

# **Pioneering New Approaches in Support of Sustainable Development in the Extractive Sector:**

## **GUIDELINES AND METHODOLOGIES FOR CONFLICT MANAGEMENT**



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## Preface

These *Guidelines and Methodologies for Conflict Management* are the result of a process initiated by the World Bank and the International Council on Mining & Metals to pioneer new approaches in support of sustainable development in the extractive industries sector. They were prepared with a largely Southern African focus but can be used in a range of situations in other countries or regions. The *Guidelines* are based on interviews with key stakeholders in the sector and visits to mining operations. (See Appendix.)

The toolkit contained in this report is applicable to a wide audience, including communities and their representatives; mine managers and their designates, consultants, communication specialists, and various departments; relevant government departments and their representatives; and local authorities and their representatives. It may be used, for example, to plan a mine closure or acceleration of a mining project, to improve stakeholder participation or engagement processes, or to understand the effects of conflict on the environment or the local community.

The *Guidelines* seek to enable wider and more consistent engagement in the realm of conflict management within the sector. The objective is to achieve, as far as possible, negotiated settlements in the resolution of disputes. The primary aim is to minimize the adversarial characteristic of conflict in this sector through proactive communication and open information sharing.

These *Guidelines* are the first step at an operational level in managing conflict consistently and according to the principles of sustainability. They may, in time, need to be expanded and to evolve as legislation develops and changes and as the industry undergoes the transformation dictated by the sustainability journey.

Anyone dealing with conflict in the extractive industries sector should find something useful in this toolkit. It provides a step-by-step guide to reviewing and implementing a comprehensive conflict management system. As this process is often driven by the mining house, a good deal of the detailed application is aimed at mine operators. The toolkit should, however, also help communities and governments identify parallel processes and capacity gaps. Essentially this toolkit endeavours to close or narrow the gap between mining houses and their communities. The long-term sustainability-driven objective is to create an integrated sector that gives due consideration to the interests of all.

Conflict is often unavoidable, and even at times beneficial, but the adversarial aspects of conflict can be minimized, for they provide little benefit for any to the parties involved.

## 1. Introduction

Mining has historically had a positive impact on the economy and on the future. As Phumzile Mlambo-Ngcuka, South African Minister of Minerals and Energy, has noted, ‘because mining is a non-renewable activity, it needs to positively influence what happens once this activity is completed in a specific area’.<sup>1</sup>

The mining industry today recognizes the need to move ‘beyond compliance’ and to build social, economic, and ecological capital in the company’s environment operates – be that local, regional, or national. To understand the relationship between conflict in the mining sector and the principles of sustainable development and investment, it is useful to examine the impact of conflict on industry and the history of conflict management in the mining sector of southern Africa.

History has clearly demonstrated that protracted conflicts and disputes have a highly negative impact from a number of perspectives. (See Box 1 for the distinction between these terms.) First, protracted disputes are costly, often for the mine company as well as mining communities. This in turn often has a negative impact on the economy of the region or nation. Some of these costs are directly quantifiable, such as losses in production through strikes and the actual costs of resolving disputes. While a case is being heard in court, a company’s costs typically run to US\$6,200–7,700 per day. Multiplied by the number of parties to the dispute, court costs for a five-day dispute can reach US\$155,000. And this excludes the lead-up to the litigation period, during which papers are issued, evidence is compiled, expert witnesses are consulted, and documents are exchanged between parties. Furthermore, once judgement has been handed down there is always the possibility of appeals. In Namibia recently, in *Nambib Resources (Pty) Ltd vs Minister of Mineral and Energy and Tradeline Namibia*,<sup>2</sup> a dispute over concession rights went through the High Court twice and ended in the Appeal Court of Namibia. The applicant spent US\$540,000 on legal costs. The costs of the first and second respondents must also be added to this.

### Box 1. Defining Conflicts and Disputes

Conflicts can be defined as ‘interactions of interdependent people who see their goals as incompatible, and who believe the ‘other’ people are interfering with their efforts to satisfy their interests or values’. Conflict management is defined as managing issues of conflict through internal structures – policies, procedures, and mechanisms – with a view to avoiding the impasse that results in disputes (for which third parties have to be brought in for a resolution) and providing a clear process for managing the resolution process if conflict leads to disputes. Independent third-party resolution can occur through adjudication (litigation or arbitration), consensus-building processes (mediation or conciliation), or hybrid methods designed specifically for the dispute at hand (mediation-arbitration, arbitration-mediation, the mini-trial, etc).

If the parties are unable to reach agreement on an issue of conflict, one or all of them must allege that a deadlock has been reached and declare a dispute. A dispute should always be declared in writing, setting out its nature and the settlement required. The parties should meet to determine and agree the preferred procedure for settling the dispute.

Two basic types of disputes can be distinguished: disputes of rights and disputes of interests. Many rights are formalized in law, and ignoring or interfering with these can form the basis of a dispute.

Rights can be used as a guideline to determine an equitable outcome. Rights-based approaches have not traditionally been commonly used in South Africa in environmental and social decision-making in extractive industries, but there seems to be a shift towards a more litigious society.

Disputes of interests arise when an individual or community has a real interest (concerns, fears, or deep-seated needs of a person or a group), but not a clear right, that has been interfered with or ignored. It is important to understand that once an interest has been negotiated and agreed, a reneging on abiding by that agreement will constitute a dispute of right.

The use of power, rights, or interests leads to very different approaches in dealing with disputes or in participating in decision-making processes – power-based approaches are aggressive, with a result of withholding benefits; rights-based approaches are litigious in nature and need to be adjudicated by courts or arbitrated; interest-based approaches allow for mediation, negotiation, and consensus building.

Sources: Conflict definition from Resolve Inc. and International Partners, 2000.

When arbitration is involved, the costs for legal representation are much the same and there are additional venue and recording costs. Arbitration, however, is usually final, so the costs of appeal can to a large extent be avoided. There is always the possibility that a decision may be challenged on review, and this can be as expensive as litigation that goes on appeal. In 1988, Judge Coetzee noted: 'There is something wrong somewhere if...the majority of us who sit here – including judges – who have to get into any kind of litigation...face bankruptcy. I have heard it said that to institute action these days is very close to becoming the ninth act of insolvency. And that is true.'<sup>3</sup>

Insofar as the costs of mediation are concerned, it has been said that comparing mediation with litigation is like comparing the cost of preventative medicine with surgery.<sup>4</sup> There is not much data available, although there is evidence that mediation can be much cheaper. It can be initiated at any stage of a dispute, and the further upstream mediation happens, the greater the savings.

Another negative impact of disputes is distrust between mines and their communities. Disputes that have previously been protracted and given rise to animosity between mines and their workers or between mines and nearby communities leave a longer-term distrust between the parties that largely precludes the consensus-building and collaborative processes needed to foster sustainability.

In terms of reputation management, mining companies are increasingly in the media and consumer spotlight – the international community is taking a stronger interest in how end products are produced. For example, the *Fair Lady*, a southern African woman's magazine, recently published a lead article on 'Diamonds: Are They the New Fur?' The article looked at conflict and blood diamonds and the community and environmental impacts of diamond mining. In the Kalahari, the forced relocation of the Basarwa tribe by the Botswanan government was perceived by the community as the responsibility of the mining house, De Beers; this illustrates that even when a conflict is ostensibly outside the mining company's control, there is still a key conflict management role for the company to play, as they have a vested interest in their market.

While disputes are inevitable, their emergence signals a failure of effective conflict avoidance and thus effective conflict management. Consequently, when considering sustainability in the extractive sector, the aim should be to minimize acrimonious disputes by

attempting to resolve them in a negotiated or mediated settlement wherever possible, which at the same time should reduce costs. This toolkit has been developed within the context of achieving this objective, while recognizing that conflict can sometimes foster better solutions for all and facilitate decisions that might otherwise not have been considered. Yet conflict is often not constructive, and it is time-consuming and costly. This toolkit addresses the latter issue most urgently.

## **Overview of Processes and Mechanisms**

The extractive sector in the southern African region, and indeed worldwide, has a history of social and environmental injustices. South African Minister Kader Asmal has noted: 'Pollution often seems to occur where black people live. This is the rubbish of history which we have to deal with today.'<sup>5</sup> These injustices still occur in post-apartheid South Africa and throughout the region.

There is increasing recognition of the link between poverty and environmental degradation. Bobby Peek of the Environmental Justice Networking Forum makes the point that industry's environmental and social commitments have often focused on saving green areas rather than improving poor environmental practices that have a direct impact on adjacent communities.<sup>6</sup>

Modern dispute resolution has a much stronger base in assessing the most appropriate course of action as opposed to making a 'simple' decision as to what is right and wrong. There is a movement towards seeing opposites as being complementary rather than mutually exclusive.<sup>7</sup>

The World Summit on Sustainable Development in Johannesburg in 2002 saw the entrenchment of a core focus on the goal of attaining a balance between economic growth, poverty, social equity, and the preservation of the world's natural resources. This means that a balance needs to be attained between the mining company and its interests and other key stakeholder groups as well as the environment. In reaching this balance, it is important to be aware that more people have to live off less. If the quality of life is affected socially or materially, then the community has the right to question industry actions. Communities are increasingly taking back power, and this is a root cause for conflict that will continue to increase unless industry demonstrates a commitment to mitigating negative and maximizing positive impacts of mining activities.

There are shortcomings in the relevant legislation throughout the region in that there is ambiguity and a lack of specific guidelines. It thus falls on industry to develop solutions, which include, for example, specific definitions where procedural and semantic issues create conflict. These solutions must be created by the sector as a whole. The industry is not immune to the tides of change, and a review of the history of conflict in the region has shown that there are severe and unsustainable consequences to the industry operating in isolation. Thus an approach of open and regular communication with all interested and affected parties (informal and formal stakeholders) based in a partnership culture between government, the industry, and concerned citizens and communities underpins this toolkit.

It is evident that the Southern African region cannot afford a continuation of the counterproductive, adversarial nature of conflicts and disputes of the past. The region needs to create wealth rapidly. To achieve this, it needs methodologies and processes that achieve 'win-win' outcomes to disputes, that minimize the time involved in resolution, and that lower the financial impact. Disputes slow down the very economic development aspired to, with

such long-term and broader ramifications as withdrawal of foreign investment. It is further evident that conflict cannot be entirely attributed to any one variable (such as ethnicity) and that the causes of conflict are much more varied. There is thus a great need to gain a deeper understanding of the root causes of conflict in order for the mining industry to define effective management strategies.

Social and environmental conflicts in the sector are set to continue for the foreseeable future unless investment in better conflict management solutions is made in a meaningful and sustainable way.

### **Conventional Approaches**

The term conflict management covers various different processes and mechanisms. The approach taken sometimes depends on the resources available – time, skills, technical or legal capacity, and finances. As noted earlier, the draw on financial resources can be considerable.

**Traditional negotiation** is a process in which opposing parties confer or bargain in order to achieve mutual agreement. It is a voluntary as opposed to a legal process. It underpins, in the context of this toolkit, the methodologies of conciliation and mediation and constitutes the basis of a consensus-based approach.

**Conciliation** is a process of reconciling or bringing together opposing sides in a dispute in an attempt to avoid litigation. Some countries have Conciliation and Mediation Councils (both Namibia and South Africa, for example, have a Council for Conciliation, Mediation and Arbitration for settling industrial disputes). These are oriented towards labour disputes, however, and are not necessarily appropriate for informal disputes and conflicts.

**Mediation** is a private, confidential, non-legal process that relies on an independent, neutral, and credible third party, agreed to by both parties, to facilitate a resolution in a conflict or dispute.

**Arbitration** is a voluntary process; the parties to the dispute select an independent and neutral arbitrator to adjudicate the issue in dispute. The arbitrator will be accredited and will have a legal background. It is a more formal process than mediation, as the arbitrator's decision is final and legally binding, but arbitration does not automatically involve the courts. It is most frequently used to deal with disputes of right and is used widely in the industrial relations environment. Although it is voluntary, arbitration is often an adversarial approach, very similar to that used in normal civil courts.

**Adjudication or litigation** is the process of resolving a dispute through a lawsuit, with legally binding results that will be rights-based as opposed to interests-based. It is a confrontational and expensive mechanism. The result is legally binding and not necessarily in the interests of all parties. It is not considered to be the most sustainable way of resolving disputes in the extractive sector.

### **Alternative Dispute Resolution**

Historically, developing countries have demonstrated a tendency to use repression of the lower classes to maintain power over a long period of time. The Basarwa case in Botswana is an example of government repression, as is the infamous Ngoni people case in Nigeria.

This approach may be effective in maintaining power, but it does not bridge social gaps or resolve social conflicts.

Similarly, protracted court cases can exacerbate rather than resolve social conflicts. Thus emphasis needs to be placed on establishing dispute resolution methods that can keep a reasonable distance from the courts. An international alternative dispute resolution (ADR) system is already in place and combines a revival of traditional mechanisms with new approaches. The goals of ADR have been described as:

- relieving court congestion as well as undue cost and delay,
- enhancing community involvement in the dispute resolution process,
- facilitating access to justice, and
- providing a more effective resolution of disputes.<sup>8</sup>

Arbitration, insofar as it can keep a reasonable distance from the courts, can cope with the problems ADR sets out to overcome and indeed can be a method of ADR. But arbitration should only be considered under ADR if it is not going to be too slow a process. One of the key objectives of ADR is to fast-track solutions and conflict resolution. The idea is to lower costs by achieving a result in a short time frame and to reduce associated difficulties.

ADR attempts to establish a preventative environment in which to manage disputes. It has focused on improving traditional methods and on building on existing dispute resolution mechanisms. These specifically are:

- increased reliance on negotiations and consultations (including a requirement of notification, making information available, monitoring, and greater institutionalization);
- institutional support for inquiry and fact finding;
- institutional support for conciliation and recourse to compulsory conciliation;
- expanded roles for technical bodies and the expert determination of disputes; and
- development of mediation.<sup>9</sup>

New ADR approaches include the following, which have been used in the United States and Britain for more than 25 years:

- court-ordered arbitration,
- non-binding arbitration,
- private judging,
- mini trial,
- early neutral evaluation,
- neutral expert fact finding, and
- policy dialogue.

Advanced ADR systems provide for mediation, which is becoming the most favoured dispute resolution method. Some governments, such as the United Kingdom, require public services and institutions to use mediation before going into litigation.<sup>10</sup>

ADR systems are also adapting the rules for dispute resolution settlement to allow new parties to participate or to deal with new subject matter, such as environmental disputes.

It is evident from the field trips and research conducted in preparing this toolkit that there is a definite place for ADR in the Southern African region. It is suggested, however, that this is looked at in the context of the region – its conflicts, the root causes of its conflicts, the historical and evolving context, and the implications for contemporary mining. The toolkit attempts to base its approach in a selected ADR and traditional framework, with a strong



emphasis on creating a preventative environment for dispute resolution and conflict management.

### **Indigenous or Traditional Conflict Management and Dispute Resolution**

Indigenous peoples and communities originate in the area or land under consideration for mining, and they may perceive mining activities as being in conflict with their rights and interests in the region.<sup>11</sup> In parts of Southern Africa that have been affected by colonialism, a major challenge arises from the changes that followed the introduction of western-style education, religions, economic systems, and modern infrastructure and communication facilities. As Ben Fred-Mensah notes, 'the changes have posed a challenge to the effective mobilization and utilization of the indigenous principles in the management of the modern conflicts'.<sup>12</sup>

Also relevant to the mining sector is the issue of indigenous peoples and land rights. For many indigenous peoples, it is their relationship to ancestral lands that binds together the past, present, and future of their cultures. Land is their lifeblood – economically and spiritually. Often they see that it is necessary to take from the land only that which is needed today, as more will be available tomorrow. Thus, as First Peoples Worldwide puts it, 'living in a sustainable manner is not a choice, it is a way of life'.<sup>13</sup> Mining can be viewed as being in conflict with this philosophy and hence a root cause of conflict.

Indigenous conflict management and dispute resolution mechanisms use local players and traditional community-based judicial and legal decision-making mechanisms to manage and resolve conflicts. This is achieved through internal or local structures without resort to state infrastructure such as courts and police. It is a mechanism that is applicable within or between communities on issues such as communal grazing, water access and usage, land ownership rights, and fishing rights.

Customary dispute resolution and conflict management processes are typically based on consensus building – where discussions are open and where information is shared and clarity sought. Community authorities, such as elders, are often the mediators. Alternatives to the elders are chiefs, women's organizations, local institutions, and professional associations. An elder's guidance usually means no loss of face, and the process is built on principles of unity, on shared responsibility and involvement, and on dialogue between the parties in conflict. The elders function as a court and as such may interpret evidence, impose judgements, and manage reconciliation. Direct confrontation is usually carefully avoided and although the process may be time-consuming, violence and high costs are often effectively avoided.

The mechanisms favoured by community elders include using religious figures (as a common link between feuding groups) and local peace gatherings or conferences (cross-cultural or cross-clan). Indigenous conflict mitigation mechanisms can effectively address smaller or local disputes, preventing escalation into larger conflicts.

## 2. An Overview of Conflict Management Approaches and Dispute Resolution Methods

Conflict and disputes place parties in opposition to each other. This toolkit and its guidelines advocate the application of the principles of sustainability so as to drive more harmonious relations between mining companies, their environment, and their communities, including local and national governments.

If conflict is not avoided, a form of power play often comes into effect. This can be handled either proactively in an attempt to get the 'upper hand' or defensively and reactively. Neither option necessarily gives much attention to the interests of the parties. An effective conflict management system encourages all parties to consider their interests – first and in an equitable way. This provides the opportunity for reaching mutual understanding.

The historical basis of conflict management in Southern Africa was originally an 'avoidance approach' that determined nothing – 'like it or lump it'.<sup>14</sup> (See Box 2.) This was followed by a shift to a 'power approach', which focused on either party's ability to coerce the other into doing what he wanted. The sector currently has a much stronger 'rights approach', with a focus on an independent standard of justice and fairness. This toolkit is built on the basis of a further shift, where appropriate, to a consensus and interests-based approach, where there is a focus on finding the 'best' compromise when two parties have different interests. This in turn can rely on either customary-based conflict management and dispute resolution mechanisms or an external mediation-based approach.

### Box 2. Four Approaches to Conflict and Dispute Resolution

In an **avoidance approach**, one or both parties avoids resolving or even recognizing the conflict issue at hand, thus determining nothing and forcing a 'take it or leave it' situation.

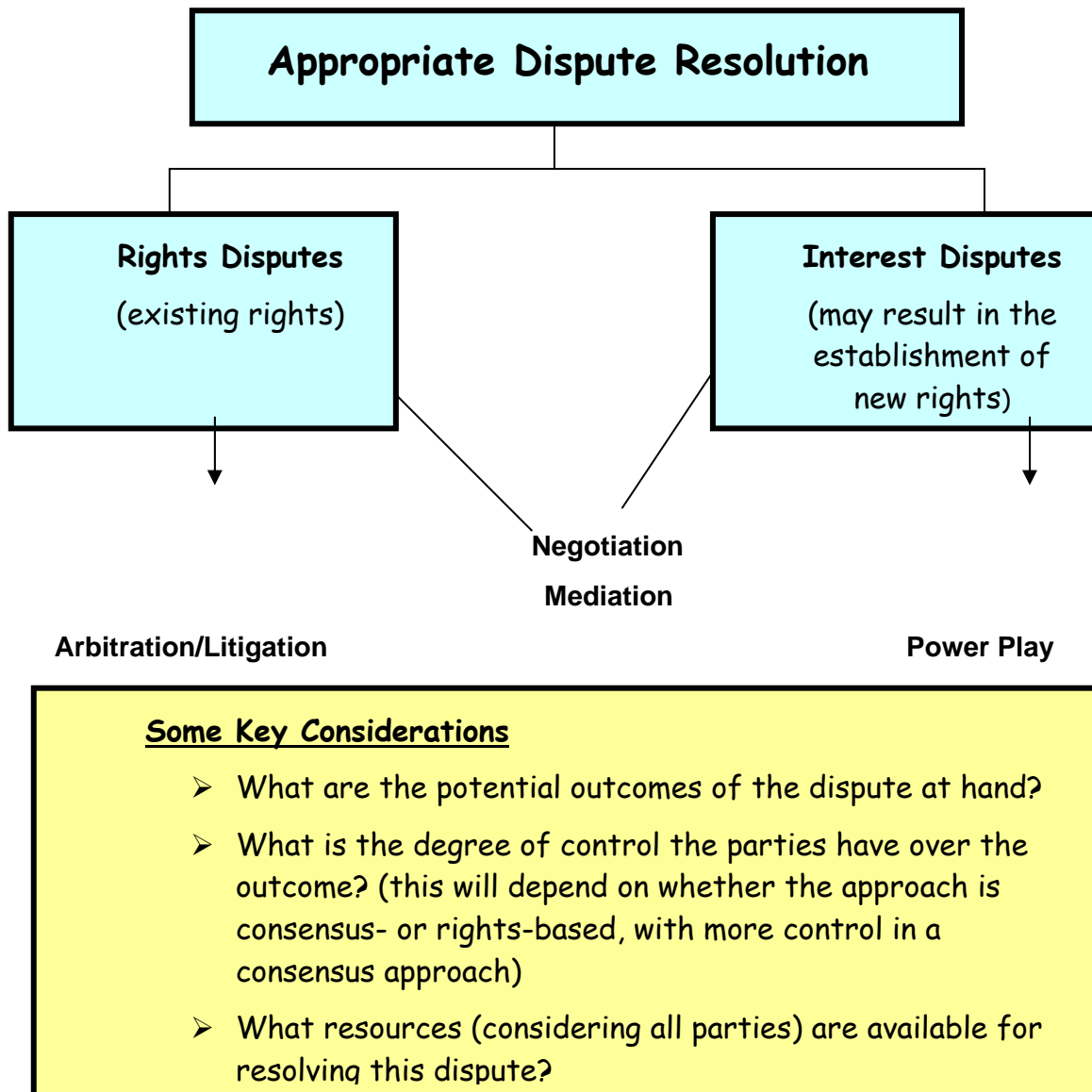
A **power approach** means that the parties determine who is more powerful through a focus on each party's ability to coerce the other into agreeing on an outcome. There is an ongoing debate in the mining sector on the issue of 'balance of power' when mining companies and communities conflict. Companies are often seen as having access to resources that the communities lack, thus creating an inequitable situation and unlevel playing fields. On the other hand, the trade union movement has frequently demonstrated its power in its ability to mobilize a labour force in order to achieve a desired outcome.

A **rights approach** has its focus on a common or independent standard of justice and fairness in determining which party is right.

A **consensus approach** is based on interests in that the focus is on endeavouring to reach a compromise that is based on the interests of all parties concerned. Customary or traditional mechanisms can be used, depending on the circumstances.

This toolkit is based on building sound community relations where there are consistent and standard communication processes and information sharing between mines and adjacent or affected communities. This either will result in consensus that prevents dispute or will provide for a less adversarial climate in which the dispute is resolved. (See Figure 1.)

Figure 1: Appropriate Dispute Resolution Guidelines



The toolkit, however, recognizes that an interests- or consensus-based approach is not always feasible or even appropriate. There are instances where conflict exists between a mine and its adjacent community that are outside of their control.<sup>15</sup>

Dispute resolution methods can be categorized into four groups: adjudicative, arbitral, negotiated or mediated, and hybrid forms. The extent to which the parties have control over two key factors – process and content – determines the category of the dispute.

The emphasis of this toolkit is on building dispute resolution processes and procedures that are not adversarial in nature and that focus on consultation rather than confrontation. This non-adversarial approach presupposes sensitivity to the issues of concern to traditional or indigenous peoples, such as land use rights.

### **Criteria for Comparing Dispute Resolution Methods**

It is useful to compare dispute resolution methods according to a generally accepted set of criteria (see Table 1):

- cost,
- speed,
- finality,
- suppleness or flexibility of the result or number of possible outcomes,
- equitability,
- relationship value and effect, and
- human factors.

Van den Berg submits an extra criterion in the mediation of environmental disputes, that is relevant here – the effect on the public image of the parties.<sup>16</sup> For large mining companies, the reputational risk of adversarial conflict and dispute resolution can be substantial.

**Table 1: Comparative Overview of Categories of Dispute Resolution Methods**

	<b>Adjudicative Methods</b>	<b>Arbitrative Methods</b>	<b>Negotiation Facilitating Methods</b>	<b>Hybrid Forms</b>	<b>Customary or Traditional Alternative Mechanisms</b>
<b>Cost</b>	Generally high	Generally high	Generally lower	Generally lower	Generally lower (if arbitration is used as distanced from the courts)
<b>Speed</b>	Generally slow	Generally slow	Generally faster; if unsuccessful, may cause delay	Generally faster	Generally slower
<b>Finality</b>	Final subject to appeal / review	Final subject to review	Final if successful	Final if successful or if adjudication/ arbitration used as a last resort	Final if successful (at a local level, community-based disputes)
<b>Suppleness</b>	Two outcomes: Win or Lose	Two outcomes: Win or Lose	Plurality of possible outcomes	Depends on method used	Depends on method used
<b>Equitability Achieved</b>	High – product of due process plus application of legal principles	Depends on arbitrator and process used – potentially high	Objectively variable; subjectively high if bargaining positions comparable	Depends on exact method used	Depends on process used – potentially high
<b>Relationship Effect</b>	Generally destructive	Generally adverse	Generally positive	Depends on the stage at which the dispute is settled	Generally positive, dependent on stage at which dispute is settled
<b>Human Factors</b>	Adversarial, traumatic and public	Private but still adversarial	Traumatic but often steadily less so	Depends on stage at which dispute is settled	Public (within the community), with a reduction in adversity where an inclusive and therefore accepted

					result is achieved
<b>Public image Reputational Risk</b>	Can be adverse even if successful ('win')	Effect same as litigation if parties publicize result; otherwise negligible	Effect can be positive even if parties compromise (if publicized)	Should be better than adjudication but depends on method used and publicity	Depends on method used, but generally better than court-based proceedings insofar as transparency is maintained

**Selecting the Appropriate Dispute Resolution Method**

Different criteria are going to be emphasized to a greater degree in some disputes than in others, so when evaluating an appropriate method it is important to fully understand the nature of the specific dispute, the potential impact of the dispute, and its potential outcomes. Each method has strengths and weaknesses. (See Table 2.) Analysing a dispute thoroughly on its own merits is essential and is a process that must be done by all parties, with consideration given to each other’s needs. Each party should rank the suitability of each dispute resolution method, and the method most commonly chosen should be selected.

**Table 2. Analysis of Litigation versus Consensus**

<b>Method</b>	<b>Strengths</b>	<b>Weaknesses</b>
Litigation	<ul style="list-style-type: none"> <li>Obtains a final result</li> <li>Reduces all parties to a common standard</li> <li>Can be enforced by either party</li> <li>Ensures that an inability to reach consensus on procedure does not lead to a stalemate</li> <li>Considers the rights of all parties</li> </ul>	<ul style="list-style-type: none"> <li>Costly</li> <li>Time-consuming</li> <li>Can destroy relationships between the mining operation and the community in the short and long term – perception of an unwillingness to reach consensus and negotiate</li> <li>Reputational risk for the mining company is substantial</li> <li>Does not necessarily consider the interests of all parties</li> </ul>
Consensus (through negotiation)	<ul style="list-style-type: none"> <li>Cheaper and can be less time-consuming</li> <li>Can achieve a final result</li> <li>Facilitates decision and considerations that may not have otherwise been dealt with</li> <li>Has greater opportunity for allowing the best interests of all parties to be considered</li> </ul>	<ul style="list-style-type: none"> <li>There can be delays if unsuccessful</li> <li>Risk of not being successful</li> <li>The ‘playing field’ may not necessarily be level</li> </ul>

Adjudication means to determine judicially or to pronounce judgement and therefore by default implies a litigious process through the courts of law. This means that a third party –

an adjudicator or judge – determines an outcome or result that, while final, is based primarily on issues of rights as opposed to issues of interests. Emphasis is given to rights that have a formal basis in law. These generally do not include the deep-seated concerns of a party that constitute issues of interest.

Litigation is at times unavoidable – for example, when the consensus or negotiated approach has failed or in labour disputes where a point of law is in question and the parties have reached a deadlock.

Consensus is far more of a ‘trade-off’ approach that involves the deployment of different strategies by each party to extract a result or movement from the other side, often resulting in concessions being made by both parties. There are three major approaches to consensus building.<sup>17</sup>

The **traditional negotiation** approach has these characteristics:

- Each side takes its most extreme position regarding the dispute, with that position justified and entrenched during the negotiations.
- Discussions between the parties take place on a regular basis and the parties deploy various strategies that facilitate the extraction of movement or agreement from the other party.
- Concessions are exchanged.
- Settlement is generally somewhere in the middle of the bargaining range. This does, however, depend on equitability issues. Often a community does not have access to the same resources as the mining company, which can place them at a disadvantage – or, more accurately, can place the mining company at an unfair advantage.
- Movement is incremental, and often small improvements are made, as opposed to rapid progress.
- The more parties involved, the less effective the progress.

This is known as a ‘positional bargaining’ approach. A ‘principled bargaining’ approach was introduced as an alternative in 1981, the essence of which is that bargaining is based on principles as opposed to positions.

A **principled bargaining** approach:

- separates people from the problem and focuses more on the latter, which depersonalizes the problem and fosters cooperation;
- focuses on interests rather than positions, thus placing more emphasis on the future than on the past;
- aims to generate multiple possibilities for settlement by investigating options that could result in mutual benefit; and
- uses objective standards to support decision-making.

This is a problem-solving approach and it can facilitate a highly effective outcome at a relatively low cost. Integral to this method is using the Best Alternative to a Negotiated Agreement (BATNA) approach. This then forms the basis for negotiations and allows for ‘stop-go’ decision-making.

In **mediation**, the parties agree to select a mutually acceptable, impartial third party to help them reach an agreement. This is a neutral party who has no position of authority outside of the mandate given by the parties concerned and who acts as a facilitator between the



parties. The parties remain in control of the process and the 'mediator' manages the process as constructively as possible. The underlying objective in mediation is to maintain or repair the relationship between the parties.

This is an appropriate method for resolving a number of disputes in the mining sector, particularly those based in differences in opinion between the mining company and the community or an individual about the exploitation and processing of the resource. Mediation is particularly appropriate where there is strong value in protecting or consolidating the relationship between the parties in the long term, and the process can often assist in the depersonalization of the issue at hand.

Mediation is a useful and effective approach in dealing, for example, with the moving of graveyards to accommodate mining activities. If consensus on the issue cannot be reached between the mining company and the community, they might select an external mediator. It is important in a case of this nature to involve the stakeholders at the outset, to minimize the conflict, and to facilitate consensus. A case could be made for moving the gravesite with respect to the spiritual and ancestral attributes in the interests of economic development. The fundamental principle applied is one of shared benefit for all stakeholders concerned. Successful mediation in an example of this nature must be built on solid public participation processes that allow the community to have a voice that is both meaningful and continuous in the decision-making process.

### 3. A Typology of Conflicts

Effective conflict management and successful dispute resolution involve understanding what needs to be managed, what key processes and procedures unfailingly need to be in place, and how to achieve these. Tables 3, 4, and 5 provide case study examples that illustrate the types of conflicts that can arise and why sustainable conflict management is important to this sector.

The typology of conflicts provided in these three tables encompasses:

- rights-based conflicts (these can be resources allocation and use issues, although not always),
- interest-based conflicts (these can be socio-economic changes brought about through mining activities and conflicts based in cultural clashes and a lack of respect for differences), and
- conflicts that arise as a result of not following procedure.

Although this typology is based on these three categories, clearly some of the examples span a number of procedural and substantive issues across the spectrum of types of conflict.

Conflicts that arise between mining companies and affected communities are not only based on resource allocation. They can also involve power inequities, cultural clashes, and a lack of respect for differences.<sup>18</sup> Relevant cultural issues that may give rise to conflicts and disputes are land use issues (rooted, for example, in a different philosophical approach); grazing rights; water access and usage; ancestral rights; and religious or spiritual issues.

It is important to point out that the typology of conflicts and disputes is not static. The extractive sector in Southern Africa is undergoing considerable transformation. This is due to international trends in mining approaches, the emerging focus on sustainable development, and changes in mining economics (due in part to diminishing mining productivity, for instance). New conflicts and disputes are likely to arise in the medium term. For example, the sector in this region has to deal with the growing realization that African societies are no longer willing to accept certain entrenched practices that are based in colonialism. This is giving rise to a differing set of conflicts and therefore potential disputes.

A further example of a source of new disputes is that there is increasing pressure on mining companies (from governments as well as internally) to move away from having communities totally dependent on the mines. This means that companies are facing a new set of issues and thus potential conflicts surrounding the effort to move communities towards independence.

**Table 3: A Typology of Conflicts Based on Rights**

Description of Conflict	Case Study/ Example
<p>Conflicts arising out of claims relating to mining rights, royalties, etc.</p>	<p>The Richtersveld community lodged a claim in 1998 against the state regarding Trans Hex Group Limited's mining lease, which entitled them to 4.5 per cent royalties on the miner's gross diamond sales from its Richtersveld operations. Alexkor felt that the sales had been mismanaged by the state. The Constitutional Court ruling in October 2003 gave the Richtersveld community the right to lay claim to Alexkor's land and mineral rights.<sup>a</sup> This is an example of a dispute resolved through litigation.</p> <p>Canadian Tiomin Resources Inc. led a titanium mining project in Kenya. The new government was asked by the Mombasa business community in January 2003 to shelve this project on the grounds that it would destroy farmland, schools, and sacred forests. This was a multibillion-shilling titanium mining project in Kwale District. The community also proposed an economic and job creation alternative based on refurbishment of local factories. Tiomin Kenya Limited had already been licensed to initiate the project. It was proposed that the previous Kanu government had issued the licence with a disregard for the plight of the farmers who own the land.</p>
<p>Conflicts over the best use of a particular resource</p>	<p>In the early 1970s, Anglo American began dredging a canal along the Boro River in Botswana that would drain water from the Okavango Delta (now a World Heritage Site) for use in the rich diamond mine of Orapa in the central Kalahari desert 180 kilometres away. Although this dredging was stopped before completion, it affected the hydrology of the river, angering local communities that depend on the environment for their living. It also drew opposition from environmentalists.</p> <p>In 1990 the Botswana government proposed creating canals on the river and building three dams for irrigation and to supply water to the nearby town of Maun. These plans were also opposed and it was widely suspected the project was intended to 'steal' water for the Orapa diamond mine. Anglo American (and De Beers, which by then ran the mine) was caught in a wave of bad publicity, both locally and internationally, although the company denied any intention of using the water. The scheme was shelved, but many opponents of the mining companies believe that it was merely an extension of the plan of 20 years earlier, which had never been fully explained.<sup>b</sup></p> <p>This is essentially an unresolved conflict that potentially could have been resolved on a consensus or negotiated basis, where the community would have been involved and included from the outset.</p>

<p>Conflicts over sites where the mine is closed but the asset still belongs to the mining company</p>	<p>The Trans Hex mine in the Northern Cape, outside of Hondeklip Bay, closed in February 2003, with retrenchments and serious economic impacts for the community at Hondeklip. The company put out to tender to the local community the opportunity to 'remin' the area, but then withdrew the tender. This has resulted in conflict, as the process gave the community the perception that there was a resource left to be mined; the closure had a negative economic impact on the town, and the issue of who owns the natural resource has arisen.</p> <p>Anglocoal are currently managing legacy issues in four mines in Vryheid in Natal that have been closed for 6–10 years.</p>
<p>Conflicts where communities and indigenous peoples are asserting their claim to land that was previously theirs and that has in the past been appropriated by mines</p>	<p>The Bafokeng Tribe in Baphutatswana, a previous 'homeland' of South Africa, had mining land restored to them that the previous Governor, Lukas Mangope, had given over to the mining house.</p>
<p>Disputes over land and other natural resources where a community defends its control against other communities as well as against outside interests</p>	<p>When Saldanha Steel was established in Saldanha Bay off the West Coast of South Africa, the existing coloured communities defended their right to contracts and jobs emerging from the industrial development. This resulted in conflict with an emergent community of Xhosa-speaking people from the Eastern Cape who migrated to Saldanha in response to the development. The Saldanha Bay resident community felt that they had the right to the industrial development and its ensuing economic opportunities. This is in a sense an unresolved conflict: nine years later, the conflict between the coloured and Xhosa-speaking community is still in evidence. For example, the coloured community blame the advent of crime and drug abuse on the Xhosa community. The issue of jobs and contracts being awarded to the 'older' established community was, however, resolved directly with Saldanha Steel, who put tender and recruitment processes in place that favoured 'local content'. The key issue in this example as a 'guideline' for other developers is that to manage or avoid conflict, the developer should survey the surrounding communities and assess the importance and potential impact of local content, land rights, and perceived related mineral rights.</p>

<sup>a</sup> 'Transhex Eyes Possible AlexKor JV', *Mining News Weekly*, 3 November 2003.

<sup>b</sup> See Maphalala 1999.

**Table 4: A Typology of Conflicts Based on Interests**

<b>Description of Conflict</b>	<b>Case Study/ Example</b>
Relocation or displacement of communities	New mining developments often involve relocating a community in the interests of mining. Some South African mining companies have done this successfully, in that there has been a negotiated settlement and no material effect on the community. Other examples are not as successful. In the case of Tionmin Inc in Kenya, relocation was decided without due consideration and negotiations. (Note that in many instances communities have access to the land but do not own it; they therefore have an interest in the land but not necessarily a right to it.)
Impact of water and air pollution and dust on surrounding communities	See Gencor case study under 'Long-term and short-term health impacts'.
Infrastructure damage through vibrations	A major coal mining company in Witbank, South Africa, dealt with a dispute in which a neighbouring private home owner claimed that mine blasting and exploration activities caused cracks and structural damage to his home. The dispute was over damage already caused, and the homeowner wanted security against potential future damage.
Forced social structures or changes	U.S. lawyer Ed Fagan has filed a string of multibillion-dollar class action lawsuits in the United States against multinational firms accused of benefiting from apartheid. These include Anglo American as well as non-extractive sector clients. The damages of apartheid to black South Africans included migrant labour being forced to leave their families.
Long-term or short-term health impacts  Health effects in nearby communities	In June 2002 the High Court in London approved settlement of an action brought by 7,300 South African asbestos miners and residents against Cape plc and Gencor. The settlement cost the companies £10.67 million in compensation to asbestosis victims (at current exchange rates). The costs of the case are in addition to the settlement amount. The victims have the whole range of asbestos-related lung diseases: mesothelioma, lung cancer caused by asbestos, interstitial asbestosis, and asbestos-related pleural disease. These are not just industrial diseases. Many victims have died of mesothelioma as a result of environmental pollution. The pollution was so bad that some victims developed interstitial asbestosis without ever having worked with asbestos. This is unknown in Europe. Many victims have died since the action commenced in the late 1990s.
Alterations to community economic conditions	The case study of Tiomin Resources Inc in Cerro Colorado and the Ngäbe-Buglé in Panama addresses the economic issue of conflict as well as environmental, social, and spiritual conflict issues. <sup>a</sup> Mining activities interfered with the subsistence living of indigenous peoples in this area. Cultural and spiritual differences were also ignored. The battle between industry and the community spanned 20 years, with community blockades, adversarial

<b>Description of Conflict</b>	<b>Case Study/ Example</b>
	<p>negotiations, lawsuits, and non-governmental organization (NGO) campaigns as well as hunger strikes. This carried a great cost for both the community and the mining house.</p> <p>The government eventually recognized the community's collective rights to the land, but this was based on the condition that they allow the mining development to proceed.</p>
<p>Social structure and alterations to community composition</p>	<p>The development of Saldanha Steel resulted in an alteration to the social structure of the local community in that a new 'race' group emerged. Although more than 50 per cent of the permanent staff were from the local community, the building of the plant and the related contractual opportunities resulted in an influx of black people, primarily from the Eastern Cape, causing considerable tensions and conflict in the area.</p>
<p>Migrant labour, single-quarter housing and hostels, and community overdependence on mining</p>	<p>The De Beers joint venture mining company in Namibia is currently working on a process of proclamation of Oranjemund as a town, where residents will have to pay for utilities that will be managed outside the mining company. The company has adopted a consultative approach and is working closely with community and government representatives. An interim management company that is representative has been formed to handle the transition from being dependent on the mining company for all services, housing, and utilities. Difficulties include finding money to buy houses from the company and managing the perception that services and utilities should be free. In addition, there is an informal market called the Sand Hotel that the mining company played no role in building, establishing, and providing electricity services to. This has been in operation for approximately 30 years and is a potential fire hazard, as the electrical works are illegal. These are all issues of conflict or potential conflict and constitute a challenge to all parties concerned. A process based in protecting the interests of all parties is in motion and has entailed extensive stakeholder engagement and negotiation processes.</p>
<p>Retrenchments and mine closures</p>	<p>At Durban Deep in Roodepoort, South Africa, more than 4,000 retrenchments were suddenly announced in early 2003, with no alternatives on the table. The union subsequently came up with an alternative.</p> <p>The Trans Hex and De Beers mines in the Northern Cape have had a crippling effect on the community of Hondeklip, where there is over 80 per cent unemployment. The community is still in conflict with Trans Hex.</p>
<p>Accelerated closure of a mine or acceleration of a new project</p>	<p>In 2002, Anglo American announced that it was withdrawing from its copper investments in Zambia (it only re-entered this region in 2000). Anglo said that declining copper prices and unexpectedly high mining costs forced the decision; critics pointed out that the move would cause major job losses that would have a negative impact on Zambia's social structure and that there would also be environmental costs to consider. A dispute arose between Anglo American and the Zambian government over the proposed withdrawal. President Levy Mwanawasa accused the company of exploiting a loophole in its</p>

<b>Description of Conflict</b>	<b>Case Study/ Example</b>
	ownership of Konkola Copper Mines (KCM) to avoid paying compensation to cover environmental and social costs resulting from the mine's closure. Anglo American agreed to pay US\$30 million, but the government thinks the company should pay more than US\$200 million. The government entered into talks with three international mining companies to buy the KCM assets. But analysts think Anglo American's decision not to develop the large copper reserves will make it almost impossible for smaller mining companies to raise financing from banks. <sup>b</sup>
Religious or spiritual interests	See Cerro-Colorado and the Ngäbe-Buglé People case study under 'Alterations to community economic conditions'.
Human rights and ethnic conflict management	The case of the Ogoni people in Nigeria shows that there are important ethnic group interests that cannot be served by individual or even by generalized group rights, such as state rights. At least mining companies must recognize the right of the ethnic group to exist, to preserve its language, culture, and traditions, and to participate equally with others in the state. Equitable access to resources and rights to the protection of them are important issues here.
Relocation of graves	Gravesites are frequently an important traditional and spiritual symbol for many communities worldwide and are regarded as sacred. Conflict can arise between religious and sacred interests and the perceived economic development from mining. Some mining houses have successfully negotiated moving graves to alternative sites.
Ill-equipped indigenous legal systems	There is not a specific example in this case, other than to say that indigenous peoples often do not have the capacity to implement and act in a conflict situation, particularly when they are up against a relatively sophisticated mining house and its infrastructure and access to resources. Indigenous legal systems do not have the incorporated processes needed for the effective resolution of conflicts with mining houses. Often these are systems (indigenous legal) that were developed to cope with internal conflicts.
Role of governments in awarding mining rights when there is insufficient community consultation	See the Cerro Colorado and the Ngäbe-Buglé case study under 'Alterations to community economic conditions'.
Issues of representation in unions, community leadership, or local government	The Cerro Colorado case also indicates the breakdown of traditional power bases and leadership in indigenous communities through protracted hostilities between mining houses and communities.

<sup>a</sup> Whiteman and Mamen 2002.

<sup>b</sup> *Financial Times*, 7 June 2002.

**Table 5: A Typology of Conflicts Due to Not Following Procedure**

Description of Conflict	Case Study/ Example
<p>Conflicts where procedure is not adequately followed, often resulting in even a good outcome being rejected</p>	<p>The Industrial Development Corporation of South Africa Ltd (IDC) conducted a feasibility study on the transportation of magnetite from the Phalaborwa to the Maputo Iron and Steel Plant in Mozambique via a slurry pipeline. It examined two proposed routes, one of which went through Kruger National Park. This option was estimated to save US\$20 million in capital costs and US\$27million in operational costs. The IDC was willing to share these savings with the park based on the money being used for specifically identified conservation projects.</p> <p>Many felt that it was important to first conduct an environmental impact assessment (EIA). At the outset of the public participation process, the SA National Park Board (SANP) refused permission for an EIA to be conducted in the park, on the premise that permission for that would constitute tacit approval of the pipeline.</p> <p>A number of NGOs took an opposite stance prior to the EIA, as did the Department of Environment and Tourism. SANP's position was that allowing the pipeline would set a precedent for allowing other negative developments in the park. The IDC eventually bowed to the pressure and announced that the transportation would be by rail and around the park. Yet the IDC felt that the government and other parties were wrong in that they declared a stance prior to due process having been conducted.</p> <p>The quantifiable costs of this dispute are in the region of US\$55 million.</p>



## 4. A Toolkit for Managing Conflict and Resolving Disputes

This chapter provides the toolkit for managing conflict and resolving disputes in the extractive industries sector. It is presented in two parts. Part One deals with the establishment of a conflict management culture in a step-by-step process, and it provides an overview of that process in the first Figure. This prepares those involved with a mining operation for conflict and for dealing with disputes. Going through the steps described in Part One will help the community and the company lay a solid foundation in that mutual understanding and knowledge are strived for and ground rules are established. Thoroughness and the ability to follow a reiterative process are essential to the long-term success and effective management of conflict in an operating environment. The analysis conducted in Part One is critical to the successful implementation and management of Part Two.

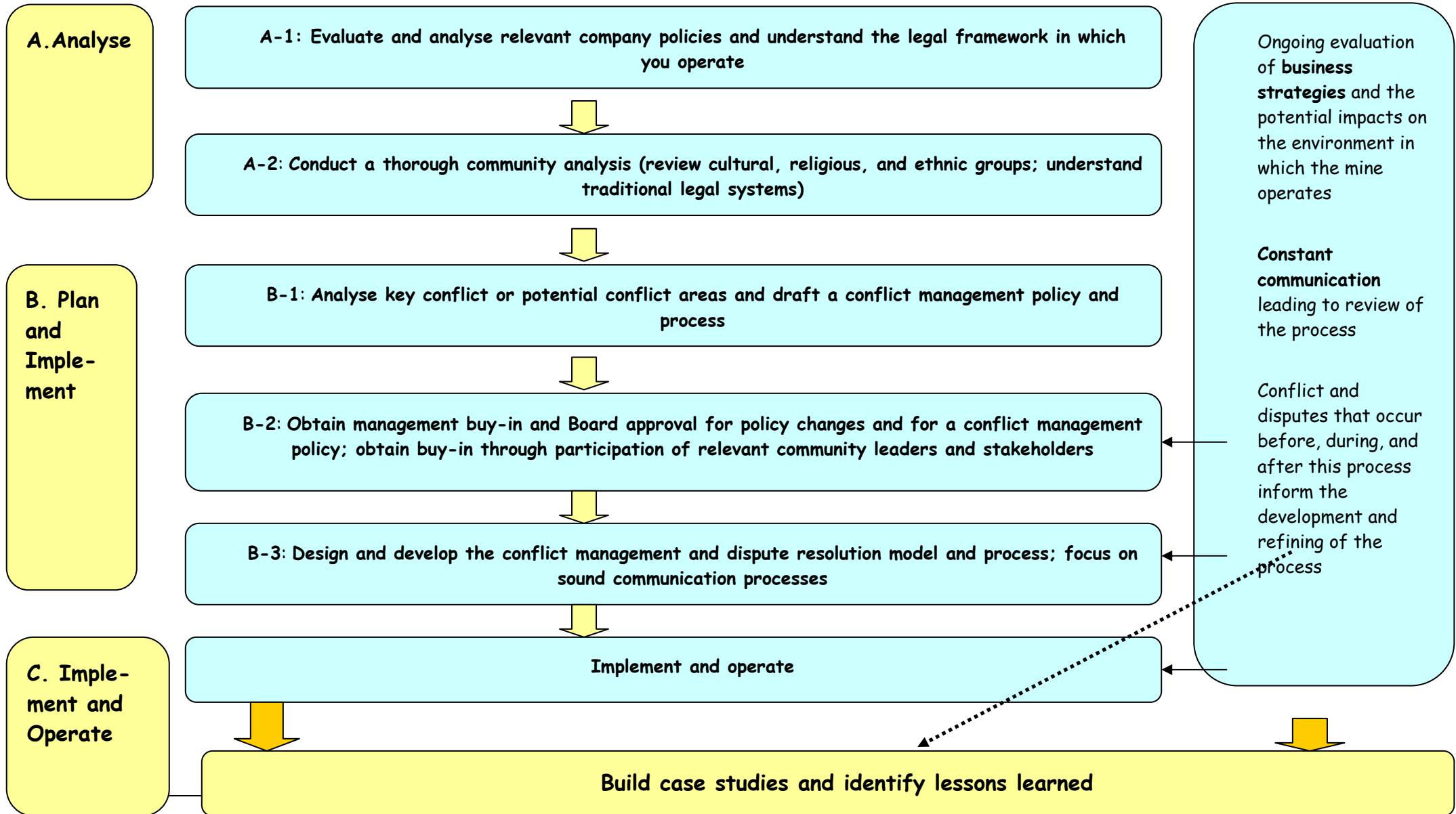
Part Two provides details of what happens in a dispute. Given that the basis of this toolkit is one of seeking a negotiated outcome, the *Guidelines* are focused on this rather than on litigation.

Both sections of the toolkit are built on a foundation of meaningful and continuous public participation. The principle is that the public should have a voice in decisions that affect their lives, and their participation should, in turn, have an impact on decision. Decision-makers must remember that differences and disputes are normal. Every culture has its own way of resolving disputes, and better decisions that are more sustainable emerge from situations where diverse interests, knowledge, and expertise are brought to bear. It is therefore extremely important that public participation and dispute resolution processes are flexible enough to be adapted to local needs, issues, and circumstances. Mining houses that operate cross-regionally need to understand the importance of incorporating this flexibility in circumstances that may differ from project to project or operation to operation.

The challenge in using this toolkit is to understand local circumstances and to customize the process in a way that will enrich decision-making in each individual situation. Thus this is a toolkit and a guideline, not a blueprint for dispute resolution. Users need to work systematically through recurring problems and develop dynamic and appropriate solutions.

**PART ONE: CREATING AN ENVIRONMENT FOR EFFECTIVE CONFLICT MANAGEMENT**

***Overview of Key Stages in Establishment of a Conflict Management Culture***



## ANALYSE

### *A-1: Analyse Company Policies and the Legal Framework in Which You Operate*

#### Key Activities

Conduct a thorough review of all relevant company policies and procedures to include:

- Industrial relations policies and practices
- Communication policies and procedures
- Empowerment policies
- Employment equity
- Disciplinary policies and procedures
- Grievance policies and procedures
- Remuneration policies
- Recruitment processes and induction programmes
- Employee benefit policies and schemes
- Corporate social responsibility programmes
- Staff social welfare programmes
- Staff communication policies
- Environmental policies and procedures, such as water treatment and waste and energy management

#### Guidelines for Implementation

1. The policy and procedure review should recognize existing deficiencies and gaps in policies and procedures.
2. Where possible, the policy review should be benchmarked against competitor and industry best practice as well as international trends (where applicable).
3. The review should aim to ensure that policies and procedures are current and that they consider key strategic objectives.
4. The policy review should be conducted with reference to any relevant compliance and legal requirements, such as the National Environmental Management Act, labour relations legislation, and mining charters that affect your operation and within which conflict must be managed.
5. The review must be conducted in an internal and external context and should, for example, ask how a policy affects the external community as well as how it is perceived by the community and whether this is clearly understood and agreed to.
6. For each policy, ask 'How is this policy going to potentially cause conflict? How do I minimize / manage that? What are the implications of this policy in terms of information sharing and communication?'
7. Ensure that any previously or recently 'scrapped' policies are properly removed - that is, ensure that the communication process is thorough.

**ANALYSE A-2: Conduct a Thorough Community Analysis**

**Key Activities**

**Research the local community**

Understand the composition with reference to:

- Religious beliefs and systems
- Cultural groups, beliefs, and traditions
- Spiritual beliefs and systems
- The roles and representation of traditional leadership
- The power of traditional leaders
- The level of acceptance of local authorities as being representative

**Guidelines for Implementation**

This overview and analysis is a critical step and must be thorough, with a view to obtaining a sound understanding of how the community operates as well as facilitating establishment of effective communication processes from the operation. The analysis will require stakeholder dialogue and engagement with reference to:

1. Review of existing data and information in the public domain.
2. Consultations to gather information.
3. Interface with the community through discussion or stakeholder groups - A representative stakeholder or discussion group can be selected. It is often sound practice to employ an external party (consultants) to facilitate this. Tread carefully when selecting consultants. The Umlazi case revealed that the community did not accept the consultants because they were not party to selecting them. If consultants are going to be used, it is often beneficial to have an independent party, ensure that they are representative, and follow due selection process. Selecting a consultant who is going to be perceived as a 'puppet' of the mining house is going to cause unnecessary conflict.
4. Continuous engagement - Once stakeholder dialogue commences, the process cannot stop; continuity is critical to the long-term success of such a process.
5. Realism - It is critical not to raise expectations with the stakeholder group at this stage unless you know they can be met.

### *Conduct a Thorough Community Analysis (continued)*

#### Community analysis (continued)

- Language barriers
- Capacity of local authorities to represent the community on a meaningful level, particularly where technical or legal knowledge may be required
- Traditional or indigenous legal systems
- Extent to which the community has bought into the mining operation's activities to date

6. Analyse community and government capacity: This is critical and links to the 'balance of power' and level playing fields issue. Provincial governments and local authorities are often understaffed and therefore cannot deliver and sometimes do not follow their own guidelines (examples include DEAT in the Maputo Iron & Steel example and the Botswana government in the Basarwa case study).
7. Assess the roles, capacities, and influence of NGOs and community-based organizations in the operating environment.
8. Understand the link between poverty and environmental degradation in the operational environment (degradation of air and water can, for example, lead to the further impoverishment of people).

Focus on psychological issues such as trust. It is important to remember at this stage that the track record of some miners and large corporations who are perceived to 'have it all' - wealth, resources, etc. - is central to the issue of public trust and the potential for conflict. Public perception of 'overpromising and underdelivery' is often paramount, and the belief that corporations do not fulfil mitigation requirements or honour commitments can prevail in a conflict management situation.

## PLAN AND IMPLEMENT

### *B-1: Analyse Key Conflict or Potential Conflict Areas and Draft a Conflict Management Policy and Process*

#### Key Activities

1. Based on exploration, construction, or operating plans, determine potential sources of conflict and key conflict issues (socio-economic, environmental, political, etc.).
2. Identify the possibilities for potential conflicts becoming real conflicts or disputes. Analyse potential outcomes.
3. Identify the benefits of amicable or managed resolution.
4. Develop an outline of the business need /case to present to internal and external stakeholders, including the management team, and review this against any existing processes.
5. Collect and review all stakeholder feedback in the context of this analysis.
6. Clearly identify the goals and objectives of a proactively managed conflict management system.

#### Guidelines for Implementation

This crucial stage forms the basis for obtaining management and community buy-in as well as the basis for how conflict is managed by all stakeholders.

1. Ensure that the stakeholder group participates in and informs the process. It is important not to go back to the community 'after the fact'. Demonstrate acknowledgement of the fact that communities want active participation and not just a monitoring or info-sharing role. This is a worldwide issue - the Ogoni people and Shell in Nigeria, the battle to close the toxic site in Umlazi (1995), and the Chiapas revolution in Mexico are a few of many examples.
2. Analyse and consolidate the results concisely and with a view to building the 'business case' for your environment.
3. A sustainable outcome is best achieved through the use of the stakeholder engagement process to establish or amend your policy, so that this is done with community participation rather than without it.
4. Conduct a through gap analysis, being aware of the fact that most applicable legislative frameworks lack detailed processes and are often open to interpretation. It is important not to assume that governing legislation can be relied on. Fill in the gaps in terms of ensuring that process detail is explicit.

*Analyse Key Conflict or Potential Conflict Areas and Draft a Conflict Management Policy and Process (cont'd)*

7. Document the benefits of building better solutions for the sector and, through that, the operation of successful conflict management.
8. Define or refine a conflict management policy for your company.
9. Manage perceptions, assisted by sound practices of information sharing.

- Define response times, recognizing each party's constraints (it can be difficult to reach agreement, given very different constraints and agendas).
  - Define a specific set of guidelines and boundaries - be aware of the fact that legislation often does not, for example, provide criteria for whether a decision should be based on negative bio-physical or on positive social impact (such as job creation).
  - Deal with substantive and procedural issues. (Note: Many conflicts arise and become adversarial simply because procedure is not followed or because of semantics.) Be thorough and careful and, above all, understand what is important to all stakeholders in terms of procedure. Remember that stakeholders have very different timelines and agendas and therefore requirements for procedure can differ enormously.
5. Determine and agree up front the level of information sharing with the community. Bear in mind that access to information is a basic tenet of democracy and that the purpose is based on a principle of informed decision-making and not propaganda.
  6. Be careful not to treat this as a public relations exercise. PR is perceived to be a Western activity and concept and is seldom if ever understood in the same way by indigenous peoples.

## PLAN AND IMPLEMENT

### *B-2: Obtain 'Buy-in' from Management, Conflict Managers, and the Community*

#### Key Activities

#### Guidelines for Implementation

1. Understand through the analysis conducted thus far what conflict means in your operation and the environment it affects.
2. Create a context for proactive conflict management through the establishment of a 'business case' - conduct a risks/benefits analysis and an opportunity assessment and present this to the management team and relevant staff. Ensure that the operational and the community's acceptance of the 'business case' is one and the same.
3. Obtain 'acceptance' of the business case without creating expectations.
4. Prepare two to three alternative conflict management and dispute resolution strategies through flowchart representation, and map these alternatives onto the risks / benefits analysis and opportunity assessment. Take the relevant management team through these scenarios and hold a workshop on the potential outcomes and impacts of each scenario. Assess outcomes, opportunities, benefits, and negative impacts. Be aware of reputational risk and long-term stakeholder relationship issues.

Define conflict management specifically in the context of your operation and its environment as well as in the context of what sustainable development means in your operation.

Consider short and long-term business goals; the anticipated life cycle of the mine; impacts on the business of thorough implementation; impacts of non-implementation; stakeholder and regulatory pressures.

A 'business case' that is not accepted by the community is not a business case.

Give demonstrable consideration to:

- integration of the proposed processes with the business environment
- resource demand in the community and the operation (such as personnel required)
- the impacts of not having full capacity within the community to manage the desired process
- priorities (strategic and operational)
- applicable deadlines - these may be existing, legal, key business values and principles, and key stakeholder concerns as discovered in the previous steps
- governance issues
- implementation timeframes and process guidelines
- training requirements



## PLAN AND IMPLEMENT

### *B-3: Design and Develop Conflict Management and Dispute Resolution Model*

#### **Key Activities**

1. Building on work in previous steps, define the scope of the policy and the objectives of the conflict management and dispute resolution process.
2. Create a diagrammatic representation of the preferred processes and produce a flowchart.
3. Obtain stakeholder feedback.
4. Develop a framework for analysing each dispute and selecting the most appropriate dispute resolution mechanism. Ensure that this shows clear integration with other relevant business processes.
5. Ensure that the legal analysis completed earlier is referred to. Improve definitions where procedural and semantic issues could create conflict.

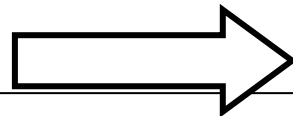
#### **Guidelines for Implementation**

1. Ensure that the Board and management strategic imperatives obtained in earlier steps are accurately represented.
2. Ensure that the strategy agreed with the workshop group in the previous stage is accurately incorporated.
3. Stakeholder views should be fed back into the process in a meaningful way, thus ensuring the ongoing credibility of the process. There may need to be a number of reiterations of this process. Investment in the process at these earlier stages should pay off in terms of a more robust and credible process in the longer term.

## C: IMPLEMENT AND OPERATE

### Key Activities

1. Plan for implementation - identify the programme for implementation throughout the business.
2. Formalize operational divisions for management commitment through:
  - Ongoing training and guidance
  - Define conflict management in the performance objectives of relevant managers through the Key Performance Indicator (KPI) process
  - Include, where necessary, conflict management and dispute resolution roles in relevant job descriptions.
3. Define the steps for selecting the appropriate dispute resolution methodology and make these readily available.
4. Document each conflict and dispute, no matter the stage at which it was resolved.
4. Evaluate and re-evaluate.



### Guidelines for Implementation

The plan should include:

- Milestones and timeframes
- Training schedule
- Capacity building schedule where appropriate
- Deliverables
- Benefits

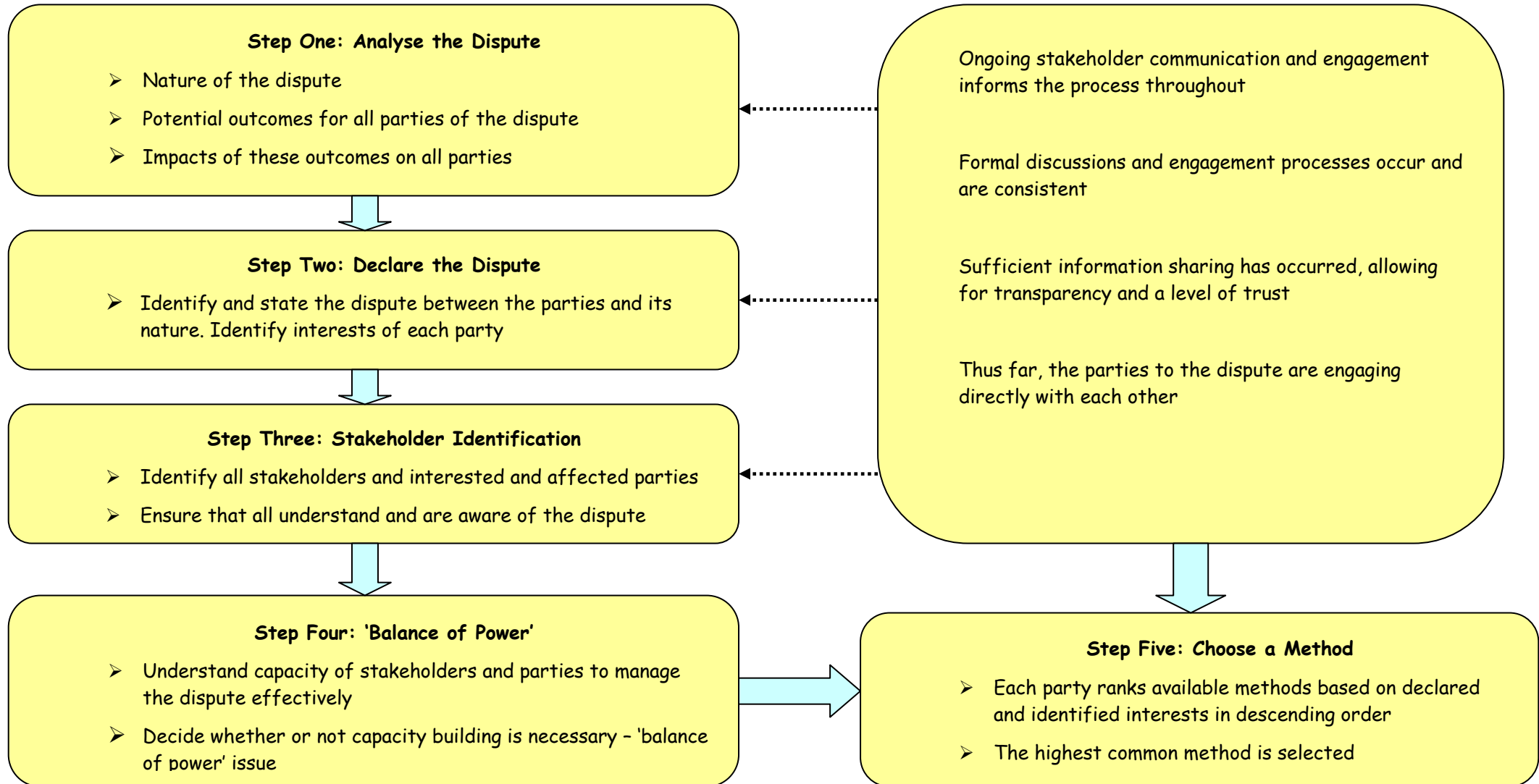
Find champions in the operation who will play driving, gate keeping, and monitoring and evaluation roles.

Ensure that there is buy-in to the integration of effective conflict management in the KPI process. Ensure that this can be measured.

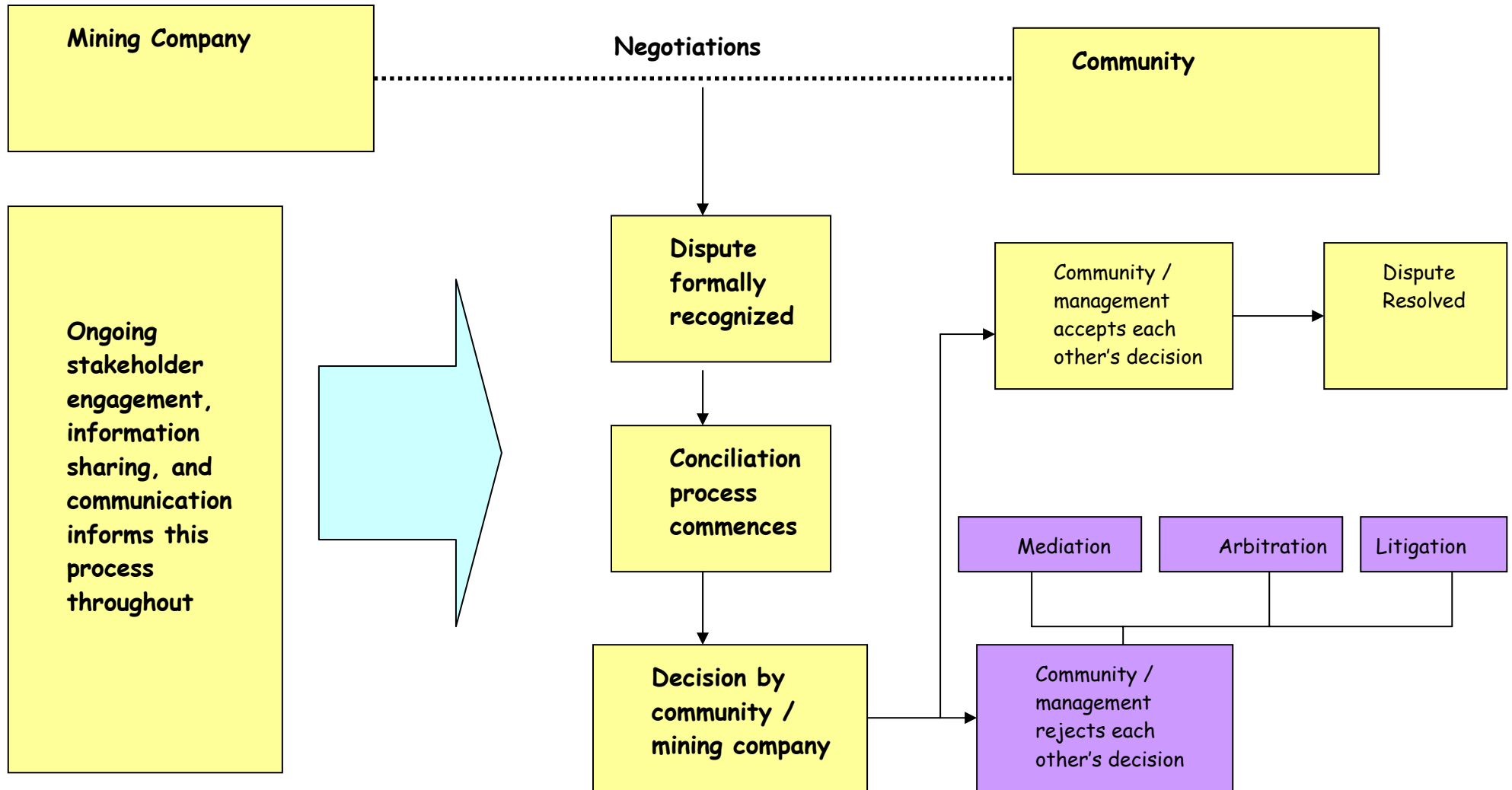
The conflict management and dispute resolution process should be constantly evaluated and re-evaluated. The evaluation process allows decision-makers to learn if the process and the outcomes are accomplishing the goals and objectives and to gather information to improve future projects.

**PART TWO: EFFECTIVE DISPUTE RESOLUTION**

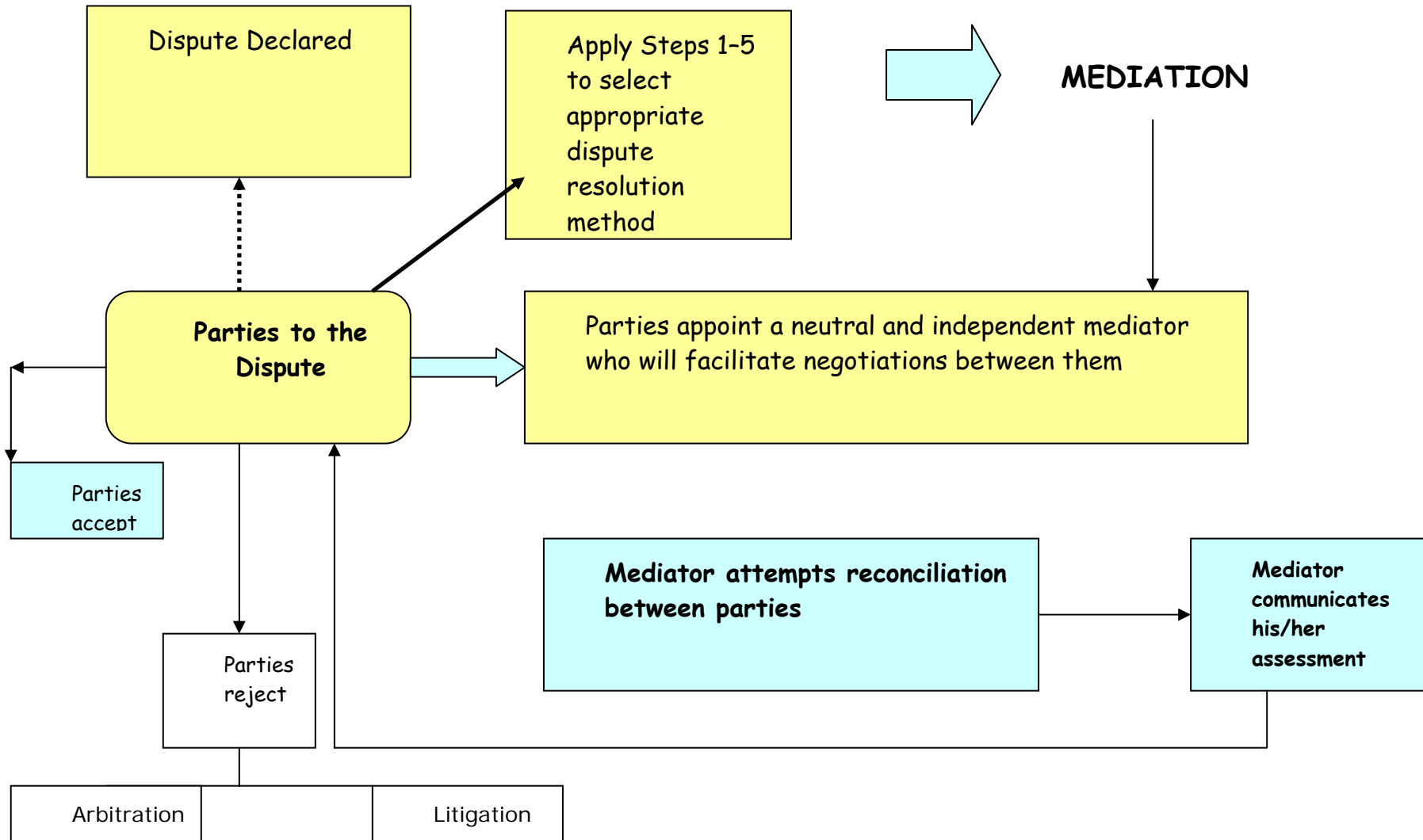
***Guidelines and Steps for Selecting an Appropriate Dispute Resolution Process***



### Steps Towards Resolution of a Dispute



### Steps Towards Effective Mediation



## 5. Conclusion

While conflict management and dispute resolution have been always been factors in the extractive sector, they have not necessarily been integral to the sector. Dispute resolution processes (mediation, arbitration, and so on) have evolved substantially and been formalized over time, whereas the approach and the context given to conflict have not evolved in a sustainable way. This toolkit indicates a need to develop an integrated approach so that conflict management and dispute resolution become less mechanistically driven and more inclusive and proactive.

This means implementing processes (such as stakeholder engagement and consistent communication processes) that augment the available dispute resolution mechanisms to allow all stakeholders in a dispute to participate based on three key underpinning principles:

- Inclusiveness – all parties participate
- Fairness – all parties participate on a level playing field
- Consensus – all parties work toward consensus and away from adversity

This toolkit is designed to facilitate an approach toward conflict management that is based on recognizing the power of conflict in building more sustainable solutions for all concerned.

## **Appendix: Interviews and Visits to Operations**

### **MINE OPERATORS**

#### **BHPBilliton & Ingwe Coal**

Corporate Head Office: Andre van den Berg, Scott Lowe, Chris Ellersen

Klipspruit Mine: Roelof Hugo, John Nkadimang (Consultant)

#### **Goldfields**

Corporate Head Office: Terrence Goodlace, Rosemary Moffat, Kevin Thomas

Kloof Mine, Westonaria: Gerrit Kennedy (VP and Head Operations), Frik Louw (Senior Technical Manager), Willem Boshoff (Senior Manager, Human Resources)

#### **Anglo American**

Corporate Head Office: Karin Ireton

Anglo Coal: John Wallington (Head, Coal Division), Biele van Zyl (Environmental Manager)

#### **De Beers**

Jeffrey Leaver (General Manager, Human Resources, Corporate Head Office)

Namdeb: Rob Smart (General Manager), Ben Rukamba (Manager, Special Projects)

Kleinsee: Louis Munnik (General Manager)

Williams Diamond Mine: Tony Guthrie, MD

#### **Avmin**

Teboho Mahuma, John Qiyosa

### **OTHER ORGANIZATIONS AND CONSULTANTS**

#### **SRK Consulting Engineers**

Ally Burger

**Sustainable Villages Africa** (Sustainable Livelihoods Implementation Practitioners)

Clive Norton

#### **Chambers of Mines in South Africa, Angola, and Namibia**

**Bafokeng Tribe** (which took transfer of mining rights when Lukas Mangope's corruption came to light in Bophatatswana, a former South African homeland)

#### **Mine Workers Development Agency**

Kate Phillips

#### **Disabled Peoples Association SA**

Colleen Howell, Consultant

## **GOVERNMENT**

### **Gauteng Government**

Mary Metcalfe (MEC for Department Agriculture, Conservation, Environment and Land Affairs), Dee Fischer and Sam Nkosi (Pollution Abatement and Remediation)



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## Notes

<sup>1</sup> Minister of Minerals and Energy Affairs 2003.

<sup>2</sup> Nambib Resources (Pty) Ltd vs Minister of Mineral and Energy and Tradeline Namibia, Case (T)A 38/2002.

<sup>3</sup> At the 1988 South African National Bar Conference held in Durban, South Africa.

<sup>4</sup> Bryson 1984.

<sup>5</sup> Asmal 1998.

<sup>6</sup> Peek 1999.

<sup>7</sup> Van den Berg 1998.

<sup>8</sup> Appleby 1993.

<sup>9</sup> Orrego Vicuna 2001.

<sup>10</sup> Ibid.

<sup>11</sup> Note that it is sometimes difficult to demarcate indigenous peoples in the context of a regional or national area. People from the Eastern Cape in South Africa, for instance, moved to the Western Cape for contract construction jobs. These people now constitute a race group in the area that did not previously exist to the same extent. The debate continues as to where to draw the line when applying the principle of 'local'. Also, in many parts of the world where settler-colonialism existed, 'indigenous' refers to the original inhabitants of the place (First Nations, Native Americans, etc). This definition may have application in South Africa, Zimbabwe, and other countries where a residual settler population holds the balance of power. And within the current political framework, there exist marginalized tribal groups, mainly hunters and gatherers like Mbuti Pygmy and Bushmen, whose rights as original peoples should be specifically acknowledged.

<sup>12</sup> Fred-Mensah 2003, p. 4.

<sup>13</sup> Project on Land and Natural Resource Rights Home Page, at [www.firstpeoples.org/land\\_rights/title\\_page.htm](http://www.firstpeoples.org/land_rights/title_page.htm).

<sup>14</sup> Industrial Relations Handbook Revision 1996, pp. 12–14.

<sup>15</sup> In the case of the Basarwa people in the Kalahari, Botswana, the Basarwa people lived in an area broken into mining concessions (with De Beers being allocated 50 per cent). The Botswana government decided to force the relocation of the Basarwa based on the fact that they were not living the traditional lives they claimed and that they would have access to water in the relocated area. It was alleged that De Beers were behind the government decision, resulting in conflict between the Basarwa community and De Beers.

<sup>16</sup> Van den Berg 1998.

<sup>17</sup> Traditional and principled bargaining approaches from van den Berg 1999, pp. 6–7.

<sup>18</sup> Whiteman and Mamen 2002.