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Public-Private Alliances for Sustainable Commodity Supply Chains

Opportunities and Risks in the South African Mining Sector

Melanie Müller, Christina Saulich and Meike Schulze

The promotion of public-private cooperation in resource-rich countries of the Global South can serve as a flanking measure that strengthens the impact of supply chain laws. The case of the South African mining sector in its struggle against Covid-19 shows that close cooperation between companies, the state and private organisations can, under certain conditions, increase the sustainability of transnational supply chains. Nevertheless, these types of alliances carry the risk of negative cascading effects if core state tasks are delegated to companies. The German government should therefore take into account the public regulatory landscape in the mining sector, particularly the quality of the implementation of laws in partner countries, and initiate measures that can work to strengthen social and environmental rights.

In June 2021 Germany broke new ground in the establishment of a binding regulation of supply chains by adopting the Act on Corporate Due Diligence Obligations for the Prevention of Human Rights Violations in Supply Chains. It follows countries such as France and the Netherlands, which are already implementing binding regulations. When the new German law enters into force in the beginning of 2023, approximately 600 companies will be required to ensure that human rights and specific environmental standards are not violated by actions within their own business areas or by actions of their direct suppliers.

Sustainability through Public-Private Alliances

As an export-oriented economy, Germany is particularly dependent on imports of raw materials, and the demand therefor is only expected to increase in step with the digital transformation and the energy transition. Yet the sustainable design of commodity supply chains poses a major challenge as these chains are particularly complex due to the large number of processing steps, which often take place in different countries. At the same time, the German government's ability to govern sustainability along transnational commodity supply chains is limited because it has no direct influence in setting, implementing or enforcing standards on the ground. Moreover, in contrast to other countries, Germany does not have large mining companies that could directly shape the extraction of commodities at the local level and thus contribute to "clean" supply chains.

The industrial extraction of raw materials exerts serious negative ecological and social impacts and leads to massive conflicts in many countries. Enhancing the implementation and enforcement of sustainability goals is therefore essential in this sector. However, the scope of supply chain laws is limited. Legal regulations in commodity-importing countries cannot solve the complex challenges along transnational commodity supply chains. This raises the question of how the German government — and also the EU (should it agree on a binding European supply chain law) — could foster the implementation of environmental and human rights standards in commodity supply chains by way of flanking measures.

The need to enhance such standards is particularly high in large-scale industrial mining projects, which often spark conflicts between the state, companies, trade unions and affected communities. In this field, multi-stakeholder approaches may be a promising tool to enhance sustainability in commodity supply chains; they are also mentioned as an objective in the Sustainable Development Goals (SDGs). These approaches involve different actors and their interests, and already exist in different forms in resource-rich countries. The legitimacy of decisions taken by such multi-stakeholder groups is higher as is the likelihood that jointly agreed upon standards will be enforced. Models based on cooperation between the government and private actors (profit-oriented companies and non-profit-oriented private organisations) with the aim to meet specific societal goals are referred to as public private partnerships (PPPs).

The German government can initiate or strengthen such PPPs within the framework of bilateral (development) cooperation. In this way, it can support partner countries in implementing sustainability standards and indirectly influence the governance of commodity sectors on the ground.

Social tensions in the mining sector

The involvement of mining companies in the vaccination campaign in South Africa can be considered one of the latest examples of successful public-private cooperation. It also illustrates how sustainability can be shaped in a country where conflicts in the extractive sector are frequent.

The extractive industry plays a central role in the South African economy. With over 450,000 employees, it is one of the country's largest employers and in 2020 it accounted for 8.2 percent of the country's gross domestic product.

South African mining legislation sets high social and environmental standards, and companies voluntary commit to specific sustainability targets. The regulation of mining in South Africa is therefore compatible with the regulatory frameworks of European supply chain legislation.

Nevertheless, massive conflicts surrounding industrial mining occur frequently in South Africa. A particularly dramatic example that received international attention was the Marikana massacre that saw the killing of 34 mine workers by the South African police during a "wildcat strike" in 2012. The conflict was centred around poor working and living conditions in the settlements surrounding the Marikana platinum mine in the Rustenburg municipality, which was operated by the British company *Lonmin.* German companies were also involved in the supply chain, as *Lonmin*'s main customers.

The escalation of violence at Marikana may be an isolated and extreme case, but it is a manifestation of an ongoing conflict. A comprehensive report by Human Rights Watch published in 2019 describes the atmosphere in many mining communities in South Africa as an "environment of fear", in which people who criticise mining projects are threatened, fear for their lives, and are subjected to state repression.

This lays bare the massive gap between regulatory aspirations and reality in the South African mining sector, especially considering the high expectations of mining-affected communities regarding developmental outcomes, such as the creation of jobs or the improvement of infrastructure. A good understanding of the conditions for successful alliances between the state, companies and non-profit organisations is therefore of the utmost importance.

The Fight against Covid-19 in the South African Mining Sector

Early on in the coronavirus health crisis, the South African government called on private companies to support the fight against the pandemic and its economic and social consequences. South Africa's Covid-19 Recovery Plan, published in October 2020, also put a focus on strengthening public-private partnerships. These alliances have proven successful in combating the pandemic: the vaccination rate in the mining sector is almost twice as high as the national average. In view of the new wave of infections triggered by the Omicron variant in November 2021, this is an important prerequisite for protecting the health of workers and the stability of the mining production.

Cooperation to minimise Covid-19 risks in mining

Even during South Africa's strict lockdown, in April 2020 the government decided to resume mining operations at half capacity. This required comprehensive measures to combat the pandemic. Indeed, the risk of infection and severe disease progression are heightened in the narrow and poorly ventilated mines where social distancing is difficult and employees already exhibit widespread pre-existing conditions. Particularly high levels of work-related mobility and precarious living conditions, especially in informal mining settlements with inadequate infrastructure, further complicated the pandemic response.

Against this backdrop, intensive negotiations were taking place between the Department of Mineral Resources and Energy (DMRE), companies, and trade unions since the beginning of the pandemic. The DMRE responded by adopting initially voluntary, later binding, occupational health and safety guidelines for the mining companies and announced occasional inspections to monitor their implementation. The Minerals Council of South Africa (MCSA) — the country's leading industrial association representing its largest mining companies — engaged in extensive cooperation and played a pivotal role in combatting the pandemic within the sector. The MCSA not only agreed to the strict Covid protocols but also established a number of voluntary measures. In January 2021, the association publicly announced its support for the national vaccination campaign — and successfully implemented it in the mining sector.

Companies in the extractive sector have built high capacities for Covid testing and ensured that vaccinations have been easily accessible for workers. Testing occurs twice as frequently in the mining sector compared to the national average. The industry relies on broad information campaigns on Covid-19 and vaccination and establishes targeted incentives to get the vaccine. Mineworkers can get immunised at 75 vaccination centres, often close to the mine sites. According to the MCSA, as of mid-January 2022, the industry had carried out 324,029 employee and contractor vaccinations among the 450,000 employees in the sector. This means that more than two-thirds of the workforce has been vaccinated. The mining sector thus performs significantly better than South Africa as a whole, where only 46 percent of adults are currently vaccinated.

Conditions for the successful implementation of the vaccination campaign

Several factors facilitated the constructive cooperation between the state, companies and trade unions.

Common interest: a key condition for the successful public-private effort to contain the coronavirus was the three actors' shared interest in keeping up production in the mining sector in order to maximise profit from the currently high raw material prices. Despite pandemic-related restrictions, the industry has been able to continue to supply international markets. According to the South Africa branch of Pricewaterhouse Coopers (PwC), the South African mining sector was very profitable in the 2021 financial year (July 2020 — June 2021). Compared to the 2019 financial year, revenues in the sector increased by 33 percent to about 793 billion rand (44 billion euro), generating an estimated 229 billion rand (12 billion euros) for the depleted national budget. In the 2021 fiscal year, resource extractors reaffirmed their role as a major employer in the country, directly employing around 2.3 million workers in the mining sector or in upstream or downstream industries.

From voluntary to a corporate standard: the success of the vaccination campaign builds on continuous processes of cooperation and negotiation in the mining sector. The Mine Health and Safety Council (MHSC) — which includes representatives from the DMRE, companies and trade unions — served as an important institution in coordinating the fight against the pandemic. While most of the workers' representatives in the Council supported the DMRE's and industry's approach, the government-critical Association of Mineworkers and Construction Union (AMCU) chose a different path. Through a court case in April 2020, the AMCU obtained legal recognition of Covid-19 as a matter of occupational health and safety, thereby obliging the DMRE to issue binding health and safety guidelines for companies in the extractive sector.

Health and safety rights: another key driver of the productive public-private cooperation in the fight against the pandemic was the already established legal framework. The adoption of the Mine Health and Safety Act in 1996 not only created the MHSC but also established comprehensive health and safety standards in the sector. For example, annual preventive medical check-ups are required for mine workers to ensure early detection of potential health risks and to monitor existing diseases. As mentioned above, preventing the spread of Covid is now considered a matter of occupational health and safety, therefore precautions have become an integral part of work routines at mines.

Health infrastructure: to meet occupational health and safety requirements in the face of poor public services, most companies have established their own health centres and equipped them with qualified staff. In addition, the sector benefits from many years of experience in the fight against tuberculosis and HIV/AIDS, and it has drawn on this private health infrastructure during the pandemic. Employees in the mining sector were therefore not dependent on the weak and highly fragmented public health system. The South African government requires companies to present Social and Labour Plans in order to obtain mining licences. Within these plans, some companies have been obliged to improve or construct health facilities in mining communities, which have then been used throughout the pandemic.

Limitations of the vaccination campaign

The limits of the vaccination campaign begin to be observed beyond the company gates. While the majority of the workforce has been vaccinated, many people in the communities surrounding the mine remain unprotected — and their dissatisfaction is growing.

Mining communities are not represented by South African trade unions, nor are their interests adequately addressed by the DMRE.

Mining-affected communities also lack access to established forums such as the MHSC. Following the April 2020 court ruling, community representatives are to be included in multi-stakeholder consultations, but communities complain that their voices continue to be excluded. The ability of communities and their representatives to exert influence and to draw attention to their concerns through strikes and protests has been severely restricted by government measures to curb the spread of Covid-19.

While the MCSA has announced the extension of the vaccination campaign to mining communities, it seems that this commitment has yet to be put into practice fully. Although there are several reports about vaccination campaigns in these communities, figures are not yet available. Mining communities' lack of access to formal institutions, combined with high levels of frustration at the weak redistribution of profits generated by the extraction of raw materials, increases the potential for (violent) conflict in and around mining sites. The struggle against the pandemic in the mining sector demonstrates once again that voluntary corporate responsibility is very limited in its ability to compensate for shortfalls in the state's duty of care.

Positive and Negative Cascade Effects

The example of the vaccination campaign in the South African mining sector can be considered successful with regards to resolving a concrete problem — namely, the spread of coronavirus in the mining industry. At the same time, this analysis highlights positive but also negative cascading effects resulting from this type of public-private arrangement. Private companies' assumption of state responsibilities goes hand in hand with an implicit exchange of roles between the two actors, and can therefore only be viewed as a partially successful model for public-private cooperation, as it creates a structural problem that explains the general susceptibility of the South African mining sector to conflict.

Securing production

Crises such as the current Covid-19 pandemic incentivise actors within an industry — namely, the state, companies and trade unions — to collaborate in order to maintain the productive capacity of "their" sector. By continuing mining production, the South African state benefits from additional fiscal revenue; and by securing urgently needed jobs, it is able to maintain its commodity-based development model. Mining firms, in turn, avoid financial losses caused by disruptions in production. Trade unions, which occupy a central position in South Africa's corporatist system of government, play their part in safeguarding jobs and in receiving continued membership dues. In addition, unions secure their political position by asserting workers' interests.

Conflicts of interest within the state

The South African government's strong focus on seamless economic production cycles is reflected in the country's mining legislation. By streamlining processes and limiting the mechanisms through which external actors can appeal decisions, mining law aims to enable companies to conduct business without disruption. The DMRE is responsible for the implementation of the law, and its regional offices review applications for mineral rights, which are in turn approved by the Minister of Mineral Resources and Energy. The DMRE also approves companies' Social and Labour Plans, monitors occupational health and safety in the mines, and since 2014 it is also responsible for the implementation of environmental laws in the mining sector. The Department of Environmental Affairs only serves as an appeal authority.

This arrangement creates a conflict of interest within the DMRE. The Department's mandate and its key priority is to promote mining in South Africa and to attract new investments in order to increase government revenue. Against this backdrop, the enforcement of comprehensive environmental standards is perceived as a potential barrier that could create delays.

The weak enforcement of social and environmental standards is further aggravated by the lacking capacity and resources of involved ministries to thoroughly monitor compliance with standards. This situation is exacerbated by corruption within the ministries, especially the DMRE, and at the municipal level. For these reasons, it is difficult to adequately monitor the potential negative effects of mining activities, such as water or environmental pollution. The implementation of legal standards in mining regions therefore increasingly depends on the will of mining companies while the state loses important competencies as well as room for manoeuvre as public tasks are outsourced to private companies.

Risks for companies

At first glance, the assumption of public responsibilities may be attractive for mining companies. However, in doing so they engage in activities that fall outside of their core business competencies — the extraction and processing of raw materials. Promoting development at the local level requires a high level of sensitivity and expertise, which mining companies have difficulty in acquiring, usually through trial and error. This comes at a high cost for companies, and the expected positive impacts of these hefty investments in mining-affected communities — so-called corporate social investments — often fail to materialise. This also explains why many social protests start at the factory gates and not at the local municipalities.

Mining companies in South Africa follow a compliance-oriented approach to implementing their socio-economic obligations, i.e. they seek to adhere to the minimum legal requirements. In many cases, this approach does not meet the needs of affected communities or lead to noticeable improvement of their living conditions.

This shortcoming is exacerbated by the fact that companies' Social and Labour Plans are often not aligned with the municipalities' integrated development plans that set out modernisation goals every five years. Aligning these two documents would help to prevent the circumvention or disregard of communities during the process of drafting Social and Labour Plans, and thus combat dissatisfaction at the community-level. The current lack of coordination makes disputes between mining companies and municipalities inevitable when it comes to certain responsibilities, such as the maintenance of infrastructure financed by companies including roads, schools or hospitals.

To mitigate risks, many mining companies are voluntarily investing in infrastructure and public service provisions. This is because the so-called "social licence to operate" is nowadays considered to be the greatest potential for disruption within their supply chain. A lack of social acceptance for the activities of mining companies often leads to conflicts in mining-affected communities; strikes and protests can disrupt production, exacting a high cost for all companies along the supply chain.

The challenges posed by the lack of involvement of affected communities are well illustrated in the case of Xolobeni. In 2008, the DMRE granted Transworld Energy and Minerals (TEM) Resources, a subsidiary of an Australian mining company, the right to mine sands containing titanium in the Xolobeni area. To this day, production has not started, as the community — with the support of civil society organisations and lawyers — has been successful in publicly challenging the project. In 2018, the Pretoria High Court ruled that the Minister of Mineral Resources must obtain the full and formal consent of the Xolobeni community before granting mining rights. Two years later, the same court confirmed that mining-affected communities have the right to see applications for mining licences. TEM had denied the Xolobeni community access to information about its planned mining operations which the community required to make informed decisions about mining in their area.

Beyond the factory gates: consequences of deficient public welfare

In the South African case, strong trade unions act as a corrective force, thanks to whom workers' fundamental rights are protected — to a certain point. This is also in the interest of companies seeing that maintaining labour standards increases the resilience of production cycles. However, when certain rights and privileges are secured for unionised workers, there arises the risk that a two-tier society in mining-affected communities could be created. While the workforce benefits from additional privileges at the workplace, the same is not necessarily true for other community members.

By law, mining companies can only be obliged to provide social, health and infrastructure services for the duration of the mine's operation. In a similar vein, voluntary service provision by companies only takes place as long as a mine is operational, as this averts negative impacts on a company's business activities and potential costs. In short, if the mine closes, the local population loses access to these services.

Lessons for Public-Private Alliances

Public-private alliances can certainly provide positive incentives as a flanking measure to German and planned European supply chain law. However, the example of the South African mining sector illustrates that this instrument has certain limitations and can even set negative incentives when companies are legally obliged to take on state tasks in areas such as infrastructure, local development and health.

The German Supply Chain Act and South African legislation clearly establish that it is a shared responsibility among states and companies to respect human and environmental rights. However, this should not lead to companies compensating for the public administration's weak capacity and limited resources at national and local levels in exchange for access to lucrative mining rights. This risk is particularly high in countries with weak governance structures.

When promoting public-private cooperation, the German government should therefore take into account the political and regulatory environment. Where necessary, development cooperation can support capacity building at all levels of government and strengthen the corrective function of public institutions whose focuses — not only in the case of South Africa — often target the promotion of the extractive sector and less so the upholding of environmental and social standards.

Particular attention should be paid to monitoring sustainability goals, which are not directly linked to companies' core business activities or trade unions' areas of focus. These include, above all, environmental objectives. Air and water pollution — as consequences of industrial commodity extraction — often occur after a certain amount of time and are usually only addressed by state institutions when they have already caused damage to people's health.

In order to counteract the risks of selective representation, it is essential to promote the interests of communities — either by strengthening local self-government or by supporting civil society. In addition, development cooperation should support independent institutions in partner countries. These include human rights commissions or independent ombudsman offices, which can address and draw public attention to the complaints of affected individuals or communities.

Still, Germany's potential to influence South Africa is limited. While the country is one of Germany's eight "global partners" in the *BMZ 2030* reform concept, cooperation with South Africa does not focus on the extractive sector. As a result, Germany has limited entry points to influence the state's governance in the mining sector via bilateral cooperation. The South African government continues to rely heavily on an extractive economic model, which is currently particularly attractive due to high commodity prices. Consequently, consideration should be given to expanding existing and planned projects of the Gesellschaft für Internationale Zusammenarbeit (GIZ) to include the field of governance and anti-corruption in the extractive sector. The aim should be to strengthen the state's monitoring capacity in this industrial sector at the national and regional levels. The German government should continue to strongly advocate for South Africa's participation in the Extractive Industries Transparency Initiative (EITI), as this would increase the transparency of financial flows in the sector, especially with respect to government revenues and their use. The creation of a multi-stakeholder group is a key element of the EITI standard, and this group would ensure that the interests of those stakeholders in South Africa who have not been sufficiently included in existing dialogue formats are taken into consideration.

At the European level, the German government should push for a risk-based approach in the planned EU supply chain law. Such an approach and its corresponding regulations would aim to minimise social and environmental risks, and encourage private actors to go beyond meeting the bare minimum legal standards. A strong European supply chain law is an opportunity to correct existing weaknesses in the German Supply Chain Act.

This Comment reflects the author's views.

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SWP
Stiftung Wissenschaft und Politik
German Institute for International and Security Affairs

Ludwigkirchplatz 3—4
10719 Berlin
Telephone +49 30 880 07-0
Fax +49 30 880 07-100
www.swp-berlin.org
swp@swp-berlin.org

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Dr. Melanie Müller is a Senior Associate in the Africa and Middle East Research Division and leads the project "Transnational Governance of Sustainable Commodity Supply Chains in the Andean Region and Southern Africa". Dr. Christina Saulich is as an Associate and Meike Schulze a Research Assistant with this project. The project is funded by the German Federal Ministry for Economic Cooperation and Development (BMZ).