

# CAN OWNERSHIP, OPERATIONAL AND FINANCIAL TRANSPARENCY ENHANCE SUSTAINABLE MINERAL DEVELOPMENT IN SOUTH AFRICA?

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## 1. Introduction: Sustainable mineral development, transparency, accountability

Mining involves the extraction, processing and use of mineral resources that are irreplaceable over the course of a human lifespan, or even over many human generations. Addressing the oft-stated observation that sustainable mining is an oxymoron, Franks points out that the crux of sustainable development and mining is not the slow rate at which minerals are replenished, but rather the manner in which the scale and rate of mineral extraction intersects with the integrity of the earth's ecosystems and the development of its people.<sup>1</sup> Accordingly, sustainable mineral development references the two-sided ideal of maximising the social and economic benefits realisable from resource rents and minimising the negative social and environmental impacts necessarily associated with mineral extraction. This task is further complicated by the need to consider intergenerational equity, as well as the pace at which different forms of capital increase and decrease. A mining project may irreversibly degrade the natural-resource base upon which future generations would have depended, for example in a manner that outpaces development of the human and institutional capital necessary to absorb and harness investment and revenues on the one hand, and to rigorously regulate detrimental social and environmental impacts on the other.

The literature on the governance of the extractive industry is increasingly recognising that transparency and accountability are important for sustainable mineral development, alongside the traditional focus areas of appropriate policy, political and institutional frameworks, effective legal and regulatory frameworks, institutional capacity, and incentive structures for appropriate actors.<sup>2</sup> It is notable, for instance, that the outcome document of the Rio+12 Conference, *The future we want*, expressly calls on governments and businesses 'to promote the continuous improvement of accountability and transparency' in order for the mining sector 'to deliver economic and social benefits and include effective safeguards that reduce social and environmental impacts'.<sup>3</sup>

1 Daniel M. Franks, *Mountain movers: Mining, sustainability, and the agents of change*, 2015, Earthscan, p. x.

2 Deval Desai & Michael Jarvis, 'Governance and accountability in extractive industries: Theory and practice at the World Bank', 2012, 30, *Journal of Energy and Natural Resources Law*, pp. 101, 114.

3 *The future we want*, 2012, para 228.

Knowing with whom one is dealing in relation to an extractive project is also critical for establishing the framework of politics and power within which transparency – and flowing from this, accountability – must function.

## 2. Elucidating the connections between transparency and sustainable mineral development

The linkages between sustainable mineral development and the different dimensions of transparency – ownership, operational and financial – become more discernible by having regard to the entire extractive industry ‘value chain’ as developed by the World Bank and other development partners.<sup>4</sup> The value chain encompasses key decisions made before, during and after mining, including the granting of rights and authorisations; the regulation and monitoring of operations; the collection of taxes and royalties; revenue management and allocation; and the implementation of projects and policies.<sup>5</sup> Sustainable mineral development emerges from the wisdom of such decisions, but what role do the different dimensions of transparency have to play?

Transparency of beneficial ownership enables the state, other businesses, and civil society at large to know who is benefitting from a particular extractive project. This may have value for simply showing that state-associated institutions have significant shareholding in extractive companies, as is not infrequently the case in South Africa.<sup>6</sup> At a systemic level, transparency with regard to beneficial ownership also enables a political community to examine, interrogate and change skewed ownership patterns, patterns that have been the concern of South Africa’s employment equity legislation and frameworks. Ownership transparency may also assist in detecting corruption or inappropriate levels of political connectedness – which are threats to the sustainable mineral development value chain if the business advantage gained through political connection sacrifices efficiency and meritocracy, and if private interests capture the apparatus of the state. Knowing with whom one is dealing in relation to an extractive project is also critical for establishing the framework of politics and power within which transparency – and following from this, accountability – must function.<sup>7</sup>

Apart from affording shareholders and non-shareholders a glimpse into the internal functioning of a company, operational transparency directly assists in better understanding how mining intersects with the well-being and human development of people and the integrity of a nation’s ecosystems. Information on mine health and safety, and the greenhouse-gas emissions, water use and energy use of a company, for example, enables interested parties to assess the cost and sacrifice associated with mineral extraction. For shareholders, honest and accurate reporting on impacts is also essential for assessing business risk. Transparency with respect to rights and authorisations, and associated management frameworks, further strengthens accountability frameworks, for, without such information, social actors wishing to hold extractive companies to account are left in the dark, not knowing which standards apply and for whose benefit they operate. Operational transparency

4 Deval Desai & Michael Jarvis, ‘Governance and accountability in extractive industries: Theory and practice at the World Bank’, 2012, 30, *Journal of Energy and Natural Resources Law*, p. 114.

5 Ibid.

6 For example, the two largest individual shareholders in Sasol Limited are the South African Government Employees Pension Fund and the Industrial Development Corporation; the Public Investment Corporation is a significant shareholder in Anglo American and Implats; and the South African government is the third-largest shareholder in Harmony Gold.

7 Desai & Jarvis, n 4 above, p. 107.

concerning production and reserve volumes is critical for assessing the viability and future prospects of an extractive company, but can also assist policy-makers and decision-makers to take wise decisions relating to the rate and scale of mineral extraction.

Finally, financial transparency is crucial for assessing the scale and flow of benefits arising from an extractive operation. Particulars of gross sales, earnings, costs, assets, dividends, taxes and royalties enable a critical assessment of how the constituent inputs to a mineral operation (the mineral wealth, water, energy, biodiversity loss, absorptive capacity for waste, labour, institutional capital and other manufactured capitals) are being transformed into both capital and income flows for business, labour and the state. Financial transparency is about more than assessing illicit financial flows and the potential for corruption between businesses and the state. Ultimately, financial information should be facilitating deliberation on whether mineral extraction – at a given market price and when all considerations have been taken into account – is worth pursuing.

### 3. Can South Africa's disclosure regime enhance sustainable mineral development?

In South Africa, a large number of laws mandating or encouraging ownership, operational and financial disclosures are already in place.<sup>8</sup> However, there are significant transparency gaps, which suggests that South Africa may not be fully capitalising on the use of transparency as a governance instrument in the pursuit of sustainable mineral development.

In the case of ownership transparency, South African legislation and the listing requirements of the Johannesburg Stock Exchange (JSE) certainly require records to be kept of shareholders, ownership, directors' indirect and beneficial interests, black economic empowerment, and so forth. However, in many instances, the broader publication of this information is discretionary or is not required at all. The regime is largely focused on enhancing ownership information and disclosures to shareholders and investors rather than to the public and local host communities. Companies have a discretion to disclose ownership information more broadly. In some instances – in the case of share capital and the identification of major shareholders, for example – they are in fact disclosing this information in their annual reports, but such disclosure largely functions as a veneer that does not facilitate understanding of beneficial ownership. The policy and regulatory framework in respect of beneficial ownership is still largely underdeveloped, despite South Africa's Open Governance Partnership commitment to introducing and implementing its Action Plan on the G20 High Level Principles on Beneficial Ownership Transparency, as well as the tabling of the Financial Intelligence Centre Amendment Bill in Parliament.<sup>9</sup> Moreover, the complexity of corporate structures, with their extensive levels of cross-ownership, makes identifying the beneficial interests behind the corporate veil very difficult.

8 T. Humby & F. Adeleke, *South Africa's extractive industry disclosure regime: Analysis of the legislative and regulatory regime and selected corporate practice*, 2016, Open Society Foundation for South Africa.

9 T. Humby & F. Adeleke, 'Regulatory requirements pertaining to owner, operational and financial disclosure requirements in South Africa: Beneficial ownership and tax benefit disclosures', 2016, Working Paper prepared for the Open Society Foundation. The Open Governance Partnership (OGP) is a multilateral organisation dedicated to facilitating and supporting governments to be more transparent, accountable and responsive to their citizens. South Africa was a part of the cohort of founding countries establishing the OGP in 2011. Membership of the OGP has since grown to 69 participating countries (see <http://www.opengovpartnership.org/countries>). Together with civil society, OGP participating countries are required to develop a National Action Plan (NAP) which specifies commitments that advance transparency, accountability, participation and/or technological innovation over a two-year period. In its third NAP, covering the period 2015–2017, South Africa has committed to implementing its action plan on the G20 High Level Principles (see Commitment 8, available at: <http://www.ogp.gov.za/documents/SOUTH%20AFRICAN%203RD%20OGP%20COUNTRY%20ACTION%20PLAN%202015.pdf>). The Financial Intelligence Centre (FIC) Amendment Bill was recently tabled in Parliament in a bid to improve South Africa's anti-money laundering laws and incorporates the concept of beneficial ownership.

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This gap in the legal definition and regulation of beneficial ownership weakens accountability frameworks. For example, in recent years, there has been an extended legal battle between the Bengwenyama Community and a black empowerment firm, Genorah Resources, to obtain prospecting rights over the community's ancestral farms in Sekhukhuneland.<sup>10</sup> The chair of Genorah Resources was the husband of a cabinet minister, and the shareholders allegedly included a provincial leader of the ruling political party, yet this, and the identity of the remaining shareholders, could never be firmly established. Genorah Resources, in turn, held shares in Nkwe (Pty) Ltd, a company listed on the Australian Securities Exchange and registered in Bermuda. The beneficial owners of Genorah and Nkwe have never been established, thus preventing the community from understanding with whom they were really dealing, and, indeed, whether vested interests were acting to block not only their prospecting rights application, but also their land-reform application, which has not been finalised after more than a decade.

Opaque ownership structures similarly plague the controversial, proposed dune-mining project in Pondoland on South Africa's Wild Coast.<sup>11</sup> Mineral Commodities Limited (MRC), a company listed on the Australian Securities Exchange and headquartered in Perth, holds the prospecting rights to four of the five blocks of the Xolobeni Mineral Sands Project. This project has faced fierce resistance from the Amadiba community. There have also been allegations that a few members of the community have been co-opted by MRC to sow conflict and quell resistance to the project. Through a subsidiary, Mineral Sands Resources (Pty) Ltd, MRC mines and processes sand at the Tormin Mineral Sands Project on the West Coast of South Africa. Its joint shareholder and black economic empowerment (BEE) partner in Mineral Sands Resources is Blue Bantry Investments 255 (Pty) Ltd. In its 2014 annual report, MRC acknowledged the contribution of Blue Bantry Investments 'in assisting in bridging the cultural divide that can sometimes exist in managing the expectations of interests and affected parties and communities'.<sup>12</sup> More particularly, the report continues: 'Blue Bantry's origins rest in the Transkei in the Eastern Cape of South Africa, where the Company's Xolobeni project is located.'<sup>13</sup> Blue Bantry Investments 255 was registered in South Africa in 2008, but other than the company name, enterprise number, the date of its incorporation, and its physical address, no further details regarding the beneficial owners of the company are publicly accessible. In 2015, there was speculation, however, that local residents Zamokwakhe 'Bashin' Qunya and his older brother, Zamile, were 'set up in a company' (i.e. Blue Bantry Investments 255) to do business with Mineral Sands Resources.<sup>14</sup> The same media report alleges that a MRC-funded, R12-million loan to Blue Bantry Investments has in effect been used to fund the conflict over prospecting and mining rights in the Xolobeni area. For example, in court papers filed with the Grahamstown High Court in 2015, it was

10 See, for example, the cases reported as *Bengwenyama Minerals (Pty) Ltd & others v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC), and *Bengwenyama-ya-Maswazi Community v Minister of Mineral Resources* [2014] ZASCA 139; *Bengwenyama-ya-Maswazi Community v Genorah Resources (Pty) Ltd* [2014] ZASCA 140.

11 The Amadiba community has been resisting mining in this area for more than ten years. In March 2016, civil society organisations were shocked to learn of the alleged assassination of the chair of the Amadiba Crisis Committee, Sikhosiphi Bazooka Rhadebe. See Tariro Washinyira, 'Wild Coast Amadiba mining opponent "assassinated"', *Mail & Guardian* 23 March 2016. Available at <http://mg.co.za/article/2016-03-23-wild-coast-amadiba-mining-opponent-assassinated> (accessed 21 April 2016).

12 Mineral Commodities Limited, 'Annual report 2014', p. 13. Available at: [http://www.mineralcommodities.com/wp-content/uploads/2016/04/2014\\_Mineral-Commodities.pdf](http://www.mineralcommodities.com/wp-content/uploads/2016/04/2014_Mineral-Commodities.pdf). [accessed 21 April 2016].

13 Ibid.

14 John Clarke, 'Amadiba residents get interdict to stop Xolobeni "reign of terror"', *Rand Daily Mail*, 26 May 2015.

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alleged that, on 3 May 2015, Bashin Qunya and an associate beat an elderly woman with a knobkierie and hacked her arm with a bush knife, among other incidents.<sup>15</sup> This situation demonstrates how, in the absence of ownership transparency, it is impossible for communities to know which of their members have a vested interest in a mining project and to demand accountability with regard to the relationship between local actors and their transnational partners.

In the case of operational transparency, there are still worrying gaps that prevent the broader South African political community from appreciating the full extent of mining's impact on earth system processes and the well-being of people. A review of company practice revealed that companies regularly report on their environmental and social impacts in terms of highly aggregated statistics. Such statistics are not set against a broader context and, given the different commodity profiles, are difficult to compare across companies. In some cases, legal obligations to disclose key environmental impacts – by way of greenhouse-gas reporting, for example – are still in draft format, or have only recently been promulgated: for example, the requirement that a company should ensure that its environmental authorisations are accessible and available on its website if such website exists. Some companies are adopting a 'wait-and-see' approach to implementing these requirements, or are attempting to interpret them in the narrowest way possible. There is also a deeply entrenched notion that the disclosure of non-compliance with environmental laws is 'dangerous', because it threatens the commercial interests of a company. This much was established in the Centre for Environmental Rights' recent review of the disclosure of environmental incidents and risks on the part of 20 listed South African companies, many of which are also listed as part of the Johannesburg Socially Responsible Investment Index.<sup>16</sup> In its 2014 report on the ongoing experience of using the Promotion of Access to Information Act 2 of 2002 (PAIA), the Centre also established that, in 2013 and 2014, 'mandatory protection of commercial information of a third party' under section 36 of PAIA was the predominant reason for the refusal of PAIA requests.<sup>17</sup> This points to government oversight bodies increasingly deferring to the wishes of business entities to withhold certain categories of information from the public eye, contrary to the spirit of PAIA. At the moment, therefore, operational transparency is not contributing to an understanding of the benefit that the extraction of natural resources confers, set against the costs it imposes. The problem here, however, is not simply about disclosure, for the broader malaise centres on the lack of legislated concepts, information categories, and information-gathering processes that would allow society to evaluate the 'cost' to the integrity of the earth's ecosystems and human development arising from natural-resource extraction. In some cases, such 'cost' may equate to irreplaceable loss.

In the case of financial transparency, companies do disclose historical financial information in their annual financial reports, yet many other categories of financial information – including profit taxes, capital gains tax, value-added tax (VAT), customs and excise levies, licence fees, and so forth – need only be disclosed on a discretionary basis. In other words, on the question of tax transparency alone, through their processes of annual reporting, companies are not legally obliged to provide a comprehensive picture of financial flows to government, including traditional authorities. In practice,

15 John Clarke, 'Amadiba residents get interdict to stop Xolobeni "reign of terror"', *Rand Daily Mail*, 26 May 2015.

16 See Centre for Environmental Rights, 'Full disclosure: The truth about corporate environmental corporate compliance in South Africa', 2015. Available at: <http://cer.org.za/download/CER-Full-Disclosure.pdf>.

17 Centre for Environmental Rights, 'Money talks: Commercial interests and transparency in environmental governance', 2014. Available at: <http://cer.org.za/wp-content/uploads/2014/11/CER-Money-Talks-Nov-2014.pdf>.

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many companies do report their profit taxes, but this is rarely disaggregated on a country-by-country or project-by-project basis, and the practice of reporting on other types of taxes is varied. There is also no legal requirement on companies to financially account for the manner in which their operations contribute to a reduction of natural capital, or to account for financial flows between companies of the same group.

It is difficult, therefore, to assess the extent to which mineral extraction is contributing positively to sustainable development at this point of the mineral value chain.

#### **4. The way forward: The need to improve transparency along the entire mineral value chain**

Ownership, operational and financial transparency play different roles in enhancing sustainable mineral development. Improved disclosure of ownership information will enable governments and civil society to know who is ultimately benefiting from natural-resource extraction and flush out vested interests. Improved disclosure of operational information will enable citizens to know and appreciate the scale and severity of environmental, social and economic impacts associated with extraction and whether these pose a threat to their health and well-being. An active citizenry, cognisant of the standards to which mining companies should be held accountable, could enhance the government's monitoring and enforcement reach. Improved disclosure of financial information will lead to a better understanding of the full range of financial benefits flowing from mining to the various levels of government, including traditional authorities.

Disclosure of these categories of information is not a panacea in and of itself, yet is a crucial first step in establishing accountability frameworks that enable a mineral-rich political community to interrogate the benefits and costs of extraction. The current disclosure regime in South Africa is not optimising transparency as a governance tool and there is worrying deference to corporate entities' self-understanding of protected commercial information. Legal developments instigated through a variety of new international reporting frameworks and aimed at defining and regulating beneficial ownership, the implementation of new standards of environmental reporting and disclosure, and the mandatory publication of taxes paid to governments in all spheres, could contribute to changing this trend.

Together with an independent judicial system, conditions allowing for freedom of expression and association, and measures that respond to and ameliorate the significant power imbalances that frequently mark relations in the extractive sector, improved disclosure frameworks can contribute to an extractive governance system that has greater integrity and rigour, can result in an environment in which it is easier to operate, can lead to responsive governance that responds appropriately to citizens' concerns, and, ultimately, can bring about more prudent management of natural-resource wealth.

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## About the series (briefing papers)

The Open Society Foundation for South Africa periodically commissions research papers on topics related to our portfolio on *Promoting Extractive Sector Transparency and Accountability*. This publication forms part of a series of three briefing papers commissioned in 2016 on select topics related to transparency, disclosure practices and accountability in South Africa's extractive sector.

The series focuses on the role of transparency in sustainable mineral development, the intersection between public and private sector accountability in mining, and reflections on enhancing government's capacity to address non-disclosure in the mining industry.

We hope that the series is a useful knowledge resource for the work of our grantees, our partners and the many mine-affected communities in South Africa.

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