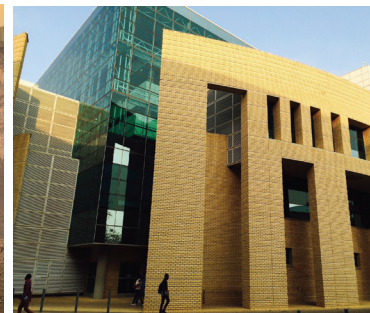
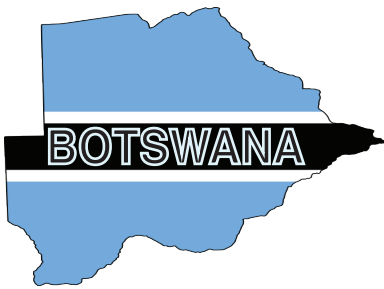




**AN ASSESSMENT OF THE NATIONAL MINING
LEGAL FRAMEWORKS AND POLICIES OF SADC
COUNTRIES AGAINST THE AFRICA MINING VISION**

(CLUSTER 1: MINING REVENUES AND MINERAL RENTS MANAGEMENT)



THE CASE OF BOTSWANA

ABOUT AFRODAD

VISION

A prosperous Africa based on an equitable and sustainable development.

MISSION

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

AFRODAD OVERALL STRATEGIC GOAL

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

THEMATIC FOCUS AREA 1: DOMESTIC RESOURCE MOBILISATION

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

THEMATIC FOCUS AREA 2: DEBT MANAGEMENT

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

THEMATIC FOCUS AREA 3: INTERNATIONAL PUBLIC FINANCE

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

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

(CLUSTER 1: MINING REVENUES AND MINERAL RENTS MANAGEMENT)

THE CASE OF BOTSWANA

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ACRONYMS

AMV	Africa Mining Vision
AU	African Union
BIT	Bilateral Investment Treaty
BURS	Botswana Unified Revenue Service
CSR	Corporate Social Responsibility
DTA	Double Taxation Agreement
DTCB	Diamond Trading Company Botswana
EI-TAF	Extractive Industries-Technical Advisory Facility
EITI	Extractive Industries Transparency Initiative
GDP	Gross Domestic Product
IFF	Illicit Financial Flows
IFSWF	International Forum of Sovereign Wealth Fund
ISLP	International Senior Project Lawyers
NGO	Non-Governmental Organisation
OECD	Organisation for Economic Cooperation and Development
RRT	Resource Rent Tax
SADC	Southern African Development Community
SBI	Sustainable Budget Index
SLP	Social and Labour Plan
SWF	Sovereign Wealth Fund
SWFI	Sovereign Wealth Funds Institute

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THE CASE STUDY OF BOTSWANA

This report is an assessment of the extent to which the mining policies and legal frameworks of Botswana are in line with the aspirations of the 2009 adopted Africa Mining Vision (AMV), whose goal is to promote “transparent, equitable and optimal exploitation of mineral resources to underpin broad-based sustainable growth and socio-economic development”. This national study contributes to a broader regional study focusing on eight SADC countries, i.e. Angola, Botswana, Malawi, Mozambique, South Africa, Tanzania, Zambia and Zimbabwe. Given the significant role of the mining sector in the economies of these countries, particularly mining exports and mining revenue contributions to total government tax revenue, the assessment was solely focused on the fiscal issues of mining as guided by the AMV Action Plan Cluster One on Mining Revenues and Mineral Rents Management. This cluster aims “to create a sustainable and well-governed mining sector that effectively garners and deploys resource rents”. It identifies a variety of activities and monitoring indicators for promoting two expected outcomes namely an enhanced share of mineral revenue accruing to African mining countries and improved management and use of mineral revenue. It is against these activities and/or monitoring indicators that the mining policies and legal frameworks of Botswana are evaluated in this study.

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

Major reviews of the fiscal, legal and policy framework for mineral exploration and mining in Botswana include the 1999 amendment of the Mines and Minerals Act and the 2006 amendment of the Income Tax Act. The review of the Mines and Minerals Act resulted in the abolition of the government’s right to a 15 percent free equity participation in all new mining projects, replaced by an option to acquire up to 15 percent working interest participation, with the view of increasing government revenue through dividends. Although these amendments were before the 2009 adoption of the AMV, the mining regime has been competitive enough to enhance mineral revenue accruing to the country. Botswana has also signed Double Taxation Agreements (DTAs) with the host countries of some of its major mining companies such as South Africa. The DTA provides that income from immovable property in Botswana which includes a mine, an oil or gas well, a quarry or any other place of extraction or exploitation of natural resources maybe taxed in Botswana. Furthermore, Botswana’s Income Tax Act requires that income from mining operations, with sources within Botswana be taxed at source. This is in line with the AMV aspiration that the terms of DTAs and BITs with host countries of mining companies must be reviewed in such a way that minerals should be taxed at the point of extraction, as a way of enhancing the share of mineral revenue accruing to a mining country.

All revenues from the Botswana mineral sector flows to a general government revenue pool, the Consolidated Fund. Allocation of mineral revenue from the Consolidated Fund is independent of the presence of a mine in a community. It is done in line with the set priorities in the National Development Plans (NDPs) and the annual budgeting process, under the guidance of the public finance policy framework. The country implements an asset-preservation principle through the sustainable budget index (SBI), where the government ensures that revenue from minerals, which are an asset, is used to finance investment in other assets (physical and human capital).

The country also established a Sovereign Wealth Fund in 1994 known as the Pula Fund with an aim to preserve part of the income from diamond exports for future generations. This augurs well with the mining revenue and minerals management cluster's expected accomplishment of improved management and use of mineral revenue and is also in line with the overall AMV goal of ensuring that exploitation of mineral resources underpins broad-based sustainable growth and socio-economic development.

However, though the fiscal regime for all non-diamond minerals is clearly laid down in the Mines and Minerals Act and is not subject to negotiation, for diamonds, the country's most important mineral, it is discretionary and no information is published on contracts with diamond mining companies and the agreed tax arrangements respectively. Furthermore, the existing commercial confidentiality regulations prohibit parliamentary committees from overseeing negotiations between the Mines Ministry and diamond mining companies, which compromises the envisaged transparency aspect of the AMV goal.

INTRODUCTION AND BACKGROUND

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

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

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

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

1.1 Cluster 1 - Mining Revenues and Mineral Rents Management

Since the adoption of the AMV in 2009, there is need to assess the progress that African countries have made in aligning their mining policies and legal frameworks to the AMV. This study attempts to do this evaluation by focusing mainly on the “Mining Revenues and Mineral Rents Management” cluster whose main goal is “to create a sustainable and well-governed mining sector that effectively garners and deploys resource rents”.

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

This goal was driven by the vital need to address observed fiscal regime challenges along the entire mineral value chain such as lack of transparent and competitive allocation of concessions for known mineral assets, the spending of mineral revenues disproportionately on current consumption which compromises inter-generational equity, inequitable distribution of mineral revenue and neglect of local authorities and communities living near mining areas and widespread tax evasion and avoidance schemes like transfer pricing (including over- invoicing of inputs costs).

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

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

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

Table 1: Continued...

Expected Accomplishment	Activities	Time Frame	Monitoring Indicators	Responsible Bodies and Main Actors
	<ul style="list-style-type: none"> • Develop the capacity of local communities to negotiate partnership agreements; and • Develop systems for strengthening capacities for national and sub-national bodies for revenue management. <p>At sub regional and regional levels</p> <ul style="list-style-type: none"> • Compile best practice guidelines on mineral revenue management and deployment for implementation at the REC and national levels. 		<ul style="list-style-type: none"> • Best practice guidelines compiled; and • Extent to which guidelines are used by RECs and member states. 	

1.2 Snapshot of mining in SADC

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

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

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

ASSESSMENT OF THE MINING POLICIES AND LEGAL FRAMEWORKS IN BOTSWANA

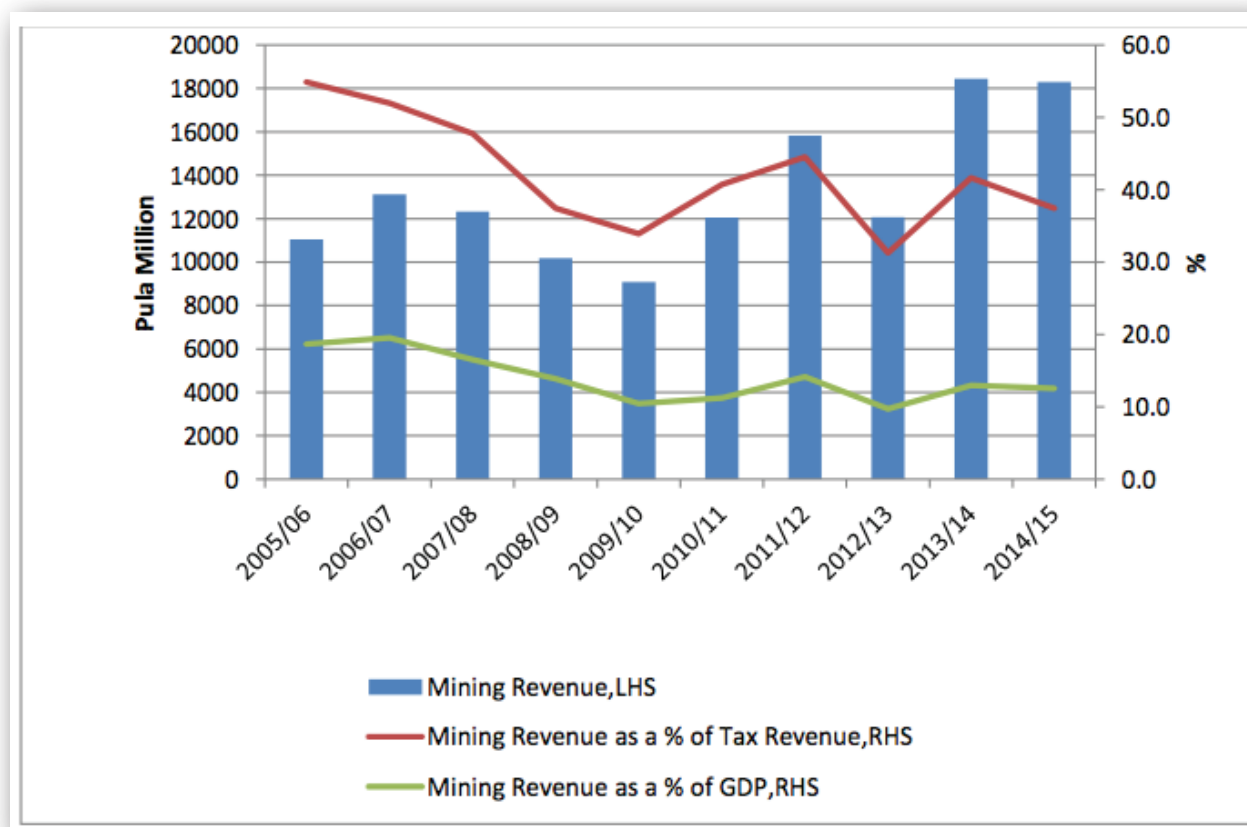
2.1 Overview of the role of the mining sector in the economy

Regardless of a significant setback following the 2008 global economic downturn, which also exposed the country's heavy reliance on commodities and vulnerability to international market fluctuations, Botswana sustained economic growth averaging 5 percent per annum between 2005 and 2014 (World Bank, 2016). As a result, it has been one of the fastest growing economies in the world. GDP per capita also grew at an annual average rate of 5.9 percent, taking the country from low to middle-income status. Key to this success has been the prudent management of the country's diamond endowment, which contributed to strong fiscal and external positions including a large stock of foreign exchange reserves (the largest portion of which is saved inside the Pula Fund).

In view of the above, mining has long been the dominant sector of the Botswana economy. For the 10 years between 2006 and 2015, mining was the largest contributor to GDP (at an average of 22.2 percent), largest source of export earnings (at an average of 71.6 percent) and a significant source of tax revenue at an average of 29 percent (African Development Bank, 2016). The main driver of the mining sector growth and earnings are diamonds with smaller contributions from base metals (copper, nickel & cobalt), coal, soda ash and gold. Diamond production started in 1971 and Botswana has since become the world's largest producer of diamonds, producing approximately 25-30 percent of the world's gem quality diamonds (OECD, 2013).

Though the mining sector continues to account for large shares of output, there has been a long term decline of its contribution from approximately 30 percent in 1994. As shown in Fig 1 below, the sector's contribution to tax revenue (though still the largest) has also declined from a high of 54.9 percent in 2005/06 to 37.4 percent in 2014/15, mainly as a result of the fall of commodity prices on the international market. Mining revenue to GDP has also declined from 18.7 percent in 2005/06 to 12.6 percent in 2014/15.

Figure.1: Evolution of Mining Revenue in Botswana, 2005/06 – 2014/15



Source: Author’s calculations from the Bank of Botswana 2015 Annual Report

2.2 Laws and Policies governing mining and management of mineral revenues

The main laws and policies that govern mining and mining revenue management in Botswana include:

The Mines and Minerals Act of 1999

This is the main law that controls and regulates exploitation of minerals in Botswana. It vests all mineral rights in the state and outlines the process for the issuance of prospecting, retention, and mining licences, as well as minerals permits. The Act provides for financial aspects such as royalties to be paid, licence fees and penalties. According to the Act, diamond mining licences are subject to negotiated settlement regarding terms and conditions, including taxes and royalties. For all other minerals, however, the terms are not subject to negotiation and the tax and royalty regimes are laid out in the Act as percentage of gross market value for precious stones, precious metals and other minerals or mineral products as 10 percent, 5 percent and 3 percent respectively.

The Act also provides that where it appears to the Minister that minerals have not been disposed at an arm’s length, the Minister can determine the royalty payable on the basis of prices ruling in the industry, and the royalty so determined shall be payable on demand. The Act also gives the Government the option to acquire up to 15 percent working interest participation in a proposed mine, upon the issue of a mining licence. Thus the government is obligated to inform the applicant as to whether or not it is exercising its option and of the working interest percentage it wishes to take.

The Precious and Semi-Precious Stones (Protection) Act of 1969

This Act regulates the possession and dealings of any relevant stones, including diamonds, and also prohibits any import or export of rough diamonds without a valid Kimberley Process (KP) certificate (an element that came into effect on January 1, 2003). This Act further clarifies that all prospecting and mining areas or buildings in which rough diamonds are handled have to be declared precious stones security areas, requiring special access only granted to valid permit holders. Finally, the Act outlines the schedule of monthly reports to be submitted to the Minister of Minerals, Energy and Water Resources; these reports detail the number of rough diamonds won, recovered, received, manufactured, purchased, or imported into a precious stones protection area.

The Diamond Cutting Act of 1979

This Act regulates the cutting, sawing, cleaving and polishing of rough diamonds, including the procedures and conditions for the issuance of diamond-cutting licences. It requires licence holders to submit monthly reports detailing all inputs and outputs, with a view to achieving reconciliation between the receipts of rough and the finished product.

Export and Import of Rough Diamonds Regulations of 2004

These regulations also prohibit against unauthorised export of rough diamonds unless the rough diamonds are accompanied by a Kimberley Process Certificate.

The Income Tax Act of 1995

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

The Public Finance Policy Framework

The Botswana public finance policy framework specifies that revenues derived from minerals, because they are derived from the sale of an asset, should be used to finance investment in other assets. The intention is to preserve the country's overall asset base and to provide the basis for the generation of income that can replace mineral income when it eventually declines. The implementation of this asset-preservation principle has since 1994 been monitored through the Sustainable Budget Index (SBI), defined as the ratio of non-investment spending to non-mineral revenues. Over the years, the country has maintained this ratio below 1, which implies that mineral revenue has either been saved or spent on public investment while recurrent spending has been financed from non-mineral sources, thus sustainable.²

2.3 Key institutions involved in the management of mining revenue

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

Ministry for Mineral, Energy and Water Resources (MMEWR)

The MMEWR regulates all mining, prospecting and exploration activities as well as mineral processing activities. Prospecting licences are administered by the Department of Geological Surveys, retention licences are administered by both the Department of Geological Surveys and the Department of Mines and mining licences are administered by the Department of Mines. The MMEWR is also responsible for all financial, commercial and administrative issues arising in those mineral sector companies in which the Government of the Republic of Botswana is a shareholder. The Permanent Secretary of the MMEWR sits on the Board of Debswana (a 50/50 joint venture between the

2. http://www.europarl.europa.eu/intcoop/acp/2016_botswana/pdf/study-en.pdf

government of Botswana and De Beers), the Diamond Trading Company Botswana (DTCB) which is the selling arm of the De Beers network, and De Beers South Africa

The high-level Minerals Policy Committee

The high-level Minerals Policy Committee is comprised of the Permanent Secretary of the Ministry of Minerals, Energy and Water Resources (MMEWR), Permanent Secretary of the Ministry of Finance and Development Planning (MFDP), Permanent Secretary to the President, the Governor of the Bank of Botswana and the Attorney General. It sets the framework for taxation and revenue-raising as regards the mining sector, and takes a lead role in negotiations with mining firms.

The Ministry of Finance and Development Planning

The Ministry of Finance and Development Planning is responsible for overseeing revenue collection of the minerals sector. The Ministry is also responsible for implementing macroeconomic and fiscal policy under the country's series of National Development Plans (NDPs) which guide the overall development of the country on a six year basis. The Plans contain estimates of revenue expected over the plan period, where diamond exports and consequent government revenue are a key component. The country is currently implementing its 10th NDP which runs from 2009 to 2016.

The Botswana Unified Revenue Service (BURS)

The Botswana Unified Revenue Service is responsible for administering and enforcing all taxes applicable to the mining sector which includes royalties, corporate profits tax and withholding tax on dividends.

The Diamond and Narcotics Squad within the Botswana Police

The Diamond and Narcotics Squad within the Botswana Police has a special mandate to investigate cases of smuggling or illicit possession of rough diamonds and other minerals. The unit is involved in the secure transport of diamonds from the mine sites to the Diamond Trading Company Botswana (DTCB), and also witnesses the transactions at DTCB when cutting and polishing facilities export sight goods. It is also responsible for sealing the goods at DTCB if the sight holder is exporting them.

2.4 Assessment of the mining policies and legal frameworks against the AMV Cluster 1

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

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

2.4.1 Enhanced share of mineral Revenue

Improve national capacity to physically audit mineral production and exports

Reviews and reports of the Kimberly Process indicate that as one of the world's leading producers of rough diamonds, Botswana has created a high degree of security and control over domestic diamond production, resulting in a high degree of traceability of stones from mine to the point of export,³ which

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

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

Review mineral regimes in terms of optimising revenues

Major reviews of the mineral regime in Botswana were before the 2009 adoption of the AMV and include the amendment of the Mines and Minerals Act in 1999 and the Income Tax Act in 2006,⁴ resulting in the:

- Abolition of the government's right to a 15 percent free equity participation in all new mining projects, replaced by an option to acquire up to 15 percent working interest participation, with the view of increasing government revenue through dividends; and
- Downward revision of royalty rates payable on the sale of all minerals from 5 percent to 3 percent, with the exception of precious stones and precious metals, which remained at 10 percent and 5 percent respectively.

Analysis and calculations from the Bank of Botswana publications of mining revenue in the 2015 Annual Report show that following the review of the mining law in 1999, mining revenue increased by 109 percent from P3.2 billion in 1998/99 to P6.7 billion in 1999/00 and has maintained an upward trend to P21.5 billion in 2014/15. As a percentage of total government revenue, mining revenue however declined from 67.3 percent in 1999/00 to 41.7 percent in 2014/15 owing mainly to falling mineral prices on the international market.

In line with the reviewed law that gives the government the option to acquire up to 15 percent working interest participation in any proposed mine, as of 2015, the Government of Botswana's mining investment and dividends sources were 50 percent interest in Debswana (which it jointly owns with De Beers); 50 percent interest in Botash (soda ash producer); 15 percent interest in Tati Nickel Mining; 15 percent interest in De Beers; 94 percent interest in BCL limited (copper-nickel mine); 50 percent interest in Diamond Trading Company Botswana and 80.8 percent indirect beneficiary shareholding in Morupule Colliery (a subsidiary of Debswana).

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

Botswana does not have any specific transfer pricing regulations. However, general anti-avoidance provisions are contained in Section 36 of the Income Tax Act, wherein, the Commissioner General may adjust the tax liability of a taxpayer if a transaction, scheme or operation is fictitious or artificial, or has been entered into or carried out by persons not dealing at arm's length with the effect of avoiding, reducing or postponing tax liability.⁵

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

5. <http://www.africataxjournal.com/?p=192>

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

Host countries of major mining companies in Botswana include South Africa which is the home country of De Beers (which is in a 50/50 joint venture with the Government of Botswana in the Debswana Diamond Company), Anglo American Corporation of South Africa (which owns a 93.3 percent stake in Morupule Colliery (Pty) Ltd and is also in a 50/50 joint venture with the Government of Botswana in the Botswana Ash Pty Ltd). Botswana and South Africa have a double taxation agreement that came into force in April 2004 and was amended in August 2015. Article 6 of the DTA on income from immovable property states that, 'income derived by a resident of a Contracting State from immovable property situated in the other Contracting State may be taxed in that other State'. Immovable property in this case encompasses all permanent establishments which include mine, an oil or gas well, a quarry or any other place of extraction or exploitation of natural resources. In this regard, the DTA gives the government of Botswana the right to tax minerals at point of extraction.

Furthermore, Botswana is a source based country. Consequently, its Income Tax Act specifically states that income from, or deemed to be from, a source within Botswana is taxable in Botswana. This includes mining operations which are sources within Botswana and hence are taxable at source or point of extraction.

Build capacity & systems to auction mineral rights where applicable

Mineral rights are not necessarily issued on an auction basis in the country. Section 38 of the Mines and Minerals Act of 1999, indicates that a person wishing to obtain a mining licence shall apply to the Minister who will issue licenses for non-diamond minerals, on a first-come, first-served basis, if the applicant meets the requirements stated in the Act.

On the other hand, any application for the issue, renewal, transfer or amendment of a licence to mine diamonds initiates a negotiating process, between Government and the applicant covering all technical, financial and commercial aspects of the proposed project including Government participation. If the negotiations do not lead to an agreement within six months or such extended period as the Minister may allow, the application fails. However, if negotiations are successfully concluded, the Minister will issue a licence reflecting the terms and conditions agreed.

Under the AMV Action Plan, the monitoring indicator is the extent to which competitive and transparent mineral concession systems are implemented. Concerns have however been raised in Botswana that commercial confidentiality regulations prohibit parliamentary committees from overseeing negotiations between the Mines Ministry and diamond mining companies,⁶ which compromises the transparent aspect.

2.4.2 Improved management and use of mineral revenue

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

Botswana has a Sovereign Wealth Fund in the form of the Pula Fund established in 1994 with one of the aims being to preserve part of the income from diamond exports for future generations. The Pula

⁶ <http://www.resourcegovernance.org/our-work/country/botswana>

Fund is managed in accordance with section 35 of the Bank of Botswana Act which stipulates the establishment and the management of long term investment funds. In addition to savings for future generations, the Pula Fund also plays a stabilisation role as it forms part of the country's policy of accumulation of foreign assets to provide macroeconomic, balance of payments and fiscal stability in the event of external shocks or anticipated domestic disruptions, such as diamond revenue shortfalls or droughts. The Pula Fund consists of two accounts, the Government Investment Account that belongs to the government of Botswana and a Foreign Exchange Reserve Account that belongs to the Bank of Botswana. Botswana is among the founding members of the RRT and was one of the architects of the Santiago Principles⁷ in 2008.

Despite this kind of background experience and that the Pula Fund is one of the model SWFs in the continent, concerns have been raised on some of its shortfalls especially on the management system of the fund. Although general budget principles guide flows into and out of the fund, the worrying thing is that there is no explicit operational rules for deposits and withdrawals which consequently undermines accountability and financial integrity principles.⁸

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

The policy in Botswana is not designed in such a way that communities near mining areas or their local authorities are given some allocation that is different from communities without mining areas. All revenues from the mineral sector are not institutionally segregated but are included in the general government revenue pool, the Consolidated Fund. Allocation of mineral revenue from the Consolidated Fund is independent of the presence of a mine in a community. It is done in line with the set priorities in the National Development Plans (NDPs) and the annual budgeting process, under the guidance of the public finance policy framework which specifies that revenues derived from minerals, because they are derived from the sale of an asset, should be used to finance investment in other assets, particularly investment in physical and human capital.

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

The Botswana Mines and Minerals Act requires holders of mineral concessions, in all phases of their operations, to give preference in employment to citizens of Botswana to the maximum extent possible consistent with safety, efficiency and economy (article 12.2). The Act also requires holders to conduct training programs for citizens (Article. 12.3).

There is no specific requirement for mining companies to engage in community development in the Act. However, in observance of the sustainable budget index (SBI) principle, the government ensures that revenue from minerals, which are an asset, is used to finance investment in other assets (physical and human capital) which includes investment in education, transport infrastructure, health services, water and sanitation for both mining and non-mining communities. In line with the asset preservation principle, it is estimated that between 1983/84 and 2014/15, a total of P405.8 billion was received as mineral revenues and was entirely devoted to investment in physical and human capital assets as follows:⁹

7 The Principles' overall ambition is to increase the transparency standards of the SWF industry at large. They therefore commit their signatories to basic and consistent standards of good governance, transparency and accountability, while allowing room to reconcile the diverging mandates and regulatory traditions of their signatories. They constitute a voluntary code of principles and as such are not legally binding under national or international law.

8. See The Mail and Guardian: Botswana repeatedly raids preservation fund, 05 Feb 2016 <https://mg.co.za/article/2016-02-04-botswana-repeatedly-raids-preservation-fund>

9. Botswana's Mineral Revenues, Expenditure and Savings Policy, page 13

- P185.9 billion (42 percent) – was spent on education;
- P66.9 billion (15 percent) – was spent on health; and
- P192.7 billion (43 percent) - was spent on electricity and water, housing, urban & regional development, roads, food & social services and roads among others.

Furthermore, some mining companies such as Debswana have Corporate Social Investment (CSI) policies in place, where they commit themselves to creating prosperity and empowerment for the communities in which they operate through job creation and various health and education development programs.

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

The Botswana national government caps annual expenditure growth of sub-nationals, regardless of revenues flows. This is meant to promote discipline and prioritisation in the utilization of funds, at both national and sub-national levels.

2.5 Conclusion

From the above analysis of mining policies and legal frameworks of Botswana, it is quite commendable that the country has in place a public finance policy framework by which it implements an asset-preservation principle through the sustainable budget index (SBI), where the government ensures that revenue from minerals, which are an asset, is used to finance investment in other assets (physical and human capital).

The interpretation of the SBI is that if it's above 1, it means that non-investment spending is being financed in part from mineral (non-current) revenues, which is unsustainable. On the other hand, a value of less than 1 means that mineral revenue is either being saved or spent on public investment, while recurrent spending is being financed from non-mineral (recurrent) sources, thus sustainable. Since 2006, Botswana is on the record for having maintained its SBI well below 1, as the share of mineral revenue spending on developmental projects such as health, education and other infrastructure development increased. This augurs well with the mining revenue and minerals management cluster's expected accomplishment of improved management and use of mineral revenue. It is also in line with the overall AMV goal of ensuring that exploitation of mineral resources underpin broad-based sustainable growth and socio-economic development.

It is also particularly worth noting that, out of the P405.8 billion total mineral revenues between 1984 and 2015, 15 percent was entirely devoted on health development spending which has a directive positive bearing on women, as they are guaranteed access to adequate maternal health services and reduced burden for caring for the sick at home, as a result of lack or limited access to health services and facilities.

Regardless of the above, it still remains a concern that though the fiscal regime for all non-diamond minerals is clearly laid down in the law and is not subject to negotiation, for diamonds – the country's most important mineral - it is discretionary. Furthermore, no information is published on contracts with diamond mining companies and the agreed tax arrangements or environmental impact assessments. Concerns have also been raised that existing commercial confidentiality regulations prohibit parliamentary committees from overseeing negotiations between the Mines Ministry and diamond mining companies, which compromises the envisaged transparent aspect of the AMV goal.

In conclusion, Botswana proves to be better off than most of its SADC counterparts in terms of adoption of the AMV and in mineral revenue and rents management. Most SADC countries can adapt some of Botswana's mining regulation systems that have allowed the country to benefit more from its extractive sector.

Recommendations

Botswana needs to consider the following recommendations to further strengthen its mining legal frameworks and policies especially to enhance the country's benefit from the extractive industry and effective revenue management in line with the AMV aspirations.

- Botswana needs to have an objective regulatory and fiscal regime for the diamond mining sector as is with the rest of the extractives.
- Information on contracts with diamond mining companies and the agreed tax arrangements should be published and accessible to all stakeholders.
- Botswana needs to fulfil its transparency obligation by allowing the parliamentarians and especially parliamentary portfolio committees to overlook the performance of the government including the extractive sector.
- To ensure transparency and accountability as prescribed by the AMV, Botswana needs to revoke the commercial confidentiality regulations that prohibit parliamentary committees from overseeing negotiations between the Mines Ministry and diamond mining companies.
- With regards to the Pula Fund, Botswana needs to improve on the governance and regulation gaps for the fund. This includes but not limited to rules relating to deposits and withdrawals, responsibilities of fund managers and public disclosure of internal audits.

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