

# The realities of sustainability

Howard Mann, International Institute for Sustainable Development's senior law adviser tells **Ben DiMatteo** about the importance of addressing sustainability now

Over his 22-year career Howard Mann has watched the world slowly wake up to the threat of climate change and plight of indigenous communities. From his role as counsel to the Canadian Department of Justice in the 1980s Mann helped draft some of the world's first effective environmental laws and participated in negotiations on ecological considerations for the NAFTA articles.

But Mann found his greatest opportunity to affect policy change worldwide through a decade spent with the International Institute for Sustainable Development (IISD). In the past five years alone he advised over 70 governments in the developing world on investment treaty negotiations, and was instrumental in giving local communities a voice in arbitration proceedings with the UN and ICSID.

Today Mann faces perhaps the most difficult task of his career: convincing private investors that sustainable investment policy is not only in their best interest but is the only tenable means of securing access to foreign resources in the long run.

The mining law committee, in concert with the African regional and indigenous peoples forum will unveil a first-ever model mining development agreement today (**Model mining development agreement and community concerns: Room 202, Level 2**)

## What will be discussed in the joint session?

Peter Leon, who chairs the mining law committee, and Bob Bassett are going to present the reasoning behind the need for a model mining development agreement. This includes the orientation, the thinking and basic principles that went into it, and the key content areas for the text. The text will then actually be put on a public website for comments from the general public as well as other IBA members.

## What's going to be your focus in that discussion?

My focus is the sustainable development issues and the shift from negotiating just hard rock mining licences to negotiating the social licence to operate at the same time, and what that means for business, for governments and for the local communities. It's that shift to understanding that the social licence to operate isn't a given anymore – it has to be negotiated as part of a package, within the local community and the state where the project is taking place.

## How does that shift take place?

It starts with creating a different mindset. There has to be a shift from seeing a mining contract as a zero-sum game, where I win or you win, I get more or you get more, to seeing the negotiation as structuring a mutually beneficial relationship.

Then it's a question of looking for what kinds of solutions will lead to long-term sustainability for the mining company and medium and long-term development benefits for the community.

## Is there an example in the past where a



## company has got it right?

I'm not sure there is one perfect model yet. I think there are very constructive elements in a growing number of cases and in a number of emerging practices around revenue sharing.

There are certainly extremely important elements when we talk about transparency of revenues, transparency of the contract, publish-what-you-pay initiatives and so on. All of these elements are now coming together. The work of John Ruggie and his team on business and human rights is providing more information to deal with the relationship of mining companies to the human rights issues they may face in operating a mine.

## What would you hope attendees take

**“There has to be a shift from seeing a mining contract as a zero-sum game”**

## away from this session?

We hope they think through carefully the underpinnings we're talking about, the need to change the historic model from one about rents only to a sustainable development context. We hope they will look carefully at the text, which is going to be available for consultation over the October to December period. A final text will appear at the end of December. And we hope they provide constructive comments based on the kinds of directions we're talking about.

Assuming all goes well, we'll have to deal with the issue of how to make developing country governments, stakeholders and industry groups aware of the model text, but that's going to be part of the process that will be launched in October as well.

## Is there a particular experience that led you down the path of sustainable policy development?

I actually started off doing my PhD thesis on arms control and disarmament, and when I joined the Canadian government and had the opportunity to take on the environmental issues I just jumped at it. For a young lawyer in 1988 just starting a government career it was as if *mana* had dropped from heaven for me to take on the international environmental files within the government of Canada.

The development of the biodiversity convention, the first UN convention on climate change in 1992, all of the work around the Rio Summit in 1992 – that was as cutting-edge as you could get for an international lawyer at that time, and probably in many ways still is.

As often happens, a senior lawyer who first had those files thought it was all just a passing fad and not worth very much of his time, and I volunteered to take it up. I've been doing it ever since,

from climate change negotiations to the NAFTA environmental agreement to other international trade and environment issues and now the investment and sustainable development issues.

### **Did you have a defining moment that shaped your mindset?**

One of those happened in 2003 with my colleagues at IISD, in particular a gentleman named Konrad von Moltke from Germany and lately of the US (he passed away five years ago). We were discussing what to do with the investment issue and realised that sustainable development is an investment problem. As much as I hate short formulas and perfect clichés and things, this one really is true.

Whatever sector of the economy you look at, the only way we're going to move from unsustainable practices and technologies is with new investment. We're simply not going to throw hundreds of millions of people out of work because the technology and processes they're using are unsustainable. The only way forward is with new investment that replaces those technologies and processes, and that investment inherently has to come from the private sector.

The government can set cues, give directions, provide signals and prohibit old activities, but the government can't actually replace them. It requires research and development; it requires new investments to replace old factories – bricks and mortar investments. It also relies on technology transfer, which is part of the investment strategies, and so on.

### **Is there an overarching crisis of sustainability facing the world in the 21st century?**

Yes – water. Certainly climate change is a critical

# “You can't assume that through investment contracts or treaties you have guaranteed long-term ownership of water rights”

issue, and the consequences of our already changing climate help propel the water issue to become what will to my mind unquestionably be the major global environmental crisis that hits first. We're already seeing critical elements of responding to it and planning to it.

Look at the issue of so-called land grabs – the rush by a number of countries and companies to invest in agricultural lands in Africa in particular and a few other developing regions. That issue is not about land.

Although it's phrased as land grabs and is often seen as access to farmlands, the real issue there is water. Without water the land isn't worth anything to those investors. They want to secure long-term rights to water resources for agricultural purposes. That's what that game is about even if that doesn't get the attention it deserves right now, or doesn't capture the public imagination as much as the title of land grabs does.

We've already seen skirmishes in a number of countries, and between a number of them, over

water rights. Those are going to increase. We've seen in the mining sector all kinds of issues related to the need for water for operating mines and the competing need for clean water in the communities neighbouring mines and down stream from the mine. Those issues are only going to increase as water shortages worsen.

### **How does that reshape the discussion?**

It is off the radar because much of the discussion is being framed in terms of land rights of the investor (how to secure proper tenure and so on) as opposed to all of the other elements that come with it.

The original World Bank documentation and related advisory work was all about setting up proper registry systems for the transfers and valuing land, but in effect the water resources were never valued – as if they ought to be free in this context, as if they have no value.

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We hope it will become extremely informative to the debate. I think more and more people are beginning to understand the nature of the water issues. The most recent World Bank report deals a little bit more with the water issues than previous reports, though still not as much as it should.

**With water becoming scarcer, how do we avoid commoditisation of water resources?**

This is one of the concerns I've had with investment treaties for a long time. There needs to be a greater awareness among the business-oriented international organisations of the relationship of foreign investment to water issues. These organisations need to ensure that advice to developing countries has the balanced use of water resources as a key dimension, and the ability of government to ensure the protection of all users of water in the event of shortfalls.

Industry as a whole – not just the natural resources, energy and mining sectors – must understand the need to reduce demand, to ensure full treatment of water before it is returned to waterways, and so on. The need to reduce water use and fund proper research and development to reduce its use is going to be critical in the longer term.

You can't assume that through investment contracts or investment treaties you have guaranteed long-term ownership of water rights in the face of declining water levels for other users, especially local communities. That's a recipe for conflict.

So making sure that investor rights are properly squared with the rights of other users to my mind is going to be much more critical and much more supportive of long-term water management than trying to create iron-clad long-term rights that simply lead to conflict.

**What are some of the greatest challenges in assessing sustainable practices?**

It starts from the proposition that there isn't a one-size-fits-all model, and that different situations will lead to different results. The main question is whether there is a real proper consideration of long-term sustainable development interests when we talk about investment today.

These are long-term investments in most cases that we're talking about – infrastructure, power, major mining sites, major manufacturing facilities, and so on. If we don't get those investments right today, then there's little chance of securing a sustainable planet in 30 years. We can't wait 30 years to get those investments right.

The history of international investment law and policy is one of ignoring that equation, of looking at investment simply as a numbers game – as if the quantity of investment completely determines whether development is taking place or not, as opposed to the qualities of the investments being made.

That's the fundamental shift that needs to be made within the investment frameworks and agreements, as well as within governments themselves who in many cases are afraid to lose an investment because they insist on certain quality dimensions.

**You have cited the South Korea Daewoo-Madagascar land deal as an example of how a land-rights agreement can play a role in the destabilisation of an entire national government. What should investors learn from a case like this?**

I hope a few things. First, the 1990s or early 2000s paradigm of being able to get what you want

through corruption is coming to an end. This is due to growing transparency within communities, the internet and because arbitration rights under investment treaties and contracts are removed if the investment is achieved through corruption.

Second is the need to be aware of the relationship between the investment being made and the communities where those investments are going. That relationship and the footprint of that investment are increasingly critical.

Simply saying that you are making jobs for that community doesn't answer the question.

**Is there a way transparency can be incentivised, like with the OECD's coloured lists of tax information disclosure?**

The reality that agreements will be made public in one way or another is growing today. It's very hard to keep secrets as the internet grows and communications grows, as communications between civil society organisations spread around the world.

Transparency in the relations between the community and the government become part and parcel in creating positive relations where suspicion would otherwise reign.

How do you incentivise that? I think OECD countries have a responsibility to do so. Certainly the enforcement of anti-enforcement legislation that is growing in OECD countries is extremely important. The best response in many cases to potential issues of corruption is sunshine.

That doesn't mean the disclosure of every detail of confidential business information – but the principle of transparency as the default position is the one that has the greatest long-term benefit for the company as well as the government involved.

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