



STRENGTHENING MINING GOVERNANCE IN MALAWI

REPORT ON POLICY AND INSTITUTIONAL ANALYSIS ON MINING IN MALAWI

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LIST OF ACRONYMS

ASM	Artisinal Small and Medium scale mining
CBD	Convention on Biological Diversity
EAD	Environmental Affairs Department
DEA	Director of Environmental Affairs
EIA	Environmental Impact Assessment
EITI	Extractive Industry Transparency Initiative
EMA	Environment Management Act
ERP	Economic Recovery Plan
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
MGDS	Malawi Growth and Development Strategy
NRJN	Natural Resources Justice Network
SADC	Southern Africa Development Community
UDHR	Universal Declaration of Human Rights
UNFCCC	United Nations Framework Convention on Climate Change

Background and Introduction

Malawi is a small landlocked country in southern Africa with a surface area of 118,840 square kilometers. With a population of 15 million, the country has one of the highest population densities in Africa. Malawi's economy is dominated by the agriculture sector, which accounts for 40% of GDP. This sector is however facing serious challenges due among others to the rapid population growth, which limits access to land and leads to environmental degradation, volatile commodity prices and climate change. Malawi's major export crops such as tea, tobacco and sugar, which account for 80% of all exports, face an uncertain future; tobacco, in particular, has been hit by the anti-smoking lobby.

Policy makers have for sometime therefore been grappling with how to diversify the economy to avoid the vicious cycle of poverty and environmental degradation. The Malawi Growth and Development Strategy (2011-2016) (MGDS) and the Economic Recovery Plan 2012 (ERP) have identified mining as one of the priority sectors; and in 2013 Government adopted a Mines and Mineral Policy which highlights the importance of mining to the future growth of the economy and outlines strategies for ensuring the development of the sector. Currently the mining sector contributes about 10% of the country's GDP but it is expected to contribute as much as 20% once current planned mining developments come on-stream.

The mining sector is relatively underdeveloped in the country. Thus despite no less than 120 licenses having been issued for prospecting and development only a few mines have actually been developed, the most prominent being in the coal and uranium field. Malawi has also recently witnessed the entry of major international mining players such as Paladin Africa in the uranium industry; Globe Metals and Mining Limited currently developing niobium; Mkango Resources and Springstone prospecting for rare earth. These multinational corporations have brought new challenges to those involved in negotiating mining transactions on behalf of the Government leading to numerous criticisms concerning the way the transactions were handled and the 'raw deal' the country got. In general there has been limited public participation in mining transactions, with only a few civil society representatives taking an active role in commenting and following up mining agreements to ensure they benefit ordinary Malawians.

There is also a paucity of policy practice and regulatory experience to assist in developing responsive policy and legislation regarding the mining sector in Malawi. The country adopted its first Mines and Minerals Mining Policy in 2013 and has been using a Mines and Minerals Act of 1981, which has been roundly criticized as outdated and not in tune with current industry and community concerns. Malawi clearly needs to update its legislation in the light of experiences in the mining industry and taking into account the practice and lessons at regional and international level.

In addition, the relationships between Government, mining firms and local communities as well as civil society in recent years has been strained due in part to ineffective governance structures to guide these relationships and ensure that

all stakeholders have a voice. A robust legal and policy framework on mining will support the effective development, implementation and monitoring of policies and strategies to manage the economic, social, environmental and other costs and benefits related to mining. It is for this reason that CEPA with support from the Tilitonse Fund has commissioned a study on mining governance so as to facilitate the development of a more responsive mining governance framework. A starting point of this process is a review of the existing policy and legislation on mining, including in particular how these instruments interface with related policy frameworks related to economic management, environment and natural resources related policies and legislation, and financial and taxation related legislation.

This report provides a comprehensive analysis of the policy and legal framework governing and having a bearing on the regulation and management of the mining industry in Malawi. The report also makes some concrete recommendations for a robust policy, legal framework that will ensure that the mining industry promotes sustainable development and is governed by transparent, accountable and inclusive processes.

Broad Overview of Policy and Legislation on Mining in Malawi

The mining sector has remained relatively undeveloped despite evidence of mineral deposits, the most prominent of which are coal, bauxite, uranium, niobium and gemstones. It was however not until the development of the Kayerekera Uranium Mine in Karonga district that there has been much public debate and interest in the mining sector. One major concern has been the manner in which Government has awarded mining licenses to mining companies. In particular, there is increasing concern that Government has not maximized the returns from mining investments. The impression is either that Government has not been able to effectively negotiate investment agreements so that they benefit Malawians, or that the negotiations are so shrouded in secrecy that the public have no confidence in the process or outcome.

The MGDS notes that the contribution of the mining sector to the country's GDP grew from 3% in 2005 to 10% in 2009 as a result of the opening of the Kayerekera Uranium Mine. It is however recognized that the sector faces some serious challenges for it to reach its full potential and account for 20% of GDP. The challenges include inadequate institutional capacity, absence of an independent regulatory authority for mining, and low investment in mining. The Government seeks to increase production and value addition in the mining sector through increased exploration and mining, improved legal and institutional framework, increased participation by small and medium scale miners, and updated geological information systems. Among the key strategies, the MGDS require Government to produce detailed geological maps, strengthen institutional capacity, enforce environmental, occupational safety and health legislation and developing an integrated data management system. Some of these strategies are reflected in the

Mines and Minerals Policy 2013 and some of them are now being implemented. For example, the geological mapping is underway, a mining cadaster is also developed; and the Mines and Minerals Act 1981 is being revised¹.

The ERP on the other hand is more explicit as to the specific actions that need to be taken in order for the country to derive maximum benefit from mining. These are:

- Establishment of the legal and institutional framework;
- Updating the geological information system;
- Undertake a crash programme to train mining engineers, legal experts in mining and other related fields in the sector;
- Enhance oil exploration and capacity building initiatives in the sub sector;
- Ensure transparency in all mining contracts and close monitoring; and
- Promoting participation of local and international investors in the mining industry.

These are important policy initiatives for improved mining governance in the country. However, although the Mines and Minerals Policy was adopted in 2013, does not capture these governance issues. This lacunae in the policy needs to be addressed since the mining policy is the key driver of mining development while the ERP provides the overarching framework for purposes of policy harmonization and funding prioritization.

On the other hand, none of the policy instruments specifically address the involvement of non-state actors including local communities in decision making in the mining industry. The ERP comes close to promoting public participation by advocating transparency in mining contracts as well as close monitoring of these contracts. The Mines and Minerals Policy 2013 and Mines and Mineral Act 1981 do not provide mechanisms for the involvement of non-state actors or local communities in the negotiation of mining development agreements. The only opportunity for public participation in mining development issues is in case where an environmental impact assessment (EIA) is taken for public hearing under the Environment Management Act 1996 (EMA). But the requirement for public hearing to review EIA reports is not mandatory under the EMA. On the other hand the Minister responsible for mining and the Commissioner for Mines are given extensive administrative and regulatory powers on mining issues without corresponding mechanisms for accountability. The involvement of civil society or local communities is not provided for even in the Mines and Mineral Policy 2013; there is need to reflect the ERP provisions which call for transparency in negotiation of mining contracts.

The Mines and Minerals Act 1981 provides the procedures for applying for and granting of mineral rights, reconnaissance and prospecting licenses, reserved mineral rights licenses and other licenses and permits. These provide access rights to prospecting, reconnaissance, mining and related activities. The Act further provides for power to determine mineral royalties as well as obligations

¹ Consultations with the Commissioner for Mines indicated that a draft bill has been in place for the past two years; it requires a review before being presented to stakeholders to finalize.

and incentives, which are specific to the mining industry. In particular, the Act requires that the mining concessions provide for training of Malawian employees and stipulate terms and conditions relating to foreign staff recruitment in the context of promoting local employment and empowerment. In this regard the Mines and Minerals Act needs to reflect the objectives and principles of the Employment Act without necessarily providing the details.

The Act further provides for management of the environmental impacts arising from mining operations as well as the safety, health and social welfare of the mining workers. Part VII of the Mines and Minerals Act 1981 provides conditions related to environmental protection, which may be imposed in a mining license. The provisions do not impose a direct obligation until and to the extent the mining license so provides. This formulation is problematic in that it depends on whether the Minister of Mines considers it necessary to impose what conditions. Considering the adverse impacts mining may have on the environment the new legislation needs to provide obligations which can be incorporated in mining licenses as well as environmental management plans (EMP) introduced as part of EIA approval under the EMA. The Occupational Safety, Health and Welfare Act 1997 on the other hand, provide detailed provisions addressing safety, health and welfare which are applicable to mining industry². The review of the Mines and Minerals Act needs to consider harmonization of the safety provisions under the Mining (Safety) Regulations made under the Mines and Mineral Act 1981 with the Occupational Safety Health and Welfare Act 1997.

Neither the Mines and Minerals Policy nor the Mines and Minerals Act has provisions to facilitate corporate social responsibility; the need for a mining company to care for the social welfare of surrounding communities is an important factor for sustainable mining. This may be included as some of the issues to be addressed in a mining concession agreement or development agreement. There are also no provisions for resettlement plans for local communities displaced by mining operations. While the Land Acquisition Act, the Land Act and the Public Roads Act have some provisions which may guide resettlement programmes, these are inadequate and it is important for the Mines and Minerals Act to establish principles and procedures that can be incorporated in development or concession agreements between Government and mining companies. The practice so far has been that mining companies commission studies for resettlement and consultants use World Bank guidelines for the purpose.

On the other hand, the Mines and Minerals Policy records that in 1982 Government established a Mineral Licensing Committee comprising professionals in mining, geology, environment, physical planning and police and customs. This is intended to improve decision-making in licensing decisions. However the Committee is not established by law and the powers remain with the Minister and the Commissioner. Further, while the multi-stakeholder Mineral Licensing Committee can facilitate harmonization in licensing, its mandate falls short of the

² According to section 3 of the Mines and Minerals Act 1981, a mine is classified as a workplace and therefore subject to the provisions and inspectorate regime of the Occupational Safety Health and Welfare Act 1997.

required sector coordination to ensure that mineral development takes into account inputs from other sectors such as environment, water, and fisheries, among others. There is also no representation from non-state actors such as civil society, local communities or traditional leaders from mining.

Overall there is no mechanism for ensuring that mining investments take into account other related issues. Both the Mines and Minerals Policy and the Mines and Minerals Act address environmental impacts of mining operations. The Act however needs to be aligned with the Mines and Minerals Policy, the National Environmental Policy 2004, the National Strategy on Sustainable Development 2004 and the Environment Management Act 1996, which deal with environmental aspects of mining and incorporate principles of sustainable development and targets set in accordance with the Rio Declaration, Agenda 21 and subsequent commitments made by Malawi.

The Mines and Minerals Act is also silent with regard to mining development, value addition and taxation issues that are peculiar to mining. These have been addressed in the Mines and Minerals Policy to some extent. However the Mines and Minerals Policy lacks specific directions or guidelines regarding appropriate taxation regimes, which are sensitive to price movements and can stimulate investment and national development, local capacity building and entrepreneurship or research and development. It is important that both the Mines and Minerals Policy and the Act specifically mandate institutions that can deliver these and provide for coordination between training and research institutions on one hand and the mining institution on the other hand. In particular it is important to align these mandates with the MGDS and the Malawi Constitution and ensure that the vision of the instruments are reflected in the new policy and legislation

The Petroleum (Exploration and Production) Act 1983 is drafted in the same manner as the Mines and Minerals Act 1983 and not much can be chosen from it. Section 4 of the Mines and Minerals Act 1981 defines a mineral as any solid, liquid or gaseous substance occurring naturally in or on the earth formed by geological processes but does not include petroleum as defined under the Petroleum (Exploration and Production) Act 1983. On the other hand, section 3 of the Petroleum (Exploration and Production) Act 1983 defines petroleum as naturally occurring hydrocarbons or a mixture thereof whether in solid, liquid or gaseous form but does not include coal or shale or anything that may be extracted from coal or shale. It follows therefore that although petroleum could qualify as a mineral it was specifically excerpted under the Mines and Mineral Act so that it is governed by a stand-alone legislation.

The interrelationship between minerals, petroleum and other natural resources such as land, forests, water, fisheries and wildlife cannot be overemphasized. This calls for harmonized approach and therefore need for policy guidelines that reflect the values of these resources as dependent on and adding value to each other. This is where an Extractive Industry Charter stipulating guidelines sustainable utilization and management of these resources would be required. A harmonized approach to natural resources extraction industry is important to ensure

sustainable utilization as well as ensuring the country receives maximum benefit from these resources. There is need for similar principles for use of land, water, forestry, fisheries, even though the details may defer. Those principles will of necessity reflect the vision in the Constitution of the Republic and the MGDS and related instruments.

In addition, Malawi needs to consider the policy and legislation approaches that neighbouring countries in southern Africa and elsewhere have taken so that the country can better respond to the demands of such a new industry. The Mines and Minerals Policy identifies the need for Malawi to take part in regional and international initiatives such as the Kimberly Process, MIGA and EITI that address mineral issues and concerns. In particular, the Mines and Minerals Policy mentions the need to share geological information with member states of COMESA and SADC. However it is also important for the policy and the legislation to reflect the regional instruments adopted by these regional bodies and signed by Malawi such as the SADC Protocol on mining which among other things sets out principles that state parties should adhere to.

Further, international instruments pertaining to natural resources management such as the African Convention on Nature and Natural Resources, the Agenda 21 and related instruments provide guidelines for developing policy and legal responses to issues arising in mining operation. In particular, these international instruments provide the genesis and principles of public participation, access to information and justice, which are important for an inclusive policy response to mining issues³.

Mining and mining related policies and legislation

Policies and legislation on mining span across a range of sector statutes and other government instruments. We discuss here the interface between mining and mining related policies and legislation and highlight areas that mining policy needs to address to ensure harmonization with these related sector instruments. The issues we highlight pertain to ownership and therefore stewardship responsibilities, environmental impact, employment, taxation, occupational safety and welfare, among others.

Section 207 of the Constitution of Malawi vests all land and territories of Malawi in the people of Malawi. Mineral resources are part of lands and territories of Malawi; it follows therefore that mineral resources are vested in the people of Malawi. Section 2 of the Mines and Minerals Act 1981 puts these in more clear terms. It provides that:

³ Malawi can also consider the principles and procedures for public participation outlined in the Aarhus Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters; which though not applicable to Malawi contains provisions which are universally embraced.

The entire property in, and control over, minerals in land in Malawi are vested in the President on behalf of the people of Malawi; but without prejudice to the exercise of any right under or pursuant to this Act.

Unlike section 207 of the Constitution, which reads like a political statement, section 2 of the Mines and Minerals Act expresses the proprietary interest in mineral resources in more concrete and legal terms. In law property must be vested in a specific person, and not in so nebulous a term as ‘the people’; in this respect the Mines and Minerals Act vests the mineral resources in the President as trustee of the people of Malawi. However since the Constitution is the supreme law of the land, the new Mines and Mineral Act should also vest mineral resources in the people of Malawi as does the Land Bill 2013 and the EMA.

On the other hand, while section 2 (1) of the Mines and Mineral Act makes it clear that no one can own mineral resources even if they own the land where the mineral resources are situated, subsection 2 goes on to state that

Nothing in subsection (1) shall operate so as to affect any interest of a person in earth, clay, granite, limestone, marble, sand, stone or other similar substance upon or in land, being an interest created by virtue of any Certificate of Claim or ownership of land or other disposition made by or on behalf of the British Crown.

This section excerpts some resources such as limestone, marble, and sand as capable of being owned by a person who owns specific interests in land. These interests are those acquired under certificates of claim made by or on behalf of the British Crown. What is not clear is why only those holding freehold interests created under certificates of claim have the privilege of owning these resources and not those holding leasehold or customary estates. The provision seems to express typical colonial privileges; yet this law was enacted close to 20 years after independence⁴. This provision needs to be revised so that either it grants all those privileges to holders of all land categories or it removes such privileges altogether. On the other hand, if all minerals belong to the people of Malawi, the best approach is to allow a taking of minerals from one’s land of any category for domestic use only.

There are other provisions that provide for or affect the ownership of natural resources in general and therefore have a bearing on ownership and management mineral resources. Section 4 of the Environment Management Act 1996 provides

The natural and genetic resources of Malawi shall constitute an integral part of the natural wealth of the people of Malawi and—

(a) Shall be protected, conserved and managed for the benefit of the people of Malawi; and

(b) Save for domestic purposes, shall not be exploited or utilized without the prior written authority of the Government.

⁴ It is worth noting that Part XII provides exceptions in that a customary landholder is entitled to take minerals on his land that by customary practice he is so entitled to take. It is unclear what minerals one can say they are entitled to take by custom except perhaps building materials.

As an environmental legislation the EMA expresses the ownership and management mandates and functions in the context of the beneficiaries for whom Government has the duty to protect, conserve and manage the resources in accordance with the principles and objectives of the EMA. In this regard the EMA reads like section 207 of the Constitution.

In general the Mines and Minerals Policy also fails to articulate the ownership framework for mining, which should guide the development of new legislation. The approach in the SADC region seems to be to vest all minerals in the state, except Zimbabwe and Malawi who vest the resources in the President as trustee. Neither of these approaches can be considered more preferable since even in the case where the President has title, he or she so holds as trustee; nevertheless in view of section 207 of the Constitution which vests all lands and territories in the Republic the new mines and minerals legislation should follow the constitutional provisions.

There are other sector specific provisions dealing with mineral resources management in the context of those sectors. Thus section 46 of the Forestry Act 1997 prohibits mineral exploration and extraction in a forest reserve or protected forest area, unless under license. The section however does not make any reference to mineral licensing under the Mines and Mineral Act 1981 and would seem to suggest that a license from the Director of Forestry is enough to authorize mining in a protected forest area. On the other hand, mineral resources are not included in the definition of forest produce under section 2 of the Forestry Act 1997; this would seem to suggest that mineral resources jurisdiction lies elsewhere. These provisions need harmonization to ensure sustainable utilization and management of mineral resources.

In terms of section 35 of the National Parks and Wildlife Act 1992, it is illegal to carry out mineral prospecting in a national park or game reserve. However sections 39 and 40 give power to the Director of National Parks and Wildlife, with the approval of the Wildlife Board, to authorize activities prohibited under section 35, including mining in a national park or wildlife reserve, if such activities are in the interest of better wildlife management. It is not easy to envisage a scenario in which mining would facilitate better wildlife management. The Director of Wildlife would struggle to justify authorizing mining in a national park, other than for revenue collection, which may benefit wildlife management. On the other hand, the National Parks and Wildlife Act does not make any reference to mineral licensing under the Mines and Mineral Act as a precondition for mineral exploration in a national park or wildlife reserve. Finally, the Water Resources Act 2013 provides that use of water for mining operations under the Mines and Minerals Act requires license or consent of the National Water Resources Authority established under the Water Resources Act 2013.

The above discussion shows a disjointed mineral licensing system, which can easily be exploited to the detriment of statutory objectives. While the Mines and Minerals Policy 2013 states that a Minerals Licensing Committee established administratively has provided forum for sector coordination, the Committee itself has no legal basis. Secondly the Committee is not as well represented to facilitate

sector coordination. During consultations, we came across incidents in which sector departments had given authorization for mining in a national park without following procedures under the Mines and Minerals Act. The revision of the Mines and Mineral Act 1981 needs to take special cognizance of the institutional arrangements to ensure harmonization.

The *Mines and Minerals Act 1981* incorporated some of the provisions of the *Occupational Safety Health and Welfare Act*. The administration of occupational health and safety on the mines, including the process plants, is therefore split between the Factories Inspectorate Department of the Ministry of Labour, and the Department of Mines. This has led to some confusion and conflicts⁵. The *Explosives Act 1966* governs all aspects of the storage, handling, mixing, preparation and use of explosives for blasting. All persons storing, preparing and using explosives must have a license in terms of this Act. Failure to comply may result in penalties. The *Water Resources Act 2013* has important implications for any mine developer because permits are required in terms of this Act to abstract, store, use and dispose of water. The Act has specific provisions relating to mining and conditions for water abstractions for mining.

- The Department of Mines should only issue a license in consultation with specific sectors such as Departments of land, forestry, water, environment and wildlife;
- Provide separate rights or licenses for exploration and mining as is the case under the existing Act;
- Exploration fees and licenses must be fixed and prescribed by law, even if this be in foreign currency;
- No exploration rights in a protected area without a legal opinion from the Attorney General;
- Exploration rights continue to be for limited duration with no spending requirements: use or lose principle to apply;
- Exploration and development rights to be subject to a work programme;
- Holders of exploration rights to convert these to mine development rights so long the terms and conditions of exploration are complied with.

Box 1: Sector Coordination and Licensing Procedures

Environmental Impact Assessment

Environmental Impact Assessment (EIA) is an important tool in mining operations considering the many adverse consequences that mineral extraction can cause. EIA is undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent authority. EIA is both a process and a tool for project planning and decision-making. Its main aims are as follows:

⁵ See Government of Malawi (2001) Environmental Impact Assessment Guidelines for Mining Projects, Ministry of Natural Resources and Environmental Affairs, Lilongwe).

- ✓ integrate environmental considerations in development planning thereby promoting sustainable livelihoods;
- ✓ ensure that the environmental and socio-economic costs and benefits of economic development projects are properly accounted for;
- ✓ ensure that unwarranted negative impacts are avoided or mitigated at an early stage in the planning process;
- ✓ ensure that potential benefits are identified and enhanced;
- ✓ carry out environmental and socio-economic evaluations of projects in parallel with analyses of technical and economic feasibility;
- ✓ ensure that decision-makers are provided with information on a project's environmental costs and benefits to complement information on its technical and economic feasibility at key decision points in the development of the project;
- ✓ ensure that all the interested and affected parties participate in the process;
- ✓ set up a framework to carry out mitigation and monitoring;
- ✓ promote inter-sectoral and intra-sectoral linkages; and
- ✓ Conserve the social, historical and cultural values of people and their communities.

The EMA outlines the EIA process to be followed and requires all project developers in both the public and private sectors to comply with the process. The Act sets out the powers, functions and duties of the Director of Environmental Affairs and the Environmental Affairs Department in implementing the EIA process. It also specifies the types and sizes of projects, which should be subject to the EIA process and provides the enabling provisions to develop EIA guidelines to assist compliance with the EIA requirements. For mining EIA Guidelines for Mining Projects were adopted in 2001 and these provide the tool for conducting EIA in the mining sector in Malawi. The EMA states that any project that is listed as requiring an EIA cannot be licensed and implemented until a satisfactory EIA study has been completed and the project approved by the DEA. The project developer is required to implement any terms and conditions that the DEA may attach to the project approval. Non-compliance is an offence attracting strict penalties. EIA Guidelines⁶ list the following mineral projects as requiring EIA:

- ✓ All mining and quarrying activity for which an exclusive prospecting license (EPL), a mining claim license or a mining license (ML) is required or any major amendments to any of the above licences.
- ✓ All extraction of sand, gravel and clay or topsoil material – be it from the ground or from the banks or beds of water bodies – where explosives or heavy machinery will be used.
- ✓ All explosives manufacturing and blasting operations.

⁶ Government of Malawi (2001) Environmental Impact Assessment Guidelines for Mining Projects, Ministry of Natural Resources and Environmental Affairs, Lilongwe)

It is assumed for the purposes of the Guidelines, those explosives manufacturing refers to the storage and preparation on-site of explosives to be used for blasting purposes. It does not cover the commercial manufacturing of explosives.

There are a number of challenges or gaps in the EMA relating to EIA, which need to be addressed so as to effectively address EIA in mining. For example there is no requirement to:

- ✓ establish the cost of rehabilitation,
- ✓ update the cost estimate on a regular basis, or
- ✓ create a rehabilitation fund to cover final rehabilitation costs;

The developer has the power to influence the EIA process in that the developer employs and pays the consultant who undertakes the study and in most cases the developer may have better access to and mastery of data than the environmental affairs department that does EIA review in view of the capacity constraints in the department.

The EMA also provides for environmental auditing of existing operations; as well as preparation of an environmental management plan to cater for mitigation measures to address adverse effects. The key challenge however remains that of implementation due largely to capacity constraints both in terms of human and financial resources on the part of Government. It is important that mineral revenues be utilized for building monitoring capacity through a fund that can be utilized by Government.

- Integrated environmental management framework;
- Integrated resources use and management;
- Make mine rehabilitation mandatory;
- Provide for fund contributed to by mining companies to cater for impacts of mine closure, disaster and social impacts; and
- Provide for fund contributed to by mining companies and to be used by the department of environmental affairs for project monitoring.

Box 2: Issues to be addressed in EIA legislation for mining

Institutional Framework and Governance for Mining

In terms of the Mines and Minerals Act 1981, the Minister responsible for mining who, in addition to political supervision and parliamentary responsibility, also has licensing powers regulates mining. The Commissioner for Mines is the technical head of the Department of Mines and has overall responsibility for administration and management of mining. Apart from giving extensive powers to the Minister without requiring consultation with other stakeholders, the Mines and Minerals Act 1981 does not outline the duties and responsibilities of the Minister or Commissioner for Mines against which the performance of the office can be monitored⁷. The Act does not stipulate any guiding principles for mining against which the Minister and Commissioner for Mines and other public officials can be made accountable. It is important that general principles such as polluter pays, the precautionary principle, access to information, corporate social responsibility, among others be incorporated in the new legislation to guide those who have specific mandates under the legislation and provide benchmarks against which decision making can be evaluated. Further, there is no provision to facilitate cross sector coordination considering that mining affects and is affected by a number of sectors such as water, land, rural development and related sectors. The new legislation therefore needs to stipulate key provisions to guide inter-sector coordination.

Table: Summary of institutional roles and responsibilities in mining

Institution	Roles and Responsibilities
Ministry of Mines/Department of Mines	<ul style="list-style-type: none"> • Formulating mining policy • Licensing mining operations • Monitoring and inspection
Department of Surveys	<ul style="list-style-type: none"> • Mining surveys • Data collection and management • Mapping and geology
Ministry of Finance	<ul style="list-style-type: none"> • Taxation policy • Revenue allocation • Development agreements
Ministry of lands	<ul style="list-style-type: none"> • Land policy • Land allocation and acquisition • Land rentals • Compensation for displaced communities
Ministry of Water/Water Resources Authority	<ul style="list-style-type: none"> • Water policy • Water abstraction permits • Pollution control
Ministry of Environment/Environmental Affairs Department	<ul style="list-style-type: none"> • Environmental considerations in mining licenses • Environmental impact assessments • Environmental monitoring and auditing

⁷ See Part III and Part IV of the Mines and Mineral Act 1981.

		<ul style="list-style-type: none"> • Pollution control
Department of Forestry/Department of Wildlife	of of	<ul style="list-style-type: none"> • Mining in protected areas • Mining and forests/wildlife
Ministry of Justice		<ul style="list-style-type: none"> • Negotiating and drafting mining development agreements; • Legal opinions in mining issues

The MGDS calls for institutional capacity building in order to facilitate efficient exploitation of mineral resources for sustainable economic growth. Many of the institutions responsible for mining related issues face numerous challenges in undertaking their tasks. These include limited infrastructure, human and financial resources. In some cases, the challenge is simply lack of political will to organize what is available; hence there have been cases where mining data produced by government is not properly organized for ease of access.

An efficient institutional framework is also important for building trust among a wide range of stakeholders involved or interested in mining. A key role for government is to exercise permanent sovereignty over mineral resources and ensure policy and decision making clearly link mineral wealth to overall economic development. The governance framework has to create clear roles and responsibilities for government and industry and ensure accountability for those roles. There must be capacity for organizational delivery structure, training and the need for fair decision-making among public officials. There must also be mechanisms for holding these officials accountable for their performance, transparency and involvement of the public in making decisions that affect them.

It is also important to consider the level at which various mining issues need to be dealt with, whether at national or local level. Hence while policy making will continue to be the responsibility of the central government, there will be certain mining activities involving low value resources such as construction materials which can be licensed at local level as is provided for under the Mines and Mineral Act. A SADC (2004) study suggested the following as some of the issues for consideration:

- Provision for local governments to share in mineral revenues through collection of royalty like payments;
- Mechanism to promote equity between mineral rich and mineral poor areas;
- Mineral wealth distribution to take into account commodity markets, mine life, location and existing infrastructure.

Corporate governance and responsibility also need to subscribe to sustainable development principles and corporate social responsibility with a view to build trust and confidence with the communities around the project location. While there have been significant commitments from the private sector by subscribing to certain principles and guidelines as well as self regulation initiatives through industry associations, it is important for mining policy and legislation to articulate minimum core obligations that the private sector need to fulfill. The Mines and

Minerals Policy needs to provide for statement of principles as well as strategies for private sector corporate governance and social responsibilities.

- A ministry responsible for mines assisted by an administrative department;
- Guiding principles in the law and policy to which public officials are accountable
- Clear duties and responsibilities for the various public officials for which they are accountable technically and politically;
- A reporting framework by the responsible minister to the National Assembly on annual basis;
- Access to information for the general public to enable them hold officials accountable

Box 3: Some important considerations for institutional arrangements for mining

In addition for Malawi to meet the MGDS objective of increasing mineral exploitation for sustainable economic growth, the overall governance environment must be informed by certain key principles. These include:

- Mineral policy stability subject to adjustments from time to time;
- Consistency and transparency;
- Stakeholder dialogue in policy formulation;
- Management of stakeholder expectations; and
- Integrated land use and development plans.

Some of the policy issues to be incorporated in mining governance framework are stipulated in the table below:

<p>Business and Mineral Development</p> <ul style="list-style-type: none">• Investment and regulatory climate;• Taxation;• Mineral rights and prospecting;• Artisanal and small scale mining;• Mineral beneficiation and value addition• Mineral clusters• Mineral marketing• Research and development <p>Ownership and Management</p> <ul style="list-style-type: none">• Ownership structure• Shareholding: government, local and foreign capital <p>People Issues</p> <ul style="list-style-type: none">• Health and safety;• Human resources development• Gender• Housing and living conditions• Recruitment• Labour, industrial relations and employment conditions;• Downscaling <p>Environmental Management</p> <ul style="list-style-type: none">• Environmental impacts assessment• Decommissioning <p>Governance</p> <ul style="list-style-type: none">• Guiding principles;• Regulation and promotion• Institutional arrangements• Central and local government• Stakeholder consultations

Box 4: policy framework template

Although some of the issues have been reflected in the Mines and Mineral Policy 2013, albeit perfunctorily, there are a number that have not. There are no clear principles for designing tax regimes often encountered in the mining industry. A mining investment is exposed to taxes at international level as a result of foreign direct investment thereby attracting dividend repatriation which may attract withholding tax, value added tax and transfer pricing; importation of plant and equipment which attract import and export duties, capital gains tax and transfer pricing issues. There are also national taxes issues such as how to design corporate tax, royalties, tax holidays, how if at all to deduct exploration and development costs, capital allowances, capital gains taxes, among others. Then there are local government taxes, which may be in form of land rents. The design of these tax regimes has very important ramifications for foreign investment decision-making.

The box below outlines some of the principles to be considered when designing a mining tax regime:

- Fiscal regime must allow flow of capital and minimize double taxation;
- Introduce mineral resource rent taxes for investments that are more profitable than others;
- Capital gains to be included in the definition of income;
- Special incentives for mines developed in very remote areas;
- Provide for mechanisms to tax more where there are super profits made;
- Avoid tax holidays;
- Care should be taken in providing for tax stability agreements since these are still subject to parliamentary scrutiny;

Box 5: Some consideration for designing mining tax regimes

The Mines and Mineral Policy 2013 does not provide any principles as statements of commitments to enable investors whether local or foreign evaluate the business environment risk. These are important as they provide pointers for investment decision making and therefore necessary for fulfilling the objectives of the MGDS. On the other hand, the Policy has outlined some social and economic issues to be addressed in order to facilitate a conducive investment climate in mining. The policy statement however merely states that the Government will maintain policies conducive to high economic growth in order attract investment in mining. This like other parts of the policy document is inadequate, as it does not specify which macroeconomic tools government will pursue to achieve this. Among the key strategies are the need to maintain long-term economic management, low inflation and interest rate and low unemployment. While the details of achieving these should be in the economic management instruments such as the MGDS, the Mines and Mineral Policy ought to articulate and reinforce these in the context of mining. In addition, the policy needs to articulate strategies for attracting foreign direct investment.

The Mines and Minerals Policy 2013 provides for the role of artisanal and small-scale mining (ASM) and recognizes the potential of this sector to contribute economic growth and poverty reduction. The Policy identifies key issues ranging from the lack of regulatory framework, poor collaboration with medium to large-scale mining firms and lack of finance and training. At regional level, the Harare Guidelines on Small and Medium Scale Mining (1993) and the Yaoundé Vision for Artisanal and Small and Medium Scale Mining (2002) classified constraints for ASM into legal, financial, commercial, technical and environmental and social issues. The policy and legal framework for this sector needs to identify the suitable areas for ASM, identification of required government technical assistance, simplification of administrative procedures for compliance and provision for realistic marketing arrangements for the sector. In addition, government can

improve ASM growth through encouraging partnerships between ASM and large-scale mining operation by providing incentives for the latter to provide technical assistance and or enter into joint ventures with the ASM sector. The collaboration would reduce the conflicts between ASM and large-scale miners which manifest in allegations of product theft, encroachment in each others mining areas, health safety and environmental hazards, government preferential treatment of large scale mining, among others. Improved collaboration between ASM and large-scale miners can bring significant benefits to the ASM sector through improved safety and health, access to technology, product marketing and equipment supply. The policy and regulatory framework needs to reflect these considerations and particularly provide the following in addition to those stipulated in the Mines and Minerals Policy 2013.

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|---|
| <ul style="list-style-type: none"> • Provide for prospecting rights, special purpose tenements exclusively for ASM to facilitate exploration, mining, mineral processing for ASM; • Reserve specific deposits for ASM; • Provide preferential rights for ASM licensing and negotiating powers for ASM to enter into agreements with medium to large scale miners; • Empower local government officials to grant ASM exploration and mining rights including registering these and collecting revenue; • Consider ASM mining rights on customary land and provide strategies to facilitate local empowerment programmes; • Consider tradable mining rights for ASM to enable ASM use these as security to access finance for their operations; • Designate specific credit, savings and loan schemes to finance ASM operations; • Provide requisite administrative arrangements within mining ministries or departments to support the ASM and incentives for it to operate legally and efficiently. |
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Box 6: Considerations for policy and regulatory framework for ASM

The involvement of civil society in mining is a recent phenomenon. The civil society institutions that have been active in mining include the Centre for Human Rights and Rehabilitation, the Catholic Commission for Peace and Justice, Citizens for Justice, Institute for Policy Interactions and Centre for Environmental Policy and Advocacy. These became active following the development of the Kayerekera Uranium Mine. A loose network called natural Resources Justice Network (NRJN) has existed for some years now and is in the process of being formalized. This may galvanize the voice of civil society; it however requires a proper institutional framework so that it can be responsive to and facilitate capacity building of its civil society members. There are also a

Box 7: Considerations for policy and regulatory framework for ASM

number of other civil society initiatives around mining that are assisting in raising the profile of mining issues in the country. These have been analyzed elsewhere⁸. The challenge remains that most of these institutions and initiatives

⁸ See Tilitonse (2013) Political Economy Analysis of Mining in Malawi (Tilitonse, Lilongwe)

are donor funded and raise their voices when they have the requisite resources. It is worth considering mainstreaming mining in the daily operations of these institutions so that even when their 'mining' funding runs out they can continue to take up and advocate for sustainable mining.

Finally, there are very few women who are involved in mining activities in Malawi. As elsewhere in southern Africa, mining is considered a man's job and women are generally not welcomed. This is why the SADC⁹ has specifically called for deliberate policy interventions to ensure that women are given the space and opportunity to participate in mining investments. This can be achieved by introducing training programmes in mining and ensure equal enrollment of men and women on the basis of SADC gender equality declaration. Further, ASM policies and legislation need to specifically target women empowerment and provide specific incentives for women venturing into mining.

Land Ownership Mining and Dispossession

In countries that have long history in mining such as South Africa, Zambia and Zimbabwe, mineral exploitation has often trampled upon traditional land rights. Mining companies were given surface mining rights over agricultural land even in the environmentally or culturally sensitive areas. In communal areas land is vested in the state; so are minerals. Private land owners, who enjoy title to their land, have better claims to compensation than communal landholders who have no title (OSISA, 2013). The situation in Malawi is almost similar in that, aside from section 207 of the Constitution vesting land in the Republic, the Land Act 1965 vests customary land in the President for the benefit of the people of Malawi. At customary law one has usufruct rights; in practice these rights are in perpetuity and inheritable within the family. Nevertheless, the compensation regime for displaced customary landholders is limited to improvements in the land, reflecting the limited or no title to the land as such. Land is essential to local livelihood; mining that often takes place in rural setting displaces these livelihoods, compensating these losses is often difficult and has generally failed to local concerns.

The law and practice regulating compensation has slight variations across the region. Hence in Botswana the acquisition of Property Act and Mines and Minerals Act requires the mining companies compensation for the value of property on the land, and to pay fair and reasonable compensation for any disturbance to the rights of the owner or the lawful occupier of the land. They are also required to pay for any damage done to the surface of the land including crops, trees, buildings or other works. In Zimbabwe, on the other hand, the Mine and Minerals Act requires payment of compensation to private

⁹ ECA/SADC (2004) Harmonization of Mining Policies, Standards, Legislative and Regulatory Frameworks in Southern Africa;

land owners; while it is the Rural District Councils as holders of title to communal (customary or traditional) land who are paid compensation. In Malawi the Mines and Minerals Act 1981 is silent on compensation; hence any compensation has to be claimed under the Land Acquisition Act 1969. Yet under this Act, the compensation payable is only limited to improvements on the land.

In terms of practice from different countries, compensation package can take many forms such as money, resettlement, job creation or alternative livelihood schemes. Such options may better provide or protect families since monetary compensation alone can generate conflicts within the households. It has been observed elsewhere that family members often dominate in decision making over money issues. On the other hand, delivering a package of compensation in form of a resettlement plan may be complicated involving as it does a number of factors such as available land, available jobs and alternative livelihood options. These require policy and legislation intervention. So far in the few instances where resettlement has been addressed, parties including Government have used World Bank or African Development Bank Guidelines. It is for this reason that the Mine and Minerals Policy and the revised Mines and Minerals Act need to address compensation by providing the applicable principles and the procedures for providing a compensation package in mining projects.

- Mineral resources on any land be vested in the Republic and to be managed by Government;
- Compensation for displacement be available for value of property and land in any category;
- The Mines and Minerals Policy and legislation to provide for principles and procedures for compensation and resettlement;
- The Land Bill and Customary Land Bill need to provide core principles for all compensation regimes on the basis of which mining policy and legislation compensation provisions can be anchored.

Box 7: Issues for consideration in compensation in Mining Projects. |

International law principles and initiatives

A number of international conventions, treaties and protocols have a significant bearing on mining activities in Malawi. Mining generally affects the environment and natural resources such as land, water, air, and biodiversity, among others. International conventions regulating these therefore, are important for mining policy and legislation. Among the key international conventions to which Malawi is a party are the Rio Declaration, Agenda 21, the Convention on Biological Diversity (CBD) and the United Nations Framework Convention on Climate Change (UNFCCC) adopted at the Earth Summit in 1992. These provide for important principles such as the right to a clean and healthy environment, access to information, public participation and access to justice provided for under the principle 10 of the Rio Declaration. They also seek to facilitate conservation of biological diversity (which is often affected by mining activities), sustainable utilization of its components, and the fair and equitable sharing of its benefits. Many of these principles have been incorporated into environmental policies and legislation. Malawi adopted its National Environmental Action Plan in 1994 and a National Environmental Policy and EMA in 1996 in response to these international conventions. Other important conventions are the African Convention on Conservation of Nature and Nature resources dealing with the conservation and management of natural resources; the Rotterdam Convention dealing with chemicals including those used in mining.

In relation to socio-economic considerations the Universal Declaration of Human Rights, the International Convention on Civil and Political Rights and the International Convention on Economic, Social and Cultural Rights to which

- SADC Protocol on Mining
- Convention on International Plant Protection;
- Convention on Wetlands of Significant Importance (commonly referred to as the Ramsar Convention);
- Convention Concerning the Protection of the World Cultural and Natural Heritage;
- African Convention on Conservation of Nature and Natural Resources;
- Montreal protocol for the Protection of the Ozone Layer;
- Convention on Biological Diversity;
- Convention on Climatic Change;
- Convention on Desertification;
- Basel Convention on the control of transboundary movement of hazardous wastes and their final disposal; and
- Rotterdam Convention.

Box 8: List of International conventions and agreements related to Mining

Malawi as a party provides a basket of rights, which have considerable bearing on mining operations and its impact on national development. These rights include right to decent standard of living, medical care, social services, employment, education self-determination, food, freedom of expression and assembly, among others. Most of these have been domesticated under the Malawi Constitution bill of rights under chapter IV. In particular, under the right to development in section 30, a number of social and economic rights are provided that require protection and respect in relation to mineral resource utilization and management. The right of access to basic services such as health, shelter, food and other amenities need to be considered both in the context of the welfare of employees in mining firms but also in relation to those of communities living around mining areas. The lives and socio-economic status of these communities are affected by mining activities in various ways thereby necessitating a deliberate policy intervention to ensure mining does not negate these rights.

At regional level, the SADC Protocol on Mining, which came into force in 2000, seeks to create a thriving mining sector that can contribute to economic development in the region. The Protocol requires member states to cooperate in a number of areas such as harmonizing policies, strategies and programmes; developing human technological capacities; promoting private sector exploitation of minerals resources, promoting small scale mining and empowering historically disadvantaged people in the sector; and developing and observing internationally accepted standards of health, mining safety and environmental protection. The Protocol has not addressed participation of women, value addition and beneficiation, which require harmonization in the region. Many of the areas of cooperation in the Protocol have, however, been addressed under the Mines and Minerals Policy and require incorporation into the revised Mines and Minerals Act.

There are other initiatives that are important for improving mining governance. The Extractive Industries Transparency Initiative (EITI) focuses on disclosure and publication of mineral revenues and payments. Malawi is implementing the Initiative and a task committee is in place comprising civil society and government stakeholders. The initiative has however not been implemented and require government endorsement and ultimately providing for incorporation of its principles and procedures through policy and legislation. There is need, therefore, for the mining policy and legislation to provide the building blocks to facilitate disclosure including enhancing and strengthening the role of civil society in mining governance.

The African Mining Vision seeks to promote a sustainable mining sector, which effectively utilizes mining resources in a manner that is environmentally friendly and socially responsible and appreciated by local communities. It advocates for access to information, recognition of resource user rights and public participation. These initiatives provide the principles and voice, which stakeholders can tap to improve mining governance.

- The Mines and Minerals Policy should outline key international conventions which mining investments must comply with;
- The inter-linkages between mining environment and natural resources conventions need to be highlighted and strategies for compliance outlined;
- The social economic and cultural rights addressed in the UDHR, ICCPR and ICESCR need to be domesticated in mining policies and legislation; and
- The SADC regional areas of cooperation and the strategies for domestication need to be articulated in the Mines and Minerals Policy.

Box 9: Key Issues for International Commitments |

Recommendations: Towards a responsive mining governance framework

The following are some detailed recommendations for policy legislation and institutional arrangements for responsive mining governance. These have been adapted from regional processes (ECA/SADC 2004) and can be considered by stakeholders for incorporation in a model Mines and Minerals policy and legislation.

Mineral Policies |

The Mines and Minerals Policy should be informed by the principles of stability, consistency, stakeholder dialogue, management of expectations, social obligations, tradability of mineral rights and integrated land use planning and development plans. The impacts of mining on the environment are significant; sustainable development principles should provide the necessary guidance.

Political, Economic and Social Environment |

- While political leaders change, policies should be consistent to build investor confidence;
- Develop economic strategies to reduce unemployment including supporting the informal sector and small-scale industries and strategies to attract FDI;
- Consider developing an Extractive Industry Charter to provide guiding policy for the entire extractive industry; and,
Strive for macroeconomic and political stability. These should target low inflation, low interest rates and low unemployment.

General Investment Regulatory framework |

- Designate a one stop shop for mining investments;
- Reserve the right of the state to acquire local equity stakes in mineral development projects on commercial terms; and,
- Gradually and cautiously reduce exchange controls.

Mining Fiscal Environment |

International tax issues

- Negotiate tax treaties with the home countries of investors to avoid double taxation on the investor;
- Use withholding taxes but set rates at internationally competitive rates;
- Provide relief for import and export duties on minerals sector items;
And,
- Protect the domestic tax base by introducing transfer-pricing rules based on OECD (arm's length) principles.

National tax issues

- Avoid tax stability or tax holiday agreements for specific investors unless as a temporary measure;
- Provide royalty tax by law rather than by negotiation with individual investors;
- Ensure that the minimum tax rate is kept at an internationally competitive minimum;
- Introduce after profit tax to share bonanza profits over and above the required investor return on investment;
- Allow for accelerated amortization and depreciation schedules for the treatment of exploration and mine development expenditures;
- 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.

Local Government/Regional tax issues

- Ensure that the local taxes are kept to a minimum to reduce adverse impact on attractiveness of particular regions.

Mineral Administration and Development Systems |

- Create simplified, transparent one-stop administration systems within the appropriate ministries;
- Consider the merits of each application for an exploration license separately and negotiate an appropriate size of area after taking the circumstances (uniqueness) of the application, the credibility of the applicant, the work programme and national and regional policy objectives into account;
- Limit the initial term for issuing exploration licences in order to reflect the exploration commitments in the work programme and make them re-renewable once for a shorter period. Provision for relinquishment should be made to enforce the 'use-it-or-lose-it' principle, as holders should demonstrate work.
- Make it mandatory for holders of exploration and mining rights to regularly submit information in a standardized format, and upon the expiry of the right, issue submit a detailed report of exploration and mining activities;
- Provide for automatic progression from exploration to mining for those holders of exploration rights who comply with the rules;
- Introduce internationally competitive mineral royalties as compensation for mineral depletion. Royalty rates should be mineral-specific;
- Introduce an exploration fee structure that encourages exploration, avoids sterilization and is linked to work programmes;
- Establish surface rental fees by the property market, which will require negotiated rates with landowners. For state land, the rates could be standardized but reviewed regularly to reflect market values; and,
- Introduce incentives to stimulate specific policy objectives, such as economic development in mining areas, and the creation of value-adding (mineral beneficiation) industries.

Mineral Beneficiation |

- Identify and analyze minerals that have potential for value addition and work on beneficiation projects in partnership with the private sector and regional partners;
- Review the supporting infrastructure (transport, energy and water), technology, skills and other inputs for value addition;
- Strengthen the regional markets for value added mineral products; and,

- Support initiatives of producer associations to deal with barriers to value addition, appropriate incentives should be provided.

Mineral Marketing |

- 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;
- Identify suitable niche markets for marketing of unique products like African-design jewelry; and,

Environment 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;
- Incorporate post-mining use of land issues into the process of granting exploration and mining licenses;
- Incorporate multiple land use planning into the license granting process; and,
- Introduce a Minerals Development Fund to include provision for environmental disasters and social decline as a consequence of mining into mining policy and legislation.

Governance |

- Introduce sustainable development objectives into mineral policy and law;
- Ensure security and continuity of tenure with reasonable exclusivity, enforceability and transferability of rights;
- Put in place programmes towards meaningful empowerment and participation of nationals to enable them hold public officials who manage mineral benefits accountable;
- Government should impose 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 articulated in policy and legislation and be incorporated in mining licenses/development agreement; and,

- Encourage mining companies and state mining organizations to provide free literacy and numerous programmes to the communities within which they operate.
- Link corporate social responsibility programmes with the granting of exploration and mineral development rights; and,
- Establish broad-based mineral boards to act as advisor and public watchdog in minerals administration.

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 seed 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;
- Review existing ASM policies and legislation with implications for traditional land rights and the role of central government in land allocation;
- Increase awareness on the benefits of adding value to mineral commodities through education and increase value addition through establishing appropriate processing industries;
- Designate certain areas of known mineral potential for ASM and reserve the right to operate these designated areas exclusively for their nationals.
- 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. Allocate the issuing, registering and managing ASM rights to local government authorities but coordinated by the mining ministry.
- Develop, adopt and enforce appropriate and uniform health, safety and environmental guidelines for the sector;
- Establish partnerships involving government, miners, NGOs, finance institutions, the formal mining sector, manufacturers of suitable ASM mining equipment and professional organizations to tackle problems in the sector;
- Enact policies to remove barriers to the participation of women in the sector;

- Ensure that employment and working conditions for miners are within internationally accepted standards through enforcing the adoption of health, safety and environmental standards;
- Make employment of child labour a punishable offence;
- Ensure that the ASM sector is integrated into rural community development programmes;
- Facilitate access to basic social services and transport infrastructure by the sector;
- Simplify the ASM taxation regime by introducing a standard tax based on a percentage of gross income and this rate should include all taxes, levies, mineral royalties and other payments to the state;
- Develop administrative structures within Ministries to provide assistance to the sector;
- Make mineral rights tradable to enable miners to use them as collateral in order to access finance from commercial banks;
- Provide the necessary environment in which miners can operate and also in which various stakeholders can participate effectively in the development of the sub-sector;
- Provide for networking and knowledge-sharing activities to ensure that mistakes are not repeated, already proven technological advance and ideas are not re-invented and lessons learned in one context are made freely available to others;
- 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; and,
- Establish flexible, equitable and free marketing systems to purchase legal mineral production from ASM at market-related prices.

Research and Development (R&D) |

- Fund fundamental research and encourage industry participation in funding applied research programmes in the mineral sector;
- Collaborate in research, encourage skills and technology transfers within the region; and
- Encourage technological innovation, 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 and Skills Development |

- Encourage industry participation in professional training and development programmes through the provision of fiscal incentives to encourage skills development programmes;
- Develop mining-related skills development programmes;
- Require companies to present social and labour 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.

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;
- Develop and implement education programmes to increase women's access, adaptability in the minerals industry and ensure retention of skilled women in the minerals sector. Training programmes should be extended to include officers in the mining ministry.
- Introduce communication and sensitization programmes to remove resistance against women empowerment and to remove cultural barriers preventing women's participation and contribution to the sector and develop and apply punitive policy measures aimed at discouraging discrimination against women in the minerals sector;
- Adopt an "Affirmative action" approach to foster the enrolment of women in technical and other key disciplines for minerals development.
- Facilitate the creation of strong women miner's network and link these with rural women groups and deploy resources to these associations and networks;
- 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.

Conclusion

As Malawi seeks to diversify its economy in accordance with the Malawi Growth and Development Strategy (MGDS) 2011-2016, mining is an important sector to contribute to the process. The MGDS has designated mining as a key priority and has provided strategies for increasing the contribution of mining to economic development from the current 10% to 20% when the sector is fully developed. Policy reform and institutional strengthening are important areas of focus. 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, there are a number of policy issues that need to be addressed or require further elaboration. We have outlined some of the major policy considerations based on our review of related policy instruments, stakeholder views and regional and international experiences in the mining sector. The Mines and Minerals Act 1981 is an old piece of legislation and is currently being revised taking into account the Mines and Minerals Policy 2013 and the various observations identified in this review.

The review has observed that the Mines and Minerals Act 1981 vests all mineral resources in The President. While this framework obtains in other countries such as Zimbabwe, the general trend in Southern Africa is to vest mineral resources in the state. The latter would conform to section 207 of Malawi Constitution, which vests all land territories in the Republic. Vesting mineral resources in the Republic reinforces the country’s sovereignty and therefore provides the justification for the stewardship and management responsibilities imposed on public officials. The Mines and Minerals Policy provides no statement on ownership and stewardship over minerals resources. This needs to be addressed.

The Mines and Minerals Act 1981 provides for the administrative arrangements for mineral development. The Minister responsible for mines and Commissioner of Mines are the responsible officials. However, the duties and responsibilities of these officials are not well defined. And there are no principles or guidelines against which their performance can be determined. We have, therefore recommended that in addition to stipulating the duties and responsibilities of responsible public officials, both the policy and legislation must stipulate the general principles for decision-making.

The review has identified a number of policy areas that require further consideration in

the Mines and Minerals Policy and thereafter incorporation into the revised Mines and Mineral Act. We have considered some of the risk factors that investors in the mining industry keenly highlight. Macro-economic management is a major consideration. Although the Mines and minerals Policy highlights this as an issue, there is no clear policy statement outlining the instruments such as the exchange rate, interest rates and inflation. In addition, the taxation regime for mining operations is key for investment decision-making; the policy statements in the Mines and Minerals Policy 2013 merely pay cursory attention to tax. There are a number of tax regimes, many of which may be unique to mining investments. The policy needs to articulate key principles of taxation, and where necessary, outline policy positions for the investor to make informed decisions.

Mining governance needs to be informed by certain generic principles. It must also articulate issues of capacity, transparency and accountability of its institutions. The Mines and Minerals Policy does provide for mining governance but has no statement of principles nor does it provide mechanisms for enhancing capacity, accountability or transparency in decision-making. Malawi is implementing a decentralized governance framework. The Mines and Minerals Policy needs to articulate the levels of decision making for resource utilization and management. The Mines and Minerals Policy provides for artisanal and small-scale mining and its significance to economic growth and poverty reduction. The Policy, however, fails to outline the legal financial, commercial technological and human resources challenges faced by ASMs. There is a need for concrete strategies for dealing with these challenges against the backdrop of policy requirements in the MGDS.

We have also considered the international commitments Malawi has made through conventions, treaties and protocols. The extractions of minerals resources affects natural resources such as water, land, biodiversity and air which are regulated by international conventions such as the Rio Declaration, the CBD, among others. There are also regional commitments such as the SADC Protocol on Mining to which Malawi is a party. The Mines and Minerals Policy only highlights regional cooperation. We have outlined some policy actions that need to be addressed around regional and international commitments.

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