



**AN ASSESSMENT OF THE NATIONAL MINING LEGAL  
FRAMEWORKS AND POLICIES OF SADC COUNTRIES  
AGAINST THE AFRICA MINING VISION**

**(CLUSTER 1: MINING REVENUES AND MINERAL RENTS MANAGEMENT)**



**THE CASE OF SOUTH AFRICA**

## ABOUT AFRODAD

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### VISION

A prosperous Africa based on an equitable and sustainable development.

### MISSION

To contribute to Africa's inclusive economic growth and sustainable development through influencing policy change on debt management and development finance anchored on a right based approach.

### AFRODAD OVERALL STRATEGIC GOAL

The overall goal of AFRODAD is 'to influence African Governments to institute and implement policies and practices for sustainable development and eradication of poverty'.

### THEMATIC FOCUS AREA 1: DOMESTIC RESOURCE MOBILISATION

Thematic Goal: To contribute to the development and implementation of transparent, accountable and efficient mechanisms for mobilization and utilization of domestic resources in Africa.

### THEMATIC FOCUS AREA 2: DEBT MANAGEMENT

Thematic Goal: To contribute to the development and implementation of sustainable debt policies and practices in Africa.

### THEMATIC FOCUS AREA 3: INTERNATIONAL PUBLIC FINANCE

Thematic Goal: To influence the quality, impact and effectiveness of international public finance, in line with the agreed development cooperation effectiveness principles.

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### THE CASE OF SOUTH AFRICA

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# ACRONYMS

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AMDC	African Minerals Development Centre
AMV	Africa Mining Vision
AU	African Union
BIT	Bilateral Investment Treaty
CSR	Corporate Social Responsibility
DTA	Double Taxation Agreement
DTC	Davis Tax Committee
EI-TAF	Extractive Industries-Technical Advisory Facility
EITI	Extractive Industries Transparency Initiative
GDP	Gross Domestic Product
IFF	Illicit Financial Flows
MPRDA	Mineral and Petroleum Resources Development Act
MPRRA	Mineral and Petroleum Resources Royalty Act
MPRRAA	Mineral and Petroleum Resources Royalty Administration Act
NGO	Non-Governmental Organisation
RRT	Resource Rent Tax
SADC	Southern African Development Community
SARS	South African Revenue Service
SIMS	State Intervention in the Mineral Sector
SLP	Social and Labour Plan
SWF	Sovereign Wealth Fund
SWFI	Sovereign Wealth Funds Institute

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## THE CASE STUDY OF SOUTH AFRICA



This report is an assessment of the extent to which the mining policies and legal frameworks of South Africa are in line with the aspirations of the 2009 adopted Africa Mining Vision (AMV), whose goal is to promote “transparent, equitable and optimal exploitation of mineral resources to underpin broad-based sustainable growth and socio-economic development”. This national study contributes to a broader regional study focusing on eight SADC countries, i.e. Angola, Botswana, Malawi, Mozambique, South Africa, Tanzania, Zambia and Zimbabwe. Given the significant role of the mining sector in the economies of these countries, particularly mining exports and mining revenue contributions to total government tax revenue, the assessment was solely focused on the fiscal issues of mining as guided by the AMV Action Plan Cluster One on Mining Revenues and Mineral Rents Management.

This cluster aims “to create a sustainable and well-governed mining sector that effectively garners and deploys resource rents”. It identifies a variety of activities and monitoring indicators for promoting two expected outcomes namely an enhanced share of mineral revenue accruing to African mining countries and improved management and use of mineral revenue. It is against these activities and/ or monitoring indicators that the mining policies and legal frameworks of South Africa are evaluated in this study.

The study mainly used a qualitative analysis approach to address the objectives set out in the Terms of Reference. The main findings of the assessment for South Africa are summarised below.

South Africa generally has in place the structures and laws meant to enhance the share of mineral revenue accruing to the state. These include among others the 2008 Mineral and Petroleum Resources Royalty Act (MPRRA) and Mineral and Petroleum Resources Royalty (Administration) Act, No. 29 of 2008 (MPRRAA), with a mineral royalty formula that is progressive in nature and ensures compensation to the state regardless of whether a mine is profitable or not.

All revenues from mineral taxation flow to a National Revenue Fund from which the National Treasury allocates and distributes between the national government and the country’s nine provinces and 278 municipalities through an equitable share scheme as stipulated under the Division of Revenue Act. However, in keeping with the principles of the social licence to operate, the Mineral and Petroleum Resources Development Act (MPRDA) requires mining rights holders to develop social labour plans (SLPs) to deliver projects that meet the needs of their mining and labour sending communities, with special emphasis on infrastructure development. Furthermore, the 2016 review of the Mining Charter now specifically requires mining companies to annually contribute a minimum of 1 percent of annual turnover towards local community development and labour sending areas.

South Africa has also signed DTAs with the host countries of some of its major multinational mining companies such as the UK and Australia who are the host countries of Anglo American, BHP Billiton and RioTinto. The DTAs provide that ‘income from real property (which includes the right to explore for or exploit, mineral, oil or gas deposits, quarries or other places of extraction or exploitation of natural resources) may be taxed in South Africa where they are situated.

This is in line with the AMV requirement that the terms of double taxation agreements and BITs with host countries of mining companies be reviewed in such a way that minerals should be taxed at the point of extraction.

However, there appears to be lack of effective enforcement and implementation of some of the country's noble mining laws and policies. This is evident from the poor or lack of implementation of set targets on mine community development (MCD) and or social labour plans by mining rights holders as reflected in the reports on the assessment of the Mining Charter by the Department of Mineral Resources. Consequently, communities surrounding mining operations continue to live in abject poverty in the country. Furthermore, though the country enacted transfer pricing regulations in 1995 in a bid to address the high level of tax avoidance, much of it undertaken by means of sophisticated financing structures, transfer pricing still appears to be a significant challenge given the high levels of IFFs from the country.

South Africa has no Sovereign Wealth Fund which the AMV identifies as one of the strategies for investing windfall earnings and mineral rents. There also appears to be no specific entity responsible for auditing production and export of minerals, which might also be one of the factors underlying the high illicit financial flows from the country.

## INTRODUCTION AND BACKGROUND

Given the huge mineral resource endowment of Sub-Saharan Africa, it is undisputable that revenue mobilisation from the mining sector is key in the ongoing domestic resource mobilisation efforts aimed at making the continent more self-reliant financing its own development. However, there are concerns that the legal and regulatory frameworks governing the exploitation and management of mineral resources in Sub-Saharan Africa are still poor and weak. These are mainly characterised by lack of independent enforcement and oversight bodies, lack of transparency which results in poorly negotiated mineral concessions with fiscal terms that are sub-optimal and do not maximise the revenues from mineral investments, weak accountability of resource revenue use, inequitable distribution of mineral revenue and neglect of local authorities and communities living near mining areas.

Substantial portions of mining revenue and benefits tend to accrue to privately owned foreign companies and a small subsection of local elites at the expense of broad based benefits such as employment creation, human and physical development, and overall economic transformation. Inevitably, resource wealth has in many cases resulted in increased income inequality and economic distortions, and even triggered social and political instability, a situation that has been widely described as the ‘resource curse’.<sup>1</sup>

Recognising all these gaps and the need to improve mineral resource policies, legal, regulatory and administrative frameworks so as to maximise the development outcomes of mineral resources exploitation, in 2009, African Union Heads of States and Governments adopted the Africa Mining Vision (AMV) whose goal is to promote **“transparent, equitable and optimal exploitation of mineral resources to underpin broad-based sustainable growth and socio-economic development”**.

To enable the attainment of the AMV goal, the African Union Heads of States and governments requested the AU Ministers in charge of mineral resources development to develop a concrete action plan for the realisation of the AMV. This culminated into an AMV Action Plan that was approved in 2011. The Action Plan comprises nine programme clusters of activities and indicators constructed around the following key pillars of the vision: Mining Revenues and Mineral Rents Management; Geological and Mining Information Systems; Building Human and Institutional Capacities; Artisanal and Small Scale Mining; Mineral Sector Governance; Research and Development; Environmental and Social issues; Linkages and Diversification; and Mobilising Mining and Infrastructure Investment

### 1.1 Cluster 1 - Mining Revenues and Mineral Rents Management

Given that it is now seven years since the adoption of the AMV in 2009, the need to assess the progress that African countries have made in aligning their mining policies and legal frameworks to the AMV is of necessity. This study attempts to do this evaluation by focusing mainly on the “Mining Revenues and Mineral Rents Management” cluster whose main goal is “to create a sustainable and well-governed mining sector that effectively garners and deploys resource rents”. This goal was driven by the vital need to address observed fiscal regime challenges along the entire mineral value chain such as lack of transparent and competitive allocation of concessions for known mineral assets, the spending of mineral revenues disproportionately on current consumption which compromises inter-generational equity, inequitable distribution of mineral revenue and neglect of local authorities and communities living near mining areas and widespread tax evasion and avoidance schemes like transfer pricing (including over-invoicing of inputs costs).

1. Collier, Paul. 2003. ‘Natural Resources, Development and Conflict: Channels of Causation and Policy Interventions’. Washington D.C.: The World Bank



The Mining Revenue and Mineral Rents Management cluster has two main expected accomplishments namely:

1. Enhanced share of mineral revenue accruing to African mining countries; and
2. Improved management and use of mineral revenue.

As shown in Table 1 below, each of the two expected accomplishments has a number of activities and indicators identified for tracking the achievement of the objectives and outcomes respectively. It is against these activities and indicators that the mining policies and legal frameworks of the four selected SADC countries will be assessed so as to determine the extent to which they are in line with the aspirations of the AMV.

**Table 1: Mining Revenues and Mineral Rents Management Cluster – Expected Accomplishments, Activities and Monitoring Indicators.**

Expected Accomplishment	Activities	Time Frame	Monitoring Indicators	Responsible Bodies and Main Actors	
Enhanced share of mineral revenue accruing to African mining countries	At national level				
	<ul style="list-style-type: none"> <li>Improve national capacity to physically audit mineral production and exports;</li> </ul>	ST	<ul style="list-style-type: none"> <li>Physical audit systems in place and implemented with trained inspectors;</li> </ul>	MS	
	<ul style="list-style-type: none"> <li>Review mineral regimes in terms of optimising revenues;</li> </ul>	ST	<ul style="list-style-type: none"> <li>Review of mineral regimes undertaken;</li> </ul>	WB	
	<ul style="list-style-type: none"> <li>Build capacity and enhance skills of officials in negotiating fiscal issues and effectively monitoring compliance with taxation laws;</li> </ul>	ST-MT-LT	<ul style="list-style-type: none"> <li>Level of improvement in fiscal revenue collected by African mining countries;</li> </ul>	NGOs	
	<ul style="list-style-type: none"> <li>Negotiate or renegotiate contracts to optimize revenues and to ensure fiscal space and responsiveness to windfalls;</li> </ul>	ST-MT	<ul style="list-style-type: none"> <li>Increase in numbers of policy makers and other stakeholders participating in capacity building initiatives;</li> </ul>	CSOs	
	<ul style="list-style-type: none"> <li>Develop systems to evaluate components of tax regimes for leakages, losses and tax avoidance and evasion (e.g. transfer pricing);</li> </ul>	ST-MT	<ul style="list-style-type: none"> <li>Degree of improvement in the design of fiscal terms;</li> </ul>	Bilateral	
	<ul style="list-style-type: none"> <li>Review terms of double taxation agreements and BITs with host countries of mining companies including the principle that minerals should be taxed at the point of extraction; and</li> </ul>	ST-MT	<ul style="list-style-type: none"> <li>Extent to which tax leakages are reduced by evaluation systems as determined by independent audits of tax compliance;</li> </ul>	AfDB	
	<ul style="list-style-type: none"> <li>Review terms of double taxation agreements and BITs with host countries of mining companies including the principle that minerals should be taxed at the point of extraction; and</li> </ul>	ST	<ul style="list-style-type: none"> <li>Number of double taxation agreements signed and implemented by member states; and</li> </ul>	ECA	
	<ul style="list-style-type: none"> <li>Build capacity &amp; systems to auction mineral rights where applicable.</li> </ul>	ST	<ul style="list-style-type: none"> <li>Extent to which competitive and transparent mineral concession systems are implemented.</li> </ul>		
	At sub regional and regional levels				
	<ul style="list-style-type: none"> <li>Review the current fiscal environment in African mining countries to develop guidelines &amp; standards for optimizing revenue (e.g. tax &amp; dividends) packages in a manner that does not discourage mining investment;</li> </ul>	ST	<ul style="list-style-type: none"> <li>Guidelines, standards and toolkits completed and distributed to RECs &amp; member states;</li> </ul>		
	<ul style="list-style-type: none"> <li>Develop mineral taxation guidelines for implementation at REC and national levels; and</li> </ul>	ST	<ul style="list-style-type: none"> <li>Degree to which guidelines are used by members states;</li> </ul>		
	<ul style="list-style-type: none"> <li>Develop typical financial models for mineral projects for member states and run training workshops at REC level.</li> </ul>	ST	<ul style="list-style-type: none"> <li>Guidelines, standards and toolkits completed and distributed to RECs and member states;</li> <li>Degree to which guidelines are used by members states; and</li> <li>Number of financing models that are developed and used by member states.</li> </ul>		
	At national level				
<ul style="list-style-type: none"> <li>Explore strategies for investing windfall earnings and mineral rent into sovereign wealth funds including stabilization funds and infrastructure funds;</li> </ul>	ST				
<ul style="list-style-type: none"> <li>Develop rent distribution systems for allocating part of mineral revenue to communities near mining areas and local authorities;</li> </ul>	ST	<ul style="list-style-type: none"> <li>Number of SWFs established by African Mining countries;</li> <li>Degree to which local</li> </ul>			

Table 1 Continued...

Expected Accomplishment	Activities	Time Frame	Monitoring Indicators	Responsible Bodies and Main Actors
Improved management and use of mineral revenue	<ul style="list-style-type: none"> <li>• Develop mechanisms to facilitate local communities access to jobs, education, transport infrastructure, health services, water and sanitation;</li> <li>• Develop the capacity of local communities to negotiate partnership agreements; and</li> <li>• Develop systems for strengthening capacities for national and sub-national bodies for revenue management.</li> <li>• At sub regional and regional levels</li> <li>• Compile best practice guidelines on mineral revenue management and deployment for implementation at the REC and national levels</li> </ul>	<p>ST-MT MT MT</p>	<ul style="list-style-type: none"> <li>• authorities and communities improve their management of mineral revenues;</li> <li>• Best practice guidelines compiled; and</li> <li>• Extent to which guidelines are used by RECs and member states</li> </ul>	

## 1.2 Snapshot of mining in SADC

The SADC region is home to a number of countries with a significant ownership of the world's major mineral resources. In terms of global reserves, over 90 percent of the platinum group of minerals (PGMs) are in South Africa and Zimbabwe, over 50 percent of diamond reserves are in Botswana, South Africa, DRC, Zimbabwe, Angola and Namibia and over 40 percent of chromite is in South Africa and Zimbabwe. Zambia and Mozambique are also known for their huge reserves of coal, with Zambia having rich deposits of copper and emeralds. Consequently, minerals together with other various commodities play a significant role in the economies of these countries.

As of 2014, mining revenue accounted for 37.4 percent of the government of Botswana's total tax revenue while mineral exports accounted for approximately 71.6 percent of total merchandise export receipts. In South Africa, mining also accounted for 26 percent and 20 percent of total merchandise exports and investment respectively. The same applies to Zimbabwe, where as of 2015, mining exports accounted for 50 percent of the total national exports. According to the 2013 and 2014 Mozambican Extractive Industries Transparency Initiative (MEITI) report, the extractive sector was the second sector that contributed most of the GDP growth in the order of 18 percent and 13 percent in 2013 and 2014 respectively.

Despite these high economic contributions, there have been concerns that the mobilisation and utilisation of proceeds from the mining sector has not translated into meaningful and tangible benefits such as poverty eradication and improved livelihoods in these countries. In this regard, the mining policies and legal frameworks for South Africa are assessed against the aspirations of the Mining Revenue and Mineral Management cluster of the AMV to determine the extent to which they are designed to effectively garner and deploy mining revenue for development purposes.

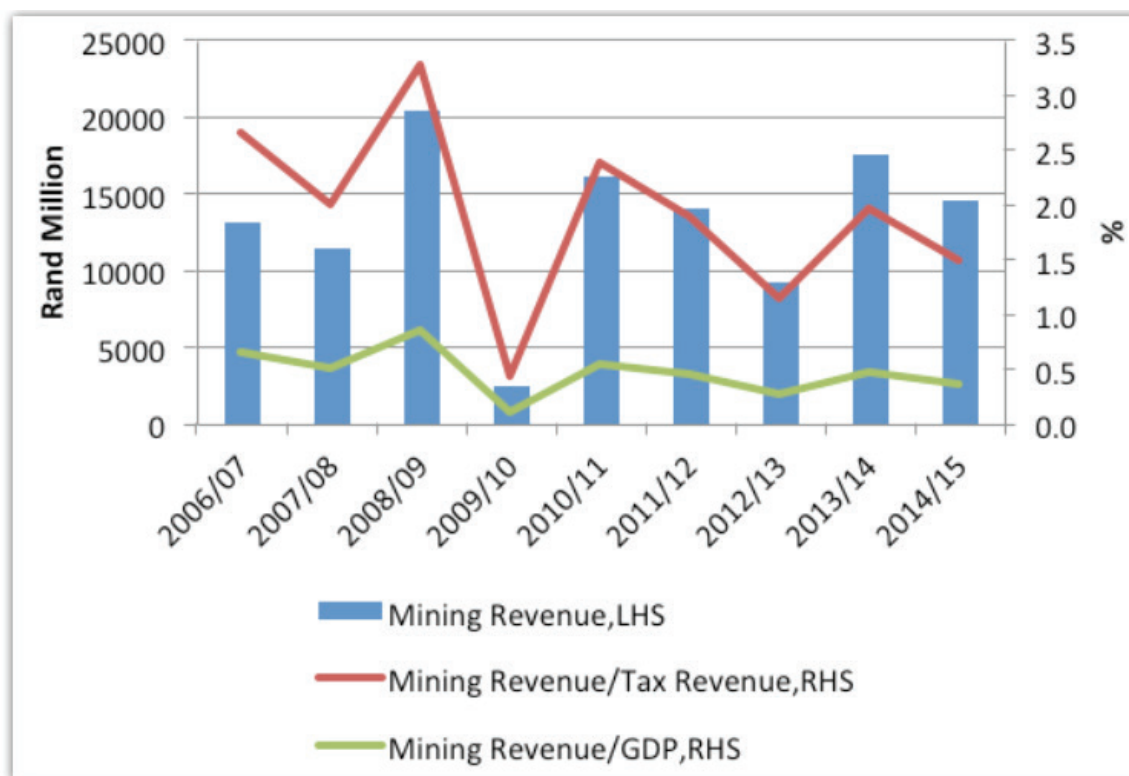
## ASSESSMENT OF THE MINING POLICIES AND LEGAL FRAMEWORKS IN SOUTH AFRICA

### 2.1 Overview of the role of the mining sector in the economy of South Africa

Adversely affected by domestic factors (drought, weakening and diminished consumer and business confidence) and external factors (low commodity prices), economic growth in South Africa has been on a downward trend, from 3 percent in 2011 to 1.2 percent in 2015. The financial services sector has been the main driver of growth as compared to such sectors as mining production and manufacturing production, which are estimated to have declined by 11.2 percent and 0.8 percent respectively, in the first quarter of 2016 (Industrial Development Corporation, 2016). The mining sector has generally been under pressure since the onset of the global financial crisis in 2008/09, largely due to the impact of weaker demand for motor vehicles (and hence for catalytic converters) on the platinum industry. Nevertheless, the mining sector has become far more diversified over the years with the platinum group metals (PGMs) sector growing in importance and making the largest contribution (45 percent) in terms of value added, followed by metal ores (36 percent) and other mining (copper, nickel and zinc) and quarrying (19 percent) as of end 2012 (Industrial Development Corporation, 2013).

Mining output as a percentage of GDP has declined from an average of 12.7 percent in the 1980s to 8 percent between 2003 and 2013 (Davis Tax Committee, 2014). As shown in Fig 1 below, mining revenue as a percentage of total tax revenue also declined from 3.3 percent in 2008/09 to 0.4 percent in 2009/10. Though it increased to 1.5 percent in 2014/15, it is below the peak of 29 percent in 1981. As a percentage of GDP, mining revenue remained below 1 percent between 2006/07 and 2014/15, with the lowest of 0.1 percent in 2009/10. Whilst its relative importance as a function of revenue collections and GDP has declined, it still remains a vital sector in terms of job creation, foreign exchange generation and balance of payments, because of the disproportionately high level of exports it achieves. It is estimated that in 2014, mining accounted for 26 percent of the country's total merchandise exports and 20 percent of investment.

**Fig 1: Evolution of Mining Revenue in South Africa, 2006/07 – 2014/15**



Source: Author’s calculations from the 2015 Davis Tax Committee Mining Report

## 2.2 Laws and Policies governing mining and management of mineral revenues in South Africa

The main laws and policies that govern mining and particularly mining revenue management in South Africa include:

### Mineral and Petroleum Resources Development Act, No. 28 of 2002 (MPRDA)

This law came into effect in 2004 and is the main legislation governing South Africa’s mining industry. It seeks to promote equitable access to the nation’s mineral and petroleum resources to all South Africans and to ensure that holders of mining and production rights contribute to the socio-economic development of the area in which they operate. The Act vests all mineral rights in the state.

### Broad Based Socio-Economic Empowerment Charter for the South African Mining Industry (the Mining Charter) of 2002

This is a principal or act that seeks to redress the plight of historically disadvantaged persons by advocating that they enter the mineral and petroleum industries and benefit from the exploitation of the nation’s mineral and petroleum resources. Similar to the MPRDA, it requires mining companies to meaningfully contribute towards community development, both in terms of size and impact, in keeping with the principle of the social licence to operate. A 2016 draft review of the charter specifically requires mining companies to annually contribute a minimum of 1 percent of annual turnover towards local community development and labour sending areas.

### **Mineral and Petroleum Resources Royalty Act, No.28 of 2008 (MPRRA)**

This Act came into effect on 1 April 2010 and governs royalty payments. It gives effect to the Mineral and Petroleum Resources Act and in particular serves to compensate the state for the permanent loss of the country's non-renewable resources. The legislation requires mining corporations to pay royalties proportional to the profitability of gross sales minus allowable cost and deductions, ranging from 0.5 percent to 7 percent.

### **Mineral and Petroleum Resources Royalty -Administration Act, No. 29 of 2008 (MPRRAA)**

This Act provides for the registration of persons liable to pay a royalty under the MPRRA as well as the administration of the royalty.

### **The Income Tax Act of 1962**

The Income Tax Act provides for a series of steps to be followed to determine a mining taxpayer's "taxable income" for any year of assessment or period of assessment.

## **2.3 Key institutions involved in the management of mining revenue in South Africa**

Institutions that have a role to play in mining, collection and management of mining revenue in South Africa include:

### **Department of Mineral Resources**

The Department of Mineral Resources is responsible for granting prospecting and mining rights. Mining rights are only granted upon the approval of a financially sound social and labour plan (SLP) detailing expenditure commitments by the mining right applicant for delivering projects that meet the needs of the mining and labour sending communities with special emphasis on infrastructure development. This is one of the MPRDA's principles for obtaining a licence to operate.

### **Ministry of Finance**

The Ministry of Finance is responsible for determining and levying mining taxes and royalties by means of an Act of Parliament in line with section 3(4) of the MPRDA. Consequently, the Minister of Finance was responsible for promulgating the Mineral and Petroleum Resources Royalty Act, 2008 as well as the Mineral and Petroleum Resources Royalty Administration Act, 2008.

### **South African Revenue Service (SARS)**

SARS is responsible for administering and collecting all mining tax revenues and royalties and deposits them in the National Revenue Fund.

### **National Treasury**

The National Treasury is responsible for allocating and distributing the nationally raised mining revenue between the national government and the country's nine provinces and 278 municipalities through an equitable share scheme as stipulated under the Division of Revenue Act. The division of revenue is done in consultations with the Financial and Fiscal Commission (FFC).

## 2.4 Assessment of the mining policies and legal frameworks of South Africa against the Mining Revenues and Mineral Rents Management Cluster

As shown above, the mining sector in South Africa is governed by several laws, policies and institutions. In this section these laws and policies will be analysed against the activities and indicators of the mining revenues and mineral rents management cluster's two expected outcomes namely:

1. Enhanced share of mineral revenue accruing to African mining countries; and
2. Improved management and use of mineral revenue.

### 2.4.1 Enhanced share of mineral Revenue

#### Review mineral regimes in terms of optimising revenues

There have been a lot of reforms in the South African mining tax system over the recent years which include:

1. The introduction of the Mineral and Petroleum Resources Royalty Act, 28 of 2008 (MPRRA) which came into effect in April 2010, to provide for the compensation to the State (as custodian) for the depletion of the country's mineral and petroleum resources).
2. The introduction of a royal rate formula under the MPRRA with the following features:
  - it marginally increases the rate of taxation depending on the profitability of the mine;
  - sets out a minimum rate of payment which has no bearing on affordability (at 0.5 percent of adjusted gross sales) and enables the fiscus to receive a minimum royalty revenue receipt in times of low profitability thus ensures compensation to the state regardless of whether the mine is profitable or not; and
  - a maximum rate for which a mine can be taxed (at 7 percent for unrefined and 5 percent for refined minerals).
3. The Mineral and Petroleum Resources Royalty (Administration) Act, 29 of 2008 (MPRRAA) was tabled together with the MPRRA to provide for the registration of persons liable to paying royalties under the Act as well as their administration.
4. Establishment the Davis Tax Committee (DTC) in 2013 with one of its key objectives being to review or consider whether the country's mining tax regime was appropriate. In its 2014 First Interim Report on Mining, the DTC made the following recommendations:
  - Gold Mining Formula - that the formula be retained in existing gold mines in order not to precipitate further decline in the labour market but be abolished for new gold mines which should be subject to the same tax rules as other mining companies.
  - Mineral Royalty – that the royalty regime be retained as it is carefully designed to achieve a strong balance towards ensuring responsiveness to different economic circumstances, capturing rents when profits are high and ensuring a measure of cover in the form of a minimum revenue stream during weak economic cycles and low commodity prices.



- Windfall Taxes - both the mineral royalty and the gold mining formulas were identified as having entrenched components of windfall taxes. As a result the Committee did not support the enactment of a dedicated windfall tax and Resource Rent Tax as new tax instruments.

In view of the above, mining sector revenue collections maintained an upward trend between 1992/93 and 2014/15. Though there was a slight decline of 4.2 percent in revenue collections between 2008/09 and 2009/10, there was 12.6 percent increase in 2010/11 and sharp increases up to 2014/15, which might have been as a result of the Mineral and Petroleum Resources Royalty Act which came into effect in April 2010.

### **Negotiate or renegotiate contracts to optimize revenues and to ensure fiscal space and responsiveness to windfalls**

Negotiated mining contracts are subject to mineral royalty payments under the Mineral and Petroleum Resources Royalty Act, 28 of 2008 (MPRRA) and the royalty formula has entrenched components of windfall taxes in it and also ensures some payment to the fiscus regardless of whether the person depleting the minerals is profitable or not.

### **Develop systems to evaluate components of tax regimes for leakages, losses and tax avoidance and evasion (e.g. transfer pricing)**

Transfer pricing issues were incorporated into law in 1995 after the Minister of Finance, in his 1995 budget speech, drew attention to the high level of tax avoidance, much of it implemented by means of sophisticated financing structures. They are dealt with by the South African Revenue Service (SARS) in accordance with section 31 of the Income Tax Act of 1962, based on the transfer pricing provisions provided by the Organisation for Economic Co-operation and Development (the OECD). Commissioner of SARS is enabled to adjust the price charged between multinational entities (where one of those entities is a tax resident) which are different to what would have been concluded at an arm's length basis between unrelated persons and to tax the entity concerned according to the adjustment, as well as raise penalties and interest.

Nevertheless, transfer pricing continues to be a challenge in South Africa. According to the Global Financial Integrity (GFI) 2004 – 2013 IFF estimates, South Africa accounted for 68 percent (US\$209 billion) of the cumulative total of US\$309.1 billion IFFs from the SADC Region, with indications from the Report of the High Level Panel on Illicit Financial Flows from Africa being that, there is a clear relationship between countries that are highly dependent on extractive industries and the incidence of IFFs.

### **Review terms of double taxation agreements and BITs with host countries of mining companies including the principle that minerals should be taxed at the point of extraction**

Some of the major mining companies that are actively engaged in the South African extractives industry are Anglo American which is a British multinational mining company with iron ore, platinum, diamond and coal mining assets; BHP Billiton which is an Anglo-Australian multinational mining company with aluminium, manganese and coal mining assets and Rio Tinto which is a British-Australia multinational mining company with coal, iron ore and titanium mining assets.<sup>2</sup>

2. <http://www.ataftax.org/en/Conferences/Documents/Willie%20Swart%20and%20Chris%20du%20Plessis%20ATAF%202016.pdf>

South Africa has double taxation agreements with the UK and Australia, which are the host countries of these mining multinationals. The DTA between South Africa and Australia came into force in December 1999 and was amended in March 2008. Article 6 of the DTA is on income from real (immovable) property and provides that 'income from real property (which includes the right to explore for or exploit, mineral, oil or gas deposits, quarries or other places of extraction or exploitation of natural resources) may be taxed in the Contracting State in which the real property is situated'. The DTA between South Africa and the UK came into force in 2002 and was amended in November 2010. Similar to Article 6 of the DTA with Australia, Article 6 of the DTA with UK also provides that 'income derived by a resident of a Contracting State from immovable property (including mineral deposits, sources and other natural resources) situated in the other Contracting State may be taxed in that other State'. In this view, the DTAs seem to be in line with the principle that minerals should be taxed at the point of extraction.

### **Build capacity & systems to auction mineral rights where applicable**

Section 9 (1) (b) of the Mineral and Petroleum Resources Development Act of 2002 (MPRDA), specifies that mining rights are to be allocated according to the first-come, first-served (FIFO) basis, where applications are considered in the order in which they are received. The Mineral and Petroleum Resources Development Amendment Bill of 2014 (MPRD-AB) proposed the deletion of section 9 of the MPRDA, and its substitution with a provision that the Minister (of Mineral Resources) may by notice in the Gazette invite applications for mining rights. There is silence on the public tender or auctioning of mineral rights in the Bill. On the other hand, there have been arguments that, by allocating mining rights to the highest bidder, the auction system would undermine efforts to encourage emerging, local firms to enter South Africa's mining industry in line with the aspirations of the MPRDA.

## **2.4.2 Improved management and use of mineral revenue**

### **Explore strategies for investing windfall earnings and mineral rent into sovereign wealth funds including stabilization funds and infrastructure funds**

South Africa currently has no Sovereign Wealth Fund though there have been recommendations from the following:

- 2010 New Growth Path framework document that identified the need for greater utilisation of the mineral resource base of the country for developmental purposes, including potentially through a SWF;
- 2012 African National Congress (ANC) commissioned State Intervention in the Mineral Sector (SIMS) report that recommended the creation of a SWF to be funded by proceeds of a resource rent tax (RRT) with the RRT receipts being ring fenced for 3 funding windows namely a fiscal stabilisation fund, regional development fund and a minerals development fund. SIMS report also makes mention of the need for a SWF Legislation accordingly.

However in 2013, the Economic Minister of Development, Ebrahim Patel, indicated that "the creation of a sovereign wealth fund was best timed with stable or rising commodity prices, thus in recognition of the market conditions characterized by the decline in commodity prices, plans for such a fund were being indefinitely postponed"<sup>3</sup>

3. <http://www.moneyweb.co.za/archive/sas-sovereign-wealth-fund-off-the-table/>

## **Develop rent distribution systems for allocating part of mineral revenue to communities near mining areas and local authorities**

In South Africa, no preferential share is attributed to mining communities on the basis of derivation. All revenues from mineral taxation flow to a National Revenue Fund from which the National Treasury allocates and distributes the nationally raised mining revenue between the national government and the country's nine provinces and 278 municipalities through an equitable share scheme as stipulated under the Division of Revenue Act in consultations with the Financial and Fiscal Commission (FFC).

In its 2014 First Interim Report on Mining for the Minister of Finance, the DTC indicated that though they had received submissions proposing that a portion of royalties collected in terms of the MPRRA and MPRRAA should be collected and appropriated directly for the benefit of mining communities, the Committee indicated that earmarking of taxes paid to the State by mining houses for the benefit of communities is contra the country's legislative design and therefore did not recommend it.

## **Develop mechanisms to facilitate local communities' access to jobs, education, transport infrastructure, health services, water and sanitation**

Both the MPRDA and the Mining Charter requires mining companies to meaningfully contribute towards community development, both in terms of size and impact, in keeping with the principles of the social licence to operate. Mining rights holders are required to develop social labour plans (SLPs) to deliver projects that meet the needs of their mining and labour sending communities, with special emphasis on infrastructure development. The 2016 draft review of the mining charter states that "consistent with international best practices, mining companies must annually contribute a minimum of 1 percent of annual turnover towards local community development and labour sending areas

## **Develop the capacity of local communities to negotiate partnership agreements**

The Mineral and Petroleum Resources Development Bill of 2013 provides that if the mining right application relates to land occupied by a community, the Minister may impose such conditions as are necessary to promote the rights and interests of the community (including conditions requiring the participation of the community).

## **Develop systems for strengthening capacities for national and sub-national bodies for revenue management**

Sub-national governments receive mining revenue from the central government through an "equitable share" transfer system and are allocated key expenditure responsibilities such as education, public order and safety, social protection and transportation. Fiscal discipline at both national and sub-national levels is promoted through the Medium Term Expenditure Frameworks (MTEF) whose objective is to incentivize the government to allocate resources to programs and projects that promote development.

## 2.5 Conclusion

South Africa generally has in place relevant mining policies and legal frameworks that are instrumental for enhancing the share of mineral revenue accruing to the state as reflected by the findings of the Davis Tax Committee's December 2014 First Interim Report on Mining for the Minister of Finance. These include among others a modern and competitive mining fiscal regime characterized by a royalty formula that is progressive in nature and ensures compensation to the state regardless of whether a mine is profitable or not. Furthermore, the Mineral and Petroleum Resources Development Act (MPRDA) requirement for mining companies to meaningfully contribute towards the development of their mining and labour sending areas (particularly their infrastructure development) through submission of social and labour plans (SLPs) as a means of obtaining a social licence to operate is commendable as it directly promotes the development of communities where mining takes place. This is further strengthened by the 2016 review of the Mining Charter which now specifically states that mining companies must annually contribute a minimum of 1 percent of their annual turnover towards local community development and labour sending areas in consistency with international best practices.

However, there appears to be lack of effective enforcement and implementation of these noble laws and policies. In their 2015 assessment of the Mining Charter, the Department of Mineral Resources report that though the MPRDA has transferred ownership of the country's mineral wealth to all people of South Africa under the custodianship of the state, communities surrounding mining operations continue to live in abject poverty. As of end 2014, only 36% of the mining right holders in the whole nation had met their set targets on mine community development (MCD). Mining right holders in the Limpopo province had attained the highest level of progress with reported performance at 73 percent, followed by Free State and Northern Cape at 67 percent and 53 percent respectively. On the other hand, the Western Cape was the worst performing province with 87 percent of the mining right holders not meeting their mining community development set targets, followed by Eastern Cape at 71 percent as well as KwaZulu-Natal and Gauteng at 70 percent each. There are also concerns that the interests of mine workers and mining communities are typically held in nebulously defined Trusts which constrain the flow of benefits to intended beneficiaries, resulting in a mining industry characterized by increasing tensions between mining right holders and both workers and host communities.

Furthermore, the high levels of illicit financial flows from the country, also reflects poorly on the country's enforcement of transfer pricing regulations which have been in place since 1995, after the Minister of Finance, in his 1995 budget speech, drew attention to the high level of tax avoidance, much of it implemented by means of sophisticated financing structures. Given the indications from the Report of the High Level Panel on Illicit Financial Flows from Africa that, there is a clear relationship between countries that are highly dependent on extractive industries and the incidence of IFFs, it is highly likely that the mining sector is a key contributor to these illicit flows. The 2004 Mining Charter set a target of 10 percent for representation of women in mining by 2009. Though overall representation of women in the mining industry was slightly above the set target at 10.5 percent by 2014, there are indications that more still needs to be done to ensure meaningful participation of women in the sector.

In this regard, the need to strengthen oversight and enforcement of mining laws and policies is highly recommended for South Africa to enable full attainment of the AMV aspirations in the country. The South African Government is also recommended to consider the establishment of a Sovereign Wealth Fund and the setting up of a minerals audit office responsible for auditing mineral production and exports in line with the AMV aspirations.

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