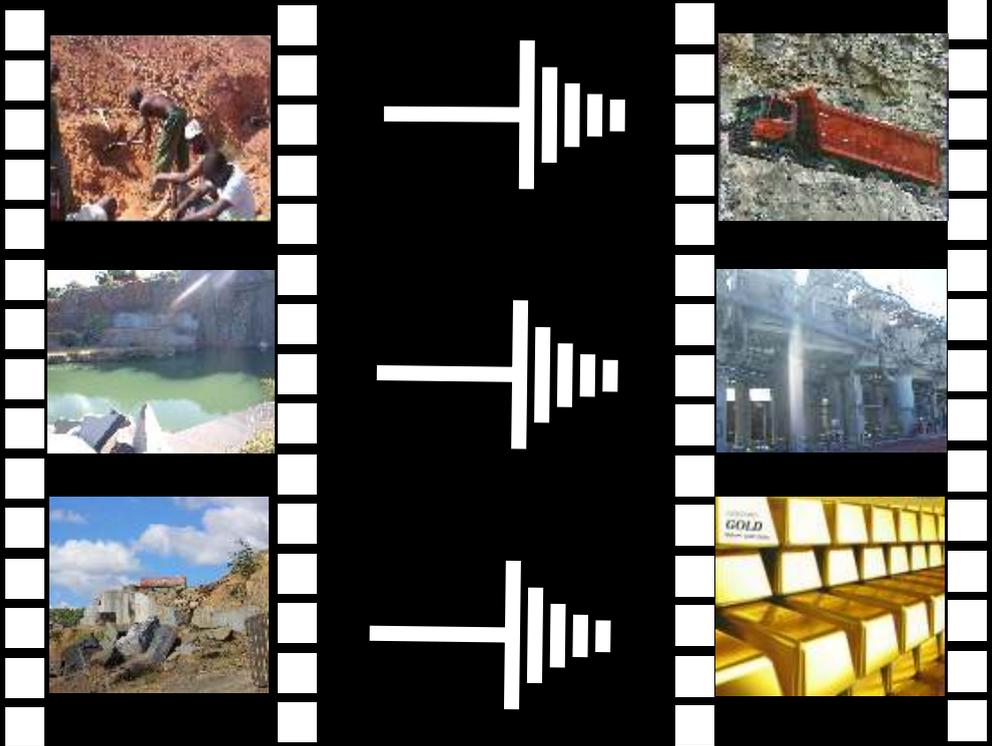


A REVIEW OF ZIMBABWE'S DRAFT MINERALS POLICY



“Transforming Comparative Advantage to Competitive Advantage”



Zimbabwe Environmental
Law Association

Author: Mutuso Dhliwayo

Reviewed by: Shamiso Mtisi

Published by: Zimbabwe Environmental Law Association (ZELA)

Copyright: 2014, Zimbabwe Environmental Law Association (ZELA)

This publication may be reproduced in whole or in part and in any form for educational or non-profit uses, without special permission from the copyright holder, provided full acknowledgement of the source is made. No use of this publication may be made for resale or other commercial purposes without the prior written permission of ZELA.

Disclaimer: The views expressed herein do not necessarily represent those of ZELA but those of the author.

Year of Publication: 2014

Layout Artist: Dorcas Chamatunhu

Available from: Zimbabwe Environmental Law Association (ZELA),
No.26B, Seke Road, Hatfield, Harare.
Email: zela@mweb.co.zw, info@zela.org
Website: www.zela.org

TABLE OF CONTENTS

LIST OF ACRONYMS	Page iii
EXECUTIVE SUMMARY	Page 1
INTRODUCTION	Page 3
BRIEF OUTLINE OF PROBLEMS WITHIN ZIMBABWE'S MINING SECTOR	Page 5
ANALYSIS OF THE PROVISIONS OF THE DRAFT MINERALS POLICY	Page 16
RECOMMENDATIONS	Page 27
CONCLUSION	Page 33
BIBLIOGRAPHY	Page 34

LIST OF ACCRONYMS

AMV	Africa Mining Vision
CBOs	Community Based Organisations
CSOs	Civil Society Organisations
EESCR	Environmental, Economic, Social and Cultural Rights
EIAs	Environmental Impact Assessments
EITI	Extractive Industries Transparency Initiative
EMA	Environmental Management Act
EMA	Environmental Management Agency
FDI	Foreign Direct Investment
HRIsAs	Human Rights Impact Assessments
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IEEA	Indigenisation and Economic Empowerment Act
MMCZ	Minerals Marketing Corporation of Zimbabwe
MMMD	Ministry of Mines and Mining Development
MTP	Medium Term Plan
SWF	Sovereign Wealth Fund
UNGPs	United Nations Guiding Principles
ZELA	Zimbabwe Environmental Law Association
ZIMASSET	Zimbabwe Agenda for Sustainable Socio–Economic Transformation
ZMDC	Zimbabwe Mining Development Corporation
ZMRTI	Zimbabwe Mining Revenue Transparency Initiative
ZPWMA	Zimbabwe Parks and Wildlife Management Authority

ACKNOWLEDGEMENTS

The author would like to express gratitude to all the funding agencies that provided ZELA with the financial resources to carry out this research and analysis of the Draft Minerals Policy of 2013. The author would also like to thank all ZELA staff members for their logistical and editorial support. A lot of the positions in this research paper were also informed by interactions with community groups and civil society actors, hence the author is very grateful to them all.

EXECUTIVE SUMMARY

That Zimbabwe has a significant and diverse mineral resource base is not in doubt. With estimates that Zimbabwe has the second largest reserves of chrome and platinum after South Africa and potential to supply about 25% of the global diamond market, mining can play a catalytic role in Zimbabwe's economic revival, stabilization and eventual growth. However, Zimbabwe's economic resource base represents a comparative and not a competitive advantage. The question therefore is what does Zimbabwe need to do to ensure that this comparative advantage based on its mineral resource base is turned into a competitive advantage? It is against this background that the Zimbabwe Environmental Law Association (ZELA) commissioned a review of the draft Minerals Policy with a view of understanding to what extent it will help Zimbabwe unlock economic development from its vast mineral resources.

The review highlights some of the problems that are stifling the potential of Zimbabwe's mineral resource base to contribute to economic development. Chief among these problems is an archaic and colonial piece of legislation in the form of the Mines and Minerals Act, which is regarded as the weakest link. The Act which was enacted in 1961 is oriented towards mineral resources exploitation with little or no regard to sustainable development. While mining itself can never be sustainable, it can contribute to sustainable development through the investment of generated revenue in human and physical capital. Other problems include lack of transparency and accountability, lack of access to information and lack of value addition and beneficiation. Furthermore, the Mines and Minerals Act fails to realize and acknowledge the role of other stakeholders in the mining sector other than the traditional ones that include the state and the private sector. These other important stakeholders include Civil Society Organisations, Community Based Organisations and Artisanal and Small Scale Miners.

The review also assesses the provisions of the draft Minerals Policy. The assessment is based on international principles and initiatives that promote good governance of mineral resources. These principles are transparency, accountability and good governance, and the initiatives include the Africa Mining Vision, the Extractive Industries Transparency Initiative, the Natural Resources Charter and the United Nations Guiding Principles on Business and Human Rights. The assessment concludes that to a larger extent, the draft Minerals Policy

has some very progressive provisions that promotes good governance of mineral resources. The progressive provisions include transparency and accountability through the adoption of the Extractive Industries Transparency Initiative, access to information, value addition and beneficiation. Furthermore, it also recognises the role of other stakeholders in the mining sector other than the traditional ones. Communities, Civil Society Organisations and Artisanal and Small Scale Miners are recognised as important stakeholders. The assessment also highlights the corrective measures that the Government of Zimbabwe is already implementing although the draft Mineral Policy is yet to be finalized. These measures include the call by the Minister of Finance in his 2014 National Budget Statement for the adoption of the Extractive Industries Transparency Initiative, the moves by the Ministry of Mines and Mining Development to ban the export of unprocessed platinum and uncleaned diamonds, plans to recognize artisanal miners and the introduction of the Sovereign Wealth Fund Bill in Parliament.

While the draft Minerals Policy has some very progressive provisions, the review makes some recommendations that can strengthen it before it is finalized by the Ministry of Mines and Mining Development and its adoption by Cabinet. These recommendations include the carrying out of a Human Rights Impact Assessment before the commencement of mining activities, the representation and participation of Community Based Organisations and Civil Society Organisations in the policy and decisions making processes in the form of the Minerals Development Board and the development of a model Mining Agreement to help in contract negotiations. Further recommendations include disclosure of beneficial ownership, limiting the application of stabilization clauses and requirement that mining companies be taxed separately for each mining project that they develop in Zimbabwe. The gender impacts of mining also need to be strengthened.

INTRODUCTION

The mining sector has been touted as possibly providing the foundation for Zimbabwe's economic recovery, stabilization and eventual growth by creating jobs through value addition and beneficiation and generation of revenue for the government.^[1] To a greater extent, this potential of the mining sector to contribute to economic development is dependent and influenced by the legal and policy framework. Depending on how the laws and policies are framed, they can either facilitate or undermine Zimbabwe's ability to get maximum benefits from its diversified and significant mineral resource base. Cognisant of the role of laws and policies in the exploitation of mineral resources, the Government of Zimbabwe is in the process of reforming its mining laws and policies so as to unlock economic development. The current and proposed legal and policy reforms^[2] in the mining sector can be construed as evidence that there is realization that the country is not getting maximum benefits from its vast mineral resource base which has remained a comparative asset opposed to a competitive advantage.^[3]

The objective of this review is to analyse Zimbabwe's draft Minerals Policy^[4] to determine the extent to which it can help the country to unlock its vast mineral potential so that it becomes a key driver for economic growth. The review starts by highlighting some of the problems within Zimbabwe's mining sector that have held back its potential. In other words, it looks at the mischief that the proposed draft Minerals Policy is meant to cure. The objective here is not to give a detailed account of the problems. These problems have been a subject of research by the Zimbabwe Environmental Law Association (ZELA) and other organisations working in the extractive sector in Zimbabwe.^[5] Rather the objective is to highlight these problems and use them as a benchmark when analyzing the provisions of the draft Minerals Policy. These problems include an old, archaic and colonial piece of legislation in the form of the Mines and Minerals Act (Chapter 21:05) of 1961, which is

[1] The mining sector has been touted as possibly providing the foundation for Zimbabwe's economic recovery, stabilization and eventual growth by creating jobs through value addition and beneficiation and generation of revenue for the government. To a greater extent, this potential of the mining sector to contribute to economic development is dependent and influenced by the legal and policy framework. Depending on how the laws and policies are framed, they can either facilitate or undermine Zimbabwe's ability to get maximum benefits from its diversified and significant mineral resource base. Cognisant of the role of laws and policies in the exploitation of mineral resources, the Government of Zimbabwe is in the process of reforming its mining laws and policies so as to unlock economic development. The current and proposed legal and policy reforms in the mining sector can be construed as evidence that there is realization that the country is not getting maximum benefits from its vast mineral resource base which has remained a comparative asset opposed to a competitive advantage.

[2] The current and proposed legal and policy reforms in the mining sector can be construed as evidence that there is realization that the country is not getting maximum benefits from its vast mineral resource base which has remained a comparative asset opposed to a competitive advantage.

[3] The current and proposed legal and policy reforms in the mining sector can be construed as evidence that there is realization that the country is not getting maximum benefits from its vast mineral resource base which has remained a comparative asset opposed to a competitive advantage.

[4] The objective of this review is to analyse Zimbabwe's draft Minerals Policy to determine the extent to which it can help the country to unlock its vast mineral potential so that it becomes a key driver for economic growth. The review starts by highlighting some of the problems within Zimbabwe's mining sector that have held back its potential. In other words, it looks at the mischief that the proposed draft Minerals Policy is meant to cure. The objective here is not to give a detailed account of the problems. These problems have been a subject of research by the Zimbabwe Environmental Law Association (ZELA) and other organisations working in the extractive sector in Zimbabwe. Rather the objective is to highlight these problems and use them as a benchmark when analyzing the provisions of the draft Minerals Policy. These problems include an old, archaic and colonial piece of legislation in the form of the Mines and Minerals Act (Chapter 21:05) of 1961, which is

[5] The objective of this review is to analyse Zimbabwe's draft Minerals Policy to determine the extent to which it can help the country to unlock its vast mineral potential so that it becomes a key driver for economic growth. The review starts by highlighting some of the problems within Zimbabwe's mining sector that have held back its potential. In other words, it looks at the mischief that the proposed draft Minerals Policy is meant to cure. The objective here is not to give a detailed account of the problems. These problems have been a subject of research by the Zimbabwe Environmental Law Association (ZELA) and other organisations working in the extractive sector in Zimbabwe. Rather the objective is to highlight these problems and use them as a benchmark when analyzing the provisions of the draft Minerals Policy. These problems include an old, archaic and colonial piece of legislation in the form of the Mines and Minerals Act (Chapter 21:05) of 1961, which is

oriented towards mineral resource extraction rather than sustainable development. The Act is out of sync with the sheer weight of emerging issues and Zimbabwe's aspirations as a country for a mining sector that is development oriented. The current legal and policy framework is characterized by opacity and secrecy without providing access to information, no provisions for transparency and accountability, lack of value of addition/beneficiation and does not provide for good mineral resources governance. In addition, it does not provide linkages –backwards, forwards and sideways to other sectors of the economy, public participation in the policy and decision making processes and it does not recognize the role of other stakeholders in the mining sector such as communities and civil society organisations. Furthermore, it does not recognize and capacitate artisanal miners on environmental and social sustainability.

Secondly, the review analyses the strengths and weaknesses of the provisions of the draft Minerals Policy. This will be done by benchmarking it against international principles and initiatives that promote best practices on the governance of natural resources including minerals. The principles include good governance, transparency and accountability while the initiatives include the African Mining Vision (AMV), the Extractive Industries Transparency Initiative (EITI), the Natural Resources Charter and the United Nations Guiding Principles on Business and Human Rights (UNGPs). Zimbabwe's new constitution also has progressive provisions that have implications on mineral resource governance and reference will be made to them.

Thirdly, the review will make recommendations on how the draft Minerals Policy can be strengthened so that it can help to unlock economic development from Zimbabwe's mineral resources. One of the key objectives of the draft Minerals' Policy is to overhaul the current Mines and Minerals Act and introduce a new Mines and Minerals Act.² It is hoped that the recommendations emerging from this review will be taken on board by the Ministry of Mines and Mining Development and inform the development of a new and comprehensive Mines and Minerals Act after the finalization of the draft Minerals Policy by the Ministry of Mines and Mining Development and adoption by Cabinet. The envisaged new mines and minerals legislation is variously described in the draft Minerals' Policy. These include a Minerals Development Act, Mines and Minerals Act and Minerals Development Law.

BRIEF OUTLINE OF PROBLEMS WITHIN ZIMBABWE'S MINING SECTOR

That Zimbabwe has vast economic potential based on its significant and diverse mineral resource base is not in doubt. Zimbabwe's significant and diverse mineral resource base has resulted in the coinage of the term “the Persian Gulf of Minerals”. Zimbabwe is estimated to have the second largest global reserves of platinum after South Africa and also the second largest global reserves of chrome after South Africa estimated at about 10 billion tones. Zimbabwe is also estimated to have massive quantities of diamonds which when fully exploited has the potential to supply 25% of the global diamond market. Apart from platinum, diamonds and chrome, Zimbabwe has other significant mineral resources that include gold, nickel, asbestos, black granite and iron ore. While Zimbabwe's mining sector has vast economic potential, it is blighted by a plethora of problems which if not addressed through comprehensive legal and policy reforms will militate against this potential.

These problems include but are not limited to lack of transparency and accountability in the whole mining value chain, poor negotiation of contracts which results in skewed contracts that fail to unlock maximum value to the country and communities, lack of value addition and beneficiation, lack of access to information by stakeholders, poor management of generated revenue, non recognition of critical stakeholders like communities and Civil Society Organisations and violation of community rights. Another problem is failure by the Act to recognize artisanal miners despite their substantial contribution to livelihoods and economic development in Zimbabwe, especially in the gold mining sector.

An old and archaic legal framework lies at the heart of problems in Zimbabwe's mining sector. While there is a plethora of laws that have implications on the mining sector, this paper will focus on the Mines and Minerals Act (Chapter 21:05) as an embodiment of the regulatory framework that is mainly responsible for holding back Zimbabwe's economic potential in the mining sector. More often than not, problems affecting the ability of developing countries like Zimbabwe to maximize benefits from their mineral resources is

¹ [REDACTED]

² [REDACTED]

³ [REDACTED]

⁴ [REDACTED]

⁵ [REDACTED]

called the natural resources curse theory. It is the Achilles heel in Zimbabwe's desire to get maximum benefits from its mineral resources.

The natural resources curse theory describes a situation where natural resources wealth like minerals fail to translate into broad based economic development benefitting all sectors of the economy and the greater majority of the population.^[2] However, there is an emerging school of thought that says that what these countries are actually suffering from is the curse of poor laws and policies.^[3] In other words, developing countries are failing to optimally benefit from their mineral resources due to poorly crafted laws and policies. The Africa Mining Vision aptly captures and summarizes this problem:

Overall, the key strategy in optimizing a resource endowment is around the resource regulatory regime, which directly determines the relative division of the spoils and indirectly influences the deepening of the sector through down and upstream linkages to the local, national, and regional economies.^[4]

The Natural Resources Charter whose main objective is to help governments and societies that are rich in mineral resources like Zimbabwe to manage them in a progressive manner so as to unlock economic growth, greater benefit to citizens and in a way that does not degrade the environment is also very clear on the role of laws and policies. The Natural Resources Charter correctly observes that:

Fiscal policies and contractual terms should ensure that the country gets full benefit from the resource, subject to attracting the investment necessary to realize that benefit. The long term nature of resource extraction requires policies and contracts that are robust to changing and uncertain circumstances.^[5]

Sadly, Zimbabwe's current Mines and Minerals Act does not seem to be alive to this fact. The weaknesses of Zimbabwe's mining regulatory framework have been widely discussed. Revenue Watch Institute describes Zimbabwe's mining regime as lacking mechanisms to promote public accountability in the mining sector.^[6] The former Minister of Finance described the current Mines and Minerals Act as an obscure legal regime^[7] for its failure to maximise economic benefits and called for its overdue amendments to be legislated. In

[1] [2] [3] [4] [5] [6] [7]

equally scathing remarks, the former Deputy Prime Minister described the Act as criminal for its failure to empower the people and their communities and urged for its urgent amendment.²² In his speech during the opening of the Eighth Parliament, the President indicated that the Mines and Minerals Bill would be one of the Bills to be discussed by Parliament during this session. He pointed out that the objective of the Bill is to boost mineral development and maximize benefits accruing to the country from its rich mineral endowment. This is a tacit acknowledgment that the country is not getting maximum benefits from its mineral resources under the current legal and policy framework codified in the Mines and Minerals Act. Against this background, it is imperative and urgent for Zimbabwe to reform its mining legislation if it is to unlock economic value and development from its mineral resources.

Surprisingly, despite this overwhelming evidence that the Mines and Minerals Act in its current state is an impediment to Zimbabwe's ability to get maximum benefits from its mineral resources, efforts to reform the Act have been moving at a snail's pace. The review of the Act through the Mines and Minerals Amendment Bill has been proposed for over 10 years without being finalized.²³ The Medium Term Plan (MTP)²⁴ had proposed the finalization and legislation of the proposed amendments by the end of 2011. However, it is 2014 and nothing has been finalized.

The Mines and Minerals Act, which is the principal Act regulating mining activities in Zimbabwe is a very old piece of legislation. It was enacted in 1961 and since then there has not been any comprehensive review and amendment of the Act.²⁵ Zimbabwe recently adopted a new Constitution²⁶ to replace the Lancaster House Constitution of 1979. Among the reasons given for the passage of a new Constitution is that the Lancaster House Constitution was too old and had been weighed down by the sheer weight of emerging issues. If this is true of a 1979 document, then what more of a law like the Mines and Minerals Act, which was enacted in 1961?

Most of the issues that the Act is meant to address were not regarded as topical when it was enacted. In its current state, the Act is oriented towards mineral extraction and not

²² [REDACTED]

²³ [REDACTED]

²⁴ [REDACTED]

²⁵ [REDACTED]

²⁶ [REDACTED]

their sustainable management. International Covenants and Declarations that provides a framework for the protection and realization of human rights like the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Rio Declaration on Environment and Development were not yet in place.⁶⁶ Given this background, it is therefore not surprising that the Act is out of breath to address the problems highlighted above as affecting the mining sector.

The greatest threat to the ability of the mining sector to contribute to Zimbabwe's economic development is the cancerous low levels of transparency and accountability. This opaqueness permeates the whole mining sector although it is mainly pronounced in the diamond mining sector. Commenting on transparency and accountability in the exploitation of the Marange Diamonds, the Parliamentary Portfolio Committee on Mines and Energy⁶⁷ noted that lack of transparency and accountability has been an ongoing issue in the Marange Diamond Fields since the inception of formal mining in Chiadzwa. Lack of transparency and accountability was cited in terms of the selection of joint venture partners, the signing of contracts, production, marketing, fiscal contribution, smuggling and leaking of diamonds as well as corporate governance. This means that it is a problem in the whole mining value chain. The former Minister of Finance is on record lamenting the lack of transparency and accountability in the diamond mining sector.⁶⁸ Even the current Minister of Finance has expressed similar sentiments as his predecessor. The media both private and public and CSOs have also highlighted the lack of transparency and accountability.⁶⁹ A look at the Mines and Minerals Act shows that principles of transparency and accountability are very alien to it despite the fact that the Ministry of Mines and Mining Development identifies transparency and accountability as two of its core values in its 5 Year Strategic Plan of 2011-2015.

Poorly negotiated contracts are another hindrance to Zimbabwe's ability to optimally benefit from its minerals resources. Contracts are very important in defining the terms of an investment project and constitute a key instrument of governance of natural resources including minerals. They determine the distribution of risks, costs and benefits of the

⁶⁶ Zimbabwe signed the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1980, the International Covenant on Civil and Political Rights (ICCPR) in 1980, and the African Charter on Human and Peoples' Rights in 1981. However, Zimbabwe has not yet ratified these treaties. ⁶⁷ Parliamentary Portfolio Committee on Mines and Energy, Report on the Exploitation of the Marange Diamond Fields, Harare, 2011. ⁶⁸ The former Minister of Finance, Dr. George Gona, in a speech to the National Assembly in 2008. ⁶⁹ The media, both private and public, and CSOs have also highlighted the lack of transparency and accountability in the mining sector. See, for example, the report of the Zimbabwe Human Rights Commission (ZHRC) on the Marange Diamond Fields, Harare, 2011.

project. They shape the extent to which the investment provides public revenues and creates income generating opportunities through employment with the local economy. A contract determines the extent to which a country benefits or fails to benefit from its mineral resources. If properly negotiated, well designed and implemented, contracts can maximize the contribution of mineral resources investment to sustainable development goals to the benefit of the country. However, poorly negotiated, drafted and executed contracts may impose unfavourable terms on the country and communities often for a long period of time, sowing seeds of dispute and undermine the pursuit of sustainable development goals like poverty reduction and environmental sustainability.²⁴ Poor contracts are mainly as a result of lack of competency to craft good mining deals for the country and corruption.

Zimbabwe has many examples of poorly negotiated contracts. These include the ZIMPLATS, ZISCO-Essar and Chiadzwa diamond mining deals. Most of the disputes between the government and investors like the long running dispute between the government and ZIMPLATS and the disputes that have affected the ZISCO-Essar agreement are evidence of poorly negotiated contracts. The former Minister of Finance, Tendai Biti described the ZIMPLATS contract as exploitative and questioned the legal soundness of the negotiators.

The root cause of these poorly negotiated contracts lies in the Mines and Mines Act. The regulatory framework should be addressed in order to promote transparency and accountability in the mining sector. Due to the absence of clear provisions on transparency and accountability, mining contracts are negotiated in secrecy thereby making it difficult to hold those who would have negotiated a bad deal for the country accountable. Transparency and accountability in the negotiation of contracts increases a sense of responsibility by the negotiators as they know very well that they will be sanctioned should their decisions impact negatively on the livelihoods of people and the interests of the nation at large. It also helps to curb the risk of corruption and mismanagement and is a key anchor of democracy, good governance and sustainable development.

Transparency and accountability are very necessary in the mining sector because the mineral resources belong to the citizens. State institutions like the Ministry of Mines and Mining Development manage them on behalf of citizens. The main objective for calling for transparency and accountability in the mining sector is to ensure that the exploitation of

²⁴ <http://www.zimstat.gov.zw/press-releases/2014/07/2014-07-20-01>

mineral resources benefit all Zimbabweans in line with the mission statement of the MMMD. It must also be noted that transparency and accountability are not exclusive of each other. Transparency is a pre-condition for accountability. Without access to timely, accessible and credible information, there is no basis for accountability.

Lack of value addition and beneficiation is another major weakness of the Mines and Minerals Act, which is holding back the potential of the mining sector to effectively contribute to economic development. The Act does not make it mandatory for minerals to be beneficiated before they are exported. Although Zimbabwe has a significant and diversified mineral resource base, the bulk of these minerals are exported as raw materials, which fetch low prices on the international market. The true value of these mineral resources is only fully realized after they have been processed. The value of minerals appreciates immensely throughout the beneficiation process. Furthermore, value addition and beneficiation create new jobs and lead to other downstream benefits.

The former Minister of Finance clearly articulated how Zimbabwe is losing out on value addition when he noted:

The low level of value addition activities, particularly in the mining sector and agricultural products, has resulted in the country being unable to realize meaningful benefits from its endowments hence compromising employment creation, foreign exchange earnings and economic growth among others. It will therefore be necessary to institute further measures to discourage exportation of raw products that have potential for value addition inside the country.²⁷

The President of Zimbabwe is also on record lamenting the lack of value addition and beneficiation. However, until recently there was concern that talk of value addition and beneficiation was not backed by action and that there was no vision on how this should be done. The President and the former Minister of Finance's voices seemed to be lone voices in the wilderness and this may explain why no concrete action has been taken to value add and beneficiate Zimbabwe's mineral resources.

A good example of how the Mines and Minerals Act lies at the heart of the failure by government to take concrete measures to promote beneficiation and value addition is the ZISCO – Essar deal that was signed between the Government of Zimbabwe through the Ministry of Industry and Commerce and Essar Africa Holdings.²⁸ The deal was meant to

²⁷ [REDACTED]

²⁸ [REDACTED]

revive the operations of the Zimbabwe Iron Steel Company (ZISCO). When allegations surfaced that Essar Africa Holdings were not interested in reviving the operations of ZISCO but in Zimbabwe's huge iron ore reserves which they wanted to export to support their operations worldwide and that the deal was just a smokescreen⁸², the leading negotiator on behalf of the Government of Zimbabwe came under a lot of criticism for not making beneficiation and value addition one of the key requirements. Appearing before the Parliamentary Portfolio Committee on Industry and Commerce, the then Minister of Trade and Industry, professor Welshman Ncube argued in his defense that the Mines and Minerals Act did not provide for valuation of mineral resources before a licence could be granted. In his opinion, it would be unfair and unprecedented for value addition and beneficiation to be used as a precondition.⁸³ Reprehensible as this may have sounded, the Minister was very right in his reading and interpretation of the Mines and Minerals Act with regards to value addition and beneficiation.

While lack of value addition and beneficiation is evident in all minerals mined in Zimbabwe, it is most pronounced in the diamond and platinum mining sectors. With the potential to supply 25% of the global diamond market, Zimbabwe is now ranked as one of the top producers of rough diamonds. However, despite having risen to the position of one of the top producers of rough diamonds globally, Zimbabwe has not generated any significant jobs and revenue from its exploitation and trade in diamonds.⁸⁴ This is mainly due to the fact that the majority of the diamonds are exported in their raw form. There has not been any significant value addition and beneficiation of diamonds in Zimbabwe in the form of cutting, polishing and making of jewellery. Although there have been efforts towards this end, they have been half-hearted. Examples to value add and beneficiate Zimbabwe's diamonds include Minerals Marketing Corporation of Zimbabwe (Diamond Manufacturers) Regulations.⁸⁵ The regulations requires the Minerals Marketing Corporation of Zimbabwe in terms of section 3(1) to set aside not more than 10% of gem quality diamonds, not more than 10% of industrial diamonds for sale to local diamond manufacturers. These local diamond manufacturers are required to cut, polish and crush or otherwise process the rough diamonds for gain or reward. The Zimbabwe Diamond Policy, 2012 is another attempt at beneficiation. The policy states that the Government shall reserve a quota of all diamonds produced in Zimbabwe for local polishing and jewellery manufacturing.⁸⁶

⁸² [REDACTED]
⁸³ [REDACTED]
⁸⁴ [REDACTED]
⁸⁵ [REDACTED]
⁸⁶ [REDACTED]

Another problem is that the Mines and Minerals Act is not sufficiently representative and participatory. When the Act was enacted in 1961, the state and the private sector were regarded as the only players in development. Civil Society Organisations and communities were mainly regarded as non-players in the development process. As a result of this perception, the current Mines and Minerals Act is mainly a reflection of state and mining company interests at the expense of other stakeholder's interests like communities and CSOs.

A key indicator of this thinking is the exclusion of these stakeholders to participate and be represented in the policy and decision-making processes and institutions. Institutions are key to achieving sustainable development in natural resources management including minerals. It is through participation in these institutions that stakeholders have access to information, have influence in the decision-making processes and are able to influence benefit sharing mechanisms. It therefore follows that if communities and CSOs are to effectively participate in mineral resource governance, they have to participate and be represented in the policy decisions making institutions.

One of the key institutions established under the Mines and Minerals Act is the Mining Affairs Board.⁶² The board is made up government representatives in the form of the Ministry of Mines and Mining Development, industry through the Chamber of Mines, Commercial Farmers' Union and a member of the Institute of Chartered Accountants. While other stakeholders are represented and participate in the board, communities and CSOs are conspicuous by their absence. The membership of this institution distances communities and CSOs from mining as if they are not interested and affected stakeholders. It makes it difficult for their concerns and interests like access to information, violation of community rights and benefit sharing to be articulated and taken at the highest decision making level. While the argument of representative democracy can be raised, it cannot be justified, as there are no clear structures through which the Mining Affairs Board is directly exposed to the issues of concern to communities. Infact, it means that the board deliberates on mining business based on the views of government technocrats and the private sector without taking into account the interests of CSOs and communities.

Ironically, the decisions made by this board in which they are neither represented nor participate in have important implications in their participation in mineral resource

Chiadzwa area in Marange to ARDA Transau until an agreement on compensation issues had been reached. The learned judge did not grant the order sought on the basis that those responsible for paying compensation had not refused to do so although no agreement had been reached. Since then, over 1 800 households have been relocated and compensation issues are still pending. The United Nations Basic Principles and Guidelines on Development Based Evictions and Displacement⁸² are very clear on how displacement and relocation of communities should be done and how fair and adequate compensation for affected communities can be worked out.

ANALYSIS OF THE PROVISIONS OF THE DRAFT MINERALS POLICY

The previous section highlighted the problems blighting the mining sector as a result of a weak legal and policy framework as codified in the Mines and Minerals Act and how this is affecting the sector's ability to optimally contribute to economic development. This section focuses on analyzing the provisions of the draft Minerals Policy. The objective of this analysis is to determine to what extent the draft Minerals' Policy, which is going to influence and shape the development of a new and comprehensive Mines and Minerals Act addresses these shortcomings. The analysis of the progressiveness of the provisions of the draft Minerals Policy or lack of it, will be measured against international principles and initiatives that promote best practices on the governance of natural resources including minerals. The principles include good governance, transparency and accountability and public participation. The initiatives include Extractive Industries Transparency Initiative (EITI), the Natural Resources Charter and the United Nations Guiding Principles on Business and Human Rights. At the national level, reference will be made to the Zimbabwe Mining Revenue Transparency Initiative (ZMRTI) and the new constitution of Zimbabwe. Both the ZMRTI and the new constitution have some very good provisions, which have some implications on good governance of mineral resources, which is the ultimate objective of legal and policy reforms. Good governance of natural resources including minerals has now been recognized as critical for sustainable development.

While the term good governance is widely used in the development discourse, there is no single exhaustive definition of the term.^[2] Governance is defined as “the complex set of norms, institutions, and processes that determine how power and responsibilities are exercised, how decisions are taken and how citizens participate in the management of natural resources”.^[3] In very simple terms, governance of natural resources can be understood to mean who has power, who has influence and decision making capacity and how decision makers are held accountable for their commissions or omissions. However, governance on its own is not enough. What is important is the process by which decisions are made or the quality of governance known as good governance.^[4] Good governance is underpinned by a number of values and principles. These include public participation in the policy and decision making processes, transparency and accountability.^[5] This lack of a clear

[2] [REDACTED]
[3] [REDACTED]
[4] [REDACTED]
[5] [REDACTED]

definition has resulted in people talking more about the values and principles of good governance rather than what it means.

For purposes of this research, a working definition of good governance has been adopted. Good governance is defined as:

The exercise of public authority with regard to society through the agencies of government—executive, legislature and judiciary in the context of the institutional and policy framework in place. It is about the process by which bargains between the state and society are made including policies and institutions and how they are subsequently implemented and monitored by organisations.^[22]

The vision of the draft Minerals Policy is based on the vision of the Africa Mining Vision.^[22] The anchoring of the vision of the draft Minerals Policy on the vision of the AMV on its own is very progressive. The AMV is in the process of moving from vision to realization and countries are encouraged to reform their laws and policies guided by its provisions. The AMV is the blue print on how Africa can use its vast mineral resources for social and economic development. The vision of the draft Minerals Policy is a welcome departure from the thinking in the current Mines and Minerals Act, which is focused on extraction of mineral resources without linking it to sustainable growth and socio-economic development.

The vision has a number of aims. These include achieving downstream linkages into mineral beneficiation and manufacturing. Under the section on problems affecting the mining sector, in the Draft Minerals Policy, lack of value addition and beneficiation was highlighted as one of the major weaknesses of the current Mines and Minerals Act. In addition, the vision aims at achieving mutually beneficial partnerships between the state, the private sector, civil society and communities. This is very much in line with the AMV, which calls for tri-partite partnerships between these stakeholders in the mining sector. This progressive provision in the draft Minerals Policy is contrasted with current Mines and Minerals Act, which regards mining as the preserve of the state and the private sector. This thinking has been the major causes of conflicts between communities and CSOs on one hand and Government and the private sector on the other hand.

Furthermore, the draft Minerals Policy is aimed at achieving a vibrant, environmentally friendly and socially sustainable artisanal and small-scale mining sector. This is another welcome development when one takes into account the contribution of artisanal miners

^[22] [REDACTED]

^[23] [REDACTED]

to economic development.^[21] This provision is in line with the AMV, which calls for the recognition and regulation of artisanal miners. The current Mines and Minerals Act criminalises artisanal mining. It is important to note that the Government of Zimbabwe is already taking steps to regularize the operations of the artisanal miners. The 2014 National Budget makes provisions for the regulation of artisanal miners through an Act of Parliament and incentives including the allocation of a budget of US \$100 million dollars for capacity building as a way of plugging mining leakages. A Joint Taskforce which includes representatives of artisanal miners, Ministry of Mines and Mining Development, Environment, Water and Climate, Environmental Management Agency (EMA), Zimbabwe Parks and Wildlife Management Authority (ZPWMA), Fidelity Printers and Refiners, ZMDC and MMCZ has been put in place to explore ways of how the regulation of the artisanal miners can be done.^[22]

The Draft Minerals Policy also calls for a well governed mining sector that is safe, healthy, gender and ethnically inclusive, environmentally friendly, social responsible and appreciated by surrounding mining communities (emphasis added). Again, this provision is a progressive provision, which is based on the AMV. Currently, mining communities regard mining as a curse rather than a blessing. The reason for this thinking is not difficult to understand. Mining is associated with forcible evictions and relocation of communities without fair and adequate compensation, loss of agricultural and grazing land, environmental degradation, water and air pollution and lack of meaningful benefits hence their failure to appreciate it. Mining can never become socially responsible and appreciated by communities without considering them as stakeholders, without respecting their EESCR, without providing them with access to information, involving them in the policy and decision making processes and paying them fair and adequate compensation for the loss of their land.

The draft Minerals Policy Principles are also very reflective of the paradigm shift in mineral resources governance. The policy principles are based on the principles of the new constitution of Zimbabwe. The principles include good governance.^[23] As already pointed out, good governance is critical in the management of natural resources including minerals. Other policy principles that promote good governance of mineral resources include equitable sharing of natural resources,^[24] which include minerals and equitable access by all Zimbabweans to the country's natural resources.^[25] These principles underpins the

[21] [http://www.mines.gov.zw/Portals/0/AMV%20-%202012.pdf](#)

[22] [http://www.mines.gov.zw/Portals/0/AMV%20-%202012.pdf](#)

[23] [http://www.mines.gov.zw/Portals/0/AMV%20-%202012.pdf](#)

[24] [http://www.mines.gov.zw/Portals/0/AMV%20-%202012.pdf](#)

[25] [http://www.mines.gov.zw/Portals/0/AMV%20-%202012.pdf](#)

thinking that natural resources including minerals resources belong to the whole nation and every citizen should benefit from their exploitation and not only a few people who are politically or economically connected commonly known as the power elites.

Another key policy principle in the Draft Minerals Policy is the requirement that procurement and other government contracts, including mineral leases, should be done in a transparent, fair, honest, cost effective and competitive manner.⁸² This principle requires an Act of Parliament to be put in place to achieve this objective. As already highlighted, one of the biggest problems that is holding back the comparative advantage of Zimbabwe's mining sector to become a competitive advantage is limited transparency, which has become a fertile ground for breeding corrupt activities. Lack of transparency is a problem within the whole mining value chain beginning from the issuance of exploration licences, mining leases and contract negotiation. The current Mines and Minerals Act does not make provisions for contract transparency and this has affected Zimbabwe's ability to maximize benefits from its diverse and significant mineral resource base. This principle is also in line with the new EITI Standard, which calls for contract transparency.⁸³ Implementing countries are required by the new Standard to publicly disclose any contracts and licences that provide the terms or information on the exploitation of mineral resources. This principle is also in line with the Natural Resources Charter, which calls for transparent and competitive award of contracts so as to secure maximum benefits and rewards.⁸⁴

Another principle derived from the new constitution is the right to a clean and healthy environment.⁸⁵ The new constitution provides that every person has a right to an environment that is not harmful to their health or well being and to have the environment protected for the benefit of present and future generations, through legislative and other measures that prevent pollution and ecological degradation and promote conservation.⁸⁶ Mining activities are one of the biggest causes of environmental degradation and pollution that negatively impact on communities' EESCR. This draft Minerals Policy principle, which is based on a key constitutional provision, is therefore very progressive as it protects community rights. If properly implemented, it can bring welcome relief to communities in mining areas like the Marange Diamond Fields, the black granite mining areas of Mutoko and the Great Dyke where communities are at the receiving end of environmental problems associated with mining activities. The influence of the

⁸² [REDACTED]
⁸³ [REDACTED]
⁸⁴ [REDACTED]
⁸⁵ [REDACTED]
⁸⁶ [REDACTED]

AMV is also evident in this principle. The AMV calls for measures to address the negative environmental, social and cultural impacts on communities as a result of mining.

The Minerals Governance section is very clear that the current Mines and Minerals Act is based on a colonial regime that is not helping to promote mineral based economic development. The section calls for the development of a new minerals regime, which hopefully will be through a new Mines and Minerals Act. The section has a number of provisions, which are aimed at promoting mineral resource governance. It calls for enhanced participation by indigenous Zimbabweans in the mining sector and related linkage industries and equitable access to the sector by all Zimbabweans with the necessary skills irrespective of their gender or ethnicity. This provision is to a large extent being influenced by the new constitution and the Indigenization and Economic Empowerment Act (IEEA).^[22] While the intentions and objectives of the IEEA have been widely viewed as being noble, it is the way in which it is being implemented that has been problematic.^[23] This provision is calling for broad based participation if indigenisation is to be meaningful.

Adverse social and environmental impacts of mining activities on communities have already been highlighted and discussed. The Minerals Governance section calls for the minimization of these negative social and environmental impacts of mining activities. It also adds another important component on the health and safety of workers within the mining sector. This provision is in line with the UN Guiding Principles on Business and Human Rights, which calls on the state to protect the rights of workers and on business to respect the rights of workers.

Artisanal and small-scale miners are also recognized as playing an important economic role. The section calls for their support so that their activities can be done in a sustainable manner to create employment, generate income and help in poverty reduction efforts in the rural areas.

The marginalisation of affected people especially communities, from the decision-making processes is one of the biggest criticisms leveled against the current Mines and Minerals Act. Apart from the state and the private sector, the Act regards other actors as if they are non-existent and this has been a major source of contestation. Marginalization is evident through among things failure to consult communities, failure to respect their rights and

failure to provide them with information that will enable them to make informed decisions. The draft Minerals Policy addresses this problem by calling for the consultation of all stakeholders and affected people from exploration through mining and post mine closure.

The policy is also alive to initiatives at the regional, continental and international levels that can be used to promote mineral resource governance for accelerated growth and development. Under the Transparent Benefits from Mining section, the EITI is specifically mentioned as an initiative to promote transparency in the mining sector through the provision of information on revenue flows and other benefits coming from the mining sector. The draft policy recommends the progressive accession of Zimbabwe to EITI and to adhere to its principles and procedures of the EITI Standard and the EITI Rules. The new EITI Standard requires contract transparency and this will help to end the opacity and secrecy surrounding deals in Zimbabwe's mining sector. With regards to transparency and accountability, the 2014 National Budget Statement states that the Government of Zimbabwe will embrace the World Bank's Extractive Industries Transparency Initiative. This is a welcome departure from previous statements especially by the MMMD that expressed outright rejection of the initiative in the past. Zimbabwe currently has a domestic initiative called the Zimbabwe Mining Revenue Transparency Initiative (ZMRTI), which is based on the EITI principles. The only difference is that the ZMRTI is a wholly Zimbabwean initiative while EITI is international. The ZMRTI is regarded as the first step in Zimbabwe's journey to join the EITI.

Illicit financial flows in the form of tax evasion and avoidance^[2] is a major problem in the mining sector. It is estimated that Zimbabwe has lost a cumulative US\$12 billion dollars in the last three decades through illicit financial outflows ranging from secret financial deals, tax avoidance and illegal financial activities.^[3] The draft Minerals Policy under the section on Equitable and Competitive Fiscal Regime is alive to this scourge and provides that mining companies with annual revenues above certain threshold levels will be required to undergo periodic tax self audits. While the threshold is yet to be set, it is recommended that every company that is carrying out mining activities in Zimbabwe irrespective of the size of its annual income will be required to undergo this tax audit so as to disclose its revenues and profits. The requirement that each company does a self-tax audit is also problematic. Companies are getting significant benefits through tax avoidance and evasion and for the government to expect them to police themselves is being unrealistic. The audit must be carried out by independent auditors that are appointed by the government.

[2] [http://www.ilo.org/public/eng/mediacenter/pressreleases/2008/080608.htm](#)
[3] [http://www.ilo.org/public/eng/mediacenter/pressreleases/2008/080608.htm](#)

The section on Transparent Benefits from Mining is very responsive to some of the problems currently affecting the mining sector especially on transparency and equitable sharing of benefits from the exploitation of mineral resources. One of the major stumbling blocks in mineral resources governance in Zimbabwe is lack of access to information. Transparency is the precondition for accountability. Transparency entails having access to timely, accessible and credible information. Without information, there is no basis for accountability. Through the draft Minerals Policy, the Government of Zimbabwe commits itself to transparency through the provision of information on revenue flows and other benefits obtained from the mining sector. This is in line with Precept 2 of the Natural Resources Charter. The provision of information results in an informed public. One of the renowned initiatives for providing information on revenue flows from the mining sector is the EITI. The policy makes a commitment to progressive accession to the EITI and to adhere to the principles and procedures of the EITI Standards and EITI Rules. Zimbabwe is already implementing a domestic version of the EITI through the Zimbabwe Mining Revenue Transparency Initiative (ZMRTI).^[2] The objectives of ZMRTI include the generation of independently reconciled information for public dissemination.^[2] The ZMRTI provides a foundation, which the Zimbabwean government can build on as it progresses to join the EITI.

Failure to derive meaningful and equitable benefits from mining activities taking place in their localities is one of the major sources of conflict between communities on one hand and the state and the private sector on the other hand. Communities see more of mining costs rather than benefits.^[2] Equity is one of the core principles and values of mineral resource governance. The draft Minerals Policy is very progressive in this aspect. With regards to benefit sharing, the policy provides that:

The Government of Zimbabwe will ensure that communities that are or could be adversely affected by mining operations derive regular and significant benefits from those operations. A predictable formula shall be put in place to determine such benefits, which shall include but not be limited to revenue allocation, access to employment, the provision of infrastructure for local use and resources for local education and skills formation. Mining companies will be encouraged to develop local supply chains for their purchases, thereby integrating themselves into the local economy.^[2]

[2] [REDACTED]

[2] [REDACTED]

[2] [REDACTED]

[2] [REDACTED]

[2] [REDACTED]

The draft Minerals Policy provides for value addition and beneficiation under the forward linkages and Regulatory Framework section. If Zimbabwe is to get full value from its mineral resources, then beneficiation and value addition is a must. Fortunately, the Government of Zimbabwe is already taking steps to address issues on value addition and beneficiation in two sectors that it is losing out most due to lack of value addition and beneficiation. The two sectors are diamond mining and platinum mining. The three platinum mining companies in Zimbabwe namely ZIMPLATS, Unki and Mimosa were compelled through a Government directive to submit platinum refinery plans to the Ministry of Mines and Mining Development. The deadline expired on the 17th of January 2014 and by close of business, all the three platinum companies had complied with this directive and submitted their refinery plans. The plans show that the platinum mining companies intend to set up a refinery that will be fully operational by 2016.⁸⁷ The period between now and 2016 will be used to sort out logistical issues which include the need for increased output of platinum production, financing and power supply.

The Government of Zimbabwe gave a similar deadline to diamond firms to come up with plans for establishing diamond cleaning facilities. The deadline was 31 January 2014.⁸⁸ The rationale behind forcing diamond companies to set up cleaning facilities is to ensure that the Government gets more in terms of revenue and those that failed to comply will face punitive penalties. Once diamonds are cleaned, the issue of clarity is enhanced and this helps in terms of value. Companies that fail to comply with this directive face punitive penalty. While diamond cleaning is not the same as diamond beneficiation/ value addition, the requirement for diamond firms to set up cleaning facilities is regarded as the first step towards value addition and beneficiation. However, previous efforts towards diamond value addition and beneficiation in the past have been hampered by very high fees that are levied on cutters and polishers that made value addition unsustainable. At the moment, the cutters are required to pay an annual registration fee of US \$100 000 as annual registration fee, an amount which is widely regarded as punitive. As a result of these high registration fees, the diamond value addition and beneficiation efforts that were ushered in by the Minerals Marketing Corporation of Zimbabwe (Diamond Manufacturers) Regulations collapsed with over 70 firms that had registered for the cutting and polishing of diamonds going out of business.

⁸⁷ [REDACTED]
⁸⁸ [REDACTED]

The 2014 National Budget statement has additional measures to encourage diamond and platinum beneficiation before export. These include the imposition of a 15% export tax on unprocessed platinum and diamonds with effect from January 2014.

The AMV highlights linkages – downstream, upstream and side stream as a way of ensuring that mining is integrated to local economic development. This provision of the draft minerals policy is aimed at achieving these envisaged linkages.

The section on Environmental Stewardship and Social Responsibility deals with the negative environmental and social impacts of mining on the environment and communities. To a larger extent, this section is influenced by Zimbabwe's current environmental laws and policies especially the Environmental Management Act⁽¹⁷⁾ and the National Environmental Policy and Strategies. The draft Minerals Policy provides that no significant mining operations will be permitted without an environmental and social impact assessment having been conducted, evaluated and approved. This is in line with sections 97, 98 and 99 of EMA which requires Environmental Impact Assessments (EIAs) to be carried out before certain projects that are listed in 1st schedule are carried out. Mining is one of the projects that require an EIA to be carried out before the commencement of mining activities.

The draft policy makes provisions for building capable institutions including geological survey. This is a very good provision when one takes into account the fact that exploration or geological survey is the lifeblood of mining. Without it, there will be no new discoveries of minerals. Limited geological survey or exploration is also limiting Zimbabwe's ability to fully leverage benefits from its mineral resources. Without geological data regarding the quantity and quality of minerals, it is not possible to negotiate effectively with investors and this is one of the major underlying cause of poorly negotiated contracts that are failing to unlock value to the country. It is widely thought that the extent of the Marange diamond deposits is not fully known by the Zimbabwe Government. Exploration requires a lot of resources, skill and competence. Successful exploration and development unlocks the mining sector's forward and backward linkages with many sectors of the economy which include job creation, new infrastructure, increased government revenue that leads to investment in social issues like education, health and other poverty alleviation initiatives. Zimbabwe used to have a very good Geological Survey and the latest comprehensive survey was done in 1990. To address this problem, the 2014 National Budget Statement calls for the operationalization of the Exploration Company through funding and capacitating

While the idea of a SWF is very noble, there are some serious concerns regarding its chances of success in the context of Zimbabwe's current, economic, social and political problems. A successful SWF is usually anchored on a sound legal framework, effective and transparent revenue collection system, a stable and predictable environment that attracts FDI and a country that have little or no international debt. Measured against these key success factors, Zimbabwe is currently not an attractive FDI destination for a number of reasons, which include political and lack of policy clarity especially on the Indigenization and Economic Empowerment Act. Furthermore, Zimbabwe has a huge external debt estimated at around 11 billion United States dollars. SWF are usually created from budget surpluses. With such a huge external debt, it is difficult to understand where the savings for the SWF will come from. Public service delivery in terms of water, health and sanitation, infrastructure and education are in dire straits making it incomprehensible to think of saving for future generations while the current generation is struggling to meet basic needs.

In the absence of transparency and accountability and proper institutions to guide investment decisions and the purpose of investment, there is fear that the creation of SWF maybe a cover for looting of funds by corrupt elements. A cursory look at the composition of the Sovereign Wealth Fund of Zimbabwe as provided for under section 6 of the Sovereign Wealth Fund Bill shows that this fear may not be misplaced.

RECOMMENDATIONS

The research review has shown that the draft Minerals Policy has some very good provisions which if properly and thoroughly implemented through the envisaged new and comprehensive Mines and Minerals Act and regulations will go a long way in addressing some of the problems in Zimbabwe's mining sector. The vision and general goals of the draft Minerals Policy on minerals governance like aspiring for strong public participation, bringing more Zimbabweans that were historically disadvantaged into the mining sector through indigenisation, creating more transparency and accountability and avoiding transfer pricing and other fiscal loopholes through equitable and competitive fiscal regime, are all very positive and commendable. However, despite these good provisions the draft Minerals Policy can be improved and strengthened before it is finalized by the Ministry of Mines and Mining Development and adopted by cabinet

Firstly the draft Minerals Policy should require mining companies to carry out due diligence on how their activities are likely to adversely affect community rights before they commence mining activities. One of the best ways of carrying out due diligence is through a Human Rights Impact Assessment (HRIA).⁸² The mining sector especially diamond mining has caused a lot of suffering to local communities by violating their EESCR, civil and political rights through water and air pollution, loss of agricultural and grazing land through relocation without fair and adequate compensation, failure to provide information and to involve them in the policy and decision making processes. While the draft Minerals Policy provides for Environmental Impact Assessment (EIA), this is not enough.

A HRIA helps to mitigate the negative impacts of mining on human rights while maximizing its positive impacts. HRIAs is different from Environmental Impact Assessments (EIA) in that they are based on binding international human rights laws to which governments have voluntarily committed themselves through signing and participation in international treaty negotiations. They measure to what extent the project complies with human rights both in terms of content and processes.

Furthermore, the issue of EIAs that is provided for under the draft Minerals Policy, is not comprehensive, it simply states that no significant mineral operation will be allowed without an environmental and social assessment having been carried out, evaluated and approved by the Government of Zimbabwe. However, the problem is that what

⁸² <http://www.unhcr.org/refugees/article/43c47615.html>

constitutes “significant mineral operation“,has not been defined and can be variously interpreted. It is therefore recommended that more specific terminology to describe when an EIA will be required.The draft Mineral Policy should also clearly state that EIAs would be required prior to mineral exploration rather than after mining has commenced, as has been the case with some mining projects.²²

The draft Mineral Policy aims to create “Development Corridors” where mineral exploitation will be used to operate growth in other sectors that includes agriculture and forest production and industrial manufacturing. It is recommended that these initiatives be subject to EIA or strategic EIA before they commence.

Secondly, the section on Transparency Benefits from Mining states that the Government will ensure that communities that are or could be adversely affected by mining operations derive regular and significant benefits from these operations. The listed benefits include revenue allocation, access to employment and the provision of infrastructure for local use among others. However what is not clear is whether communities living near that mine need to prove that they are adversely affected by mining activities in order for them to gain access to the benefits. It is also not clear how the communities' benefits will be shared. It is recommended that the term adversely affected be clearly defined. Local communities in mining areas that are directly affected by mining activities should have broad access to the benefits.

Thirdly, several sections of the draft Minerals Policy including Developing with Broad Based Participation states that public participation and consultations are important and will be required. However it is not clear how public participation and consultation will be incorporated into mineral development projects, especially on who can participate, who must be consulted and whether these projects require free, prior and informed consent. It is recommended that public participation and consultation be initiated even earlier so that communities can weigh in on whether or they want mining in their regions.

Fourthly, it is recommended that some areas should be declared off limits to mining activities due to their environmental cultural, social or economic reasons. These areas include conservancies, protected areas and world heritage sites. There are a lot of cases where mining is taking place in protected areas like Hwange National Park for coal and the mining of heavy sands in Mana Pools, which is World Heritage site.

Fifthly, it is recommended that the policy should state that any stabilisation clauses included in mining contracts should apply to fiscal provisions for a limited period of time and cannot apply to other laws and policies like those pertaining to the environment, labour, access to information and community rights. Ideally stabilisation clauses should be flatly rejected for mining contracts. While stabilisation clauses are not necessarily bad per se as they help in attracting the much needed Foreign Direct Investment (FDI), the failure by developing countries like Zimbabwe to understand their implications and negotiate them wisely, has resulted in them losing out on tax revenue. Tax revenues that should accrue to the government are often impeded by stabilisation agreements or clauses, which essentially lock in a fiscal system. As a result of poorly negotiated stabilization agreements, both the good and the bad characteristics apply and will not adjust with changes in external factors. A good example is a tax holiday. If a tax holiday is guaranteed under a stabilization agreement/ clause, then no taxes will be paid during the tax holiday period even though prices increase.

Sixthly with regards to fiscal provisions it is recommended that the policy require that the envisaged new Mines and Minerals Act, clearly establish the fiscal regime that will govern each mining agreement. This can be done through developing a model mining contract that would be used in each negotiation. This will help reduce corruption and conflicts of interests that have commonly characterized the negotiations of contracts in Zimbabwe. Examples where such corruption and conflict of interest have been evident include the Marange diamond mining contracts and Zimbabwe Iron Steel Company (ZISCO)-ESSAR deal.

Seventhly, under the Equitable and Competitive Mineral Section, mining companies with revenue above specified revenue threshold will be required to conduct audits. While this requirement is good, it is recommended that every company with a mining contract in Zimbabwe be required to conduct an audit and that a mine's revenue and profit be declared. The Draft Policy requires that only practices that have encouraged transfer pricing will be reviewed. This is not good enough especially when one takes into account how difficult it is to detect transfer pricing by companies and trying to determine if it was encouraged or not is even more difficult.

The draft Mineral Policy should require that a company would be taxed separately for each project it develops in Zimbabwe, a practice that is commonly known as ring fencing.²² Ring fencing refers to the practice of separating a taxpayer's activities and operations that limit

consolidation of income and deductions. Ring fencing is very necessary when a mining company has got more than one project or operations in a country. It is perfectly legal for it to compile the accounts of its different projects although they are geographical separate if the host country does not ring fence its operations. Failure to ring fence operations encourages a company to shift losses from loss making entities to profitable activities within the host country thereby reducing their tax obligations. The practice by companies of sharing profits and losses across multiple projects should be prohibited. Ring fencing helps to avoid potential delays in receipt of revenue by the government by disallowing write offs that are incurred beyond a producing area. However, ring fencing should be balanced with the consideration that it may act as a disincentive for mining companies to invest in exploration activities beyond the project area and this can slow the development of the mining sector.

The draft Minerals Policy should also require a company to demonstrate its financial and technical capacity before it is allowed to bid for a concession and to disclose beneficial ownership.²² This will help to screen those companies that are not serious about mining but are just looking for a way to make a quick profit. Examples of mining companies in Zimbabwe that have been accused of not being serious investors after getting mining contracts include Canadile Miners and GyeNyame. The two companies got concessions to partner the Zimbabwe Mining Development Corporation (ZMDC) to mine diamonds in the Marange diamond fields in Chiadzwa.

In their applications for licences, the two companies misrepresented their technical and financial capacities. As a result of Canadile Miners' misrepresentation regarding its financial capacity, it is alleged that the Government lost about US \$2 billion and the matter is currently pending before the courts with the former directors facing fraud charges.²³ Government has since delisted Canadile mining and its special grant was taken over by Marange Resources. GyeNyame got the licence to partner ZMDC on the understanding that it was going to inject US\$110 million into the partnership. However, out of the expected amount, it only invested US\$8 million. This has resulted in the Government dissolving the partnership between ZMDC and GyeNyame and is scouting for a new investor.²⁴ Commendable as these efforts by Government to dissolve the partnerships maybe, it is also evidence that not enough due diligence regarding their technical and financial capacities was done when these two mining companies were chosen as partners of the

²² [REDACTED]
²³ [REDACTED]
²⁴ [REDACTED]

ZMDC hence the need to make sure that it is a requirement under the draft Minerals Policy.

Most of the mining companies mining in diamonds in Marange namely Mbada Diamonds, Marange Resources, Anjin investments, Diamond Mining Company, Jinan and Kusena do not have the financial resources and technical expertise for underground mining of diamonds. Most of them are good at alluvial mining. The lack of financial resources and technical expertise to do underground diamond mining has resulted in the Ministry of Mines and Mining Development considering not renewing their licences when they lapse with a view to having one diamond mining company that is capable of both alluvial and underground diamond mining of diamonds.⁸²

Furthermore, the draft Minerals Policy should also provide for beneficial ownership. Beneficial owner refers to the person (s) who directly or indirectly ultimately own or control the company and benefits. He or she or they, are the ultimate recipients of profits or other benefits that are generated by the corporate entity and in this case, the mining company. It is recommended that a register or record of the entities that bid for, operate or invest in mining activities in Zimbabwe be publicly available in the interest of promoting transparency and accountability in line with the objectives of the draft Minerals Policy.

Eighthly, the proposed Minerals Development Board does not have any direct Community Based Organisations and Civil Society Organisations participation and representation. While the other stakeholders namely government, business, labour and academic participate and are represented, CBOs and CSOs are conspicuous by their absence. The failure to provide for the participation and representation of CSOs and CBOs is surprising when one takes into account the fact that the draft Minerals Policy calls for tri-partite partnerships that are mutually beneficial and calls for an inclusive Minerals Development Board. The proposed composition is not inclusive of CBOs and CSOs and is reminiscent of the current Mines and Minerals Act in which these stakeholders do not participate and are not represented in the Mining Affairs Board. CSOs and CBOs are important stakeholders in mining and should be represented and participate in this important policy and decision making board. It is therefore recommended that the Board include CSOs and CBOs in its composition. It is further recommended that the Board also include experts on human rights, water resources, land rights, environment and taxation.

The ninth point is that while the draft Minerals Policy makes provisions for transparency and accountability and access to information, it is not clear how these will be implemented. In other words, there are no practical strategies proposed that will be used in the implementation of the policy. For example, there is no provision related to the oversight role of parliament on contract negotiations, revenue use and management. The role of parliament on these issues should be clearly stated and provided for. Furthermore, the draft Mineral Policy should declare that mining agreements, licences and other documents issued under the envisaged new Mines and Minerals Act and subsequent regulations, should be public documents. The failure of the draft Minerals Policy to provide clear strategies for implementation is contrasted with the provisions of the National Environmental Policy and Strategies of 2009. It is very clear in its implementation strategy. Apart from providing Guiding Principles, it also provides Strategic Directions.

Lastly, the draft Minerals Policy has some gaps regarding the negative social impacts of mining especially as they relate to Gender, HIV and AIDS. Women are some of the community members that are negatively affected by mining activities and these should be clearly articulated. Furthermore, the country's Indigenisation and Economic Empowerment Act calls for the participation of historically disadvantaged groups in the mining sector. Women are among the historically disadvantaged groups but it is not clear how they will participate. It is recommended that the draft Minerals Policy clearly state that the Government will ensure that the mining industry will comply with the National Gender Policy.

CONCLUSION

The review has shown that despite some weaknesses, the draft Minerals Policy has some good and progressive provisions that can help to ensure that Zimbabwe derives maximum benefits from its mineral resources to fund its developmental needs. However, while the draft Minerals Policy is a step in the right direction, it is important to note that a policy is a statement of intent of what the Government plans to do in a given sector and in this case, the mining sector. Rights accorded in a policy like the draft Minerals Policy, are not enforceable and claimable in a court of law. To a larger extent, the implementation of a policy is dependent on political will rather than legal provisions. This principle on enforceability may explain why Zimbabwe is very good at developing good policies, which are not equally backed by good laws.

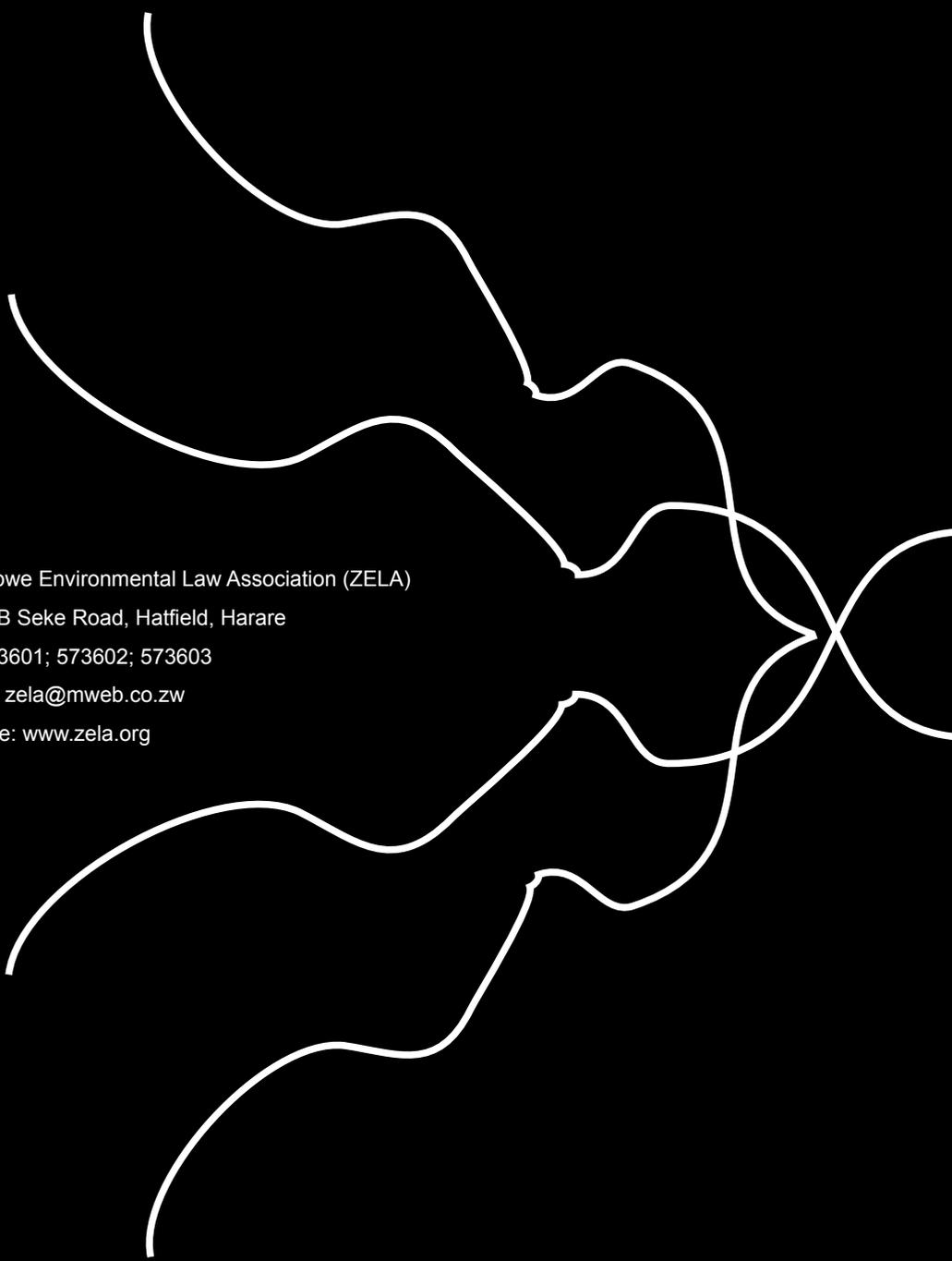
The most important consideration is to ensure that the progressive provisions in the draft Minerals Policy are properly and thoroughly concretised through a law and regulations made thereunder. It is therefore imperative that the provisions of the draft Minerals Policy are solidified through the development of a new and comprehensive Mines and Minerals Act.

BIBLIOGRAPHY

1. 2011 Mid-Year Fiscal Policy Review Statement
2. Africa Progress Report, 2013. Equity in Extractives. Stewarding Africa's Natural Resources for All
3. Africa Union, 2009. Africa Mining Vision
4. Annex I of the Report of the Special Rapporteur on Adequate Standard of Living. A/HRC/4/18
5. Center for Natural Resources Governance, 2013. Beneficiation: A Case for Zimbabwe's Diamonds
6. Constitution of Zimbabwe Amendment (No.20) Act 2013
7. Diamond Policy of Zimbabwe
8. Environmental Law Alliance Worldwide, 2013, Natural Resources Contracts: A Practical Guide
9. Government of Zimbabwe 2009. National Environmental Policy and Strategies
10. Government of Zimbabwe, 2003. Environmental Management Act, Chapter 20:27
11. Government of Zimbabwe, 2011. The Medium Term Plan, 2011-2015
12. Government of Zimbabwe, 2013. Zimbabwe Agenda for Sustainable Socio-Economic Transformation. Towards an Empowered Society and a Growing Economy, October 2013-December 2018
13. Hawkins, T, 2009. The Mining Sector in Zimbabwe and its potential contribution to recovery
14. International Institute for Environment and Development, 2010. Investment Contracts and Sustainable Development. How to make contracts for fairer and more sustainable natural resources investments.

15. Joint Report by the African Development Bank and Global Financial Integrity, May 2013
16. Lausche, B. 2011. Guidelines for Protected Areas Legislation. IUCN Gland
17. Mines and Minerals Act, Chapter 21:05
18. Ministry of Finance, 2011. The 2011 Mid-Year Fiscal Policy Review Statement
19. Ministry of Mines and Mining and Development, 2013: Draft Minerals Policy
20. Murombo, T, 2013. Assessment of the effectiveness of initiatives and frameworks being used in Zimbabwe to promote good governance, public accountability and transparency in the natural resources sector with a particular focus on mining
21. News Day, January 21, 2014. Government formalizing operations of artisanal
22. Parliament of Zimbabwe, Chrome Report
23. Parliament of Zimbabwe, Fifth Session of the Seventh Parliament, 2013. First Report of the Portfolio Committee on Mines and Energy on Diamond Mining (with special reference to Marange Diamond Fields) Presented to Parliament in June 2013
24. Revenue Watch Institute, 2013. Resource Governance Index, Zimbabwe
25. Statutory Instrument 157 of 2010
26. Sunday Mail Editorial. Lets maximize on our mining sector. July 10-16, 2011
27. The 2014 National Budget Statement
28. The Extractive Industries Transparency Initiative Standard, 2013
29. The Herald, 21 January 2014
30. The Natural Resources Charter, 2010
31. The Sunday Mail, 12 January 2014
32. The Sunday Mail, 19 January 2014

33. The Sunday Mail, 26 January 2014
34. The World Bank, 2013. Human Rights Impact Assessments: A Review of the Literature, Differences with other forms of Assessments and Relevance for Development
35. Transparency International Zimbabwe, 2013. Research paper on the Power Dimension to Mineral Related Corruption. Preliminary Findings from a Study conducted on the State of Corruption in the Mining Sector: The case of Gold, Diamond and Platinum Mining in Kwekwe, Gwanda, Marange and Mhondoro-Ngezi
36. UNGPs
37. Zimbabwe Environmental Law Association, 2011. Extractive Industries Policy and Legal Handbook. An analysis of the key issues in Zimbabwe's mining sector. Case study of the plight of the Marange and Mutoko mining communities
38. Zimbabwe Environmental Law Association, 2012. Report of the scientific investigation of the impact of the Marange diamond operations on water quality in the Save and Odzi Rivers including assessment of the health, environmental and livelihoods impacts
39. Zimbabwe Environmental Law Association, 2012. An outline of the mining taxation regime in Zimbabwe
40. Zimbabwe Environmental Law Association, 2012. Mining within the Zimbabwe's Great Dyke: extent, Impacts and Opportunities
41. Zimbabwe Environmental Law Association, 2013. Community Share Ownership Trusts (CSOT) in Zimbabwe's Mining Sector. The case of Mhondoro-Ngesi.
42. Zimbabwe Environmental Law Association: Towards the Development of a Diamond Act: An analysis of the legal and policy framework on diamonds and Zimbabwe's compliance with the Kimberly Process Certification Scheme Minimum Requirements, 2012
43. Zimbabwe Mining Revenue Transparency Initiative



Zimbabwe Environmental Law Association (ZELA)

No. 26B Seke Road, Hatfield, Harare

Tel: 573601; 573602; 573603

Email: zela@mweb.co.zw

Website: www.zela.org