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# Mining Codes in Africa: Emergence of a “Fourth” Generation?

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*by*

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# Abstract

*A burgeoning interest among academics, policy-makers and civil society groups has developed concerning Africa's extractive sector – particularly its mining codes – which are now at the centre of a wider policy debate over natural resource governance and economic development on the continent. This article reviews the evolution of Africa's regulatory codes in the mining sector, which has undergone what Bonnie Campbell describes as “three generations” of liberalization since the 1980s. We also highlight new voluntary, regional and transnational initiatives, driven by a host of heterogeneous actors from Africa and abroad, which constitute a “fourth” generation of mining codes and natural resource governance practices which place primary emphasis on transparency and accountability by both mining companies and host governments. This new generation of natural resource governance initiatives presents new opportunities as well as unique challenges, particularly with the growing role of emerging economies such as the BRICS in Africa's mining sector. We conclude by assessing future trends and charting policy options.*

# Acronyms and Abbreviations

ADB	African Development Bank Group
AMI	African Minerals
AMV	African Mining Vision
AU	African Union
BRICS	Brazil, Russia, India, China, South Africa
CANADEM	Canada's Civilian Reserve
CSR	Corporate Social Responsibility
DFAIT	Department of Foreign Affairs and International Trade
DRC	Democratic Republic of Congo
ECOSOC	United Nations Economic and Social Council
ECOWAS	Economic Community of West African States
EIR	Extractive Industries Review
EITI	Extractive Industries Transparency Initiative
EU	European Union
FDI	Foreign Direct Investment
FPIC	Free, Prior and Informed Consent
GDP	Gross Domestic Product
GMI	Global Mining Initiative
GRAMA	Le Groupe de recherche sur les activités minières en
IFC	International Finance Corporation
IFI	International Financial Institution
IMF	International Monetary Fund
NRCAN	Natural Resources Canada
PNAE	Plan National d'Action pour l'Environnement
UK	United Kingdom
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNRISD	United Nations Research Institute for Social
UQAM	Université du Québec à Montréal
US	United States

# Introduction

The mining and extractive sector constitutes a significant and increasingly important share of exports and tax revenues for much of Africa, and holds enormous potential to finance rapid infrastructure development and private sector socio-development projects needed for sustainable broad-based economic growth and poverty reduction. The continent is believed to contain roughly 30% of the world's mineral reserves, much of it unexplored (Prichard 2009, 240). Rising global demand for iron ore imports, for instance, recently prompted African Minerals (AMI), Rio Tinto Plc and ArcelorMittal to announce intended investments of over \$US25 billion on over 3000 miles of railway construction and 11 new ports across iron ore-rich West Africa (De Backer 2012, 7). These investments are projected to expand the economy of Sierra Leone by almost 51% in 2012 alone, the most rapid economic growth of any nation as predicted by the International Monetary Fund (Ibid., 8). From 2000 to 2011, natural resource extraction constituted a major component of real GDP growth in over fifteen African states, including over half all growth in Equatorial Guinea, Ghana, the Republic of Congo, and the Democratic Republic of Congo (IMF 2012, 65). As a consequence, increased international attention is now being directed to harnessing Africa's resources for socio-economic development.

Mining sector regulations and codes have also undergone fundamental changes in recent decades. A recent World Bank publication estimated that over the past 20 years, more than 110 nations either replaced or considerably altered their mining laws in response to increased competition for foreign direct investment (FDI) as well as pressure from major donors (Otto et al. 2006). In Africa, 30 states passed new legislation between 1990 and 2000 (Hetherington 2000), with many more policy changes occurring in the last decade (Campbell 2009). Many of these reforms have been directed towards attracting greater foreign investment through decreased regulation, liberalised social and labour policies, and more private sector-friendly ownership and taxation schemes (Campbell 2004; 2009).

In recent years, however, the relaxed regulatory frameworks that have hallmarked the Washington Consensus<sup>1</sup> era have been called into question across a growing number

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<sup>1</sup> This is the term coined by John Williamson, referring to the neoliberal economic policy adjustments advocated from the 1980's on by international financial institutions (IFIs) and many Western development donors. These included fiscal restraint, reduced public expenditures, low taxation rates, liberalized interest rates, competitive exchange rates, trade liberalization, liberalized rules for FDI, privatization, deregulation, and strengthened property rights (Williamson 2004).

of African countries. Rising resource prices coupled with large profits made by multinational mining companies, mounting awareness of the inability of liberalised mining regulations to meet the development challenges facing African countries, and issues of legitimacy raised by externally driven regulatory codes in the natural resources sector have all put pressure on governments to renegotiate contracts and revise mining codes to include remedial processes and favourable policies (Campbell 2009). Within the past two years, for instance, the governments of Angola, Tanzania, Guinea and Mozambique have adopted new mining laws containing provisions for “greater national participation, facilitation of mining activities, increase of fiscal revenue and local community development” (De Backer 2012, 10).<sup>2</sup> At the same time, the rapid growth of new investors – particularly the BRICS states (Brazil, Russia, India, China, and South Africa) – in the African minerals sector, as well as the expansion of investment into previously untapped resource-rich areas such as the DRC, Liberia and Sierra Leone, have raised new challenges for achieving sustainable development in the extractives industry. As a result, Africa’s mining codes are now at the centre of a broader policy debate over natural resource governance and sustainable economic development on the continent.

In this paper, we trace the recent evolution of Africa’s regulatory codes in the mining sector, drawing on the work of Bonnie Campbell and the *Groupe de recherche sur les activités minières en Afrique* (GRAMA) at the Université du Québec à Montréal (UQAM), who identify three “generations” of liberalization in the regulatory frameworks of Africa’s extractive sector since the 1980s (Campbell 2004; 2009). We also highlight the emergence of new private, voluntary, and transnational initiatives which have become prominent in natural resource governance debates, a wave that might be considered a “fourth” generation of codes for natural resource management. The voluntary Extractive Industries Transparency Initiative (EITI), for instance, supported by a coalition of companies, investors, and civil society groups and governments, encourages the full publication and verification of company payments made to governments and the revenues accrued from oil, gas and mining activities (NRCAN 2012). Meanwhile, national-level legislation in home countries such as the UK Bribery Act 2010<sup>3</sup> and the US Dodd-Frank Act<sup>4</sup> have placed greater legal scrutiny on the transparency of commercial activities in oil, gas and mineral resource development.

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<sup>2</sup> In Guinea, for example, the new mining code entitles the State to an overall shareholding of up to 35%.

<sup>3</sup> The Act extends extra-territorial jurisdiction to prosecute bribery committed abroad by persons resident in the UK as well as UK nationals and corporate bodies. <http://www.legislation.gov.uk/ukpga/2010/23/notes/division/2>

<sup>4</sup> This legislation compels American companies to disclose the use or sourcing of “conflict minerals” from the DRC and adjacent states, the source of certain listed metals, as well as the payments made to governments for commercial exploration of oil, gas and mineral resource development (De Backer 2012).

While these initiatives represent a significant advance in the role that global civil society plays in the development of resource governance policies, they remain limited in effectiveness due to a host of issues, such as an absence of regulatory enforcement, low governance capacity in new areas of resource extraction, and continued imbalances between the resulting benefits for multinational private sector actors and African state governments.

Finally, we assess future trends and policy challenges for natural resource governance and socio-economic development for actors operating in Africa's mining sector. Rising investment from emerging economies and continued pressure on host-country governments to intervene more forcefully in the extractives industry will be the key issues determining the role that the extractive sector plays in resource-rich African states in the immediate future. Navigating these challenges successfully will demand innovative, implementable, and inclusive governance strategies as well as best practices over the continent's natural resources which promote transparency and shared benefits for host countries, foreign investors, and local communities.

## The Evolution of Africa's Mining Codes

The history of foreign involvement in Africa's resource extraction sector is extensive. Many colonial-era policies, including the introduction of cash economies and infrastructure investments, can be traced to the objective of expanding access to valuable mineral resources. For example, the copper mines of Zambia and the Democratic Republic of the Congo (DRC), the Ghanaian gold fields, and tin mines in northern Nigeria spurred the construction of new railways and other transportation infrastructure under colonial governments (Freund 1984). Nevertheless, European-controlled mining operations during the colonial-era contributed little to overall continental and domestic development, with the majority of revenues being transferred abroad, culminating in a subsequent lack of local resource sourcing and ownership. Additionally, communities tended to suffer severe social dislocation and environmental destruction (Prichard 2009; Freund 1984).

As a reaction to the inequality of benefits within host countries during this period, many post-independence African governments adopted a nationalistic approach to their countries' natural resource sector (Prichard 2009). State mining firms increasingly assumed ownership of existing operations, with 41.5% of mineral production on the

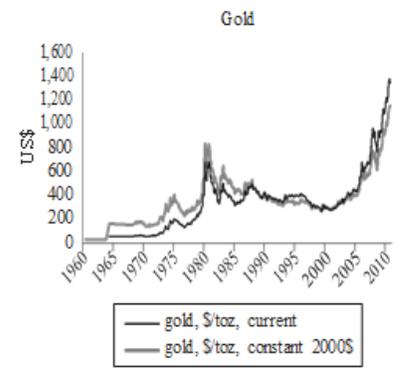
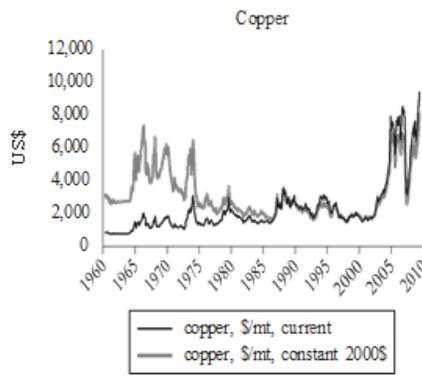
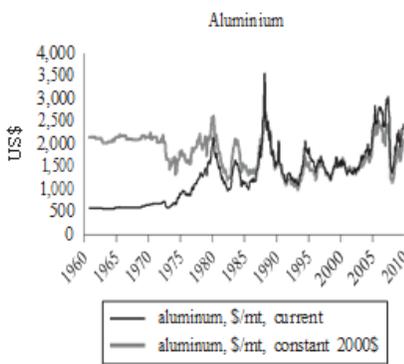
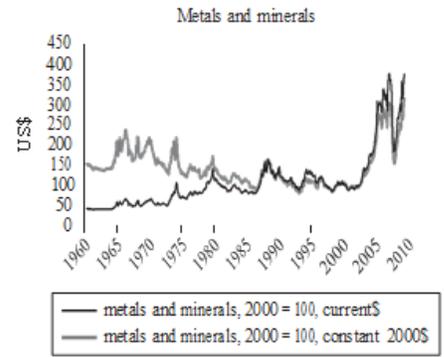
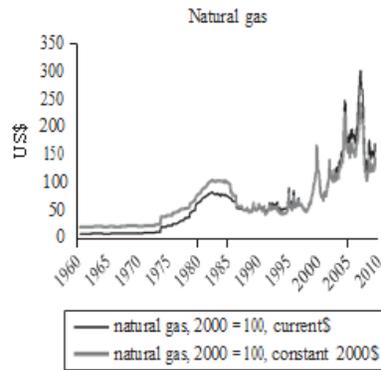
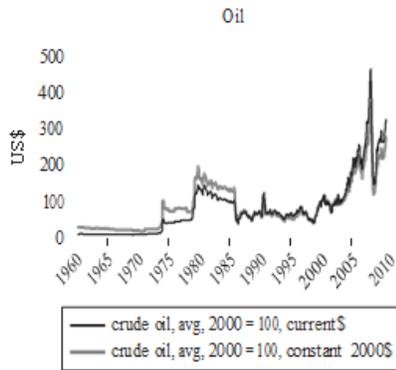
continent under state control by 1989, and another 40.5% controlled by state-private sector joint ventures (World Bank 1992).<sup>5</sup> Populist and socialist governments in Guinea, Nigeria, and Tanzania, for example, nationalized large swaths of the economy after the withdrawal of the colonial powers, although multinational companies continued to play a role in resource extraction in these countries (Morgenthau 1977, 89). Post-independence governments also implemented stricter regulations relating to local employment, domestic input sourcing, improvement schemes, and taxation (Prichard 2009).

During the post-independence period, Africa's share of worldwide mineral production declined dramatically. Low mineral prices (see tables below) discouraged investment in high-risk areas, leading to a collapse in exploration operations on the continent (Bridge 2004). The continent's portion of international mineral production fell from 31.5% in 1970 to only 10% in 1987 (World Bank 1992, Fozzard 1990), while expenditures on exploration and maintenance of existing operations also declined. During the 1980s, for example, sub-Saharan Africa accounted for 21 percent of the world's land mass, yet received only 4 percent of global expenditures on mineral exploration (World Bank 1992). This decline was credited by international observers to state mismanagement of the mining sector, lack of stable property rights, and high rates of taxation and regulation on private sector investment (Ibid.). Moreover, poor governance practices and misallocation of state resources resulted in the deterioration of national economic infrastructure across much of the continent.

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<sup>5</sup> Up to 86.9% of this state-owned production occurred in Zambia and the DRC, primarily in copper (World Bank 1992).

## International Oil and Mineral Prices, 1960–2010 (current and constant 2000\$)



Source: Global Economic Monitor Commodity Prices (World Bank 2011a).

Note: mt = metric ton; toz = troy ounce.

# Liberalisation since the 1980s: Three Generations

In light of the widespread perception that inefficient state management was responsible for the ailing minerals sector, along with increasing government dependency on loans from International Financial Institutions (IFIs), Africa's mining sector underwent significant reform beginning in the late 1980s. Within this new policy environment, the expansion of transnational mining investment was characterized by "the redefinition of the role and functions of the state," and a "new delineation between public and private spheres of authority" (Campbell 2008, 368). The Washington Consensus agenda entailed the wholesale privatisation of state companies, an end to foreign ownership restrictions, decreased rates of taxation and royalties, the reform of labour laws to permit greater "flexibility," and the termination of requirements for local sourcing and hiring (Szablowski 2007, 34). The World Bank explained that:

"The recovery of the mining sector in Africa will require a shift in government objectives towards a primary objective of maximizing tax revenues from mining over the long term, rather than pursuing other economic or political objectives such as control of resources or enhancement of employment ... in the new policy environment governments should obtain a fair share of the economic rent of the sector through fiscal arrangements that are stable, competitive and fair, rather than through ownership and operation" (World Bank 1992, x).

In tandem with a withdrawal from the role of owner-operator, African governments were also to limit the pursuit of social or political goals, such as expanded social, educational, and employment programs, through operational involvement in the resource sector. Rather, their function was to facilitate private investment through enhanced efficiency and "apolitical" regulation (Szablowski 2007, 34). The form of these new legislative and regulatory codes often involved the restriction of state-ownership in the resources sector, privatization of existing state-run mining operations, and the elimination of local sourcing and employment requirements. As a consequence, Africa's experience for two decades was a "cumulative process of reform leading to several generations of increasingly liberalised mining regimes" (Campbell 2008, 369).

One of the paradigmatic "first generation" cases of mining code liberalisation occurred in Ghana, where the International Monetary Fund (IMF) applied substantial pressure on the state government from the mid 1980s to amend its Investment Promotion Act, allowing for greater foreign investment in the country's mining sector (Akabzaa 2004).

Liberalisation of ownership and taxation regulations resulted in an inflow of investment from the USA, Canada, Australia, Britain and South Africa, who rapidly took over underperforming state-owned mining operations and opened new projects (Opoku-Dapaah and Boko 2010). Foreign investors were granted a number of incentives for doing business in Ghana, including the right to repatriate their profits, exemption from paying duties on imported equipment, and total ownership of business ventures in the country. Prompted by these pro-investment policies, the recovery in global demand for primary commodities, and direct efforts by the Ghanaian government to attract and support joint ventures with foreign firms (for example, by creating the Ministry for Private Sector Development to play a facilitating role between the government and private companies), since the late 1980s the three largest mining companies in the country – Newmont, Golden Star and AngloGold – invested over \$3 billion in mining operations (Ibid.)

The second generation of mining codes unfolded in the early to mid-1990s, continuing the trend of liberalisation and privatization but with nominal recognition of the need for certain social and environmental regulations (Campbell 2004). In Guinea, for example, the 1994 Plan National d’Action pour l’Environnement (PNAE) and the 1995 Mining Code set forth “the protection of the environment” as the responsibility of operating companies. However, these rules remained non-binding on multinational companies, and governments held little enforcement capacity for their implementation (Ibid., 34). A 2001 study conducted by the Institut des Sciences de l’Environnement of the Université du Québec à Montréal cast doubt on the adequacy of these measures to ensure environmental protections:

“There has occurred a deterioration of the quality of air due to dust emissions from bauxite in the atmosphere ... Moreover, massive deforestation linked to mining activity has contributed to displacing certain animal species ... To these problems one must add the management of wastes and oils which result from the maintenance of mining installations and equipment [and] the displacement of local villages due to the extension of the area of activities” (quoted in Campbell 2004, 37).

Finally, a third generation occurred from the end of the 1990s, with countries such as Mali and Madagascar opening up their mining industry to foreign investment. In Mali, a new mining code drafted in 1999 was modelled on the Ghanaian framework, designed to attract foreign investment through various incentives to foreign mining companies and make Mali “one of the major poles of the African gold trade” (Hatcher 2004, 43). In addition, the new mining policy aimed to increase the contribution of mineral production

to the country's GDP, primarily through taxation on the operations of mining firms (this, despite the fact that many tax exemptions were created for mining companies by the 1999 code). Likewise, in Madagascar, a new mining code in 1999 sought to "accelerate the process of state disengagement from commercial exploration, production, and marketing operations," while promoting greater private sector investment in the natural resources sector and increasing the sector's contribution to national economic growth (Sarrasin 2004, 61). In the following years, this wave of mining code liberalization would continue to be adopted across a large number of African states (See Figure 2 below).

In sum, the pressures introduced by international donors and financial institutions, along with the post-independence history of underperformance by state-run enterprises in the mining sector, led to the widespread adoption of liberalized mining codes across the African continent. These reforms most often restricted the role of the state from one of owner-operator to a benign "facilitator" of private sector investment. To the extent that natural resource management strategies directed at environmental or social protections informed these legislative shifts, they remained heavily reliant on "self-regulation" by private sector operators.

**Figure 2 - Recent Mining Code Revisions in Africa**

Countries	Enactment Year of the Latest Mining/Mineral Code/Legislation	Maximum Duration of Mining Lease (all are renewable)	Maximum Duration of Exploration License (all are renewable)	Barriers to repatriation of profits?	Foreign currency restrictions?
Botswana	1999	25 years	n/a	No	No
Burkina Faso	2003	20 years	3 years	No	No
Cameroon	2001 (amended 2010)	25 years	4 years	No	No
Central African Republic	2010	25 years	3 years	No	No
Chad	1995	25 years	5 years	No	No
D.R. Congo	2002	30 years	Years	No	No
Congo, Republic of	2005	25 years	3 years	No	No
Ethiopia	1994	20 years	3 years	No	No
Gabon	2000	25 years	5 years	No	No
Ghana	2006 (amended 2010)	30 years	5 years	No	No
Guinea	1995	10 years	n/a	No	No
Ivory Coast	1995	20 years	3 years	No	No
Liberia	2000	25 years	3 years	No	No
Mali	1999	30 years	n/a	No	No
Mauritania	2008	n/a	3 years	No	No
Morocco	2005	n/a	3 years	No	No
Namibia	2006	n/a	n/a	No	No
Niger	2006	20 years	3 years	No	No
Nigeria	2007	25 years	3 years	No	No
Sierra Leone	2009	25 years	4 years	No	No
Senegal	2003	5 years	4 years	No	No
South Africa	2004 (royalty added 2008)	30 years	3 years	No	No
Tanzania	1998 (amended 1999)	10 years or life of mine	5 years	No	No
Uganda	2003	21 years	3 years	No	No
Zambia	2008	25 years	n/a	No	No

Source: African Development Bank Group (2012)

# Consequences

While liberalised mining codes have been presumed to benefit resource-rich countries through greater domestic investment and royalties, the transformation of resource revenue taxation into sustained economic development remains a difficult task (Collier & Venables 2011). From one perspective, the recent growth of natural resource exports has been a boon for stagnating African economies, accounting for approximately one-quarter of the 4.9 percent annual real GDP growth across Africa from 2000 to 2008 (McKinsey Global Institute 2010). Ghana, for example, was associated with undeniable benefits from the windfall of private investment in its minerals sector. Approximately 220,000 new mining jobs were created for Ghanaians between 1987 and 2002, and the mining sector spent millions each year on goods and services from local businesses around areas of operations (Opoku-Dapaah and Boko 2010). In 2007 Newmont planned to spend over \$8 million in Ghana on social and environmental projects, including compensation funds to dislocated communities, and four of the largest companies have agreed to construct an 80 megawatt power plant to buttress the national electrical grid (Ibid., 236).

However, the unprecedented and largely unregulated expansion of mining operations in the recent phase of the industry's development has resurrected debates over the developmental benefits of natural resource exploitation. Liberalized regulatory frameworks are often perceived to maximize benefits for privately owned foreign companies and a small subsection of local elites, rather than provide broadly shared benefits to affected communities (Campbell, 2009). Natural resource dependency also insulates national leaders from public pressure since they do not rely on taxation of their populations for revenue, with an established correlation between resource abundance and political corruption (Ross 2012). States like the DR Congo, Angola, and Equatorial Guinea appear trapped by a "resource curse," where economic rents gained from the export of minerals and petroleum permit governments to neglect taxing personal or corporate incomes, to divert public revenues to patron-cliental networks, and to deplete natural resources without re-investing in assets to diversify the national economy (Sachs and Warner 2001; Hilson and Maconachie 2009). The World Bank's Africa's Pulse reported in 2012 that strong economic growth in resource-rich countries had "failed to make a significant dent on their poverty levels," most often due to a failure by governments and multinational companies to re-invest resource revenues into health, education, and employment creation services (Tran 2012).

At the community level, the promised benefits and linkages of resource exploitation have often failed to materialize. As a recent study by the African Development Bank has

shown, few of the inputs into capital-intensive mining activities in Africa over the last decade have been sourced locally. Rather, equipment, machinery and consumables are most often imported (ADBG 2012, 13). Employment generation is also limited by the capital-intensive nature of the sector. In Mali, for example, while the mining industry accounts for up to 17% of national GDP and 70% of exports, this translates into direct employment for only 13, 000 people in mining communities (Thomas 2010). In Ghana, the figures are similar; between 2000 and 2007 the minerals sector employed approximately 0.2% of the non-agricultural labor force, despite contributing 5.5% of Ghana's GDP and 40% of its exports (ADBG 2012). The situation is exacerbated by the growing use of surface mining technologies, which has constrained employment opportunities in the sector, as well as increased expatriate staff quotas (Akabzaa 2009).

Moreover, local officials often lack the capacity to accurately monitor the output and capital expenditures of multinational mining companies, allowing firms to manipulate their tax obligations and minimize the royalties paid to local governments and mining-affected communities. While this is partly attributable to low taxation rates, there are also accusations that mining companies manipulate the existence of exemptions and capital allowances, with local tax administrators having limited ability to effectively monitor these claims (Prichard 2009, 262). In the 2004 fiscal year, for instance, a report by the EITI revealed that only two companies in Ghana actually paid corporate income taxes, and that no mining companies paid capital gains, profit, or withholding taxes (Akabzaa 2009, 46). Moreover, inconsistencies in the valuation of minerals render the process of revenue-tracking more difficult, and the application of different exchange rate regimes by mining companies for the payment of royalties has produced "distortions" in the amounts of revenues actually paid to the government (Ibid., 46).

Hatcher (2004), for example, notes that new mining regulations introduced in Mali in 1999 permitted the development of the Sadiola gold mine in the Kayes region, but that the regulations required no financial compensation to local populations displaced as a result of the operation (Hatcher 2004, 49). Indeed, the mine apparently had "limited economic impact on the Kayes region. Development of educational and health infrastructure benefited only the Sadiola region ... [and] the tax revenues and dividend income collected by the government of Mali seemed to remain in Bamako" (Hatcher 2004, 49-50; see also Gosselin and Touré 2002, 62-63). These problems reflect the broader politico-economic and ethnic tensions which intersect with natural resource governance issues, raising the risks of instability and conflict in resource-rich countries (see, for example, Ross 2004).

Finally, Campbell highlights that the external origins of these regulatory frameworks risk undermining the popular legitimacy of the states which adopt them (Campbell 2008; 2009). In particular, the public policy space available to African governments and the ability of the local citizenry to have direct input into decision-making processes concerning natural resource management is circumscribed by the enhanced role granted to foreign private sector operators, and the transfer of legal authority in the mining sector from national to transnational regimes (Szablowski 2007, 299). Commenting on Zambia's liberalization of its mining sector, for instance, one author noted: "In the future the economic and social goals likely to emerge from a genuinely open political process are much less likely to coincide with those preferred by the international financial institutions whose funding is crucial for Zambia's economic survival" (Burdette 1992, 6). The United Nations Research Institute for Social Development (UNRISD) highlighted the dangers of such trends in a 2000 study, noting that pressure to align macroeconomic objectives with the demands of attracting foreign investment encouraged governments to insulate economic decisions and policymaking from democratic scrutiny (UNRISD 2000, 1, quoted in Campbell 2009).

Hence, while successful in attracting increased foreign investment, liberalized mining regimes adopted across Africa since the 1980s have displayed key shortfalls in their ability to meet the development challenges of the continent. The lack of capacity on the part of African states to monitor and enforce natural resource management regulations, limited benefits for local employment and pro-poor economic growth at the community level, and a perceived lack of transparency in resource revenue management policies have prompted calls for stronger natural resource governance strategies.

## Emergence of a Fourth Generation? Natural Resource Governance in the 21st Century

Recent years have witnessed the rise of a new wave of natural resource governance initiatives which seek to supplement the shortcomings of previous generations of mining code regulations. With a perceived decline in the authority and capacity of nation-states to effectively govern natural resource exploitation, new forms of private and transnational governance have emerged to promote a "socially responsible capitalism" wherein markets and states work together with civil society (Howell and Pearce 2001). The launch of the Global Mining Initiative (GMI) in 1998, spearheaded by a consortium of mining company executives without any direct involvement by sovereign states, marked the beginning of this new approach (Dashwood 2006). These "alternative accountability mechanisms" (Coumans 2010) include various private, voluntary, and

regional initiatives which are driven by a host of heterogeneous actors, including corporations and state governments, but also regional organizations and civil society groups at both the domestic and international level.

The emergence of these new governance initiatives – what might be called a “fourth generation” of natural resource governance codes – has its origins in the debates over corporate social responsibility, particularly in the Latin American mining sector, where civil society organizations successfully drew attention to human rights and environmental abuses committed by multinational mining corporations (Sagebien and Lindsay 2011). UN Special Representative and academic John Ruggie characterized the movement as a response to a global “governance gap”:

“The root cause of the business and human rights predicament today lies in the governance gaps created by globalization – between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation” (Ruggie 2008, 3).

These campaigns put a renewed focus on transparency and accountability not only among host governments but also on investing partners and private companies. In Africa, civil society groups such as Global Witness increasingly put emphasis on the lack of transparency in the extractive industry, including the 1999 report *A Crude Awakening*, which documented the complicity of major multinational oil companies in the embezzlement and mismanagement of Angola’s oil revenues during that country’s 40-year civil war (Global Witness 1999).

Unlike earlier waves of global activism, the newest wave of governance initiatives has largely focused on a constructive dialogue which includes private sector actors as vital partners in natural resource management. Acknowledging the fact that the exploitation of Africa’s vast mineral resources holds enormous potential for positive economic development and improvement in the quality of life for many of the continent’s citizens, civil society groups have adopted a more cooperative stance with the private sector. Mining firms, for their part, have taken an increasing interest in participating in such voluntary initiatives as part of a broader shift in the extractive industry towards the embrace of CSR strategies. As a result, debates over natural resource governance and CSR have moved beyond the traditional positions of supporting or opposing extractive industry activities, and instead towards a more sophisticated dialogue on forms of regulation and policy proposals (Canel, Idemudia and North 2010).

The sources of fourth generation codes are highly varied. They originate with industries (e.g. the GMI and the Mineral and Sustainable Development project of the International Council on Mining and Metals,<sup>6</sup>), governments (e.g. EITI<sup>7</sup> and the Voluntary Principles on Security and Human Rights<sup>8</sup>), standard setting and certification bodies such as the International Organization for Standardization, NGOs (e.g. the Natural Resource Charter<sup>9</sup> and the Initiative for Responsible Mining Assurance), financial institutions (e.g. the Equator Principles and the International Finance Corporation's (IFC) Performance Standards<sup>10</sup>), and the United Nations (the Kimberly Process and the UN Global Compact<sup>11</sup>) (Coumans 2010, 31). Some cover a broad spectrum of social and environmental issues, while others target specific themes such as labour practices, corruption, corporate governance, human rights, environment impact and protection, and compliance reporting (Ibid., 32).

Collectively, these alternatives to national regulations have attracted attention for their potential to ameliorate global environmental and social problems by encouraging responsibility and compliance with good governance norms among global private actors (Bernstein and Cashore 2007; Gale 2006). Proponents argue that these mechanisms are they key to improving transparency and “improving a country’s credibility among foreign investors and the international banking community ... [and] improving its potential for future development” (EITI 2006, 23). For extractive companies, the adoption of voluntary CSR codes as a supplement to national regulatory schemes has been done in order to secure a “social license to operate” in affected communities, and to avoid additional regulation by the state in the future (Canel, Idemudia and North

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<sup>6</sup> These initiatives set forth a series of principles to which member companies are expected to adhere. These include guidelines such as adhering to ethical business practices, upholding human rights, improvement of health and environmental performance, contributing to conservation and land use planning, and contributing to the institutional development of the communities where they operate. Other examples of industry-initiated codes include the Canadian Prospectors and Developers Association's *Environmental Excellence in Exploration* initiative and the Australian Minerals Industry framework for CSR, called *Enduring Value* (see Coumans 2010, 31).

<sup>7</sup> EITI, launched in September 2002 at the World Summit on Sustainable Development in Johannesburg, South Africa, is marketed as a mechanism for “facilitating prudent management of mineral payments through the verification and full publication of company payments and government revenues from oil, gas and mining” (Hilson and Mocanachie 2009, 53).

<sup>8</sup> A voluntary code of conduct initiated by US and UK governments concerning security and human rights in the extractive sector, focused on risk assessment, relations with public security, and relations with private security.

<sup>9</sup> The Natural Resource Charter was drafted by a group of 30 international experts, including Paul Collier, Director of the Centre for the Study of African Economies at Oxford University; Karin Lissakers, Director of Revenue Watch Institute; and, Tony Venables, Director of OxCarre at Oxford University. The Charter provides 12 voluntary “Precepts” which are meant to inform and guide natural resource management for resource-rich developing countries.

<sup>10</sup> A framework which defines client roles and responsibilities for managing projects and requirements for IFC support, including the need to disclose financial and human rights related information. The Equator Principles emerged as a derivative of the IFC Performance Standards, and have been adopted by over 60 financial institution

<sup>11</sup> The Kimberly Process – an initiative to stem the flow of conflict diamonds through a certification and sanctioning scheme – has received increased criticism following the withdrawal of Global Witness from the organization. The UN Global Compact, similar to the voluntary initiatives within industry and governments, provides a list of ten “universally accepted principles” in the areas of human rights, labour, environment and anti-corruption to ameliorate the business practices of corporate actors operating internationally.

2010, 9). While all CSR codes remain voluntary, many incorporate accountability mechanisms and are, to an extent, compelling on corporations. Schemes such as the Kimberley Process, for example, provide both rewards and punishments in the form of certification for compliance and sanctions for non-compliance (Coumans 2010, 32).<sup>12</sup> Similarly, the International Finance Corporation conditions bases the disbursement of funds on compliance with the IFC's Performance Standards, a requirement which has bolstered the norm of seeking free, prior, and informed consent (FPIC) from local communities for projects with significant social and environmental impacts. The IFC performance standards have also been incorporated into the national guidelines of major mining investors, such as Canada's Corporate Social Responsibility Counsellor.<sup>13</sup>

One of the most noteworthy recent initiatives has originated from African nations themselves, through the adoption of the Africa Mining Vision (AMV) by Heads of State at the 2009 African Union (AU) summit. The AMV advances a holistic framework for improving Africa's mining regimes, focused on balancing the requirements of transparency and accountability with the need to integrate mining into Africa's long-term development at the local, national and regional level. Above all, this means transforming natural resource capital and "transient" wealth into lasting forms of capital and industrial growth, with the ultimate objective of reducing African states economic dependence on primary resource exports. The AMV has since become among the most important frameworks for developing mineral resources in Africa; for instance, the European Union (EU) has recognized the AMV as the basis for EU-AU Cooperation.

The AMV is significant for two primary reasons. First, it represents a self-conscious effort on the part of African political leaders to find a "common voice" with which to negotiate access to the continent's natural resource wealth. Whereas African states have generally been fragmented and have negotiated on unequal terms with mining companies (who are better resources and skilled) the AMV is meant to build the capacity and cooperative networks necessary to strengthen the leverage of African negotiators across the continent. Second, and critically, many view the Vision as a fundamental departure from the model of economic development underpinning the first three generations of mining code liberalization. It calls for "more fiscal space and responsive taxation to allow host countries to better capture windfall gains and to

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<sup>12</sup> Diamonds from the Marange diamond fields in Zimbabwe, for example, were banned from international sale by the Kimberley Process in 2009 following allegations that diamond revenues were funding the operations of Zanu-PF and that human rights abuses at the mines were rampant.

<sup>13</sup> The Office was created in 2009 as part of the Government of Canada's CSR strategy for the Canadian extractive sector operating overseas, mandated to review the CSR practices of Canadian companies and advise stakeholders on the implementation of performance standards (DFAIT 2011).

encourage the use of revenues for value addition ... [including] employment generation, local procurement of goods and services, entrepreneurial development, skills and knowledge creation, technology transfer, infrastructure expansion and above all linkages” (Pedro 2012). This includes promoting the use of resource infrastructure to open up other access to other resource areas, such as agriculture and forestry, as well as the promotion of resource-processing industries (i.e. mineral beneficiation) to bolster the manufacturing and industrial sectors. Thus, the AMV has been described as a reaction to the “failure” of Washington consensus policies, the rejection of the role of host governments as mere regulators of private sector activity, and the return of the “developmental state” (Ibid.) in Africa.

However, these voluntary initiatives are also clearly problematic. Observers worry that mining companies are “blue washing” their operations, signing on to non-binding international compacts in order to give a positive public image to unsound practices (Nwete 2007: 313). In Nigeria, for example, despite the adoption of CSR policies by oil companies since the late 1990s, local communities continued to bear the social and environmental costs of extractive activities, including over 5,000 recorded oil spills between 2000 and 2004 alone (Idemudia 2010). The key problem remains one of capacity – lacking the technical and institutional resources to effectively monitor oil industry compliance with regulatory statutes or undertake water and soil sample tests, the Department of Petroleum Resources is effectively dependent on self-monitoring by oil multinationals. As one engineer in the Ministry of Natural Resources and Environment in Akwa Ibom State reported, “the entire figures we have are based on what Exxon Mobil chooses to release to us” (Ibid., 141). Not only does this situation create a conflict of interest for Exxon Mobil, but it impairs the ability of the state to act as an effective arbiter between conflicting corporate-community claims in the event of environmental damage caused by extractive activities.

Meanwhile, the type of financial flows covered by EITI and other reporting schemes remains limited; for instance, these rules usually do not affect bilateral loans, permitting donor countries to lend money to companies which may collude with officials in resource-rich countries without public scrutiny. These voluntary codes and performance standards also complicate questions of legal responsibility and legitimacy, with many regulatory functions transferred to either the transnational legal arena or to contractual agreements between companies and specific communities (Campbell, 2010: 214). For example, so-called “name and shame” instruments, such as the Kimberly Process and

the Dodd-Frank Wall Street Reform and Consumer Protection Act,<sup>14</sup> face implementation and legitimacy issues which have created doubts as to their effectiveness. Critics of the Kimberly Process, for instance, decried the failure to suspend Zimbabwe from the organization following a violent crackdown that killed an estimated 200 people at a diamond mine in 2008. When the top committee of the Kimberly Process subsequently decided to allow two joint-venture companies to export diamonds from the Marange and Mbada diamond fields, Global Witness declared that the Process had been “stripped of all credibility” and that it had “become an accomplice to diamond laundering” (MacNamara 2011). Without sufficient state capacity and political will to enforce good governance norms and corporate behaviour, industry self-regulation alone appears unlikely to guarantee broad-based benefits from natural resource extraction.

## Policy Challenges and Future Trends in Africa’s Mining Sector

Looking forward, what are the major trends shaping natural resource investment and governance in Africa’s future? One significant trend is the aggressive investment strategies being pursued in Africa owing to high commodity prices. Following a brief downturn between 1997 and 2002, global mineral prices have entered a period of rapid growth resulting, in part, from increased demand by emerging economies such as China (Prichard 2009). The rise in prices has spurred global investment in exploration in the minerals sector, soaring from \$1.9 billion in 2002 to \$7.5 billion in 2006 (Metals Economics Group 2007).

While this recent mining sector growth is not in itself unique, two dimensions of the current mining boom in Africa warrant attention. The first is the high-risk character of many new sites of extractives exploration and development. Due to a surge in demand for base metals, and the growing prominence of high-risk exploration firms (known as “Juniors”), there is a greater willingness to engage in more isolated and unstable areas which are often characterised by poor infrastructure, weak political institutions, and legacies of violent conflict (Prichard 2009). This dimension is demonstrated through the

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<sup>14</sup> Passed into US law in 2010, the conflict minerals section of the Dodd-Frank Act is directed at companies engaging in economic activities in which conflict minerals are “necessary to the functionality or production” or their manufacturers, including tin, tantalum, tungsten and gold originating from the Democratic Republic of Congo and surrounding countries. To be compliant, a company must publish a “Conflict Minerals Report” which affirms whether its conflict minerals are “DRC conflict-free” and provide evidence supporting this conclusion (Brookings Institute, 2011).

shifting of mining operations from traditional gold mining sites such as Ghana, Mali and Tanzania towards producers like the DRC, Zambia, Liberia, Guinea and Gabon (Ibid).

The second major dimension in the recent mining boom across Africa is the prominence of investment from emerging economies, particularly China, Brazil, South Africa, Russia, and, to some extent, India. Since 2000, China has been particularly active in establishing a series of resource-backed deals in which dams, power plants and other infrastructure projects are exchanged for rights to mining exploration and development. In 2010, trade flows between Africa and BRIC countries (excluding South Africa) were approximately \$150 billion, with \$60 billion in foreign direct investment stock in the continent, the majority concentrated in natural resources. These figures are projected to increase threefold in the next half-decade (Building BRICS in Africa, 2010).

The involvement of the BRICS in Africa's extractives sector is both a potential advantage and risk for the continent. On the plus side, increased competition for mineral resource access can increase the negotiating power available to host governments seeking to maximize local revenues; in some cases leading to developing country's enterprises outbidding historically dominant Western firms (Prichard 2009). This has been the situation with China's relationship with Angola, whereby the former has received significant exploratory and production rights in return for a multi-billion dollar aid package to promote construction and expansion of infrastructure (Botchway, 2011). Similar loans have been proposed for Nigeria in 2008 and the Congo, which would provide China with access to large deposits of natural resources to fuel its growing demand. At the same time, however, serious criticisms of these growing economic ties have been raised. Resource investments popularly perceived as "land grabs," poor labour standards in mining operations, the importation of foreign workers, and a lack of accountability in government budgets have provoked tensions between civil society groups, African governments, and foreign investors. In Zambia, a popular outcry against the poor labour standards of China's copper mining operations following the death of several dozen workers in 2007 prompted the Zambian government to openly criticize Chinese business practices and even make threats concerning future mining contracts.

Another key development is that with higher profits registered by companies operating in Africa's minerals sector, governments are facing heightened pressure from their populations to legislate more equitable revenue-sharing codes and adopt a larger developmental role for the state. Observers have noted a growing trend towards "resource nationalism" across Africa, with at least eleven countries recently deciding to review their mining contracts in light of demands for social regulation of the private sector (Campbell 2010). This reflects a growing concern that African states may require

a significant broadening of policy space – space restricted by previous generations of mining codes – to ensure a positive developmental role for mining, including the integration of mining activities into other sectors, such as industrial policies (Ibid., 213). South Africa, for example, banned the export of unprocessed chromium to China in 2007, which had placed tariffs on these mineral imports. Governments have also begun using higher tariffs and royalties on license approvals as a means to recover from the recent global economic crisis (Deloitte, 2010). This was seen in 2011 when Guinea conducted a revision of its national mining codes, empowering government officials to impose up to a 35% tariff on revenues from foreign extractive operations. The African Development Bank has also recently reported that countries like Burkina Faso, Ghana, Mali, and South Africa have increased royalty rates in their mining codes above the average rate of 3% (ADB 2012). Considering infrastructure, some African countries have introduced legislation requiring new mining ventures to make major, supplementary investments, while simultaneously necessitating the re-investment of state royalty revenues into public works. For example, major efforts to rehabilitate railway systems have recently been undertaken in Angola, the DRC, north-west Zambia, Tanzania, Liberia, Gabon, and Mozambique (Prichard 2009). These investments hold the promise of new economic opportunities and improved transportation access for local communities.

African states have also moved to take a “strength in numbers” approach to legislating mining codes. At a sub-regional level, according to the United Nations Economic and Social Council, legal harmonization efforts have been noted throughout the continent, including increased monitoring mechanisms, frameworks for improved administrative systems, and single points of contact for licensing and regulatory approvals. One example is the Economic Community of West African States’ Draft ECOWAS Directive on the Harmonization of Guiding Principles and Policies in the Mining Sector which seeks to create a common mining and extractives code of conduct in Western Africa, focused on a participatory approach, sustainable development, poverty reduction, environmental protection, good governance and defence of human rights (ECOSOC, 2009). Efforts such as these are aimed at fostering a regional environment embedded with tenants of corporate social responsibility; however, the effectiveness of such endeavours remains to be seen.

Finally, the consolidation of political stability in several post-conflict African countries may also spur a more assertive bargaining posture among national governments. As a tentative peace takes hold in countries such as the DRC and Liberia, which has subsequently made them more attractive to foreign investment, governments can begin to demand higher rates of taxation, partial ownership, or regulating requirements for local employment, sourcing and benefit (Prichard 2009). Political stability has also led to

states becoming more nationalistic in the protection of their resources, a form of defence increasingly utilized in the face of an aggressive extractives industry backed by the BRICS states. While certainly these states may act as positive partners to other countries in Africa, the worry exists that the requirements of resource demands from their expanding populations at home may outweigh the desire for a fundamentally reciprocal relationship with local governments.

## Conclusion

How can policymakers respond to these challenges and maximize the positive developmental role of the extractive industry in Africa? First and foremost, contractual arrangements between host governments, local communities, and mining corporations must be created in a transparent manner in accordance with established mining codes, rather than through secret and individually negotiated deals. Corruption and patronage in the contracting and licensing of mining concessions impede efficient tax administration and undermine the popular legitimacy of foreign-owned mining operations. Yet even policy mechanisms like the EITI, which explicitly target transparency, are unlikely to reduce rent-seeking behaviour without more fundamental institutional changes in African countries, including respect for the rule-of-law, independent judiciary and legal systems, and an informed and engaged citizenry (Hilson & Maconachie, 2009: 58). The multinational mining corporations, international donors, and civil society groups must recognize the long-term value of investing in local technical capacity and adhering to the regulatory regimes of host governments. In this regard, development assistance should focus on improving auditing and accounting capacity among local administrators and civil society organizations.

Increased transparency and accountability alone, however, may be insufficient for African states to engage in further positive development. Many African governments are simultaneously locking themselves into bilateral treaties which protect the interests of foreign investors and restrict the scope for public policy-making (UNCTAD 2007, quoted in Campbell, 2010: 213). International donor strategies focused on increased private sector participation, typified by the Canadian Government's recent partnerships with mining companies, are also being scrutinized for continuing to restrict the policy space available to developing countries to pursue aggressive socio-economic development and pro-poor growth (Kindornay and Reilly-King, 2013).

In a 2010 report, Deloitte observed that extractive companies are beginning to recognize that engaging stakeholders at every stage of the extraction process, from exploration to completion, is beneficial and necessary. To avert political crisis and

protect their own investment, corporations are slowly attempting a re-evaluation of their relationship with local and indigenous communities, reflective of a free, prior and informed consent model of engagement. This attitude shift reflects a growing recognition that corporate interests must take into account a much wider range of factors, from climate change to local environmental and socio-economic impacts, and to ensure that economic contributions occur in communities surrounding extractive projects (Deloitte 2010). Therefore, when coupled with legislative initiatives of governments, the capacity exists for corporations to promote growth and sustainability in local communities. By no means does evidence suggest that such action is uniform across all extraction projects and locations, but trends do suggest that there has been and will continue to be some movement towards greater protection of local environments, increased stakeholder engagement, and further legislative remedies for affected communities.

The outstanding question is whether “fourth generation” mining codes in Africa can provide an effective avenue for policies which remedy these challenges. While hope exists for the establishment of concrete and enforceable legislative protections and legal frameworks for corporations operating internationally, progress remains limited by a lack of clarity over who assumes the role of enforcement agent: the host state, with potentially ineffective political, institutional and legal structures, or the country in which the corporation is permanently headquartered? Perhaps what is required is not a further proliferation of legal codes and regulations, but a re-imagining of those we already have and a refocusing of efforts on leveraging natural resources to create broad-based economic opportunities. This will ensure that while demands for extractives are met, it is done in a manner which increases local development, protects populations, reduces harm to the environment, and promotes a sustainable future for generations to come.

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# Appendix 1 - Law, Acts & Codes

## *First Generation*

- Investment Promotion Act- amendments (Ghana)

## *Second Generation*

- 1994 Plan National d'Action pour l'Environnement (Guinea)
- 1995 Mining Code (Guinea)

## *Third Generation*

- Madagascar (1999)
- Mali (1999)
- Tanzania (1998)

## *Fourth Generation*

- Global Mining Initiative (GMI)
- Mining, Mineral and Sustainable Development project of the International Council on Mining and Metals
- Extractive Industries Transparency Initiative (EITI)
- Voluntary Principles on Security and Human Rights
- International Organization for Standardization
- Natural Resource Charter
- Initiative for Responsible Mining Assurance
- Equator Principles
- International Finance Corporation's Performance Standards
- Kimberly Process
- UN Global Compact
- UK Bribery Act 2010
- US Dodd-Frank Act