Resource Extraction
and its Contribution to Development in Africa

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Introduction

The forthcoming report of the International Study Group on the revision of mining regimes in Africa created by the UNECA in 2007 begins with a striking observation. It is now exactly thirty years since the Organisation of African Unity, the precursor to the African Union, adopted the *Lagos Plan of Action for the economic development of Africa* which presented a strategic review of Africa's development challenges and potential paths. The Plan's identification of "[t]he major problems confronting Africa in the field of natural resource development" (paragraph 76) rings familiar today. These problems included:

> lack of information on natural resource endowment of large and unexplored areas […]; lack of adequate capacity (capital, skills and technology) for the development of these resources; a considerable dependence on foreign transnational corporations for the development of a narrow range of African natural resources selected by these corporations to supply raw material needs of the developed countries;
> - the inadequate share in the value added generated by the exploitation of natural resources of Member States […];
> - non-integration of the raw materials exporting industries into the national economies of the Member States thus impeding backward and forward linkages;
> - extremely low level of development and utilisation of those natural resources of no interest to foreign transnational corporations;
> - and disappointingly low general contribution of natural resources endowment to socio-economic development.

In October 2008, the first African Union Conference of Ministers Responsible for Mineral Resources Development produced the Addis Ababa Declaration on Development and Management of Africa's Mineral Resources[1] of which the first statement read as follows:

[1] The first African Union Conference of Ministers Responsible for Mineral Resources Development produced the *Addis Ababa Declaration on Development and Management of Africa's Mineral Resources*, 13-17 October 2008, Addis Ababa, Ethiopia, 1st Ordinary Sessionau/Min/ Camrmrd /4(I).

> We, the African Union Ministers Responsible for Mineral Resources Development, meeting in Addis Ababa, Ethiopia on 16 and 17 October 2008 during the First Session of our Conference,
>
> Deeply concerned about the high incidence of poverty and underdevelopment in Africa in-spite of its abundant endowment of mineral resources;
>
> Aware of the significant contributions that prudent and efficient development and management of our mineral resources can make towards the achievement of the Millennium Development Goals (MDGs) and meeting the challenges of poverty eradication and broad-based socio-economic development in our countries;
>
> Also aware that much of Africa’s mineral resources remain under-explored and under-exploited and that geoscience knowledge is at a relatively too low level to attract exploration and investment;
>
> Considering the Yaounde Vision on Artisanal Small-scale Mining (ASM) activities in Africa, adopted in Yaounde in November 2002, which underlines the importance of these activities in the development of rural communities and in poverty reduction;
>
> Convinced that Africa needs policy space, and recognizing, in this regard, the importance of a pro-active development state to achieve fair and equitable fiscal and investment regimes and to maximize the benefits derivable from mineral resources exploitation […].

The Declaration went on to call on the different African based organisations and notably the:

> UNECA, AfDB, AMP, the Regional Economic Commissions and all other stakeholders, to formulate recommendations taking into account the recommendations made by the Experts Meeting, a concrete Action Plan for the realization of the Vision after its adoption […].

And to:

> Re-affirm our commitment to prudent, transparent and efficient development and management of Africa’s mineral resources to meet the MDGs, eradicate poverty, and achieve rapid and broad-based sustainable socio-economic development […].

It was in the context of current and heightened attention given to these issues that the United Nations Economic Commission for Africa (UNECA) set up the International Study Group three years ago to look into how mining might contribute to development, among other things, through the revision of mining regimes in Africa. While the report of this Group is not out yet, the thinking and background papers which have been produced by it are directly relevant and shed light on the subject at hand.

The 2008 Declaration of the Ministers Responsible for Mineral Resources Development starts from the recognition that, in spite of the importance of the investments which has been forthcoming, mining in Africa for the past two decades has not contributed to sustainable socio-economic development and poverty reduction.

It is essential therefore to understand why this has been the case if policies are to be renewed in such a manner as to avoid past patterns which have failed. A considerable amount of material exists in this respect. Consequently, in the first part of my presentation, I will explore two questions:

- What have we learnt from past trends?
- What have been some of the consequences of the past patterns of investment in the mining sector in Africa?

In the second part, I will examine briefly how past approaches might be renewed to avoid former errors and what are certain conditions necessary for this to happen.

A.1 What have we learnt from past trends?

Understanding the heritage of resource extraction and its contribution to development in Africa is obviously an extremely complex task. Experiences vary considerably depending on the particular mineral, the site concerned and the specificities of different countries which are characterised by very diverse policy traditions, trends and objectives, reflecting an enormous variance with regard to history and context.

As the focus of the work of the UNECA brings our clearly, the role of regulatory frameworks which orient the development of mining activities, while by no means the only dimension, is one of the central aspects in determining the outcome of activities in the sector. The manner in which mining regimes have been reformed since the 1980s, and the perspectives and principles which have guided the reforms, will therefore be the focus here.

Several aspects of the design of past mining regimes designed to attract investment merit attention. Five will be mentioned.

i) What comes out clearly is the extent to which consideration of what was needed to attract foreign investment was very much premised on a **mono sectoral approach** rather than one which sought to articulate the contribution of the mining sector into macro economic objectives involving inter-sectoral linkages, with a view of seeing to what extent the sector could contribute to broader developmental objectives. Little provision was made to build eventual backward and forward linkages, such as the possibility of value added processing of minerals, which in a resource extraction economy would normally be considered important development objectives. Such an approach can be seen as quite distinct from one which foresees a transformative role for mining in which the sector serves as a catalyst to spur activity in other sectors of the economy.

ii) The revision of mining regimes was undertaken very much from the perspective of mining companies. In fact, proposed reforms were informed by the replies of major and junior companies to questionnaires as to what types of regimes might best suit their needs.

iii) The contribution of mining activities to the local economy was seen to be tax revenues and foreign exchange receipts which were presented as “the major benefits to be derived from mineral development”[2]. However, because African countries are perceived to be a high or medium risk investment, they were encouraged to be competitive in their taxes and incentives.

iv) With regard to the environmental effects of mining activity, and subsequently, the social impacts which remained much less developed than other aspects of regulatory frameworks, these impacts were seen as side effects (considered as secondary and marginal to the positive consequences), which could be regulated by the introduction of voluntary performance standards. The application of such standards was seen to rest above all with companies rather than being considered as issues which were clearly interrelated and integral parts of development strategies entailing overriding government responsibility**.**

As one analyst summarised the policy environment of the 1980s and 1990s, under the leadership of the World Bank Group:

> [T]he new agenda advocated comprehensive privatisation of state companies, an end to restrictions on foreign ownership and the repatriation of profits, lowering rates of taxation and royalties, restructuring labour laws to permit greater flexibility, and the termination of performance requirements such as those mandating local

[2] World Bank, *Strategy for African Mining*, World Bank Technical Paper no.181, Africa Technical Department Series, Mining Unit, Industry and Energy Division, Washington D.C. World Bank, 1992, p.27.

sourcing or local hiring. In addition, mining legislation had to be rationalised, administrative processes simplified, technical services to the industry (such as modernisation of the mining cadastre) improved and "subjective" elements of bureaucratic discretion removed from the permitting and approvals processes[3].

v) Underlining the above approaches of the 1990s, one past trend stands out above all others and it concerns the redefinition of the role and functions of the state and the new delineation between public and private spheres of authority which have accompanied this redefinition. It can be argued that these changes have had central implications not only for the social and economic development of the countries concerned, but they have also entailed implications for the legitimacy of activities of mining companies and of states themselves, implications which do not seem to have received the attention which they deserve.

The recommended reforms with regard to the role of the state were in fact very precise. In its 1992 report *Strategy for African Mining,* the World Bank set out that the role of government was to create a suitable environment for the private sector. This required "[a] clearly articulated mining sector policy that emphasizes the role of the private sector as **owner and operator** and of government as **regulator and promoter**"[4]. As Szablowski whose work concerned mining in Latin America noted, government was to stop "being an owner-operator pursuing social or political goals through its operational involvement in the mining industry". Instead, governments were encouraged "to become efficient and 'apolitical' regulator[s]"[5]. Their role was to facilitate private investment. The myriad of policy reforms that the World Bank promoted through the package of privatisation and liberalisation reforms was accompanied by the assertion that the early reformers were ahead of their competitors. Africa's experience over 20 years has been a cumulative process of reform leading to several generations of increasingly liberalised mining regimes[6].

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[3] David Szablowski, *Transnational Law and Local Struggles, Mining, Communities, and the World Bank,* Oxford & Portland, Hart Publishing., 2007, p.34.

[4] World Bank, *op.cit.,* p.53 {emphasis added}.

[5] Szablowski, *op.cit.*, p.34.

[6] These are analysed in B. Campbell (ed.), *Regulating Mining in Africa : For Whose Benefit?*, Uppsala,The Nordic Africa Institute, 2004, 89 p. and B. Campbell (ed.), *Mining in Africa : Regulation and Development*. Co publication London: Pluto Press, Ottawa: IDRC, and Uppsala: The Nordic Africa Institute, 2009, 284 p.

A.2 What have been certain implications of past reforms?

A 2005 UNCTAD study provides a useful framework within which to analyse the contribution of foreign investment to development[7]. The background paper to this study, TD/B/COM.2/EM.20/2, sets out a series of the areas which permit tracking the contribution of foreign investment concerning how the participation of companies in the extractive industries affected the economies concerned. These areas are the following:

- The size and distribution of budget and export revenues from existing resources;
- Creation of employment and local linkages;
- Industrial diversification and infrastructure development;
- The environment and local communities;
- Broader social development issues.

With regard to the extractive sector, one aspect of this framework is of particular interest. It concerns the first dimension, the size and distribution of budget and export revenues from existing resources. This area is of particular significance for two reasons:

- First, because it is in this area that the contribution of mining is expected to be the most important.
- Second, over time and thanks to initiatives such as the Extractive Industries Transparency Initiative (EITI), more complete information is increasingly available and existing data permits drawing more robust conclusions that would not have been possible ten years ago.

With regard to mining payments made by companies to governments and revenues received by governments from mining companies, we appear at present to be at a turning point. After almost two decades of experiences which demonstrated a pattern which had emphasised keeping very modest the level of royalties, duties, as well as other forms of taxation in many mineral rich countries of Africa in order to ensure competitiveness, this pattern now seems to be increasingly questioned and in the process of being redefined. Such a pattern of questioning what now appear as overly generous concessions which have led to a

[7] United Nations Conference on Trade and Development (UNCTAD), *Economic Development in Africa: Rethinking the Role of Foreign Direct Investment*, New York and Geneva: United Nations, 2005.

disproportionately low share of government revenues is in fact currently quite widespread in mineral rich countries of Latin America[8].

While obviously a complex subject which varies widely among mineral sectors and country specific situations, illustrations based on the Ghanaian experience will be used here to illustrate a broader pattern with regard to experiences in Africa. The research of our team allows illustrating similar trends elsewhere such as in Mali[9].

Ghana[10] illustrates what has been presented as the first generation in the liberalisation of African mining codes of the mid 1980s, characterised by the stringent withdrawal of public institutions from the sector, privatisation, a reduction in the level of royalties and the abolition of certain taxes. The pattern of the opening up of the mining sector to foreign investment was to have important consequences for the level of revenues actually retained in the country. This is because of such factors as the high level of fiscal incentives enjoyed by mining companies, the constrained capacity of the sector to generate significant local labour employment, lack of capacity for value added processing, and the huge amounts of foreign exchange earnings retained in offshore accounts.

The progressive reform in the country's mining code at the time resulted in the scaling back of corporate income tax liability and the provision of more specific fiscal allowances that aimed to reduce the general tax liability of mining sector operators. In order to situate more recent proposals, it is helpful to recall that corporate income tax, which stood at 50-55% in 1975, was reduced to 45% in 1986, further scaled down to 35% in 1994 and finally to 25% with the 2006 code. Additional Profit Tax which stood at 25% in 1986 was abolished in 2006. Initial capital allowance to enable investors to recoup their capital expenditure was increased from 20% in the first year of production and 15% for subsequent annual allowances in 1975 to 75% in the first year of operation and 50% for subsequent annual allowances in 1986. The

[8] This has led in turn to the publication of documents which are clearly intended to counter allegations of the insufficient contribution of past mining regimes to local economies. The methodology on which conclusions of certain of these studies are based however, merits very careful scrutiny, as for example the Fraser Institute's *Economic Freedom and the "Resource Curse". An Empirical Analysis*, by Louis-Phillipe Béland and Raaj Tiagi, October 2009, and Price Waterhouse Coopers "Total Tax Contribution", Pricewaterhouse Coopers LLp, *Global study for the mining sector*, 2008.

[9] See G. Belem in B. Campbell (ed.), *Regulating Mining in Africa. For Whose Benefit?*, *op.cit.*, and G. Belem in B. Campbell (ed.), *Mining in Africa. Regulation and Development.*, *op.cit.*

[10] Thomas Akabzaa, "Mining legislation and net returns from mining in Ghana", in B. Campbell (ed.), *Regulating Mining in Africa : For Whose Benefit?*, *op.cit.*

royalty rate, which stood at 6% of the total value of minerals won in 1975, was reduced to 3% in 1986 and maintained at that level in 2006. Other duties that contributed significantly to government revenue from the sector before the reforms, such as the mineral duty (5%), import duty (5-35%), and foreign exchange tax (33-75%), were all abolished in 1986.

Table 1. Comparison of earlier fiscal elements of various fiscal policies implemented in the Ghanaian mining sector

ITEMS	SMCD[11] 5 1975	ACT 437: INVESTMENT CODE, 1981	PNDCL[12] 153 REGIME 1986	AMENDMT. 1994	Proposed Amendts. 2002[13]
Corporate Income Tax	50-55%	45%	45%	35%	35%
Allowances					
Initial Capital Allowance	20%	20%	75%		75%
Subsequent Annual Capital Allowance	15%	N.A	50%		50%
Investment Allowance	5%	N.A	5%		5%
R & D Allowance	N.A	25%	N.A		N.A
Royalty	6%	2-6%	3-12%		3% or less
Min. Turnover Tax	2.5%	2.5%	N.A		N..A
Mineral Duty	5-10%	5-10%	N.A		N.A
Import Duty	5-35%	5-35%	N.A		N.A
Foreign Exchange Tax	33-75%	33-5%	N.A		N.A
Import Licence Tax or Import Levy	10%	10%	N.A		N.A
Government shareholding	55%	55%	10%		0%
Gold Export Levy	3 cedis/oz for every oz above 100,000 oz.	3 cedis/ oz for every oz above 100,000 oz	N.A		N.A
A.P.T			25%		0%

Sources: Thomas Akabzaa, “Mining legislation and net returns from mining in Ghana”, in B. Campbell (ed.), *Regulating Mining in Africa: For Whose Benefit?, op.cit.*, p.27.

[11] SMCD – Supreme Military Council Decree.
[12] PNDCL – Provisional National Defence Council Law.
[13] This proposal was before parliament for ratification in 2002.

Table 2. Ghana: Comparison of the fiscal and related provisions of the Minerals and Mining legislations of 1986 and 2006

Items	PNDCL 153 1986	Amendments to Law 153	ACT 703, 2006
Incentives			
Initial capital allowance	75%		75%
Subsequent capital allowance	50%		50%
Investment allowance	5%		5%
Carried forward Losses for purposes of taxation	Up to five years		Up to five years
Off-share Retention of sales	25% to 80%		25% to 80%
R&D allowance	Exempt		Exempt
Mineral duty	Exempt		Exempt
Import duty	Exempt		Exempt
Foreign exchange tax	Exempt		Exempt
Import license tax or import levy	Exempt	Exempt	Exempt
Gold export levy	Exempt	Exempt	Exempt
Taxes			
Corporate income tax	45%	35%	25%
Royalty	3% to 12%		3% to 6%
Withholding tax	10%		10%
Capital gain tax	10%		10%
A.P.T.*	25%		0%
National Reconstruction Levy		2% of before tax profits (2001)	0%
Others			
Govt. equity participation in mining lease	10% free carried interest with to option increase to 30% provided additional shares purchased at market price		10% free carried interest, no option for acquisition of further shares.

* Additional Profit Tax
Sources: Thomas Akabzaa, "Mining in Ghana: Implications for National Economic Development and Poverty Reduction", in B. Campbell (ed.), *Mining in Africa. Regulation and Development, op.cit.*, p. 40.

An analysis of the linkage effects of foreign investment in the mining industry usually employs the concept of retained value -- the share of the total value of production retained within the host country[14] -- to evaluate the contribution of the sector to national development. The higher the actual export value returned to the national economy, the more the economy is positively impacted by the sector. Holders of a mining lease are permitted by the Bank of Ghana to retain a minimum of 25% of the operator's foreign exchange earnings in an external account for the purposes of procuring equipment, spare parts, raw materials, and for dividend payments and remittances in respect of goods for expatriate personnel, among others. Each

[14] Craig Emerson, "Mining Enclaves and Taxation", *World Development*, vol.10, no.7, 1982, p.561-571.

company negotiates directly with the government the exact percentage that can be retained outside Ghana.

Currently companies maintain between 60% and 80% of their export earnings in foreign accounts. The Bank of Ghana maintains, however, that an average of 71.2% of value of all mineral exports is held in offshore accounts. The retained value of 28.8% is perceived as inflated, as no adjustment is made for the import content of local purchases, such as petroleum products, explosives, and other consumables in the mine. Estimates that government revenues represent less than 40% of the retained value may therefore be considered excessive.

In view of the level of foreign exchange earnings allowed in the offshore accounts of the various mining companies, only a small percentage of earned foreign exchange trickles back into the national economy. This pattern was documented by Akabzaa in the 2004 study by the following table:

Table 3. Ghana: Retention and surrender levels of gold exports

		AMOUNTS $ Million			
	LEVELS (%)	**1998**	**1999**	**2000**	**TOTAL**
Retention Offshore	71.2	491.995	491.581	505.907	1489.483
Surrender to Bank of Ghana	28.8	192.908	162.154	176.963	532.025

C. Retention/Surrender Levels

Year	**Total** Gold Export ($ million)	**Retention** Amount	**Retention** Level (%)	**Surrender** Amount	**Surrender** Level (%)
1998	687.76	492	71.5	192.908	28.0
1999	710.82	491.58	69.2	162.154	22.8
2000	702.03	505.91	72.1	176.963	25.2
Total	2100.61	1489.483	70.9	532.025	25.3

Sources: Thomas Akabzaa, “Mining legislation and net returns from mining in Ghana”, in B. Campbell (ed.), *Regulating Mining in Africa: For Whose Benefit?*, *op.cit.*, p.28.

Many other aspects of the impact of the liberalisation of regulatory processes could be given and are well documented. Beyond the scaling down of tax rates, there are further points: the issue of monitoring and the weakness or lack of fiscal control.

In this regard, the need for much more careful monitoring of the revenues derived from the sector comes out clearly as a result of the Extractive Industries Transparency Initiative (EITI) established in 2003. The Ghanaian EITI 2006 Inception Report[15] illustrates clearly problems concerning regular fiscal control or even the lack of such control. Among issues raised is the fact that until quite recently:

1) No mining company was paying corporate tax to Internal Revenue Service.

2) None of the mining companies had paid any capital gains tax to the Internal Revenue Service even though many of the mining companies have changed ownership over the years.

3) There were complaints of delays in the payments of royalties to the communities, as well inconsistencies in mineral valuation.

4) With regard to the latter point, there is no uniformity in the pricing of minerals won by mining entities.

These problems have persisted, as suggested by the most recent third EITI report of 2008 which notes:

1) There were no independent checks on the assays/refinery results provided by mining companies. These assays form the basis for the payment of mineral royalties. Therefore:

> Mining companies should be encouraged to provide details of mineral royalty payments to the District Assemblies. This will enable the District Assemblies to compute mineral royalty receivable[16].

Among the numerous other discrepancies listed in the most recently available update are the following:

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[15] Ministry of Finance and Economic Planning, Ghana Extractive Industries Transparency Initiative, *Inception Report on the Aggregation of payments and Receipts of Mining Benefits in Ghana*, Prepared by Boas & Associates, Ghana, September 2006.

In February 2007, the Ghana EITI process produced its first report covering payments and revenues for the first half of 2004. The second report was produced in 2007, covering payments and receipts for the second half of 2004. The third report, covering payments and receipts for 2005, was released in April 200. A fourth report to cover 2006-2008 is presently being prepared.

[16] Ministry of Finance and Economic Planning, Ghana Extractive Industries Transparency Initiative, *The Aggregation/Reconciliation of Mining Benefits in Ghana* (January 2005-December 2005), Prepared by Boas & Associates, April 2008.

2) There was no payment of mineral right licence by the selected companies.

3) There was no payment of concession ground rent.

4) Concerning corporate tax, the Internal Revenue Service (IRS) received corporate taxes in the year 2005 from only four out of the nine selected companies. These were Abosso Goldfields Ltd; Goldfields Ghana Ltd (Tarkwa); Ghana Manganese Company Ltd and Anglo gold (Bibiani) Ltd.

5) Concerning variations in gold pricing, as noted in 2004, the issue of companies using varying pricing policies for their gold sales recurred in 2005. It was consequently recommended: “Policy guidance on pricing of minerals won is required to ensure transparency and uniformity”.

The issue of the level of revenues actually retained in a country such as Ghana which is presented as “well governed” and the problem of fiscal control identified by the EITI, suggest there is more at stake behind the disappointing socio-economic contribution of mining activities to the country. For these are the consequences or the symptoms of a reform process which has reshaped institutional arrangements and the relations within them. Clearly, the stringent forms of state retrenchment over the last 20 years have affected much more than the technical and administrative dimensions (good management aspects) of the role which the public sector plays in productive activities. Behind the disappointing economic results are profoundly asymmetrical relations of influence, power and negotiation capacity characteristic of the regimes brought in since the 1980s and which persist to date, explaining the recent widespread calls for revisions.

Four dimensions of the process of reshaping of institutional arrangements stand out in particular.

1. The strong retrenchment of the state from the sector has also been accompanied by parallel processes: the redefinition of its role, and a reduction of state sovereignty. In this regard the recommendations of the study commissioned by the World Bank, *Review of Legal and Fiscal Frameworks for Exploration and Mining*, propose a “shift in the policy orientation of developing countries in favour of enabling and facilitating private investment in mineral

resource development"[17]. Four of the seven components of the proposed policy shift which aim to create a favourable investment climate concern the regulatory function of the state. The capacity of the state to implement developmental goals is seriously compromised by the proposal that it should withdraw even further from the regulation of key macro economic instruments. Moreover, its capacity to ensure a sustainable flow of net returns from mining activities and its capacity to maintain political sovereignty are, in fact, challenged in a very direct manner as the following recommendations illustrate:

> (i) Economic reform that liberalised the general investment regime (in the areas of taxation, currency exchange, banking, trade and labour) and opened all sectors to foreign investors.
>
> (ii) Allowing or expanding private access to resources previously reserved to the state, **which involves a major change in the concept of sovereignty for many developing countries**.
>
> (vi) A reduction in the levels of *ad valorem* royalties required by the state.
>
> (vii) A reduction in corporate income tax rates, as well as customs duties on imported capital goods, so that they fall within a generally accepted range[18].

2. The process of redefining the role of the state in the mining sector, and of reconceptualizing its sovereignty more generally, is accompanied by the reduced autonomy and authority of states, as well as their reduced capacity to influence the evolution of their own structures. As a counterpart, the distribution of structural power has clearly been shifted to the advantage of private actors and, notably, transnational mining companies. In the volume published in 2001 by Susan Strange with John Stopford and John S. Henley, the consequences of the growth of foreign direct investment on the structural power of states is described as follows: "[…] states' positive power to harness internal resources is decidedly constrained when they try to influence where and how international production takes place. They find they cannot direct; they can only bargain"[19].

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[17] Koh Naito, Felix Remy and John P. Williams, *Review of Legal and Fiscal Frameworks for Exploration and Mining*, Produced for the World Bank, London: Mining Journal Books, 2001.

[18] *Ibid*, p. 6 {emphasis added}.

[19] John M. Stopford, Susan Strange and John S. Henley, *Rival States, Rival Firms: Competition for World Market Shares*, Cambridge: Cambridge University Press, 2001, p.14.

3. The narrowing of the margin of manoeuvre of mineral-rich states and of their policy space as a result of having to respond to an externally-driven reform process has, in certain circumstances, been accompanied by the institutionalising of a particular mode of reproducing power relations. This has especially been the case in countries where mineral resources are plentiful. In a manner similar to the experience of petroleum rich countries, notably Nigeria, where authors such as Cyril Obi have identified and analysed a "politics of oil"[20], the particular "politics of mining" that has emerged in certain mineral rich states and been perpetuated in countries such as Guinea, is often severely lacking in transparency and accountability in spite of the fact that the Bretton Woods Institutions have been overseeing the reform process for many years.

Finally and as also illustrated by the experience of Guinea, whose mining code was revised initially under the auspices of the World Bank in 1995, the mining sector has been favoured over other sectors and in a manner which is in certain ways to the detriment of the country as a whole. As a World Trade Organization study noted: "The incentives given to approved mining enterprises are still much more attractive than those for non-mining enterprises under the Investment Code"[21]. Almost a decade after the introduction of the Guinean code, the World Bank recognized, with regard to the impact of exemptions on the government's fiscal revenue, that "[t]ax exemptions severely limit Guinea's revenue collection performance"[22]. Furthermore, the institution identified "[t]he large number of import duty exemptions, often unjustified, which particularly favour the mining sector"[23] as one of the three main factors constraining revenue mobilization in the country. Indeed, in 2001, exemptions on import duties alone exceeded the duties collected. And the World Bank report, which estimated the real current cost of fiscal exemptions that favour the mining sector in terms of lost revenue at 20% of total revenue (or approximately 3% of GDP), adds in this regard that "[t]he real value

[20] Cyril Obi, "The Oil Paradox: Reflections on the Violent Dynamics of Petro-Politics and (Mis)Governance in Nigeria's Niger Delta", *Africa Institute Occasional Paper*, no. 73, Pretoria: Africa Institute of South Africa, 2004.

Cyril Obi, "Global, state and local intersections: power, authority and conflict in the Niger Delta oil communities", in T. Callaghy, R. Kassimir and R. Latham (ed.), *Intervention and Transnationalism in Africa. Global-Local Networks*, Cambridge: Cambridge University Press, 2001.

[21] World Trade Organisation (WTO), *Trade Policy Review: Republic of Guinea – Report by the Secretariat* (Revision), Report no. WT/TPR/S/153/Rev.1, Geneva: Trade Policy Review Body, December 14, 2005, p.54.

[22] World Bank, *Guinea: Strengthening Public Expenditure Management for Poverty Reduction and Growth – Public Expenditure Review*, Report no. 27347–GUI, Washington D.C.: The World Bank, June 10, 2004, p.10.

[23] *Ibid*, p. xi.

of exemptions may be higher than actually recorded since many of them have been granted informally over the years to individual traders, either as a favour or on a rent-seeking basis”[24].

4. The fourth implication of the far-reaching reforms of the 1990s concerns the emergence of contradictions that have accompanied the liberalisation process and, notably, the emergence and prolongation of particular domestic structural power relations linking African decision makers to powerful foreign actors, whether corporate, financial or diplomatic. Significantly, the Bretton Woods Institutions have become involved in attempting to address the consequences of certain practices, notably, those lacking in transparency. These practices must, however, be resituated in the context of the liberalising reforms of the mining sector that African governments were summoned to introduce, and which involved measures to ensure the strong retrenchment of the state in situations where political institutions had already been severely weakened by years of structural adjustment. The difficulties of coming to terms with these practices and, more fundamentally, with the contradictions and tensions inherent in their own policies, are well illustrated by the World Bank Group’s distancing from the most important recommendations of the 2003 Extractive Industries Review which it had itself commissioned -- as, for example, with regard to promoting mining activities in areas characterised by “weak governance” and a lack of transparency. The possibility of moving beyond the current situation to one ensuring the introduction of regulatory frameworks likely to promote developmental and environmental objectives and the respect of human rights appears constrained in many situations, however, by the structural relations of power inherited from the past, and by the hierarchy of values which these relations perpetuate. Moreover, the inherited structural relations of power appear to be kept in place by a constellation of forces both within and without.

B. Revisiting past trends

The pendulum has clearly swung very much in one direction. As a result:

- in the context of the weakened capacity of governments to ensure the respect of their regulations when these exist;
- in the absence of measures to ensure more transparent and equitable negotiation of regimes and contacts;

[24] *Ibid*, p.11-12.

- and of the disappointing contribution of the extractive sector to local development;

the danger exists, that in certain cases, it is the legitimacy of the activities of mining companies themselves which will increasingly been called into question.

I recall an industry advisor saying to the representatives of mining enterprises at a conference in Scotland organised by the Centre for Energy, Petroleum and Mineral Law and Policy: "Mining companies are going to have to deal more and more with security issues". That was six years ago.

There have been various responses to this situation. Just to mention three:

1) The emergence of translational legal frameworks;
2) Attempts to treat the problem as essentially one of "weak governance";
3) Increasing emphasis on bringing in security forces, with the risk of the "militarization" of mining operations.

These trends explain the risk and the real danger of increasing confrontation well illustrated by the tendency of companies to turn to hiring of private security force. Here there is also a real reputational risk for aid agencies or NGOs which enter into such situations or which might contribute to prolonging short term and inappropriate strategies which do not meet up to the expectations of local communities and national decision makers.

For expectations are at a very different place compared to the beginning of this decade, as the declaration of Mine Ministers at the AU in October 2008 and noted above, brings out clearly:

> **Convinced** that Africa needs policy space, and **recognizing** in this regard, the <u>importance of a pro-active development state to achieve fair and equitable fiscal and investment regimes and to maximize the benefits derivable from mineral resources exploitation</u> […][25]

The Ministers went on, among other points, to call on the African Development Bank to "strengthen the capacity of African member states to negotiate better mineral contracts".

If past approaches are to be renewed, two important interrelated dimensions need to be

[25] *Addis Ababa Declaration on Development and Management of Africa's Mineral Resources*, 13-17 October 2008, Addis Ababa, Ethiopia, 1st Ordinary Sessionau/Min/ Camrmrd /4(I) {emphasis added}.

addressed. First, is the need for a paradigm shift and the adoption of a "developmental perspective" -- development from the perspective of the needs of the countries concerned -- as opposed to one which presumed that development would necessarily flow from the presence of foreign investment in the extractive sector. This latter assumption will clearly not materialise under present circumstances.

Second, the adoption of a developmental perspective will entail the reinforcing rather than allowing the continued weakening of the institutional and negotiating capacity of governments of mineral rich countries.

B.1 The adoption of a "developmental perspective"

A developmental perspective implies adopting strategies and the introduction of conditions permitting their implementation in such a manner as to contribute to: building local linkages, local transformation of minerals, local employment; diversification of minerals extracted; industrial corridors; improving small scale mining; building infrastructure from a developmental and regional perspective, etc.

Such strategies are spelled among other places in the forthcoming ISG report to the UNECA which draws on African Union's February 2009 document *Africa Mining Vision* and notably the section: **"Transparent, equitable and optimal exploitation of mineral resources to underpin broad-based sustainable growth and socio-economic development"**:

- A knowledge-driven African mining sector that catalyses and contributes to the broad-based growth and development of, and is fully integrated into, a single African market through:
    - Down-stream linkages into mineral beneficiation and manufacturing;
    - Up-stream linkages into mining capital goods, consumables & services industries;
    - Side-stream linkages into infrastructure (power, logistics, communications, water) and skills and technology development (HRD and R&D);
    - Mutually beneficial partnerships between the state, the private sector, civil society, local communities and other stakeholders; and
    - A comprehensive knowledge of its mineral endowment.

- A sustainable and well-governed mining sector that effectively garners and deploys resource rents and that is safe, healthy, gender and ethnically inclusive, environmentally friendly, socially responsible and appreciated by surrounding communities;
- A mining sector that has become a key component of a diversified, vibrant and globally competitive industrialising African economy;
- A mining sector that has helped establish a competitive African infrastructure platform, through the maximisation of its propulsive local and regional economic linkages;
- A mining sector that optimises and husbands Africa's finite mineral resource endowments and that is diversified, incorporating both high value metals and lower value industrial minerals at both commercial and small-scale levels;
- A mining sector that harnesses the potential of artisanal and small-scale mining to stimulate local/national entrepreneurship, improve livelihoods and advance integrated rural social and economic development; and;
- A mining sector that is a major player in vibrant and competitive national, continental and international capital and commodity markets.

B.2 The issue of institutional capacity and legitimacy

The adoption of a developmental perspective will entail the reinforcing rather than allowing the continued weakening of the institutional and negotiating capacity of governments of mineral rich countries. These have been weakened by years of liberalisation measures and the continuing transfer to private actors (mining companies and NGOs), of what were previously considered state or public responsibilities (rule setting and implementation, service provision, security, etc.). Past trends which transfer public responsibilities to private actors have often failed moreover to clarify the regulatory responsibilities of governments. This blurring of responsibilities is likely to be accompanied by an accountability gap and therefore a legitimacy gap.

For while current trends may allow governments to shift the locus of responsibility for what were previously considered state functions (clinics, roads, infrastructure, security, etc.) to the private operators of large-scale mining projects and NGOs, such transfers however, not only silence the legitimate, and indeed necessary right of governments to offer services to their populations, a precondition to their being held publicly accountable, but also, contribute to obscuring the issue of government responsibility itself. The current sidestepping of the state, by suggesting companies can gain better legitimacy for their operations by offering social services, runs the risk of undermining a precondition for building responsible governments and the basis of democratic practice: the need to hold governments publicly accountable.

B.3 The issue of "weak governance"

In the context of the weakened institutional and political capacities of states in many mineral-rich countries of Africa and in an attempt to ensure the legitimacy of the activities of private operators, one response has been the tendency on the part of multilateral financial institutions and certain Western governments to suggest that such issues can be treated as symptoms of "weak governance". According to this approach, these problems can be resolved by the introduction of the right set of administrative practices and procedural measures, and can be monitored by using "governance indicators". This is problematic for several reasons. Such an approach introduces parameters that seek to quantify the performance of historically-constructed, country-specific, highly complex institutional relations, using notions that are variously defined and the object of debate, and that are often highly subjective, such as "government effectiveness", "regulatory quality", "voice and accountability".

The increasing technicisation of decision-making processes runs the risk of sidelining important substantive debates and, notably, of depoliticizing issues such as resource distribution, which may be treated as technical questions even though they are clearly political. Consequently, these issues are difficult to track, monitor, and measure with indicators because they often involve political choices and not only technical decisions. Moreover, with technical and administrative aspects of "governance" given overriding emphasis, current proposals to contribute to "capacity building for resource governance" in developing countries unfortunately miss the key point that past reform measures, which have sought to open the extractive sector for investment, have done so in a manner that severely weakened the political and institutional capacity of local governments. Consequently, it becomes a circular argument to call for the reinforcing of local capacity if the nature of past and ongoing reforms, which weaken local capacity, is not questioned.

B.4 Certain conditions for the adoption of a "developmental perspective"

Adopting a "developmental perspective" therefore implies :

1) The acceptance of the legitimacy of governments, if it is their decision to do so, to supply social services to their populations (water, roads, clinics, schools) - a condition for building responsible governments.

Reforms have been proposed by the multilateral financial organisations to improve the administrative capacity of states in the mining sector, as, for example, through the World Bank recommendations with regard to reinforcing institutional capacity, adopting strategic plans reinforcing governance, transparency, infrastructure, telecommunications, energy, and roads, all of which are critically important. What is of note is the apparent lack of recognition of the need to reinforce the "developmental capacities" of states. In this regard, there appears to be little attempt to respond to the observations made, for example, by the Commission for Africa, which recognised not only the legitimacy of state intervention, but also the need to reinforce the capacity of states in Africa so that they might assume a larger developmental role: "Weak institutional capacity prevents the state from undertaking its responsibilities effectively, whether planning and budgeting, managing development assistance, providing services or monitoring and evaluating progress"[26].

2) It also implies the acceptance of the legitimacy that governments of mineral rich countries revisit and renegotiate contracts and regimes which have been signed in non transparent conditions or contain grossly inequitable clauses.

As local benefits resulting from mining activities have proven disappointing, there have been numerous calls for the revision of fiscal, legal and environmental frameworks and mining contracts have come from in countries as different as Liberia, Zambia, Tanzania, Guinea and the Democratic Republic of the Congo[27]. Moreover, at least eleven countries have decided to review their mining contracts[28]. This process is illustrative of the objective shared by many African countries to better respond to the new demands for the social regulation of private

[26] Commission for Africa, *Our Common Interest*, Report of the Commission for Africa, U.K, 2005, p.128.

[27] Frédéric Maury, "Quand les États renégocient", *Jeune Afrique* (hors série: L'État en Afrique), 2008, p.84-86.

[28] These are: South Africa, Ghana, Guinea, Liberia, Madagascar, Niger, Nigeria, the Democratic Republic of the Congo, Sierra Leone, Tanzania and Zambia.

sector development that have accompanied the rapid process of liberalisation and the opening up of mineral-rich African economies to investment.

3) Particularly in the present context of weakened institutional and political capacity of mineral rich countries, it is important that the countries of origin of companies (for example, the Canadian government for Canadian companies), accept the responsibility of ensuring, in case of dispute, that companies be held accountable. This is key to ensuring the legitimacy of their operations and very much in the interest of responsible companies. In a country like Canada, such a proposal is still, however, very much the object of debate in spite of the fact that it was at the centre of the unanimous recommendations of the Canadian Round Table 2007 report produced by an advisory group named by the federal government (where industry and civil society were represented equally). The same proposal is the central principle guiding a private member's Bill (C-300) presently before the Canadian Parliament.

Conclusion: Certain conditions for the emergence of future options

The past experience of the reform of mining regimes in Africa illustrates that the modification of rules and procedures can take place without involving the transformation of these regimes if the principles and norms on which they rests are not also transformed. For example, in spite of the introduction of new guidelines concerning the protection of the environment which emerged in the 1990s, the constraints imposed by the hierarchy of values which characterize most mining regimes in Africa to the present, clearly continues to impact and condition the negotiation of future contracts and regimes. Notwithstanding the widespread recognition of the importance of the objective of environmental protection, mining projects continue to be approved in protected forests and conservation areas, as is happening at present in the Mont Nimba region of Guinea, a UNESCO World Heritage Site. While regulations often exist with regard to these concerns, the capacity to enforce them is often severely lacking as has been documented over the last ten years by the World Bank itself notably with regard to Madagascar[29].

[29] World Bank, *Project Appraisal Document for a Mining Sector Reform Project, Report No.17788-MAG*, Washington, D.C.: World Bank, 2 June 1998, p. 6. Quoted in Bruno Sarrasin « Madagascar: A Mining Industry Caught Between Environment and Development », in B. Campbell (ed.), *Regulating Mining in Africa: For Whose Benefit?*, *op. cit.*

As suggested in the above analysis, unresolved issues of legitimacy and regulation explain the emergence of new legal regimes which are either local or transnational, formal or informal. As a result, the content of these regimes is defined at a level and in arenas which often bypass the national space and which in turn, will have an important impact on determining the relations of influence and authority at work within the structure of the mining industry. The approach proposed here has sought to draw attention to the conditions which contribute to the perpetuation of particular relations of influence and authority and the risks that these trends involve in the current African context.

Given the heritage of the reforms of the last two decades and the hierarchy of values present in most mining regimes in Africa, the transformation of the principles and norms on which these regime rest depends on the creation of new institutional arrangements and political space reflecting structural relations quite different from those which have characterised the sector in the past. To the present, the role played by powerful foreign actors has clearly placed severe constraints which impact and condition the negotiation of future contracts and regimes. Moreover, what can be observed is a reform process characterised by the technicisation of issues, the danger of blurring the areas of responsibility of the actors concerned, accompanied by an accountability gap and therefore a legitimacy gap.

Consequently and as noted, the problem of the lack of capacity to ensure the enforcement of existing regulations is in fact not merely a technical issue of building "governance resource capacity" but very much a political issue concerning building political and institutional capacity. If the externally driven nature of the reform process points to potentially negative implications for democratic processes and state legitimacy, it also raises the question of state accountability which is particularly critical if conflicts are to be avoided.

These trends clearly present problems of legitimacy for the activities of foreign investors themselves. Moreover, there is every reason to suggest that when tensions arise mining companies will attempt to resolve them by hiring private security forces to securise their operations. Such trends are neither in the interests of the countries or communities concerned, nor in the interests of the companies present. As the recommendations of the Canadian Round Tables on corporate social responsibility in the extractive sector (2007) made clear, these issues obviously involve mining companies but are of a broader scope. They also involve in a very direct manner the role which multi and bilateral actors, as well as international NGOs, play in shaping the principles and practices surrounding mining regimes in Africa. The role which such actors assume in conditioning the structural relations of power and influence which help determine values, norms and practices which enter into the revision of mining regimes has been largely overlooked. This significant oversight can perhaps be explained at least in part because of the apparent concordance between the values that have shaped mining regimes historically in areas such as North America and Australia and those which have been introduced into African regulatory frameworks.

However, the contradictions and problems of coherence which arise as a result of the attempt to reduce the analysis of social, political and economic processes, which have been determined historically, to essentially technical and administrative issues, and to adopt as a response management solutions which might be considered universality valid, as much of the donor community would appear to suggest, raise two fundamental issues: first, the impossibility of managing from the exterior issues which are as complex as those concerning institutional and economic reforms and second, the total absence of political responsibility of multilateral, bilateral actors and international NGOs for the reforms and policies which they propose and at times impose. With regard to the thrust of the current reform process itself, to the extent that the initiative for this process remains externally driven, the issue of the reinforcement rather than the erosion of state legitimacy remains unresolved, as does the possibility of the countries concerned to determine the conditions under which mining activities take place. This in turn contributes to explaining the mounting problems of legitimacy which mining operations are facing on the continent. The increasing and alarming drift towards the securization of mining operations in Africa should signal the urgency of revisiting the role which external actors continue to play at a particularly critical turning point in the reform process concerning these issues. The current situation also points to the urgent need for the countries of origin of mining companies to assume responsibility in order to ensure respect by mining companies of international standards, the existence of essential monitoring and reporting procedures and, if necessary, measures of redress particularly in the context of the heritage of weakened institutional and political capacity left by past reforms.

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