Factoring in Governance is not enough.

Mining Codes in Africa,

Policy Reform and Corporate Responsibility*

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Introduction

The quality of governance of a country is a key determinant for the development outcomes of extractive industries activities. This is one of the main hypotheses underlying much of the discussion and certain of the recommendations made by the World Bank Group's Extractive Industries Review. While undoubtedly of central importance, a recent comparative study of mining codes in Africa suggests that while the quality of national governance is undoubtedly a key ingredient, no amount of local governance is sufficient if not accompanied by legal and fiscal frameworks designed to meet development objectives and which are implemented in the context of good international policies and rules.

In order to draw attention to the importance of what might be called "international governance", this article proposes to look more closely at the process of reform undertaken under the auspices of the World Bank which over the 1980's and 1990's has conditioned the frameworks put in place to usher in the liberalisation of the mining sector in Africa.

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There can be no doubt. Over the last two decades, the reform of regulatory and legal frameworks favouring greater harmonisation and stability in the mining sector in Africa has indeed contributed to creating a more favourable environment for foreign investment. These measures have entailed however, a redefinition of the role of local states which is so profound that it has no historical precedent. In this context, these reforms may have the potential effect of driving down norms and standards in areas of critical importance for social and economic development, as well as the protection of the environment in the countries concerned. There is in fact strong evidence which suggests that the latter tendency has been and continues to be the case in an increasing number of situations.

Consequently, present trends raise pressing questions concerning the conditions necessary to ensure development goals and the role and responsibility of the agents and actors who contribute to the shaping of this process. If the issue of lasting and sustainable economic development is to be addressed, it implies taking into account not only the role of the private sector and specific companies, but as well the role which bilateral and multilateral financial institutions and the countries of origins of the companies present play in shaping the investment environment and the norms which regulate it.

To develop these ideas, this article analyses the process of liberalisation of the African mining sector in the 1980's and the creation of a new regulatory frameworks for mining in Africa in the 1990's from a developmental perspective.

The case studies considered illustrate a dynamic and open-ended process of the reform which translates into three generations of African mining code. The first generation of the 1980's illustrated by the Ghanaian experience, provides an example of the initial very stringent forms of state withdrawal which it was suggested were necessary to attract foreign investment. The second generation of the 1990's and Guinea is the example here, illustrates increasing recognition of the need for certain forms of regulation, notably with regard to the protection of the environment but the solution at that time was to attribute responsibility to oversee such issues, to private (non-state) actors. The third generation of the end of the 1990s, Tanzania, Mali and Madagascar, illustrate that it is increasingly recognized that states do in fact have a role to play in facilitation and regulation. With regard to this process of "re-regulation", the questions which eventually must be examined more thoroughly are what roles are being attributed to local states, defined by whom, in what context and with what social, economic and environmental impacts?

Pending further empirical research, our hypothesis is that the process of economic reform of the African mining sector over the last twenty years which has had as its objective creating a more favourable environment for foreign investment, has entailed profound modifications in the role of local states which have not received the attention which they deserve. Moreover, the manner in which measures of deregulation and forms of re-regulation and facilitation were introduced in the 1980's and the 1990's, may not necessarily be compatible with, and even present impediments to meeting the development challenges of the countries concerned.

Consequently, beyond the role played by individual corporate actors, the conclusion draws attention to the broader context which needs to be taken into account in addressing these issues and notably to the importance of bilateral and multilateral actors. The paper ends by pointing to several possible areas of reform and to measures which might contribute to enhancing the role of the mining sector is responding to development challenges.

1. The creation of new regulatory and fiscal frameworks for mining in Africa

To understand present trends, it is important to contextualise the process of liberalisation of the African mining sector which began in the 1980s. While policies of stabilisation and adjustment went a long way in getting rid of price distortions and liberalising African economies, this process was accompanied by a deep redefinition of the relations between states and markets and states and their societies, involving a redirection, redefining and even withdrawal of the functions of the state as they had previously existed. While much has been written about the economics of structural adjustment, much less attention has been given to the manner in which the role of the state was redefined. One notable exception in the academic literature was the work of T. Biersteker [1] who noted that while opinion in the 1980's seemed to converge concerning the need to reduce the state, there was little discussion on what it meant to do so and even less on the political implications. Based on the recognition that the state's multiple functions were affected in different ways[2], his analysis led him to conclude that the manner in which the role of the state had been reduced by structural adjustment policies, might well undercut its ability to redirect its regulatory intervention on behalf of the private sector. Furthermore, reducing or redirecting the state's distributive intervention in the economy could well undercut its ability to mediate effectively between conflicting factions within civil society, especially between industry and the work force, or to build coalitions in favour of the desired reforms. And lastly, by failing to mobilise the private sector adequately and by weakening the fiscal basis of the state, World Bank and I.M.F. programmes, concluded Biersteker, could undermine the legitimacy of the state itself.

Biersteker's contribution is a useful framework for understanding what is happening presently in the African mining sector. In this respect, it is important to underline the extensiveness of the adjustment experience on the continent and the dynamic nature of liberalisation which does not seem to have a terminal point. It is in this area of the world where the greatest number of programmes was introduced. During the 1980's and 1990's, 35 countries of Sub-Saharan Africa implemented 162 structural adjustment programmes (SAPs) with the World Bank /and /or the IMF. [3] During the same period, 126 SAPs were introduced throughout the rest of the world[4].

Second, it is important to underline the extent to which during the 1980's, a very central aspect of the reform process was the profound and very conscious withdrawal of state participation from the mining sector. According to the United Nations Conference on Trade and Development, "During this period, a deteriorating financial situation has forced many countries to reconsider the role of the State. State-owned enterprises, including in the mineral sector, have been privatized, inter alia to reduce fiscal deficit."[5]

A useful illustration of policies of liberalisation proposed for the mining sector in the 1980's which may be considered as the first generation of reforms in this area, is provided by Ghana, the continent's second most important producer of gold and bauxite[6].

As detailed in a study devoted to gold mining in western Ghana,[7] the mining sector received priority attention under the country's Economic Recovery Programme (ERP), initiated in 1983 as this sector was considered key to the country's economic recovery.

In fact the sector mining has received a tremendous boost with policy changes dynamically initiated since 1986. A new Mineral and Mining Law (PNDCL 153) was put in place in 1986. There were two addendum : Additional Profile Tax Law (PNDCL 122) and Minerals (Royalties) Regulations (LI 1349) in 1985 and 1987 respectively. Another law, Small Scale Mining Law (PNDCL 218) was enacted in 1989 in a bid to give legal credence to small-scale artisanal mining in the country. Another law established the Minerals Commission as a key institute to ensure a one stop investment centre for mining.[8]

These laws, together with generous provision of tax incentives to foreign investors, constitute the main legislation which wields jurisdiction over fiscal issues of the mining sector.

For example, *corporate income tax,* which stood at 50-55 % in 1975 was reduced to 45 % in 1986 and further scaled down to 35 % in 1994. Initial *capital allowance* to enable investors to recoup their capital expenditure was increase 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. *Royalty rates*, which stood at 6 % of total value of mineral won in 1975, were reduced to 3.7 % in 1987[9]. *Other duties* such as the Mineral duty (5 %), import duty (5 - 35 %) and Foreign Exchange Tax (33-75%) that prevailed and contributed significantly to government revenue from the sector until the reforms, were abolished.

In addition, the following incentives were introduced :

- Exemption from the payment of customs import duties in respect of plant and equipment and accessories imported for use in mining.
- Personal remittance quota for expatriate personnel was freed from any tax imposed for the transfer of external currency out of the country.

Apart from these concessions, a holder of a mining lease may be 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 purpose of acquiring equipment, spare parts, raw materials and for dividend payment and remittance in respect of goods for expatriate personnel among others[10]. The study from which the above is drawn notes and documents that companies have in fact negotiated individual retention levels far above the minimum requirement.

To return to a more general level, by the end of the 1980's in the context of the disappointing overall results of the adjustment process in Africa, the initial stringent forms of state withdrawal which had accompanied the initial phases of structural adjustment became the object of serious questioning and new emphasis came to be put on « building capacity », and improving « governance » through the introduction of institutional reforms. This reflection, illustrated for example in the World Bank's 1992 and 1994 publications on governance, was to become gradually more systemised in the 1997 World Development Report which focused entirely on « The State in a Changing World ». In a parallel fashion, there also occurred a renewal of reflection on institutional reforms with regard to the mining sector. The process of redefining the role and functions of the state was undertaken however, above all with a view of creating a favourable environment for investment and the free play of market forces. Developmental objectives, notably through re-distributive measures in order to ensure greater social cohesion, or regulatory measures to monitor the use of non-renewable resources and to ensure the protection of the environment, were to be placed very much in a secondary position as compared to the emphasis on policies to attract foreign investment and promote exports.

With regard to the mining sector, as the World Bank became increasingly involved in the conceptualisation and introduction of institutional reforms in the 1990's, it did so from the perspective of a financial institution, privileging strategies favouring short term fiscal redress and incentives to attract potential investors. In this regard, there is remarkable continuity between the 1992 study Strategy for African Mining and the 1998 document Assistance for Mineral Sector Development and Reform in Member Countries[11], the former setting out the rationale and the latter, and notably its Appendix 2, "Summary of the Essential Elements of a Modern Mining Code," reading as a synthesis and as a tool to implement the recommendations proposed in 1992.

The 1992 study was the first systematic presentation of reforms considered needed by the Bank in response to the fact that the sector was, according to this institution, under-performing. In fact, Africa was attracting only 5% of exploration and capital expenditures of the world's mining industry.[12] In view of the continent's considerable mining potential and the significance of this sector in certain African national economies, this area of activity could be considered "an important source of tax revenues and foreign exchange which are essential to Africa's economic recovery"[13]. In order to gain a better understanding of the concerns of international companies which invest in a developing country, the World Bank had undertaken a survey which was sent to eighty mining companies including juniors and majors.

This survey revealed that, after mineral potential and existing infrastructure, which are the main decision criteria, potential investors look for a stable legal and fiscal framework, which includes a mining code, contractual stability, a guaranteed fiscal regime, profit repatriation and access to foreign exchange. Three aspects of the Bank study are particularly significant to our analysis. First, it noted that macro-economic data was less important because the mining sector is more isolated from other sectors of national economy, except for some features concerning earning and exportation, such as exchange rates. Investors also look for a larger and a faster return on equity in Africa than in developed countries because higher risk premiums are required for projects in developing countries. Investors also prefer to keep majority ownership. Furthermore, noted the document, investors are concerned about corruption and political risks and suffer from the lack of geological information in Africa. In short, "perceived mineral endowment, infrastructure, political stability, investment policies, and institutional framework, are all key determinants of exploration and investment decisions"[14] Because the mineral potential in Africa leaves no doubt, the main decision factor determining an investment is the perceived risk, especially political risks.

What comes out clearly from the above is the extent to which consideration of what was needed to attract foreign investment was very much premised on a sectoral approach rather than one which would permit, where appropriate, the possibility of articulating the contribution of the mining sector into a macro economic objectives involving inter-sectoral linkages for example, with a view of seeing to what extent the sector could contribute to broader developmental objectives. Because of the approach adopted, there are consequently no provisions or discussion of building 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.

More precisely, primary focus for the governments of African countries was seen to rest on how to take into consideration a precise set of concerns aimed at attracting investment and reducing investment risk for private mining companies. To do so, the World Bank prescribed recommendations in four main areas: a) appropriate regulatory framework; b) economic and fiscal policy; c) institutional reforms and infrastructure and d) environmental effects.

Second, with regard to the environmental effects of mining activity, the 1992 publication suggests that these are generally geographically localised, identifiable and specific, and because adequate technology is available to deal with them, the study concludes: "The necessary measures to safeguard the environment and health and safety of the population and the workforce can be incorporated in legislation and regulations."[15] The assumption underlining both documents is that new technologies in conjunction with social pressures will encourage international mining companies to respect environmental codes. The 1998 document stresses the importance of Environmental Impact Studies – a point to which we shall return.

Third, as a new element of the Bank policy, the issue of social impacts of mining remained at the end of the 1990's, far less developed than other aspects of regulatory frameworks. On relations with communities, the World Bank recommended the participation of affected people and NGOs in a consultative process. It also suggested the protection of indigenous peoples. But regarding the compensation of private landowners, the study remained far less prescriptive than on other issues. In relations between communities and mining companies, the Bank suggested that the ultimate power of decision rested with the state and the Mining Minister if negotiations failed.

From a developmental perspective what is of central importance is the manner in which these documents have conceptualised the role of local states, for the proposed measures have had a key impact on shaping the institutional reforms which have been implemented. In this regard, with a view of creating a suitable environment for the private sector, the 1992 study specifies the need for: "A clearly articulated mining sector policy that emphasizes the role of the private sector as *owner* and *operator* and of the government as *regulator* and *promoter*".[16] (Our underlining). Nothing is said concerning other key functions of governments which are to supervise, to plan, to mediate effectively and to enforce with a view of bringing binding results.

2. Three generations of mining codes.

A comparative study of the mining codes of five African countries permitted identifying three generations of codes of which as noted, that of Ghana (1986) represented the first, Guinea (1995) the second, and Tanzania (1998) Mali and Madagascar, (both 1999), the third.

The case of Ghana is interesting because the liberalised legislation did indeed provoke a mining boom in that country. However, with the benefit of hindsight, questions arise from a developmental perspective as to the real benefits accruing to the local economy and population because of the sector's limited capacity to generate local employment, because of the extensiveness of fiscal incentives, the lack of capacity to encourage value-added processing, the huge amounts of foreign exchange earnings retained offshore which means less control over the country's foreign reserves, and more generally, the lack of capacity of the state to manage resources to meet development goals. [17] In this regard, 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[18] to evaluate the contribution of the sector to national development. The higher the actual value of export value returned to the national economy, the more the economy is positively impacted by the sector. In Ghana, 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 purpose of procuring equipment, spare parts, raw materials and for dividend payment and remittance in respect of goods for expatriate personnel, among others. Each 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 earning in foreign accounts. On the average the Bank of Ghana maintains 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 over estimated as no adjustment is made for the import content of local purchases, such as petroleum products, explosives, and other consumables in the mine. Consequently, estimates that government revenues represent less that 40% of the retained value may be considered overly generous.

The Ghanaian experience is particularly striking because it illustrates that a mining boom may be accompanied by only modest mining employment as production increases and a much lower contribution to GDP than might have been expected, 2-3%, while mining represents approximately 40% of total merchandise exports earnings since 1992.

The second generation of codes may be illustrated by the Guinean experience. Here among the various aspects of increased liberalization and as illustrated in Article 16[19] of the 1995 Mining Code, the protection of the environment is presented above all as the responsibility of operating companies. The same approach is taken in the 1994 Plan National d'Action pour l'Environnement (PNAE) which, in contrast to the previous 1993 proposal[20,] sets out a very minimalist role for the state in the area of environmental policy and recommends that it should be private operators which should intervene in this area.[21] Hence nothing is said about the potential role of Government in re-regulating to ensure development objectives whether these concern access to a net sustainable return of value-added, monitoring and capacity to enforce environmental and social norms or labour standards. Such a strategy is based on the assumption that openness will encourage vigorous competitive markets in which prices rather than social policies will drive the behaviour of firms and factors of production they employ and so provide an optimal allocation of resources. Realistic sustainable environmental outcomes, continues this mode of reasoning, are most likely to be achieved by privately owned companies acting in response to the pressures of the free market. However, as K. Andersen has suggested, it is not sure why this "best environmental practice" works. In other words, self-regulating markets may well depend on quite specific circumstances. Among those proposed, it would seem that the most important would be intense public scrutiny and highly competitive markets, notably in countries which have deposits sufficient in size and grade to attract multinationals. The same author continues:

> "The primary challenges for the government, and its regulators, will be to negotiate financial terms and agreements which capture a sufficient share of the rent; to have regulations in place which are fair, appropriate, and consistent; and, if necessary, to have the capacity to enforce agreements and compliance with environmental regulations."[22]

If developments in the Guinean mining sector since the late 1980's and 1990's reveal one thing it is the country's difficulty in meeting this primary challenge - negotiating financial terms concerning the conditions of extraction of its key resources, bauxite and alumina, in order to maintain minimally stable, rather than declining export receipts and government revenue from this critical sector. Moreover, in the absence of intense public scrutiny and in the presence of a leading mining sector characterised by oligopoly, it is difficult to see how openness, accompanied by state withdrawal, could be claimed to contribute to guaranteeing vigorous competitive markets.

In the absence of public scrutiny, competitive markets or such a capacity for state intervention, present conceptualisation of Guinean economic growth strategies and environmental legislation may well have unfortunate, cumulative and perverse consequences in that they contribute to endangering natural resource endowments, increasing poverty, and hence compromising more sustainable patterns of social and economic development. In this regard, a study carried out in 2001 in Guinea in collaboration with the Institut des Sciences de l'Environnement of the Université du Québec à Montréal suggests to what extent environmental impacts have escaped proper scrutiny:

> "There has occurred a deterioration of the quality of air due to dust emissions from bauxite in the atmosphere and this is especially the case during the dry season (November to May). The quantity of dust emitted is such that its effects are felt even in Guinea Bissau, that is several hundred kilometres away from Kamsar (the port from which bauxite is exported). Moreover, massive deforestation linked to mining activity has contributed to displacing of certain animal species because now that the soil is barren, it is very poor. The Compagnie des Bauxites de Guinée (CBG) is presently trying to develop a reforestation technique which will be lasting in view of the advanced state of soil degradation. To these problems one must add the management of wastes and oils which result from the maintenance of mining installations and equipment, as well as the management of different social impacts which result from the displacement of local villages due to the extension of the area of activities."[23] (Our translation).

One is left with the impression not only of the inadequacy of past measures of environmental protection but also of the gap between this heritage and the present approach as set out in current legislation in this area.

With regard to what we have categorised as the third generation of mining codes, three case studies were considered. Mali is interesting because its 1999 code was explicitly modelled on that of Ghana. With regard to the environment, while there are in fact provisions for impact assessments, research carried out in this area points to the government's absence of resources, its lack of access to information and the lack of headway made so far in this regard. [24] In a similar manner in the case Madagascar[25], in spite of the introduction of legislation to ensure environmental protection and a new 1999 mining code, there is good reason to question whether the government of this country, just as that of Mali, is in fact in a position to ensure the enforcement of norms in this key area, should they not be respected by private operators, for the reasons pointed out by the World Bank:

« After several years of budgetary reductions, Government institutions lack the human and financial resources to enforce the law, especially in the context of decentralization. »[26] Under the circumstances, although countries such as Mali and Madagascar do possess legislation in the area of environmental protection, its application is far from assured particularly in the context of the increased liberalization contained in their respective mining codes. This situation appears to leave responsibility for the monitoring and enforcement of environmental norms largely up to private operators and, because of the heritage recognized by the World Bank, there is good reason to remain sceptical concerning the capacity of local states to question or remedy the resulting practices.

A last example, that of Tanzania, who's new mining code was introduced in 1998 as the result of a five-year World Bank-financed sectoral reform project, may serve to illustrate further development issues. Mining in Tanzania has been identified as a priority economic sector, slated to grow to 10% of GDP (from its current level of 1.5%). [27] A "strong, vibrant, well-organized private sector" is envisioned.[28] In support of this goal, Tanzania has taken steps to create a policy environment that is highly attractive to foreign investors. It allows 100% foreign ownership ('national treatment' accorded to foreign investors); guarantees against nationalization and expropriation; and offers unrestricted repatriation of profits and capital. As with Mali and Guinea, the revised mining code offers a low royalty rate of 3%, as well as a variety of incentives such as waived import duties on mining equipment and tax exemptions.

While the previous 1979 Mining Act required applicants for mining licenses to present a plan for local procurement of goods and services, such a stipulation is entirely absent from the 1998 Mining Act. Moreover, the World Trade Organization's Trade Policy Review of Tanzania 2000 states: "The authorities indicate that Tanzania does not have any local content requirements."[29] Given that provisions to build backward and forward linkages (such as value-added processing of minerals) to resource extraction within the economy would normally be considered important development objectives, it appears that the Tanzanian government has abandoned, or been obliged to abandon, these development objectives.

Other changes in the legislation governing the mining sector in Tanzania reveal the manner in which state or political control of the sector is reduced while private investor influence is enhanced. For example, the 1998 Mining Act introduces a clause (#10) providing for a "Development Agreement" to be negotiated between holders of mineral rights, and the Minister of Mines. This agreement "may contain provisions binding on the United Republic … which guarantee the fiscal stability of a long-term mining project …and may contain special provisions to take effect in the event of a change in the applicable law." (Mining Act, section 10.2) With regard to environmental regulations, the Development Agreement may "define the scope, and, as may be appropriate in any particular case, limit the extent of the obligations or liabilities of the holder of a special mining license." While the Development Agreement is not to be inconsistent with the Mining Act, when the Mining Act confers discretionary decision-making on the Minister or Commissioner, such discretion must be exercised in accordance with the provisions of the negotiated Development Agreement. This Development Agreement clause thus effectively provides private mining companies with a potential legislative loophole through which, in certain areas, more favourable arrangements can be obtained from the state. Such provisions constrain the Tanzanian state's future ability to introduce policy changes aimed at advancing broad developmental goals.

The process of liberalisation illustrated by these three generations of mining codes appears to be cumulative and open-ended as suggested by the fact that Mali's code was explicitly modelled on that of Ghana, but now it is Ghana's legislation which is under review in order to bring it more into line with what exists in Tanzania. Under the circumstances, the question which arises is whether a country which deregulates and liberalises in order to be fully competitive in the context of evolving norms and incentives and which respects its obligations under WTO rules, can indeed ensure the enforcement of environmental norms, pursue development objectives that build backward and forward linkages to resource extraction (such as value added processing of minerals), introduce "trade balancing" involving export/import restrictions if necessary to build up local content so as to stimulate local productive activities. The answer appears to be more than uncertain.

3. Conclusions

Recent forms of « re-regulating » African states and societies, which have as their objective creating legal and regulatory frameworks conducive to attracting foreign investment, while clearly contributing to the latter, appear to fall very short of permitting sustainable development strategies and the introduction of norms and standards whether with regard to the protection of the environment, social impacts or labour, conducive to such strategies.

While attention has been drawn during the recent Extractive Industries Review carried out by the World Bank Group to the need for more efficient and transparent *management* of resources in a sector which has often been characterised by corruption and rent-seeking behaviour, the importance of which could hardly be disputed, the issues raised in this article are of a different order. They concern not so much the level of technical issues concerning the need for good administrative practices, but more substantive concerns regarding the design of the reforms and legal and fiscal frameworks which help shape the role of local states, the nature and objectives of state interventions and hence help determine to what end, under whose control and to whose benefit resources in extractive industries operate. In this regard, the extractive sector provides a particularly striking illustration of the fact that multilateral financial institutions and most notably the World Bank in view of its overall mission of poverty reduction and the promotion of sustainable development, are at times caught between contradictory and not always compatible logics- that of promoting foreign private investment as opposed to promoting the social and economic development of the countries and populations concerned. This appears particularly true in the post adjustment African context characterised by a radical redefinition of the role of the state.

Rather than suggest an increasing recognition of the need for a more proactive developmental role for local states, it may be argued that it is in fact the opposite trend which appears to have characterised certain recent recommendations[30]. For if one looks at the manner in which recent proposals are likely to effect the role of states, understood in the sense suggested by Biersteker as discussed above, it may be seen that recommendations have tended to favour a weakening of the fiscal basis of the state, of its capacity to monitor and enforce and consequently, decreasing legitimacy and state sovereignty.

In this regard, the study commissioned by the World Bank "Review of Legal and Fiscal Frameworks for Exploration and Mining" proposes a "shift in the policy orientation of developing countries in favour of enabling and facilitating private investment in mineral resource development"[31]. Four of the seven components of the proposed policy shift set out with a view of creating 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 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.(Our underlining).

(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." [32]

On the one hand, there is little doubt that present forms of liberalisation and regulatory frameworks which are designed to minimise risk and ensure a favourable investment climate, explain the increased presence of investors in the sector mining sector. This interpretation is confirmed, in the case of Canadian interests, by Michael Knuckey of Noranda, who underlines that while decisions to invest are complex, part of the explanation is to be attributed to: "changes in political systems, liberalization of investment policies, and the adoption of enticing new mining laws (that) have created an appearance of reduced political risk in many places that were clearly off limits in the past."[33]

On the other hand, there is increasing evidence to suggest that such a degree of deregulation in the absence of a capacity to enforce existing norms in areas concerning the flow of export receipts, environmental protection or social impacts, cannot help but lead to a pattern of confrontation which is neither in the interest of local populations, their states nor industry.

Given the degree and forms of state withdrawal over the last 20 years, the question is no longer *whether* norms and standards should be defined or *what should be the basis* of such norms and standards, but *who* should define them and *how* should their enforcement be ensured.

The analysis presented in this article suggests that these issues cannot be resolved by individual actors within the industry. More generally, the above suggests the extent to which it is not for industry to undertake to re-regulate new norms for social and economic development in lieu of the state, notably through the intervention of local or international NGO's. The issues are clearly so large that such an approach may well turn out to be counter-productive for several reasons.

A mining boom will not lead to a process of economic diversification capable of generating long-term sustainable development in the absence of effective public policies which encourage such a process. In fact, in a study on Latin America and the Caribbean, the World Bank expressed the fear that :

> « exploration successes will not necessarily translate into mines, related industries, employment, and the increase in national wealth if the requisite conditions are not in place»[34].

As the North-South Institute's 1998 study points out, evidence to the contrary is lacking :

> « No research has been carried out enabling conclusions to be drawn about whether Canadian mining investment in general, …contributes or not to sustainable development. Technology transfer, the generation of employment, provision of capital, and export earnings are often referred to as benefits of multinational mining investment. We found no data, however, establishing overall effects in relation to these factors. »[35]

On the specific issue of labour standards, according to the OECD, the right of association is non existent or seriously impeded in certain mining countries. Fundamental labour standards, according to the 1998 North-South Institute report, are seriously restricted in several African countries where mining investment is important.[36]

Given the nature of the issues raised here and the present context of increasing deregulation of state developmental functions, it is critical that private sector actors not substitute themselves to state actors but rather recognise the negative implications of present trends as these are neither to the advantage of foreign investors, nor the local populations.

As this article has attempted to suggest, the heritage of the 1980s and 1990s points to the need to recognise the central role and responsibility of multilateral and bilateral actors in shaping the institutional frameworks and hence the developmental outcomes in the extractive sector in Africa. A review of the design of the reforms over the last two decades also suggests the extent to which the role assumed by external actors has precluded the adoption of alternative development strategies for the sector by the countries concerned. The preliminary findings concerning the impact of past reforms suggest moreover, the need to review certain fundamental assumption at the core of past recommendations. Most important, there appears to be more than ample evidence suggesting the need to question whether proposed reforms formulated from the perspective of financial institutions, privileging strategies favouring short term fiscal redress and incentives to attract potential investors and which tend to equate economic growth driven by foreign investment with strategies to reduce poverty, will, in the absence of a more proactive developmental role for local states, indeed contribute to sustainable social and economic development and the protection of the environment.

In the absence of the capacity of local states to formulate and enforce norms and standards, the question as to *who* and *how* this is to be done takes on a particularly important character.

In the short term, it is clear that the answer cannot come merely from *individual* corporate actors. In view of the very real risk that the present situation should deteriorate and lead to a pattern of increasing confrontation, there are however, various types of measures which may be taken.

In the absence of the existence of an international regulatory framework and until such a framework is put in place, individual companies can agree to:

1. Adopt a protocol on the conduct of business, based on the “Draft Fundamental Human Rights Principles for Business Enterprises” drawn up by the UN Sub-Commission on the Promotion and Protection of Human Rights. These principles should be strengthened by the addition of a strong and independent monitoring board, including rules for enforcement if they are to be the basis of a recognised international regulatory framework that is binding on states and business enterprises.

2. Implement the Organization for Economic Cooperation and Development’s “Guidelines for Multinational Enterprises”, and ensure that the designated National Contact Points are given greater prominence, with powers for monitoring and enforcement. A company's willingness to implement the OECD guidelines could become a condition of eligibility for all northern government guarantees and export credits.

More generally:

3. The countries which are home to mining companies operating internationally should agree to develop corporate social responsibility guidelines. These would make reference to established indices of corporate social responsibility, such as those set out in the OECD’s “Guidelines for Multinational Enterprises”. For these to be effective, there needs to be put in place

mechanisms to ensure the monitoring and enforcement of these guidelines involving participants in the countries and the mining communities concerned.

4. Stock exchanges in the countries where mining companies are registered, should establish corporate social responsibility disclosure requirements modelled on corporate governance guidelines. As part of their listings requirements, companies would be required to disclose in their annual reports or annual information circulars their approaches to corporate social responsibility, assess the extent to which these practices conform to the corporate social responsibility guidelines set out in stock market listing rules and explain any discrepancies.

Any form of public support to a mining company should be conditioned on a company's capacity to demonstrate its strict adherence to corporate social responsibility guidelines.

Finally, given the present lack of financial and technical resources and hence the absence of the capacity of many African states to monitor and enforce norms, it should be the responsibility of the countries of origin of the companies which operate internationally to ensure respect of norms and standards contained in such guidelines. The fact that such practices have already begun to be implemented in several Scandinavian countries and are recommended by the European Union's "Guidelines for European Enterprises Operating in Developing Countries" (1998) is clearly proof of the feasibility of such measures. In this regard, there is a need to go beyond voluntary codes of conduct and guidelines in favour of the establishment of mechanisms permitting independent monitoring and binding enforcement.

Ultimately however, responsibility to define, monitor and enforce norms and standards must rest with local governments and the communities concerned. The current process of redefinition of the role of the state through the introduction of increasingly standardised legal and fiscal frameworks with a view of creating a favourable environment for investment but at the expense of its capacity to respond to the challenges of development, is neither viable nor in the interest of either local populations or foreign investors.

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[1] Thomas J. Biersteker, "Reducing the Role of the State in the Economy: A Conceptual Exploration of I.M.F. and World Bank Prescriptions", in *International Studies Quarterly*, Vol.34, 1990.

[2] To summarise briefly, Biersteker suggests that the effect of World Bank and IMF programs has been to:

- increase or at least maintain state efforts to **influence** the economy;
- state attempts to **regulate** the economy tend either to be reduced or to be redirected;
- managing demand by imposing wage restraints or eliminating indexation programs entails a redirection of state **mediation**, not its reduction ;
- most, though not all policy reforms recommended entail a reduction of state attempts to **distribute** (or redistribute) the social or private product of capital ;
- policy reforms nearly always entail a reduction in the state's efforts to **produce** goods and services directly;

Finally, although most of the recommended policy measures are not specifically directed against the planning function , as they leave more and more of the economy to the market, they should in fact **reduce** state efforts to **plan** economic activity. (pages 486-8).

[3] Hakim Ben Hammouda, L'économie politique du post-ajustement, Karthala, Paris, 1999, p. 53.

[4] CNUCED, Rapport sur le commerce et le développement, 1993, Geneva, 1993.

[5] United Nations Conference on Trade and Development, "State Participation and Privatization in the Minerals Sector". Report by UNCTAD Secretariat. TD/B/CN.1/GE.2/2.30/August/1995. P.4.

[6] The case study of Ghana was produced by Thomas Akabzaa, Department of Geology, University of Accra, Legon.

[7] Thomas M. Akabzaa, Boom and Dislocation. The Environmental and Social Impacts of Mining in the Wassa West Distinct of Ghana, Third World Network, Africa, 2000, Chapter 2, pp. 17-19.

[8] Ibid.,pp.17-18.

[9] « According to the statutes the royalty payable ranges between 3 - 12 %, according to the operating margin of the mine. But in practical terms no mine pays more than 3 % », Ibid., p. 30.

[10] Minerals and Mining Law, 1986, (PNDCL), p. 153. Ibid.,p. 30.

[11] Peter Fox, William T. Omorato et John Strongman. The World Bank Group. Assistance for Mineral Sector Development and Reform in Member Countries, Washington D.C., The World Bank, 1998.

[12] World Bank, Technical Paper No. 18, African Technical Department, 1992. Quoted by Patricia Feeney, "The Human Rights Implications of Zambia's Privatisation Programme"in Micheal K. Addo (ed.) Human Rights Standards and the Responsibility of Transnational Corporations, Kluwer Law International, Great Britain, 1999, pp.323-350.

[13] Ibid., p. v

[14] World Bank, Strategy for African Mining, Mining Unit, Industry and Energy, World Bank Technical Paper Number 181, Africa Technical Department Series, 1992, Washington, p.18.

[15] Ibid. p 47.

[16] Ibid.,p. 53.

[17] Thomas M. Akabzaa, Boom and Dislocation. The Environmental and Social Impacts of Mining in the Wassa West Distinct of Ghana, Third World Network, Africa, 2000.

[18] Craig Emerson, Mining Enclaves and Taxation. World Development Vol 10. No. 7, 1982, pp 561-571.

[19] Article 16 « Protection de l'environnement » reads : « Les opérations minières ou de carrières doivent être conduites de manière à assurer la protection de l'environnement conformément au Code de l'Environnement. Les entreprises doivent prendre les mesures nécessaires à la prévention de la pollution de l'environnement, aux traitements des déchets, émanations et effluents, et à la préservation du patrimoine forestier et des ressources en eau. »

[20] Bonnie Campbell, "Environmental Policies, Mining and Structural Adjustment in Guinea", Journal of Mineral Policy, Business and Environment. Raw Materials Report, published by Raw Materials Group, Stockholm, vol.13, no.1, April 1998.

[21] République de Guinée, Plan National d'Action pour l' Environnement, PNUD/UNSO/GUI/90/X20, Parc Scientifique Agropolis, Montpellier, September 1994, p. 22.

[22] Kathleen Andersen," Mining, privatization and the environment" in Journal of Mineral Policy, Business and Environment, Raw Materials Report,(Stockholm), vol.11, no.3, 1995, p.27.

[23] Geneviève Nolet, Envirobref, Institut des Sciences de l'Environnement, Université du Québec à Montréal, February-March 2001.

[24]Soulemayne Dembele, "Environnement au Mali. ONG: Partenaires ou Prestataires de services?" In Info-CCA, Bulletin de liaison du Comité de Coordination des Actions des ONG au Mali, no.152, Bamako, September 2000.

Claudie Gosselin and Touré Bani, "Cohérence des politiques et interventions canadiennes dans la lutte contre la pauvreté: Le cas du Mali", The North-South Institute, Ottawa, November 2000,

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[27] World Trade Organization, Trade Policy Review of Tanzania, (Geneva: WTO, 2000), p. 55.

[28] Ibid.

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[35] Ibid.,pp.77-78.

[36] Ibid.,p.80.