All that Glitters Isn't: Gold Mining, Sustainable Development, and the Loulo Mine

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Abstract: *A complex balancing act of the interests of the various stakeholders involved in international mining projects determines whether these ventures spur inclusive economic development and improve the lives of the people in the communities surrounding the mine. This article evaluates that complex dynamic via an in-depth study of the Loulo mine in Mali. Extrapolating from the experience of the Loulo mine, the article recommends that future mining projects include community-level stakeholders at the table early on, increase transparency and accountability for companies and governments alike, and involve development finance institutions from the outset in order to unlock mineral wealth and spur on sustainable development. This is especially true where corruption levels are high and the corporate incentive to benefit the local communities is comparatively low. While the article expresses words of caution relating to each of these recommendations, a more inclusive approach will make such ventures more likely to turn mineral resource wealth into a golden ticket that benefits all stakeholders rather than only a select few.*

Résumé: *L'équilibre complexe entre les intérêts des différentes parties prenantes impliquées dans les projets miniers internationaux détermine si ces entreprises stimulent le développement économique inclusif et améliorent la vie des personnes dans les communautés entourant la mine, ou non. Cet article évalue cette dynamique complexe à travers une étude approfondie de la mine de Loulo au Mali. En extrapolant à partir de l'expérience de la mine de Loulo, l'article recommande que les futurs projets miniers impliquent les parties prenantes au niveau communautaire dès le début, augmentent la transparence et la responsabilité des entreprises et des gouvernements, et engagent les institutions de financement du développement depuis le départ afin de débloquer la richesse minérale et de stimuler le développement durable. Cela est particulièrement vrai lorsque les niveaux de corruption sont élevés et que l'incitation des entreprises à profiter des communautés locales est relativement faible. Bien que l'article exprime des mises en garde concernant chacune de ces recommandations, une approche plus inclusive rendra ces entreprises plus susceptibles de transformer la richesse en ressources minérales en un billet d'or qui profitera à toutes les parties prenantes, plutôt qu'à quelques privilégiés.*

Titre en français : Tout ce qui brille n'est pas : L'exploitation aurifère, le développement durable et la mine de Loulo

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1. INTRODUCTION

During its 15 years of operations, the Loulo gold mine could have contributed to long-term, sustainable development in southwestern Mali in a more impactful way. Today, Mali remains one of the poorest countries in the world,[1] despite its considerable mineral wealth and the astounding profits achieved by some of the multinational mining companies operating within Mali's borders.[2] How is it that one of the richest empires in history,[3] now a country that continues to possess significant mineral resources, has not transformed the immense value of those resources into long-term, sustainable development?

As part of a broader discussion, Africa's vast natural resource deposits continue to be simultaneously at the center of numerous conflicts as well as hopes for prosperity and development on the continent. From mineral deposits to oil, these natural resources have been the focus of movies,[4] books,[5] debates,[6] and much academic research.[7] The "paradox

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1 See Pedro Conceição, *Human Development Report 2020, The Next Frontier: Human Development and the Anthropocene, Mali*, UNDP, 2020, online: <hdr.undp.org/sites/all/themes/hdr_theme/country-notes/MLI.pdf > (placing Mali's Human Development Index at 0.434, putting Mali at 184 out of 189 countries in the ranking).

2 See Jon Yeomans, "Randgold Resources Sees Glittering Prospects from Exploration", *The Telegraph*, (3 August 2017), online: <telegraph.co.uk/business/2017/08/03/randgold-resources-sees-glittering-prospects-exploration/>.

3 Mansa Musa, the great emperor of Mali known as the golden king, was the richest human that ever walked the earth, with a net wealth of over $400 billion USD. See Naima Mohamud, "Is Mansa Musa the richest man who ever lived?", *BBC News* (10 March 2019), online: <bbc.com/news/world-africa-47379458>. See also "The Quest for Gold", online: *National Geographic Channel* <channel.nationalgeographic.com/galleries/the-quest-for-gold/at/13-2090652/>.

4 See e.g. *Blood Diamond*, 2006, DVD (Burbank, Cal: Warner Bros, 2006).

5 See e.g. Jon Schubert, Ulf Engel & Elísio Macamo, eds, *Extractive Industries and Changing State Dynamics in Africa: Beyond the Resource Curse* (New York: Routledge, 2018).

6 See e.g. Jonathan Di John, "Is There Really a Resource Curse - A Critical Survey of Theory and Evidence" (2011) 17:2 Global Governance 167.

7 See e.g. Punam Chuhan-Pole, Andrew L Dabalen & Bryan Christopher Land, *Mining in Africa: Are Local Communities Better Off?* (Washington, DC: The World Bank, 2017). See also Eliana Cusato,

of plenty" appropriately captures the inconsistency inherent when countries blessed with substantial reserves of natural resources perform poorly on development metrics. While a number of factors appear to contribute to the resource curse, and debates in both academia and policymaking endure, the resource curse continues to be a thorny problem in sustainable development discussions in a number of countries around the world.[8]

This article contributes to this discussion in three ways. First, it undertakes the first academic case study of the Loulo mine in Mali.[9] Utilizing a variety of sources, including United States Securities and Exchange Commission (SEC) Filings, Canadian National Instrument 43-101 filings relating to Mineral Disclosure in Canada, annual and quarterly company reports, non-governmental organization (NGO) and human rights reports, and other secondary literature, this article presents a broad overview of the Loulo mine. In doing so, it challenges the corporate narrative that the Loulo mine has been a laudable contributor to sustainable development in Mali.

Secondly, the article offers three substantive recommendations, based on the experience of the Loulo mine, regarding how future mining projects might more sustainably, equitably, and productively involve all stakeholders in large-scale mining projects. Engaging with three common threads in development discussions—rights and responsibility-based approaches, transparency initiatives, and development finance institution (DFI) involvement—the article envisions benefits for corporations, governments, and host-country communities alike. Extrapolating from the experience of the Loulo mine, the article argues that including community-level stakeholders at the table early on, increasing transparency and accountability for companies and governments alike, and involving DFIs from the outset may make the project finance model more likely to turn mineral resource wealth into a golden ticket that spurs on sustainable development by benefiting all stakeholders rather than only a select few. This is especially true where corruption levels are high and the corporate incentive to benefit the local communities is comparatively low.

Thirdly, the article, having concluded that the Loulo mine could have contributed to long-term, sustainable development in Mali in a more meaningful way, nonetheless expresses brief words of caution relating to the three recommendations. There is no silver bullet for achieving sustainable development. Any recommendation must be taken with prudence, in light of project-specific circumstances and development hurdles, and taking into account relevant stakeholder's broader goals, needs, and abilities. Nonetheless, future gold mining projects would do well to include the experience of the Loulo mine and recommendations presented herein during future mine planning, project structuring, and stakeholder discussions.

The article is structured as follows. Part II provides a brief background to the Loulo mine. It considers the location, geography and history of the mine, the financing of the mine, and divergent opinions regarding the mine's impact on community development. Part III presents

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"International Law, the Paradox of Plenty, and the Making of Resource-Driven Conflict" (2020) 33 Leiden J Intl L 649.

8 See e.g. Paasha Mahdavi, "Institutions and the 'Resource Curse': Evidence from Cases of Oil-Related Bribery" (2020) 53:1 Comparative Political Studies 3.

9 While no fieldwork was undertaken, the secondary sources analyzed in this Article lay the groundwork for future study of the Loulo mine, including fieldwork.

three recommendations for how future gold mine projects might learn from the experience of the Loulo mine. Each of the three recommendations also includes a brief word of caution regarding that recommendation. Finally, Part IV concludes.

2. THE LOULO MINE PROJECT

2.1. Overview and History of the Project

The Loulo mine is situated in the southwestern portion of Mali, near the border with Senegal, on the West Mali gold belt.[10] The belt stretches north to south along a key crustal scale lineament called the Senegal-Mali sheer zone.[11] Gold lodes were first discovered at Loulo in the 1980s during a mapping and geochemical soil sampling project done by a joint venture between the French *Bureau de Recherches Géologiques et Minières* and the Malian government.[12] In 1996, Randgold Resources[13] acquired BHP Minerals Mali Inc., and one year later Randgold submitted a feasibility study for mine construction.[14] In 1999, the Malian government granted the necessary mining permit and in 2003 Randgold got Board approval and updated its feasibility study.[15] Construction of the Loulo mine started in 2004 and the mine was officially opened on November 12, 2005.[16]

Since opening, the mine has been incredibly successful. As of the beginning of 2018, the mine had extracted 5.6 million ounces of gold and contributed nearly $3.0 billion to the Malian economy in the form of taxes, royalties, salaries and payments to local suppliers.[17] Extensive

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10 See Randgold Resources, "Technical Report on the Loulo-Gounkoto Gold Mine Complex, Mali, Report for NI 43-101" (18 September 2018) at 1, online (pdf): *Randgold Resources* <s25.q4cdn.com/322814910/files/doc_downloads/operations/loulo/loulo-gounkoto-2018.pdf> [2018 Technical Report].

11 See David M Lawrence et al, "The Geology and Mineralogy of the Loulo Mining District, Mali, West Africa: Evidence for Two Distinct Styles of Orogenic Gold Mineralization" (2013) 108 Economic Geology 199 at 199.

12 *Ibid* at 199–200.

13 In 2019, Randgold Resources merged with Canadian mining company Barrick Gold, the largest gold mining company in the world, and retained the name Barrick Gold; see e.g. Henry Sanderson, "Barrick Gold reports loss of $1.2bn in quarter before Randgold merger", *Financial Times* (13 February 2019), online: <www.ft.com/content/3715389a-2f8f-11e9-8744-e7016697f225>. See also "Form 51-102f4: Business Acquisition Report", online: *Barrick Gold Corporation* <www.sec.gov/Archives/edgar/data/756894/000119312519072723/d686959dex991.htm>. Throughout this article, the prior company name, Randgold, will be used for three reasons. First, nearly all of the secondary sources utilized here relate to Randgold's corporate SEC filings and Randgold's Corporate materials, like quarterly reports. For ease of reference to those materials, the name Randgold is used. Secondly, the analysis of the Loulo mine primarily deals with the period during which Randgold was the primary holder of SOMILO, the project company. While the analysis here is certainly relevant to Barrick's continued operations at the Loulo mine in Mali, the analysis primarily concerns Randgold's historic dealings at that mine in Mali. Finally, despite the merger of the two companies, the CEO of Randgold is now the Chief Executive of Barrick, signaling continuity between the two companies.

14 See 2018 Technical Report, *supra* note 10 at 48.

15 *Ibid.*

16 *Ibid.*

17 See Randgold Resources, "Randgold Resources…23 Years of Partnering with Mali" (30 October 2018), at 4 (not published) [Randgold Resources…23 Years of Partnering with Mali].

geologic surveys confirm the sustainability of the mine for the near future.[18] In the years to come, the mine is projected to produce 600,000 ounces of gold per year[19] thus confirming the continued contribution of the mine to corporate shareholders and the Malian economy alike.

2.2. Financing the Mine: Project Finance with a New Look?

A 2014 World Bank report listed the Loulo mine as one of 14 project finance investments in West Africa which closed between 2003 and 2013, using the following definition of project finance: "structured long-term financing of infrastructure, industrial projects and public services with limited recourse to the sponsors, where project debt is repaid from future cash flow generated by the project once operational."[20] Though fitting this definition, the Loulo mine is a unique version of project finance when compared with other project finance schemes in West Africa and across the world.

While the Loulo mine is 100 percent owned by the project company, *Societé des Mines de Loulo SA* (SOMILO),[21] as is standard in project finance,[22] the project's financing structure is unique in its reliance on shareholder loans. Through SOMILO, Randgold Resources owns 80 percent, and the State of Mali owns 20 percent.[23] However, according to reports, Randgold funded the whole initial $82 million investment in the Loulo mine via shareholder loans.[24] As a result, Randgold controls 100 percent of the cash flows from the Loulo mine up until the point when these shareholder loans are repaid.[25] Thus, the project uses its operational cash flow in order to pay off the project debt owed to Randgold's shareholders, a financing arrangement which is atypical compared to standard project finance deals.

According to the emblematic project finance scheme, the project company generally takes on some debt (i.e. bank loans) to get started, and the debt to equity ratio tends to be high—favoring debt rather than equity.[26] Typically, "[t]hese loans supply the bulk of the capital for the project company, are often for extremely large amounts even by the standards of big business, and are secured against the future revenues of the finished project, not against the assets of the sponsors."[27] However, SOMILO's reliance on shareholder loans does not fit into

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18 See 2018 Technical Report, *supra* note 10 at 184.

19 See Randgold Resources, "2016 Q2 Report: Randgold Digs Deep After Tough Q2 To Sustain 2016 Performance Forecast" (2016) at 19, online (pdf): *Randgold Resources* <www.worldreginfo.com/wdoc.aspx?file=Randgold_Resources/5/40AE6FE6-DE17-45FA-BDBE-47B062326AF3/354534_sem_2016_en_gb00b01c3s32.pdf> [2016 Q2 Report].

20 Arnaud Dornel, "Project Finance for Infrastructure in Africa" (2014) at 4, online (pdf): *The World Bank* <imf.org/external/np/seminars/eng/2014/CMR/pdf/Dornel_ENG.pdf>.

21 See 2016 Q2 Report, *supra* note 19.

22 See e.g. Scott L Hoffman, *The Law and Business of International Project Finance*, 2nd ed (Ardsley, NY: Transnational Publishers, 2001).

23 See 2016 Q2 Report, *supra* note 19 at 3.

24 *Ibid*.

25 *Ibid*.

26 See B Esty & A Sesia, "An Overview of Project Finance - 2004 Update" (Cambridge, Mass: Harvard Business School, 2005), Case Note 9-205-605 (estimating that bank loans make up around 70 percent of a typical project financing, with 30 percent coming from sponsors").

27 Tom Sorell, "Project Financing in Developing Countries, New Corporate Social Responsibility, Human

the typical project finance schema because shareholder loans are not neatly classified as either debt or equity. Indeed, courts have struggled with the exact classification of shareholder loans.[28] While a loan is typically a debt, because it belongs to shareholders, it is treated like equity.[29] Shareholder loans are attractive in that the maturity of shareholder loans is long and already-low interest rate payments can sometimes be deferred.[30] Randgold—with deep-pocketed and appropriately committed shareholders—clearly wanted the control over cash flow as well as the benefits that shareholder loans offer, while conceding a higher level of risk to its shareholders.

Project finance deals also generally try to diversify funding sources.[31] However, the financing scheme of the Loulo mine does not indicate diversification with respect to either funding sources or representations of different interests.[32] Randgold has created a big incentive to look after its shareholders first before turning to other stakeholders that the project affects. Moreover, even though Randgold is not the sole owner of the project company, it seems to treat its 80 percent ownership as such—due to its apparent financing control over both the project and gold profits.[33]

Why did Randgold opt for this financing scheme? Randgold may have been concerned about the project risk based on projections of in-country political risk and thus tried to

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Rights, and Multinationals" (2008) 5:1 Essex Human Rights L Rev 1 at 1.

28 See Wayne M Gazur, "An Arm's Length Solution to the Shareholder Loan Tax Puzzle" (2010) 40:2 Seton Hall L Rev 407 (noting "[i]n all but the most obvious cases, classifying shareholder loans as either debt or equity for federal income tax purposes is not an easy task. Courts and the Internal Revenue Service have approached the classification issue by applying lists of multiple factors with little predictive value for taxpayers or other courts" at 408).

29 See e.g. *Tudor Sales Ltd (Re)*, 2017 BCSC 119 (in which the court ruled that the shareholder loan in question was equity rather than a debt).

30 *Ibid*.

31 For example, in the Chad-Cameroon Petroleum Development and Pipeline Project, funding was split into debt financing—coming from the International Finance Corporation, two export credit agencies, and capital markets—and equity financing—in part coming from the International Bank for Reconstruction and Development and the European Investment Bank. Trying to create sustainable development on the back of oil in Chad and Cameroon, the multiple project financiers looked to mitigate political risk and maximize the chances of oil revenue being used for development. See Benjamin C Esty, "The Chad-Cameroon Petroleum Development and Pipeline Project (A)," Harv Bus Sch Rev (2006).

32 Compare with, Benjamin C Esty, "Australia-Japan Cable: Structuring the Project Company," Harv Bus Sch Rev 7 (2003). (In the Australian-Japan Cable project finance megaproject, Australia's largest mobile phone network, Telstra, wanted to hold around 40 percent of the equity in the $520 million submarine cable structure to guarantee that they had a significant role in running the company while also saving "enough equity so that their partners would have a meaningful equity position and large enough shares to justify board representation.")

33 For example, when the mine was being built, one of the infrastructure contractors, MDM Ferroman, defaulted on its construction contract. Randgold Resources had a series of meetings with MDM and ultimately SOMILO, the project company, decided, with the help of Randgold Resources' capital management's team, to complete the project under its direct management. It does not seem that the government of Mali had any say in the contractor's termination. See Jon A Nones, "Randgold Puts MDM Ferroman Up Against the Ropes", *Futures Magazine* (31 January 2006), online: <www.futuresmag.com/2006/01/31/randgold-puts-mdm-ferroman-against-ropes. See also Anthony Vaccaro & Ryan Walker, "Contractor woes dampen Randgold", *The Northern Miner* (23 January 2006), online: <northernminer.com/news/contractor-woes-dampen-randgold/1000200492/>.

use joint ownership and recourse to its shareholders to deter agency conflicts between participants.[34] Given the instability in Mali and political risk inherent in the project, perhaps utilizing shareholder loans to fund the Loulo mine investment was Randgold's way of taking control from the only other project participant—the Malian state. In addition, by limiting the number of project participants, Randgold had greater ability to control where the money was going—to Randgold's shareholders and to the Malian government, per their 20 percent ownership. In theory, involving development banks or other project financiers can take away control from a corporation's relationship with a host government by taking away its biggest bargaining chip—money. Moreover, where funds are diverted or more closely scrutinized, host governments, whose goal is not necessarily country-wide poverty reduction and development, may gain marginally less from natural resource extraction companies operating within their jurisdictions.

Finally, this unique financing scheme was only possible due to the capital liquidity of Randgold's shareholders. The shareholders of Randgold are big financial companies who could make a risky investment, and they had the capital to put off interest rate payments while waiting for the mine to reach profitability levels. Randgold had conducted extensive geologic surveys before opening the mine.[35] They were fully aware of the existence of extensive gold deposits that would provide high quality ore for years to come. With less control over the market price of gold or the political regime in Mali, they used a financing scheme to keep as much control over eventual profits as they possibly could. Nonetheless, as further explored below, Randgold and Mali's partnership may have been more productive and beneficial to all project stakeholders had they adopted a more inclusive approach from the outset.

2.2.1. The Loulo Mine and Mali's Development

Different sources come to different conclusions regarding the Loulo mine's impact on the local community surrounding the mine and Mali's economy more generally. According to Randgold's own self-reporting,[36] the mine has had and continues to have a very positive effect on the Malian economy and the communities surrounding the mine. The Establishment Convention between SOMILO and Mali stipulates a royalty on gold sales of six percent and a corporate tax rate of 30 percent after a five-year corporate tax holiday.[37] To this end, Randgold's Mali operations—which include the Loulo, Gounkoto, and Morila mines—have in total contributed an estimated $6 billion dollars to the Malian economy by way of taxes, royalties, salaries, and payments to local suppliers, and approximately $3 billion of that has come from the Loulo mine.[38] Between 2013 and 2017, the Loulo mine's contributions to the Malian economy

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[34] See Benjamin C Esty, "The Economic Motivations for Using Project Finance," Harv Bus Sch Rev, 3 (2003).

[35] See 2018 Technical Report, *supra* note 10 at 3.

[36] Much of the media-based information available on the Loulo mine explored in the article comes from Randgold's own company reports, such as: annual and quarterly company reports, U.S. Securities & Exchange Commission filings, and Canadian National Instrument 43-101 filings.

[37] See 2018 Technical Report, *supra* note 10 at 2. This agreement was *sui generis* but apparently based on the 1991 Mali Mining Code. See also SEC, "Exhibit 99.1 Randgold's Key Assets Deliver Strong Performance and Tongon Gets Back to Work" (6 November 2018), online: *SEC Archives* <www.sec.gov/Archives/edgar/data/1175580/000114420418057600/tv506483_ex99-1.htm>.

[38] See Randgold Resources…23 Years of Partnering with Mali, *supra* note 17 at 4.

comprised between three to four percent of Malian gross domestic product (GDP).[39] There is no doubt that the Loulo mine has significantly contributed to Mali's economy. However, juxtaposed with the annual profits,[40] Randgold's specific contributions to development in the communities around the mine appear sparse.[41]

2.2.2. *The Corporate Viewpoint*

Consider Randgold's arguments for the mine's positive effect on the local community. According to Randgold's 2018 Annual Report, the Loulo mine employs a high percentage of Malians. For example, in 2017, there were 2,975 people working at the Loulo mine in total and 2,820 of those were Malian nationals, a total of nearly 95 percent.[42] While the presence of the mine has led to an increase in population in the communities surrounding the mine,[43] statistics on indirect job creation were not uncovered in the sources surveyed. Randgold also tries to employ Malian companies, when possible, though it is not clear exactly what criteria are used to guide this policy. For example, they employed a Malian hauling contractor, SFTP, for whom they provided trucks and training for drivers.[44] SFTP now owns most of their own equipment and services other mines in Mali.[45] However, despite the above, the local community formally expressed concern over the employability of the young people in the communities surrounding the mine, both at the mine and more generally.[46] It is unclear exactly what, if anything, is being done to address this concern.[47]

According to Randgold reports, the Loulo mine also boasts a good environmental record. The mine complies with all Malian environmental legislation and it holds an Environmental Management System certification.[48] They have implemented an action plan to protect and enhance biodiversity onsite, they recycle 89 percent of the tailing storage facility water used onsite, and they are evaluating whether to assist with the Malian elephant project.[49]

Randgold also reports high safety standards in the mine. According to Randgold CEO Dr. Mark Bristow, "no aspect of our performance is more important than the health and safety of

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39 *Ibid*.

40 In 2017, the Loulo mine itself made 313.5 million in profits. "2017 Annual Report: Investing in the Future" (2017) at 38, online (pdf): *Randgold Resources* <minedocs.com/17/RandgoldResources%20_AR_2017.pdf> [2017 Annual Report].

41 *Ibid* at 151–152. In 2017, the Loulo mine spent $625,879 on community development initiatives, administered by community development committees—locally elected committees who are "responsible for the allocation of a community investment budget" funded by Randgold.

42 See 2018 Technical Report, *supra* note 10 at 43.

43 *Ibid* at 290.

44 See 2017 Annual Report, *supra* note 40 at 149.

45 *Ibid*.

46 *Ibid* at 291–292.

47 *Ibid* at 292 (noting that strategies to increase youth employment and entrepreneurship have been identified but giving no detail on how and what has been done in this regard).

48 *Ibid* at 171.

49 *Ibid* at 178–179.

our people."[50] This is reflected in the statistics. The Long-Term Injury Frequency Rate in the mine was 0.17 per million hours worked in 2017.[51] Randgold also continues to address the Malaria rate in the mine (23 percent in 2017) and the mine continues to keep HIV/AIDS and venereal disease low in the mine with voluntary counselling and testing.[52] Finally, Randgold has a corporate commitment to human rights that includes strict due diligence in recruitment and hiring, contractual human rights clauses, and compulsory training on the UN Voluntary Principles on Business and Human Rights.[53]

Randgold's CEO also considers community engagement important. As part of Randgold's stakeholder engagement program, Dr. Bristow holds formal dinners every year and on an ad hoc basis with local community chiefs.[54] These dinners give local chiefs a consistent opportunity to bring up any issues they feel are important and to get direct and immediate feedback on those issues. According to one chief from a different Randgold mine in the Côte d'Ivoire, "[t]he dinners we chiefs have with Mark are important to us. They allow us to speak to him chief to chief and friend to friend and we know when we speak he listens. When we speak with Mark the result is immediate, and he takes time to explain the decisions he makes."[55] To this end, Randgold has spent more than $6.4 million US dollars on community investment in the communities around the Loulo mine, including $625,870 in 2017.[56] Of that money, 50 percent has been for economic projects, 10 percent for health, 18 percent for education, seven percent for potable water, and finally 15 percent for agriculture.[57] This investment has by Randgold's account included the construction of 17 schools alongside teacher training and student bursaries, the donation of 10 tractors, seeds and fertilizer for community agriculture production near the mine, construction of 57 boreholes and four water supply systems, the building of five dams, the completion of a health center and the delivery of medical equipment, an agriculture development project, building a slaughterhouse, and bringing in a microcredit company to help support local economic initiatives.[58] Randgold's investment has also funded the payment of examination fees for many disadvantaged students.[59]

In sum, Randgold's own reports indicate the beneficial and sustainable nature of the Loulo mine's operations as well as the investments that Randgold has made into community development and the Malian economy more generally. However, human rights groups indicate a more troubling, and complex, narrative.

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50 *Ibid* at 133.

51 *Ibid* at 137.

52 *Ibid* at 42.

53 *Ibid* at 166.

54 See "Annual Report 2016: Sustainably Profitable" (2016) at 41, 177, online (pdf): *Randgold Resources* <annualreports.com/HostedData/AnnualReportArchive/r/NASDAQ_GOLD_2016.pdf> [2016 Annual Report].

55 2017 Annual Report, *supra* note 40 at 125.

56 See Randgold Resources…23 Years of Partnering in Mali, *supra* note 17 at 13. See also 2017 Annual Report, *supra* note 40 at 152.

57 See Randgold Resources…23 Years of Partnering in Mali, *supra* note 17 at 13.

58 *Ibid.*

59 *Ibid.*

2.2.3. The Critical Viewpoint

According to critics, Randgold may be playing up its corporate social responsibility (CSR) program to present a positive image, while in fact taking advantage of huge tax benefits in order to draw the highest possible profits from their mining activities.[60] Meanwhile, the partner in the project, the Malian state, finds itself in a weak position vis-à-vis Randgold. The government is a regulator, a tax collector, and a shareholder in the project company. It is responsible for enacting the laws governing mining and mining operations, it collects taxes in line with corporate tax legislation and mining contracts, and it holds a 20 percent ownership in the project company, SOMILO. This multifaceted nature of the government's relationship with the mining companies operating within their borders may complicate or introduce skewed incentives into the effective functioning of all of these activities.[61] Similarly, Randgold having already started a community development initiative may to some extent shield the Malian state from accountability for using the royalties and dividends for development purposes because Randgold is "in-charge" of development in the communities surrounding the mine and has taken active steps in that regard.[62] This may lower the Malian state's accountability to its constituents.

Power imbalances are also a large facet of the critique. On the one hand, local community leaders have the opportunity to ask questions and engage in dialogue with the CEO of Randgold. On the other hand, communities are in a weak position to voice disagreements to the CEO of a powerful multinational gold mining company whose mining projects in Mali are together responsible for approximately between six to 10 percent of the GDP of Mali.[63] Engaging in discussion with local communities and leaders is important, but power imbalances give little room for recourse in case of disagreement. Tellingly, Dr. Bristow's annual pay as CEO was approximately seven million USD in 2013,[64] which was more than Randgold's entire sustainability investment in the surrounding community of the Loulo mine.[65]

Finally, critics point out that the gold mining sector is cut off from the rest of the economy.[66]

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60 See International Federation of Human Rights, "Gold Mining and Human Rights in Mali" at 1, online (pdf): <www.fidh.org/IMG/pdf/Mali_mines_final-en.pdf> [International Federation of Human Rights]. See also Richard Wachman, "Mark Bristow: the man least likely to suffer when gold loses its lustre", *The Guardian* (6 May 2011), online: <theguardian.com/business/2011/may/06/mark-bristow-randgold-interview> ("we've paid the Mali government $800m in taxes in seven years – you can buy a lot of schools and roads for that money").

61 See International Federation of Human Rights, *supra* note 60 ("the state does not play its role as regulator and supervisor of these companies' activity, nor that of distribution of the national revenue for the benefit of the population" at 2).

62 *Ibid* ("they sometimes generate confusion between what comes under the responsibility of companies and what comes under that of the state" at 6).

63 See Randgold Reseources…23 Years of Partnering in Mali, *supra* note 17 at 4. See also Randgold Resources, "Successful and sustainable mining industry key to building Mali's economy — Randgold" (27 July 2016), online: *Mining.com* <www.mining.com/web/successful-and-sustainable-mining-industry-key-to-building-malis-economy-randgold/>.

64 See Jill Treanor, "Randgold Resources in biggest shareholder revolt over CEO pay", *The Guardian* (29 April 2013), online: <theguardian.com/business/2013/apr/29/randgold-resources-biggest-shareholder-revolt>.

65 See Randgold Resources…23 years of Partnering with Mali, *supra* note 17 at 12.

66 See International Federation of Human Rights, *supra* note 60 ("the sector is in fact largely cut off from

Because the gold industry does not substantially interact with other sectors of the economy, and because it is largely export oriented, absent strong resource governance, it has a tendency not to contribute effectively to sustainable development.[67] Because, some say, getting out of the poverty trap requires a "push" as well as investment in sectors that lead to growth—like education, sustainable and integrated industries, and infrastructure[68]—unless the gold mine can help fund other, more sustainable industries, it will not lead to long-term, community development no matter how much gold the mine extracts. Where mining companies' focus is on tapping into and selling extractive resources to markets abroad rather than engaging in sustainable development initiatives, CSR schemes and development initiatives risk operating as window-dressing rather than meaningful community development.

2.2.4. Recent Disputes Over the Loulu Mine

Despite Randgold's control over cash flows from the mine, disagreements over payments with the Malian government have nonetheless arisen. A tax dispute between Mali and Randgold developed in 2013 over whether the company was liable for taxes only stipulated in the mining contract between SOMILO and the government or whether subsequent changes to the Malian tax regime were also included.[69] In June 2016, an International Center for Settlement of Investment Disputes (ICSID) tribunal issued a final and binding award against the State of Mali for SOMILO in the amount of $29.2 million for money deemed to have been wrongfully taken by the Malian government through value-added tax (VAT) credits.[70] However, Mali still has outstanding claims of hundreds of millions of US dollars for which the government continues to pressure Randgold.[71] The strength of Mali's outstanding legal claim of $200.5 million US dollars is unclear, but Randgold did make payments of 27.3 million US dollars towards these outstanding claims for the first time in 2016.[72] Moreover, later in 2016, Randgold paid the Malian State $25 million US dollars in tax advances essentially as a good faith effort to keep the negotiations with the government alive.[73]

The precarious dynamics of the Malian political regime is a big reason why a large amount of uncertainty exists regarding the future of gold mining in Mali. The purpose of going to the ICSID arbitration was to solve the dispute once and for all. Nonetheless, the government continued to make the same claims after the award. A frustrated Dr. Bristow said, "[w]e can't pick up our mines and go away …. We've paid our tax. We're definitely not giving anyone the finger. There will be a solution – there always is…," adding that maybe more arbitration would

the other economic sectors and is completely export-oriented" at 2).

67 *Ibid* at 7.

68 See e.g. UN Millennium Project, *Investing in Development: A Practical Plan to Achieve the Millennium Development Goals. Overview* (New York: Routledge, 2018) (escaping the "poverty trap" requires a "big push of basic investments between now and 2015 in public administration, human capital (nutrition, health, education), and key infrastructure" at 19).

69 See Adam Green, "Mali: Randgold Tax Saga Goes to Arbitration", *Financial Times* (2 October 2013), online: <www.ft.com/content/7be0407a-cc84-314e-ba53-ce78a0acad8a>.

70 See 2017 Annual Report, *supra* note 40 at 207.

71 *bid* at 207–208.

72 *Ibid* at 207.

73 *Ibid*.

be necessary.[74]

The legal complexity of the multiple mining codes in Mali also creates uncertainty for long-term operations. Its simplification might create more certainty and thus more investment. Mining companies thought they were contractually protected for 30 years (from 1993) from changes to the fiscal regime.[75] However, in 2018, the Government was negotiating a new mining code which would raise royalties and taxes companies must pay.[76] Mali continued to claim that if negotiations did not pan out, it would implement the new law unilaterally.[77] In April 2020, the Malian Government approved a new mining code that would give Mali vastly more control over mining operations in its borders, in addition to changing long-held beliefs about the stability of exploration permits.[78] The exact effects of the new legislation on long-operating mines in Mali remain unclear.

3. LESSONS FROM THE LOULO MINE: RECOMMENDATIONS ON HOW TO BETTER ATTAIN SUSTAINABLE DEVELOPMENT ALONGSIDE EXTRACTIVE INDUSTRY PROJECTS

Randgold Resources has reaped enormous financial benefit from its investment in the Loulo mine. Similarly, the Malian government has also obtained large revenues from the Loulo mine's operations. Yet, relatively, the local communities in Mali surrounding the Loulo mine appear to have thus far gained the least from the project.[79] Indeed, one report on the impact of mining in Mali's Kayes region, which included the Loulo mine, noted that "[c]ommunity members tend to criticise the fact that not only has mining been of little or no benefit to them, but that also they have suffered its adverse consequences."[80] Moreover, Randgold and the Malian government have been dissatisfied with each other as project partners. Below, the article contends that including the local community from the outset of the project, increasing transparency and accountability, and involving DFIs could allow the Loulo mine, and similar gold mining projects in the future, to better mitigate risk, improve stability of operations, and spread the gains from development to the concurrent benefit of companies, governments, and the local communities in which these projects operate.

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74 Jon Yeomans, "Gold Miner Randgold Hits Out in Mali Tax Dispute", *The Telegraph* (10 October 2016), online: <telegraph.co.uk/business/2016/10/10/gold-miner-randgold-hits-out-in-mali-tax-dispute/>.

75 "Mali parliament approves new mining code", *Reuters* (29 April 2020), online: <reuters.com/article/mali-mining-idUSL5N2CG9N6> [Mali parliament approves new code].

76 *Ibid*.

77 See "Mali says negotiating mine code revision but could act unilaterally", *Reuters* (17 March 2018), online: <www.reuters.com/article/us-mali-mining-idUSKCN1GS2O6>.

78 See "Mali parliament approves new code", *supra* note 75.

79 See generally François Lenfant & Massaran Traoré, "The mountain gave birth to a mouse: The socio-economic impact of mining in the Kayes region of Mali" (October 2015) at 8, online (pdf): *International Alert* <international-alert.org/sites/default/files/Mali_ImpactMiningKayes_EN_2015.pdf>.

80 *Ibid*. But see Randgold's 2017 Annual Report, *supra* note 40 quoting the Mayor of Sitakily, Mali as saying, "For us life has changed dramatically. The mine has brought not just economic but social richness - we have new arrivals, new facilities and many opportunities" at 117.

3.1. Broader Inclusion of the Local Community at the Outset

One study in Mali illustrated that the negotiation and signing of important contractual documents defining the rights and responsibilities of mining companies and governments takes place largely without the participation of the people living in the mining community or the wider public.[81] The media-based research for this project similarly found no evidence of participation of the people in the local communities surrounding the Loulo mine during this stage of the project. The Malian Mining code stipulates that mining permits must be accompanied by a Convention of Establishment which defines the rights and responsibilities of both the State and the mining company.[82] Because the Convention of Establishment creates important conditions of the mining project, not having a say during this process significantly restricts the legal ability of local communities to influence the mines that operate in their communities.[83] Understanding the community needs and interests from the outset of the mining project is key to understanding how the project will influence the trajectory of the local community over the lifecycle of the mine and beyond. This can only happen with early community involvement in project discussions as participation allows the community to have some influence at the liminal juncture of contract creation.

As an additional hurdle, there appears to be a widespread lack of awareness in communities surrounding mining projects in Mali of the major social issues and legislation relating to mining.[84] Thus, for both the specific projects in their communities and their rights related to mining in Mali at large, a lack of information continues to curtail local communities' ability to effectively influence the legal process. Importantly, once the conventions are signed by the Ministry of Mines and the mining company, communities are then often "won over" with promises of well-paid employment, though sometimes without understanding the stakes involved in the project.[85] Information and the ability to act on that knowledge are therefore crucial to local communities' ability to influence a mining project from the outset.

This section argues that two points nonetheless support the recommended broader inclusion of the local communities from the outset: international law's broad recognition of the right to participate in decision making[86] and the nascent consensus that project finance undertakings in developing countries possess a more exacting duty of CSR.[87]

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81 See Amadou Keita et al, "Legal Tools for Citizen Empowerment: Increasing Local Participation and Benefit from Mali's Mining Sector" (2008) at 16, online (pdf): *IIED* <pubs.iied.org/12554iied>.

82 *Ibid* at 7.

83 *Ibid* at 10. See also 2017 Annual Report, *supra* note 40 where Randgold showcases the grievance mechanism, which is supposedly "established during the exploration phase of any project to ensure local community voices are heard from the outset" and provides "community members with a means by which they can lodge any complaints should a dispute arise, or if they feel they have been treated unfairly or discriminated against" at 129. However, this mechanism appears to have been implemented after the creation of the Loulo mine, as no media-based evidence was uncovered relating to discussions, grievances, or input from the local community during the early stages of the Loulo mine's construction.

84 See Keita et al, *supra* note 81 at 29.

85 *Ibid* at 16.

86 See Brenda L Gunn, "Protecting Indigenous Peoples' Rights through Indigenous Peoples' Participation in Decision-Making: A Climate Change Example" (2020) 17:1 JSDLP 1 at 13.

87 See Sorell, *supra* note 27.

3.1.1. International Law's Broad Recognition of the Right to Participate in Decision Making

The *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) contains several provisions that have legal bearing on the right of the local communities surrounding the Loulo mine to participate in decision making set to affect important aspects of their lives and community. Randgold's own reports admit that there are recognized Indigenous populations living around the mine,[88] reporting that relevant "studies identified that the inhabitants within the villages are mostly Malinké but include other ethnic groups who have arrived later such as Peul, Bambara, and Bozo."[89] Indigenous Rights groups recognize the Bambara, Peul (or Fulani), and the Bozo populations in the surrounding area of the Loulo mine as Indigenous peoples.[90] Therefore, notionally, those groups ought to be subject to all the protections in UNDRIP, which Mali is a party to.[91]

A wholistic reading of Articles 14, 18 and 19 of UNDRIP suggests application to the Indigenous groups surrounding the Loulo mine. Article 18 delineates the right of Indigenous peoples to participate in decision making in any matters that would affect their rights.[92] Large-scale mining projects in areas in which the local population's primary economic enterprises are subsistence farming and artisanal mining[93] plainly have a significant impact on local livelihoods. Building on this, the project also impacts the rights of those peoples. Article 14 of UNDRIP provides that "[I]ndigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning."[94] Yet, Randgold, as part of its development scheme, has by one account built 16 schools in villages surrounding the Loulo and Gounkoto mining complexes.[95] No indication exists that the local communities have had much, if any, say in how these schools are created, staffed, organized, or what curricula is being used. Whether these schools respect, take account of, and are appropriate to Indigenous group's education rights under UNDRIP remains obscure. By all accounts, Randgold is concurrently acting as educational provider and multinational miner, with little input in the decision-making process allowed to the local population, particularly at the all-important early stages of project formation and development.

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88 See 2018 Technical Report, *supra* note 10 at 43.

89 *Ibid*.

90 See International Work Group for Indigenous Affairs, "Indigenous Peoples in Mali" (12 September 2011), online: *IWGIA* <www.iwgia.org/en/mali/717-indigenous-peoples-in-mali> [International Work Group for Indigenous Affairs]. See also Minority Rights Group International, "Mali" (June 2019), online: *World Directory of Minorities and Indigenous Peoples* <minorityrights.org/country/mali/>.

91 See International Work Group for Indigenous Affairs, *supra* note 90.

92 See *United Nations Declaration on the Rights of Indigenous Peoples*, 13 September 2007, UN Doc A/RES/61/295, art 18 (stating that "Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions") [*UNDRIP*].

93 See 2018 Technical Report, *supra* note 10 at 43.

94 *UNDRIP*, *supra* note 92, art 14.

95 See 2018 Technical Report, *supra* note 10 at 43.

According to Article 19 of UNDRIP, the state must also guarantee inclusion before the adoption of administrative or legislative measures that may affect the Indigenous community.[96] The Malian government's original granting of exploration and mining permits meet these standards, thus requiring the government to engage in bona fide consultations and cooperation with those Indigenous peoples concerned. Yet, no evidence exists that the voice, needs, interests or aspirations of the local Indigenous groups were ever considered before any of these decisions were taken. While the government in Bamako has been in numerous conflicts with the Taureg groups in the north,[97] Bamako's relationship with the various indigenous groups in the communities surrounding the Loulo mine may be more multidimensional.[98] Absent field studies, it is difficult to characterize why there is a lack of evidence of the rights and interests of Indigenous groups surrounding the Loulo mine being taken into account.

It is important to note that a complication exists in Malian domestic law regarding UNDRIP's application. While Mali's Constitution proclaims to defend "the cultural and linguistic diversity of the national community,"[99] Mali "does not recognize the existence of indigenous peoples on its territory as understood in UNDRIP and International Labour Organization Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries."[100] Therefore, despite the Malian government's appearance of support for those principles outlined in UNDRIP and the fact that it is a party to the Convention, there is simultaneously a conscious attempt not to engender any enforceable rights, or indeed, to leave out Indigenous peoples and their rights under the Convention. The human rights community must recognize the limiting effect of such scenarios and push for broader application of Indigenous inclusion in resource extraction projects. While the Loulo mine seems to have sidestepped any application in practice of the provisions of UNDRIP under Malian domestic legislation, the applicability of those rights, recognized as due at the international level, still acts as persuasive law emphasizing a right to participate where Indigenous rights are at stake.

Finally, broader inclusion from the outset and more input into community building would be beneficial to both Randgold and Mali because it would harness the human capital capacity that both Randgold's workforce and Mali's country-level development need. Randgold's attempt to allow the community's voice to guide the use of their CSR projects is respectable but misplaced: that voice should have been involved in the first place. Investing in the local community is investing in the long-term health of the mine. Where constituents are pleased with the status quo in their communities, they may put political pressure via democratic means on the state. This, again, would be beneficial to the project company in terms of, for example,

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96 See *UNDRIP*, *supra* note 92, art 19 (outlining that "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them").

97 See e.g. "Ancient Causes of a Modern Conflict in Mali" (23 March 2014), online: *Harvard Political Review* <harvardpolitics.com/ancient-causes-modern-conflict-mali/>.

98 See "Observations on the State of Indigenous Human Rights in Mali for: The 29th Session of the United Nations Human Rights Council Universal Periodic Review" (January 2018), online (pdf): *Cultural Survival* <culturalsurvival.org/sites/default/files/UPRReportMali2017.pdf>.

99 "Mali's Constitution of 1992" translated by Daniel G Anna, Preamble, online: *Constitute Project* <constituteproject.org/constitution/Mali_1992.pdf?lang=en>.

100 International Work Group for Indigenous Affairs, *supra* note 90.

further acquisition of mining exploration permits.

To be sure, affording local communities the opportunity to participate in large-scale mining projects that will deeply affect their communities is only the tip of the iceberg. As has been long recognized in scholarship, merely recognizing "a right to participate does not in and of itself ensure effective participation."[101] Delineating the constitutive elements, the procedural requirements, and specific rights-based guarantees of the right of participation in decision making is an appropriately difficult question. Prior scholarship has identified several constitutive procedural elements of this right, including access to information, a voice in decision making, transparency of the decision-making process, enforcement, and recourse.[102] The experience of the Loulo mine illustrates at least two more procedural elements relevant to the effective exercise of the right to participate. First, the right to participate in decision making inherently exists in an unequal setting. The preamble to UNDRIP recognizes this fact.[103] The right to participate in decision making cannot itself correct for the power imbalance. Participation under duress, lacking in essential knowledge relating to the decision, or where the relevant stakeholder lacks access to redress mechanisms for either financial, economic, or legal means naturally precludes fundamental elements of the right to participate. The focus must be on the efficacious ability to exercise these rights rather than simply the existence of those rights in the abstract.

Second, the Loulo mine illustrates the importance of *timing* in the exercise of the right to participate in decision making. Randgold emphasized the fact that the CEO meets with local chiefs to discuss any issues related to the Loulo mine vis-à-vis the local community.[104] To be sure, this is an important and significant step on Randgold's part towards community inclusivity. Nonetheless, this inclusivity loses much of its value where the most important time frame during which a voice in the decision-making process would have been most valuable expires. The liminal juncture of contract creation, in which chiefs could have introduced wording or clauses to legally protect their own community interest, cultural heritage interests, and economic, political, or development interests, via for example the SOMILO contract negotiation, appears to have long passed by the time the chiefs were given a seat at the Loulo mine's table. If it is indeed "the province of law to protect especially vulnerable populations,"[105] then the right to participate in decision making must include these two other elements to retain its basic purpose.[106] This is particularly important in project finance where development issues are at stake, and where a large power imbalance exists between the multinational company, the

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101 Neil AF Popović, "The Right to Participate in Decisions That Affect the Environment" (1993) 10:2 Pace Envtl L Rev 683 at 691.

102 *Ibid*.

103 See *UNDRIP*, *supra* note 92, Preamble ("Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests…").

104 See 2017 Annual Report, *supra* note 40 at 124.

105 Eleanor Lumsden, "The Future Is Mobile: Financial Inclusion and Technological Innovation in the Emerging World" (2018) 23:1 Stanford JL Bus & Fin 1 at 4.

106 See *UNDRIP*, *supra* note 92, Preamble, emphasizing right to equal participation and preservation of right to be different.

government and other relevant stakeholders.

3.1.2. Project Finance in Developing Countries' More Exacting Duty of Corporate Social Responsibility?

The second point further supporting broader inclusion of the local community frames project finance in developing countries as having a more exacting duty of CSR. Three reasons support this premise. First, sponsor companies not only conduct business operations in developing countries, but they also actively play a role in development, possibly to a larger extent than other types of big business.[107] Indeed, the former CEO of Randgold Dr. Bristow has stated that "[a]s an investor in a national asset, and as a custodian of that asset, I think you're required to *add value* to that nation, not build a wall around yourself and live in exclusion from the surrounding economy."[108] In line with Dr. Bristow's recognition, particularly when extractive resource projects take place in least-developed countries, adding value to the nation in which the multinational company operates must include creating progress towards achieving livelihood goals of the local community which, in turn, requires the community's inclusion in project discussions.

Second, development difficulties often align with business hurdles. Skilled workers, transport infrastructure, technological networks and connectivity like internet, phone connection, and basic sustenance infrastructure such as medical care, foodstuffs, water access, and hygiene materials are all business needs for operations in-country as well as development needs.[109] The alignment of both development and business needs may place a higher degree of responsibility on the multinational to achieve its business needs in a way that also contributes to sustainable development, particularly where the ethos of a company is creating value in host countries. Evidently, sustainable development does not always align with business operations. But when project finance business needs in developing countries do coincide with development needs, as a baseline part of their CSR, companies should ensure that business investment pays heed to related community development needs and goals.

Third, the international soft law instruments like the Global Compact,[110] the UN Norms,[111] and the Organization for Economic Cooperation and Development guidelines[112] may place a further onus on project finance in developing countries to carry out their operations in respect of international law, both hard and soft. In short, CSR combined with global soft

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107 See Sorell, *supra* note 27.

108 "All that Glitters: Mark Bristow", *The CEO Magazine* (17 March 2017), online: <theceomagazine.com/executive-interviews/mining-metals/mark-bristow/> [emphasis added].

109 See Sorell, *supra* note 27.

110 See Deloitte, "UN Global Compact Implementation Model" (2010), online (pdf): *United Nations Global Compact* <d306pr3pise04h.cloudfront.net/docs/news_events%2F9.1_news_archives%2F2010_06_17%2FUN_Global_Compact_Management_Model.pdf>.

111 See UN Sub-Commission on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, Economic & Social Council, 55th Sess, UN Doc E/CN.4/Sub.2/2003/12/Rev.2, online: <digitallibrary.un.org/record/501576?ln=en>.

112 See "Guidelines for Multinational Enterprises" (2011), online: *OECD* <www.oecd.org/daf/inv/mne/48004323.pdf>.

law instruments, human rights treaties, and project-sponsors which state development goals, may place a higher onus of inclusion of the local community in sustainable development discussions and negotiations for project finance companies operating in developing nations.

3.1.3. A Word of Caution Regarding Human Rights and Corporate Social Responsibility

Rights-based approaches, particularly where corporate incentives abound, should be approached with caution as they present important limitations in practice. Some view human rights in the extractive industries as more of an aspirational ideal rather than practical tool.[113] And critics are right to point out the limitations of rights-based approaches—they may ignore big incentives not to comply with those standards and the practical realities of enforcement.

Rights-based redress mechanisms suffer from a multi-layered access, efficacy, and clout problem. First, those persons who might rely on rights to substantiate their own interests may be in vulnerable positions without knowledge of their rights, access to legal counsel, or the financial wherewithal to adjudicate their rights in court. Second, as seen in Mali, the domestic state in which peoples may rely on rights-based approaches to advance their interests may encounter substantial domestic hurdles in applying their international human rights. Some states choose to actively sidestep international human rights obligations due to their incompatibility with domestic politics, law, or socioeconomic perceptions of infeasibility. This may occur even where states appear to be willing participants in the broader international human rights treaty framework, as is the case in Mali. Third, one cannot ignore the power imbalances between large companies and Indigenous populations. A David and Goliath tale appropriately captures the imbalance in practice between corporate profit-based incentives in relation with vague human rights obligations. Where individual rights-based redress mechanisms end, CSR, a laudable publicity stunt, fails to meaningfully engage with the intersection between big business, local interests, and sustainable development.

The above notwithstanding, arguments for broader inclusion of the local community at the outset of an extractive industry project could still stand as an important counterweight to the interests of government, big business, and corporate shareholders. Beyond judiciable rights-based claims, bad press exposing rights violations can act as a powerful extralegal influencer. In the digital age, mining companies often rely on positive press and media to communicate with communities, shareholders, and governments, to attract more investment, or to boost confidence in their operations.[114] Similarly, governments must be responsive to bad press insofar as they care about the wishes of their constituents. Indigenous populations and NGOs, even where redress under the judicial system is unlikely, may be able to utilize negative press to shape behaviors of companies and governments. When word gets out about a new extractive resource project, an information campaign, even if via online platforms, could substantially shift initial permitting, exploration, and contracting dialogues occurring between

113 See Simon D Handelsman, "Human Rights in the Minerals Industry" (2002) at 34, online (pdf): *International Institute for Environment and Development* <pubs.iied.org/sites/default/files/pdfs/migrate/G00531.pdf>.

114 See e.g. "Going digital: why innovation is critical for the mining industry" (17 May 2020), online: *Mining Global* <miningglobal.com/technology/going-digital-why-innovation-critical-mining-industry>.

corporations, governments, and local populations.[115] Finally, aspirational, difficult to apply in practice, or one-sided does not mean wrong. Rights-based approaches and CSR campaigns, for all their insufficiencies in spurring sustainable development in practice, remain a necessary component nudging companies, governments, and local peoples toward increased participation in, and benefit from, large-scale extractive business projects in their communities.

3.2. Increase Transparency and Accountability

The Loulo mine, as with many other business undertakings in the extractive industries, suffers from a lack of transparency. This is particularly true for the Malian state. Little indication exists as to how the Malian government is utilizing the funds gained from the Loulo mine. The government should be held accountable to proper uses of funds via full disclosure of the amount of those funds and how they are being used, whether for development schemes or the general functioning of the state. Similar levels of transparency would be helpful with respect to the permitting process for mining operations in Mali. Yet this too, suffers from a lack of clarity and a subsequent accountability gap. Increasing transparency and accountability in the use and collection of rents from gold extraction would likely have led to better development outcomes for the communities surrounding the mine in its 15 years of operation.

Improving transparency of financial flows from natural resource extraction projects is a means to an end. Increased levels of transparency bring about other positive by-products, such as increased accountability, decreased opportunity for corruption, mitigated risk of embezzlement and misappropriation, and expanded citizen awareness of government resource management.[116] Shining a spotlight on resource revenues can influence the government to better utilize those funds for the good of its citizens. Importantly, increased transparency must occur at multiple levels, as risks abound at various echelons of the value chain.

Marie Chêne of Transparency International rightly states that "[c]orruption risks can occur at every step of the extractive value chain, from awarding of mineral, oil and gas rights, regulation and management of operations, revenue collection and management, to commodity trading and public spending."[117] Improving transparency at each level is therefore necessary to interrupt the cycle of resource revenue misuse and impede corrupt uses of these funds. Moreover, this resource-related corruption can take a number of different forms, including bribery, siphoning off of public funds, patronage, extortion, embezzlement, and misappropriation,[118] making addressing the transparency gap more complex and more crucial. Transparency is a key first step in addressing these issues. It is a necessary but not sufficient part of achieving better accountability and ultimately, better governance of natural resource profits.

What sort of mechanisms might improve overall metrics of transparency? The Extractive

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115 See e.g. Alexandru Predoiu & WNV, "Rosia Montana: how Romanians united to save a mountain village from mining apocalypse" (11 January 2017), online: *The Ecologist* <theecologist.org/2017/jan/11/rosia-montana-how-romanians-united-save-mountain-village-mining-apocalypse>.

116 See Marie Chêne, "Natural resource management transparency and governance A literature review focusing on extractive industries" (2017), online (pdf): *Chr. Michelsen Institute* <u4.no/publications/natural-resource-management-transparency-and-governance.pdf>.

117 *Ibid* at 1.

118 *Ibid* at 2.

Industries Transparency Initiative (EITI) is one such tool. Originally created in 2003 at the World Summit on Sustainable Development,[119] the EITI sets disclosure standards under which participating governments and companies report revenues and other information relating to the extractive industries.[120] The receipts are compared to discover any discrepancies and the information is made public. The intent behind the initiative was to ameliorate public access to natural resource profits and ensure greater accountability therein. Academic assessments of the EITI's effectiveness have generally been optimistic,[121] while acknowledging that the EITI and transparency alone cannot improve governance at large. As such, some recommend a multifaceted use of the EITI along with other measures aimed at improving resource governance.[122] For example, Human Rights Watch has advocated for EITI's use alongside a focus on the guarantee of fundamental rights.[123] Others argue that attention must be paid to the causal chain between transparency and good governance.[124] Still others emphasize the importance of political stability as a necessary factor of transparency being a driver of improved resource governance.

Mali became a member of EITI in 2011 and the first report was released in 2013.[125] Among their many recommendations was ensuring that Mali adheres to the tax code when collecting taxes, publishing contracts, archiving receipts more effectively, and keeping a public register of the companies who operate in the extractive industries in Mali.[126] Mali's government has work to do. However, even the EITI report itself presents some challenges with respect to accountability. The 2018 report is over 680 pages, and full of intricate tables and graphs.[127] Moreover, the report is written entirely in French as it is intended for the government, which is nonetheless problematic for citizens who wish to understand how natural resource revenue from their communities is being used, since the majority of the population in Mali speaks Bambara.[128]

Mali's EITI reports support the idea that it is an EITI member making important efforts

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119 For more on the history of the EITI, see "History of the EITI" (last visited 2 July 2021), online: *The Extractive Industries Transparency Initiative* <eiti.org/history>.

120 See D Boldbaatar, NC Kunz & E Werker, "Improved resource governance through transparency: Evidence from Mongolia" (2019) 6:3 Extractive Industries & Society 775.

121 See e.g. Caitlin C Corrigan, "Breaking the resource curse: Transparency in the natural resource sector and the extractive industries transparency initiative" (2014) 40 Resources Policy 17.

122 See "A New Accountability Agenda: Human Rights and the Extractive Industries Transparency Initiative" (July 2013), online (pdf): *Human Rights Watch* <eiti.org/document/new-accountability-agenda-human-rights-eiti>.

123 *Ibid* at 27–30.

124 See Boldbaatar, *supra* note 120.

125 See Moore Stephens LLP, "Rapport ITIE Pour L'Année 2013" (December 2015) at 5, online (pdf): *The Extractive Industries Transparency Initiative* <eiti.org/sites/default/files/migrated_files/rapport_itie_mali_2013_-_final.pdf>.

126 *Ibid* at 71–80.

127 See BDO LLP, "Initiative Pour La Transparence Dans Les Industries Extractives: ITIE Mali Rapport Pour L'Année 2018" (August 2020), online (pdf): *The Extractive Industries Transparency Initiative* <itie.ml/wp-content/uploads/2020/08/Projet-rapport-ITIE-Mali-2018.pdf>.

128 See Servaas Feiertag, "Legal Research in Mali" (October 2020), online: *Hauser Global Law School Program, New York University School of Law* <www.nyulawglobal.org/globalex/Mali1.html>.

towards improving transparency in natural resource extraction. Nonetheless, one thing is clear, the EITI has not been the silver bullet for resource-driven sustainable development in Mali. The annual EITI reports have improved awareness of some aspects of revenue received from SOMILO, but there is still a transparency gap as to the government's approach to turning the funds received into inclusive sustainable development investment in communities where they are needed most.

The African Development Bank has recommended that "EITI membership should be set as a precondition for DFI financing of any mining transactions…to increase the likelihood that resources are properly allocated."[129] It is not a cure-all, but it can lay the groundwork for the development of future institutions because it allows civil society to oversee the government's use of funds obtained via natural resources extraction and all of the administrative processes inherent therein. This is especially important for resource-rich countries since the resource rents are often narrowly concentrated making them easier to siphon off.[130] Finally, there may be some reflective benefits that accrue to resource governance where transparency initiatives are connected to, or administered by, outside institutions for specific projects due to increased oversight of resource rents.

Increased transparency and accountability on the part of Mali is important but only part of the story. Randgold could also do far better job in terms of both transparency and accountability. Randgold is still opaque in both its contracting practices and its CSR record. Dr. Bristow emphasizes his meetings with community chiefs. However, there is no evidence of any public record of such meetings with the local chiefs, evincing some skepticism about whether this initiative is simply a ploy to play up Randgold's CSR scheme without imposing any real obligations. Moreover, in the SOMILO contract, the arbitration clause stated that London would be the seat of arbitration.[131] However, the tax dispute between Randgold and Mali ended up in Paris before an ICSID tribunal.[132] No other indications of the contract governing this clause were found, despite reaching out to the legal department of Randgold and exhausting all public domains of contracts involved with the Loulo mine. Increasing such transparency would ultimately provide more protection against arbitrary changes in legal behavior by either Randgold or the Malian Government.

3.2.1. A Word of Caution Regarding Transparency

Transparency is not, and never will be, a panacea. Marie Chêne likewise succinctly captures the nexus of transparency's relationship with sustainable development, cautioning that:

> [w]ithout strong regulatory frameworks and competent institutions, transparency

129 Ousman Gajigo, Emelly Mutambatsere & Guirane Ndiaye, "Gold Mining in Africa: Maximizing Economic Returns for Countries" (March 2012), African Development Bank Group Working Paper Series No 147 at 32, online (pdf): <www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/WPS%20No%20147%20Gold%20Mining%20in%20Africa%20Maximizing%20Economic%20Returns%20for%20Countries%20120329.pdf>.

130 *Ibid* at 33.

131 See Societé des mines de Loulo SA, "General Conditions of Contract" (June 2020) at 7, online (pdf): *Randgold Resources* <s25.q4cdn.com/322814910/files/doc_downloads/operations/loulo/Loulo-Terms-and-Conditions_EN.pdf>.

132 See Green, *supra* note 69.

> alone is unlikely to achieve sustainable development outcomes. We need flexible, collaborative and adaptive management practices anchored in a solid understanding of the political economy to adapt to changing circumstances and local context. Sound and sustainable fiscal regimes – and a leadership committed to the use of revenues for the benefit of all – is also key to translate resource wealth into sustainable development outcomes.[133]

Transparency must coexist with other sustainable development prerequisites to achieve positive development results.

Reflecting the above, one empirical study found that the EITI "has had no significant effect on democracy and political stability."[134] Transparency alone will not improve other elements of good governance. It is only one element of a complex and multifaceted set of elements that contribute to an environment in which sustainable development occurs. The broader question of how to achieve sustainable development in Mali is tied in with the political history of Mali, which is characterized by instability, low levels of trust, and poor investment in both people and infrastructure. Transparency and accountability initiatives for mining companies and governments alike must account for the wide range of issues that inhibit sustainable development in communities surrounding mining operations.

Mali has its own set of specific development needs that encompass a wide range of issues. Poverty is concentrated in the south of the country and in rural areas; the ability to understand and read legal documents is limited because more than 50 percent of the population cannot read or write.[135] This is compounded by the fact that under Article 25 of the constitution the official language is French while the majority of the population speak Bambara.[136] Of the population of more than 18 million, nearly half are under the age of 18 and two out of every three people in Mali live on less than two dollars per day.[137] Mali has an immense need of new infrastructure: only three percent of roads are blacktopped, 53 percent of the population lacks access to electricity, and 75 percent of the population lacks access to health services.[138] Transparency initiatives must take place in the context of specific community development discussions. Only by linking specific development needs with actual financial flows can one contextually understand how natural resource revenues—either at the company level or the government level—address, or fail to address, essential development needs.

Finally, in August 2020, soldiers expelled Ibrahim Boubacar Keïta from the presidency and set up a civilian transitional government after widespread protests over government corruption, economic mismanagement, and election disputes.[139] As a general matter, the

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133 Chêne, *supra* note 116.

134 Corrigan, *supra* note 121 at 18.

135 See Feiertag, *supra* note 128.

136 *Ibid*.

137 See Boubacar Ba & Morten Bøås, "Mali: A Political Economy Analysis" (2017) at 2, online (pdf): *Norwegian Institute of International Affairs*, online <nupi.brage.unit.no/nupi-xmlui/handle/11250/2468085>.

138 See African Development Bank, "African Economic Outlook 2020: Developing Africa's Workforce for the Future" (2020) at 150, 166, online (pdf): *African Development Bank Group* <afdb.org/sites/default/files/documents/publications/african_economic_outlook_2020-en.pdf>.

139 See Bisa Williams & John Goodman, "Mali's Coup Could Destabilize the Sahel", *Foreign Affairs* (27 August 2020), online: <foreignaffairs.com/articles/africa/2020-08-27/malis-coup-could-destabilize-

complexity and instability inherent in the political history of Mali and the region must be a part of any recommendations regarding sustainable development. Nonetheless, the more specific human capital, infrastructure, and unstable political situation in Mali is not dispositive of the recommendations of increasing transparency based on the experience of the Loulo mine. Even though increasing transparency has not, and is unlikely to, solve all of Mali's development problems, it nonetheless remains a key part of any effort to address government accountability of natural resource rents. Increasing transparency will not spur on sustainable development on its own, but sustainable development will not occur without it.[140] Transparency initiatives for companies and governments alike must be part of future gold mining projects in order to ensure rents and profits have any chance of going towards sustainable development.

3.3. Involve Development Finance Institutions

Utilizing the experience of the Loulo mine, this section contends that the involvement of DFIs has potential to yield benefits for the various stakeholders in international mining projects. It considers possible advantages of DFI involvement for local communities, governments, and mining companies, before briefly engaging with critical arguments regarding DFI involvement.

3.3.1. Advantages for Sustainable Local Development

The local communities surrounding the Loulo mine have thus far seen relatively little impact from the billions of dollars that have been extracted from their lands. Development banks' involvement in the Loulo mine would have helped monitor the use of mining revenues, promoted the more efficient use of funds, and tailored the use of those revenues to the most pressing development needs of the local communities.

First, a development bank could help improve transparency as to where community-allocated funds are going and what they are being used for. Mali ranks highly in terms of global corruption, and where money has no oversight, it is usually lost.[141] Institutional monitoring might mean that more of the three billion US dollars contribution to the Malian economy that Randgold claims to have made would go towards poverty alleviation, infrastructure, and human capital development. For example, a fund could be created, like that seen in the Chad-Cameroon Pipeline project, ensuring a certain percentage of funds would go towards community development and poverty alleviation.[142] A development bank's involvement in extractive industry projects like the Loulo mine might encourage greater investment sums being planned for, and reaching, the local communities.

Secondly, groups like the International Finance Corporation, whose mandate includes poverty alleviation, could provide the necessary know-how to adequately address Mali's poverty trap, which Randgold does not have the expertise to do, and which the precarious politics and

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sahel>.

140 See "No Sustainable Development Without Tackling Corruption: The Importance Of Tracking SDG 16" (17 July 2017), online: *Transparency International* <www.transparency.org/en/news/no-sustainable-development-without-tackling-corruption-sdg-16> (noting that "with corruption, there's no sustainable development").

141 See "Our Work In: Mali", online: *Transparency International* <www.transparency.org/en/countries/mali>.

142 See Esty, *supra* note 34.

corruption in the Malian political regime have impeded. With this expertise in development and their orientation towards poverty alleviation, the investment local communities do receive may be more efficiently used and tailored to their needs rather than the needs of the mine.

Finally, a development bank's presence could help to clear up any accountability problems regarding development in the communities surrounding the mine. As it stands, Mali may be able to freeride on Randgold's community development scheme, thus shirking some responsibility for development in the communities surrounding the mine. At the same time, as a multinational mining company, Randgold can play up its CSR scheme to assert it is doing its part while claiming that in-country development goes above and beyond its role.[143] Involving a development bank would put the onus on who is best situated to perform that role and shift the focus to where it belongs—the mine's impact on the local community.

3.3.2. Advantages for Governments

Development banks can play a positive role in helping developing countries manage resource wealth to spur sustainable development by providing expertise on the more efficient use of mining revenues and helping mediate corporate-government negotiations.

The African Development Bank has published extensively on the topic of the more efficient use of revenues that come in from mining operations within their borders.[144] This expertise could help Mali put more effective use to the money that it has coming into its coffers by creating sustainable, value-added investments into Mali's future while minimizing waste and inefficient uses of funds.

Consider two brief examples that illustrate development banks' potential to help governments turn natural resource revenues into sustainable development. Companies and governments alike tend to be short-sighted when it comes to natural resource projects.[145] This can be problematic for development purposes because investment leading to lasting community development takes time. Moreover, mines do not last forever.[146] As soon as the resource is used up, the foreign mining company leaves, and the community is left without the economic influence of the mine.[147] Development banks can help to reorient projects towards

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143 But see Saël Gagné-Ouellet, "Regulatory Framework Review and Mining Regime Reform in Mali: Degrees of Rupture and Continuity" in Bonnie K Campbell, ed, *Modes of Governance and Revenue Flows of African Mining* (London, UK: Palgrave Macmillan, 2013) 47 (noting that "the discretionary nature of community development plans allows companies to use their actions as a way to showcase their magnanimity, even though they are in fact obligated to do so" at 81).

144 See Gajigo, *supra* note 129.

145 See Annalisa M Leibold, "Aligning Incentives for Development: The World Bank and the Chad-Cameroon Oil Pipeline" (2011) 36:1 Yale J Intl L 167 ("the MNC, motivated by profit, will maintain an especially short time horizon due to the risky investment climate. The elite faction in power, representing the host state, will seek to maximize its own benefit and, due to political uncertainty, will have a strong incentive to spend too much in the short term. Therefore, neither participant will have an incentive to give adequate consideration to the long-term development impacts of the project" at 191).

146 The Loulo mine is projected to run until 2032. See 2018 Technical report, *supra* note 10 at 263.

147 See e.g. Michael Haney & Maria Shkaratan, "Mine Closure and its Impact on the Community: Five Years After Mine Closure in Romania, Russia and Ukraine" (2003) The World Bank Policy Research Working Paper 3083 at 7–10.

the longer term so that mine closure is not the end of economic development. For example, in Romania, the World Bank played an influential role in diversifying economic impacts of mines in its Mine Closure and Social Mitigation Project that helped communities foster conditions for local economic growth and job creation outside of the mine.[148] Similarly, in Madagascar, a World Bank-supported mining project took an innovative approach to poverty reduction and development through the creation of a Gemological Institute, still in existence today, that provides a host of economic benefits from job creation to training and human capital development to downstream sector benefits.[149] Thus, while development banks cannot always overcome impediments to natural resource-based development—such as corruption—their development expertise and ability to focus on longer-term goals may assist governments to reorient towards longer-term sustainable development from natural resource revenues.

Development bank expertise may also help during government negotiations with mining companies. Mali has negotiated the issue of royalties with the mining companies who are operating within its borders.[150] The African Development Bank has conducted extensive research on this exact topic.[151] This research cuts in Mali's favor, indicating that raising royalties a marginal amount likely will not largely affect the profitability of the mine's operations.[152] Having such research and the weight of authority that development banks naturally bring with them could help governments looking to increase mining revenues introduce flexibility into negotiations with companies like Randgold, whose main focus is on profitability. Given the upward swing in the price of gold over the last 20 years, governments could use such moments as a springboard to increase royalties in return for other compensations, like easier access to exploration permits or a break on VAT assessments. Such a quid pro quo agreement backed by the research of competent institutions could help static contractual agreements that no longer fit the gold market, political situation, or state of affairs in project finance ventures in the extractive industries. In this way, development banks could inject some flexibility into long-term corporate-government mining ventures that might prove beneficial to the host government, given the instability of the gold market.

3.3.3. Advantages for Mining Companies

Randgold may have benefited from the involvement of a DFI from the outset of the Loulo mine project for three reasons: increased control as a result of mitigated risk of foul play by the host country, diversification of project risk, and an enhanced mine image through commitment to sustainable development.

Firstly, despite Randgold's desire to maintain control and ownership over the Loulo mine

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148 *Ibid* at 21.

149 See Gary McMahon, "The World Bank's Evolutionary Approach to Mining Sector Reform" (October 2010) at 22–23, online: *The World Bank: Extractive Industries for Development Series #19* <openknowledge.worldbank.org/handle/10986/18288>.

150 See e.g. "Mali says negotiating mining code revision but could act unilaterally", *supra* note 77.

151 See Ousman Gajiho, Emelly Mutambatsere & Guirane Ndiaye, "Royalty Rates in African Mining Revisited: Evidence from Gold Mining" (June 2012), online (pdf): *African Development Bank* <www.afdb.org/en/documents/document/economic-brief-royalty-rates-in-african-mining-revisited-evidence-from-gold-mining-28730>.

152 *Ibid* at 8.

by limiting outside involvement in the project, including a development bank could in fact have provided them with *more* control over the project, and a less rancorous relationship with the Malian government. This is partly because of the "political umbrella" that such institutions can provide.[153] The mere presence of DFIs can offer a certain amount of leverage which influences the behavior of the host government. A development bank's involvement in a project finance scheme carries with it a deterrent effect against behavior that either runs contrary to the terms of the agreement or that hinders the project's development to the sole benefit of one of the project partners. Their mere presence in the project reduces the chance of foul play by the project participants and may in fact deter adverse events before they happen.[154] Importantly, this likely would have mitigated the effect of the tax problem that Randgold had with the Malian government. Mali would have been less likely to withhold Randgold's back-taxes in the first place with the clout of an international development bank participating in, and monitoring, the project. Additionally, Mali would have by all accounts been more likely to pay back the VAT taxes owed to Randgold because of this deterrent effect.

Secondly, including a development bank would have reduced some of the project risk via diversification. SOMILO, the project company, is 80 percent owned by Randgold and 20 percent by the Malian State with all the funding coming from shareholder loans.[155] While this gives Randgold a lot of control up front, paradoxically, it constrains Randgold's options should problems arise—as they did. A development bank might put conditions on access to funds which could prompt a government to act, where necessary, or to deter behavior in other cases, such as Mali's threat to unilaterally change the mining code. Were Randgold to try something similar, the mine would simply cease to function because Randgold is the sole participant with access to the "purse strings."

A DFI could mitigate risk by moderating ineffective contractually stipulated legal dispute resolution mechanisms. Randgold's frustration over a lack of recourse to methods of dispute resolution other than arbitration, which already has not proved fruitful, is evident. Even a favorable arbitral judgment has not solved the issue. A DFI might be able to add further weight towards compliance with legal dispute resolution by imposing sanctions on access to funds, negative publicity, or other avenues to impact the government's behavior at less of a cost to the other stakeholders than arbitration proceedings that parties may or may not readily comply with.

In addition, development banks have tools at their disposal that are not necessarily in the project contract that may reduce the risk of foul play by host governments. Development banks may play an important behind-the-scenes mediation role between project stakeholders that can help push projects towards net-gain for all. The sizable financial resources of development banks may provide the necessary capability in large-scale projects, like mines, to push projects in a noncontentious direction. Pointing fingers between private project partners, as seen in the back-tax dispute between Randgold and Mali, does not accomplish much in the

153 See Christa Hainz & Stefanie Kleimeier, "Political Risk, Project Finance, and the Participation of Development Banks in Syndicated Lending" (2012) 21 J Financial Intermediation 287 (arguing that "that non-recourse project finance loans and the participation of development banks in the loan syndicate help mitigate political risk" at 288).

154 *Ibid*.

155 See 2016 Q2 Report, *supra* note 19 at 3.

way of resolving the dispute. However, a development bank's project-related activity that may warn other potential investors about the difficulty of working in a certain jurisdiction from a credible, neutral, and reliable source may carry clout for governments looking for funds. It is possible that such clout would have proved beneficial for Randgold in its tax disputes with the Malian government.

Thirdly, a partnership with a DFI would enhance the image of the mine. Randgold states that what sets them apart from other mining companies is their focus on enduring profitability via long-term investment in the communities in which they operate.[156] Involving a development bank would serve as a lynchpin to this commitment and send a strong signal to shareholders, governments, and communities alike that they are not just there to exploit the gold mine and then leave. In theory, Randgold knows mining and DFIs know how to achieve sustainable development. Such involvement would thus serve as a nontrivial indicator to local communities, the Malian government, other gold mining companies, and other states looking to attract foreign investment of the priorities of big extractive industry projects that small CSR programs fail to achieve. Including an actor whose mandate is poverty alleviation would demonstrate to communities around the mine both a commitment to development and the nonmutual exclusivity of profitability in the extractive industries and sustainable development. In contrast, while Randgold has made commitments to sustainable mining and developing the local community around its mines, it favors control over funding streams and profitability for its shareholders over other commitments.

3.3.4. A Word of Caution Regarding Development Banks

Some rightly question the efficacy of development banks to spur on growth and inclusive development in the post-WWII global south.[157] Despite the above arguments for why, based on the experience of the Loulo mine, development banks should be included from the outset of the project, development banks are not a panacea for natural resource fueled sustainable development.

High-level critiques of development banks are diverse and numerous. Some characterize development banks as pro-free market and deregulation, neo-colonialist, lenders who attach strict and counterproductive conditions and do not always respect human rights standards.[158] More focused case-specific critiques question why, in natural resource projects involving development banks, those countries often still suffer from development problems or the effect of the involvement of the DFI on specific metrics is uncertain.[159] The World Bank itself has recognized that even where development banks are involved in extractive industry projects, sustainable development is not always the outcome. In the early 2000s, the World Bank

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[156] See "All that Glitters: Mark Bristow", *supra* note 108.

[157] See e.g. Joseph E Stiglitz, *Globalization and its Discontents* (New York: Norton Publishing, 2003).

[158] See "What are the main criticisms of the World Bank and IMF?" (4 June 2019), online: *Bretton Woods Project* <www.brettonwoodsproject.org/2019/06/what-are-the-main-criticisms-of-the-world-bank-and-the-imf/>. See also Korinna Horta, "Rhetoric and Reality: Human Rights and the World Bank" (2002) 15 Harv Hum Rts J 227.

[159] See e.g. Samantha Attridge, Dirk Willem te Velde & Søren Peter Andreasen, "Impact of development finance institutions on sustainable development" (2019) at 71–72, online (pdf): *Overseas Development Institute* <odi.org/sites/odi.org.uk/files/resource-documents/12892.pdf>.

commissioned the Extractive Industry Review, posing the fundamentally important question: is natural resource extraction entirely at odds with sustainable development?[160] While important evolutions have taken place,[161] some commentators still emphasize the need for further reform of development banks.[162] And in Mali, the International Monetary Fund stepped in during the 1980s to help stabilize the Malian economy's many difficulties.[163] However, frustration with the imposed austerity measures led to revolts and the formation of a new constitutional, multi-party democracy,[164] signaling historical dissatisfaction with such institutions.

There are also important reasons why governments and companies may not want to involve a development bank, and reasons why a development bank itself may not want to be involved in certain projects. For example, project monitoring, increased transparency, and international procurement standards may disincentivize governments and companies from prospective involvement of DFIs. Similarly, a development bank may not want to be involved in certain types of extractive industry projects due to reputational risk concerns, particularly given NGO monitoring of some projects.[165] Corruption risks, the prospect of being caught in the middle of a major commercial dispute, or simply reputation hazards may disincentivize a development bank from involvement in certain projects.

These critiques and observations are an important part of the broader discussion, but they are not dispositive of the above recommendation. The involvement of a DFI does not cure all problems associated with sustainable development—ranging from sound institutions to good government to high human capital attainment. The argument presented here however is narrower. Rather than top-down involvement in the broader economy, as a limited project participant, DFIs can help to achieve certain desired ends—e.g. reduced partnership conflict, specific earmarked funds for development, and sustainability know-how. Where certain specific ends in a mining project can be achieved or assisted via inclusion of a DFI in the project, those benefits and the participation of a DFI should be considered. In large extractive industry projects, there can be advantages presented to all stakeholders from the limited presence of a

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160 See Emil Salim, "Striking A Better Balance—Volume I: The World Bank Group And Extractive Industries" (2003), online (pdf): *Extractive Industries Review* <lawweb.colorado.edu/profiles/syllabi/banks/EIR%20vol1_eng.pdf>.

161 See e.g. Jakob Vestergaard, "The World Bank And The Emerging World Order Adjusting To Multipolarity At The Second Decimal Point" (2011), online (pdf): *Danish Institute for International Studies Report* <pure.diis.dk/ws/files/57514/RP2011_05_World_Bank_voice_reform_web.pdf>. See also Jessica Einhorn, "Reforming the World Bank", *Foreign Affairs* 85:1 (January/February 2006) 17, online: <foreignaffairs.com/articles/2006-01-01/reforming-world-bank>.

162 See e.g. Amar Bhattacharya & Homi Kharas, "Time to reform the multilateral development bank system" (20 February 2018), online (blog): *Brookings* <brookings.edu/blog/future-development/2018/02/20/time-to-reform-the-multilateral-development-bank-system/>.

163 See Library of Congress – Federal Research Division, "Country Profile: Mali" (January 2005), online (pdf): *Library of Congress* <www.loc.gov/rr/frd/cs/profiles/Mali.pdf>.

164 *Ibid*.

165 See e.g. "New report exposes World Bank links to destructive coal mining in Indonesia" (11 April 2019), online: *Inclusive Development International* <www.inclusivedevelopment.net/campaigns/new-report-exposes-world-bank-links-to-destructive-coal-mining-in-indonesia/>; "Armenian Environmentalists Urge IFC to Pull Out of Amulsar Gold Mining Project" *HETQ* (28 April 2017), online <hetq.am/en/article/78249>.

development bank which should not be ignored.

4. CONCLUSION

Randgold states that one of the cardinal tenets of its philosophy as an international mining company is "miners should be developers rather than exploiters, and that the people who are the real owners of a country's natural resources should receive a fair share of the value created by their extraction."[166] Yet, what is clear is that 15 years of prosperous mineral extraction from the Loulo mine in Mali has not lifted Mali from its development dilemma. Despite the Loulo mine's huge contribution to the Malian economy at large, Mali remains an underdeveloped country with significant challenges to sustainable development.

This article has analyzed the dynamics at play through a case study of the Loulo mine from a sustainable development perspective. The article's reliance on secondary source materials has laid the groundwork for further study, which might benefit from fieldwork and empirical studies. It offered three recommendations on how future project finance operations in the extractive industries might spur more inclusive sustainable development for all stakeholders: offering a more expansive voice to local interests early on in project negotiations, improving transparency both at the multinational level and host government level, and including development banks. Yet these recommendations are not the silver bullet to inclusive sustainable development from natural resource extraction. After all, "[a]nyone who claims to understand economic development in toto, or to have found the key to the secret of growth, is almost certainly wrong."[167] The hope, nonetheless, is that it will start a more in-depth conversation regarding how the use of project finance in the extractive industries can serve as a boon rather than a bane to sustainable development in the communities in which these important projects operate, thereby benefiting all stakeholders rather than only a select few.

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166 2016 Q2 Report, *supra* note 19 at 20.

167 Charles Kindleberger, *Economic Development*, 2nd ed (New York: McGraw Hill, 1958).