



BETTER LAND USE, BETTER FUTURE FOR ALL

**Land, biodiversity and extractive
industries in southern Africa:**

How effective are legal and institutional
frameworks in protecting people
and the environment?

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"It highlights good practices while also capturing crosscutting weaknesses and gaps in the legal frameworks."

Introduction

In the natural resources sector, laws are often formulated to regulate the relationship between men and the environment. Ideally, the law can play a vital role in regulating and protecting communities from adverse environmental and social impacts of mining, loss of land, biodiversity and natural wealth, as well as other human rights violations. Almost all countries in the Southern African Development Community (SADC) have developed laws and institutions to regulate and monitor the extraction of mineral resources and their impact on the environment and people. However, the level of implementation and enforcement of those laws varies across the region and in some cases legal gaps exist.

In light of this, the Southern Africa Resource Watch (SARW) commissioned research in three SADC countries – Botswana, South Africa and Zimbabwe – to assess the effectiveness of existing legal and institutional frameworks governing land, social and environmental accountability in the extractive sector. This policy brief analyses the findings of the three reports and identifies current legal and institutional frameworks in Zimbabwe, South Africa and Botswana that seek to protect land, biodiversity and communities from the adverse impacts of mining.

It highlights good practices while also capturing crosscutting weaknesses and gaps in the legal frameworks. The policy brief also analyses the institutional capacities of responsible government departments, whose legal mandate is to monitor and hold mining companies accountable, and looks at the domestication and application of regional and international instruments. More importantly, the efficacy of voluntary practices and standards adopted by mining companies and financial institutions to promote social and environmental accountability in the extractive sector is also assessed.

In many respects this is a performance appraisal of governments and mining companies in the three SADC countries in terms of how they apply and uphold the concept of social and environmental accountability from a legal perspective. It is based on the need to ensure that mining companies and governments are more accountable and responsible, and take steps to promote the rights of communities affected by mining operations and to ensure environmental and biodiversity sustainability.

However, this policy brief is not meant to be an exhaustive discussion of all the legal instruments in each country but rather a cursory overview that aims to inform the debate and provide some concrete recommendations, which will contribute to strengthening regulatory frameworks in the SADC region that protect the environment and communities from the potentially adverse effects of the extractive industries.

Existing legal and institutional frameworks

Mineral rights, land ownership and displacements

From the three country studies, it emerged that national legislation and institutions that regulate and facilitate the monitoring of mining operations do exist. Some of the laws were developed during the colonial period, while others were formulated afterwards. However, colonial-era laws were chiefly aimed at facilitating the extraction of minerals, profit making and depriving indigenous populations of their resource wealth. In South Africa and Zimbabwe, during the apartheid and colonial eras, mining trumped surface land rights. Mining companies were given the legal power to acquire mineral rights over agricultural land and even in environmentally sensitive communal and tribal areas. Minerals were exploited without paying particular attention to social and environmental impacts or accountability.

From the studies it also emerged that most post-colonial and post-apartheid laws still vest mineral rights in the state. In communal areas, surface land rights are vested in the state. Private landowners enjoy title to their land, which has implications in terms of compensation for loss of land to mining operations. In South Africa, the Minerals and Petroleum Resources Development Act of 2004 vests mining rights in the state, which has a duty – through the Department of Mineral Regulation – to issue, regulate and administer mineral rights. Meanwhile, Zimbabwe's Mines and Minerals Act (Chapter 21:05) vests mineral rights in the president, who has an obligation to fulfil the public good or hold the minerals in trust for the benefit of all citizens. In Botswana, the Mines and Minerals Act, as read together with the Mineral Rights in Tribal Territories Act, also vests mineral rights in the state.

Indeed, the law in Botswana goes further since it compels all tribes to surrender mineral rights to the state – arguably a deprivation of community rights.

These laws require any company that intends to prospect, explore or mine to apply for a mining licence and give a mandate to governments to regulate and set standards and conditions under which mining can take place. Such conditions can be codified in mining contracts or agreements and may also be stated in national legislation. Depending on country practice, mining contracts may contain basic obligations that companies must comply with relating to issues such as revenue sharing, royalty payments, resettlement plans, environmental requirements, labour laws, mine closure, community development and employment of locals. These are contractual provisions that can be used by the state to promote environmental and social accountability and protect the land and its precious biodiversity.

Land ownership, displacement and compensation are some of the key legal issues that governments and mining companies in Zimbabwe, South Africa and Botswana often battle with. Due to the centrality of land to rural livelihoods, its ownership, tenure and related use rights regularly clash with the needs of the mining industry. Consequently, all the countries have legislation that provides for acquisition of land for different purposes. In Botswana, the modalities for acquisition of land for public interest and developmental purposes are set out in the Acquisition of Property Act, Tribal Land Act, State Land Act

“The government and mining companies argue that they are not obliged to compensate the communities since the land does not belong to them.”

and the Land Control Act. In Zimbabwe, land for mining purposes is acquired in terms of the Mines and Minerals Act, Land Acquisition Act and the Constitution of Zimbabwe. Ideally, such legislation should be used to protect the social and environmental rights of communities but the implementation of these provisions remains problematic.

Depending on country legislation and practice, compensation for displacement may involve money, resettlement and the creation of jobs or alternative livelihood schemes. In Botswana, land acquisition and compensation is administered under the Acquisition of Property Act and compensation is confined solely to the value of the property on the land. However, Section 63 of the Mines and Minerals Act requires mineral concession holders to pay fair and reasonable compensation for any disturbance to the rights of the owner or lawful occupier. The concession holders are also required to pay for any damage done to the surface of the land or to crops, trees, buildings or other works. What is curious about Section 63 is that compensation for deprivation of rights is payable upon demand and that there is only a limited period of five years within which a claim can be laid. In Zimbabwe, the Mines and Minerals Act in Section 188 (2) provides for the payment of compensation by holders of mining rights to private landowners when a mining operation is established. However, the rights of communal residents are not protected since Section 188 (7) states that compensation will be paid to the Rural District Council acting as the landowner in communal lands. Nevertheless, in practice some mining companies in Zimbabwe have been compensating communities by

directly providing them with money, houses and other social services – an example of how some mining companies promote social and environmental accountability and take steps to lessen the poverty burden on communities.

Despite the laws, there have been numerous instances of communities objecting to their treatment by mining companies. For example, there were allegations of the forced removal of San communities from the Central Kalahari Game Reserve in Botswana to pave the way for Gem Diamonds’ mining activities, while communities were also forcibly displaced to make way for diamond mining operations in Marange in Zimbabwe. The Marange communities did not receive the compensation they expected – ending up with what the government and the mining companies called disturbance allowances of US\$1,000 per household and resettlement houses, some of which quickly developed cracks due to poor workmanship and materials. The government and mining companies argue that they are not obliged to compensate the communities since the land does not belong to them.

Environmental and biodiversity protection legislation

The case studies revealed that all three countries have developed specific legislation and institutions to regulate the environmental and biodiversity impact of mining projects and most of the laws were passed after the 1992 Rio Earth Summit, which resulted in the adoption of the Rio Declaration. The environmental laws impose obligations on mining companies

“These provisions strengthen the legal arsenal that can be used to increase social and environmental accountability in the extractive sector, especially around the protection of the land and biodiversity.”

and establish bodies that are responsible for administering the laws and monitoring compliance. All the countries have a variety of legislation covering issues such as pollution prevention, control of hazardous waste and radioactive material, protection of wetlands, and conservation of plants and wildlife.

In South Africa, the National Environmental Management Act (NEMA) of 1998 regulates environmental issues. The Act is administered by the Department of Environmental Affairs (DEA), which issues environmental licences and monitors compliance. The NEMA is also supported by a suite of other laws that relate to environmental protection and conservation of biodiversity. Botswana has passed a number of statutes, including the Environmental Impact Assessment Act; Atmospheric (Pollution Prevention) Act; Mines, Quarries, Works and Machinery Act; Waste Management Act; and Mine and Minerals Act. Zimbabwe passed the Environmental Management Act, which is supported by a multiplicity of regulations and other Acts that regulate environmental management. Most of the environmental and mining laws contain expansive provisions that can be used to hold mining companies to account for their social and environmental

impacts. In all the environmental legislation, mining companies are required to rehabilitate or reclaim mined out areas.

Arguably, one of the key legal tools found in all three countries' environmental laws are the Environmental Impact Assessments (EIA), which are now legal as well as planning tools. EIA legislation requires a developer to carry out an environmental, social and economic assessment of the potential impacts of any project and state the measures proposed for preventing or mitigating any anticipated adverse effects to the environment. In particular, the impact of proposed projects on water resources, biodiversity, roads, settlements, land use, economy and culture among other factors are supposed to be identified.

If properly implemented, EIAs can be effectively used to promote social and environmental accountability as they are supposed to take account of the social, environmental, economic and cultural impacts of mining projects and are meant to be informed by the views of the affected communities. Mining companies are required to commission EIAs while government departments monitor compliance. In Botswana, for example, the Environmental Impact Assessment Act (2005) requires the applicant to publicise the intended activity, its effects and benefits in the mass media using official languages and to hold meetings with the affected communities. All these measures are intended to promote genuine social and environmental accountability.

Constitutionalising environmental and social rights

The case studies noted that South Africa and Zimbabwe have included environmental, social, cultural, and economic rights in their national Constitutions, which is likely to influence the way extractive industries deal with communities'

social and environmental rights. Civil society organisations and community groups may also use the constitutional provisions to protect the rights of communities and to hold governments and mining companies to account by undertaking public interest litigation.

The South African Constitution gives every person the right to a healthy environment and to have his or her environment protected for the benefit of present and future generations. Zimbabwe's 2103 Constitution protects the right to safe, clean and potable water and sufficient food. The state is also encouraged to adopt and implement policies and legislation to ensure that local communities benefit from the resources in their areas. Furthermore, every person has the right to an environment that is not harmful to his or her health.

In sum the Zimbabwean and South African constitutions encourage the state to take measures to prevent pollution, conserve the environment and promote sustainable development. These provisions strengthen the legal arsenal that can be used to increase social and environmental accountability in the extractive sector, especially around the protection of the land and biodiversity.

Access to information and public participation

Theoretically, social and environmental accountability is anchored on access to information, disclosures laws and practices. The concept of free, prior and informed consent is therefore vital in the extractive sector, particularly for local communities, which need to be able to access information on the impacts of mining operations and their revenue streams.

The country reports indicate that Zimbabwe and South Africa have incorporated access to environmental information provisions in their environmental legislation. In Zimbabwe,

the Environmental Management Act states in Section 4 that every person has a right to access environmental information. In addition, Zimbabwe and South Africa have developed specific legislation on access to information – the Promotion of Access to Information Act in South Africa and the Access to Information and Protection of Privacy Act in Zimbabwe. In essence, national laws in Zimbabwe and South Africa provide citizens with the right to access records in the custody, or under the control, of public bodies. If implemented and enforced, these laws can promote social and environmental accountability in the mining sector by ensuring that governments and mining companies have to provide information to local communities.

Protection of the health and safety of mine workers

Protecting the health and safety of mine workers is also of paramount importance in promoting social and environmental accountability. Mine workers are often exposed to diseases, hazards and unsafe working conditions. In all three case study countries, there is legislation compelling mining companies to adopt adequate measures to protect workers. In Botswana, the Mines, Quarries, Works and Machinery Act seeks to protect the safety, health and welfare of people engaged in mining operations and covers issues such as accidents, first aid, mine rescue and precautions among other safety issues. In many cases, health and safety legislation is complemented by labour legislation, which sets out the rights of workers in relation to collective bargaining, wages, working hours and termination of employment. In Botswana, the Employment Act is applicable, while in Zimbabwe the Labour Relations Act is applicable. It is the responsibility of mining companies to observe the requirements of labour laws

and practices. However, the shooting of workers by the police at Lonmin's Marikana mine in South Africa over a wage dispute is a clear indication of the failure by mining companies and government to protect and respect the rights of workers. The events at Marikana also show that mining companies remain largely unaccountable and appear to be protected by governments.

Empowerment of local communities

In some of the case study countries, economic empowerment or indigenisation laws and policies have been promulgated and these have implications for social and environmental accountability. Historically, indigenous communities have been sidelined and prevented from benefiting from their mineral resources in a sector dominated by foreign multinationals. However, countries like Zimbabwe have developed legal frameworks to empower local communities to derive direct economic benefits from the natural resources mined in their communities. Zimbabwe passed the Indigenisation and Economic Empowerment Act, which resulted in the establishment of Community Share Ownership Schemes giving at least a 10 percent shareholding in mines to the local communities. The main purpose of the schemes is to unlock revenue to enhance local education, agriculture, infrastructure, micro-enterprises and human resource development. In South Africa, big companies that acquired rights under the apartheid regime were given a chance to renew those rights as long as they met a certain target by allocating some of their shareholding to historically disadvantaged people. There are also communities that are already involved in the mining sector such as the Bafokeng and the Bakgatla. The social and environmental impacts of these measures are significant and should be analysed and documented.

Voluntary initiatives adopted by mining and financial companies

The case studies revealed that multinational mining companies and financial institutions were also adopting voluntary systems and measures to promote social and environmental accountability and to protect land and biodiversity. In South Africa, mining companies are becoming more aware of the risks associated with the impacts of their projects and non-compliance with social and environmental requirements. The South African King Committee Report on Corporate Governance (King III), which attempts to bring local businesses in line with international best practice in terms of the natural environment, social environment and the global economy, was an important step. Other measures adopted by mining companies to promote voluntary social and environmental accountability include the Global Reporting Initiative (GRI), stock exchange listings, the Sustainable Development Framework of the International Council on Mining and Metals (ICCM), the OECD Guidelines for Multinational Enterprises and the UN Global Compact among others. Most of these initiatives promote reporting by corporates of their economic, environmental, social, labour and human rights impact on communities. In South Africa and Zimbabwe, civil society organisations have also launched various efforts to influence mining companies to use the OECD standards and the GRI in relation to corporate social responsibility.

The promotion of social and environmental accountability in the mining sector also extends to financial institutions, which have developed voluntary methods to ensure that mineral industry investors adequately account for environmental and social impacts in their project evaluation frameworks – such as the International Finance Corporation (IFC) Performance Standards on Social and Environmental Sustainability (2006). The standards aim to minimise the investment

impact on the environment and affected communities, while enhancing development outcomes. In Botswana, the Ghaghoo diamond-mining project in the Central Kalahari Game Reserve is being financed by international financial institutions and the project documents included annexures of the IFC standards. This shows that there are attempts to comply with the standards by the project proponents.

169, which address the rights of indigenous people, also apply.

The Extractive Industries Transparency Initiative (EITI) is another mechanism that can be used to promote social and environmental accountability, although it is mainly aimed at disclosure and the publication of mineral revenues and payments. In the SADC region, only Zambia, Mozambique and the Democratic

“The UN Framework establishes three pillars – the state’s duty to protect, corporate responsibility to respect and access by victims of human rights abuses to effective judicial and non-judicial remedies.”

International laws, principles and initiatives

A number of regional and international human rights instruments and standards are also in place to provide guidance on social and environmental accountability. Broadly, the key human rights instruments that are applicable include the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant of Economic, Social and Cultural Rights. These instruments enshrine a basket of rights, including decent standard of living, medical care, social services, employment, education, self-determination, food, freedom of expression and assembly among others. Theoretically, the economic, social and cultural rights in these international instruments were domesticated by Zimbabwe and South Africa in their Constitutions. However, implementation remains a challenge. In Botswana, where indigenous communities such as the San are found in areas like the Central Kalahari Game Reserve, the UN Declaration on the Rights of Indigenous Peoples and the ILO’s Convention

Republic of Congo (DRC) are implementing EITI. Zimbabwe has been hesitant to join the EITI due to concerns by some politicians that it is an imposition of the West. However, a domestic version of EITI called the Zimbabwe Mining Revenue Transparency Initiative (ZMRTI) was launched to promote the disclosure of mineral revenues and payments. But the future of the ZMRTI is uncertain since it was being driven by the MDC-led Prime Minister’s office, which was abolished by the new constitution.

The UN Guiding Principles on Business and Human Rights is another important initiative that can be useful in promoting social and environmental accountability. The UN Framework establishes three pillars – the state’s duty to protect, corporate responsibility to respect and access by victims of human rights abuses to effective judicial and non-judicial remedies. All three pillars are directly connected to social accountability measures on the part of the state and mining companies. The Zimbabwe Environmental Law Association initiated discussions in 2013 with the Zimbabwe Human Rights Commission

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(ZHRC) on the application of the UN Framework in the mining sector and the ZHRC made a commitment to focus on promoting environmental, economic, social and cultural rights in the extractive sector.

From an environmental perspective, social and environmental accountability has also been promoted through the application of Agenda 21 and the Rio Declaration of 1992, which both promote sustainable development principles. Principle 10 of the Rio Declaration states that all citizens have the right to participate in natural resource development decisions, to access information and to seek appropriate forms of redress for environmental harm. The polluter pays principle is also captured in Principle 16 of the Rio Declaration, which calls on countries to ensure that polluters pay for the costs associated with development. Mining companies are some of the heaviest polluters and they are bound to comply and pay for clean-up and environmental remediation. Notably, all the case study countries have adopted – and incorporated into their national legislation and even constitutions – the concept of sustainable development as well as the precautionary principle and the polluter pays principle.

At the SADC and African Union level, there are instruments that are also vital in promoting social and environmental accountability and are applicable in the mining sector. The African Union adopted the African Charter on Human and Peoples’ Rights, which encourages member

states to protect people’s right to work, health, education, culture and freedom to freely dispose of their wealth and natural resources among others. Meanwhile, the African Mining Vision (AMV) seeks to promote a sustainable mining sector, which effectively garners and deploys resource rents in a manner that is environmentally friendly, socially responsible and appreciated by surrounding communities. The AMV advocates for access to information, recognition of resource user rights and public participation. Furthermore, the AMV supports the capacitation of parliaments to provide effective oversight over government and mining companies, which is particularly important in Botswana where the parliament is almost silent in relation to the environmental and social impacts of mining.

Meanwhile, the SADC Protocol on Mining seeks to create a thriving mining sector, which can contribute to economic development, alleviate poverty, and improve the standard and quality of life in the region through the harmonisation of national and regional policies, strategies and programmes. It also includes provisions on the need to observe internationally accepted standards of health, mining safety and environmental protection as well as promote the empowerment of historically disadvantaged people in the sector. These regional instruments could provide vital guidance to SADC states and mining companies about how best to promote social and environmental accountability.

Legal and institutional gaps

The case studies identified a number of legal and institutional challenges and gaps that were hindering social and environmental accountability in the mining sector, particularly in relation to land, biodiversity and the environment.

Lack of enforcement and implementation of laws

The major factor undermining social and environmental accountability in the extractive sector in all three countries is the limited – or lack of any – enforcement of existing laws and policies. On paper the countries have well-established institutions and progressive laws, but implementation and enforcement is lagging behind allowing pollution, human rights violations and biodiversity loss linked to extractive industries to continue in Botswana, South Africa and Zimbabwe. In South Africa, the pollution of ground water by mining operations (known as acid mine drainage) is a cause for major concern and is a legacy of years of non-compliance with water pollution control laws. In Zimbabwe, the pollution of rivers such as the Save and Odzi by diamond mining companies is also continuing and has been reportedly linked to the deaths of cattle – despite the existence of laws and commitments made by mining companies in their EIA reports to curb and control pollution. In all three countries, there is inadequate compliance with environmental mitigation measures and mine closure laws and standards.

Nowhere is the problem of compliance, implementation and enforcement of laws more problematic than in the realm of EIAs. In some cases, communities are not consulted as prescribed in legislation, while in many other instances, only token public consultation processes are undertaken by mining companies to make it look as if they are complying with the law. However, in reality, they have no intention of listening to

local people or implementing concrete steps to curb environmental damage and protect communities. Furthermore, most EIAs appear to be based on the incorrect assumptions by mining companies and their consultants, who believe they have ready-made solutions to potential problems. Another flaw of EIAs is that they are produced by the mining company or developer of the project and this means there is no independent assessment. Meanwhile, effective implementation and monitoring is often restricted by the relevant ministry's lack of financial and human resources.

In Zimbabwe, social and environmental accountability is also limited by the requirement that anyone who wants to access an EIA report held by the Environmental Management Agency has to pay a fee of US\$250 – far too high for most community members or groups. And the EIA reports in Zimbabwe are not even worth the money since most of them lack detailed assessments of the impact of mining processes on the ecology, livelihoods and cultural rights of communities.

Another critical gap that was identified – especially in Botswana – was the absence of constitutional provisions relating to social and environmental rights that could be used to advance social and environmental accountability. Even in Zimbabwe and South Africa, where these rights have been included in their constitutions, their enforcement remains a major challenge. The state and judiciary often treat these rights as progressive

rights that can only be implemented when the state has adequate financial resources. This means they are not treated in the same way as civil and political rights.

The studies also found that there are no clear legal provisions in Botswana and Zimbabwe that establish environmental sureties or an Environmental Rehabilitation Fund as part of the mine closure planning process. Such a fund or surety would guarantee that mining companies or the government would have the resources available to rehabilitate the environment after mine closure. In Zimbabwe, there is also a major policy gap since the country does not have a Mining Policy and its Mines and Minerals Act is out-of-date and does not include clear and comprehensive provisions on environmental management and protection. However, the government has been making trying – albeit slowly – to develop a Mining Policy and a new Mines and Minerals Act.

Weak land tenure systems and absence of free, prior and informed consent

The research studies revealed that land laws do not offer adequate protection to rural communities affected by mining operations because they have very weak tenure rights over the land. Most communities only have usage rights over the land that they occupy since the land is owned by the state. In some cases, governments and mining companies forcibly remove communities to make way for mining without providing them with adequate compensation. In many cases, communities that are forced off their land are not consulted. This means many displacement and resettlement programmes are done without free, prior informed consent and some communities find themselves in a worse position after relocation. Current exploration and mining operations in Zimbabwe's Marange diamond fields have resulted in the forced relocation and

resettlement of more than 800 families so far. This was done without adequate consultation and without the consent of the communities, partly because the country does not have clear and specific laws on displacement to make way for mining operations. Meanwhile, in Botswana, the cultural rights and heritage of the San have also been trampled upon.

Institutional challenges

All the research studies concluded that what is needed in the extractive sector are strong institutions that are transparent, participatory, consensus oriented, accountable and responsive, effective and efficient and follow the rule of law. However, in practice, key institutions such as the legislature are often marginalised or barred from playing an oversight role by the executive or blocked by mining companies. Parliaments are sometimes excluded from involvement in the negotiation of mining contracts. For example, the renewal of De Beers' 25-year leases for its four mines in Botswana was only presented to MPs after negotiations with the government had been finalised. In Zimbabwe, the legislature, through its Committee on Mines and Energy, had to fight hard to be allowed to carry out its oversight function – even going so far as to threaten government officials and mining companies with contempt of parliamentary proceedings after the committee's efforts to summon key individuals to testify about the problems in the Marange diamond fields were initially resisted and its attempts to visit Marange were denied twice. While the mining companies and government officials eventually complied, the saga demonstrates how little respect they have for the role and powers of the legislature, which is one of the most critical institutions in relation to the promotion of environmental and social accountability in the mining sector.

The case studies also exposed the institutional conflicts and overlaps that sometimes affect

the monitoring of mining industries and the implementation of laws. For example, in South Africa collaboration between the Department of Mineral Resources (DMR) and the Department of Environmental Affairs regarding the regulation of environmental impacts is very weak. In some cases, the DMR issues mining rights without the knowledge of the Department of Environmental Affairs. One glaring example was when the DMR issued a mining licence to Coal of Africa (CoAL) near Mapungubwe National Park – a UNESCO World Heritage Site – without compliance with all the related environmental laws, including water-use laws. In many cases, the Department of Water Affairs is often compelled to issue water licences in areas where there is insufficient water for mining because the DMR has already issued mining rights to companies. In addition, there are also instances of overlaps on environmental matters between the provisions in South Africa's National Environmental Management Act and its Minerals and Petroleum Resources Development Act. Even though the Department of Environmental Affairs is the lead agent on environmental matters, the DMR believes that it has the mandate, and the capacity, to regulate environmental impacts related to mining. These conflicts and overlaps affect environmental and social accountability and can lead to environmental degradation and biodiversity loss through unregulated mining practices.

Some environmental monitoring departments also lack the technical, financial and human resources to monitor the implementation of EIA commitments and other legal requirements. In Botswana, an assessment of the Department of Environmental Affairs' Environmental Impact Assessment Unit revealed that there is need for capacity building and strengthening. Meanwhile, mining departments are still secretive and in many cases do not readily disclose information to the general public – usually by hiding behind confidentiality clauses.

But institutional problems also affect mining companies. In South Africa and Zimbabwe, some mining companies are constantly looking for legislative loopholes in order to bypass legal and policy requirements and boost their short-term profits. For many mining companies, Corporate Social Responsibility (CSR) is just a public relations exercise and CSR projects are largely cosmetic, especially as most of the CSR standards adopted by mining companies are voluntary – and therefore they are not legally binding.

The case studies also revealed that compliance with social and environmental accountability measures is affected by the size and capitalisation of the mine. Small or informal miners often face financial constraints that hamper their ability to comply with environmental standards, while multinational companies can afford to comply with all legal requirements. As for project financing, even if the World Bank, AfDB and IFC recommend environmental and social standards, the studies found that mining companies from emerging economies, such as China, may not pay any regard to these issues. All they are interested in is the extraction of mineral resources – not community development, human rights or environmental and social rights.

Domestication of international laws and policies

The domestication and application of regional and international instruments by member countries is weak. Regional harmonisation and integration of policies under SADC also fall short of addressing social issues and the plight of rural communities that are affected by mining projects. Indeed, SADC protocols on mining are more concerned with enhancing economic development partnerships rather than seeking a common understanding on legislation and policy implementation for the proper management of natural resources and the environment.

Recommendations

Governments should promote greater access to information and more transparency by:

- Improving the implementation, and enforcement, of existing access to information and disclosure laws by providing more financial and technical training, and necessary equipment;
 - Passing access to information and disclosure laws where none currently exist;
 - Signing up to the Extractive Industries Transparency Initiative (EITI) to promote the disclosure of revenue and payments in the extractive sector;
 - Ensuring that information about any mining project or programme that negatively affects the environmental and social interests of communities cannot be treated as confidential information.
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Governments should improve institutional capacity by:

- Ensuring that there is sufficient human and technological capacity to enforce and implement mining-related laws;
 - Providing staff in public institutions that are responsible for environmental and social accountability programmes with adequate training to carry out their tasks;
 - Developing an effective monitoring, evaluation and reporting system involving all stakeholders to improve environmental accountability;
 - Ending overlaps and jurisdictional clashes between government departments responsible for issuing mining licences and environmental management; and
 - Conducting audits of mining and prospecting rights databases and establishing cadastre systems.
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Governments should improve mining-related legislation by:

- Making corporate social responsibility a legal requirement so that companies can be held legally accountable for the promises and commitments they make in EIA reports; and
 - Ensuring that regional and international instruments are domesticated and effectively enforced in order to promote social and environmental accountability.
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Governments and companies should reduce the impact of mining on communities by:

- Avoiding resettlement if possible;
 - Carrying out resettlement only if there is no other option and only after securing the free, prior and informed consent of the affected individuals as set out in a binding Consent Agreement based on clear legal frameworks
 - Paying people affected by resettlement just and equitable compensation; and
 - Operating according to international human rights law and best practice in relation to compensation for resettlement even when affected people do not have legal title to the land they lived and worked on.
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Mining companies should:

- Support – and join – voluntary initiatives such as the ICMM principles, Global Reporting Initiative, Equator Principles, EITI etc.;
- Publish their environmental monitoring reports, revenue contributions and impacts on communities and report their progress toward achieving concrete

environmental and social goals through specific and measurable indicators that can be independently verified, which should be disaggregated by project.

Financial institutions should

- Work on outreach campaigns with communities on the environmental and social risks associated with their financing of extractive projects as part of their environmental and social accountability.
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Civil society organisation and community groups should:

- Play a more active role in monitoring the implementation of EIA commitments through improved community-based or independent monitoring of extractive industries;
- Work to establish multi-stakeholder mechanisms to ensure community participation in the design, implementation and monitoring of mining projects;
- Work with governments to establish local level institutional structures to support local development programmes, such as foundations, trust funds, community empowerment schemes or joint ventures between local communities, employees and mining companies;
- Study the Community Share Ownership Scheme in Zimbabwe and the Bafokeng Community in South Africa (among others) to see what are the best models and how to replicate them;
- Seek judicial redress for damage caused by the extractive sector by using (where applicable) constitutional provisions relating to environmental, social, cultural and economic rights; and

“Mining companies should publish their environmental monitoring reports, revenue contributions and impacts on communities”

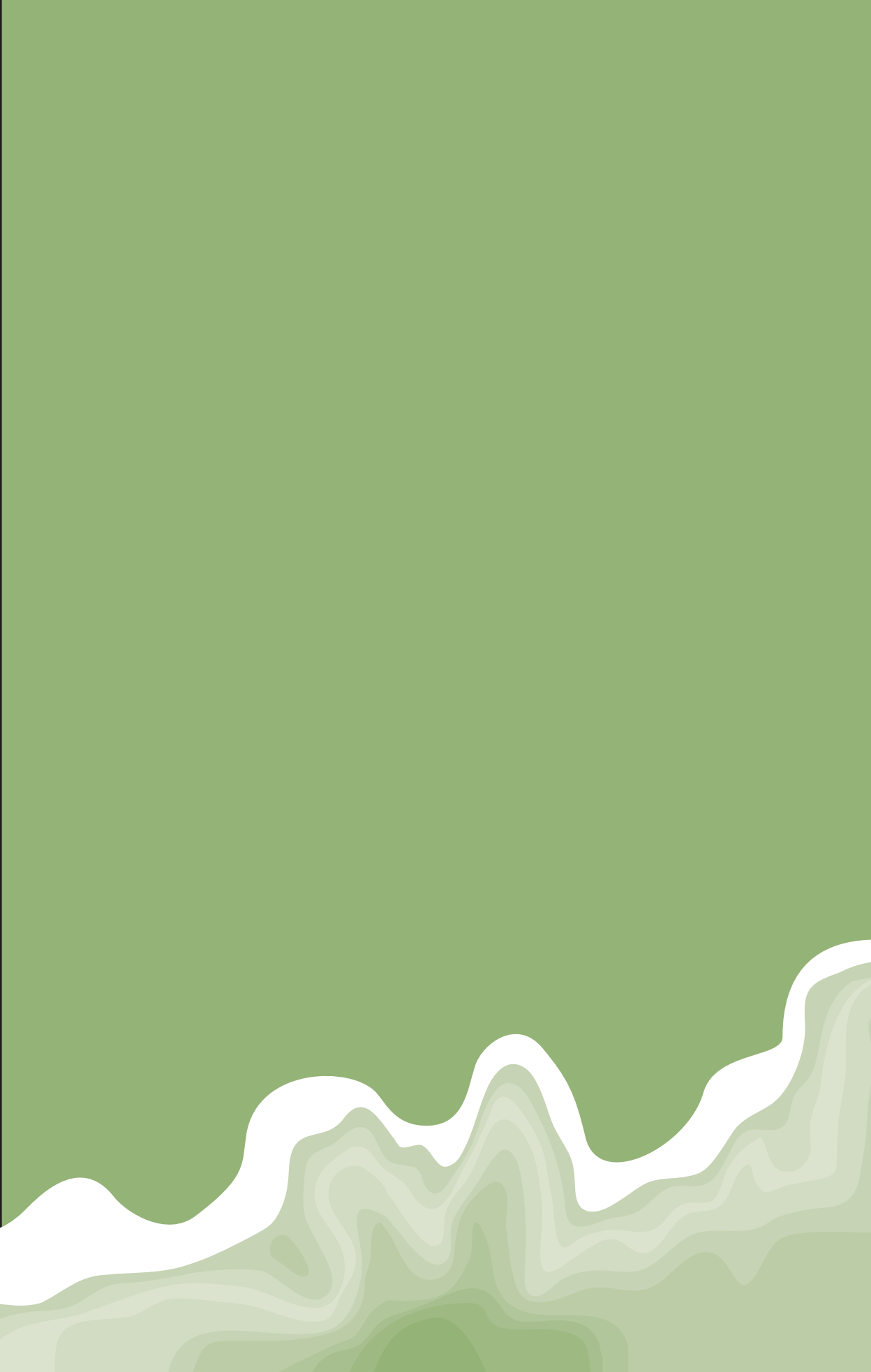
- Assess the implementation of regional and international instruments on social and environmental accountability and then conduct advocacy campaigns.
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Parliaments should enhance their oversight role by:

- Adopting and applying the principles contained in the SADC Resource Barometer developed by SARW and the SADC-PF, which sets out draft principles for good governance of the extractive sector; and
 - Summoning key government ministers, activists and industry experts to testify at public hearings and initiating more regular communication between relevant parliamentary committees and representatives from the mining sector.
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Notes







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The GEF unites 182 countries in partnership with international institutions, non-governmental organizations (NGOs), and the private sector to address global environmental issues while supporting national sustainable development initiatives. Today the GEF is the largest public funder of projects to improve the global environment. An independently operating financial organization, the GEF provides grants for projects related to biodiversity, climate change, international waters, land degradation, the ozone layer, and persistent organic pollutants. Since 1991, GEF has achieved a strong track record with developing countries and countries with economies in transition, providing \$9.2 billion in grants and leveraging \$40 billion in co-financing for over 2,700 projects in over 168 countries.

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for Southern Africa

The Open Society Initiative for Southern Africa (OSISA) is a growing African institution committed to deepening democracy, protecting human rights and enhancing good governance in southern Africa. OSISA's vision is to promote and sustain the ideals, values, institutions and practice of open society, with the aim of establishing a vibrant southern African society, in which in which people, free from material and other deprivation, understand their rights and responsibilities and participate democratically in all spheres of life.

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