Debunking Resource Nationalism: Parts 1 and 2

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*speaking in my personal capacity only. The views expressed should not be ascribed to IISD or its affiliated roles

International Institute for Sustainable Development

Debunking Resource Nationalism

Part 1: Resource Nationalism as a Legitimate Response to Unilateral Measures by Companies

Part 2: Label, Weaponize, Monetize?

What is Resource Nationalism?

Wikipedia: Resource nationalism is the tendency of people and governments to assert control over natural resources located on their territory.

What is Resource Nationalism?

Unlike outright nationalisation (as seen in the 1960s and 1970s), modern resource nationalist measures include:

- fiscal changes (e.g. introducing higher royalties and windfall profit taxes, as well as issuing severe adjusted tax assessments);
- introducing or increasing compulsory minimum quotas for: shareholding (free carried) by the host state or local citizens;
- local beneficiation (often through export restrictions or duties);
- procurement of local goods and services;
- recruitment and promotion of local personnel (which entails phasing out expatriate personnel);
- retention of earnings in local financial institutions;
- importantly, renegotiating investor-state contracts that stand in the way of these measures.

Source: Peter Leon, RESOURCE NATIONALISM TRENDS IN SUB-SAHARAN AFRICA INTERNATIONAL BAR ASSOCIATION ANNUAL CONFERENCE 2018

Part 1: Resource Nationalism as a Legitimate Response to Unilateral Measures by Companies

Part 1: Context

The future of mining is strong, not a sunset industry

- But disruption will impact more than just what gets mined to feed new technologies; or who (or what) does the mining
- It will also impact how the sector operates in the future
- And mining companies and the mining sector will look very different as a result
  - Companies that adapt to change will thrive
  - Companies that resist all change will wither

Part 1: Context: Disruption for governments has two leading factors

Both are largely company made:

- Jobs and local procurement
- Government Revenue

The nature of the disruption is fundamental:

- These are the two biggest parts of the mining “deal” today for developing country governments

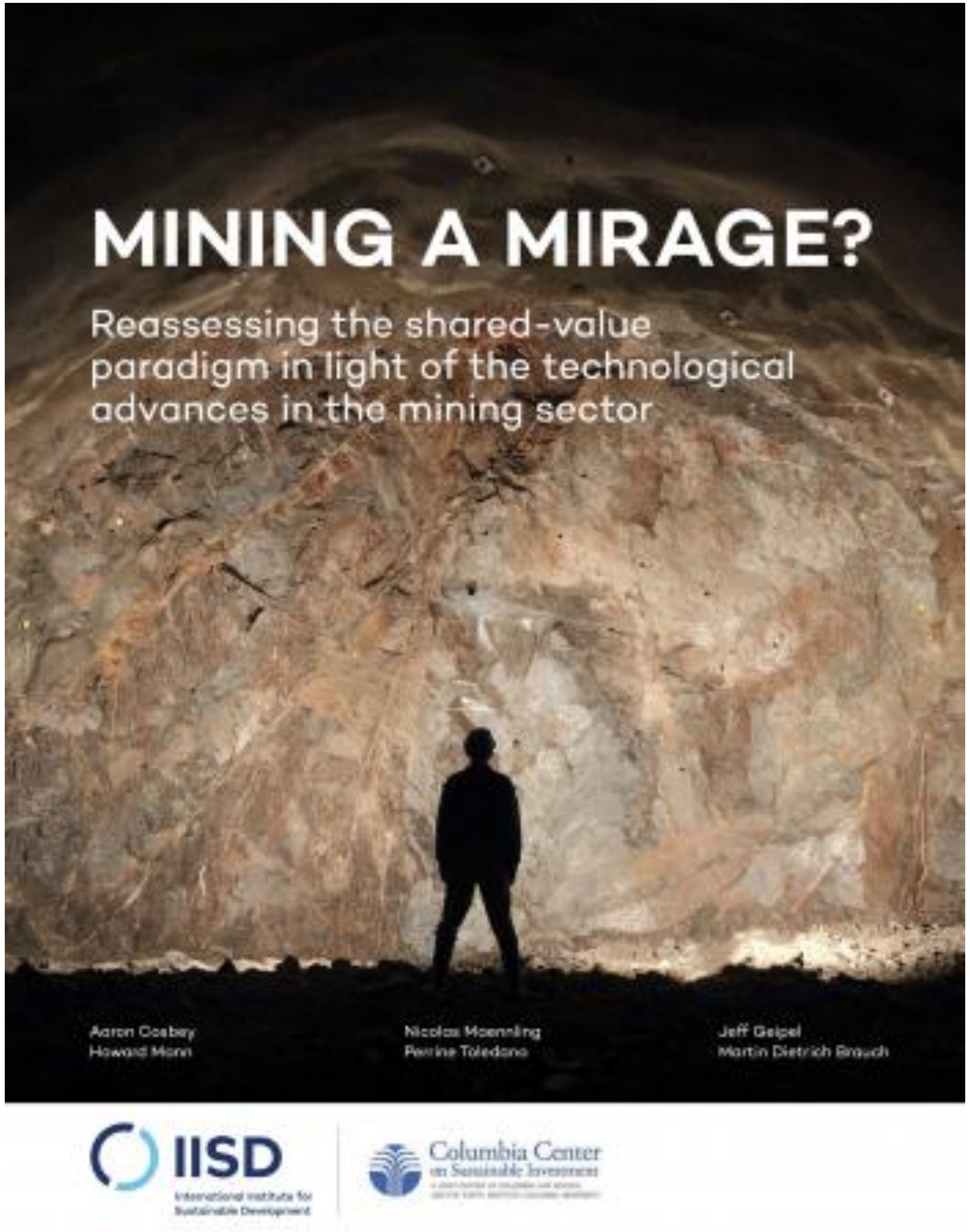
Both are in jeopardy due to company actions

- There are valid, and less valid, reasons for both, but that does not alter the impact they are having and will increasingly have on developing countries

For new mines and existing mines (example of companies unilaterally changing the deal)

Part 2 Context: Jobs

Mining a Mirage: IISD, CCSI, EWB, 2016



Jobs: Mining a Mirage, Impact on Host Economy

	Direct Impact	Direct + Indirect	Direct, Indirect + Induced	Total impact as % of total multiplier effects of mine	Total impact as % of national GDP
High-Income OECD Country Scenarios					
30%	55,931,204	75,507,125	92,006,831	8.5%	<0.01%
50%	92,736,431	125,194,182	152,551,429	14.0%	<0.01%
70%	129,541,658	174,881,238	213,096,028	19.6%	>0.01%
Low Middle-Income Country Scenarios					
30%	39,843,100	103,592,059	124,310,471	6.2%	<2%
50%	65,474,572	170,233,887	204,280,664	10.2%	<3%
70%	91,106,044	236,875,715	284,250,858	14.1%	<4%

Note: Multipliers used are from the national accounts of the respective host countries.

Impact: an absolute reduction in contributions to the national economies of the host countries ranging from USD 93 million to USD 284 million.

In absolute terms, the OECD country is suffering more (because have more existing local inputs to lose) but in relative terms the LMI country is hit more.

- Ability to close the gap in rates of local inputs will be stripped away

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ALREADY OUT OF DATE!!

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Jobs: The 100% Goal

Why MaM is already out of date: Bloomberg News, November 29, 2017: “**Robots will run mines within the next decade, Anglo says**”

*Some mines in the next decade **will run without humans** and instead rely on robots, virtual models and sensors, according to **Anglo American Plc**. Anglo is betting on technology, such as computerized drills with “chiseling ability as good as a human” to increase productivity, cut costs and reduce environmental impact, Tony O’Neil, Technical Director at Anglo, said at the Mines and Money Conference in London. “The industry that everybody currently knows will be unrecognizable” in five to seven years, O’Neil said.*

Jobs: The 100% Goal

PROPOSITION:

- MINING COMPANIES CANNOT EXPECT TO BE THE SOLE ECONOMIC BENEFICIARY OF THESE EFFICIENCIES

- ESPECIALLY WHEN THEY COME AT THE EXPENSE OF JOBS AND LOCAL PROCUREMENT AS PART OF THE BIG BARGAIN

- SERIOUS NEGATIVE IMPACTS ON SHARED VALUE PARADIGM

Jobs, Mining and Shared Value

Key point: Jobs are a local issue

Job losses cannot be seen just in aggregate across the sector:

- National numbers are relevant
- Local numbers at rural sites are even more relevant
    - In themselves and as an offset to environmental issues
- Global numbers are completely irrelevant for developing countries

Part 1 Context: Revenues

Billions of dollars in perceived losses to governments in mining (ie. Perceived by government, BUT, perception = reality)

$200 billion (for developing countries) (IMF)

$100 billion (UNCTAD)

Uganda $352 million

Canada $344 million

Australia $755 million

$100 billion (Tax Justice Network - LDCs)

Mbecki Report: 50B USD in Africa, 60% in extractives

Part 1 Context: Revenues

Billions of dollars in perceived losses to governments in mining (ie. Perceived by government, BUT, perception = reality)

Acacia: Telegraph Business, October 2017:

However, in an interview with the Telegraph earlier this year before the export ban hit, Acacia boss Brad Gordon admitted that the company had struck rather generous tax deals when it began operating in the country 15 years ago. He said Acacia was voluntarily overpaying to make up the difference and that such tax deals, which can incentivize miners to invest in a new country, can 'come back and bite us'.

- Acacia Settlement, Oct. 2017: 16% equity to Tanzania
- Feb. 2018: announced no dividend on 257M USD profit

Revenue: Tax Practices of Companies

International Arbitration reporter, April 2018:

Vietnam faces unusual BIT arbitration, with seller and purchaser of assets teaming up to file a joint claim in face of country’s threat to impose a capital gains tax.

- Oil and gas sector, dispute over capital gains on indirect sale of oil assets
    - ConocoPhillips and Perenco v Vietnam

Revenue: Tax Practices of Companies

Mongolia-Netherlands Double Tax Treaty terminated by the governments

- Too favourable to companies to point of being abusive (withholding tax issue)
- Company in Mongolia insisted it be maintained due to stabilization clause
- Objective determination of both states party to the treaty not followed by the company

Revenue: Tax Practices of Companies

CEO, major gold company, IGF Annual Meeting dinner, 2014:

“Keep your hands off **our** profits”

Developing country participant:

“Keep your hands off **our** minerals, we’ll keep our hands off your profits”

Unilateral changes by companies…

Governments are rapidly losing the two foundational elements of their side of the bargain: jobs and revenue

Are fighting back:

- “Resource nationalism” (like this is a bad thing?)
- Tax laws and audits and tax bills
- [Environmental and social management conflicts growing:
    - government affirmations of rights, roles]
- New forms of relationships:
    - challenge = opportunity?

Raises legal right of unilateral responses by governments…

- Public policy, “ordre public international”
  - Broad recognition today that addressing BEPS-Tax issues is a matter of international public order (doctrine from corruption cases)
- “Rebus sic stantibus”: tax and automation practices of company create a fundamental change in circumstances of the original deal when applied to an existing project
- Governments must be allowed to implement new international agreements/standards in response to unilateral BEPS practices that alter expectations of the government
- Government can enforce implementation of obligations of investors
- Implementation of development benefits of investment?
  - Employment and taxes are part of the foundational elements
  - But goes beyond that to economic and social development more broadly

Raises legal right of unilateral responses by governments…

- Broad concepts are recognized in public international law
- Application is fact specific

Resource Nationalism Part 2: Label, Weaponize, Monetize?

The Label: Resource Nationalism?

Unlike outright nationalisation (as seen in the 1960s and 1970s), modern resource nationalist measures include:

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Source: Peter Leon, RESOURCE NATIONALISM TRENDS IN SUB-SAHARAN AFRICA INTERNATIONAL BAR ASSOCIATION ANNUAL CONFERENCE 2018

The Label: What is driving it?

- There is a sentiment that African mining countries did not derive proportionate benefits from the last commodities boom, when multinational mining companies appeared to make windfall profits, but their host state's fiscal share remained relatively static.
- This found formal expression in the African Mining Vision (AMV), adopted by the African Union (AU) in 2009, which calls for:
    - transparent and equitable revenue collection and distribution; and
    - leveraging mining to stimulate economic "linkages": downstream (i.e. beneficiation); upstream (i.e. procurement);
    - and sidestream (i.e. infrastructure, technology and skills development).
- Attitudes have hardened since 2015, after an AU High Level Panel reported that, from 2000 to 2010, African states collectively lost at least US$ 50 billion per annum in revenue, owing to "illicit financial flows", 56 per cent of which came from the extractives sector.

Source: Peter Leon, RESOURCE NATIONALISM TRENDS IN SUB-SAHARAN AFRICA
INTERNATIONAL BAR ASSOCIATION ANNUAL CONFERENCE 2018

The Label: What is driving it?

AND, REVERT TO SOME BASICS:

- States have sovereignty over their natural resources, not a new concept
    - State ownership of resources in almost every country
    - Ability to set conditions for harvesting those resources is 100% recognized
- Mineral resources are essential for development in mineral rich developing countries
    - Use it or lose it, can't wait for the next time they come around!
    - Resource led development has failed to date
    - FDI led development in resources has failed to date
    - Trade led development in resources has failed to date
- Africans and others are declaring their right to development from their resources
- Mining company lawyers can work with this or weaponize it
    - Leading companies ARE working with it and finding solutions
- AND: What is the intended alternative: resource de-nationalization? The old international law of colonialism? Companies set all the rules?

The Label: The legitimacy of resource nationalism

- African Mining Vision
- ICMM work on local procurement, employment, taxation and many more issues
- International Bar Association Model Mine Development Agreement, 2011
    - 10.3 Parties' Commitment to Protecting Human Rights
    - 20.0 Development Obligations
    - 21.0 Use of Local Goods and Services
    - 22.0 Local Community Development
        - 22.1 Community Development Agreement
        - 22.3 Local Business Development Plan
    - 24.0 Employment and Training of Local Citizens
        - 24.1 Minimum Employment Levels
        - 24.2 Investment in Skills of Local Work Force
        - 24.3 Labour Training and Capacity Enhancement
        - 24.4 Management Training and Capacity Enhancement

The Label: The legitimacy of resource nationalism

International Bar Association Model Mine Development Agreement, 2011

21.0 Use of Local Goods and Services

The Company shall, when purchasing goods and services required with respect to Mining Operations, give first preference, at comparable quality, delivery schedule and price, to goods produced in the State and services provided by the State citizens or businesses, subject to technical acceptability and availability of the relevant goods and services in the State.

22.3 Local Business Development Plan

The Company resolves to cooperate with the State in carrying out the State's responsibilities by developing a local business development program to promote economic development and growth in the area of communities impacted by the Project. Such a program would be modified from time to time to fit the existing circumstances related to the particular operating phase (development, construction and operation) in the life of the Project. The program would be based on the objectives listed in Annex C.

Weaponize

- A few articles
- **"Growing government control over resources sounds alarm bells"**
  - "Alarm bells are sounding for the mining industry over growing government control of resources in Sub-Saharan Africa, as states try to cash in on higher commodity prices and secure votes ahead of elections."
  - BL Premium on line, 12 October 2018
- **Rising Resource Nationalism Seen as 'Fire Burning' for Miners** *By Danielle Bochove,* Bloomberg, May 16, 2018
  - "A rising tide of resource nationalism is causing miners to rethink where they invest and creating volatility for a sector already buffeted by brewing trade wars."

Weaponize

“African nations must resist siren song of resource nationalism”

Countries that shun populist moves appear more attractive as commodity prices fall, Peter Leon, editorial, FT, 18 August 2018

- “The spectre of resource nationalism is again rearing its head across Africa, leading to significant regulatory intrusions in Tanzania, the Democratic Republic of Congo and South Africa — all major mining jurisdictions.”
- “In March, the DRC overhauled *its investor-friendly* mining code…”
- “Countries that resist the fiscal and populist temptations of resource nationalism *could well become more attractive and competitive* than the likes of the DRC, Tanzania and South Africa — at precisely the point in the commodities cycle when this matters most.”

Monetize?

Follow the money:

- Who benefits from this weaponization?
  - Mining companies through regulatory chill
  - Law firms through arbitration and related services

- Many articles on resource nationalism linked to law firms active in mining

- Law firms selling arbitration as a way to address the problem of resource nationalism

Monetize?

Upheaval and uncertainty in mineral regulation in parts of Africa: Resurgence of resource nationalism highlights the importance of investment treaty protections

Herbert Smith Freehills 27 July 2018 | Africa Legal Briefings

- Arbitration as a response: “The last few months have seen significant changes to mining regulations in various African states, giving rise to a concern that a regional trend of resource nationalism may be (re-) emerging. In this context it is important for companies associated with the mining sector to be aware of the protection international investment treaties may provide against the impact of resource nationalism on their assets, and how to maximise that protection before risks materialise.”

Monetize?

Upheaval and uncertainty con't

Regulatory chill:

The recent developments in these states, and elsewhere, highlight the importance of rights enshrined in international treaties, which are protected from the vagaries of local politics. Investment treaties provide a stable framework of protections upon which investors can rely even when there is upheaval in local laws and regulations.

*Through such treaties **and by planning ahead, investors can enhance the security of their investments and their negotiating leverage with the host state. Such leverage can help to protect and preserve the smooth operation of an asset –** and help to provide an avenue for recourse against the host state in the event arbitrary and/or discriminatory state acts **do nevertheless occur.***

Monetize?

- Actual arbitrations being commenced:
- *IAReporter, Zoe Williams, 10 September 2018:*
  - Chinese mining company MMG has initiated negotiations with the Democratic Republic of Congo (DRC), pursuant to the China-DRC BIT. The negotiations relate to the country's mining code, which was overhauled in January of this year to impose a variety of new conditions on miners, and to increase the state's take from mining activity."
  - South African miner AngloGold Ashanti and Jersey-based Rangold Resources have both indicated that they may also turn to arbitration due to the new mining law.

  - On July 13 2017, South African mining company AngloGold Ashanti indicated its Tanzanian subsidiaries have initiated UNCITRAL arbitration, as provided for in its Mining Development Agreement with the government. While a press release issued by AngloGold states the company's willingness to engage in "constructive dialogue", it presents the initiation of arbitration proceedings as a precautionary step. AngloGold is represented by Quinn Emanuel Urquhart & Sullivan LLP.

Monetize?

- Comparison of the Resource Nationalism approach to Big Tobacco use of the threat and resort to arbitration
- Regulatory chill for several years imposed on developing countries

What can governments do? Good regulatory design

Organisation for Economic Cooperation and Development (OECD) draft *Guiding Principles for Durable Extractive Contracts*: *alignment* with the long-term vision and strategy of the host state;

- *sharing* financial and technical data to build a *common understanding* of the risks and opportunities;
- a *sound investment and business climate*, underpinned by a fair, transparent and clear legal and regulatory framework;
- a fiscal system that provides for a *fair sharing of economic rent*, taking into consideration the risks and potential rewards;
- flexibility for the host state to introduce *regulatory changes* that: are *not arbitrary*;
- reflect *internationally recognised standards* or *good practice*;
- give due regard to the *adverse impact* on the project.

Source: Peter Leon, RESOURCE NATIONALISM TRENDS IN SUB-SAHARAN AFRICA
INTERNATIONAL BAR ASSOCIATION ANNUAL CONFERENCE 2018

NOTE: These draft principles are now out of date, being revised. But general thrust still right

What else can governments do?

Defang the threat of resource nationalism:

- Understand the monetizing threat
- Set out the positive case for resource nationalism

- Unity in numbers:
    - Define collective replies to arbitration when possible
        - What are the legal issues to address up front?
            - Design policies well
            - Negotiate changes well
        - Defence fund
        - Insurance fund if needed
        - State side lawyers prepared to fight hard

Questions, comments, thoughts?

Thank you

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