

Ten years ago, in an attempt to improve its understanding of investment decisions in developing countries, the World Bank undertook a survey of 80 mining companies. The survey revealed that the main investment criteria, after mineral potential and existing infrastructure, was a satisfactory legal and fiscal framework.

This message was enthusiastically embraced across Africa, and legal reform of the mining sector contributed to a more favourable environment for foreign investment. However, a recent study* by Groupe de Recherche sur les Activités Minières en Afrique (GRAMA) at the Faculté de Science Politique et de Droit, Université du Québec à Montréal, concludes that these measures have entailed a redefinition of the role of the state that is so profound that it has no historical precedent. The study warns that the various reforms have the potential effect of driving down standards in areas of critical importance for social and economic development, as well as in protection of the environment in the countries concerned.

Following a comparative study, GRAMA identified three generations of African mining codes.

First generation

The first generation of mining codes was established during the 1980s (and is best illustrated by Ghana). These codes reflect a process of liberalisation, including privatisation of state enterprises and very extensive deregulation. Although policies of stabilisation and adjustment went a long way in removing price distortions, this process was accompanied by a deep redefinition of the relations between state and market, and between state and society. Although 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, who noted (in 1990) that although opinion in the 1980s seemed to converge concerning the need to reduce the role of 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, Mr Biersteker's 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.

GRAMA argues that Mr Biersteker's contribution is a useful framework for understanding what is now happening in

African mining codes questioned

the African mining sector. In this respect, it is important to underline the dynamic nature of African liberalisation. During the 1980s and 1990s, 35 countries in sub-Saharan Africa implemented a total of 162 structural adjustment programmes (SAPs) with the World Bank (and/or the International Monetary Fund), compared with only 126 SAPs throughout the rest of the world.

A central part of this reform process during the 1980s was a profound withdrawal of state participation in mining. 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 those in the mineral sector, have been privatised, *inter alia* to reduce fiscal deficit."

In the case of Ghana, the new legislation did indeed stimulate a mining boom. However, with the benefit of hindsight, GRAMA questions the real benefits accruing to the local economy because of the mining sector's limited capacity to generate additional local employment and value-added processing. As a result, huge amounts of foreign-exchange earnings remained offshore. The Bank of Ghana estimates that over 71% of the value of the country's mineral exports is held in offshore accounts. Indeed, the retained 29% is perceived as an overestimate because no adjustment is made for the import content of local purchases, such as petroleum products, explosives and other consumables at the mines.

The Ghanaian experience is particularly striking, according to GRAMA, because it illustrates that a mining boom may be accompanied by only modest local mining employment. In Ghana, mining has represented approximately 40% of total merchandise export earnings since 1992 but has contributed on average under 3% annually to GDP.

Second generation

GRAMA identifies a second generation of mining codes formed during the 1990s. These codes (illustrated best by Guinea) are characterised by such an absence of regulatory mechanisms that the situation

came to be recognised as detrimental to the mining industry itself.

By the end of the 1980s, in the context of the disappointing overall results of the adjustment process in Africa, the initial stringent forms of state withdrawal were the subject of serious debate. New emphasis was placed on building capacity and improving governance through the introduction of institutional reforms. However, the process of redefining the role and functions of the state was undertaken, above all, with a view to creating a favourable environment for investment. Developmental objectives, notably through re-distributive measures to ensure greater social cohesion, or regulatory measures to protect the environment, were given little emphasis.

The World Bank became increasingly involved during the 1990s in institutional reform. It did so from the perspective of a financial institution, favouring short-term fiscal redress and incentives to attract potential investors. In this regard, there is remarkable continuity between the 1992 World Bank study 'Strategy for African Mining' and the 1998 document 'Assistance for Mineral Sector Development and Reform in Member Countries'. The former sets out the rationale and the latter can be read as a synthesis for implementation.

The 1992 study was the first systematic presentation of the reforms that the World Bank considered necessary for a sector that was, according to that institution, under-performing (Africa was attracting only 5% of the world's exploration and development expenditure).

The second generation of codes may be illustrated by the Guinean experience. Among the various aspects of increased liberalisation (as illustrated in Article 16 of the country's 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, which, in contrast to the previous 1993 proposal, sets out a minimalist role for the state in the area of environmental policy. Nothing is said about the role of government in regulating to ensure development objectives. The strategy was based on the assumption that openness will encourage vigorous competitive markets, in which prices will drive the behaviour of firms (and the factors of production that they employ) and so provide an optimal allocation of resources.

If developments in the Guinean mining sector since the late 1980s reveal one thing, it is the country's difficulty in meeting this primary challenge. Moreover, in the absence of intense public scrutiny and in the presence of a mining sector characterised by oligopoly, GRAMA argues that it is difficult to see how openness, accompanied by state withdrawal, could be

claimed to contribute to guaranteeing vigorous competitive markets.

Third generation

The third, and most recent, generation of mining codes (as typified by those in Tanzania, Mali and Madagascar) have come in response to the problems exposed by the second generation. By the late 1990s, the World Bank was recommending the participation of affected people and NGOs in the consultative process, and current reforms generally focus on re-regulation and facilitation.

Mali's 1999 code was explicitly modelled on that of Ghana although, with regard to the environment, there are provisions for impact assessments. In a similar manner, Madagascar introduced legislation to ensure environmental protection as part of its 1999 Mining Code. However, GRAMA questions whether either country is in a position to ensure the enforcement of these standards should they not be respected by private operators. Indeed, with regard to Madagascar, the World Bank concluded: "After several years of budgetary reductions, government institutions lack the human and financial resources to enforce the law, especially in

the context of decentralisation." This situation appears to leave responsibility for the monitoring and enforcement of environmental standards largely up to private operators.

A new mining code was introduced in Tanzania during 1998 following a five-year World Bank-financed sectoral reform project. Mining in Tanzania has been identified as a priority economic sector, targeted to grow to 10% of GDP (from its current level of 1.5%), and a strong, vibrant, well-organised private sector is envisioned. 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, provides guarantees against nationalisation 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 and tax exemptions.

Whereas the previous 1979 Mining Act required applicants for mining licences to present a plan for local procurement of goods and services, such a stipulation is entirely absent from Tanzania's 1998 Mining Act. Moreover, the World Trade Organisation's 'Trade Policy Review of Tanzania 2000' states: 'The authorities

indicate that Tanzania does not have any local content requirements.' It appears that the Tanzanian Government has abandoned, or been obliged to abandon, these development objectives.

Conclusions

The liberalisation of mining codes in Africa appears to be cumulative. For example, just as Mali's code was explicitly modelled on that of Ghana, it is now Ghana's legislation which is under review in order to bring it more into line with that which now exists in Tanzania. However, recently revised fiscal and legal frameworks governing mining activities have been conceived above all else to foster inward investment rather than to meet longer-term development objectives.

In its report, GRAMA questions whether a country which deregulates and liberalises in order to be fully competitive (and which respects its obligations under WTO rules), can enforce environmental standards and pursue wider development strategies. The latter might include value-added processing of minerals and export/import restrictions to stimulate local activities. GRAMA believes that the answer is more than uncertain.

This article is based on research by Bonnie Campbell, Pascale Hatcher, Ariane Lafortune and Bruno Sarrasin of Groupe de Recherche sur les Activités Minières en Afrique, Faculté de Science Politique et de Droit, Université du Québec à Montréal. The research drew on collaboration from Thomas Akabzaa, Department of Geology, University of Ghana, and Paula Butler, Ontario Institute for Studies in Education, University of Toronto.

For details, contact
 Professor Bonnie Campbell
 Département de Science Politique,
 Faculté de Science Politique et de Droit,
 Université du Québec à Montréal,
 CP 8888, Montreal, H3C 3P8
 Québec, Canada.
 Tel: +1 514 987 3000 (ext 4574)
 Fax: +1 514 987 0218
 E-mail: campbell.bonnie@uqam.ca

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 is not only the role of the private sector and specific companies that need to be taken into account. Also important is the role which bilateral and multilateral financial institutions, and the countries of origin of the operating companies play in shaping the investment environment and the norms which regulate it.

Despite the increasing deregulation of state functions, it is critical that the private sector does not substitute itself into this role. However, in the continued absence of sufficient government capacity to formulate and enforce the necessary standards, the question of how, and by whom, these tasks can be undertaken takes on a particular urgency.

In the short term, it is clear that the answer cannot come merely from individual companies. In view of the very real risk that the present situation should deteriorate and lead to a pattern of increasing confrontation, there are various measures that might be taken. In the absence of an international regulatory framework, GRAMA concludes that individual companies can agree to:

- 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 an independent monitoring board, including rules for enforcement.
- Implement the Organisation of Economic Co-operation and Development's 'Guide-

lines 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.

- The countries that are home to mining companies operating in Africa should agree to develop guidelines for corporate social responsibility. 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.

- 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 their approaches to corporate social responsibility, and to explain any discrepancies. Any form of public support should be conditioned on a company's capacity to demonstrate its strict adherence to corporate social responsibility guidelines.

- Given the present lack of financial and technical resources in many African states, it should become the responsibility of the countries of origin of the mining companies operating in Africa to ensure compliance with accepted standards. Such practices have already begun to be implemented in several Scandinavian countries, and are recommended under the 1998 European Union guideline for 'European Enterprises Operating in Developing Countries'.

Ultimately, however, responsibility to define, monitor and enforce 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 to 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. □

* Groupe de Recherche sur les Activités Minières en Afrique, 'The Challenges of Development, Mining Codes in Africa and Corporate Responsibility', in *International and Comparative Mineral Law and Policy: Trends and Prospects*, edited by Elizabeth Bastida, Thomas Walde and Janeth Warden, Centre for Energy, Petroleum and Mineral Law and Policy, University of Dundee. Due to be published in June 2003.