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The Political Economy of Enhancing Children's Rights through Mineral Rents

The Case of Mongolia

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Mobilizing Revenues from Extractive Industries:
Protecting and Promoting Children's Rights and Well-Being
in Resource-Rich Countries

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Introduction to Working Papers on Mobilizing Revenues from Extractive Industries: Protecting and Promoting Children's Rights and Well-Being in Resource-Rich Countries

This paper is part of a series of outputs from the UNRISD and UNICEF research project on Mobilizing Revenues from Extractive Industries: Protecting and Promoting Children's Rights and Well-Being in Resource-Rich Countries.

The project seeks to contribute to knowledge creation and institutional learning processes within the partner organizations; to bring knowledge to national and international debates about channeling revenues from mineral extraction towards social policy and investments in children; and to examine public finance mechanisms, economic and social policies, and political conditions that are conducive to this end.

More specifically, it aims to:

- advance knowledge and understanding of the linkages between extractive industries and public policies as they relate to children's rights and well-being in Mongolia, Papua New Guinea and the Philippines; and
- advance knowledge and understanding of the political processes and institutions that impact on revenue mobilization in Mongolia, Papua New Guinea and the Philippines.

For further information on the project visit http://www.unrisd.org/eiandchildren.

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Acronyms

AMV	African Mining Vision
BIC	Bank Information Centre
CAO	Compliance Advisor Ombudsman
CDSUWS	Centre for Development Studies University of Wales Swansea
CMP	Child Money Programme
CRC	Committee on the Rights of the Child
DSF	Development Support Fund
EBRD	European Bank for Reconstruction and Development
EITI	Extractive Industries Transparency Initiative
GDP	Gross domestic product
GoM	Government of Mongolia
HDF	Human Development Fund
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICMM	International Council on Mining and Metals
IDS	Institute of Development Studies
ILO	International Labour Organization
IPEC	International Programme on the Elimination of Child Labour
MNT	Mongolian Tögrög (the currency of Mongolia)
MOF	Ministry of Finance of Mongolia
NHRCM	National Human Rights Commission of Mongolia
OHCHR	Office of the United Nations High Commissioner for Human Rights
RBAD	Rights-Based Approach to Development
SDC	Swiss Agency for Development Cooperation
SSAM	Small-Scale and Artisanal Mining
UNECA	United Nations Economic Commission for Africa
UNGA	United Nations General Assembly
UNICEF	United Nations Children's Fund
UNRISD	United Nations Research Institute For Social Development
USAID	United States Agency for International Development

Summary

Populated by predominantly young people, Mongolia's economy has relied heavily in recent years on mining. After several years of boom, the recent decrease in mining rents has only emphasized the pressing need for linking mining revenues to continuing demands in social expenditure, especially in ways that promote the rights of the child. While geared at attracting foreign investors for large-scale mining activities, the more liberal norms adopted by Mongolia since its political transition may have hampered the implementation of a development model informed by a rights-based approach. Moreover, the particular set of norms driving Mongolia's mining boom appears to be displacing, at least partially, the policy debates over the country's mining governance to the transnational level. In turn, such trends seem to explain why local and national socio-environmental issues pertaining to the sector have at times been addressed in technocratic terms that cannot easily conform to a rights approach.

The paper reviews the historical progression of the country's mining regime and its contribution to government revenues, analyses the linkages between mining rent and social expenditure, focusing on children and the extractive sector's ability/willingness to take account of children's rights in the small-scale and artisanal mining (SSAM) sector. It concludes that Mongolia should establish a coherent long-term poverty reduction strategy that encompasses both the economic benefits and potential harm of extractive industries; strengthen socio-environmental regulation and enforcement capacity: ratify and apply international instruments regarding access to information, public participation in decision making, and access to justice in environmental matters: put in place effective prevention and remedy mechanisms for human rights abuses by private companies; and pursue its efforts towards the legalization, regulation and monitoring of SSAM using a rights-based approach.

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Introduction

Thanks to its mining sector, Mongolia's economy expanded quickly following the political and economic transition in 1990. The Gobi desert is currently the construction site of what is going to become the world's largest coal mine (Tavan Tolgoi), and the third-largest copper and gold mine (Oyu Tolgoi). However, despite the impressive economic growth that preceded the recent decrease in mineral and energy prices,[1] rising inequalities and a fledging social welfare system haven proven to be a challenge for the country, a challenge exacerbated by the stagnating growth experienced since 2014.

Today, Mongolia ranks 90 out of 188 countries on the Human Development Index (UNDP 2015: 254).[2] With the fast expansion of the mining sector, the country saw poverty rates decline from 27.4 per cent in 2012 to 21.6 per cent in 2014. According to the World Bank (2015), "substantial progress" has also been made in regard to several Millennium Development Goals at the national level—although the organization cautions that significant regional disparities do prevail. It is further worth noting that life expectancy rose from 62.9 in 2000 to 69 in 2013 (World Bank 2015). However, in 2014, 21.6 per cent of Mongolia's population still lived below the poverty line (World Bank 2016)—a proportion that reaches nearly 50 per cent in rural areas (Awehali 2011). In 2013, World Vision estimated that more than one-third of the population lives on less than 68 cents a day (World Vision 2013). Furthermore, the disparities between rural and urban areas are also deepening. The unplanned *ger* (Mongolian traditional tent) districts in Ulan Bator have rapidly increased due to the continued migration towards the city—almost half of the population now lives in the capital (1,378 million) in 2015 (CIA 2016), up from 26.8 per cent of the population in 1989 (World Bank 2016).[3]

With 40.4 per cent of the population under the age of 15 in 2014, Mongolia is a country of young people—with 10.34 per cent of the population under the age of five (UNDP 2015: 235). The fast pace of economic growth in the country has led to great improvements in most child-related Millennium Development Goals indicators. For instance, immunization is now at 99 per cent, enrolment rates at 95 per cent for basic education, the prevalence of stunting has dropped from 15 to 10 per cent between 2010 and 2013, and under-five mortality rates from 107 (in 1990) to 22.4 (in 2014) per 1,000 live births (UNICEF Mongolia n.d.; World Bank 2015). However, despite such improvements, important challenges remain in children's health, development and protection. UNICEF Mongolia (n.d.) notes that indicators in terms of the improvement of water, sanitation and hygiene in the country have remained stagnant. Furthermore, geographical disparities affecting children are alarming.[4] UNICEF Mongolia (n.d.) reports that a child is four times more likely to die before the age of five if born in the Western regions, compared to children born in the capital. As further summarized in table 1, while overall improvements have taken place, the need to link the increase in

1 Since 2014, Mongolia experienced a rapid deceleration in growth due to falling mineral prices, down from 12.3 per cent in 2013 to 7.9 per cent in 2014 and 2.3 per cent in 2015 (ADB 2016).

2 The HDI is a composite measure of achievements in three basic dimensions of human development: a long and healthy life, access to education and a decent standard of living.

3 As of 2015, the total population of the country was just under 3 million (World Bank 2016).

4 For instance, while in urban areas the use of improved sanitation facilities climbed at 69 per cent, it remained as low as 29 per cent in rural areas (UNICEF Mongolia n.d.).

mining rent to the new demands for social expenditure, most notably towards the child, remain pressing.

Table 1. Selected Indicators: Mongolia, 2000–2014

	2000	2010	2011	2012	2013	2014
Total population (in million)	2.40	2.71	2.76	2.81	2.86	2.91
Population growth (annual %)	0.89	1.60	1.70	1.77	1.79	1.76
Fertility rate (births/woman)	2.14	2.56	2.61	2.64	2.66	2.66
Mortality rate, under-5 (per 1,000)	62.7	30	28	26.2	24.7	23.5
Prevalence of underweight (% of children under 5)	11.6	4.7	n.a.[a]	n.a.	1.6	n.a.

Note: [a] Not available**. Source:** World Bank 2016.

The objective of this paper is to analyse the core issues pertaining to the mobilization and utilization of mining rent in Mongolia. Key to this contribution is to assess how the country's mining regime is being implemented on the ground and more importantly, what impact such a regime may have on stakeholders' human rights, those of children in particular. In other words, while the country's mining regime might provide for solid socio-developmental safeguards, the implementation in practice of such safeguards might not emphasize the importance of accounting for relations of power among the key stakeholders. As such, the paper maps the sector's main stakeholders, their respective influence over rent mobilization and over the prioritization of allocations geared towards social development and children's rights.

Building on a framework combining political economy and a rights-based approach, the hypothesis tested in this paper is that the more liberal norms adopted by Mongolia since the transition process, while conducive for attracting foreign investors for large-scale mining activities, may have hampered the implementation of a development model informed by a rights-based approach. Moreover, although the 2014 reform of the minerals law included a provision for community development agreements, and although the Ministry of Mining has made efforts to consult a wide array of stakeholders, significant portions of the debate on the country's mining governance have shifted towards international or transnational political arenas where legitimacy tends to be based on technocratic arguments. This approach downplays political and democratic arguments, as well as local and national socio-environmental issues pertaining to the sector, which are concomitant with a rights-based approach.

This paper is divided into five sections. Section one discusses the significance of integrating a rights-based approach to a political economy analysis of Mongolia's extractive industries. At the core of this conceptual framework lies the distinction between *needs-based* and *rights-based* institutional logics. The second section of the paper maps the historical progression of the country's mining regime and its contribution to government revenues. Section three provides an analysis of the linkages between mining rent and social expenditure, focusing on children in particular. Section four analyses the extractive sector's ability/willingness to take account of children's rights, particularly regarding the need to include an assessment of the impact of policies on the children's rights and the need to consider them within the broader familial, communal and social context of children, their families and communities. It also discusses issues of the rights of the child in the small-scale and artisanal mining sector. Section five concludes by listing different scenarios currently being discussed by the government and making policy recommendations.

1. Theoretical Framework: The Significance of a Rights-Based Approach

While practically non-existent in the 1990s, human rights discourse has now been mainstreamed in global policy circles (Human Rights Council 2011: 3). In the extractive industry, this growing trend has emerged as a direct response to the contentious nature of the sector (Bebbington et al. 2008; Coumans 2008) and its potentially adverse impact on human rights.[5]

This trend speaks further to the increasing complexity of the governance architecture of the sector, characterized by a multiplication of overlapping sets of norms, potentially contradictory or mutually reinforcing. The regulation of a given mining project, for example, is typically the result of the interplay between the legal and institutional orderings of the host country and that of the mining company's home jurisdiction, a web of contractual arrangements between private actors (which might include communities affected by the project), norms imposed by lenders under a wide range of criteria (some of which might include human rights language), several more or less structured, constraining and enforceable international codes of conduct, and so on. Most of these norms have transnational reach, in the sense that they regulate actions or events independently of national borders or geographical jurisdictions.

This reality poses important challenges in regards to a possible dislocation between a human rights language and the actual implementation of such language on the ground. In other words, an increase in the usage of human rights language does not automatically guarantee that the necessary mechanisms and procedures to ensure the monitoring and protection of these rights will be established, respected and enforced. In order to address these challenges, this paper draws from literature on the Rights-Based Approach to Development (RBAD) and on legal pluralism. We distinguish two levels of analysis. On the first level, a multiplicity of scholarly contributions and policy tools focus on the *impacts* of natural resource exploitation and on the policies related to its regulation, resource mobilization and so forth. On the other level, scholarly contributions analyse the institutional and political *processes* and underlying *principles* or *values* within the context of which decision making takes place and the configuration of relationships among actors that these processes entail.

Many authors in the RBAD literature argue that a human rights framework implies addressing issues of inequality, discrimination, power asymmetries, accountability and conditions of participation (OHCHR and UN 2006: 15; Slim 2002) in the design and analysis of policy making. They also underline the necessity for increased capacity of *rights bearers* to hold *obligation bearers* to account over objectively defined, mandatory, universal and inalienable standards, instead of over processes emphasizing *prioritization of needs* that are, ultimately, contingent on the particular power relationships at play in a given historical context.[6] Others argue that using human rights

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[5] In 2008, the Special Representative on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie, found "an exceptionally high percentage of cases of human rights abuses related to the activities of extractive industries". In his report, he studied 320 random cases of human rights abuses by corporations (between February 2005 and December 2007) and found that of eight sectors studied, the extractive sector dominated at 28 per cent of the total (Human Rights Council 2008: 8-9). Mining and extractive industries in general pose specific human rights challenges. The International Council on Mining and Metals, an industry association, identifies specific issues related with employment, security, resettlement, indigenous peoples, conflict, artisanal and small-scale mining, and corruption and transparency (ICMM 2009: 16-27); while the NGO International Alert also cites, among others, environmental impacts and conflicts over land use (see International Alert 2005).

[6] Cohen 2004: 7; De Gaay Fortman 2001: 53; Harris-Curtis, Marleyn and Blackwell 2005; Save the Children 2005: 16; OHCHR, UNDP and UNICEF 2003.

language in itself does not prevent technocratic approaches that would contribute to the instrumentalization and depolitization of human rights and development issues.[7]

In the actual policy-making processes involving resource mobilization, as those discussed in this paper, bargaining and contestation often revolve around the tensions between rights and needs. Indeed, Article 4 of the Convention on the Rights of the Child calls for the allocation of resources "to the maximum extent possible" to children. This acknowledges that a certain prioritization of needs might sometimes be inevitable.[8] However, the debates on RBAD emphasize that resolving this tension depends at least as much on procedural elements as on the content of specific norms and policies. Some recent attempts by non-governmental organizations (NGOs) to integrate children's rights into their programming can thus provide certain criteria by which to evaluate extractive industry–related policies and norms in the light of children's rights. Under the four general principles of non-discrimination, best interests of the child, rights to life, survival and development, and right to be heard (UNGA 1989: "Preamble"; see also: Save the Children 2005: 18-19), we could infer that procedural requirements for policies and norms would include:

- identifying instances of discrimination;
- providing and being based on sufficient, relevant and disaggregated data;
- putting in place monitoring systems and mechanisms for remedy;
- providing for children's participation by, inter alia, facilitating their access to information;
- including an assessment of the impact of policies on the rights of children; and
- considering children's rights within the broader familial, communal and social context (UNGA 1989; see also Save the Children 2005: 31-35).

The institutional impact of these policies and norms should be threefold: increased capacity to address gaps and violations of rights; strengthened structures and mechanisms that emphasize duty bearers' accountability and capacity; consultation as well as effective access to remedy; and increased capacity of communities and civil society to claim children's rights (Save the Children 2005: 42).

In the case of industrial mining, however, additional attention must be given to the impacts of policies and norms on the capacity of the state to protect against human rights abuses by a private company. This may be done through appropriate policies, regulation, adjudication and effective enforcement. The Human Rights Council (2011: 4) highlights the need to monitor the effectiveness of due diligence mechanisms put in place by corporate actors and their willingness to address adverse impact with which they are involved, as well as the need for the effective access of human rights victims to judicial and non-judicial remedies.

In the case of Mongolia, reforms to the legal framework prioritize a set of specific liberal norms and procedures for its mining sector development, as supported by international donors at the time. Gagné-Ouellet (2012) summarizes these norms:

- Priority given to the private sector for mining development;
- Priority given to mining over other types of territorial use;
- Priority given to an exportable resource over other mineral resources;

[7] Uvin 2002; 2007; Bradshaw 2006; see also Decary-Secours 2013 on this debate.
[8] "States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation" (UNGA 1989: Art. 4).

- Priority given to the industrial sector over artisanal and small mines;
- Guarantees protecting mining rights.

Analysing the procedural implications of these norms and policies involves identifying the mechanisms by which they are legitimized. Furthermore, for legal pluralism, "sets of norms" that govern a given activity—including, for example, the principles underlying a particular public policy—can be compared and analysed on the basis of the political identities that they produce, being: "the kind and degree of political recognition that is conferred by a legal order on those who are subject to it"[9] (Szablowski 2007: 303).

In the case of public policy directed at children—such as the cash transfers discussed in this paper—Save the Children provides a useful example of how approaches based on political identities articulated in terms of "needs" and "rights" imply different procedural requirements (Save the Children 2005: 22).[10]

In the context of the global liberalization processes that have shaped the nature of governance of the extractive sector more generally and that of Mongolia in particular, Szablowski (2007) has drawn attention to the ambiguities of processes of legitimation that are linked to the external origins of normative frameworks, the potential interference between political and technical as well as public and private spheres, and their implications in terms of political and social responsibilities for the actors involved (Szablowski 2007; see also UNRISD 2000). According to him, for example, an externally driven policy dynamic, "[can shift the] debate away from a forum in which citizenship rights and entitlements are taken for granted…to a transnational forum in which mediation is cast as a technical concern to be carried out on behalf of beneficiaries who are acknowledged to possess *needs,* but not *rights*" (Szablowski 2007: 304-305, emphasis added). External and internal legitimating processes also depend on the actual power relations at play, such as geopolitical constraints and the structural distribution of power in the global extractive sector.

2. The Mining Regime and Resource Mobilization in Mongolia[11]

It is estimated that Mongolia rests on 6,000 deposits of 80 different minerals, notably coal, copper, gold, rare earth and iron ore.[12] The country's large-scale mining sector has only recently been stepped up, amid the transition in the 1990s. By 2012 Mongolia had already positioned itself in seventh place in terms of world mineral and ore production (Mendoza et al. 2012b: 4). In fact, in 2011, Mongolia had become the fastest growing economy in the world, nearly twice as fast as China (Langfitt 2012).[13]

The Gobi desert is now the construction site of what is projected to become the world's largest coal mine (Tavan Tolgoi), and the third-largest copper and gold mine (Oyu

[9] Since law "is…both an obstacle and a resource for social actors in their efforts to achieve their goals...the term 'political identity' [refers] to a particular way in which a legal order may play these constraining or facilitative roles" (Szablowski 2007: 303).

[10] Annex 1 provides some theoretical background on issues of political identity, processes of legitimation and access to rights in the extractive sector.

[11] This section, as well as part 3, builds on adapted work from Hatcher (2014).

[12] In addition to these minerals, Mongolia is believed to have reserves of asbestos, bismuth, clays, copper, diamond, gemstones, graphite, gypsum, lead, limestone, magnesium, molybdenum, nickel, petroleum, phosphate, platinum-group metals, rare earths, salt, sand and gravel, silica, talc, tin, tungsten, uranium, zeolite, and zinc (USGS 1999: 15.1).

[13] In 2011, it grew by more than 17.5 per cent.

Tolgoi). While, as discussed later in this paper, internal and international factors have challenged this development model based on mining, it is crucial to note that the flood of investment into the country's mining sector stems from a particular legal framework on mining which was first introduced in the early 1990s, during the country's transition to democracy and a market economy.[14] In order to understand the political economy of the sector, a brief historical review of Mongolia's evolving mining regimes is required.

Historical background

Before it freed itself from Russian tutelage in 1990, all exploration and mining rights in Mongolia belonged exclusively to the Soviet Union and its allies, and strikingly, the country did not have a national mining law. The adoption of the Petroleum Law in 1991, which served as the legal framework overseeing operations in the mining sector, triggered the development of coal, copper, fluorite, gold and molybdenum mining in the 1990s (USGS 1999: 15.1). Although the Russians were producing petroleum in Mongolia as early as the 1950s, and there was some large-scale mining activity in the country, Mongolia's large-scale mining sector had, until recently, remained mostly untapped. The foundations of the legal framework, which was to propel the country to its current status of one of the world's key producers, were drawn in the early 1990s, during the country's rapid transition towards a market economy. Sponsored by the Asian Development Bank and the World Bank, the initial "shock therapy" saw the liberalization of prices, the removal of trade restrictions and the privatization of state enterprises.

As a result of the initial wave of liberalization reforms in 1991,[15] which would be followed by another wave in 1994, citizens' purchasing power spiralled (the cost of food increased by 477 per cent), petroleum products quadrupled in price and, throughout the early 1990s, inflation gripped the country (325 per cent in 1992) (Shagdar 2007: 2). While unemployment was not a problem before 1990 (Word Bank 1996: 28), it had reached 8.7 per cent in 1994 (over 75,000 people) (Khongorzul 2009: 139), with an even sharper increase in rural areas.[16] Furthermore, between 1992 and 2005, persons working in the informal sector, including those undertaking artisanal mining activities, almost doubled to 566,000 people (Khongorzul 2010: 90).

The reforms further marked the sizeable waning of the country's social security system. Primary school enrolment rates dropped from 98 to 84 per cent between 1989 and 1995, while high school enrolment rates dropped from 65 to 54 per cent (World Bank 1996: 52). Likewise, the cuts to the universal health care system saw further deterioration of basic health care services both in rural areas and cities (World Bank 1996: 60-63). Subsequently, from 1990 to 1994, maternal mortality rates almost doubled from 12 in every 10,000 pregnancies to 21 (World Bank 1996: 60). Despite a substantial increase in social security contributions by the state between 1989 and 1997 (Zorig 2013: 43), social security benefits and pensions dropped in real terms and saw an important decrease in most rural areas as of 1994.[17] Vulnerable groups[18] received 80 per cent less in social assistance in 1995 than they did in 1994 (World Bank 2006: 74). Crucially, these liberalization and adjustment measures affected women and children the most (UNIFEM 2001: 9).

[14] Although Mongolia achieved independence in 1921, the Soviet Union helped install a communist regime in 1924.
[15] See Khongorzul 2010; World Bank 2006.
[16] See Word Bank 1996.
[17] Khongorzul 2009: 139; Nixson and Walters 2000: 58; World Bank 2006: 74, 76.
[18] Vulnerable groups as defined by the government are the unemployed, disabled, female-headed households, herders without many animals, the elderly without care, large families with a small income, and children who have lost either one or both their parents (World Bank 2006: 25).

Amid the severe social and economic aftermath of this shock therapy, large-scale mining was quickly identified as a key sector for generating the country's much-needed revenues. In the mid-1990s, alongside most of the other countries in the region that were rich in natural resources, the Government of Mongolia embarked on a reform process that led to the adoption of a new mining legislation.[19] The 1997 Mineral Law[20] and later, the Foreign Investment Law (2002), were closely modelled on specific liberal norms and procedures, as advocated by international donors, which were key in helping to reform the sector[21] The donors sought to encourage foreign investors to participate in the exploration and development of the country's large-scale mineral wealth.

As stated in the first section of this paper, a RBAD in the context of the mining sector should pay particular attention to the impacts of policies and norms on the capacity of the state to protect against human rights abuses by private companies through appropriate policies, regulation, adjudication and effective enforcement; on the effectiveness of due diligence mechanisms put in place by corporate actors and their willingness to address adverse impacts of the projects they were responsible for; and on the effective access of human rights victims to judicial and non-judicial remedies (Human Rights Council 2011: 4).

In the case of Mongolia, reforms to the legal framework prioritize a set of specific liberal norms and procedures for the mining sector development, as supported by international donors at the time. The reforms focused on transparency, security and transferability of property rights, as well as taxation and royalty rates that would attract foreign, large-scale investors. Royalty rates were set at 2.5 per cent of sales value, no import duties were imposed and investors benefited from a 10-year tax holiday (except for gold).[22] Furthermore, under the 1997 Law, a license holder investing no less than USD 2 million for the first five years of a mining project could enter into a fiscal stabilization agreement (Art. 20), thus guaranteeing the long-term stability of the fiscal requirements.[23] The reform soon led to significant increases in mineral exploration as well as to the exploitation of deposits discovered earlier (McMahon 2010: 25).

However, less than a decade later, Mongolia embarked on a parliamentary review of its Mining Law, a process that led to the adoption of an amended version in 2006—today, the revised Mineral Law of Mongolia still governs the country's mining activities.[24] The 2006 Mining Law further saw the adoption of a windfall profits tax on gold and copper,

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19 For instance, Myanmar adopted a new mining law in 1994, Philippines in 1995, Vietnam and Kazakstan in 1996, China, Laos and Kyrgyzstan in 1997. See Naito et al. 1998.

20 The 1997 Minerals Law regulated relations with respect to exploration and mining of all types of mineral resources except water, petroleum and natural gas from June 1997 to August 2006.

21 For instance, in addition to helping draft the country's overall governance framework, the World Bank has been a key player in the development of the country's mining regime, starting with the 1991 Economic Rehabilitation Project, followed by the Economic Transition Support Project in 1993. The subsequent year, the Bank established the Coal Project, which was to reverse the decline in Mongolia's coal production, while also providing support for the stabilization of the Erdenet copper exporter and the rehabilitation of the Baganuur coal mine. The Bank states that it has been "supporting and nurturing the development of the regulatory framework for private sector led mining sector exploration and development for more than 10 years", during which time it has focused on establishing the legislative and fiscal regimes to apply to mining (World Bank 2008). "This work culminated in the passing of the 1997 Mineral Law and adoption of a reasonably competitive fiscal regime for the sector.". See also Hatcher 2014 and McMahon 2010.

22 Due to the complex relationship between royalty rates, tax systems, in particular contractual arrangements, reliable data on the extractive revenues captured by states is not easily available. While making it difficult to compare different revenue capture strategies, it also often converts them into contentious political issues (see for example Vérificateur Général du Québec 2009; for a discussion of revenue flows in the African context, see Campbell 2013).

23 If the amount of the initial investment in the Mongolian mining project is no less than USD 2 million, the term of the stability agreement may be 10 years. However, if this investment is no less than USD 20 million, the term of the stability agreement may be 15 years (Art. 20).

24 It is worth noting however that the Mining Law has been amended every year since 2008. The most recent amendment took place in February 2015.

the highest in the world (Pistilli 2012).[25] The tax was intended to encourage mining companies to process the minerals within the country, in which case they would be exempt from the windfall tax. The additional revenues from the tax were to be earmarked for social programmes (USAID 2011: 2) but amid the negotiations over the investment agreement of Oyu Tolgoi (OT) mine, the government agreed to cancel the windfall tax in 2009 (and phase it out over two years).

These changes were indicative of a shift in government policy over the need to both maximize mining rent and to address the socio-political tensions that had arisen with the rapid expansion of the mining sector. This expansion, which had led to an exponential multiplication of licenses and activities, had not been accompanied by socio-environmental monitoring capacities. Such a legacy led to the multiplication of demands emerging from the country's increasingly organized civil society (Pistilli 2012).

These tensions are partly linked to the particular nature of the 1997 legislation, which external actors were influential in defining. As discussed in the first part of this paper, the nature of the governance framework is crucial as it determines the way different institutional arrangements enable or disable different actors (the kind of political identities they confer to actors) and the way norms legitimate their claims. While the governance of the mining sector stemming from the 1997 code was successful in attracting foreign investors, it failed to address some of the increasing internal tensions arising from the sector's socio-environmental legacy,[26] as well as the increase in income inequalities.

These tensions continue to be deeply influenced by national politics—and electoral cycles. In fact, since it came into effect in 2006, the Mining Law has been amended 22 times.[27] The short-lived 2012 decision by the government to tighten the rules for foreign investors in the country goes a long way to explain, along with the rising tensions with the private owners of OT mine, the severe decline of foreign investments in the mining sector between 2012 and 2015. This is further discussed at the end of the following section.

Mobilizing mining rent

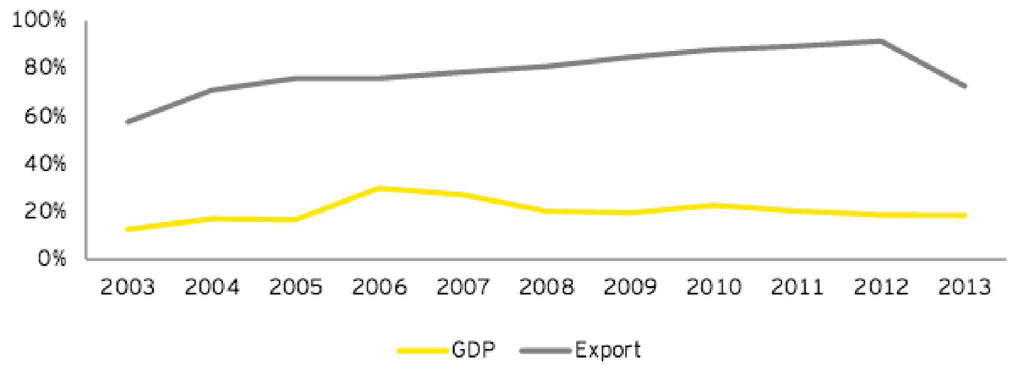
Despite recent tensions and frequent policy changes, mining represents the cornerstone of Mongolia's economy and as such the sector is crucial for financing the country's social expenditure programmes. From contributing close to 13 per cent of the country's GDP in 2002 (Mendoza et al. 2012b: 4), mining accounted for 18.5 per cent of the GDP in the first half of 2014 (EITI n.d.: 4). The sector further accounts for the overwhelming share of the country's total exports—from an average of 71 per cent of total exports between 2007 and 2010 (Ernst and Young 2012: 4) to about 89 per cent of the country's exports in 2014 (Ernst and Young 2015: 2) (see figure 1).

[25] The windfall profits tax imposed a 68 per cent tax on the portion of metal sales price of copper ore and concentrate in excess of USD 2,600 per ton and sales price of gold above USD 500 per ounce (Connors 2011: 37), raised to USD 850 per ounce in 2008.

[26] Apart from its immediate impact on the children's right to health, for example, mining can have long-lasting environmental effects that raises broader issues of intergenerational equity. See Campbell 2004, 2009; EIR 2003.

[27] See Ashid Advocates (2015) for a brief summary of the recent amendments.

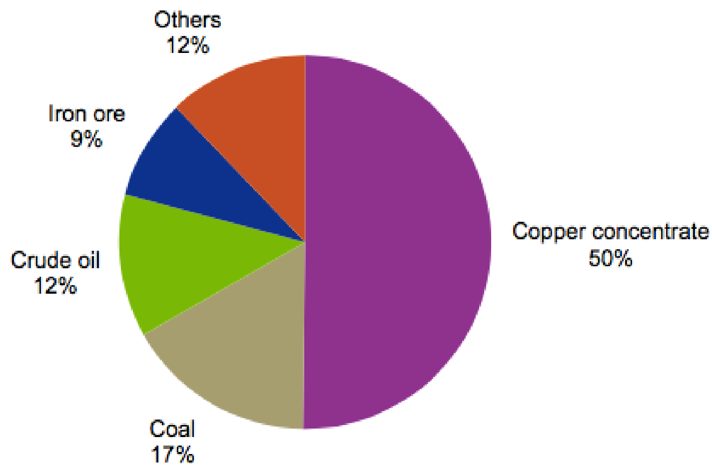
Figure 1. Mining as Percentage in GDP and Export



Source: Ernst and Young 2015: 4.

Copper concentrates and coal are Mongolia's main exports. Figure 2 illustrates the top four commodities in total exports of the country in 2014.

Figure 2. Main Commodities in Total Exports, 2014

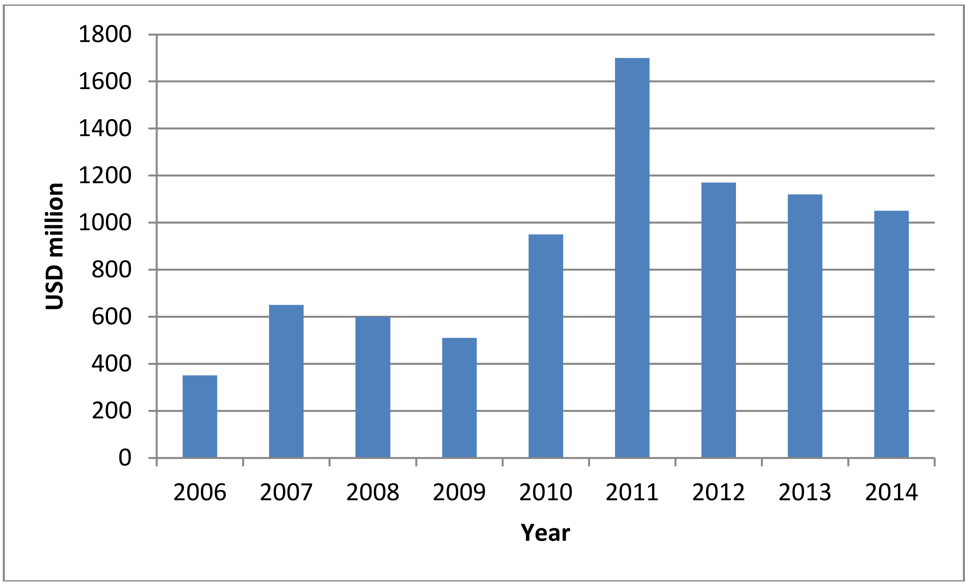


Source: EITI 2015: 49.

The importance of the sector in the country's economy suggests that Mongolia is highly exposed to the recent fall of world commodity prices. Further to this, the economic slowdown in China, which accounts for 89 per cent of total Mongolian exports, has severely impacted the country's economy and as such, its ability to mobilize mining rent (Ernst and Young 2015: 2). Coal exports for instance, declined by about 40 percent between 2012 to 2015, and the country's GDP growth has spiralled downward from 11.6 per cent in 2013 to 2.3 per cent in 2015 (Rossabi 2016).

Despite recent internal and international challenges, the extractive industry accounts for a substantial part of total government revenues—in 2014 it represented 25.8 per cent of budget revenues (EITI 2015: 48). However, these numbers are set to sizably increase in the near future due to the expected expansion of mining activities in the country. Figure 3 follows the contribution of the sector to public revenues.

Figure 3. Government Revenues from Mining (in million USD)



Source: EITI n.d.

According to the 2006 Mining Law, which was last amended in 2015, in the case of minerals labelled "of strategic importance",[28] the state can claim up to 34 per cent of shares where non-state funding sources were used to determine proven reserves or up to 50 per cent ownership where state funds were used (Art. 5).

The primary tax that applies to mining companies is in the form of a royalty imposed on total sales value of the extracted mineral—the value depends on the product.[29] Table 2 provides a detailed account of the sector's main contributions at the national government level. Mineral royalties, which are deductible for tax purposes, are calculated on the basis of total sales value of the minerals extracted.[30] Additionally, a corporate income tax is imposed at 10 per cent of profits up to USD 1.5 million[31] and 25 per cent thereafter. A Value Added Tax of 10 per cent is imposed on the supply of taxable goods and services and on imports into Mongolia, and a customs tariff of 5 per cent applies to imported goods. Other tax rates apply, notably 10 per cent on dividends, 10 per cent on interest income, 2 per cent on immovable property, 30 per cent on

[28] "Strategic importance" is here defined as: "a deposit [with size] that may have a potential impact on national security, economic and social development of the country at the national and regional levels or that is producing or has a potential of producing more than five (5) per cent of total Gross Domestic Product in a given year" (Art. 4.1.11).

[29] Since January 2011, an amendment to the Mineral Law introduced a surtax royalty on the total sales value of 23 types of minerals in addition to the standard flat-rate royalty. The surtax royalty rates vary depending on the type of mineral, its market price and the degree of processing, generally from 0 to 5 per cent of market prices—copper is an exception and attracts the highest rate of surtax royalty of up to 30 per cent for unprocessed ore (Ernst and Young 2015: 14).

[30] The sales value is determined differently depending on the product—exported products, products sold or used on the domestic market and products sold in international or domestic markets where it is impossible to determine market prices. Furthermore in 2011 a new surtax royalty regime was introduced. Under the new two tier system, a surtax royalty is imposed on the total sales value of 23 types of minerals in addition to the standard flat rate royalty—the surtax royalty rates vary depending on the type of mineral, its market price and the degree of processing (generally from 0 to 5 per cent of market prices). Copper is an exception and attracts the highest rate of surtax royalty (up to 30 per cent for unprocessed ore). See Ernst and Young 2015: 14.

[31] All amounts have been converted to USD using the exchange rate in effect on 1 January 2016 (1,986 MNT per USD). Readers should be aware, however that the value of Mongolia's currency fell significantly since 2006 when it was valued at around 1,100 MNT per USD (see: www.oanda.com).

income from the sale of rights.[32] Additionally, all exploration costs and site preparation expenses may be amortized over a period of five years (Art. 61.1) and losses may be deducted from taxable income during the two tax years following the year during which the loss was incurred (Art. 61.4).

Table 2. Key Revenue Streams at the National Level, 2014 *(USD millions)*

	Key national revenue stream	Per government-reported data	
		Amount	per cent
	Fee for exploitation of mineral resources (Royalties)	305.2	34.8
	Petroleum receipts of GoM as per Product Sharing Agreement (PSA)	143.4	16.4
	Corporate income tax	106.0	12.1
	Value added tax	99.2	11.3
	Social and health insurance	68.2	7.8
	Total donations and support given to public agencies	53.9	6.1
	Licence fee for exploitation and exploration of mineral resources	20.6	2.4
	Customs service fee	20.3	2.3
	Customs duty	18.7	2.1
	Fee for air pollution	15.4	1.8
	Oil royalties	13.0	1.5
	Fee for recruiting foreign experts and workers	5.6	0.6
Individual	Penalties	0.0	0.0
	Advance payments received by GoM (Government of Mongolia)	-	0.0
	Dividends on state investments	-	0.0
	Tax on petrol and diesel fuel	2.6	0.3
	Excise on petrol and diesel fuel	1.3	0.1
	Reimbursement of deposit, exploration of which is carried out by the budget fund	1.0	0.1
	Bonus for training as per PSA	0.8	0.1
	Field deposit/area pledge as per PSA	0.7	0.1
	Supporting payment to representative office as per PSA	0.5	0.1
	Signature bonus in the year as per PSA	0.1	0.0
	Administration service charge as per PSA	0.0	0.0
	Receipts of GoM as per Nuclear Energy Law	-	0.0
	Other	-	0.0
Aggregate	Bonus for production commencement as per PSA	-	0.0
	Tax on increase on some product price	-	0.0
	Reimbursement	-	0.0
Grand Total		876.6	100.0

Source: Adapted from EITI 2015: 152–53.

It should further be noted that the mining law allows for an investment agreement to be requested by a mining license holder who will invest no less than USD 50 million during the first five years of the mining project,[33] as was the case for the OT mine.[34] Set to become the world's third largest copper and gold mine (Langfitt 2012), OT is expected to have a lifetime ranging from 60 to 120 years (USAID 2011: 11). Signed in October 2009 after six years of negotiations and a public review by the parliament, [35]

32 Mining operating expenses and payment for works and services performed by others are tax deductible in the year incurred and tax losses can be carried forward four to eight years by mining companies, depending on the investment amount. Depreciation and amortization for tax purposes is also permitted. For a detailed review of the country's fiscal regime, see Ernst and Young 2012.

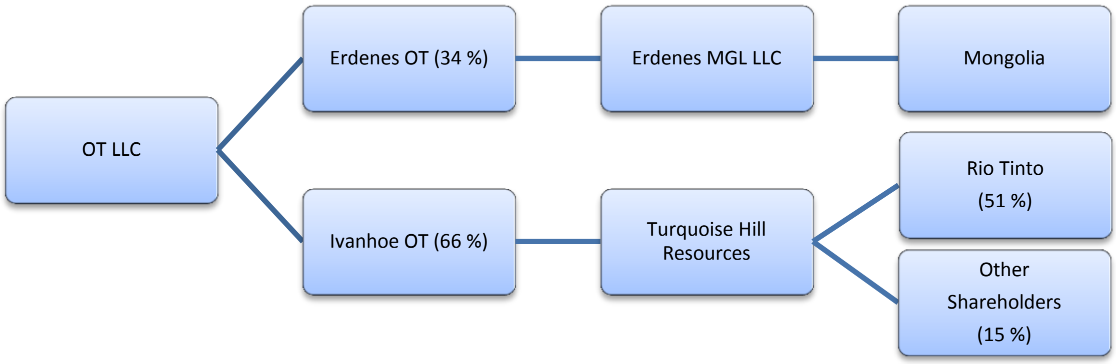
33 The agreement is intended to provide "a stable operational environment" for the investor, notably through clauses ensuring a stable tax environment (income tax, customs duty, value added tax, royalties, the right of the licence holder to sell its products at international market prices); and guaranteed rights of the licence holder to manage the income derived from its sales at its own discretion. The agreement further contains clauses pertaining to the environment, regional employment and public health (Art. 29).

34 "Turquoise Hill" is the Mongolian meaning of "Oyu Tolgoi', a name that most certainly reflects the fact that copper turns turquoise when exposed to oxygen.

35 Between the Minister of Finance, the Minister of Mineral Resources and Energy and the Minister of Nature, Environment and Tourism, together representing the Government of Mongolia; Ivanhoe Mines Mongolia Inc. LLC and Ivanhoe Mines Ltd; and Rio Tinto International Holdings Limited.

OT's investment agreement, which was notably developed with a World Bank technical assistance project (World Bank 2009), provides generous conditions for its shareholders. The Government of Mongolia[36] holds 34 per cent of common stocks in OT while the remaining 66 per cent of shares are in the hands of the foreign-owned company Turquoise Hill Resources (formerly Ivanhoe Mines[37]), see figure 4. The British-Australian mining corporation Rio Tinto owns a majority stake in Turquoise Hill Resources, which makes it the largest foreign investor in the country.

Figure 4. Oyu Tolgoi Ownership



Source: Adapted from White 2013 and Intierra RMG 2012.

By mid-2012, USD 6.2 billion had already been invested in the first phase of the mine (OT 2013d), and in December 2015, an additional USD 5.3 billion deal was signed over the extension plan of the mine (the underground phase which contains approximately 80 per cent of the mine's total value). In addition to export credit agencies and 15 commercial banks, the International Finance Corporation and Multilateral Insurance Guarantee Agency announced that they would provide USD 2.2 billion in loans and guarantees for the second phase of the mine (IFC 2015).

The recent deal over the expansion of the mine follows a two-year dispute over its future. The dispute, which started in August 2013, mainly revolved around revenue sharing issues (cost overruns and a dispute over taxes) and issues linked to the role of foreign investors in the country, now heavily reliant on mining.[38] Amid the dispute, Rio Tinto laid off 1,700 workers and foreign investments in the country fell from USD 4.5 billion in 2012 to about USD 400 million in 2014 (Kohn 2015).

Even if revenues diminished significantly since 2012, when Mongolia was the world's fastest growing economy, the importance of mining revenues for the public sector remains crucial. Under its investment agreement (Chapter II), OT's taxes and rates are stabilized for 30 years.[39] As such, no fiscal or regulatory changes may be imposed unless they are more favourable to the investors. The shares of the government are further locked at 34 per cent—although there is an optional provision for an additional 16 per cent purchase of OT at the end of the initial 30 year term of the agreement.

[36] Via its company Erdenes MGL LLC (EML). Erdenes OT is the corporate entity which oversees the project on behalf of Erdenes MGL LLC.
[37] Ivanhoe Mines (now called Turquoise Hill) of Canada was itself originally owned by BHP Billiton. The latter sold its exploration licence to Ivanhoe (for USD 5 million) in March 2000.
[38] See Kohn 2015.
[39] Those are the corporate income tax, customs duty, value-added tax, excise tax, royalties, exploration and mining licences, immovable property and/or real estate tax.

Furthermore, Turquoise Hill receives a 10 per cent investment tax credit on all capital expenditures and investments made throughout OT's construction period. Crucially, the agreement further marked the cancellation of the windfall profits tax which was introduced in 2006, as well as the revision of corporate income tax to extend the loss carried–forward provision from two to eight years (World Bank 2009: 15).

In April 2015, OT and local communities agreed on a Cooperation Agreement by which OT is contributing USD 5 million every year to a Development Support Fund (DSF).[40] The DSF, which is administered jointly between OT and the community, is focused on community programmes and projects for the local community (OT 2016).

OT is now already largely computed in every spread sheet which assesses the country's public coffers. Once it came into full operation—it produced its first concentrate in January 2013—OT could increase the country's GDP by a third (Zand 2013), and it may be supplying 55 per cent of Mongolia's fiscal revenues (McMahon 2010: 25). By February 2015, production had reached one million tonnes of concentrate (EITI 2015: 76).

The green light for the next phase of OT further speaks to the pressing need for the government to respect, protect and fulfil the rights of children according to its enhanced financial capacity. Social policies as key to children's development and equitable distribution of resources are discussed in the following section.

3. Linking Mining Rent and Social Expenditure

During its 70 year-long socialist era, the main contributor to the social security fund in Mongolia was the state itself.[41] The central government was responsible for pension allocation, education and healthcare, as well as a guaranteeing access to full employment (Gochoosuren 2013: 25). However, it should be noted that the Soviet Union was key in subsidizing Mongolia's universal social security scheme throughout the country's socialist rule (Gochoosuren 2013: 25). As previously argued, the transition towards the market economy in the early 1990s marks the waning of the social security system. A key point to note here is that this transition coincided with the sudden stop of assistance flows (financial and technical) from the Soviet Union. Foreign donors quickly stepped in and became key in supporting the country's economy.[42]

Amid the country's growing social inequality since the economic transition, different social sector programmes were established or reformed to reduce poverty and increase security of the population and in particular vulnerable groups, notably via cash transfers, social health insurance, housing support and programmes focused on education.[43] More specifically, social assistance benefits are now divided into (Gochoosuren 2013: 51):

- ✓ welfare pensions for the elderly and those with permanent disabilities not eligible for state social [sic] insurance general office assistance, orphans and dwarves;
- ✓ child-related allowances, including pre-natal, infant and child care; benefits for

40 Umnugobi aimag, and Khanbogd, Manlai, Bayan-Ovoo and Dalanzadgad soums.
41 For example, in the 1970s, while people contributed a small amount based on their wage level, the state budget allocated nearly 90 per cent of social security funding (Gochoosuren 2013: 25).
42 For instance in 2000, over 20 per cent of the country's GDP was fed by international donors such as the World Bank and the International Monetary Fund (Gochoosuren 2013: 28).
43 Keys to the recent development of the country's social policy were the Social Insurance Law (1994), the Social Welfare Law (1995) and the Employment Promotion Law (2001). As underlined by Gochoosuren (2013: 32), the Social Security Sector Strategy Paper (approved in 2003) further tackled social welfare service, social insurance and employment policy, between 2004 and 2013.

large families; and

- ✓ social welfare services, discounts and concessions for the disabled, elderly, war veterans, and heroes of the state.

Established in 2005, the Child Money Program (CMP) was one of the government's flagship social spending strategies. Its aim was to reduce short-term income poverty and inequality, while developing children's well-being and human capital. Within its first year of implementation, the programme covered 63 per cent of the country's children (647,500 children).

At the heart of the CMP laid a key debate over whether the CMP should be universal in scope.[44] The programme began as a conditional cash transfer, whereby only low-income families[45] with three or more children were eligible to the monthly MNT 3,000 (USD 1.50) per child.[46] Additional conditions applied, notably up-to-date immunizations for children, school, or non-formal education, enrolment for children between the age of 8 and 18 who were living with parents (or officially authorized guardians) and were not engaged in unacceptable child labour activities (ILO 2007). However, during a change in government in 2006, a programme assessment showed that the targeted transfer experienced "very high leakage to non-poor households and substantial exclusion of poor households" (Hodges et al. 2007: 5). As observed by Mendoza, McArthur and Ong Lopez (2012b), considerable errors in targeting were flagged, such as the exclusion of some of the poorest children, particularly those living in remote herding families who could not meet some of the programme's conditions, including having documentation that their children had been immunized and/or were enrolled in school (Mendoza et al. 2012a: 20). As such, following the adoption of the Law on Monetary Assistance to the Child and Family in 2006, the programme became unconditional and universal, whereby every Mongolian child between 0–18 years of age became entitled to the transfer (Government of Mongolia 2007: 15).[47]

In 2010, the CMP was replaced by the Human Development Fund (HDF).[48] The creation of the HDF was a culmination of the government's attempt to establish a fund to manage revenues from mineral wealth and to channel such revenues towards social

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44 Further at issue was the fact that from 2004 to 2012, elections in Mongolia were characterized by competing political promises regarding direct cash allowances derived from the country's increasing mining revenues. An Institute of Development Studies report (IDS 2011) concludes that the Human Development Fund (HDF) had little to do with the country's former flagship programme; the HDF "was created and implemented as part of a political process that was not informed by social protection efforts and the impacts of the CMP" (IDS 2011: 27). By the end of 2009, in light of the shortfalls of the mining sector, only USD 60 was ultimately distributed to each citizen, much less than the initial USD 753 per citizen promised by politicians.

45 Families living under the Minimum Subsistence Level, an official measure defined annually by the National Statistical Office of Mongolia by proxy means testing.

46 Mongolia's National Poverty Line is set at USD 17 per month. The CMP also included a single transfer of USD 50 for each new-born baby and a single transfer of USD 251 to newly married couples (Mendoza et al. 2012a: 20). Additionally, from the fifth month of pregnancy women receive extra monthly payments for 12 months (Government of Mongolia 2007: 15).

47 However, street children or those imprisoned are not qualified to receive the payment (UNICEF 2007: 25). By July 2007, the sum of the transfer had been further enhanced by the addition of USD 12 allocated to every child on a quarterly basis, an amount which was reduced to USD 4 in March 2009 amid the country's falling mining revenues.

48 HDF was passed into law in 2008. Aware of its vulnerability linked to an economy increasingly dependent on mineral wealth, the Mongolian Development Fund was established in 2007. The wealth fund was intended to accumulate excess revenues from mining activities and to target these resources for the country's economic and human development began in 2007 (MOF n.d.). The latter was replaced by the HDF. In adopting the HDF, the government would have studied the Alaska Permanent Fund, Norway's sovereign wealth fund, and Chile's use of its copper resources to help drive growth. They would have also considered Canada and Australia as models for distribution of mineral revenues (Campi 2012).

policies (MOF n.d.).[49] Today, the HDF is key in directing mining rent towards financing the country's social expenditures. The fund, which is renewed by the parliament each year, finances pension and medical insurance, payments for apartment purchases, cash, medical and education service payments and cash for children (EITI 2015: 108). The HDF is fed by the following revenue sources (EITI 2015: 108):[50]

- ✓ dividends and sale of government shares in legal entities holding production licences of strategically important mineral deposits;
- ✓ 70 per cent of mineral resource royalties from legal entities extracting and producing mineral resources;
- ✓ net profit from the HDF's investments in securities and bonds; and
- ✓ a certain part of loans and prepayments received in regards to the usage of strategically important mineral deposits.

By 2011, the HDF represented almost 40 per cent of the country's overall budget. While it included health insurance (approx. USD 15.3 million), student tuition fees (approximately USD 66.5 million), and assistance in covering the cost of purchasing a house, cash transfers encompassed almost 87 per cent of the total benefits (approximately USD 15 per citizen per month) (EBRD 2012; UNDP 2011). Significantly, the amount distributed in the form of cash transfers in 2011 represented 40 per cent of the state's entire budget (UNDP 2011: 23). The universal components of cash transfers attached to the HDF were carried out for three more years, although they were to decrease considerably—by 67 per cent—in 2013 (World Bank 2012a: 6).

Indeed, following the 2012 elections, the government stopped HDF universal direct cash transfers and reinstated the Child Money Programme as a universal and unconditional benefit for all children under 18 years, offering monthly transfers of approximately USD 10. The CMP now reaches around 994,000 children (that is its coverage rate is over 99 per cent) at a total cost of 1.5 per cent of GDP in 2014.[51]

According to the 2014 audit report of the HDF budget, USD 210.5 million in revenues from mineral resource royalties and dividends were injected into the fund (EITI 2015: 108). Table 3 follows the increase in revenue transfers to the HDF (2010–2014).[52]

Table 3. Transfers to the HDF, 2010–2014 *(USD Million)*

Income	2010	2011	2012	2013	2014
Mineral resource royalties	58.8	134.6	166.1	163.2	202.9
Dividends	20.6	22.6	55.3	34.3	7.5
Total	**79.4**	**157.2**	**221.4**	**197.5**	**208.4**

Source: EITI 2015: 107.

49 As such, the HDF was to assist Mongolia's overall efforts to comply with its obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR), to which Mongolia is a state party. Auteri (2013) underlines that the programme would align the state's goals with objectives of the ICESCR insofar as the HDF would expand citizens" access to national wealth and facilitate the protection of several ICESCR enumerated rights. The ICESCR obliges states parties to recognize rights to work (Article 6), social security (Article 9), adequate standards of living and freedom from hunger (Article 11), and the highest attainable standards of health and accessible healthcare (Article 12).

50 In June 2015, parliament began to debate of the draft of the Law on the Future Heritage Fund. The law is designed to save a certain percentage of revenues from mineral extraction in foreign assets in order to benefit future generations. If approved, the latter would replace the existing HDF in 2018 (EITI 2015: 108).

51 Own calculations based on data from the national statistics database. For further information, see Yeung and Howes 2015.

52 Although figures for 2015 are not available at the time of publication, it is expected that transfers to the HDF decreased in 2015 due to the downturn in commodity prices.

In May 2015, the parliament amended the Budget Law and the Human Development Fund Law in order to ensure that the benefits of mining revenues trickle down to rural communities and mining regions. Sixty-five per cent of mineral royalties revenues are now to be directed to the HDF and 5 per cent to the General Local Development Fund (EITI 2015: 107).[53] The purpose of this local fund is to support local development and to aim for equality of regions in Mongolia. In addition to royalties, the fund's revenues stream from (EITI 2015: 107):

- ✓ 50 per cent of the revenues from exploration and production licence fees;
- ✓ 25 per cent of total VAT from goods and services (except imported goods and services);
- ✓ grants and donations rendered by domestic NGOs and official foreign aid to support local development;
- ✓ transfers from lower level funds to upper level funds; and
- ✓ 30 per cent of the oil resource royalties.

Transfers from the General Local Development Fund to local budgets take into account the development index of local government, the size and density of the population, the remoteness and size of the territory and the tax initiatives of the local government (EITI 2015: 106). However, the allocated funds per head of population will be up to 10 per cent higher in areas where mining operations are taking place (EITI 2015: 106). Table 4 details key revenue streams at the sub-national level.

Table 4. Key Revenue Streams at the Sub-National Level, 2014 *(USD millions)*

	Key sub-national revenue streams	Per government reported data	
		Amount	%
Individual	Fee for water use	57.2	49.9 %
	Real estate tax	23.1	20.1 %
	Land fee	10.5	9.2 %
	Dividends on state investments	10.3	9.0 %
	Fee for use of mineral resources of wide spread	4.5	3.9 %
	Penalties	3.5	3.1 %
	Tax on vehicles and self-moving mechanisms	2.0	1.8 %
	Fee for recruiting foreign experts and workers	0.2	0.2 %
	50% Contribution to environmental protection special account	0.1	0.1 %
	Others	2.5	2.2 %
	Reimbursements	0.3	0.3 %
Aggregate	Support received as per PSA	0.3	0.2%
Grand Total		**114.6**	**100 %**

Source: Adapted from EITI 2015: 152-153.

In sum, the government has been multiplying efforts to funnel mining revenues towards social welfare policies. A priority has clearly been given to the allocation of resources for children's well-being such as children's social services, health and education. However, challenges remain, and, as emphasized by the Committee on the Rights of the Child (CRC), budgetary allocations for children will have to be sustained to respond to national and local needs for the promotion and protection of children's rights (CRC

[53] Effective date of the amendment is 1 January 2016. The remaining 30 per cent goes to the state budget, out of which 30 per cent goes to the local community.

2005: 3). Notable challenges are linked to the quality of services, as well as to the need for the government to establish a coherent poverty reduction strategy.

Concerns over the quality of health and education services are emerging. In 2012, 99 per cent of children of primary education age (6-11 years) and 93 per cent of children of secondary education age (12-15 years) attended school (National Statistics Office of Mongolia 2013: XXV). However, satisfaction with the quality of education in 2011 was at 57.9 per cent (UNDP 2013: 171). Most noticeably at the *soum* level,[54] issues are emerging linked to overcrowded classrooms, the availability of textbooks, a lack of qualified teachers, lack of heating in the classrooms, etc. Likewise, while Mongolia is equipped with a social health insurance system—the "citizens' health insurance"—access to adequate treatment from doctors and hospitals requires insured people to make supplementary payments from their own pockets, and as such, sickness has become a financial risk, with the concomitant implications for the rights of children to the highest attainable standard of health (GIZ n.d.).[55]

The other challenge for the government will be to continue to develop an overarching national plan and programme for poverty reduction, in accordance with article 27 of the CRC (CRC 2005: 12). The current administration is being pro-active with insuring the long-term benefits of mining revenues, notably by focusing on children. Kh. Gantsogt, State Secretary of the Ministry of Finance, emphasizes that "Mongolia stands for maximizing the benefits of mining and distributing the benefits on the principle of equity between the generations" (cited in UNDP 2013). In this spirit, the Ministry of Population Development and Social Protection was further created to design a long-term strategy for the overall development of the country, managing the delicate balance between saving for future generations, while investing in infrastructures and social sectors.

Finally, the harmonization of policies among ministries will be required, alongside close attention to the need to sustain social development expenditure despite competing envelopes such as infrastructures.[56]

In the following section, we expand the analysis to the overarching socio-environmental challenges linked to the mining sector and the safeguarding of children's rights.

4. Mining, Children and Rights

An evaluation of the extractive sector's capacity to take account of children's rights—which can be summarized under the four general principles of non-discrimination, best interests of the child, rights to life, survival and development, and right to be heard—implies requirements for policies and norm in specific areas, as discussed above. In view of the objectives of this study, we shall focus on two such areas: the need to include an assessment of the impact of policies on the rights of children and the need to consider children's rights within the broader familial, communal and social context. In this section, we begin by detailing further the social, environmental and economic context in which such an assessment of the rights of children is to be set.

[54] A *soum* is the lowest administrative unit in Mongolia.
[55] In 2011, GIZ launched a three-year project to support the reform of the Social Health Insurance in Mongolia in order to improve the operational capabilities of the related institutions of the SHI system on a sustainable basis.
[56] In the context of dropping public revenues, the Government of Mongolia is currently re-evaluating the future of the CMP. A 40 per cent budget reduction for the CMP was submitted to the parliament for 2016. Two options are being discussed for reducing the costs of the programmes in case this budget is approved: either giving up universal coverage and targeting only poor families, or retaining universal coverage while offering larger benefits to the poor (Lkhagvasuren 2015).

While Mongolia has a solid environmental legal framework for the mining sector,[57] monitoring and enforcement remain a pressing concern. It is noteworthy to recall that a Rights-Based Approach to Development for the particular context of mining suggests a need to give additional attention to the capacity of the state to protect against human rights abuses by a private company through appropriate policies, regulation, adjudication and effective enforcement; on the effectiveness of due diligence mechanisms put in place by corporate actors and their willingness to address adverse impact with which they are involved; and on the effective access of human rights victims to judicial and non-judicial remedy (Human Rights Council 2011: 4). In this section, we assess how Mongolia's mining regime is being implemented on the ground and, more importantly, what impact such a regime has on stakeholders' human rights and notably those of children. We observe that while the country's mining regime provides for solid socio-environmental safeguards, the implementation and enforcement of these safeguards requires further attention.

Environmental challenges

The Centre for Human Rights and Development observes that environmental issues remain one of the most pressing human rights concerns in the country (cited in Mendoza et al. 2012a: 18). It is estimated that 31 per cent of the country's population lives on degraded land, meaning a degradation estimate taking into account biomass, soil health, water quantity and biodiversity and range in severity (UNDP 2013: 191). Pressing environmental concerns in Mongolia partly stem from the country's legacy of unrestrained expansion of mining activities during the first two decades after the transition to the market economy.[58] According to the Mineral Resources Authority, 4,000 hectares of land have been adversely affected by mining in the country—500 mining sites affect 56 towns in 15 different provinces (cited in Mendoza et al. 2012a: 18).

A significant concern emerges over the Gobi region in particular, where environmental issues arising from mining development are amplified by the actual scale and number of projects in the region. Tavan Tolgoi, which is to become the world's largest coal mine, is located only 160 km from OT, while the other giant copper mine of Tsagaan Suvraga is 230 km north, while there are another five to six medium-sized mines within a 500 km radius (BIC 2012).

Water access and air quality are among the chief concerns raised by communities in mining areas, and most acutely in the Gobi around OT. Water is a particularly acute issue. For instance, OT will require an estimated 920 litres of water per second for the next 30 years (Watts 2011). With a shelf life ranging around 60 years, the mine's water consumption is one of the most serious concerns for local herders and environmentalists,[59] notably in light of the development of OT's second phase. Uncertainty remains and there appears to be some mistrust both towards the company's promises and towards the government's ability to monitor what is happening on the ground (USAID 2011: 8; CEE Bankwatch Network et al. 2016).[60] In particular, medium and long-term concerns exist over the impact which such increased activities will have

[57] The Mineral Law notably requires an Environmental Protection Plan (EPP) for exploration as well as an EPP and environmental impact assessments (EIAs) for mining licence holders.

[58] The nomadic and animist cultures in Mongolia, which greatly value the protection of the environment, still have great resonance today (Sukhgerel, D., Director of OT Watch, personal communication, October 2013).

[59] On the topic, notably see Goodland 2012 and OT Watch et al. 2012.

[60] Concerns are particularly acute in relation to the diversion of the Undai River which crosses OT's property. The mostly subterranean river replenishes springs and downstream wells. Yet, OT has "failed to present and publicly consult the Undai River diversion plans" (McGrath et al. 2012: 21).

on the rights of children, notably over access to water reserves and the degradation of the fragile eco-system.

Alongside the country's Mining Law, OT's Investment Agreement includes socio-environmental provisions that have been modelled on the industry's highest standards.[61] The agreement also translates concerns of local communities and the overall promotion of the development of the Southern Gobi region (OT 2013c). However, some tensions remain, notably with herders, who represent a third of the country's population. Some herders fear that the changing landscape will fragment and reduce grazing land for livestock, threaten and endanger wildlife, and challenge their livelihoods (USAID 2011: 3). In October 2012, and February 2013, local herders filed two complaints (with the support of the NGOs OT Watch and Gobi Soil) with the Compliance Advisor Ombudsman[62]—the independent recourse mechanism for the International Finance Corporation and Multilateral Investment Guarantee Agency—claiming that OT's use of land and water disrupts their nomadic way of life, and puts in jeopardy their indigenous culture and livelihood (CAO 2013). Furthermore, the complainants are arguing that "they have not been compensated or relocated appropriately, and question the project's due diligence, particularly around the issue of sustainable use of water in an arid area" (CAO 2013). As part of the CAO's dispute resolution mechanism, the parties selected an independent expert panel whose report widely confirmed the herders' claims (CAO 2015a). A tri-partite council involving the local government, herders' representatives and representatives from the company has been set up to implement the expert panel's representation, which are still ongoing (CAO 2015b; 2016).

Local development

With poverty levels reaching nearly 50 per cent in some rural areas (Awehali 2011), the local communities need to benefit from the increased revenues from mining, especially those directly affected by the extractive industry.

Excluding small-scale and artisanal mining, the extractive industry in the country employed 41,000 people in 2014 (EITI 2015: 50). In the same year, OT employed a total of 5,825 people—95.4 per cent of which were Mongolian nationals (EITI 2015: 205).[63] However, 2,515 of these jobs were categorized as permanent, leaving 56.8 per cent of such workforce under temporary contracts. Beyond the specific case of OT, McGrath et al. (2012: 21) noted that many Mongolian employed in the mining industry are in fact students on vocational training. The shortage of skilled labour in the country has also led mining companies (and construction companies) to hire foreign workers (World Bank 2009: 13, cited in Mendoza et al. 2012a: 14).

The fast-pace expansion of the sector did lead to an increase in educational opportunities, although the latter has not kept up with current demand. In addition to the 6,417 students who were trained by OT in 2013—at the cost of 5.2 million USD for the company—specialized training centres are now opening across the country.

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[61] Under Chapter 38, the Investment Agreement requires provisions to ensure: (i) independent reporting on the progress of the project's environmental protection plan and monitoring programme be undertaken every three years and that such reports shall be made public; (ii) the cost of eliminating material, adverse impacts on air, water, soil, animals and plants will be borne by the project; (iii) areas closed to further mining will receive environmental rehabilitation and potential hazards will be addressed to protect the public; (iv) a mine-closure plan will be financed through funds allocated to an escrow account beginning seven years before actual closure.

[62] The CAO responds to complaints from project-affected communities with the goal of enhancing social and environmental outcomes on the ground.

[63] OT's Investment Agreement further pledged that 90 per cent of its workers at the mine would be Mongolian during its operations (OT 2013e).

This is particularly relevant given the CRC's concerns for inadequate standards of living (CRC 2005: 13), and the importance of stable household income. However, since most jobs in the mining sector are occupied by men, women tend to miss out on the potential benefits associated with the country's mining boom in terms of employment (Khan et al. 2013). According to Cane (2015: 6), while there is a presence of women in the resource sector in Mongolia, the numbers are comparatively lower than those of men. For example, the author notes that women's employment at Oyu Tolgoi does not exceed 38 per cent of the workforce in any category, and is frequently well under 20 per cent: "When you consider how well Mongolian women fare in obtaining lower to middle-level employment nationwide, this is a very poor performance and leaves much room for improvement" (Cane 2015: 6). This can have further implications for children, as the CRC underscored in its concluding observations on Mongolia's last periodic review, due to the increasing number of families headed by a single parent and the often limited degree to which fathers generally assume their parental responsibilities (CRC 2005: 8).

As a result of the rapid development of mining projects in the Southern Gobi region, the sudden influx of migrating labour has become a significant local challenge. Such influx has raised concerns over a significant inflation of the price of local consumption goods, a lack of urban and infrastructure planning, as well as an increase in sex workers and a correlated rise in HIV/AIDS and other sexually transmitted diseases.[64] Other health hazards linked to the increase of mining activities are tuberculosis and respiratory disease, as well as alcohol-induced accidents (McGrath et al. 2012: 7).

These findings raise further concerns for children, since the CRC noted in 2005 the poor state of sanitation, environmental pollution problems and the limited access to clean and safe drinking water in the country. Furthermore, it noted that migrant children are often living without official registration and have very limited access to health and social services (CRC 2005: 12).

It is to be noted that these issues particularly resonate in the case of small-scale and artisanal mining (SSAM). While SSAM is a relatively new phenomenon in Mongolia,[65] an estimated 100,000 people work in the sector (SDC 2013c: 12). The World Bank estimates that altogether 250,000 people rely on the sector (World Bank 2008), and as such, SSAM remains the largest generator of rural income after agriculture. While the activity is mainly seasonal—in summer a diverse range of people such as herders, students, even government officials, take up the activity—it accounts for 20 percent of Mongolia's total rural workforce (Stacey 2014).

The violation of children's human rights has been widespread in the sector (SDC 2011: 7). The CRC underlined in 2005 "the high number of child domestic and rural workers and children working in very harmful conditions in gold and coal mines" (CRC 2005: 14). It is estimated that up to 40 per cent of miners are women—who would earn 50 per cent of their male counterparts in the SSAM sector (Purevjav 2011: 206)—and some estimates show that the same proportion would be children (Murray 2003, cited in CDSUW 2004: 23–24).[66] While most child labourers are young boys (with an average age of 14 years), girls are also reported to work in mining-related activities (ILO-IPEC

64 On the topic see McGrath et al. 2012; Cane 2015.

65 It emerged as a direct aftermath of the "shock therapy" package embraced by the country in the early 1990s. Amid the market reforms, unemployment and poverty levels rose steeply and, coupled with the end of the 1990s extreme *zud* (an extremely snowy and cold winter which hampers the livestock's ability to find fodder and most commonly results in large numbers of animals dying from starvation and the cold) with its severe impact on herders, people increasingly turned to artisanal mining as an economic activity of last resort.

66 According to Murray (2003), the majority of children are only involved in mining work during their school holidays (cited in CDSUW 2004: 23-24).

2006, cited in Mendoza et al. 2012a: 16). Whether full time or part-time on the weekend, children are found working in river mining, digging and transporting sediment, as well as in a range of activities in mining communities, notably household chores—such as preparation and delivery of food to miners—and working in offshoot industries such as restaurants within the vicinity of the mining site (Mendoza et al. 2012a: 16). As such, children are vulnerable to on-site injuries, as well as sickness derived from the activities, notably overtiredness, exposure to chemicals, respiratory diseases due to pollution in mining areas, and other diseases from lack of hygiene in mining locations (ILO-IPEC 2006, cited in Mendoza et al. 2012a: 16).

Historically, the government has been cautious in proposing any legislation for SSAM for fear of being perceived as supporting a sector that remains so unpopular with the public (SDC 2011: 22-23).[67] This is linked to the fact that in Mongolia, SSAM has been—and remains—attached to its legacy of serious environmental damages across the country, notably water and land pollution (due to some extent to the fact that the sector had been kept illegal).[68] Other factors contributing to the negative image of the sector include notably issues of tax evasion, conflict with herders and mining companies, rise in crime, additional pressure on local administrations (SDC 2011: 7).

For the most part, governmental initiatives have subscribed to the over-optimistic idea that SSAM was a temporary phenomenon and if kept illegal, it would eventually disappear (Sustainable artisanal mining employee, personal communications, October 2013).[69] In December 2010, a formal regulation (Resolution 308) was approved and small-scale mining became legal under certain conditions.[70] The legislation stipulates that miners must organize in "unregistered partnerships" in order to engage in extraction activities which are regulated by local administrations and limited to areas not yet licensed for exploration and exploitation (SDC 2011: 26).[71] Technically, the new legal provisions give artisanal miners the opportunity to scale up their activities into more formalized small-scale mining; have a plot of land upon which to legally mine;[72] have official workplaces; have a law regulating their activities; and become legitimate tax-paying citizens with full rights and responsibilities (SDC 2011). Such security would further encourage much-needed training for the sector, as 90 per cent of the workers are "non-professionals" (SDC employee, personal communications, October 2013).

67 A notable exception would be Sum governors, who, in light of their direct knowledge of the importance of the sector in terms of local livelihood, have traditionally been supportive of SSAM (Sustainable artisanal mining employee, personal communications, October 2013).

68 Furthermore, the widespread use of mercury, a practice which, although long made illegal in Mongolia, has been jeopardizing the health of these miners and their families, in addition to environmental contamination derived from the use of the metal (Mendoza et al. 2012a: 15).

69 Recognizing the importance of SSAM in absolute numbers and as a source of economic activity, as well as its incapacity to enforce its prohibition or regulate or tax it appropriately and the need to comply with international obligations on the environment and human rights (including on child labour issues), the Mongolian state, in collaboration with NGOs and international organizations, began studying regulatory options in the early 2000s (SDC 2011: 8; Purevjaj 2011: 197). Initial legal drafts were prepared in 2002. Early attempts at regulation, however, faced insurmountable implementation problems, according to SDC, because of inadequate preliminary research, and specifically lack of adequate consultation of the "ninjas" themselves (SDC 2011: 8). However, the approbation of such a law proved to be a politically contentious issue in itself, and successive electoral processes prevented any legislative resolution until 2011 (SDC 2013a: 3; 2011: 17).

70 The new Law also endorses a series of template documents such as the "Application for the Conclusion of a Contract on the Extraction of Minerals', "Contract on the Extraction of Minerals', a "Tripartite Contract on the Extraction of Minerals by Small-Scale Mines on Areas of Special License Holders', as well as norms such as "Instructions on Environmental Rehabilitation of Small-Scale Mines', "Rules for Occupational Safety in Small-Scale Mines', an "Information Form on Small-Scale Mining Activity', and "Forms for Planning and Reporting on the Measures to be Undertaken for the Protection of the Environment, its Rehabilitation and Occupational Safety" (SDC 2011: 26).

71 The government has authority over the organization of citizens engaged in small-scale mining, their demands, contractual issues, the size and limit of the land to be used for extraction, where to enrich ore, how to sell minerals, land rehabilitation and what is prohibited, as well as the rights and responsibilities of soum and district governors, the Citizens' Representative (Khural) and the state agency in charge of geology and mining issues, as well as small-scale mining partnerships (SDC 2011: 26).

72 Provided the deposits are of no commercial value for industrial exploitation or are already exploited waste deposits.

These needed regulations fill a void for the sector but they remain contentious and their implementation impacts have so far remained limited.[73] However, a year after the enactment of the legalization, 317 new partnerships had been established and 65.6 per cent of their members were enrolled in health insurance and 21.2 per cent in social insurance (Itty 2013). As of December 2015, 7,325 people had formally registered in the sector, 30 per cent of who were women (SDC 2016). It is to be noted that the annual income of these workers was a staggering 300 per cent above the country's minimum wage. While the number of registered partnerships has almost doubled in the initial years since the legalization of the sector, 89 per cent of artisanal small-scale mining (ASM) activities still remain informal (as of 2015) (SDC 2016). According to the SDC, this is mostly due to the small-scale artisanal miners' reluctance to pay taxes and a lack of access to viable land for the miners. However, in addition to a range of projects currently unfolding to further support the formalization of the sector, the Mineral Resource Authority of Mongolia's recent increase in allocation of ASM mining land is bound to substantially increase the possibilities for formalization (ARM and SCS Global Services 2014, 2015).

Given the importance of the sector in terms of rural employment and income, continued efforts towards the legislation of the SSAM are pivotal to the discussion over child rights and protection in rural areas across the country.[74]

Economically, the benefits of SSAM remain limited, notably in light of the lack of legal regulation of such activities (SDC 2011: 26-32). However, amid the economic downturn, the legalization process has allowed for the sector to make what the SDC refers to as "a tangible contribution" to the economy (SDC 2016). In 2015, the SSAM sector sold 6.7 tonnes of gold to the Bank of Mongolia—46.3 per cent of total gold-mining sector sales—generating USD 245 million in foreign exchange earnings and USD 6.1 million in royalties (SDC 2016).

While initiatives are multiplying, the sector appears to remain in a particular uncertain framework by which any projects initiated in the sector run the risk to be read as an attempt to formalize the sector. The forthcoming discussion over the adoption of an overall new Mineral Law will require that close attention be paid to SSAM and the risks of reverting to the criminalization of the sector.

[73] Particularly contentious issues among parliamentarians included the following: attempts to scale up artisanal mining into small-scale mining through miners partnerships and how many miners these should include; underground mining; whether basic deposits should be the object of SSAM; the amount of land that should be allocated for SSAM; the use of explosives; restrictions on equipment capacity; allocation of responsibility for occupational health and safety; environmental rehabilitation measures and costs and the use of mercury; depth of digging (SDC 2011: 24). Furthermore, the new legislation has failed to tackle the practice whereby legal license owners are subcontracting their plot to illegal miners, and in so doing, exposing the latter to serious human rights concerns, notably a weak safety environment.

[74] A wide range of organizations are currently working on projects to support the sector, notably World Vision, which is working specifically on the impact of SSM on children in the country; the World Health Organization, which, in partnership with the Ministry of Health, is working on the health impacts and access to healthcare in the sector; and the Asia Foundation. Furthermore, as of May 2013, in association with 27 NGOs, small-scale miners have created their own association (Mongolian Artisanal Miners' United Umbrella Association NGO), with the objective of developing socially and environmentally responsible SSAM.

Box 1. International experiences with SSAM: The United Nations Economic Commission for Africa (UNECA)

The National Human Rights Commission of Mongolia (2012) measures echo worldwide experiences regarding SSAM. For example, in December 2011, the African Union endorsed the recommendations of a report of the United Nations Economic Commission for Africa (UNECA) which used a rights-based approach to SSAM. This policy document recommends among other things: regulating informal SSAM and assuring a legal regime that gives SSAM right holders enough land, duration of rights and security of tenure. It is within this renewed policy context that the African Union and UNECA have called in the same document for "enforcing international norms prohibiting child labour" (see annex 1).

Rights for communities to participate

The UN Committee on the Rights of the Child observes that traditional attitudes in Mongolia have limited children's right to freely express their views within the community at large. For this reason, the CRC recommended that the government undertake a regular review of the extent to which children's views are taken into consideration and of their impact on policy making and programme implementation (CRC 2005: 7).

In the context of mining and local development, the recent amendments of the Mining Law (Article 42.1) states that a "mining licence holder shall work in cooperation with the local administrative bodies where the mineral deposit is located and conclude an agreement on matters of environmental protection, voluntarily supporting local community development". Furthermore, OT's Investment Agreement also gives centre-stage to community relations (OT 2013a, 2013b).

While recent acknowledgements of the importance of local community participation in the country's legal framework are bringing increasing attention to the issue, concerns over the implementation process of the laws have multiplied since the beginning of the mining boom. For example, issues linked to participatory processes were raised throughout the negotiation process of OT's investment agreement, notably in relation to the legitimacy of the selection of the parties to represent the "local communities" in talks with the mining authority (NGO officer, personal communications, October 2013; OT Watch et al. 2012: 6). The quality of the participatory processes and, ultimately, of the consent provided by local communities, are complicated by the uniqueness of Mongolia's demography, especially in the Gobi, which is sparsely populated. The lack of communication between affected families and communities is a disadvantage in terms of access to information and bargaining power. The 2014 reform of the minerals law included a provision for community development agreements which attempted to tackle such concerns.

McGrath et al. (2012) further note that citizens and local administrations have expressed feelings of marginalization relating to decision making on projects and that the insufficiency of information, discussion or consultation with the impacted communities was problematic. Recent reforms provide some governmental framework for corporate social responsibility initiatives in which companies develop plans in consultation with local residents, but it is too soon to determine whether the established accountability mechanisms will be adequate (see annex 3 for a comparative experience).

Following the international conference "Mining and Human Rights in Mongolia" (held

10-11 October 2012 in Ulan Bator), the National Human Rights Commission of Mongolia and the conference participants called for the parliament to ratify the Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters (the Aarhus Convention) in order to "ensure public access to information on the environment, public participation in decision-making and to remedy already violated rights" (National Human Rights Commission of Mongolia 2012).[75] Additionally, the need to further open political spaces for communities was emphasized and the group called for the:

- creation of a domestic legal framework that allows meaningful and active participation of the Governors of the Province, the soum (administrative unit of Province), the Citizen's Representative Khural, and the public;
- creation of the required mechanisms for citizens, civil society and other interested parties to claim for damages to the environment and Mongolian citizens caused by mining activities, for example, to lodge public interest claims in courts and tribunals;
- creation of enforceable regulation to ensure compliance of mining companies' technical and environmental restoration work. Through a participatory process, allow, and integrate, feedback about the appropriateness of the reclamation process and outcomes by local residents;
- need for licensing regulation to ensure that infrastructure issues, including railway and roads, have been fully resolved to the satisfaction of local residents prior to the exploitation of large-scale mineral resources;
- assignment of a local representative of the National Human Rights Commission of Mongolia to investigate and resolve human rights violations and complaints promptly in local areas. Ensure the efficient implementation of one of the mandates of the NHRCM: to advance public knowledge and awareness of human rights;
- establishment of a mechanism, composed of representatives of local administrative bodies, mining companies, civil society and other relevant organizations charged with resolving conflicts and complaints that have occurred during mining activities—independently and promptly. The process to establish this mechanism has to be transparent to ensure its credibility. (National Human Rights Commission of Mongolia 2012).

Such conclusions over the need to further open platforms for citizens to participate in the country's changing socio-economic landscape further point towards current opportunities to improve the country's legal framework and the related need to build capacity to ensure that such legal provisions are monitored and regulated. In turn, such changes would ensure a greater voice of citizens in discussing social policy, especially regarding children's rights.

5. Conclusion

Future challenges and opportunities

In Mongolia, political space for discussion has broadened considerably and the mining sector is being greatly debated. While the mining regime has clearly contributed to the development of the country's resource exploitation, questions are emerging in relation to the sheer pace of the expansion of the sector and the institutional capacity of the state to monitor and regulate the booming sector. It appears that while Mongolia has solid socio-environmental laws for the sector, environmental damage and social rifts

[75] As of today, Mongolia is not a signatory of the Aarhus Convention.

across the country's mining regions remain a concern. The debate further extends over the expected correlation between the expansion of the sector and the reduction of poverty, as well as over the financing of social policies.

The experience of Mongolia concerning the financing of social policies with a view to enhancing children's rights through mineral rents is of considerable importance as it is unfolding in the midst of a fundamental re-examination at the international level over the role and place which the extractive sector has occupied in the past in the development of the countries concerned. This discussion is further reinforced by the recent decline in oil and commodity prices, as well as the slowing demand from China.

By way of illustration, the African Mining Vision (AMV) adopted in 2009 by the Heads of States of the African Union foresees a change of paradigm away from the former enclave export-driven model to one in which the mining sector plays a transformative role and serves as a catalyst to spur social and economic development which will be intergenerational, more equitable and respectful of the environment.[76] Among the key policy recommendations formulated in the report, which sets out guidelines to permit the implementation of the AMV, are those concerning the capture, management and sharing of mineral revenue. The report concludes:

> The effective use of mineral revenue in long-term physical and social infrastructure marks the prudent transformation of finite mineral capital into other forms of long term capital—to ensure inter-generational equity—and is enhanced by transparency in collection, as well as in use. Systems that allocate part of the mineral revenue to communities near mining areas should be designed to ensure lasting benefits beyond the life of the mine (African Union and UNECA 2011: 99).

In Africa, until recently, emphasis has been placed on maximizing revenue flows from mining in order to build physical capital with much less attention paid to the critical importance of human capital and even less placed on understanding how to ensure intergenerational equity in a lasting manner as, for example, by financing social policies that enhance children's rights. The change of paradigm called for by the AMV would require carefully revisiting the manner in which these issues have been framed in the past.

Such reflection may be seen as complementary to a rights-based approach to the development of the mining sector. The approach requires an analysis which transcends a narrow focus on the mitigation of the negative social, economic and environmental impacts of the mining sector. Rather, it calls for a broader perspective which considers not only the investment-led development model, but also the particular politics of mining embedded within the liberalized norms promoted by multilateral actors in resource-rich countries in the past 20 years.[77] In such light, these policies can be seen in a causal relationship with the environmental, social, economic, and political implications and human rights costs of the pursuit of mining governance designed and promoted by externally driven guidelines. It further sheds light on how socio-environmental safeguards embedded in mining regimes can be seen as only secondary to the promotion and pursuit of an export-led growth model driven by large-scale industrial mining.

76 See African Union and UNECA 2011.
77 The Extractive Industry Review, which was established in 2001 to independently evaluate the World Bank Group's involvement in extractive industries, observed that under the leadership of the Bank, no less than 100 countries had reformed their laws, policies and institutions during the 1990s (EIR 2003: 10).

Attempts to deviate from liberal norms underline the need for public debate focused on the examination of appropriate policies and institutions aimed at resolving the internal legitimacy problems increasingly faced by states. The *regulation-legitimation* dynamic must include political processes through which a human rights-based approach to development could be realized. A shift in such practices would require re-assessing policy prescriptions in the light of their actual impact on the country's democratic institutions, and strengthening processes required to ensure a rights-based approach to development and consequently addressing the rights of children in a comprehensive and sustainable manner.

This international reflection closely resonates with the case of Mongolia. The country is itself rethinking the normative framework that has presided over the past development of the country's mining sector. Mongolia is considering alternative approaches and policy measures to ensure that the mobilization of domestic resources from the mining sector be directed towards furthering social policies. These policies represent the counterpart of a process of transforming the productive system and promoting intergenerational and equitable social development which is respectful of the environment. As such, and as reiterated by the Convention on the Rights of the Child (CRC 2005: 7), the National Human Rights Commission of Mongolia (2012) underlines the need to further integrate issues relevant to the rights of children, notably by calling for greater visibility of child rights in public debates and policy discussions around the extractive industries and, crucially, ensuring that children are able to voice their positions.

Policy recommendations

In this context, we make the following policy recommendations for Mongolia:

1. **Mongolia should establish a coherent long-term poverty reduction strategy** that encompasses both the economic benefits and potential harm of extractive industries as well as the effective mobilization of revenue generated by it. Such a strategy should transcend the narrow focus on the mitigation of the negative social, economic and environmental impacts of the mining sector. It should adopt a broader perspective, considering not only the investment-led development model, but also the particular politics of mining embedded within this model as promoted by multilateral actors in resource-rich countries in the past 20 years. In other words, debate should not be constrained by the liberal mining framework, and the following should legitimately be up for debate, including:
    - the priority given to the private sector for mining development;
    - the priority given to mining over other types of territorial use;
    - the priority given to an exportable resource over other mineral resources;
    - the priority given to the industrial sector over artisanal and small mines; and
    - the level of legal protection of mining rights.
2. **Socio-environmental, regulation and enforcement capacity should be strengthened**, especially regarding water access and air quality in mining areas. Following a human rights approach, this process would include:
    - identifying instances of discrimination, especially against children. Attention should be given to the issue of migrating labour, especially as it affects the rights of children;
    - finding sufficient, relevant and disaggregated data;

- putting in place monitoring systems and mechanisms for remedy;
- providing for children's participation by, inter alia, facilitating their access to information;
- including an assessment of the impact of policies on the rights of children; and
- considering children's rights within the broader familial, communal and social context. Particular attention should be given to water and land use for extractive activities, and their potential impact on their indigenous culture and livelihood.

3. In that spirit, **Mongolia should implement the National Human Rights Commission of Mongolia's recommendations** regarding the ratification of the Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters (the Aarhus Convention) in order to "ensure public access to information on the environment, public participation in decision-making and to remedy already violated rights" (NHRCM 2012).
4. **Mongolia should put in place effective prevention and remedy mechanisms for human rights abuses by a private company** through appropriate policies, regulation, adjudication and effective enforcement, such as:
    - ensuring the effectiveness of due diligence mechanisms put in place by corporate actors and their willingness to address adverse impact with which they are involved; and
    - ensuring effective access of human rights victims to judicial and non-judicial remedy.
5. **Mongolia should pursue its efforts towards the legalization, regulation and monitoring of SSAM using a rights-based approach**.

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Annex

Annex 1: The extractive sector, political identities, processes of legitimation and access to rights

Key to the legitimation of social and material claims in legal entitlements are ideas or procedural fairness (Szablowski 2007: 16-17). There are, however, important distinctions to be made between legitimation processes that depend on the accountability mechanisms put in place by national democratic institutions and those that depend more heavily on other political dynamics deployed in international or transnational settings.

Important insights emerge from the recognition of the conceptually distinct roles of *law-takers* and *legitimating audiences* as a function of which *law-makers* deploy their legitimating discourses and strategies. Within a national context, the audience to be convinced of the legitimacy of a legal order usually overlaps with the actors that are subject to it, whereas in transnational law-making, the legitimating audience for a given normative framework (say, environmentally preoccupied investors assessing a company's compliance to environmental standards) can be completely distinct from law-takers (local communities affected by contamination) (Szablowski 2007:59). In the context of such "dissociated audiences" (*i.e.* when legitimating audiences are distinct from law-takers), human rights language is likely to function as a legitimation strategy quite independently of the actual constraints imposed on the actions and practices of powerful actors – and of its empowering effect on the nominal right holders.

Regarding the rights of children, political identities formulated in terms of "needs" of "rights" have profound implications for the kind of requirement placed on policy-making, as is illustrated in table 1 bellow. In this sense, the reforms applied globally to the extractive sector contribute to the redefinition of the responsibilities and rights of different actors, including issues related to the relationship among actors and between them and the state, and in this sense condition as well the very notion of democratic citizenship (Campbell 2000; 2009). Analysis in this area is in essence context-specific. Indeed, the notion that once the "right" institutions are put in place, positive outcomes should automatically ensue is neither theoretically valid (Dietsche 2012), nor empirically demonstrated (Campbell 2004 and 2009; Doran 2005).[78] A key element is the issue of "how policy-makers choose to protect which rights, to what extent and under what conditions" (Dietsche 2012). In analysing the implications of institutional arrangements, it is therefore necessary to take into account the interactions that condition, restrain or shape the political space, as well as the specific historical context in which political choices are made.

[78] For an example related to certification schemes applied to "conflict minerals" in the Democratic Republic of Congo, see de Failly et al. (2013).

Table 1: Needs-based Approaches vs. Rights-based Approaches

Needs-Based Approaches	**Rights-based Approaches**
Action is **voluntary** or optional	Action is **mandatory**
People have **needs** which should be met, and these needs can be prioritized	People have **legally** established claims and entitlements
Poor people **deserve** help as the object of charity	Poor people are **entitled** to help as the subject of rights
Some people may have to be **left out** (i.e. target can be less than 100%)	**All people** have the same right to fulfill their potential and should be assisted to do so (i.e. the target is 100%)
People affected by development work are **passive beneficiaries**; they can be **invited** to participate in order to improve the effectiveness of programmes or projects	People affected by development work are **active participants** by right
Some needs may not be recognised in some **cultures**	Rights are **universal** and **inalienable**, they cannot be diluted or taken away
Power structures are too difficult to change and **pragmatic** ways need to be found to work within them	Power structures that block progress in realizing human rights must be **effectively changed**
Development is a **technocratic** process and should be led by technical "experts" who know best	Development actors must **empower** rights holders to claim their rights and be involved in public decision making
There is a "**hierarchy" of needs** and some needs are nearly always more important than others	Rights are **indivisible** and **interdependent**, though in any situation some practical prioritization may be required

Source: Adapted from Save the Children 2005: 23

Annex 2: Artisanal and small-scale mining in Africa

"The AMV (African Mining Vision) foresees a mining sector that is safe, healthy, gender and ethnically-inclusive, environmentally-friendly and socially responsible. It aspires to harnessing the full potential of [Artisanal Small-Scale Mining (ASM)] in stimulating local and national entrepreneurship and in improving livelihoods. It also aims to promote an integrated approach to rural social and economic development. The AMV further emphasizes the aspirations of the Yaounde Vision for ASM which was adopted in 2002 […].

Along this perspective, ASM policy has to be formulated and implemented as part of a broad rural development strategy, and should include:

- Regularizing informal ASM;
- Simplifying and decentralizing procedures for acquiring ASM rights;
- Providing a realistic implementation plan, including institutional capacity enhancement;
- Assisting miners to graduate from subsistence to sustainable businesses;
- Assuring a legal regime that gives ASM right holders enough land, duration of rights and security of tenure;
- Providing accessible institutional, technical and financial support;
- Encouraging support for ASM from the more established private sector (including [Large-scale Mining]);
- Expanding exploration work that leads to the designation and allocation of areas for ASM;
- Ensuring regional and international cooperation to address the challenges of conflict minerals;
- Raising capacity locally to run tracking and certification schemes before enforcing bans on transporting non-compliant minerals;
- Enforcing international norms prohibiting child labour;
- Exploring and launching measures to redress discrimination against women, whether due to the law or operation in practice; and
- Promoting sub-regional cooperation in technology development, research, construction of appropriate plant and machinery, technical standards, compilation of a database of local capacity and generation of financial resources".

Source: African Union and UNECA. 2011. *Minerals and Africa's Development. The International Study Group Report on Africa's Mineral Regimes*. December, p.79.

Annex 3: Corporate social responsibility initiatives under the African Mining Vision

"From a policy perspective, CSR [Corporate Social Responsibility] initiatives should not be considered a substitute for government responsibility towards its citizens in providing basic infrastructure and other public goods. Indeed, CSR initiatives should complement government e efforts through local government institutions and local authorities. The framework that a government chooses to entrench CSR should be clear about the responsibilities of mining companies and which responsibilities should be matched with and communicated to mining communities.

The different types of frameworks should be considered part of a national policy debate on the mining industry's obligations regarding social development objectives. Without such debate, there is danger that the CSR requirements in a jurisdiction will be left to the industry to determine. This ad hoc approach can lead to uncertainty of how much should be spent on CSR and what types of CSR projects should be developed as well as the mechanisms for their development. Indicators around assessing the impact of good CSR projects must be built into the framework and applied by a range of stakeholders, such as civil society. The framework must focus on stakeholder consultation and allow for review of obligations and commitments. This review must be based on reporting requirements that should be part of the CSR framework".

Source: African Union and UNECA. 2011. *Minerals and Africa's Development. The International Study Group Report on Africa's Mineral Regimes*. December, p.88-89.