

Zimbabwe's Minerals Amendment Bill (2015): Enhancing natural resource governance?

Summary

The purpose of this policy brief is to identify the shortcomings of the Minerals Amendment Bill (2015) of Zimbabwe and to make recommendations that will have a positive impact on the lives of mining communities. It is in line with Africa-wide trends to improve transparency and accountability in the mining industry in order to enhance economic development. The Minerals Amendment Bill (2015) is being introduced to amend the country's 1963 Mines and Minerals Act that had numerous weaknesses. In particular, the 1963 Act did not promote transparency and accountability in the mining sector. Reports show that its limitations manifested in the leakage of minerals and revenue, opaque licensing deals, poor flows of taxes and royalties to the fiscus, rampant corruption, human rights abuses, forced relocations, environmental degradation and disease, among other problems. The proposed Bill incorporates essential elements to promote transparency and accountability issues. However, a systematic review of the Bill shows that it still lacks some of the most essential aspects of a good mining

law. In analysing this Bill, we engaged secondary sources of evidence around issues of natural resource governance. Based on the review of the existing legislation, and current bill and comparative practices, we propose a set of recommendations to improve the Minerals Amendment Bill (2015) that could eventually have a positive impact on human rights and socioeconomic conditions, especially in communities where mining companies operate.

Context and importance of the problem

Africa's natural resources, particularly minerals, have made a limited contribution to economic growth and social development and have largely benefited ruling elites and multinational corporations at the expense of Africans themselves.¹ Today, some African countries (such as Zimbabwe) are taking measures to improve mineral resource governance through, for

¹ Bryan, S and Hofmann, B (2007) *Transparency and accountability in Africa's extractive industries*, National Democratic Institute for International Affairs, Washington, DC

instance amending existing legislation. Zimbabwe's Mines and Minerals Act was crafted in 1963, during the colonial era, in the context of repression and recognition of only white minority rights. Although amendments to the Act have been in the pipeline for several years, nothing tangible was done until the Mines and Minerals Amendment Bill was crafted in 2015. The lack of urgency to reform the sector over the years has meant that revenue flows have been affected; the economy has lost much-needed growth and the vulnerability of communities living in resource-rich areas has increased.² The inadequacies of the existing law and policy inconsistencies have fuelled corruption, opaque licensing and other forms of resource plundering.

Presenting his 2013 Budget Speech, Minister of Finance Patrick Chinamasa bemoaned the absence of transparency and accountability in the exploitation of mineral resources as one of the key economic challenges facing Zimbabwe's economy.³ The Mines and Minerals Amendment Bill (2015) followed years of outcry by civil society and the international community over poor governance in the industry, particularly in the diamond sector.⁴

Extensive losses in the mining industry have been highlighted in reports, including one by former President

Mugabe who estimated that more than 15 billion dollars realised from Marange diamond sales had disappeared amid various forms of illicit deals.⁵ By 2013, Zimbabwe had become the world's fourth-largest diamond miner, producing an estimated 17 million carats that year but with negligible revenue streams to government.⁶

Although the proposed Mines and Minerals Amendment Bill (2015) is a marked improvement from the previous Act, it still lacks critical elements necessary to promote the good governance of mineral resources. To that end, this policy brief outlines the shortcomings of the Amendment Bill, and provides recommendations to promote better mineral resource governance, mitigate human rights violations and improve the socioeconomic conditions in communities affected by mining operations.

Critique of the Mines and Minerals Amendment Bill (2015)

Human Rights Impact Assessments

One of the biggest outcries concerning mining activities has been the violation of human rights in the communities where mining takes place⁷. For instance, poor waste water treatment regulation enables mining companies to dispose of waste water in a manner that will likely contaminate the drinking and

irrigation water of nearby communities. In such cases, the rights to life, dignity, water, and an environment that is not harmful to the health and wellbeing of people as provided for in Part 2 of Zimbabwe's Constitution are violated. The final Act must compel potential miners to conduct Human Rights Impact Assessments (HRIAs), a due diligence exercise, on how their activities are likely to adversely affect community rights before commencing mining activities. HRIAs have been used to address human rights concerns in countries such as Eritrea.⁸ In Zimbabwe, where HRIAs do not exist, mining (especially diamond mining) has caused a great deal of suffering to local communities through the violation of their economic, environmental, social and cultural rights.⁹ Therefore, an HRIA can help to mitigate the negative impacts of mining on human rights while maximising its positive impacts. The proposed Mining Board can request HRIAs and reports from prospective mining companies. The assessments and subsequent reports must be concluded by personnel independent from the mining company, at the mining company's expense, and must indicate the efficacy of the mitigation measures proposed by the mining company to prevent human rights violations.

Environmental protection

Zimbabwe's Environmental Management Agency is tasked by the Environmental Management Act (Chapter 20:27) to monitor and recommend appropriate mining methods. One of the biggest limitations of the Bill is that it usurps the power

2 Mangwende, S (2014) Effects of gold panning in communities: A case of Shrugwi District, Thesis submitted in partial fulfilment of a Bachelor of Arts (Hons) degree, Midlands State University

3 Maringira, G and Masiya, T (2016) The security sector and the plunder of Zimbabwe's Chiadzwa alluvial diamonds: 'Goat mentality' in practice, *Africa Security Review*, 25:4, DOI: 10.1080/10246029.2016.1225587

4 Partnership Africa Canada. (2012). Reap what you sow: Greed and corruption in Zimbabwe's Marange diamond fields, http://www.pacweb.org/Documents/diamonds_KP/Reap_What_You_Sow-eng-Nov2012.pdf

5 Pigou, P (2016) Zimbabwe's reforms: An exercise in credibility – or pretence? Southern Africa Report, Issue 6, September 2016. Institute for Security Studies, Pretoria

6 Maringira, G and Masiya, T (2016) The security sector and the plunder of Zimbabwe's Chiadzwa alluvial diamonds: 'Goat mentality' in practice, *Africa Security Review*, 25:4, DOI: 10.1080/10246029.2016.1225587

7 Human Rights Watch. (2010). *Deliberate chaos: Ongoing human rights abuses in Marange diamond fields of Zimbabwe*. New York

8 Götzmann, N, Bansal, T, Wrzoncki, E, Poulsen-Hansen, C, Tedaldi, J and Høvsgaard, R (2016) *Human Rights Impact Assessment Guidance and Toolbox*. The Danish Institute for Human Rights, Copenhagen

9 Zimbabwe Environmental Law Association (ZELA) (2011) *Analysis of key issues in Zimbabwe's mining sector*. Harare

of the Environmental Management Agency and gives powers to the Minister of Mining, Ministry officials and the Permanent Secretary of the Ministry of Mines. The Minister or his experts are granted power to determine the best methods of mining in any area, including in rivers, on the surface and underground. The Bill also sets out penalties for environmental protection violations. This responsibility now either clashes with the Environmental Management Act or disregards the powers of the Environmental Management Agency. In addition, of late, there has been a tendency to give priority to mining above all other forms of economic activity in the country. Examples are the mining of coal and methane in an area earmarked for the Hwange National Park and the mining of heavy sands in Mana Pools, a UNESCO world heritage site. Usurping the powers of the Environmental Management Agency will compound the problem.

The Mining Affairs Board

Clause 6 of the Amendment Bill, aimed at amending section 7 of the Mines and Minerals Act, speaks to the composition of the Mining Affairs Board. It states that the Permanent Secretary of the Ministry of Mines will chair the Board, thereby rendering it far less independent. In terms of Clause 6, the Board is chaired by the Permanent Secretary and only he/she can chair it; in his/her absence, the Deputy Secretary cannot chair. This problem is compounded by too many principal directors in the Ministry who are proposed to sit on the Mining Affairs Board as stated in the same clause. Furthermore, Clause 6 provides that the Board comprises all Principal Directors in the Ministry; the Director of Geological Survey; any other two Ministry officials as the Minister may deem expedient to be members of the Board; and six other members appointed by the Minister. Such an arrangement fails to provide a

non-partisan Board catering to diverse interests in the sector.

Community-based organisations (CBOs) and civil society organisations (CSOs) need representation on the Board. This is particularly so in view of the paramount role they played in lobbying for mining and environmental reforms. They also play a critical role in exposing rights abuses, opaque mining deals and other forms of resource plundering. It is important that this watchdog role be maintained or even enhanced through inclusion in the Mining Board. At the moment, CSOs have been overlooked. Furthermore, the importance of gender representation on the Board is downplayed in the Bill. The problem of lack of women representation extends to the failure of the Bill to incorporate artisanal mining, which affects mostly women and the poor.

Mining revenues

Traditionally, mining revenue taxes and royalties were only paid to central government. This is changing, with legislation providing for benefits to be redistributed at the local level in countries such as Bolivia, Canada, Colombia, Indonesia, the Philippines, Papua New Guinea, South Africa and Venezuela.¹⁰ In this regard, Zimbabwe's proposed Act should unequivocally ensure that communities that are or could be adversely affected by mining operations derive regular and significant benefits from these operations, including revenue allocation, access to employment and the provision of infrastructure for local use. At the moment, it only points out that revenue should be paid out to the local authority with the consent of the Minister. This does not give assurance of direct benefits to the communities. Many local

authorities in Zimbabwe have a poor governance record and the chances of misappropriation of funds are high.¹¹ Giving the responsible Minister the discretion to decide the royalties mining companies should pay makes the proposed Act susceptible to corruption.

There is also scope for communities to directly secure shares in companies investing in mining in their localities. Existing cases of communities with shares in platinum mining (such as the Bafokeng) provide evidence that community shareholding will promote local development if incorporated in the legislation.¹² The Revenue Watch Institute (2008) also notes that in Papua New Guinea, Brazil and Ghana communal and customary owners of land as well as other nongovernment beneficiaries are entitled to permanent shares of revenues.

Furthermore, mineral production and revenue transparency in mining have been very limited and this has contributed to loss of taxes for the Zimbabwean fiscus. For instance, due to lack of production and revenue transparency and accountability at the height of alluvial diamond mining, smuggled diamonds were sometimes intercepted in the diamond markets and trade routes of India, the United Arab Emirates, Israel and Lebanon, among others.¹³ Therefore, the amendment of the legislation should compel

10 Revenue Watch Institute (2013) *The 2013 Resource Governance Index*. New York

11 Sithole, A (2013) Corruption in Zimbabwean urban local authorities: A Case of Gweru City Council. *Asian Journal of Social Sciences and Humanities*, 2(3), pp 25–33

12 Cook, E (2013) Community management of mineral resources: The case of the Royal Bafokeng Nation. *Journal of the Southern African Institute of Mining and Metallurgy*, 113(1), January

13 Masiya, T and Benkenstein, A (2012) Zimbabwe's Marange diamonds and the need for reform of the Kimberley Process, Policy Briefing, No. 43. SAILA, Cape Town

companies to make their production and revenues a public record. This will enable both the state and interested parties to have access to the records and help in monitoring revenue flows.

Ring fencing

The practice whereby companies share profits and losses across multiple projects should be prohibited by introducing ring fencing in the law. This is necessary if a mining company has more than one project. Failure to ring fence operations encourages companies to shift losses from loss-making entities to profitable activities within the host country, thereby reducing their tax obligations. Ring fencing also assists in preventing potential delays in the government's receipt of revenue by disallowing write-offs incurred beyond a producing area. Ring fencing has been successfully implemented in countries such as South Africa and Tanzania to prevent corporations from depriving the state of taxes if one of their companies experience losses.¹⁴

Financial capacity

The Mines and Minerals Amendment Bill (2015) should also put more emphasis on compelling any company interested in mining to demonstrate its financial and technical capacity before it is allowed to bid for a concession and to disclose beneficial ownership. This will help in identifying companies with greater potential to successfully mine concessions. In addition, it will prevent a recurrence of past experience in Zimbabwe's diamond sector when companies were accused of being

spurious investors after acquiring mining contracts.¹⁵ In fact, current government efforts to consolidate mining companies are evidence that some mining companies do not have the financial resources and technical expertise to continue mining diamonds.

Reclamation plans

Finally, one would have hoped that the Bill incorporates requirements for any mining company to produce a reclamation plan rather than just making them contribute to the Safety, Health and Rehabilitation Fund. The fund is good but not enough to make companies responsible for any environmental damages associated with their mining, use of a particular chemical or technology. A reclamation plan should be approved by the government before mining begins, stating the alternative use of the land after mining. Incorporated in the legislation in countries such as the USA and Canada, reclamation plans have fostered land reuse once mining activities have ceased.¹⁶

Comparison with South Africa's mining legislation (MPRDA)

In South Africa, the Mineral and Petroleum Resources Development Act (28 of 2002) (MPRDA) governs the mineral industry. Compared to its predecessor, namely the Minerals Act (50 of 1991), and in contrast to Zimbabwe's Minerals Amendment Bill (2015), it is clear that the MPRDA seeks to ensure equitable access to mineral properties, incorporate the concept of sustainability into the industry and empower

historically disadvantaged persons.¹⁷ This aspect, which is also reflected in the MPRDA's objectives, forms the basis of this comparison when considering the above articulated context and critique.

The Act establishes the Minerals and Petroleum Board (MPB), whose functions include advising the Minister of the Department of Mineral Resources on "the sustainable development of the nation's mineral and petroleum resources"; transforming and downscaling mineral and petroleum industries; and any objections referred to the MPB. Unlike the Minerals Amendment Bill (2015), the composition of the MPB as per the MPRDA comprises organs of State as well as CBOs and CSOs relevant to mining activities. For instance, the Minister is directed to appoint *inter alia* three persons representing organised labour, three persons representing organised business and two persons representing relevant CBOs. This structure enables the Board to not only operate independently but also to reflect the perspectives of those interested and affected by mining. Other areas of comparison include the submission of social and labour plans and obtaining the necessary environmental authorisations for mining rights holders, which provides the regulatory structure for addressing human rights concerns (including environmental protection); and submitting annual audited financial statements reflecting the balance sheet as well as profits and losses of the entity mining or processing minerals. This enables the Department of Mineral Resources to address some of the concerns raised in the above critique.

14 Readhead, A (2013) Getting a good deal: Ring-fencing in Ghana. Natural Resources Governance Institute, <http://www.resourcegovernance.org/sites/default/files/documents/getting-a-good-deal-ring-fencing-in-ghana.pdf>

15 Dhliwayo, M (2014) *A Review of Zimbabwe's Draft Minerals Policy*. Zimbabwe Environmental Law Society, Harare

16 Hayes, J (2015) Returning mined land to productivity through reclamation. *Cornerstone Journal*, 3(4), pp 4–9

17 Cawood, FT (2004) The Mineral and Petroleum Resources Development Act of 2002: A paradigm shift in mineral policy in South Africa. *The Journal of the South African Institute of Mining and Metallurgy*, p 58

Recommendations

Based on our analysis of the Minerals Amendment Bill (2015) and systematic review of related reports, we make the following recommendations to ensure that mining operations are beneficial to communities where mines operate and not just to those who own them. The recommendations will be shared with government officials, parliamentarians and civic groups in the natural resource governance sector.

- The Bill should incorporate HRIAs to protect the human rights of communities in mining areas.
- The Bill should take into consideration socioeconomic rights of communities in mining areas, including mining shareholding, revenue allocation and access to employment, as well as the provision of infrastructure for local use among others. Provision should therefore be made for information sharing sessions and public awareness campaigns.
- While agricultural land is protected, other activities such as conservancies, national parks, and cultural or scenic heritages must also be protected by the Act.
- The Mining Board's composition should include CBOs and CSOs given their important watchdog role.
- The legislation should compel companies to make their production figures and revenues a public record to ensure transparency.
- Ring fencing should be introduced by law to prevent companies from sharing profits and losses from a particular mine across multiple businesses that they own.
- The Bill should compel any company interested in mining to demonstrate its financial and technical capacity.
- The Bill should oblige prospective mining companies to submit reclamation plans that must be approved by government before mining begins.

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