AFRODAD

AN ASSESSMENT OF THE NATIONAL MINING LEGAL FRAMEWORKS AND POLICIES OF EIGHT SADC COUNTRIES

ANGOLA, BOTSWANA, MALAWI, MOZAMBIQUE, SOUTH AFRICA, TANZANIA, ZAMBIA AND ZIMBABWE

REGIONAL REPORT

ABOUT AFRODAD

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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ACRONYMS

ALSF	African Legal Support Facility
AMDC	African Minerals Development Centre
AMV	Africa Mining Vision
AU	African Union
BIT	Bilateral Investment Treaty
BURS	Botswana Unified Revenue Service
CSR	Corporate Social Responsibility
DTA	Double Taxation Agreement
DTC	Davis Tax Committee
DTCB	Diamond Trading Company Botswana
EI-TAF	Extractive Industries-Technical Advisory Facility
EITI	Extractive Industries Transparency Initiative
FSDEA	Fundo Soberano de Angola
GDP	Gross Domestic Product
IEE	Indigenization and Economic Empowerment
IFF	Illicit Financial Flows
ISPL	International Senior Project Lawyers
MDA	Mining Development Agreements
MEJN	Malawi Economic Justice Network
MEM	Ministry of Energy and Minerals
MGDS	Malawi Growth and Development Strategy
MMCZ	Minerals Marketing Corporation of Zimbabwe
MMEWR	Ministry for Mineral, Energy and Water Resources
MPRDA	Mineral and Petroleum Resources Development Act
MPRRA	Mineral and Petroleum Resource Royalty Act
MPRRAA	Mineral and Petroleum Resources Royalty Administration Act
NEAP	National Environmental Action Plan
NGO	Non-Governmental Organisation
NRJN	Natural Resources Justice Network
OECD	Organisation for Economic Cooperation and Development
RRT	Resource Rent Tax
SADC	Southern African Development Community
SARS	South African Revenue Service
SBI	Sustainable Budget Index
SIMS	State Intervention in the Mineral Sector
SLP	Social and Labour Plan
STAMICO	State Mining Company
SWF	Sovereign Wealth Fund
SWFI	Sovereign Wealth Funds Institute
TCME	Tanzania Chamber of Minerals and Energy
TMAA	Tanzania Minerals Audit Agency
TRA	Tanzania Revenue Authority
ZCCM-IH	Zambia Consolidated Copper Mines Investments Holdings
ZIMRA	Zimbabwe Revenue Authority

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EXECUTIVE SUMMARY

This report is an assessment of the extent to which the mining policies and legal frameworks of SADC countries 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". The study focuses on eight selected 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 countries' mining polices and legal frameworks are evaluated in this study.

The study used a qualitative analysis approach to address the objectives set out in the Terms of Reference. The main findings of the assessment for the eight SADC countries are as follows:

Improve national capacity to physically audit mineral production and exports

Botswana, Tanzania, Zambia and Zimbabwe have been making efforts to enhance the capacity to audit mineral revenue, with Botswana championing this in the SADC region.

Botswana has established and upholds a considerably high degree of security and control over their diamond production. This has enhanced the traceability of stones from the mine to the point of export[1] which also makes it easy to audit mineral production and exports respectively.

The Botswana Precious and Semi-Precious Stones Protection Act also ensures that all mining areas, or buildings in which rough diamonds (precious stones) are dealt with have to be and are declared gazetted security areas. Access to such areas is restricted to holders of valid permits issued in terms of the Act. People and vessels entering and exiting such areas are subject to security searches. The Act also requires submission to the Minister responsible for minerals, monthly returns detailing precious stones won, recovered, received, manufactured, purchased, or imported into a precious stones protection area.

Also notable, is Tanzania's 2010 Mining Act which led to the establishment of the Tanzania Mineral Audit Agency (TMAA) to carry out solid technical audits and more rigorous tax audit exercises and enforcement. As a result, Tanzania enjoyed the doubling of mining tax revenue collected from 2011 to 2012.

Zambia has legislative frameworks that ensure that mineral production and exports are audited. The legitimacy to audit rests primarily in the President, the Auditor General and the Finance Minister. These institutions have the mandate to audit all contracts involving government or its agencies and enterprises; to audit books, records and reports of institutions in which government has an interest; to scrutinize the financial affairs of government departments and statutory corporations and every private institution that receives a government grant, subsidy or subvention in any financial year.

1. http://www.pacweb.org/Documents/diamonds_KP/2011_KP_Review_Visit_Botswana.pdf

Zimbabwe has no mineral audit body but the government once hired an international minerals auditing firm to audit mineral production and exports. The rest of the countries assessed have no specific body for auditing mineral production and exports but it is part of the many duties of the auditor general. In spite of these efforts by some of the countries assessed, all SADC countries need to improve national capacity to physically audit mineral production and exports.

Review mineral regimes in terms of optimising revenues

In terms of reviewing the mineral regimes to optimise the revenues accruing to government, all eight countries considered have made amendments to their mining regimes as part of their efforts to enhance revenue accruing to the government. Botswana already had a competitive fiscal regime garnered to maximise minerals revenue accruing to the government, even before the AMV. The country had major reviews, particularly the amendment of the Mines and Minerals Act in 1999 and the Income Tax Act in 2006.[2] Following the review of the mining law in 1999, mining revenue has maintained an upward trend until 2015.

Angola, Botswana and Malawi have legislations that support the participation of state owned companies in mining activities so as to maximise revenue. South Africa has had numerous reviews to its mining tax system over the recent years. Some of the major reforms include the Mineral and Petroleum Resources Royalty Act, 28 of 2008 (MPRRA) which came into effect in April 2010, and the Mineral and Petroleum Resources Royalty (Administration) Act, 29 of 2008 (MPRRAA) which was also tabled together with the MPRRA to provide for the registration of persons liable to paying royalties under the Act as well as their administration.

Build capacity and enhance skills of officials in negotiating fiscal issues and effectively monitoring compliance with taxation laws.

As noted in the AMV, African countries are incapacitated to effectively negotiate fiscal issues and contracts in the mining sector. This has adversely affected the resource rich countries as the TNCs who own mining companies take advantage of the poorly capacitated countries and negotiate contracts that benefit the TNCs on the expense of the host countries. Findings from this research show that most recently, Mozambique, Malawi, Zambia and Zimbabwe have made strides in building and enhancing the capacity of officials in negotiating fiscal issues and effectively monitoring compliance with tax laws.

Negotiate or renegotiate contracts to optimise revenues and to ensure fiscal space and responsiveness to windfalls

Government of Malawi in 2014 suspended oil and gas exploration activities to scrutinise and review every existing license agreement to examine the licensing procedures that were followed. This evaluation was a starting point in ensuring that the prescribed legal procedures were followed and the contracts optimise benefits to the country. There is no evidence of renegotiated contracts with mining companies in Angola, Tanzania, Zimbabwe, Botswana and Mozambique. However, Tanzania recently passed three bills allowing the government to renegotiate or dissolve mining contracts with mining companies operating in Tanzania. This was done to increase transparency in the sector and revenues accruing to the government by minimising cases of mining companies playing down the amounts they declare for exported mineral commodities.

Develop systems to evaluate components of tax regimes for leakages, losses and tax avoidance and evasion

With the exception of Malawi, countries have different systems in place to safeguard against tax leakages, losses, tax avoidance and evasion. However, the effectiveness of these systems has to be addressed. Countries such as Angola already had Order 2/03 of 28 February 2003, well before the adoption of the AMV which establishes the foreign exchange regime for holders of mineral rights.

2. Botswana Mineral Investment Promotion - 2008 http://www.mines.gov.bw/Botswana%20Mineral%20Investment%20Promotion.pdf

Mining companies are subject to tight foreign exchange restrictions which help minimise IFFs through transfer pricing and tax avoidance. The petroleum and gas sector has a different regime called the Foreign Exchange Law for the Petroleum Sector, Law No. 2/12, of 13 January 2012 which also serves the same purpose in the oil and gas sector.

In South Africa, transfer pricing issues were incorporated into law in 1995 after the Minister of Finance, in the 1995 budget speech, drew attention to the high level of tax avoidance, much of it done by means of sophisticated financing structures, but nonetheless, transfer pricing continues to be a challenge in South Africa.

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

Botswana, Malawi, Mozambique, South Africa, Tanzania, Zambia and Zimbabwe have DTAs with other countries especially mother countries of major mining companies that they host. Most of these DTAs specify that minerals and mineral proceeds are taxed in the country of extraction, and for countries such as Zimbabwe and Mozambique, even in instances where there are no DTAs, their tax laws require that minerals be taxed at source. These countries have also renegotiated some of the terms of their DTAs except for Tanzania which has not renegotiated any of its existing DTAs. Ideally and in synch with the aspirations of the AMV, 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. DTAs that embrace the afore-mentioned clause are deemed to be in line with the AMV principle that minerals should be taxed at the point of extraction.

Build capacity & systems to auction mineral rights where applicable

In all of the eight countries assessed, mineral rights are deemed property of the state whose responsibility is to oversee exploration and exploitation of mineral resources within its geography. Other companies and private investors who wish to engage in mining and mining related activities have to obtain licenses through the responsible ministry. Mineral rights are auctioned by the government ministries or entities. The manner in which mineral rights are auctioned varies from country to country, for instance in Botswana and South Africa the legislative frameworks indicate that the Minister issues mining licenses on a first come first served basis; in Mozambique the government has the legitimacy to organise a public tender of mineral rights and establishments usually through the National Institute of Mines (INM).

In South Africa, the Mineral and Petroleum Resources Development Amendment Bill of 2014 proposed the deletion of the section on mineral rights being auctioned on a first come first served basis, and proposes that the Minister may, by notice in the Gazette, invite applications for mining rights which will be awarded to the highest bidder. However, the Bill is silent on the public tender or auctioning of mineral rights. 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.

Under the AMV Action Plan, the monitoring indicator is the extent to which competitive and transparent mineral concession systems are implemented. Concerns have been raised in Botswana that commercial confidentiality regulations prohibit parliamentary committees from overseeing negotiations between the Mines Ministry and diamond mining companies, which compromises the transparent aspect.

Explore strategies for investing windfall earnings and mineral rent into sovereign wealth funds including stabilisation funds and infrastructure funds

The AMV prescribes that countries have to invest earnings from the extractive sector into SWFs and infrastructure funds. SWFs play a stabilisation role as national investment entities ensuring national financial sustainability through savings and investments for future generations. Angola and Botswana are the only two countries in SADC that have established fully functioning Sovereign Wealth Funds supported by revenues from the extractive sector. The Botswana SWF known as the Pula Fund was established in 1994 and has assets worth about US$5.7 billion whilst the Angolan Fundo Soberano de Angola (FSDEA) was established in 2012 and has assets worth US$4.6 billion. The rest of the countries assessed have not established SWFs yet but their governments have officially expressed their intent to set-up such a fund for mitigating market shocks in the resources they produce and to ensure sustainability in mineral rents and revenues. For South Africa, the 2010 New Growth Path framework and the 2012 African National Congress (ANC) commissioned State Intervention in the Mineral Sector (SIMS) report, both recommend the creation of a SWF. Zimbabwe signed a Sovereign Wealth Fund of Zimbabwe Act into law in 2014, but a fully fleshed SWF has not yet been established to date.

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

According to the AMV Action Plan, communities near mining areas and local authorities hosting mining companies should directly benefit from exploitation of their communities. In this regard, there should be legislative provisions or systems in place to ensure that part of revenue from the mining sector is directly allocated to the host community. The Angola Mining code (2011) and Article 20 of the Mozambican Mining Law (2014) stipulate that part of the revenues generated by mining activities go towards directly benefiting the communities where mines are operating.

Most SADC countries however, have legislations and mechanisms that promote a central system that receives and manages resource rents and revenues, and funds are reallocated to various communities regardless of whether the community hosts a mine or not. The legal and regulatory frameworks in Botswana, Malawi, South Africa, Tanzania, Zambia and Zimbabwe are all designed in such a way that all revenues are collected and controlled by the central government. Revenue collected from mining is transferred into a consolidated fund or a national account, sometimes together with revenues from other sectors of the economy as in the case of Zambia, and is distributed in line with national budgets and development plans regardless of whether the community hosts a mine or not. There is prospective change in legislative frameworks in Malawi and Zambia as both the gazetted Malawi Mines and Minerals Bill and the Zambia Mines and Minerals Amendment Bill, 2015 stipulates that the holder of a large mining licence shall also be obligated to expend part of their mineral proceeds towards the community within which the mining location is situated.

Develop the capacity of local communities to negotiate partnership agreements

South Africa and Malawi are making efforts to enact legislations that ensure communities can negotiate and are sufficiently capacitated to negotiate partnership agreements with mining companies. The South African 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). The Mines and Minerals Amendment Bill (2016) amends the principal Mines and Minerals Act by adding a new section 391H on auctioning of mining rights where the Ministry of Mines and Mining Development may put to auction, the right to mine certain minerals whenever there is need and in the interests of the nation.

The previous resource governance in Malawi provided capacity building to communities to negotiate partnership

contracts with investors and government, but there is still need to upscale the initiatives especially when the new Mines and Minerals Bill is approved. The Malawi Mines and Minerals Bill, 2015 makes it a prerequisite for medium or large-scale miners to develop a community engagement plan with local government authorities, traditional leaders, communities, organizations, women and minority groups in the area in proximity to the mining location. In cases where a community entitled to a Community Development Agreement (CDA) lacks the capacity to effectively negotiate a CDA, the community has the liberty to request the holder of the mining licence to collaborate with community or non-governmental organisations or find appropriate expertise in order to build the capacity for the community to effectively negotiate the agreement, including provision of the required funds to the qualified community for capacity-building as are reasonable in the circumstances.

In Angola, Zambia and Tanzania there are no local communities that have negotiated a partnership agreement with a mining company in their locality. Neither are there physical initiatives to capacitate the local communities to be able to negotiate such contracts with mining companies.

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

Angola, Botswana and Mozambique have legal provisions within their mining legislation that require mining companies to prioritise employing nationals of the host nation and capacitate them with the required skills in the mining sector. For Zambia, the Employment Act emphasises on the employment of Zambians for jobs that can be done by Zambians. The Mozambican New Mining Law of 2014 goes further to stipulate that mining contracts should contain social responsibility activities.

South Africa 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 recommends local community development contributions by mines. Other countries do not have clauses in their mining legislation that stipulate the need for community development initiatives such as Cooperate Social Responsibility (CSRs) but Zimbabwe has a crosscutting legislation known as the Indigenisation and Economic Empowerment Act that enhance local communities benefit through Community Share Ownership Trust (CSOT).

Though there is no legal obligation, some mining companies in Tanzania, Zambia and Botswana have made efforts to give back to local communities, but there is a general consensus among the communities that the mines are not doing enough, OPM Report (2011). Malawi can only look forward to the adoption of the Mines and Minerals Bill whose adoption and earnest implementation in harmony with the 2013 Mines and Minerals policy promise an opportunity for mining communities to benefit more from their natural resources.

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

In all the eight countries, mining revenue management is centrally done at national level, and the revenue is reallocated to sub-regions in accordance with the country's fiscal regime and development plans. There is no evidence of deliberate efforts to develop the capacities of sub-national bodies in terms of revenue management in the assessed countries mainly because of the centrality of revenue management systems. Botswana, Zambia and South Africa have similar mechanisms for enforcing fiscal discipline at both national and sub-national levels by national government monitors and approves all development and spatial plans to ensure they are in synch with national development plans. In Malawi both the Mines and Minerals Policy and the proposed Mines and Minerals Bill emphasise

the government's intent to establish and capacitate institutions that can revitalise the mining sector and improve on mining revenue management.

1. 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 on the Sub Saharan African continent 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'[3]

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 State and Government 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".

The AMV is Africa's own response to tackling the paradox of great mineral wealth existing side by side with pervasive poverty.

To enable the attainment of the AMV goal, the African Union Heads of State and government 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 of nine programme clusters of activities and indicators constructed around the following key pillars of the vision:

i. Mining Revenues and Mineral Rents Management;
ii. Geological and Mining Information Systems;
iii. Building Human and Institutional Capacities;
iv. Artisanal and Small Scale Mining;
v. Mineral Sector Governance;
vi. Research and Development;
vii. Environmental and Social issues;
viii. Linkages and Diversification;
ix. Mobilising Mining and Infrastructure Investment.

Since the adoption of the AMV in 2009, there is need to assess the progress that African countries have made in aligning their mining policies and legal frameworks to the AMV. 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".

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

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).

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, each of the two expected accomplishments has a number of activities and indicators identified for tracking the achievements of the objectives and outcomes respectively. It is against these activities and indicators that the mining policies and legal frameworks of the eight selected SADC countries were 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			
	• Improve national capacity to physically audit mineral production and exports;	ST	• Physical audit systems in place and implemented with trained inspectors	MS
	• Review mineral regimes in terms of optimising revenues;	ST	• Review of mineral regimes undertaken	WB
	• Build capacity and enhance skills of officials in negotiating fiscal issues and effectively monitoring compliance with taxation laws;	ST-MT-LT	• Level of improvement in fiscal revenue collected by African mining countries	NGOs
	• Negotiate or renegotiate contracts to optimize revenues and to ensure fiscal space and responsiveness to windfalls;	ST-MT	• Increase in numbers of policy makers and other stakeholders participating in capacity building initiatives	CSOs
	• Develop systems to evaluate components of tax regimes for leakages, losses and tax avoidance and evasion (e.g. transfer pricing);	ST-MT	• Degree of improvement in the design of fiscal terms	Bilateral
	• 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	ST-MT	• Extent to which tax leakages are reduced by evaluation systems as determined by independent audits of tax compliance	AfDB
	• Build capacity & systems to auction mineral rights where applicable.	ST	• Number of double taxation agreements signed and implemented by member states	ECA
		ST	• Extent to which competitive and transparent mineral concession systems are implemented	
	At sub regional and regional levels			
	• Review the current fiscal environment in African mining countries to develop guidelines & standards for optimizing revenue (e.g. tax & dividends) packages in a manner that does not discourage mining investment;	ST	• Guidelines, standards and toolkits completed and distributed to RECs & member states	
	• Develop mineral taxation guidelines for implementation at REC and national levels; and	ST	• Degree to which guidelines are used by members states	
	• Develop typical financial models for mineral projects for member states and run training workshops at REC level.	ST	• Guidelines, standards and toolkits completed and distributed to RECs and member states	
	At national level	ST	• Degree to which guidelines are used by members states	
Improved management and use of mineral revenue	1. Explore strategies for investing windfall earnings and mineral rent into sovereign wealth funds including stabilization funds and infrastructure funds;		• Number of financing models that are developed and used by member states	
	2. Develop rent distribution systems for allocating part of mineral revenue to communities near mining areas and local authorities;		• Number of SWFs established by African Mining countries	
	3. Develop mechanisms to facilitate local communities access to jobs, education,		• Degree to which local authorities and communities improve their management of mineral revenues	
			• Best practice guidelines compiled	
			• Extent to which guidelines are used by RECs and member states	

Table 1 Continued...

Expected Accomplishment	Activities	Time Frame	Monitoring Indicators	Responsible Bodies and Main Actors
	4. transport infrastructure, health services, water and sanitation; 5. Develop the capacity of local communities to negotiate partnership agreements; and 6. Develop systems for strengthening capacities for national and sub-national bodies for revenue management At sub regional and regional levels • Compile best practice guidelines on mineral revenue management and deployment for implementation at the REC and national levels	ST-MT MT		

1.1 Objectives of the Report

The objectives of this study are derived from its Terms of Reference (ToRs)'s three identified objectives namely:

1. To document challenges and loopholes in existing national policies and legal frameworks at the continental level (Africa Mining Vision-Cluster 1 on Mining Revenues and Mineral Rents Management);

2. Identify legal and regulatory gaps and issues hindering the implementation and domestication of the continental initiative; and

3. To produce a regional perspective/analysis that will inform advocacy strategies and messages at national alternative mining indabas (AMIs) and provincial alternative mining indabas' (PAMIs).

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[4] 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.

Similarly for Zimbabwe, mining exports accounted for 50 percent of the total national exports in 2015. According to the 2013 and 2014 Mozambican Extractive Industries Transparency Initiative (MEITI) report, the extractive sector was the second sector that contributed the most to GDP 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 Angola, Botswana, Malawi, Mozambique, South Africa, Tanzania, Zambia and Zimbabwe are individually 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.

4. AFRODAD 2017 An Assessment of the national mining legal frameworks and policies of Zimbabwe

2

ASSESSMENT OF THE MINING POLICIES AND LEGAL FRAMEWORKS OF THE SELECTED SADC COUNTRIES

This section analyses the laws and policies against the activities and indicators of the AMV mining revenues and mineral rents management cluster's two expected outcomes namely:

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

2.1 Enhanced share of mineral revenue

Improve national capacity to physically audit mineral production and exports

As a region, SADC countries have at least some mechanisms in place to sustain and enhance their capacity to audit mineral production and exports. Botswana is one country that is hailed for setting a good example to the rest of the SADC region and the continent by establishing and upholding a considerably high degree of security and control over their diamond production. This has enhanced the traceability of stones from mine to the point of export[5] which also makes it easy to audit mineral production and exports respectively. Though not yet as capacitated as Botswana, other countries such as Tanzania, Zambia and Zimbabwe are making efforts to enhance their capacity to audit mineral productions and exports.

Botswana has the Precious and Semi-Precious Stones Protection Act which ensures that all mining areas, or buildings in which rough diamonds (precious stones) are dealt with have to be and are declared gazetted security areas. Access to such areas is restricted to holders of valid permits issued in terms of the Act.

People and vessels entering and exiting such areas are subject to security searches. The Act also requires submission to the Minister responsible for minerals, monthly returns detailing precious stones won, recovered, received, manufactured, purchased, or imported into a precious stones protection area.

Zambia has legislative frameworks such as Articles 114-121 of the national Constitution, the Public Audit Act and the Finance (Control and Management) Act that ensure that mineral production and exports are audited. The legitimate institutions to audit are the President, the Auditor General and the Finance Minister who have the mandate to audit all contracts involving government or its agencies and enterprises; to audit books, records and reports of institutions in which government has an interest; to scrutinize the financial affairs of government departments and statutory corporations and every private institution that receives a government grant, subsidy or subvention in any financial year. Zambia also established a Mining Tax Unit in the Tax authority and the Zambia Mineral Value Chain Monitoring project in 2014 at the Revenue Authority to track and audit minerals production.

Tanzania has a fully-fledged Tanzania Minerals Audit Agency (TMAA) responsible for auditing the quality and quantity of minerals produced and exported by miners. For Zimbabwe, miners are required to report their production figures to the Ministry of Mines and Mining Development but the level of non-compliance is high, thus contributing to worsening the mining data gaps in the country.

5. http://www.pacweb.org/Documents/diamonds_KP/2011_KP_Review_Visit_Botswana.pdf

The Reserve Bank of Zimbabwe is reported to have hired services of international minerals auditing firms including Alex Stewart International (ASI) to audit the mining industry, particularly the production and export of minerals from the country.

Despite these and other efforts by national governments and their partners, SADC countries remain considerably incapacitated to physically audit mineral production and exports. The main issue is on technical capacity. There is need for SADC national governments to invest in strengthening the capacity of the responsible agencies to physically audit mineral production and exports.

Review mineral regimes in terms of optimising revenues

Most SADC countries have made amendments to their mining regimes as part of their efforts to enhance revenue accruing to the government. Some proactive countries such as Botswana already had their fiscal regime garnered to maximise minerals revenue accruing to the government, even before the AMV. Botswana had two major reviews particularly the amendment of the Mines and Minerals Act in 1999 and the Income Tax Act in 2006.[6] Following the review of the mining law in 1999, mining revenue has maintained an upward trend until 2015.

Botswana has witnessed a steadily increasing mining revenue from 2005 to 2014, but the value of mining revenue as a percentage of total revenue and as a percentage of GDP has been on a downwards trend in the same period. This is mainly because of falling mineral prices on the international market. Botswana has an ideal example of Debswana Diamond Company which is in a 50/50 joint venture with the Government of Botswana and De Beers, a South African mining company.

In Zimbabwe, the review of mining fiscal regime in Zimbabwe has been ongoing since 2013.[7]

The aims of the new regime is mainly to enhance balance between revenue generation and attraction of investment into the mining sector by eliminating duplication in the collection of levies, addressing transfer pricing and thin capitalisations where high-geared mining companies enjoy tax relief on interest charges and review some mining fees and charges which are observed to be relatively high compared to those obtaining in the SADC region.

Angola and Malawi also have legislations that support the participation of state owned companies in mining activities so as to maximise on revenue. The Angola Mining Code of 2011 gives the State the right to participate, through a state owned company, and the newly gazetted Mines and Minerals Bill of 2015 in Malawi encourages government participation and ownership in large scale mining. The Malawian Bill was presented to the Ministry of Justice in 2016 and promises more benefits and revenue for the government, but is still to be debated in parliament.

The government of Tanzania passed legislation in 2011 that included a rise in royalties on gold exports. It also established the Gold Audit Programme to audit and inspect the production and transportation of gold to ensure the state received royalties and taxes from those activities. Tanzania also dissolved the Tanzania Minerals Audit Agency (TMAA) which will be replaced by a Commission to carry over the minerals audits to improve revenue mobilisation and management. In July 2017, the Tanzanian parliament passed three pieces of legislation that make significant changes to the legal and institutional frameworks governing oil, gas and mineral extraction:

(1) the Written Laws (Miscellaneous Amendments)Act 2017
(2) the Natural Wealth and Resources (Permanent Sovereignty) Act 2017
(3) the Natural Wealth and Resources (Revenue and Re-Negotiation of Unconscionable Terms) Act 2017.

6. Botswana Mineral Investment Promotion - 2008 http://www.mines.gov.bw/Botswana%20Mineral%20Investment%20Promotion.pdf
7. http://www.chronicle.co.zw/chinamasa-calls-for-transparency-in-mining-sector/

Mozambique on the other hand, enacted a new Mining Tax Regime (Law No. 28/2014) which came into force in 2015. The new law improved fiscal regime progressivity; adopted a strict ring fencing principle where tax obligations are assessed individually for each mining licence/concession and introduced the capital gains tax at a fixed rate of 32 percent.

The catastrophe of falling global mineral commodity prices hit resource rich SADC countries especially those whose economies are primarily hinged on a single commodity, as the case with copper in Zambia and oil in Angola. The fall in global copper prices adversely affected the Zambian economy which is reliant mainly on the proceeds from copper production and exports. The Zambia Mines and Minerals Development Act of 2015 presented a paradigm shift from contracts to a statutory model of governance; and presented licensing as the primary governance regime for the sector to allow for improved administration and enhanced mining revenue.

There have been a number of reforms in the South African mining tax system over the recent years. Some of the major reforms that are in synch with the AMV include the Mineral and Petroleum Resources Royalty Act, 28 of 2008 (MPRRA) which came into effect in April 2010, and the Mineral and Petroleum Resources Royalty (Administration) Act, 29 of 2008 (MPRRAA) which was also tabled together with the MPRRA to provide for the registration of persons liable to paying royalties under the Act as well as their administration. South Africa also established 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. As a result of these and other reforms, mining sector revenue collections have maintained a gradual upward trend in recent years. The review of mining fiscal regimes by national governments attests to their intent to mobilise more revenue from the mining sector. The general trend in the assessed countries shows that revenue accruing from the mining sector is volatile but gradually increasing. National governments need to strengthen the capacity of their taxation institutions and personnel to ensure that fiscal laws are effectively enforced and revenue is optimised.

Build capacity and enhance skills of officials in negotiating fiscal issues and effectively monitoring compliance with taxation laws

As noted by the AMV, African countries are incapacitated to effectively negotiate fiscal issues and contracts in the mining sector. This has adversely affected the resource rich countries as the TNCs who own mining companies take advantage of the poorly capacitated countries and negotiate contracts that benefit the TNCs on the expense of the host countries. Seven[8] SADC countries have subscribed to the Extractive Industries Transparency Initiative (EITI)[9], a reflection of the governments' commitment uphold transparency of mineral rents and the management of revenue from the extractive industries. In terms of enhancing the skills of officials in fiscal issues and mining taxation compliance, Malawi has very few mining experts and relies mainly on imported expertise in form of expatriates. This led the government of Malawi to request for technical assistance from the British Government for the development of the full mining code and in 2013 the country received technical support from the Commonwealth Secretariat, out of which came the Petroleum Sharing Agreement. In 2013, Malawi sent some of its ministry workers to the Netherlands to study for a Master's Degree in Geology and Earth Science. In 2016, the Government of Malawi in collaboration with the African Minerals Development Centre (AMDC) facilitated the formation of a contract negotiation task team to support Malawi's

8. Democratic Republic of Congo, Madagascar, Malawi, Mozambique, Seychelles,Tanzania and Zambia
9. The Extractive Industries Transparency Initiative (EITI) is a global standard for the good governance of oil, gas and mineral resources. It seeks to address the key governance issues in the extractive sectors.

Minister of Natural Resources, Energy and Mining. Similarly in Zimbabwe, the Zimbabwe Revenue Authority (ZIMRA) staff received training from Adam Smith International in 2011on a range of fiscal policy and mining taxation issues including windfall taxes, thin capitalisation, ring- fencing mineral rights, loss-carry forwards and depreciation, revenue modelling and the calculation of royalties.

Mozambique was a recipient of the Extractive Industries-Technical Advisory Facility (EI-TAF), where between 2011 and 2014, officials (involved in managing mining and natural gas) attended technical training workshops hosted by the World Bank on contract negotiation processes and the general terms and conditions related to mineral development agreements. Zambia currently has a World Bank supported programme, 'Public Financial Management Reform Program Phase 1 which embraces capacity building and development for officials in the mining sector.

In light of these deliberate efforts by national governments to build and develop the capacity of its officials, there is no physical evidence of improvement in negotiating neither fiscal issues nor effectively monitoring compliance with taxation laws. This is evidenced by the perennial problem of Illicit financial flows from the mining sector, especially through tax evasion and massive tax avoidance. Furthermore, a considerable increase in mining revenue would have been experienced in the region.

Negotiate or renegotiate contracts to optimise revenues and to ensure fiscal space and responsiveness to windfalls

Windfall taxing is one efficient way to ensure mining countries equally benefit from the unexpected profits that mining companies enjoy in boom periods, but there are some SADC countries such as Angola and Zambia that still do not have windfall taxes in place to cater for such scenarios.

In the case of Zambia, tax on windfall earnings was once introduced in 2008 but was revoked in 2009 due to heavy criticism especially from the mining companies. South Africa already had a fiscal regime responsive to windfalls even before the AMV. In South Africa, 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.

In November 2014, the Malawian government suspended oil and gas exploration activities in their process to scrutinise and review every license agreement that was in place. The Malawian government through the Ministry of Natural Resources, Energy and Mining insisted that there is need to review all licenses previous governments gave to companies to explore oil in the country so as to determine and scrutinise the licensing procedures that were followed. This is a starting point in evaluating the contracts and ensuring they followed the prescribed legal procedures and benefit Malawians. A similar move in the mining sector is long overdue considering the poor agreements entered into with some of the biggest mining companies which favour the mining companies and continue to undermine the potential revenue that Malawi is supposed to be getting.The new Mines and Minerals Bill 2015 presents some hope for enhanced transparency in the Mining industry as it provides for the transparency of the licensing process and the issuance of mandatory guidelines to fiscal payment records by mineral holders to government authorities.

Though there is no evidence of renegotiated contracts yet, the president of Tanzania expressed intent to revisit mining contracts arguing that there are some deals that were entered into with mining firms in Tanzania and they do not benefit the Tanzanians as much as they should.

This is why Tanzania recently passed three bills allowing the government to renegotiate existing mining contracts. The Tanzanian parliament passed the following laws:

1. The Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Bill, 2017
2. The Natural Wealth and Resources (Permanent Sovereignty) Bill, 2017
3. The Written Laws (Miscellaneous Amendments) Bill, 2017.

This was done to increase transparency in the sector and revenues accruing to the government by minimising cases of mining companies playing down the amounts they declare for exported mineral commodities.

Before the adoption of the 2014 mining fiscal law, Mozambique offered mining companies a guarantee that the terms of their original contract would be honoured throughout the duration of the contract. Under the new Mining fiscal law of 2014, there is room for renegotiation of mining contracts and terms are guaranteed only if the mining company adheres to the terms of the contract. Fiscal stability can be extended from year 11 through the lifetime of the contract for payment of additional 2 percent of Mining Production Tax from the eleventh year of production.

Zambia received support from Norway for strengthening tax administration and renegotiation of contracts between the Zambian government and large multinationals in the mining sector.

Develop systems to evaluate components of tax regimes for leakages, losses and tax avoidance and evasion

Illicit financial flows especially through transfer pricing and tax avoidance by mining TNCs continue to be a burden that SADC countries are still to effectively mitigate. The Report of the High Level Panel on Illicit Financial Flows from Africa indicated that there is a clear relationship between countries that are highly dependent on extractive industries and the incidence of IFFs. TNCs in the mining sector negotiate for huge tax breaks from the host governments and use complex corporate structures to exploit loopholes in international tax rules.

Angola already had Order 2/03 of 28 February 2003, well before the adoption of the AMV. This law of the National Bank of Angola establishes the foreign exchange regime for holders of mineral rights also aims at both strengthening the banking sector and mitigating capital flight from the capital intensive sector. Mining companies are subject to tight foreign exchange restrictions which help minimise IFFs through transfer pricing and tax avoidance. The Angolan petroleum and gas sector has a different regime called the Foreign Exchange Law for the Petroleum Sector, Law No. 2/12, of 13 January 2012 which also serves the same purpose in the oil and gas sector.

For South Africa, 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 done by means of sophisticated financing structures. Nevertheless, transfer pricing remains a challenge in South Africa as evidenced by the Global Financial Integrity (GFI) estimates which indicate that South Africa accounted for 68 percent (US$209 billion) of the cumulative total of US$309.1 billion IFFs from the SADC Region.

Though Botswana does not have any specific transfer pricing regulations, the general anti-avoidance provisions are contained in Section 36 of the Income Tax Act, wherein, the Commissioner General may adjust the tax liability of a taxpayer where he is of the opinion that a transaction, scheme or operation is fictitious or artificial, or has been entered into or carried out by persons not dealing at arm's length with the effect of avoiding, reducing or postponing tax liability.[10]

10. http://www.africataxjournal.com/?p=192

Mozambique has a basic regime on transfer pricing in the Corporate Income Tax Code (CIRPC), as amended in January 2014. Similarly, Zimbabwe enacted new legislation on transfer pricing with effect from 1 January 2016, to augment the anti-avoidance sections of the Income Tax Act [Chapter 23:06]. These new mining tax laws in both Zimbabwe and Mozambique require all mining companies in the countries to adhere and comply with the local transfer pricing rules. The local transfer pricing rules for both countries promote the arm's length principle which applies to deals between related parties. For payments to companies in low tax jurisdictions, the authorities will need to be satisfied that the payment was genuine and reasonable. This allows the tax administration authorities to make required corrections for determining taxable profit when the transactions between related parties are concluded on terms inconsistent with the arm's length principle with such adjustments having the potential to create additional tax liabilities.

In November 2009, the Tanzania government established the Tanzania Minerals Audit Agency (TMAA), a semi-autonomous institution entrusted with conducting 'financial and environmental audits as well as auditing the quality and quantity of minerals produced and exported by miners in order to mitigate transfer pricing and tax avoidance whilst at the same time maximising on revenue accruing to the government from the extractive sector (TMAA, 2011). However, TMAA was dissolved under the directive of the Tanzanian president in May 2017. There is anticipation that the Commission that the government of Tanzania indicated will be established to replace and take up the roles of TMAA will enhance minerals revenue and minimise revenue leakages by mining companies in Tanzania. In March 2017, Tanzania banned the export of mineral concentrates and oresformetallic minerals such as gold, cooper, silver and nickel. The Tanzanian government has consistently targeted Acacia mine accusing the mining company of short-changing the government by playing down the amounts of declared exports.

In an effort to mitigate mining tax avoidance and evasion, Zambia shifted from relying on the prices that mining companies claim they are selling their copper overseas to the prevailing copper prices on the international commodity markets. The Norwegian Development Assistance also financed the audits of three mining companies in Zambia to determine whether their transfer pricing practices are in line with international standards. According to Zambian authorities, Norway has also helped set up a financial intelligence unit and each of the transfer pricing audits has led to adjustments in taxable income by the companies. The country also has DTAs which are meant to deal with reciprocal taxation arrangements on multinationals and foreign residents. However these and other legal provisions are failing to adequately address tax evasion.

Tax avoidance and evasion continue to be rampant despite some notable efforts in enacting and reviewing legislations in terms of plugging the tax leakages. IFFs from the mining sector continue to be considerably high and they compromise the revenues accruing to the national governments of the natural resource rich SADC region. National governments in the SADC region need to be more robust with developing systems to evaluate components of tax regimes for leakages, losses and tax avoidance and evasion.

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

All the assessed SADC countries, except for Angola, have DTAs with other countries especially mother countries for major mining companies that they host. Most of the DTAs specify that minerals and mineral proceeds are taxed in the country of extraction. Ideally and in synch with the aspirations of the AMV, 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. DTAs that embrace the afore-mentioned

clause are deemed to be in line with the AMV principle that minerals should be taxed at the point of extraction.

Most countries that have DTAs used the OECD model as the primary reference for the agreements and treaties. The OECD model usually exempts interest, dividends paid to individuals, and copyright and patent royalties and limit the source country to a 15 percent tax rate on rentals from real property and mineral royalties which justifies why there is great need to renegotiate these contracts. Only a few countries in the region have managed to review some of the DTAs they have since the adoption of the AMV. Some of these countries are Botswana, South Africa and Zambia.

Botswana for instance renegotiated its DTA with South Africa; South Africa also renegotiated and amended its DTA with the UK in November 2010, whilst Zambia renegotiated its DTA with the United Kingdom. Furthermore, Botswana is a source based country and thus its Income Tax Act specifically states that income from, or deemed to be from, a source within Botswana is taxable in Botswana. This includes mining operations which are sources within Botswana and hence are taxable at source or point of extraction.

The Malawian government has been making some efforts in trying to renegotiate some DTAs particularly with Norway and Netherlands so as to maximise on the share that Malawi gets in the value chain. A number of SADC countries have DTAs with several countries, some with more than ten countries, but it is imperative to note that having a high number of signed DTAs is a necessary but not sufficient requisite for resource rich countries to benefit from their minerals. This is because double taxation agreements can sometimes result in a country losing its tax rights which might also affect the ability of the country to tax minerals at the point of extraction as required by the AMV.

It is not the quantum of DTAs that matters but the quality of the DTAs and how they affect revenues accruing to national governments that matters. Most of the SADC countries have DTAs but there is need to renegotiate most of these to ensure that they are in line with the AMV principle that minerals should be taxed at the point of extraction.

Build capacity and systems to auction mineral rights where applicable

Both the Angolan Constitution and the Mining Code state that all minerals are owned by the state which gives the Angolan state the monopoly to concession, extraction and exploration of all minerals in the country. Other companies have to obtain a licence to be allowed to mine in Angola. This helps the government in regulating the activities of the mining sector and maximise their potential to collect mining revenue.

In Botswana, Section 38 of the Botswana Mines and Minerals Act of 1999, indicates that a person wishing to obtain a mining licence shall apply to the Minister who will issue licenses for non-diamond minerals, on a first-come, first-served basis, if the applicant meets the requirements stated in the Act.

Similarly, Section 9 (1) (b) of the South African Mineral and Petroleum Resources Development Act of 2002 (MPRDA), specifies that mining rights are to be allocated according to the first-come, first-served basis, 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. The Bill is however silent on the public tender or auctioning of mineral rights but, 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.

Article 10 of the 2014 Mining Law in Mozambique is specifically on the public tender of mineral rights and establishes that the government may organize a public tender procedure for granting mineral rights when there is public interest. The National Institute of Mines (INM) is the entity responsible for holding these public tender processes. In Zimbabwe, the Mines and Minerals Amendment Bill (2016) amends the principal Mines and Minerals Act (1961) by adding a new section 391H on auctioning of mining rights where the Ministry of Mines and Mining Development may put to auction, the right to mine certain minerals whenever there is need and in the interests of the nation.

Under the AMV Action Plan, the monitoring indicator is the extent to which competitive and transparent mineral concession systems are implemented. For instance, concerns have however been raised in Botswana that commercial confidentiality regulations prohibit parliamentary committees from overseeing negotiations between the Mines Ministry and diamond mining companies,[11] which compromises the transparent aspect.

2.2 Improved management and use of mineral revenue

Explore strategies for investing windfall earnings and mineral rent into sovereign wealth funds including stabilisation funds and infrastructure funds

The AMV prescribes that countries have to invest earnings from the extractive sector into Sovereign Wealth Funds (SWFs) and infrastructure funds. SWFs play a stabilisation role as national investment entities ensuring national financial sustainability through savings and investments for future generations. Angola and Botswana are the only two countries in the SADC that have established fully functioning SWFs supported by revenues from the extractive sector.

The rest of the countries assessed have no established SWFs yet but their governments have officially expressed their intent to set-up such a fund for mitigating market shocks in the resources they produce and to ensure sustainability in mineral rents and revenues.

In 2012 Angola established a SWF named the Fundo Soberano de Angola (FSDEA), with the aim of promoting growth, prosperity and social and economic development across Angola. The FSDEA has assets worth of USD 5bn, equivalent to the initial endowment when it was formed in 2012. The FSDEA allocates 7.5 percent of its endowment to socio-economic development projects such as healthcare, education, income generation and access to clean water and energy. In 2015, the Sovereign Wealth Funds Institute (SWFI) announced a rating of 8 out of 10 on transparency for the Angolan FSDEA.

Botswana has a Sovereign Wealth Fund in the form of the Pula Fund established in 1994 with one of the aims being to preserve part of the income from diamond exports for future generations. The Pula fund has assets worth about US$5.7 billion.

The Pula Fund is managed in accordance with section 35 of the Bank of Botswana Act which stipulates the establishment and the management of long term investment funds. In addition to savings for future generations, the Pula Fund also plays a stabilisation role as it forms part of the country's policy of accumulation of foreign assets to provide macroeconomic, balance of payments and fiscal stability in the event of external shocks or anticipated domestic disruptions, such as diamond revenue shortfalls or droughts. Botswana is among the founding members of the Resource Rent Tax (RRT) and was one of the architects of the Santiago Principles[12] in 2008. South Africa, Malawi, Mozambique, Zimbabwe and Zambia currently do not have SWFs but despite having expressed their intent to establish the fund.

11. http://www.resourcegovernance.org/our-work/country/botswana
12. The Principles' overall ambition is to increase the transparency standards of the SWF industry at large. They therefore commit their signatories to basic and consistent standards of good governance, transparency and accountability, while allowing room to reconcile the diverging mandates and regulatory traditions of their signatories.They constitute a voluntary code of principles and as such are not legally binding under national or international law.

In South Africa there has been recommendations from the 2010 New Growth Path framework and the 2012 African National Congress (ANC) commissioned State Intervention in the Mineral Sector (SIMS) report, both of which recommended the creation of a SWF. SIMS report also stresses the need for a SWF legislation accordingly. In 2013, the then Economic Minister of Development in South Africa 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"[13]

Zimbabwe signed a Sovereign Wealth Fund of Zimbabwe Act into law in 2014. The Act states that the Fund will be driven primarily by 25 percent of all royalties on mineral exports, which will be deposited along with special dividends on the sales of diamonds, gas, granite and other minerals through the Zimbabwe Mining Development Corporation, but a fully fleshed SWF has not yet been established to date.

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

Angola and Mozambique have legislations in place that stipulate that communities hosting mining companies should directly benefit from the mining activities in their locale. The Mining code in Angola stipulates that 5 percent of the revenues collected by the state go towards directly benefiting the communities where mines are operating. In Mozambique, Article 20 of the 2014 Mining Law on Local Development specifies that a percentage,[14] of State revenues generated by mining activities will be allocated to the development of the communities established in the areas where mining activities take place.

Most SADC countries however, have legislations and mechanisms that promote a central system that receives and manages resource rents and revenues which reallocates the funds to various communities regardless of whether the community hosts a mine or not.

In Botswana the allocation of mineral revenue from the Consolidated Fund is independent of the presence of a mine in a community. It is done in line with the set priorities in the National Development Plans (NDPs) and the annual budgeting process, under the guidance of the public finance policy framework which specifies that revenues derived from minerals, because they are derived from the sale of an asset, should be used to finance investment in other assets, particularly investment in physical and human capital. Malawi has also upheld the centrality of a national revenue account, i.e. 'account number one' where all national revenues are transferred to. However, the gazetted Mines and Minerals Bill presents some hope for mining communities, as it stipulates that the holder of a large mining licence shall also be obligated to expend at least 0.45 percent of its annual gross sales revenues on community development.

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 revenue between the national government and the country's 9 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 Interim Report[15] the Davis Tax Committee (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 DTC indicated that earmarking of taxes paid to the State by mining houses for the benefit of communities is contra the South Africa's legislative design and therefore did not recommend it.

13. http://www.moneyweb.co.za/archive/sas-sovereign-wealth-fund-off-the-table/
14. The percentage is fixed in the State Budget Law depending on the expected revenue for mining activity
15. The DavisTax Committee Interim Report on Mining for the Minister of Finance (2014)

In Zambia revenue collected from mining is transferred into a consolidated fund with other revenue sources and is distributed regardless of whether the community hosts a mine or not.

The Zimbabwe Constitution (2013) requires all fees, taxes and other sources of revenue (including all mining revenue) to be paid into the Consolidated Revenue Fund (CRF). However, Section 255 of the Mines and Minerals Act and/or Section 76 of the Mines and Minerals Amendment Bill, 2015 require any miner of a registered mining location to pay a specified sum[16] at specified intervals to any local authority within whose area the registered mining location is situated.

In Tanzania, the central government has always monopolized fiscal authority in natural resources sector but recent reforms have attempted to reorient focus to the local level. The main hindrance however is that most local government areas lack robust revenue sources for financing improved local service delivery, promoting local economic development or encouraging accountability. In this regard, regional allocation is made on the basis of spending priorities, rather than on whether regions are home to extraction, (NRGI, 2015).

Develop the capacity of local communities to negotiate partnership agreements

South Africa, Zimbabwe and Malawi are making efforts to enact legislations that enhance the capacity of communities to be able to effectively negotiate partnership agreements with mining companies. The previous resource governance in Malawi provided capacity building to communities to negotiate partnership contracts with investors and government, but there is still need to upscale the initiatives especially when the new Mines and Minerals Bill is approved. As provided for in the Mines and Minerals Bill 2015, the holder of an exploration, retention, medium or large-scale mining licence has an obligation to develop a community engagement plan in collaboration with local government authorities, traditional leaders, communities, organizations, women and minority groups in the area in proximity to the mining location. Mining activities shall not commence until the holder of a medium or large-scale mining licence has registered a community engagement plan with the Registrar. Where a community entitled to a Community Development Agreement (CDA) believes that it lacks the capacity to effectively negotiate a community development agreement, the community has the liberty to request the holder of the mining licence to collaborate with community or non-governmental organisations or find appropriate expertise in order to build the capacity for the community to effectively negotiate the agreement, including provision of such funds to the qualified community for capacity-building as are reasonable in the circumstances.

The South African 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).

In Angola, Zambia and Tanzania there are no local communities that have negotiated a partnership agreement with a mining company in their locality. Neither are there physical initiatives to capacitate the local communities to be able to negotiate such contracts with mining companies, mainly because the constitution vests all minerals in the president.

16. The Minister may specify a sum for the purposes of subsection as a lump sum or as a percentage of the value of the output of the mining location concerned, or in such other manner as the Minister may think appropriate.

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

Angola, Mozambique and Zambia have legislations and other obligatory mechanisms in place that require mining companies to prioritise employing nationals of the host nation and capacitate them with the required skills in the mining sector. The Botswana Mines and Minerals Act (1999) requires holders of mineral concessions, in all phases of their operations, to give preference in employment to citizens of Botswana to the maximum extent possible consistent with safety, efficiency and economy (article 12.2). The Act also requires holders to conduct training programs for citizens (Article. 12.3).

For Botswana, there is no specific requirement for mining companies to engage in community development in the Act. However, in observance of the sustainable budget index (SBI) principle, the government ensures that revenue from minerals, which is an asset, is used to finance investment in other assets (physical and human capital) which includes investment in education, transport infrastructure, health services, water and sanitation for both mining and non- mining communities. Furthermore, some mining companies such as Debswana have Corporate Social Investment (CSI) policies in place, where they commit themselves to creating prosperity and empowerment for the communities in which they operate through job creation and various health and education development programs.

The Angola local content policies reflect commitment of the government in promoting Angolan companies with the ultimate aim of protecting the domestic market over the products and services for the mining industry. As indicated in the Mining Code of 2011, the concessionaires have an obligation to give preference to the utilization of national materials, services and products, provided the price difference does not surpass 10 percent and an eight day delay on delivery date when compared to foreign offers.

The mining rights holders are also required to employ and train Angolan nationals. Article 8 of the new 2014 Mining Law in Mozambique states that the mining contract that the Government may enter into with the holder of a prospecting and research licence and mining concession, among other clauses, should contain social responsibility activities, local employment and technical-professional training programmes for Mozambican nationals. The Zambia Employment Act also emphasises on the employment of Zambians for jobs that can be done by Zambians.

Despite that some mining companies in Tanzania have made efforts to give back to local communities, there is considerable dissatisfaction with the industry mainly because of lack of employment opportunities that mining has provided.[17]

The new Malawi Mines and Minerals Bill (2015) embraces the concept of Community Development Agreement (CDA) in which a holder of a large scale mining licence is obligated to have legally binding community development agreement and is obliged to implement the agreed developmental initiatives with each community that it operates in and is directly affected by the mining operations. The adoption and earnest implementation of the 2015 Bill in harmony with the 2013 Mines and Minerals policy will present an opportunity for Malawians to benefit more from their natural resources particularly through strengthening the role of artisanal and small scale mining in the economy, royalties and local job creation.

In South Africa mining rights holders are required to develop 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.

17. Oxford Policy Management-Mining Benefits Study,Tanzania (2010-2011)

Some mining companies in Zambia have executed projects that have had health and infrastructural benefit to the community. The projects include women's savings, education, health and agriculture, for which most projects involve infrastructure development. It is however imperative to note that most of these initiatives are not enforced by government mechanism but usually through the mining companies CRS initiatives.

The Zimbabwe Mines and Minerals Act (1961) has no specific provisions for community benefits and participation in mining nor does it specify that mining companies should have a Corporate Social Responsibility (CSR). It is however through the 2008 Indigenisation and Economic Empowerment Act (IEEA) that communities' access to such services can be derived from. The IEE policy requires at least 51 percent of shares in every foreign owned company (including mining companies) to be owned by indigenous Zimbabweans. Of this, at least 10 percent must be disposed to local communities through a Community Share Ownership Trust (CSOT). A further 10 percent can also be made available to employees through a qualifying Employee Share Ownership Scheme/ Trust (ESOS/T). Money accruing to CSOTs ought to be used for social and economic infrastructure in accordance with community priorities which include the provision of social services and the maintenance and development of infrastructure.

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

South African 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.

Botswana also has a similar system where the national government caps annual expenditure growth of sub-nationals, regardless of revenue flows. This is meant to promote discipline and prioritisation in the utilization of funds, at both national and sub-national levels.

The Zambia Revenue Authority receives all taxes from mining companies. Zambia Consolidated Copper Mines Investments Holdings (ZCCM-IH), a majority state-owned company overseen by the Mines and Natural Resources Ministry, collects dividends and other investment income from its subsidiaries which operate in the mining sector. The district governments in Zambia collect their own taxes in property rates, fuel levies, personal levies etc., but the national government monitors and approves all development and spatial plans to ensure they are in synch with national development plans.

The establishment of the Tanzania Mining Audit Agency (TMAA) in 2009, which carries out financial, mineral and environmental audits, has led to increased auditing capacity over mining projects. For Malawi, both the Mines and Minerals Policy (2013) and the proposed Mines and Minerals Bill, 2015 emphasise the government's intent to establish and capacitate institutions that can revitalise the mining sector and improve on mining revenue management. However, practical efforts are not visible on the ground and there continues to be rampant secrecy especially when it comes to issues concerning revenue from the extractive sector.

2.3 Conclusion

SADC countries are making progress in adopting the aspirations of the AMV in their domestic legal, regulatory and fiscal frameworks. Countries such as Botswana have been proactive and already have some of their major policies and legislations in line with the AMV. Some of the countries in the region have managed to draft bills, enact new laws and adopt policies that speak to Cluster 1 of the AMV as they aim to maximise on mining related revenue accruing to the governments and ensure efficient management of such revenues and rents. It is however imperative to appreciate that though there has been some progress in adopting the AMV, this assessment shows that the progress has been relatively slow and thus national governments need to consider the proposed recommendations to ensure the adoption of the AMV is swift. This will ensure that mining revenues accruing to SADC national governments will be enhanced, accountability and transparency upheld and SADC countries reap more benefits from their mineral resources.

Proposed Recommendations

- National governments should devise more revenue optimisation strategies and strengthen mining rents mining systems in harmony with the AMV.
- Countries should adapt Country Mining Visions (CMV) which is a national blueprint to guide strategies and initiatives of the broader AMV at national level.
- National governments need to develop and strengthen the capacity of their officials especially in contraction negotiations with mining firms and tax administration.
- Governments need to introduce a mechanism that ensures communities hosting mines directly benefit from the mining activities.
- SADC countries need to ensure that they have DTAs with countries from which major mining companies come from. This can help address tax evasion and minimise transfer pricing. The DTAs should promote the principle of taxing minerals and mineral proceeds in the country hosting the extraction and mining activities.
- There is need to ensure SWFs are established and/or strengthened to mitigate global market shocks affecting the mining industry.
- National governments need to develop their national CSR frameworks whose responsibilities are clear and are part of a broader social development agenda that has been consultatively developed between Government, mining companies and communities. Mining companies need to improve the practice and application of meaningful corporate social responsibility.
- National governments need to establish legislations and work with CSOs in making deliberate efforts to build the capacity of mining communities to negotiate contracts for maximum beneficiation from the mineral resources in their locale.

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