

Brief History

The plunder of natural resources by mining / extractive companies is facilitated by the “free entry” or “free mining” principle. Tracing the historical path of the free entry mining system in various countries, and its impacts on individual and collective rights to lands and resources, is an issue that needs to be effectively addressed by researchers, organizations, and policymakers concerned about the mining / extractive industry.¹

The free entry principle originates from the feudal British land system, which was based on the notion that the Crown has underlying title to all land, although other parties may have interests, tenures, or estates in it.² The ‘doctrinally foundational’ judgments made by Chief Justice John Marshall of the Supreme Court of America regarding indigenous (native Indian) status, established the basis of legislation in the prescribed manner of the British Crown, which in turn, was adopted after affirmation by the American States and union.³

Marshall applied the principle of ‘discovery’, which he stated had been developed from the laws of civilized nations, as a means of ordering the settlement of the New World.⁴ According to this principle, “discovery gave title to the government by whose subjects or by whose authority, it was made...”⁵ Marshall further argued that “all Nations of Europe, who have acquired territory on this continent, have asserted in themselves, and have recognized in others, the exclusive right of the discoverer to appropriate the lands occupied by Indians.”⁶

Similarly, the colonization of Africa was based on the principle that colonial powers would “watch over the preservation of native population(s) and the improvement of the conditions of the(ir) moral and the(ir) material well being.”⁷ In Kenya, all land was declared “crown lands” via the Crown Lands Ordinance of 1915. This rendered all native tribes in Kenya “tenants at the will of the Crown.”⁸

¹ Lapointe, U. (2009). *Origins of Mining Regimes in Canada & The Legacy of the Free Mining System*. Presented at the Conference on Rethinking Extractive Industry: Regulation, Dispossession, and Emerging Claims. March 5-7, 2009. The Centre for Research on Latin America and the Caribbean (CERLAC) and the Extractive Industries Research Group (EIRG). Toronto, ON: York University

² Blackstone, W. (1762-69). *Commentaries on the Laws of England*, vol. 2. Oxford, U.K: Clarendon Press

³ McHugh, P.G. (2004). *Aboriginal Societies and the Common Law: A History in Sovereignty, Status, and Self-Determination*. New York, NY: Oxford University Press

⁴ *Ibid*

⁵ White, G.E. (2000). ‘Recovering the World of the Marshall Court.’ *33 John Marshall Law Review* 781. p.574

⁶ *Ibid*

⁷ See General Act of the Berlin Conference, art. 6 (Feb 26, 1885) [Official Documents (1909) 3 (Supp) AJIL 7 in Pinero, R. (2005). *Indigenous Peoples, Postcolonialism and International Law: The ILO Regime (1919 – 1989)*. Oxford, UK: Oxford University Press]. Cited in: Korir, S.A. (No Date Available). *The Endorois’ Legal Case and its Impacts on State and Corporate Conduct in Africa*. Tilburg Law School, Netherlands

⁸ See *Wainaina v Murito* (1922) 23 Kenya Law Review Vol. IX, 102. Cited in: Korir, S.A. (No Date Available). *The Endorois’ Legal Case And Its Impacts On State And Corporate Conduct In Africa*. Tilburg Law School, Netherlands

The free entry system grants unlimited access to land based on the assumption that mining is the “highest and best” use of it.⁹ This principle inspired the formulation of mining regimes in North American and British spheres during the nineteenth-century,¹⁰ and also guided the liberalization process of African mining regimes during the 1980s and 1990s, at the beginning of the era of (neoliberal) economic globalization.¹¹ This is the period when the global extractive industry underwent an extensive process of deregulation, financialization, and privatization.¹²

Mining regimes—regulatory frameworks are a central component of the power structures that influence relations among the actors involved. This conditions the nature of the negotiating space that is created, the results of the negotiation processes, and the ability of participants to advance alternative policies, thereby perpetuating “asymmetrical relations of power and influence.”¹³ From an international political economy (IPE) standpoint, the free entry system has resulted in the preferential treatment enjoyed by the extractive industry and perpetuates “asymmetrical relations of power and influence.”¹⁴ Mining regimes based on free entry principles are characterized by an asymmetrical power structure that constrains the negotiating space of project-impacted communities, thereby limiting their opportunity to choose a development strategy that is suitable to their needs.¹⁵

Furthermore, “decision-making structures are value-articulating institutions that determine the values that can be expressed, and, ultimately, the preferable choices...they establish procedures that frame the debate and that influence what will be negotiated, thereby skewing the outcome.”¹⁶ In other words, the ability to shape institutions is largely dependent on the ability to promote ‘priority values’ within those institutions. These values are transmitted by institutions and actors, and any possibilities or outcomes of political action are largely determined by the hierarchy of these values. Thus, the values favoured by certain powerful actors effectively serve to promote their interests and positions.¹⁷

⁹ MiningWatch Canada. (2010). *End Mining’s Privileged Access to Land! Communities Across Canada Outraged by Free Entry System* – <http://www.miningwatch.ca/news/2008/11/28/end-mining-s-privileged-access-land-communities-across-canada-outraged-free-entry> (Accessed on 19th February, 2018).

¹⁰ Canel, E., Idemudia, U., & North, L. (2010). Rethinking Extractive Industry: Regulation, Dispossession, and Emerging Claims. *Canadian Journal of Development Studies* (30)1-2, 5-25.

¹¹ Campbell, B. (2010). Revisiting the Reform Process of African Mining Regimes. Special Issue – Rethinking Extractive Industry: Regulation, Dispossession, and Emerging Claims. *Canadian Journal of Development Studies* (30)1-2, 197-217.

¹² Evans, G., Goodman, J., & Lansbury, N. (2002). *Politicising Finance*. In Evans, G., Goodman, J., & Lansbury, N (eds) *Moving Mountains: Communities Confront Mining and Globalisation*. London, U.K: Zed Books

¹³ Campbell, B. (2010).

¹⁴ *Ibid*

¹⁵ MiningWatch Canada. (2008). *The Boreal Below: Mining Issues and Activities in Canada’s Boreal Forest*. Ottawa, ON: MiningWatch Canada

¹⁶ Walter, M., & Martinez-Alier, J. (2010). How to Be Heard When Nobody Wants to Listen: Community Action against Mining in Argentina. Special Issue – Rethinking Extractive Industry: Regulation, Dispossession, and Emerging Claims. *Canadian Journal of Development Studies* (30)1-2, 281-301.

¹⁷ Campbell, B. (2010).

These power asymmetries are perpetuated through the lack of appropriate resources, funding, and opportunities that facilitate “meaningful participation” – which means involvement that is “early, inclusive, deliberative, transparent and empowering.”¹⁸ In the context of meaningful participation, there are two major negative effects that result from the imbalance of power between corporate actors and communities: first, it produces unbalanced negotiations that tend to be dominated by the already powerful extractive companies; second, it generates a situation that allows these companies to manipulate the rules under which “free prior and informed consent” (FPIC) is implemented.¹⁹ FPIC refers to decision-making or engagement in which the free and informed consent of those affected by development projects is obtained before-hand.²⁰

Due to these power imbalances, communities are often unable to secure decent agreements that address their long-term needs. The negotiation process often leaves disenfranchised communities with little choice, but to focus on short-term benefits as opposed to alternative development strategies that can effectively address their plight.²¹ Often, local people are rarely involved in conceptualizing or designing projects that affect them,²² much less given “the right to say no to that on which they disagree.”²³ In fact, the option of refusing to give consent to mining companies and of gaining support for alternatives to proposed extraction projects is minimal when great power imbalances exist between corporations and national governments on one hand, and local communities on the other.²⁴ Moreover, extractive companies are some of the biggest players in the global economy, and the decisions that they make are based on global strategy as opposed to local needs.²⁵

The operations of the World Bank in the extractive sector are also underpinned by free entry principles.²⁶ The curtailment of the state from productive activities and its subsequent confinement to the role of facilitating private investment, the need for little ministerial oversight, land surface relinquishment requirements, and the availability of long-term security of tenure,

¹⁸ Sinclair, A.J., Diduck, A., & Fitzpatrick, P. (2007). Conceptualizing learning for sustainability through environmental assessment: Critical reflections on 15 years of research. *Environmental Impact Assessment Review* (28)2, 415-428.

¹⁹ Szablowski, D. (2007). *Transnational law and local struggles: Mining, communities and the World Bank*. Oxford, U.K: Hart

²⁰ Szablowski, D. (2010). Operationalizing Free, Prior, and Informed Consent in the Extractive Industry Sector? Examining the Challenges of a Negotiated Model of Justice. Special Issue – Rethinking Extractive Industry: Regulation, Dispossession, and Emerging Claims. *Canadian Journal of Development Studies* (30)1-2, 111-130.

²¹ Lo, M.S. (2010). Revisiting the Chad-Cameroon Pipeline Compensation Modality, Local Communities’ Discontent, and Accountability Mechanisms. Special Issue – Rethinking Extractive Industry: Regulation, Dispossession, and Emerging Claims. *Canadian Journal of Development Studies* (30)1-2, 153-174.

²² Weitzner, V. (2010). Indigenous Participation in Multipartite Dialogues on Extractives: What Lessons Can Canada and Others Share? Special Issue – Rethinking Extractive Industry: Regulation, Dispossession, and Emerging Claims. *Canadian Journal of Development Studies* (30)1-2, 87-109.

²³ Lo, M.S. (2010).

²⁴ Canel, E., Idemudia, U., & North, L. (2010).

²⁵ Lanning, G., & Mueller, M. (1979). *Africa Undermined: Mining Companies and the Underdevelopment of Africa*. Harmondsworth, U.K: Penguin Books Ltd.

²⁶ Campbell, B. (2010).

all make the World Bank's approach to the extractive sector similar to "former approaches founded upon the principle of free mining."²⁷

Furthermore, free entry principles have been included in free trade agreements, thereby providing the legal basis for "suing governments that rescind permit for mining operations."²⁸ For instance, a number of mining firms are presently demanding Ksh 334 billion from the Government of Kenya as compensation for the cancellation of their licences. Notwithstanding the cancellation of these licences was inspired by the need to safeguard the environment, public health, avert taxation disputes and consideration of the interests of project-affected communities.²⁹

Pursuant to the above, although the World Bank and other major institutions continue to promote resource-led development as a model for economic growth in developing countries, a paradox of underdevelopment generally accompanies resource-led economic growth. Ironically, countries with abundant resources tend to perform less well economically, than countries that are considered resource-poor.³⁰ This has been labelled the "resource-curse."³¹

Large-scale resource extraction has often ruined traditional means of livelihood and natural environments worldwide, leaving behind formerly sustainable societies and local economies dependent on foreign corporations and external markets.³² A World Bank report has confirmed that local economies do "not appear to have benefitted from large-scale mining through sustained economic growth and improved services" and that often "local people feel no perceptible benefit from the resources extracted from 'their' land."³³ In fact, the World Bank now admits that the large-scale exploitation of resources leaves affected communities poorer.³⁴

The World Bank's 2003 Extractive Industries Review (EIR) brought the resource-curse thesis into the broader public arena.³⁵ According to the EIR, while per capita Gross Domestic Product (GDP) had been growing by an average of 1.7 per cent in all developing and transitional economies, it

²⁷ *Ibid*

²⁸ Canel, E., Idemudia, U., & North, L. (2010).

²⁹ Kariuki, J. (2018). *Mining firms sue Kenya over permits*. Daily Nation, 7th February 2018 – <https://www.google.com/amp/s/www.nation.co.ke/news/Mining-firms-sue-Kenya-over-permits/1056-4295772-view-asAMP-mvnjrb/index.html> (Last accessed on 21st February 2018).

³⁰ Bush, R. (2007). *Poverty and Neoliberalism: Persistence and Reproduction in the Global South*. London, U.K: Pluto Press

³¹ Auty, R. (1993). *Sustaining Development in Mineral Economics: The Resource Curse Thesis*. London, U.K: Routledge. See also: Reed, D. (2002). 'Resource extraction industries in developing countries.' *Journal of Business Ethics* 39, 199-226; Ross, M. (2001). *Extractive Sectors and the Poor*. Boston, MA: Oxfam America

³² Evans, G., Goodman, J., & Lansbury, N. (2002). *Globalisation: Threats and Opportunities*. In Evans, G., Goodman, J., & Lansbury, N (eds) *Moving Mountains: Communities Confront Mining and Globalisation*. London, U.K: Zed Books

³³ World Bank. (2003). *Project Performance Assessment Report: Ghana Mining Sector Rehabilitation Project (Credit 1921-GH) and Mining Sector Development and Environment Project (Credit 2743-GH)*. Sector and Thematic Evaluation Group, Operations Evaluation Department, report no. 26197, Washington, D.C. p.21

³⁴ Bond, P. (2006). *Looting Africa: The Economics of Exploitation*. Scottsville, South Africa: University of KwaZulu-Natal Press

³⁵ Stevens, P. (2003). *'Resource impact: a curse or a blessing?'* Dundee, Scotland: CEPMLP

was contracting by 2.3 per cent a year in those where minerals accounted for more than 50 per cent of exports.”³⁶ The World Bank has concluded that “for every percentage point increase in a country’s extractive dependency, that country’s potential GDP falls by 9 percent.”³⁷ Recent studies in the Philippines found that GDP grows by only 0.15 per cent for every 10 per cent increase in mining-related income. These statistics demonstrate that far from being a driver of economic growth, “GDP growth responds weakest to growth in the mining sector.”³⁸

In a report titled *Where is the wealth of nations?* the World Bank states that ‘natural capital’ such as natural resources has been grossly undervalued, and that preserving this natural capital is vital to reducing poverty in areas such as Sub-Saharan Africa.³⁹ Furthermore, the World Bank has acknowledged that without effective public policies to encourage economic growth, large-scale resource extraction does not automatically lead to long-term sustainable development. The World Bank has also stated that if the requisite conditions are not met, the successes of exploratory processes will not necessarily translate into mining projects, associated industries, employment, or economic growth.⁴⁰

Thus, rather than generating substantial and uninterrupted revenue flows at predictable levels, or providing employment and infrastructure that can help build nationally integrated markets to meet domestic requirements, resource dependence has primarily served the interests of extractive companies and their global markets.⁴¹ In fact, resource dependence often ruins traditional means of livelihood and natural environments, leaving behind formerly sustainable societies and local economies dependent on foreign corporations and external markets.⁴²

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To learn more about the plunder of natural resources by mining / extractive companies via the “free entry” system, please see the author’s master’s thesis [HERE](#).

³⁶ Pegg, S. (2003). *Poverty reduction or poverty exacerbation? World Bank group support for extractive industries in Africa.* Report sponsored by Oxfam America, Friends of the Earth-US, Environmental Defense, Catholic Relief Services and the Bank Information Centre. p.15

³⁷ World Bank. (2005). *Where is the wealth of nations? Measuring capital for the 21st century.* Washington, DC: Conference Edition. p.24

³⁸ Rovillos, R.D., & Tauli-Corpuz, V. (2012). *Development, Power, and Identity Politics in the Philippines.* In Sawyer, S., & Gomez, E.T (eds) *The Politics of Resource Extraction: Indigenous Peoples, Multinational Corporations, and the State.* New York, NY: United Nations Research Institute for Social Development (UNRISD). p.132-133

³⁹ World Bank. (2005). See also: Reuters. (2010). *Rethink foreign deals, African nations advised.* The Daily Nation (Kenya), 25th May 2010

⁴⁰ World Bank. (1996). *A Mining strategy for Latin America and the Caribbean: Executive summary.* Mining Unit. Industry and Energy Division. Technical Paper No. 345, Washington, DC: World Bank

⁴¹ Bush, R. (2010). *Mining, Dispossession, and Transformation in Africa.* In Fraser, A., & Larmer, M (eds) *Zambia, Mining, and Neoliberalism: Boom and Bust on the Globalized Copperbelt.* New York, NY: Palgrave MacMillan

⁴² Evans, G., Goodman, J., & Lansbury, N. (2002).