

Transparency and Public Participation In Madagascar Environmental Law Case study: Mining activities

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Abstract:

This article pointed out the importance of transparency and public involvement in decision-making process. Mining in Madagascar has tremendous potential to further the country's development but is the most controversial area of economic development. So while although there are concerns about participation in decision-making more generally in Madagascar, participation in the mining sector is the most sensitive and high profile area and thus an appropriate field of study. As a recommendation, the study proposed that the new mining code should include practical provisions to enable the public involvement. Also, it argues that the use of Malagasy traditional form of participation may help to the promotion of participation rights.

Keywords: Public participation, access to information, mining governance, Aarhus Convention

Introduction:

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Madagascar is a huge island of 597,000 km², located in the Indian Ocean, in Southeast Africa. With its area, it is the world's fourth largest island. Because of its rich biodiversity and natural resources, Madagascar attracts different people such as scientists, tourists, and investors. Besides, the country has established a goal: to be a country ruled by law. Therefore, many efforts have been made, by the institutions to enact and to apply the rules.

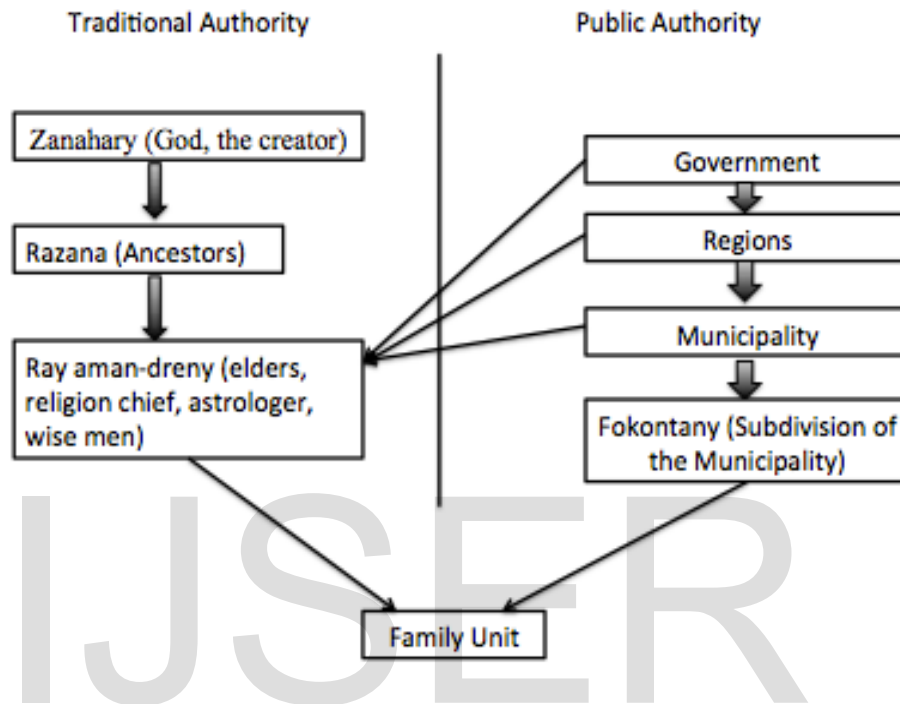
The environment constitutes a tremendous potential for the country's development, and the law has a role to play to ensure its good management. Indeed, the establishment of the Green economy and the reconciliation of the population with its environment to promote sustainable development are among the main goal of the government.² In response to it, the legal concept "transparency and public participation rights" merits our attention and discussion. The reason is that the environmental issues are not only the affairs of the leaders of government but concern all the population. Without public involvement, the protection of the environment will be difficult. Meanwhile, there is high demand for public participation in Madagascar society.³

Traditional authorities (elders within the community) and the citizens want to have input on decision having an impact on their lives. NGOs and some activists working on the promotion of environmental protection, apply pressure to the government for a better management of the natural resources, and for further respect of environmental rights.

² See The National Plan of Development (NPD), ... Available at <http://www.primature.gov.mg/plan-national-de-developpement-pnd/>

³ See Randria, "Reform of the Mining Code", (available at http://www.newsmada.com/2017/02/02/amendements-au-code-minier-le-sort-de-la-majorite-a-prioriser-selon-le-collectif-tany/?utm_source=dlvr.it&utm_medium=facebook)

Malagasy traditional institution



(Source: Heriniaina Andriananja, Katia Radja and Nicolas Sirven in “Ties Network in Manjakatempo, Madagascar: The Self-governance of Dry Forest, 2006, page 33)

Madagascar society is a very organised structure. This figure represents its functioning. In Madagascar, there is a coexistence of two kinds of authority within the community: one is the traditional authority, and the other is the public agency. It is important to notice that the traditional power is not a formal institution established by the law as like as the public body is, but it may have a significant influence on the organisation of the community. Also, the public authority often cooperates with the traditional authority, when dealing with critical issues.⁴

⁴ See Heriniaina Andriananja, Katia Radja and Nicolas Sirven in “Ties Network in Manjakatempo, Madagascar: The Self-governance of Dry Forest, 2006, page 33

One of the traditional values having a prominent place in Madagascar community is called “FIHAVANANA”. It is a concept based on the belief that relationship is more important than money. Accordingly, each member of the community considers themselves as having one blood, and whatever happens to one individual will affect all. The spirit of goodwill and friendship constitutes the essential key to this concept “FIHAVANANA”. It implies that in every event happening within the society, each member is concerned. The sense of ownership of every decision, affecting the community, benefits from this concept. The “Ray aman-dreny” (elders of the community) are consulted by the “Family Unit” (member of the community) when they want to do some activities such as marriage, or planting rice field, so that, all the communities will be involved. Besides, the government agencies used to have contact with the elders of the communities when they want to do something in the village or city.⁵

As well, the concept of “DINA” has a valuable place in the Malagasy society. It is a “local convention” that each member of the community agreed to respect. It may include provisions relating to different aspects of the community life such as the security of the citizens, the use of the land and other natural resources. DINA also is a kind of community court, which aims to solve locally the dispute that the member of the community is facing. The elders lead the DINA, with the assistance of the other members of the community.⁶ This traditional institution is very helpful because it reduces the cases going to Court and may have an efficient result. The DINA may have legally binding effect after its authentication by the public prosecutor of the Tribunal of First Instance, and the authorization from the administrative authority. In the hierarchy of norms in Madagascar, the DINA is at the lower level: Constitution, Laws and regulations, and at the lowest level is the DINA. It is organised by the legislation of 2001-004 related to the implementation of DINA.⁷

⁵ Supra note 4

⁶ See Philippe Karpe, “L'indispensable restructuration du droit environnemental malgache” (The necessity of restructuration of Madagascar Environmental Law), *Études rurales*, 178 | 2006, 113-128.

⁷ Ibid

The fact that the citizens are very sensitive to the respect of these traditional values reinforces the need for transparency of public participation in Madagascar environmental law.

Mining in Madagascar

Mining in Madagascar has tremendous potential to further the country's development but is the most controversial area of economic development. The new Mining Law is being developed partly in response to those concerns. So while although there are concerns about participation in decision-making more generally in Madagascar, participation in the mining sector is the most sensitive and high profile area and thus an appropriate field of study. Social problems, insecurity, and poverty could be alleviated if the population has room to participate actively in the decision-making process. It starts with the reasonable access to environmental information or the respect for the transparency principle. Then, the informed citizens could be involved efficiently in taking decisions. Despite the fact that Madagascar has provisions regarding transparency and participation rights, its application is facing some problems. This is what provides the justification for exploring the extent to which transparency and public participation rights exist and are applied in Madagascar Environmental Law.

The concept of transparency

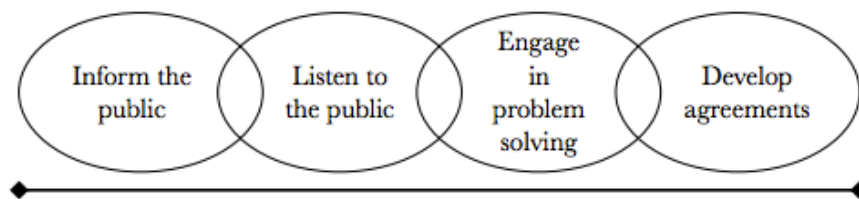
The concept of transparency, applied to environmental law, is a principle often used in the management of the public funds. In this principle, the citizens should have access to information related to the utilisation of the public resources by government. Therefore, the public authority should respect the accounting rule, in which, the revenue and the expense of an entity, should be registered on a particular paper (e.g.: Budget). The aim of this document is for the accountability of the management, and to build trust between the government and the citizens. In a democratic country, the representatives of the people must vote the state budget to authorise the use of the public resources by the government. The rationale behind

this is to seek the consent of the citizens through their representatives: it is one form of democracy.

Back to the concept of transparency in environmental law, the access to the environmental information is the first pillar of the “democratisation of the management system of the environment”. Due to some factors such as the environmental degradation, climatic changes, the concern about the preservation of the environment gain place within the international community. Therefore, it is commonly agreed that environmental issues are best handled with public participation.⁸

Relation between transparency and participation rights

There is a correlation between transparency and participation rights. In fact, if we refer to the definition of what participation is, it is best understood as a continuum. It has four major points, which are: Inform the public; Listen to the public; Engage in problem-solving; Develop agreements.⁹



As we can see in that figure, the access to information is a vital point to enable the public participation in decision-making process. At this point, access to environmental information, and participation rights are interdependent. The freedom of information, or the right to obtain information, in possession of the government in response to a specific request, enables the public to examine the data

⁸ Supra note 7

⁹ See the International Association for Public Participation’s Public Participation Spectrum, Available at <http://iap2.org/practitionertools/index.shtml>.

(raw and interpreted) that the government considers in connection with environmental decisions.¹⁰ Without such access to information, the public participation in decision-making process would seldom advance beyond shots in the dark.¹¹ The government agencies might have greater success in problem-solving by working collaboratively with the public to find a solution that will enjoy broad support.¹²

Global relevance of Aarhus Convention

The Aarhus Convention's full name is the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.

This Convention was adopted under the auspices of the United Nations Economic Commission for Europe (UNECE) on 25 June 1998. It has entered into force on 30 October 2001. At present, it has 47 parties, from the UNECE region, including the EU, and all EU Member States, and countries from Central and Eastern Europe, the Caucasus and Central Asia.¹³ Although regional in scope, the Aarhus Convention membership is open to non-UNECE members, upon approval by the Meeting of Parties.¹⁴ The Convention has a global relevance as it is considered as the best international practice in promoting public participation.¹⁵ The reason is that: "Aarhus Convention is a fruit of the wider international environmental and humans rights laws considering that it was inspired by, and firmly rooted in a number of

¹⁰ See CHRISTOPHER M. JOHNSON, *Defining the content of the right to information* (Sierra Club Legal Defense Fund 1992).

¹¹ See Neil A.F. Popovic, *The Right to Participate in Decisions That Affect the Environment*, at 12

¹² See James L. Creighton, "The Public Participation Handbook: Making Better Decisions Through Citizen Involvement", at 10

¹³ The parties are Albania, Armenia, Austria, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, European Union, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Luxembourg, Malta, Moldova, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Tajikistan, The Former Yugoslav Republic of Macedonia, Turkmenistan, Ukraine, United Kingdom.

¹⁴ See Art 19 (3)

¹⁵ See Uzuazo Etemire, "Law and Practice on Public Participation in Environmental Matters: The Nigerian Example in Transnational Comparative Perspective", *Introduction*

such key international initiatives.”¹⁶ This Convention recognises the link between participation rights and human rights. Indeed, in its preamble, it makes a reference to Principle 1 of 1972 Stockholm Declaration of the United Nations Conference on the Human Environment.¹⁷ It is also the only legally binding international instrument, enshrining the principle 10 of the Rio Declaration.¹⁸ As well, it makes a reference to the World Charter for nature. The UN Secretary Ban Ki-Moon stated that: “The Aarhus Convention is more critical than ever. This important treaty, which combines the protections of the environment and human rights, may help us facing the today's environmental challenges such as the climate change, and the water pollution. Also, the treaty's critical focus on involving the public is helping to keep governments accountable.”¹⁹ Besides, many International Financial Institutions (IFI) members have a binding legal obligation to promote the principle found in the Aarhus Convention, in the policies, projects, and procedures of IFIs, when dealing with environmental matters.²⁰

The influence of Aarhus Convention in developing countries

The Aarhus Convention's principles could be criticized for being western in focus, but this is unfounded because of the widespread interest in applying similar principles in developing countries across the world as this section goes on to argue. Hence it is not inappropriate to look to the Aarhus Convention in the context of developing Malagasy participation provisions.

¹⁶ Supra note 15

¹⁷ Adopted by UN Conference on the Human Environment, 5-16 June 1972 (1972) 11 ILM 1416

¹⁸ Other important global non-binding instrument exists such as the UNEP Bali Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters (2010). However, the Aarhus Convention is the only generator of hard law on Principle 10.

¹⁹ See Secretary-General's message to the fourth session of the Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters... Available at <https://www.un.org/sg/en/content/sg/statement/2011-07-01/secretary-generals-message-fourth-session-meeting-parties-convention>

²⁰ See Aarhus Convention Parties Agree to Promote Convention in IFIs ... Available at <http://sdg.iisd.org/news/aarhus-convention-parties-agree-to-promote-convention-in-ifis/>

Since 2010, the democratization of environmental governance has received a substantial boost with the development and adoption of Bali Guidelines: “Guidelines for the Development of National Legislation on Information, Public Participation and Access to Justice in Environmental Matters.”²¹ In 2008, the UNEP Council Governance appointed some high-level experts from different regions of the world, to draft the Bali Guidelines.²² It is a soft law instrument developed with the participation of nations and civil society groups around the world and adopted by the UNEP Council Governance.

An African scholar, Uzuazo Etemire, in his book “Law and Practice on Public Participation in Environmental Matters: The Nigerian Example in Transnational Comparative Perspective”, pointed out the influence that the Aarhus Convention have on the African continent, especially in the formulation of law provisions, regarding participation rights.²³ Indeed, in a United Nation Economic Commission for Africa (UNECA) report on environmental public participation in Africa, embraces and acknowledges the Aarhus convention as a “model regime for public participation”.²⁴

The actual position of Madagascar Environmental Law

The changing nature of the environment reveals new challenges and trends both at the National and International level. As the country continues to face environmental challenges, it is now also facing new environmental risks, which include chemicals management, hazardous waste management (e.g.: waste from electrical and electronic equipment), climate change, and different sources of pollution.²⁵

Madagascar's unique Biodiversity and natural resources constitute a national wealth and a global natural heritage that the country has the responsibility to

²¹ See Uzuazo Etemire, “Insights on the UNEP Bali Guidelines and the Development of Environmental Democratic Rights”, Introduction.

²² Ibid

²³ See Uzuazo Etemire, “Law and Practice on Public Participation in Environmental Matters: The Nigerian Example in Transnational Comparative Perspective”. 17

²⁴ See UNECA, Improving Public Participation in the Sustainable Development of Mineral resources in Africa (Addis-Ababa: UNECA, 2004) 15-16 and 37

²⁵ See preamble of the Malagasy Charter of the Environment

preserve for present and future generations. The natural resources of Madagascar as natural capital form the basis of its sustainable development, both economic and social, and constitute an essential key to the reduction of poverty in the country.

The Malagasy Constitution, as the fundamental law of the country, recognises the principle of sustainable development, which includes the rational and equitable management of natural resources, the transparency and good governance in the conduct of public affairs, and respect for fundamental rights and freedom.²⁶ Also, in its Article 37, the Constitution states: “ The government guarantees the freedom of enterprise within the limits of respects for... the environment”. Besides, the “Malagasy Charter of the Environment” (Charte de l’environnement) constitutes an essential legal tool for the promotion of environmental protection in Madagascar. As stated by the Article 2 of this law, its purpose is to define the principles and general framework for the country's environmental policy.²⁷ Concerning the access to environmental information and public participation in environmental decision-making, it is important to notice that the country has adopted some provisions relating to it. These provisions are in Article 7 and Article 14 of the Charter mentioned above.

Existing Institutions supporting public participation

In Madagascar, there are some institutions, which may support the public participation, in a case of violations of rights:

First of all, the Administrative Tribunal, which is a particular branch of the Court System in Madagascar, may consider claims against the act, and decisions of the government. It is an institution regulated by the Law 2001-025 related to the Administrative and Financial Tribunal. Its composition is as follows: president, counsellors, State Attorney, Clerk.²⁸ The procedure used before this court is mainly

²⁶ See preamble of Madagascar Constitution... Available at <http://www.hcc.gov.mg/wp-content/uploads/2015/09/CONSTITUTION-IV.pdf>

²⁷ See Law 2015-003 named “the Malagasy Charter of the Environment” ... Available at http://www.assemblee-nationale.mg/wp-content/uploads/2015/01/Loi-n%C2%B02015-003_fr.pdf

²⁸ See Art 2 of the Law 2001-025... Available at http://www.mefb.gov.mg/textes_lois/dcp/loi_2001_025.pdf

in written form. The decision of Tribunal may be: annulling the decision of the public authority if it is found illegal, or maintain it if the act is considered as legal. The existence of this Administrative Tribunal in Madagascar may contribute to the respect of the rule of law. However, the fact that this Tribunal is not yet implemented in the different administrative divisions of Madagascar constitutes a block for this goal. Actually, the Administrative Tribunal is based in the capital, thus making it relatively inaccessible for many citizens. Indeed, the problem of independence of the judicial branch from the executive is still a major challenge for the promotion of justice in Madagascar.²⁹

Secondly, NGO's are the most important key, as an institution, supporting public participation. NGO's have the advantage to be closer to the citizens from the local community. Also, the member of NGO often has more knowledge of the law and can give support to the population, in need of assistance. Moreover, NGO's can make pressure on the government for respecting citizen rights. In doing so, NGO's often use the media, and the contact with foreign countries embassy, to influence in some way the decision of the government.³⁰

Finally, traditional institution like the "DINA" may be used to solve environmental issues, and could be a mechanism for public participation. The "DINA" as already mentioned earlier is a local jurisdiction, lead by the elders of the community. In some way, it can help to settle the dispute that may happen within the society. For example, in a case that the population has not been consulted for the implementation of a mining project, and contest the functioning of the company, the company may come to the elders of the community to find solutions. As the elders have great influence in the society, it could be easier for the parties to find a consensus, which is going to end up the dispute.³¹

²⁹ See Free-news, "La Justice à Madagascar: toujours au service de l'Etat" (The Judicial power in Madagascar: always in favor of the government), Available at <http://www.newsmada.com/2017/03/12/la-justice-a-madagascar-toujours-au-service-de-letat/>

³⁰ See Rakotondralambo, H., Ndranto, R. 2014. Extractive sector and environmental civil society in Madagascar. GREAT insights, Volume 3, Issue 7. July/August 2014.

³¹ Andriamalala, G. and Gardner, C. J. 2010. "L'utilisation du dina comme outil de gouvernance des ressources naturelles: leçons tirés de Velondriake, sud-ouest de Madagascar" (The utilization of dina

Adequacy of Malagasy Law provisions with Aarhus

At first glance, the Malagasy legislation, in some provisions is compliant with the Aarhus Convention. Firstly, the Malagasy Constitution and the Malagasy Charter of the Environment had set out, a general rule for the principle of public participation. Article 14 of the Malagasy Charter of the Environment, for example, stated that it recognizes the principle of public participation in decision-making and the access to environmental information. Secondly, the fact that the investments, whether public or private, should be compatible with the environment and subject to Environmental Impact Assessment, constitutes a crucial point for the environmental protection.³² As well, it offers an opportunity for the public to participate in the decision-making. Nonetheless, Madagascar has many actions to take, before being firmly compliant with the Aarhus Convention. In fact, it is stated in Aarhus Convention that the party should have practical arrangements, to enable effective public participation. For instance, Madagascar does not have such useful methods, especially for mining activities. Since the administration of the mining industries, in the country, is centralised, the access to information is quite difficult for the broad public.

The lack of effective provisions makes the substantive right to information and participation meaningless. For instance, most of the information held by the public authority is in paper form, but some government agencies have started to establish online databases. This situation constitutes already a hurdle for public participation, and it is a violation of the Article 4 and the Article 6 of the Convention. As a reminder, Article 4 of the Aarhus Convention provides that the party should ensure the availability of information to the public, within the framework national legislation, including where requested such information. This provision is not entirely respected in Madagascar legislation because most of the critical information is held in the central administration. Indeed, most of the available information is in the French language, and not in Malagasy (the most used language by the ninety

as instrument of governance of natural resources). Tropical Conservation Science Vol. 3 (4): 447-472

³² Supra note 27

percent of the population). French and Malagasy are both official language of Madagascar, but the ability of the majority of people in understanding French is yet limited. The language barrier is another challenge for the public access to information. In fact, the importance of language in communication is obvious: sharing information with someone in a language that he/she does not understand is difficult.

Despite the fact that Madagascar has a general provision about public participation rights, the existence of lacunas in the way of application of such rights, creates difficulties.

An example of case: WISCO Soalala

Wuhan Iron and Steel Corporation, known as WISCO, is a Chinese company, operating in the Iron extraction project, in the Western region of Madagascar. In 2012, the local communities and an NGO launched an alert, regarding the construction of a road and harbour. In fact, this construction presented a high risk of destruction, for the National Park of Baly Bay in Soalala. The local communities were concerned because several rivers are flowing to the neighbouring villages, originated from inside of the park. The nature conservation NGO managing the park, and the company, have discussed the issue. However, the public did not know the outcome of the meetings. In such circumstances, the citizen should have had access to the information and should have the opportunity to submit their opinions.³³ This case shows that citizens cannot always rely on NGOs to be on their side which maybe suggests a role for traditional institutions like the DINA. Unfortunately, in December 2014, the media reported a fire that lasted for nine days and destroyed 220 hectares of the national park.³⁴ Would the fire have resolved a part of the

³³ Art 11 of the Law 2001-025

³⁴ See Hanitra R., "Baly Bay National Park in Soalala: 222 hectares of forests and protected species, gone in smoke!" ... Available at <http://www.midi-madagasikara.mg/societe/2014/12/19/parc-national-de-la-baie-de-baly-soalala-222-ha-de-forets-et-des-especies-protegees-partis-en-fumee/>

problem? In any cases, access to environmental information is a right for each citizen.

Conclusion and Recommendations

Environmental protection is a common concern, which means everyone should be involved in decision-making relating to it. The principle of public participation aims to associate the population to the ruling of the public authority that may have impacts on the environment. International instruments, such as the Rio Declaration, the Agenda 21, and the Aarhus Convention emphasise the importance of public involvement in the environmental decision-making process. We have seen that although the Aarhus Convention's principles could be criticized for being western in focus, this is unfounded because of the widespread interest in applying similar principles in developing countries across the world. An effective public participation depends mainly on the existence of adequate access to information. Without such access, public input in the decision might be awkward, and meaningless.

As the government wants to reform the Mining Code now, it is crucial to make some recommendations, to ensure that the Malagasy law will reflect the best international practice:

- Making practical provisions about the public participation: It means the Mining Code should include provisions on the organisation of the public consultation, as a necessary process, before proceeding to the issuance of environmental permit and mining permit.
- The consultation of the public should be organised at an early stage and offered to the citizen, the opportunity to submit comments and opinions. In this perspective, the law should take into account the local custom and culture. The Malagasy society has a traditional institution such as the "FIHAVANANA" and "DINA", which may be helpful for the promotion of participation rights. If such institution is used to provide information, and

- participation in decision-making, the law on public participation could be more effective.
- The law should establish a regional office of Mines, and appoint a public officer, in charge of the environmental information relating to the mining project. Also, the information should be in Malagasy, or at least translated by the public officer if it is only available in French. In fact, the access to information should be easier as much as possible.
 - The law should impose an obligation on the public authority, responsible for the final decision, to publish the result of the consultation and provide the reasons contributing to the decision. For this purpose, the public agency can use different means such as the Internet and the media. Also, the result should be communicated using traditional institutions (FIHAVANANA and DINA) in cases where people do not have Internet access.
 - The local community should be given a role in to the management of natural resources. So they might not have authority over the decision but they could still make agreements with the developer about how the project is controlled and their interests protected. Again, the traditional institution may facilitate such initiative. The contact between the elders of the community and the leader of the mining project could be a means for giving room to public participation.

Among other things, the government should ensure that the Administrative Tribunal operates in all administrative divisions of Madagascar to make it more accessible. Also, the public authority should make a decree, relating to the organisation of public participation, in mining activities, so that the decision-makers have a reference to follow. Indeed, NGO's should be given more opportunity to the promotion of environmental protection, and the government should ensure that they do have standing to bring challenges or act on behalf of communities which is something which Aarhus Convention requires. However, by also giving more authority to the traditional institutions, the government ensures that citizens are also empowered to participate even in cases where NGOs are not involved. Finally,

the role of ONE (National Organ of the Environment) could be enhanced in terms of sending officers to remote areas to explain projects in the relevant language, engage with the DINA or elders and ensure effective public participation.

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