

# INTERNATIONAL TREATIES GOVERNING MINERAL EXPLORATION

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### Summary

The formation of the United Nations in 1945 established an organization committed to freedom of the individual and to the preservation of the rights of individual sovereign nations. Declarations of common interest to nations were identified as international treaties and accorded special significance under the Vienna Convention. When ratified by signatory nations, treaties entered law, as customary international law, or as domestic law of individual countries in the manner decreed by that country's constitution.

Two treaties include specific reference to mining activities, and then only in relation to areas of the world recognized as international in status, being outside the territorial boundaries of any sovereign state. Numerous other treaties which have acquired the force of law included references to activities which were an integral component of mineral exploration. Notwithstanding, treaties were between sovereign states and enforcement mechanisms were slow, cumbersome and, for mining related activities, rarely implemented.

In recent years, the attention of the developed world has been drawn to the need to act responsibly in relation to the management of the earth's natural resources so as to ensure their continuing availability to future generations. The processes now known as sustainable development, have become general practice; accepted by mining companies and informally policed by non government organizations, private single interest groups, driven by altruistic motives, but largely forming the public conscience in relation to industry transgressions of "best practice".

This article considers the treaties which are significant in relation to mineral exploration for global operators or which is being performed in developing countries where domestic law is less stringent or less stringently applied than in the countries of domicile of transnational companies. It concludes that despite calls for international law to prescribe operating guidelines, this is unlikely to occur and that the industry approach of self-regulation based on widely accepted codes and standards which recognize international treaty obligations appears to offer the best assurance of responsible operations. The article concludes also that international operators should be fully aware of treaty obligations entered into by governments and ensure that transgressions which could be interpreted as a breach of international law, which could lead to action in an international forum, do not occur.

### 1. Introduction

Continuing mining and mineral processing technological development produces commodities contributing to the quality of life of many individuals throughout the world. Mining and ore processing follow exploration, an activity becoming increasingly more difficult and complex as near surface orebodies are identified, mined and rehabilitated. Discovery of quality orebodies is more expensive, occurs in more remote areas and in more difficult geological conditions, and is significantly more time

consuming than in the past. Until recently, with the exception of petroleum, exploration has been directed toward land based deposits with sub-sea technology insufficiently developed to make such activity commercially attractive.

Technology is advancing at a rate driven by need. Industry consolidation has resulted in a number of “mega-companies” operating across international borders, with the capacity to seek and to exploit resources occurring in formerly inaccessible areas; economics, along with legal constraints being the major factors influencing the pace of change.

Legal constraints largely relate to the rights to access and to develop discovered orebodies. Consistent with rights enshrined in the United Nations Charter, mineral exploration is a national responsibility and national legislation governs all activities within a national jurisdiction. International activity has been substantially driven by the interest of international minerals companies, locally regulated by domestic legislation, and with specific-interest non-government organizations vigorously applying their own standards to perceived transgressions of accepted practice.

Exceptions relate to areas which are clearly recognized as being of international interest embodied in negotiated and ratified treaties, and to areas which fall outside defined national jurisdiction, the two major areas defined being the Deep Sea and Antarctica. Over the past two to three decades other issues important to the mining industry have been included in international treaties, conventions and declarations, and these include references to human rights, the environment and to “social contracts”, all of which are relevant for companies operating beyond the borders of their country of origin.

## **2. International Treaties**

### **2.1. Background**

In 1945, fifty-one countries established the United Nations, membership expanding to 191 by 2002. The UN Charter has remained virtually unchanged since coming into force in 1945. The Charter embodied principles of equality and of self-determination, including in Article 1:

“1.2 To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and...,

1.3. To achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; ....”

The Charter Preamble, (what “the peoples of the United Nations determined”), aims to “... establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained”.

Sovereignty has been identified as a fundamental concept in international law. It is said to be “an integral part of the principles of equality of States and of territorial integrity

and political independence that are referred to in Article 2 of the United Nations Charter”. A country has the right to legislate in relation to activities which take place within its boundaries, and to make laws and regulations which reflect the national interest. The legislative authority of a country within its defined borders may be varied by that state to comply with the requirements of an international treaty to which it is a signatory and the provisions of which have been incorporated in its national law. Treaties can also apply to areas of land (or sea) which fall outside recognized state boundaries, and describe or limit the rights of individual countries within the treaty area, but only if the state is a treaty signatory and the treaty obligations are embodied in national law. Treaties have a special and legal status internationally, and the Vienna Convention on the Law of Treaties (1969) governs a state’s obligations following its entry into a treaty.

## **2.2. The Vienna Convention on the Law of Treaties**

The Vienna Convention was adopted in 1969 and entered into force in 1980. As of 2002, there were 94 parties to the Convention. The Preamble declared that the Convention was “intended to codify and develop the law of treaties”.

Article 2 of the Vienna Convention on the Law of Treaties, “Use of Terms” states:

“1. For the purposes of the present Convention:

- (a) ‘Treaty’ means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation; ....”

Treaties are increasingly being used as a basis for international law, being capable of readily reflecting international societal changes. Most international legal relationships are now governed by treaty obligations.

## **2.3. Treaties and the Law – International and National**

International law evolves from many sources, one of which is customary law which is frequently derived from an international treaty. All countries are obliged to give effect to international law, and this may be accomplished in different ways. The “dualist” approach contends that international law and national law comprise two separate systems, and that international law can only be applied domestically following its incorporation in national law, through legislation. The “monist” approach considers international law to be dominant over municipal law and part of the same system, incorporation being immediate and automatic.

In the UK, incorporation applies to customary international law. The US will not give effect to a treaty provision unless it is consistent with the US constitution. In Germany the general rules of public law are deemed an integral part of federal law but treaty obligations need to be transformed into municipal law. Australian practice is that international law (including treaty obligations) must be incorporated in national law by legislation. Individual countries look to incorporation to resolve any potential conflict

between international and community interests and state protectionism. Treaties are only binding on parties to that treaty and a state, on ratification, may express reservations concerning specific treaty obligations which then become ineffective for that state. Once an international treaty has entered into force, its provisions are widely regarded as international law, and may become the basis for decision making in international forums, even for non-signatory states. The principle of state sovereignty is re-affirmed in a 1978 Vienna Convention on the Succession of States in Respect of Treaties which declares: “Nothing in the present Convention shall affect the principles of international law affirming the permanent sovereignty of every people and every State over its natural wealth and resources”.

#### **2.4. Treaty Implementation and Enforcement, and Dispute Settlement**

Treaties are binding on signatory states once a state has signified its consent to be bound or has formally ratified the treaty. A signatory state must comply with the treaty provisions, subject only to expressed reservations, but a treaty cannot be applied to third party (states) without that state’s consent. Treaties, having the force of international law, comply with established procedures and processes for their administration, unless specific arrangements for dispute settling are included as a treaty provision, as in the World Trade Organization’s General Agreement on Tariffs and Trade.

F L Kirgis (1996), Chair of the ASIL Insights Advisory Committee has referred to the popular assumption that international law cannot be enforced. He identified Charter provisions which the UN has the capacity to introduce (providing specified procedures are followed) in order to achieve compliance. These are however, generally inappropriate for alleged breaches of treaty obligations, comprising economic (trade), diplomatic or military sanctions, as countermeasures should not have effects greatly disproportionate to those of the precipitating event.

Kirgis argued that most international law, especially that of treaty origin is self-enforcing and that compliance is achieved because it is in the interests of the parties to do so. There is, he said, “no standing body of international law enforcement officers”, despite pressures for its establishment. Certain specialized agencies, some created as a consequence of the treaty being entered into, do have established procedures, such agencies including the World Trade Organization, and the World Bank’s International Centre for the Settlement of Investment Disputes which has been used as a vehicle for settling resources industry disputes unrelated to investment.

#### **2.5. International Conventions and Protocols**

The United Nations Treaty Collection provides an overview of the terminology used in binding international instruments. Terms such as treaties, agreements, conventions, charters, protocols, declarations, memoranda of understanding and some others (statutes, covenants, accord etc.) are interchangeably used. An international instrument’s title has no overriding legal effect, and the regulations giving effect to Article 102 of the UN Charter sets out the obligation to register every treaty or

international agreement “whatever its form and descriptive name”. The intent of the parties may usually be determined from the preamble to a treaty with the terminology employed indicative of a treaty’s relationship with any previous or subsequent agreement.

Treaties variously designated as Conventions, Declarations or Protocols include references to obligations, rights and commitments of significance for the resources industry. Conventions, while having their origins in bilateral agreements now apply to multilateral agreements involving a number of parties. The term “Convention” broadly embraces all international agreements and is a source of international law. “Protocols” are deemed less formal than a treaty or a convention.

The term “Declaration” is frequently used. Declarations may not always be legally binding and the term may be used intentionally to indicate that the obligations are not binding upon the parties but merely to identify certain aspirations, as was the case in the 1992 Rio Declaration.

These terms all have relevance in any consideration of international agreements between states involving activities associated with resource development, either in a national or international context.

### **3. Treaties and the Resources Industry**

#### **3.1. General**

The UN Charter, the basis of international law, strongly emphasizes the rights (and obligations) of individual countries. The right of a sovereign state to legislate and regulate activities within its borders identifies mineral development as a domestic responsibility. While few specific references to mineral exploration and exploitation appear in international law, treaties, conventions and declarations on subjects peripheral to the development of natural resources have implications for mining related activities. International obligations have been defined in the past through participatory processes under the aegis of the United Nations and have addressed issues of common concern for both developing and developed countries. They relate to the global impacts of mining related activities and include human rights and environmental and waste management issues, and contentious subjects such as climate change. Measures to alleviate and eradicate disease and provide adequate living conditions for individuals are reflected in obligations directed towards, among many, the mining industry.

Two international treaties include references which direct, limit, or constrain, with the force of international law, mineral exploration and development. Activities affected by treaty obligations are associated with areas which are internationally recognized and individual country sovereignty is not an issue. The regions prescribed by these treaties are the Antarctic and the Deep Sea.

#### **3.2. The Antarctic Treaty and Antarctic Protocol**

Antarctic region activity is the subject of the Antarctic Treaty (1959) and of three

subsequent complementary treaties. The Antarctic Treaty was signed in December 1959 by 12 states, seven of these each asserting a territorial claim to some part of Antarctica, and the Treaty entered into force in June 1961. By 2004, 44 countries were party to the Treaty, either as an original signatory, a consultative party, or an acceding state. The twenty-seven consultative parties, which include the original signatories, control the decision making, although nations conducting scientific research may apply to become consultative parties. The Treaty, an initiative of the participating countries working co-operatively in the Antarctic during the International Geophysical Year in 1957-58, sought to guarantee that "... Antarctica shall continue forever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord."

The most significant goal of the Treaty is the encouragement of continued international co-operation in scientific research. Another major objective of the treaty was the "freezing" of territorial claims other than those in place based on discovery and occupation, a position unchanged and respected by Treaty signatories. This Treaty made no reference to the regulation of mineral resources

Two complementary treaties relate to marine living resources and to seals. The third is the Protocol on Environmental Protection to the Antarctic Treaty 1991, popularly known as the Madrid Protocol.

In 1970, the UK and New Zealand, in response to approaches from minerals companies, raised the issue of commercial geophysical exploration in the Southern Ocean, in the Antarctic Treaty System. In 1976, a voluntary moratorium was placed on the exploration and exploitation of Antarctic minerals, using a "precautionary principle" approach because of the potential environmental damage which might result from unregulated minerals exploration and mining. In 1981 Treaty nations initiated discussions concerning a comprehensive minerals regime. Long and difficult negotiations achieved consensus by 1986, and the Convention on the Regulation of Antarctic Mineral Resource Activities was adopted. CRAMRA "sought to regulate minerals prospecting, exploration and development activities, although mining would only be permitted if all Parties agreed that there was no risk to the environment."

In 1989 as a consequence of extreme pressure applied by environmental lobby groups, Australia and France elected not to sign CRAMRA, and the Agreement failed to enter into force. By 1990, opponents of CRAMRA included New Zealand, Italy and Belgium while the UK, Japan and the USA argued against a permanent ban on mining. The group of countries opposing CRAMRA proposed instead a comprehensive environmental protection convention for Antarctica, and in 1991, some two years after the collapse of CRAMRA, the Protocol on Environmental Protection to the Antarctic Treaty (the Madrid Protocol) incorporating a number of CRAMRA definitions and measures was signed.

Article 7 of the Madrid Protocol reads:

*"Prohibition of Mineral Resource Activities"*

Any activity relating to mineral resources, other than scientific research, shall be

prohibited”.

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### **Biographical Sketch**

**Eric Leslie Garner** was born in Melbourne, Australia: he obtained a degree in Civil Engineering (with Honours) at the University of Melbourne (1952) and Master of Administration at Monash University in 1975, winning the M V Anderson prize. He has worked in the resources (petroleum and mining) industries since the mid 1950s, in Europe, Africa, Asia and Australia, occupying initially operational roles and later assuming increasing responsibilities in major international consulting engineering and engineer-constructor organizations. He was involved in the initial stages of exploration and production of Nigeria's oil resources and in oilfield and facilities development in Indonesia.

Mr. Garner joined a leading Australian consulting engineering company, becoming a director of Kinhill Engineers in 1985. He was appointed Mining Business Line Manager for URS Australia (incorporating AGC Woodward-Clyde and Dames and Moore) in 1998 and is at present a Consultant to that organization. In 2003, he completed a Graduate Certificate in Commercial Law at Deakin University, specializing in international law.

He is a Fellow and Chartered Professional of the AusIMM and of Engineers Australia. He was a founding Committee Member of AUSTMINE, an Australia-wide government-sponsored organization promoting the export of Australian mining technology and equipment, and was Chairman from 1988 to 1991. He was made a member of the Order of Australia (AM) in 1994 for services to the resources industry and to international trade. In 2004 he was awarded the AusIMM's Beryl Jacka Award for services as a Councilor representing overseas members, and as a Committee Chairman.