The legal imperative behind ESG compliance and decarbonisation

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10 Feb 2021

Environmental, social and governance (ESG) performance confirmed its entrenched position at Mining Indaba Virtual 2021, where virtually all speakers and panellists engaged on the critical trends associated with the conceptualisation and implementation of ESG, and the actionable impact that it must now strive to achieve.

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The mining industry identified the need for companies to move away from seeing ESG as a reporting and data-gathering exercise and towards extracting value from it.

The drive to incorporate ESG awareness and implementation into corporate strategy, organisational culture, risk management, stakeholder engagement and portfolio planning has been well received and understood by the industry, as it should be.

The term ESG was devised in 2005 and publications outlining the preliminary principles became more frequent from 2015.

But ESG is no longer a nice-to-have or merely a value-driver or investment metric. It is a prerequisite to diminishing the social trust deficit; to guaranteeing the responsible sourcing of metals and minerals; to driving policy reform; and, ultimately, to decarbonising the economy.

Mining in its context for society

Anglo American CEO, Mark Cutifani, made a particular reference to addressing the social trust deficit. "Articulating or talking about mining in its context for society, and then showing people on the ground the difference we can make and at the same time being respectful of their needs, their wants, their desires for their community and what's important to them – that's the future for us… It's about how we connect with our stakeholders in every sense of the word…"

How mining companies achieve these priority impacts will be informed by how well they navigate, understand, report against and identify opportunities within the many legal frameworks which inform the fundamental principles and obligations underpinning ESG performance.

The mining cycle, and service providers and stakeholders within the mining industry, will all be affected by and subject to varying legal and institutional obligations.

Operations

From an operational perspective, a mine's compliance efforts are circumscribed by a host of environmental permitting and social development obligations and duties towards the wellbeing of their employees while they are at work, both in terms of fair labour practices and ensuring that they are able to perform work without being exposed to immediate, or longer-term, harm.

Those listed on stock exchanges are further scrutinised against corporate governance obligations, standards and listing requirements (such as the King IV Code on Good Corporate Governance; the Companies Act's fiduciary duties; and the JSE's Listing Requirements).

Overlaid on that, funding institutions are increasingly guided by and prescriptive of international best practice standards, codes and reporting requirements (such as the IFC's Performance Standards; the World Bank's Environmental, Health and Safety Guidelines; or the UN's Principles for Responsible Banking).

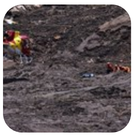
Traversing the wide scope of legal application to the mining lifecycle from an ESG perspective may seem rudimentary, but it is only through a detailed and bespoke mapping of ESG compliance obligations affecting the mine and its complete value chain that the company will be able to effectively harness the true aim of ESG.

Understanding the obligations informing the operations' daily obligations; but also where the company gets its resources; sources its employees, equipment, suppliers; who it sells to; and how its products are used are all components of effective ESG mapping, whether it is from a human rights perspective, a procurement law perspective or a community development perspective.

Learning from disasters

Take, for example, the internal tailings management function. Consultants, Environmental Resources Management (ERM), note the paradox that, while the mining industry has made huge strides in integrating ESG into key business decisions over the last 30 years (albeit primarily driven by statutory requirements), it has only recently started to get to grips with the risks posed by its waste disposal sites, in particular tailings storage facilities (TSFs). Undoubtedly, this has been as a direct result of the Brumadinho disaster in 2019.

Yet the learnings from the disaster stressed not only the engineering complexities and failings of TSF management, but also the impacts of the disaster on the environment and safety of people as well as the impacts on the economy and infrastructure well into the future - all aspects which the subsequent Brumadinho settlement discussions had to address.



In a progressive shift change, there is now a realisation (while not new) that managing tailings is not just an engineering challenge; it poses a risk with significant societal consequences that puts future investment in jeopardy and ignoring this is just no longer feasible for the industry.

The launch of a Global Industry Standard on Tailings Management, championed by the International Council on Mining and Metals, the United Nations Environment Programme, and the Principles for Responsible Investment, in August 2020 will see a new form of regulation of these facilities, which demands conformance by TSFs within three to five years.

How do existing and future regulatory obligations align with this imperative?

The 2018 declaration of the work done by team leaders and mud guards at TSFs as an essential service under the Labour Relations Act introduces further labour and safety issues for consideration under the ESG narrative of the company.

Or, consider the project financing of a renewable energy facility, not only to ensure stable power supply to operations but also as an opportunity to offset the company's carbon tax liability. It is not always clear whether the principles underlying sustainable financing are necessarily aligned with the statutory requirements and obligations imposed on the mining industry.

Sustainable financing solutions and investor ratings are also inextricably linked to assessments of supply chain to product, which metrics companies can harness in setting organisational goals.

What's more, it is common knowledge that legal reform is not something that occurs rapidly, and it is almost always reactive. In contrast, sustainable financing and principles underlying ESG are progressive and continuously evolving.

The challenge with this misalignment is that the regulatory framework does not necessarily facilitate the projects and opportunities being identified by the mining industry and which attract asset managers. “Doing the right thing” can also be expensive, which creates tension with financiers and relevant stakeholders.

Understanding the regulatory frameworks governing new technologies, such as the hydrogen economy, is becoming increasingly important. So is understanding the juxtaposition between drivers of shareholder value and investment returns against regulatory hurdles to project commencement.

These functions are further compounded by the mine lifecycle itself, which requires a balancing of concurrent mining and rehabilitation and the eventual closure objectives and identification of a sustainable end state for the land.

While mining companies are fully versed in the financial provisioning and closure requirements imposed under mineral regulation, compliance mapping would assist in determining whether some of the above sustainable financing opportunities tie in with the statutory obligations of the mine, and whether such sustainable financing could in time be recognised by the regulators as contributions towards financial provisioning in a mine closure context.

Compliance

Value beyond compliance, a key theme in the ESG world, is still underpinned by the compliance function. The sooner miners equip themselves with a map of their ESG legal landscape, and the legal and ESG targets they can and intend to achieve, the faster they will be in a position to constructively engage and support government in enabling much-needed policy reform; the more pronounced societal impact will be; the more coordinated stakeholder engagement will be; the better equipped they will be to retain market share among buyers or those with stringent ESG requirements; the more sustainable operations will become; and the more available opportunities for sustainable solutions will become. All these achievements will have the consequence of South Africa realising its ambition of a just transition and a low carbon economy.

ABOUT THE AUTHOR

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