

Regulatory Frameworks, Issues of Legitimacy, Responsibility, and Accountability: Reflections drawn from the PERCAN initiative

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Introduction

During the 1990s, the Peruvian mining sector was the object of a far-reaching process of liberalization which included the privatization of state enterprises and a series of measures aimed to attract foreign direct investment. Since 1992, the sector has received US\$12 billion in national and foreign investment. In 2007, it represented 20 per cent of total foreign direct investment and generated 25 per cent of public revenue collected from corporate income taxes by the Peruvian government; 130,000 people are estimated to work in the mining sector. Since the 1990s, with the growth rate at 7.8 per cent as compared with the 4.1 per cent growth rate of the GDP, it is one of the fastest-growing sectors. A large part of this activity is undertaken by foreign mining companies. Peru is at present the world's second largest producer of silver, the third largest of zinc, the fourth largest of lead, the fifth largest of copper, and the sixth of gold. In 2007, mining activities represented 62 per cent of the total of Peruvian exports and 10 per cent of GDP (PERCAN and MEM, 2009, p. 1). Canadian mining companies are key actors in the Peruvian mining sector, particularly with regard to the exploration and production of gold (DFAIT, 2010).

However, the Peruvian mining sector is characterized by a very high incidence of social conflicts (PERCAN and MEM, 2009, p. 1). Peru's Ombudsman reported that a significant proportion of the 197 reported social conflicts in 2008 were related to mining (DFAIT, 2010). At present, according to certain estimates, activities concerning the exploitation of natural resources represent by far the most important (50 per cent) source of conflicts in Peru (Defensoría del Pueblo, 2010, p. 6); their frequency inevitably has important implications for the governance and the viability of the sector.

In the context of increasing mining activities and of conflicts in this area, the Canadian International Development Agency (CIDA) introduced an ambitious program which had as its objective:

[I]mproving the contribution of the mining sector to the sustainable development of the Peruvian mining regions, promoting the dynamic and firm integration of social issues within an integrated framework for socially responsible and efficient mining . . . through the implementation of activities aimed at strengthening the institutional capacity of the mining sector, favoring policies and practices that are appropriate for the Peruvian mining industry. (PERCAN, 2009)

The Peru-Canada Mineral Resources Reform Project (PERCAN) is the result of a bilateral agreement between CIDA and the Peruvian Ministry of Energy and Mines (MEM). The project has been implemented in several phases over the period 1998 to 2011, with a total budget CAN\$17.7 million (PERCAN and MEM, 2009, pp. 6–7, 29). In view of the fact that the Canadian government has expressed its intention to reproduce this initiative in other Latin American countries (notably in Colombia), an examination of the context in which this project has been set up and the assumptions on which it rests seems pertinent in order to be in a position to evaluate to what extent the strategy pursued by the Canadian government is likely to resolve the problems raised by the widespread presence of conflicts related to mining in Peru.

This chapter adopts a historical perspective in order to explore the problems that PERCAN seeks to address, by examining the role that regulatory frameworks and the actors involved, whether public or private, play in shaping the environment in which mining activities take place. The first section draws attention to issues of legitimacy, responsibility, and accountability that are often at the origin of conflicts, and in doing so, attempts to cast light on the processes noted in the Introduction of this volume, notably, by addressing the question of how ‘irresponsibility and lack of accountability are built into the system’ (Sagebien and Lindsay, present volume, Introduction, p. xvi).

The second section will analyze the strategies that PERCAN has implemented in order to determine the extent to which these address the problems which they set out to resolve. The example permits deepening understanding of the role of various actors, notably external, in current initiatives to address governance gaps.

Mining regulation in Peru: Legitimacy, responsibility, and accountability

The reforms ushered into the mining sector in the 1980s and 1990s under the leadership of the World Bank Group (World Bank, 1992, 1995a, 1996), whether in Latin America or Africa, had as their primary objective the opening of mineral-rich economies to foreign investment as a means to stimulate economic growth. In the new policy environment that resulted:

The new agenda advocated comprehensive privatisation of state companies, an end to restrictions on foreign ownership and the repatriation of profits, lowering rates of taxation and royalties, restructuring labour laws to permit greater flexibility, and the termination of performance requirements such as those mandating local sourcing or local hiring. In addition, mining legislation had to be rationalised, administrative processes simplified, technical

services to the industry (such as modernisation of the mining cadastre) improved, and 'subjective' elements of bureaucratic discretion removed from the permitting and approvals processes. (Szablowski, 2007, p. 34)

In Peru, the agenda that aimed to revitalize the mining sector beginning in 1991 under the first Fujimori government entailed a radical change in the country's political orientation away from statist economic policies and toward free market economics, ushering in a period of structural macroeconomic change and related legal reforms. The culmination of this process has been characterized as 'one of the most rigorous neoliberal strategies ever applied in Latin America' (Teivainen, 2002, p. 113), making the country a showcase among the international community (Boloña, 1996, p. 215).

In fact, while reducing inflation and restoring major macroeconomic balance were presented as the priorities of the new government's domestic policies, the objective of having Peru welcomed back into the international financial community and the reestablishment of relations with the multilateral financial organizations were central in shaping the reorientation of the country's economic policies according to many analysts (Aliaga and De Echave, 1994, p. 5; Boloña, 1996, p. 213; Gonzales de Olarte, 1996, p. 73; Iguíñiz, 1998, p. 26). According to Susan Stokes (1997, p. 219), when the new President took office, the stark contrast between the economic policies that had been part of the electoral program of Fujimori and the unequivocally neoliberal orientation of the measures that were in fact to be implemented by his government, can be explained by the conditionalities presented by the multilateral financial institutions as non-negotiable preconditions for the disbursement of new loans.

As a result, the Peruvian adjustment program benefited from the strong support, both financial and technical, of the World Bank, the Inter-American Development Bank and the International Monetary Fund (IMF). The IMF in particular was closely involved with the drawing up of the economic policy program (Teivainen, 2002, p. 117), through the Rights Accumulation Program and the Extended Facility Program, introduced respectively in 1991 and 1993 (Boloña, 1996, pp. 216, 222).

In fact, in a single month in November 1991, Fujimori introduced 120 bills for new laws that aimed officially to reduce state intervention in the economy. Of these, 78 per cent were in the end adopted (Cameron, 1994, p. 149). According to Philip Mauceri, '[t]ogether, these legislative decrees represented the most significant reordering of the Peruvian state since the Velasco era' (quoted by Cameron, 1997, p. 55).

The number of reforms and the rapidity with which they were adopted had both political and economic consequences. On the economic front, the development model that was introduced attributed overriding importance to the role that foreign direct investment was to play in the economy and called for the withdrawal of the state from a large number of its previous functions: 'In 1991, the administration redefined the state's role in production, that is, that the state should not be present at all in direct production but

should return to its sole function as the promoter of private capital. This role was specifically expressed in the promotional laws' (Nuñez-Barriga, 1999, p. 153). In this regard, an advantageous package of fiscal incentives was introduced to attract foreign investments (UNCTAD, 1993; UNCTAD, 2000a, p. 20).

However, the stability of these reforms depended on the narrowing of political space and a realignment of political forces (Samford, 2010), which led Fujimori in 1992 to suspend the Constitution, dissolve Congress, and dismantle the judicial system. The new Constitution (1993) subsequently substantially strengthened the power of the Executive (Cameron, 1994; Crabtree, 2000). Moreover, the reforms significantly modified the state's mandate. To summarize, the Fujimori administration proceeded to introduce important modifications in the country's macroeconomic regulations and to construct a new legal order that was seen as 'more suitable for the needs of transnationalizing business transactions' (Teivainen, 2002, p. 132). According to UNCTAD, these measures 'place powerful constraints and obligations on the Government' (UNCTAD, 2000a, p. 26). The consequences of these policies with regard to the improvement of the level of well-being of Peruvian people were, at best, mixed. While in 1986, 37.9 per cent of the population lived below the poverty level, ten years later and after the far-reaching reforms, in 1996, this proportion had climbed to 49 per cent (Gonzales de Olarte, 1997, p. 80; see also Figueroa et al., 1996; Wise, 1997; Crabtree and Thomas, 1998; Machuca, 2002).

A further consequence of these economic measures was the increased importance of the place occupied by the primary sector in the Peruvian economy and in particular, by those sectors able to generate a relatively higher level of profitability such as the mining and fishing sectors (Iguíñiz, 1998; Jiménez, 2002). The mining sector, which is highly export oriented, has traditionally maintained a central role in generating foreign exchange for the country (IDEM, 1991), and was in fact essential in order for Peru to be in a position once again to begin repaying the country's debt (Aste Daffós, 1997). The World Bank played an active and determinant role in the reform of the mining sector, notably through the granting of loans for two programs over the period from 1993 to 1998: the Privatization Adjustment Loan (Mineral Resources and Mining) (for a sum of US\$250 million) and the Energy and Mining Technical Assistance Loan (Proyecto EMTAL – US\$11.8 million) (Mainhardt-Gibbs, 2003).

The process of reform introduced into Peru's mining sector at the time closely resembled that of Chile. Like Chile, Peru has a rich mining history and tradition, but its tradition had been one of administrative rather than adjudicative determination of mining rights. In 1991, Peru passed numerous amendments to the existing mining law of 1981. In 1992, the new legal framework for mining was promulgated as the General Mining Law. Like Chile, Peru gave stronger recognition and protection to private property rights in the new constitution enacted in 1993 after the amendment to the mining law. Also like Chile, Peru offers investors stabilization agreements. Unlike Chile, however, Peru carried out an aggressive program of privatization of nearly all state-owned mining enterprises and made

environmental compliance an integral component of its new legal regime for mining (World Bank, 1996).

In conformity with the economic policy agenda that had been adopted and in order to establish a level playing field between public and private, and between foreign and national enterprises, the Peruvian General Mining Law of 1992 also redefined the role of the state in mining. In keeping with the World Bank recommendations which 'set out programs for the reform of the institutions to meet the needs of a private-sector-led mining industry' (World Bank, 1996, p. 30), the law also provided the legal framework for the reform of the public mining institutions which administer the mining law and simplified the administration of mineral rights. The Peruvian experience has in fact in many ways inspired the conceptualization by the World Bank of its Latin American Mining Law Model, which served as a barometer for the recasting of the mining legislation of dozens of countries around the world (Williams, 2005).

Summarized briefly, the reforms introduced into the sector resulted in five main changes. First was the conversion of mineral rights into irrevocable property rights, which are protected from being seized without just compensation and due process of law, are freely transferable, and can be held for an unlimited period of time (Williams, 2005, p. 746). Failure to comply with a requirement on the part of the investor no longer entailed the cancellation of the mining title but only a simple penalty or 'administrative sanction,' as it has been called (Sánchez Albavera et al., 1999, pp. 19–20). Secondly, the procedures for access to these rights take place in a non-discriminatory, transparent, and efficient manner that provides security of the right to proceed from exploration to exploitation, due to the introduction of the unified concession for exploration and exploitation in the Peruvian Mining Investment Law of 1991 (Chaparro, 2002; Williams, 2005). Thirdly, the security of tenure reduces the possibility of discretionary practices on the part of the administration. Maintenance fees are fixed at an annual rate of US\$2 per hectare (Campodónico Sánchez, 1999), a figure which was to be increased slightly at the very end of the 1990s. Fourthly, with regard to operating rights and obligations, most observers recognize that the former were extended and the latter reduced and simplified (Chaparro, 2002). Fifthly and finally, the competitiveness and stability of the investment parameters led to the introduction of a fiscal regime based on revenues rather than on inputs or production, as well as the possibility for certain companies to sign fiscal stability agreements with the government. These stability agreements, which are signed for terms of ten to fifteen years, represent a clear incentive that is considered to have played a major role in attracting new investment (World Bank, 1995a). Between 1991 and 1998, 22 mining companies took advantage of this right (Campodónico Sánchez, 1999). Contrary to the guarantees granted through such stability agreements to investors more generally, those offered to mining companies apply to all taxes normally collected by the government (UNCTAD, 2000b).

These reforms were well received by international mining companies, resulting in the spectacular growth in exploration investment in Peru from about US\$10 million in 1989

to about US\$200 million in 1995 (World Bank, 1996). As noted at the time, however, the inadequacy of public monitoring of investments, notably with regard to environmental issues (World Bank, 1996, p. 6; Nuñez-Barriga, 1999), as well as the soaring number of projects that were simultaneously to increase considerably the land area devoted to mining activities (Bedoya, 2001), represented over the years that followed (among other factors) fertile ground for the emergence of tensions and conflicts between companies and communities affected by mining operations.

In order to better understand the nature of the difficulties that have persisted to the present and certain factors at the root of such conflicts, three implications of the manner in which the process of liberalization was introduced into the Peruvian mining sector in the 1990s merit closer attention.

First, underlining the approaches of the 1990s which aimed to create a suitable investment environment for the private sector, the one past trend that stands out above all others concerns the radical redefinition of the role and functions of the state and the new delineation between public and private spheres of authority that have accompanied this redefinition. As summarized in a World Bank document entitled *Strategy for Mining in Africa* (World Bank, 1992), which systematized the approach to mining regime reform in Africa adopted by the multilateral financial institutions, this required: 'A clearly articulated mining sector policy that emphasizes the role of the private sector as owner and operator and of government as regulator and promoter' (World Bank, 1992, p. 53). As we have seen, the primary role of government in the 1990s was that of facilitator of private investment. What resulted was a sectoral approach that focused on mining rather than one which sought to articulate the contribution of the mining sector to macroeconomic objectives involving inter-sectoral linkages, with a view of seeing to what extent the sector could play a transformative role and contribute to broader developmental goals. In Peru, for example, little provision was made to build eventual backward and forward linkages in the industry, such as the possibility of value-added processing of minerals (UNCTAD, 2000a), which in a resource extraction economy would normally be considered important development objectives.

Secondly, and as elsewhere, as states were caught between the competing imperatives of attracting foreign investment and at the same time responding to national and local concerns, their latitude for action was often circumscribed by the legal and practical conditions set out in reformed regulatory frameworks. The lack of room for maneuver led some states to respond to, if not reconcile, competing internal and external pressures involved by awarding 'rights to the investor accompanied by an informal delegation of local regulatory responsibilities' (Szablowski, 2007, p. 27). It led as well to states effectively 'transferring legal authority to mineral enterprises to manage social mediation' (Szablowski, 2007, p. 27). In this context, the coping strategy adopted by governments to deal with new mining regimes can be described as one of the 'retreat of the state' (Strange, 1996) or of 'selective absence.' According to the latter formulation, the state

basically 'absented itself from substantial parts' of the legal regimes intended to help 'mediate between investors and community interests' (Szablowski, 2007, pp. 28, 45).

A third consequence of the liberalization of the mining sector has been the way in which past public functions of the state have increasingly been delegated to private operators. These include service delivery and also rule-setting and implementation. The tendency has been for 'an increased (and often reluctant) assumption of state-like responsibilities by transnational mining enterprises at the discreet behest of weak governments' (Szablowski, 2007, p. 59). While past and current trends may allow governments to shift the locus of responsibility for what were previously considered state functions (such as clinics, roads, infrastructure, and security) to the private operators of large-scale mining projects and NGOs (Non-governmental Organizations), and help explain the pressures on companies to engage in CSR (Corporate Social Responsibility), such transfers not only silence the legitimate and indeed necessary right of governments to offer services to their populations, a precondition to their being held publicly accountable, they also contribute to obscuring the issue of government responsibility itself. The current sidestepping of the state, by suggesting companies can gain better legitimacy for their operations by offering social services, runs the risk of undermining a precondition for building responsible governments and the basis of democratic practice: the need for governments to be accountable to their populations.

In a context of weakened institutional and political capacities of states resulting from the reform process and, consequently, of their weakened capacity to pursue developmental objectives, to enforce regulations in areas of key importance to communities, and to meet national economic objectives, along with the trend of transferring public responsibilities to unaccountable private actors, these trends are likely to raise issues of legitimacy for the operations of mining companies themselves.

There have been various interpretations and responses to the problems and risks resulting from the 'legitimacy gaps' with which companies have been faced and which may well be increasing. For authors such as Szablowski (2007) who are interested in responses at a multilateral level, 'the transnational dimension of legitimation brought on by globalization has prompted the development of global policy arenas and has sparked the need for transnational law-making, with far-reaching consequences' (p. 60). What is being debated through the resulting 'global legal politics' concerning the rights and obligations of enterprises 'is the regulatory terms on which different audiences are willing to find that the entitlements of transnational enterprises will be deemed legitimate' (p. 65).

For other analysts who adopt a different point of entry and analytical framework, the focus is placed on processes internal to the countries in which companies operate, which are seen as dysfunctional and described as the 'governance gaps.' According to this perspective, 'CSR provides firms with a strategic response to the risks that systemic dynamics present, by addressing governance gaps that can, in turn, increase the potential for obtaining a "social license to operate"' (Sagebien and Lindsay, present volume,

Introduction, p. xv). As with approaches formulated in terms of 'weak governance' this type of perspective raises a series of questions, for it appears to be postulated that these problems concern above all poor (or corrupt) management issues which can be resolved by the introduction of the right set of administrative practices and procedural measures, and monitored by using 'governance indicators.' However, such approaches often lead to the introduction of parameters that seek to quantify the performance of historically constructed, country-specific, highly complex institutional relations, using notions that are variously defined and the object of debate, and that are often highly subjective, such as 'government effectiveness,' 'regulatory quality,' and 'voice and accountability.' The increasing technicization of decision-making processes runs the risk of sidelining important substantive debates and, notably, of depoliticizing issues such as resource distribution, which may be treated as technical questions even though they are clearly political. Consequently, these issues are difficult to track, monitor, and measure because they often involve political choices and not only technical decisions.

In this regard, it seems difficult to reconcile how CSR might provide firms with a strategic response to the risks that systemic dynamics present by addressing governance gaps around key issues where institutional and technical capacity are lacking, such as in contract negotiation, revenue collection, or even environmental monitoring, all areas in which they would be in conflict of interest. Moreover, with technical and administrative aspects of 'governance' given overriding emphasis, current proposals to contribute to 'capacity building for resource governance' in developing countries unfortunately miss the key point that past reform measures, which have sought to open the extractive sector to investment, have done so in a manner that severely weakened the political and institutional capacity of local governments. Consequently, it becomes a circular argument to call for the reinforcing of local capacity if the nature of past and ongoing reforms, which weaken local capacity, is not questioned.

Our analysis suggests that issues of legitimacy with which companies are increasingly faced can be seen as a consequence of evolving structural relations that result in part from the manner in which the mining sector has been reformed. These structural relations have significantly modified and sometimes obscured the demarcation of spheres of responsibilities, whether public or private, and have frequently also blurred distinctions between the political and the technical domain. On a conceptual level and as an alternative to approaches formulated in terms of 'weak governance' or 'governance gaps,' this chapter proposes the usefulness of the notion of 'modes of governance.' This term has been defined in many ways. Applied to mining, Belem (2008) defines it as the sum of the forms of regulation that determine the conditions of exploitation of mineral resources for any particular project. This definition puts emphasis on the actors responsible for the forms of regulation, as well as the evolution of these forms resulting from the evolving positioning of these actors. 'The notion of modes of governance permits identifying the implications for social relations of emerging institutional arrangements, as well as the role of actors who represent alternative values' (Belem, 2008, p. x [our translation]). Hence, the mode of governance in the mining sector 'represents the sum of the forms of

regulation for each of the related dimensions (economic, social and environmental), which determines, in any given period, the conditions of exploitation of mining resources' (Belem, 2008, p. 232 [our translation]).

It is against this background stressing the importance of taking into account the reforms at the origin of the reshaping of institutional arrangements, the structural relations of influence and authority which characterize these reforms, and the role and responsibilities of the various actors involved, that PERCAN will be examined as a specific program introduced as a response to the challenges raised by the emergence of conflicts around mining activities. In a manner complementary to debates that have arisen concerning responses at a multilateral level to issues of legitimacy as analyzed by Szablowski, as well as those that look to CSR as a tool and suggest possible avenues of responses at the corporate level, this chapter focuses on a bilateral initiative to address these issues as they have become manifest in Peru.

The PERCAN initiative

In 2007, the Canadian government announced its intention to make Latin America a region of priority in its foreign policy. A key measure underlining this re-engagement in the Americas is the establishment of free trade agreements with countries and zones considered strategic allies (such as Peru, Colombia, and Central America). These agreements are also seen as instruments of democratic consolidation (Cameron and Hecht, 2008).

In a parallel sense, Latin America has become a privileged destination over the last decade for Canadian investment in the extractive sector. According to the Canadian Ministry of Natural Resources, between 2002 and 2008, the distribution of assets of Canadian mining companies located in Latin America, as compared with those invested abroad in general, rose from 24 per cent to 51 per cent. In absolute figures, this represents an increase from CAN\$8.5 billion in 2002 to nearly CAN\$57 billion in 2008 (NRCAN, 2008a, 2009). The presence of Canadian companies is of such importance that these have been described as 'quasi-diplomatic envoys of the Canadian state' (Sagebien et al., 2008, p. 120). In Peru, the book value of the assets of Canadian mining companies was CAN\$2.3 billion in 2008 (NRCAN, 2009).

In view of the fact that the relations between companies and local communities give rise to an increasing number of conflicts, this area of concern has become more and more important in the strategies adopted by Canada concerning the mining sector in the hemisphere; in this regard, 'problems of governance' in host countries are often raised in order to explain the disappointing results of mining investments.¹ Thus, the PERCAN

¹ In its answer concerning the corporate responsibility of Canadian companies to the Standing Committee on Foreign Affairs (House of Commons, 2005), the Government of Canada stated that 'Canadian investment abroad can provide a much needed infusion of capital for developing countries' and that host

project has as its central objective responding to ‘problems of governance.’ In the description drafted by the team responsible for the project, mining activities are described as the cornerstone of the Peruvian economy; the problem, it is suggested, is that the latter is characterized by a generalized absence of confidence. In spite of the reforms, it is noted that companies find administrative processes and the legal framework cumbersome. Further, the Peruvian Ministry of Energy and Mines (MEM) considers that companies could and should devote more resources to improving the welfare of local communities and that communities ‘suffer from unfulfilled expectations as well as the scars of environmental degradation, which fuel the perception that new mining operations will leave behind additional environmental legacies, in addition to the hundreds of hazards from the past that dot the country and have still not been addressed’ (PERCAN and MEM, 2009, p. 1).²

Given its objective to reinforce the capacity of the MEM as the ‘facilitator and promoter of better company-community relations,’ and its specific objectives to ‘increase the level of acceptance of mining operations,’ ‘diminish the number of violent crisis in the mining sector,’ and ‘increase the number of mechanisms and multi-stakeholder participatory, consultation and dialogue processes’ (PERCAN and MEM, 2009, p. 17), PERCAN has produced a number of tools to help improve the management of social issues. These tools are to be used by the MEM in order to ‘provide guidance to companies and local population... so that they exercise their rights and obligation adequately’ (PERCAN and MEM, 2009, p. 72). It is suggested that the MEM is to undertake a systematic monitoring of the commitments made by the companies in order to ensure that their activities are articulated within the sustainable development framework (PERCAN and MEM, 2009, p. 63). Other tools should allow the MEM to develop a strategic approach to managing crises and conflicts in the mining sector (PERCAN and MEM, 2009, p. 66), while keeping in mind that although these will not be eliminated, acts of violence will be reduced (PERCAN and MEM, 2009, p. 67).

One of the tools created to reach these objectives is the Guide on the management and communication in situations of crisis (Cabrera, 2007). Written in order to reinforce the capacity of mining operators to manage social conflicts, the guide presents a specific conception of the origin of crises and the solutions to be envisaged: ‘Non-violent crises... should be considered as opportunities to promote a better distribution of the wealth created by mining activities and to prevent... the occurrence of violence, destruction and aggression whether individual or collective’ (Cabrera, 2007, p. 3 [our translation]). In order to do this, the guide recommends forms of relations that are proactive rather than reactive (Cabrera, 2007, p. 7).

governments bear ‘the primary responsibility for monitoring company compliance with local laws’ (DFAIT, 2005).

² Citations from the document (PERCAN and MEM, 2009) are originally in Spanish and have been translated by the authors into English.

The guide analyzes the 'social risks' with which the mining operator is faced depending on the degree of acceptance of its activities on the part of the affected population and the degree of confidence and credibility with which its actions are perceived. In this regard, the analysis and course of action proposed for social risk management aim to mitigate the risks that result from inadequate modes of communication and which give rise to a loss of confidence and a lack of credibility and legitimacy that call into question the 'social license to operate' (Cabrera, 2007, p. 90). The guide warns against perceptions that put emphasis on the asymmetry of relations of power or a presentation of actors in terms of a victim/aggressor dichotomy. This type of perception is unfortunately favored by the media, according to the guide, which projects simplistic interpretations concerning complex problems and privileges attitudes that are antagonistic among actors (Cabrera, 2007, p. 97). It also warns against the existence of "pseudo-crisis" which are not based on real facts but fabricated to promote certain interests' (Cabrera, 2007, p. 10). In summary, according to the guide adequate communication of the risks associated with mining activities should determine the communities' acceptance or rejection of a given mining project (Cabrera, 2007, p. 106; see also PERCAN and MEM, 2009, p. 2).

PERCAN also supports the dissemination of the regulations and norms that apply to the participation of citizens (PERCAN and MEM, 2009, p. 85). This normative framework (MEM, 2008, 2010) commits mining operators to a certain number of activities in the area of information and consultation. However, although it encourages conciliation and the signing of agreements between companies and communities, it does not question the security of a mining title. In contrast to the principles set out in the application of Convention 169 of the International Labour Organization, for example, these norms clearly stipulate that indigenous communities do not have the right to a veto concerning mining activities or over the decisions of the authorities responsible for them (MEM, 2008, p. 4).

In a similar manner, the activities that aim to ensure a better technical understanding of environmental impacts of mining activities do not imply that the procedures which lead to the granting of mineral rights be questioned or that there could be modifications made in the measures of control and sanctioning of environmental damages. In this sense, the confusion surrounding the role of the Ministry of the Environment created in 2008, to which the MEM did not transfer responsibilities linked to the approval of environmental impact assessments of mining projects, is in itself telling (Sagebien et al., 2008; PERCAN and MEM, 2009).

The technical assistance supplied by PERCAN needs to be reset in a particular political context. In this regard, the conflicts between companies and communities over the last 15 years have become a 'highly contested arena of global conflict' (Szablowski, 2007, p. 3). As well as involving states and companies, many NGOs and advocacy networks have established contacts with affected communities in an attempt to bring about changes in the modes of governance of the sector (Szablowski, 2007). Accompanying the informal transfer of responsibilities of the state to private operators noted above, this area of

debate has encouraged the development of regimes of negotiated justice and direct engagement regimes between companies and communities (Szablowski, 2010).³ Consequently, different regimes set out different roles for the state and the other actors, as well as different conceptions of the rules that should govern the relations between companies and local communities and the manner in which the asymmetries of power among actors should be taken into account (Szablowski, 2010).

These regimes, which are in fact in competition with one another, result in competing political identities for the actors, that is: 'the kind and degree of political recognition that is conferred by a legal order on those who are subject to it' (Szablowski, 2007, p. 303). For in this area, two basic tendencies can be identified: the promotion of political identity defined in terms of 'stakeholders' and that in terms of 'rightholders.' Hence,

[The] participation of non indigenous NGOs in the mining struggles of indigenous peoples takes place in a context in which local and international indigenous organizations have developed rights-based positions with respect to their lands, territories and natural resources and with respect to the right to determine the kind of development that takes place on their land. (Coumans, 2008a, p. 42)

These forms of collaboration give rise to demands based on human rights and to a perspective that is antagonistic in terms of company/community relations. In such a context, the access that communities have to rights-based support is fundamental in order to ensure that the options open to them are not reduced a priori, including the option of refusing a mining project.

For two decades, the government of Canada and the mining industry have attempted to define the engagement between companies and communities in terms of bilateral relations that concern above all technical questions (Coumans, 2008a, p. 62), and in which the interventions of a third party are to be seen as interference or, at times, instrumentalization.⁴ The foundations of this approach were made explicit within the framework of a process of 'multiparty dialogue' initiated in 1992 by the mining industry and called the Whitehorse Mining Initiative (WMI). This framework was to serve to encourage the emergence of a broad consensus concerning the best way for the mining industry to contribute to sustainable development in Canada. At the time, the process had

³ Negotiated justice implies '[a move] toward new governance models in which normative authority is pluralized and multiple actors are engaged in horizontal relationships . . . [I]ncreasing conflict and calls for the social mediation of mining investment at a time when states have made legal and ideological commitments to limit the formal regulatory burden placed on extractive firms [have contributed to the development of] regimes to promote and constrain engagement between extractive firms and affected communities in order to delegate (often informally) the responsibility of social mediation onto extractive projects themselves' (Szablowski, 2010, p. 113).

⁴ Canadian officials have sometimes played a role in delegitimizing the critics of the impact of Canadian extractive investment, as in Guatemala where the Canadian ambassador has been condemned to pay damages for the defamation of a Canadian journalist (Ontario Superior Court of Justice, 2009; Schnoor and Murray Klippenstein, 2010). They have also been accused of 'promoting conflict between indigenous communities and NGOs that are critical of mining' (Coumans, 2008a, p. 48).

already brought to the fore a certain tension between the status of Indigenous communities as stakeholders and that of Indigenous peoples entitled to collective rights (rightholders) (Weitzner, 2010). The WMI is referred to explicitly with regard to Canadian financial and technical support of CSR in South Africa, Peru, Brazil, and several other Latin American countries (Weitzner, 2010, pp. 88, 99).⁵

In keeping with the strategies proposed by PERCAN, the Canadian government developed a number of partnerships with industry in order to make CSR 'tools' available to companies operating abroad and to develop specific tools for indigenous communities, including a Mining Information Kit for Aboriginal Communities, developed in partnership with PDAC (Prospectors and Developers Association of Canada), MAC (Mining Association of Canada), and CABA (Canadian Aboriginal Mining Association) (Coumans, 2008a, p. 43). The Canadian embassy in Peru financed an adaptation of this document for use abroad and ensures its distribution in collaboration with PERCAN (PERCAN and MEM, 2009, p. 13).

When it created the position of Extractive Sector CSR Counsellor, the Government of Canada again defined its responsibility concerning the activities of Canadian mining companies abroad in keeping with this perspective of the relations between companies and communities. In this regard it stated:

Unresolved disputes directly affect businesses through expensive project delays, damaged reputations, high conflict management costs, investor uncertainty, and, in some cases, the loss of investment capital . . . [T]here [is] strong support for a mechanism to enable the sector to resolve CSR disputes related to the Canadian extractive sector active abroad in a timely and transparent manner. (DFAIT, 2009).⁶

As mentioned above, multi-stakeholder dialogue tools thus imply a particular conception of the nature and sources of conflicts and of the appropriate means to resolve them. For PERCAN '[The] existence of conflicts, latent or potential, is intrinsic to social relationships, making imperative the creation of a favorable climate for the development of mining operations and the training of stakeholders in conflict management. Thus, for the PERCAN project, conflict management is an important element in the strengthening of the industry as a whole' (PERCAN, 2010).

⁵ For Weitzner, '[i]t is unclear to what extent officials involved in these strategies are learning from . . . the lessons from the Canadian experience, especially in Indigenous participation. Without targeted attention to increasing the voice of marginalised peoples in these forums . . . the process that Canada is encouraging could be seen as "greenwashes" that enable Canadian industry to continue to operate overseas, under the pretext that something is being done, when in fact business continues as usual' (Weitzner, 2010, p. 100).

⁶ As a result, the proposed mechanisms only permit making inquiries into this kind of allegation if the explicit endorsement of all parties – including that of the companies involved – is confirmed. However, several authors suggest that Canada has not adopted extraterritorial legislation in keeping with its international obligations, nor adequate mechanisms required to deal with eventual cases of human rights violations that might arise abroad (Webber, 2008, pp. 35, 36; see, as well, Belem et al., 2008, p. 60).

To summarize, the measures proposed by PERCAN are based on a notion of political identity that is expressed in terms of 'stakeholder,' corresponding to a regime that has as its object the mitigation of 'violent crises,' and in which the desirability of carrying out mining activity and its priority over the other uses of the soil and of its resources has been determined a priori.

Obviously, the proposals set out in PERCAN in theory do not prevent the Peruvian state from introducing legislative and regulatory measures based on a political identity expressed in terms of rights ('rightholders'). Such measures would in principle give precedence to the respect of the rights of the people who were affected by mining operations, and it would be in this perspective that the planning of mining activities and of their regulation would be determined. Several Peruvian political actors in fact advocate for this type of approach. However, when compared with the voice of other actors in the Peruvian mining sector, particularly those of civil society and the communities affected by mining, PERCAN has a relatively privileged access to and capacity to be heard by the Peruvian authorities, notably when Canadian mining interests are involved. For example, an activity proposed by PERCAN in 2009 had as its objective that the MEM should adopt a guide on the environmental management for the mining of uranium, and justified it in these terms:

Peru has no experience in mining uranium. However, recently a junior Canadian company undertook uranium exploration... which has been the cause of concern on the part of the Peruvian authorities and communities... It is therefore necessary for the Peruvian government to have access to the information and appropriate framework in order to regulate this activity in an appropriate manner... Canada has developed vast experience in the management of the extraction of uranium... The objective is to develop a technical guide... and to advise the MEM in the development of the necessary legal norms (PERCAN and MEM, 2009, p. 110).

Conclusion

As PERCAN appropriately suggests, 'During the last decade of growth, in spite of the considerable effort put forward . . . policies and institutions have not been developed sufficiently in order to deal with environmental impacts and social conflicts arising from mining activity' (PERCAN and MEM, 2009, p. 2). However, the objective of promoting and consolidating a process of social management led by the MEM risks being constrained by the consequences of the process of liberalization and the reform of the mining sector described in the first part of this chapter. By significantly reducing the capacity of state intervention, these reforms have simultaneously reduced the range of policies that Peru could introduce in order to better address the imminently conflict-ridden nature of mining activity in the country.

Although the documents produced by PERCAN recognize the historical origins of conflicts and the fact that social conflicts are exacerbated by contemporary mining activity, the solutions that are put forward in order to solve them appear limited in terms of the real impact they are likely to have. Consequently, the measures introduced by PERCAN are

likely to prove disappointing. As laid out in the risk assessment of the PERCAN project, this may provoke 'the adverse reactions of mining title holders who consider that these proposals entail a certain control over the commitments of companies with regard to social issues, when in fact the MEM no longer has jurisdiction in this area; [and] due to the fact that relations with communities depend on voluntary initiatives which should not be supervised' (PERCAN and MEM, 2009, p. 72).

On the basis of the analysis of a bilateral initiative, this chapter has attempted to suggest that much closer attention needs to be paid to the links between issues of legitimacy, responsibility and accountability, and the manner in which regulatory frameworks condition these links and issues. Such an analysis needs to be reset in its specific historical settings if further conflicts are to be avoided in the mining sector in countries such as Peru. Moreover, the analysis also suggests that the manner in which the PERCAN project defines the issues at stake in the Peruvian mining sector and the solutions proposed cast doubt on the neutrality of the interventions of external actors concerning the role they play in shaping the modes of governance of the sector.

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