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AN ANALYSIS OF ZIMBABWE'S MINES & MINERALS AMENDMENT BILL (2015)

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EXECUTIVE SUMMARY

The Mines and Minerals Bill (MMAB, 2015) in Zimbabwe was introduced to amend and strengthen the 1963 Mines and Minerals Act. The 1963 Act lacked provisions that would prevent mineral revenue leakages, opaque mining licensing, poor flows of taxes and royalties to the fiscus, corruption and human rights violations against host communities among other issues. The MMAB has incorporated some essential changes to address current limitations. The provisions include the "use it or lose it policy" which prevent accumulation of mining claims for speculative purposes and the cadastre system which requires an Environmental Impact Assessment (EIA) to be undertaken before issuance of a mining title. The MMAB is also proposing the setting up of the Safety, Health and Rehabilitation Fund (SHRF) which makes it mandatory for mining executives to account for environmental violations. This provision is in line with section 73 (b) (1) of the new constitution which oblige the state to pass legislation to protect the environment by preventing pollution and ecological degradation. The CRD is concerned that the proposed Amendment still contains a number of limitations.

RECOMMENDATIONS

1. The Amendment Bill should make it mandatory for mining companies to undertake HRIA and EIA before mining licence are issued**.**
2. Ring fencing should be introduced to prevent companies from sharing profits and losses across multiple projects. This will assist in preventing potential delays in receipt of revenue by the government and making companies meet their tax obligations.
3. Provision should be made in the MMAB for companies interested in mining to demonstrate financial and technical capacity before being allowed to bid for licences and to disclose beneficial ownership.
4. The Bill must provide for the regularisation of artisanal miners.
5. The MMAB must adopt the Zimbabwe Mining Revenue Transparency (ZMRTI) to promote transparency and accountability in the mining sector.

The Mining Affairs Board (MAB) will be chaired by the Permanent Secretary of Mines. All Principal Directors in the Ministry of Mines will sit on the Board, as well as at least two other ministry officials recommended to the board by the Minister of Mines. Such an arrangement weakens the oversight function of the Board and does not provide representation to diverse interests in the mining sector. The mining sector has violated Environmental Economic Social and Cultural Rights (EESCR) of communities mainly because key community gatekeepers such as Rural District Councils (RDCs), Traditional Leaders, Environmental Management Agency (EMA) have been excluded in the MAB. The new constitution recognises EESCRs of communities where natural resources are being exploited. The MMAB should make it an obligation for mining companies to undertake Human Rights Impact Assessment (HRIA) and Environmental Impact Assessment (EIA) to promote EESCRs of communities. The bill should provide for the regularisation of artisanal mining. Artisanal miners are subject to all forms of human rights abuse by corporates and state security. The formalisation of artisanal mining will promote sustainable mining and uplift their living standards. The extraction of mineral resources in Zimbabwe has largely deprived communities of meaningful benefits because of policy gaps and opacity. The MMAB must align to chapter 14(c) of the new constitution on devolution by compelling mining companies to remit levies to RDCs and shares to Community Share Ownership Trusts (CSOTs). The inclusion of local empowerment clause in the MMAB is critical if government is serious about empowering communities out of mining.

6 The Bill should provide for parliamentary oversight in the negotiation of mining contracts to promote transparency and accountability.The Bill must provide for the regularisation of artisanal miners.

7 The MMAB should provide for local empowerment out of mining through local employment, procurement and enterprise development.

8 The law should make it mandatory for mining companies to remit shares to Community Share Ownership Trusts (CSOTs).

9 The MMAB must make it mandatory for mining companies to provide compensation to victims of mining displacement before they are relocated.

10 Minerals in Zimbabwe belong to citizens. The bill must provide for access to information on contract, revenue and any other vital information on minerals for public accountability.

11 The Bill should include all critical stakeholders to be represented on the MAB to ensure transparency and accountability in mineral governance.

12 The MMAB should incorporate gender parity and promotion of vulnerable groups in mining development.

13 The MMAB should provide for a one stop shop mineral governance system to avoid policy inconsistences fuelling corruption and mineral plunder.

BACKGROUND TO THE AMENDMENT BILL OF 2015

Zimbabwe has great potential to develop from its vast mineral resources. According to the Zimbabwe Investment Authority(ZIA) about 60% of the country's land is comprised of ancient rocks renowned for hosting rich varieties of minerals resources including gold, base metals (e.g. Nickel, Copper ,Zinc and lead) and industrial minerals (limestone, Phosphates ,Clay and Dolomites) and has got the second largest deposits of platinum in the world. This potential in the mineral sector requires prudent resource governance.

Zimbabwe's Mines and Minerals Act (MMA) was crafted in 1961, during the colonial era, under a context of repression of the black majority. The MMA supersede all other acts that underpin community development when minerals are discovered. Thus the law is not in harmony with Acts such as the EMA Act(Chapter 20.27,Rural District Act (Chapter 29:13) and Water Act(Chapter 20.24). The law is also not aligned to the new constitution with respect to environmental rights, 73(b)(iii) which provides for the right to sustainable development out of use of natural resources. Policy disharmony and failure to adapt international best practices such as the Extractive Industries Transparency Initiative (EITI) in the MMA has contributed to the mismanagement of mineral resources and human rights violations. In other words an absence of a robust MMA law has meant that revenue flows have been affected; the economy has lost much needed development and increased the vulnerability of communities living in resource rich areas[1]. Presenting his budget in 2013, the Minister of finance Patrick Chinamasa bemoaned the absence of transparency and accountability in the exploitation minerals as one of the key economic challenges facing Zimbabwe. He further raised concern over government delays in implementing policy reforms in the mining sector amid reports of leakages, smuggling, under invoicing and externalization of export proceeds.

Poor governance of alluvial diamond resources in Zimbabwe compelled Civil Society Organisations (CSOs) like the CRD to exert pressure on government to reform the mining sector. CSOs advocated for legislation that would promote transparency,accountability, stimulate investment, sustainable development, guarantee security of tenure and aid efficient use of land, as well as solve land conflicts between miners, farmers and communal dwellers[2].

Mineral reform is critical in Zimbabwe because historically the sector has made significant contribution to the country's Gross Domestic Product (GDP) and can do much more if properly managed. The CRD newsletter of 2014 points out that mining has significantly contributed to Zimbabwe's Gross Domestic Product (GDP) from an average of 10.2% in the 1990s to 19.9 % in 2009 and 2013 surpassing agriculture. According to the ZIA, the sector contributes about 50% of the country's foreign exchange earnings and 4.5% of employment[3].

Despite the major contribution of the mining sector to the country's GDP, the sector faces a number of challenges that have affected its promise to contribute to the country's development. Its contribution to the fiscus has not reached its full potential. Weak laws and policy inconsistencies have contributed to corruption, smuggling and illicit financial outflows in the mining sector. The most famous plundering of mineral resource occurred in the Marange diamonds fields to an extent that put Zimbabwe on the international map of conflict diamonds.

President Mugabe estimated that more than 15 billion dollars realised out of Marange diamond sales disappeared amid corruption, outrageous salaries and benefits for executive officers running the diamond mining ventures; massive accumulation of wealth by those executives , public officials and security forces in recent years[4]

Desmond Munemo confirms that political elites, military police, and officials were also among a syndicate of players that smuggled and sold diamonds to buyers outside Zimbabwe and outside the formal economic system[5]. Thus unscrupulous politics, smuggling and tax evasions became the order of the day. Lack of transparency and accountability hampered the potential of the mining sector to contribute to the fiscus, a key requirement for resuscitating the economy and uplift the living standards of vulnerable communities.

When the alluvial diamonds were discovered, there was much expectation that the country's economy will turn around, cease to depend on foreign aid, boost tourism and generate revenue for local communities in the resource rich areas. As may be recalled in 2011, Obert Mpofu, then Minister of Mines and Mining Development, declared that once the diamond ban is lifted by the Kimberley Process, Zimbabwe would never carry out a begging bowl again. He posited that "the KPCS certification had freed Zimbabwe from the shackles of dependence and positioned the country to establish a tract in the world diamond market"[6]. Paradoxically, by the year 2013, Zimbabwe had become the world's fourth-largest diamond miner, producing an estimated 17 million carats that year but with minute revenue received by the government[7]. In late 2015, the Minister of Finance, Patrick Chinamasa announced that the alluvial diamonds in Marange had been exhausted and companies had not prepared to embark on the more expensive underground mining.

The CRD has primarily worked in the natural resources governance sector since 2007 through research, community training and advocacy. Today the CRD is the leading organization advocating for transparency and accountability in the natural resources governance sector in Zimbabwe. It is in this context that the Centre's work has included lobbying for legislative reforms to cover aspects related to sustainable mining, corporate social responsibility in the mining sector and community participation among other issues. In this regard, the amendment of the MMA is of particular interest to the CRD.

The MMA was drafted in 1961 and enacted in 1965. The attempt by government to amend the MMA in 2007 failed to go to parliament. The Obert Mpofu driven draft mineral policy in 2013 was not adopted after receiving wide criticism during public consultation meetings. The recently introduced Mines and Minerals Amendment Bill (2015) in its current form shows marked improvements from the previous Act. However it omits critical undertakings necessary for an improved mineral resource governance policy framework in Zimbabwe.

PROGRESSIVE REFORMS IN THE MMAB

The "use it or lose it" policy will stop holders of mining claims from prejudicing the country by holding mineral claims for speculative purposes. Investors holding claims will be forced to work on the ground and increase production in the mining sector. The obligation for claim holders to submit work plans for review to the MAB every six months will improve accountability and transparency in mining titling. Section 27 of the Bill states that an exclusive prospecting licence shall not entitle the prospector to remove or dispose of any mineral except for purpose of having it assayed or for determining its nature and must get permission to do so from the Cadastre Registrar. This provision is critical in stamping mineral leakages that have taken place in alluvial mining of precious minerals like diamonds. Allegations of mining operations taking place under the disguise of exploration have been reported in Marange diamond operations. In 2012 government investigations into the operations of a Chinese mining company Nan Jiang Africa Resources in Devure, discovered that the company was already mining diamonds without a mining licence according to then Deputy Minister of Mines Gift Chimanikire[8]. The government also accused De-beers diamond company of looting alluvial diamonds in Marange between 1993 to 2006 under the disguise of mineral exploration[1].

Section 14 to 18 of the MMAB provide for the establishment of the cadastre system. The system is an electronic management and recording of processes that creates mining rights and titles to be

presided by the cadastre registrar who is the permanent secretary of mines. This system will complement policies such as the use it or lose policy by profiling of all mining licences in Zimbabwe. Profiling will among other issues ensure compliance of title holders to operational standards set in the cadastre system under section 14 of the MMAB. The cadastre system will enhance the right of access to information on mining licences to citizens, a provision that did not exist in the MMA. The MMAB however violates the separation of power, an important pillar of good corporate governance as the Permanent Secretary of Mines is both the registrar of the mining cadastre and chairperson of the MAB. The obligation in the MMAB for mining companies to list on the Zimbabwe Stock Exchange is a step in the right direction in promoting transparency and accountability. Listing of mining giants on the local bourse will also curb illicit financial flows as money yielded from mining will be accounted to local development.

LIMITATIONS OF MMAB

One of the biggest limitations of the MMAB is the usurpation of powers of EMA by the Ministry of Mines in direct violation of section 73 of the constitution. The Minister and his experts have been granted power to determine the best methods of mining to be conducted in any area including rivers, on surface and underground. According to the MMAB, standards for river bed mining are set by the Ministry of Mines not the EMA Act (Chapter 20:27) The government enacted statutory Instrument 92 of 2014 on environmental management which banned alluvial mining in river beds, banks, wetlands and any land within 200 metres of naturally defined banks[1]The ban followed disastrous river bed mining activities in Mazowe and Mutare Rivers which were threatening livelihoods of rural communities. The proposal to conduct riverbed mining create a situation where government is violating its own laws.The provision of SHRF in the bill to be administered by the Ministry of Mines is in competition with section 48 of the EMA Act which provide for EMA to collect revenue for environmental rehabilitation.The MMAB supersede section 95 and 96 of RDCs Act which provide for councils to charge levies on miners by according discretionary powers to the Minister of Mines to enforce compliance from mining companies. Several diamond mining companies in Manicaland reneged from paying levies to RDCs because RDCs have no power to enforce compliance. The net effect of revenue loss by RDCs has been that communities cannot derive development from the exploitation of resources found in their locality. Although section 85 of the MMAB provide compensation to injurious effects of mining activities for ground owners, it does not make it mandatory for victims of mining induced displacement to claim their dues before being relocated. Diamond mining companies folded operations without paying compensation to about 3 000 families displaced by diamond mining activities in Chimanimani and Marange between 2010 and 2016.The MMAB does not create a single licencing system in awarding of mining grants creating opportunities for opacity and corruption.

The bill centralise power around the Ministry of Mines officials in making decisions in the Mining Affairs Board (MAB). The bill isolates other critical stakeholders like EMA, RDCs, CSOs and traditional leadership. This is in violation of section 13(4) of the constitution which obliges the state to ensure that local communities benefit from resources in their areas. Under the Traditional Leaders Act (Chapter 29.17), Traditional leaders have jurisdiction over communal land in terms of EESCRs for the benefits of their communities. The RDCs are agents of development for rural communities through revenue collection for service delivery. The EMA is the regulatory agency in environmental health and protection. Community Based Organisations (CBOs) and Civil Society Organisations (CSOs) need representation on the Mining Board in view of the paramount role they play in providing checks and balances to operations of government. These human rights defenders have played a critical role in exposing rights abuses, opaque mining deals and other forms of resource plunder.

The MMAB cannot adequately address issues of transparency and accountability in the mining sector if these critical players are not involved in decision making in the MAB.In terms of revenue that should accrue to the state through payment of royalties and corporate tax, ring fencing should be introduced to prevent companies from sharing profits and losses across multiple projects. If ring fencing is not introduced, a company can easily shift losses from loss making entities to profitable entities thereby reducing or manipulating tax revenue to government.

In view of the past experience where companies could bid for mining licences without adequate capital, the MMAB should make provision for potential mining companies to demonstrate financial and technical abilities for mining and to disclose beneficial ownership when bidding. Mining companies that were granted mining rights in Marange had no proven financial and technical capacities in diamond mining. In fact current efforts by government to consolidate mining companies provide evidence of lack of capacity in the numerous diamond companies that were operating in Marange. Moreso, there was concealment of beneficial ownership in those mining companies a situation which had devastating effects on Marange communities who had hoped to benefit from the exploitation of their natural resource.

Mineral production and revenue transparency in mining have been very limited and this has contributed to loss of taxes for the fiscus. The legislative amendment should adopt the Zimbabwe Mining Revenue Transparency Initiative (ZMRTI) that compels companies to make their production and revenues a public record. This will enable both the state and citizens to monitor, curb mineral leakages and illicit financial flows. An absence of this provision in the past, non disclosure of revenue and production statistics increased smuggling and illicit financial outflows in Marange.

Subsequently it became common to have smuggled diamonds being intercepted at various international airports and trade routes including India, the United Arab Emirates, Israel and Lebanon. This prejudiced the state of potential revenue. The Marange community accused Chinese mining companies of importing semi-skilled workers from China to work in diamond mining companies at the expense of local employment. In order to promote community development the bill should enshrine local content policy clauses that compel mining companies not only to employ locals but to contract local enterprises in the procurement of goods and services. If incorporated in the MMAB, the local content policy will give life to local downstream industry in the mining sector. In addition, the MMAB should make it mandatory for mining companies to cede shares to CSOTs to ensure communities benefit directly from exploitation of their natural resources.

END NOTES

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