



ENVIRONMENTAL, SOCIAL AND GOVERNANCE SAFEGUARDS: A LOBBY AND ADVOCACY BRIEF FOR A PARADIGM SHIFT IN THE MINING SECTOR

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1. Introduction

This paper is the first in the series of what will eventually become CEJ quarterly briefs on different matters of environmental and social justice in Zambia. This inaugural paper focuses on the trends in the extractive industry, particularly, mining on communal lands and in ecologically sensitive areas. Most of these trends are of a negative and conflictual nature, they attract public debates and necessitate public policy consensus. This edition was prompted by the unending discussion surrounding mining investments in ecologically sensitive areas and by the growing call for action against injustices suffered by local communities in Serenje District arising from manganese contamination associated with manganese mining in the district.

However, rather than dwelling on the prevailing contentious debates around these issues, this paper identifies broader and much deeper fundamental issues which have often been underrated in Zambia if not merely because the majority of the citizens are not simply aware of the underlying root of the problems. Foregoing, the paper proposes the need to consider strengthening Environmental, Social and Governance (ESG) safeguards in the mining sector. Looking backwards (how far mining has evolved in Zambia since the colonial era) and looking forward (how far mining can environmentally and socially be legitimized), it is very difficult to demonstrate how local communities have directly benefited from mining.

In practice, it is more difficult to show how local communities have tangibly benefited from mining in their communities than it is to demonstrate the negative impacts of mining externalized to the communities through pollution, water contamination, land degradation, lead poisoning, land grabbing and poor resettlements schemes mostly conceived and executed outside of Free, Prior and Informed Consent (FPIC). This presents a general outlook of what there is for local communities to talk about insofar as their historical relationship with mining is concerned.

While still grappling with the legacy of Kabwe lead pollution, Serenje is silently building up what could become another devastating legacy of mine-related poisoning in the same Province. Manganese poisoning in the communities of Serenje District makes a sad reality which ostensibly reveals the fact that the country seems to have learned very little from the Kabwe lead contamination.

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In this edition, the paper highlights a number of issues the country should consider addressing to brighten the future of mining in terms of its environmental and social profile. Drawing from international research in the extractive sector, the paper contextualizes specific challenges of mining on traditional land in the Zambia. In the end, the paper makes a set of recommendations for a paradigm shift towards a more environmentally and socially sustainable mining sector.

2. Background

Mining has been central to the social and economic narrative of Southern Africa in general and particularly in Zambia.³ Much of what we can point to in terms of development infrastructure in Zambia owes its attributes to the mining sector. The sector has been a key provider of foreign investments, employment, government revenue through taxes and infrastructure development. In fact, Zambia contributes to the mineral wealth of Southern Africa being one of the world's richest region in mineral deposits.⁴ On the other hand, mining has been the dominant center of Zambia's political economy from the colonial era in the 1920s.⁵

But looking forward into the future of mining invokes an imperative need to look back to its bleak history first. Southern Africa in general has developed its mining industry from a history associated with semi-slavery conditions under which many migrant mine workers were subjected and many of them still suffering from vocational diseases in their poverty-stricken retirement.⁶ The case of Kabwe lead mining liabilities, and the suffering of the people in Mufulira's Kankoyo area on the Copperbelt, attest to this historical fact. This history truncates a simple narrative that; while mining has been responsible for the development of the country, the development has come at a huge social and environmental cost to local communities around which mining takes place. This cost carries with it a long shadow of displacement of populations, poverty, suffering, inequalities and disease burden.⁷ This scenario has been described as national benefits at local costs;⁸ a scenario that typifies the very inherent nature of mining – that while it generates wealth and tangible developmental benefits far from the mine pit, it leaves behind more misery, social dislocation, pollution of the air and contamination of local water sources, destruction of ecologically-sensitive areas and a legacy of derelict land. Much of what is often presented on paper as post-closure plans are seldom implemented due to poor regulatory enforcement mechanisms, and in many cases, the mining company may be exempt from an additional obligation to implement that plan post-closure. This provokes the need for public disclosure of the secret mining agreements which mining investors enter in with government.

³ The World Bank, *Digging Beneath the Surface: An Exploration of the Net Benefits of Mining in Southern Africa* (The International Bank for Reconstruction and Development, Washington DC, 2019), 7.

⁴ *ibid*, 7.

⁵ Ndongwa Noyoo, 'Mobilizing Natural Resources for Sustainable Development: Copper Mining and the Path of Dependence in Zambia' (2021) 41 *Cadernos de Estudos Africanos* 119-144, 127.

⁶ The World Bank (n 3), 7.

⁷ Angel Mondoloka, *Approaches to Supporting Local and Community Development: The View from Zambia*. United Nations University Wider Working Paper 2017/14, pg. 15-16.

⁸ Chomba Kolala and Bridget Bwalya Umar, 'National Benefits, Local Costs? Local Residents views on Environmental and Social Effects of Large-Scale Mining in Chingola Zambia' (2019) 43 *Natural Resource Forum* 205-217, 205.



Looking into the future of mining, it is clear that the huge historical toll of mining on local communities and their natural environment remains the major challenge which, in practice, nullifies the significance of the sector's contribution to national wealth. On the hand, international research shows that much of global resource extraction occurs on traditional lands, in customary jurisdictions and on Indigenous peoples' lands in rural areas.⁹ As such, the need to ensure that interests and claims of local communities are codified into mining decisions [especially the mining agreements] becomes the fundamental basis for environmental, social and governance safeguards.

Without changing the historical paradigm of mining and the sector's dominant economic appraisal, the future of mining threatens the very existence of local communities on the one hand.¹⁰ On the other hand, it also threatens the existence of the remaining stock of ecosystems and biodiversity in areas of the world which were once pristine environments. That the connection between people and their land is an essential matter of life and death for local communities as rightly observed by the UN,¹¹ the greatest challenge for mining investors in this Century and beyond is the acquisition of a 'Social License to Operate' (SLO) in local and indigenous communities.¹² The dominant negative picture that mining has historically painted for local communities will increasingly place a burden on the acquisition of SLO for mining investors. While local communal land in Zambia is legally recognized, it is not formally registered and does not have legal enforcement which makes the legal claims to land ownership and property rights always difficult to the disadvantage of local community claimants.

This challenge compounds another ripple effect of challenges: it is difficult to address, respect, protect and enforce local communities' land rights, resource tenure and property rights as well the rights to a clean, safe and healthy environment for local communities within the body of fundamental human rights. The glaring historical trend in which national governments undertake to do everything possible to attract foreign investments in the mining sector even at the expense of local peoples' land rights and the human right to a clean, safe and healthy environment has worsened the vulnerability of local communities.¹³

The privatization of Zambia Consolidated Copper Mines (ZCCM) in the 1990s was characterized by the evolution of Mining/Development Agreements between government and private mining companies. More than anything else, the salient objective of these Agreements is to protect foreign investments on foreign territories – that includes seeking redress in international investment arbitration courts to resolve disputes between the mining company

⁹ Muthukumaraswamy Sornarajah, *The International Law on Foreign Investment* (3rd Edn, Cambridge University Press 2010), 6.

¹⁰ Nicholas Bainton, 'Mining and Indigenous Peoples' (2020) *Social Anthropology* 1-35, 14.

¹¹ UNDESA, *State of the World's Indigenous Peoples: Right to Lands, Territories and Resources Volume 5* (United Nations Department of Economic and Social Affairs, 2021) < <https://www.un.library.org/content/series/25186922> >

¹² Ciaran O'Faircheallaigh, *Negotiations in the Indigenous World: Aboriginal Peoples and the Extractive Industry in Australia and Canada* (Routledge, 2016), 1.

¹³ Alistair Frazer and John Lungu, *For Whom the Wind Falls: Winners and Losers in the Privatization of Zambia's Copper Mines* (CSTNZ and CCJP, 2006), 4-5.



and the hosting state.¹⁴ By overstepping national legal mechanisms for dispute resolution in this manner, the international investment arbitration framework has increased the latitude of Multinational Corporations (MNCs) to garner power as autonomous law-makers operating their mining activities on national territories yet controlled at international level.¹⁵ This power is often legally predicated on the provisions of a Bilateral Investment Treaty (BIT) into which the state enters with the mining investor's country of origin.¹⁶

Under the crippling environmental and social challenges of the mining sector after privatization of ZCCM, regulatory authorities have found themselves in regulatory difficulties which has hindered them from enforcing even legislative provisions that seek to protect local communities' rights, as large-scale mining enterprises are protected by Mining/Development Agreements.¹⁷ In the worst case scenarios, mining companies are exempted from compliance with environmental regulations as part of stabilization clauses in the Mining/Development agreements.¹⁸ This matter came to light in the *Nyasulu and 2000 other community members vs KCM* High Court ruling in the year 2011.

It is ironic that more than 10 years of Zambia's membership to the Extractive Industry Transparency Initiative (EITI), these Agreements are still secret documents which have not been subjected to the transparency requirements of EITI. It is plausible that the provisions of these Agreements enhance fertile ground for mining companies to perpetuate their corporate irresponsibility towards the community in which they operate.

As a consequence of the foregoing, mining is increasingly becoming a conflictual undertaking as evidenced from the unending contention over mining in the Lower Zambezi National Park, the Serenje Manganese poisoning and the Sinazongwe conflict with coal mining in that region. The influx of large-scale mining investments, and the massive movement of capital, goods and services into a rural traditional area is part of a huge cause of conflict,¹⁹ *albeit*, never thoroughly assessed in Zambia using social impact assessment tools. Understandably, the legal regulatory framework for environmental assessments in Zambia does not require a social impact assessment. This is evidenced from the definition of Environmental Impact Assessment (EIA) in the Environmental Management Act, 2011, the EIA Regulations and the Mining Environmental Regulations.

The movement of large-scale capital investments into rural communities creates two completely different and often opposing perspectives of mining between the mining company and local communities. Key features of this dichotomous perspective include (i) the perception of 'risk'

¹⁴ Muthukumaraswamy Sornarajah (n 9), 3-5.

¹⁵ Julian Arato, 'Corporations as Law Makers' (2015) 56/2 Harvard International Law Journal 229-295, 229.

¹⁶ *ibid*, 229-30.

¹⁷ Alistair Frazer and John Lungu (n 13), 5.

¹⁸ *ibid*, 5.

¹⁹ Deana Kemp and Carol J. Bond, Mining Industry Perspectives on Handling Community Grievances: Summary and Analysis of Industry Interviews. The University of Queensland, Centre for Social Sustainability in Mining [CSRSM] and Harvard Kennedy School, Corporate Social Responsibility Initiative [CSRI], April 2009, pg. 5.



which, for a mining company, has traditionally been construed around business, financial and reputational risks at the expense of the social risk of the mine to the communities and the social risks of the community to the mine,²⁰ and (ii) the location of communities within the frame of government public affairs as an extension of public relations as opposed to location of communities within the ambit of health, safety, environment and community relations.²¹

3. The Consequences of Mining Conflicts

The Center for Social Responsibility in Mining in Australia (being a mining country like Zambia) has outlined potential consequences of the conflictual perspectives that arise from mining on communal lands. In this paper, we contextualize these conflictual issues to the Zambian context.

- A. Conflict becomes an inherent reality of mining in rural communities.²² A study by Angel Mondoloka reveals that nearly all Corporate Social Responsibility (CSR) programs by mining companies in Zambia have a community backlash due to poor relationships between the community and mining companies.²³
- B. This conflict revolves mainly around environment, land, rights, resource tenure and property rights, land access and land-use, livelihoods, compensation, amenity, physical resettlement, employment and development equity.²⁴ In Northwestern Province, a group villagers sought to force their way back to their original villages after being relocated during the establishment of Kalumbila mine.²⁵ This depicts a conflict rooted in land and resources rights, local consent and the safeguards of stakeholders' effective and meaningful participation.
- C. Community conflict is often emotive because it impacts peoples' traditional ways of life, cultural perceptions and the feeling of resource entitlement.²⁶ For countries like Zambia being former British colonies, occupation of land for commercial resource extraction is construed as re-colonization of the lands.²⁷ This signifies the emotion driving Serenje communities and their allies to call for justice against ongoing manganese contamination.²⁸
- D. Community grievances escalate into public interest conflicts because they attract public attention on a wider scale and eventually the conflict becomes difficult to de-escalate, as seen from the Lower Zambezi case. The Nyasulu High Court case referred to above also

²⁰ *ibid*, 14.

²¹ *ibid*, 15.

²² *ibid*, 5.

²³ Angel Mondoloka (n 7), 15-16.

²⁴ Deana Kemp and Carol J. Bond (n 19), 5-6.

²⁵ Angel Mondoloka (n 7), 15-16.

²⁶ Deana Kemp and Carol J. Bond (n 19), 6.

²⁷ *ibid*, 6.

²⁸ CEJ, Manganese Toxicity: A Summary Report on Manganese Poisoning in Serenje District. Centre for Environment Justice, 12 March 2023, pg. 1.



attests to this conflict, as the case became the most famous case of environmental justice in Zambia.

- E. Mining operations exacerbate already existing inequalities and inequities, tension and conflict within local communities especially in respect to environmental and social beneficiation of the mine to the communities. This signifies the case of CSR in Chambishi where community members are reported to have viewed the mine's CSR strategy as an avenue of political expediency for the elite and not for the ordinary members of the community. From Mondoloka's report, consent for mining operations on communal lands is sought with traditional leaders and not with the community at large.
- F. Because much of mining takes place on indigenous and local peoples' customary lands, it is unfair, inequitable and an injustice that local communities do not get more involved in negotiating agreements that provide them with a stronger say, prior to, during and after mining operations.²⁹ This signifies the need to pitch social safeguards right at the initial phases of establishing a mining project on traditional land rather than involving local community members after key decisions have already been made between government and mining companies. From an ESG safeguards perspective, the 'G' for governance in the ESG acronym becomes crucial in this context.

4. Recommendations

It is on this background that the need for a paradigm shift in mining investments should be drawn. However, Environmental, Social and Governance (ESG) packaged as a set of tick boxes in mining corporate culture may not still address the problem. For this reason, ESG should be couched in form of safeguards with a strong community focus given the bleak history with which mining in Zambia has been painted.

- 4.1. In theory, the paradigm shift must be triggered and strengthened by addressing ESG safeguards as peoples' fundamental rights within the body of their justiciable Constitutional rights to a clean, safe and healthy environment - which rights must be enshrined in the Bill of Rights for justiciability. Flowing from the strength of the Constitution, the Mines and Minerals Development Act should be amended, if not repealed, to firstly, re-focus its traditional orientation from the dominant financial and economic appraisal of mining to community safeguards needs, and secondly; to compel mining investors to seek a 'Social License to Operate' as part their ESG due diligence towards establishment of a mining project in respect of local communities' land rights, resource tenure and property rights, as well the Constitutional right to a clean, safe and healthy environment.

²⁹ Deana Kemp and Carol J. Bond (n 19), 8.



- 4.2. In practice, however, this paradigm shift is not possible without re-thinking the asymmetrical nature of the international investment legal framework. This is a framework of norms, rules and principles created mainly by international mining investors in protecting their investments on foreign lands. This framework is further reinforced and augmented by international investment arbitration bodies which have frequently suffered legitimacy crises, especially from the perspective of developing countries, because of their perceived jurisprudential bias towards the protection of foreign investors' business interests at the expense of social, environmental and human rights harm caused by the same foreign mining investments in local communities.³⁰
- 4.3. Foregoing, an ESG paradigm shift for the mining sector cannot go without safeguarding local communities' social, environmental and human rights interests within the body of Bilateral Investment Treaties (BITs) signed between the Zambian government and the mining investor's country of origin. This includes the need for transparency with Mining Investment or Development contracts signed between national governments and mining investors. These agreements have traditionally been kept as state secrets and classified documents under lock and key despite mammoth efforts under the Extractive Industry Transparency Initiative (EITI) over the years. While many governments in Africa, Zambia included, still find it justifiable to keep these agreements secret, the negative social, environmental and human rights effects accruing from the bindingness of these agreements are daunting matters of life and death for the local communities in which mining takes place. In a civilized open society, such public interest documents cannot be kept secret given the extent to which they impact human rights.
- 4.4. With that in mind, it is hereby proposed that all BITs and Mining Investment or Development contracts which government enters into with mining companies be, firstly, subjected to Parliamentary oversight and secondly, be published for public scrutiny not only as an ESG safeguarding requirement but as part of what would be conceived in terms of a Constitutional right to safeguard public interest from potential and actual negative impacts of mining investments. This would justify the country's membership to the Extractive Industry Transparency Initiative (EITI) without which, it is irrational to be a member of the EITI when BITs and mining agreements in the country are kept secret.

³⁰ Christopher M. Ryan, 'Meeting Expectations: Assessing the Long-Term Legitimacy and Stability of International Investment law' (2008) 29/3 University of Pennsylvania Journal of International Law 725-761, 726.



5. CONCLUSION

The fact that much of all mining explorations and operations in the world are undertaken on Indigenous, tribal and/or local peoples' lands, on communal territories and customary jurisdictions, the preposition of the World Bank provokes concerted attention, i.e., sub-soil asserts like minerals are sources of national wealth whose extraction out of the ground can unlock value to meet socially desirable ends.³¹ True as this may contestably be, it leaves a moral question regarding the need to address the socioeconomic benefit of those who directly occupy the soil from which the mineral wealth is derived. This observation sets a strong tone on which environmental and social safeguards for local communities in mining areas should be based. But that foundation can only be as theoretically strong as it is constitutionally founded. On the other hand, it can only be as practically strong as the extent to which mining companies are compelled, both by social responsibility and legal demands, to implement their ESG safeguards.

Finally, this perceived paradigm shift in the mining sector is only possible with the conscientization of the local communities, local institutions and traditional administrative systems. No matter how well couched the peoples' rights are on paper, the rights are only meaningful in practice if they can be claimed by the people whose rights are violated or are at stake. Therefore, the crucial aspect of driving an ESG paradigm shift towards sustainable mining includes the conscientization of land owners, resource tenure and property rights holders using a human rights-based approach.

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³¹ The World Bank (n 3), 7.



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