1998, at 8.1–2.
[59] Ibid, at Appendix SE-III.

2001.[60] The Development Plan featured in the EIS is sketchy and provides 'an initial approximation of possible activities and their costs' intended to be given more definition later.[61]

Resettlement

Once the acquisition of land was complete, CMA planned to conduct resettlement with a land-for-land exchange. The Resettlement Plan outlined in the project's EIS provided that part of the *puna* land acquired by the company would be set aside for resettlement purposes. To make up for the shortfall in land, the resettlement pastures would be improved to allow for more intensive grazing. In addition, technical assistance would be provided to allow the resettlers to engage in other economic activities and thus rebuild their livelihoods to pre-resettlement levels. The Resettlement Plan provided in the project's EIS is, however, woefully deficient in almost every respect.[62] Scarcely five pages long, it does not follow the format required by OD 4.30, it fails to provide the necessary information on the pre-resettlement livelihoods and living standards of the specific target population, and it fails to convey an understanding of the customary arrangements of highland land use and access in the area. Furthermore, CMA's estimates regarding the carrying capacity of the lands designated for resettlement were overly optimistic, as were its expectations regarding the possibility of generating extra income for resettled families through eco-tourism and other activities.[63]

PART II: THE PROCESSES OF LAND ACQUISITION AND RESETTLEMENT

The Development of Local Legal Ordering

This section of the chapter tells the story of how negotiations regarding the acquisition of land were carried out between corporate and community actors in San Marcos. In these early interactions, a process of informal normative development is evident. Actors on both sides of the divide seek to establish the principles of their relationships: they attempt to communicate

[60] The EIS states that this figure is US$6.3 million; however, it includes US$2 million that was to be spent on facilities in Huaraz for CMA's workers who would be stationed there. Therefore US$4 million is a more accurate figure regarding the impact in Conchucos.

[61] Klohn Crippen, n 59 above, at III.1. In its final chapter dealing with cost-benefit analysis, the EIS states that the Antamina project will provide significant national economic benefits; that local people will benefit from improved infrastructure and increased production resulting from development programmes; that cultural resources and tourism will be enhanced; and that the loss of agricultural and pastoral lands will be offset by resettlement. It concludes that the net benefit of the Antamina project is favourable: Klohn Crippen, n 59 above, at 9.2.

[62] Ibid, at Appendix SE-II.

[63] Salas, n 4 above.

norms to one another, they aim to develop a basic set of expectations regarding future behaviour. Indeed, both sets of actors are involved in developing an informal kind of 'local law': a shared legal order that can be used to orient the expectations and shape the behaviour of the parties.

As much socio-legal scholarship would suggest, this sort of informal normative development takes place both parallel to and through the operation of formal legal orders in the local environment. National and transnational legal orders are rarely capable of wholly determining the content of local ordering. However, they often play a key role in affecting power relations, creating bargaining entitlements and conferring symbolic authority on the negotiating parties.[64] Local legal ordering between actors who are new to one another necessarily involves improvisation and trial and error. However, with time and continued interaction, such ordering can result in the formation of stable regulatory communities which share relatively strong understandings regarding their respective rights and duties.

The process of legal development involves acts of persuasion that take place within fields of power. Legal regimes function only if people are convinced to adhere to them, to pay attention to their outward symbols, to accept in their daily practices the norms and principles these regimes propound.[65] The arrival of the Antamina project in San Marcos triggered at least two large-scale transformations of the meaning of property relationships in the area. During land sale negotiations, one particular set of rights and duties relating to land was proposed by CMA representatives to community actors. However, when resettlement was carried out, this set of normative relations was suddenly and substantially revised. The chapter aims to explain the processes of persuasion and negotiation that have undergirded these transformations. In doing so, it uses the schema developed in the previous chapter regarding the goals, expectations and challenges facing corporate and community actors in establishing relations.

Chapter 5 identified two tensions that beset community actors in the rural Andes who are confronted by the prospect of the development of a large-scale foreign-owned mine in their locality. First, the rural Andes as a whole in Peru is embroiled in profound economic crisis and social upheaval. In this context, local responses to mining are by no means certain. The prospect of a large mining project presents both considerable opportunities and threats to local actors. Groups of community actors therefore face a fundamental tension between hopes and fears associated with project development. Secondly, the divisive history of community conflict in the rural Andes has resulted in shifting and uncertain patterns of loyalty and trust. Many existing rural institutions are weak. Thus community actors faced with

[64] M Galanter, 'Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law', (1981) 19 *Journal of Legal Pluralism* 1, SF Moore, *Law as Process: An Anthropological Approach* (London, Routledge & Kegan Paul, 1978).

[65] CM Rose, *Property and Persuasion* (Boulder, Colo, Westview Press, 1994).

the prospect of mine development confront a tension between solidaristic collective action and personal advancement through the transgression of community ties.

On the corporate side, Chapter 5 identified a different set of challenges. In their relations with community actors, mining enterprises seek to obtain secure, legitimate entitlements at a reasonable cost and in an expedient manner. Paying some kind of a reasonable premium in terms of time or funds in order to secure local approval—sometimes called a 'social licence'—is both prudent and acceptable. However, attempts to accomplish this task in a rational manner face two hurdles. First, rational decision-making is impeded by uncertainty. It is not clear on what a company should spend its money and time in order to achieve the results it desires. Furthermore if local people are not satisfied with a company's efforts, when can that company legitimately say that it has done enough? Secondly, consistent action on the part of the company is made problematic by the lack of normative consensus among corporate actors with regard to community issues, and by the large number of corporate-related actors—including functionally distinct departments, consultants and contractor firms—whose activities will bring them into contact with community members.

The Acquisition of Land by CMA

Beginning in October 1997 and continuing over a period of 12 months, CMA conducted often protracted negotiations with 14 groups of owners in common and the two *campesino* communities. CMA's Community Relations Department was charged with this task. Its timetable for completing the transactions was dictated by the terms of the privatisation agreement signed by CMA's shareholders. The investors had until September 1998 to pull out of the project before they would be held to their commitment to invest US$2.5 billion. Like other departments within CMA, Community Relations was expected to 'have its ducks in a row' before the pull-out date.[66]

Overall supervision of the Community Relations Department was the responsibility of CMA's first Director of Institutional Relations, a Canadian manager brought in from one of CMA's parent companies. The Director's Community Relations staff team was composed largely of Peruvian engineers with experience working in Peru's domestic sector of medium-sized mining enterprises. The team was led by an engineer who had been responsible for managing exploration activities in the area over the preceding year. The Community Relations team also included a junior lawyer seconded to CMA from a prominent firm in Lima. No social specialists were included within this team during the land acquisition process.

[66] Interview No 65, Oct 2000.

Comunidad Campesina Huaripampa

Formed in 1914, and legally recognised in 1963, Huaripampa is older, more traditional, and poorer than its rival Ango Raju.[67] The village of Huaripampa is the largest population centre in the district outside the town of San Marcos itself. Although the community's agricultural land is communally owned, it is farmed in individual parcels occupied by different families. The official territory of the community also includes three high altitude areas obtained through the Agrarian Reform that are not contiguous with the main body of Huaripampa's territory. These are the highland pastures of Yanacancha and Pajuscocha, and the small highland farming and pastoral community of Ayash Huaripampa. Ayash Huaripampa is centred in a small village in the highest reaches of the district, only a few kilometres from what would become the Antamina mine site. During the Agrarian Reform period, this community of some 60 families was transformed from a *hacienda* to an annex to the *campesino* community of Huaripampa.

CMA's Community Relations team initiated negotiations regarding the sale of land by first approaching the *campesino* community of Huaripampa. These negotiations began in October 1997 and resulted in a formal agreement signed in January 1998. CMA sought to acquire the Yanacancha property from the community.[68] The Canadian Director involved himself personally in these negotiations, together with members of his staff. This provided the Director with an opportunity to interact with community actors, get to know them, and explore alternatives. Huaripampa was represented by its elected community authorities—the community President, Vice-president and Secretary—and was advised by a lawyer, a *sanmarquino* resident in Lima with longstanding ties to the community. CMA arranged to pay the lawyer's fee.

In general, the company was received with enthusiasm and negotiations were amicable.[69] The parties eventually reached a figure of US$400 per hectare. Community informants report that the company also agreed to provide Huaripampa with a number of development projects, including a fish farm, technical assistance with agriculture and pastoral activities, job training to assist *comuneros* to work for the mine, and a weaving workshop for women of the community.[70] These were oral promises that were not put in writing. Company informants dispute the claim that particular development projects were promised to Huaripampa in the context of negotiations for the sale of land.[71] Some argue that the community leaders and their lawyer

[67] Pasco-Font *et al*, n 18 above.
[68] The fundo Yanacancha measures 2,337 hectares; while Pajuscocha measures 500 hectares. See Table 6.2.
[69] Interview No 40, Sept 2000; Interview No 1, Sept 2000.
[70] Interview No 40, Sept 2000; Interview No 62, Oct, 2000; Interview No 1, Sept 2000.
[71] Interview No 6, Sept 2000.

misunderstood statements made by CMA representatives with regard to the company's general plans for development projects in the region. [72]

However, these disputes did not emerge until later. When the agreement was being made, good feelings reigned: succulent *pachamanca*[73] stews were prepared at community meetings, the Canadian Director was made an honorary *comunero*, the future was bright. A *comunero* sums up the climate of hope and promise that was created at that time:

> There were many promises from the mine from the moment they arrived [. . .] One employee after another [would make promises], including that Huaripampa would be transformed into a modern community . . .[74]

A general assembly of *comuneros* was held and the community authorities obtained the two thirds majority vote required to authorise the sale. The contract of sale was signed with CMA on 10 January 1998. Huaripampa was paid US$934,800.

In comparison with the subsequent negotiations for land carried out by CMA in San Marcos, the process with Huaripampa went very smoothly. The great majority of *comuneros* of Huaripampa have few economic or social ties to the highland pastures owned by the community. These lands are physically distant from Huaripampa itself, situated in a neighbouring watershed. As a result, the *comuneros* of Huaripampa have for the most part not developed the kinship-based reciprocity links with shepherd families required to gain access to the pastures of the *puna*.[75] The community itself derives income from a communal herd kept in the highlands and from the annual payment in barter for shepherds' land use. These funds were used for administrative purposes. Furthermore, the shepherds were not community members. The large majority of *comuneros* had little to lose from the sale.

Two particular groups, however, did have important interests at stake. The broad community of actual users of the highland pastures sold—comprising those highland shepherd families and their extended kin—stood to lose a significant portion of their livelihoods. In addition, some five to 15 hectares of the territory sold by Huaripampa consisted of agricultural land used by members of the community's high altitude annex, Ayash Huaripampa. However, neither of these groups was brought into the negotiations or consulted by the community authorities of Huaripampa regarding the sale.[76]

[72] Salas, n 4 above, at ch 5.

[73] A *pachamanca* is an Andean feast made up of a variety of meats, potatoes, and vegetables that is slow-cooked in cauldron burried underground with coals.

[74] '*Ha habido muchísimas promesas de la mina en el momento que llegaron . . . Venia otro empleado, otro empleado, otro ingeniero que aduciendo que incluso a la comunidad iban transformar a una comunidad moderna . . .*' Interview No 40, Sept 2000.

[75] Salas, n 4.

[76] In the words of one *Ayashino*, 'The first one to negotiate [with the company] was Huaripampa. . . . Here in Ayash we are one of the community's annexes. . . . Basically, they told us nothing. Not: "We will sell so many hectares to Antamina" or "As community members, you

Instead the lands were sold out from underneath their users. The small size of Ayash relative to the population of the main community meant that the authorities of Huaripampa did not require the support of its *comuneros* to secure a two thirds majority. As for the highland shepherds, since only a few were *comuneros*, their votes were of negligible importance. The exclusion of the 'losers' from the decision-making process meant that community authorities could pursue a single overriding interest: the pursuit of modernisation and progress in the community.

In the year that followed the sale, a significant amount of the money received by Huaripampa was spent. Community leaders invested funds in a number of projects, including the construction of an industrial college and a medical clinic, the electrification of the village, and the purchase of a four-wheel-drive pickup, a small truck, and a satellite TV dish. However, no funds were budgeted for staffing either the college or the clinic, and no arrangements were made with public authorities for assuming responsibility for these facilities before they were built. Even more significantly, no communal investment was made into productive activity capable of increasing the earnings of *comuneros*. Instead, community leaders invested in status symbols intended to express Huaripampa's prestige as a modernising urban centre.

This is not to say that the investments made were not supported by an economic logic. Damonte argues that such investments in urban status symbols may be geared to increasing a community's importance relative to the other population centres in its district. If so, this is part of a strategy to increase the community's share of the local services and rents provided by state agencies.[77] Salas provides a second argument, observing that *comuneros* may be disinclined to support long-term productive projects because of a history of factionalism, distrust and unscrupulous leadership in the zone (and perhaps in Peru generally). He cites interviews in which *comuneros* claim that such projects will only enrich the authorities who manage them.[78] Signifi-

will receive some benefit"—nothing. So they sold the land to the company and were paid the money. So, some time passed and the gentlemen of Antamina made their arrangements . . . But we were left out, despite the fact that we were part of the same community. [The leadership of Huaripampa did not involve us] in any of the agreements or conversations.'

'*El primer negociador fue Huaripampa . . . somos [en Ayash Huaripampa] uno de sus sectores . . . Practicamente no nos informaron de nada, de decir que vamos a vender tanta hectarea de tierra a Antamina o sea que como una comunidad de la misma que es, van a ser beneficiados algo, nada. Entonces ellos vendieron . . . a la Compañía Minera Antamina y recibieron una cantidad regular de plata. Entonces de ahi paso un tiempo, los senores de Antamina ya se arreglaron, . . . pero dejandonos a un lado, a pesar de que eramos de la misma comunidad. [La dirigencia de Huaripampa no nos involuncro] en ninguno de los convenios ni en las conversaciones*': Interview No 31, Sept 2000.

[77] G Damonte, *Llegaron al Pueblo: Apuntes sociales sobre los nuevos proyectos mineros en el Perú* (Lima, GRADE, 2000).

[78] Salas, n 4 above, at ch 5.

cantly, the construction of the infrastructure projects was used to distribute individualised benefits among *comuneros*. In normal circumstances, such common projects would rely on labour raised from traditional work parties (*faenas*) of *comuneros* who would not receive cash remuneration. However, in this case, the infrastructure projects that were developed with the land sale proceeds were built using large amounts of paid labour from *comuneros*, thereby supplementing local incomes for many months. A third reason for the failure productively to invest the proceeds of the sale may relate to the success of the company's rhetoric concerning its influence in developing the area. Community authorities and *comuneros* may simply have expected that economic development and jobs would be provided by CMA and therefore felt that community investment in these areas was unnecessary.

During 1998 and part of 1999, Huaripampa's *comuneros* were enthusiastic about their future with CMA. However, as a new slate of community authorities was installed after elections in 1999, it was soon discovered that a large amount of the money that had been paid out by the company was missing. Of the nearly US$1 million received by Huaripampa, roughly US$400,000 had been officially spent. However, only US$40,000 remained in the community's bank account.[79] A court case was launched against the outgoing community president who had departed to the departmental capital of Huaraz. By 2000, when fieldwork was conducted, the enthusiasm and hopes of Huaripampa had evaporated, leaving a deep sense of frustration. The hoped-for modernisation of the community never came. Few jobs were available to *comuneros*. Huaripampa's 'special' development projects were not delivered. And much of the sale proceeds were either spent on 'white elephant' projects or lost. In the words of one *comunero*:

[79] Interview No 40, Sept 2000. 'Yes, 880,000 [US] dollars. I remember that this was the amount received by the community. . . . I think we in the community are persuaded that sometimes we have bad leaders. Up until now, I don't want to draw conclusions: whether it is due to sharp practice, negligence, or incapacity, I don't know. We in the community have been thrown into a mess, no? Because the price of the work that has been done—for electrification, the construction of the medical post, and the construction of the school—(these are the major projects) they don't amount to 400,000 dollars. So the leaders who were governing the community at that time . . . it's not clear what they've done with the other half of the money. Only with the arrival of the new president was it discovered that only 40,000 dollars were left in the bank.'

'*Sí, 880,000 dólares. Sí me recuerdo esa cifra recibió la comunidad doctor. Bueno deduciendo todo este asunto de la negociación doctor, particularmente pienso y creo la comunidad estamos convencidos de que a veces las malas autoridades que tenemos en la misma comunidad—hasta la fecha yo no saco las conclusiones—de repente por ser muy vivos, o por negligencia o por incapacidad, no sé. Nos ha traído prácticamente un lío, acá en la misma comunidad, no? Porque imagínese las obras básicamente que se ha calculado el precio—por decir la electrificación, la construcción de la posta médica y la construcción del colegio—son obras más importantes que se ha hecho, no llegan ni a $400,000 dólares, no? Entonces esas autoridades que prácticamente han estado en ese período gobernando a la comunidad, necesariamente analizando bien pues la mitad del dinero no se que cosa han hecho, no? Solamente para el nuevo presidente que ha entrado han dejado $40,000 dólares en el banco.*'

> Since this kind of thing has never happened to the community before, perhaps many times we believed in [what the company representatives] were saying, no? . . . And in the end, after they bought the community's land, after they started work on the mine, they forgot about Huaripampa, no? Now, they don't even come to visit.[80]

Today, the community of Huaripampa remains marginalised and poor. The sentiments of many in Huaripampa are echoed in the following *comunero*'s verdict on the community's interactions with CMA:

> Unfortunately for the community it has been a sad reality, to see the community in the same state, in the same situation where nothing changes . . .[81]

Comunidad Campesina Ango Raju de Carhuayoc

Once an agreement had been reached with Huaripampa, the Canadian Director of Institutional Relations delegated responsibility for negotiations with the remaining owners to his Community Relations team. With the Huaripampa agreement, CMA had arrived at the formal terms which the company would seek to apply universally. CMA Community Relations staff were instructed to offer US$400 per hectare to all other landowners. In March 1998, representatives from Community Relations began negotiating with the *campesino* community Ango Raju in order to purchase two tracts of the *puna* called Neguip and Yanacancha, comprising a total of 1,129.9 hectares. This represented all of the highland pastures owned by the community.

Ango Raju was formed as a *campesino* community in 1972 during the Agrarian Reform. It numbers some 175 *comuneros* and their families.[82] The bulk of the community's population is centred in the village of Carhuayoc, although not all village residents are members of the *campesino* community. The lowland territories owned by the community are particularly productive and include irrigated land. In addition, community members maintain access to a diversity of production zones through kinship and reciprocity networks. Carhuayoc also has a strong tradition of artisanal textile production, using wool from the *puna* to make clothes and blankets on household looms.

[80] '*Entonces como nunca pasaba a la comunidad este tipo de circunstancias, tal vez la comunidad muchas veces hemos creído en sus palabras de ellos, no? . . . Pues al final cuando ya adquirieron los terrenos de la comunidad. Cuando efectivamente empezaron ya los trabajos de diferentes proyectos en la mina, prácticamente fue olvidado ya Huaripampa, no? Ya prácticamente ahora ni nos visitan*': Interview No 40, Sept 2000.

[81] Interview No 40, Sept 2000: '*[a]sí es, porque lamentablemente para la comunidad fue una triste realidad doctor, de ver a la comunidad en el mismo estado, en la misma situación que no cambió nada.*'

[82] Interview No 32, Sept 2000.

Residents of Carhuayoc are regarded in the region as prosperous and comparatively well-educated.

Negotiations between Ango Raju and CMA differed greatly from those with Huaripampa. Community informants involved in the process report little of the friendliness and enthusiasm that characterised much of the interaction with Huaripampa. On the company side, these negotiations were initially conducted by several Peruvian engineers assisted by the junior lawyer. In contrast with the loose and investigatory character of negotiations with Huaripampa, here the CMA Community Relations team was charged with obtaining the community's consent to a pre-determined offer that it lacked the authority to vary. This contributed to a difference in tone. In addition, the Peruvian engineers appear to have adopted a different negotiating style in the absence of the Director. Community informants remark that while these negotiators could at first be friendly, they were also prone to domineering and aggressive attitudes.[83]

In addition, the internal situation within Ango Raju proved to be more complicated. In contrast with Huaripampa, a significant number of *comuneros* maintained livelihood interests in the *puna* owned by the community through longstanding kinship and reciprocity relations with shepherd families.[84] In addition to this, many *comuneros* either owned or had use rights to private lands in the *puna* that CMA was also seeking to acquire. Therefore the community's decision whether or not to sell, and if so on what terms, held important implications for the existing livelihoods of many *comuneros*. Also a sense of superiority among the *comuneros* of Ango Raju suggested that they could and should bargain for a better deal than that of their neighbours in Huaripampa.

Negotiations with CMA began in March 1998 and continued in a series of meetings in Huaraz over the next several months. On the community side the negotiations were conducted by a special committee made up of the current

[83] In the words of one *campesino*: '[h]is attitude was the same as all of the company workers: wanting to win out over us: pressuring, seeking to humiliate us—"Such-and-such will happen if you don't sell".' ('*Como la actitud de cualquier trabajador de su empresa queriendo ganar a nosotro: pressionando, haciendo humiliar—"Esto va a pasar si no vende"*': Interview No 9, Sept 2000. The word '*prepotente*', meaning domineering or abusive of a position of power, recurrs in community accounts of negotiations: Interview No 8, Sept 2000. As we shall see further on, so does the theme of '*engaño*' or deception. Speaking of a particular CMA negotiator, one *campesino* remarked: '[h]e is person who is well versed in this . . . [experienced] in sweet-talking people—or better said, promising, sweet-talking, and deceiving people'. '*Es una persona que ese ha practicado, que se ha llevado a ese campo práctico no? Para endulzar a la gente, mejor dicho prometer, endulzar y engañar a la gente*': Interview No 28, Sept 2000.

[84] One *comunero* of Ango Raju estimated the number of *comuneros* who had kept animals in the *puna* owned by the community at 30 or 40 out of 175. In addition, 14 *comuneros* lived as shepherds in community lands. If these figures are roughly accurate, they would place the number of *comuneros* with direct economic ties to community lands only (ie not counting those *comuneros* with only direct economic ties to private *puna* land) at just under one third of the total: close to the number required to block the sale of community land: Interview No 32, Sept 2000.

community authorities, accompanied by two ad hoc representatives elected by the community's general assembly to keep an eye on the official leaders. Together this group was called the Negotiating Commission (*comisión negociadora*).[85] The community also retained a lawyer in Huaraz whose fees would eventually be paid by the company.[86]

These negotiations presented a substantial challenge for CMA's representatives. The *comuneros* of Ango Raju were both more demanding and more divided than those of Huaripampa. The CMA Community Relations team needed to find ways to respond to the issues that were dividing the community. However, the team members were authorised only to make a fixed cash offer per hectare of land. Unsurprisingly, during both the meetings with CMA and the community assemblies convened to debate the company's offers, much more was discussed than the issue of price. Company negotiators sought to persuade *comuneros* of the benefits that would accrue to them and their community with the arrival of the mine. In order to do this, CMA representatives outlined the company's pre-set plans respecting land compensation, land-for-land resettlement, and community development. They also described what *campesinos* could expect once the mine was in operation. In doing so, at least some CMA staff made representations they would have known to be false. Chief among these was the promise that the mine would provide widespread employment opportunities for local people.[87] These promises captured the imaginations of many *campesinos*. In the words of one *comunero*:

> . . .we understood that with the work that we would have in the mine, we would have another kind of life—one in which our children would earn wages, no? . . .we understood that the presence of the mine would change things. We thought that we would work and with our wages we would live better and have houses in other places. Our children would go to other universities. But now we have no opportunity to go work. These hopes are gone.[88]

[85] In the words of one *comunero*: '[t]he *comisión [negociadora]* was formed to safeguard the interests of the community. The comite is elected by all the community so that it can defend all the interests and rights of the community.' ('*La comisión [negociadora] se formó para salvaguardar los intereses de la comunidad. El comite es elegido por toda la masa para que defienda todos los intereses y derechos de la comunidad*': Interview No 9, Sept 2000.

[86] This led to at least one rumour suggesting corruption: 'Even our lawyer was seduced [by the company]. It is said that they gave him [US] 7000 dollars for his work.' ('*Hasta el abogado que tuvimos, le endulzaron que segun dicen le dieron $7000 por ese antecedente*': Interview No 28, Sept 2000. I cite this rumour in order to suggest the atmosphere of profound mistrust surrounding relations with the company. It is worth noting that the informant alleges no particular wrongful act or omission on the part of the lawyer. Instead, the assertion that he was generously paid by the company is left to stand on its own as an implicit accusation.

[87] GRADE, n 4 above.

[88] '*[E]ntendíamos que con un trabajo que íbamos a tener en la mina, íbamos a tener otro tipo de vida, con lo cual nuestros hijos tuvieran una ganancia no? Para llegarnos a otros lugares y entendíamos así . . . que la presencia de la mina iba a cambiar. Y pensamos que íbamos a trabajar y con esa ganancia íbamos a vivir mejor para tener casa en otros lugares. Llegar a los hijos a otras universidades. Pero ahora nosotros no tenemos posibilidad de ir a trabajar. Por lo tanto no existe esa opinión nueva*': Interview No 9, Sept 2000).

CMA negotiators also invoked the threat of the servitude process in order to assert a particular set of power relations between the company and the *campesino* community. CMA negotiators portrayed the servitude law as if it gave the company all the cards: through an administrative process CMA could take over *campesino* lands with minimal payment if it wished.[89] This account was apparently not contested by the community's lawyer. The *comuneros* of Ango Raju were taken aback by the threat:

> 'Servitude'—we had little idea what it meant and so we had doubts. Suddenly we discovered we could lose our lands from it and this was something new for us . . .[90]

> [We were told:] If you do not sell your land, we will proceed to servitude and you will lose out.[91]

However, this alone was not sufficient to persuade the required majority of *comuneros*. In an assembly of community members, some advocated fighting to defend the community's lands. Anticipating defeat during a key assembly meeting, community authorities held off calling for a vote.[92] Support of at least two thirds of Ango Raju's *comuneros* could not be secured until the company representatives agreed to put CMA's promises regarding land-for-land resettlement and local development projects in writing for the community. Eventually three legal documents were drafted by CMA and signed by company and community representatives: a Purchase and Sale Agreement transferring land to CMA, a Resettlement Agreement in which the company agreed to provide Ango Raju with replacement land once CMA took possession, and a Community Development Agreement outlining various local development projects that would be undertaken by the company. Once it was agreed that these commitments would be provided in writing, the necessary community support was secured to authorise the sale of community land.[93] The transfer was formalised in June of 1998 and Ango Raju was paid US$452,000.

[89] This is, as discussed earlier, not an accurate description of the context surrounding the administration of the *servitude* law. While the right to apply remains on the books, since the mid-1990s it has been the policy of the Ministry of Energy and Mines to refuse to issue the servitude. It is an open question whether, given government support for the Antamina project, the power of *servidumbre* would have been made available to CMA had it been requested.

[90] '*Servidumbre: nosotros muy poco sabíamos el significado y por eso había dudas. De repente pensábamos perder nuestras tierras con eso y era algo novedoso eso . . .*': Interview No 9, Sept 2000.

[91] '*Si ustedes no venden su terreno, nosotros pasamos a servidumbre y van a perder*': Interview No 3, Sept 2000. Also: 'They threatened the people: "If you don't sell to me, you will lose your land completely." That is what they did.' (*'Ellos amenazaban a la gente: "Si no me vendes, tu pierdes tierra en total." Eso es lo que hicieron*': Interview No 32, Sept 2000.

[92] Interview No 138, Sept 2000.

[93] Interview No 2, Sept 2000; Interview No 11, Sept 2000; Interview No 14, Sept 2000.

A review of the three documents suggests that CMA's negotiators were attempting to refrain from creating new responsibilities for the company. The documents commit CMA to carry out activities that had already been planned and budgeted for. The Resettlement Agreement repeats the company's intention to conduct land-for-land resettlement, while the Community Development Agreement lists a series of development projects matching the list provided in the company's EIA. Significantly, however, each takes the form of a contractual commitment assumed by CMA and made explicitly to the *campesino* community of Ango Raju. Ango Raju's insistence on this formalisation and its agreement to sell thereafter suggests the importance that *campesinos* invested in these commitments. This point will be expanded upon later in the discussion.

Once the *campesino* community received the sale proceeds, the *comuneros* of Ango Raju were divided into two camps concerning what to do with them. The first group advocated distributing the funds among the community members, while the second wanted to invest them in a collective enterprise. In the end, the latter group won and the community purchased two trucks that the authorities intended to rent to CMA.[94] Community Relations saw the importance of fulfilling this request, but faced initial difficulties in persuading CMA Operations and CMA Construction to ensure that the vehicles would be rented. This was, however, eventually achieved. With the income from the rental arrangement, Ango Raju has paid for infrastructural improvements in the community (including electrification) and has expanded its fleet of trucks used by CMA.

Private Owners

Negotiations with groups of private owners of *puna* land began soon after the conclusion of the transaction with Huaripampa. This process continued until the last sales were finalised just before the September 1998 deadline. As shown in Table 6.2 below, in the end some 15 contracts of sale were executed by groups of owners in common ranging from two to 33 persons.[95]

These negotiations differed from those carried out with *campesino* communities in two important respects. First, since the lands in question were owned in common, a contract of sale required the unanimous agreement of each person entitled to rights of ownership.[96] Secondly, unlike the two *campesino* communities, these privately owned lands were not officially titled. Titling and registration of ownership were required before the transactions could take place.

[94] Pasco-Font *et al*, n 18 above.

[95] The exception here involved the sale of Yanacancha (sixth from the top in Table 6.2). This land was owned individually by a former *hacendado*.

[96] Although in some cases powers of attorney were signed by some family members thereby enabling a family representative to sign on their behalf: see GRADE, n 4 above, at 16.

Table 6.2: Purchase of Land from Private Owners in San Marcos by CMA[a]

Acreage	Area (Ha)	Number of Owners	Price Paid (US$)[b]	Amount Received per Owner
Tucush IA	80.2	4	32,079.16	8,019.79
Tucush IB	219.5	2	87,796.60	43,898.30
Tucush II	143.3	22	82,337.64	3,742.62
Tucush II	62.5	9	82,337.64	9,148.63
Tucush III	60.7	10	41,149.64	4,114.96
Yanacancha	234.0	1	93,600.00	93,600.00
Yanacancha II	117.0	6	46,800.00	7,800.00
Yanacancha II	117.0	15	46,800.00	3,120.00
Chogopampa Aselgaspampa Challhuash I	141.7	8	56,669.40	7,083.68
Chogopampa Aselgaspampa Challhuash II	188.9	33	75,559.20	2,289.67
Shahuanga I	83.0	15	33,183.84	2,212.26
Shahuanga II	80.5	5	32,207.92	6,441.58
Shahuanga III	80.5	14	32,207.92	2,300.57
Shahuanga IV	217.2	10	86,892.50	8,689.25
Tranca Antamina	259.5	21	259,500.00	12,357.14
Total	2085.5	175	1,089,121.60	Average = 6223.55

[a]This table has been compiled from the figures on CMA's land purchase contracts provided in an independent audit report concerning land acquisition and resettlement in San Marcos: GRADE, n 4 above.
[b]The price paid for land by CMA was US$400 per hectare with the exception of Tranca Antamina for which the rate was US$1000 per hectare.

The task of identifying rightful owners, surveying the properties and registering title was undertaken by a special programme of the Ministry of Agriculture called the PETT (*Programa Especial de Titulación de Tierras*). The PETT is a national programme funded by the World Bank in order to title informally held land in the country.[97] In order to bring the PETT in to do its

[97] See PETT website:www.pett.gob.pe/.

work in San Marcos, CMA signed a special agreement with the Ministry of Agriculture in which the company agreed to fund the programme's activities. Pursuant to the terms of this agreement, the PETT officials began work in San Marcos in early 1998 and completed their activities by March of that year.[98] A number of problems resulted from these arrangements. First, PETT's work was done speedily, in difficult circumstances (its work was conducted during the rainy season) and at times incorrectly. Local informants argue that some individuals or entire sections of family members failed to secure proper registration among the common owners of lands.[99] Secondly, the PETT officials in the area were outfitted by CMA with vehicles and equipment and maintained close co-ordination with CMA staff. *Campesinos* in the region perceived that the officials were taking direction from CMA. Accordingly the failure to title all owners was perceived by some as a conspiracy between CMA and certain land-owners to exclude intransigent family members capable of blocking the sale.[100]

With regard to the conduct of negotiations, informants report very similar dynamics to those outlined with regard to Ango Raju. CMA was represented in these negotiations by the Peruvian engineers working for Community Relations, assisted by the lawyer from Lima. Reluctant vendors were threatened with the mining servitude,[101] while CMA representatives sought

[98] GRADE, n 4 above, at 9.

[99] Informants reported a great deal of resentment and conflicts arising from the titling process: 'I think that there were crooked dealings because the company brought in the PETT itself to do the titling work. . . . Many were left out of the titling process. People who were owners but who weren't living on the land lost out' ('*Yo creo que hubo malos manejos porque la empresa misma que a los de la PETT trajeron ellos les van a titular el terreno todo . . . El titulo a muchos tambien les dejaron fuera. O sea otra gente que eran dueno pero que no vivian ahi, perdieron*': Interview No 15, Sept 2000). 'The company contracted the PETT to title the lands in the Antamina area. And, the PETT favoured the company. But also conflicts were created. Many families appeared to be owners of land and got title to it and the rest were left out . . . And so, the conflicts continue to this day. People are spending their resettlement money on lawsuits to fight over land.' ('*La empresa contrató a la PETT para que haga titulación de tierras de la zona de Antamina. Y por una parte, le favoreció. Pero ha creado conflictos. Muchas familias aparecieron dueños de esa tierra y salieron con sus títulos a nombre de unas cuantas personas y el resto no le ha salido . . .. Y entonces hay conflicto hasta ahora. Siguen en proceso y hasta la plata que recibieron en reubicación están gastantdo en juicios de pleitos de terreno*': Interview No 9, Sept 2000. Other accusations of corrupt titling involve claims that PETT officials excluded a particular family line from their ownership rights: Interview No 28, Sept 2000; Interview No 17, Sept 2000, and that certain members of one land-owning family conspired to claim a disproportionate amount of the lands sold: Interview No 27, Sept 2000.

[100] Company staff maintain that no such conspiracy existed. They argue that PETT officials were simply deceived by land-owners who sought to exclude other relatives in order to increase their portion of the sale proceeds: Interview No 89, Feb 2001.

[101] Eg, according to one *campesino* informant, '[w]e didn't know what "servitude" was. They explained it to us: "If you don't sell, the state will give us the land for this much and you they won't give a cent." And that isn't doing business' ('*Nosotros no sabiamos que era servidumbre. Sino que ellos nos explicaron: Si ustedes no nos venden, es por esta cantidad el estado por servidumbre nos va a dar y a ustedes no les dara ni un centavo. Y no es negocio*': Interview No 11, Sept 2000.

to reassure land-owners that great benefits would come their way once the mine was established. The following four accounts from members of *campesino* families who sold to the company are typical:

> [During negotiations for the sale of land] we were invited by Antamina. They had us watch videos about the investments that this company would bring . . . They deluded us. 'Money will come. You will have work. We will help you and you will live better, in better conditions . . . There was a threat, the threat of the servitude. Out of fear of this, we had to sell. They played us like novices and for this we accepted. They beguiled us with a price that suited them . . . they came [to our house] constantly, until we signed. They gave us $400 and then *chau*, they left for good.[102]

> [The company representatives] arrived telling us that with Antamina we would have a new kind of life. So, people thought that this would be better, but they were in for a big shock. [CMA staff] came, for example, promising work, knocking on the door promising work—but now there isn't any.[103]

> The company [told us during the sale of land negotiations that] they would help us to improve the conditions of our lives so that we would not be living as we have in the past. This was stipulated in the environmental impact program which later changed. And they said it very well: 'We will improve your livestock. We will improve your pastures. We will [help you] raise trout and give you social services, and health services, and you will live better.' For this we agreed to sell [our land].[104]

> At that time [negotiating the sale of land] they were friendly, telling us that we would live better than we did today. And we were happy. So we agreed to sell. We made an agreement among [ourselves to sell the land] because we would do well, better. But they said that we would remain here [on our lands] for four or five

[102] '*[Antes de la compraventa] fuimos invitados por la Antamina. Nos hicieron ver videos, cuanto de inversiones tenía que traer esta empresa . . . Nos ilusionaron. Va a venir dinero. Ustedes tienen que trabajar. Nos tienen que apoyar y ustedes van a vivir mejor, en mejores condiciones. . . . Hubo un amenaza, lo de servidumbre. Por temor a eso, teníamos que vender. Nos agarró de novatos y por eso hemos aceptado. Nos endulzaron con el precio que ellos les convino. . . . iban [a nuestra casa] constantemente, hasta que firmamos. Nos dieron $400 y chao hasta ahora*': Interview No 14, Sept 2000.

[103] '*Ellos llegaron ofreciendo que con Antamina habría ya no vida actual sino otra vida. Entonces la gente creyó que eso era mejor, pero ha chocado bastante. Ellos vinieron por ejemplo, ha ofrecer trabajo, tocaban la puerta para que nos den trabajo—pero no hay pues*': Interview No 11, Sept 2000.

[104] '*La empresa [nos informo durante el proceso de compraventa que] nos iba a ayudar para tener mejoras en las condiciones de vida para que no estemos viviendo en las mismas causas anteriores. Eso estaba estipulado en el programa de impacto ambiental ese que cambio luego. Y dijeron muy bien: 'Vamos a mejorar su ganado, su raza, ya que ustedes crian ganado. Vamos a mejorar sus pastos, vamos a criar truchas y darles servicios sociales de salud y viviran mejor.' Por eso aceptamos vender*': Interview No 15, Sept 2000.

> more years—until they found other lands to replace [those that had been purchased].[105]

In general, CMA staff strove to persuade land-owning groups to sell while resisting demands to add to formal commitments that CMA would assume towards community actors. However, two exceptions were made to this rule. First, CMA agreed to pay US$1000 per hectare for Tranca Antamina, the lands that lay over the ore body itself. This was justified by the singular importance of this territory to the project and by the fact that these were very productive high altitude agricultural lands rather than pastures. Secondly, some 11 groups of land-owners insisted upon and eventually received written commitments from CMA with regard to its promises of land-for-land resettlement. As with the Ango Raju Resettlement Agreement, these documents were set out in contractual form and signed by CMA representatives.[106]

Analysing the Negotiations: Looking at the Construction of an Informal Legal Order

From the company's perspective, CMA's negotiating strategy appeared to be a great success in the short term. Land owners signed; title was formalised and transferred; cash compensation was paid. Moreover, the company enjoyed considerable local popularity. This early success occurred because CMA negotiators were able to establish an understanding with local actors via the land acquisition process. The previous sections have sought to express the challenge that this presented. Company negotiators were authorised only to make a fixed offer, and therefore essentially prevented from bargaining. Their task was to convince owners to accept the company's proposals. Success in this endeavour depended upon constructing a symbolic and rhetorical strategy that responded to peasant hopes and fears and convinced them that their best interests lay in accepting what the project had to offer. In effect, these negotiators propounded the basic terms of an informal legal order that proposed certain roles to be played by local actors and the mining enterprise in the future.

[105] '*En ese momento [negociando la compraventa], amables ellos nos dijeron que íbamos a vivir mejor que lo que estábamos ahora. Y nosotros estábamos feliz. Entonces hemos dicho para vender. Hemos hecho un acuerdo entre [los familiares dueños] porque vamos a estar bien, mejor. Pero han dicho que íbamos a estar aquí otros cuatro, cinco años aquí aun—hasta que encuentre otro terreno, otro sitio y reemplazar [el terreno comprado]*': Interview No 21, Sept 2000.

[106] GRADE, n 4 above, at Annex 7.

Substantive Offers

In their interactions with land-owning families, community authorities, *comuneros*, *campesinos*, shepherds, etc, CMA's Community Relations staff were able to improvise and refine a discourse that responded to the chief concerns and aspirations found among these groups. Both of the principal motivations ascribed in Chapter 5 to community actors appear to have been important in the Antamina–San Marcos case. To negotiate contracts of sale, Community Relations staff needed to speak to both sets of community concerns: the desire on the one hand for new and transformative economic opportunities; and the fear on the other hand of losing the basis of existing livelihoods and ways of life. Both of these motivations carry economic, social, cultural and symbolic elements. The former is associated with progress, development, education, modernisation, and the cultural power and attractions of the urban coast. The latter is associated with the sphere of relatively autonomous, familiar and secure reproduction available in Andean rural environments. As ideal types, the two are often presented as contradictory: modernisation is frequently believed to require the destruction of what came before it.[107] However, CMA Community Relations staff asserted that the project would both bring new opportunity and protect existing livelihoods.

The promise of new economic opportunity and transformation in the area was suggested by the significant cash payments offered to land-owners (in unfamiliar and prestigious US dollars), the promise of local development programmes, expectations regarding a new local market for agricultural goods, and the assurance of widespread opportunities for employment. Many of the quotations already cited in this chapter suggest the enthusiasm with which many *campesinos* reacted to company promises of modernisation and development. In particular, the prospect of waged labour in the mine is stressed for its transformative capability.

The other key promise was that land acquired by the company would be replaced in a subsequent land-for-land resettlement process. *Campesinos* were assured they could continue to use their lands until CMA chose to take possession, and that when this occurred the purchased lands would be replaced. This offer proposed that existing production systems and ways of life dependent upon *puna* lands would not be dismantled as a result of the sale. While informant interviews disclosed a greater degree of general interest in new economic opportunities, a number of community informants emphasised the importance of the resettlement offer:

[107] M Berman, *All That is Solid Melts Into Air* (New York, Penguin, 1983).

> We said [to CMA], 'If we sell this land, where will we live?' So, they promised to give us another place—that they would buy us an equal quantity of land. So we accepted.[108]

> I didn't want to sell our pastures. We lived from our pastures and our animals, legally ours, relying purely on the *puna* . . . [During the land sale negotiations I told CMA that] I wanted pastures—that they replace my pastures with land . . . 'Give me pastures!' I told them. So we would have lived peacefully with our herds.[109]

Different community actors undoubtedly placed very different values upon these risks and opportunities. Depending on a person's circumstances and proclivities, she or he could value one well above the other. A land-owner resident in Lima, for example, might have no personal interest in maintaining access to the *puna*, while an elderly full-time shepherd might be highly resistant to losing her way of life. Nevertheless it is likely that many community actors stood somewhere in between, perhaps maintaining a partial livelihood reliance upon the highland pastures or conscious of the need to support kin or neighbours dependent upon the lands. Furthermore, many *campesino* informants stressed that stable work with the mine was something that was hoped for on behalf of the local youth rather than themselves. This suggests that mining employment was expected to form part of an overall strategy commonly found among Andean nuclear and extended families of maintaining diversified economic activities.

The ability to respond to both local concerns and local aspirations appears to have been fundamental to gaining the support required to authorise many of the sales. Ango Raju, for example, was deadlocked between factions supporting and opposing the sale. Although some *comuneros* were happy to sell community lands for cash, others were staunchly against it. One *comunero* expressed the perspective of this latter group towards the *puna* land with the phrase: '[i]t's my life'.[110] As noted previously, the deadlock in Ango Raju was not resolved until company representatives agreed to put CMA's resettlement and development promises into writing as direct commitments to the community. With a stronger guarantee of a future land-for-land exchange, those who supported the sale were able to secure the required two thirds majority.[111]

As described above, written Resettlement Agreements were also insisted

[108] '*Nosotros dijimos, si nosotros vendemos este terreno, donde vamos a vivir nosotros? Entonces, nos compromete a entregar otro sitio—que la misma cantidad de terreno iban a comprar. Entonces nosotros aceptamos*': Interview No 21, Sept 2000.

[109] '*Yo no quería vender pasto. Y de nosotros vivíamos ahí con puro animales, legalmente de nosotros ha vivido pura puna . . . Yo he querido pasto que me reemplace pasto por tierra . . . "Dame pasto!" yo le he dicho. Entonces nosotros hubiéramos vivido con animales mas tranquilo pues*': Interview No 23, Sept 2000.

[110] '*Es mi vida*': Interview No 2, Sept 2000.

[111] Interview No 2, Sept 2000; Interview No 11, Sept 2000; Interview No 14, Sept 2000.

upon by roughly 11 groups of private owners.[112] In contrast, the authorities of Huaripampa placed little emphasis on resettlement and focused instead upon the company's commitments with regard to payment and development projects. The focus entirely upon realising modernisation hopes resulted from the ability of the authorities of Huaripampa to exclude from the negotiation and ratification processes those persons with direct economic interests in the lands to be sold.

In sum, the actions and representations of CMA staff during the land negotiation process presented a set of principles to community actors that the company suggested would orient the conduct of corporate and community relations in the future. These principles would provide a normative compass and a basic vocabulary for regulatory conversations between corporate and community actors. This represented the outer framework of a legal order that could have developed with time, had circumstances unfolded differently. Under the basic terms of this framework, community actors would acquiesce to the project's installation in San Marcos. They would yield formal title and occupancy of the lands required for the project. In return, the company would bring to the region new opportunities for local prosperity and protect existing livelihoods and ways of life.

Building a Basis for Trust

However, the offers and promises presented by CMA Community Relations negotiators were not in themselves enough to ensure agreement. What guarantees could be offered that the company was serious about the commitments it was making and that it would continue to be serious in the future? CMA Community Relations negotiators needed to convince their interlocutors that their interests were best served by trusting the company. Community actors reacted with a variety of responses and counter-strategies.

The company negotiation strategy developed by CMA negotiators essentially proposed an asymmetrical trust-based relation between local actors and the company. A symbolic reading of CMA's actions suggests that company actors sought to portray the enterprise as a powerful and benevolent entity—a form of generous and trustworthy patron whose presence would bring prosperity to the region but whose power could not be opposed. CMA was presented as an engine of modernity that would transform life in San Marcos—younger *campesinos* would be changed into modern workers, while farmers and pastoralists would benefit from the company's development programmes. However, the company was also presented as all-powerful: it would dictate the terms upon which *campesino* lands would be acquired.

[112] GRADE, n 4 above, at 16.

Various symbolic resources were mobilised in this regard—in particular, the use of official law. The mining servitude law was used to suggest both CMA's overwhelming advantage in the negotiations and, correspondingly, its good faith. CMA negotiators portrayed the servitude law as if it awarded automatic rights of expropriation to the company. In this way, they could stress both the company's power and trustworthiness. Despite its advertised ability to expropriate lands, the company forbore from doing so. Instead it promised generous payment, plans for local development, replacement land for resettlement purposes, and employment: everything, essentially, that community actors hoped for.

The advantages secured by CMA through its domination of official legal discourse—notwithstanding the fact that some community actors could count on legal representation—were considerable. For example, many of the programmes used to advertise the company's generosity were in fact formal legal commitments assumed by CMA in order to satisfy regulatory authorities and secure project approvals. CMA's development and resettlement plans both appeared in the project's Environmental Impact Statement (EIS) and therefore constituted commitments made to the Peruvian government. In addition, the execution of the resettlement plan was required by the project's financing arrangements with MIGA. Nevertheless, CMA negotiators presented these commitments as voluntary undertakings that demonstrated the generosity and good faith of the company. The power conferred on CMA through its domination of formal legal discourse during negotiations was not lost on community actors. One community actor involved in negotiations stated that, when faced with the pronouncements of company representatives on legal matters, he and his colleagues simply lacked the vocabulary to respond.[113] Through the selective representation of legal rights and responsibilities, CMA negotiators sought to portray the company as operating without constraint. *Campesinos*, it was suggested, were not able to bind Antamina, and in any event their best interests lay in accepting the company's power.

Campesino accounts suggest that they knew full well they were not powerless: their compliance was desired by the company and could be withheld. However, the cost appeared to be a confrontation with both the company and the state. One *campesino* describes the attitude of the rebellious faction in Ango Raju thus. He says that during the community's general assembly, these *comuneros* responded to the servitude threat by daring Antamina and the authorities to confiscate their land: '[l]et them take it!'.[114]

[113] A community informant involved in negotiations with the company used exactly this phrase to describe his predicament: 'We lacked the vocabulary to respond' ('*No tenemos vocubulario para responder*'): Interview No 2, Sept 2000.

[114] '*El estado mismo, que se lleva! . . . Que se lo lleve Antamina! –eso se ha dicho en la asamblea*': Interview No 32, Sept 2000.

No doubt, this was posturing, at least in part. Strong state support for the Antamina project was evident to *campesinos*.[115] Indeed, state authorities from the PETT land titling programme appeared to many local actors to be following the directions of company employees. The absence of state intervention on behalf of local community interests also spoke volumes. Similarly, *campesinos* had little faith in judicial controls where money and power were concerned.[116] Thus the expected cost of a confrontation with CMA—including the risk of losing both land and the offered compensation—doubtless strongly influenced the compromise and risks that *campesinos* were willing to accept.

However, despite company assurances, *campesinos* devised various strategies with the hope of binding CMA both to its specific commitments and perhaps to a larger pattern of benevolent and predictable behaviour. Two different strategies are exhibited by the behaviour of the authorities of Huaripampa and Ango Raju. The actions of the authorities of Huaripampa suggest that they sought to cultivate a patron–client relationship with CMA and thereby entwine the company in relational ties and obligations to the community. This logic is demonstrated in the assertion by community representatives that they did not insist that CMA put its development promises into writing. Instead, the offer was received with a show of trust by community authorities.[117] In addition, Huaripampa's authorities conducted a ceremony in which the Canadian Director of Community Relations was made an honorary member of the community.[118]

Other landowners, such as Ango Raju, attempted instead to use legalised strategies in order to bind the company to its promises. Ango Raju, which had greater internal divisions regarding the sale of land, held out until CMA negotiators agreed to provide its resettlement and development promises as

[115] Indeed rumours were repeated that President Fujimori himself had secret financial interests in Antamina and would give unswerving support to the project: Interview No 15, Sept 2000.

[116] This opinion of the judicial system in Peru is hardly unique to *campesinos*, and unfortunately is well-grounded in fact: see C Landa, 'The Scales of Justice in Peru: Judicial Reform and Fundamental Rights' Occasional Papers No 24 (London, University of London, Institute of Latin American Studies, 2001). A history of small-scale judicial corruption has been supplemented by recent evidence that the Fujimori regime supported a highly organised influence-peddling network. In a notorious case, a video disclosed President Fujimori's spychief bribing a supreme court judge to decide a civil dispute among investors in the Yanacocha gold mine in favour of US mining company Newmont and its Peruvian partner. See M Riley, 'Shadowy figures, deals marked mine battle', *Denver Post*, 13 December 2004, A-18. For discussion of central government control of judiciary under Fujimori regime see S Bowen, *The Fujimori File* (Lima, Peru Monitor 2000). In the words of one *campesino* in San Marcos: '[h]ere in Peru there is no independent judiciary. The courts are subject to the power of the government [and so] every court case brought against Antamina is lost' ('*Acá en Perú no hay vigencia del poder judicial. Éste está sujeto al poder con el gobierno …cualquier juicio con Antamina hemos perdido ya*'): Interview No 15, Sept 2000.

[117] Interview No 1, Sept 2000; Interview No 62, Oct, 2000.

[118] Interview No 40, Sept 2000.

written commitments made to the community.[119] At least 11 groups of private land-owners were determined or bold enough to hold out for similar written Resettlement Agreements setting out the company's commitment to land-for-land resettlement.[120]

Do these efforts further to bind the company suggest that community actors had no confidence in the relationship being proposed by CMA negotiators? Was the essential framework for building trust proposed by CMA staff wholly rejected by community actors? This does not appear to be the case. Each of the strategies adopted by community actors could provide an added degree of security to their situation. However, neither strategy had the power to ensure CMA's compliance on its own. If it chose, the company was capable of ignoring Huaripampa's relational overtures or using its resources and influence to defeat Ango Raju's legal claims. These actors had decided that on balance their best option lay in accepting the company's offer. That they sought some extra security to hold the company to its promises is not surprising. However, the fact that *comuneros* and authorities of both communities were positive about the sales once they were conducted suggests that a certain degree of trust had in fact been built. If this were not the case, community actors would probably have agreed to the sales in an atmosphere of anxiety and trepidation. Instead community informants report widespread enthusiasm for the future.

Stability of the Legal Order

Several factors point to the instability of the legal order whose basic framework was being developed. First, the legal order, as it was understood by community actors, was based in part on false promises, misunderstandings, unofficial dealings and errors in planning. For example, employment with the mining project and other development benefits would not be available either to the extent or in the manner expected by local actors. In addition, as we shall see, CMA's Resettlement Plan was badly flawed due to the company's lack of understanding of highland livelihoods and its over-optimistic view of development possibilities in the *puna*. Secondly, institutional weaknesses prevalent among community actors meant that certain local responsibilities could go badly wrong. As we have seen, these institutional weaknesses could mean that some affected interests went unrepresented in the negotiation process and that sale proceeds could be

[119] Peasant communities are required to obtain a two thirds majority vote of members in order to authorise the sale of community land (Art 11, *Ley de Tierras*, No 26505). Before the company agreed to provide this second community with written resettlement and development commitments, the community was deadlocked between groups in favour of and opposed to the land sale. Copies of the agreements with CMA are on file with the author.

[120] GRADE, n 4 above, at Annex 7.

subject to mishandling or misappropriation. Thirdly, and perhaps most importantly, while the local legal order constituted an important normative point of reference for *campesinos*, CMA management—as we shall see—did not consider the company to be bound by any specific commitments owed directly to community actors.

Resettlement: the Local Legal Order Unravels

The climate of approval created during the process of CMA's acquisition of land would be short-lived. The process that triggered the unravelling of the local legal order began in early 1999 when the overall design of project facilities was substantially revised. The new plan agreed upon by Bechtel, CMA Construction and CMA Operations changed the location of the concentrator plant, the main camp and the waste rock dumps. It also featured the construction of a pipeline for carrying concentrate to the coast. An addendum to the project's EIS outlining these changes was produced and submitted to the Ministry of Energy and Mines.[121] As a result of these design changes, the lands that had been designated for resettlement of highland shepherd families were dedicated instead to other purposes. Despite this fact, the addendum to the EIS did not address this issue. Even more significantly, neither Bechtel, CMA Construction nor CMA Operations told CMA's Community Relations Department of the change.

To make matters worse, Community Relations became aware of the alteration in plans only when it began resettling peasants. Resettlement negotiations with highland families had begun in late 1998. This was not a speedy process. Since CMA planned to resettle these families in a smaller area that the one they currently occupied, the company had pledged to improve the quality of pastures available.[122] Many shepherd families wanted to see that the improved pastures were established in the resettlement areas before they vacated their lands. These families naturally feared that once crowded into an over-grazed expanse of *puna*, their animals would die. By early 1999, once some housing had been built, Community Relations had begun to move a few families to the resettlement area. However, CMA Operations and CMA Construction apparently expected these lands to be vacant and soon initiated construction activities. Eventually, confrontations ensued between construction workers and resettled families of pastoralists. Community Relations was called in to deal with the situation, and the disconnection of the company's different departments suddenly came to light.

[121] Knight Piesold Consultores, *Addendum 3 del Estudio de Impacto Ambiental de la Compañía Minera Antamina SA* (Submitted to Peru Ministry of Energy & Mines, 20 Jan 1999).

[122] CMA Community Relations was also planning to make up for the shortfall in highland incomes through microenterprise and other initiatives.

Community Relations was blindsided by the proposed change in plans. Not only did the new project design appropriate the territory designated for resettlement, but the revised construction schedule required a wholly new timetable for arranging clearances. Community Relations soon came under great pressure from CMA Operations, CMA Construction and Bechtel in order to vacate the purchased lands in the shortest time possible. Community Relations either lost this power struggle or chose not to contest the matter. Decision-making was driven by the considerable gains to be realised by early completion of the project's facilities. Accordingly, Community Relations accepted a drastically accelerated timetable for the clearance of required lands.

Having lost the territory to be used for resettlement, executing the land-for-land plan was no longer feasible in the short term. The rainy season was approaching and there was no time to acquire and prepare new land. A new plan was put into effect. Community Relations staff approached shepherd families with the following proposal: that they vacate the highlands immediately in exchange for resettlement land and housing in the *puna* to be provided six months in the future. During the waiting period, CMA staff assured the resettlers tha they would be supported with monthly payments of US$500 per family. As a guarantee, CMA staff told the families that the cost of resettling each family would be placed in escrow in a bank account. Should CMA fail to honour its obligation, the money would be turned over to the head of the household. The sum proposed for the security was considerable. Community Relations estimated the cost of resettling a family to be US$30,000.

Unsurprisingly, the highland shepherd families neither understood nor trusted the financial arrangement being proposed. They saw nothing that could be expected to hold the company to its promise once they no longer occupied their lands. Furthermore, their experiences with CMA's management of resettlement did nothing to give them confidence in the company's word. Resettlement had been viewed as a gradual process involving a negotiated selection of land, construction of new living spaces and improvement of pastures. CMA's sudden change of plans was both surprising and highly anxiety-provoking for highland families.[123] When the first offer failed, the highland families were then presented with a second alternative: a cash payment of US$33,000 (comprising the security added to the US$500 stipend for six months) in exchange for their immediate departure. Faced with the threat of eviction, their growing distrust of CMA, and the attraction of this surreally vast sum of money, every shepherd family that received the offer chose this latter option.

Between February and April of 1999, CMA took possession of the

[123] Salas, n 4 above, at ch 5.

highlands it had purchased and vacated them. Fifty-three highland families were provided with cheques for US$33,000, transportation off the lands, and the option to sell their herd animals to CMA.[124] CMA staff involved in the evictions report that they were difficult, sad, but generally cordial and respectful.[125] Accounts repeated among community actors in San Marcos are very different. These accounts relate that CMA staff were accompanied by police officers and a local Justice of the Peace carrying an eviction order from the provincial court. They recount that houses were destroyed in front of their owners in order to discourage their return.[126] These stories testify to the profound resentment which resulted from the abrupt and dramatic change imposed upon the highlanders. CMA's previous promises of a better life, of improved pastures and improved housing, came to be regarded as premeditated deceptions.

The Fallout from the Accelerated Resettlement Plan

The execution of CMA's Accelerated Resettlement Plan (ARP) proved to be a watershed in corporate and community relations in San Marcos. The Plan so wholly flew in the face of established community expectations and popular conceptions of justice that it triggered a wholesale re-evaluation of CMA by local actors—even those with no ties to the *puna*. The company's actions were widely read as deliberate attempts to cheat *campesinos*.

One series of contentious issues arose from the considerable deficiencies in CMA's resettlement planning activities. These deficiencies, which were less evident when a land-for-land exchange was planned, became stark once the company decided that resettlement would be monetised. As we have seen in Part I of this chapter, highland pastures in San Marcos are shared resources. Extended families with ties to the *puna* have established norms with regard to how to apportion access to highland pastures. Thus, when CMA promised initially to relocate highland residents onto new pastures, it appeared that full-time families, as well as alternators and visitors, would be able to either maintain or adapt their existing relations to *puna* resources. Accordingly, the fact that CMA resettlement planners were largely ignorant of local tenure and

[124] GRADE, n 4 above.

[125] Salas, n 4 above, at ch 5.

[126] '[CMA] threw them out and burned their huts. [The judge from Huari] came for the clearance of Yanacancha with the prosecutor and police officers. They came to remove the people there. The eviction notice was delivered one day and the next day they proceeded to eviction. . . . I saw it. They didn't remove us that day; they came for another group. They convinced us to go by threatening to bring the judge. We had to withdraw after the others.' ('*[L]es botaron, les quemaron sus chozas. Eso fue el primer desalojo [El juez de Huari] vino para el desalojo a Yanacancha con fiscal y policías. Vinieron para sacar la gente. Así que la denuncia se hace un día y al día siguiente procede el desalojo. . . . Yo lo vi., A nosotros no nos sacaron ese día, sino a otro grupo. A otros nos sacaron con amenazas de que iba a venir el juez y tuvimos que retirarnos atrás de los otros.*'): Interview No 15, Sept 2000.

use arrangements was not too significant so long as resettlement planning continued to be land-based. However, once resettlement was translated into a very large all-or-nothing cash payment, the stage was set for a deep and enduring conflict over who should receive these payments and why.

CMA staff provided resettlement payments only to heads of families identified to be permanent residents of the highland territories purchased by the company. The family unit was defined as all those living under one roof. A nuclear family that did not occupy a home on its own was not viewed to be independent of its extended family and was therefore held not entitled to its own resettlement payment. Permanent residence and family independence were determined according to a census conducted by CMA staff and contractors. However, neither the census nor the subsequent Accelerated Resettlement Plan (ARP) based upon it took into account the migratory and seasonal nature of residence and collective reliance on the *puna* as an economic zone. No effective baseline study had been conducted which would have helped CMA staff to understand or track patterns of residence or resource use in the *puna*.[127] As a result, the selection of the group held to be entitled to resettlement payments was confused and erratic. Some alternating families were identified as permanent residents, while others who were not present in the *puna* when the initial census was conducted were not. Some full-time shepherds were also missed, either because they were temporarily absent or through the oversight of the census takers.[128]

CMA staff also took into account the official ownership status of those they found to be permanent residents when disbursing resettlement funds. Shepherds living on the lands of *campesino* communities who had not become *comuneros* were deemed by some CMA personnel to possess fewer resettlement rights because they lacked rights of ownership. This reasoning was used to justify reduced payments.[129] Similarly, shepherds on private land who had no legally recognised ownership status were treated differently. As retainers in the employ of land-owners in the valley, these persons were also held to be entitled only to a reduced claim. The owners of the lands disputed the right of the shepherds to resettlement payments and claimed compensation for their own loss of use. As a result, the resettlement money was divided between the shepherd and the owner in a three-way negotiation carried out by a CMA representative.[130] Accordingly some visiting families received resettlement compensation through these means but others did not.

The payment of large amounts of money to those identified as permanent residents of the *puna* was extremely divisive. The criteria used to determine entitlement to the payments were not clear to local actors, nor did they appear logical. Company decisions looked either arbitrary or partial.

[127] Klohn Crippen, n 59 above, at Appendix SE-II.
[128] See GRADE, n 4 above.
[129] GRADE, n 4 above, at Annex 4.
[130] GRADE, n 4 above, at Annex 4.

Exceptions to every apparent rule abounded, and many of those who were denied payments could point to a similarly situated family with a cheque. Both families and communities were split apart by resentments and the feeling of having been cheated by neighbours, relatives and the company. A gold rush mentality ensued as *campesinos* deluged CMA with claims for the same resettlement payments received by their neighbours or relations. Land owners with written agreements promising resettlement were among the most vociferous claimants, demanding payment of US$33,000, now commonly referred to as 'my resettlement' ('*mi reubicación*').

That residency should be used to determine entitlement to payment made little sense to *campesinos*. Their points of reference were the agreements and representations made by company staff. The commitment to carry out resettlement was made in the context of the negotiations for the purchase and sale of land.[131] Some land-owners had bargained for the commitment to be made in writing. However, *campesino* informants emphatically assert that the offer of resettlement was made to all owners.[132] As stated above, the land-for-land resettlement plan proposed to protect the interests of the broad network of persons who relied on the highland territories for all or part of their livelihoods. Many owners and others reliant upon the lands now saw they were being cheated of their promised interest while enormous benefits were being showered on a small number of shepherds. For the most part, the resettlement payments dwarfed the sums received by private owners for selling the land. As shown by Table 6.3, in comparison with a resettler's US$33,000, the majority of land-owners received less than US$5,000 apiece.[133] Furthermore, informant interviews reveal that many land-owning *campesinos* divided the sale proceeds that they received among their adult children. Thus the amounts received by those *campesinos* with formal ownership interests could easily be as little as $900 or even $200.[134]

This inverted a set of local conceptions of status and right that CMA had previously appeared to be respecting: that ownership of land connoted high status within the social network of those associated with the *puna*.[135] Most formal owners of *puna* lands were either alternating or visiting families with dwellings in the lowlands of San Marcos or the coast. Living in the *puna* on the other hand demonstrated low status and a correspondingly low interest in

[131] In the words of one owner, '[t]hat was a negotiation with the owner. The person from the company said to the owner: "I will give you equal land". But the shepherd was not included in this negotiation'. ('*Porque eso es negociación con el dueño. La persona de la empresa dice al dueño: 'Voy a dar a usted tierra igual'. Pero el pastor no está incluido en esta negociación*'): Interview No 32, Sept 2000.

[132] Interview No 15, Sept 2000; Interview No 90, Feb 2001.

[133] Out of 175 private vendors 151 (86%) received less that US$10,000 from the sale, and 109 (62%) received less than US$5,000: see Table 6.3.

[134] These are the amounts reported received by two informants: Interview No 23, Sept 2000; Interview No 15, Sept 2000.

[135] I am grateful to Gerardo Damonte for suggesting this insight.

Table 6.3: Sale of Land Payments Received by Individual Owners

Amount Received Per Owner from Sale of Land (US$)	Number of Recipients	Percentage of Total Recipients
Above 15,000	3	1.7
10,000 to 14,999	21	12.0
5,000 to 9,999	42	24.0
2,000 to 4,999	109	62.3
Total	175	100.0

Source: GRADE, *Evaluación del Proceso de Reubicación y del Programa de Post-Reubicación en Antamina* (Lima, GRADE, 2000).

land, reflected in a dependency on its owners. This perspective is reflected in the following statements from land-owning *campesinos*:

> ['*Q: Was your relative who cared for your herds in the puna given a resettlement payment?*'] 'Yes, only he received it. But I wasn't paid [resettlement] and I don't think that it is right . . . Now I don't have my herds, sheep, cows, nothing. I can't sow potatoes up there. It's finished.'[136]

> 'The owners were not paid, only their shepherds were paid. . . . It is clear that [this creates anger] since the owner is paying the shepherd and he who pays does not receive.'[137]

The reversal of this order served to incense land-owners (whether visitors, alternators, or full-time shepherds) who were deemed by the company not to be entitled to resettlement payments. These community actors found the symbolic importance of their own payments markedly devalued by the new wealth in the hands of the resettlers.

Additional Sources of Community Anger Against CMA

Locally, CMA's execution of the Accelerated Resettlement Plan appeared to be grossly unfair and designed to cheat *campesinos*. By mid-1999, three further developments arose which further reinforced this view of the company in San Marcos. First, CMA did not appear to be following through

[136] '*[Q: El miembro de su familia que cuidaba sus animales en la puna, le pagaron la reubicación?] Sí a él no más. Pero a mí no me pagaron [la reubicación] y no creo que sea justo . . . Ahora yo no tengo mi ganado, ovejas, vacas, nada. No puedo ingresar a sembrar papas ahí. Ya no ya*': Interview No 16, Sept 2000.

[137] '*Los dueños no han recibido. Sino sus pastores han recibido. . . . Claro porque su dueño esta pagando a pastor y el que paga no recibe. Molesto no?*': Interview No 21, Sept 2000.

with the development programmes that it had pledged to carry out in the region. During 1997 and 1998, CMA was in dialogue with a number of development NGOs regarding the programmes it planned for the region, and some of these NGOs were invited to submit project proposals to CMA. However, in 1999, the company abruptly broke off communications and stopped responding to NGO inquiries.[138] NGO actors came to suspect that the Canadian Director of Institutional Relations no longer had the power to authorise the expenditures necessary to carry forward CMA's local and regional development plans.[139] Although more than US$4 million in development programmes had been pledged in the project's EIS, virtually no such expenditure was evident in San Marcos in the year after the company took possession of the purchased highlands.

The reason for this is not certain. However, it could have been due to a decision to delay spending on community development projects until after project construction was complete. Costs assumed during the construction phase are particularly burdensome for a mining project due to the fact that they must be financed through borrowing. Delaying these costs until a mine commences production can result in significant savings. I have heard the story more than once, from persons in close contact with CMA staff, that in 1999 the company's new investors decided to hold off on community development spending until after construction was complete.[140]

[138] According to an NGO informant: 'Antamina said to us: "Present us with project ideas. We want you to help us with agricultural development." And so we wrote up a project and they were supposed to get back to us. From there, CMA started to backtrack because they didn't have any money. . . . And then we entered a period of silence. And we asked ourselves: "What happened? They had been so eager to talk to us."' ('*Antamina nos dice a nosotros: "Presenta proyectos, queremos que nos ayudes en lo que es desarrollo agropecuario". Entonces nosotros escribimos un proyecto y supuestamente ellos nos tenían que respondernos. Y ahí [CMA] empieza a retroceder porque no había dinero . . . Y solamente comienza a entrar en un silencio. Y nosotros decimos: Qué pasó? Tanto nos han dicho, no?*'): Interview No 56, Oct 2000.

[139] Interview No 56, Oct, 2000.

[140] Eg, 'But at that time there arose a change in the distribution of investment in the company. New investors came into the picture and said: "No, no, no it is impossible to spend five million or four million dollars on community development—this is never done during the construction phase. If we are to spend this money, let us do it when operations begin and when we are realising dividends [from the project]." As a result, this is one of the chief problems that the mining company has had, no? It starts things up. It creates expectations regarding community development. It says: "We will do these things, we will work in education, we will give scholarships to the best students so they go to university, we will work in health, we will work in agriculture . . ." A series of promises that were not fulfilled. . . . Or they were not fulfilled in the set time, which caused [the company] a serious problem.' ('*Pero en este proceso surge un cambio también en la distribución de las inversiones. Entran otros inversionistas y dicen: "No, no, no, imposible que gastemos 5 millones o 4 millones de dólares en desarrollo comunitario, eso no se hace nunca en una etapa de construcción. Si vamos a poner plata, pongamos plata en el momento de la operación, cuando ya tengamos dividendos y no queremos." Entonces ahí está también uno de los principales problemas que ha tenido la compañía minera, no? Lanza, crea expectativas en lo que es desarrollo comunitario, dice: "Vamos a hacer tal cosa, vamos a trabajar en educación, vamos a dar becas a los mejores alumnos para que se vayan a estudiar a las universidades, vamos a trabajar en salud, vamos a trabajar en agricultura . . ." Una serie de ofrecimientos y que nunca se cumplió . . . O no han cumplido en su momento. Entonces les generó todo una problema.*'): Interview No 57, Oct, 2000.

The second negative development that became evident once project construction began in 1999 was that labour was not being recruited locally from among the residents of San Marcos. The disillusionment this produced in the district is evident in the following observation made by a *campesino* informant.[141]

> Everyone wanted Antamina to come [to San Marcos], to come and work. We believed that this company would provide work, that it would change the situation [here]. But . . . progress has not come, work has not come. The company is large, it needs specialised personnel. So here we should have been informed. For this reason, people greatly wanted Antamina to come, but we didn't understand their system of employment.[142]

A third negative development from the perspective of community actors relates to problems arising from CMA's cash-based compensation arrangements. Given that neither employment, nor development projects, nor replacement lands were forthcoming from CMA, *campesinos* who had lost access to productive resources as a result of the land sales had to find ways to address this impact on their livelihoods. Those who received no compensation from the company—those visiting, alternating and full-time shepherd families who were deemed to be neither owners nor permanent residents—would have experienced livelihood losses. On the other hand, those who had received either resettlement payments or land sale proceeds had to find ways to translate these funds into new productive activities. Various factors suggest that, for many, this would have been a significant challenge.

First, the purchasing power of the payments made by CMA was diminished by considerable inflation in local prices, particularly for land and housing.[143] Secondly, the funds received from the sale of land were often re-distributed into relatively small amounts among family members. Thus divided, these sums would be more suited to consumption than investment. Thirdly, many of those who received larger sums from CMA, especially the

[141] Later CMA Community Relations gained the institutional recognition and power to be able to obtain the co-operation of CMA Operations and the company's contractors in order to ensure a certain degree of local employment. Damonte notes that such unskilled labour as was required during the construction phase was recruited by third-party contractors using a rotational system, which tended to lower both wages and the duration of contracts: G Damonte, 'Global Economic Responses to Local Post-Conflict "Opportunities"', Paper presented to Latin American Studies Association (2003).

[142] '*Toda la gente queria que venga Antamina, que ven a trabajar. Pensamos que esa empresa cuando viene va a generar trabajo, va a cambiar la situacion. Pero . . . no ven el progreso, no ven el trabajo. Y esta empresa es grande, necesita personal calificado. Entonces ahi nosotros debimos estar informados siempre. Por eso la gente deseamos mucho que venga Antamina pero no sabiamos como era su sistema de trabajo*': Interview No 9, Sept 2000.

[143] In the words of one *campesino*, '[b]efore Antamina came land here was cheap . . . Before, prices were in [Peruvian] soles. Now they are in [US] dollars.' ('*Antes que viniera Antamina, ahi si terreno era barato . . . Antes era soles, no dollares. Ahora es dolares*'): Interview No 21, Sept 2000.

resettlement payments, were unfamiliar with money management.[144] Cash, a very scarce commodity in the rural Peruvian Andes, is conventionally used within household economies for quite particular small-scale expenditures such as the purchase of agricultural inputs, medical costs and the cost of schooling children. Fourthly, as an underdeveloped zone, San Marcos lacks viable investment opportunities.

Certainly, many stories are told in San Marcos of how many of those who received resettlement payments have lost their money to unscrupulous relatives, failed investments, negligence or simple consumption. As Salas observes, these stories probably contain elements of both truth and exaggeration.[145] Due to the lack of an effective pre-resettlement baseline study, the impact of cash-based resettlement on those who received payments remains a difficult matter to resolve conclusively.[146] However, it is also hard to refute the charge that even some of the families who were compensated by CMA have in the end lost out as a result of the land purchases. For many—but certainly not all—*campesinos*, a form of productive property had been exchanged for one that would chiefly be consumed.

Community and Corporate Perspectives on the Local Legal Order

Community Perspectives: CMA's Betrayal of the Local Legal Order

In sum, in the 12 month period after the evictions took place, *campesinos* became profoundly disillusioned. Many found their principal hopes dashed. There was no large-scale access to stable employment, little visible results

[144] CMA did hire an NGO to help resettled families manage the funds that they had been paid. However, this was done only 5 months after the evictions, and the experience of resettlement had sharply diminished the willingness of these families to trust CMA or its agents: Salas, n 4 above, at ch 5. Furthermore, the programme was subsequently found by an external consultant to be insufficient to meet the needs of the affected families that it targeted. Ian Thomson Consulting, *Review and Assessment of the Resettlement Program, Community Development Plan and Community Relations Program of Compañía Minera Antamina* (Dec 1999) (Unpublished report on file with author) at 10.

[145] Salas, n 4 above, at 5.2.2.

[146] Salas has conducted a study of 48 families from Yanacancha who were provided with cash-based resettlement by CMA. These families were surveyed some 8 months after the evictions regarding what they had done with the money received: whether it was invested, consumed, lost or saved. Salas carried out the survey while working as an employee for CMA, and of course this is likely to have contributed to a significant margin of error in the results. The resettled *campesinos*, one might imagine, are likely to be cagey about discussing their finances, particularly with a CMA employee. Indeed, Salas notes that the figures declared by *campesinos* total only 40% of the amounts that they are known to have received. With these caveats in mind, two figures from Salas' analysis that relate to productive investments are nevertheless striking. First only 14% of the money declared by *campesinos* is stated to have been invested productively (either in the purchase of land, tools, vehicles or animals). And, secondly, only 28 out of a total of 48 families surveyed declare that they have made any kind of productive investment: ibid, at 5.2.2.

from the company's development promises, a fleeting rather than steady access to income and capital. Many *campesinos* also found some of their worst fears realised. Access to productive assets underpinning household economies had been lost, and deep family and community divisions had been provoked by the company's selective compensation policies.

The expectations held by *campesinos* that certain hopes would be realised and that certain fears would be averted were not the product of their own imaginings. They were the result of intense and patterned engagement that took place between corporate and community representatives over the better part of a year. During that time, different groups of *campesinos* deliberated among themselves how to influence the company and whether or not to accede to its demands. For their part, company actors responsible for community relations issues developed both head office policies and field practices that were designed to gain *campesinos*' trust. It is little wonder, then, that when the company started to behave in a fashion distinctly contrary to their established expectations that *campesinos* felt betrayed. This is illustrated by the key accusation that is levelled by actors throughout San Marcos against the company: that it is responsible for deceiving them. *Engaño*—the Spanish word for deceive, cheat or swindle—features prominently in informant interviews carried out with community actors.

Disillusioned by the events of 1999, many peasants raged against the company which remained, at that time, deaf to their complaints. Those who had received either verbal or written promises (of work, of resettlement) from CMA staff were told that these promises had not been authorised by the company and were not binding. Complainants were told, '[t]hose are the promises of [staff member X], not of Antamina'.[147] Notorious figures from the land sale negotiations were reshuffled in the company and assigned to posts away from contact with *campesinos*. In the countryside, the company's reputation was rapidly reconstructed: transgressive, deceitful and corrupt, it came to be regarded as a powerful destructive force which, many were convinced, would pollute and destroy their lands.

Company Perspectives: Internal Struggles over Community Relations Policy and Practice

The previous discussion has focused chiefly upon community perspectives. What of the dynamics internal to the corporation and its contractors? What was understood by different groups of company actors during the events described above? How is it that the various messages projected to community actors by CMA representatives came about?

[147] 'We complained to the company's new staff that Antamina's promises were such and such. . . . "Those are the promises of [engineer X] not of Antamina"' ('*Nosotros reclamamos que la promesa de Antamina era tal y tal a esos nuevos ingenieros que están ahora. . . . "Esas son promesas de [ingeniero X] no de Antamina*"'): Interview No 15, Sept 2000.

The preceding discussion has already revealed the sharp divides between CMA's internal departments over this period. Community Relations considerations were confined within a functionally separate department which was not integrated into the larger picture of project decision-making. Instead, the Community Relations Department was called in by CMA Operations and CMA Construction to address specific problems when they arose. Otherwise, it was not kept in the loop. In addition, the change to the Accelerated Resettlement Plan (ARP) suggests that community relations commitments were viewed as malleable within CMA. Previous discussions and commitments made to local actors therefore offered few constraints when the company's plans changed. When faced with new budgetary and timetable requirements, the Community Relations Department was expected to 'get on with the job' and achieve the desired results.[148]

However, a second significant struggle took place within CMA that has been alluded to only fleetingly in the narrative so far. During the sale of land and the resettlement process, CMA was also embroiled in an internal conflict over the degree to which Community Relations activities should be conducted according to 'old school' or 'new school' principles. As stated early in this chapter, CMA's first Director of Institutional Relations—the Directorate responsible for the Community Relations Department—was a Canadian executive from one of CMA's parent companies. Interviews with a wide range of informants with different backgrounds place this individual in the new school: a convert to the idea that a mining company needs to gain a 'social licence' from its neighbouring communities. In contrast, much of the Director's Community Relations staff are identified as members of the old school: 'can-do' Peruvian engineers who had built their careers in Peru's domestic mining sector. From an old school perspective, winning over local hearts and minds is decidedly less important than fulfilling the expectations of management on time and under-budget.

From a senior management perspective, both old school and new school attitudes have their advantages and disadvantages. At their worst, new school attitudes are expensive, wishy-washy and may allow community actors to walk all over the company. At their best, they may placate outside observers and avoid future problems with local communities. Old school attitudes, on the other hand, are cheap and able to deliver short term results. However, they may also antagonise local communities and lead to problems.

Neither new school nor old school perspectives completely dominated CMA's community relations activities over the period described thus far. This greatly contributed to the lack of accountability and oversight regarding the

[148] Cragg and Greenbaum identify 'getting on with the job' to be an important trope in the professional discourse of managers from Canadian mining companies: W Cragg and A Greenbaum, 'Reasoning about Responsibilities: Mining Company Managers on What Stakeholders are Owed', (2002) 39 *Journal of Business Ethics* 319.

messages that were being projected to community actors by the company. New school converts within management issued earnest statements of goodwill, emphasising the company's commitment to local communities and its overall programme for the region. This would certainly have created a general level of hopeful expecation among community actors. Meanwhile, it seems that old school Community Relations foot soldiers often resorted to telling *campesinos* what they wanted to hear in order to induce contracts of sale that accorded with the formal terms required by management. Thus, many of the company's promises were being made in an informal dialogue that did not reach those within the company who felt that such commitments would be binding on CMA. Together these two dynamics may be largely responsible for the expectations created among community actors in San Marcos. Management created a general context, which was lent specificity by Community Relations operatives. On the level of verbal promises, the system was all accelerator and no brake.

Furthermore, the events of 1998 and 1999 reflect a gradual shift within CMA Community Relations policy and practice from a new school to an old school orientation. Over this period of time, the Canadian Director progressively lost influence within the company with regard to community relations issues. Part-way through the purchase of land process, new staff began to be brought in to the Community Relations Department from the company of CMA's President, a middle-sized domestic mining firm operating in the central Andes. In particular, a Peruvian Manager was brought in from this company in mid-1998 and was assigned to be the Director's 'right-hand man' on community relations matters.[149] At least one insider informant suggests that the Director came to be kept out of the loop by his own staff.[150]

The design and conduct of the Accelerated Resettlement Plan (ARP) also bear the marks of an uneasy marriage of new school and old school approaches. Both camps accepted CMA's decision to abandon the original resettlement plan and to find a way to clear the purchased lands as quickly as possible. The decision to pay out high levels of cash compensation suggests a new school influence. A company informant states that the Director fought hard to be able to set compensation at the company's own resettlement costs.[151] Thus the funds that had been earmarked for the original resettlement plan were disbursed through the ARP. However, old school influences are pervasive as well. They can be found in both the pressure tactics used by CMA negotiators in clearning lands and the

[149] Interview No 65, Oct 2000.
[150] Interview No 138, Sept 2000.
[151] Interview No 39, Sept 2000.

payment of lesser sums to those deemed for one reason or another to be less entitled.[152]

Different Corporate and Community Views on Legitimate Legal Ordering

This combination of formal new school behaviour and largely informal old school behaviour led many within CMA to misunderstand the nature of many community grievances. A number of company actors interviewed in 2000 felt that the company had behaved well during the processes of land acquisition and resettlement. In their view, the company was largely a victim of its own good behaviour.[153] In trying to behave responsibly, the company was overwhelmed, first by the unattainable expectations of a desperate community and, secondly, by the rampant greed and envy generated by the tactical mistake of making large cash resettlement payments. In these narratives, community actors are unreasonable, unsatisfiable and driven by the desire to claim as much as possible from the company.

Certainly the payment of large sums in resettlement compensation did spark local greed and envy. This is, however, only part of the story. Over the course of this chapter, I have sought to argue that the intense reactions of community actors to the events of 1999 can best be explained by reference to the web of negotiated reciprocal commitments arrived at by corporate and community representatives during the sale of land process—what I have been referring to as a local legal order. While the local legal order is the touchstone consistently invoked by community actors when they express their land-related grievances against CMA, it remains, in official discourse at least, largely invisible to the company. Where aspects of the order are acknowledged, they are cast as illegitimate and not binding: they are promises made by either starry-eyed Canadians or rogue engineers who exceeded their authority.

Propounding this view requires that the sale of land process be made into something that, from community perspectives, it decidedly was not: a one-off transaction between disinterested strangers in which cash was exchanged for official title to land. Community actors struggled hard, using their available institutional and legal resources to obtain guarantees from the company regarding the kind of future that Antamina would bring. Guarantees were made and then broken. This generated profound local anger and extinguished the trust that had been created between corporate and community actors. *Campesinos* and townspeople in San Marcos increasingly came to view the company as a destructive and deceitful presence. CMA's embattled

[152] The Director continued in his post until several months after the evictions were conducted in the highlands. By the final months of 1999, CMA's internal structures were reorganised. A Vice-Presidential position was created above the Director, and he was reassigned to work on a housing construction project in Huaraz.

[153] Interview No 39, Sept 2000; Interview No 75, Nov 2000.

Community Relations staff increasingly came to view local actors as a clamouring horde out to harangue the company and to extort from it any benefits possible.

The section that follows will address the last part of the case study narrative: the ending of the stand-off between corporate and community actors and the ensuing processes of re-engagement and dispute resolution that were conducted in relation to grievances arising from land acquisition and resettlement. In contrast to the story that has just been told, in which the local legal order has played a central role, in this final part of the narrative the IR Policy regime rises from obscurity to orient the processes of conflict resolution.

PART III: RE-ENGAGEMENT UNDER THE AUSPICES OF THE WBG INVOLUNTARY RESETTLEMENT POLICY REGIME

From Stalemate to Re-engagement

After the Accelerated Resettlement Plan (ARP) was implemented, CMA entered an extended period of uncertainty with regard to its community relations orientation. If execution of the ARP had seen the hard bargaining tactics of the old school often win out over new school approaches to community engagement, the future direction to be taken by the firm was not yet clear. Nor was resolving the issue a major corporate priority at the time. With the ARP, the principal goals set for CMA Community Relations had been achieved: the company had secured title to and obtained possession of the lands needed to develop the Antamina project. Thus the pressure on Community Relations abated as the firm's main focus of attention shifted to the task of project construction. What ensued after the ARP was an extended transition period during which CMA Community Relations was largely disengaged from community actors in San Marcos. A reorganisation of CMA's corporate structure in late 1999 replaced the Canadian Director of Institutional Relations with the new position of Vice-President of Institutional Relations. A Peruvian lawyer, not clearly identified with either old school or new school perspectives, was appointed to this position.

Effectively, for much of 1999, Community Relations was left without much direction, or many funds. While community development activities in general were apparently on hold, some small projects were initiated, such as an assistance programme which aimed to provide resettled families with financial counselling and training. These efforts were minor in scope and had little impact. The resettler assistance programme was begun only some five months after the ARP had been concluded. Furthermore, the programme was subsequently found by an external consultant to be insufficient to meet the

needs of the affected families that it targeted.[154] During this period, CMA Community Relations staff in San Marcos were confronted with the considerable local fallout from the company's recent actions. The ARP had left the district up in arms, had resulted in a flood of claims and complaints to the Community Relations office, and had wiped out what remained of the company's local goodwill. With no mandate to resolve the outstanding claims that arose from land acquisition and resettlement, CMA Community Relations sought to limit community engagement and weather the storm. Frustrated community actors felt stalemated by the company's intransigence.

The period of corporate-and-community disengagement was to last until early 2000—some 10 to 12 months. It would be halted by the outcomes of two parallel developments. Notably, both of these developments arose from the context of pervasive community anger. First, CMA management decided to commission an expert consultant as a precautionary measure to verify the company's compliance with its safeguard policy obligations to MIGA. And, secondly, community actors in San Marcos found a way to break their stalemate with CMA by bringing a complaint to the World Bank. Each of these developments and its consequences is outlined below.

CMA's Response to post-ARP Community Anger: Internal Compliance Review

For some within CMA, the intensity and number of resettlement-related complaints raised a warning flag. Did the degree of community hostility in San Marcos create a context in which the company was vulnerable? Could the project face problems in the future with regard to compliance with the social and environmental covenants in its financing contracts? In the latter part of 1999, the outgoing Canadian Director and the new Vice-President of Institutional Relations agreed on a precautionary course of action. In order to address the issue of potential liability and to find an authoritative way of closing the question of resettlement, a pair of Canadian consultants was hired to review the resettlement process.[155] The consultants were instructed to 'identify any vulnerabilities with respect to compliance' with the relevant World Bank Group policies and to identify 'any present action necessary to achieve or maintain compliance'.[156] Despite this broad language, the terms of reference indicate that the report was to be of a general diagnostic nature. Given that the report would be based on less than a week of fieldwork in rural San Marcos, it could not provide a systematic audit of local claims.

[154] Ian Thomson Consulting, n 145 above, at 10.

[155] The Canadian consultants are a geologist and a rural sociologist who have worked extensively on social issues for the mining industry in Peru. See the 'On Common Ground Consultants' website at www.oncommonground.ca.

[156] Ian Thomson Consulting, n 145 above, at 5.

The resulting report, completed in the last days of 1999, delivered a carefully worded warning to CMA. The report found that the Accelerated Resettlement Plan (ARP) had substantially complied with MIGA's IR Policy, but that errors had also been made.[157] Several areas of non-compliance with WBG IR Policy were identified, including: the lack of an adequate Resettlement Plan with a development strategy and schedule; the lack of an appropriate grievance process for resolving disputes arising from the acquisition of land; a failure to provide compensation for use-rights enjoyed by users/occupiers of the lands purchased by the project; and several cases of failure to protect the most vulnerable residents.[158] In addition, while the report did not provide a systematic audit of local claims, it did identify a number of individual claimants who ought to be entitled to resettlement benefits under the IR Policy.

In reaching these conclusions, the report avoided the language of blame. The report attributed CMA's non-compliance with the IR Policy to a lack of appropriate training or knowledge among the company's Community Relations staff. Despite this soft-pedalling, the report made relatively extensive recommendations. It laid out a blueprint for the reorganisation of CMA's community relations activities which emphasised the need for increased reliance on development professionals and social specialists. It advised the CMA to hire a Programme Director with experience in community-based development projects and NGOs, stating that 'this individual must have the backing of senior management and the authority to make decisions on behalf of the company'.[159] With regard to bringing the company into compliance with WBG IR Policy, the report recommended that studies be performed in order to identify (1) all users of the land purchased by CMA (including those with a shared, seasonal or usufruct access to resources on these lands); (2) the socio-economic impact on each of these individuals; and (3) the current status of special needs families and individuals, including those who did not receive the full lump sum resettlement payment.[160]

Use of the word 'non-compliance' in the report signalled the need for CMA management to consider its actions very carefully. Strictly speaking, CMA's non-compliance with WBG safeguard policies placed the company's owners in violation of the terms of the financing contracts that they had made with both MIGA and the project's consortium of lenders and guarantors. Furthermore, the contracts provided that CMA's owners were required to report any 'material change' in the project's type or scope of activities that could be of concern to the lenders and guarantors.[161] Thus, in order to avoid alarming the project's financial consortium and/or giving rise to a situation

[157] Ibid.
[158] Ibid.
[159] Ibid, at 24.
[160] Ibid, at 22.
[161] Multilateral Investment Guarantee Agency, n 56 above.

where CMA's owners could be found in default of their contractual obligations, CMA management would have to take action on two fronts. First, the report or its contents would have to be disclosed in some manner to MIGA and to the other members of the consortium. And, secondly, CMA would have to show that an action plan was being implemented in order to bring the project into compliance with WBG safeguard polcies within a reasonable time. It is not clear to what extent the company was able to follow through on either of these issues before it was overtaken by events.

Community Actor Responses to the Stalemate: Appeals to Authority and the World Bank Complaint

If the consultant report provided CMA management with a new organisational blueprint for its community relations activities in which social specialist knowledge would gain influence, then a second set of developments radically increased the urgency of making this blueprint a reality. Within several weeks after the consultant's report was delivered to CMA, a large coalition of community actors in San Marcos met to draft a detailed letter of complaint that would be sent to the offices of the World Bank in Lima. This single event would have a dramatic impact on the state of corporate and community relations.

How did the complaint come about? In early 2000, nearly a year after the evictions were carried out in the highlands acquired by CMA, local municipal and *campesino* community leaders in San Marcos felt exasperated with the company's intransigence. In January, the district mayor convened a meeting of authorities and representatives of local organisations (such as the district irrigation committee) in a collective effort to seek outside intervention on their behalf.[162] The profound level of community anger and frustration with CMA created a temporary consensus among the district's warring factions and a rare opportunity for unity. Accordingly, the district mayor was able to mobilise support for this initiative from from across the district's political divide. A series of letters of complaint against CMA was subsequently drafted and signed by the principal public authorities and civil society leaders of the district. Letters were sent to Peru's National Ombudsman, the Ministry of Energy and Mines, the Environmental Commission of the National Congress, the President of Peru, the transnational mining enterprises that owned CMA and the President of the World Bank.[163] Each of these letters outlined the company's misdeeds in San Marcos and asked for intervention on the community's behalf.

[162] Interview No 1, Sept 2000; Interview No 4, Sept 2000; Interview No 33, Sept 2000.

[163] Municipio Distrital de San Marcos, 'Memorial Dirigido al Presidente del Banco Mundial' (Letter to World Bank President, 10 Feb 2000).

Intriguingly, the letter to the World Bank President was sent out almost by accident. The community actors who initiated the action were themselves not aware of the exact significance of the World Bank Group (WBG) safeguard policies for CMA. However, company staff had drawn attention to the safeguard policies by stating that CMA was in compliance with them. Furthermore, the project's Environmental Impact Statement (EIS) referenced the policies as international standards that were applied by the project.[164] A lawyer affiliated with the then current administration of the district municipality had gained some information about the WBG safeguard policies at a conference in Lima and suggested that a letter to the World Bank ought to be added to the list.[165] The lawyer obtained unofficial Spanish translations of the WBG safeguard policies and added allegations of failure to comply with the policy to the letter. These accusations were of a general nature and focused on the company's failure to implement the three central pillars of the WBG Indigenous Peoples Policy: that project-related benefits should accrue to indigenous populations, that negative impacts on indigenous populations should be avoided or mitigated, and that development projects should be planned and implemented with the informed participation of indigenous populations.[166] No violations of the Involuntary Resettlement Policy (IR Policy) were alleged.

The central charge levelled in the complaint is that CMA had obtained lands in San Marcos through deception and false promises, in particular in its dealings with *campesino* communities.[167] Company staff are accused of deliberately lying to peasants and cheating them. The letter also expresses grave concerns with regard to the project's potential for environmental damage in the region. In the end the letter asks the World Bank President to send a commission to ensure that CMA follows through on its responsibilities: first, to execute a socio-economic development plan and environmental protection plan in San Marcos, and, secondly, to fulfil the promises made by the company to the communities of the region.[168]

The appeals made to national officials, foreign companies and Canadian diplomats received no response. The letter to the World Bank President, however, was passed from the offices of the World Bank in Lima on to MIGA headquarters in Washington, DC. To the surprise of local leaders in San Marcos, this letter activated an intensive response on the part of both MIGA

[164] Klohn Crippen, n 59 above.

[165] The conference concerned mining and community issues and involved both representatives from both mining enterprises and NGOs.

[166] Municipio Distrital de San Marcos, n 164 above.

[167] Ibid, at 1–2.

[168] Other grievances alleged in the letter include lost access to a mountainous road linking San Marcos to the Amazon region; and the unauthorised extraction of gravel from peasant lands by CMA contractors for road construction: ibid.

and CMA. Once it received the letter, MIGA became actively involved in investigating and addressing the complaint. A fact-finding mission of MIGA staff was sent to San Marcos in early May 2000. A letter responding to the complaint was sent to the District Mayor from the Executive Vice-President of MIGA assuring him that appropriate steps would be taken. A Peruvian development research institute was subsequently commissioned to conduct a full safeguard policy compliance review of CMA's land acquisition and resettlement activities in San Marcos.

The visible changes made in CMA's actions and attitudes towards community relations issues over the course of 2000 were even more striking. A Community Development team was created and based in the company's office in San Marcos. The new manager of the team, an energetic Peruvian biologist with a background in nutrition and development work, became the new face of CMA in San Marcos. While plainly a new school adherent, the Manager of Community Development soon proved to have the authority within CMA to make commitments to community actors and follow through with them. In the months that followed, CMA promoted and financed the creation of a development round table for San Marcos and a local environmental committee.[169] Subsequently, the company initiated its first substantial development projects in San Marcos aimed at the population at large. In addition, it began to settle local claims based on its written promises of resettlement.[170]

Explaining the Change in CMA's Community Relations Approach

CMA representatives argue that the change in approach evidenced in 2000 was already in the works. However, it appears that the community complaint played a key role in bringing out once again the socially responsible face of the company in San Marcos or, at the very least, in accelerating and strengthening its return. The significance of the community complaint is suggested by how it differs from the consultant's report.

The Canadian consultant's report provides a controlled and urbane assessment of CMA's discharge of its IR Policy responsibilities. It places its findings of non-compliance in a context of overall compliance and company good faith. It praises the company for its virtues, and it downplays the idea that the company is at fault for its failings. Furthermore, it sets out a structured path forward towards full compliance with World Bank Group safeguard policies. By both raising questions and answering them in a way designed not to ruffle feathers, the report helped to keep the ball in CMA's

[169] These bodies are intended to co-ordinate with CMA staff concerning local environmental and development issues.

[170] Individual landowners with written promises of resettlement were paid US$5,000 apiece in settlement of their claims. Those who had received only verbal promises were not compensated.

court. Once disclosed to MIGA, the report could be used as evidence that the company was reliably on track towards achieving full compliance. Accordingly the report supported the argument that CMA should remain in control of its compliance programme without undue outside interference.

If the consultant's report commissioned by CMA was drafted in a manner designed to soothe nerves, the community complaint was written to assail them. In contrast to the report, the complaint is a document peppered with unresolved accusations and with unanswered demands for justice.[171] It conveys overall a tone of frustration and outrage. Certain CMA staff are denounced by name as dishonest and are said to be unwelcome locally. In addition, the complaint would have been difficult to dismiss as the work of a disgruntled few. It was signed by the district mayor, together with the authorities of both *campesino* communities, and by a range of other officials and civil society leaders in the district. This solidarity not only lent credibility to the complaints made, it also suggested that CMA was in significant trouble locally. Unlike the consultant's report, the community complaint created the need for more answers to explain the situation. It also argued that further outside scrutiny and perhaps direct involvement were necessary to ensure the resolution of continuing problems.

Perhaps most seriously of all, from MIGA's perspective, the presence of the letter suggested the possibility that San Marcos could blow up to become MIGA's very own public relations disaster that could threaten both the Agency's reputation and the careers of its current officials. Due diligence was required to protect both, with documented efforts to investigate and ensure CMA's compliance. For CMA's part, convincing action was necessary to ensure that the project's lenders and insurers were satisfied that the company was behaving responsibly and that it was not in violation of its contractual responsibilities. Accordingly, the threat to both MIGA and CMA was dramatically elevated by the arrival of the community complaint in Washington. It seems therefore reasonable to conclude that this had a strong influence over the subsequent actions of both institutions.

The Assertion of Transnational Legal Ordering: MIGA's IR Policy Regime

The accounts presented in Part II of this chapter—dealing with land acquisition and resettlement—charted the development and eventual repudiation of a local informal legal order among corporate and community actors. During this period, national and transnational legal orders played a lesser or

[171] Eg, 'we can no longer tolerate that this company deceives, mistreats, and fails to comply with its promises with each one of our communities' ('*no podemos tolerar mas que esta compañía engane, maltrate e incumpla sus ofrecimientos y compromisos, con cada una de los comunidades*'): Municipio Distrital de San Marcos, n 164 above, at 2.

supporting role in community and corporate interactions. Normative ordering among corporate and community actors was chiefly produced interactionally, through direct engagement between CMA representatives and private landowners, *campesino* community leaders and the rural population at large. This situation was soon to be reversed. When the apparent consensus supporting the nascent local legal order abruptly collapsed, so too did these interactional methods of influencing the company's behaviour. CMA's sudden intransigence meant that community efforts to re-enrol the company using direct engagement proved futile.

In their attempts to find new leverage, community actors inadvertently helped to trigger a transformation of the legal terrain upon which their struggles with CMA were being waged. After the community complaint was received in Washington, MIGA's IR Policy regime was rapidly projected into San Marcos and soon became the dominant framework for addressing conflicts concerning the highland pastures acquired by the company. Thus the community and corporate actors involved in San Marcos became embroiled in a new set of legal processes designed to produce a legitimate resolution of outstanding matters.

The remainder of this chapter will set out and examine the legal processes deployed by this transnational legal order and their consequences. In line with the analysis of the IR Policy regime presented in Chapter 4, particular attention will be paid to the decision-making architecture used in the regime's legal processes—how different parties were involved in the production of legal decisions. A more thorough discussion of these issues will be presented in Chapter 7.

MIGA's Initial Investigation and Response

In early May of 2000, three environmental and social staff from MIGA in Washington, DC, conducted a five-day site visit to San Marcos.[172] They were greeted by a deluge of complaints from irate *campesinos* and townspeople. The MIGA mission also met with CMA management and staff as well as with officials from the Peruvian Ministry of Energy and Mines in Lima. By 9 June 2000, MIGA's Executive Vice President sent a letter to the District Mayor of San Marcos responding to the complaint that had been made. The letter informed the mayor that 'a series of problems' had been identified both by MIGA's investigation and by the consultant's report commissioned in October 1999.[173] It stated that the company was committed to addressing these issues and had started to rectify the situation even before the

[172] M Ikawa, Executive Vice-President of the Multilateral Investment Guarantee Agency, Letter to F Vargas, Mayor of District Municipality of San Marcos, 9 June 2000.

[173] '*La mision de MIGA identificó una serie de problemas ademas de los ya subrayados por el experto en octubre de 1999*': ibid, at 3.

community complaint came to the attention of MIGA. It further stated that MIGA had sent a report containing recommendations to CMA's investors and the company directors. It added that the company had committed itself to following a corrective plan of action to deal with the problems identified. Lastly the mayor was asked to pass on the contents of the letter to the other signatories and interested parties in the district.

The arrival of the MIGA mission greatly impressed local actors and is widely credited with helping to change the company's attitude towards the community. However, they could be forgiven for expressing a certain disappointment in the vagueness of the letter provided by MIGA in response to their complaint. The problems identified by the investigation are never set out, neither is the substance nor the timetable of the corrective action plan. Certain recommendations made to the company are stated clearly—including the need for CMA to improve its internal communication and its communication with the community—but little more is made explicit. The letter does suggest that fault has been found with CMA, but again it does not go so far as to say how, for what, or to what degree. It also states that remedial actions are being taken, but it does not say what they are. Indeed, although the letter clearly aims to reassure its readers, it provides remarkably little information concerning the regulatory processes afoot. Despite their standing as complainants, the letter provides its recipients with few, if any, tools with which to take on a role of 'informed participation' in the resolution of their claims.

IR Policy Compliance Study

Following its site visit to San Marcos, MIGA signalled to CMA that it should contract an independent audit of its compliance with MIGA's Involuntary Resettlement Policy (IR Policy). The work done by both the Canadian consulting team and the MIGA site visit had uncovered substantial problems with CMA's IR Policy implementation. In contrast to these two relatively brief troubleshooting investigations, the proposed audit was intended to provide a comprehensive evaluation of the company's IR Policy performance. Social science researchers would be contracted over a period of four months—including one month of fieldwork—during which they would conduct a family by-family assessment of eligibility for assistance under the IR Policy regime. In addition, the researchers would be asked to evaluate CMA's IR Policy performance in general and propose a strategy for closure of the company's resettlement responsibilities.[174]

A Peruvian development research centre known for its high-profile consulting work for international organisations, foundations, government

[174] GRADE, n 4 above, at Annex 1.

ministries, universities and large enterprises, was proposed by MIGA to carry out the audit. The centre was known to officials at the World Bank for its previous collaboration on a WBG/IDRC publication concerning large mines and community relations.[175] Indeed, this work had involved examining the Antamina project as a case study. Given its strong academic credentials and its track record of prestigious consulting work, the centre was viewed at the WBG as an actor capable of delivering an independent and credible report. Accordingly, CMA contracted the centre to conduct the IR Policy audit. The core research team commissioned for the IR Policy audit consisted of a rural economist and an anthropologist. These consultants were aided by two field assistants. For convenience, this group will be referred to collectively as the Peruvian Consulting Team or the Consulting Team.

Fieldwork and Conclusions

In June of 2000, the Peruvian Consulting Team began its work. In order to address the central question of outstanding cases of individual entitlement to resettlement benefits, the Consulting Team conducted a socio-economic survey in San Marcos. This survey was based on a sample of some 100 persons, including the heads of the 56 families who had been officially resettled by CMA and persons identified from CMA's local complaints database who had significant ties to the highland pastures.[176] Information was collected regarding present livelihoods and pre-resettlement residency in and usage of the *puna*.

However, the chief obstacle confronting the Consulting Team was the lack of verifiable information concerning the socio-economic status of the highland-dependent population before resettlement took place. Under the WBG IR Policy, project sponsors are instructed to provide compensation and assistance, such that the 'former living standards, income earning capacity, and production levels' of persons displaced by projects are at least restored.[177] However, CMA did not conduct an adequate baseline survey outlining the pre-resettlement livelihoods and living standards. The pre-resettlement census conducted by CMA provided only a partial accounting of family resources, and it did so only with respect to a portion of the relevant population: those identified as permanent residents of the *puna*. The CMA census did not take into account the seasonal and rotational residency patterns followed by many families. Thus much of the population with economic ties to the highland pastures had been excluded.

[175] Pasco-Font *et al*, n 18 above.
[176] GRADE, n 4 above, at 18–20.
[177] Operational Directive 4.30 on Involuntary Resettlement (hereinafter OD 4.30), para. 3(b), available at www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle.pol_Resettlement/$FILE/OD430_InvoluntaryResettlement.pdf (accessed 1 Oct 2006).

Accordingly, no comprehensive information existed which would have permitted a comparison of the present circumstances of the whole of the greater population of highland-dependent families with those of the past. Given the disparity in information available, the Consulting Team designed two different systems for determining entitlements among the *puna*-dependent population for assistance and compensation under MIGA's IR Policy.

With regard to the families recorded by CMA's census, the Consulting Team was able to count on a basic information set concerning pre-resettlement income and assets. By assigning rough cash values to these items (including animals, land, payments for shepherding duties, and other sources of income), the researchers were able to arrive at figures estimating both pre- and post-resettlement levels of net present value. Although virtually all of the population subject to the census had received substantial sums of resettlement compensation by CMA, the Consulting Team nevertheless felt it was necessary to carry out the comparison. The Team argued that, given many of the problems associated with large-scale cash compensation in the rural Andes (including inexperience with money management, local inflation and limited investment opportunties), it was not prepared to assume that monetary compensation would guarantee that *campesino* families would be able to maintain their living standards.[178] The results of their study bore out this decision. The Consulting Team's calculations suggest that of the 56 families identified in CMA's census, only 36 were better off after being resettled, while 20 were worse off.[179]

For families that did not receive resettlement payments during the ARP, the researchers did not possess any pre-resettlement economic data. However, since these families were uncompensated, all that needed to be approximated to show the degree to which a family had been affected by lost access to the highlands was the role that the highlands played in their pre-resettlement livelihood. To this end, the researchers set out a typology of three different types of livelihood reliance on the *puna* based on the social science literature regarding Andean pastoralism. The three categories established by the researchers correspond to the classification set out at the beginning of this chapter regarding rights of customary use of highland pastures. Using the information collected by the interviewers about occupancy of the *puna*, the researchers classified the various families into three groups corresponding to the categories set out previously as either full-time shepherd families, alternators or visitors.[180]

As the reader will recall, full-time families spend most of their time in the highlands tending collective herds made up of animals owned by kin.

[178] GRADE, n 4 above, at 2–8, 29–30.
[179] Ibid, at 8, 21–22, 26–27.
[180] Ibid, at 6–8.

Alternating families spend part of their time in the *puna* helping with the herd, and part of their time tending agricultural plots in the lowlands. Visiting families reside in the lowlands or sometimes on Peru's coast and keep animals in the *puna* in the care of a full-time or alternating family. They may visit the highlands either as much as once a month or as little as once a year. Together, all three classes of families play integral roles in kinship-based collective systems of access to resources.

Using this typology, the Peruvian Consulting Team drew a central distinction relating to eligibility for resettlement assistance of the population that had not been compensated during the ARP. It decided that only full-time and alternating families would be entitled to resettlement benefits. Although visiting families had indeed lost a socio-economic resource that supported their livelihoods, as a group their connection to the *puna* was held to be too slight to require compensation. With regard to entitlement, the Consulting Team determined that full-time families should be compensated with land of equal or better size and quality to replace the land they had lost.[181] For alternating families, however, the researchers drew a second distinction. Some alternators were found to carry the primary responsibilities for caring for common herds. Although all families in an alternating group would take on herding responsibilities in rotation, the primary families spent significantly more of their time on pastoral activities than did others. The researchers therefore found that the primary alternators were entitled to 'full resettlement' (compensation in land) while the secondary alternators had lost a lesser degree of their livelihood entitlements. The researchers advised that secondary alternators be compensated with some form of social and technical assistance.[182]

With respect to those families who had received resettlement payments from CMA, the researchers advised that further compensation be provided only to those 20 families identified as worse off by the net present value calculation. The researchers suggested that this compensation should take the form of individualised assistance programmes designed to help these families to raise their standard of living. They also stated that these programmes should not form part of the development programmes managed by CMA in the region.[183]

An overview of these eligibility and entitlement criteria arrived at by the Consulting Team is summarised in Table 6.4.

[181] Ibid, at 27.
[182] Ibid, at 25
[183] Ibid, at 27–8.

Table 6.4: Entitlement of Highland-dependent Families to Post-resettlement IR Policy Compensation According to GRADE Study

Paid Resettlement?	Status of Family		Number Identified	Suggested Entitlement
No	Full-time shepherd		6	Land
	Alternator	Primary resp.	5	
		Secondary resp.	11	Assistance
	Visitor		21	Nothing
Yes	Full-time, alternator, or visitor	Id'ed as worse off by NPV[a]	20	Assistance
		Identified as better off by NPV	35	Nothing

Source: GRADE, Evaluación del Proceso de Reubicación y del Programa de Post-Reubicación en Antamina (Lima, GRADE, 2000).
[a]A calculation was made estimating the net present value (NPV) of each nuclear family both pre and post-resettlement.

Preparation of the Final Report

The Consulting Team's report was prepared in draft and delivered to CMA in December of 2000. CMA senior management engaged the members of the Team in prolonged discussions concerning the contents of the report. A final report was then concluded and sent to MIGA.

The final report provided an explanation of the reasoning and methods used in the study. It set out the typology of families decided upon by the Consulting Team, the compensation or assistance to which each category of family was found to be entitled, and a list of families to whom these benefits were owed. The report also set out recommendations with regard to the study's presentation and how follow-up should be conducted. It advised that CMA's plan for closure of the resettlement process should begin with a public explanation of the process, of its legal and institutional framework, of its goals and limits, and of the errors committed by the company. The Consulting Team also advised that the report should be publicly presented to the community by the Team itself.[184]

Public Presentation of the Report in San Marcos

By choosing to present their report to the community, the researchers placed themselves in a challenging situation. On the one hand, they had been

[184] Ibid, at 28.

contacted to produce closure within the narrow terms of IR Policy. The report was intended to provide an authoritative and conclusive resolution of outstanding claims. On the other hand, however, achieving the public acceptance required to produce any degree of actual closure during the meeting would require persuading *campesinos* to accept the version of justice that they were being offered. Unfortunately for the researchers, the conceptions of justice held by community actors had little or nothing to do with MIGA's IR Policy. The very existence of the Policy was largely unknown to the assembled *campesinos*. Instead, community actors oriented their claims for justice according to the promises, representations and agreements made by company representatives over the course of their interactions.

This presentation took place in mid-February 2001.[185] Some 200 *campesinos* collected in a school room in the town of San Marcos. The atmosphere of the meeting was very charged. *Campesinos* crowded the classroom benches and lined the walls. CMA's Community Develoment staff sat at the back. The principal researchers of the Peruvian Consulting Team—the rural economist and the anthropologist—came to the front of the room. Speaking in Spanish and assisted by a Quechua translator, the members of the Team introduced themselves and proceeded to explain the purpose and conduct of their work. They explained the existence of the World Bank, its social and environmental rules, and why they were being applied to CMA. They then proceeded to explain the content of the rules and how they applied in the local environment. And lastly they explained who among the *puna*-dependent families was found to be entitled to resettlement compensation and why, before taking final questions.

This process was not allowed to flow smoothly. Periodically, the consultants were interrupted with outbursts, with questions, with challenges, and with denunciations of the company. Various forms of overt resistance arose from the floor as different actors sought to redirect the dynamic of the meeting in order to focus upon the issues and matters they prioritised. Some audience members took the opportunity to proclaim their own grievances. Others made small speeches aiming to score points on behalf of one or the other of the district's political factions. Others questioned the Consulting Team members, seeking to determine their credentials and their credibility. In each case, the Team members were forced to respond in a manner that would allow them to reassume the course they intended. These challenges and responses fell into three general groups.

First, community actors repeatedly raised issues that did not, according to the Team members' interpretation, fall within the sphere of matters intended to be remedied by MIGA's IR Policy. Some land-owners asserted that they had not been properly recognised as title holders by the PETT and

[185] I attended this meeting and the public interviews conducted afterwards. This account is drawn from my field notes taken at the time.

thus had not received the amount due to them from the sale proceeds. Others demanded that the written Resettlement Agreements be respected. Yet others argued that the offer of resettlement was made orally by the company to all land-owners and should be respected. Again others argued that they had received resettlement payments of less than US$33,000 and should be paid the difference. The consultants responded to each of these claims by making a distinction between the IR Policy and Peruvian law. These, they argued, were *legal* claims, and had to be resolved through Peru's national legal system. Although the consultants agreed that in many cases the complaints were well-founded, they argued that they fell outside the sphere of matters covered by the IR Policy and could not be remedied by the present process.

Secondly, the members of the Consulting Team were pressured by the crowd to make certain rhetorical concessions in order to obtain its respect. In particular, the Team had to show that it was not whitewashing the company. Periodic outbursts from the crowd required the Consulting Team to state where it stood on various issues. Significantly, the Team members agreed with *campesinos* that the company was responsible for wrongdoing. They agreed that promises had been made but not kept. They agreed that problems were apparent in the land titling process and that the company should re-open the matter in order to resolve them. This expert confirmation of company misdeeds—both in a public forum and in the presence of CMA's representatives—had an important symbolic effect in sustaining the consultants' credibility.

Thirdly, the Consulting Team encountered problems when it sought to explain which among the assembled persons were found to be entitled to assistance under the WBG IR Policy. It began by explaining how it felt the Policy applied to the situation in San Marcos. It informed the audience that eligibility for resettlement depended upon residence within the highland territories purchased by the company; that full resettlement compensation was supposed to be paid in replacement land and not in cash; and that over the long term resettlement should be designed to ensure that living standards are at least restored to their pre-resettlement levels. However, the Consulting Team soon found it also had to justify to the assembled *campesinos* how it was that the results mandated by the regime could be so strange. In answer to this, the Team members explained that the WBG IR Policy had been drafted by *gringos* in Washington who were not familiar with the situation in San Marcos. The Policy, they argued, was oriented towards a situation in which a definite territory was used and occupied by a single family. The strange outcomes produced by the IR Policy regime in the Andean case thus resulted from the fact that the foreigners' assumptions did not apply to the situation of Andean highland pastures.

The Consulting Team concluded its presentation by stating that those persons who had been found to have a sufficient degree of independent

residence in the *puna* were entitled to resettlement compensation. Questions were taken and lists were posted to show those found to be eligible under the IR Policy. During this final stage of the meeting, the Consulting Team invited all persons with remaining questions or those who wished to have their cases reviewed to meet it in the afternoon in the courtyard of a nearby hotel in town. This second gathering attracted roughly 100 people, each of whom sat down with the consultants to discuss the particulars of his or her case. Further information was gathered from these claimants to determine whether the families in question had been properly classified on the full-time, primary/secondary alternator, and visitor scale developed by the Consulting Team. Several cases of reclassification occurred as a result of these interviews. Significantly the interviews were conducted in the open, in full view of those waiting to be heard. This level of transparency served to allay fears of secret deals and helped to inspire confidence in the process.

CMA's Responses to the Report

After receiving the Consulting Team's report, CMA Community Development began to take steps to implement its key recommendations. Those deemed by the report to be entitled to assistance have been targeted by a specialised programme based out of the Community Development office in San Marcos. This programme has sought to provide this group with special benefits designed to improve their livelihoods.[186] The situation with regard to those deemed entitled to land compensation is more complex.

Once the report was issued, CMA entered into protracted negotiations with the individuals identified to be entitled to compensation in land. Given the scarcity of highland pastures available in and around San Marcos, the company eventually purchased 50 hectares of fertile agricultural land far outside the district, some 20 kilometres from Huaraz, the departmental capital.[187] This land is intended to provide an additional economic resource to be exploited by the entitled families who continue to reside in San Marcos. CMA retains title to the lands and has attempted to organise the resettlers into a collective. Suffice it to say that this state of affairs has resolved some conflicts and inspired new ones. When I conducted a follow-up visit to San Marcos in June 2002, difficulties between the company and the resettlers continued to ensue over work on the land, investment in a reservoir, and the eventual handover of title.

[186] Interview No 114, June 2002.
[187] Ibid.

7

Assessing the World Bank Safeguard Policy

INTRODUCTION

Objectives of the Chapter

What are we to make of the narratives presented in the case study? On one level, they present a jumble of engagements, clashes, agreements, broken accords, efforts at reconciliation and simmering conflicts. However, on another, the currents and flows of legal ordering can be detected beneath the surface of events. Actors orient their behaviour and develop their expectations according to the legal orders they perceive to be at work around them. However, as we have seen, awareness of the operation of different legal orders is far from uniform—even amongst those immersed in them. A key theme raised by the case study is that the existence or non-existence of this awareness among different groups of people is very important to the actual work that legal orders do.

Taken as a whole, the case study presented in Chapter 6 tells a story of two legal regimes—one local, the other transnational—and their impact upon ordering corporate and community relations. In part II, the chapter traced the development of a local legal regime that emerged from the interactions between CMA representatives and community actors in San Marcos. This nascent regime—apparent to some, invisible to others—was developed and then swiftly shattered, with serious consequences for virtually all concerned. The collapse of these normative understandings led to the breakdown of corporate and community relations in San Marcos and a period of intense estrangement.

Part III of Chapter 6 described how the ensuing stalemate was ended through the intervention of MIGA's Involuntary Resettlement Policy (IR Policy) regime. The IR Policy regime soon became the dominant force in ordering the land-related conflicts between CMA and community actors.

This represented a notable shift in the use made of this transnational legal regime. During the land acquisition and resettlement phases, its operation had been consigned to the shadows. Although in private it was used to guide corporate action, in public CMA representatives used the company's IR Policy commitments to support local ordering processes. However, during the MIGA audit, the IR Policy regime was called to the fore to play an overt and central role in ordering. This helped to ensure that the local normativity developed in San Marcos was displaced, and was not used to address the outstanding issues dividing corporate and community actors.

Some of the implications of this trajectory from local to transnational processes of legal ordering will be discussed in the final chapter of this book, Chapter 8. The present chapter will return to the case study narratives in order to examine the functioning of the IR Policy regime in line with the analysis presented in Chapter 4. The key concern here will be to examine the regime's regulatory effects and its capacity to persuade different audiences of its legitimacy. In particular, the chapter will inquire into the capacity of the regime to produce a stable and widely accepted regulatory framework for governing corporate–community relations.

The Safeguard Policy Regime Decision-making Model

A critique of the decision-making model employed by the IR Policy regime was set out in Chapter 4. The chapter described the features of the regime that are designed to ensure that it is able to exercise an autonomous regulatory influence and that it can therefore command legitimacy and respect. This model is briefly reviewed below.

In the IR Policy regime's regulatory model, the company that is seeking to develop the project—known as the project sponsor—is responsible for collecting the relevant legal facts and for designing a formal Resettlement Plan in line with the IR Policy. Resettlement planning is to take place with the participation of the affected population. The Plan (together with information concerning local participation in its development) is submitted by the project sponsor to the WBG agency for review and approval. Once the Plan is approved, the WBG agency is kept informed through regular reports on safeguard policy compliance provided by the project sponsor.[1] An environmental engineering firm is also typically contracted to assist with continuous compliance monitoring.

This formal structure of regulatory responsibilities is imposed on the project indirectly as a result of a contract for financial services made between the project sponsor and either IFC or MIGA. IFC provides private sector

[1] In addition, as observed in Ch 4, WBG staff will typically conduct an initial site visit of a project that is expected to have considerable potential for social and environmental impacts.

projects with loans and occasionally with equity investments.[2] MIGA provides lenders and equity investors with insurance against 'political risks'—such as the risk of loss through nationalisation or armed conflict.[3] In both cases, the IFC or MIGA client—again, the project sponsor—must agree to use its influence over the project to ensure that it complies with certain requirements set out in the financing contract. Where the project fails to comply with appropriate WBG safeguard policies, and where the non-compliance is not remedied within a reasonable period, this will place the sponsor in breach of its financing contract.[4] In such a case the WBG agency would be entitled either to recall its loan or cancel its insurance policy unilaterally.

In practice, however, the 'ultimate sanction' of cancellation is seldom, if ever, used. Typically, a project sponsor will have good reason to wish to avoid being placed in a situation where it risks being in breach of a WBG financing contract due to environmental or social non-compliance. First, there are the reputational consequences to be considered should the situation become public knowledge. Secondly, the possibility of breach must be disclosed to other members of the project's financial consortium. These other lenders and insurers may become concerned with the continuing viability of the project. However, it should also be noted that circumstances can exist which significantly diminish the influence of a WBG agency. For example, where the bulk of a loan is already repaid, the IFC's ability to insist on safeguard policy compliance is presumably limited.

Thus, the basic architecture of the IR Policy regime establishes two sets of independent regulatory conversations. On the one hand, the project sponsor remains in contact with the WBG agency regulator, informing it of its initial plans and of its continuing policy implementation. On the other, the project sponsor communicates with the affected local population, involving it in decision-making through consultation and participatory procedures. In effect, the IR Policy regime employs a *bilateral model* in which the project sponsor acts as the intermediary between the Bank agency and the local population. As illustrated in Diagram 7.1, in the normal course of business, there is no direct contact between the latter two groups of actors. Instead, two separate streams of communication take place in parallel. As a result, the role played by the project sponsor is vital. Just as the local population learns of the IR Policy regime through the sponsor, so the Bank agency learns of the local population in the same manner.

Of course, the danger presented by the bilateral model is that, without further checks and balances, the project sponsor may either intentionally or

[2] See 'About IFC' at www.ifc.org/about/.
[3] See 'About MIGA' at www.miga.org/screens/about/about.htm.
[4] Multilateral Investment Guarantee Agency, 'Standard Contract of Guarantee' (2001).

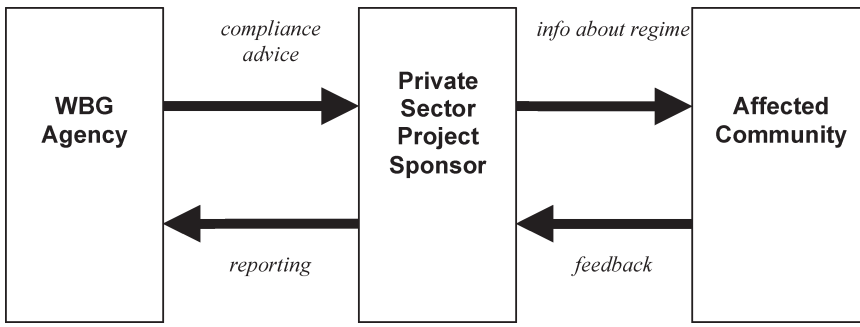

Diagram 7.1: 'The Bilateral Model': Flow of Information on Social Safeguard Policy Implementation in the Normal Course of Business

unintentionally subvert the regime. The model places the sponsor in a dangerously powerful position. It is in substantial control, on the one hand, of the facts and arguments considered by the WBG agency and, on the other, of the knowledge of the regime disseminated to the local population. The potential for subversion is therefore significant.

One set of checks and balances is provided by the possibility of a formal community complaint being communicated to the WBG. Where this occurs, the bilateral model is displaced as a result of a third set of regulatory conversations that take place between community actors and WBG officials—producing a tripartite model characterised by three streams of communication (see Diagram 7.2).

In addition, in 2000 the office of the Compliance Advisor/Ombudsman (CAO) was established to address safeguard policy compliance issues at IFC and MIGA including community complaints directed against those agencies. Thus through the complaints process, local actors may contest the facts or the policy interpretations asserted by the project sponsor. As we have seen, such a complaint was eventually made in the case study. Indeed, the complaint mechanism provides an important participatory safeguard in which local actors can become more deeply involved in ensuring the integrity of the regime and in representing their own interests. However, its significance will depend upon the degree to which it is accessible to community actors. Where accessibility is limited, one can expect that its regulatory role will be similarly restricted.

This brings us to the primary mechanism for ensuring the regulatory integrity of the IR Policy regime: the reliance placed upon social specialist expertise. It is the social specialist profession that is intended to give the IR Policy regime substance, rigour and credibility. The IR Policy regime presumes that its norms regarding fact-gathering, analysis, public participation and resettlement planning will be implemented in accordance with the

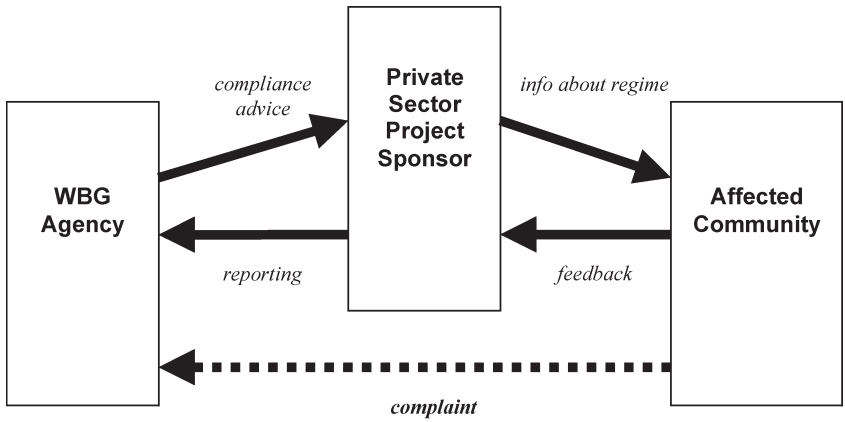

Diagram 7.2: A Tripartite Model: A Third Channel of Communication is Opened Up

professional knowledge and practices of qualified social specialists.[5] Accordingly, these specialists are presumed to be capable of exerting a strong regulatory influence within their organisations. In addition, the regime's supervisory structure is premised on the idea that this body of knowledge and practice is sufficiently shared within the profession that one qualified expert will be able to verify the integrity of the work performed by another, largely on the basis of written reports. In this manner, the involvement of social specialists in World Bank Group agencies, project sponsors and environmental engineering firms is intended to engage these organisations in 'webs of dialogue' in which the influence of this form of professional knowledge is promoted.[6]

However, the discussion in Chapter 4 called these assumptions into question. In that chapter, several reasons were suggested for doubting the influence that social specialists might exercise within their organisations—whether these are mining enterprises, environmental engineering

[5] Operational Directive 4.30, on Involntary Resttlement (hereinafter OD 4.30) is available at www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol_Resettlement/$FILE/OD430_InvoluntaryResettlement.pdf (accessed 1 Oct 2006); Operational Policy and Bank Policy 4.12 (OP 4.12) are available at http://wb1n0018.worldbank.org/Institutional/Manuals/OpManual.nsf/284229c80327Ofad8525705a00112597/864bbbc199d202852570c90030386c?OpenDocument$Start=5 (accessed 1 Oct 2006).

[6] 'Webs of dialogue' is a term used by Braithwaite and Drahos to refer to the exercise of persuasive power, often in the absence of explicit sanctions, in situations of complex interdependency: J Braithwaite and P Drahos, *Global Business Regulation* (Cambridge, Cambridge University Press, 2000) at 553–4.

firms or World Bank Group agencies.[7] The analysis presented in the chapter also questioned the belief that a sufficiently strong interpretive consensus exists among social specialists to enable rigorous regulatory supervision on the basis of unchallenged written reports.

The subsequent sections of the chapter will examine, using the case study, the degree to which the assumptions upon which the IR Policy regime is based are borne out in practice. What does the case study tell us about the role played by social specialists in decision-making? What does it tell us about the degree to which the threat of a community complaint can help to encourage an attitude of good faith compliance in a project sponsor? This chapter will be organised in two parts in order to answer the two questions raised by the regulatory structure of the IR Policy regime. First, when and how do social specialists acquire the power to play the authoritative role they are assigned by the regime? Secondly, how and how effectively do social specialists exercise their power in order to discharge their regulatory and legitimation responsibilities?

CIRCUMSTANCES AFFECTING THE INTERPRETIVE POWER OF SOCIAL SPECIALISTS

How to Identify Social Specialist Influence in the Case Study?

How can one estimate the degree to which social specialists are actually involved in making a regulatory decision in the manner expected by the IR Policy? When assessing a particular case, it is not enough to know simply whether a specialist was or was not consulted. Presence does not necessarily imply influence. A social specialist's advice may, for example, be ignored within an organisation. Alternatively, a layperson may be sufficiently familiar with specialist reasoning and methods to address a given situation without direct professional guidance. In the end, assessing social specialist impact on decision-making requires examining the decisions themselves. Do they bear the marks of having been made in accordance with a distinctive type of rationality attributed to social specialists? What other kinds of rationalities can be seen to have influenced the making of the decision? The following section will sketch an outline of this distinctive type of rationality associated with

[7] S Joyce and M MacFarlane, 'Social Impact Assessment in the Mining Industry: Current Situation and Future Directions' MMSD Background document (London, IIED, 2001), RJ Burdge and P Opreyszek, 'On Mixing Apples and Oranges: the Sociologist does Impact Assessment with Biologists and Economists' in RJ Burdge (ed), *A Conceptual Approach to Social Impact Assessment* (Middleton, Ill, Social Ecology Press, 1994), JA Fox and LD Brown (eds), *The Struggle for Accountability, The World Bank, NGOs and Grassroots Movements* (Cambridge, Mass, MIT Press, 1998).

social specialists. It will be contrasted with two other types of rationality that are intended to be used in the making of regulatory decisions in the IR Policy regime. This set of three ideal-types of rationality will provide a heuristic device which will subsequently be used to assess the relative influence of social specialist rationality over IR Policy decision-making in the case study.

Three Rationalities of Decision-Making

Three different ways of making decisions are proposed here in order to act as guides to analysis. Each represents a different mode of decision-making that is based upon a different form of reasoning, a different type of knowledge, different ideas and practices about how facts are gathered and considered, and different interpretive conventions. Each is an ideal-type that is based on a different kind of rationality: that is to say, each uses a different way of making sense of the world and of judging what is important within it. The three modalities of decision-making that will be considered here are private sector business rationality, the professional rationality of social specialists and the rationality of public participation in decision-making.[8] Of course these are not the only rationalities used to make regulatory decisions. These three modalities have been selected for use as analytical tools because of the different factors already identified to be at play in IR Policy decision-making. The influence of social specialists is measured not by the number of experts hired by a project but by the degree to which their professional rationality can be seen to influence regulatory decision-making.

Here, private sector business rationality will be used to represent a central part of the conventional approach to decision-making taken within the private sector business world. Individuals apply this rationality when their actions are oriented towards achieving the goals of a business organisation. The goal in question may be anything from ensuring the long-term viability of the company to completing a construction project on time and under budget. The principal tool for making judgements is cost-benefit analysis, and issues tend to be perceived through an economistic lens.[9] Its outlook is often closely aligned with liberal legalist conceptions, such as those of exclusive, exchangeable property rights. Business rationality is focused upon end results rather than on means per se. Doing what is necessary to achieve the desired

[8] Of course, this does not exhaust all possibilities. The three rationalities are chosen for their relevance to the present study. This analysis owes a clear debt to Mashaw's work: see J Mashaw, *Bureaucratic Justice* (New Haven, Conn, Yale University Press, 1983).

[9] Teubner refers to the guiding discourse of business actors as 'the economic code'—the conceptual lens used for discerning opportunities for economic advantage. He distinguishes this from the legal code which attempts instead to read economic relations as sources of enforceable obligations: G Teubner, 'The Two Faces of Janus: Rethinking Legal Pluralism' (1992) 13 *Cardozo Law Review* 1443 at 1454–5.

results and 'getting on with the job' are core values within business rationality.[10]

Business rationality, as we shall see below, differs from professional rationalities which are linked to their own forms of specialised knowledge. In contrast, business rationality is grounded upon a generalist outlook. Business management is associated with its own, often sector-specific, sphere of knowledge and practice, but it has as a whole eluded professionalisation.[11] Business rationality calls upon outside forms of specialised knowledge and practice to provide the information necessary for effective decision-making. Thus many of the tools and facts considered in the application of business rationality—such as market projections, actuarial tables or legal opinions—are provided by specialists using their own forms of knowledge. Highly useful tools and forms of knowledge may become entrenched in business practice. However, in principle, there is no necessary link between business rationality and any particular profession or specialised knowledge. Expert knowledge is called upon on an instrumental basis. When it is not perceived to be useful, it is liable to be discarded.[12]

Various indicators may be used to show the influence of business rationality in a regulatory decision. The hallmarks of business rationality are efforts at cost control, profit maximisation and expediency. As noted above, business rationality is bottom-line oriented: doing what is necessary to achieve a business objective and 'getting on with the job' are among its primary values. The pursuit of business objectives occurs within a guiding framework. The boundaries for the proper exercise of business rationality may be set by factors such as the prevailing norms of business practice, the corporate culture of a firm, or the judgements of professionals. Due to its nature, however, business rationality tends to struggle against boundaries that complicate reaching desired objectives.[13]

Social specialist rationality in contrast is a professional or expert form of decision-making rationality. Professions are exclusive occupational groups which assert a claim to special knowledge. Each profession aims to legitimate its status in competition with other groups[14] and strives to create a market for

[10] W Cragg and A Greenbaum, 'Reasoning about Responsibilities: Mining Company Managers on What Stakeholders are Owed' (2002) 39 *Journal of Business Ethics* 319.

[11] A Abbott, The System of Professions (Chicago, Ill, University of Chicago Press, 1988) at 132.

[12] Macaulay observes that the professional knowledge of lawyers is generally rejected by business people in resolving disputes with long-term trading partners. In Macaulay's study, business people preferred to resolve matters informally in order to preserve the relations of trust among the parties. Lawyers were called in only once the relationship had failed: S Macaulay, 'Non-Contractual Relations in Business: A Preliminary Study' (1963) 28 *American Sociological Review* 55 at 61–2.

[13] RL Nelson and LB Nielsen, 'Cops, Counsel, and Enterpreneurs: Constructing the Role of Inside Counsel in Large Corporations' (2000) 34 *Law and Society Review* 457.

[14] Abbott, n 11 above.

its services.[15] Professional rationalities are distinguished by the fundamental role they assign to professional knowledge and practice in decision-making. In their ideal-type, these rationalities are not oriented by business interests. In principle, neither a doctor's diagnosis of an illness nor a lawyer's opinion regarding the legality of a transaction are supposed to be influenced by financial considerations.[16] Judgements must be made in line with an autonomous body of norms and practices. This autonomy is fundamental to legitimating professional authority.[17] Professional assessments are held to be reliable to the extent that they comply with an accepted body of principles and conventions the authority of which can be confirmed by a reputable professional community. An element of mystery and charisma pervades the office of the professional that lends authority to judgements made in her or his area of expertise.[18]

The established professions constitute strong epistemic communities in which collective norms, conventions and dispositions are reproduced.[19] This is accomplished in part through formal self-regulation of matters such as education, apprenticeship, licensing and disciplinary issues. It is also reproduced informally through competition taking place within a profession, as members struggle with one another for authority over their field of practice.[20] Although private in nature, professional practice carries with it an important element of public trust. The maintenance of professional standards in private practice by for example, doctors, engineers, lawyers and accountants is fundamental to the integrity of the systems of public health, public safety, official legality and capital formation.[21]

As observed in Chapter four, the social specialist profession is not a highly established one.[22] It lacks, for example, formal institutions for accreditation or disciplinary self-regulation.[23] Nevertheless, the form of rationality required for social specialist work clearly falls within the category of profes-

[15] Y Dezalay and BG Garth, *Dealing in Virtue. International Commerical Arbitration and the Construction of a Transnational Legal Order* (Chicago, Ill, University of Chicago Press, 1996).

[16] It may be that, in practice, the social specialist is deeply conscious of the cost implications that his or her findings may have for his or her client. If so, this is a case in which business rationality is allowed to dominate social specialist reasoning.

[17] SA Reiter and PF Williams, 'The Independence Wars and the System of Professions', Paper presented at Asian Pacific Interdisciplinary Research in Accounting Conference, Adelaide University, 15–17 July 2001.

[18] Mashaw, n 8 above.

[19] P Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38 *Hastings Law Journal* 805.

[20] Ibid, Dezalay and Garth, n 15 above.

[21] Reiter and Williams, n 17 above.

[22] RJ Burdge, 'Why is Social Impact Assessment the Orphan of the Assessment Process?' (2002) 20 *Impact Assessment and Project Appraisal* 3, A Chase, 'Anthropology and Impact Assessment: Development Pressures and Indigenous Interests in Australia' (1990) 10 *Environmental Impact Assessment Review* 11.

[23] RJ Burdge and F Vanclay, 'Social Impact Assessment: a Contribution to the State of the Art Series' (1996) 14 *Impact Assessment* 59 at 67.

sional decision-making.[24] Social specialists are contracted in order to make expert determinations regarding the social impacts and entitlements of project-affected populations, including those displaced by private sector development. Specialised formal guidelines and principles for social assessment have been developed by practitioners[25] and a nascent but sparse professional literature has emerged in several impact assessment journals.[26] The social specialist's work is understood to require both special technical knowledge regarding the 'social'[27] and professional independence from the business objectives of a project.[28]

The regulatory influence of social specialist rationality can be detected by reference to the influence of its professional norms on decision-making. Both the literature on social specialist practice[29] and the practice guidelines set out by the ICGP[30] provide relatively detailed potential sources for identifying these norms that could be used to guide analysis. Instead, however, to avoid presupposing the particular content of any norms shared by social specialists in practice, only two very general criteria will be adopted here. Social specialist rationality will be found to be influential in regulatory decision-making where, first, information is gathered through social scientific practices (such as baseline surveys, participant observation, etc.) that are carried out competently; and, secondly, where IR Policy rules are interpreted and applied as a result of a close understanding of 'the social'.

What is 'the social'? The term must be defined according to its particular regulatory context. As discussed in Chapter 4, the WBG IR Policy regime was designed to address the persistent failure of liberal legalist and other state-mandated resettlement compensation schemes to deter the impover-

[24] K Finsterbusch, 'In Praise of SIA—a Personal Review of the Field of Social Impact Assessment: Feasibility, Justification, History, Methods, Issues' (1995) 13 *Impact Assessment* 229.

[25] Interorganisational Committee on Guidelines and Principles for Social Impact Assessment, 'Guidelines and Principles for Social Impact Assessment' (1995) 15 *Environmental Impact Assessment Review* 11.

[26] See Burdge, n 22 above. The practice guidelines for Social Impact Assessment established by the Interorganisational Committee on Guidelines and Principles for Social Impact Assessment have been written for use in the US in accordance with the National Environmental Policy Act of 1969. As Vanclay observes, the guidelines are not written in a format suitable for adoption internationally. F Vanclay, 'Conceptualising Social Impacts' (2002) 22 *Environmental Impact Assessment Review* 183 at 189–90.

[27] S Lockie, 'SIA in Review: Setting the Agenda for Impact Assessment in the 21st Century' (2001) 19 *Impact Assessment and Project Appraisal* 277.

[28] M Fearnside, 'The Canadian Feasibility Study of the Three Gorges Dam Proposed for China's Yangzi River: A Grave Embarrassment to the Impact Assessment Profession' (1994) 12 *Impact Assessment* 21, PC Jobes, 'Social Control of Dirty Work: Conflict Avoidance in Social-Impact Assessment' (1985) 5 *The Rural Sociologist* 104 at 108, and RE Rickson and ST Rickson, 'Assessing Rural Development: The Role of the Social Scientist' (1990) 10 *Environmental Impact Assessment Review* 103 at 108–9.

[29] Eg, CJ Barrow, *Social Impact Assessment: An Introduction* (London, Arnold, 2000), Finsterbusch, n 24 above.

[30] Interorganisational Committee on Guidelines and Principles for Social Impact Assessment, n 25 above.

ishment of displaced persons in the Global South. These schemes fail in large part because they are based on the legal fiction of official freehold tenure. In the liberal legal model, full compensation is realised on payment of fair market value for officially recognised property interests. However, rural livelihoods in the Global South depend upon a host of informal entitlements and customary relations that fall outside the liberal legalist schema. These include systems of informal ownership, common property and use-rights, as well as non-market production and exchange networks. This, then, is the sphere of the 'social'. It is the objective of the IR Policy regime—and the task of the social specialist—to investigate these intensely local entitlements and relations and to design a course of action that will ensure the restoration of livelihoods.[31] The social is that sphere of local relations that lies outside liberal legalist conceptions of entitlement and which is considered vital to the realisation of the goals of WBG IR Policy.

The third decision-making rationality proposed here is that of public participation. As the name indicates, this rationality concerns the involvement of affected third parties or members of the concerned public in the making of decisions. The term 'affected third party' is used here to describe persons who are affected in some way by the proposed or current actions of others. Participatory rights are assigned in order to allow such persons to protect their endangered interests and, in so doing, to legitimate the decision-making process.[32] This involves projecting into the decision-making process the influence of affected members of the public in a form and to an extent understood to be appropriate to the goal of interest-protection. We have seen that the realisation of business objectives and adherence to professional norms provide the orienting logics of the two rationalities outlined above. Similarly the exercise of a participatory rationality is oriented towards an appropriate expression of the will of affected persons and groups. Such a rationality is in evidence, therefore, when this will is both effectively canvassed and appropriately influential on decision-making. In the ideal-type of this rationality, the will of affected third parties is expressed smoothly,

[31] This task is complicated by the fact that these local customary relations do not exist as a static code. Rather they consist of 'a living, negotiated tissue of practices which are continually being adapted to new ecological and social circumstances—including, of course, power relations': JC Scott, *Seeing Like a State* (New Haven, Conn, Yale University Press, 1998) at 34. Inevitably, the work of the social specialist will involve a codification of existing practice. The specialist is called upon to construct an approximation of this 'living tissue' and to translate it into a series of fixed entitlements to land, resources or other assistance to be provided by the project sponsor. Presumably, the entrenchment of social specialist work as a profession would involve the development of strong shared conventions and practices relating to this codification and translation work.

[32] G Pring and SY Noe, 'The Emerging International Law of Public Participation Affecting Global Mining, Energy, and Resources Development' in DN Zillman, AR Lucas and G Pring (eds), *Human Rights in Natural Resource Development* (Oxford, Oxford University Press, 2002).

without distortion by those charged with facilitating the process of participation.[33]

Much, of course, hangs on the word 'appropriate'. While participatory rationalities are all premised on the view that third parties must be involved in decision-making, they differ from one another with regard to the kind of involvement in decision-making that is considered to be suitable. As we have seen in Chapter 4, participatory practices fall along a continuum of power ranging from negligible involvement (the right to receive information) to considerable involvement (bargaining or control).[34] Just as professional rationalities are based on the application of specialised professional norms, participatory rationalities are based upon the application of their own particular participatory norms to decision-making processes.[35]

A participatory rationality will be seen to be influential when effective participatory processes actually occur and when the results of these processes are able to impact upon decision-making. These processes must promote the flow of relevant information to and from the concerned third parties in a manner capable of affecting the facts and rule interpretations used to make regulatory decisions. The degree of influence required will depend upon the kind of participatory rationality that is being applied. Where the rationality in question is based upon a relatively weak form of participation (such as consultation), effective influence will require only that the participatory processes in evidence offer, at a minimum, a real possibility of affecting decision-making. With regard to a rationality that is based on a stronger degree of public participation (confusingly, the word 'participation' itself is often used in this stronger sense in the literature[36]), an actual impact on decision-making will be required.

[33] World Bank, *The World Bank Participation Sourcebook* (Washington, DC, DC, World Bank, 1996) at 3–4. As noted in Ch 4, a critical literature has emerged that is sceptical of this claim in practice: see B Cooke and U Kothari (eds), *Participation: The New Tyranny?* (London, Zed Books, 2001), W Cowrie, 'Introduction' (2000) XXI *Canadian Journal of Development Studies* 401, I Guijt and M Kaul Shah, *The Myth of Community* (London, Intermediate Technology Publications, 1998).

[34] AS Carter, 'Community Participation as an Indicator of Social Performance at International Mining Projects', MERN Working Paper No 131 (Bath, MERN, 1998), DE Rocheleau, 'Participatory Research and the Race to Save the Planet: Questions, Critique, and Lessons from the Field', *Agriculture and Human Values* (Spring-Summer 1994) 4.

[35] See, eg, GA Daneke, MW Garcia, and J Delli Priscoli, *Public Involvement in Social Impact Assessment* (Boulder, Colo, Westview Press, 1983), International Finance Corporation, *Doing Better Business Through Effective Consultation and Disclosure* (Washington, DC, IFC, 1998), Rocheleau, n 34 above, World Bank, n 32 above. In addition to the type of involvement (eg information, consultation, negotiation), these norms have two dimensions: first the manner in which third party interests are represented in decision-making (by elected delegates, by traditional leaders, self-representation by individuals, etc); and, secondly, the methods used to develop the positions taken by representatives (voting, consensus, hierarchy, bargaining, informal mechanisms, etc).

[36] Participation is used in the literature in two ways. First, it is a general title referring to all methods of public involvement: Pring and Noe, n 32 above. Secondly, it is also used as a sub-category that describes a particular type of public involvement greater than consultation. Eg,

In sum, each of the three decision-making rationalities exhibits a different guiding orientation that is in principle in conflict with the others. In its ideal-type, business rationality prioritises accomplishing business objectives over adherence to either professional norms or participatory norms. Similarly, social specialist rationality resists the economic calculus of business decision-making and privileges expert norms over public participation. Participatory rationalities give precedence to expressing the will of affected third parties above either the business concerns of a firm or the professional judgements of social specialists. The guiding orientations and the indicators for detecting the relative influence of the rationalities in practice are summarised below in Table 7.3.

Table 7.3: Identifying Traits of the Decision-making Rationalities

Type of Rationality	Orientation	Indicators of Influence
Business rationality	Business objectives	Rule interpretations that promote expediency, efficiency, 'getting the job done'.
Social specialist rationality	Professional norms	Social science methods of data gathering. Rule interpretations based on social factors.
Participatory rationality	Public (or third-party) will	Flow of information to and from affected groups that has an impact upon decision-making.

Roles Assigned to the Rationalities by the IR Policy Regime

Although they exist in competition, all three types of rationality are employed in the formal decision-making structure set out by the IR Policy regime. I have argued earlier in this chapter that social specialist rationality is charged with playing a dominant role in ensuring the effectiveness and credibility of the regime. It is invested with the authority to make factual findings and to interpret how the rules of the IR Policy should be applied to the context in question. WBG IR Policy stipulates that qualified social experts are to be charged with designing and reviewing IR activities.[37] Business ratio-

the World Bank's *Participation Sourcebook* contrasts participation with consultation and states that 'participation must involve some degree of shared control': World Bank, n 33 above, at 11). See also R Roberts, 'Public Involvement: From Consultation to Participation' in F Vanclay and DA Bronstein (eds), *Environmental and Social Impact Assessment* (Chichester, John Wiley & Sons, 1995).

[37] Operational Directive 4.30 (OD 4.30), paras 22, 25; Operational Policy 4.12 (OP 4.12), paras 19, 32; Bank Policy 4.12 (BP 4.12), para 2.

nality comes into play when the cost implications of social specialist decisions are to be considered. The figures provided by the social specialist will be used by the business manager to determine whether the project remains economically viable once resettlement costs are taken into consideration.[38] Presumably a negotiation will occur concerning how to minimise these costs. However, it is the specialist's responsibility to ensure that the regime's standards are not compromised by any measures taken.[39]

IR Policy also deploys a particular participatory rationality that is designed to influence decision-making. What is the nature of this rationality? WBG IR Policy states that affected persons are to be informed and consulted from the earliest stages, that they are to be given opportunities to participate in resettlement planning and implementation, and that they are permitted to choose between acceptable resettlement alternatives.[40] These provisions indicate that the regime's participatory logic is, first of all, premised upon a relatively extensive deliberative engagement with affected local actors. Secondly, they suggest that regulatory decision-making should produce outcomes that meet with the approval of affected local actors. However, the regime does not require project sponsors to satisfy a community's demands. Ultimately, the project sponsor's IR Policy responsibilities are limited to delivering resettlement solutions that meet an objective standard ('acceptable resettlement alternatives').

The responsibility for certifying acceptability—and for giving practical shape to the regime's vaguely worded participatory provisions—falls to social specialist rationality. Thus, the participatory rationality propounded by the IR Policy regime is a subordinate logic. The application of the IR Policy's rules on public participation in decision-making is intended to be structured by social specialist rationality. Once involved, community actors may insist on alternative methods of participation. However, pursuant to the IR Policy regime's regulatory model, it is the social specialist's task to confirm that the participatory mechanisms chosen are appropriate in the circumstances.[41]

It should be noted that the professional rationality of lawyers is also called upon in the IR Policy decision-making framework. WBG IR Policy states that resettlement planning and implementation activities must comply with formal state legal regimes in land acquisition and resettlement activities.[42] This compliance is to be managed by qualified legal experts.[43] Thus although the requirements of IR Policy go beyond those of official state legal regimes,[44]

[38] M M Cernea, Involuntary Resettlement in Development Projects. World Bank Technical Paper No 80 (Washington, DC, World Bank, 1988).

[39] This is demonstrated by the fact that after the resettlement plan is designed, it must be submitted for expert review by a WBG social specialist: OD 4.30, n 5 above, para 25.

[40] Ibid, paras 3, 8, 9, 11.

[41] This suggests that participatory rationality is a subordinate logic in the IR Policy regime.

[42] OD 4.30, n 5 above, paras 5, 12, 13, 14.

[43] Ibid, paras 24, 25, 27.

[44] Ibid, para 3(d).

they do not trump the requirements of those regimes. Lawyers' rationality is active in IR Policy decision-making to the extent required to ensure that state law is not violated. The broader objectives of IR Policy are to be attained through the application of social specialist knowledge.

An Additional Factor: Co-operation versus Defection

The use of different ways of making decisions is not the only factor to be taken into consideration in the evaluation of the functioning of the IR Policy regime. Equally important is the question of the extent to which participants in the IR Policy regime's regulatory conversations are motivated to adopt an attitude of good faith compliance towards the regime.

Game theory models of regulatory behaviour acknowledge that actors may take quite different attitudes towards their involvement in a regulatory 'game'. An actor's behaviour is assumed to be oriented towards either co-operation or defection.[45] For a regulatee (ie the entity being regulated), co-operation constitutes a *bona fide* effort to comply with the letter and spirit of regulatory provisions, whereas defection entails an effort to defy, escape or subvert the intent of a regulatory regime. For a regulator, co-operation involves adopting a flexible approach with a regulatee in order to attain the objectives of the regulatory regime. Defection on the other hand may take two forms. First, a regulator may lapse into an aggressive, rule-bound stance in which prosecution is sought for technical rather than substantive infractions.[46] This may lead to literal compliance; however, it is likely to do so at an unacceptable cost by unreasonably harming economic performance. Secondly, a regulator may defect from the regime by becoming 'captured' by the firm or industry it is intended to regulate.[47] In such cases, the regulator will abrogate its regulatory responsibilities and give the firm preferential treatment in defiance of the objectives of the regime in question. In reality, the behaviour of any actor with regard to a legal order is likely to fall upon a scale somewhere between full co-operation and total defection. Furthermore, an actor is likely to be susceptible to changing his or her orientation depending on circumstances.

In their study of regulatory strategies, Ayres and Braithwaite highlight the capacity of actors to adopt co-operative or combatative responses depending upon how they are treated by regulators. These authors focus upon how regulators can promote and maintain co-operative behaviour among their

[45] JT Scholtz, 'Deterrence, Cooperation and the Ecology of Regulatory Enforcement' (1984) 18 *Law & Society Review* 179.

[46] I Ayres and J Braithwaite, *Responsive Regulation* (Oxford, Oxford University Press, 1992) at 31.

[47] Ibid, at 54–5.

regulatees.[48] Our task is somewhat different, yet acknowledgement of the basic capacity of actors to change their attitude towards a regulatory regime is also fundamental to our inquiry. In examining how regulatory decisions are made in the case study, it is not enough, therefore, to determine which mode or modes of decision-making (whether the rationality of business, social specialists or public participation) have come into play. Equally important is the end to which the relevant rationality is put.

None of the three types of decision-making rationality is either automatically good or bad in terms of the IR Policy regime. Each form may be used in either a co-operation or defection mode. That is to say each may be used in such a way as either to attain or to defeat the purposes of the regime. For example, where business rationality is the primary instrument used for decision-making, the decision to adopt a co-operative stance with regard to the regulatory scheme will involve a good faith layperson's approach to interpreting and applying rules in line with corporate priorities and budgets allocated. Defection, on the other hand, will involve ignoring or subverting inconvenient rule provisions. Use of social specialist rationality in the defection mode will be likely to involve 'creative compliance'—the use of expert knowledge to achieve formal compliance with a set of rules while nevertheless subverting their intent.[49] Equally, public participation in decision-making may be used—whether by corporate or community actors—to hijack the regime in an effort to promote goals contrary to those espoused by the regime itself.

Limitations of the Approach and a Hypothesis

This chapter will review the IR Policy regulatory decisions made in the case study in order to examine whether, how and when social specialist influence is able to play the guiding role assigned to it by the regime. This will be done using the heuristic tools developed thus far: principally the three rationalities and their indicators summarised in Table 7.3. Following this analysis, the discussion will turn to the question of the quality of social specialist decision-making. When social specialist power has been at its greatest, how does it perform?

[48] Their argument in brief is that regulators are most likely to promote co-operative responses among regulatees when they adopt an initially positive or forgiving attitude, followed by an escalating tit-for-tat strategy. Accordingly, an initial violation should be treated as a good faith mistake and the offender should be encouraged to progress along the road to compliance. However, foot-dragging or further violations should be met with progressively more stern responses: ibid, at 20–53.

[49] D McBarnet and CJ Whelan, 'Creative Compliance and the Defeat of Legal Control: The Magic of the Orphan Subsidiary' in K Hawkins (ed), *The Human Face of Law* (Ixford, Clarendon Press, 1997).

The approach taken to this inquiry entails certain limitations. The present study involves the examination of only one case. This restricts the weight and generality of the conclusions that can be drawn from it. Two strategies are used to mitigate this limitation. First, the case will be examined to see whether it lends support to a dynamic already identified in the literature on WBG safeguard policy development and compliance. Fox and Brown have argued that the relative influence of 'pro-social' reformers within IBRD and IDA has been closely tied to the presence of outside criticism of safeguard policy performance—when this criticism has been backed by political and economic leverage.[50] The present case study affords the opportunity to examine whether the influence of social specialists within MIGA and the transnational mining sector responds to a similar dynamic. Thus the case study will be used to test the following hypothesis: the influence of social specialist rationality in decision-making will wax or wane depending upon the degree to which IR Policy compliance is translated into a significant business pressure on the firm.

Secondly, internal comparisons will be made in the case study in order to deepen the analysis. The events presented in the San Marcos–Antamina case provide the opportunity to examine four distinct stages in which different interpretations of IR Policy rules were applied. By comparing the changes in interpretation associated with changes in circumstances affecting power relations in the corporation, more persuasive conclusions may be drawn.

A further possible objection to the contemporary relevance of this study relates to the period it covers: the major events in question occurred between 1998 and 2001. It may be argued that since this time, both MIGA and many senior transnational mining enterprises have significantly increased their sophistication regarding community issues in general and the application of WBG safeguard policies in particular. In 1998, MIGA had just adopted the safeguard policies and had little formal experience with them. Furthermore, the establishment of the CAO in 2000 has provided both IFC and MIGA with an important expert interlocutor that has deepened the engagement of each organisation with safeguard policy issues. For its part, in the years since 2000, the transnational mining industry has been involved in several major multi-stakeholder initiatives dealing with mining, community and sustainable development concerns. These include the industry-sponsored Mining, Metals and Sustainable Development (MMSD) process, the World Bank Group's Extractive Industries Review, and the formation of the industry's own International Council on Mining and Metals (ICMM), an association dedicated to addressing sustainability and community issues.[51]

In response it can be affirmed that the case study is rooted in a particular

[50] Fox and Brown, n 7 above.

[51] For a description of MMSD, EIR and ICMM see Ch 3 and the following websites: www.iied.org/mmsd/, www.eireview.org/ and www.icmm.com/.

time and place. The analysis presented here does not attempt to conclude that either MIGA or the mining enterprises in question have remained unchanged in their attitudes towards WBG safeguard policies or social specialists in the years following 2000. It is indeed possible, if not probable, that these organisations have deepened their institutional commitments to the use of social specialists in ensuring WBG safeguard policy compliance. Nevertheless, by examining the dynamics of social specialist influence, the case study retains relevance to contemporary practice. The essential regulatory structure of the IR Policy regime has not changed since the period covered in the case study. Thus, while the level of commitment to social specialist-led application of WBG IR Policy may arguably be greater today than in the past, the fundamental issue of the relative power of specialist influence in changing circumstances remains the same. In what kinds of situations is specialist influence maximised? What kinds of results are produced by specialists when their power is predominant? To the extent that the case study is able to provide insight on these questions, it remains valuable.

IR POLICY REGULATORY DECISIONS MADE IN THE CASE STUDY

Analyzing the Regulatory Decisions Made

Analysis of the performance of the IR Policy regime in the case study will focus upon regulatory decisions made with regard to three principal issues. These are:

1. How eligibility for resettlement compensation or assistance under the regime was determined;
2. The material entitlements provided to eligible persons; and
3. The nature, form, and quality of local participation in decision-making.

It is notable that over the course of the period covered by the case study these regulatory decisions were revised several times. Several distinct stages are apparent during which different rule interpretations were asserted. Each stage was preceded by a change in external circumstances that affected the behaviour of the actors involved in producing regulatory decisions. Examination of how decision-making changed from one stage to another allows us to draw conclusions about how the different external factors influenced actors' behaviour, particularly relations of power and interpretive authority within the firm. These stages are:

1. Initial resettlement planning;

2. Land acquisition;
3. Accelerated Resettlement Plan (ARP);
4. MIGA compliance review.

The sections that follow will review the regulatory decisions made during the case study and how they changed as a result of external influences. This will be followed by a discussion which examines the roles played by the three different decision-making modes during each phase.

A Brief Recapitulation of WBG IR Policy's Eligibility, Entitlement, and Participatory Requirements

With regard to eligibility, WBG IR Policy provides that resettlement compensation and assistance are owed to persons displaced by a project. Displacement is not defined in Operational Directive 4.30 on Involuntary Resettlement (OD 4.30), the version of the policy in force during the case study.[52] However, OD 4.30 does make it clear that eligibility is not limited to holders of legal title to land. Those who have lost informal rights to resources or use rights that amount to less than exclusive ownership ('usufruct or customary rights to the land or other resources taken for the project') are also eligible for compensation and assistance.[53] In recognition of the complexity involved in determining eligibility, OD 4.30 states that the project sponsor should establish 'criteria for determining the resettlement eligibility of affected households'.[54] As an example of one such criterion, it states that 'households that have only partially lost their assets but are no longer economically viable should be entitled to full resettlement'.[55]

With regard to entitlement—that is to say, the kind of compensation and assistance to which eligible persons are entitled—WBG IR Policy provides the following. Resettlement efforts should be conceived as 'development programmes' designed to compensate displaced persons for their losses and to assist them 'to improve . . . or at least to restore' pre-displacement 'living standards, income earning capacity, and production levels'.[56] Several further

[52] In contrast, Operational Policy 4.12 (OP 4.12), n 5 above, the revised IR Policy currently used by IBRD and IDA, provides a clear definition of displaced persons. The term designates those who, as a result of an involuntary acquisition of land, either (a) lose shelter or must be relocated, (b) lose assets or access to assets, or (c) lose income sources or means of livelihood, whether or not they must move to another location: ibid, para 3.

[53] OD 4.30, n 5 above, para 3(e).

[54] Ibid, para 14(c).

[55] Ibid, para 14(c).

[56] Ibid, paras 3 and 3(b). In its entirety, para 3(b) of OD 4.30 provides: '[d]isplaced persons should be (i) compensated for their losses at full replacement cost; (ii) assisted with the move and supported during the transition period in the resettlement site; and (iii) assisted in their efforts to improve their former living standards, income earning capacity, and production levels, or at least to restore them'.

stipulations are provided regarding the kinds of strategies to be used to attain this benchmark. Preference should be given to land-based resettlement strategies for people dislocated from agricultural settings. Cash compensation alone is normally inadequate in these circumstances.[57] Where equivalent replacement land is limited, improvements (such as irrigation or land reclamation projects) may be required.[58] In addition, restoration of pre-displacement livelihoods may require further strategies such as vocational training, employment counseling, provision of employment, assistance to small businesses, etc.[59] Lastly, the Policy provides that customary and formal rights should be treated as equally as possible in devising compensation rules and procedures.[60]

With regard to participation, OD 4.30 sets out requirements on four levels: information, consultation, participation and dispute settlement. Affected groups 'need to be systematically informed and consulted' during resettlement planning 'about their options and rights'.[61] Institutionalised arrangements, such as regular meetings between project officials and communities, should be provided for resettlers and hosts to communicate their concerns about the resettlement programme to project staff throughout planning and implementation.[62] Particular attention must be given to ensure that vulnerable groups such as indigenous people, ethnic minorities, the landless and women are represented adequately in such arrangements.[63] With regard to stronger forms of public involvement, OD 4.30 states that 'community participation' in planning and implementing resettlement 'should be encouraged',[64] and that resettlers should be able to choose from a number of acceptable resettlement alternatives.[65] In a footnote, OD 4.30 adds that resettlement plans should include schemes for resolving resettlement-related disputes, such as disputes involving compensation.[66]

First Phase: Resettlement Planning

During resettlement planning, the question of who would be eligible for resettlement compensation and assistance (a 'displaced person') was viewed

[57] Ibid, paras 4 and 13.
[58] Ibid, para 13.
[59] Ibid, para 18.
[60] Ibid, para 17.
[61] Ibid, para 8.
[62] Ibid, para 8.
[63] Ibid, para 8.
[64] Ibid, para 3(c). This paragraph of the Directive adds that appropriate patterns of social organisation should be established for community participation, and existing social and cultural institutions of resettlers and their hosts should be supported and used to the greatest extent possible.
[65] Ibid, para 8.
[66] Ibid, n 11.

as an uncomplicated one. CMA's Resettlement Plan reveals no understanding of seasonal, partial and kinship-based occupancy and use of highland pastures. Instead planning was based on the layperson's (or the outsider's) expectation that residence, ownership and rights of land use in rural Andean environments are congruent. As a result, resettlement was treated as a straightforward process involving an easily identifiable group of displaced persons: those who simultaneously occupied, owned and used the lands to be purchased. As time went on, it must have become clear to the individual members of CMA's Community Relations staff and its advisers that no such single group existed. Perhaps to some employees in closer contact with *puna* occupants, it even became clear that residence in the highlands and usage of its resources were questions of degree rather than binary propositions. However, despite any such knowledge, until MIGA's compliance audit was triggered, the basic assumption that the identification of the population of displaced persons was a conceptually simple matter was unchallenged in practice.

With regard to the entitlement owed to eligible persons, CMA first proposed a land-based strategy in which purchased lands would be replaced by equally productive terrain. Later, when it appeared that sufficient suitable land could not be found nearby, several possible secondary strategies were proposed to make up for the productive shortfall, including improvement of pastures, micro-enterprise development, and efforts to promote eco-tourism. Although designed by specialist consultants contracted by CMA, these strategies have since been shown to be highly unrealistic.

Compliance with the participatory requirements of IR Policy during resettlement planning was poor. While information was collected from the local population in the form of a basic census and other studies, information concerning the company's IR plans was not locally disseminated until after these plans had been developed. Accordingly, no effective means for either local consultation or participation in planning were established.

Second Phase: Land Acquisition

A notable shift in focus occurred during the process of land acquisition. During this phase, CMA staff came into close and repeated contact with members of the population with economic ties to the lands the company sought to obtain. As described in the case study, the negotiation process effectively required CMA representatives to become seriously engaged with the aspirations and fears found among this diverse group of people. During individual negotiations, public presentations and group meetings, CMA negotiators found that they needed to speak to these preoccupations in order to encourage *campesinos* to sell their land. The company's plans regarding

resettlement were soon being used to respond to the hopes and concerns of community actors.

The principal shift that took place was a revision of the category of those deemed eligible for resettlement compensation and assistance. During this phase, the offer of resettlement was made specifically to owners of land. This occurred despite the fact that, at a minimum, evidence showing cases of a discrepancy between ownership and occupancy would have been revealed to CMA staff by the land titling process. Company negotiators were dealing with groups of owners which clearly included both persons from outside San Marcos and locals who did not reside in the *puna*. The focus upon owners in land acquisition negotiations led CMA staff to represent resettlement as a commitment that 'belonged' to titled owners rather than to the land's occupants.[67] This occurred quite naturally, given that (1) CMA staff were trying to obtain contracts of sale valid in the eyes of state authorities, and (2) the official land tenancy regime vested the right to transfer land exclusively in the hands of titled owners. The activities of CMA's negotiators were oriented by the conceptual categories and rights established by Peruvian state law rather than those of the IR Policy. The offer to land owners is also evidenced in the written Resettlement Agreements made between CMA and certain land owners. These owners, including the *campesino* community of Ango-Raju, insisted that CMA put its commitment to replace the purchased lands in a written contractual form.

Despite these changes in eligibility, the content of entitlement under the IR Policy was not revised during the land acquisition phase. CMA staff continued to think of resettlement as the provision of replacement land.

With regard to the IR Policy's participatory requirements, however, land acquisition signalled a considerable change. During this phase, CMA representatives initiated the first and the principal local process through which the plans made by the company pursuant to the IR Policy regime was disseminated and discussed with local actors. Much of what people in San Marcos know about resettlement is derived from representations made by CMA staff during the private negotiations and public meetings held during this period. It represents, therefore, an initial high water mark with regard to the level of public participation in IR policy decision-making. However, although this participation was broad, its value is questionable. The following discussion will examine CMA's performance with regard to the IR Policy's requirements regarding information, consultation, participation and dispute resolution.

During the land acquisition phase, CMA representatives did systematically conduct public and private meetings during which information regarding the company's IR Policy plans was disseminated. However, the information

[67] Eg, with the resettlement agreement provided to the campesino community of Ango-Raju, CMA representatives promised land-based resettlement to the community (the legal owner of the land) rather than to the actual occupants of the land to be purchased.

provided was fragmentary and all too often misleading. *Campesinos* were informed of the company's intention to replace the lands that it purchased, but not, for example, that it was doing so in pursuit of a regulatory responsibility designed to protect local livelihoods. Both the content and the existence of the IR Policy regime were kept from local actors. In addition, *campesinos* were made unrealistic promises regarding the benefits they could expect to enjoy once construction of the mining project was underway. In general, local actors received little reliable information with which to make future plans.

Could the process be fairly characterised as consultation? The previous discussion of participatory rationalities set out the following basic requirement. For a process to count as consultative, the convenor of the process must at a minimum be disposed to listen to alternative views in such a way that there is a real possibility that its plans may be changed based on the information received. This was not the case here. The behaviour of CMA staff suggests that the purpose of the public discussion of CMA's resettlement plans was not to inquire into community opinion regarding how MIGA's IR Policy should be applied in San Marcos. Instead, the job given to CMA negotiators was to persuade owners to sell using a pre-set package of offers and inducements. The company's basic plans pursuant to MIGA's IR Policy were presented as a *fait accompli* and as evidence of CMA's good intentions. In other words, although a form of public participation was convened through the sale of land process, CMA representatives sought to prevent this engagement from having an impact on IR Policy decision-making. Most significantly, local people were not provided with the basic information which would have allowed them to be aware of the regime and to discuss its proper application in San Marcos.[68]

Equally, no stronger form of participation was convened during the sale of land process, affected persons were not given the opportunity to choose between reasonable alternatives, and no dispute resolution system was instituted.

Third Phase: Accelerated Resettlement Plan

With the implementation of the Accelerated Resettlement Plan (ARP), the interpretation of eligibility under the IR Policy was revised once again. As outlined in Chapter 6, the ARP was adopted when CMA revised its construction schedule and required the sudden clearance of the lands that it had purchased. The ARP spelled the end of a land-based resettlement strategy, and instead resulted in a process whereby *campesinos* were paid cash for their swift departure from the purchased lands. Resettlement payments

[68] Such as copies translated into Spanish and Quechua of the relevant IR Policy.

were provided to heads of families identified by CMA to be permanently resident on the territory in question.

The use of permanent residence as the criterion which would determine eligibility for resettlement was one of the key regulatory developments of this phase. By this time, CMA staff had ascertained that those with socio-economic ties to the *puna* did not form a simple homogenous group. In order to determine eligibility, CMA planners classified local families into categories based on their residence status.[69] In the schema developed by CMA staff, residence was posed as an either/or question. Families were either permanently resident in the highlands or non-resident. Families who had animals kept in the *puna* but who were not deemed to be permanently resident there were classified as indirect usufructuaries (*usufructuarios indirectos*) and were held not eligible for resettlement.

Eligibility under the ARP was not influenced by the official ownership status of highland occupants deemed by the company to be 'permanent residents'. However, the quantum of resettlement compensation to which families were entitled was affected by ownership status. This represents a violation of OD 4.30 which stipulates that those with either customary or formal rights to land should be treated as equally as possible.[70] Those permanent residents who were also titled owners received full resettlement compensation payments of US$33,000 from CMA, as did those official community members (*comuneros*) resident on *campesino* community lands. In contrast, however, shepherds resident on private land who lacked formal ownership rights were often (but not always) given only a portion of the full resettlement payment. Many of these payments were divided by CMA staff, acting informally, between the shepherd and the non-resident land owner. With respect to non-*comuneros* occupying community lands (referred to as *precarios*), their lack of ownership rights was used by CMA staff as a reason for diminished resettlement payments.[71]

[69] The categories used are:

1. Resident Owner—family resident on privately owned land where the head of the household is one of the titled owners in common.
2. Shepherd—family resident on privately owned land where the head of the household is not one of the titled owners in common.
3. *Campesino* Community Member (*Comunero*)—family resident on land of a *campesino* community where head of the household is a community member.
4. 'Precarious' Resident (*Precario*)—family resident on land of a campesino community where head of the household is not a community member.
5. Indirect Usufructuary—family not resident in the puna who has animals kept there by a shepherd.

GRADE, *Evaluación del Proceso de Reubicaciòn y del Programa de Post-Reubicación en Antamina* (Lima, GRADE 2000) (unpublished report on file with the author), Annex 4.

[70] OD 4.30, n 5 above, para 17.

[71] Ibid, at Annex 4.

Public participation was allowed to have very little impact upon regulatory decision-making during implementation of the ARP.[72] As in the case of the land acquisition phase, the *modus operandi* of CMA Community Relations was to make a plan, to identify a class of interlocutors deemed to be the group entitled to resettlement, and then to pressurise these actors to accept the company's plan without change. Persons outside the group were not accepted by the company as interlocutors, and persons inside the group were pressurised to accept take-it-or-leave-it offers. Accordingly, persons identified as displaced were not offered a choice amongst reasonable resettlement alternatives. As discussed above, the offer of present departure in exchange for the promise of land in the future was not a viable option for *campesinos*, notwithstanding the financial security pledged by the company. Given the stakes at risk, *campesinos* simply could not afford to trust either the company's goodwill or the integrity of the unfamiliar security mechanism it was offering.[73] Accordingly, over the first three phases of the case study, the dissemination of information was tightly controlled by the company, meaningful consultation did not occur, and no broader or further methods of public participation were convened. In addition, no dispute resolution mechanism was instituted.

Fourth Phase: MIGA Compliance Audit

The MIGA compliance audit that followed the complaint sent to the World Bank by community actors in San Marcos triggered a number of significant changes in IR Policy application in the district. As set out in part III of Chapter 6, these changes were designed by two Peruvian social specialist consultants who were commissioned by CMA at MIGA's request to assess the company's IR Policy performance and to identify cases of non-compliance.[74]

First, the question of eligibility was substantially revised. In making their determination, the Consulting Team relied upon two chief sources of data: CMA's previous reports and records relating to resettlement, and a socio-economic baseline survey which it conducted of the relevant population. Since partial pre-resettlement economic data were available for the population who had received resettlement payments, a before-and-after comparison was possible for this group. This comparison revealed that just

[72] The most considerable impact of corporate and community engagement during this phase was the refusal by community actors to accept CMA's initial offer of immediate departure in exchange for future resettlement.

[73] Face-to-face deal-making did, however, occur in many cases in which the shepherd to be resettled was a low-status retainer of the land's owners who did not possess any ownership rights. In these cases (as set out in Ch 6), many land-owners succeeded in bargaining with CMA staff to receive a significant portion of the shepherd's resettlement payment.

[74] GRADE, n 69 above.

over one third of those compensated had become worse off after the ARP. The Consulting Team determined that this group would be eligible for further resettlement assistance. For the uncompensated group, no pre-resettlement data had been generated. Accordingly, the consultants determined the eligibility of uncompensated *campesinos* on the basis of an estimate of the livelihood interest that each family had lost. They classified *puna*-related households into four eligibility categories based upon the amount of time that household members spent in the highlands. This was done on the premise that time spent actively involved in highland-related economic activities reflected the degree to which access to highland pastures was important to the socio-economic wellbeing of a household. According to this reasoning, a family that dedicated considerable time to activities based in the *puna* depended upon the highland territories more than one that spent less time. Highland-related families were classified as full time shepherds, families who alternated regularly between highland and lowland production activities (alternators), and families that visited the highlands perhaps once a month (visiting families).[75] The first two categories were held to be eligible for resettlement under the IR Policy, while those in the third category were not.

The concept of entitlement was also revised during the MIGA compliance audit. The audit established two kinds of resettlement entitlement: compensation in either land or assistance. Compensation in land sought to replace the productive assets lost by the family as a result of CMA's purchases of *puna* territory. Assistance on the other hand was intended to provide income support and, where possible, to help develop the family's capacity to earn income in the future. While the Consulting Team stipulated that replacement land should be of the same area and quality as the former lands used by a household, it provided few details regarding the kind of assistance required. Land was awarded to eligible full-time families who had not received any previous resettlement compensation. Uncompensated alternator families, on the other hand, were divided into two groups: those with primary responsibilities in the *puna*, and those with secondary responsibilities. The primary families were held to be entitled to land whereas the secondary families were awarded assistance. And, lastly, those eligible families who had already received resettlement payments were also deemed to be entitled to assistance, irrespective of whether they were visitors, alternators, or full-timers.

[75] As set out in Ch 6, this user-friendly nomenclature is adapted from G Salas Carreño, *Dinámica social, reciprocidad y reestructuración de sistewas de acceso a recursos: Las familias pastoras de Yanacancha y la presencia del Proyecto Antamina* (Honours Thesis in Anthropology, Pontificia, Universidad Católica del Peru, 2002). In its place, the Consulting Team used the roman numerals I, II and III to designate the three categories: GRADE, n 69 above.

WBG IR Policy is silent on the questions of how and to what extent participatory processes should be used in a post-resettlement evaluation. Given the participatory requirements imposed during resettlement planning and implementation, it may be inferred, however, that IR Policy would emphasise both informing and consulting affected persons, and would encourage using stronger forms of participatory engagement, including dispute settlement.

Engagement between the Consulting Team hired to conduct the audit and the affected population took place on three different occasions: first, during an initial public presentation in San Marcos to explain the work that they had been commissioned to do; secondly, when the Consulting Team gathered information from the affected population by conducting interviews and household surveys; and, thirdly, during the presentation of the final report in an open meeting in San Marcos. A copy of the final report was given to the district municipality to be made publicly available.

Of these three opportunities for engagement, the last was by far the most significant. Attended by most of those claiming a compensatable interest in the highland territories, the consultants' presentation proved to be an extended session during which *campesinos* received substantial information regarding the IR Policy regime. Furthermore, after the meeting was concluded, a large group of persons with questions, claims or outstanding issues was invited to discuss its cases with the Consulting Team. Individual discussions were conducted over the course of an afternoon in an open courtyard in full view of the group of waiting petitioners. Claimants were asked about the amount of time that members of their households had spent in the highlands and were given the opportunity to challenge their categorisation as either visitors or alternators. The consultants cross-checked these claims with statements made by highland residents concerning their neighbours. Some new cases of eligibility were identified and transmitted to CMA as a result of this secondary process.

Although ad hoc in nature, the post-presentation meeting represents a genuine instance of community consultation. *Campesinos* were informed of the basis for the IR Policy decisions made by the consultants and were given the opportunity to rebut the factual findings that had been made in the report. Furthermore this opportunity resulted in some cases of changed decision-making based on community input. Stronger forms of participation, however, were not in evidence during the MIGA audit. In particular, the Consulting Team did not provide community actors with the information or the opportunity to engage deliberatively with the Team with regard to how either eligibility or entitlement should be interpreted in San Marcos. Community actors were allowed to argue that they had been miscategorised. They were not, however, given room to argue that the categories should be drawn differently or that the kinds of entitlement linked to each category should be changed.

ASSESSING THE RELATIVE INFLUENCE OF THE DECISION-MAKING RATIONALITIES

Now that the patterns of change in key areas of regulatory decision-making have been canvassed, these changes can be placed in an overall context. The discussion that follows will examine the relative influence of different decision-making modes over the course of the case study and draw conclusions concerning the factors responsible for supporting the power of one mode over another.

In this analysis, CMA's 'starting point', that is to say, the initial configuration of decision-making modes and attitudes regarding regime co-operation or defection during the resettlement planning stage, is significant for two reasons. First, it provides a baseline for measuring the effects of subsequent pressures and influences. From this perspective, whether the company was 'good' or 'bad' from the outset is beside the point. Instead, the initial position is useful for what it tells us about the directions taken by the company when its context has changed.

Secondly, the initial position taken by the company is interesting in its own right. CMA presents a virtually paradigmatic case of a 'good' mining company in terms of community relations and social responsibility issues. The key drivers related to the adoption of the new school of community relations were virtually all present: the project was very large; project financing requirements were considerable, thereby making the project sponsors reliant on its lenders and guarantors; a World Bank Group agency was involved in financing; the project was situated in a country with a history of relative political and economic instability; the initial project sponsors were senior transnationals with reputations worth protecting; and one of these sponsors had recently been 'burned' as a result of fierce local opposition to a project. Accordingly, the initial position taken by CMA's Community Relations team during resettlement planning—a time when this team was under comparatively little pressure from either inside or outside the company—can give us an approximate idea of what constituted the high point of 'new school' attitudes from 1997 to 2000 in the mining industry.

The First Three Phases: Resettlement Planning, Land Acquisition and the ARP

Starting Point: Resettlement Planning

From the outset, social specialist rationality failed to play the framing role in IR Policy interpretation assigned to it by the WBG regime. We know that social specialist knowledge was called upon at various times during resettlement planning. Expert consultants were hired to prepare the social chapter

of the project's Environmental Impact Statement (EIS) in which the initial Resettlement Plan was presented. Additional consultants were subsequently retained to assist with developing resettlement options, including the selection of sites and various schemes to make up for the shortage of suitable land. A census was conducted by CMA staff and by other consultants to obtain information on the population of persons to be displaced by CMA's land purchases. Substantial information was gathered with regard to the local 'human environment' using social science methods. Nevertheless, the question of eligibility in the Resettlement Plan shows little evidence of a robust 'social' understanding of Andean populations informing IR Policy interpretations.

Instead, the eligible group was conceived of as using the highly misleading liberal legalist concept of exclusive rights to use of property. This simplifying assumption reflects the dominance of business rationality in decision-making and its lead role in organising the project of resettlement planning. It suggests that business rationality was used to identify the issues requiring expert attention, and that social specialist rationality lacked the influence required to alter the established agenda. Nevertheless, social specialist rationality did exert an identifiable influence on some issues. For example, when it became apparent that insufficient replacement lands were available, experts were consulted in order to determine how the shortfall in productive activity could be addressed. There is no evidence, however, that a participatory rationality was exhibited by actors involved in resettlement planning. As set out earlier, no substantive information, consultation, or stronger participatory processes were initiated by the company in a manner that could be expected to influence planning.

Despite these problems, the company's attitude towards IR Policy implementation during resettlement planning was one of general co-operation. Clearly stated key IR Policy provisions, such as the priority of land-for-land solutions and the insufficiency of cash-based resettlement, were taken both seriously and at face value. The land-for-land decision is noteworthy because it runs counter to the common sense of standard business practice: the company was committing itself to replace lands that it would also purchase in a cash transaction. A conventional business perspective would regard either one form of compensation or the other to be sufficient. To opt instead for cash payment *and* land-for-land resettlement shows the independent regulatory influence of the IR Policy regime. The decision therefore reflects both a co-operative attitude to the regime and a certain degree of autonomy and power among those charged with social or community matters within the mining enterprise. At this stage in the game, the Community Relations department had both the desire and the ability to authorise this kind of additional expenditure on the basis of its own judgement regarding appropriate actions in its specialised policy area.

Furthermore, it must be noted that this initial co-operative attitude

towards the 'major' provisions of the regime was tempered by a loose attitude towards compliance with provisions apparently deemed to be of secondary importance. A number of non-discretionary rule provisions were not observed. For example, adequate socio-economic field research was not performed;[76] the Resettlement Plan neither featured the format stipulated by the rules nor contained certain prescribed substantive information;[77] and consultation of local people likely to be displaced did not occur in the earliest stages of resettlement planning.[78] This suggests that MIGA's IR Policy was treated as a set of non-binding norms rather than as a mandatory set of rules. The looseness of this approach suggests an attitude of qualified co-operation on the part of CMA during this phase. The company may have been committed to achieving the central objectives of MIGA's IR Policy, but it was not prepared to spend much time on ensuring compliance with all of the Policy's individual details—whether or not these constituted mandatory provisions of the Policy.

Competing Business Pressures Mount: Land Acquisition and the ARP

Social specialist influence declined over these two stages as competing objectives gained increasing importance. When new pressures arose during land acquisition and the ARP, social specialist knowledge and practices tended not to be mobilised in response. Instead, mounting business concerns were allowed to drive IR Policy-related decisions. This is clearly reflected by the shifts in eligibility and entitlement criteria that took place during these phases. During land acquisition, the need to convince owners to sell land led to resettlement being offered to owners. Once title had been transferred, however, the need to clear land quickly during the ARP led CMA to make cash-based resettlement offers to highland occupants. In particular, amid the intense pressures that led to the ARP, business rationality came out as the clear driver of IR Policy decision-making. This is demonstrated by the overriding importance accorded to the new construction schedule. Nothing was permitted to challenge the constraints it established, including the company's previous commitment to land-based resettlement. When business pressures gained strength, the interpretation of IR Policy requirements was bent to achieve the business objectives of the firm.

In these circumstances, social specialist rationality was superseded by business rationality. There is no evidence of the kind of sophisticated professional reasoning to indicate that social specialist knowledge was used in its 'defection mode' to achieve the company's objectives through creative compliance. Instead, the reinterpretations asserted during the ARP reflect

[76] OD 4.30, n 5 above, para 11.
[77] Ibid, para 5.
[78] Ibid, para 3(c).

many of the commonplace assumptions of the business world. The decision to provide cash-based resettlement may have conflicted with the IR Policy's presumption against the practice;, however, it accorded fully with the conventional business view that legal tender could provide full and fair compensation for an asset. The separation of highland occupants into permanently resident and non-resident categories in order to determine eligibility for resettlement compensation stood, as observed earlier, at odds with the social realities of highland occupancy and use. It accorded, however, with the company's preference for a straightforward and restrictive means for determining eligibility. The decision to provide lesser resettlement payments to those without formal legal ownership of highland territories defied the IR Policy's injunction against treating formal and informal interests differently. It reflected, however, a further subordination of a broader 'social' way of thinking to the narrow liberal legalist view of property entitlements. Even the payment of relatively large sums in resettlement compensation followed from a cost-benefit business logic. A cash premium was paid to vacate the lands in the shortest time possible and thereby avoid the even greater financial costs that would be caused by delaying the project.

As observed earlier, although public participation was convened during land acquisition and the ARP, it was not conducted in a meaningful way either in terms of information, consultation or participation. No independent participatory rationality is discernable in the actions of CMA staff. Nor is there convincing evidence that social specialist knowledge was used to ensure that public participation occurred in accordance with a professional standard. Instead, CMA's use of participation was ordered by the logic and concerns of business rationality. CMA's interpretation of its participatory responsibilities under the regime was oriented towards achieving the instrumental goals of the firm. Community engagement took place with regard to IR Policy issues only when it was necessary to persuade a group to adopt a desired course of action. Furthermore, the strategies used by CMA representatives in these engagements involved the selective dissemination of information accompanied by efforts to restrict the potential influence that community actors might exercise over IR Policy decision-making. Beyond these efforts, public participation in IR Policy decision-making appears to have been resisted. Overall CMA sought to manage participation in such a way as to retain unilateral control of resettlement planning and implementation—by controlling information, restricting debate, and resisting change to its pre-set plans.

The company's initial commitment to an attitude of qualified co-operation with the IR Policy regime can be seen to have waned as competing corporate priorities emerged during land acquisition and the ARP. During the land acquisition stage, it appears that an initial step was taken towards defection, by virtue of the fact that more pressing matters (especially the need to acquire land) were allowed to drive regulatory decisions and relegate the concern for

vigilant compliance with the IR Policy regime further into the background. With the ARP, however, the shift towards defection was significantly magnified. Compliance with IR Policy provisions was often allowed to fall by the wayside as company staff struggled to clear the purchased lands within the time allowed by the revised construction schedule. Resettlement was not conceived as a 'development programme' in which displaced persons would be both compensated and assisted to rebuild their livelihoods.[79] Meaningful consultation or participation in resettlement decision-making did not occur.[80] Those identified as displaced were not offered a real choice between viable resettlement alternatives.[81] Land-based resettlement was rejected in favour of a cash-only offer despite the predominantly pastoral and agrarian livelihoods of the displaced population.[82] Despite warnings within OD 4.30 concerning the likely inadequacy of cash-only approaches to resettlement, no system of counselling or money management assistance was made available to those who received payments.[83] The potential social impacts of such a large infusion of cash in the local economy were also not examined or taken into account. Arrangements for monitoring and evaluating the impact of resettlement were not put into place until much later.[84] Efforts were not made to assist with the integration of those resettled into their new environment.[85] No grievance process was established for resolving disputes related to land acquisition.[86] No amended Resettlement Plan was produced which met the formal or substantive requirements set out by OD 4.30.[87] The quantum of resettlement compensation received by *campesinos* was affected by considerations of formal versus customary rights to land.[88] The failure to observe these provisions of MIGA's IR Policy shows a considerable degree of defection from the regime.

However, it would be quite clearly wrong to say that CMA had entirely abandoned the IR Policy regime in its implementation of the ARP. According to Peru's state law, the company had title to the lands that had been purchased. But for the IR Policy regime, it could simply have evicted the

[79] Ibid, para 3(b).
[80] Ibid, paras 3(c) and 8.
[81] Ibid, para 8.
[82] Ibid, para 13.
[83] Ibid, para 4. As set out in pt III of Ch 6, CMA Community Relations did provide money management assistance to those who had received resettlement payments some 5 months after completion of the ARP. This programme was later described by an expert consultant to be insufficient to meet the needs of the affected families that it targeted. Ian Thomson Consulting, *Review and Assessment of the Resettlement Program, Community Development Plan and Community Relations Program of Compañía Minera Antamina* (Dec 1999) (unpublished report on file with the author) at 10.
[84] OD 4.30, n 5 above, para 22. See Ian Thompson Consulting, n 83 above, at 7.
[85] OD 4.30, n 5 above, para 3(d).
[86] Ibid, n 11.
[87] Ibid, para 5.
[88] Ibid, para 17.

occupants of the lands that it now owned. Of course, given the promises that had been made, this would have been politically deadly in local terms. However, CMA could also have tried to pay out much smaller sums. Instead, the company based its resettlement payments upon an estimation of the 'replacement cost' of resettlement—based upon the cost to the company of carrying out its initial Resettlement Plan. As a result, even after the Resettlement Plan had been scrapped, the basic principles of the IR Policy regime continued to be used by the company to structure its alternative plan.

Social Specialists Strike Back: the MIGA Compliance Audit

In short, business rationality was the dominant decision-making mode during the first three stages of the case study. Social specialist knowledge was called upon in a minor way, but before the compliance audit was triggered, it was not used either to frame or to answer the key interpretive questions involved in implementing the regime. Local participation was kept to a minimum and was not discernibly directed by a set of professional standards or practices advocated by social specialists. Instead company representatives sought to retain unilateral control of resettlement planning and implementation. Furthermore, both social specialist influence and CMA's initial commitment to a generally co-operative approach to IR Policy implementation declined when significant opposing business pressures arose.

The decline in social specialist influence was abruptly reversed during the final phase presented in the case study: the MIGA compliance audit. During the audit, social specialist rationality gained an unprecedented level of importance in framing and answering regulatory questions. In addition, the compliance audit exhibited a high level of co-operation with the IR Policy regime. The questions of eligibility and entitlement were systematically revisited by the Consulting Team using both information collected by social science methods and a nuanced understanding of the social realities of the Andean highlands. In their report, the consultants applied their findings and recommendations to address the question of livelihood restoration without clearly acceding to either community demands or corporate expectations. Certainly, community actors who had hoped that the consultants would support their claims for cash payments were disappointed. Yet aspects of the Consulting Team's report also rankled with CMA management. Notably, the recommendations regarding compensation in the form of either land or assistance created lasting obligations for CMA that company management would likely have preferred to avoid.[89] Similarly, the consultants' decision to extend eligibility to many of those who had already received substantial cash

[89] Compensation in either land or assistance would require CMA to continue to employ additional Community Relations staff responsible for tasks such as negotiating the acquisition of replacement land with resettlers and implementing assistance programmes. A simple cash payment in compensation would, from a management perspective, be far preferable.

compensation payments flew in the face of conventional business logic. Effectively, the company was being told that many of the large cheques it had handed out had counted for nothing.

To what can this reversal be attributed? Social specialist rationality gained power in the case study when its authority was backed by an immediate form of third party pressure. Specifically, this occurred when a climate of intense community anger was converted into pressure on CMA to certify its compliance with WBG IR Policy. As we have seen in part III of Chapter 6, the community hostility that arose after the implementation of the CMA's accelerated resettlement plan (ARP) was converted into a source of business pressure on the company as a result of two processes occurring in tandem.

First, cautious managers within CMA were prompted to commission a study to determine the firm's potential vulnerability to claims of Policy non-compliance. This provided a pair of international social consultants with the opportunity to critique the company's performance and provide it with instructions regarding how to return to the path of legitimacy and compliance. The path advocated by the international consultants prescribed organisational changes that would increase the role played by social specialists and development professionals in decision-making.[90] Here certain aspects of the regulatory architecture of the IR Policy regime served to bolster the influence of the consultant. Given the reporting requirements and penalty clauses provided in the project's financing contracts, failing to disclose the report to lenders and guarantors could have serious consequences. Disclosure, however, would require the firm to devise a strategy to follow, in whole or in part, the path directed by the international consultants.

However, CMA's decision on disclosure was preempted by the second key development that would create pressure on the company to obtain independent certification of its IR Policy compliance. The widespread anger in San Marcos prompted leading community actors to make a unified call to the World Bank to intervene on their behalf. The resulting written complaint issued by community actors triggered a significantly greater legitimacy crisis for CMA. In contrast with the relatively urbane report written by the international consultants, the community complaint accused the company of bad faith, crooked dealing, as well as widespread non-compliance with the safeguard policy. This crisis could not be answered without recourse to social specialist involvement. The complaint's allegations could be dealt with authoritatively only by calling upon outside professional expertise. Here, too, the formal disclosure and breach of contract provisions in the project's financial contracts were key in translating the controversy into an urgent business concern. Equally, for MIGA the community complaint constituted a pointed reputational threat. Unlike the consultant's report which remained under the control of the project's owners and backers, the complaint could

[90] Ian Thompson Consulting, n 83 above.

conceivably spark a public campaign against MIGA's mishandling of the Antamina project. For MIGA, the complaint signalled the need to act decisively in order to protect itself from reputational harm. Again, an authoritative response would have to be based on independent social specialist involvement.

A Note on Competing Professional Rationalities: the Influence of Lawyers

The guiding role intended for social specialist rationality was also prone to being usurped by the professional knowledge of lawyers. This is most evident during the land acquisition process in which the primacy of legal rationality came to be strongly asserted.

During the land acquisition phase, the CMA negotiating team relied upon a junior lawyer from a prominent firm in Lima, while the *campesino* communities had access to representation by local lawyers. The Resettlement Agreements appear to have been drafted (and in some cases signed) by the company's lawyer. The involvement of lawyers appears to have contributed to the transformation of some of the CMA's IR Policy responsibilities into contractual commitments under official state law. During the land acquisition negotiations, the details of CMA's Resettlement Plan were removed from their normative context and converted into fixed offers made in the context of contractual negotiations. When called upon to do so, the lawyers took this process a step further and concretised an offer of resettlement into a specific contract promising land, without reference to the IR Policy regime itself or its objectives. This makes perfect sense from the professional rationality of lawyers. Contracts must contain clear, concrete promises rather than vague or uncertain ones, otherwise they will not be enforceable in state courts. Effectively, lawyers' rationality was used to interpret CMA's IR Policy commitments and export them into a competing legal regime in which social specialist rationality had no influence.

Explaining the Weakness of Social Specialist Rationality in the First Three Phases

What are the causes of the relative weakness of social specialist rationality with CMA during the first three phases of the case study? For this rationality to exert an effective influence on corporate decision-making, social specialists would have to be hired at appropriate times, given appropriate terms of reference, funds and time, and eventually heeded by company decision-makers at all levels. Two explanations are possible: either CMA management and staff lacked the experience and knowledge to deal with social specialists or they lacked the desire to do this. Inexperience could make

managers uncertain about when to contract social specialist work, how much to pay, how to identify qualified practitioners, or how to implement social specialist recommendations. Conversely, placing limited value on social specialist work—an attitude described by Burdge and Vanclay in its extreme form as an 'asocietal mentality'[91]—would have similar results. It would make managers more likely to underuse, underfund and ultimately ignore quality social specialist work. Thus it is not always easy to determine which of the two factors is responsible, particularly given that inexperience with and suspicion of social specialist work are likely to go hand in hand.

What do we know? Social specialist knowledge was consulted mostly during resettlement planning. As new issues arose during land acquisition and the ARP, the company tended not to look to social specialists to provide solutions. Instead, CMA management turned to engineers and old hands experienced in bargaining with communities. This suggests a failure to value social specialist rationality, particularly where time and cost considerations become more important. This could be based on a lack of knowledge regarding the benefits of social specialist intervention. Equally, however, it could be based on an informed assessment of the costs in time and money associated with social specialist-led solutions.

What is truly telling within the case study is the apparent silence of social specialists and others with regard to issues that might be called unpopular within the company. The principal example is the company's early assumption that resettlement was a conceptually simple matter involving the physical movement of a defined population of exclusive rights-holders from one place to another. How is it that this assumption was allowed to endure for so long without being effectively challenged by a social specialist or even by a Community Relations staffer? As noted earlier, after considerable engagement with *campesinos* involved in highland pastoralism, it would have become apparent to some front-line Community Relations staff that the question of dependence on *puna* resources was a much more ambiguous and complex affair than was being assumed. While this over-simplication mattered less when a land-for-land exchange was being contemplated, once the company adopted a cash-based strategy developing a more realistic approach to eligibility became truly important.

However, particularly as time went on, questioning the prevailing view of eligibility would have been a distinctly unpopular position to take within the company. First, it would involve arguing that the company ought significantly to increase its IR Policy responsibilities by expanding the sphere of eligible persons by an unknown number. And, secondly, the suggestion would involve basing eligibility upon a mysterious system of informal resource rights and usages—a body of knowledge under the control of local people. Both aspects of the proposal are likely to have appeared nightmarish to a preoccupied

[91] Burdge and Vanclay, n 23 above.

Community Relations administrator—particularly when that administrator would have to explain and justify to CMA management the need for more time and funds.

In sum, the case study suggests that there is a strong resistance to allowing community relations planning to fall outside the control of business rationality. Furthermore, when competing pressures mount—as they inevitably do during project development—not only does business rationality tend to dominate IR Policy application, but an attitude of defection towards the regime becomes more likely. Conversely, both social specialist influence and the tendency towards co-operation with the regime increase when crises occur that call into doubt the legitimacy of the firm's actions. This replicates the pattern identified by Fox and Brown, where outside pressure can provide opportunities to 'insider reformers' to increase their power within an institution. In the case study, both community discontent and community action are shown to be capable of provoking such opportunities for social specialists. In both cases, vital support was lent by one aspect of the regime's regulatory architecture. The inclusion of IR Policy compliance as a contractual commitment to the project's financial consortium was crucial to translating community discontent into a concrete business threat that required an expert response.

What About Peer Review? Looking for a Strong Epistemic Community of Social Specialists

The case study therefore suggests that without the opportunities provided by outside pressure, the power of social specialists can be very limited. What about the influence of professional review and supervision? One of the assumed features of social specialist rationality is that it is supported by a set of professional consensus over knowledge, standards and practices so as to make it possible for one specialist to confirm the validity of the work of another.[92] The practice of peer review and supervision within the IR Policy regime is intended both to support the social specialist's institutional authority and to keep him or her honest. If so, why was the decline of social specialist influence in CMA permitted when its performance was being supervised by the Policy and Environment Department at MIGA? It is striking that, until the Audit was triggered, the growing number of outstanding issues relating to compliance and interpretation was not effectively addressed.

CMA's social and environmental performance was initially evaluated by MIGA when the project was being approved for MIGA support. Monitoring for compliance with social and environmental warranties was subsequently delegated to an environmental engineering firm, Pincock, Allen & Holt,

[92] Finsterbusch, n 24 above.

based in Denver, Colorado, which had been hired to act as the Independent Engineer under the project's financing contracts.[93] Pursuant to the MIGA contract, CMA had a responsibility to keep these parties informed of its continuing compliance with safeguard policies and to inform them of any significant changes or problems.

The interactions that took place between CMA, MIGA and the Environmental Engineer are treated as confidential by each of these organisations. Only a limited amount of information regarding these communications has been gathered during research. CMA informants have confirmed that MIGA staff conducted an initial site visit to San Marcos in 1998 and that the initial Resettlement Plan designed by the company was reviewed by MIGA.[94] In addition, staff from the Independent Engineer carried out routine monitoring in San Marcos. The lack of inside information obviously hampers analysis.

Effective peer review requires (1) the timely employment of qualified professionals by the regulator and the regulatee; (2) a commitment to enforcing professional standards by the regulator; (3) the full provision of sufficient information from the regulatee for the reviewer to carry out its task; and (4) the existence of a sufficiently strong professional consensus on knowledge and practices to permit review.

The available evidence suggests that both the first and the second requirements were lacking in the Antamina case. MIGA did not engage a social specialist in its initial review of the Antamina project.[95] Neither did the Independent Engineer incorporate social specialist expertise on its monitoring team.[96]

It also appears that MIGA's commitment to employing social specialists and enforcing social aspects of the safeguard policies was weak. MIGA's department responsible for social and environmental assessment and monitoring is small. Only two persons—neither of whom is a social specialist—constitute the Agency's core in-house review staff. As a result, MIGA regularly relies upon social specialists from IFC for project review.[97] However, despite this arrangement, MIGA's treatment of social issues has been problematic. A study conducted by the Compliance Advisor/Ombudsman (CAO) of MIGA's application of its environmental and social review procedures from 2000 to 2002 noted 'major shortcomings' in MIGA's social review of projects.[98] The study disclosed poor performance in identifying and reporting social issues in comparison with environmental ones.

[93] Compliance Advisor/Ombudsman, *Preliminary Audit Review of MIGA in Relation to Compañía Minera Antamina S.A.—Public Report* (Washington, DC, CAO, 2001).

[94] Interview No 65, Oct, 2000.

[95] Compliance Advisor/Ombudsman, n 93 above.

[96] Ibid.

[97] Compliance Advisor/Ombudsman, *Insuring Responsible Investments? A review of the application of MIGA's Environmental and Social Review Procedures* (Washington, DC, CAO, 2002) at 9, 14, 16.

[98] Ibid, at 14.

The failure to integrate social specialist capacity within MIGA may be indicative of a deeper suspicion shown of social considerations. Documents published by MIGA reflect a concern that onerous social obligations are impractical, given MIGA's position as an insurer of private sector investments and will harm its ability to attract business.[99] In addition, an interview with a staff member from MIGA's Policy and Environment Department in 2000 disclosed a certain ambivalence towards World Bank Group IR Policy issues.[100] The informant asserted that OD 4.30, the WBG's IR Policy, was viewed by both the IFC and MIGA as a 'fundamentally flawed document'. The policy, it was argued, had been designed for public sector development projects and imposed responsibilities that were unsuitable for private sector corporations. In addition, the informant signalled that little consensus existed among social specialists at World Bank agencies regarding how to interpret and apply the policy.

When asked how in practice did MIGA determine whether a displaced population had been properly identified by a company, the informant replied that the principal means for such a review was to examine 'not the outcome, but the process'. MIGA assessors look at the quality of the participatory processes used in the preparation of the Environmental Assessment and the Resettlement Plan. A major criterion in assessing whether the displaced population has been correctly identified is the degree to which consultation with the local community took place to address these questions. This suggests a standard of review in which a wide range of interpretive discretion is delegated to the project sponsor. This is particularly the case when one considers the poor quality of the participatory mechanisms used by CMA in resettlement planning and implementation. Such low standards for community participation make a review based upon the quality of participatory processes hardly substantial.

Accordingly, the experience of the Antamina–San Marcos case cannot speak authoritatively to the issue of whether a powerful body of professional knowledge and practices exists to enable a rigorous review of the letter and spirit of IR Policy compliance. What this case does show, however, is the relative fragility of any such body of knowledge in the face of its marginalisation within an institution. Whatever social expertise was consulted by MIGA in the period before the audit was not capable of exerting an important regulatory influence through MIGA's assessment and monitoring procedures.

[99] See Framework for Safeguard Policies at MIGA, available at www.miga.org/index.cfm?aid=271 (accessed 1 Oct 2006) and Comparative Matrix, available at www.miga.org/index.cfm?aid=271 (accessed 1 Oct 2006).

[100] Interview No 78, Dec 2000.

Conclusions Regarding Social Specialist Influence

The case study suggests that the influence of social specialists depends on a contest of pressure: project development business pressures on the one hand, and community relations and policy compliance pressures on the other. Throughout the case study, decision-makers within CMA can be seen to be responding to different pressures and concerns depending on their perceived importance. Accordingly, the case study also suggests that the degree of influence wielded by social specialists is affected by the degree of pressure felt by the company with regard to community and IR Policy issues. Yet the ability of social specialists to generate the necessary pressure themselves appears to be limited. Instead, pressures must come from another source in order to provide opportunities that can be subsequently exploited by specialists, who may then be able to use aspects of the regime to generate momentum.

The case study has shown that community actors can play a crucial role in the generation of these external pressures. When are they able to do so? Pressure results when large scale community dissatisfaction that bears upon IR policy compliance exists and where news of this dissatisfaction may be transmitted to MIGA or other members of the financial consortium. In these circumstances, the safeguard mechanisms present in the IR Policy regime (ie the community complaints procedure and the disclosure and compliance requirements in MIGA and IFC contracts) can translate community unrest into a direct business threat to the project sponsor and thereby generate pressure to address the situation with social specialist expertise. Accordingly, the ability of social specialist rationality to ensure the regulatory effectiveness and legitimacy of the IR Policy regime can be to a significant degree dependent upon this kind of local involvement and oversight. Another way of saying this is that the authority of social specialists is capable of being magnified by certain kinds of public participation. And yet, the regime itself does little to assist local actors to play this role. As observed in Chapter 4, the regime does not even have a clear requirement stating that local people must be provided with copies of the policy in their own language. If left in the dark, local actors are weaker interlocutors, and are able to exert the required influence haphazardly at best.

Where social specialist influence depends upon community action for its authority, several issues are raised:

The Circumstances in which Pressure may be Generated will Tend to Arise Late in the Process

If countervailing pressure depends on manifest and widespread local frustration related to IR Policy, then this is unlikely to occur early in corporate and community relations. As in the Antamina–San Marcos case, local frustration may take time to generate. As a result community pressure

may not assist social specialists during resettlement planning or implementation. Instead it is likely to bolster social specialist authority only after things have gone wrong. The delay involved in this dynamic is counterproductive. First it fails to help avoid problems before they arise. Secondly, it runs the risk that greater investments will be made and greater social harms caused before the conditions for social specialist intervention are created.

A Project Sponsor may be able to Implement a Deficient IR Plan without Provoking Widespread Community Opposition

If community pressure for IR Policy compliance is a product of manifest and widespread local frustration related to IR Policy activities, this pressure is unlikely to be felt in the early stages of dorporate and community relations. Community actors were angered by CMA's arbitrary behaviour and its failure to live up to the promises generated in the local legal order. If Antamina had made fewer or different promises, it could conceivably have implemented a deficient resettlement plan without provoking the same degree of local anger. Indeed, a firm may be well advised to keep local actors in the dark about the IR Policy regime in order to avoid generating community expectations that could later be disappointed. Furthermore, IR Policy could be implemented in a way that divided community actors with only a minority up in arms.[101] In sum, community outrage is an unreliable instrument for ensuring the integrity of the IR Policy regime.

Firms may be Willing to Tolerate the Risk of Community Anger in order to Secure the Perceived Benefits of Working with Minimal Intervention by Social Specialists

Actual community anger may not be necessary to support social specialist authority. So long as firms are risk-averse, they will use social specialists proactively to avoid dangerous community outbursts. This may be so, however, the argument is not borne out by the case study. The community anger generated following the ARP took CMA by surprise. CMA management failed to understand community perspectives and grievances, in part because of its failure to invest in or listen to social specialist expertise. Instead, many company actors saw the ARP and the large payments made to resettlers as an example of good corporate behaviour. Thus it appears that social specialist expertise can play an important role in helping a firm to understand the kind of community-related risks that it is running. Companies which already under-employ or ignore social specialists will be correspondingly less aware of the risks they face.

[101] As Bourdieu observes, the capacity to feel that one's entitlements have been infringed is not distributed evenly in society: n 19 above.

THE QUALITY OF SOCIAL SPECIALIST DECISION-MAKING IN THE IR POLICY MODEL

This brings us to the second major question to be addressed in this chapter. Here we are less concerned with when social specialist rationality is able to function with relative authority and autonomy. Instead we are concerned with how it discharges its regulatory and legitimation functions when it does occupy a prominent position in decision-making. Does social specialist rationality deliver? Or rather what does it deliver? Since social specialist rationality was in a relatively dominant position during the compliance audit phase, the discussion will focus upon regulatory decisions made during this stage.

Regulatory Effectiveness

As we have seen, the regulatory decisions made during the compliance audit were arrived at using more detailed information, collected through more thorough and systematic means. The decisions were also made using expert knowledge and experience concerning Andean social structures and livelihood patterns. However, what is striking is the importance of certain decisions that do not flow from a clear professional logic. For example:

— 'Visting families' who received no compensation are recognised to have an economic interest in the lands acquired by CMA. However, in the audit report, these families are found not eligible for any resettlement assistance. No arguments are presented to support the conclusion that this interest is so small that it need not be compensated. Rather, the marginal nature of many household economies in San Marcos suggests otherwise. Few households in the district can afford to lose part of their productive resources without suffering appreciable socio-economic consequences. Furthermore, it is likely that some visiting families were more reliant on *puna* resources than others.
— The sharp distinction in resettlement entitlements made between 'alternating families' with primary shepherding responsibilities and those with secondary responsibilities seems odd. The former are deemed entitled to replacement lands (ie replacement of a major productive asset) while the latter are instead awarded entitlement to 'technical and social assistance' from CMA.[102] The relative significance of the livelihood interest lost by secondary alternators is not specified—only that the loss is not great

[102] 'We believe that CMA should also attend to these cases, preferably with technical and social assistance policies' ('*Consideramos que CMA deberá atender también estos casos, preferentemente con políticas de asistencia técnica y social*'): GRADE, n 69 above.

enough to warrant asset replacement. The lack of recommendations with regard to the nature, goals and extent of the assistance required raises further questions with regard to its potential adequacy.[103]

— Residency may function as an effective overall proxy for determining the relative livelihood impact of lost access to *puna* resources for a family. However, individual families may not fit the predominant pattern. Some families that spend little time in the *puna* may nevertheless have a significant economic reliance on it. These will be poorly served by the residence formula.[104]

— The *campesino* communities of Huaripampa and Ango-Raju also lost an economic interest in the *puna* as a result of the sale of land. Before the arrival of CMA, both communities derived income from highland ownership through community-owned herds and through the receipt of payments from shepherd families on community land. However, the study performed by the Consulting Team did not consider whether the economic interest held by the two communities was restored by the payment each received for the sale of its lands. While it appears that Ango-Raju was able to benefit from the transaction, the situation in Huaripampa warrants expert inquiry.

Cut-off points obviously have to be placed somewhere. Entitlement categories have to be constructed. Judgement calls have to be made. This is the nature of regulatory decision-making, and the use of social specialist rationality does not obviate the need for value judgements. Even seemingly purely technical decisions are shot through with political implications. Given the stakes, there is a good argument for the parties to be involved as a matter of right in making these decisions. For their part, mining enterprises have a pressing interest in how the IR Policy regime will impact upon their investments. However, by the same token, the level of interest held by community actors in the IR Policy regime's regulatory outcomes is even more significant. For many, how the regime operates will determine whether the loss of all or part of their land-based livelihoods will be effectively compensated or not.

Indeed one wonders what different *campesino* groups would have argued if they had been given the opportunity to consider and propose modifications to the eligibility and entitlement criteria developed during the MIGA compliance audit. Without this kind of input, social specialist expertise may deliver rational and systematic responses to the questions of IR Policy application. What it is not capable of delivering, without engaging affected groups in explicit local deliberative discussions over interpretation, is regulatory

[103] Indeed why not provide secondary alternators with a lesser form of asset replacement—perhaps equivalent to two thirds of the full entitlement to replacement land provided to primary alternators?

[104] To these points one might add the essential fluidity of economic ties to the puna over time. The primary alternator in one year may become a secondary alternator by the next.

decisions that are based in part on local judgement. This is not to suggest that one local judgement exists that can be straightforwardly ascertained by a participatory process. Nevertheless facilitative and responsive processes of participation are capable of creating decisions broadly viewed as legitimate among groups. The construction of legitimacy depends crucially on process.[105]

Rational and systematic assessments based on both social science knowledge and previous experience are certainly valuable to IR Policy decision-making. However, an established body of literature has questioned the sufficiency of exclusively technical approaches to social assessment.[106] While the practical importance of concrete socio-economic realities cannot be denied, elements of social analysis are always somewhat indeterminate. Social specialists are engaged in the practice of prediction in highly complex circumstances. As Lockie observes:

> 'Despite the aura of objectivity, technocratic rationality is ill-equipped to deal either with the competing interests, beliefs, values and aspirations that characterise complex social situations, or with the active participation of multiple stakeholders in working through these situations.'[107]

Structured, deliberative engagement of affected populations in IR Policy decision-making has the potential to improve regulatory decisions. It can do so by increasing the knowledge and capacity of local actors to hold the company to account with regard to its IR Policy responsibilities. It can also do so by promoting decisions that are responsive to locally held opinions and perspectives. This perspective is in line with a growing body of scholarship asserting the need for stronger forms of participatory engagement in social assessment. Advocating the use of negotiation-based approaches to social impact assessment, Lockie argues that 'the most basic criteria against which all impact assessment activities should be evaluated is their contribution to communicatively rational deliberation'.[108]

Two further reasons support the notion that deliberative engagement between social specialists and community actors will improve regulatory decisions.

[105] See the discussion in TR Tyler and G Mitchell, 'Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights' (1994) 43 *Duke Law Journal* 703.

[106] D Cardinall and JC Day, 'Embracing Value and Uncertainty in Environmental Management and Planning: A Heuristic Model' (1998) 25 *Environments* 110 at 118, D Craig, 'Social Impact Assessment: Politically Oriented Approaches and Applications' (1990) 10 *Environmental Impact Assessment Review* 37, R Howitt, 'SIA, Sustainability, and Developmentalist Narratives of Resource Regions' (1995) 13 *Impact Assessment* 387, Lockie, n 27 above, H Wilkins, 'The Need for Subjectivity in EIA: Discourse as a Tool for Sustainable Development' (2003) 23 *Environmental Impact Assessment Review* 401.

[107] Lockie, n 27 above, at 279.

[108] Ibid, at 285.

1. Counterbalancing the corporate influence in deliberations. As we have seen, this kind of deliberative process was not convened during the MIGA compliance audit. The consultants' public presentation of their findings was an innovative move, and one that had not been adopted by the previous social studies conducted in the region. By doing so, the consultants entered into an implicit dialogue with their audience in which the assembled crowd could, if it was moved to do so, reject the process offered by the consultants and harangue them as the company's lackeys. The to-ing and fro-ing of this exchange has been examined in the previous chapter. However, what this process notably lacked was a deliberative dimension in which the purposes and proper interpretation of the IR Policy would be actively discussed. Instead, MIGA's IR Policy was presented as a black box. The fact that it could produce answers that were unreasonable in local eyes was explained by the ignorance of its *gringo* authors in Washington, and could therefore not be helped.[109] In contrast, when the draft consultants' report was presented to senior management at CMA a month or two earlier, there ensued a vigorous discussion regarding the consultants' reasoning and conclusions. The consultants were called upon to defend their interpretations and the language used in the report.

In my opinion, it is highly unlikely that the report's findings or conclusions were changed as a result of these discussions;[110] although it is common practice to soften language found offensive by a client. Nevertheless, as set out in the previous chapter, it is not difficult to imagine how these post-decision regulatory conversations can matter to the decision-making process itself. The likelihood of being called to account by a vigilant, informed and assertive actor can weigh on a decision-maker—particularly where this actor is an influential client in a limited market. The client's concerns and interests become that much more prominent in the minds of decision-makers. Similarly, the fact that a second actor is unlikely to be able to assert her- or himself in the same way can also have an implicit effect.

2. Bringing local perspectives to an emerging regulatory community. Establishing deliberative regulatory conversations between social specialists and community actors is important for a second reason. Application of the WBG IR Policy—particularly with respect to private sector projects—is still in its infancy and is growing fast. The Policy and its meaning are in the process of being 'learned on the job' on a global scale by a host of professionals and institutions involved in project development. A regulatory community of repeat players is establishing itself and expanding. At present, however, discussions

[109] Obviously a deliberative version of this process would require a very different structure from the public presentation meeting. Such a version could consist of a series of informational and consultative workshops conducted with different local groups much earlier on in the process.

[110] The consultants involved in the compliance audit have a high degree of integrity, and the circumstances of the audit provided them with a strong position to support their interpretations.

regarding IR Policy interpretation and practice are taking place in regulatory conversations that simply overfly local communities, not unlike the passenger jets that carry international consultants back to their home countries. The intensification of deliberative engagement between social specialists and local community actors has the potential to ground an element of the learning and consensus-building process upon the ability to engage with and respond to the needs and perspectives of local communities. However, in itself this is not enough to address the disadvantage that community actors will experience as 'one-shot' participants when they are faced with projects sponsors who are experienced 'repeat players'.[111] Community actors will require advocacy assistance, from either national grassroots organisations or expert NGOs.

Legitimation

The production of legitimacy through law takes place differently for different audiences. For our purposes the relevant audiences in relation to the legitimacy of the Antamina project operations in San Marcos can be distinguished spatially: the national, the transnational and the local.[112]

Nationally and transnationally, the IR Policy regime was part of a package of legitimation strategies deployed by CMA that was highly successful at creating a positive image of the firm. CMA advertised its adherence to international standards, its use of specialised experts, and its commitment to protect local communities and the environment. To anyone who made further inquiries, CMA could, if it wished, point out that the social acceptability of its land acquisition activities was being independently supervised by a World Bank agency. Throughout the first three stages of the case study—resettlement planning, land acquisition and the Accelerated Resettlement Plan (ARP)—CMA's reputation nationally and transnationally remained high with regard to community issues. The company's failure to give precedence to social specialist rationality in IR Policy decision-making had no effect on this situation. So long as CMA was in control of the message being projected to national and transnational audiences, insufficient local knowledge was available at these levels to contradict the dominant impression.

As we have seen, greater social specialist involvement became necessary when challenges to CMA's legitimacy attracted the attention of important transnational actors. The suggestion of foul play on the part of the company

[111] M Galanter, 'Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change' (1974) 9 *Law & Society Review* 95.

[112] M Mann, 'Has Globalization Ended the Rise and Rise of the Nation-State?' (1997) 4 *Review of International Political Economy* 472.

raised by the community complaint brought CMA under the scrutiny of MIGA and its commercial lenders. The social specialist-run MIGA audit has apparently satisfied these actors. In the absence of an effective voice projecting a contrary narrative, CMA has re-established its positive public image.

The trajectory of CMA's local legitimacy, charted in Chapter 6, has been an altogether different affair. CMA's local reputation has never recovered from its fall during implementation of the ARP. Through substantial efforts since 2000, the company has promoted new processes of engagement with local actors. Nevertheless, distrust and pessimism continue to mark the responses of people throughout San Marcos. It should be re-emphasised, however, that neither CMA's considerable initial legitimacy nor its subsequent loss was attributable to the IR Policy regime and its use or non-use of social specialists. The regime did not confer legitimacy on CMA's actions in the minds of local people for the simple reason that they were not informed of its existence. Instead, during the period of the case study, the reference point against which CMA's local legitimacy has been measured has been its compliance with the local legal regime developed between company representatives and community actors. Accordingly, the local regime, and not the IR Policy regime, was used by community actors to orient their behaviour and expectations, until it was definitively abrogated by CMA.

The MIGA compliance audit marked the first time that the IR Policy regime was called upon to create local legitimacy for CMA. With their presentation, the consultants were asking the local community to accept the validity of their conclusions. In the end, community members were not sufficiently informed or united to reject the version of justice being offered them. Furthermore, the independence, the expertise, and the substantial field research associated with the consultant's work all probably contributed to an impression of impartiality and prestige. The process, however, provided local actors with little opportunity for collective action.

Where the audience was capable of exercising power was in the area of outstanding claims. As a group the audience was capable of ensuring that the consultants restricted the ambit of their brand of justice. The 'social' claims being settled according to the IR Policy were publicly acknowledged not to resolve all outstanding matters with the company. The consultants confirmed the existence of an unresolved sphere of 'legal' matters (such as allegations of foul play in land titling and acquisition, and enforcement of written resettlement contracts) which ought also to be addressed. Interestingly, the outstanding claims and resentments generated by the company's abandonment of the local legal order were made to fit into one of these slots—the legal and the social—and those which could not effectively articulated in the language of one or the other, effectively fell by the wayside.

MOVING FORWARD: BRIDGING 'SOCIAL ACCEPTABILITY' AND 'SOCIAL ACCEPTANCE'

With the account provided of the case study, I have tried to show how a mining enterprise and local groups almost inevitably enter into negotiations that, at heart, concern the terms on which local people will accept the arrival of the proposed project into their lives and environment.[113] Where local groups can find leverage to engage in this process (such as through land sale negotiations), they are likely to do so. However, the IR Policy regime neglects this local sphere of negotiations, establishing instead transnational regulatory conversations that tend to overfly it. This transnational system is concerned with administering a technocratic negotiation that involves only regulators and project sponsors and which concerns a project's 'social acceptability'. This structure overlooks actual and potential local negotiation processes in which the issue is concrete 'social acceptance'. Social acceptability refers to the certification by a qualified expert that appropriate social standards have been met. Social acceptance, on the other hand, involves the facilitation of a process through which community actors make a legitimate collective decision regarding the circumstances in which they would accept project development.

Basing a regulatory regime solely on social acceptability entails considerable weaknesses: by emphasising the fulfilment of abstract standards (the application of which may be based on corporate representations), the regime can be divorced from local realities and, in practice, descend into an exchange of reports concerning which boxes have been ticked. The case study shows that local processes of social acceptance also have weaknesses. They tend to occur piecemeal where points of leverage exist, and are driven by actors who can access these sites. They suffer from confusion, disorganisation, an imbalance of power, and overwhelmingly from a lack of reliable information. As a result, they can be as unrealistic as the regime's transnational conversations and can ultimately lead, as in the Antamina case, to frustrated expectations among all parties.[114]

The challenge for the IR Policy regime and for the World Bank Group's safeguard policy system in general is to develop the means to marry these two processes together and thereby combine their strengths. The promise this

[113] Cases certainly exist where local people oppose mineral development on any terms: see, eg, C Filer, 'The Bougainville Rebellion, The Mining Industry and the Process of Social Disintegration in Papua New Guinea' (1990) 13 *Canberra Anthropology* 1 and Oxfam America, *The Promise of Gold: Tambogrande, Peru* (Boston, Mass, Oxfam America, 2004).

[114] Without a clear idea of what mineral development can and will bring, local people cannot be expected to engage in 'realistic' negotiations. Company negotiators, under pressure from various sides, may find it easier to accede informally to unrealistic local demands in order to obtain formal agreement. The Antamina case also shows how a company's lack of information or understanding of local social realities can lead to the exclusion of important local actors, and the conclusion of agreements that have minimal local legitimacy.

offers is that of imparting to the local sphere the resources, regulatory oversight, opportunities for capacity-building and enforcement mechanisms available to the transnational system, and of providing to the transnational system the credibility and stability offered by explicit, informed and transparent agreements with local groups. Currently the safeguard policy's mechanisms for deriving legitimacy in the transnational sphere are divorced from those processes by which legitimacy is developed locally. The assumption being made here is that linking these two will improve the quality of regulatory outcomes by aligning those outcomes more closely with local aspirations and desires, that have been arrived at through informed processes of negotiation, agreement and compromise. This, I would argue, is likely to benefit all participants in the regime by providing more durable and reliable regulatory results. However, it also represents a fuller realisation of what the regulatory regime should aim to achieve. The existing regime has in part been devised with a view to satisfying transnational audiences; as a result, it focuses upon the production of authoritative reports and the invocation of highly abstract standards. While external audiences have their role to play, the core aim of the regime should be to satisfy in practice, in a sustained and sustainable way, local populations. This is achieved by engaging with, providing a framework for, and deepening local regulatory conversations, such that the role that they play in the resettlement regime ceases to be peripheral—and becomes instead fundamental to decision-making.

8

Transnational Law and Democratic Governance

This book began by asking what the current proliferation of transnational legal ordering means for the prospect of democratic governance. What has followed is an inquiry that has gone from a general discussion of the nature of democratic legitimacy in a globalising world to a blow-by-blow case study analysis regarding the influence of a transnational legal order on relations between corporate and community actors in a rural district of the Peruvian Andes. This has led to a number of useful insights that contribute to both socio-legal scholarship and law-and-globalisation studies. In this concluding chapter, I will touch upon and develop certain of these ideas in order to clarify the contribution that they make to continuing scholarly inquiry.

POSING THE QUESTION: ANTECEDENTS TO AN INQUIRY INTO DEMOCRATIC LEGITIMACY

Responding to the challenge of the question initially posed in this book has entailed articulating a new approach to conventional concepts of law and democratic accountability. In modern political thought, democratic aspirations have been tied to the state,[1] conceived, at least in theory, as an omni-competent vehicle for translating popular will into comprehensive social ordering.[2] However, globalisation has put an end to an uncritical faith in the state's capacity to achieve social objectives. Whereas once state power was an automatic prescription for nearly any governance problem,[3] today states are widely acknowledged to have distinct ideological and practical limits to their reach. The recognition of these limits has been accompanied by

[1] M Goodhart, 'Globalization, Democracy, and the State' (2001) 33 *Polity* 527 at 542, P Manent, 'Democracy Without Nations?' (1997) 8 *Journal of Democracy* 92.

[2] Omni-competence is implied by the Westphalian doctrine of state sovereignty: that the state possesses the exclusive and absolute right to order any and all matters within its territory: see D Held, 'Law of States, Law of Peoples: Three Models of Sovereignty' (2002) 8 *Legal Theory* 1 at 3–5.

[3] J Braithwaite, 'The New Regulatory State and the Transformation of Criminology' (2000) 40 *British Journal of Criminology* 222.

a highly publicised expansion in transnational economic, social and political activities that are not contained by state borders. Given these facts, concepts of law and democratic accountability that are exclusively state-centred have outlived their usefulness. To maintain contemporary relevance, a revitalised approach to law and accountability must be capable of being applied to those regimes of normative ordering that have an impact upon matters of importance to people's lives—whether these regimes arise from state or non-state action, and whether they act on a territorial or a non-territorial basis. This is best achieved through the academic tradition of legal pluralism.

I am not simply proposing that a legal pluralist concept of law—and particularly one grounded on an interactional and discursive view of law—has a demonstrably greater relevance and explanatory power in a globalising world. I am suggesting that going beyond a state-centred view is an important step in furthering the democratic and emancipatory purposes used to justify the entrenchment of the state-centred legal paradigm. To leave law tied to the state when the state's myths of authority and competence are so visibly eroded is to abandon one of our most powerful metaphors—one which combines a concern for accountability, legitimacy and justice.

The case to be made for democratic forms of accountability and legitimacy in global governance—currently the concern of a great many scholars[4]—is made both clearer and more persuasive by the explicit recognition that what is at stake is the legitimate exercise of legal ordering. It is interesting, then, that work addressing the question of the construction of legitimacy has emerged chiefly from those working on global governance rather than from the legal pluralist school. With some notable exceptions,[5] those taking a legal pluralist view on globalisation are either interested in understanding the nature and character of global legal structures[6] or focused chiefly on the

[4] Eg, Goodhart, n 1, R Howse, 'From Politics to Technocracy—and Back Again: The Fate of the Multilateral Trading Regime' (2002) 96 *American Journal of International Law* 94, S Picciotto, 'Democratizing the New Global Public Sphere', Paper published 2001, available at www.lancs.ac.uk/staff/lwasp/demglobpub.pdf, JG Ruggie, 'Taking Embedded Liberalism Global: The Corporate Connection', Institute for International Law and Justice Working Paper 2003/02 (New York, New York University, 2003), C Scott, 'Private Regulation of the Public Sector: A Neglected Facet of Contemporary Governance' (2002) 29 *Journal of Law and Society* 56, A-M Slaughter, 'The Accountability of Government Networks' (2001) 8 *Indiana Journal of Global Legal Studies* 347, J Weinberg, 'ICANN and the Problem of Legitimacy' (2000) 50 *Duke Law Journal* 187.

[5] Eg, Held, n 2 above, B de Sousa Santos, *Towards a New Common Sense* (New York, Routledge, 1995).

[6] Eg, F Snyder, 'Governing Economic Globalization: Global Legal Pluralism and European Law' (1999) 5 *European Law Journal* 334, G Teubner (ed), *Global Law Without a State* (Aldershot, Dartmouth, 1997), DM Trubek, Y Dezalay, R Buchanan and JR Davis, 'Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas' (1994) 44 *Case Western Reserve Law Review* 407, R Wolfe, 'Rendering unto Caesar: How Legal Pluralism and Regime Theory Help in Understanding Multiple Centres of Power' in G Smith and D Wolfish (eds), *Who's Afraid of the State? Canada in a World of Multiple Centres of Power* (Toronto, University of Toronto Press, 2001).

question of regulatory effectiveness of law outside the state.[7] I have hoped to show in this book that legal pluralism offers a particularly effective vantage point from which to examine the dynamics of legitimation, its connection to regulation, and its pursuit both inside and outside state structures.

Legal pluralism also provides a useful starting point from which to approach the challenge of a normative inquiry into legitimation and transnational legal ordering. How are we to evaluate democratic legitimacy in a globalising world? If legal ordering also takes place outside and beyond the state, what are the conditions in which its exercise ought to be viewed as legitimate? Devised for a state-centric view of legal ordering, existing liberal democratic models provide limited guidance.[8] Globalisation has further blurred the boundaries traditionally used to distinguish categories of fair process from one another: public versus private,[9] technical versus political.[10] In a picture-book world of states separated by bright lines, one could imagine that politics were performed and the boundaries of legitimate action drawn within each sovereign unit. In a globalising world, however, where both dim lines and transnational action are common, even in its idealised version the state-centred paradigm is not up to the job. What, we may ask, are the appropriate spheres for the exercise of personal autonomy, civic responsibility, politics and expert knowledge with regard to a transnational legal order? Where is the political unit that ought to be charged with validating the choices made? Faced with a similar dilemma, Freeman suggests that the project devising new accountability criteria requires detailed empirical research into developing legal arrangements. She calls for 'highly contextual, specific analyses' in order to understand both their benefits and dangers.[11]

I have sought to take up Freeman's suggestion and thereby to help clear the path for more inquiries of this kind. This analysis has been carried out on two levels. First, it has involved an examination of the dynamics underlying the development of transnational law within a specific global policy arena; and,

[7] HW Arthurs, 'Private Ordering and Workers' Rights in the Global Economy: Corporate Codes of Conduct as a Regime of Labour Market Regulation' in J Conaghan, K Klare and M Fischl (eds), *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (Oxford, Oxford University Press, 2001), A Blackett, 'Global Governance, Legal Pluralism and the Decentred State: A Labor Law Critique of Codes of Corporate Conduct' (2001) 8 *Indiana Journal of Global Legal Studies* 401, SE Merry, 'Global Human Rights and Local Social Movements in a Legally Plural World' (1997) 12 *Canadian Journal of Law and Society* 247, DM Trubek and JS Rothstein, 'Transnational Regimes and Advocacy in International Relations: A "Cure" for Globalization?', Paper presented at Conference on Conflicts and Rights in Transnational Society, Courmayeur Mont Blanc, Italy, Sept 1998.

[8] J Freeman, 'The Private Role in Public Governance' (2000) 75 *New York University Law Review* 543.

[9] AC Aman, 'Globalization, Democracy, and the Need for a New Administrative Law' (2002) 49 *UCLA Law Review* 1687.

[10] Howse, n 4 above, CM Radaelli, *Technocracy in the European Union* (London and New York, Longman, 1999) at 25.

[11] Freeman, n 8 above, at 665.

secondly, it has involved a detailed case study analysis of the influence of one particular transnational legal order drawn from that arena.

THE DYNAMICS OF A GLOBAL POLICY ARENA

Presented in Chapters 2 and 3, the inquiry into the global policy arena dealing with mining and community conflicts outlined a vigorous global legal politics that has led to the production of multiple transnational legal orders. Insights gained from this inquiry have been used to develop two models to help understand some of the dynamics involved in contemporary global legal restructuring.

Modelling Flows of Legal Authority: the Privatisation and Transnationalisation of National Law

In this global policy arena, different actors struggle to influence the dominant norms and processes that govern mining and community relations. This has involved a transfer of authority over aspects of local ordering from the national to the transnational level. On the national level, developing country states such as Peru are engaged in 'strategies of selective absence' as they quietly delegate legal authority for managing local grievances to private enterprises. The transnational level, however, is characterised by a kind of legal arms race. Formal legal regimes operating on a transnational basis are being developed by both mining enterprises and financial institutions to ward off the threat posed by the efforts of mining industry critics. 'Certification institutions' which aim to certify good corporate behaviour[12] are fielded in response to what I have called the persistent *de-certification* campaigns conducted by transnational advocacy networks.[13] Certification and de-certification efforts compete for credibility in the global market place of ideas as industry actors aim to reassure their key allies (including state regulators, commercial lenders and insurers, and shareholders) and as industry critics seek the leverage required to influence corporate behaviour.[14]

This suggests a generalised process through which areas of national public legal responsibility are systematically privatised and up-loaded to the transnational sphere. Economic globalisation has triggered new local demands for

[12] R Garcia-Johnson, G Gereffi and E Sasser, 'Certification Institution Emergence: Explaining Variation', Duke Project on Social and Environmental Certification (Durham, NC, Duke University, 2001) available at www.env.duke.edu/solutions/research-envcert.html.

[13] ME Keck and K Sikkink, *Activists Beyond Borders* (Ithaca, NY, Cornell University Press, 1999).

[14] Other sectors, such as forestry, are characterised by competing certification institutions: B Cashore, G Auld and D Newsom, *Governing Through Markets: Forest Certification and the Emergence of Non-state Authority* (New Haven, Conn, Yale University Press, 2004).

the social regulation of private sector development. However, states like Peru that have been squeezed into the neo-liberal mould are not able (or are perhaps not willing) to manage these new pressures directly. Instead, responsibility for social issues at the local level is diverted, more or less covertly, to private forms of regulation managed by transnational enterprises. Critics allege abuse of the de facto authority wielded by these enterprises over the consequences of private development for local communities and mount transnational advocacy campaigns designed to influence corporate behaviour by damaging the legitimacy of their targets. In response, enterprises aim to deflect both actual and potential attacks by developing transnational legal orders that are designed to shore up the legitimacy of their actions. Thus national law and politics are converted into transnational law and politics.

Modelling Industry Certification

I believe that particular insight is often to be gained by examining certification and de-certification efforts as parts of a single interactive legal regime. This goes a step beyond the recommendation of Garcia-Johnson *et al* that the actions of industry critics should be seen as a factor influencing the development of a certification institution. Instead, the patterned actions of de-certifiers tend to form a living, breathing part of what a certification institution actually does.[15]

The value of this approach has been suggested by the discussion of the World Bank Group's (WBG) safeguard policy regime presented in Chapters 3 and 4. As recounted by Fox and Brown, the creation of the regime and its continued development are a story of dynamic interaction among insider conservatives, insider reformers and outsider critics.[16] Critics have both triggered the circumstances that fostered the creation of the regime, and given reformers the opportunities required to change the regime's formal structures and expand their informal influence. Today, critics also participate directly in the regime's formal structures. They are expert interlocutors consulted in rule-making processes. They are advocates who facilitate the bringing of complaints to the Inspection Panel and the CAO. However, even before these formal accountability mechanisms existed, the WBG's NGO critics effectively constituted the safeguard policy regime's informal complaints mechanism. Through transnational campaigns involving demonstrations in the Global South, media campaigns in the US and Europe, and political advocacy in Washington, NGO critics could at times produce results for project-affected groups in remote locations. Indeed, many of the WBG's

[15] Garcia-Johnson *et al*, n 12 above.

[16] JA Fox and LD Brown (eds), *The Struggle for Accountability, The World Bank, NGOs and Grassroots Movements* (Cambridge, Mass, MIT Press, 1998).

NGO interlocutors and critics continue to rely on these resources even as they are involved in the safeguard policy regime's formal institutions.

The point being made here is that the existence of an organised movement of WBG critics—capable of linking project-affected groups in the Global South with experienced Washington players—is as integral to what the safeguard policy regime does (and does not do) as an organised labour movement is to a collective bargaining regime. The safeguard policy regime is an effort both to accommodate and to contain an organised movement capable of disrupting a desired state of affairs. This is the game of law: every legal order constitutes an effort to validate some social claims and to foreclose others. However, the safeguard policy regime can be fully successful neither at accommodation nor containment. De-certification efforts continue to hammer at its doors. Where containment fails—such as when World Bank support for the Narmada dam complex in India was withdrawn following a highly critical ad hoc independent investigation commissioned as a result of a successful transnational advocacy campaign—the regulatory results that are produced cannot be fully explained by reference to the regime's own official processes. This is because certification institutions form only the more formal visible part of legal regimes that are also made up of de-certification institutions that can gain regulatory influence when certification efforts fail.

INTERLEGALITY

The case study has been examined extensively in both Chapters 6 and 7. The insights derived from it can be divided into two principal categories: interlegality and legitimation. The first category will be dealt with here.

Interlegality and Access to Information

Interlegality, that is to say the overlapping or 'intertwined' action of different legal orders upon a single social situation, is a well-known phenomenon within the legal pluralist literature.[17] Teubner points out that the concept of interlegality has been poorly theorised by legal pluralists, who have often resorted to vague metaphors to describe how legal orders interact.[18] In the strongest formulation developed by the legal pluralist school, legal orders have been said to be 'mutually constitutive' in the sense that they help to

[17] It is also referred to as 'internormativity': SE Merry, 'Legal Pluralism' (1988) 22 *Law & Society Review* 869.

[18] See G Teubner, 'The Two Faces of Janus: Rethinking Legal Pluralism' (1992) 13 *Cardozo Law Review* 1443 for a criticism of the weakness of conventional legal pluralist accounts of interlegality. From the perspective of systems theory, Teubner proposes the concept of 'structural coupling'.

construct one another.[19] Legal norms are prone to migration, particularly where a strategic actor is able to bend them to its purposes. Galanter provides a straightforward example by suggesting that rights created by one legal order can create 'bargaining endowments' that can be exploited by actors to help support alternative forms of legal ordering.[20] Similarly, Merry argues that norms propounded by formal national or international law (such as human rights concepts) can do important 'cultural work' even where they are not judicially enforced. Once propounded by an official source, these norms can be used to raise consciousness and can be appealed to in an effort to legitimate new social claims.[21] Thus legal norms can be used to create new senses of 'normative entitlement' that can inspire and orient the efforts of social actors.

The case study has highlighted the importance of differences in access to information in the practice of interlegality. At the time that CMA representatives were negotiating with *campesino* landowners, the company was subject to overlapping legal requirements emanating from a large number of sources. These sources included various Peruvian government agencies, Peru's civil law, the contracts made with the project's financial consortium (including MIGA), the privatisation agreement made between CMA's original investors and the Peruvian government, and the contract made with the transnational construction giant, Bechtel. Various regulatory requirements were drawn selectively from these sources by CMA representatives in order to help constitute the local legal order. This example of interlegality, however, was based upon the stark difference in access to information between corporate and community actors. The legal landscape mined by company representatives also featured a number of bargaining endowments and normative entitlements that could have greatly assisted *campesinos* in their efforts to develop a realistic and stable accord with CMA. Indeed, in the case of MIGA's Involuntary Resettlement (IR) Policy, the requirements in question were intended for the benefit of community actors. However, hidden from view, these became *silent endowments* and *invisible entitlements*. They would be used—sometimes loosely—to guide company action; however, they could not be pointed to or insisted upon by community actors. In addition, the superior informational resources of corporate actors facilitated their efforts to portray CMA as a 'friendly giant': an unfettered, powerful, but benign entity that could be counted on to benefit San Marcos of its own volition.

The tendency towards the privatisation of social law identified earlier in this discussion is likely to intensify these informational disparities. This is not to say that state law is perfectly transparent and accessible to those subject to it. Significant barriers impede the efforts of many citizens, particularly those

[19] Merry, n 17 above, F Snyder, 'Colonialism and Legal Form: The Creation of "Customary Law" in Senegal' (1981) 19 *Journal of Legal Pluralism* 49.

[20] M Galanter, 'Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law' (1981) 19 *Journal of Legal Pluralism* 1.

[21] Merry, n 7 above.

most disenfranchised, to use liberal state law to their advantage.[22] However, the public values underlying liberal democratic state legality provide the basis on which claims for access to information and pro-transparency reforms can be made. Private legal orders in contrast lack the conceptual infrastructure upon which such claims may be grounded.

In a world in which both legal complexity and transnational law appear to be proliferating, differentials in information are likely to play a central role in how interlegality takes place and in the practical results that it engenders. By highlighting the importance of these issues, the case study calls for an attention to the dynamics of access to legal information in the study of interlegality in the future. Transparency—'the prescription that any person should be able to observe regulatory deliberation or easily discover the outcomes (and their justifications) of the deliberation'[23]—has been identified by Braithwaite and Drahos in their grand survey of global business regulation as 'an emergent property of globalisation', a 'meta-principle' being promoted in a wide range of regulatory contexts.[24] By revealing the power imbalances caused by a lack of transparency, the case study underlines the importance of examining how, where and for whom transparency in legal ordering is being promoted.

Interlegality and Discretionary Power within the Corporation

Transnational enterprises are sites of considerable complex interlegality. They are continuously subject to overlapping legal pressures resulting from the dynamics of global legal pluralism.[25] Furthermore, transnational enterprises and other strategic actors exert a strong influence over the creation and development of legal regimes emanating from different global 'sites'. [26] With the example of CMA and its transnational parent companies, the case study has highlighted the considerable discretion that may exist within an enterprise to manage its overlapping compliance responsibilities in response to shifts in its business priorities. The case study suggests the ease with which a regulated enterprise (possibly with the approval of its transnational regulator—as may have been the case with MIGA) may effectively bend or dispense with regulatory requirements perceived to be secondary to more pressing objectives. This is particularly the case with 'reflexive' legal regimes,

[22] M Galanter, 'Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change' (1974) 9 *Law & Society Review* 95, DM Trubek and M Galanter, 'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States' (1974) *Wisconsin Law Review* 1062.

[23] J Braithwaite and P Drahos, *Global Business Regulation* (Cambridge, Cambridge University Press, 2000) at 25.

[24] Ibid, at 29, 507–11.

[25] Snyder, n 6 above.

[26] Ibid.

such as management systems, that encourage companies to develop internal processes for self-regulation.[27]

Where compliance issues can largely be managed within the firm—that is to say, where there is only a small risk of intervention by intrusive third parties or regulators—the exercise of discretion by the company becomes an internal negotiation between different functional units of the enterprise (such as CMA Community Relations and CMA Operations/Construction), its business partners (such as Bechtel), and among business managers, lawyers and other professionals. The case study suggests that further research on these kinds of internal regulatory conversations would be valuable in shedding additional light upon the dynamics of corporate compliance.

LEGITIMACY AND TRANSNATIONAL ORDERING

In Chapter 1 the following model was set out to explain the dynamic interaction of 'law-makers' and 'law-takers' on the issue of legitimacy. Legitimation strategies are deployed by law-makers in a dual effort to support public recognition of their role in producing legal decisions and to encourage compliance with these decisions. Law-makers design their strategies based upon their own theories of what will induce law-takers to perceive legitimacy.[28] All legitimation theories share one characteristic: that legitimation is bought at a cost of an appropriate form of constraint over discretion in decision-making. Since in a complex society it will not always be possible to craft decisions that accord with either the values or the interests of a majority of law-takers, the practice of legitimation over time depends upon the presence of widely held beliefs among law-takers concerning fair, right or appropriate processes for making certain kinds of decisions.[29] Beliefs in right process are accordingly an important resource for law-makers.[30]

However, the practice of legitimation is not an exact science. It is often based on guess-work and dependent upon shaky channels of communication from law-makers to law-takers.[31] Furthermore, legitimation is not performed equally before all audiences. I argued that some 'organised audiences' will be recognised by law-makers as able to pose a direct threat to their authority, and may therefore be appeased with special treatment. These audiences may be

[27] EW Orts, 'Reflexive Environmental Law' (1995) 89 *Northwestern University Law Review* 1227.

[28] DM Trubek, 'Complexity and Contradiction in the Legal Order: Balbus and the Challenge of Critical Social Thought About Law' (1977) 11 *Law & Society Review* 529.

[29] TR Tyler and G Mitchell, 'Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights' (1994) 43 *Duke Law Journal* 703.

[30] TM Franck, *The Power of Legitimacy Among Nations* (Oxford, Oxford University Press, 1990).

[31] Trubek, n 28 above.

able to demand legal decisions or procedural innovations that respond directly to their interests or values. 'Disorganised audiences' on the other hand, pose a lesser threat since, for whatever reason, they are less able to act in concert to make demands of law-makers. Accordingly, their potential challenge to the power of law-makers can be countered at a lower cost in lost decision-making discretion. Since disorganised audiences become influential only once organised, legitimation strategies can be designed simply to impede organisation. Thus watered-down versions of commonly accepted procedural safeguards may be enough to impede the efforts of would-be critics who may aim to mobilise disorganised actors. This is not intended to imply that the practice of legitimation is a universally cynical enterprise. Instead, it is meant to underline how legitimation strategies tend to be approximate efforts based upon subjective and practical calculations regarding the beliefs and capacities of others.

The discussion in Chapter 1 set out two axes of ideas of 'right process' that commonly exist in many contemporary social fields. These can be summarised as public versus private on the one hand and expert versus political on the other. This typology will be revisited here in order to assess the implications that the case study analysis has for revealing the 'benefits and dangers' involved in the accountability arrangements exhibited by a particular transnational legal regime.

Publicness versus Privacy in the Transnational Sphere

The distinction being drawn here is not to be summed up as state versus non-state. Rather, it extends from heavy civic responsibility at one pole to absolute civil autonomy at the other. Civil autonomy implies a freedom to choose the actors with whom one wishes to deal, and the freedom to negotiate the obligations one wishes to assume. In contrast, civic responsibility implies the need to accommodate other interests which are recognised to have both procedural and substantive rights in the matter at hand. For ease of reference, this will be called the public/private distinction. Publicness is generally felt to adhere in power that is enjoyed by an authority. In the contemporary period, participatory processes derived from the liberal democratic state model are increasingly demanded in order to legitimate authority.[32] However, widely accepted means for constituting authority in the transnational sphere have not yet been established.[33] Transnational law

[32] Manent, n 1 above.

[33] Although both the Internet Corporation for Assigned Names and Numbers (ICANN) and the *lex mercatoria* appear to have established their authority in the transnational sphere by acts of self-constitution of the kind heralded by Teubner: G Teubner, '"Global Bukowina": Legal Pluralism in the World Society' in G Teubner (ed), *Global Law Without a State* (Aldershot, Dartmouth, 1997).

would appear on this score to be an inherently private matter. However, as we have seen, this has not been enough to shield transnational legal orders from demands for public-style accountability. The WBG safeguard policy regime is our case in point. Both the analysis of the development of the regime and its implementation in the case study suggest that the regime continues to have an ambiguous and fluctuating relationship to the question of the essential publicness or privacy its decision-making processes.

Indeed, the struggle over whether the safeguard policy regime is essentially public or private in nature has been a fundamental one that has animated its peculiar development. Devised as an effort to contain the influence of critics and to maintain internal control over policy implementation, the initial features of the regime were strongly private. Policies were confidential. Policy-making was carried out behind closed doors. The details of policy implementation in individual cases were not disclosed. No right to review was recognised. Steadily over the years, reforms have been extracted from the WBG that have added many of the trappings of publicness to the safeguard policy regime. These include the availability of policies, notice-and-comment procedures in policy-making, the public availability of project EISs and other policy implementation-related information, and access to justice measures such as the Inspection Panel and the Compliance Advisor/Ombudsman (CAO). Nevertheless, the WBG continues to reject the label of publicness, principally by avoiding the language of rights[34] and by asserting that the measures are in effect voluntary actions taken by World Bank agencies.[35] Furthermore, the battle for transparency and access to justice measures has had to be waged in each of the WBG agencies in order to ensure the spread of reforms.

The case study shows a continued ambiguity in the regime's public/private cast. CMA's IR Policy responsibilities were treated as a private matter through planning, land acquisition and the ARP. Perhaps even more surprisingly, MIGA's initial response to the community complaint originating from San Marcos declined to inform the complainants of the findings and recommendations made by the Agency after its preliminary investigation of the matter.[36] Indeed, the letter recognises only the slenderest right of the complainants to know what is going on. Only when the Consulting Team, acting on its own recommendations, presented its report locally in San Marcos was the affected population in the district treated to some degree like a concerned public with

[34] F MacKay, 'Universal Rights or a Universe unto Itself? Indigenous People's Human Rights and the World Bank's Draft Operational Policy 4.10 on Indigenous Peoples' (2002) 17 *American University International Law Review* 527.

[35] S Schlemmer-Schulte, 'The World Bank Inspection Panel: A Record of the First International Accountability Mechanism and Its Role for Human Rights' (1998) 6:2 *Human Rights Brief* 1.

[36] M Ikawa, Executive Vice-President of the Multilateral Investment Guarantee Agency, Letter to F Vargas, Mayor of District Municipality of San Marcos, 9 June 2000.

a right to receive information and reasons relating to the application of the IR Policy.[37]

Thus while the IR Policy regime makes use of various public legitimation strategies (access to information, access to justice), it nevertheless exhibits a strong bias towards privacy in its routine operation. This is because of the institutional context in which the IR Policy regime has been set: it is a species of transnational social law that has been attached as a subsidiary matter to a larger regime intended to facilitate transnational business transactions. The values of the larger regime within which IR Policy is located are intensely private, based as they are upon the assumptions of confidentiality and freedom of contract between business actors. Thus in their implementation, the public features of the IR Policy regime continually clash with the dominant principles of the greater regime.

This perhaps can explain why the process-oriented public legitimation strategies featured by the IR Policy regime do not compare particularly favourably with those of liberal democratic states. The IR Policy regime's requirements feature all of the problems of liberal access to justice measures while providing few of the benefits. Project-affected populations face very significant barriers to learning about the regime and how it may operate in their favour. These barriers are made greater by the distance and language barriers separating local people from WBG institutions in Washington. Advocacy networks may be able to fill some of these gaps, however, NGOs are not able to intervene as a matter of course in every case. Nor are they often able to do so early in the process. Indeed, the inadequacy of the regime's procedural measures is surprising, given that some of the major substantive principles contained within IR Policy represent an advance over state systems (such as IR Policy's emphasis on the need to compensate for the loss of informal use rights). One might have thought that similar thinking would have inspired more effective transparency and access-to-justice measures for the benefit of project-affected groups.

The failure to do this suggests something of the dynamic referred to in the discussion of organised and disorganised audiences. Once examined in some depth, the regime is not as impressive as it is on its surface. Its regulatory framework features public accountability principles and procedures reminiscent of those employed by liberal democratic state agencies. However, these accountability mechanisms are as hard, if not harder, for impoverished indigenous people to access as their state-run counterparts—institutions already known to serve such marginalised actors poorly. This fact should give

[37] GRADE, *Evaluación del Proceso de Reubicación y del Programa de Post-Reubicación en Antamina* (Lima, GRADE, 2000). However, as discussed in Chs 6 and 7, despite its virtues the ad hoc process established by the Consulting Team was highly circumscribed in its scope. Claimants were allowed to contest the Team's factual findings; however, they were not provided with the opportunity to consider and debate how the WBG IR Policy itself should be applied to circumstances in San Marcos.

one pause, particularly in cases where de facto legal authority is being transferred from national to transnational regimes.

The analysis of the case study suggests that more work needs to be done regarding the development of rigorous public legitimation strategies in transnational legal orders. Is there an emerging global public sphere?[38] If so, what are its dominant principles? And, crucially, is this sphere able to carry out its functions in a manner that is autonomous from the realm of transnational business transactions that it aspires to regulate?

Technical versus Political Legitimation Strategies in Transnational Arenas

Legitimation strategies based on technical versus political forms of decision-making start from quite different assumptions. Technical questions are those best suited to resolution through the exercise of specialised knowledge, usually in contemporary contexts in the hands of an accredited professional. Although the construction of expert knowledge involves the creation and distribution of power,[39] this is usually not acknowledged by technocrats who tend to portray their activities as essentially apolitical in nature.[40] Political questions on the other hand involve the accommodation of conflicting values, interests and perspectives and defy exclusively rational forms of resolution.[41] To resolve political questions, choices have to be made which are not based on any privileged form of knowledge. Increasingly, forms of public participation are called upon to address the political aspects of controversies.[42] Technocratic strategies gain their legitimacy from the reputation for competence enjoyed by the particular experts in question, while political strategies count on their ability to convene relevant constituencies in decision-making.[43]

Organising political input into legal decision-making can be quite problematic in a transnational arena. The non-territorial nature of these arenas makes the definition of appropriate constituencies and their convocation particularly difficult. Transnational spaces lack natural political units. Furthermore challenges presented by geographic distance, language,

[38] Picciotto, n 4 above.

[39] M Foucault, 'Space, Knowledge, and Power' in P. Rabinow (ed), *The Foucault Reader* (New York, Pantheon Books, 1984).

[40] Radaelli, n 10 above.

[41] S Lockie, 'SIA in review: setting the agenda for impact assessment in the 21st century' (2001) 19 *Impact Assessment and Project Appraisal* 277.

[42] G Pring and SY Noe, 'The Emerging International Law of Public Participation Affecting Global Mining, Energy, and Resources Development' in DN Zillman, AR Lucas and G Pring (eds), *Human Rights in Natural Resource Development* (Oxford, Oxford University Press, 2002).

[43] C Coglianese, *Is Satisfaction Success? Evaluating Public Participation in Regulatory Policymaking*, Regulatory Policy Program Working Paper RPP-2002-09 (Cambridge, Mass, JFK School of Government, Harvard University, 2002).

technical capacity, access to information, access to resources and clashes of value systems complicate the prospect of deliberative interaction. Attempting to address these challenges head on is both costly and risky for corporate and corporate-oriented transnational law-makers.

As we have seen in the example of the WBG safeguard policy regime, transnational law has shown a bias for technocratic legitimacy strategies—particularly when dealing with disorganised audiences. Organised audiences, such as the WBG's experienced NGO critics in Washington, have to some extent won their seats at the table. They are consulted on rule-making. They possess the knowledge and experience required to represent affected communities before the WBG's formal dispute resolution processes. The legitimacy of their involvement is asserted on the basis of their status both as principled expert interlocutors dedicated to holding the WBG to account and as representatives of project-affected communities that have sought their assistance. By involving these NGOs, the WBG has been able to draw legitimation benefits from both of these streams. However, the 'representativeness' of NGOs involved in transnational coalitions and networks is contested.[44] Fox and Brown note that Washington-based NGOs are often more interested than their community allies with pursuing structural reforms in WBG agencies,[45] while other observers have noted that relationships between Northern and Southern partners in transnational advocacy efforts have varied from the co-operative to the competitive.[46] This attempt to create transnational constituencies or transnational political units is not yet viable.

Furthermore, where complaints are not made and where communities are not linked to transnational networks—that is to say in the routine application of the safeguard policies—the kind of direct, informed involvement seen among Washington 'insider-critics' does not exist. In these cases, the political input of affected populations is made subject to the exercise of professional judgement by specialists in the employ of project sponsors. As we have seen, subordinating local 'participation' in this manner can severely limit the ability of local actors to influence legal decisions. Even at the apogee of social specialist influence during the MIGA compliance audit, the affected population was not given the opportunity to be deliberatively engaged in applying the regime.

The preference for technocratic legitimation processes over political ones among project sponsors and corporate-oriented transnational law-makers such as MIGA and IFC is easy to understand. Technical processes not only feature lower transaction costs (they are faster, cheaper and less risky to sponsors than potentially freewheeling political processes). They are also

[44] S Ostry, 'Global Integration: Currents and Counter-Currents', Walter Gordon Lecture presented at University of Toronto, 23 May 2001.

[45] Fox and Brown, n 16 above.

[46] L Jordan and P Van Tuijl, 'Political Responsibility in Transnational NGO Advocacy' (2000) 28 *World Development* 2051.

more easily subject to discrete forms of influence and control. The expert study provides a project sponsor with assurances over the timeline and budget of the work as well as the scope of inquiry. Not only does the sponsor exercise control over these items by setting the terms of reference, but experts are asked to compete for the company's favour before gaining the right to carry out the study contract. Thus, including political legitimation measures in a transnational regime but making them subject to technocratic measures limits the risk that the former will get out of control.

This represents a legitimation loophole that has not yet received an effective response by the WBG's NGO critics or by its insider reformers. In the routine application of its social provisions, the WBG safeguard policy regime lacks the oversight required to ensure that its goals are being achieved. Despite the failure to produce effective regulation at the local level, however, the regime may nevertheless be effective at producing legitimation for transnational audiences where the project sponsor is able to control the account of local events that is projected into this sphere. In the absence of contrary evidence, both the technocratic and political legitimation mechanisms found in the regime can be used to assert that the regime has performed as it should.

The increase of regulatory conversations within the WBG involving specialised units such as the CAO, agency environment and social departments, and the IFC's Operations Evaluations Group (OEG) may over time lead to deeper professional points of consensus and greater bureaucratic control within WBG agencies over safeguard policy performance.[47] These developments merit further and continuing study. However, one vital group of actors involved in the application of safeguard policies remains largely outside the influence of the advocacy efforts of NGOs or the bureaucratic controls of WBG officials. These are the private sector consultants employed by project sponsors to design and implement safeguard policy compliance plans. So long as this community of practitioners is more likely to be disciplined through their links to private sector clients than through ties to either of these other groups, the present structure of safeguard policy decision-making is unlikely to produce more promising regulatory results.

Appropriate Decision-making Processes for the IR Policy Regime

Effective regulatory action in the IR Policy regime requires the integration of both political and technical input into the decision-making process. The previous chapter argued that, given the nature of the task involved, the regime's regulatory goals could be best achieved by convening processes of negotiated 'social acceptance' rather than abstract certifications of social

[47] International Finance Corporation, *The Environmental and Social Challenges of Private Sector Projects: IFC's Experience* (Washington, IFC, 2002) at 36–7.

acceptability. Informed social acceptance requires independent access to professional and specialist knowledge concerning the risks and benefits of private sector development projects.[48] With the case study I have sought to show that local efforts to convene social acceptance processes happen in any event—whether or not they are facilitated by national or transnational legal orders. Where local processes of social acceptance fail (as they are likely to in the absence of substantial institutional support), risks are multiplied for both project sponsors and communities: opportunities for productive co-operation are lost and corporate-community relations become prone to disintegrating into conflict.

LEGITIMACY, POLITICAL IDENTITY AND TRANSNATIONAL LAW

Chapter 1 concluded with a few observations regarding the possible implications of the development of transnational law for the construction of political identity. In closing now, I would like to return to this theme and touch on its salience for a central concern that has run through this book: that of developing a normative framework for discussing the legitimacy of transnational legal orders. In Chapter 1, I proposed that asking questions about the political identity or identities created by a transnational legal order could prove to be a helpful way of examining our willingness to confer legitimacy upon that order. Here, I propose to take up this suggestion in light of the insights provided by the preceding chapters on the IR Policy regime of the World Bank Group.

As socio-legal scholars of the constructivist school have argued, law is constitutive of identity.[49] The identities available to social actors are forged through the interaction of social, historical and cultural context, law, and the creative exploitation of possibilities afforded by these structures.[50] Hall

[48] C O'Faircheallaigh, 'Making Social Impact Assessment Count: A Negotiation-Based Approach for Indigenous Peoples' (1999) 12 *Society and Natural Resources* 63.

[49] RJ Coombe, *The Cultural Life of Intellectual Properties* (Durham, NC, Duke University Press, 1998), CJ Greenhouse, 'Constructive Approaches to Law, Culture, and Identity' (1994) 28 *Law & Society Review* 1231, E Mertz, 'A New Social Constructionism for Sociolegal Studies' (1994) 28 *Law & Society Review* 1243.

[50] Hall has developed two highly useful concepts in order to combat essentialised ideas about identity and highlight both the scope and limits of creativity and agency in identity-creation. He observes that actors are capable of occupying particular identities by 'positioning' themselves—or by being positioned—within structures of history, culture, and power: S Hall, 'Cultural Identity and Diaspora' in J Rutherford (ed), *Identity, Community, Culture, Difference* (London, Lawrence & Wishart, 1990) at 225–6. He also argues that actors can exploit opportunities to create new identity-possibilities through 'articulation': the linkage of different conceptual and social elements in an effort to transform social meanings: S Hall, 'On Postmodernism and Articulation. An interview with Stuart Hall' in D Morley and K-H Chen (eds), *Stuart Hall: Critical Dialogues in Cultural Studies* (New York, Routledge, 1996) at 141–2. Together, the concepts of articulation and positioning suggest the potential for creative

contends that identity construction is vital to the pursuit of emancipatory social goals. Drawing on his experience of Caribbean anti-colonial struggles, he argues that '[i]n a sense, until it is possible to state who the subjects of independence movements are likely to be, and in whose name cultural decolonisation is being conducted, it is not possible to complete the process'.[51]

Law is therefore both an obstacle and a resource for social actors in their efforts to achieve their goals.[52] Here I use the term 'political identity' to refer to a particular way in which a legal order may play these constraining or facilitative roles. Political identity stands for the kind and degree of political recognition that is conferred by a legal order on those who are subject to it. Every legal order necessarily implies such an identity for those who are involved in its processes. A feudal order implies certain classes of subjects, including lords and serfs. A marketised order: consumers or workers. A professional order: colleagues and laypeople, and so on.

As discussed in Chapter 1, the statist liberal democratic project was founded upon the creation of a new form of political identity: the national citizen. Based on Enlightenment notions of rationality, personal independence and respect for individual agency, this political identity has had important emancipatory effects.[53] In practice, of course, liberal democratic citizenship fails to live up to its ideal.[54] Even the strongest liberal democratic states lack the capacity to deliver the goods on either a consistent or a comprehensive basis.[55] In the case of weak states, citizenship guarantees are all too often a legal fiction. Where a state is ineffective, corrupt, under-

identity-construction which is both enabled and constrained by the cultural and historical materials available to be put to valid use within contested fields of power: S Hall, 'Negotiating Caribbean Identities' (1995) 209 *New Left Review* 3.

[51] Ibid, at 4–5.

[52] I use the word 'goals' broadly to include, in Geertz's phrase, the desire to imagine principled lives that can practicably be led: C Geertz, 'Local Knowledge: Fact and Law in Comparative Perspective' in C Geertz, *Local Knowledge: Further Essays in Interpretative Anthropology* (New York, Basic Books, 1983) at 234.

[53] The concept of national citizenship has, of course, had both positive and negative effects. Systems of governance based on national citizenship and state borders have permitted the expansion of democratic controls and human welfare within many parts of the world, while simultaneously restricting access to many of these benefits outside the Global North.

[54] D Yashar, *Contesting Citizenship in Latin America: The Rise of Indigenous Movements and the Postliberal Challenge* (Cambridge, Cambridge University Press, 2005) at 49–50.

[55] This is, of course, due not only to the weaknesses of states but also to the contradictions involved in the liberal democratic project. Liberal societies espouse egalitarian values, yet they are founded on social structures that encourage stratification and permit domination. The notion of an autonomous official legal system that is avowedly blind to social status is, Trubek argues, necessary 'to mediate the tension between social ideals and structure' and thereby legitimate 'a society challenged by its own ideals': Trubek, n 28 above, at 542. The ensuing disjunction between official legal equality guarantees and actual social outcomes is an 'inherent and fundamental [feature] of the life and consciousness of liberal society': Trubek, n 28 above, at 543. However, the size of the gap between guarantees and outcomes can, of course, differ significantly from state to state.

resourced, captured by elites, or straight-jacketed by international commitments, the political agency it affords to its citizens through its formal institutions may be feeble indeed. Nevertheless, the principles of democratic citizenship as a political identity provide a conceptual structure and rhetorical resources that can be of use to actors pursuing social justice objectives. They can be used to pursue common interests, rally support, and motivate collective action.

What then of the species of transnational social law represented by the WBG IR Policy regime? The political identity it creates for the intended beneficiaries of its regulatory processes—local project-affected communities—is ambiguous. The dedicated efforts of NGO critics and their transnational allies have over time led to the adoption of certain accountability mechanisms, such as the Inspection Panel and the CAO, that provide project-affected groups with a degree of recognition as autonomous political actors with a say in how the regime will affect their future. These reforms are indeed significant, although it must be noted that they apparently continue to meet strong institutional resistance within World Bank agencies.

However, with the aid of the San Marcos–Antamina case study, I have sought to show that the essential structure of the IR Policy regime projects a very different political identity upon its intended beneficiaries. As I suggested in Chapter 4, in the ordinary course of its operations the regime constructs project-affected populations not as active players within its processes, but rather as passive subjects. Local involvement in regulatory decision-making is confined principally to serving as the objects of expert study. The views of project-affected groups may be canvassed by social specialists and company personnel, but this is done to gather data to inform deliberative processes in which local actors themselves are largely not engaged.[56] Indeed, the case study suggests that, where community engagement does occur, corporate actors will seek to restrict the information and deliberative opportunities available to project-affected groups in order to avoid ceding control over matters that could affect project timetables or budgetary allocations. Furthermore, and perhaps most tellingly, the case study also suggests that even where community actors succeed in activating the complaints process, they may still have great difficulty in gaining effective recognition of a right to active, informed involvement in regime decision-making. Responsibility for resolving the complaint may be delegated to experts who are neither instructed nor expected to involve local actors meaningfully in processes of deliberation.

Thus the uploading of legal responsibility for social mediation of private sector development from the national to the transnational sphere tends to entail a transformation of the conceptual terrain upon which issues are

[56] In effect, project-affected groups face the predicament of being thought of as a particular subset of the environment—the 'social environment'.

considered. It can represent the shifting of a debate away from a forum in which citizenship rights and entitlements are taken for granted. Instead, the debate may be moved to a transnational forum in which mediation is cast as a technical concern to be carried out on behalf of beneficiaries who are acknowledged to possess needs, but not rights. This represents a subtle but significant dilution of the terms of political discourse and of the rhetorical resources available to project-affected groups.

Given its tempestuous development and the continuing struggles taking place over its direction, the future shape of the IR Policy regime is far from certain. It should be noted, however, that the regime is hardly alone in its identity construction efforts. Through their advocacy and networking activities, many NGO and grassroots actors are involved in the construction of a quite different political identity for project-affected communities—a political identity that is based on ideas of *transnational* citizenship.[57] Mobilising the scarce resources at their command, these actors struggle to impose on distant entities—including transnational enterprises, World Bank agencies and commercial lenders—a range of political obligations that they argue are owed to project-affected communities. These include access to information, the right to be heard and the right to prior informed consent to resource development.[58] These efforts to project the discourse and values of citizenship into the transnational relations are largely not acknowledged as such and remain in their infancy. Nevertheless, they are a vitally important feature of the global contests that are taking place over the development of transnational law. The extent to which transnational legal regimes acquire a public and democratic orientation rather than a private and technocratic one will depend greatly upon these efforts and their successors.

[57] Where the community in question articulates its claim as an indigenous people, this may be referred to instead as a *transnational indigeneity*; in other words a claim to a political status that exists independently of the official law of any state and that requires respect and certain behaviour from other actors.

[58] I Macdonald and B Ross, *Mining Ombudsman Annual Report 2001–2002* (Victoria, Oxfam Community Aid Abroad, 2002), Extractive Industries Review Secretariat, *Striking a Better Balance: The Extractive Industries Review* (Washington, DC, Extractive Industries Review Secretariat, 2003) at ch 4.

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