



Economic Commission for Africa

# Improving Public Participation in the Sustainable Development of Mineral Resources in Africa





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Resources in Africa

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# Acronyms

CCSRP	Collège de Contrôle et de Surveillance des Ressources Pétrolières
CDE	Centre for the Development of Enterprise
DGAA	Dirección General para los Asuntos Ambientales
DOE	Department of Environment
DRC	Democratic Republic of Congo
DREM	Regional Office of the Ministry of Energy and Mines
EIA	Environmental Impact Assessment
FDI	Foreign direct investment
IBAs	Impact and benefit agreements
ICMM	International Council for Mining and Metals
IDC	Industrial Development Corporation
IFC	International Finance Corporation
MDF	Mineral Development Fund
MINCA	Minera Las Cristinas
MRDC	Mineral Resources Development Corporation
NAMF	New African Mining Fund
NEAC	National Environmental Advisory Committee
NSC	National Steering Committee
PCDP	Public Consultation and Disclosure Plan
PRSPs	Poverty Reduction Strategy Papers
RBN	Royal Bafokeng Nation
SAPs	Structural Adjustment Programmes
SAPRI	Structural Adjustment Participatory Review Initiative
SDD	Sustainable Development Division
SDRA	Sustainable Development Report on Africa
UNCED	United Nations Conference on Environment and Development
VAT	Value Added Tax



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# Overview

“Public participation” and “sustainable development” have become central and interconnected terms in present day development discourse. Their currency and pervasiveness is due, in large measure, to their adoption as important norms of the international order in various UN forums. Consequently, governments, business corporations and other actors on the international scene have felt obliged to express and demonstrate commitment to these norms.

The notion of sustainable development seeks to introduce into policy and project analysis, points of view previously marginal to the methods of economic evaluation that dominated decision-making. It seeks to incorporate into such analysis environmental and social costs, which used to be treated as externalities. It also seeks to broaden the concept of potential benefits and beneficiaries beyond what was previously conventional.

Several of the constitutions adopted by African countries in the last decade or so reveal its influence. For example, Article 13 of the Constitution of Malawi requires the state to adopt and implement “policies and legislation aimed at achieving the following goals:

To manage the environment responsibly in order to :

- (i) Prevent the degradation of the environment;
- (ii) Provide a healthy living and working environment for the people of Malawi;
- (iii) Accord full recognition to the rights of future generations by means of sustainable development of natural resources; and
- (iv) Conserve and enhance the biological diversity of Malawi.

To achieve a sensible balance between the creation and distribution of wealth through the nurturing of a market economy and long-term investment in health, education, economic and social development programmes”.

The extractive nature of mineral production and its organization involve significant impacts on the environment and on communities. The evaluation of environmental and social costs as well as the identification of benefits and beneficiaries (and their weighting) often occurs in an intense and heightened atmosphere in the context of mineral development. Adoption of sustainable development as a measure of its contribution to society has become a major means by which the minerals industry seeks to respond to the questioning of its legitimacy based on concerns about the environmental and social costs of its operations.

In the UN conferences which have popularized the sustainable development framework, “public participation” has been proposed as an essential pre-condition or ingredient. “One of the fundamental prerequisites of the achievement of sustainable development”, says Chapter 23 of Agenda 21 (the programmatic declaration emerging from the 1992 Rio de Janeiro UN Conference on Environment and Development), “is broad public participation in decision-making.”

At the minimum, this requires that procedures exist by which those that would be affected by the decision as to whether or not a mineral resource is to be developed can make meaningful inputs into the making of that

decision. The first sentence of Principle 10 of the Rio Declaration on Environment and Development proposes that “[e]nvironmental issues are best handled with the participation of all concerned citizens, at the relevant level.” In Section 1 of this report we survey and comment on developments, particularly in Africa, regarding the obligation to take account of environmental and social costs and a number of different mechanisms for public participation. We focus on the environmental decision-making process because its provisions for public participation are usually more elaborate than what is typically contained in traditional planning or mineral licensing regimes in Africa.

One of the major challenges of sustainable development in the context of non-renewable resources such as minerals is for the resources and the revenues from their production to be used, while they are available, in such a manner as to contribute to the transformation of the economies of those developing countries from which they are produced and sustain them long after the minerals have been depleted. This is, of course, a challenge relevant to most African mineral-producing countries. In Section 2 of the report, we consider issues relating to the derivation and allocation of revenue from mineral operations at both national and local community levels. Section 3 addresses the integration of mineral production into national and regional economies in order to further their development beyond the life of the resource, one of the most significant aspects of the challenge of utilising minerals to transform an economy. In Section 4, we seek to draw some policy implications from our discussions.

# Background to the study

The leadership of Africa has long been preoccupied with enhancing the contribution of the minerals and mining sector to the economic and social development of the continent. In the 1960s and 1970s, the dominant thinking was that this could be achieved if the State had significant or, indeed, full ownership of shares in mining companies. That thinking led to the nationalisation of large private companies operated during the colonial period. In countries such as Ghana, Guinea, Zambia and the Democratic Republic of Congo (DRC), the State took over control of the industry. Hopes were raised that the nationalised sector would provide more significant economic benefits to the nation and improve livelihoods of the people. However, in many cases, nationalisation led to stagnation and even decline in the mining industry.

By the late 1980s, much of the African mining industry was in a state of crisis and under-performing. Government attitudes and policies on ownership began to change; there was a fundamental paradigm shift and redefinition of the role of state, from 100% ownership and control of minerals by the state, to almost complete withdrawal. Many African countries embarked on a radical reform process in the late 1980s and early 1990s with the aim of attracting foreign direct investment (FDI) to rehabilitate their moribund minerals and mining sector. To this effect, state enterprises were privatized and efforts and resources were deployed to improve the investment climate. African countries began to adopt new mining laws and ancillary legislation more favourable to private investors. New mineral policy, legal, regulatory and administrative frameworks were formulated and established. Comprehensive packages of incentives for the mining investor in terms of reduced taxes and royalties were also approved. The structure of mineral production in most African countries has thus been transformed through liberalisation of investment codes, restructuring of fiscal, legal, and regulatory frameworks for mining and privatisation of state-owned mining companies. This resulted in a mining boom, increased foreign direct investments and associated influx of mining capital, technology and skills.

However, critics argue that the boom and the ensuing rise in export earnings in several mineral economies in Africa have produced questionable development outcomes. They state that most reforms were more geared towards attracting foreign investment and promoting exports and less towards fostering local development. They add that while benefits of mining to certain national economies can be evident, local costs (environmental impact and social and cultural disruptions) associated with mining have not been adequately compensated for.

They further say that the reforms were sectoral-centred and did not take into consideration macro-economic objectives that could spur broader developmental objectives. In this regard, they have observed that promotion of linkages (backward, forward and lateral) between mining and other sectors of the local economy was neglected, as in the case of local beneficiation, value addition and creation of a vibrant local private sector that could participate in the mineral boom. Criticism has therefore been voiced on the lack of specific provisions in many African mining laws and regulations to encourage mining companies to foster backward and forward linkages. Others noted that due to the enclave and capital-intensive nature of mining and its foreign-ownership dominance, the multiplier effects are insignificant.

Concerns have also been expressed about the magnitude of incentives that have been offered to mining companies. Critics indicate that mining should stop being treated as a special industry because those incentives tend to reduce the share of rent from which African governments depend to mobilise resources to fund their social and

development programmes. Others have indicated that mining has not fulfilled its poverty reduction role and poverty reduction has not been mainstreamed into mining policies.

The fact that most of the reform process was government-centred and did not include the civil society and most important, local communities, as parties to the process, has also been a cause of concern. In this respect, many critics argue that it is not appropriate to assume that government interests are the same as the interests of the public at large. In their new capacity as regulators and promoters of mining, African governments raise revenues from the mining industry through taxation, levies, royalties, and shares in mining companies and/or joint ventures; they also determine whether and how mineral revenues will be spent. It has been postulated that while governments may claim to operate in the interest of an entire nation, it may not be necessarily true that the “government’s take is the public’s take”.

Therefore, development perspectives may be narrow-minded and may only take into consideration government and mining companies’ perspectives, without due regard to the views and aspirations of local communities and civil society. Processes for communication, consultation and decision would tend therefore to favor bi-polar initiatives and outcomes and would not be sufficiently representative and participatory. Existing power relations would exacerbate this. On the other hand, others consider that lack of local capacities and resources to administer the mining laws and regulations, and to monitor and enforce its application, hinders government’s role in shaping the development outcomes of mining.

In response to new pressures on the minerals industry for an equitable share of benefits, including for local communities, and for maximization of local impacts for sustainable development, the industry is searching for a new social contract for mining that could result in integrated development and increased social well-being, livelihood security and reduced vulnerability of poor communities. The pressure comes mainly from community-based organizations, NGOs and other stakeholders.

Some mining companies are departing from their previous approaches to development and community relations, characterized as “Strictly Business”, “We do the best we can”, “Benevolent Benefactor”, “Manage and Measure” and “Practical Partnerships” to adopt “less instrumentalist and more holistic” development approaches that have a better potential to significantly uplift and empower local communities. There also seems to be a broader understanding that sustainable development for the mining sector means that mining developments around the globe should be sustainable in environmental, economic and social terms, taking into consideration market dynamics, technological innovation, community involvement, health and safety, environmental impacts and governance structures. In this regard, it is becoming clear that “successful mining companies and industries will be assessed according to a triple bottom line: financial success, contribution to social development and responsible consideration of the environment”.

New contractual arrangements and legal instruments to facilitate mine equity participation by local communities and other stakeholders, as well as new revenue (derived from royalties, income taxes, land taxes and lease rents, etc) distribution mechanisms for sharing at local level portions of centrally collected rents, are being considered as responses to the challenges posed by the new development paradigm discussed above. With the same objective, tri-sector partnerships involving government, private sector and local communities are being tested with a view to improving government, private sector and local community relations and the social and development outcomes of mining at local level. The same applies to public participation “to secure consent for government and industry actions”.

Despite commendable trends towards transformation of the mining industry, much still needs to be done. Some of the factors hindering faster transformation have been indicated earlier and include capacity gaps at both government and local community levels, poor understanding of the linkages between mining and poverty reduction and lack of an appropriate legal and regulatory framework that will encourage local participation in mining development.

The study on “Improving Public Participation in the Sustainable Development of Mineral Resources in Africa” was undertaken by SDD in response to the challenges articulated above and in anticipation that there will be need for a new generation of mining codes, regulations and regimes that can accommodate the new societal and development trends and needs, as well as new mechanisms that can facilitate broader and more equitable participation in mineral resources development on the continent.

The study provides analytical material that contributes to the debate on sustainable mineral resources development in Africa and to a better understanding of the concept of public participation on mining in the continent. It discusses the potential challenges, barriers and opportunities for increased participation and what it entails in terms of improving policies, legal and regulatory frameworks, fiscal regimes, contractual and procedural instruments and participatory mechanisms.

The study is also the sectoral input on mining to the Sustainable Development Report on Africa (SDRA), SDD’s flagship publication.



# Participation in Decision-Making

## The increasing scope of environmental obligations

The elevation of environmental considerations into constitutional and statutory obligations as well as the establishment of governmental institutions with environmental responsibilities in which increasing power is vested, have been significant features of the period since the UN Conference on Environment and Development (UNCED) was held in 1992.

“Article 37 of the Mozambican Constitution, for example, requires that the state “promote efforts to guarantee the ecological balance and the preservation of the environment for the betterment of the quality of life of its citizens.” Even without such explicit provisions, some legal systems have adopted the argument that the right to life, which every constitution guarantees, implies the right to a certain quality of life and that that allows environmental considerations to be taken into account in determining whether or not that right is being adequately respected. Indeed, some have gone as far as to say that the existence of the obligation on the state to promote ecological balance entitles a citizen to challenge, in court, the validity of government grants of resource exploitation rights on the grounds that they are excessive (see Box 3). Some constitutions, such as that of Namibia, make it explicit, though that its provisions calling upon the state to adopt policies aimed at the “maintenance of ecosystems, essential ecological processes and biological diversity ... and utilisation of ... natural resources on a sustainable basis” (article 95) “shall not of and by themselves be legally enforceable by any court, but shall nevertheless guide the Government in making and applying laws to give effect to the [ir] fundamental objectives ... . The courts are [nonetheless] entitled to have regard to the [m] ... in interpreting any laws based on them.” (Article 101)

Impact assessment is one of the most significant tools that has been introduced to enhance environmental obligations and bring the environment into the arena of decision-making on development projects, plans and policies. Prior to its introduction, environmental considerations mainly led to (a) the demarcation of areas - as parks, wildlife or forest reserves - with special regimes of access and for operations therein; (b) the specification of health, safety and sanitation conditions in and around the workplace and dwelling concentrations of the work force; and (c) the application of general principles of law such as those imposing obligations not to cause nuisance or injury to neighbours. Public participation in its procedures has been recognised as an important part of impact assessment, with great potential for assisting in its contribution to the sustainable management of natural resources.

## Environmental impact assessment of projects

The most specific context of the operation of environmental impact assessment is in decision-making about projects.

Legislation providing for environmental impact assessment often contains general criteria indicating when it is required: any activity “likely to significantly affect the environment” must be subject to assessment. Certain categories of projects are specifically identified as requiring such assessment because of their likely impact. Mining generally falls within these categories, though some forms of exploration activity, such as those involving

mapping and much of target selection are not always included unless they are to be carried out in ecologically sensitive areas. Even with activities that are not specified as automatically requiring such an assessment, screening procedures may be imposed for the purpose of evaluating whether a particular instance should be subject to fuller assessment obligations.

The obligation to directly fund and conduct an assessment is usually imposed on the prospective developer. In the case of small-scale or artisanal mining, this may not be feasible. It may, in such instances, be preferable for the state to organize and pay for the impact assessment and recover the costs through licence fees or by way of a deduction from the revenue generated by small-scale mining. In South Africa, the National Steering Committee of Service Providers to Small Scale Mining (NSC), consisting of a number of government institutions and some NGOs, funds environmental assessments for selected small-scale mining projects. In some regimes persons engaged in impact assessment must be approved by the government institution, which has responsibility for such assessments, even where the study is to be paid for directly by the project sponsor.

The terms of reference for impact assessment are sometimes subject to government approval before the commencement of the study. One of the methods used to help reduce disparities in content and set minimum standards is to prescribe certain details that have to be included in the terms of reference and in the study report. The Belize Environmental Impact Assessment Regulations, 1995 (Statutory Instrument No. 107 of 1995), Regulation 19, go into some detail in indicating minimum contents of a report. It requires that the report contain, inter alia:

- (a) A description of the development proposed, comprising information about the site, the design and size and scale of the development, and its immediate surroundings;
- (b) The data necessary to identify and assess the main effects which the proposed development is likely to have on the environment;
- (c) A description of the likely significant effects, direct and indirect, on the environment of the development, explained by reference to its possible impact on human beings; flora; fauna; soil; water; air; climate; material assets, including the cultural heritage and landscape; natural resources; the ecological balance and so on;
- (d) A presentation of all reasonable alternatives in comparative form, exploring each alternative, including the no-action alternative, and the reason why certain alternatives were recommended or eliminated ...; and
- (e) ... the relationship between short-term uses of the environment and the enhancement of long-term productivity, and any irretrievable or irreversible commitment of resources that would occur if the action were implemented as proposed.”

Regulation 5(f) also requires “an indication of gaps in knowledge and uncertainty ... encountered in computing the required information.”

These regulations impose controls on the discretion of the approving authority and make it possible for others to evaluate a report submitted in order to determine whether or not it forms a sufficient basis for granting environmental approval. In a case applying the Belize regulations (summarised in Box 1), a dissenting minority of the judges demonstrate how this can be done. They took the view that an EIA report which proposes a faulty design as a result of significant errors in the data about the physical characteristics of the site on which the development

is to occur, cannot be accepted as the basis on which to grant environmental approval; an approval granted in such circumstances can be challenged on that ground.

## **Institutional arrangements for project approvals**

The increasing range of issues that environmental impact assessment studies are expected to cover poses significant challenges. The definition of “environmental effect” in the Canadian Environmental Assessment Act, 2003 reflects the expansive scope of impact assessments:

“ ‘environmental effect’ means, in respect of a project :

- (a) any change that the project may cause in the environment...;
- (b) any effect of any [such] change.... on (i) health and socio-economic conditions, (ii) physical and cultural heritage; (iii) the current use of lands and resources for traditional purposes by aboriginal persons; or (iv) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance; or
- (c) any change to the project that may be caused by the environment.”

Thus, beyond the effects of a development on the elements, on flora and fauna and on human health, its social and economic implications, broadly defined, have to be considered. The range of disciplines that this entails and how they relate to each other evidently pose substantial challenges if the exercise is to be meaningful. Furthermore, particularly in the context of the development of resources such as minerals, approaches to managing the resource become of themselves issues of environmental impact assessment. Clearly, no single government institution in Africa is likely to have the capacity to supervise or review an assessment process or study from the variety of disciplinary backgrounds that is required.

Different countries resolve this problem in different ways. The responsibility for handling the EIA process in the particular area, the mining sector for example, has in some instances, been assigned to the government institution responsible for licensing activity in that sector. The concern that is expressed about that arrangement is that if the institution sees itself as a promoter of the activity (and not just a regulator), its weighting of environmental hazards may not be adequate. A supervisory or co-ordinating role for the main environmental agency may serve as a corrective in that case. In other instances, while the national environmental authority is responsible for the assessment process, issues of economic viability are left principally to the mining sector institutions, which decide whether or not to grant a mining permit.

The relationship between the decision-making process for environmental approval and those for the grant of a mining permit needs to be clarified. Environmental approval has to be a pre-condition of the mining operation. Indeed, it is often a pre-condition for the grant of a mining permit, though in some instances the latter may be granted subject to a requirement that environmental approval be obtained before operations commence.

The status thus formally given to environmental approvals may not be reflected practically in the relative authority of a recently created environmental body as compared with already established, influential and sometimes better endowed institutions with sectoral responsibilities whose decisions are now affected by the creation of an environ-

## **Box 1**

### **The Belize Dam Case**

BACONGO v. DOE (Privy Council decision, 29 January 2004) / [www.privy-council.org.uk/files/output/page472.asp](http://www.privy-council.org.uk/files/output/page472.asp)

#### **Background**

Environmental legislation in Belize required the sponsor of a project which could have a significant impact on the environment (such as this one) to conduct an environmental impact assessment (EIA) and submit it to the Department of the Environment (DOE). A hydroelectric dam construction project stirred up much opposition among environmental groups in Belize and internationally. The view of the Government was that the advantages to Belize from hydro-electric generation (instead of importing expensive power from Mexico to supplement its existing hydro facilities and thermal generation from imported crude oil) outweighed the losses it would cause.

#### **Belize Environmental Assessment Procedures**

Under the laws of Belize, a National Environmental Advisory Committee (NEAC) was established to review each EIA and advise the DOE as to (a) its adequacy and (b) whether a public hearing ought to be conducted. The NEAC was composed of twelve members, ten of whom were civil servants. The head of DOE chaired it. The two non-civil service members of the NEAC were representatives of NGOs appointed by the Minister on the recommendation of the DOE. The DOE had the power under the applicable legislation to (a) approve the project unconditionally, (b) approve it subject to conditions, (c) reject it, (d) ask for further information or (e) require further work to be done and consequently an amendment and re-submission of the EIA.

#### **The EIA Report; the NEAC and DOE decisions**

When BECOL submitted its EIA report to the DOE, doubts were expressed in the course of NEAC meetings about the accuracy of the report's description of the dam site as being made of granite. It was agreed to commission an independent study on the issue. The report of the independent study (the Cornec report), which was submitted after the decisions of the NEAC and the DOE and the commencement of litigation, confirmed that the EIA report was in error in some respects (including its description of the geology of the dam site) and raised a number of questions about it. The NEAC decided, by a majority, that there was no need to hold a public hearing before project approval. It also voted to recommend that environmental clearance be given for the building of the dam, subject to adjustments in the engineering design if required, to take account of the further investigations commissioned. The DOE then gave environmental clearance subject to the implementation of an Environmental Compliance Plan.

#### **The Litigation**

BACONGO challenged the NEAC decisions as well as that of the DOE. The Judicial Committee of the Privy Council, to which BACONGO had appealed after it lost its application in both the High Court and the Court of Appeal in Belize, by a three to two majority, upheld the decisions of the NEAC and the DOE. The majority of the court took the view that (a) the decision-making authorities, NEAC and DOE, had followed the proper procedure in reviewing the EIA; (b) it was not for the court to overturn their decision on the basis of a difference in view as to its substantive merits; (c) the geological error in the EIA was not so significant "as to prevent it from satisfying the requirements of the Act or forming a proper basis for approval by the DOE" (paragraph 48); and (d) the decision not to hold a public hearing was not an irrational one and therefore not subject to challenge. The two judges who dissented took the view that "the EIA was so flawed by important errors about the geology of the site as to be incapable of satisfying the requirements of the Environmental Protection Act and the Regulations." (Paragraph 118). They argued that the design of the dam was not only an essential component of a complete EIA report but also "should have been the subject of public consultation and public debate before approval and before work started on the project." (Paragraph 117). In this instance, they observed, "there are to be changes in the design ... but the nature of the changes has been withheld from the public." (Paragraph 117). Their preference would have been for a corrected EIA to be prepared for public consultation and to be subject to review by the NEAC and the DOE.

mental agency. The weakness of the new agency may undermine its credibility and effectiveness. The challenge is to give the agency sufficient authority and resources to exercise its responsibilities and pursue its mandate while taking account of the resources available in other institutions. An impotent agency may lead to insufficient weight being given to environmental considerations. In a study on foreign investment and environmental policy in Tanzania in the late 1990s, Lissu (1999) gives examples relating to large-scale shrimp farming in a mangrove area and the construction of tourist facilities in national parks in which “policy pronouncements and legal provisions in respect of environmental protection” were overridden by a determination, on the part of the office of the Vice President of the Republic in the former instance and the Ministry of Tourism in the latter, to proceed with the project (see also Ringia, 1998). Staerdahl, 2003, also reports tensions in the relationship between South African municipalities (with long-standing land use planning powers) and provinces that have more recently been given powers with respect to Environmental Impact Assessment processes (but not in relation to mining).

The report’s conclusion is that “between the two systems [issues] were dealt with on a case by case approach, and that it [the relationship] was often complicated, conflict ridden and time-consuming.” On the other hand, a formally powerful body, which does not show adequate respect for institutional expertise available elsewhere, could become a vehicle for decisions, which are not rationally based, whether on environmental or other grounds. There is much scope here for the development of conventions between institutions as to who does what and when, and on how to collaborate in order to enhance coherent, efficient and integrated decision-making. The development of such conventions may require prodding from a higher authority.

## **Procedures for participation in project impact assessment**

Two key benefits are now commonly proclaimed as arising from ensuring public participation in the decision as to whether or not a project with potentially significant environmental impacts should proceed. Firstly, local knowledge often provides valuable information that might be missed by outside experts. Secondly, it improves the chances of legitimacy of a project, thereby reducing the costs emanating from the social tensions that can result from an externally-imposed project.

On the other hand, the decision-making process could be made longer and result in additional expenses if it involves meaningful public participation. Furthermore, the opportunity exists for vocal groups to take over the process and seek to shape decisions in directions which may not be sufficiently representative of the participating public.

The possibility that delay or expense may result or unfavourable publicity be aroused, or even mobilised, may prompt project sponsors or supporters or government officials, while paying lip service to the norm of public participation, to seek to denude the process of substantive content or limit its scope. This appears to have happened in the Belize Dam case (summarised in Box One). One of the arguments of the Belize authorities was that the legitimate concerns of the public could be adequately met by the conditions imposed as part of the environmental management plan agreed with the developer. Clearly the negotiation and settling of that plan did not provide for any further involvement of the public and was not a public process. This need not be fatal if the concerns expressed in the consultations are, indeed, sufficiently addressed in the management plan. However, in some instances, granting conditional approval subject to agreeing to an environmental management plan may be a way of diffusing the potential problems that could derive from the effect of a critical mass of reservations or opposition.

Where environmental impact assessment obligations are imposed, it is now standard for them to include a public participation component. Tanzania's Mining (Environmental Management and Protection) Regulations, 1999 require a project sponsor to publish, in Kiswahili and English, in a newspaper circulating in the locality of the proposed project, inter alia, an indication (a) of where a copy of its environmental impact study may be inspected; and (b) that representations about its application for environmental approval may be made to the licensing authority within a specified period. On the other hand, Uganda's Environmental Impact Assessment Regulations, 1998, appear to envisage a broader scope for public participation. Regulation 12 (1) requires the developer to "take all necessary measures to seek the views of the people in the communities, which may be

affected by the project during the process of conducting the study...". In furtherance of this, the developer must (a) publicise the project, its anticipated effects and benefits for at least fourteen days in the mass media and in a language understood by the affected communities; and (b) hold meetings thereafter with the affected communities regarding the project at such times and in such venues as are agreed with leaders of local councils in the area. After the study has been completed, the general public is invited through newspaper announcements to make written comments on it. Notices to those most likely to be affected are to be issued in languages understood by the majority of them and published in newspapers circulating in their locality as well as distributed through local government units. The Executive Director of the National Environmental Protection Agency is empowered to decide whether or not a public hearing should be held on the study. He or she may base their decision on the comments submitted on the study or on the view that a hearing is "necessary for the protection of the environment and the promotion of good governance."

Thus the Ugandan regulations provide for public involvement in the course of the preparation of the study as well as for a further possibility at the stage where it is being reviewed by government agencies. Imagination and flexibility in the choice of consultation and discussion mechanisms and techniques are required to make regulations such as these effective. The criteria for determining whether or not to hold a public hearing in the course of reviewing an environmental impact study are more fully set out in the Belize regulations than in Uganda's. Regulation 24(2) of the former requires the Department of the Environment to take into account certain factors in deciding whether or not a public hearing is required, namely:

- "(a) the magnitude and type of the environmental impact, the amount of investment, the nature of the geographical area, and the commitment of the natural resources involved...; and
- (b) the complexity of the problem and the possibility that information presented at a public hearing may assist the developer to comply with its responsibilities regarding the proposed undertaking, project or activity."

An objective application of regulations such as these would require the holding of a public hearing in the course of reviewing environmental impact studies regarding any significant mining project.

Peru's Regulations on People's Consultation and Participation in the Process of Approval of Environmental Studies in the Energy and Mines Sector, passed in December 2002, contain detailed provisions prescribing forms of notification, access to the EIA reports, consultation and participation. It requires meetings to be held before, during the conduct and after the completion of environmental impact studies. It empowers a unit within the head office of the Ministry of Energy and Mines responsible for environmental affairs in the sector (the DGAA) to prescribe a certain number of workshops to be held through which the sponsors are to disseminate information about the technologies to be used, likely impacts of the project as well as contributions and questions raised

about it. With the exception of exploration activities and small-scale and artisanal mining, consideration of the environmental impact of mineral development requires the holding of a public forum after the conclusion of the impact study. Indeed, the DGAA may require that such a forum be held only after a stipulated number of preliminary workshops. Furthermore, depending on the importance of the project and its area of coverage, more than one such forum may be held in the locality closest to the project as well as in other areas.

At least 40 days before the forum, a notice that it will be held must be published in the official Peruvian daily as well as in a newspaper circulating in the locality of the project. Advertisements must also be run on the most popular radio station in the locality of the project for five days immediately after the newspaper publications and also for the ten days preceding the forum.

The project sponsor must provide copies (in digital and print form) of the impact assessment report and an executive summary of it to the DGAA, the Regional Office of the Ministry of Energy and Mines (DREM), and the Municipality within which the project is to be developed. Copies of the report and the executive summary must also be supplied to members of the public who apply and pay a fee computed on the basis of the cost of reproduction. Copies must be supplied within 7 working days of a request. In addition, the report is to be made available to be read in the Ministry of Energy and Mines. Copies of the sponsor's responses to comments made by the DGAA during the assessment process are also to be made available for public inspection at the DGAA, the DREM and the Municipal District of the place where the forum is to be held.

The public forum is conducted under the supervision of a steering committee made up of a number of public officials from the region and the district. It is to be conducted in Spanish or in the main language of the area and the project sponsor is required to engage the services of interpreters if there would otherwise be language barriers to effective communication.

There are provisions regarding the order in which contributions are made, the maximum duration of contributions from each member of the public, (five minutes) the form in which contributions may be made (orally or in writing), the recording of proceedings, the preparation of a summary as well as the right of access to the recording, the summary and documents presented at the forum.

A public hearing is not, strictly speaking, a decision-making forum in the sense that the dominant views that emerge from it are not necessarily those that have to be adopted in the approval determination. However, ignoring strong or demonstrably well-grounded views may provide a basis for challenge of whatever decision is made, apart from the potential for undermining both project acceptability and the credibility of the assessment process.

Lenders to mining projects are increasingly putting pressure on project sponsors to commit to and implement public participation processes. For example, World Bank Group safeguard policies relating to the environment, involuntary resettlement, indigenous people and information disclosure have a bearing on their evaluation of loan applications as well as on the covenants imposed on borrowers in loan agreements. Indeed, the strengthening of a borrower's capacity to meet environmental, public participation and social obligations required by these safeguard policies is now frequently a significant aspect of lending decisions. Recent reviews of policy, such as the World Bank's Extractive Industries Review and the Review of IFC's Safeguard Policies by its Compliance Advisor Ombudsman (CAO), are bound to lead to a reinforcement of these policies.

The IFC's existing policies require the submission of a Public Consultation and Disclosure Plan (PCDP) for a project with potentially significant environmental and social impact. Such a plan must include an inventory of key stakeholders, methods to be used, a schedule of consultation activities and how they fit into the overall project schedule, a budget, an indication of staff and management resources to be devoted to its implementation, a review of previous consultation processes as well as criteria by which its effectiveness is to be assessed.

A number of major commercial banks have begun an initiative by which they commit to apply IFC safeguard policies when they are financing projects with potentially significant environmental impacts whose capital cost is \$ US 50 million or more. As at 31 May 2004, twenty-five financial institutions (including ABN Amro Bank, Bank of America, Barclays Plc, Citigroup Inc, Credit Suisse Dresdner, the European Investment Bank, HSBC Group, ING Group and Standard Chartered) had adopted the Equator Principles, described as "a framework for financial institutions to manage environmental and social issues on project financing".

The fifth of the nine "principles" requires its adherents to fund projects with potentially significant impacts only if "satisfied that the borrower or third party expert has consulted, in a structured and culturally appropriate way, with project affected groups, including indigenous peoples and local NGOs", that the assessment report "or a summary thereof, has been made available to the public for a reasonable minimum period in a local language and in a culturally appropriate manner", that the project environmental management plan "will take account of such consultations". Those "likely to have significant adverse impacts that are sensitive, diverse or unprecedented", category A projects, must be subject to independent expert review.

The argument the sponsors make for applying the principles only to projects with a capital cost above \$ US 50 million is that a threshold test is required and that in their estimation, projects below that figure represent less than three per cent of the market. (See response to question 8 at [www.equator-principles.com/faq.shtml](http://www.equator-principles.com/faq.shtml)). It may be argued in response that it is an adequate threshold that the project has potentially significant impacts. If a project falls under category A, that should be sufficient reason to apply the principles without reference to its capital cost estimates.

It is, of course, one thing to express public participation rights in formal instruments and quite another to implement them effectively; there are quite fundamental challenges involved in their practical implementation. Among these are the redressing of the weight of existing power relations, especially in relation to marginalized and vulnerable groups, addressing deep-seated authoritarian elements of local cultures and reducing the resource constraints (human and material) of public institutions as well as of those affected by or actively concerned about projects with environmental implications.

Valuable work has been done to assist in planning and implementing effective public participation processes. The IFC's manual, "Doing Better Business Through Effective Public Consultation and Disclosure" is an excellent example. It contains, *inter alia*, guidance notes for identifying consultation possibilities at different stages of a project, a checklist of objectives and actions for improving consultation (Annex D: "Review Checklist for Improved Public Consultation") and another checklist of "Techniques for Public Consultation and Information Disclosure" (Annex E). These provide a range of tools from which a selection can be made for application to specific situations.

The International Council for Mining and Metals (ICMM) has, in collaboration with the World Bank, sponsored studies which focus on helping to make participation effective in the context of mining projects. These

seek to relate participation processes to the activities that are involved in different phases of a mining project (exploration, evaluation and feasibility, development and operations, closure and post-operation); to the standards required by law or other applicable norms; the broad strategic objectives of the sponsoring organizations(s); the characteristics of the participating stakeholders; and the communication strategy judged to be appropriate and the resources available.

## Rights of access to information

The Peruvian Regulations referred to in the preceding sub-section are expressed to be premised on a law establishing the right to participate in the making of policy and the adoption of measures concerning the environment and natural resources and emphasising the right to be informed of measures or activities that could directly or indirectly affect the health of the people or the integrity of the environment and natural resources.

### Box 2

The Aarhus Convention

[www.unece.org/env/pp/documents/cep43e.pdf](http://www.unece.org/env/pp/documents/cep43e.pdf)

The recitals to the Aarhus Convention acknowledge that the right to live in a healthy environment as well as the duty to protect it for present and future generations requires that “citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters, and... that citizens may need assistance in order to exercise their rights.”

Among the obligations it imposes on parties to the Convention are to:

- a) Make environmental information available within not more than two months of a request;
- b) Ensure that public institutions have and update relevant environmental information;
- c) Impose requirements for the provision (by those who engage in them) of adequate information to public institutions regarding activities with potentially significant environmental effects;
- d) Require that information related to an imminent threat to health or the environment be disseminated promptly to the potentially affected public;
- e) Identify and publicise the types of environmental information held by various public institutions as well as the terms on and the process by which they can be assessed;
- f) Encourage operators to inform the public regularly of the environmental impact of their activities;
- g) Encourage prospective operators to identify, interact with and provide information to the public that may be concerned by their activities before they apply for the requisite permit;
- h) Provide for public participation procedures which allow sufficient time and supply enough information (including on specified issues) for the public to participate effectively in decision-making regarding different phases of an operation with environmental effects;
- i) Provide for “early public participation, when all options are open and effective public participation can take place”;
- j) Take due account of the outcome of the public participation process;
- k) Make accessible the decision taken;
- l) Ensure that persons exercising their rights are not penalised, persecuted or harassed;
- m) Ensure that judicial procedures as well as speedy and inexpensive administrative procedures exist for enforcing the rights of access to information and to participate in decision-making; and
- n) Provide recognition and support to environmental protection associations.

There are certain limited grounds on which environmental information may be legitimately withheld. These grounds are to be “interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment.”

This emphasis on the connection between public participation in environmental decision-making and access to relevant information is derived from Principle 10 of the Rio Declaration, which states that “each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available.” It is also a feature of the UN Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention), now widely regarded as a model of a public participation regime.

South Africa’s legislative framework exemplifies an incipient trend in Africa of enacting freedom of information legislation with potential to put pressure on the dominant bureaucratic culture of secrecy, even regarding the most routine matters. Its constitution guarantees the right of every person (a) to “receive or impart information or ideas” (section 16(1)(b)); and (b) to have access to information held by the state as well as to “any information that is required for the exercise or protection of any rights.” (Section 32(1)). Given the formulation of the right to a healthy environment in section 24, the right of access provided for in section 32 would cover information in private hands required for its exercise or protection. These rights are expressed to be subject to such limitation as may be provided in laws “of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors...”

Further to these provisions, the Promotion of Access to Information Act, 2000 and regulations made thereunder; establish a scheme to facilitate access to information held by public and private institutions. The scheme involves (a) mechanisms for publicising the categories of material held by different institutions; (b) obligations to designate officials to handle access obligations; (c) procedures for obtaining access to such as are not protected from disclosure; (d) time limits for disclosure; (e) a prescription of the grounds justifying non-disclosure; and (f) avenues for redress in respect of the decisions of the responsible officials and the institutions. It is noteworthy that in a number of instances in which an institution would have been exempted from the obligation to disclose information in order to protect commercial or financial interests, disclosure of the “results of any product or environmental testing or other obligation” is required if it “would reveal a serious public safety or environmental risk” (s.36(2)(c), S.42(5)(c), s.46(a)(ii)). The South African Human Rights Commission is assigned responsibility for monitoring and enhancing the implementation of the Act.

## **Participation in monitoring and enforcement**

The strongest obligations are those which are legally enforceable. These are imposed by constitutions, legislation or other laws or by agreements, whether in the form of international treaties or contracts under domestic law. Environmental management plans, for example, are usually expressed in the form of undertakings assumed by applicants for permits in agreements with governmental institutions. The strongest method of enforcement, from the point of view of the legal system, is by way of orders made by a court or other judicial body. Many legal systems, particularly those influenced by English law, used to have a rule to the effect that a person did not have standing to institute an action unless he or she could show a right infringed or an interest prejudiced over and above the general public interest in the matter. The rules of standing have been progressively broadened so as to permit litigation to be instituted to enforce obligations owed to all or many members of the general public. The provisions of the Aarhus Convention (summarised in Box 2) and the Philippines Supreme Court decision in the Oposa case (summarised in Box 3) exemplify this trend.

Court proceedings can be protracted and expensive. There is much scope for procedural devices to prolong a case or distract from the substantive merits of the matter, which prompts the litigation. Other quasi-judicial institutions, such as Human Rights Commissions, ombudsmen and various administrative tribunals are often established to offer opportunities for relatively less formal and more expeditious methods of investigating and remedying defaults.

### **Box 3**

Enforcing the right to “balanced and healthful ecology” in the Philippines:

#### **Oposa versus Factoran**

A number of minors and an environmental NGO brought an action suit against the Secretary for the Department of the Environment and Natural Resources in the Philippines. They sought orders to compel him to (a) cancel all existing timber licences and (b) stop granting new licences. They pleaded that at the rate at which the Philippines forests were being cut down under those licences, there would be no forests remaining after a decade. They argued that the grant of those licences involved a “grave abuse of discretion” on the part of the government; that the destruction of the forests would have “disastrous consequences” and would cause “serious injury and irreparable damage to the plaintiff minors’ generation and to generations yet unborn”; and would violate their constitutional right to “a balanced and healthful ecology in accord with the rhythm and harmony of nature.”

The defendant, the Secretary of State, applied to have the action dismissed without a trial on the ground that the court could not decide on the issues raised or grant the remedies sought. He contended that the issue in controversy involved a “political question” upon which the Court was not empowered to decide. These arguments were accepted by the trial court but were rejected by the Supreme Court, to which the plaintiffs appealed. The latter held that the plaintiffs were entitled to bring the action to protect their constitutional rights and those of future generations. The main opinion delivered on behalf of the Court observed that the right to a healthful and balanced ecology “belongs to a different category of rights altogether for it concerns nothing less than self-preservation and self-perpetuation.” It rejected the “political question” argument on the ground that even if the matter could be so characterised (which it disputed), the power granted it by the Philippine Constitution to decide whether or not there had been a grave abuse of discretion justified it in examining “even the wisdom of the decisions of the executive and the legislature.”

One of the judges, while agreeing that the plaintiffs’ action should not have been dismissed without a trial, expressed reservations about the breadth of the formulation of their rights by the leading judgment of the Court and proposed that the “doctrine set out in the court’s decision... should be subjected to closer examination.”

Though the case did not proceed to trial, it appears that the government acted to reduce substantially the number of timber licence agreements in operation.

**Sources:** see also *Gatmaytan 2003*; *Manguiat 2003*. [www.elaw.org/resources/text.asp? 1D=278](http://www.elaw.org/resources/text.asp? 1D=278)

Institutions with oversight responsibilities are in many instances empowered to issue notices to stop or suspend operations which are in violation of environmental obligations, either after due warning or in the event of a threat of major and immediate harm arising. Where an institution fails to exercise its power in spite of continuing and significant violations, a number of legal systems allow members of the public to call for an enforcement of the duties of the institution and an end to the violations. This is illustrated by a Ugandan case in which an environmental NGO, Greenwatch, sued the Attorney-General and the National Environmental Management Authority on the basis that the Government had failed to regulate the impact on the environment of the manufacture, use and disposal of plastic substances. The High Court rejected the Government’s objection that the complaint of Greenwatch did not disclose a claim that could be entertained. The court held that the NGO was

entitled to apply for enforcement of the constitutional right of a citizen to a clean environment and of the duty imposed on the Government to protect and preserve the environment.

Loans granted by financial institutions increasingly include covenants imposing environmental and social obligations regarding the conduct of the borrower in relation to the operations funded by the loan. Reports from the borrower to the lender are required to cover performance not only with respect to financial matters but also environmental and social covenants. Clauses in investment insurance agreements contain similar requirements. Thus pressure on the lender or the insurer can be a vehicle for demanding compliance by the borrower or the insured.

Several mining companies have begun publishing annual sustainability reports alongside the traditional reports, which focus on financial performance. These sustainability reports follow guidelines formulated by the Global Reporting Initiative. They involve reporting on the company's performance with regard to targets set on a variety of issues related to sustainable development such as environmental management, health and safety, employee equity, economic integration, and so on. The targets set in relation to environmental management issues usually involve adopting standards already established or formulated by independent institutions (such as the International Organization of Standards) or by industry associations. More work remains to be done on the formulation of measures for evaluating corporate performance in respect of the social aspects of sustainable development.

Under some of the Canadian Impact and Benefit Agreements, which are referred to in Box 5, a joint committee of representatives of the affected people and the mining company is established as a mechanism for exposing community concerns about defaults in the fulfilment of the company's obligations.

## **Participation in policy formulation**

Developing procedures for public participation in policy formulation poses distinctive challenges. Particular project activities tend to have more localised impacts than policy. The affected public is therefore likely to be much broader in the latter instance than in the former. Policy and plan formulation often involves more general and abstract statements of intention than project approval decision-making. Even for those directly responsible, the implications of the expressions they have agreed to in policy documents are not always obvious when they are measured against particular actions they wish to take in specific situations.

The initiation and adoption of policies or plans is a central responsibility of government. To the extent that governmental decision-making processes are open and transparent and provide for accountability, opportunities will exist for public participation.

Important work is being done in identifying indicators by which to assess the quality of governance across countries. In work done for the World Bank by Kaufmann, 2003, six groups of indicators are offered for such evaluation: (a) voice and accountability, (b) political stability; (c) government effectiveness; (d) regulatory quality; (e) the rule of law; and (f) the control of corruption. Those relating to voice and accountability and the rule of law are particularly useful as tools with which to evaluate and monitor the scope for and effectiveness of public participation in formulation of policy as well as in the general climate, for making decisions regarding specific projects.

Voice and accountability indicators include the availability and exercise of civil and political rights, the accountability of public officials, the responsiveness of government to the governed, the extent to which the populace at large and organised groups are able to have their voices heard and that to which government is beholden to special interests, as well as the effectiveness of Parliament in the legislative process and in monitoring the executive.

The rule of law indicators include issues regarding the extent to which the law is obeyed, followed or respected by the government as well as the governed, judicial independence from political and special interest influences and how far the state is seen as representing its citizens.

While there has been much advance in the formal adoption in Africa of constitutional regimes expressing the values whose realisation these indicators seek to measure, there is still much scepticism as to how far there is merely rhetorical adherence rather than effective commitment by our governments.

Concerns about the limits of governmental institutions in advancing these basic democratic values have led to a focus on the potential role of CSOs in redressing the deficit. There have been some interesting instances of the participation of such organisations in the evaluation of Structural Adjustment Programmes (SAPs). These have been conducted as part of a World Bank-sponsored process titled the Structural Adjustment Participatory Review Initiative (SAPRI). With regard to policy formulation, Poverty Reduction Strategy Papers (PRSPs) that many developing countries have to submit in order to receive World Bank funding are required to be produced through participatory processes. Reviews of the processes of adoption of PRSPs have raised issues regarding (a) the representativeness of the civil society groups consulted; (b) their capacity to address policy issues; (c) the extent to which the elected representatives of the people, in Parliament or in local government bodies are involved; (d) how much effective room for manoeuvre exists for poor developing countries to affect the PRSP content; and (e) the relationship between policies articulated in PRSPs and those implemented by governments through budget statements and other policy measures.

The existence of these processes may indeed be exploited by governments and donors for window dressing purposes. On the other hand, they represent opportunities for strengthening public participation in an effective manner.



# Allocation of Benefits from Mining

## Forms of benefit

The benefits of mining to a host country's economy include fiscal revenues, foreign exchange earnings, direct and secondary employment, regional development and transfer and development of skills. But there are also significant costs to local communities and the host nation as a whole associated with mining. These are mostly in the form of adverse environmental and social impacts on mining communities, including pollution of water bodies and the atmosphere, and pressures on local infrastructure and services due to very rapid increases in population.

Participation in the benefits of mining by the host nation or its nationals may occur through corporate and dividend taxes; royalty charges; equity participation by the state, mining community or nationals; availability of foreign currency to the central government; land and other property rent; property rates; and access to mine infrastructure (water, light, etc) by local communities.

Direct contribution from mining to central government revenues may come mostly from corporate and dividend withholding taxes, mineral royalties, employee payroll taxes, customs duties on imports, value added tax (VAT) on local purchases, and dividend payments from government shareholding. The magnitude of each of these components varies from country to country. In Ghana, for example, the corporate tax rate is currently 32.5% (although the 2004 budget statement indicated that this would be reduced to 30%); royalties are 3% to 12 % of gross value, the exact rate depending on profitability (though it has effectively been 3% for all operations since it was introduced); and Government's free carried interest in operating mines is 10% shareholding.

Also since 2001, there has been a levy- the National Reconstruction Levy - which affects mining companies as well as other enterprises and is levied on taxable income at the rate of 2.5%. The Government has indicated that this is just a temporary measure intended to operate for only a few years. Currently in Ghana, royalties form the largest component of central government revenue, followed by employee payroll taxes. Corporate taxes, on the other hand, presently form a relatively small part of total revenues. In 2003, for instance, the Minerals Commission reported that mineral royalties amounted to about \$ US 23 million; payroll taxes were about \$16 US million, whilst corporate taxes amounted to only about \$ US 10 million. This is explained by the fact that the capital allowance structure of the Ghana corporate tax regime is fairly generous and has the effect of delivering low tax revenues around the first eight years of a project's life, especially for projects with high initial capital costs.

In contrast, in Namibia, the mining corporate tax rate is 37.5% for all minerals and 55% for diamonds while royalties are charged at 5% *ad valorem* for all minerals except for diamonds, which attract a 10% royalty rate. South Africa, on the other hand, has a corporate tax rate of 37% for companies that pay a dividend withholding tax (of 12.5%), and 46% for those who do not pay dividend withholding tax. No mineral royalty is currently charged for operations on state leases but the Government has announced its intention to introduce one soon.

Accounting for revenues paid to governments from mining projects has become an important issue of governance. At the forefront of keeping this matter on the international agenda are the Publish What You Pay Campaign launched by a group of NGOs and the Extractive Industries Transparency Initiative (EITI) sponsored by the British government and now supported by a number of governments, multilateral agencies, companies and civil society groups.

The totality of the direct and indirect charges that may be levied on a mining project provides, on one hand, a measure by which to evaluate a mine's contribution to a country's economy. On the other hand, it has a major influence on investors' decision to invest in a particular country. Local community imposts or charges on mining companies (such as property rates, land rent, etc) should be taken into account in designing the central government component of mining fiscal regimes (corporate tax rates, royalties etc). The decision by investors to invest in a mining project depends very much, among other things, on their assessment that the current total take by the host country, including all community imposts, provides them with adequate return on their investments. But since the host country's take could increase significantly with changes in laws after the project has commenced operations, it is now very common for investors to insist on agreements with the host government which aim to ensure that the division of benefits is set and remains predictable at least for much of the life of a project. Constancy of policy and fiscal regimes is important in projects with long gestation periods, especially mining.

## **Local community allocation from national revenue**

While the attention of national policy-makers has traditionally focused on the fairness of the allocation of benefits as between mining investors and the host country as a whole, increasing attention is now being paid to the benefits derived by the communities where mining operations take place. To ensure security and a co-operative atmosphere for mining projects, the local mining communities must receive what they consider to be a fair share of the benefits accruing from mining.

The benefits to the local community may come in various forms. There are benefits in the form of revenues, which accrue to the community merely because of its location, such as property rates and land rents. There are also benefits which may come as the community's share of central government revenues from mining. However, there are also non-income benefits such as employment for local residents, assistance to community health and educational institutions, access to the use of mine infrastructure by the general public, and so on.

A major concern for mineral policy-makers in developing countries relates to arrangements for allocating portions of central government mineral revenues to local mining communities, and the management of monies so allocated. The scheme must first of all clearly identify, by legislation or otherwise, the communities to benefit. It must then specify (a) the components of government revenues from which allocation is to be made – whether from royalties, corporate taxes, dividends, or a combination of any of these; (b) the proportion to allocate; and (c) the groups or institutions within the community to benefit, and their respective shares. Payments to the groups may be made directly by the central government revenue collectors, or through another government agency or institution, either existing or created for the purpose. Box 4 summarises the Nigerian experience of petroleum revenue allocation between the states within or close to which production occurs and the rest of the country.

In Ghana, the Mineral Development Fund (MDF), which has been in existence since 1993, provides the mechanism through which portions of royalties paid to the central government are distributed to mining communities. Under the MDF, nine per cent of royalties paid by a mining project goes to the local community to be shared between the District Assembly (the local political administrative unit) and the local traditional authorities. The MDF also provides for monies to be made available, on application, for use in addressing some specific problems, which may be shown to result from mining activities. In addition, under a general national

revenue-sharing scheme (the District Assemblies Common Fund), all District Assemblies in the country (including those in mining communities) get a share (determined by a complex formula) out of five per cent (5%) of all revenues collected by the central government. Thus further monies from mining go back to the mining communities.

#### **Box 4**

##### **Petroleum Revenue Allocation in Nigeria**

Dissatisfaction with the share of national petroleum revenue allocated to the communities directly affected by production operations and, indeed, with the overall benefits they derive from such operations has resulted in protests, litigation, sabotage, abductions and loss of life.

As is generally the case in African countries, most fiscal revenue in Nigeria is collected by or on behalf of the national government. Local or state governments depend heavily for their viability on the portion of national revenue allocated to them. Such allocation is determined by formulae arrived at by the application of a number of different factors: location within the state of a resource or the activity generating the revenue; relative population density of the different states; balanced national development, etc. These factors have, over the years, been weighted differently.

How much weight should be given to the location of a resource has been the source of much controversy in the context of the allocation of petroleum revenue. The states in the Niger Delta, from where all Nigeria's oil production occurs, have complained that they have not been getting a fair share of petroleum revenue even though they bear most of the adverse environmental and social consequences of the operations.

One of their complaints is that the Federal Government has interpreted the constitutional provision, which requires the allocation of at least 13% of petroleum revenue to the state from which it is derived, in a manner that gives insufficient weight to the derivation component of the current formula. The issue has turned on whether petroleum produced offshore can be said to be derived from the state whose land abuts the production area. The Federal Government has taken the position that the offshore areas of Nigeria are not part of any state. This position has been upheld by the Supreme Court of Nigeria, in the case of *Attorney General of the Federation v. Attorney General, Abia State and others*. However, legislation has subsequently been passed, the *Allocation of Revenue (Abolition of Dichotomy in the Application of Principle of Derivation) Act, 2004* to make the onshore/offshore distinction immaterial for the purposes of revenue allocation.

**Sources:** *Ebeku 2003; Oguine 1999; A-G of Federation v. A-G of Abia State: Allocation of Revenue (Abolition of Dichotomy in the Application of Principle of Derivation) Act, 2004.*

The most important issue to address concerning the revenues that go back to the communities (as indeed for revenues retained by central government) is how to utilize and manage the monies. Since mineral deposits have finite lives, the economy of any local community, which depends substantially on mining, could in time grind to a halt if the use and management of the community's share of revenues is not planned properly. Economic diversification to avoid creation of mining communities, which degenerate into ghost towns after exhaustion, is a major challenge. The most optimum use of the revenues is to invest them in ventures that yield a long-term income stream, thus ensuring revenue flows to the community long after mining has ceased. Investing the monies (or a greater part of them) in low risk financial instruments is one option but it would seem preferable to invest in ventures that have linkages with the local economy rather than in purely financial schemes. Investing in enterprises or schemes that lead to the development of high-level skills for a large number of people in the community is particularly useful in this effort.

It must be noted however that for such communities, which are usually very poor, the decision to invest in these optimal ways is not always easy, since pressure for the use of all the revenues on immediate or short-term needs tends to be enormous.

In the Ghana example, mining revenues, which go to the District Assemblies, like all their other revenues, are spent and managed in accordance with regulations or practice established by each Assembly. However, central government authorities have expressed concern about how mining revenues paid to the traditional authorities are utilized and managed. The sums are normally paid to chiefs as representatives of the whole community, and under a well-functioning customary law system they would be utilized and managed as agreed among sub-chiefs, elders and advisers on behalf of the polities they represent. But the record shows that in many cases things do not work out accordingly. There are many cases where there has been no consensus on the use of the sums, nor even public disclosure of amounts paid. Proposals for addressing these concerns include specifying the category of uses for the monies (preferably for community capital projects), but allowing for some small unaccountable amounts, which a chief may use at his discretion as custom allows; and publicizing widely amounts paid. The mining companies who are often perceived by the public as not doing enough for their local communities are at the forefront in pressing the Government to establish clear guidelines for the traditional authorities on how to spend the monies.

#### **Box 5**

##### **Impact and Benefit Agreements in Canada**

In Canada (as in Australia and U.S.) aboriginal groups have managed to get the legal system to acknowledge that they have rights over designated areas of land and that they are entitled to negotiate terms on which resource developers can have access to such areas. The terms negotiated are typically contained in Impact and Benefit Agreements (IBAs). The negotiation of such agreements is sometimes required by law. In some instances, however, they have been entered into voluntarily.

Typically, such agreements contain provisions aimed at advancing employment skills training as well as educational and business opportunities for members of the community. They also require payments (in the form of royalties, profit shares, trust funds for designated purposes) to the community or as compensation to members of the community who suffer loss as a result of the resource development. Though these agreements are separate from the environmental assessment process, they sometimes include environmental obligations and mechanisms for monitoring them.

In a diamond project to be undertaken by a BHP Billiton subsidiary in Botswana, for which the company sought IFC involvement, it undertook to “support and improve local communities, including those of the indigenous San” and to “develop impact benefit agreements and community partnership programmes similar to those undertaken for the Ekati mine in Canada”. It lists as possible elements of such programmes: preferential hiring policies for local people, relaxation of minimum educational requirements and literacy training, cross-cultural training for management and supervisory personnel, business development and procurement policies that aid local businesses to access opportunities created by the project, an agreement covering socio-economic policies and programmes, and including performance targets and a community development trust. With respect to the Ekati mine, it appears that the company has agreements with some groups, as well as programmes, which go beyond them. The agreements, which are confidential, are said to require cash payments to the groups as well as the provision of scholarships and preferential employment and procurement policies in favour of its members. Substantial human and financial resources are required for a community to negotiate an effective IBA. Without such, the agreement may primarily serve the company’s public and community relations objectives while not conferring significant benefit on the community. Similar resource needs influence the effectiveness of other public participation mechanisms available to a community.

**Sources:** *Ali 2003; BHP Billiton 2003; IFC 2003a; Lucas 2002; O’Reilly & Eacott 2000; Sosa & Keenan 2001.*

The traditional authorities on their part have a lot of complaints about the magnitude of amounts allocated to them and the amount of time it takes for the monies to reach them after payment by the companies; there are also legitimate questions regarding the quantum of revenues and the method of payments. The recipients have argued for direct payment from the central government collector i.e. the Internal Revenue Service, or even more directly, from the companies, but this has not yet been agreed. Complaints by the traditional leaders regarding revenues allocated to their communities, along with complaints about inadequate job opportunities and skills training for their youth, are what most commonly generate tension between mining companies and local communities.

## Managing revenue

Various schemes for managing host country or community mineral revenues exist in a number of countries. Examples of such schemes are the Alaska Permanent Fund (based on oil revenues) and trust funds established on the island of Nauru, funded from phosphate revenues, and in Chad, for the management of its petroleum revenue.

The Permanent Fund in Alaska, which was established by constitutional amendment in 1976, is funded from a portion (specified by law to be no less than 25%) of all mineral taxes and imposts. The monies in the Fund are invested by an independent trust and part of the earnings is paid annually as dividends to the citizens of the state. Dividend payments have been made every year since payments began in 1982, and in 2000 a total of just over US\$1.14 billion was paid out to about 582,000 citizens, i.e. about US\$1960 per person. The principal amount of the fund itself is left untouched, thus ensuring that future generations are provided with capital for investments of their choice. The scheme is generally thought to have worked very well up to now.

The second example relates to the island of Nauru phosphate revenues, where several trust funds were established with the Government's share of revenues, with the aim of generating a perpetual stream of income. Our information is that, unfortunately, the scheme has not been very successful (principal amounts have been dissipated) due to a series of bad investment decisions. This example raises the question of whether it would be appropriate in cases like this to impose restrictions by law on the type of investments trustees are allowed to make, as in the Alaskan Permanent Fund.

The scheme for the allocation, management and monitoring of revenues to Chad from the Chad/Cameroon Pipeline Project also incorporates the idea of setting aside portions of government revenues "for the benefit of future generations" (see Box 6). But there are two other aspects of the scheme which could provide a model for other African mineral projects – (a) allocating a percentage of revenues to fund defined priority sectors of the national economy; and (b) having an oversight committee (with membership from the public service and civil society) to manage and monitor revenues paid into the fund. The project has only just commenced operations and it would be interesting to see how the scheme works out in practice.

Botswana has a reputation of being one of the most successful African countries in managing its mineral-derived revenue. It is cited as having adopted prudent monetary and fiscal policies and implemented them in a disciplined manner (see Solomon, 2000), even without recourse to special mineral fund arrangements.

## Box 6

### Chad: Management of Petroleum Revenue

As part of the arrangements under which the World Bank participated in the funding of the Chad-Cameroon Pipeline Project for the production of petroleum from certain fields in Chad and its transportation through a pipeline ending in Cameroon, the Government of Chad has agreed and established a scheme for the allocation, management and monitoring of revenue generated from the project.

Under the scheme, royalties and dividends received by Chad from oil production from those fields are to be paid, in the first instance, into a special offshore account. Ninety per cent of such payments are to be transferred to Special Treasury Accounts with commercial banks in Chad, while the remaining ten per cent is retained offshore in savings accounts “for the benefit of future generations”. It appears that the understanding is that the future generations fund will not be touched for twenty-five years.

Of the amount repatriated to Chad, eighty per cent in the case of royalties and eighty-five per cent in the case of dividends is to be allocated to what have been identified as priority sectors, namely, “public health and social affairs, education, infrastructure, rural development (agricultural and livestock), environment and water resources”.

The monies are to be utilised in accordance with an annual public expenditure programme prepared by the Government. For the first five years, fifteen per cent of the repatriated amount is to be used for Government recurrent expenditure. Five per cent of royalties repatriated to Chad is to be allocated to “decentralised communities” in the producing region.

An oversight committee, the Collège de Contrôle et de Surveillance des Ressources Pétrolières (CCSRP) is established with power to approve disbursement and to monitor expenditure. The Government has also expressed commitment to a strengthening of the powers and capacities of the Government audit institution, which operates under the Supreme Court. The CCSRP consists of nine members; five of them are public officials and four are from civil society. The revenue allocation and oversight arrangements are intended to take account of other developing country experience regarding the potential for mismanaging large unexpected revenues from petroleum production and mining as well as the specific situation of Chad. In the words of the World Bank’s Project Appraisal Document (Report No. 19427-CD, December 29, 1999) Chad “faces a particular challenge given the immaturity of its democratic management institutions and capacities, and existing social tensions. Chad’s capacity weakness is all-encompassing and greater than in most sub-Saharan African countries, reflecting the impact of almost three decades of civil strife”. Concern has been expressed about the fact that petroleum revenue from customs duties and signature bonuses are neither subject to the Revenue Management Law nor to control and monitoring by the CCSRP. Whether the strengthening of the other financial management institutions will reduce the significance of these exclusions remains to be seen.

**Sources:** *World Bank 1999; Catholic Relief Services 2003.*

## Infrastructure provisions

There may be special arrangements and understandings between mining companies and respective local communities that can significantly promote development of the communities. These include agreements for general public access to certain mine facilities and infrastructure (power lines, roads, etc); assistance in the construction and operation of educational and health facilities; and preferential employment of local labour and on contracting of services from indigenous local companies.

Of particular interest here is an arrangement under which a mining company will agree to provide some specified infrastructure (road, water plant, etc.) for the community, if it will receive a tax credit for it. The arrangement will require the full approval of central government. This arrangement – Infrastructure Tax Credit Scheme

– currently exists in Papua New Guinea (PNG), where up to three quarters of one per cent (i.e. 0.75%) of the value of gross sales of minerals won may be spent on approved mining community infrastructure projects. The projects are selected and approved by a process that involves the company, local and provincial governments, and the central government.

## Tri-sector partnerships

Natural resource companies are at the forefront of attempts to promote what have become known as “Tri-Sector Partnerships”. The partners are (a) the company engaged in developing or planning to develop a resource; (b) civil society organizations such as community groups, NGOs, churches, etc; and (c) local and central government institutions. The objective is to collaborate in community development projects by identifying and contributing resources that each partner is able to provide. Companies are interested in such partnerships as a way of gaining acceptability for their projects and to themselves by providing some resources without raising unsustainable community expectations or encouraging dependency on it. The partnership seeks to recognise that civil society groups are often more familiar with the community and its needs than others and can contribute or mobilise participation in a project based on their local knowledge. The resources of local and central government, whether in the form of money or helping to coordinate or expedite a project, can contribute effectively to its realisation. Examples of such partnerships are described on the Business Partners for Development Natural Resources Cluster website ([www.bpd-naturalresources.org](http://www.bpd-naturalresources.org)).

One of these partnerships involved a collaboration to improve health care facilities for a rural community of 12,000 people close to a gold mining project in Venezuela. Exploration activities were being conducted in an area in which artisanal mining had been significant by Minera Las Cristinas, CA (MINCA) that, at the time, was owned 70% by Placer Dome and 30% by a Venezuelan state-owned enterprise. Tensions that arose from the perception that large-scale investors were being encouraged at the expense of local artisanal miners were exacerbated by MINCA’s decision in 1999 to suspend operations based on a fall in gold prices.

Around the same time, the company began a process of consultation which led to the execution in March 2000 of a Memorandum of Understanding involving eighteen stakeholder groups for collaboration in building a community health centre, improving access to potable water and providing health training. MINCA provided some funds and expertise for construction. Various government institutions at regional and national level provided money and facilities within their areas of competence; a US NGO provided medical equipment; and all parties contributed labour. The partnership was assessed to have been successful in terms of “business benefits, community development impact and good governance.” MINCA estimated, *inter alia*, that it saved on security costs arising from improved relations with the community. Improved access to health care for the community was an obvious benefit. The creation of a forum for dialogue between government health institutions and community groups is reported to have developed from the collaboration.

## Equity participation

Ownership of equity interest in mining projects by the state, local mining, community or individual citizens of the host nation is one vehicle for participating in the benefits of mining. This could be by way of free equity

interest in mineral operations, in which case it has to be considered as part of the overall fiscal package; it would be a minority interest in the shareholding of the project company.

In cases where the Government is to pay for its shareholding and where the operating company is not publicly quoted, determining what a fair price is could lead to disagreements. Even if a valuation method is agreed upon, there could be disputes on the parameters to be used in the relevant formulae. For example, if a discounted cash flow method is chosen, the discount rate and the mineral prices, which are used to project future cash flows, may not all be agreed upon. The matter may then have to be settled by arbitration, expert determination or other dispute resolution mechanisms.

It is often argued that paying for shares in mining projects subjects government's monies to unnecessary risk. Many commentators have also observed that host government shareholding in mining companies, even if free, does not offer significant benefit where dividends are not regularly declared. A slightly higher royalty rate, for example, in substitution for free shareholding would, in that case, be far better where royalty liabilities are computed on the basis of reasonably transparent criteria less easily subject to manipulation.

Community equity participation in mineral projects is not very common in the developing world. Papua New Guinea (PNG), however, has a number of such projects. Among them are gold mining projects in the district of Porgera, where the community (comprising local landowners) has a 2.5% shareholding in the operating company, which is majority-owned by Placer Dome; and on the Island of Lihir, where the community holds 6.7% of the shares in an operating company owned by Rio Tinto, Newmont and others. The significant points to note here are that (a) shares allocated to the communities were ceded to them by the central government out of the latter's shareholding option; (b) the shares were not free; and (c) payment for them was provided by a loan from a central Government agency to be repaid from dividends. Actually, the communities hold their shares through a state mineral agency, the Mineral Resources Development Corporation (MRDC). The structure of the communities' shareholding has gone through many changes since 1997, but small holdings still remain.

Those who have closely studied these two cases of equity participation have concluded that investments made by the communities have yielded only modest returns compared to royalty payments and wages, which have been far greater. (See Banks, 2003). To the extent that shareholding leads the community's representatives to access, participate in and develop the culture of business decision-making, it may serve a purpose beyond immediate financial gain. On the other hand, the danger exists that such shareholding can degenerate into mere tokenism, which contributes little significant value to the community. In any case, whatever concessions or payments are made for such equity participation need to be evaluated in other than sentimental terms.

Wholly state-owned mining projects are becoming rather rare in Africa and indeed in most of the developing world. It would appear that the view is taking hold that most of what the state wishes to achieve by significant ownership in mining projects can be achieved through the regulatory process or policy instruments.

This view is based on the assumption that the state has no difficulty attracting private investors, that it is unable to raise the required finances and does not have people with the requisite management and technical skills. If, on the other hand a state possesses the required resources, a profitable and purely commercial operation can be achieved.

Codelco, the Chilean state-mining copper company remained state-owned even during the Pinochet regime, when most state-owned enterprises were privatised. The company not only operated profitably, but was also

able to embark on major expansion projects involving huge investments during the 1980s. Codelco's success has been attributed to the near-commercial autonomy that it enjoyed for many years, unlike most state-owned enterprises, which do experience high levels of government interference often resulting in unprofitable commercial decisions being taken. (See Auty, 1993).

Debswana, the diamond mining company jointly owned by De Beers and the Botswana Government (fifty per cent shareholding each) appears to be a successful case of substantial state shareholding in a mining enterprise. (See Solomon, 2000).

## **Black economic empowerment and the Royal Bafokeng Nation**

The community of Bafokeng – the Royal Bafokeng Nation (RBN) – in the North West province of South Africa, with a population of some 300,000, provides an example of a community which appears to have done exceedingly well with its participation in mining operations conducted on its land.

RBN owns land with very good prospects for platinum group metals, and collects royalties from two large platinum mining companies owned by Impala Platinum and Anglo Platinum. RBN, through its corporate vehicle, Royal Bafokeng Resources (RBR), also has joint venture mining projects with these companies, and derives substantial revenues from them. RBR has had negotiations with Impala Platinum with the aim of converting its royalty rights into equity holding in the company. It has been reported that these negotiations have not yet succeeded. Impala may probably be waiting to see how the new royalty regime, which the central government intends to introduce nationwide, would be applied to its operations – whether or not the central government would be prepared to take account of RBN's royalty rights in applying its own regime.

For an indication of how RBN has benefited from mining activities on its land we may refer to pronouncements by officials of the nation. In a presentation at the Eastern and Southern Africa Sub-Regional Workshop Preparatory Meeting in November 2003 in Lusaka, Zambia, under the theme “Traditional Leadership in the Age of Democracy” a representative of RBN gave a long list of projects that have so far been financed with the Nation's mining revenues. They include road networks costing 520 million Rands (\$US 80 million); water systems at a cost of 300 million Rands, (\$ US 46 million); and educational institutions financed with a total of about 170 million Rands (\$ US 26 million). This is certainly much more than all the benefits that most mining communities in Africa have gained even after many years of mining activities in these communities. And RBN is poised to gain even more under the recently introduced Black Economic Empowerment (BEE) legislation.

This recently introduced policy in the Republic of South Africa deserves special mention. In October 2002, the Government of South Africa announced its plans for transferring 26% of the country's existing mining assets to black-owned interests over a 10-year period, with an interim 15% achievement within 5 years.

The plans were contained in what has come to be known as the Black Economic Empowerment Mining Charter, formerly the Broad Based Socio-Economic Empowerment Charter, which had been negotiated among the Government, owners of mines and trade unions. The private sector had also undertaken to assist in funding transfers to black companies. In addition to ownership, the charter also spells out a number of other areas where benefits from mining would be made more available to the black population within specified periods. These include human resource development, employment at the management level, and procurement of goods and services from black companies.

Performance of existing mining companies with regard to the undertakings made by them under the Charter is to be measured by means of a “scorecard”, which awards different levels of credit for various actions. The score-

### Box 7

#### The Broad-Based Socio-Economic Empowerment Charter and Scorecard

[www.dme.gov.za/minerals/pdf/scorecard.pdf](http://www.dme.gov.za/minerals/pdf/scorecard.pdf)

The Charter and Scorecard, published as a part of the regulations under the South African Mineral and Petroleum Resources Development Act, 2002, became effective on May 1, 2004. This date therefore marks the beginning of the five-year time horizon for companies to comply with the requirements of the Charter and the accompanying Scorecard, in order to be able to convert their old order mining rights to new order rights.

The Scorecard consists of nine “pillars”, each prescribing certain performance standards as summarized in the table below:

	Pillar	Requirements
1	Human Resources Development	Workplace skills audit and plans for all operations; Individual career paths and skills development plans by January 2007; Advancement of Mining-related subjects in Schools; 500 new scholarships and learnership by March 2005; Opportunities for literacy & numeracy offered to all employees; Identification of talent pool and fast tracking; Mentoring, coaching and empowerment;
2	Housing, living conditions and nutrition	a) Significantly improve living conditions, providing options and promote ownership b) Achieve national nutrition standards
3	Employment equity	a) 40% in management by May 2009 b) Aspire to 10% women by May 2009
4	Migrant labour	a) Non-discrimination
5	Procurement	Over 3 to 5 years to progress procurement from BEE supplies;
6	Mine community & rural development	a) Support host and labour source communities with development;
7	Beneficiation	a) Discretionary involvement in beneficiation as offset against ownership targets;
8	Ownership	a) 15% five-year target b) 26% ten-year target
9	Reporting	a) Audited reporting against targets in Annual Report

Even though most of the socio-economic problems that the BEE seeks to address may have had their roots in the peculiar system of apartheid, they nevertheless have similarities with the problems associated with the mostly foreign-dominated mining industry in other parts of Africa, especially those southern African countries in which blacks have been disadvantaged as against a settler community.

card also provides that where black participation has been in excess of a set target in one area, such excess may be used to offset shortfalls in other areas of operations.

Mining companies must meet the provisions of the scorecard within a five-year period to be assured of mineral rights tenure.

Some of the most important objectives of BEE, especially the eventual significant black ownership in companies, would, in practice, have been very difficult to achieve if black entrepreneurs were not provided financial assistance to fund transactions. The Industrial Development Corporation (IDC) and the New African Mining Fund (NAMF), both of South Africa, as well as the International Finance Corporation (IFC) of the World Bank, have provided such assistance and indicated willingness to do so.



# Integrating Mining into the National Economy

In most African countries, mining projects depend on inputs from developed countries for their set-up and operations. Almost all equipment, machinery and spare parts, and most consumable materials, as well as high-cost expert labour, have to be imported. Funding for these items (especially before start-up), whether in the form of equity capital or loans, is derived from outside the countries. Servicing of these loans, repayment of capital (dividend payments) and payments to expert foreign labour result in only a relatively small amount of revenues from mining being retained in the host countries. The share of mining revenues retained in the country consists of royalties, corporate and dividend taxes, wages and salaries of local employees, sales and value added taxes, import duties, land and other property rentals, and property rates. The low retention of the benefits from mining in developing countries has led a number of commentators to question the wisdom of promoting mining in developing countries given its considerable environmental and social costs.

Promotion of linkages between mining and other sectors of the economy of host countries maximises value accruing to the local economy. It increases the proportion of mining revenues that is retained in the country and enhances income and employment multiplier effects. This may be achieved in a number of ways, including offering incentives to miners to embark on local value addition to mine product and providing incentives to both local and foreign investors to invest locally in businesses that produce goods and services required by the mining industry.

Training of local employees to eventually replace highly skilled foreign labour (“localization”) is an important element in the effort to improve the skills base and at the same time retain a higher proportion of mining revenues. In order to get mining companies to take the replacement of foreign employees with well-trained local ones seriously, regulatory authorities in host countries do sign localization agreements with the companies. Immigration authorities are empowered to monitor the agreements, and the granting of the companies’ applications for work permits for their foreign employees may be affected by the performance of the agreements. The exercise of such powers in a coherent, objective and transparent manner can contribute to the localisation process. Mining companies usually attract expatriate employees to work on projects in developing countries by agreeing to absorb a substantial part of the income tax that would be payable by these employees in the host country. To minimize this financial burden, the companies often negotiate effective tax rates for their expatriate employees, which are lower than would otherwise have been applicable. While the need for foreign expertise may lead to granting this request, limiting its duration may be used as an instrument for encouraging localization.

The private sector in most developing mining countries is not yet strong enough to undertake, on its own, the establishment of ventures whose goal would be to provide significant levels of goods and services to their country’s mining sector within a certain period. A deliberate and well-organized programme of assistance to local entrepreneurs by the governments of these countries is required to realize that goal.

The main problem for local entrepreneurs is that they are not able to raise the high amounts of initial capital required to finance these ventures. For most African countries, providing assistance to indigenous business people by way of direct grants or soft loans would present an enormous challenge given the pressure on government funds to address more immediate needs. However, the supply of significant amounts of goods and services to mining companies by indigenous businesses is so central in the effort to fully integrate mining into the local economy that a policy to institute such assistance is worth considering. To prevent abuse or misuse during

implementation of any such programme of assistance, close monitoring by the appropriate state institutions (government auditors, etc.) and transparency are vital. Government could also assist by offering incentives such as generous tax and duty exemptions, which would raise the viability of ventures, thus allowing financing to be obtained more easily.

Where the government receives economic aid for the mining sector from bilateral or multilateral sources, part of the funds may be used for such assistance. An example is the programme of assistance organized under the Mineral Development Fund of Namibia. Established in 1996 by an Act of Parliament, the Fund is financed with interests and repayments of loans by persons to whom the Government has on-lent soft loans granted by the European Union to the Government of Namibia for the mining sector.

The Fund finances a wide variety of mining-related projects – from small- and medium-scale mining projects to gemstone cutting and polishing. Thus the Fund makes it possible for Namibian entrepreneurs to participate more fully in the minerals sector of the economy. Financing more down stream projects such as further processing of mineral products also ensures that greater profits from mining remain in Namibia.

Multilateral arrangements such as those of the African Project Development Facility (APDF) of the World Bank Group's Small and Medium Enterprise Department and the European Union's Centre for the Development of Enterprise (CDE), offer funding for and various forms of technical support which could benefit the development of local industry.

Beneficiation of mineral products, i.e the further processing of mine output into higher value products, is one of the most important mineral activities that a developing mining country would like to see take place within its borders. If based on proper feasibility and market studies, beneficiation ensures more local employment and almost always results in greater profits for investors and therefore more taxes for the government. The impact of beneficiation on local employment and other linkages to the economy has led some governments to consider putting an obligation on companies to beneficiate, and to offer to reward them if they do.

Mineral beneficiation remains a topical issue in Africa where, despite centuries of mining activities, the processing sector remains in its infancy. Most African countries have spoken about the need for further mineral beneficiation. This realisation is demonstrated by the identification of beneficiation as one of the core areas under the African Mining Partnership (AMP). In South Africa, the Government has indicated that it would soon introduce a bill – the Beneficiation Bill – which will impose obligations on companies to beneficiate (to a certain extent) specific proportions of their mine output. Some mineral products (zinc, manganese, ore, chrome, bauxite) lend themselves more easily to beneficiation than others (precious metals). It is not surprising therefore that some people advocate promoting the exploration of minerals, such as bauxite over gold, for example.

Another policy measure which countries may use to promote greater integration of mining into its general economy is through foreign exchange control. Foreign mining companies often consider such a policy a disincentive to investment. They would like to retain all their export revenues in offshore accounts, and repatriate to the local economy only to the extent that they consider necessary to fund their local costs. However, rather than grant complete exemption from exchange control, authorities in the host country could institute a policy requiring the companies to justify the proportion of their gross revenues, which they would need to retain offshore to pay for their foreign costs and obligations. These would normally include costs of replacement equipment; consumables and spares; expatriate labour; interest and loan repayments; dividends to foreign shareholders; and

costs of certain services. The details of the part of the justification relating to consumables and spares, expatriate labour and services could then be examined carefully and approval given to enable the procurement of only those items which cannot be obtained locally. This would encourage the company to procure greater amounts of local goods and services for their operations, thus reducing the isolation of mining operations from the economy of the country. The approval may be reviewed periodically. The policy also has the desirable effect of giving the country more access to foreign currency from mining.

Where exemption from payment of import duties is generally granted to mining companies, excepting goods which can be obtained locally from that concession could achieve the same effect.

Compared to the mining industry in other African countries, South Africa's mining sector is very well integrated into the general economy. Historically, income from mining has been used to finance other sectors of the economy. The big mining houses – Anglo-American, Gold Fields, and the predecessors of some of the new companies – have, besides mining, owned many other businesses such as banks, construction companies, and even vineyards – all financed with mining income.

South Africa has an impressive array of providers of goods, services and technology to the mining industry. Drilling equipment, recovery plants, explosives, chemicals, engineering design, extraction processes, and so on, are all supplied by South African companies. In fact a number of technological processes used worldwide in the mining industry have been pioneered in South Africa, e.g. BIOX process, using bacteria to assist in gold extraction. Training of engineers and technicians who work in all these areas is also done in institutions based in the country.

Most of the benefits from mining can therefore truly be said to be retained in the country. As stated earlier, the aim of the South African Government is to ensure more equitable distribution of the benefits among its people, hence the Black Economic Empowerment initiative.



# Policy Implications

The most fundamental lesson from the experiences of mining operations in developing countries over the last two decades is that a stable and profitable project requires consideration of much more than the economic viability of a mineral deposit. Though that remains central, competent project appraisal (both by sponsors and regulators) requires early incorporation of environmental and social impact analysis. Strengthening the capacity of governmental institutions to engage in such integrated assessment is a major challenge. For the mining industry, the task is to fashion the instruments required to implement the re-orientation of corporate culture called for by the new approach.

While enhanced environmental obligations have become a standard feature of the principal mining regimes in Africa, work remains to be done to make their formulation more precise. The establishment of environmental protection or management institutions has also become standard in countries with significant mining activity. The actual resources available to carry out the regulatory mandate need to match the expectations generated by the changes in law. Furthermore, the relationship between newly created institutions with a primarily environmental focus, on one hand, and older existing institutions, which have traditionally regulated mining, can be reasonably arranged in different ways in the concrete context of particular countries. However, institutional relationships should aim at giving effect to the new orientation of mining policy rather than pay lip service while undermining it.

Public participation procedures can be found in the environmental assessment aspects of African mining regimes. However, measured against the model of the Aarhus Convention, most of them are deficient in not requiring participation in the early stages of project consideration or in policy formulation. Indeed, impact assessment of policy measures is not well developed. Peru's regulations setting out detailed procedures for consultation represent an advance, which could be adapted by African countries. The practical realisation/implementation of participation rights/obligations calls for much detailed work in identifying elements of the affected and interested public and in managing consultation and decision-making processes. The formulation of guidelines and indicators by or under the sponsorship of the World Bank Group and the International Council for Mining and Metals provides helpful standards for developing effective processes. In this context, the barriers arising from deep-seated authoritarian aspects of dominant culture can only be overcome through sustained commitment.

Access to information is recognised as an important pre-condition for effective public participation. South Africa's set of laws elaborating rights to information and establishing mechanisms for implementation offer an example in relation to which the state of the right to information elsewhere in Africa can be assessed.

With regard to the allocation of benefits from mining, a concern to ensure that a reasonable share goes to those communities close to and disproportionately affected by a mining operation has become an important part of decision-making. This is additional to the traditional focus of attention on allocation as between project sponsors, and the host country, represented by central government. Government revenue-sharing formulae, tri-sector partnerships as well as impact and benefit agreements (IBAs) with local communities are instruments emanating from the concern about enhancing benefits to affected communities. Particular care needs to be taken with IBAs given the limitations on the capacity of these communities to engage in meaningful negotiations. Training in management of revenues could be part of the assistance provided to communities.

Transparency and efficiency in the management of revenue paid to various governmental authorities has become an important part of the mineral policy agenda. Mechanisms for enhancing these are still in the early stages of implementation but have significant potential for improving the public benefit in many resource-rich African countries.

One of the mechanisms by which host countries have, in the past, sought to capture mineral rent, has been through the setting up of state mining enterprises. Although no longer a preferred instrument, some still exist. In many countries, they have been privatised or dismantled. The decision as to what to do in any particular instance must be made in the specific context, on the basis of the sort of criteria we have indicated in this paper rather than simply dogmatically or as a matter of following the trend.

More common in recent regimes has been the taking of a minority interest by the state or a community in a mining project. Sometimes, such interest is paid for either up front or from dividends when declared. In other instances, no direct payment is made and the allocation is simply part of the overall division of benefits. Here again, it is necessary to concretely assess whether equity participation is merely symbolism (sometimes an expensive one) or if it yields meaningful benefits. In particular, such participation ought to be compared with other fiscal instruments such as royalties.

The integration of mining into national and regional economies remains one of the biggest challenges of mining policy for most of Africa. It requires long-term planning and investment strategies, which include schemes for financing local ventures to improve linkages between mining and the rest of the economy, fiscal measures which promote the procurement of local goods and services and the encouragement of local processing of minerals.

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