

**Breaking the curse:
How transparent taxation and fair taxes can turn Africa's mineral
wealth into development**

EXECUTIVE SUMMARY

December 2008 saw a 'perfect storm' hit international metals prices, bringing the five-year international metal price boom to an abrupt end. The combined collapse in demand for metals and sharp drop in the demand of institutional investors for commodity-based assets have slashed copper prices by up to two thirds, and gold prices by up to a third from their peaks in July 2008.

The metals price bust has dealt a blow to the mining tax reforms undertaken in a few mineral-rich African countries in the past two years. Emboldened by the metals price boom, governments in Zambia, Tanzania, South Africa and the Democratic Republic of Congo have amended their mining tax legislation or contracts with mining companies to increase the revenue they collect from mining rents. They did so partly under public pressure – African citizens have been all too aware that while the 'good times were rolling' for the global mining industry, they saw no increase in mining tax revenue to governments or spending on their basic development needs.

The poor balance sheet of mining tax revenue in times of record high metals and minerals prices has motivated African and international non-governmental organisations to collaborate in commissioning a study on mining taxation and transparency in seven African countries. The countries are Ghana, Tanzania, Sierra Leone, Zambia, Malawi, South Africa, and the Democratic Republic of Congo (DRC). Each country study examined past and present mining tax laws, tax rates, and the forces driving tax changes, and compared the tax terms of mining contracts with national tax laws.

The central argument made by the report is that African governments have not been able to optimize the mining tax revenue due to them before the 2003 to 2008 price boom; neither have they been able to capture the anticipated windfalls during the price boom. This argument is grounded on two main reasons: (i) Mining companies operating in Africa are granted too many tax subsidies and concessions (ii) There is high incidence of tax avoidance by mining companies conditioned by such measures as secret mining contracts, corporate mergers and acquisitions, and various 'creative' accounting mechanisms. These two factors coupled with inadequate institutional capacity to ensure tax compliance contribute in a large measure to diminish the tax revenue due to African governments. In turn, they diminish the contribution of mineral resource rents to national development. This explains the high preponderance of income poverty indicators in mineral endowed African countries and communities in mining areas. To reverse this trend and ensure the maximization of mining tax revenue for national development the report recommends reforms of policies, laws, and institutions that govern the financial payments made by mining corporations to national governments.

Mining companies claim that they need to be compensated for the unique risks they face, such as price booms and busts, through special tax exemptions and concessions. But these tax subsidies, together with tax avoidance and illegal tax evasion practices by mining companies, have robbed African treasuries of millions of dollars of foregone tax revenue from the mining industry. Fuelling these losses has been a lack of transparency and oversight of the financial remittances from mining companies to government institutions, coupled with the inability of government institutions to audit the complicated accounts of multinational mining companies.

How tax subsidies and tax avoidance are driving down revenues from mining

This report argues that African governments have failed to collect the additional rents generated by mining companies before and during the price boom because (i) they have given tax subsidies to the industry and (ii) mining companies have been pushing for tax breaks in secret mining contracts, amounting to an aggressive tax avoidance strategy. As a result, the citizens of mineral-rich countries continue to live in poverty, and are in some cases subject to violent conflict fuelled by the wealth generated from mineral resources as is the case today in the eastern DRC. To break this 'resource curse' and turn mineral wealth into revenue for development, the laws, policies, and institutions that govern the financial payments made by mining corporations to national governments need to be reformed.

The report draws on evidence from mining tax studies undertaken in seven countries: Ghana, Tanzania, Sierra Leone, Zambia, Malawi, South Africa, and the DRC. Each country study examined past and present mining tax laws, tax rates, the forces driving tax changes, and compared the tax terms of mining contracts with national tax laws.

In the report, estimates are given of the revenue foregone by the governments of Malawi, South Africa, DRC, Tanzania, Sierra Leone, Ghana and Zambia as a result of special tax breaks given to companies in secret contracts or in the mining tax laws promulgated in these countries since the 1990s. In Ghana, South Africa, and Tanzania, the report estimates that lower royalty rates have cost or will cost treasuries up to US\$68m, US\$359m, and US\$30m a year respectively. In Malawi and Sierra Leone, tax breaks granted in mining contracts have cost or will cost treasuries up to US\$16.8m and US\$8m a year respectively. In the DRC, the tax exemptions in a single mining contract has cost the treasury US\$360,000 a year.

African mining tax regimes are a mix of secret and discretionary tax deals, as well as tax laws enacted through parliament. Most mining tax laws dating from the 1990s have lowered taxes considerably to attract new foreign direct investment into the sector. This shift to lower taxes has been promoted by the World Bank in all its client countries in Africa, as a means to revitalize the mining sector. Many of these laws allow ministers to negotiate tax deals with individual mining companies at their discretion, often leading to lower royalties, corporate taxes, fuel levies, windfall or other taxes than those stipulated in the law. At their worst, contracts may completely exempt companies from any taxes or royalties, as was the case in a number of the mining contracts signed between private companies and state-owned enterprises in the DRC between 1997 and 2003.

Secret and discretionary tax deals must cease to be a part of mining tax regimes; instead, government and parliaments should aim to develop and enact comprehensive tax laws which can be monitored by citizens, companies, elected parliamentarians and investors through the budget process. In addition, international financial reporting standards should force multinational mining companies to report publicly on all their financial operations, including a breakdown of their remittances to governments and other structures, in each country where they operate.

Tracing the legacy of World Bank-driven mining tax regimes

This report traces the history of mining tax regimes in Africa since independence, throughout the booms and busts in international metals prices. It pays particular attention to the drive of the World Bank to open up Africa's mining sector to foreign private investors since the 1990s, which has shaped subsequent mining tax regimes in all its client countries. Next, the report argues that revenue is the key development benefit from mining, which explains why an equitable and transparent mining tax regime is of paramount importance if mining wealth is to translate into future development.

The core of the report investigates the tax subsidies given to mining companies in mining tax laws and contracts, and gives estimates of some of the costs of these exemptions. These subsidies take the form of lower tax rates and higher and faster tax deductible capital allowances. It then investigates the tax avoidance strategies used by mining companies, focusing primarily on the

negotiation of tax breaks in secret mining contracts. This tax avoidance strategy is in contravention of the OECD Guidelines on Multinational Enterprises, to which many of these companies claim to ascribe. Some mining companies have also been accused of illegally evading taxes. In Tanzania a government-commissioned auditor has alleged that the country's four main gold mining companies have over declared their losses by millions of dollars.

How to increase the revenue collected from mining activity

To reverse the 'paradox of plenty' characteristic of many mineral-rich societies in Africa – whereby countries with the most natural resources are often the poorest and worst governed, two major changes are needed. First, the process of creating tax regimes and mechanisms of tax payment need to become transparent. This transparency requires equal opportunities for citizens to monitor payments, receipts and utilization of mineral tax revenues. To contribute to such transparency, a new international accounting standard, which requires all multinational companies to report on their remittances to governments, and their profits and expenditures in each of the countries where they operate, needs to be established. The International Accounting Standards Board is presently discussing whether or not to introduce such a standard for the extractives sector. This would be an important systemic reform, which would enable governments and citizens to track where companies pay tax, and how much. This would make it more difficult to shift profits between subsidiaries of different companies.

Second, African mining tax regimes need to be reformed to ensure that African governments are able to collect a fair share of mining rents to fund their national development plans. In some countries this would require an increase in the rates of royalties and other taxes; in others this would require a stop to the practice of negotiating tax breaks for individual companies in secret contracts.

There is a real danger that the crash in international mineral commodity prices, coupled with the reduction in international finance available for new mining investment, could set back the mining tax reforms underway or recently enacted in countries like Tanzania, and Zambia. In Zambia, the minister of finance announced in his budget speech at the end of January 2009 that he will reverse a tax amendment passed in parliament less than a year ago, introducing a new windfall tax. In Tanzania, the minister of finance has failed to implement any of the tax increases recommended by a presidential commission tasked to review the country's mining tax regime in his June 2008 budget speech, although he did introduce a turnover tax on companies declaring losses three or more years in a row, directly aimed at mining companies.

Too many African governments are still unwilling to open up their tax deals and tax receipts from mining companies to public and parliamentary scrutiny; and too many mining companies are still pushing for tax exemptions and fail to report what they earn and what they remit to government in each jurisdiction where they operate. Transnational mining companies have also been pushing for tax exemptions and fail to report what they earn and what they remit to government in each jurisdiction where they operate. The credit crunch and its impact of a reduction in finance available for mining investment are set to motivate governments to continue such secret deals. The crunch will also give mining companies the moral instrument to demand more exemptions. These are systemic and political complications that threaten the reform agenda.

The report argues however, that both systemic and political solutions are needed to increase mining revenue and transparency. At the systemic level, a new international financial reporting standard is needed, which all companies registered on stock exchanges will need to implement. It should require them to report on their financial operations and remittances to government and other structures on a country-by-country basis. This will allow citizens and parliaments to monitor the financial flows between parent companies and subsidiaries, and detect tax avoidance practices.

African governments also need to revise their company acts to require the subsidiaries of multinational mining companies incorporated in their jurisdictions to publish the financial information required by the Extractive Industry Transparency Initiative (EITI). This will ensure that privately or state-owned mining companies such as the growing number of Chinese state-owned or financed mining companies are required by national law to publish their profits and losses, and remittances to government and other structures.

Recommendations

To African governments

1. Collaborate with the United Nations Economic Commission for Africa (UNECA) to develop and publish an easy to use guide on mining taxation. The guide should cite best practice and detail the purpose, costs in foregone revenue and benefit of each type of tax instrument and tax concession
2. Review their company and financial laws to require all extractive industry companies to use the EITI template in their annual financial reports by law
3. Stop the practice of granting tax exemptions to mining companies in mining contracts. All mining tax rates and terms should be legislated in the substantive law and merely confirmed in mining development agreements

To African parliaments

1. Pass laws that require mining development agreements to be ratified by parliaments, as is the case in Ghana and Sierra Leone, and made public
2. Push for a new international accounting standard that would force companies to report on their profits, expenditures, and taxes, fees and community grants paid in each financial year on a country-by-country basis

To the International Accounting Standards Board

Adopt a new international accounting standard for extractive industries, which require them to report on their profits, expenditures, and taxes, fees and community grants paid in each financial year on a country-by-country basis

To bilateral and multilateral donors

Scale up their financial assistance to African governments to improve their capacity to monitor and audit the accounts of mining companies, and to review their mining tax regimes. African governments should be free to use this finance to purchase legal and other technical assistance from any service provider of their choice

Introduction

This report has been compiled by a group of African and international civil society organisations concerned about the lack of transparency in mining contracts, as well as the revenue that national budgets forego because of excessive mining tax concessions as well as multinational mining companies avoiding and evading tax.

Our analysis, drawn from research conducted in Ghana, Zambia, Tanzania, Sierra Leone, Malawi, DRC and South Africa, shows that African governments are foregoing millions of dollars in tax revenue from the mining industry. This is largely because of overly generous tax concessions, usually granted discretionarily in secret mining contracts, as well as tax avoidance and illegal tax evasion practices by multinational mining companies. Fuelling these losses is a lack of transparency and oversight of the financial remittances from mining companies to government institutions, coupled with the inability of government institutions to audit the complicated accounts of multinational mining companies.

This report will argue that transparent and balanced mining tax regimes, as opposed to secret tax deals with individual companies, are the best way to avoid corruption and assure citizens and investors that the rents from mining are being shared fairly. It will also argue that states should stop subsidising industrial mining activity through lowering taxes, unless such subsidies are part of a carefully considered industrial plan and outweigh the costs of mining to communities and the environment.

Four decades after independence, many Africans continue to harbour great expectations of economic and social development based on the continent's rich mineral deposits. The African Union's development blueprint, the New Economic Partnership for African Development (NEPAD), believes that mining activity, if well managed, can transform the continent's economies. This belief led NEPAD to establish an African Mining Partnership (AMP) with corporate mining companies in 2002.

Furthermore, the UN Economic Commission for Africa (UNECA) is spearheading the development of a Mining Vision for Africa and is leading the development of best practice guidelines for African governments to ensure that their mining laws protect the environment and communities while maximising the remittances from mining companies to government budgets in a transparent and accountable way.

Finally, many African governments have been reviewing their mining contracts and tax laws since the 2003 price boom¹, to put in place more transparent and beneficial mining tax systems.

These new initiatives are in part a response to the fact that neither the nationalisation, nor the subsequent liberalisation of mining activity in mineral-rich African countries has brought lasting transformation to their economies and societies. Instead, mineral wealth has fuelled and prolonged violent conflict in countries such as Angola, the Democratic Republic of Congo and Sierra Leone, stalled economic diversification in countries such as Botswana and Zambia, and failed to contribute to the development of communities and economies of mineral-rich countries. Although African leaders have acknowledged this,² they have missed the 'window of opportunity' offered by the 2003 to 2008 boom to increase the development benefits from mining.

¹ IMF Commodity statistics show that the metals price index for copper, aluminium, iron ore, tin, nickel, zinc, lead and uranium rose from 40 in April 2002 to 200 in April 2008. This equals an average rise of 269 per cent in the price of minerals during this period.

² In 2007, UN ECA and the African Development Bank organised a 'Big Table' meeting on 'Managing Africa's Natural Resources for Growth and Poverty Reduction'. Participants at this meeting acknowledged that African mineral wealth has not led to poverty reduction or growth in mineral-rich countries. They subsequently tasked UN ECA to lead a pan-African research process that would provide guidelines for African governments on how to turn their mineral wealth into development benefits. UN ECA has also

A view prevailing in the international community³ is that natural resource rents are almost certain to be a destabilising force in mineral-rich states that are either predatory (Zaire under Mobutu Sese Seko) or besieged by violent internal conflict (Angola and Sierra Leone). In the past, the non-existence of de facto states or recognised authorities to carry out state functions in these territories has meant that there were no legitimate institutions capable of enacting or enforcing democratically and transparently agreed rules and laws to govern the operation and taxation of mining activities.

As a result, companies often ended up doing business with individuals, rather than public institutions. For example, the secret mining contracts signed during the 1998-2003 war in the DRC or during the 1991-2001 conflict in Sierra Leone were largely driven by patronage relations between mining companies and political elites – the former seeking special tax deals in return for personal benefits to political elites.⁴ Like in other conflict-prone countries with mineral deposits close to the surface, artisanal mining by opposition forces or their supporters have prolonged their internal conflicts.

But natural resource deposits need not be a ‘curse’ on development. Citizens – who are the ultimate beneficiaries of natural resources in most African constitutions – are increasingly putting political elites on the continent under pressure to tax resource rents transparently and distribute the revenue equitably based on the development goals shared by society. Ultimately, it is the quality of national legislative and policy processes, state institutions and individual political leadership that will determine whether potential wealth goes towards financing national development or lining the pockets of political and business elites. This view is shared by UNECA, which states that it is ‘the quality of institutions that determines the development gains from mining’ and that ‘weak governance institutions have been at the root of Africa’s ‘resource curse’, and not mining activity itself’.⁵ The Botswana Director of Mines holds a similar view. He attributes the fact that the government collects 75 per cent of net profits declared by diamond companies in taxes and dividends to stable policies, good political leadership, a skilled tax bureaucracy and good governance.⁶

This report will focus on the laws, policies, and institutions that govern the financial payments made by mining corporations to national governments in the form of taxes, royalties and fees. It will argue that African budget revenue increases did not correspond to increases in company profits during the 2003 to 2008 mineral commodity price boom because (i) governments granted tax subsidies to the industry and (ii) mining companies were pushing for tax breaks in secret mining contracts, amounting to an aggressive tax avoidance strategy. To optimise tax revenue for development, African governments need to

- stop subsidising foreign mining companies through tax concessions.
- put in place mining tax schemes that are consistent with an overall industrial strategy

published the following report as a guide: Antonio M.A. Pedro, ‘Mainstreaming Mineral Wealth in Growth and Poverty Reduction Strategies’, UN ECA Policy Paper No 1, no date available

³ Prominent academic studies fuelling this view include that of the World Bank economist Paul Collier and Anneke Hoefler, in ‘Resource Rents, Governance and Conflict’, *Journal of Conflict Resolution*, 2005, Volume 49(1). These views are shared in a number of academic studies, including Thad Dunning, ‘Resource Dependence, Economic Performance and Political Stability’, *Journal of Conflict Resolution*, 2005, Volume 49(4), and Lujala Paivi, Nils Peter Gleditsch and Elizabeth Gilmore: ‘A Diamond Curse? Civil War and Lootable Resource’, *Journal of Conflict Resolution*, Volume 49(4), 2005

⁴ The UN Expert Panel Report on the Illegal Exploitation of Natural Resources and Other Forms of Wealth in the DRC has found that ‘by contributing to the revenues of the elite networks, directly or indirectly, companies and individuals fuel the ongoing conflict as well as human rights abuses’, and that ‘the consequence of illegal exploitation has been ... the emergence of illegal networks headed by either top military officers or businessmen. These ... elements form the basis of the link between the exploitation of natural resources and the continuation of the conflict.’ UN Expert Panel DRC Report, S/2001/357, April 2001

⁵ Antonio M.A. Pedro ‘Mainstreaming Mineral Wealth in Growth and Poverty Reduction Strategies’, ECA Policy Paper No 1, date unknown, United Nations Economic Commission for Africa

⁶ Jacob Thamaga, Director of Mines, Ministry of Minerals Energy and Water Resources, presentation at the Geneva Trade and Development Forum, 10 March 2008, organised by the EC Working Group on turning mining revenues into development benefits, Brussels

- outlaw the use of confidential contracts to negotiate tax breaks, which help companies to avoid making tax payments and reduce the revenue for development generated by mining companies
- improve the institutional oversight of the mining tax regime

At present, African mining tax regimes comprise a mix of secret discretionary tax deals and tax laws enacted through parliament. Secret and discretionary tax deals must cease to be a part of mining tax regimes; instead, government and parliaments should aim to develop and enact comprehensive tax laws, which citizens, companies, elected parliamentarians and investors can monitor through the budget process. In addition, the report will argue for a new international accounting standard that would compel multinational mining companies to report publicly on all their financial operations, including all their remittances to governments and other structures in each country where they operate.

This report will set out the case for these demands as follows: First, it will outline the history of mining tax regimes in Africa in the context of mining booms and busts as well as the involvement of the World Bank. Second, it will explain why the African and international development community needs to pay particular attention to mining taxation. Third, it will outline how mining companies are avoiding paying taxes in African jurisdictions. Finally, it will outline the two major changes needed to reverse the outflow of mining rents that could be used to finance development in mineral-rich African countries: One, tax regimes and payments need to become transparent so that citizens can monitor the revenue remitted by companies. Two, mining tax regimes should be reformed to ensure that African states collect a fair share of mining rents to fund their national development plans.

The country-specific research informing this report has been commissioned and supported by Third World Network Africa, Tax Justice Network Africa, Southern African Resource Watch, Action Aid International, and Christian Aid. We have worked with mining experts in Ghana, Malawi, Democratic Republic of Congo, Sierra Leone, Tanzania, Zambia and South Africa to investigate in detail the evolution of national mining tax regimes, the driving forces behind these regimes, as well as a select number of mining contracts in each country.⁷

In each of these countries, national civil society organisations are actively monitoring the impact of mining on the environment and communities, as well as campaigning for changes in mining legislations and company behaviour. Many of these organisations are members of the African Initiative on Mining and the Environment and Society (Aimes), a network of African and international civil society organisations actively campaigning for more responsible and transparent mining in Africa. The network is coordinated by Third World Network Africa, based in Ghana.

Chapter One: A Short History of Mining Tax Regimes in Africa

⁷ This report draws from the following background studies and reports: Laurent Okitonemba and Dona Kampata 'Dans quelle mesure le boom des matières premières peut-il augmenter l'assiette fiscale en Afrique? Etude du cas de La République Démocratique du Congo', Southern Africa Resource Watch, OSISA, Kinshasa October 2008, unpublished; Thomas Akabzaa 'Ghana's Mining Tax Regime', Third World Network Africa, Accra, October 2008; Patrick S Kambewa, 'Malawi's Mining Tax Regime', September 2008; Alastair Fraser and John Lungu, 'For Whom the Windfalls? Winners and Losers in the Privatisation of Zambia's Copper Mines', Zambia Civil Society Trade Network and Catholic Centre for Justice Development and Peace (CCJDP, now Caritas), 2006; Mark Curtis and Tundu Lissu, 'A Golden Opportunity: How Tanzania is Failing to Benefit from Gold Mining', published by the Christian Council of Tanzania, National Council of Muslims in Tanzania, Tanzania Episcopal Conference, October 2008; Mark Curtis, 'Sierra Leone at the Crossroads: Seizing the Chance to Benefit from Mining', National Advocacy Coalition on Extractives (NACE), Freetown, March 2009 (forthcoming); Mark Curtis 'African Mining and Tax Regimes: A Comparative Table', mimeo, October 2008; and Mark Curtis, 'Mining Briefing: How Can the Commodity Boom Grow Africa's Tax Base – South African Case Study', mimeo, October 2008; Patrick Kambewa, 'How Can the Commodity Boom Grow Africa's Tax Base – Case Study from Malawi', zero draft report, mimeo, October 2008.

Since independence, African mining tax regimes have been very closely correlated to international price and demand trends for metals. The United Nations Conference on Trade and Development distinguishes between three phases in the international metals economy – the 1960s and 1970s, a decade of high metals demand, high international mineral prices and high production; the 1980s and 1990s, an era of decreasing metals demand from industrial countries, raw mineral oversupply, and lower prices; and the current phase starting around 2002, marked by a record boom in international mineral commodity prices, fuelled by metals demand in newly industrialising countries such as China and India.⁸ This boom cycle has been short-lived – in January 2009, international commodity prices were again at levels seen in the early 2000s. African governments have responded to each of these phases with a very different approach to sharing the rent from mining activity.

Phase One: High Prices and High Revenue

During the 1960s and 1970s, the newly independent governments of mineral-rich African countries all expressed hopes to develop, diversify and industrialise their economies based on the mining industry. In most countries, mining became a state-directed activity. By nationalising the industry, governments hoped to capture more benefits from mining through local employment creation, direct spending on social services for mining communities, and higher budget revenue from having a direct stake in the business.

During this period, mineral prices were surging as a result of the rapid growth in international demand for raw minerals, stimulated by metals-based growth in both industrial and newly industrialising countries. In Africa, most mineral exploration and extraction operations were run by state-owned enterprises – many of them were previously privately-owned before being nationalised. Given state ownership of the rents earned from mining activity, mining revenues formed a large share of government revenue, and were used in more developmentally oriented states to finance national development plans.

Backed by high international commodity prices, Zambia's gross domestic product in 1969 exceeded that of South Korea and Brazil. In the early 1970s, revenue from all copper mining operations, run by the state-owned Zambia Consolidated Copper Mines Company, provided two-thirds of government revenue, funding the provision of health and education services for all, as well as investment in development of the agricultural and other sectors. In 1989, income from mineral extraction contributed 35% of government revenue in the former Zaire and 58% in Botswana – largely through state equity in mining operations. By then, however, mineral taxes were contributing only 16% of government revenue in Zambia, reflecting the dire state of the industry.

However, despite the high hopes and many African governments' political declarations to this effect, mining failed to stimulate the industrialisation of the continent's economies, with the possible exception of the apartheid regime in South Africa. Nevertheless, in countries such as Botswana and Zambia, copper and diamond mining activities did bring significant income and local economic development benefits to the areas where mining took place.

Phase Two: Low Prices and Low Taxes

During the 1980s and 1990s, slower international metals-driven growth, together with oversupply, led to a slump in international prices – with the exception of the period between 1990 and 1997, when prices rose. Many African mineral-rich countries were suddenly faced with a sovereign debt crisis as they no longer earned sufficient foreign exchange from their mineral exports to fund the repayments of loans they took during the boom years. The World Bank,

⁸ World Investment Report 2007: Transnational Corporations, Extractive Industries and Development, UNCTAD 2007

through the International Development Association, became a lender of last resort, and used this position to rewrite the mining laws and tax regimes across Africa (see Box 1.1).

BOX 1.1

World Bank mining strategy in Africa

Before the 1980s, the World Bank group's main involvement in mining development was to finance mining projects undertaken by the public or private sector in developing countries. At the time, it was the only source of finance available to these operators. However, since the mid-1980s, it shifted its focus to support for the reform of mining development programmes in developing countries. It started providing financial support and technical advice to its client countries to help them stimulate greater private sector participation in the mining industry through 'competitive' tax regimes. From the mid-1990s onwards, it played a key role in the formulation of new legal mining frameworks in a number of African client countries with 'less institutional capacities', including Tanzania, Ghana, Zambia, Sierra Leone, and the DRC.⁹

In 1992, the World Bank published its 'Strategy for African Mining'. This was part of a World Bank process across the globe to define what it saw as its role in enhancing the role of mining in development. At the time, commercial scale mining was taking place in 20 countries in Africa.

The main purpose of the World Bank's strategy for mining in Africa and in other developing countries was to attract 'high risk capital' to invest in exploration for new mineral deposits and to take over Africa's stagnating state-owned and operated mines. The Africa strategy states explicitly that 'the overall drive of the Bank and donors should be directed at reducing 'country risk' for the investor'.

The World Bank's advice centered on the premise that foreign direct investment in the mining sector was essential to revitalise the industry, which was partly ravaged by bad management and corruption dating from the era of state-owned enterprises, and needed capital and technology, which was not available in African countries.

This drive to reform African mining regimes to attract foreign investment was part of an overall strategy to reduce the role of the state in development. It was also linked to the need for African governments to earn foreign currency with which to pay back expensive loans taken out during the earlier boom times. The World Bank used aid conditions and other means to cajole unwilling African governments into privatising their mining industries, and attract foreign investment into the sector, often at the cost of foregone revenue that could be spent on development.

The justification for a shift to lower tax rates and other tax concessions offered to foreign mining companies was that capital for mining was scarce, given low international prices; therefore African countries had to compete with one another and with other mining economies to attract high risk capital by developing 'competitive' tax regimes. According to the strategy, 'investors require competitive terms and conditions and iron clad assurances that the investment environment will be stable and that the rules of the game will not change'.

In no African country, however, did these tax regimes form part of a broader industrial strategy. The latter would have gone against the dominant international view – called the Washington Consensus – that the private sector, and not states, should drive development.

Neither did the World Bank's mining strategy attempt in any way to bring transparency to the payment and collection of taxes and other government remittances from mining activity. This has changed in recent years – the World Bank is now a major supporter of the Extractive Industries Transparency Initiative (see Box 4), and actively encourages resource-rich client governments to

⁹ For an overview of the World Bank's role in mining reforms across developing countries, see Felix Remy, 'Mining Reform and the World Bank', published by the World Bank Group's Oil, Gas, Mining and Chemicals Department, www.ifc.org/ogmc

endorse the EITI. It even helps to finance their ability to implement the initiative. In the DRC, for example, the World Bank has spoken out against the secrecy of mining contracts and funded a technical review of the contracts.¹⁰ However, a recent review by Global Witness and the Bank Information Centre of how the IMF and World Bank use their leverage to promote extractive industry transparency found that the World Bank engagement with transparency is neither consistent nor comprehensive across resource-rich countries.¹¹

The World Bank strategy argued that major private investment in exploration and mining would follow if African governments would reduce the risks to especially medium and smaller investors – called ‘juniors’, many of them based in Canada and Australia. Accordingly, ‘by structuring the tax system to reduce the risk of taxation or royalties contributing to operating losses, governments should secure more investment and higher taxation [revenue] over the life of the mine’. Given that most African countries fall in the medium-to-high-risk category, they would have to provide ‘highly competitive tax packages and incentives to attract new high risk exploration and investment funds from international companies’. The World Bank argued on behalf of mining companies that ‘competitive’ tax regimes would help them to ‘control costs’.

On government revenue, the strategy argued that tax policy should look at maximising government revenue over the full length of the mining operation – between 10 and 20 years. This would require policies that promote investment in new mines. Given that new mining investors had to manage their cash flow in the context of wide fluctuations in profitability given cyclical price flows, the World Bank argued that the tax system should emphasise profit-related taxes.

Given this view, the Bank strategy actively discouraged African governments from charging royalties that are based on sales value, rather than on the company’s declared profits. The Bank argued that because value-based royalties are charged equally to profit and loss-making companies, they a) increase the risk of operating losses and b) discourage companies from mining more expensive, low-grade underground ores, thus reducing the lifespan of the mine. Wisely, none of the World Bank’s client countries followed its advice to abolish royalties altogether. Instead, they lowered the value-based royalties charged to companies. Chapter Three will show how royalties are often the only major source of revenue governments earn during the first years of new industrial mining operations, due to the tax concessions offered to mining companies.

While emphasising the risks of mining to companies, the Bank’s strategy said nothing about the significant risks faced by communities living close to mining activities, which include the loss of livelihoods, homes, health, and natural resources. Today, ironically, the World Bank is at the forefront of advocating strong environmental policies as one of the pillars of a modern legal mining framework.

The mining tax regimes of most of the countries investigated for this report were influenced by the World Bank. In Tanzania, the World Bank funded the Mineral Sector Development Technical Assistance Project, intended to promote fiscal reforms to attract private capital into the mineral sector. This project led to the development of the government’s 1997 Mineral Sector Policy, which emphasised the primary role of companies as mining operators, and the government as regulator. Also in 1997, two new laws were passed covering investment, financial laws and customs duties. These laws reduced tax rates and customs duties on certain imports and legalised the repatriation of profits. The new Mining Act, which followed in 1998, was the direct outcome of the five-year World Bank-financed sectoral reform project.¹²

¹⁰ For a detailed overview the World Bank’s activity in the DRC, including on mining and transparency, until 2006, see Nikki Reisch, Bank Information Centre, Michelle Medeiros, Friends of the Earth and Shannon Lawrence, Environmental Defense in ‘The World Bank in the DRC: March 2006 update’.

¹¹ See Global Witness and Bank Information Centre ‘Assessment of International Monetary Fund and World Bank Group Extractive Industries Transparency Implementation’, October 2008

¹² Cited in Mark Curtis and Tundu Lissu ‘A Golden Opportunity: How Tanzania is Failing to Benefit from Gold Mining’, published by the Christian Council of Tanzania, National Council of Muslims in Tanzania, Tanzania Episcopal Conference, October 2008

In Ghana, the World Bank's involvement had already started in the 1980s. In the early 1980s, the International Development Association loaned Ghana about USD\$50m, as part of its support for the Economic Recovery Programme, to promulgate Ghana's 1986 mining law and rehabilitate three gold mines run by the state. In 1988, IDA loaned the government money for 'Export Sector Rehabilitation'. This loan was tailored exclusively to the mining sector, and aimed to (i) rehabilitate economically viable mines, (ii) help attract private investment in mining, (iii) strengthen the capacity of government agencies dealing with the mining sector, and (iv) increase the benefits of small-scale mining to the country. A third loan, for the Mining Sector Development and Environmental Project, sought to enhance the capacity of government institutions to carry out their functions of administering mineral rights, providing reliable and modern geological information and encouraging and regulating investment in an environmentally sound manner.

In Sierra Leone, the World Bank is funding a US\$6m technical assistance project that seeks to 'accelerate sustainable development of extractive industries through strengthening the policy, fiscal and regulatory framework and thereafter to attract investment in large-scale mining to continue sector growth'. The World Bank expects that this project will lead to 'increased payments received from the extractive industries by the government' by 'strengthening the assessment and collection of royalty payments... and enforcement of payments from small and large-scale mining'.

The Bank has also used 'triggers' for release of Highly Indebted Poor Countries debt relief and aid to push for a mining tax reform that would attract private investment into Sierra Leone. This has become the government's key objective in its 2003 Core Mineral Policy. One of the 10 current triggers for the government to receive a US\$10m World Bank loan is changes to the mining tax regime 'in line with recommendations from the IMF'. Some of these recommendations, made in 2004, will help increase mining tax revenue and transparency in the mining sector. However, the Bank also recommends that the government implements the terms of a secret Memorandum of Understanding with Sierra Rutile, which gives the company huge tax exemptions'.¹³

In the DRC, the World Bank has been supervising the country's mining policy since 2001, after 10 years of absence. Its main strategy was to spur economic growth through private sector activity, mainly by trying to attract foreign investors into the mining sector. At the same time, it was promoting the further privatisation of the country's mining parastatals, a process started by the government, under premier Kengo Wa Dondo in 1995, before the war broke out. The Bank promoted three key structural reforms as part of its Transitional Support Strategy: the restructuring of key mining parastatals; the promulgation of a new Mining Code in July 2002, and the preparation of a new Mining Registry.¹⁴ The Bank's 2004 Transitional Support Strategy aims to achieve countrywide implementation of the Mining Code 'with a view to improving transparency ... in the management of revenues generated in [the mining sector]'.¹⁵

As part of this strategy, the World Bank has funded a number of studies and audits, to assist the government in restructuring Gécamines, a state-owned cobalt and copper mining enterprise. None of these has been made available to the public. The first study, undertaken by UK firm International Mining Consultants (IMC) in 2003, found that all the joint ventures negotiated between Gécamines, state-owned copper and cobalt enterprise, contain numerous anomalies, all to the [financial] detriment of Gécamines. It recommended that joint ventures with private partners need to be re-examined with the objective of optimising state revenue by re-establishing a more equitable relationship between the state and investors. To further assist Gécamines in implementing the many IMC recommendations, the World Bank funded two further audits in

¹³ Thomas Akabzaa, 'Ghana's Mining Tax Regime', unpublished background paper, Third World Network Africa, October 2008

¹⁴ For further analysis of the World Bank's involvement in DRC see 'The state vs the people: governance, mining and the transitional regime in the Democratic Republic of Congo', Netherlands Institute for Southern Africa, International Peace Information Service (IPIS) and Fatal Transactions, 2006

¹⁵ *Transitional Support Strategy Paper*, World Bank, Report no 27751, January 2004

2005, including a financial audit of six joint venture mining operations signed with Gécamines between 1997 and 2004, to be undertaken by Ernst and Young. The auditors reported that a) the companies provided them with insufficient data to make a fair assessment of their financial operations and b) the terms of the contracts prevented Gécamines from deriving any financial benefit from the joint mining ventures. They recommended a fundamental revision in the terms of the six mining contracts and more transparent company reporting.¹⁶

Despite these recommendations, the government continued to sign joint venture mining contracts, contravening the 2002 Mining Code. The World Bank mining specialist, Craig Andrews, stated in a confidential World Bank memo in 2005 that none of the mining contracts has been negotiated in a transparent way, and that their terms were depriving Gécamines of its fair share of the profits generated from the mining operations.¹⁷ This acknowledgement vindicated the criticisms of Congolese and international civil society organisations since the start of the Bank's involvement in the DRC mining sector that it has neglected the lack of institutional capacity in the country to regulate private mining companies and that it has been downplaying the bad governance and corruption that have stood in the way of increasing government revenue collection through a transparent tax system.

[END BOX]

These tax reforms, coupled with tax incentives offered by some of the major mining economies such as Australia, Canada and the US to their mining multinationals for overseas exploration, have led to an upsurge in 'junior' exploration companies obtaining mining licences and trading their concessions, or attempting to make quick short-term profits. For example, Canadian companies now account for more than 60 per cent of all new investors in African mining exploration. Five out of every six of the 1,220 companies registered on the Toronto Stock Exchange are juniors.¹⁸ This is significant, as these companies are seen as very risky by institutional investors, and are more likely to ask for special tax deals from governments to help sway potential financial backers. We argue that the upsurge in these types of investors has compromised the quality of foreign direct investment in Africa's newly privatised mining sector. 'Junior' companies require huge tax subsidies to help them finance their operations, they need to turn profits faster as they are not in the business for the long-term, and they are less sensitive to the need for corporate social responsibility.

The Canadian government, as part of its own industrial strategy, has been giving heavy tax subsidies to Canadian mining firms to encourage them to explore and mine overseas¹⁹. These tax subsidies include:

- deductions for debt and interest accrued abroad,
- tax exemptions for profits repatriated to Canada,
- deductions of up to 100 per cent for investments in exploration and development projects undertaken by companies themselves,
- opportunities for companies with several projects abroad (exploration and exploitation) to deposit their respective finances in a single account when calculating taxes due in Canada, enabling larger profits accrued in more profitable ventures to be combined with less profitable exploration projects, thus reducing the overall tax paid,
- deductions for depreciation and accelerated depreciation,
- three-year tax holidays on dividends earned by shareholders in mining companies.

¹⁶ The six Ernst and Young reports can be found on the following website: <http://ratcliffephotos.free.fr>. The Ernst and Young mission took place between March 30 and May 22, 2005

¹⁷ World Bank Office Memorandum, 'Contracts Between Gecamines and Private Companies', September 8, 2005, cited in Laurent Okitonemba and Dona Kampata, 'Dans quelle mesure le boom des matières premières peut-il augmenter l'assiette fiscale en Afrique?', October 2008, unpublished report commissioned by Southern Africa Resource Watch project of the Open Society Institute of Southern Africa

¹⁸ Denis Tougas, Canada in Africa: The Mining Superpower, Pambazuka News, November 20, 2008

¹⁹ Denis Tougas, Canada in Africa: The Mining Superpower, Pambazuka News, November 20, 2008

This phase saw the introduction of tax laws that deprived governments of collecting of a fair share of the economic rent generated by mining activity. Instead, the tax system was used to encourage new investment in the sector by giving huge tax concessions to companies, in so doing subsidising what is a very risky enterprise. In practice, this meant that most of the mining rent was collected by shareholders, financiers and owners of mining corporations – especially between 1990 and 1997, when prices rose significantly from their previously low levels.

Phase Three: Commodity Boom and Low Government Revenue

Between January 2002 and April 2008, international metals prices rose on average by 269 per cent²⁰. This price surge was driven by a rise in demand for metals in emerging economies such as China and India, combined with the low global supply of minerals due to the lack of investment in the 1980s and 1990s. Coupled with reformed foreign investment regimes in Africa, this price surge has led to huge increases in capital invested in exploration and production of minerals across the continent.

The sharp price increases seen since 2003 have been aided by a surge in investors with high savings hunting for ‘yields’ among riskier and relatively few assets, given the low returns on ‘safe’ assets since the start of the financial crisis. This has enabled risky mining projects to obtain large private and official financial backing. For example, Equinox Minerals, listed on the Canadian and Australian stock exchanges, managed to obtain a loan of US\$584m to develop Lumwana, Africa’s largest open pit copper mine, in Zambia. This loan was made by a syndicate of international financiers backed by official export credit agencies.²¹

This combination of factors saw a record surge in the prices of gold, copper and platinum since 2003, peaking in July 2008. Copper fetched a record high of an average of US\$9000 per tonne, or US\$4.10 per pound, whereas gold peaked at US\$1,000 an ounce. To put this in perspective, copper prices hovered around US\$2000 per tonne in 2004, and gold fetched only around US\$300 an ounce in 2000.

Merill Lynch predicted that this would be a commodity ‘supercycle’, which may last up to 50 years, driven by the industrialisation of emerging economies. PriceWaterhouseCoopers published a report in 2006 entitled ‘Let the Good Times Roll’, detailing the surge in mining share prices and shareholder profits from mining.

We describe below how in Zambia, South Africa, Tanzania and the DRC, government-appointed commissions have been reviewing mining tax laws after realising that national treasuries have lost out from the price boom due to the huge tax concessions enjoyed by mining companies, as well as their ability to avoid paying taxes by lowering their declared profits in a number of ways (see Chapter 3).

Senior African tax administrators acknowledged these tax leaks in an August 2008 communiqué, stating that ‘more effective tax systems can mobilise the domestic tax base as a key mechanism to escape aid or single resource dependency; promote economic growth, and reduce inequalities’.²² Given that between 1991 and 2004, the equivalent of 7.6 per cent of its total GDP has left the continent in capital flight, African governments are becoming more aware of the transnational companies’ practices of evading and avoiding tax, and how these undermine their tax base.

Furthermore, high international commodity prices have spurred on donors such as the European Union, the World Bank, and United Kingdom’s Department for International Development (DfID) to assist African governments in increasing their tax take from mining rents. In Zambia,

²⁰ IMF commodity statistics show that the metals price index for copper, aluminium, iron ore, tin, nickel, zinc, lead and uranium rose from 40 in April 2002 to 200 in April 2008

²¹ See ‘Into Africa: How the Resource Boom is Making Sub-Saharan Africa More Important to Australia’, Roger Donnelly, Benjamin Ford. Lowry Institute for International Policy, New South Wales, 2008

²² See Pretoria Communiqué, issued by the South African Ministry of Finance, October 2008

DfID has funded the legal team helping the government to rewrite its tax laws, and the UNDP is piloting a project to develop the capacity of African governments to collect and manage revenue from the extractives industries, starting with Sierra Leone and Mozambique.²³

Since July 2008, however, international metal prices have been in free-fall. In January 2009, most base metals fetched only about two thirds of their peak prices in July, whereas futures contracts were being exchanged at or below the marginal cost of production for these metals.²⁴ Many companies are suspending operations, especially in the copper and cobalt belt of the DRC and Zambia, given the huge drop in international prices. For example, First Quantum, which mines copper and cobalt, has suspended copper production at Bwana Mkubwa mine in Zambia. The company's stock price has dropped by almost 84 per cent from its peak (although still a third higher than at its lowest) and its market value has dropped from US\$5.6bn to US\$900m. Katanga Mining, the DRC's largest copper miner, saw a 98.5 per cent reduction in stock price (although still a third higher from its lowest average price), and its market value has declined from US\$3.1bn to US\$36m.²⁵

Some mining analysts²⁶ believe that the current collapse in international metal prices is only a temporary dip – a secondary effect of the international credit crisis. Because of the international credit crisis, banks are showing a higher degree of risk aversion, but while some banks have withdrawn finance for mining projects, the withdrawal is not wholesale. Many companies, especially 'juniors' are suspending their mining activities – with large numbers of jobs being lost – in places such as the DRC until prices pick up again.²⁷

Subsequently, governments across Africa are finding their negotiating capacity vis-à-vis mining companies suddenly diminished. Those who have already started reforming their old mining tax regimes or renegotiating mining contracts, are now facing enormous pressure from companies to reverse these tax reforms in response to falling international prices. In Zambia, First Quantum is openly challenging the new tax laws enacted in April 2008, and in Tanzania, Canadian Barrick Gold, with the support of the Canadian government, is challenging the tax proposals of a government-appointed commission reviewing the country's mining regime (see chapter 4 for details.)

Arguably, this is the time when it will be cheapest for governments to reform their mining tax laws. A 'perfect storm' combination of factors has driven commodity prices down. These include

- a collapse in demand, from the US to China, for both consumer goods and capital projects (construction, but also shipping and aviation) that drive the need for most commodities;
- a sharp drop in institutional investor demand for commodity-based assets – in part because of investor concerns over volatility, and in part because long positions in commodities had retained their value and could therefore be liquidated to get cash by financial institutions under pressure, such as hedge funds.

²³ Interview with HP McCleod, UNDP, Freetown, July 2008

²⁴ Oxford Analytica, 'Falling Metals Prices will Hit Africa Hard', 5 January 2008, as reported in the *Globe and Mail*, www.theglobeandmail.com/, 5 January. Copper prices have been hit hardest – it traded for only US\$3,000 a tonne at the LME in January 2009, down from its peak of US\$9,000 a tonne in July, and less than half of the US\$7,000/tonne in January 2008. Gold has done better according to World Gold Council statistics, with prices dropping to US\$855 an ounce in January 2009, down from its historic peak of US\$1,000 an ounce in April 2008, but still much higher than the low of US\$300 an ounce it traded at in January 2000. Cobalt prices have dropped from US\$55 a pound in March 2008, to US\$17 a pound in November 2008, mainly as a result of a 'sudden steep decline in demand from China', see Barry Sargeant

²⁵ Barry Sargeant, 'The Mining Curtains are Falling in Katanga Province, DRC, as Ambitious Mid-tier Miners with Battered Balance Sheets Continue to Halt Operations, Mainly in Cobalt,' Mineweb, 24 November 2008

²⁶ Martin Creamer, editor of *Mining Weekly*, in an interview on South Africa's 'Second Take' 12 December 2008, was confident that international metals prices would bounce back, given that the structural conditions for their initial rise since 2003 are still present: the continued metals-driven growth of China and other large industrialising countries, and continued global undersupply of the metals needed for this growth, especially given that many 'junior' mines are shutting down operations due to low prices.

²⁷ Quote Aimes

Prices may continue to fall in the next year or two, but these factors are almost certain to reverse themselves over the next five years, so that commodity prices are likely to rise eventually. They are unlikely to reach the record peaks of July 2008 again, at least not for a long time, since financial markets will be able to provide such high volumes of credit, at least not in the foreseeable future.

Governments, therefore, ought to accept lower output from mines today, if that is the impact of equitable taxation, as prices will rise again in future, and they will be able to capture a fairer share of the rent.

Chapter Two: Why Are Taxes Important?

Revenue is the Key Development Benefit of Mining

Mineral extraction is an 'enclave' economic activity. In African mineral-rich countries, foreign mining companies import most of their mining equipment, as well as the technical, financial and managerial services needed to run the mines. At present, very few African firms, mostly based in South Africa, can provide these equipment and services. Once extracted, raw ore is exported for further refinement or processing elsewhere. This means that industrial mining companies create very little forward or backward linkages into the local or national economy that would stimulate more private sector development and job creation. Furthermore, given the capital intensive nature of industrial mining, these companies create very few jobs relative to the abundant labour supply in mineral-rich African countries.²⁸

This is why there is a consensus among UNCTAD, UNECA and the IMF that the paramount development benefit of mining in Africa is the potential to generate public revenue through a transparent tax and budget system. UNCTAD states: 'the potentially most important contribution from mineral extraction is the rise in host-country income'.²⁹ The World Bank has challenged this view, and maintains that if multinational mining companies can commit to sustainable development as part of its bottom line, then the transfer of skills, technology, and capital from mining can 'revolutionise' the impact of mining on economic and social development.³⁰ However, in our view this commitment is still lacking in especially junior players in the mining industry (see Box 2.1). Coupled with legal mining frameworks that are intentionally or unintentionally silent on linking mining to local community and wider economic development, the revenue collected through the budget remains the key instrument through which governments can make mining work for development in the foreseeable future.

In addition, more transparent tax structures help to build state-citizen accountability. In resource rich states that are prone to being predatory or are conflict ridden this could go a long way in strengthening participatory and democratic development.

African Governments Fail to Collect a Fair Share of Mining Rent

Our research has found that African governments are foregoing millions of dollars in revenue through mining tax subsidies and company tax avoidance strategies (see Chapter 3). If government revenue collected and distributed through the budget is the key development benefit of mining activity in African countries, then it is fair to conclude that at present, the main

²⁸ UNCTAD estimates that the mining sector employs just 0.2% of Tanzania's workforce. According to government figures, one third of people between the ages of 15 and 35 are unemployed and while 700,000 graduates enter the job market every year, only 40,000 find employment in the formal sector. Cited in Mark Curtis and Tundu Lissu, 'Golden Opportunity: How Tanzania is Failing to Benefit from Gold Mining', published by the Christian Council of Tanzania, National Council of Muslims in Tanzania, Tanzania Episcopal Conference, October 2008

²⁹ *World Investment Report 2007: Transnational Corporations, Extractive Industries and Development*, UNCTAD, 2007

³⁰ Felix Remy, 'Mining Reform and the World Bank: Providing a Policy Framework for Development', Oil, Gas, Mining and Chemicals Department, World Bank and IFC, 2003

beneficiaries of the mining boom in Africa are a handful African political elites, the shareholders of mining companies, the engineering, construction and management consultant firms servicing the global mining industry, and the financial institutions backing these ventures.

The income from mining jobs may create demand for local small and micro enterprises servicing the mineworker community, and has in the past been an important source of remittances to countries such as Lesotho, Mozambique, and Malawi – all labour reserves serving South Africa's mining conglomerates. But this is negligible in view of the massive economic transformation required to kick-start sustainable development in the least developed countries. More seriously, industrial mining poses serious risks to the environment and livelihoods of communities living near mining areas, which often leads mining activity to cause rather than reduce poverty.

BOX 2.1

Social and environmental risks of mining to communities

Local communities living around mining areas continue to fall victim to the social and environmental fall-out from large-scale mining, with very little protection from their governments to stem the erosion of their livelihoods, health and natural resource base.

The organisations writing this report have worked with communities affected by mining in many countries across Africa and have detailed the costs of mining to communities and households. These include the loss of land for farming, soil and water contamination, air pollution, deforestation, forced removals, physical damage to dwellings and an unsafe living environment.³¹

These community impacts constitute an additional cost to society. So far, African mining tax regimes have failed to encourage mining companies to improve their social and environmental practices, and national laws have failed to adequately protect communities and the natural resources on which they depend. Compared to the enormous energy devoted to costing and mitigating the commercial risks of mining to companies, very little energy has been devoted to costing and mitigating the social and environmental risks of mining to communities.

While some reputable corporations, such as Anglo American, are now willing to consider ways in which to mitigate the social and environmental impact of their mining operations, thanks to many years of pressure from civil society organisations and affected communities, their practices vary considerably from one country to another. This is partly determined by the country's political leadership and the strength of local laws and their enforcement. A number of international voluntary standards and UN declarations encourage multinational companies to be socially responsible, to respect human rights and to report how they mitigate their social and environmental impact, especially in countries with weak legal systems. These standards include the OECD Guidelines for Multinational Enterprises, the UN Global Compact, the Equator Principles, and the Global Reporting Initiative. Although the process of developing these standards has led many reputable multinational companies to improve their social and environmental impact, they cannot substitute for (a) a national political leadership interested in protecting the livelihoods and natural resources of communities living in mining areas, and (b) comprehensive national environmental, labour and mining legislation that can be enforced to protect communities. The UNECA model legislation, and the mining codes of the Economic Community of West African States (ECOWAS) and the Southern African Development Community (SADC) show welcome signs that African governments are interested in reforming legal mining frameworks to protect the rights of communities affected by mining.³²

³¹ Southern Africa Resource Watch, TWN Africa Aimes members, Christian Aid, and Action Aid have documented in recent reports how communities are affected by mining. These reports include 'Undermining Development: Copper Mining in Zambia', October 2007, and 'Death and Taxes: The True Toll of Tax Dodging', May 2008 (www.christian-aid.org.uk), 'Precious Metal: The Impact of Anglo-Platinum on Poor Communities in Limpopo, South Africa', March 2008; Gold Rush: The Impact of Gold Mining on Poor People in Obuasi in Ghana, 2005 (www.actionaid.org.uk), 'Sierra Leone at the Crossroads: Seizing the Chance to Benefit from Mining', National Advocacy Coalition on Extractives, Freetown, forthcoming March 2009

³² Some voluntary corporate social responsibility standards that apply to all multinational corporations include the OECD Guidelines on Multinational Corporations, the UN Global Compact, the Equator Principles, which outline the standards for bankers who finance mining projects. The Christian Aid report 'Behind the Mask: The Real Face of Corporate Social Responsibility' questions

It still remains the primary responsibility of governments to ensure that citizens receive education, healthcare, water, sanitation, and other basic human needs. Mining companies often start operations in remote and economically depressed areas – in many instances areas that governments have been neglecting. Hence, local communities look up to mining companies as newly-arrived ‘patrons’ that could provide them with the basic services they should demand instead from their governments. Companies cannot be expected to provide such services efficiently and equitably; neither are there any accountability mechanisms between them and communities. That is why their tax payments to the government budget are more important than the direct services they provide to communities, given that these are entirely voluntary, will vary from year to year, are not distributed equitably, and comprise a very small share of the company’s overall profits. Country citizens living in mining areas should be able to monitor the collection of company revenues by central and local governments, and have a say in its allocation and expenditure. To support this argument, the following table shows that highly profitable mining companies are spending less than 1 per cent of profits on community social development in South Africa.

Table 2.1: Community development spending of five selected companies, 2007³³ (\$m)

	Community development spending (CDS)	Profits	CDS as % of profits
Anglo Platinum	15.9m	1.6b	0.99
AngloGold Ashanti	3.2m (*)	657m	0.49
Impala Platinum	5.7m (**)	2.2b	0.26
Lonmin	2.8m	408m	0.68

[END BOX]

Chapter Three: Revenue Foregone through Tax Concessions and Tax Avoidance

Government Subsidies to Mining Companies

*There is nothing more sad in this business than a very poor country, with almost nothing that will attract FDI beyond a few rent-generating niches, ready to allow any foreign investor to pay little or no taxes in the hope of attracting more FDI. The result in this situation is that almost all the investment that does come, comes to the rent-generating niches for which investors would not have been deterred by a reasonable tax burden. The incentives generate almost no additional foreign direct investment and are mostly a dead loss to the treasury.*³⁴

Taxation serves four main functions in society: It allows governments to collect revenue through the budget to spend on agreed national and local development plans. It allows governments to redistribute this revenue through the budget to achieve more equitable development. It allows governments to re-price goods and services to achieve social and environmental goals or

whether corporate social responsibility commitments are sufficient to hold companies to account for their impact on communities, 2004 (www.christian-aid.org.uk).

³³ Figures provided by companies in Rands have been converted to US dollars at the rate of 1 Rand = \$0.127

(*) Includes spending in southern Africa region from where a number of employees in South Africa are drawn.

(**) Includes community development spending in Zimbabwe, to be consistent with the fact that profit levels also include Zimbabwe. Sources for these figures: Anglo Platinum, *Sustainable Development Report 2007*, p.34; AngloGold Ashanti, *Country Report South Africa: Vaal river*, 2007, p.56; Impala Platinum, *Annual Report 2008*, p.31; Harmony Gold, *Sustainable Development 2007*, p.42; Lonmin, ‘Lonmin Development Trust’, www.lonmin.com

³⁴ Joel Bergsmann, ‘Advice on Taxation and Tax Incentives for Foreign Direct Investment’, May 1999, paper presented at World Bank Foreign Investment Advisory Service seminar in 2000, p. 7

influence the behaviour of companies and individuals, and over the longer term, it is associated with stronger channels of political representation, as it encourages tax paying citizens to demand more accountability from their governments.³⁵

Since the 1990s, mining taxation in African countries has been used primarily to influence the behaviour of mining companies by encouraging them to invest in exploration and extraction. Taxation of mining activity has not been used successfully either to generate government revenue (with the exception of South Africa and Botswana), and redistribute this revenue through the budget; or to encourage downstream beneficiation and good social and environmental practices by mining companies.

African governments have failed to collect significant budget revenue from mining, despite higher production and prices, for two main reasons: excessive tax concessions to mining companies, amounting to tax subsidies, and aggressive tax avoidance by mining companies, primarily by insisting on tax breaks in secret mining contracts. This section will discuss how these practices have robbed governments of revenue that could have been spent on development.

In general, governments use the following types of taxes to raise revenue from taxpaying citizens and enterprises: import, export, value added, sales, income, local government, company payroll, stamp duty, capital gains, and withholding. They also levy taxes on vehicles (in the DRC), property, internal turnover, rental income from concessions, employee salaries and fuel. In addition to these taxes, mining companies can be charged value or profit-based royalties and windfall or excess profit taxes.

Table 3.1: Mining taxes and policy objectives³⁶

Tax type	Objective
Unit-based royalty	An ownership transfer payment, to provide stable and certain revenues
Ad-valorem based royalty	An ownership transfer payment, to provide at least some revenue
Property tax	To provide stable revenue based on the value of the physical plant, often to local government
Withholding on remitted loan interest	To provide revenue, to encourage greater equity, to encourage local financing
Withholding on imported services	To provide revenue, to encourage the use of local services
Registration fees	To provide operating revenues to administrative offices
Rent or usage fees	To provide stable revenue, often to local government, for land use
Income tax	To provide revenue based on ability to pay
Capital gains tax	To capture profits on disposal of capital assets
Additional profits tax or windfalls tax	To capture a part of exceptionally high profits
Withholding on remitted profits or dividends	To provide revenue based on ability to pay; to encourage retention of capital within the country

³⁵ Alex Cobham, 'Tax Evasion, Tax Avoidance and Development Finance', Working Paper No 129, Finance and Trade Policy Research Centre, Queen Elizabeth House, University of Oxford, September 2005

³⁶ This table has been compiled by James Otto in James Otto et al, 'Mining Royalties: A Global Study of their Impact on Investors, Government and Civil Society, World Bank, 2006

In all African countries – with the exception of South Africa (until 2009) and Zimbabwe – mining companies have to pay royalties calculated as a percentage of the value of production to the treasury. Only the Zambian government levies windfall and variable profits taxes. The Zambian parliament passed this measure in an amendment to the income tax Bill in April 2008, largely as a result of a public and civil society outcry in Zambia over the low level of revenue generated by the newly revitalised mining industry, which had been earning record prices for copper between 2004 and 2008. Mining companies also have to pay license fees for mining concessions (a major source of income from mining in Sierra Leone) and dividends to state-owned partners (the DRC still has a state-owned enterprise, Gecamines, which takes at least 25% equity in all new mining operations).

In all the countries we examined, with the exception of Sierra Leone and South Africa, the main sources of government revenue generated from mining activity are royalties and payroll taxes. In Sierra Leone, the government still earns most of its income from mining licences and export duties (which are calculated in the same way as royalties), and in South Africa -- which has a mature mining industry and efficient modern tax administration -- the government earns its mining revenue from corporate income tax, which at 28%, is the lowest corporate income tax rate in Africa (with the exception of the five-year tax holiday granted to mining companies by the Mali government). Gold mines in South Africa pay a variable income tax rate – those declaring less than 5% profits as a percentage of revenue pay no tax. This measure is intended to keep in production gold mines extracting ores deep underground at very high cost. This is because these mines employ a large number of South Africa's half a million mineworkers.

The **rate** at which mining activity is to be taxed as well as the **tax base** that the rate is applied to will determine the revenue government earns. Mining companies receive tax subsidies by

- (i) paying lower rates than other companies;
- (i)(ii) reducing their tax base through special allowances;
- (i)(iii) being exempt from paying certain types of taxes.

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Mining companies argue that they are entitled to these tax breaks for two main reasons. First, mining carries far higher risks – geological, financial and political – than other commercial activities. Due to geological uncertainty, companies can spend huge amounts of money on exploration, without finding economically viable deposits. Financially, mining development and extraction require huge capital outlays, which are sunk costs, to pay for equipment and specialised services. These outlays need to be raised from institutional lenders, banks and stock exchanges, often in complicated financial packages. Volatile international prices or sudden increases in tax payment could dry up the cash flow of a mining operation, leaving their financial backers out of pocket. Low and stable tax regimes would compensate them for this volatility and make their projects more 'bankable'. Finally, companies argue that they face a high 'political' risk in territories where the state is weak or absent, and rules and regulations are non-existent, not enforced or arbitrary. This is why they seek to sign individual contracts with governments, providing for legal dispute arbitration in overseas jurisdictions, detailing their individual tax concessions, and stabilising these concessions for the life of the project.

Second, and related to financial risk, industrial mining requires huge initial capital outlays in the form of expenditures on equipment and loans before production starts. Mining companies argue that they should be allowed to defer paying tax on income earned until they have paid off these expenditures, or they would not be able to raise finance in international markets and may face operational cash flow losses. In accounting terms, this means reducing their taxable income base by deducting capital expenditure (including loan services) on exploration and mine development immediately from their taxable income, whereas most other companies do so over the life of their business or over a much longer defined period.

African governments, desperate to attract foreign investors into the mining sector during the 1990s, changed their tax laws to give mining companies the tax breaks they were asking for, with encouragement from the World Bank. (see Box 1.1). However, the section below will show that

states have taken a huge developmental risk in foregoing tax revenue in the first years of the life of new mining operators, without earning commensurate returns when the parent companies of mining subsidiaries across Africa were declaring huge profits during the 2003 to 2008 price boom.

Table 3.2: Tax policy responses since the 1990s to the unique attributes of foreign mining investors³⁷

Reason for special treatment	Tax policy response
A lengthy and costly exploration programme will precede the start-up of a mine. During this period there will be no income against which to offset these costs	Offset pre-production exploration expenses against future income (carry forward losses and amortisation)
Mine development is exceptionally capital intensive and an operation will initially need to import large quantities of equipment and services	<ul style="list-style-type: none"> - Provide various means to accelerate recovery of capital costs once production starts - Reduce or exempt from import duties - Reduce or exempt from paying value added tax on imported equipment and services
Mined product is destined for export markets	<ul style="list-style-type: none"> - Reduce rates or exempt from export duties - Exempt exports from VAT
Mines produce raw materials that are prone to substantial price changes on a periodic basis related to the business cycle	<ul style="list-style-type: none"> - Waive certain types of taxes, usually royalties, for projects experiencing financial duress - Allow losses to be carried forward
Many mining projects will have a long life-span and companies fear that once their captive investment is in place, government will change the tax law, negatively affecting the returns	<ul style="list-style-type: none"> - Stabilise all or some of the taxes for at least part of the mine life - Stabilise taxes by law or in the form of an agreement
A company may have special tax treatment for one operation but may have ongoing exploration that may lead to other operations	Apply ring-fencing principles, which stipulate that accounts from the mine should not be mixed with accounts for activities outside the mine
Where the level of investment is particularly large, investment may be possible only under a severely modified tax system	Enter into a negotiated agreement with the company and include special tax provisions that supplant the general tax law

Many tax breaks are tailored specifically to cater to the financial risks faced by marginal (very expensive mining for deep-seated ores) or junior (new inexperienced companies mainly interested in exploration) companies. This begs the question whether African governments should be courting investment for ‘marginal’ or exploration projects by foregoing revenue for development when (a) the social and economic benefits of such projects are minimal and (b) they often cause harm to local communities (see Box 2.1 on social cost of mining).

(i) Lower tax rates and tax exemptions

For this report, we examined the official mining tax framework – income tax and mining and minerals laws – governing mining taxation in seven African countries. Our investigation showed roughly similar trends in all the countries. These findings are underscored by similar comparative studies.³⁸ Mining companies in all the countries under investigation enjoy the following tax concessions:

³⁷ Table reproduced from James Otto et al ‘Mining Royalties: A Global Study of their Impact on Investors, Government and Civil Society’, page 17

³⁸ The most comprehensive studies on mining taxation are James Otto, Craig Andrews, Fred Cawood et al, ‘Mining Royalties: A Global Study of their Impact on Investors, Government and Civil Society’, published by the World Bank in 2006, and James Otto, Maria Luisa Batarseh, John Cordes ‘Global Mining Taxation Comparative Study’, Second Edition, Institute for Global Resources Policy and Management, Colorado School of Mines, March 2000

(a) No value added tax on imports or export sales.

Mining export companies cannot reclaim the VAT they pay on goods and services from the final beneficiaries of the mineral, and hence are entitled, like other export companies to VAT exemptions or refunds. Nevertheless, mining companies in South Africa, Namibia, Burkina Faso and Mali do not enjoy these exemptions, without major obvious impact on the economic viability of new or existing investors.

(b) No customs duties on imports or exports

Historically, most governments in the world have used import and export duties for mining and other imports to achieve a broad range of policy objectives, from protecting locally produced goods to improving infrastructure. Since the 1990s, this has changed, partly in the context of the widespread trade liberalisation undertaken by most African governments – which has come at a huge fiscal cost. IMF research has shown that low-income countries, even following the Fund's advice to switch to VAT, were only able to replace around 30% of the revenues lost to trade liberalisation.³⁹ Given that overall import duties have fallen dramatically since the 1990s, it could be argued that a modest import duty could replace the revenue lost through VAT refunds or exemptions, without deterring investment. Opponents of this idea argue that even modest levels of import duties can make a marginal project economically unviable.

Sierra Leone charges export duties of 3% on diamond exports from artisanal mines, 5% on the country's only industrial miner, Koidu Holdings Ltd, and 3% on diamond exports from licensed traders. Given that no mining companies have declared taxable income in Sierra Leone, these duties are the most important source of mining revenue to the government.⁴⁰

(c) Lower corporate income tax rates

Over the past two decades, there has been a general lowering of corporate income tax rates across all countries, including those for mining. Mining companies have to pay similar corporate income tax (CIT) rates to other companies in most African countries. An exception is Sierra Leone, where they pay only 30% as opposed to 37.5% charged to other companies. In Mali, mining companies enjoy a five-year tax holiday and in South Africa, gold mining companies pay no tax if their declared profit falls below 5% of revenue. CIT rates vary between 30% and 35%, as opposed to rates of 40% and even 50% two decades ago. Exceptionally, the 2006 Ghanaian mining law only charges 25% CIT, down from 45% in 1986.

Only Namibia continues to charge high income tax rates – 37.5% for non-diamond minerals, and 55% for diamond mines. Whereas governments could increase their income by charging higher corporate taxes, this would not be guaranteed unless the tax base increases (see Chapter 4). According to an IMF document making recommendations for mining tax reforms in Sierra Leone, 'there is no sound reason why [mining] companies should benefit from general reductions in the corporate tax rates ... it is quite common for mining companies to pay a higher income tax rate than other companies. The higher rate is one way for the government to capture a share of the resource rents'.⁴¹ A number of authoritative studies have found that greater tax incentives do not necessarily lead to more foreign direct investment, especially in natural resource sectors, and that governments are unnecessarily foregoing revenue by offering such incentives.⁴² According to a report of global consulting firm McKinsey, 'popular incentives, such as tax holidays ... serve only to detract value from those investments that would likely be made in any case'.⁴³ The IMF believes that tax incentives shrink the tax base of low income countries unnecessarily. It states

³⁹ Thomas Baunsgaard and Mick Keen, IMF working paper, 05/112, 2005

⁴⁰ This is according to IMF budget revenue tables published in Emil M Sunley, Thomas Bannsgaard and Philip Daniel, Sierra Leone: Fiscal Incentives and the Fiscal Regime for the Minerals Sector, IMF Fiscal Affairs Department, April 2004

⁴¹ Fiscal incentives and the fiscal regime for the minerals sector, Emil Sunley et al, IMF, Fiscal Affairs Department, document 'for official use only'

⁴² See L. Wells, N. Alleth, J. Morriset and N. Pimia: 'Using Tax Incentives to Compete for Foreign Investment: Are They Worth the Cost?', FLAS/WB, IFC, 2001,

⁴³ McKinsey Quarterly, 2004, Volume I

that “Tax incentives in sub-Saharan Africa are now used more widely than in the 1980s, with more than two-thirds of the countries in the region providing tax holidays to attract investment. Such incentives not only shrink the tax base but also complicate tax administration and are a major source of revenue loss and leakage from the taxed economy.”⁴⁴

(d) Lower withholding tax rates:

Withholding taxes are levied on the services provided by non-taxpayers in a given jurisdiction, paid directly by mining companies to tax authorities. This is both an easy way to collect taxes for African tax authorities with low capacity and a way of countering tax evasion or avoidance by service providers and shareholders. The mining and tax laws in all seven countries provide for withholding tax on dividends paid to shareholders, loan interest, and fees paid to consultants of between 10% and 15%. South Africa and Burkina Faso each levy 12.5%⁴⁵ and South Africa charges a secondary tax, which has the same function as a withholding tax on dividends, on companies. This, however, compares to figures as high as 35% in Mexico, Chile and Greenland, 30% in Western Australia and Arizona, and 20% in Poland and Zimbabwe (where withholding tax is credited against income tax).⁴⁶ Over time, especially when mining projects start declaring and paying out higher dividends, governments will forego significant revenues due to low withholding taxes. This is especially useful given that shareholders often shift their dividend profits to tax havens, where they cannot be regulated by double taxation treaties.

(e) No windfall or additional profits taxes

At present, the only country in Africa that levies a windfall tax in its mining legislation is Zambia, and that only since April 2008. In Ghana, the 2006 Mineral and Mining Law has taken out the additional profits tax that was levied in the 1986 mining law. Windfall or additional profits taxes are a means for governments to collect the extra rent generated by mining companies during times of windfall profits. Multinational mining corporations, and their subsidiaries in Africa, were announcing huge profit increases in the mid-2000s, resulting from the unexpected steep increases in international prices of gold, copper, cobalt, platinum and other minerals.⁴⁷ Copper prices, for example, were four times higher in July 2008 than the prices assumed in the business feasibility studies of the companies investing in Zambia’s copper mining.

Mining companies are generally against windfall taxes as they view windfall profits as a compensation for the financial risks of their operations. Nevertheless, and despite opposition from mining companies, the Zambian government, under public and donor pressure, introduced a windfall and additional profits tax as part of amendments to its mining tax laws in April 2008. According to the tax amendments, companies will need to pay an additional 25% windfall tax when international prices move beyond a stipulated trigger price. Windfall and variable profits taxes will not apply at the same time. In April 2008, the Finance minister expected the government to collect an additional US\$415m in the 2008/9 financial year as a result of the new tax regime. On this basis, the government has planned for an increase in infrastructure investment such as electricity and roads, funded from Zambian, rather than donor resources.

However, some Zambian companies – notably Canadian First Quantum – have threatened legal action against the government for breach of their 25-year fiscal stability agreements (see section Chapter 4). Many others pushed for the windfall tax rate to be reduced to 12.5% and the variable profit tax of 15% to be abolished. Given the crash in copper prices since the peak of July 2008, the government will not collect the full income it projected from windfall taxes this financial year. More problematic though, is the pressure from companies to abolish the tax, which only kicks in at copper prices above US\$5, 512 a month. This signals an unwillingness to share, in a reasonable

⁴⁴ *Finance and Development*, IMF, September 2008, <http://www.imf.org/external/pubs/ft/fandd/2008/09/gupta.htm>

⁴⁵ South Africa also levies a secondary tax on companies (STC), to be paid on 10% of dividends declared – this tax will be replaced with a withholding tax on dividends in 2009

⁴⁶ Figures from James Otto et. al ‘Global Mining Taxation Comparative Study’, Second Edition, Colorado School of Mines

⁴⁷ PriceWaterhouse Coopers: ‘Mine: Let the Good Times Roll: A Review of Global Trends in the Mining Industry’, 2006

fashion, the rents of mining activity with governments while at the same time expecting tax subsidies to compensate them for financial risk.

(f) Lower royalties

Royalties are paid by commercial companies to the owners of a mineral in return for the right to extract a non-renewable resource. Given that most African constitutions stipulate that the state is the mineral owner, royalties are paid to the treasury. Only South Africa and Zimbabwe do not charge royalties. However, the South African government is planning to introduce a new royalties Bill in 2009, given that the 2004 Mineral and Petroleum Resources Development Act vests mineral ownership in the state as opposed to previously, when private landowners also owned the minerals underground.

Companies usually argue that royalty payments should not be levied at all, and if levied, they should be calculated on the basis of their profits, and not the value of sales. This is because output-based royalties do not take into account operating costs, and could therefore reduce the financial viability of a project. For this reason, the World Bank, in its 1992 strategy, argued that African governments should (a) lower their royalties and (b) use declared profits, rather than sales value as a basis to calculate royalties. But mining tax experts have dismissed this argument, saying that ‘the distorting effects of royalties can be expected to much be less serious in practice than in theory for all but the most marginal, grade-sensitive mines’.⁴⁸ Some economists argue that value-based royalties are a regressive tax, as income remains the same irrespective of company profits. But tax regimes can compensate for that through the collection of corporate income tax and additional profits or windfall taxes.

A further reason why African governments should not consider further lowering royalties or introducing profit-based royalties is that international companies can manipulate their tax base to reduce declared profits (see Chapter 4). Royalties are an easy tax to monitor and collect given the present inability of many authorities in mineral-rich countries to cross-check and audit the declared profits of multinational mining companies with very complex accounting structures and ability to hide profits through transfer mis-pricing. This is provided that, of course, the legal framework sets out clear ‘arms-length’ principles to guide calculation of the value of mineral sales from which royalties are computed. For example, the amendments in the *Zambian Income Tax Act*, passed by parliament in April 2008, stipulate that royalties are to be calculated based on the average monthly cash price on the London Metal Exchange, Metal Bulletin, or any other metals exchange as agreed with the government. In Ghana, the EITI Aggregator report said that gold companies quoted different prices for gold sold on the same day, leading to different royalty payment calculations. This shows the importance of developing a clear framework to calculate mineral reference prices.⁴⁹ In Sierra Leone, the export duty on alluvial diamonds is used to fund the Gold and Diamond Office in the Ministry of Mineral and Mining, which calculates the price of diamonds for export duty valuation.

Royalties are the main income governments earn from new mining projects in the first few years of operation, given that exploration and mining companies are entitled to deduct all expenditure on capital equipment and interest on loans from taxable income immediately or over a maximum of three or four years. All mining companies can carry over their tax losses – when capital expenditure is greater than taxable income – indefinitely. In addition, they can deduct immediately, or over a few years, the full estimated cost of wear and tear on new capital equipment from taxable income. Normally, companies amortise these deductions over the life of the business. Together, these concessions mean that mining companies investing huge sums of money in exploration and new mining development will not pay income tax until they have recouped all their capital costs – sometimes this can be a few years into production, sometimes much longer. These incentives amount to what UNCTAD calls ‘a hidden subsidy’ to multinational companies.⁵⁰

⁴⁸ James Otto, *Mining Royalties*, World Bank, 2006

⁴⁹ BOAS and Associates, *Ghana EITI First Aggregated Report*, 2007

⁵⁰ UNCTAD, ‘Economic Development in Africa: Rethinking the Role of Foreign Direct Investment’, New York/Geneva, 2005, p 46

So unless governments can charge royalties, they will earn very little budget income in the first few years of new mining projects. We have calculated the estimated revenue foregone in Ghana, Tanzania, Sierra Leone, and South Africa, because of governments lowering the royalty rates charged in their mining tax laws since the 1990s. They have done so under pressure from the World Bank (see Box 1.1), and in South Africa, from companies. We have calculated the losses by comparing revenue earned under the current tax regime to what the government could have earned if royalties were slightly higher. These calculations are based on the declared royalty rate in national laws. The next section will calculate revenue foregone as a result of royalty discounts or exemptions negotiated by companies in individual contracts.

In **Ghana**, the Minerals and Mining Act of 2006 charges royalties on a sliding scale from 3% to 6% of gross sales value. This law replaced the Minerals and Mining Act of 1986, which used a sliding scale of 3 to 12 %. According to the EITI Aggregator report, however, no company has ever paid more than 3% in royalties, partly because of high capital allowances, and partly because Ghana's tax collection authorities do not know how to use the formulae. Gold accounts for 90 per cent or more of Ghana's mineral exports. According to our calculations, between 1990 and 2007, the government had foregone revenue of between US\$387.74m (if royalties were to be paid at 6%) and US\$1.163bn (if royalties were to be paid at 12%). In 2005, for example, the government would have collected more than half of the country's debt repayment if additional royalties collected at the rate of 12%. In each year, additional royalties would have exceeded HIPC debt relief payments.

In **South Africa**, the government has been drafting a new royalties Bill since March 2003. Parliament is expected to pass this Bill in May 2009. The mining industry and South Africa's competition commission have argued strongly for royalties to be profit-based rather than value-based. The original draft proposed a royalty on company turnover of 8% for diamonds, and 2.25% for gold. This rate has been reduced to a profit-based royalty of 3.7% on diamonds and 2.1% on gold by the fourth draft in June 2008. If we use the royalty rates proposed in the third draft of the Bill, which range from 2.98% to 4.63%, the South African government would forego an estimated US\$359m to US\$499m a year in revenue from unrefined minerals – based on earnings for unrefined and refined metals in 2006, by lowering royalties to the lower rates proposed in the fourth draft of the bill.⁵¹

In **Tanzania**, no mining company, other than AngloGold Ashanti, had paid corporate income tax by the end of 2008 – 10 years after industrial mining companies started operating in the country.⁵² AngloGold Ashanti paid US\$1m in 2007 (see section below). Therefore, royalty payments have been the main avenue for revenue collection. Between 2002 and 2006, mining companies exported around US\$2.9bn of gold. During the time, the government earned around US\$17.4m a year in royalties, charged at 3% of the net back value (market value minus cost of transport and transactions) of gold exports. If these royalties were to be increased to 5% as recommended by the presidential commission in charge of reviewing all mining agreements,⁵³ government revenue would have increased to US\$29m a year or an extra US\$145m over the five years. Tanzania is one of the ten poorest countries in the world – this funding could have swelled government coffers to pay for essential health, education and other basic services to Tanzanians. For example, the government's budget for 2007/8 envisages spending US\$48 per person on education, health, infrastructure and water.⁵⁴ US\$145m could have paid for over 3 million people to be provided with these services.

⁵¹ These calculations use figures provided by the government in National Treasury, Media Statement, June 3, 2008, Annexure 1, p.3, at: <http://www.treasury.gov.za/legislation/bills/2008/royalty/2008060301.pdf>.

⁵² The only exception is AngloGold Ashanti, who reported tax payments of US\$1m in 2007.

⁵³ The Report of the Presidential Committee to Advise the Government on Oversight of the Mining Sector, United Republic of Tanzania, Volume 2, April 2008, headed by Judge Mark Bomani (unofficial English translation).

⁵⁴ Budget quoted in Mark Curtis and Tundu Lissu: 'A Golden Opportunity? How Tanzania is Failing to Benefit from Gold Mining', CCT, National Council of Muslims in Tanzania, Tanzania Episcopal Conference, October 2008.

(ii) Manipulating tax base allowances

There are serious problems with the way mining companies in Africa receive tax relief for the expenditure they incur on the cost of creating their mining operations. For accounting purposes, these are usually written off over the period during which the mine is expected to be economically active. The tax treatment is very different. In most cases, tax relief is given when the cost of the expenditure is incurred. This has two consequences. The first is that the accounts can suggest that these companies are making profits but no tax is due. This appears unreasonable to citizens who expect companies to provide a return to the communities that are giving them a licence to make those profits. Secondly, this method of operation can continue tax deferral for many years, thus massively reducing the potential return to the governments of Africa on the use of the natural resources that provide many of them with their greatest hope of raising revenue.

In some countries, for example, mining companies are allowed to deduct the capital expenditures for exploration and development of new concessions from the taxable income of an existing concession. This practice amounts to a government tax subsidy, and encourages mining companies to re-invest profits in new exploration. Governments, however, need to calculate the costs in lost tax revenue against the benefits of new exploration before granting such subsidies. The Zambian government, for example, has decided that it will in future prevent companies from doing this by requiring them to 'ring-fence' the tax payments on their different concessions, and in Tanzania, the presidential commission reviewing the country's mining regime has recommended that companies in future be required to 'ring-fence' their concessions.

We do not challenge the right of the companies to have tax relief on the costs they incur. The question is how much of the expenditure can be deducted and how fast. Mining companies want to be able to immediately deduct all their loan interest and expenditure on equipment, machinery and other capital costs from their sales revenue. This seems a reasonable request, but given the massive expenditures needed for exploration and mine development, mining companies investing in new projects will not declare profits for a number of years while they pay off their creditors and suppliers. This is illustrated by our findings in Tanzania and Sierra Leone.

The Geita gold mine is AngloGold Ashanti's (AGA) only one in Tanzania and is one of Africa's biggest open pit mines. According to its annual report, it produced 308,000 ounces of gold in 2006.⁵⁵ According to the company's annual reports, it has made gross profits of US\$93m from Geita mines between 2002 and mid-2007. Yet, AGA has paid only USD\$1m in corporate income tax, and according to the company will not pay any more until 2011, a whole 11 years after starting operations. Similarly, Barrick Gold reported a net income of US\$97 between 2004 and the first half of 2007 but has not yet started paying corporate income tax.⁵⁶

In Sierra Leone, Sierra Rutile will only start declaring taxable income in 2014, a full 10 years after re-starting operations in 2004. Koidu Diamonds, the country's largest diamond mine processing kimberlite ore, started mining operations in 2004. By 2007, it was exporting US\$28.2m worth of diamonds. During this time, it has remitted a total of US\$9.97m to the government in royalties and fees, not corporate income tax. According to the company's own financial forecasting, it will only start declaring taxable income in 2011.⁵⁷

In Tanzania, companies which signed mining development agreements with the government before 2001 are each year allowed to add an extra 15% to their pool of capital expenditure that they have not yet been able to offset against taxable profits. This is a relic from the country's 1973 Income Tax Act, which was abolished for other purposes in the Income Tax Act of 2001 but which was, under pressure from the World Bank and Canadian and South African governments, retained for mining companies to claim this extra allowance if their contracts were

⁵⁵ AngloGold Ashanti Annual Report 2006, p. 80, www.anglogoldashanti.com

⁵⁶ Tanzania's *Sunday Citizen*, October 7, 2007

⁵⁷ Mark Curtis, 'Sierra Leone at the Crossroads: Seizing the Chance to Benefit from Mining', National Advocacy Coalition on Extractives (NACE), Freetown, March 2009 (forthcoming)

signed before 2001. According to the Tanzanian Commissioner for Minerals, Peter Kafumu, 'this clause was put in ... as an incentive to attract investors through advice from the World Bank'. According to a senior official from the Tanzanian Chamber of Mines, 'we knew that the clause was really hurting the country's economy by denying it more taxes from the mining industry'.⁵⁸ This measure allows Tanzanian companies to add cumulatively, at the start of each financial year, an extra 15% to the amount of capital expenditure they did not deduct from taxable income in the previous financial year. This amounts to a government grant to mining companies and reduces the probability that they will ever pay tax on their profits.

In 2003, an independent auditor contracted by the government to examine the accounts of four major gold companies alleged that the country's two largest mining companies, AngloGold Ashanti and Barrick Gold Mine both over declared their losses, which in turn reduced their tax liabilities to the government. A government-commissioned audit claimed that they have done so through 'erroneously claiming' or 'early charging' of the additional tax allowance. If these figures are correct, this has cost the government around US\$132 in lost revenues between 1998 and 2003.⁵⁹

Not all African mining tax regimes give such generous capital allowances, however. Under some tax regimes, mining companies have to 'amortise' their capital expenditure over a number of years, partly to allow the government to collect revenue from taxable income at an earlier stage. In Zambia, the government's new tax law stipulates that companies can only deduct 25% of capital expenditure in each year of mining production. This is similar to the types of capital allowances that prevailed before the 1990s. For example, the 1975 tax regime in Ghana only provided for a 20% capital allowance in the first year of expenditure, and 15% of the balance in each subsequent year over the life of the mine. Today, Ghanaian mining companies can only deduct 80% in the first year of operation, and the balance thereafter in equal shares.

Accelerated capital depreciation allows mining companies to deduct all or most of the estimated wear and tear costs of their machinery and equipment immediately or in the first few years of the project. Most other companies do so over the life of the business. This incentive unnecessarily delays the period before companies declare taxable income. In Malawi, the government expressly refused to give such an incentive to Paladin Ltd, the country's first industrial miner.

Such tax incentives are said to be a necessary measure to attract new investors to exploit mineral-rich resources in countries with very little infrastructure to support a mining industry, given the additional infrastructure costs these investors have to incur. So, instead of improving the electricity and transport network, fundamental to the operation of mining companies in remote areas, governments give them tax breaks instead, hoping that this would compensate for the additional costs of operations. But surely, tax subsidies should not be used to compensate companies for operational costs, unless they form part of a well-designed industrial mining strategy that aims to link mining activity to the transformation of the rest of the economy.

Good infrastructure, a mining strategy, and skilled tax authorities make a clear difference in how much revenue governments can collect from mining. In 2007, gold mining companies in South Africa, which have the most expensive operational costs in the world due to gold ores being deep underground, collectively declared taxable profits of US\$672, and paid out US\$127m to the government. In Tanzania, where industrial mines have operated for only 10 years, only one company has declared a small taxable income.

For African countries that lack, for the time being, good infrastructure, a clear mining strategy, and skilled tax authorities, royalties or export duties therefore remain a very important means of collecting government revenue in the first years of mining.

⁵⁸ Cited in Mark Curtis and Tundu Lissu, 'A Golden Opportunity: How Tanzania is Failing to Benefit from Gold Mining', published by the Christian Council of Tanzania, National Council of Muslims in Tanzania, Tanzania Episcopal Conference, October 2008

⁵⁹ Ibid.

Table 3.3: Comparing mining taxes in existing mining tax legislation (not contracts) across select mineral-rich African countries⁶⁰

	Value-based royalties	CIT	VAT	Import/export taxes	Fuel levy	Withholding taxes
Burkina Faso	7% precious stones 4% base metals 3% industrial/precious metals	35%	Yes	11% on mining equipment for production	n/a	12.5% on dividends
Angola	5% precious stones 3% metallic minerals (can be set on a mine by mine basis)	35% 10% tax on income from financial investments	Angola does not charge VAT	Exempt	n/a	15% on dividends
Namibia	10% precious stones 5% other minerals	37.5% non-diamond companies 55% diamond companies	0-15%, no concessions for mining companies	No concessions for mining companies	n/a	5-15% on dividends On interest to be introduced in 2009
Zimbabwe	None	35%	0%	5% on mining equipment, refunded if minerals are exported	n/a	20% (credited against income tax)
Mali	6% gross sales revenue less refinery costs	0% for first five years (tax holiday) 35%, reduced if profits invested in Mali	No VAT for the first five years. After that, 18%, some recoverable	0% during exploration and first 3 years of production, after that 7.5-22%	n/a	10% on dividends
Mozambique	Production tax on value of minerals sold Rate to be determined by Council of Ministers 10-12% diamonds 3-8% other minerals	32% Until 2010, companies investing more than US\$0.5m, pay 25% less tax in first 5 years of production	Exempt	Exempt for all mining equipment	n/a	10% on dividends
Malawi	10% for unprocessed minerals 5% for others	30%	0%	Exempt	Exempt	n/a
Tanzania	3% gold Can be deferred if cash operating margin is below 0	30%	Zero-rated	0% capital equipment for mining 5% spare parts on exploration equipment for first year, then 0% after that	None	None
South Africa	Profit-based royalties to be introduced in 2009 3.7% diamonds 2.1% gold	28% in 2008 Variable rate to gold mine, depending on ratio of profit to revenue, up to 37.5%	14%	% Export taxes on raw diamonds	n/a	To be levied in 2009, replacing the current 10% STC on dividends declared
Sierra Leone	5% precious stones 4% precious minerals 3% industrial minerals 3% artisanal miners	30% (non-mining companies pay 37.5%) 3.5% turnover tax if income below 7% turnover	n/a	Only equipment prospecting/ exploration equipment exempt Sierra Rutile Act limits import duties to 5% for rutile mining only 5% for diamond mine development equipment 5.5% export tax on industrial mine 6% export tax artisanal miners – 3% is a royalty	Not exempt, charged separately	10% non-resident contractors 5% resident contractors 15% interest 10% dividends

⁶⁰ This table has been compiled from information provided in the background studies commissioned for this report on Sierra Leone, Malawi, Ghana, Tanzania, Zambia, South Africa and the DRC. See footnote x. Additional information is provided in Mark Curtis 'African Mining and Tax Regimes: A Comparative Table', mimeo, drawn from various government sources in these countries.

				3% export tax on traders		
Zambia	3% copper	30%	VAT refunds	Exempt for all mining equipment	n/a	10% on interest and dividends
Ghana	3-6%	25%	VAT exempt	Exempt for 500 mining items		10% on interest and dividends
DRC	2% non-ferrous metals 2.5% precious metals 4% precious stones	30%	DRC does not apply VAT	2% before mining starts 5% when mining starts 3% consumer goods No export duty	3% import tax	10% on dividends None on interest if company is paying third party rates

Tax Avoidance by Mining Companies

(i) Negotiating tax breaks in secret contracts

The OECD Guidelines for Multinational Enterprises state that ‘enterprises should refrain from seeking or accepting exemptions related to ... taxation not contemplated in the statutory or regulatory framework’.

Despite this global standard, multinational mining companies seeking to invest or expand their investment in Africa continue to enter into confidential agreements with governments to acquire special tax rates and concessions that are outside the statutory framework. These tax concessions are normally included in a mining development agreement, which sets out the detailed responsibilities of each party. These agreements are legal commercial contracts, and override national law. Where they include tax rates, these override the national tax regime.

Confidential mining development agreements have been a key instrument used by companies to avoid paying mining taxes set out in the national law. They have been able to obtain these exemptions in countries desperate to attract foreign private investment into their mining sector since the 1990s after the World Bank told them that their existing mining tax regimes, as set out in mining and income tax laws, were not conducive to private investment. Instead of revising their tax laws through parliament, high-level politicians started making secret tax deals with individual mining companies – giving the latter ample opportunity to push for as small a tax burden as possible.

This section will outline how these tax deals have been made in Zambia, Tanzania, Malawi, Sierra Leone, Ghana and the DRC, to what extent they differ from the taxes stipulated in national tax laws. It will also provide estimations in Zambia, Malawi, and Sierra Leone of the amount of revenue foregone as a result of the tax exemptions negotiated.

In **Zambia**, the mining development agreements negotiated with private investors who took over the copper mines after the privatisation of Zambia Consolidated Copper Mines in 1998 offer huge tax exemptions to mining companies. The mining law allows the minister in charge to enter into private agreements with companies. According to Lennard Nkhata, acting permanent secretary in the Zambian Department of Minerals and Mining, ‘the private sector wanted concessions so that when they take over these assets they would be able to recapitalise them and at the end of the day, make these mines profitable. The companies wanted to drive certain taxes down ... So the whole package is very, very attractive’.⁶¹

Companies obtained enormous tax concessions in their agreements with the government – which was paying Clifford Chance, a London-based international legal firm, for this advice. The two largest mining companies, Konkola Copper Mines (KCM), owned by Vedanta Plc in 2004, and

⁶¹ Interviewed in 2006, quoted in Alastair Fraser and John Lungu, ‘For Whom the Windfalls? Winners and Losers in the Privatisation of Zambia’s Copper Mines’, Zambia Civil Society Trade Network and Catholic Centre for Justice Development and Peace (CCJDP, now Caritas), 2006

Mopani Copper Mine, owned by First Quantum, managed to negotiate deals whereby they would pay only one fifth of the royalty stipulated in the mining law. At 0.6%, these royalty rates were the lowest in Africa. A further concession allows them to defer royalty payments if their cash-operating margin falls below zero. Together, these tax breaks have drained government coffers from much-needed revenue for development spending. Vedanta Plc bought KCM from Anglo American in 2004 at a knock down price of US\$50m. At the time copper prices were low, the mine required huge new investment, and Anglo American did not believe it was an economically viable proposition. However, as the commodity boom took off, KCM declared an increase in operating profits from US\$52m in 2005 to US\$206.3m in 2006. First Quantum, meanwhile, reported increased net earnings from US\$4.6m in 2003 to US\$152.8m in 2005. While 'the good times were rolling' for these companies⁶², Zambia's minister of finance in his 2006 budget speech estimated that the country would earn less than US\$11m from copper mining royalties in the next financial year.⁶³

Historical comparison puts this foregone revenue in perspective. In 1992, international copper prices averaged around US\$2,280 a tonne and Zambian copper mines produced around 400,000 tonnes of copper. Budget revenue earned from copper mining taxes and other remittances was US\$200m. In 2004, copper prices averaged US\$2,868 a tonne, and after some rehabilitation of the copper sector, the country again produced 400,000 tonnes of copper. However, this time around, it earned only around US\$8m in budget revenue from the copper mining industry.⁶⁴

Companies also pushed for a reduction in corporate income tax rates, from the 30% stipulated in the law, to 25%, as well as an exemption from the 10% withholding taxes stipulated in the law. Between 2002 and 2004, the government collected only US\$3m in royalties. We calculated that if companies had paid the 3% royalties on gross sales, as stipulated by the Mining and Minerals Act, the government would have earned an additional US\$63m, revenue that could have been used to finance its national development strategy.⁶⁵

These tax breaks were fixed for a period of up to 20 years. The mining development agreements all stipulate that mining companies can take the government to an international arbitration court if these tax exemptions are withdrawn. This is exactly what First Quantum has threatened to do after the Zambian parliament passed amendments to the income tax law in April 2008, overriding the tax exemptions in the mining development agreements.

In **Tanzania**, large industrial miners have signed six mining development agreements with the government over the past 10 years. None of the gold mining companies sought exemptions from royalties or corporate income tax rates in any of the contracts. However, they did seek significant exemptions from local government taxes, withholding taxes, and fuel levies. According to the Commissioner for Minerals, Dr Peter Kafumu, negotiating with the mining companies was an intimidating experience, much like being faced with a traditional weapon: 'The companies are holding a panga by the handle and we are getting the sharp end.'

In the substantive law, withholding taxes are charged at 0.3% of the value of company turnover, whereas the mining agreements stipulate that companies will not pay local government tax in excess of US\$200,000 a year. Apart from the fact that these amounts are far lower than 0.3% of company turnover, local governments have not been collecting even the stipulated US\$200,000 from mining companies. Given the huge pressure companies put on infrastructure and communities in the areas where they operate, these taxes are crucial if local governments are to provide the social and other services needed for them to continue operating. The agreements exempt companies from paying withholding taxes on interest to related parties such as parent

⁶² These figures are taken from PriceWaterhouseCoopers, Metals and Mining, Review of Global Trends in the Mining Industry, 2007

⁶³ Ngandu Magande, MP and minister for finance and national planning, budget address, February 3, 2006, www.zra.org.zm

⁶⁴ These figures were cited in a Zambia Chamber of Mines presentation given by the chair of the Chamber to a visiting IMF mission in October 2006, entitled 'Zambian Mining Industry: Post-privatisation', unpublished

⁶⁵ Calculated in A Rich Seam: Who Benefits from Rising Commodity Prices?, Christian Aid, January 2007

companies or associates, although the 1998 law stipulates that they do need to pay withholding tax on these loans.

Companies have also pushed for exemptions from fuel levies. The Bomani Commission, appointed by the president to review the mining development agreements, estimates that the government has foregone Tsh39.8bn in 2006/7 and Tsh59bn in 2007/8 in revenue as a result of fuel levy exemptions to six large mining companies. If they are only exempt from the fuel they need for generators used in production, as suggested by the Bomani Commission, the government will be able to reduce these losses.⁶⁶ Mining contracts have also set stamp duties at 0.3%, about a tenth of the rate of 4% stipulated in the law.⁶⁷

In **Malawi**, the main legal framework for mining is the Mines and Minerals Act, which dates back to 1981. The new uranium project at Kayalekere in the north of the country, operated by Paladin Africa Ltd, is the first large scale mining project to be undertaken in Malawi. The project has been mired in controversy as civil society organisations have taken the government to court for violations of Malawi's constitutional and environmental law. They accused the government of negotiating a mining development agreement with the company without conducting a proper environmental impact study, for keeping the agreement secret, and for allowing the project to go ahead in the absence of laws regulating uranium mining. So far, the government is confident that the tax exemptions it has given Paladin in the mining development agreement will not leave public coffers empty as happened in Zambia, and to some extent Tanzania. According to Ellason Kasonga, director in the department of mines, 'we knew the uranium deposits were there, but it was better to leave it there rather than get a raw deal. We saw how our neighbouring countries had blundered and we decided to learn from them'.⁶⁸ In our analysis, the government has not learned any lessons.

The government decided to acquire a 15% share in the company in return for a number of tax breaks in its mining contract. Paladin will enjoy a 2.5% reduction in corporate income tax, a reduction in royalty rates from they 10% stipulated for unrefined minerals in the law, to 1.5% for the first three years, and 3% thereafter.

We have calculated the revenue the government has foregone as a result of this deal. The best estimate of revenue foregone can be made on royalties, given that they are relatively easy to calculate on the basis of gross estimated sales. It is more difficult to calculate foregone revenue from the reduction in corporate income tax rates, given that companies can delay the declaration of taxable income for many years due to the huge capital and operational expenditures involved in mining. The latest estimates are, for example, that company capital expenditures are running into US\$200m against original projections of US\$187m.⁶⁹ The company is unlikely to declare any profits until it recoups these expenses from sales income, which may take several years. Given that the company's own bankable feasibility study shows a reduction in expected revenue from US\$195 a year, to US\$70m a year in the last four years of operation, the main budget revenue will be collected from royalty payments.⁷⁰

We calculated that, based on the company's own bankable feasibility study, it will sell about US\$197m of uranium in the first seven years of operation. Normally, this should earn the Malawian treasury about US\$19.7m a year, at a rate of 10%, and when sales fall in the last four years of the mining operations to US\$70m a year, the government should still earn about US\$7m a year. However, the huge royalty discounts given in the tax deal, mean that the government will

⁶⁶ United Republic of Tanzania: 'Report of the Presidential Committee to Advise the Government on Oversight of the Mining Sector', Volume 2, April 2008

⁶⁷ Mark Curtis and Tundu Lissu, 'A Golden Opportunity: How Tanzania is Failing to Benefit from Gold Mining', published by the Christian Council of Tanzania, National Council of Muslims in Tanzania, Tanzania Episcopal Conference, October 2008

⁶⁸ Interviewed by Judith Melby, March 2008, and cited in 'Death and Taxes: The True Toll of Tax Dodging', Christian Aid, May 2008

⁶⁹ See 'Kayalekera Uranium Project Malawi', September 2008, www.paladinenergy.com.au, and John Borshoff, Managing Director, Paladin Energy Ltd, quoted in *Marketwire*, November 20, 2008

⁷⁰ *The Bankable Feasibility Study* is cited by Patrick Kambewa in the background study prepared for this report.

earn only about US\$2.9m a year for the first three years of operations, and US\$5.8m for the next four years. After that, royalty income will fall back to US\$2.1m.⁷¹ The government will therefore forego US\$16.8m a year for the first three years of operation, and a further US\$13.9m a year in the next four years. In the last four years, it will forego about US\$5m a year. In total, this amounts to US\$124.5m over the 11 years of the project. Even if the government lowered royalties by half, to 5%, charged by the Namibian government, where Paladin operates another uranium mine, this will still result in US\$62.25m foregone over the 11-year duration of the project. The US\$10m promised by the company for development and water projects in the Kayalekera community, which is tax deductible, pales in comparison to the lost revenue.

In **Sierra Leone**, mining forms the backbone of the government's development strategy. Before the 10-year civil war from 1991 to 2001, mining generated around 20% of the country's fiscal revenues. Today, however, revenues from mining are miniscule. Most government income is collected in the form of export taxes on diamonds. In 2006, total government revenue from all minerals amounted to between US\$9 and US\$10m, about 5% of diamond sales totaling US\$179.

Studies suggest that with significant institutional and capacity reform, Sierra Leonean companies could sell US\$1.2bn of minerals a year by 2020 – a sevenfold increase over current levels. With the right government tax framework and budget spending, the income earned from these exports could create the conditions for up to a million people to step out of poverty.⁷²

Sierra Rutile, the second largest mineral exporter in Sierra Leone, has acquired extraordinary tax exemptions through three agreements signed with the government. In 2001, the government and Sierra Rutile signed an agreement, which was enacted in parliament in 2002⁷³. The Sierra Rutile Agreement Act of 2002 sets royalty rates at 3.5% of total sales, and income tax at 3.5% of turnover, or 37.5% of profits, depending on whichever is higher. The law also contains a stability clause, which allows Sierra Rutile to continue paying the taxes specified in the Act for the duration of the mining lease, which is 25 years. Then, in July 2003, the government signed a memorandum of understanding with Sierra Rutile, which overturned some of the provisions of the Act. First, it reduced the royalty rate to a miniscule 0.5% until 2014, after which it would revert to 3.5%. It also reduces the turnover tax to 0.5% until 2014, and scraps entirely the payment of corporate income tax on profits until 2014. It also reduces the fuel import duty from 12% stipulated in the law, to 1% until 2014.

A World Bank review of Sierra Leone's mining industry in 2005 noted that this fiscal package was 'largely driven by the mining company' who argued that it needed to embark on a large refurbishment programme and that it had previously lost tens of millions of dollars worth of equipment during the civil war. According to senior tax officials, the government was in 'desperate circumstances' and wanted to attract further investments at all costs. In February 2004, the government reached an agreement with the company, following the 2003 MOU, confirming that it would forego pay-as-you-earn taxes of up to US\$37m in return for a 30% share in the company, accrued at a rate of 3% a year.

An internal Sierra Leone government review estimates that revenue losses from the tax concessions granted to Sierra Rutile would amount to US\$98m between 2004 and 2016 – or around US\$8m a year. Other estimates, using recent company revenue projections, have put the losses at US\$68m, or US\$5.6m a year. Sierra Leone is the poorest country in the world – this

⁷¹ These calculations are based on Paladin Africa Ltd financial calculations of the expected returns on its investment in the uranium mine. According to its own assumptions (www.paladinenergy.com.au) 1,493t U308 (uranium) will be produced in the first seven years, and 530t over the last four years. Total capital expenditure is expected to be US\$300m, according to The project operating costs are expected to range from US\$19/pound for the first 7 years, to US\$23/lb over the life of the project. These calculations also assume a flat real price for U308 of US\$60/lb over the entire 11-year period.

⁷² Quoted in Mark Curtis, 'Sierra Leone At the Crossroads: Seizing the Chance to Benefit from Mining', NACE, March 2009 (forthcoming)

⁷³ The chair of the parliamentary committee on mining, quoted in Mark Curtis, 'Sierra Leone at the crossroads: seizing the chance to benefit from mining', NACE, March 2009, claims that he has never seen the agreement.

additional income would enable the government to plan for greater expenditure on health, education and infrastructure services based on its national development plan.

In the **DRC**, the recent history of mining is mired by allegations of corrupt politicians awarding illegal tax exemptions to mining companies in return for private benefits. These allegations have been well documented.⁷⁴

The World Bank has funded a number of studies and audits into the financial terms of the mining contracts signed since 1996. Amongst these, a 2004 audit by Ernst and Young found that Gécamines did not receive any share from the profits made by its joint ventures with private mining companies, due to the terms of the mining contracts it had negotiated with private mining companies. The president and senior officials in the ministry of mining were responsible for signing these contracts.⁷⁵

In 2005, the Lutundula Commission, a parliamentary team appointed by the government to investigate the country's mining contracts signed between 1996 and 2003, denounced the interference of high-level politicians in these deals. It found that most contracts were 'disproportionately advantageous to mining companies'. In response to these findings, an Inter-ministerial Commission was tasked in April 2007 to review all the mining contracts signed between the government and mining companies – most of them junior – between 1996 and 2006. The report found that none of the mining contracts complied with the law. It recommended that out of 61 contracts examined, 39 be renegotiated and 22 cancelled as they were too far out of line with the Mining Code. The taskforce appointed to take forward these recommendations have decided that 14 contracts could go ahead with the submission of new feasibility studies, but 25 have to be modified by 2010.

At the worst end of the spectrum of contracts, companies were entitled to complete exemption from any income tax and royalty payments. Many companies received much reduced tax rates or deferral of tax payments for at least five years. We examine only one contract, classified as a category C contract that is due to be cancelled.

In 2005, Oryx Natural Resources, incorporated in the Cayman Islands, signed an agreement with MIBA, the government-owned diamond company, to purchase an 80% share in Sengamines, a US\$2bn diamond concessions south of Mbuji-Mayi. First African Diamonds, a South African company, bought the Oryx share in 2006.⁷⁶ The contract stipulates that the company is exempt from paying income tax, royalties and most of the other taxes specified in DRC tax law. The only taxes it would pay were a professional contribution tax – but only six years after production started; internal turnover tax (tax on national transactions) – but only due six years after the start of production; expatriate salary tax – only due seven years after the start of production; and withholding tax on dividends – only due five years after the start of production.

⁷⁴ Recent studies and exposés include the Final Report of the UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo, UN S/2002/1146, 'The State Versus the People: Governance, Mining and the Transitional Regime in the DRC', IPIS, Netherlands Institute for Southern Africa, and Fatal Transactions, 2006. DRC former mining minister Florent Mututulo, who took office in 1997, has described on public radio how he has been approached by foreign mining businessmen willing to pay bribes, but how he has refused to take these bribes. Transcript of the *Dan Rather Reports*, broadcast in the US on 17 September 2008, episode number 330, entitled 'All Mine'

⁷⁵ The contracts of a number of joint venture contracts between state-owned enterprises and private companies were posted on the website of the Congolese Ministry of Finance in October 2007. <http://www.minfinrdc.cd>. Several pages are missing from some of the contracts

⁷⁶ The government has expropriated First African Diamonds from Sengamines in September 1998. It now plans to negotiate a new contract with a Russian co-owner. First African Diamonds is planning legal action, as reported by John Helmer, 'Alrosa Agrees with DRC on Sengamines Takeover' in *Mineweb*, September 16, 2008 on www.mineweb.net. Before signing the current contract with Oryx in 2005, Sengamines was jointly owned by MIBA and a Zimbabwean company called Operation Sovereign Legitimacy (Osleg). Dumisani Ndlela reported in the Zimbabwe Financial Gazette on 3 February 2005 that this company was owned by four prominent Zimbabwean citizens, two of whom were key figures in the Zimbabwe Defence Force during the war in the DRC. This company was named in the Final Report of the UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth in the DRC, 2002, S/2002/1146 as one of 85 companies operating in the DRC at the time of the war that were in breach of the OECD Guidelines on Multinational Enterprises.

According to Belgian-based International Peace Information Service (IPIS)⁷⁷, Sengamines exported an average of 80,000 carats of diamonds a month between 2001 and 2003, as reported by its Antwerp dealers, at a very low price of US\$15 a carat, amounting to US\$14.4m a year. If the company had paid the very low 2.5% royalty on gross value stipulated in the law, the government would have earned a minimum of US\$360,000 a year from royalties alone. The figure would double if the government charged the 5% royalty paid by companies in most other diamond-rich African countries.

This figure, however, is only a very small fraction of the massive revenue foregone by the DRC government due to companies seeking tax exemptions in their mining contracts. This is illustrated by the minuscule income earned by the DRC from mining. According to World Bank figures, budget revenue from mining taxes amounted to only US\$16.4m in 2003, US\$15.7m in 2004, US\$26.7m in 2005, US\$11.7m in 2006, and US\$13m in 2007.⁷⁸ According to a 2007 World Bank document, “fraudulent practices by companies and government agencies have created a gap [between] what should be paid versus what is actually recorded as having been received in terms of royalties and surface rents alone. The gap is larger if total mining taxes are considered: about US\$200 million per year should be generated by the sector”.⁷⁹ The government claimed to receive only US\$13m in taxes from mining in 2007, just over 5% of what it should have earned. To put this amount in perspective, in Sierra Leone, where only two industrial mining companies are currently operating, mining taxes earned the government about US\$10m in 2006.

This culture of secrecy and individually negotiated tax deals in contracts is systematic across all African countries and embedded in mining companies’ way of doing business. It undermines all efforts to bring greater transparency to the tax payments of companies and to hold governments to account for the spending of this money.

(ii) Mis-invoicing and alleged tax evasion

Trade mis-invoicing occurs when companies either under-declare the value of their exports or overstate the prices of their imports. This enables a company to reduce the profits it declares in the country where it is registered as a taxpayer. Mis-invoicing is a common practice, especially in the trade that takes place among associates or between associates and parents of large multinational corporations. A recent report by Global Financial Integrity, a project of the US-based Centre for International Policy, estimates that between 2002 and 2006, an average of US\$10bn left Africa every year as a result of trade mis-invoicing. This is likely to be a huge underestimation, given the lack of trade data in Africa and given that this figure does not count trade invoices between subsidiaries of the same parent group of companies.⁸⁰

Nevertheless, there is very little hard evidence to show the extent to which this practice has robbed African treasuries of revenue they could have earned from income tax on mining profits. According to the calculations of the New Economics Foundation, the following export earnings were lost because of companies undervaluing or over-invoicing their minerals trade between South Africa and the US: US\$412m in 2002, US\$84m in 2003, US\$86m in 2004, and US\$38m in 2005, or a total of US\$620m over four years.⁸¹

⁷⁷ International Peace Information Service, ‘Sengamines Export Data, June 2001-September 2003’, Antwerp, 11 November 2003, www.ipisresearch.be

⁷⁸ Claude Kabemba, ‘Is a Genuine and Transparent Process of Mining Contract Renegotiation Possible in the DRC?’, Southern Africa Resource Watch, Open Society Initiative of Southern Africa (OSISA), mimeo

⁷⁹ World Bank, ‘DRC Growth with Governance in the Mining Sector’, November 2007, cited in Raf Custers ‘World Bank and DRC Congo Mining Session’, International Peace Information Service, Paris, November 30, 2007

⁸⁰ We are citing the figure arrived at by Global Financial Integrity researchers using the Gross Excluding Reversals method to calculate illicit capital outflows resulting from under-invoicing of exports and over-invoicing of imports. This figure is cited in Table 16 on page 16 of the report: ‘Illicit Financial Flows from Developing Countries 2002-2006’, Dev Kar and Devon Cartwright-Smith, Global Financial Integrity, Centre for International Policy, Washington DC, 2008

⁸¹ These figures have been calculated by the London-based New Economics Foundation, based on trade figures provided by Simon Pak, a US expert on trade mis-invoicing. Quoted in ‘A Rich Seam: Who Benefits from Rising Commodity Prices?’, Christian Aid, January 2007

Most African mining tax authorities at present do not have the requisite skills to audit the complex accounts of large multinational mining companies; hence if these practices exist they can go undetected and unpunished. In Sierra Leone, a former senior civil servant publicly acknowledged that ‘it is very difficult to tell if [the mining companies] are making profits because you have to go by what the companies say. But it is easy to raise operating costs to a fictional level. You can also inflate local costs. What is lacking in Sierra Leone is the ability to monitor and regulate this. It is quite possible for the system to be abused’.⁸² According to Tanzania’s Commissioner for Minerals, ‘we have no capacity to look at their books. [The companies] can write the books so that third world countries cannot regulate. Even the contracts are difficult. I think the mining companies exploit our weaknesses in law and capacity’.

Multinational companies can avoid paying tax in developing countries in many ways. Evidence suggests that they do so mostly by transfer mis-pricing. There is no obligation on one country to report a potential loss of revenue suffered by another country because of this abuse from which it has gained and the other has lost. There is no evidence that this happens either, so if funds are moved from relatively highly taxed African states to either tax havens or even lower taxed states in the OECD, there is no incentive or obligation on the states that know they benefit unduly as a result to tell the African authority that they are losing revenue as a consequence. Therefore, African countries are left to their own devices when seeking to tackle this abuse and are critically short of the resources and expertise to do so.

African tax authorities do sometimes uncover tax irregularities. In 2003, auditors appointed by the Tanzanian government alleged that the country’s four major gold mining companies had been claiming capital expenditures in some cases without invoices or other evidence to substantiate the spending. In addition, they alleged that ‘6,762 documents are still missing, preventing the auditor from confirming if royalties ... have actually been paid for 939 past shipments’.⁸³

The auditors also alleged that they were hindered in their work by ‘the persistent reluctance of the mining companies to cooperate’. In their view, the companies’ failure to keep adequate financial records in Tanzania meant that ‘these mining companies *are in default of the law* (our emphasis), and their failure to cooperate could be interpreted as a strong desire to hide faulty declarations’. This report has been leaked to local Tanzanian newspapers, who have made allegations of tax evasion by the mining companies.

However, despite these findings, no effort has been made to determine whether any of the estimated US\$132m foregone by the treasury can be recovered from the companies.

Chapter Four: Breaking the Curse: How to Increase Revenue and Transparency

Reviewing Mining Laws and Contracts to Raise Revenue

The evidence in this report paints an overwhelming picture of African tax systems unable to retain a share of the profits generated by mineral resource extraction. To rectify this, governments need to plug the ‘leaks’ in their tax systems that allow profits to drain away. This will require the following specific actions:

- increase the tax and royalty rates charged on mining and related profits.

⁸² Quoted in Mark Curtis ‘Sierra Leone at the Crossroads: Seizing the Chance to Benefit from Mining’, National Advocacy Coalition on Extractives, March 2009

⁸³ Alex Steward Assayers Report, ‘The Evaluation of the Gold Mining Programme’, mimeo, pp5-8. The government has not shared this report with any of the gold mining companies. In response to the allegations made in the report, the Tanzania Chamber of Mining and Energy ‘it is an essential element of audit procedure that an auditee be given the opportunity to explain any apparent anomalies found during an audit. This has unfortunately never happened and given rise to a lot of speculation on the subject [of this report]. The report is still a matter of discussion between the government and respective mining companies’.

- reduce unnecessary tax allowances that shrink the income tax base of mining companies.
- eliminate the use of secret mining contracts to grant mining companies tax exemptions.

Over the past few years a number of African governments – some of them newly elected - have been reviewing their mining tax regimes. This has been partly in response to the mineral price boom, and partly in response to pressure from the World Bank and IMF as well as African and international civil society to increase taxes collected from mining in a transparent way.

In **Tanzania**, newly elected President Kikwete promised in his inaugural address in December 2005 to review all mining contracts to ensure that ‘the nation is benefiting from the richest minerals available in most parts of the country.’⁸⁴ Two years later, in November 2007 he announced the formation of a committee to investigate the nature of the mining laws and contracts.

There have been four such previous committees; none of their reports has ever been made public. The fourth, ‘*Review of Mining Development Agreements and Fiscal Regime for the Mineral Sector*’, was leaked. It recommended sweeping changes to mining and fiscal laws and the renegotiation of various mineral development agreements with the mining companies. Yet, apart from minor changes to the Buzwagi Agreement with Barrick Gold, none of the recommendations have been implemented.

Following this review, the President tasked a commission, headed by Judge Mark Bomani, to review the six mining contracts signed with large mining companies, to analyse the mining tax system, identify and analyse the rights and responsibilities of government and investors, as well as the tax provisions in mining contracts, and give recommendations for reforms in the mining sector.

The Bomani Commission recommended far-reaching reforms to the mining tax regime, including an increase in the gold royalty from 3 to 5% and the application of the rates outlined in the substantive law for stamp duties, withholding taxes, local government taxes, import duties (mining-related imports will remain exempt) and fuel levies (except fuel used for electricity generation on the mines). The Commission also recommends that no more special tax exemptions be granted to mining companies in their contracts.

The Finance minister, in his June 2008 budget speech, largely ignored these recommendations. The only tax reform he announced was a new turnover tax of 0.3% on all companies declaring losses for three or more years in a row.⁸⁵ This measure is clearly aimed at collecting revenue from mining companies in Tanzania, of whom only one, AngloGold Ashanti, has declared a small taxable income since the start of its operations.

In **Sierra Leone**, both the previous government and the new government under President Ernest Bai Koroma, elected in September 2007, have stated that the country is benefiting too little from mining. According to former Finance minister John Benjamin, ‘there are certain generous tax and duty concessions embedded in bilateral agreements between government and private sector entities that continue to undermine revenue collection. The government negotiated and agreed to most of these agreements from a relatively weak position, especially after the war when economic conditions in the country were still precarious and fraught with uncertainties’.⁸⁶

As far back as July 2004, the then government requested the law reform commission to lead a consultation process to redraft the Minerals Act. It only presented its report to the government a full three years later, in 2007. The draft Minerals Act is now in its final draft stage. The draft law contains provisions that commit the Ministry of Mineral Resources to (a) develop a framework

⁸⁴ *Sunday Citizen*, May 13, 2007

⁸⁵ *The Citizen*, 13 June 2008

⁸⁶ Cited in Mark Curtis, ‘Sierra Leone at the Crossroads: Seizing the Chance to Benefit from Mining’, National Advocacy Coalition on Extractive, March 2009 (forthcoming), p 29

for transparency in the reporting and disclosure of revenues from the extractives sector, (b) publish its revenues from the extractives sector 'at least annually' and (c) ensure that 'all payments due to the government ... are duly made'.⁸⁷

Meanwhile, in early 2008, the President appointed a Task Force to review three individual contracts signed with the companies mining rutile, diamonds and bauxite. As a result, a consultative committee has now been established to review all mining-related laws, review and assess all current mining contracts, and in particular the 2003 MOU with Sierra Rutile, which overturned the 2002 Sierra Rutile Law.

Together, these developments may increase the revenue collected by the government, but only if the special tax exemptions granted to Sierra Rutile are overturned, overgenerous tax allowances are reduced in the Mining and Income Tax Acts, and the corporate tax rate for mining companies is levied at the same rate as that for other companies. So far, these tax changes have not been considered in the new draft mining law.

In **Zambia**, the government of the late president Levy Mwanawasa agreed in 2008 to review the fiscal terms of the mining development agreements his government had negotiated since the privatisation of the country's copper mines. He was under political pressure from the opposition, trade unions and civil society. In April 2008, the Zambian parliament passed an Income Tax Amendment Bill, which introduces a new windfall tax and variable profit tax when copper and cobalt prices rise above a certain level. It also reduces capital allowances from 100% to 25% a year for mining companies, and introduces a reference price for determining the values for windfall tax.⁸⁸ The Finance minister announced, in addition, that companies will henceforth be required to pay the 3% royalties and 30% corporate tax stipulated in the substantive law instead of the reduced rates of 0.6% and 25% as negotiated in their mining development agreements. In his budget speech, the minister forecast that these new measures would earn the treasury an additional US\$415m in revenue.

In the **DRC**, the mining contract review process described here, will no doubt see an increase in government income from mining, albeit from a very low base. However, the little information available on the fiscal terms of the new contracts being negotiated shows that the government is continuing the practice of negotiating special tax rates with mining companies that do not reflect the rates and terms stipulated in the mining code. It has been reported that the new contract between Gecamines and Freeport McMoRan, joint owner of one of the world's largest unexplored copper and cobalt deposits in Tenke Fungurume, includes special rates that do not apply to other mining companies. Some of these are in excess of the rates stipulated in the mining code – the royalty rate is set at 2.5%, instead of the 2% stipulated in the code, and the company will pay a 1% export duty, instead of being exempt, like other companies. Furthermore, Gecamines will increase its share in the Tenge Fungurume Mining Company from the previous low 17.5% to 45%.⁸⁹ While the terms of the new contract are a vast improvement on the original contract, which exempted the company from all taxes, royalties and duties, it sets the precedent for the practice of negotiating and stabilising individual tax deals with companies outside the legal framework, which makes monitoring of the revenue flows very difficult.

The terms of the 2002 Mining Code are not under review as part of the contract renegotiation process. This means that the very low 2.5% royalty on diamond exports will remain in place. The government could, however, double its revenue from diamond exports if it increases the rate to 5%, the rate charged by most African governments.

Transparent Tax and Budgeting Systems

⁸⁷ Ibid.

⁸⁸ The Income Tax Amendment Bill, 2008, Memorandum, N.A.B, January 24, 2008

⁸⁹ Reported in *Northern Miner*, September 2008

Most African mineral-rich countries whose economies depend heavily on extractive industries, have lower economic growth than those that are not so dependent on these industries.⁹⁰ Botswana and South Africa are notable exceptions to this 'paradox of plenty'. In countries such as Angola, the DRC and Sierra Leone, civil conflict has been prolonged by the presence of easily looted resources, and in Angola, the DRC, Tanzania and Sierra Leone, many believe that revenues from extractive industries serve to heighten corruption.⁹¹

But there is nothing intrinsic to natural resource wealth that condemns countries to low growth, mineral dependency or corruption.⁹² The development impact of mining is ultimately determined by how mining royalties and other taxes are legislated, collected and redistributed. The so-called resource curse afflicting mineral-rich countries can be broken once mining tax laws are transparent and equitable, skilled tax authorities are able to collect all the taxes due, and these are distributed through a participatory and transparent budget process.

To ensure that the correct amount of revenue is collected from mining activity, and that this is spent equitably according to the country's agreed national development strategy, civil society organisations and parliaments need to be able to monitor and oversee the collection, allocation, and actual spending of budget revenue. Unless there is a legal framework in place that allows civil society organisations, parliamentarians and citizens access to budget and revenue information and unless there are laws that allow them to hold the government to account for its fiscal management and expenditure⁹³, there is no guarantee that income earned from mining would contribute to development and poverty reduction.

At present, it is impossible for most citizens in mineral-rich African countries to monitor mining revenue collection and expenditure through the budget. It is also very difficult for parliaments to pass tax laws affecting mining companies. This is because

- confidentiality clauses in mining agreements prevent them from being made public.
- mining contracts are not ratified or supervised by parliament.
- freedom of information laws do not exist, which means citizens cannot access information that is not already in the public domain.
- it is rare for any accounts to be available on public records in these countries.
- laws guaranteeing taxpayer confidentiality prevent the public from scrutinising mining tax returns filed with tax authorities.
- multinational companies and their subsidiaries in African countries are not required by international accounting standards to report where they make their profits on a country by country basis and what they remit to government and other institutions in taxes and other payments in each location that they trade.
- most mining contracts include a clause stipulating that the tax deal agreed in the contract, or outlined in the substantive law, will remain in place for the duration of the contract, usually between 10 and 25 years, irrespective of changes in the substantive law legislated by parliament.

Many African governments want to keep mining tax deals secret. They actively discourage parliamentary oversight. Many African mining and tax laws also stipulate that governments can negotiate special tax deals with companies investing above a certain amount. These laws also expressly allow for the tax exemptions to be frozen for the duration of the contract and allow the

⁹⁰ A number of prominent economists such as Jeffrey Sachs and Thorvaldur Gylfason have tried to demonstrate through regression analyses that there is a negative relationship between economic growth and resource dependency; others have questioned the data used in these analyses.

⁹¹ Transparency International's corruption index for many countries correlates positively to their dependence on mineral or petroleum resources. Many countries that are not dependent on mineral resources also score poorly on the index.

⁹² Antonio M.A. Pedro, 'Mainstreaming Mineral Wealth in Growth and Poverty Reduction Strategies', ECA Policy Paper No 1, date unknown, United Nations Economic Commission for Africa

⁹³ Such mechanisms would include a fully functioning government auditor, well-informed parliamentarians that hold government to account, legal rights to access information, structures through which citizens can help shape government policy, and enforceable sanctions for corruption.

minister of mining excessive discretion to negotiate special tax deals with companies or defer their royalty payments. This is the case in Tanzania, Ghana, Sierra Leone, the DRC, and Zambia.⁹⁴

In Tanzania, Zito Kabwe, an opposition parliamentarian, was suspended from parliament in August 2007 for introducing a Private Member's motion to investigate the government after it signed a new mining agreement despite promising not to do so until the mining review had been completed.

None of the six contracts signed between the government and mining companies has been made public, and the Commissioner for Minerals, Peter Kafumu, has warned that possession of these contracts is 'illegal'.⁹⁵

In Malawi, the government has refused repeated requests from parliamentarians to publicise its uranium contract with Paladin Mining while negotiating the contract. According to Goodall Gondwe, Malawi's Finance minister, it would be 'unethical' to discuss the contract in public.⁹⁶

In Zambia, the government has refused to publish its contracts with copper mining companies, despite pressure from trade unions, civil society and parliamentarians. Unlike in Sierra Leone and the DRC, the mining review process was veiled in complete secrecy. In the DRC, the Mining Code does not require the government to publish the contracts it signs with companies – but in March 2008 it published all the mining contracts under review on its website – but parts of the text was left out. In Ghana and Sierra Leone, the law stipulates that parliament must ratify the contracts signed between the government and mining companies. In practice, however, their oversight has been minimal. In Ghana, only the select committee on mining and minerals ratifies the agreements. In Sierra Leone, a member of the parliamentary committee on mines and minerals has said that his committee never saw the agreement between the government and Sierra Rutile that was turned into an Act of Parliament in 2002.⁹⁷

These practices exclude parliamentarians, citizens, and communities affected by mining from debating and shaping mining tax and royalty policy. The recent reviews of mining policies and contracts in Zambia, DRC, Tanzania and Sierra Leone have demonstrated the concerns of citizens, including communities affected by mining, about the development costs of tax concessions and subsidies to mining companies. The evidence in this report suggests that African governments are using tax concessions merely as a tool to attract foreign mining investment – often of dubious quality – rather than as a component of a wider strategy for industrial development. These tax concessions, together with the aggressive tax avoidance strategies employed by mining companies, have robbed them of revenue that could have been used for development. Instead, mineral-rich governments remain as dependent as ever on overseas taxpayers for aid to fill the gaps in their development budgets. According to Zito Kabwe, a Tanzanian parliamentarian and member of the Boman Commission, 'if all taxes were paid, if no gold was undervalued and if there were no over-declaration of total cost, this year we should get slightly more [revenue from mining] than what the donors give us'.⁹⁸

Once collected, mining revenues need to be distributed by government in a transparent manner for agreed development expenditures that can be easily monitored. With the exception of royalties, most mining taxes are paid directly to the treasury to support general budget expenditure. Given that royalties are a compensation for extracting non-renewable resources, and given that communities living in mining areas are most affected by mining activity, the practice in

⁹⁴ This is also the case in Mozambique, Burkina Faso, Senegal, and Mali. But there are no provisions for fiscal stabilisation in the mining laws of mineral-rich countries such as Angola, Namibia, Zimbabwe, Uganda, Kenya, or Cote d'Ivoire. Mark Curtis, 'African Mining and Tax Regimes: A Comparative Table', October 2008, mimeo

⁹⁵ Cited in Mark Curtis and Tundu Lissu: 'A Golden Opportunity: How Tanzania is Failing to Benefit from Gold Mining', published by the Christian Council of Tanzania, National Council of Muslims in Tanzania, Tanzania Episcopal Conference, October 2008

⁹⁶ As reported by Frank Jomo, March 8, 2007 on www.mineweb.net

⁹⁷ Cited in 'Sierra Leone at the Crossroads: Seizing the Chance to Benefit from Mining', National Advocacy Coalition on Extractives (NACE), Freetown, March 2009 (forthcoming)

⁹⁸ Interview with Judith Melby, March 2008, quoted in 'Death and Taxes: The True Toll of Tax Dodging', Christian Aid, May 2008

many countries has been for a share of royalties to go directly to communities affected by mining, but also to pay for the costs of monitoring the mining sector.

The share of royalties paid to communities directly has been very little. In Sierra Leone, only 0.75% of the 3% royalty charged on diamond exports⁹⁹ goes directly to the areas affected by mining through the Diamond Area Community Development Fund (0.75%). The rest is divided between the treasury (0.7%), the running costs of the Gold and Diamond Office (0.75%), valuation costs (0.4%), the environmental rehabilitation account held by the government (0.05%) and on public information and minerals monitoring (0.1%). Mining companies also have to pay 0.1% of gross sales to the Agricultural Development Fund, to develop agriculture in mining areas.

In Tanzania, the Bomani Commission recommended that only 3% of the royalty collected on gold be distributed to the villages around the mines. The rest is to go to a mineral development fund (60%), a Tanzanian Mineral Authority mirroring Ghana's Mineral Commission, and the District Council in charge of the mining area (7%). In the DRC, most of the royalty goes to the central government (60%) and the rest is distributed to local government structures to be used exclusively for community development and infrastructure – the provincial administration in charge of the mining area (25%) and the administrative territory where mining takes place (15%).

However, not all governments earmark royalties for communities affected by mining. In South Africa, the government has rejected proposals by civil society organisations and trade unions, and even some mining companies to earmark royalty revenues to communities affected by mining. In the new royalties Bill, all royalty revenues will be collected by the treasury. According to the Finance minister, 'not only is earmarking contrary to sound fiscal policy, but [it] would negate the underlying principle of the Mineral and Petroleum Resources Development Act that the minerals of our country belong to all South Africans'. Instead, the 'government is amenable to consider an on-budget spending programme targeted at mining and labour supplying communities directed at human and/or local economic development'.¹⁰⁰

The political context in each country, especially the degree of real devolution of power to local authorities, will determine which spending mechanism will best allow local communities to shape and monitor the spending of mining revenue.

Transparent Company Reporting

In Africa, most mining investment is undertaken by the subsidiaries of multinational corporations incorporated in South Africa, Canada, the US, Australia or Europe, and listed on one or several international stock exchanges. The company laws and stock exchange regulations in these countries require them to publish their financial data in annual reports, based on the international financial reporting standards set by the International Accounting Standards Board (IASB) or under US requirements.

International Financial Reporting Standards do not require multinational companies to report data on their profits, expenditure and taxes on a country-by-country basis. Instead, their reports reflect their aggregate financial position across all their operations. It is, therefore, very difficult for governments and citizens in African countries to obtain local information on company profits, expenditures, and tax and other payments to governments and other institutions. This, in turn, makes it impossible to monitor government revenue collected from mining companies in a comprehensive way, particularly as many governments do not yet collate revenue figures from various types of mining company payments anywhere in a single format. They often do not require the local accounts of the companies in question to be filed on public record.

⁹⁹ Koidu Diamonds, the only industrial miner, pays 5%

¹⁰⁰ Quoted in Mark Curtis, 'Mining Briefing: How Can the Commodity Boom Grow Africa's Tax Base – South African Case Study', mimeo, October 2008

The Extractive Industries Transparency Initiative (EITI) initiated by the UK government in 2002 after campaigns by civil society organisations aims to partly resolve both issues. First, governments that elect to become EITI candidate countries have to get their own accounting in order and report publicly and accessibly on all the revenues they receive from extractive industry companies in each budget year. All mining (and other extractive) companies, in turn, have to volunteer to submit reports to the government for public dissemination. The reports must detail all their financial remittances to the government and related institutions, as well as profits and expenditure in each financial year. An aggregator is then tasked to compare the respective figures, point out differences and explain them. No African country has been validated as EITI compliant yet, although a number have joined as candidate countries – including Nigeria, Sierra Leone, Ghana, and the DRC. The Tanzanian and Zambian governments both announced their intention to join the initiative in 2008.

The EITI provides a useful push to governments to improve their accounting and reporting of revenues from the extractive industries sector. The initiative has prompted a number of donors – notably the World Bank, DfID and Norway – to provide financial and technical support to increase the capacity of governments to monitor and collect mining revenue. So far, however, the initiative has been less successful in prompting mining companies to publish their profits, expenditure and remittances to government. The EITI does not require multinational companies to publish their remittances on a country-by-country basis. Hence, it is very difficult, if not impossible, for citizens, parliamentarians and governments to detect tax avoidance strategies. Companies cannot be forced to publish national reports using the EITI template unless national laws regulating financial reporting require them to do so – which is not the case at present.

Box 4.1: EITI company reporting template¹⁰¹

The EITI requires mining companies to report publicly the following information for each financial year. The details of the information are to be negotiated with companies in each country, depending on the national tax law and other considerations:

I Revenue and profit for each concession or license

- Total production by value and quantity.
- Total sales by value and quantity.

II Taxes and fees paid to the state

- a) Taxes paid: corporate income tax, VAT refunds deducted, Customs duties, Windfall taxes, Real estate taxes, Excise taxes, Fuel levies, Vehicle taxes, Taxes on dividends paid, Taxes on interest paid, other
- b) Royalties paid
- c) Fees paid: exploration, license, land rent, mineral resource use, other
- c) Charges: stamp duties, other
- d) Dividends
- e) Other: donations to government, community expenditure

III Sum of discounted taxes

Capital expenditure, staff development expenditure, exploration costs, environmental fund contributions

[END BOX]

In view of these shortcomings, the best chance of obtaining the information necessary for governments, citizens and communities to track company remittances to national and local government departments, and to community development projects, is the introduction of an international accounting standard that requires national and multinational companies to report this information. African governments are increasingly requiring all national and foreign

¹⁰¹ This template has been adapted from the EITI Sourcebook, March 2005, www.eititransparency.org

companies to comply with these reporting standards. It is also, we argue, in the interest of firms to publish this information, which is why many mining companies have already indicated their willingness to participate in the EITI. First, clear information on profits, expenditure, taxes, and other remittances on a country-by-country basis gives their investors a clearer picture of the real prospects and risks faced by the company. Second, once communities have information on the revenue transmitted to government and other structures meant to service them, they will be able to monitor these funds directly, instead of expecting companies to spend more on community services directly.

The Publish What You Pay Coalition has been advocating a new international accounting standard for the extractives industry that would require multinational companies to report the information outlined in Box 4.2 on a country-by-country basis. This information will not be too onerous on companies, given that in many cases it is only an extension of information they already have to report on a country-by-country or regional basis for local taxation purposes. Some best-practice companies are already choosing to make this type of financial information available in their annual reports.¹⁰² The extractives activities research team at the International Accounting Standards Board will be publishing a discussion paper in 2009, and based on the feedback on this paper, will recommend the adoption of such a new financial reporting standard.

Box 4.3: An IFRS for multinational companies

The Publish What You Pay Coalition is advocating a review of the international accounting standard (IAS14 Segment Reporting) regulating how multinational companies report on the financial situation of their different operations. To improve transparency, all multinational companies should be required to report the following information for each of the countries where they operate¹⁰³:

1. total company turnover.
2. third party turnover.
3. third party costs excluding employment costs.
4. interest paid on loans.
5. profit before tax.
6. tax charged on profits split between current and deferred tax.
7. other taxes or equivalent charges due to the government of the territory in respect of local operations.
8. the actual payments made to the government of the country and its agencies for tax and equivalent charges in the period.
9. the liabilities owing locally for tax and equivalent charges at the beginning and end of each period as shown on the balance sheet at each such date.
10. deferred taxation liabilities for the country at the start and close of the period.
11. gross and net assets employed.
12. the number of employees engaged, their gross remuneration and related costs.
13. the names of all subsidiaries working within the territory.
14. comparative data where appropriate in each case.

This additional reporting is not too onerous on multinational corporations as many of them already report most of this information. The International Accounting Standard (14) on segment reporting already requires companies to report the number of employees they engage, their remuneration and related costs, the names of all subsidiaries working within the territory; interest paid by these subsidiaries; the gross and net assets employed; and deferred tax liabilities.

An IFRS for the extractives industry should, at the minimum, require country-by-country disclosure of the following payments and costs:

- royalties and taxes paid in cash.

¹⁰² Publish What You Pay and Revenue Watch Institute, Briefing Paper, IASB Roundtable of the Extractives Activities Research Team, September 15, 2008

¹⁰³ International Accounting Standard 14, Segment Reporting, 2005 Update, Submission to IASB by the Publish What You Pay Coalition, including Global Witness, OSISA, Care, CAFOD, Transparency International

- royalties and taxes paid in kind (measured in cash equivalents).
- dividends.
- bonuses.
- license and concession fees.
- * production costs.
- * development costs.

[END BOX]

Do Donors Help or Hinder Revenue Collection and Transparency?

Some donors – notably the IMF, World Bank, DfID; members of the UN family – notably UNCTAD, UNDP and UNECA, as well as African political leaders themselves, through NEPAD’s African Mining Partnership, are increasingly aware that Africa’s mineral riches could be turned into a force for development rather than a curse. They are, to different degrees, supporting the efforts of African governments to integrate mining into their development strategies and to increase their tax take from mining¹⁰⁴.

Box 4.3: IMF guidelines on resource revenue transparency

The IMF has, for a number of years, been a lone voice in the donor community advocating these measures. In Sierra Leone, it advised the government against offering huge fiscal incentives to foreign mining companies and reducing their corporate tax rates. In Zambia, it supported the government’s recent attempts to raise mining tax and royalty rates.¹⁰⁵ Unfortunately, its tax advice to governments remains confidential, which undermines public participation in mining tax debates.

In its Guide on Resource Revenue Transparency, the IMF advocates against mining tax subsidies and for greater transparency in revenue collection and distribution. To minimise tax subsidies to mining companies, the Guide advises that mining contracts and agreements should not form part of the mining taxation framework as they do at present. Instead, the tax terms agreed in mining contracts should merely repeat or confirm the substantive law. If any special tax agreements are reached in mining agreements, these should be incorporated into national tax law, subject to parliamentary and public debate and scrutiny. The budget should clearly recognise the costs of incentives provided through indirect tax exemptions due to the different tax treatment given to the mining sector. Any concessions from the tax regime applicable to other industries, such as VAT refunds, import tax exemptions, corporate tax reductions, fuel levy exemptions and so on should be counted as budget expenditures. This would help to calculate the overall subsidy to the mining industry.

To improve transparency, the IMF Guide advocates that national and international resource companies comply with national and international accounting and auditing standards, that the government’s policy framework and legal basis for taxation are presented to the public clearly and comprehensively, and that national legislation include requirements for the full disclosure of resource-related revenue.

The guidelines further recommend that all resource revenue-related transactions be identified, described and reported in the national budget process. Standardized templates should be developed for mining development agreements that outline exploration, development and production terms. This would reduce the discretion of high-level politicians in mining agreement

¹⁰⁴The World Bank has been encouraging mineral-rich countries to integrate mining development into their poverty reduction strategy papers and supporting extractive industry transparency in client countries. DfID has paid the legal fees of the advisors to the Zambian government on its recent mining tax reforms, and the UNDP is funding a pilot programme to develop the capacity of governments to collect more revenue from mining – pilot countries are Sierra Leone and Mozambique in Africa. Additionally, the Africa Development Bank is considering a legal facility to help governments with the legal aspects of contract negotiations.

¹⁰⁵This involvement is detailed in Alastair Fraser and John Lungu, ‘For Whom the Windfalls? Winners and Losers in the Privatisation of Zambia’s Copper Mines’, Zambia Civil Society Trade Network and Catholic Centre for Justice Development and Peace (CCJDP, now Caritas), 2006

negotiations, and the potential for corruption. Finally, the guidelines recommend that all mining development agreements should be made publicly available.

[END BOX]

UNECA has been mandated by the Africa Union to prepare an African Mining Vision, which sets out the key objectives, principles and values that should guide Africa's mining development in future – these include maximising the collection of revenue from mining in a transparent way. UNECA is also leading a pan-African study that will collect information and analysis on the mining regimes of all African countries. These studies, undertaken by an International Study Group, will form the basis of a set of mining policy guidelines for African governments covering all aspects of mining including taxation, as well as a model mining development agreement, based on best practice collected around the continent.¹⁰⁶

But many donor governments have played a less constructive role, and have tried to stymie the development of transparent, participatory policies and sovereign legislation that would contribute to the development benefits of mining.¹⁰⁷ We show below how the governments of Canada and the United States, both mining economies, have interfered in local political processes in Tanzania and the DRC to secure the interests of their mining companies.

In 1996, the Canadian High Commissioner in Tanzania intervened on several occasions to influence revisions to mining legislation as a means of promoting Canadian business interests. He acted to counter the legal claims of local miners who were questioning the legitimacy of a Canadian mining company, Sutton Resources, and its designs on the Bulyanhulu deposits. In 2004, Canada's ambassador to the UN had criticised part of a report produced by the Panel of Experts on the Illegal Exploitation of Natural Resources in the DR Congo, in which nine Canadian companies were accused of violating OECD Guidelines during the country's protracted war.¹⁰⁸ In June 2008, the staff of the Canadian High Commission in Tanzania tried to influence parliamentarians to reject the recommendations of the Bomani Commission, a committee appointed by the president to review the country's mining contracts and legal framework.

A former Tanzania Finance minister has publicly questioned the role of foreign donors in Tanzania and their interference in national tax laws to safeguard the interests of their mining companies. He stated that 'during the preparations (for enacting the 2004 Act) several foreign diplomats based in the country formed a committee to examine the proposals for the (Income) Tax Bill, which is rather unusual. Being the then Finance minister, I met twice with them to hear and respond to their objections – especially to the manner in which mines were to be made to pay income tax as had then been proposed by an expert from Oxford University in England. Eventually, the Cabinet decided to postpone the incorporation into the new law of the entire section of that Bill which dealt with minerals so that it would be re-examined when the time was right.'¹⁰⁹ It is alleged that these diplomats represented the UK, Norway, South Africa and Canada.

Canada and South Africa are the host countries of the major industrial miners in Tanzania: Barrick Gold and AngloGold Ashanti. Diplomats from these countries were trying to safeguard the ability of these companies to continue benefiting from tax concessions granted in the 1973 Income Tax Act, which were at risk of being abolished in the 2004 Act. These included their ability to deduct 100% of expenditures made before production starts from income tax liability and to continue benefiting from a government tax subsidy on capital expenditure.¹¹⁰

¹⁰⁶ International Study Group, Terms of Reference for the Review of African's Mining Regimes, Antonio Pedro, UN ECA, mimeo

¹⁰⁷ See Denis Tougas, 'Canada in Africa: The Mining Superpower', Pambazuka News, November 20, 2008

¹⁰⁸ Evans Rubera, 'Mining and Colonial Practices in Tanzania: The Return of Victorian Era Exploitation?', Pambazuka News, November 20, 2008

¹⁰⁹ Quoted in a letter dated December 3, 2007, to the Chairman of the Mineral Sector Regulatory System Review Committee, by the Minister for Industries, Trade and Marketing, Basil Mramba, relating what happened when, in 2004, the government repealed the Income Tax Act of 1973 and replaced it with the 2004 Income Tax Act. Cited in Death and Taxes: The True Toll of Tax Dodging', Christian Aid, May 2008

¹¹⁰ The Report of the Presidential Committee to Advise the Government on Oversight of the Mining Sector, United Republic of Tanzania, Volume 2, April 200

In a similar vein, the US government has been undermining the efforts of civil society and donors to bring transparency to the DRC's mining regime. In 2005, the world's largest publicly traded copper company, Freeport McMoRan Copper and Gold, bought a majority share in the Tenke Fungurume mine, the world's largest open pit copper mine in southern DRC. The company signed a contract for the development of the concession at Tenke Fungurume behind closed doors – the deal reduced the government's share in the project from 45% to just 17%. The World Bank's chief mining specialist, Craig Andrews, has criticised 'the complete lack of transparency with respect to the negotiations and approval of these contracts'.¹¹¹ This renegotiation took place despite the recommendation of the Lutundula Commission that there should be a moratorium on the negotiation of all new contracts until a proper review has been undertaken.

A US academic investigating the Tenke Fungurume contract has criticised a high-ranking US diplomat who was involved in the negotiations. According to him, she was 'instrumental in convincing President Joseph Kabila to sign off on the deal'.¹¹² She then took a job with Freeport less than a year later as vice president in charge of government relations. According to DRC citizens, 'the United States pushed us to sign a contract when we shouldn't have signed it. And then the lady who pushed [it]... is making money off that contract'.¹¹³

Companies Reaction to Mining Tax Reforms

As discussed in Chapter 3, mining companies believe they are entitled to special tax exemptions, given the risky nature of their business. It is therefore not surprising that they have largely opposed the changes proposed or made to mining tax regimes. In Tanzania, Barrick Gold has used the leverage of the Canadian government to try to stall tax regime reforms. The company has also publicly denounced the authors of a civil society report pushing for mining tax reforms. In Zambia, First Quantum immediately threatened the government with legal action following the changes to the mining tax regime made in April 2008, and other companies have followed suit in demanding the abolition of the windfalls tax and variable profits tax, as well as a reduction of corporate income tax rates to 25%. The Zambian president announced in January 2009 that the government might cut mining taxes in response to pressure from mining companies, some of which have been suspending operations due to low international copper prices. In his view, 'we must ensure that we do not kill the goose that lays the golden egg. There is little point in taking in a few million dollars in tax if thousands of jobs are lost as a result'.¹¹⁴ The IMF representative to Zambia, however, has publicly urged the government not to cut taxes, despite pressure from the companies.¹¹⁵ The current low copper prices, averaging US\$3,000 per tonne, are still higher than the prices assumed in the business feasibility studies of companies buying the mines in the early 2000s, before the boom.

Mining companies cite crashing commodity prices and the lack of availability of finance for new mining investment due to the international financial crisis as reasons why governments should continue granting them tax concessions. According to Barrick Gold, responding to the recommendations made for tax reforms in a civil society report – many of which have been adopted by the Bomani Commission, 'such changes would only aggravate an already desperate economic picture for new investment in the sector and cast an even larger cloud over the long-term future of the gold mining industry in Tanzania'. In the DRC and Zambia, a number of

¹¹¹ Raf Custers, IPIS

¹¹² Quoted in a transcript of the Dan Rather reports, broadcast in the US on September 17, 2008, episode number 330, entitled 'All Mine'.

¹¹³ Peter Rosenblum, professor, Columbia University and Dan Rather, quoted in a transcript of the Dan Rather reports, broadcast in the US on September 17, 2008, episode number 330, entitled 'All Mine'.

¹¹⁴ Rupiah Banda in his State of the Nation address on January 16, 2008, published by Reuters on January 16, 2009

¹¹⁵ Birgir Anarson, IMF Resident Representative in Zambia, quoted in a Reuters report, 13 January 2009, www.miningweekly.com

copper and cobalt mining operations have already been suspended, while mining companies wait for prices to rise.¹¹⁶

Recommendations

African governments, their donors, and mining companies face a number of challenges if mining is to start contributing to economic and human development in mineral-rich countries. There is a real danger that the crash in international mineral commodity prices, coupled with the reduction in international finance available for new mining investment, could set back the mining tax reforms under way or recently enacted in countries like Sierra Leone, Tanzania and Zambia. They may again fail to benefit from the next commodity price boom. Governments might also be persuaded by companies in their individual contract negotiations that they need to continue granting them special tax exemptions to compensate for these risks.

Furthermore, too many African governments are still unwilling to open up their tax deals and tax receipts from mining companies to public and parliamentary scrutiny. And too many mining companies are still pushing for tax exemptions and still fail to report what they earn and what they remit to government in each jurisdiction where they operate.

To remove these obstacles blocking increased revenue and transparency in Africa's mining industry, systemic and political solutions are needed. At the systemic level, a new international financial reporting standard that all companies registered on stock exchanges will need to implement has to require them to report on their financial operations and remittances to government and other structures on a country-by-country basis. This will allow citizens and parliaments to monitor the financial flows between parent companies and subsidiaries, and detect tax avoidance practices.

African governments also need to revise their company acts to require the subsidiaries of multinational mining companies incorporated in their jurisdictions to publish the financial information required by the EITI. This will ensure that privately or state-owned mining companies such as the growing number of Chinese state-owned or financed mining companies are required by national law to publish their profits and losses, and remittances to government and other structures.¹¹⁷

i. African governments

4. Collaborate with the UNECA to develop and publish an easy-to-use guide on mining taxation. The guide should cite best practices and detail the purpose, costs in foregone revenue and benefit of each type of tax instrument and tax concession.
5. Review their company and financial laws to require all extractive industry companies to use the EITI template in their annual financial reports by law.
6. Stop the practice of granting tax exemptions to mining companies in mining contracts. All mining tax rates and terms should be legislated in the substantive law and merely confirmed in mining development agreements.

ii. African parliaments

¹¹⁶Barry Sargeant, 'The Mining Curtains are Falling in Katanga Province, DRC, as Ambitious Mid-tier Miners with Battered Balance Sheets Continue to Halt Operations, Mainly in Cobalt,' *Mineweb*, November 24, 2008

¹¹⁷ The African Publish What You Pay campaign, which met in Abuja in September 2008, also called for the EITI reporting requirements to be embedded in national law, for the introduction of freedom of information Bills in all African countries, and for mining contract transparency. See Publish What You Pay Communiqué, issued at the Africa Regional Meeting, September 10, 2008

3. Pass laws that require mining development agreements to be ratified by parliaments, as is the case in Ghana and Sierra Leone, and made public.
4. Push for a new international accounting standard that would force companies to report their profits, expenditures, and taxes, fees and community grants paid in each financial year on a country-by-country basis.

iii. International Accounting Standards Board

Adopt a new international accounting standard for extractive industries, which require them to report on their profits, expenditures, and taxes, fees and community grants paid in each financial year on a country-by-country basis.

iv. Bilateral and multilateral donors

Scale up their financial assistance to African governments to improve their capacity to monitor and audit the accounts of mining companies, and to review their mining tax regimes. African governments should be free to use this finance to purchase legal and other technical assistance from any service provider of their choice.