

# NATURAL RESOURCES JUSTICE NETWORK POSITION ON THE POLICY AND LEGAL FRAMEWORK FOR MINING IN MALAWI





## INTRODUCTION

The government of Malawi through the Malawi Growth and Development Strategy II (2012-2016) identified mining as a potential sector for economic growth. Despite the growth of the mining industry, Malawi is yet to finalise the revision of the regulatory framework that guides operations in the sector.

Natural Resources Justice Network (NRJN), a grouping of over 33 civil society organizations that are active in the Extractive Industry Sector (Mining, Oil and Gas), has outlined key legal and regulatory considerations towards a more responsive mining governance framework that promotes sustainable development whilst ensuring that the sector is governed in a transparent, accountable and inclusive manner.

## KEY PROPOSITIONS FOR THE NEW LAW

The mining sector has not kept pace with the rapid modernization of mining codes as have other countries in Africa. The mining legislation therefore needs to be positioned to improve efficiency, transparency and sustainability of the sector in tandem with policy reform. The Mines and Mineral Act (MMA) should in this regard be informed by the principles of stability, consistency, stakeholder dialogue, management of expectations, social obligations, tradability of mineral rights, integrated land use planning and development plans.

**NRJN** proposes a need to address the following elements in the legal and regulatory framework for mining in Malawi to enable the sector contribute significantly to sustainable social and economic development.

## MINING FISCAL ENVIRONMENT AND TAXATION REGIME

- Allow the flow of capital for the fiscal regime and minimize double taxation,
- Taxes and royalty revenues derived from mining activities such as exploration, mine development and mining to reflect the value of the resources mined,
- Care should be taken in providing for tax stability agreements since these are still subject to parliamentary scrutiny,
- Negotiate tax treaties with the home countries of investors to avoid double taxation on the investor,
- Provide royalty tax by law rather than by negotiation with individual investors, royalty to be calculated from the gross market value,
- Strengthen the legal framework on taxation in the mining sector so that maximum revenue is generated to support socio-economic development of the country while permitting the mine developers and operators an adequate rate of return on their investment,
- Speed up with the legislating process to keep pace with the development of mining sector,
- Strive to generate much needed revenue from the mining sector by balancing incentives for attracting foreign direct investment and ensuring relevant resource mobilization initiatives in the sector,
- Limit either the period of loss carry forward or the cost amount as determined in the income tax calculation,
- Consider using depreciation schedules for capital equipment based on the item's useful life, and , consider including realized capital gains (or a portion thereof) in

- the annual income tax calculation,
- Revise the tax regime to address issues as regards royalties and tax holidays,
  - Create a separate account where royalties, license fees and taxes obtained from mining could be monitored,
  - Consider a flexible fiscal system which responds to price movements and stimulates national development,
  - List all mining companies on the stock exchange, and;
  - Legal provisions to protect wanton or unregulated transfer of foreign earnings.

## **MINERAL ADMINISTRATION AND DEVELOPMENT SYSTEMS**

- Create simplified, transparent one-stop administration systems within the appropriate ministries;
- Introduce internationally competitive mineral royalties as compensation for mineral depletion;
- Impose a reasonable social obligations upon holders of exploration and mining licenses and should make commitment to social obligations a requirement for the granting and renewing of exploration and mining licenses; the principles and modalities of these obligations should be articulate in policy and legislation and be incorporated in mining licenses/development agreement; corporate social responsibility programmes should be linked with the granting of exploration and mineral development rights;
- Consider developing an Extractive Industry Charter to provide guiding policy for the entire extractive industry;
- Put in place programmes towards meaningful empowerment and participation of nationals to enable them hold public officials who manage mineral benefits accountable;
- Protect local Malawians who intend to participate in the industry by designating certain Minerals to be exploited by Malawians.
- Establish a special Oil and Gas unit within the Ministry to oversee issues of oil and Gas Exploration and Extraction,
- Provide a percentage of the profits to be invested into the community through a community fund to be administered by the local government,
- Institute a Mining Development Commission to be composed of experts from various government departments, academia, civil society and private sector to provide regulatory oversight; and,
- Ensure security and continuity of tenure with reasonable exclusivity, enforceability and transferability of rights.



## ENVIRONMENTAL MANAGEMENT

- Incorporate principles of integrated environmental management and basic environmental impact assessments before the granting of exploration rights. For mining rights, the international principles of integrated environmental management should apply for all projects,
- Adopt an integrated resource use and management framework which maps and profiles all resources in a mining area and seeks to enhance their sustainability;
- Make it mandatory for mining companies to provide for rehabilitation of land and pay for adverse impacts on community livelihoods,
- Integrate multiple land use planning into the license granting process,
- Introduce a Minerals Development Fund to include provision for environmental disasters and social decline as a consequence of mining into mining policy and legislation,
- Reinforce environmental monitoring and compliance of the Environmental Impact Assessment (EIA),
- Revise the EIA guidelines to make it mandatory for public participation and consultations, and;
- Make EIA's in the language that the local people would understand for meaningful participation and consultations.

## RESETTLEMENT AND COMPENSATION

- Make available compensation for displacement for value of property and land in any category;
- Provide for principles and procedures for compensation and resettlement in the MMA,
- Provide core principles for all compensation regimes in the Land Bill and Customary Land Bill on the basis of which mining policy and legislation

compensation provisions can be anchored,

- Develop a National Resettlement Policy to guide all resettlement in Malawi in a uniform and just manner,
- Constitutionally guarantee social, cultural and economic rights of communities,
- Legislate for protection of customary rights and preservation of cultural and social traditions,
- Include in the MMA mandatory compensation for compulsory acquisition for deprivation of use of land due to reconnaissance, exploration or mining,
- Develop a culture of free, prior and informed consent within laws and regulations.
- Amend Land Acquisition Act to involve consultation with the local community prior to acquisition. Draw on the principle of Free, Prior and Informed Consent as outlined in the UN Declaration on the Rights of Indigenous Peoples,
- Develop EIA regulations under the Mines and Minerals Act specific to prospecting and mining licenses in line with international best practice,
- Develop a council or environmental agency to oversee, monitor and implement the regulations,
- Amend mining and land laws to include increased public participation of the affected communities including vulnerable groups,
- Legalize recognition of customary tenure based on occupancy,
- Enact resettlement regulations with detailed standards for compliance and monitoring; put in verification processes to ensure conditions are met,
- Constitutionally guarantee sustainable development principles in the mining industry,
- Enact supplementary legislation to environmental impact mitigation which addresses compliance with socio-economic mitigation,
- Repeal law excluding High Court from proceedings for wrongful acts brought under Mines and Minerals Act,
- Enact laws that provide alternative and accessible dispute resolution mechanisms at community level,
- Repeal mining law that only provides for compensation of surface rights, enact less discretionary compensation rules,
- Enact strict liability laws for damage to surface of land previously occupied by communities,
- Enact laws that take into account emerging damages, ceasing profits and need to relocate,
- Enact laws introducing an amount on top of compensation to be calculated to cover ancillary costs, and,
- Reform land law to include at least market value compensation for unregistered customary land holdings.

## **WOMEN AND MINING**

- Implement and enforce specific provisions for gender equality and equity and develop targeted policies to empower women in mining and/or support gender equality in mining policies with appropriate legislation,
- Adopt an “Affirmative action” approach to foster the enrolment of women in technical and other key disciplines for minerals development,
- Address social issues associated with women in mining effectively and involve

- women in the adoption of minerals policies that tackle Human Rights issues,
- Strengthen and/or create national Gender and Women in Development Policies in order to guide empowerment of women in the mining sector. In the medium term, initiatives similar to the empowerment charters in South Africa should guide the women empowerment process in the region, and,
  - Develop educational programmes aimed at both increasing men's sensitivity to women issues and women's empowerment in all sectors of minerals development.

## **CORPORATE SOCIAL RESPONSIBILITY**

- Develop an overarching Corporate Social Responsibility (CSR) policy for all investors in Malawi to regulate and guide the implementation of CSR interventions with possible monitoring and compliance reinforcement mechanisms,
- Legally bind companies to adhere to CSR through the Community Development Agreement (CDA),
- Allocate a percentage of the benefits accrued to mining to local communities;
- Spell out in the CDA how they community lives will be improved, and,
- Align CSR with international best standards such as the United Nations Guiding Principles on business and human rights.

## **INTEGRATING THE MINING SECTOR IN THE DOMESTIC ECONOMY**

- Develop mining clusters to link mining sector to the broader economy,
- Promote linkages between mining and agriculture, mining and tourism and mining for the value adding process industries, and,
- Undertake promotional events to sensitize the general public in mining opportunities and business development opportunities.



## **SAFETY, HEALTH AND SOCIAL WELFARE**

- Exploration, mining and processing of mineral resources to comply with requisite

safety health and environmental regulations,

- Ensure that each company within its jurisdiction accepts corporate responsibility for occupational health and safety through an appropriate set of legal requirements, as well as through governmental monitoring, inspection and enforcement activities,
- Make certain that failures in occupational safety and health performance are effectively dealt with to prevent reoccurrence and are supported by a system of penalties up to and including the revocation of operating permits,
- Harmonize and build capacity of institutions responsible for health, safety and welfare of mining workers, and,
- Strengthen and align the Mines and occupational Health and Safety Act with what other countries have done.



## ARTISANAL AND SMALL-SCALE MINING (ASM)

- Develop specific and appropriate legislation for the ASM sector and allocate resources for administration of relevant legislation, training and education in the sub-sector, providing support for the development of cooperatives, and assisting with finance, marketing of output and other technical matters,
- Revisit mineral policies in order to assess how the link between mining and poverty reduction is addressed and how ASM is factored into Poverty Reduction Strategies,
- Develop special mineral development rights for the sector that are simple to apply for, easy to comply with, transferable and give adequate security of tenure,
- Ensure that employment and working conditions for miners are within internationally accepted standards through enforcing the adoption of health, safety and environmental standards, and;
- Establish specific credit, savings and loan schemes to assist with technology and human resources, to finance ASM, and train participants in the ASM sub-sector.

## MINERAL BENEFICIATION AND MINERAL MARKETING

- Strengthen the regional markets for value added mineral products,
- Increase awareness on the benefits of adding value to mineral commodities through education and increase value addition through establishing appropriate processing industries, and,
- Leave the marketing of minerals to the free market and only monitor through the responsible ministry. Assistance in marketing should be reserved for the artisanal and small-scale mining sector; and, Identify suitable niche markets for marketing of unique products.

## **RESEARCH AND DEVELOPMENT (R&D)**

- Fund fundamental research and encourage industry participation in funding applied research programmes in the mineral sector and also encourage skills and technology transfers within the region,
- Establish structures e.g. laboratories to analyze samples within the country,
- Encourage information sharing on mining,
- Strengthen governments department to be able to carry out research and mapping on mining, and;
- Encourage technological innovation, skills transfer and support development of small-scale sector to fabricate for local markets and develop a sector strategy to include R&D, training, marketing, finance, technology and management skills.

## **HUMAN RESOURCES DEVELOPMENT IN THE MINING SECTOR**

- Encourage industry participation in professional training and development programmes through the provision of fiscal incentives to encourage skills development programmes,
- Require companies to present social and labor plans as part of the package for accessing mine development rights and encourage companies to train employees in alternative skills in order to manage downscaling, and,
- Take advantage of regional centers of excellence for skills development through sharing and utilization of existing training infrastructure.

## **OIL AND GAS**

- Review the discrepancies between the Petroleum Exploration and Production Agreements (PEPA), the MMA and the constitution,
- Improve on the penalty for carrying out oil exploration and production without authority so as to promote deterrence,
- Establish an independent body under PEPA to receive license applications, issue licenses, and regulate the health, safety and environmental standards in the oil extraction industry to promote an efficacious, transparent and accountable licensing regime,
- Incorporate issues of public health in the granting of the license for exploration and production,
- Dictate the contents of petroleum Agreements to promote consistency and safeguard such agreements against corruption, bias so as to reflect best practice; the Ministers' discretion to determine contents of petroleum agreements is in appropriate, and,

- Need to either enact Oil extraction taxation or incorporate comprehensive provisions in the taxation Act to specifically regulate Oil extraction.

## CONCLUSION

As Malawi seeks to diversify its economy in accordance with the Malawi Growth and Development Strategy 2011-2016, mining is an important sector to contribute to the process. The Mines and Minerals Policy 2013 is the first stand-alone policy document adopted by Government; the Mines and Minerals Act 1981, however, remains the key piece of legislation regulating mining operations. While the Mines and Minerals Policy 2013 is very recent, a number of policy issues need to be addressed or elaborated further to facilitate equitable participation by local Malawians, communities and other stakeholders in mining activities. Tools to improve revenue distribution at local level need to be developed and strengthened. Matters of transparency, accountability and efficiency in the management of revenue paid to various governmental authorities from mining ventures cannot be over emphasized.





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