Unequal Terms in Africa's Mining Contracts: What to Do, and Whose Responsibility?

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July 31, 2019

State-investor agreements, also known as host government agreements (HGAs) or contracts, are an important site of investigation when it comes to assessing the nature, outcome and aftermath of large investment projects. Over the last decade, and especially in the mining sector, African state actors have begun to denounce unequal mining contracts, and are increasingly reviewing mining contracts accordingly. While African host states are seemingly taking it upon themselves to remedy real and perceived imbalances vis-à-vis investors in their mining contracts, a key question remains what structural reasons have led to such imbalances in the first place, and whose responsibility it is to address these structural issues: host states, investors, home states, international financial institutions, or all the above? This brief discussion contextualizes how responsibilities to redress unequal mining contracts may be shared.

Renegotiating Mining Contracts and Host State Responsibility

According to Revenue Watch Institute, state-investor agreements are renegotiated in the extractive sector more than in any other industry in the world. Within Africa's mining sector in particular, the record number of contract renegotiations by host states is due to the fact that mining contracts have long been plagued by accusations of unfair terms and irregularities, where one party (usually investors) wins and the other loses (usually host states). It is therefore not uncommon to see host African states take bold steps to unilaterally initiate reviews of mining contracts, as was the case for the Democratic Republic of Congo in 2008, when the Minister of Mines declared all mining contracts will be reviewed. In the same period, reports showed that mining-rich African states either renegotiated (for example, Central African Republic, Guinea, Liberia, Sierra Leone, Tanzania) or planned to renegotiate (for example, Ghana, Malawi, Mozambique) their mining contracts. These renegotiations occur within a rising resource nationalism in Africa's mining sector over the last decade, with African host states seeking greater agency in the governance of their natural resources, increased fiscal revenues, and local content provisions. For instance, a 2012 report from the African Development Bank Group calls for increased royalties in Africa's gold mining sector and a better alignment between mining contracts and existing mineral codes, as a means to ensure a fairer return of resource rents in host countries. Such changes are in sharp contrast to earlier liberalization of mining laws dictated to African states by structural adjustment programs from the World Bank and the International Monetary Fund (IMF) in the 1980s and 1990s, and correspond to a new development approach to mineral regimes on the continent. These reforms of the mineral sector are further reflected at the continental level, with the African Union initiating policy frameworks such as the Africa Mining Vision (AMV) in 2009. Indeed, among other core aims, the AMV seeks to empower African states to strengthen their bargaining power in mineral contracts, particularly through capacity-building of state actors at the negotiating table. Thus, African actors (both individual states and regional actors) are taking full responsibility in bettering mining contracts, instead of waiting on others. Still, one cannot ignore the fact that global political economic structures contribute to shaping practices around mining contracts. Therefore, international institutions that are part of these structures should bear some responsibility for redressing unequal terms in mining

contracts.

Global Norms and Home State Responsibility

Indeed, similarly to regional efforts such as those of the African Union through the AMV, there has been a growing number of international initiatives seeking to address the sources of unequal terms of exchange between states and investors. For instance, the Extractive Industries Transparency Initiative (EITI) has more recently begun to encourage participating members to disclose contracts and licenses, although this is not a requirement. The global movement towards contract transparency as a new norm involves global civil society organizations such as Publish What You Pay and Revenue Watch Institute, but also International Financial Institutions such as the World Bank and the IMF. The rationale behind contract transparency is that civil society organizations and concerned citizens will be able to hold governments accountable for poorly negotiated mining contracts. This is not without resistance from extractive companies and some host states, who often invoke competition as reasons for confidentiality clauses in contracts.

Discussions on building host state capacity to balance the terms of exchange built within mining contracts have also become a priority for home states such as Canada, given that Canadian mining companies are the most represented foreign investors in Africa's mining sector. In February 2014 for example, Canada initiated the Extractive Cooperation for Enhanced Economic Development (EXCEED) initiative in order to 'assist African governments in reviewing and negotiating complex contracts and legal frameworks in the extractive sector'. The EXCEED program emerged as part of Canada's contribution to the African Development Bank's African Legal Support Facility, whose mission is to achieve sustainable legal capacity for Africa by removing asymmetrical legal and technical barriers plaguing African states at the contract stage. In an international landscape without clear regulations or processes for fair contracts, such initiatives signal that home states have a significant part to play in taking responsibility for the behaviour of investors, particularly since the latter can impact their home country's image abroad.

Blind Spots: Investor Responsibility and Minimum Standards in Mining Contracts?

A key and yet missing dimension when assigning responsibility for equalizing the terms of investment is the role of foreign investors. Because the very goal of investors is to maximize profits, it is assumed that they should not be faulted in proposing unequal and unfair terms in the mining contracts that they negotiate with host states, especially when it comes to revenues. Investor responsibility is therefore often left to international guidelines and principles, without mandatory requirements for ensuring a more responsible behaviour. This is perhaps because matters of state-investor relations tend to largely focus on maximizing revenues, thus ignoring the importance of contractual provisions for human rights and the environment. Indeed, investor responsibility is mostly discussed within debates on corporate social responsibility, which, in the mining sector, also tend to understate the significance of the contract stage while addressing the aftermath of mineral exploration and exploitation. In other words, paying close attention to the contract level is an opportunity that must be seized when it comes to rethinking state-investor responsibility in Africa's mining sector. While host state responsibility is often taken as a given, with the state being answerable to their citizens, investors also need to be held accountable to the terms of exchange, and in a way that goes beyond a focus on revenues.

Specifically, it is important to address some key lacunae of what is not in a typical mining contract, as highlighted by Revenue Watch Institute's report on contract deals in the extractive sector. This could be done by requiring minimum standards in mining contracts, which would include provisions for environmental mitigation costs and for the respect of human rights in the operations of the mine. These suggestions are certainly not exhaustive, and are merely meant to emphasize contracts revision in a standardized manner, so as to not only balance the terms of exchange for revenue maximization, but also to ensure mineral exploitation that will be sustainable for local communities in the long term. To enact this vision requires a recognition from all parties involved in shaping the norms that underpin state-investor agreements in Africa's mining sector that (1) more needs to be done beyond maximizing mineral revenues; and that (2) all involved are responsible in ensuring that such a vision becomes a reality. Existing global and regional governance initiatives, such as the AMV have an ideal opportunity to recommend a common vision for rethinking the content of mining contracts, which would address the

aforementioned lacunae and move the continent closer to a sustainable approach to mineral exploitation.

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