



# Assessment of Mineral Regimes in the East African Community:

Aligning Frameworks with the African Mining Vision





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# I. Introduction

Several initiatives have sought to formulate policy and regulatory frameworks that would enable African countries to harness the development potential of their mineral resources. These initiatives have included the Johannesburg Declaration and Plan of Implementation of the World Summit on Sustainable Development; the Yaoundé Vision on Artisanal and Small-scale Mining; the African Mining Partnership's Sustainable Development Charter and Mining Policy Framework; the Southern African Development Community Framework and Implementation Plan for Harmonization of Mining Policies, Standards, Legislative and Regulatory Frameworks in Southern Africa; the West African Economic and Monetary Union Common Mining Policy and Community Mining Code; the Economic Commission for Africa and African Development Bank summary report of the 2007 Big Table on Managing Africa's Natural Resources for Growth and Poverty Reduction; and the work of the International Study Group to Review Africa's Mineral Regimes.

These initiatives culminated in the African Union's adoption of the Africa Mining Vision in 2009, the purpose of which is to create a "transparent, equitable and optimal exploitation of mineral resources to underpin broad-based sustainable growth and socio-economic development". The Vision is intended to integrate the mineral sector into the broader economy of each country. The African Minerals Development Centre was established in 2013 to support the coordination and implementation of the Africa Mining Vision.

The core mission of the African Minerals Development Centre is to work with States members of the African Union and their national and regional organizations, including the African Union Commission and regional economic communities, to enable mineral resources to play a greater transformative role in the continent's development through increased economic and social linkages and, in this manner, to help address its intractable poverty and limited development. A principal function of the African Minerals Development Centre is to support African countries in enhancing their capacities for effective mineral policy and regulatory design and implementation through alignment with the Africa Mining Vision. To that end, the African Minerals Development Centre commissioned this study, with the objective of reviewing the policy and regulatory frameworks of the five East African countries (Burundi, Kenya, Rwanda, Uganda and the United Republic of Tanzania) for alignment with the Africa Mining Vision. In particular, the study seeks to assess the extent to which these countries' policy and regulatory frameworks have accommodated and enabled the implementation of the development objectives of the Africa Mining Vision, including the extent to which these frameworks have enabled the utilization of mineral resources to underpin broad-based sustainable growth and socioeconomic development. The study also evaluated the extent to which these policy and regulatory frameworks have facilitated the attainment of the Vision's principal goals, which include: fostering a transparent and accountable mineral sector promoting good governance in the mineral sector; improving knowledge and optimizing the benefits of mineral resource endowments; developing linkages and using them to support economic diversification; harnessing the potential of small-



scale mining; fostering environmentally sustainable, safe and socially responsible mining practices; and building human and institutional capacities.

In terms of methodology, the study is based on in-depth review of literature and interviews with key informants, including officials of government ministries, regulatory agencies, experts and stakeholders. These interviews were conducted during country missions in July and August 2015.

The study's main finding is that although the mining policies and laws of the East African countries address many of the goals of the Africa Mining Vision, they have not sought specifically to align their mining regimes with the Vision. Countries are beginning, or planning, to incorporate more of the tenets of the Africa Mining Vision into their mineral sector frameworks. There are a number of key elements that should be incorporated and which are vital to ensuring that the mineral sector is well linked with the national economy and inclusive of local communities and small-scale miners. Improvements to policy frameworks are particularly needed where policy gaps have allowed the continuation of poor practices or prevented linkage development in the past; specifically, more narrowly defined targets and a better definition of the government-firm-community relationship in mineral development are needed.

The study notes that a number of actionable elements need to be fully incorporated into country mining visions, including transparency and accountability in mineral sector governance; streamlined mining administration and licensing; an apex-level vision for linkages and value addition with accompanying specific, concrete measures; involvement of local communities in natural resource management; a clear approach with mandatory steps for firms in local hiring and procurement; provision of mineral and geographical data and mapping; environmental protections; the empowerment of women in mineral sector policies; and embracing a multi-faceted approach to supporting artisanal and small-scale miners that goes beyond formalization and enables those miners' participation in the wider economy. A regional approach within the East African Community (EAC) could help to identify best practices regarding those policy aspects and to build a vision for cross-border cooperation in accordance with the characteristics of each country and the potential for the region to harmonize mineral sector strategies through a regional value-chain approach to mineral linkages.

Chapter II of this report outlines the conceptual framework of the study and then examines how Africa's mining sector has been governed in the past and how it ought to be governed in future if it is to contribute to development. Chapter III examines how the East African countries govern their mineral sectors and the regional efforts towards harmonization of governance regimes. Chapter IV sets out the conclusions and recommendations of the study.

## II. Governing the mining sector in Africa and the Africa Mining Vision

It is estimated that Africa contains 30 per cent of the world's mineral reserves but, despite the continent's abundant mineral wealth,<sup>1</sup> African countries have largely exhibited low levels of development and poor standards of living.<sup>2</sup> For the most part, Africa has not been unable to unlock its mineral wealth for the benefits of its citizens and the way in which the continent's mineral wealth and the pervasive poverty of its people exist concurrently therefore remains a paradox.<sup>3</sup> Instead, exploitative multinational corporations and African elites seem to have been the main, if not sole, beneficiaries of this wealth. For various reasons, including lack of expertise and corruption, African countries have tended to negotiate unfavourable mining development agreements, with the result that the continent has received inadequate returns for its minerals. Africa also lacks systematic geological mapping of its mineral resource base.<sup>4</sup> Yet another troubling feature of African mining is that it has largely been seen as a supplier of strategic minerals to industrialized countries, and policies have thus focused on minerals that play that role. This approach has also seen the mining sector being developed as an "externally-oriented enclave only narrowly linked with the rest of the domestic economy through the taxes paid to the state by the mining companies and their small pool of mainly lower level African workers".<sup>5</sup>

Most of Africa's minerals have therefore been exported in raw form, or after only basic processing, and without significant value-addition.<sup>6</sup> The export of raw minerals yields fewer skilled and secure jobs, generates less revenue and is more vulnerable to fluctuations in global commodity prices. In addition, although artisanal and small-scale mining (ASM) activities are widespread in Africa and employ a large number of people, the policy and regulatory frameworks that could facilitate the development or sustainable growth of ASM operations have largely been absent. Indeed, these frameworks have tended to favour large-scale mining, typically operated by foreign or multinational firms. Further, the exploitation of Africa's mineral resources has often been accompanied by the violation of human rights and the destruction of the environment, local economies and social fabrics.<sup>7</sup> In many cases, those who either occupy or own the land on which minerals are to be found have also complained of inadequate recognition of their rights, including the lack or inadequacy of compensation whenever they are asked to give way for the commencement of mining activities.

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1 Hany Besada and Philip Martin, *Mining Codes in Africa: Emergence of a "Fourth" Generation?* Research report (Ontario, North-South Institute, 2013), p. 3.

2 Eli G. Burton, "Reverse the Curse: Creating a Framework to Mitigate the Resource Curse and Promote Human Rights in Mineral Extraction Industries in Africa", *Emory International Law Review*, vol. 28, No. 1 (2014), p. 425.

3 United Nations Economic Commission for Africa, *Minerals and Africa's Development: The International Study Group Report on Africa's Mineral Regimes* (Addis Ababa, UNECA, 2011), p. 9.

4 African Union, *Africa Mining Vision* (2009), p. 2.

5 United Nations Economic Commission for Africa, *Minerals and Africa's Development*, p. 14.

6 African Union, *Africa Mining Vision*, p. 2.

7 United Nations Economic Commission for Africa, *Minerals and Africa's Development*, pp. 46, 49, 59, 70.

Following independence, many African countries sought to address the shortcomings of the regimes that colonial governments established around mining, such as the “obliteration of African enterprise, even where the geological conditions favoured small-scale producers and where African tradition and experience were considerable, as in the Gold Coast and Southern Rhodesian gold industries”.<sup>8</sup> Newly independent Governments took a number of policy approaches in this regard, including vesting minerals in the state, establishing state mining enterprises and taking substantial shares in existing mining companies, but these approaches did not bear fruit, for various reasons. For example, most state mining companies functioned poorly and failed to invest in research and development to keep mining and processing operations competitive. Low mineral prices also discouraged investments, leading to a collapse in explorations.

A need therefore arose to address the shortcomings of these post-independence policy approaches, not least because most African countries were also severely indebted by the early 1980s. Countries therefore turned to the World Bank and International Monetary Fund for assistance, and these institutions became increasingly involved in designing economic reforms across the continent, through what came to be known as structural adjustment programmes.<sup>9</sup> The programmes emerged out of a diagnosis by these international development policy institutions that the policies that African states had been pursuing were responsible for their poor economic performance. The World Bank observed, for example, that “the main factors behind the stagnation and decline were poor [macroeconomic and sectoral] policies emanating from a development paradigm that gave the State a prominent role in production and in regulating economic activity”.<sup>10</sup> Public enterprises, which constituted a principal means through which African states participated in development, were also performing poorly.

During this period, there was also an attack on big government in the West, which led to the ascendance of the ideology of neoliberalism.<sup>11</sup> According to this ideology, the “main restriction on the tendency for free capitalist economies to grow is ... market failure resulting from perverse governmental intervention”.<sup>12</sup> In the view of neoliberals, Governments in developing countries had gone too far in interfering with the free play of markets. The structural adjustment programmes were therefore inspired by neoliberalism and the perceived failures of the state-led development paradigm that African countries had pursued in the 1960s and 1970s. To enhance development, the World Bank and International Monetary Fund now required African countries to increase the role of the market in their economies, a process that mandated, in particular, the reduction in the size of the public sector, including through privatizing public enterprises and removing government regulations and controls.

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8 Ibid, p. 13.

9 Ibid, p. 15.

10 World Bank, *Adjustment in Africa: Reforms, Results, and the Road Ahead – Summary*. (Washington, D.C., World Bank, 1994), p. 20.

11 Neoliberalism refers to “a broad structure of political beliefs founded on right wing, yet not conservative, ideas about political democracy, individual freedom and the creative potential of unfettered entrepreneurship”. Richard Peet, “Review essay: Neoliberalism or Democratic Development?” *Review of International Political Economy*, vol. 8, No. 2 (2001), p. 329.

12 Ibid.

As part of the structural adjustment process, many African countries have therefore reformed their mining regimes<sup>13</sup> over the past two decades or so and there has been a “conscious attempt to redefine the role of the state in order to ensure its withdrawal from productive activities”.<sup>14</sup> Many state-owned enterprises in the mineral sector, for example, have now been privatized. This approach is exemplified by the World Bank’s *Strategy for African Mining*, which sought to address the underperformance of the mining sector.<sup>15</sup> According to the World Bank, most of the state-owned enterprises in the mineral sector lacked the management and technical capabilities and the necessary risk capital to invest, and could not therefore sustain the development of Africa’s potential. The World Bank considered that the solution to this problem lay in “attracting new high-risk capital from foreign mining companies”<sup>16</sup> and hence advised African countries to facilitate private investment. In order to attract private foreign investment, it further advised African countries to establish suitable mining regimes, including stable legal and fiscal frameworks, contractual stability, regulatory frameworks with minimal ministerial discretion, renewable and transferable mineral rights with long-term security of tenure, easy conversion between exploration and exploitation licences, minimum work commitments, profit repatriation, attractive returns on equity given the higher risk premiums allegedly required for projects in African countries, guarantee of majority ownership, and the management of political risks.

The resulting mining regimes have therefore been characterized by “decreased regulation, liberalized social and labour policies, and more private sector-friendly ownership and taxation schemes”.<sup>17</sup> As decreed by the World Bank, mining policies have emphasized the “role of the private sector as owner and operator and of government as regulator and promoter”.<sup>18</sup> Further, African Governments have limited the “pursuit of social or political goals, such as expanded social, educational and employment programs, through operational involvement in the resource sector”.<sup>19</sup> The ensuing mining codes have therefore eliminated local sourcing and employment requirements.

However, these World Bank inspired mining regimes are now being called into question. First, critics maintain that these regimes have been “premised on a sectoral approach that privileged the perspectives of potential investors rather than an approach that might have sought to articulate these views with broader concerns regarding the contribution of the mining sector to national or regional macroeconomic strategies”.<sup>20</sup> For example, few of the inputs into capital-intensive mining activities have been sourced locally. The World Bank approach has been deemed to ignore the need to build intersectoral linkages and encourage the local transformation of mineral resources, which would allow the sector to contribute to broader development objectives.

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13 A regime is defined as the governance arrangements, including policies and regulatory frameworks. See: Robert O. Keohane and Joseph S. Nye, *Power and Interdependence: World Politics in Transition* (Boston, Little, Brown & Co, 1977).

14 Bonnie Campbell, “Revisiting the Reform Process of African Mining Regimes”, *Canadian Journal of Development Studies*, vol. 30, No. 1-2, 2011, p. 200.

15 World Bank, *Strategy for African mining* (Washington, D.C., World Bank, 1993).

16 Ibid, p. 10.

17 Besada and Martin, *Mining Codes in Africa*, p. 3.

18 World Bank, *Strategy for African mining*, p. 53.

19 Besada and Martin, *Mining Codes in Africa*, p. 8.

20 Bonnie Campbell, “Revisiting the Reform Process”, p. 201.

Second, these reforms have led to a reduction of state sovereignty, thereby seriously compromising the state's capacity to implement developmental goals, particularly given that they require the state to withdraw from regulating key macroeconomic instruments. The reforms have, for example, led to a reduction in the levels of ad valorem royalties required by the state, and a reduction in corporate income tax rates, as well as customs duties on imported capital goods. African states therefore have less autonomy, while transnational mining companies have assumed more power. In other words, the state's power to harness mineral resources is "decidedly constrained" when it tries to "influence where and how international production takes place".<sup>21</sup> This reduction in state sovereignty is often exacerbated by unfavourable bilateral investment treaties, which protect the interests of foreign investors but restrict the policy space available to countries to pursue aggressive socioeconomic development and pro-poor growth.<sup>22</sup> What has resulted is a structure of power that makes it difficult for African countries to introduce regulatory frameworks that promote developmental and environmental objectives and protect human rights.

Third, critics maintain that the resulting mining regimes have not recognized the need for certain forms of regulation, particularly with regard to the protection of the environment.<sup>23</sup> The World Bank approach favoured self-regulation in this respect and, as a result, there has only been a "nominal recognition"<sup>24</sup> of the need for social and environmental regulations. For the most part, such regulations have remained non-binding. The need to pay greater attention to environmental protection has now been heightened by the rapid growth of new investors – particularly Brazil, the Russian Federation, India, and China – in the African mineral sector.

Fourth, a number of the states in which these regimes have been established have weak institutional and political capacities. As a result, state functions such as service delivery, rule-setting and implementation have been delegated to private actors. Many policy aspects of a small-state mining approach ignore the importance of state involvement in nurturing mining sectors in many developed countries, which are linked to the broader economy, and of the historical need to build the necessary institutional structures before taking a gradually more laissez-faire approach to mining. Since the state has retreated from mediating socioeconomic relations, the transnational mining companies operating in these countries have increasingly been subjected to social claims.<sup>25</sup> Further, these companies "face the risk of potential conflict and, consequently, the need to ensure the security of their own activities".<sup>26</sup> Thus, some of these companies have turned to private security forces to ensure the security of their operations. Because socioeconomic relations are poorly mediated, these companies also face legitimacy challenges.

Finally, the World Bank inspired reforms have neglected ASM, despite this sector's undisputed potential to alleviate poverty and safeguard livelihoods. In particular, the foreign investment model has been blamed for undermining efforts

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21 John M. Stopford, Susan Strange and John S. Henley, *Rival States, Rival Firms: Competition for World Market Shares* (Cambridge and New York, Cambridge University Press, 1991), p. 14.

22 Besada and Martin, *Mining Codes in Africa*, p. 22.

23 Bonnie Campbell, "Revisiting the Reform Process", p. 205.

24 Besada and Martin, *Mining Codes in Africa*, p. 9.

25 David Szablowski, *Transnational Law and Social Struggles: Mining, Communities and the World Bank* (Oxford, Hart Publishing, 2007), p. 60.

26 Bonnie Campbell, "Revisiting the Reform Process", p. 209.

to formalize ASM. It is acknowledged that the ASM sector is “plagued by a long list of social and environmental problems”,<sup>27</sup> including environmental degradation, increased levels of child labour, adverse impact on human health, links to civil wars, connections with money-laundering, and supporting terrorist activities. Many of these problems can be attributed to the fact that the ASM sector is unregulated and operates outside the legal sphere. The need has therefore arisen to formalize the ASM sector, including through registering and organizing unregulated mining, bringing ASM into the formal economy or at least opening new space for ASM to exist in a quasi-formalized state in order to extend basic services and protections while recognizing the operators’ right to mine. These measures would make mining activities more sustainable and would channel benefits to miners at the bottom of the production chain. In the process, impoverished, mineral-rich communities would become more prosperous. Formalization would entail, among other things, adequate zoning of land suited for ASM activities and the provision of technical support to small mining communities. However, the prioritization of large-scale mining to encourage international investments has led to vast quantities of land being apportioned to multinational mineral exploration and exploitation companies and has often prevented the objective of bringing small scale-operators into the legal domain from being realized. Policies have thus treated large-scale mining and small-scale mining unequally. One effect of this has been to exacerbate “tensions between the large-scale and small-scale sectors, resulting in conflict over land and other key livelihood resources”.<sup>28</sup>

In order to deal with these challenges, various private, voluntary and transnational initiatives, with their origins in debates over corporate social responsibility, have emerged.<sup>29</sup> Examples include the Voluntary Principles on Security and Human Rights, which provide guidelines for dealing with state or private security forces; the International Council on Mining and Metals, which aims to improve social and ecological standards and contribute to the resolution of conflicts between resource extraction and the preservation of nature; the Kimberley Process, which is a certification process established in the context of the issue of “blood diamonds” resulting from the civil wars in Liberia, Sierra Leone and Angola to prevent trade in conflict diamonds with the help of a complex certification system; the Extractive Industries Transparency Initiative, which aims to increase the transparency of public revenues emanating from the resource sector; and the Publish What You Pay campaign, which also seeks to increase transparency in the resource sector.<sup>30</sup>

For multinational mining companies, implementing these initiatives is important, as it secures them a “social license to operate” in affected communities.<sup>31</sup> However, the initiatives remain limited in effectiveness for various reasons, such as their voluntary nature and the absence of regulatory enforcement. A common concern is that even where multinational companies have adopted these initiatives, local communities

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27 Roy Maconachie and Gavin Hilson, “Safeguarding Livelihoods or Exacerbating Poverty? Artisanal Mining and Formalization in West Africa”, *Natural Resources Forum*, vol. 35, 2011, p. 293.

28 Ibid, p. 301.

29 Besada and Martin, *Mining Codes in Africa*, p. 15.

30 Schnell, M. and M. Grosman, “International Approaches to Improve Resource Governance in Africa”, In *Geological Resources and Good Governance in Sub-Saharan Africa: Holistic Approaches to Transparency and Sustainable Development in the Extractive Sector*. Jürgen Runge and James Shikwati, eds. (New York, CRC Press, 2011), pp. 46-47.

31 Besada and Martin, *Mining Codes in Africa*, p. 16.



continue to bear the social and environmental costs of mining activities. Weak state capacity has also meant that revenue officials do not have the capacity to “accurately monitor the output and capital expenditures of multinational mining companies, allowing firms to manipulate their tax obligations and minimize the royalties paid to local governments and mining-affected communities”.<sup>32</sup>

The net result is that the World Bank inspired mining regimes have not produced significant local benefits, leading to calls for their revision. Although the liberalized regulatory frameworks have maximized benefits for the multinational companies, they have failed to provide broadly shared benefits to affected communities. Further, Governments and multinational companies alike have failed to reinvest resource revenues into health, education, and employment-creation services. A number of countries have therefore taken the decision to “review their mining contracts to better respond to the new demands for the social regulation of private sector development that have accompanied the rapid process of liberalization and the opening up of mineral-rich African economies to investment”.<sup>33</sup> These processes of revision are leading to the adoption of the Africa Mining Vision approach, in which the mining sector is viewed as a catalyst for building intersectoral linkages. Some of the revised regimes now contain provisions for “greater national participation, facilitation of mining activities, increase of fiscal revenue and local community development”.<sup>34</sup> They also require transparency in the contractual arrangements between host governments, local communities and mining companies. For these revisions to make a difference, it is necessary to ensure that citizens will be able to access to information about the mining arrangements and that independent judiciaries will be able to enforce them.

A number of other African countries have also sought to formalize their ASM sectors. Notably, in this regard, Mali has adopted an approach that could be emulated by other countries. Mali’s breakthrough came from working with traditional communities to formalize their artisanal workings and the country has now legalized procedures for securing licences that provide traditional societies engaged in small-scale mining with security of tenure. It has also organized small-scale miners into cooperatives and associations. Mali’s experience demonstrates how efforts to formalize the ASM sector must be based on a clear understanding of the dynamics of affected local communities.<sup>35</sup>

At the regional level, African states have now sought to harmonize their policies and regulatory frameworks,<sup>36</sup> including in the areas of monitoring mechanisms, administrative systems and single points of contact for licensing and regulatory approvals. One example of these harmonization efforts is the Economic Community of West African States draft Directive on the Harmonization of Guiding Principles and Policies in the Mining Sector, which seeks to create a common mining and extractive code of conduct in Western Africa, focused on a participatory approach, sustainable development, poverty reduction, environmental protection, good

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32 Ibid, p. 13.

33 Campbell, B. “Revisiting the Reform Process”, p. 212.

34 Steven De Backer, *Mining Investment and Financing in Africa: Recent Trends and Key Challenges*. (Webber Wentzel, 2012), p. 10.

35 Maconachie and Hilson, “Safeguarding Livelihoods or Exacerbating Poverty?”, pp. 301-302.

36 Besada and Martin, *Mining Codes in Africa*, p. 21.

governance and defence of human rights. However, harmonization initiatives continue to be hampered by various obstacles, including disparate policy and regulatory frameworks, inadequate geological knowledge of mineral resource endowments, inadequate physical infrastructure required for mineral resources development, processing and value added manufacturing, and a lack of capacity and political will for implementation.<sup>37</sup>

All in all, African mining continues to face national and regional governance challenges that must still be overcome if Africa's mineral resources are to contribute meaningfully to sustainable development. Yet another development is the recent decline in demand for mineral commodities in China, India and Brazil. The hope is that this time round, African countries will make more optimal use of the lull in global commodity prices to develop more favourable market conditions through effective and efficient policy and regulatory frameworks for the minerals sector. However, and above all, there is an urgent need to strengthen linkages between mineral resource extraction and Africa's industrial development, if these resources are to contribute to broad, long-term development goals. Unfortunately, the required linkages remain poorly developed, which reflects "the industry's main orientation – extracting and shipping minerals to overseas markets".<sup>38</sup>

The Africa Mining Vision provides a timely and much-needed policy framework for addressing these challenges; in particular, it seeks to address the shortcomings of the neo-liberal approach. According to the Africa Mining Vision, this approach was "narrow minded and more geared towards attracting foreign investment and promoting exports and less towards fostering local development".<sup>39</sup> Further, it faults this approach for being "sectoral-centred", favouring foreign direct investment over local capital development and failing to integrate poverty reduction into mining policies because of the weak linkages between local, national and regional economies.

The approach has also been characterized by asymmetrical power relations, with the result that decision-making processes have tended to favour bipolar initiatives (government and private sector) while excluding local communities and civil society at large. As a result, the local costs associated with mining, such as environmental impacts, and social and cultural disruptions, have not been adequately compensated for. The Vision decries the magnitude of special incentives offered to mining companies, which reduce the share of rent that African Governments depend on receiving in order to fund their social and development programmes.

In order to address these challenges, the Africa Mining Vision seeks to integrate Africa's mineral sector into the continent's social and economic development process through six related goals:

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37 H. Mtegha and others, "Regional Organisations' Approach to Mining and Exploitation in Sub-Saharan Africa", In *Geological Resources and Good Governance in Sub-Saharan Africa: Holistic Approaches to Transparency and Sustainable Development in the Extractive Sector*. Jürgen Runge and James Shikwati, eds. (New York, CRC Press, 2011), p. 158.

38 United Nations Economic Commission for Africa, *Minerals and Africa's Development*, p.151.

39 Africa Mining Vision, p. 11.



1. Fostering a transparent and accountable mineral sector, in which resource rents are optimized and utilized to promote broad economic and social development;
2. Promoting good governance of the mineral sector, in which countries and citizens participate in mineral assets, and in which there is equity in the distribution of benefits;
3. Improving the knowledge, and optimizing the benefits, of finite mineral resource endowments at all levels of mining and for all minerals;
4. Harnessing the potential of small-scale mining to both improve rural livelihoods and to integrate the rural economy into national development;
5. Fostering sustainable development principles based on environmental and socially responsible mining, which is safe, inclusive and appreciated by communities and all stakeholders;
6. Building human and institutional capacities towards a knowledge economy that supports innovation, research and development.

At the governance level, the Africa Mining Vision therefore calls for a review of mining policy and regulatory frameworks, which need to appropriately and directly address the issues of primary importance if these six goals are to be realized. Since the review of the liberalized mining regimes is a recent and ongoing exercise, the nature of the evolving mining policies and regulatory frameworks is not well understood. This study seeks to fill that gap with respect to East Africa, specifically in evaluating the extent to which East African countries are aligning their policy and regulatory frameworks with the Africa Mining Vision, by determining the extent to which these frameworks are enhancing the good governance of the mineral sector and, if they are not, what gaps still exist between the national policy environments and the approach advocated by the Africa Mining Vision.

The Action Plan for Implementing the Africa Mining Vision provides nine parameters for evaluating the frameworks in place across East African countries:

1. Mining revenues and mineral rents management: does the mining sector effectively garner and deploy resource rents? For example, what fiscal provisions govern the collection of mineral rents and, further, to what extent are financial inflows from mining channelled into long-term physical and social capital? Another important question is whether the mineral regime has mechanisms for establishing a fair market value of resources, such as transparent and competitive concessioning.
2. Geological and mineral information systems: have countries developed a comprehensive knowledge of their mineral endowment, which would enable them to make informed decisions on mineral sector development? Geological and mineral data should not only be available, but also

accessible, as this would lower the risk to investments in exploration and mine development. It would also greatly assist countries in their negotiations with mining companies.

3. Building human and institutional capacities: is the mining sector knowledge-driven and does it provide an engine for an internationally competitive industrial economy? This entails upgrading skill levels, in terms of variety, depth and quantities, and the development of new skills, for example in the area of planning and oversight. Stakeholder institutions, such as parliaments, local communities and civil society, also need to upgrade skills to be effective in their role of providing checks and balances to government functions.
4. Artisanal and small-scale mining: has the potential of artisanal and small-scale mining been harnessed, with a view to advancing integrated and sustainable rural development? This entails, among other things, regularizing and mainstreaming ASM into broad-stream socioeconomic activities; developing a regulatory regime that promotes a viable and sustainable ASM sector; upgrading knowledge, skills and technologies in the ASM sector; and developing and strengthening ASM associations.
5. Mineral sector governance: has the country created a sustainable and well-governed mining sector that is inclusive and appreciated by all stakeholders, including surrounding communities? This entails establishing strong, transparent and participatory governance processes and respect for human rights in mining operations.
6. Research and development: is the mining sector knowledge-driven? Capacity must be enhanced to generate new knowledge in mining-related products, processes, technologies, and services. It requires countries to develop their capacity for knowledge generation and innovation, which can be measured in terms of the availability of scientists and engineers, the quality of scientific research institutions, university-industry research collaboration, private-sector spending on research and development, and government procurement of advanced technology products.
7. Environmental and social issues: is the mining sector environmentally friendly, socially responsible and appreciated by all stakeholders and surrounding communities? This requires strengthening the capacity of state institutions for environmental regulation, building local community capacity to negotiate favourable impact and benefits agreements, and building effective mechanisms for grievance, dispute and conflict resolution.
8. Linkages and diversification: does the mining sector catalyse and contribute to broad-based growth and development through linkages? This requires leveraging mineral extraction and processing operations into broader economic development outcomes, identifying minerals that offer possibilities for national and regional industrial development and

integration, investing in infrastructure networks, and providing incentives for investors to structure projects in ways that deepen their integration into the broader national and regional economy.

9. Mobilizing mining and infrastructure investment: has the level of investment flows into mining and infrastructure projects been increased to support broad socioeconomic development? This entails developing effective investment promotion and protection strategies, enhancing the participation of the local private sector in infrastructure projects, and establishing natural resource development corridors.<sup>40</sup>

These nine parameters must be articulated in the mining policies, laws and regulations – all important instruments for these countries – if the goals of the Africa Mining Vision are to be realized. Chapter III of this report therefore examines the extent to which these parameters have been, or are being, considered in the policies and regulatory frameworks of the East African countries.

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40 African Union Commission, African Development Bank and United Nations Economic Commission for Africa, *Action Plan for Implementing the Africa Mining Vision – Building a sustainable future for Africa's extractive industry: From vision to action* (2011).

### III. Governing the mining sector in East Africa

Although the mining policies and laws of the five East African countries covered by the study address many of the goals and concerns of the Africa Mining Vision, the countries have not thus far sought to specifically align their mining regimes with that Vision and, for the most part, references to the Africa Mining Vision in these regimes are tangential at best. However, Rwanda is the exception to this, insofar as it is currently developing a country mining vision.

The laws of these countries confer varying mineral rights (see table 1). All five countries have sought to enhance transparency and accountability in the administration of their mining regimes, although, as we shall see, some are more democratic than others. Kenya, for example, is in the process of dispersing the powers of its mining commissioner, who will now be required to consult the national Mineral Rights Board before exercising many of his or her powers. Similarly, the United Republic of Tanzania has similarly created a Mining Advisory Board.

These countries have also sought to improve knowledge of their mineral resources and are at various stages of mapping these resources. Some, such as the United Republic of Tanzania, have renegotiated mineral development agreements in response to public complaints that mining companies were taking the lion's share of the benefits arising from the exploitation of mineral resources. But all five continue to experience various challenges with respect to harnessing the potential of ASM, fostering sustainable development principles, managing licences and mineral development agreements, enhancing linkages between the mining industry and the rest of their economies, and resolving conflicts between mining companies and communities that live in or around mining areas.

Another notable feature of the mining regimes of these countries is that, for the most part, their policies and regulatory frameworks remain gender neutral, although Rwanda, Uganda and the United Republic of Tanzania have included some provisions on gender equality and equity in their policies. This gender neutrality persists despite the fact that women play a significant role in the mining sector. For example, ASM has a huge female workforce, estimated at between 40 and 50 per cent across the continent.<sup>41</sup> It is therefore apparent why the Africa Mining Vision calls upon countries to work towards gender equality and the empowerment of women.<sup>42</sup> In particular, it urges countries to empower women through the integrating gender equity into mining policies and laws and formulating gender charters for their mining sectors.

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<sup>41</sup> African Mineral Development Centre, *African Women in Artisanal and Small-scale Mining* (2015), p. 2.

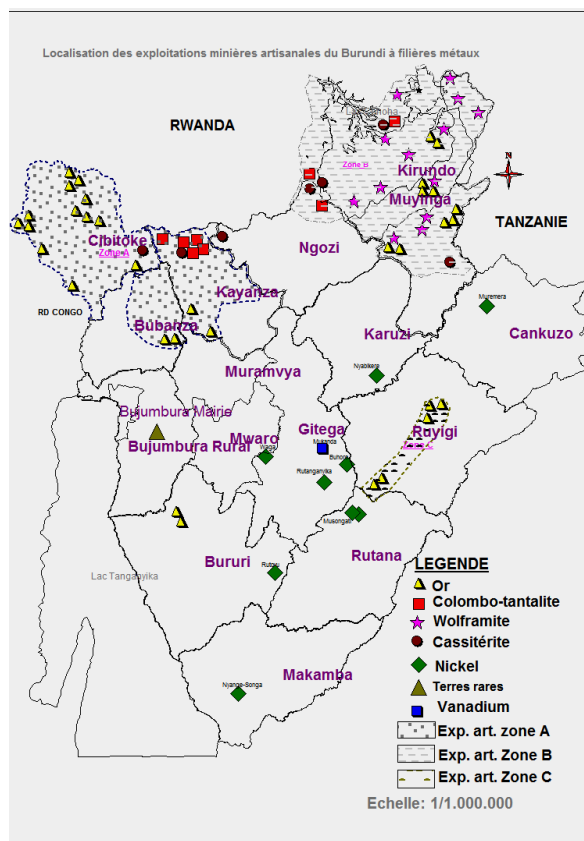
<sup>42</sup> Africa Mining Vision, p. 32.

Table 1: Mineral rights in East African countries

Country	Reconnaissance licence	Prospecting/ exploration licence	Retention licence	Large-scale mining licence/ lease	Small-scale mining licence	Reconnaissance permit	Prospecting permit	Mining permit	Artisanal mining licence
Burundi	Research permit; duration not indicated	1 year + renewal of 1 year		Exploitation licence: 25 years + unlimited renewals of 10 years	Artisanal logging permit: 2 years + unlimited renewals of 2 years				
Kenya	2 years (non-renewable)	3 years + 2 renewals of 3 years	2 years + 1 renewal of 2 years	25 years + 1 renewal of 15 years		Duration not indicated	5 years + 1 renewal of 5 years	5 years + 1 renewal of 5 years	
Uganda		Prospecting licence: 1 year (any mineral); not clear if renewable. Exploration licence: 3 years + 2 renewals of 2 years	3 years + 1 renewal of 2 years	21 years + 1 renewal of 15 years	Location licence: 2 years + unlimited renewals of 2 years				
Rwanda		4 years + 1 renewal of 4 years		25 years + unlimited renewals of 15 years	15 years + unlimited renewals of 10 years				5 years + unlimited renewals of 5 years
United Republic of Tanzania		4 years + 1st renewal of 3 years + 2nd renewal of 2 years	5 years + 1 renewal of 5 years	Special licence: period requested by applicant	Mining licence: 10 years + 1 renewal of 10 years; primary mining licence: 7 years + undefined renewal				

This study will proceed by examining the mineral frameworks in place in the five EAC States members. It gives a snapshot of the policy environment and legal frameworks, with an analysis of the extent to which the inclusive and dynamic elements of the Africa Mining Vision are embedded. This will feed into the policy recommendations in Chapter IV on the elements that should be adopted by the countries to ensure that their mineral sectors better linked and provide greater benefits that can be shared across local communities and the economy at large.

## A. Burundi



Burundi produces cobalt, copper, nickel, niobium (columbium), tin, tantalum, tungsten, gold, and limestone. Mining accounts for less than 1 per cent of the country's gross domestic product (GDP);<sup>43</sup> nevertheless, the Government considers the development of the mineral sector to be of high importance, given its potential to enhance job creation, economic diversification, and tax revenues.<sup>44</sup> Burundi has, for example, the second largest coltan reserve in the region and about 6 per cent of world nickel reserves, but these resources are currently being extracted by artisanal methods and the industry faces challenges, such as inadequate electricity and transport infrastructure.<sup>45</sup> Burundi enacted a new Mining Code in 2013 and is now in the process of formulating a mining policy.<sup>46</sup> However, the country has not carried out any geological surveys owing to the costs involved.

43 Thomas, R. Yager, Thomas R, "The Mineral Industry of Burundi", in 2012 *Minerals Yearbook*, United States Geological Survey, ed. (Washington, D.C., Government Publishing Office, 2014)

44 iTSCI, *Governance Assessment Burundi* (2013).

45 African Development Bank, *Burundi: Country Strategy Paper 2012-2016* (2011).

46 Republic of Burundi, *Promotion of Extractive and Mineral Processing Industries in the EAC: Burundi Status* (2012).

The Mining Code establishes the following categories of mineral rights: exploration licence, research permit, exploitation licence, artisanal logging permit, and dealer's licence.<sup>47</sup> The Minister, as the licensing authority, processes applications for these licences on a first come, first served basis. Power is largely centralized in the Minister, although he or she is required to consult a regulatory board or council of ministers before making certain decisions. The exploration licence does not confer an exclusive right to prospect, and is not transferable. It is granted for a period of one year and may be renewed once for a similar term. The licence holder must commence survey operations within three months of the date of the licence being granted.

A research permit confers on the holder an exclusive right to explore and search for the substances for which the permit is issued. It also permits the holder to take samples of those substances for the purposes of conducting any study or necessary testing, although the samples must be delivered to the Ministry. The holder of a research permit is required to commence operations within the time frame prescribed by the licence.

An exploitation licence confers on the holder the exclusive right to prospect, research and exploit the mineral substances for which the licence is issued. It is granted for a period of 25 years or the life of the mine, and may be renewed for additional 10-year periods. Every exploitation licence must be accompanied by a mining agreement, which must be renewed whenever the licence is renewed. The Mining Code stipulates the provisions of the mining agreement, which include: free carried interest for the state of at least 10 per cent; the mining company's guarantees; the mining company's commitments to the creation of infrastructure, socioeconomic contributions, employment of citizens, procurement of local goods and services; and environmental protection in general and restoration of exploited sites in particular. Many of these provisions are key elements of the Africa Mining Vision. Further, an applicant seeking an exploitation licence must provide an approved feasibility study, an approved socioeconomic impact study, an approved environmental impact assessment (EIA) study, a capital works programme and preparation deposit for its operation, and an operating plan.

An artisanal permit can be obtained only by a formal mining cooperative. This mineral right is granted for two years, and may be renewed for an unlimited number of further two-year periods. Finally, the dealer's licence confers on the holder the right to deal in artisanal mineral substances. It should also be noted that the Mining Code stipulates that all mineral research and exploitation activities can only be undertaken after the prior consent of persons likely to be affected by such activities has been obtained. Further, such persons are entitled to compensation for any interference with their land ownership or occupation rights.

In practice, there are problems with efforts to formalize artisanal mining. According to many stakeholders, formalizing the artisanal mining sector requires "more than just organizing miners into cooperatives".<sup>48</sup> Among the issues are that many

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<sup>47</sup> Republic of Burundi. Mining Code of Burundi 2013.

<sup>48</sup> K. Matthysen, *Review of the Burundian Artisanal Gold Mining Sector* (Antwerp, International Peace Information Service, 2015), p. 13.

artisanal miners are not familiar with the notion of a cooperative, are “suspicious about potential benefits, and believe it will mainly serve the wealthier stakeholders to increase their profits”.<sup>49</sup> There is a fear, therefore, that efforts to formalize the sector will be subject to elite capture. The process of registration is also complicated and may discourage many artisanal miners from seeking permits. Artisanal miners are first required to file a demand with the local administrator who, in consultation with the relevant communal council, grants a certificate confirming the availability of the land to be mined. They must then register their cooperative and apply to the Ministry of Mining to authorize their activities. Once this is done, the Ministry of Mining and the Ministry of Environment send a mission to the site to observe the situation on the ground and register the future permit's geographical coordinates. A permit is then issued to the cooperative once it has paid all the taxes due.

**Table 2: Extent of alignment of the policy and regulatory frameworks of Burundi with the Africa Mining Vision**

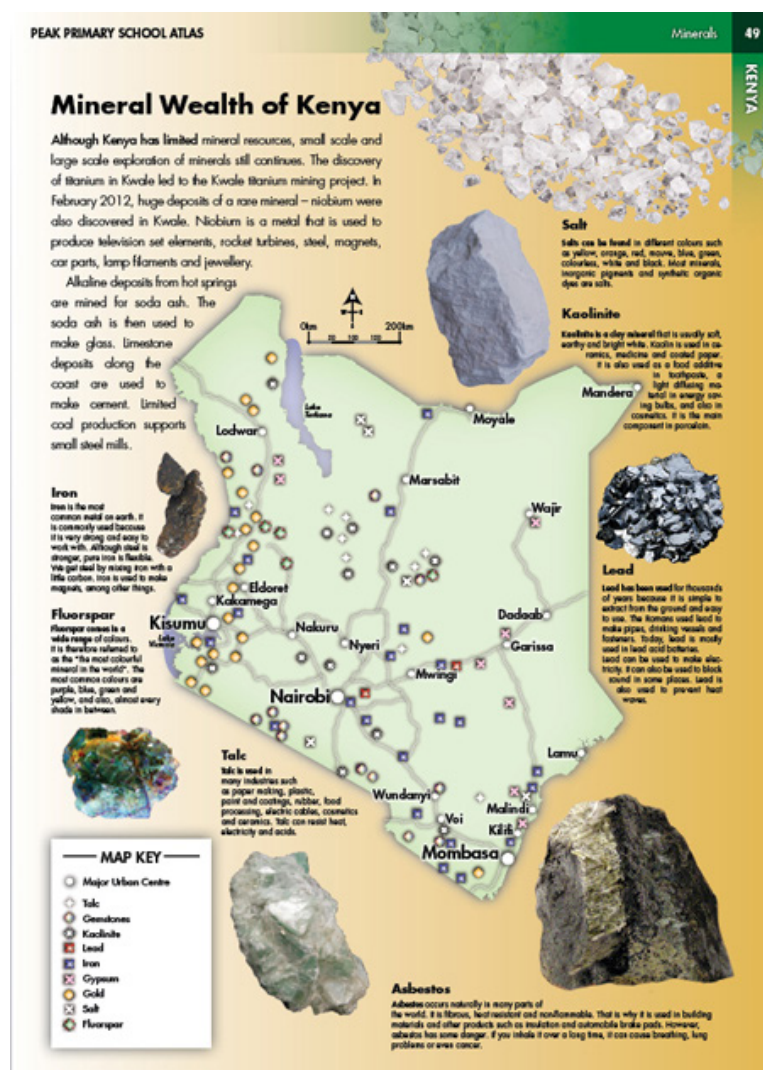
Parameter	Achievements	Drawbacks
Mining revenues and mineral rents management	<ul style="list-style-type: none"> <li>• Licence applications processed on first come, first served basis</li> <li>• Mining agreement required for all exploitation licences</li> <li>• Free carried interest for the state</li> <li>• Royalties paid for all minerals</li> <li>• Royalties negotiated within mining agreements</li> </ul>	<ul style="list-style-type: none"> <li>• Inadequate capacity to audit mineral production and exports</li> <li>• Mineral concession system not sufficiently competitive or transparent</li> <li>• Not clear how mineral revenues are managed and used</li> </ul>
Geological and mineral information systems	–	<ul style="list-style-type: none"> <li>• No geological surveys</li> <li>• Inadequate information to stimulate investments</li> </ul>
Building human and institutional capacities	<ul style="list-style-type: none"> <li>• Licensees required to employ citizens</li> </ul>	<ul style="list-style-type: none"> <li>• No clear policies on building human and institutional capacities</li> </ul>
Artisanal and small-scale mining	<ul style="list-style-type: none"> <li>• Regularization through permit system</li> <li>• Miners organized into cooperatives</li> </ul>	<ul style="list-style-type: none"> <li>• No programmes on developing knowledge, skills and technologies</li> <li>• No programmes on extension services, including financing, marketing, health, safety and environment</li> </ul>
Mineral sector governance	<ul style="list-style-type: none"> <li>• Lesser discretionary powers for regulatory authorities</li> <li>• Minister required to consult regulatory board/council of ministers in decision-making</li> </ul>	<ul style="list-style-type: none"> <li>• No clear policies on public participation in decision-making, monitoring and evaluation of mineral projects</li> <li>• No clear policies on transparency and access to information</li> <li>• No clear policies on protection of human rights</li> </ul>
Research and development	–	<ul style="list-style-type: none"> <li>• No clear policy on research and development</li> </ul>
Environment and social issues	<ul style="list-style-type: none"> <li>• Licensees required to protect environment and restore exploited sites</li> <li>• Compensation for interference with land/occupation rights</li> <li>• Enacted environment code</li> </ul>	<ul style="list-style-type: none"> <li>• No clear policies on strengthening state capacity for effective environmental management/regulation</li> <li>• No clear strategy for dealing with adverse impacts of ASM</li> </ul>

49 Ibid, p. 14.



Parameter	Achievements	Drawbacks
Linkages and diversification	<ul style="list-style-type: none"> <li>Licensees required to procure local goods and services.</li> <li>Government making efforts to promote value addition</li> </ul>	<ul style="list-style-type: none"> <li>No clear strategies for enhancing mineral-based industrialization and diversification of economy</li> </ul>
Mobilizing mining and infrastructure investments	<ul style="list-style-type: none"> <li>Licensees required to build infrastructure</li> </ul>	–

## B. Kenya



The most significant minerals of Kenya have historically been industrial minerals, such as fluorspar, soda ash, kaolin, rare earths and cement; in 2012, Kenya produced 5 per cent and 2 per cent of the world's production of soda ash and fluorspar, respectively.<sup>50</sup> The country also produces metals such as gold, iron ore, niobium (columbium), titanium and zirconium. Other minerals found in Kenya are kyanite, manganese, silica sands, gemstones, gypsum and limestone.<sup>51</sup> Nevertheless, mining

50 Thomas R. Yager, "The Mineral Industry of Kenya", in 2012 *Minerals Yearbook*. United States Geological Survey, ed. (Washington, D.C., Government Publishing Office, 2014)

51 Republic of Kenya, *Promotion of Extractive and Mineral Processing Industries in the EAC: Kenya Status*.

and quarrying only accounts for about 0.7 per cent of the GDP of Kenya. According to the Ministry of Mining, the country's mineral resources are "vastly underexploited", although the mining sector continues to grow and the country is seeking to position itself as a regional mining sector hub for East Africa.<sup>52</sup>

A number of global mining companies now have operations in Kenya, although there is a significant presence of artisanal and small-scale miners who, for example, account for most of the gold production. The Government is now taking various steps to make the country a more attractive destination for mining investments, including by intensifying efforts to acquire mineral and geological data through a countrywide aeromagnetic survey, the contract for which has been awarded to a Chinese geological institute. The Ministry of Mining has automated its mineral licensing system by establishing an online mining cadastre portal, which is expected to increase efficiency and transparency in the grant of mineral rights and the management of concessions. In addition, the country is investing heavily in infrastructure projects, with a view to reducing the costs of mining operations over time. It has also embarked on reducing the cost of energy and producing additional power, which it hopes will stimulate economic growth in its industries, including the mining sector.<sup>53</sup>

### **1. Governing the Kenya mining sector**

For a long time, Kenya did not have a policy framework for mineral development, and the Mining Act<sup>54</sup>, first enacted in 1940 and later revised in 2012, constituted the main instrument for the governance of the mining sector. This Act established the Minister responsible for mining and the Commissioner of Mines and Geology as the principal institutions responsible for administering the mining regime. The Act established legal rights and specifications for licensing, but represented an ad hoc approach to the mineral sector rather than a coherent policy framework. Under this law, any person who wished to prospect or mine on any land was required to obtain either an exploration or extraction licence. There were four types of exploration licences: prospecting right, exclusive prospecting right, special licence, and mining location. A prospecting right was not transferable, and lasted one year, although it could be renewed for another year. The holder of a prospecting right was entitled to prospect for minerals, subject to any terms and conditions the Commissioner might, "in his absolute discretion", have deemed fit.<sup>55</sup> The prospecting right therefore enabled the holder to identify a potential area over which to apply for an exploration licence.

The exclusive prospecting licence could only be granted to the holder of a prospecting right or a person whose agent was the holder of a prospecting right. A person seeking an exclusive prospecting licence was required to submit an application, together with a programme of work, and to satisfy the Commissioner that he or she had sufficient capital to ensure proper prospecting. The exclusive prospecting licence also lasted one year and could be renewed for further one-year terms up to a maximum of five years. The licence could only be transferred to a different holder with the consent

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<sup>52</sup> Republic of Kenya, Ministry of Mining, *Kenya Mining Investment Handbook 2015* (Nairobi, Government of Kenya, 2015), p. 19.

<sup>53</sup> Ibid, pp. 28-32.

<sup>54</sup> Republic of Kenya, Mining Act 1940.

<sup>55</sup> Ibid, Section 14(a)(i)(b).

of the Commissioner. In exchange for the grant of this licence, the holder could be required to furnish a financial guarantee and was required to observe all the terms and conditions of the licence, including keeping such records of prospecting operations, as determined by the Commissioner. Further, any minerals obtained in the course of prospecting were the property of the Government, and could only be removed from the land or disposed of with the Commissioner's consent. The special licence granted the holder the right to prospect under terms and conditions determined by the Commissioner, including the area of land in which mining was to occur, the minerals to be prospected, taxes such as royalties and fees, labour, and the form and period of the licence.

Finally, a mining location was made up of "claims"; a claim was allowed over an area less than 200 m by 250 m, and a location could have a maximum of 10 claims. The holder was allowed a maximum of eight locations in any given administrative district. A person aggrieved by any decision of the Commissioner refusing to grant any of these licences was able to appeal to the Minister whose decision was "final and ... not subject to appeal or review in any court".<sup>56</sup>

As far as extraction was concerned, the Commissioner could grant the mineral right holder a mining lease or special mining lease in respect of that land, upon such terms and conditions as the Commissioner determined, including a demonstration that the mineral right holder had sufficient working capital to sustain mining operations. This lease could be granted for a term of not less than five and not more than 21 years, and be renewed for such term as the Commissioner considered appropriate. Further, where prospecting or mining operations disturbed the rights of the owner or occupier of any land, or caused nuisance or damage to the land, the holder of the mineral right was liable, and on demand duly made, to pay the owner or occupier fair and reasonable compensation for the disturbance, nuisance or damage. An owner or occupier of land who was dissatisfied with the compensation offered could refer the matter to court within one month of making the demand for compensation.

The Mining Act also regulated dealing in minerals, which was deemed to include the buying, selling, bartering, depositing or receiving as a pledge or security, exporting, cutting or polishing any mineral covered by the Act. Any person wishing to deal in minerals was required to register as a dealer and obtain a mineral dealer's licence each year. It was a criminal offence to possess or deal in minerals without that licence. Mineral dealers were also required to "maintain a proper register of the kind, quantity and quality of minerals they have dealt in, bought, sold, bartered, exported, cut or polished, [and] the manner by which it was obtained or disposed of".<sup>57</sup>

There were various challenges in the administration of this regime. First, the absence of a policy framework meant that emerging issues in the sector were addressed on an ad hoc basis, which often led to uncoordinated responses to the issues.<sup>58</sup> Having been enacted in 1940, the Mining Act was in more recent years deemed outdated, as it did not address modern industry needs or trends and did not conform to

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<sup>56</sup> Ibid, Section 93.

<sup>57</sup> Ibid, Section 12(4).

<sup>58</sup> Republic of Kenya, Ministry of Mining, *Strategic Plan 2013-2017* (2013), p. 25.

international best practices. The law excluded from its jurisdiction several minerals that were mined or quarried on a commercial basis and, further, it did not cater for differences in the type and scale of mineral operations and standardized terms and conditions of mineral rights.<sup>59</sup>

There was also corruption in the licensing arrangements, due to an absence of transparency. It was in response to that corruption that the Government established a task force in 2013 to review existing agreements and licences relating to prospecting, exploration and mining.<sup>60</sup> The task force found that some licences had been issued even where the licensing prerequisites – such as the consent of the relevant county council or the land owners – had not been met, licensees had not demonstrated adequate financial capacity to carry out mining operations, and licences had been issued in respect of large areas of land even though the programmes of work and expenditure proposals did not justify the awards. In other cases, some mining licences had been issued where the applicants did not have valid prospecting licences, while others had been issued to entities that were not incorporated at the time of the application. In light of all this, the Ministry of Mining began working towards computerizing its licensing system to reduce human interaction, as a way of reducing corruption.<sup>61</sup> It was also deemed necessary to circumscribe the Commissioner's licensing powers, which were prone to abuse.

Another issue was that the institutional framework did not facilitate the maximization of the benefits that accrued from mining, which therefore meant that there was low investment and low value addition. Artisanal and small-scale miners, for example, mined most of the minerals but sold their products in raw form without value addition.<sup>62</sup> In addition, the Government had not devoted significant resources to the sector, which was consequently underfunded. The Government now plans to address this challenge by establishing value addition centres. Another constraint to the maximization of benefits has been the lack of deliberate efforts to promote preferential sourcing of local goods and services by mining companies. Further, the country has not been able to tax mining companies effectively due to the absence of a well-structured and clear fiscal regime for the sector.<sup>63</sup>

Conflicts arose between mining companies and the communities living in the areas where minerals were to be found, because the expectations of these communities regarding, for example, employment, income generation and general development, had not been met. Unfortunately, the Mining Act did not provide for consultation with stakeholders in the process of considering applications for mineral rights and, as such, it did not give local communities a role in the management of mineral resources. A number of communities also raised concerns concerning displacement/resettlement, land compensation and sharing of benefits accruing from minerals.<sup>64</sup> A case in point was a titanium mining project along the coast, where the Government forcibly displaced individuals who refused to accept compensation that they

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59 Republic of Kenya, Ministry of Mining, *Minerals and Mining Policy* (2014), p. 2.

60 Republic of Kenya, Ministry of Mining, Ministerial Task Force, *Report on Review of Prospecting, Exploration and Mining Licences and Agreements* (2014).

61 Ministry of Mining, *Strategic Plan 2013-2017*, p. 29.

62 Ibid, pp. 29-31.

63 Ministry of Mining, *Minerals and Mining Policy*, p. 4.

64 Ministry of Mining, *Strategic Plan 2013-2017*, pp. 26, 32.

considered inadequate.<sup>65</sup> The Government did not consult the community on the question of compensation and merely imposed the decisions on it.

In general, the Government did not consider the non-economic value of land in calculating the amounts of compensation, which left local communities disenchanted.<sup>66</sup> Another common problem was that community land was rarely demarcated or titled, leading to the exploitation and oppression of local communities in the process of resettlement and compensation.<sup>67</sup> This happened, for example, in Taita Taveta County, where most of the land on which mining occurred was not titled. Further, there was no framework for resolving disputes between mineral rights and surface rights, which were protected equally by the Constitution; this hampered exploration and mineral development and discouraged investments.<sup>68</sup>

The extraction of minerals also caused extensive environmental degradation in some cases, and mining companies did not give due consideration to environmental protection concerns. For example, those undertaking major mining projects did not always conduct EIAs and, when they did, the EIAs were often inadequate.<sup>69</sup> In the case of the titanium mining in Kwale for example, the EIA did not adequately address “the impact of the toxic substances, including radioactive emissions released from the mining operations on the coastal ecosystem, nor the need for continuous rehabilitation of the mining area”.<sup>70</sup> Health and safety concerns were also ignored, with the result that mine workers were vulnerable to various hazards.<sup>71</sup> In particular, mine inspectors did not usually inspect or regulate the activities of small-scale miners. In addition, the Government was not able to regulate artisanal and small-scale mining, which is mostly extra-legal.<sup>72</sup>

Crucially, the Ministry did not have the requisite human and financial capacity to enforce the regime.<sup>73</sup> As a result, the Mining Act was “rarely enforced” and most mineral dealers operated informally and did not pay for licences and taxes. Further, even though the Act prohibited government officers from acquiring or holding mineral rights, a good number of them engaged in mining.<sup>74</sup> Inadequate geological data and information also hampered the development of the mining sector.<sup>75</sup> As a result, the country’s mineral resources remained underexplored and underexploited.

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65 Kayumba Angelani Ange, *Challenges and Prospects of Equitable Benefit Sharing in Mining Sector: A Case Study of Titanium Mining in Kwale County, Kenya*, Master's thesis, Centre for Advanced Studies in Environmental Law and Policy, University of Nairobi (2014), p. 33.

66 Collins Odote and Smith Otieno, “Getting it Right: Towards Socially Sustainable Exploitation of the Extractive Industry in Kenya”, *East African Law Journal*, vol. 1, 2015, p. 234.

67 Mwandawiro Mghanga, *The Wealth in the Underground that is Elusive to Local Communities – Mining in Taita Taveta County: Prospects & Problems* (Nairobi, Heinrich Böll Stiftung, 2012), paragraph 2.4.

68 Ministry of Mining, *Minerals and Mining Policy*, p. 2.

69 Mghanga, *Mining in Taita Taveta County*, para. 6.

70 T.C. Davies and O. Osano, “Sustainable mineral development: Case study from Kenya”, *Geological Society London Special Publications*, vol. 250, No. 1, 2005, p. 93.

71 Charles M. Mwalimu, “Kenya's Legal Framework on Mining: Its Adequacy in Safeguarding the Social, Economic and Environmental Welfare of the Local Community in Mui Basin”. Available from [http://www.academia.edu/3841695/KENYA\\_S\\_LEGAL\\_Framework\\_on\\_mining\\_it\\_s\\_adequacy\\_in\\_safeguarding\\_the\\_social\\_economic\\_and\\_environmental\\_welfare\\_of\\_the\\_local\\_community\\_in\\_mui\\_basinnd](http://www.academia.edu/3841695/KENYA_S_LEGAL_Framework_on_mining_it_s_adequacy_in_safeguarding_the_social_economic_and_environmental_welfare_of_the_local_community_in_mui_basinnd)

72 Ministry of Mining, *Minerals and Mining Policy*, p. 4.

73 Ministry of Mining, *Strategic Plan 2013-2017*, pp. 26, 31.

74 Mghanga, *Mining in Taita Taveta County*, para. 2.1.

75 Ministry of Mining, *Minerals and Mining Policy*, p. 2.



Some of these challenges could have been addressed had the Government negotiated effective mineral development agreements, but this did not happen. The special mining lease issued to Tiomin Resources Inc. was illustrative; the lease required the lessee to carry out mining operations “in a workmanlike manner and in accordance with good mining practice”, without stipulating any benchmarks. Similarly, it required the lessee to carry out mining operations in such a manner as to protect the environment against unnecessary damage and “with due regard to safety principles and requirements contained in the laws, rules and regulations” in force in the country. It also provided that the lessee should “endeavour to satisfy the local markets without overriding supply contracts already entered into”. Under the agreement relating to that mining lease, Tiomin was also granted a number of tax exemptions and fiscal incentives, including the reduction of corporate income tax on gains or profits by 50 per cent from the date of commercial production for a period of 10 years. With respect to employment, the agreement required Tiomin to give priority to Kenyans with appropriate qualifications to the maximum extent practicable and consistent with efficient operations and to ensure that Kenyans were trained to take up the majority of key positions. On the use of local materials and local services, it required Tiomin to use reasonable efforts to purchase goods and materials available in Kenya, provided that those goods and materials are of internationally comparable quality, available at the required time and in the required quantities, and offered at competitive prices on a deliverable basis in Kenya.

## **2. *Establishing a new governance framework***

The Government has recently formulated a new policy framework – the Minerals and Mining Policy of 2014 – to address those earlier challenges and a new mining law was enacted in May 2016. The policy aims to change the orientation of the economic policies of Kenya, which have favoured agriculture and tourism as the main drivers of economic growth and development, by giving the mining sector better attention. The hope is that, as a result, the mining sector will be able to contribute 10 per cent to GDP by 2030, as envisaged in the country’s Vision 2030. This economic policy blueprint recognizes the mining sector as one of the key drivers for economic growth that will help to transform Kenya into a middle-income economy by 2030. The policy review was further necessitated by the promulgation of a new constitution. The Constitution of Kenya of 2010 vests mineral resources in the national government in trust for the people.<sup>76</sup> It also requires parliamentary ratification of any transaction that involves the grant of a right or concession for the exploitation of natural resources, including minerals.<sup>77</sup>

In order to address the above challenges, the Minerals and Mining Policy seeks, in particular, to:

1. Provide a legal framework that conforms to current industry needs, trends and international best practices;
2. Provide a strategy for clear, simple, predictable, transparent and accountable licensing procedures, including access to land;

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<sup>76</sup> Republic of Kenya. Constitution of Kenya, 2010, Article 62.

<sup>77</sup> Ibid., Article 71.

3. Enhance the acquisition, processing and dissemination of geological and mineral data;
4. Provide a strategy for value-addition of minerals;
5. Provide a framework for harmonizing mining and environmental legislations;
6. Provide a framework for mainstreaming activities of artisanal and small-scale miners;
7. Provide a framework for local participation in minerals and mining investment ventures;
8. Provide a framework for a well-structured mining fiscal regime;
9. Provide a framework for the equitable sharing of mineral benefits.

With respect to mining revenues and rent management, the Government is seeking to maximize the fiscal benefits generated by the exploitation of mineral resources by striking “a balance between generating short-term revenue, and attracting longer-term investment in the mining sector”.<sup>78</sup> It has proposed harmonizing the fiscal regime, planning for all fiscal obligations and enhancing the ability of mining authorities to administer the regime efficiently and effectively. To that end, the Government plans to introduce measures such as requiring the Cabinet Secretary to publicize mineral royalties and rents periodically, setting out in the relevant tax laws corporate income tax and capital gains tax on the transfer or assignment of mineral rights, identifying and developing strategic minerals, and ensuring equal treatment of mining businesses regarding import duties and sales tax or value added tax.

On geological and mineral information systems, the policy observes that the rate at which information is being generated cannot cope with demand, which necessitates a concerted effort to fast-track the acquisition, processing, storage and dissemination of the data. The Government has therefore proposed conducting a nationwide airborne geophysical survey, acquiring spaceborne data and conducting ground surveys of identified anomalies, in order to provide information to potential investors.<sup>79</sup> Further, the new Mining Act requires the Cabinet Secretary to ensure that a database of geoscience and information is kept and maintained, and made available to the public on request.<sup>80</sup>

The policy seeks to provide a framework for mainstreaming and formalizing ASM operations. The Government also aims to remove the barriers that hinder ASM, especially access to finance, insecure mineral rights and inadequate technical capacities. Further, it seeks to give artisanal and small-scale miners incentives to operate legally. The policy outlines various measures to harness the potential of

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<sup>78</sup> Ministry of Mining, *Minerals and Mining Policy*, p. 9.

<sup>79</sup> *Ibid.*, p. 8.

<sup>80</sup> Republic of Kenya. Mining Act 2016, Section 29.

ASM, including through appropriate licensing, which should enable artisanal and small-scale miners to obtain fair market prices for minerals, providing market information, training, facilitating access to credit, offering suitable mineral rights, and facilitating access to land. The policy also seeks to encourage artisanal and small-scale miners to use appropriate, affordable and safe technology by facilitating the collation and dissemination of information about appropriate technologies and providing extension services and technology demonstrations. It also sets out the need to advise and support artisanal and small-scale miners on forming representative associations and to assist them in tax compliance. To mitigate the negative impacts of ASM, the Government has also proposed disseminating information to raise awareness on health, safety and environmental risks among artisanal and small-scale miners.<sup>81</sup>

Regarding the governance of the mineral sector, the Government has proposed establishing a “simple, stable, predictable, transparent, efficient and unified regulatory framework”.<sup>82</sup> It has also proposed establishing a standardized and transparent licensing system, in order to conduct mineral operations on a level playing field and base investment decisions on factors that can be predicted and planned for. One measure that would facilitate the realization of this goal is enhancing the capacity of mining authorities to administer the system efficiently and transparently. A second proposal is to automate and rationalize the licensing system so as to promote transparency.

The Government considered the new mining law to be critical to realizing the goals of the policy, particularly good governance and, subsequently, the Kenyan Parliament duly enacted that new Mining Act 2016. This new law seeks to facilitate democratic governance of the mining sector by dispersing the powers formerly exercised by the Commissioner, which are now exercised by the Cabinet Secretary, Mineral Rights Board, Director of Mines and Director of Geological Survey. The Cabinet Secretary is responsible for the general administration of the mining regime. The membership of the Board is drawn from both the public and private sectors and an effort has been made to ensure that it not only has technical expertise but also brings together all governmental agencies concerned with mining, including county governments, the National Land Commission and National Treasury. The Board could therefore facilitate much-needed inter-agency coordination. Its role is to advise and give recommendations to the Cabinet Secretary on the administration of licences, the administration of mineral rights agreements, the designation of land for ASM, the declaration of minerals as strategic minerals, and the setting of royalties and other fees. The Cabinet Secretary is, in turn, required to consult the Board before making administrative decisions.

The Director of Mines is responsible for the day-to-day operation of the Directorate of Mines, whose functions include managing and developing mineral resources, supervising mining activities, ensuring compliance with licensing conditions and advising the Cabinet Secretary and the Board during the negotiation of mineral agreements. The Director of Geological Surveys is responsible for the day-to-day operation of the Directorate of Geological Surveys, whose functions include

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<sup>81</sup> Ministry of Mining, *Minerals and Mining Policy*, pp. 10-11.

<sup>82</sup> *Ibid.*, p. 7.



undertaking geological surveys and determining the country's mineral potential, developing a national repository of geo-science information and providing that information to prospective investors, providing geoscience expertise in evaluations of prospecting and mining applications, and supporting the Director of Mines in the administration and supervision of prospecting and mining applications.

The hope is that this dispersal of power and the requirement of consultation will enhance accountability in the administration of the mining regime, thereby reducing or preventing the corruption that has been previously witnessed in licensing. For example, although it is the responsibility of the Cabinet Secretary to grant, deny or revoke mineral rights, he or she can only do so on the recommendation of the Board. Further, the Mining Act 2016 requires the Cabinet Secretary to notify the Board of its decision to approve or reject a licensing application before notifying the applicant. Although this requirement could enhance transparency and accountability in the licensing decision-making process, it is not clear what the Board is supposed to do were the Cabinet Secretary not to heed its advice.

The Act introduces a new nomenclature of mineral rights, which may be granted in respect of large-scale or small-scale operations. In general, a prospecting or mining operation is classified as small scale where the proposed prospecting area does not exceed 25 contiguous blocks or where the proposed mining area does not exceed two contiguous blocks. The mineral rights that can be granted in respect of large-scale operations are: reconnaissance licences, which may be granted for a non-renewable term of two years; prospecting licences, which may be granted for a term not exceeding three years and renewed at most two times after the initial grant; retention licences, which may be granted for a term not exceeding two years and renewed for a further period not exceeding two years; and mining licences, which may be granted for a term not exceeding 25 years or the forecast life of the mine, whichever is shorter, and renewed for a term not exceeding 15 years or the remaining life of the mine, whichever is shorter.

Conversely, the mineral rights that can be granted in respect of small-scale operations are reconnaissance permits; prospecting permits, which may be granted for a term not exceeding five years and renewed for one further term; and mining permits which may be granted for a term not exceeding five years and renewed for a term not exceeding five years or the remaining life of the mine, whichever is shorter. The Cabinet Secretary may designate other mineral rights, but only on the recommendation of the Board.

An applicant seeking a reconnaissance or prospecting licence is required to provide to the Cabinet Secretary information on the area in respect of which the licence is sought, the mineral or minerals in respect of which the licence is sought, the proposed programme of operations, details of the technical expertise and financial resources, a plan for the procurement of local goods and services, and a plan for the employment and training of citizens.

A retention licence may be granted where the holder of a prospecting licence has identified a mineral deposit that is of potential commercial significance, but the deposit cannot be developed immediately due to temporary adverse market

conditions, economic factors, technical constraints, or other factors beyond the reasonable control of the licence holder. In order to demonstrate the existence of any such conditions, the applicant is required to provide the Cabinet Secretary with a full independent study and assessment of the relevant adverse market conditions, economic factors, technical constraints or other factors that may make it impossible to develop the mineral deposit immediately. The Cabinet Secretary may only grant a retention licence where, on the recommendation of the Board, the application is deemed to be reasonable regarding the study and assessment; the applicant has adequate financial resources, technical competence and mining industry experience; the applicant has obtained an environmental and social impact assessment licence and an environmental management plan; and the applicant has acceptable proposals for the procurement of local goods and services and the employment and training of citizens. An applicant seeking a mining licence is also required to supply the information required for a prospecting licence. In addition, the applicant is required to provide proof of submission and approval of an environmental and social impact assessment report and environmental management plan, and a plan giving particulars of the applicant's proposals with respect to "socially responsible investments for the community".<sup>83</sup>

The Act also seeks to ensure the effective negotiation and administration of mineral development agreements. It empowers the Cabinet Secretary, working in consultation with the National Treasury, to enter into such agreements with holders of mining licences where the proposed investment exceeds US\$ 500 million. In particular, the agreement should provide for value addition – that is, the processing of minerals – and should be prepared in a standard format. To ensure transparency and accountability in the making of mineral agreements, the Act provides that both Houses of Parliament (the National Assembly and Senate) must ratify all mineral agreements. In addition, all agreements must be made available to the public. Further, the Act requires the Cabinet Secretary to make regulations which provide for accountable and transparent mechanisms of reporting mining and mineral-related activities, including revenue paid to the Government by mineral rights holders and production volumes under each licence or permit.

The holder of a reconnaissance permit enjoys non-exclusive rights to conduct reconnaissance for the mineral or minerals only in the area specified in the permit. They are required to comply with the terms and conditions of the permit and to take all necessary measures to protect the environment. Further, where the prospecting concerns community land, the applicant for a reconnaissance permit is required to obtain the consent of the community if the operations will involve excavation and drilling. The same obligations apply to the holder of a prospecting permit and the holder of a mining permit, although the latter is also required to protect and restore the environment within the mining area and submit to the Cabinet Secretary quarterly reports on mine development and mineral production.

It should be noted that the Act has been harmonized with existing environmental legislation, as dictated by the Minerals and Mining Policy.<sup>84</sup> Thus, mineral rights holders are also required to comply with the requirements of the Environmental

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<sup>83</sup> Republic of Kenya. Mining Act 2016, Section 119.

<sup>84</sup> Ministry of Mining, *Minerals and Mining Policy*, p. 8.

Management and Co-ordination Act 1999. Mining licences are not granted unless the applicant has also obtained an environmental impact assessment licence. Applicants for prospecting licences, retention licences and mining licences are also required to provide environmental protection bonds sufficient to cover the costs associated with the implementation of the environmental and rehabilitation obligations of the rights holder.

The Act also established a system for the regulation of artisanal mining, which it defines as “traditional and customary mining operations using traditional or customary ways and means”.<sup>85</sup> It empowered the Cabinet Secretary to establish county offices of the Ministry, and to designate a representative of the Director of Mines to be the head of the county office. The idea is to decentralize the administration of the mining regime, so that it is accessible to artisanal miners. Accordingly, the county officer is responsible for granting, renewing and revoking artisanal mining permits, supervising and monitoring the operations and activities of artisanal miners, facilitating the formation of artisanal association groups or cooperatives, and promoting the fair trade of artisanal miners. In addition, the Act established an Artisanal Mining Committee for every county to play a role similar to the Mineral Rights Board by advising the county officer in the granting, renewal or revocation of artisanal mining permits. Artisanal miners can apply for artisanal permits, which have a term of three years and may be renewed for one more similar term. Further, the holder of an artisanal permit may apply to convert it to a small-scale permit. The artisanal permit and small-scale permit are subject to less stringent regulatory requirements than the licences; the holder of an artisanal permit is required to mine and produce minerals in an effective and efficient method, to observe good mining practices, health and safety rules and to pay due regard to the protection of the environment.

In order to discourage the acquisition of mineral rights for purposes of speculation, the Act stipulates timelines within which operations in respect of any rights granted must commence. Thus, the holder of a reconnaissance licence (which is not transferable) must commence operations within three months of the grant of the licence, while the holder of a mining licence is required to commence operations within six months of the grant of the licence.

The Act seeks to enhance efficiency in the processing of applications for mineral rights: applications for prospecting or reconnaissance licences must be determined within 90 days and applications for mining licences must be determined within 120 days. An applicant who is aggrieved by the decision of the Cabinet Secretary may appeal to the High Court within 30 days.

The Act introduces competitive tendering as the mechanism for awarding mineral rights in respect of large-scale operations. In other cases, mineral rights are awarded on a first come, first served basis.

In an effort to facilitate credible public participation in the licensing decision-making process, the Act requires the Cabinet Secretary to notify landowners or

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<sup>85</sup> Republic of Kenya. Mining Act 2016, Section 4.

lawful occupiers of land, the community and the relevant county government that he or she has received an application for a licence. The purpose of this notice is to give these persons and entities an opportunity to object to the grant of the licence. It is then the responsibility of the Board to hear and determine any such objections. In addition, before the Board can recommend to the Cabinet Secretary the grant of a mineral right, the applicant for a licence must provide notification of approval from the National Land Commission, if the mineral right is in respect of public land; the relevant state agency, if the mineral right is in respect of land held, used or occupied by such a state agency; the relevant Cabinet Secretary, if the mineral right is in respect of a place of burial, religious significance, public building or other public purpose; the Governor of the relevant county, if the mineral right is in respect of land situated within a town, municipality or trading centre; the Cabinet Secretary responsible for wildlife, if the mineral right is in respect of land situated within a marine park, a national park or a local sanctuary; the Cabinet Secretary responsible for the environment, if the mineral right is in respect of land situated within a protected natural environment; the Director of the Kenya Forest Service, if the mineral right is in respect of land situated within a forest area; and any other person who in the opinion of the Cabinet Secretary would be affected by the grant of the mineral right, such as owners of private land or the community in occupation of the land. The Act therefore seeks to ensure that the grant of mineral rights does not undermine prior land rights and thus mineral rights cannot be granted with respect to private land without the express consent of the owner, although the Act goes on to stipulate that such consent “shall not be unreasonably withheld”. The Act therefore envisages that the applicant for a mineral right and the landowner, whether private or community, shall enter into an agreement concerning the payment of adequate compensation. Where the community land in question is unregistered, the National Land Commission is required to safeguard the interests of the community. It is envisaged by the Act that the Cabinet Secretary will make regulations for the granting of prospecting and mining rights over community land.

All mineral rights are granted subject to conditions such as protection of the environment, community development, and safety of prospecting and mining operations and of the persons undertaking such operations. Further, mineral rights holders are required to submit site mitigation and rehabilitation or mine-closure plans, and provide an environmental protection bond sufficient to cover the costs associated with the implementation of their environmental and rehabilitation obligations. With respect to community development, the Act requires mineral rights holders to implement community development agreements. The Act requires the Cabinet Secretary to enforce these conditions as if they were contained in a contract between the Cabinet Secretary and the holder of the mineral right, meaning that these conditions will be implied terms of any grant of mineral rights.

The Ministry has developed Community Development Agreement Regulations,<sup>86</sup> which envisage that community development agreements will be reached through fair negotiations between mineral rights holders and affected communities, will address broad development objectives as opposed to being focused narrowly on financial compensation, and will be formalized so that they become legal documents binding to both parties. The aim is to ensure that mining operations are

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<sup>86</sup> Republic of Kenya. Community Development Agreement Regulations 2016.

consistent with the continuing economic, social and cultural viability of the affected communities and to ensure accountability and transparency in mining-related community development.<sup>87</sup> Every affected community will be represented in these negotiations by a Community Development Agreement Committee (comprising the community's representative in the County Assembly, one women's representative, two recognized community leaders or elders, two youth representatives, the local community Chief, two representatives of marginalized groups, and the area's Member or Members of Parliament). The agreements must be in accord with and complement county and national development plans, must include mechanisms for monitoring the impact of the agreements on the community, and will be subject to review every five years. These agreements require the approval of the Cabinet Secretary before they can come into force.<sup>88</sup>

The Mining Act also stipulates procedures for the payment of compensation where mineral rights disturb or deprive the owners or lawful occupiers or users of the land or part of the land. In such cases, the person seeking compensation is required to make a demand or claim for compensation to the holder of the mineral right, who should then pay "prompt, adequate and fair compensation".<sup>89</sup> Accordingly, the Act requires the mineral rights holder to deposit a compensation guarantee bond with the Ministry and encourages parties to resolve disputes on compensation amicably through negotiations. Where the parties are unable to agree, either party may refer the dispute to the Cabinet Secretary for determination, and may appeal to the High Court where they are dissatisfied with that determination. The holder of a mineral right cannot commence mining operations unless the question of compensation has been resolved. Further, the Cabinet Secretary is responsible for ensuring that communities who prefer to be compensated by way of resettlement are settled, at the cost of the mineral right holder, on suitable alternate land, that due regard is given to their economic well-being, and social and cultural values, and that the resettlement is undertaken in accordance with relevant physical planning law.

On employment and training, the Act seeks to ensure effective transfer of skills by requiring mineral rights holders to submit to the Cabinet Secretary detailed programmes for the recruitment and training of citizens of Kenya as a condition for the grant of the mineral rights. It also requires the Cabinet Secretary to make regulations for the replacement of expatriates, the number of years such expatriates shall serve, and collaboration and linkage with universities and research institutions to train citizens. The holders of mineral rights are also required to give preference in employment to members of the community and citizens of Kenya and are further required to give preference in the conduct of their operations, to the maximum extent possible, to materials and products made in Kenya, services offered by members of the community and citizens, and companies or businesses owned by citizens.

The Act also provides a framework for local participation in mining investment ventures. First, it provides that the state shall acquire a free carried interest of 10 per cent in the share capital of large-scale mining operations and mining operations

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<sup>87</sup> Ibid., p. 9.

<sup>88</sup> Ibid., p. 22.

<sup>89</sup> Republic of Kenya. Mining Act 2016, Section 153(1).

relating to strategic minerals,<sup>90</sup> in respect of which the state shall not pay financial contribution. Second, it requires the holder of a mining licence whose planned capital expenditure exceeds the amount prescribed by the Cabinet Secretary to list at least 20 per cent of its equity on a local stock exchange within three years after commencing production. However, these thresholds are negotiable. The holder of a mining licence may negotiate how much of the equity should be listed on the stock exchange and the period within which the listing should occur, for example, where market conditions would not allow for the successful completion of the offering on the stock exchange.

Regarding the equitable sharing of mineral benefits, the Act requires mineral rights holders to pay royalties at rates prescribed by the Cabinet Secretary. Those royalties are then distributed, with the national Government receiving 70 per cent, the county government receiving 20 per cent, and the community where the mining operations occur receiving 10 per cent.

The policy says very little on the questions of capacity development and linkages and diversification. The only references to capacity development are found in the conditions that licence applicants must meet, such as giving preference to citizens of Kenya regarding employment. Nevertheless, it does contain statements on mobilizing mining and infrastructure investment. According to the policy, the Government will establish a responsive regulatory framework, with a view to fostering mining investment opportunities for greater socioeconomic development. The measures aimed at realizing this strategic objective include requiring mining companies to meet obligations on creating business and employment opportunities, training and skills transfer. As we have already seen, these measures form part of the conditions for granting mineral rights. Further, the Government intends to hold free carried interests in major mining operations and in the development of strategic minerals and to establish mechanisms that enable the listing of large-scale mining companies in local stock exchanges.<sup>91</sup>

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<sup>90</sup> Strategic minerals are minerals declared as such by the Cabinet Secretary with the approval of the Cabinet and by notice in the Kenya Gazette.

<sup>91</sup> Ministry of Mining, *Minerals and Mining Policy*, p. 10.



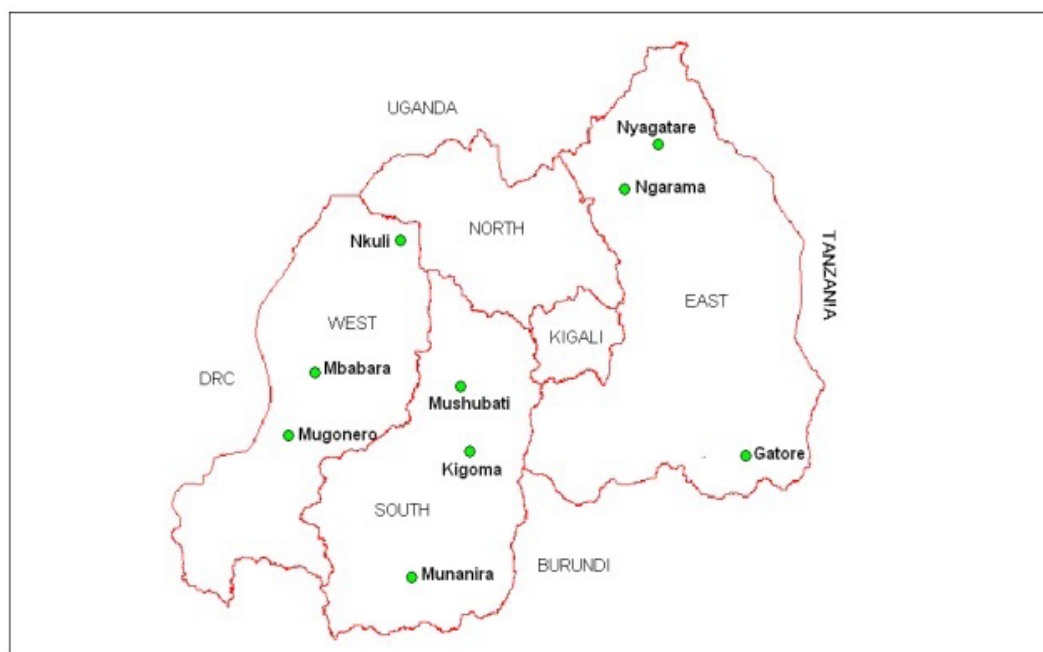
**Table 3: Extent of alignment of the policy and regulatory frameworks of Kenya with the Africa Mining Vision**

Parameter	Achievements	Drawbacks
Mining revenues and mineral rents management	<ul style="list-style-type: none"> <li>Plans to maximize fiscal benefits.</li> <li>Plans to harmonize fiscal regime.</li> <li>Plans to enhance administration of mining regime – e.g., publicizing royalties, developing strategic minerals, and ensuring equal treatment of businesses regarding tax.</li> <li>State to hold free carried interest in large mining companies.</li> <li>Licensees subject to “use or lose” requirement.</li> <li>Licences awarded through competitive tendering or on first come, first served basis.</li> <li>Royalties paid at rates determined by Cabinet Secretary.</li> <li>Royalties to be shared between national government, county governments and local communities.</li> </ul>	<ul style="list-style-type: none"> <li>No clarity on improving national capacity to audit mineral production and exports.</li> <li>No clarity on building capacity in negotiating fiscal issues, and monitoring compliance with tax laws.</li> <li>No clear framework for reducing tax leakages.</li> </ul>
Geological and mineral information systems	<ul style="list-style-type: none"> <li>Plans to carry out geophysical survey and to share information with investors.</li> <li>Law requires Cabinet Secretary to keep, maintain and facilitate access to database of geoscience and information.</li> </ul>	<ul style="list-style-type: none"> <li>No clear policy on enhancing capacity of national geological institutions.</li> </ul>
Building human and institutional capacities	<ul style="list-style-type: none"> <li>Applicants for licences required to give preference to employment of citizens and to provide training for citizens.</li> </ul>	<ul style="list-style-type: none"> <li>No clear policy on assessing human resources and skills needs.</li> <li>No clear policy on building human and institutional capacities.</li> <li>No clear policy on enhancing coordination and policy coherence within and across public sectors.</li> </ul>
Artisanal and small-scale mining	<ul style="list-style-type: none"> <li>Plans for framework to mainstream and formalize ASM.</li> <li>Plans to support ASM by providing access to finance, secure rights, technical capacity, market information, training (on health, safety, and environmental risks), and safe technology.</li> </ul>	<ul style="list-style-type: none"> <li>No clear policies and regulations on how to build a viable and sustainable ASM sector.</li> <li>No determination and designation of geologically suitable areas for ASM.</li> <li>No clear policy on developing and strengthening ASM associations.</li> </ul>
Mineral sector governance	<ul style="list-style-type: none"> <li>Dispersal of regulatory/administrative powers.</li> <li>Procedural fairness in licensing.</li> <li>Public participation in licensing decision-making.</li> <li>Plan to establish stable, transparent and accountable regulatory framework, including licensing system.</li> <li>Plan to enhance administrative capacity, automate and rationalize licensing system.</li> <li>Use of community development agreements as a tool of governance.</li> </ul>	<ul style="list-style-type: none"> <li>No clear policy on mainstreaming health and human rights issues into impact assessment procedures and policy planning frameworks.</li> <li>No clear guidelines for companies to comply with human rights standards.</li> <li>No sector-specific guidelines for public participation.</li> <li>Legislature not effectively resourced to provide oversight over mineral sector institutions and mining companies.</li> </ul>

Parameter	Achievements	Drawbacks
Research and development	<ul style="list-style-type: none"> <li>• Law requires Cabinet Secretary to make regulations for collaboration and linkages between industry and institutions of higher learning.</li> </ul>	<ul style="list-style-type: none"> <li>• Inadequate funding for minerals research.</li> <li>• No policy or legal instruments to encourage research and development.</li> </ul>
Environment and social issues	<ul style="list-style-type: none"> <li>• Law subjects licensees to requirements of environmental protection, community development, safety of operations.</li> <li>• Law requires licensees to implement community development agreements.</li> <li>• Law requires agreement for adequate compensation of landowners/occupiers of land.</li> </ul>	<ul style="list-style-type: none"> <li>• Need to strengthen state capacity for effective environmental management/regulation.</li> <li>• Need to develop a sustainable environmental, social and health and safety strategy.</li> <li>• Need to develop capacities of communities to negotiate impact and benefits agreements.</li> <li>• Need guidelines for grievance, dispute and conflict resolution.</li> </ul>
Linkages and diversification	<ul style="list-style-type: none"> <li>• Law requires licensees to give preference to Kenyan goods and services.</li> </ul>	<ul style="list-style-type: none"> <li>• No clear policy or strategy on value addition.</li> <li>• No multi-sectoral approaches to mineral development.</li> </ul>
Mobilizing mining and infrastructure investments	<ul style="list-style-type: none"> <li>• Law requires licensees to list some equity in a local stock exchange.</li> <li>• Law enacted on public-private partnerships.</li> <li>• Plans to foster investment opportunities.</li> </ul>	<ul style="list-style-type: none"> <li>• No effective investment promotion and protection strategy.</li> </ul>



## C. Rwanda



1. Ngarama (Gatsibo District) : Granite/ Granite gneissique/Migmatites
2. Gatore (Kirehe District) : Black sandstone with other minor stratification colors
3. Mushubati (Muhanga District): Amphibolite
4. Kigoma (Ruhango District): Granite and Amphibolite
5. Munanira – Gishamvu (Nyaruguru District): Migmatite/Gneiss
6. Mugonero (Nyamasheke District): Granite/Gneiss
7. Mbabara (Karongi District): White Marble and Dolomite
8. Nkuli (Nyabihu District): Granite/Gneiss
9. Karongi : Dolomite
10. Nyagatare: Granite/Gneiss and Amphibolite

Source: World Bank 2014.

Mining in Rwanda concentrates on base metals such as tin (cassiterite), tantalum (coltan) and tungsten (wolframite), and is primarily small scale in size and method.<sup>92</sup> Rwanda also produces small amounts of gold, peat and limestone. The majority of operations consist of small-scale domestic entrepreneurs and mining cooperatives. However, there is little processing of minerals in the country, apart from cement, brick and tile manufacture.<sup>93</sup> Nevertheless, Rwanda plays a significant role in the world's production of minerals such as tantalum, tin, and tungsten and, in 2012, for example, it produced about 12 per cent of the global output of tantalum.<sup>94</sup>

92 World Bank, "Unearthing the Subsoil: Mining and Its Contribution to National Development", *Rwanda Economic Update*, No. 6. (Washington, D.C., World Bank, 2014), p. xi.

93 Ian Wilson, *Environmental, Social and Economic Dimensions to Consider in the Development of the Mining Industry in Rwanda* (Rwanda, United Nations Economic Commission for Africa, 2014), p. 24.

94 Thomas R. Yager, "The Mineral Industry of Rwanda", in *2012 Minerals Yearbook*, (Washington, D.C., United States Geological Survey, 2014), p. 35.1

Mining products are the biggest single export products of Rwanda.<sup>95</sup> In 2012, minerals represented 23 per cent of the country's exports and contributed 1.3 per cent of GDP.<sup>96</sup> Unfortunately, the country's primary mining exports – tungsten, tin and tantalum ore (the so-called 3T minerals) – have gained notoriety as conflict minerals, as Rwandan militia groups have been accused of mining in the Democratic Republic of the Congo and using the proceeds to support rebel activity in the Kivu region. To deal with this problem, the Government, working with the International Tin Research Institute, established in 2010 a certification scheme for domestically produced 3T minerals to meet end users' requirements under the American Dodd-Frank Act.<sup>97</sup> This law requires American companies and their suppliers to declare whether the 3TG minerals (3T and gold) or their derivatives used in their products originate from the Democratic Republic of the Congo or any adjoining country; if so, they must provide a report on the due diligence undertaken in the value chain and publicly disclose whether or not the products are conflict-free.<sup>98</sup>

### 1. The policy framework

Following independence, the Rwandan Government grouped together all mining companies and founded the Société des Mines du Rwanda (SOMIRWA), in which it held 49 per cent of the shares. This corporation filed for bankruptcy in 1985 and, thereafter, the Government founded a new publicly owned company, the Régie d'Exploitation et de Développement des Mines (REDEMI), to continue mining and exploration. The Government sought at the same time to reinvigorate the artisanal mining sector by organizing mining cooperatives into the Coopérative de Promotion de l'Industrie Minière Artisanale au Rwanda (COPIMAR).<sup>99</sup> After the genocide of 1994, the Government started to privatize the publicly owned mines and COPIMAR was renamed the Fédération des Coopératives Minières au Rwanda (FECOMIRWA).

Rwanda introduced a revised mining policy in 2009 with a view to accelerating the transformation of the mining industry from a publicly run to a private industry.<sup>100</sup> The policy has sought to address the major constraints facing the mining industry through a framework of five strategic pillars, namely:

1. Strengthening the legal, regulatory and institutional environment;
2. Developing targeted investment, fiscal and macroeconomic policies;
3. Improving mining sector knowledge, skills and use of best practices;
4. Raising productivity and establishing new mines;
5. Diversifying into new products and increasing value addition.

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<sup>95</sup> Jasper Van Teeffelen, *The EU Raw Materials Policy and Mining in Rwanda: Policy Coherence for Development in Practice* (Amsterdam, Evert Vermeer Foundation, 2012), p. 27.

<sup>96</sup> Wilson, *Environmental, Social and Economic Dimensions*, p. 9.

<sup>97</sup> Yager, "The Mineral Industry of Rwanda", p. 35.1.

<sup>98</sup> Van Teeffelen, *The EU Raw Materials Policy and Mining in Rwanda*, p. 28.

<sup>99</sup> Ibid., p. 25.

<sup>100</sup> Government of Rwanda, Ministry of Natural Resources, *A Revised Rwandan Mining Policy: Transforming Rwanda's Mining Industry*, 2009, p. 2.

Key programmes under these pillars have included streamlining the regulatory framework, establishing a fiscal strategy, consolidating existing information on mineral deposit potential, promoting the Extractive Industries Transparency Initiative and corporate social responsibility, establishing a financing mechanism for artisans, reforming licensing for mineral traders, developing value-addition investment opportunities, and providing improved electricity supply for smelters. The policy notes that, “Rwanda’s minerals face extraordinary price swings leading to large export earnings fluctuations”.<sup>101</sup> In terms of streamlining the regulatory framework, the policy revised the permit application process so that applications would in future be addressed to districts and then forwarded to a central committee tasked with analysing and issuing the permits.

On mining revenues and rents management, the policy established a clear and simple tax regime with little discretion, with the objective of making it easy for investors to calculate their tax liability. It has also limited the exemptions for mining companies. The new tax structure has therefore avoided the granting of additional special exemptions to mining companies, so as to limit distortions and discrimination in the economy. Mining companies also face zero-rated import duties on capital equipment and raw materials, in accordance with the EAC custom union rules. The Government has set out detailed and codified accounting rules and procedures for the has sector, so that mining firms and the revenue authority share a common understanding of the administration of corporate tax and the calculation of royalties, the aim of which was to reduce the frequency, length and cost of tax disputes and negotiations. In addition, the policy has introduced an ad valorem royalty system, which incurs lower administration and compliance costs than a profit-based royalty system and is administratively feasible for the Rwanda Revenue Authority and reduces the bureaucratic burden on business. Ad valorem royalty rates are considered able to provide stable revenues for the Government in the face of price volatility. Further, the policy has exempted import duties and corporate taxes on exploratory activities in order to encourage investment for the purposes of increasing knowledge of mineral reserves. The policy also contains measures to introduce a standard rate for corporate tax, and for the central administration of taxes, with the exception of land rents. Further, it also provides for the inclusion of renegotiation clauses in mineral development agreements, which would facilitate the renegotiation of royalty rates to accommodate fiscal policy changes. On the issue of rents management, the policy states that a proportion of the national taxes collected should be returned to the community in which the mining company is based, as an effective means of building local support for the mining industry and demonstrating local impact.

On geological and mineral information systems, the policy notes that there are no reliable estimates of existing and potential deposits that can attract investors. The mining law requires permit applicants to make an initial estimate of the value of the reserves that they plan to mine, and to make an initial mapping of the deposit. While this approach should help to build geological knowledge, the policy notes that it could exclude some small-scale miners from applying for new permits, because of the high costs of developing the estimates and mapping deposits. The policy therefore underscores the need for the Government to take charge of mapping

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<sup>101</sup> Ibid., p. 11.

exercises, in order to provide better information and encourage private investors. To that end, the Government took measures to consolidate existing knowledge of potential deposits, to invest significantly in geological surveying and to strongly enforce prospection permits.

On building human and institutional capacities, the policy recognizes the development of local skills as a key means of ensuring that the mining industry has a positive impact on rural communities and the country as a whole. It notes, however, that there had previously been only limited investment in local technical mining skills, resulting in limited locally available expertise in geology, mine engineering and metallurgy. The Government therefore carried out a needs assessment and, being aware of the skills needed by the mining industry, has made efforts to train mining scientists, and enhance local business and marketing skills. Further, it notes the need to train officials of the revenue authority, including customs officials, in the economics and peculiarities of the mining sector. For example, customs officials need to be able to differentiate between minerals and to rapidly assess that a specific piece of equipment is necessary for the mining sector. The policy also states that mining firms should be assisted to bring in international expertise for a period of two to three years through a system of free work permits, subject to strict skills transfer requirements. The policy also proposed developing degree programmes in local universities, technical training programmes in technical schools, and training and exchange programmes with regional geology and mineral institutions. The policy also underscores the need to increase the employment of women; the target is that women should account for 20-30 per cent of jobs in the mining sector.

The Government has sought to formalize operations with respect to artisanal and small-scale mining, recognizing that they face higher compliance costs than large-scale mining companies, and to develop a tax regime for small and medium-sized enterprises, which would also benefit small-scale mining operators. The aim of these formalization measures is to facilitate the acquisition of private property rights and organizational representation, thereby enabling small-scale operators to access better market opportunities for development, including capital financing. Through the policy, the Government has, in addition, sought to create a mining development fund, partly supported by royalty revenues, in order to support small-scale mining with technical assistance and business development. The policy outlines the need for a technical and financial support scheme for artisanal and small-scale miners to enable them access finance, and improve productivity and profitability. It also proposes supporting them through technical assistance, including by providing extension services, and business development support, including business planning, accounting and management skills. Another notable measure outlined in the policy is the development of a local jewellery sector as a means of increasing the participation of women in mining activities.

In order to address concerns over the protection of the environment and social fabrics, the policy underscored the need for careful monitoring of the existing environmental regulations and the establishment of a public-private fund to support community development. It was considered necessary to introduce incentives for mining companies to engage in community development, such as making the costs

of community development a deductible expense. The policy also calls for the integration of community development initiatives into district development plans.

On linkages and diversification, the policy considers diversifying exports into other sectors and adding value to minerals or facilitating downstream integration of minerals into other industries to be the most effective strategies for dealing with price fluctuations. The policy notes, however, that these strategies can be hampered by insufficient local production and the cost and reliability of energy. The policy advocates the creation of opportunities in the production of local construction materials, the development of business opportunities for gemstone cutting and polishing enterprises, the development of a mineral processing centre, the development of a mining services sector, and improving the supply of electricity for processors.

Although the policy does not address the issue of research and development, it contains statements on mobilizing mining and infrastructure investment. To increase the flow of capital to the mining industry, the Government should provide partnership funding for the small-scale mining subsector, which could take the form of a multilateral fund with low interest rates, or public-private partnership agreements. It was also proposed that the Government should create a project-financing unit, which would develop large-scale projects that could be financed in collaboration with international financial institutions and large private sector firms, and to create a mining development fund, whose role would be to make strategic public investments in the mining sector and receive a share of royalty revenues.

The Mining Policy is currently under review, as the Government seeks to align it with the Africa Mining Vision and develop a country mining vision. The Government plans to mechanize the mining industry in order to enhance value addition and has already set up a smelter in Kigali to process calcarite so as to produce and export tin and other finished products.<sup>102</sup>

## **2. The legislative framework**

The primary law that governs mining activities is the Law on Mining and Quarry Operations of 2014, which is administered by the Rwanda Geology and Mines Authority. The law defines minerals as “substances which can be processed to increase their economic value and which include metallic and non-metallic substances with the exception of hydrocarbons and water”.<sup>103</sup> It governs activities relating to the exploration, mining, purchase, sale, stocking, processing, transportation and marketing of mineral and quarry products and radioactive minerals. There are four classifications of mining licence: exploration licence, which may be granted for a period not exceeding four years and renewed once for a period not exceeding four years, after relinquishment of 50 per cent of the unexplored area; small-scale mining licence, which may be granted for a period not exceeding 15 years of the estimated life of the ore body proposed to be mined, whichever is shorter, and may be renewed for further periods of no more than 10 years; large-scale mining licence, which may be granted for a period not exceeding 25 years or the estimated

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<sup>102</sup> Interview with Minister of State for Mining, Kigali, Rwanda, 22 July 2015.

<sup>103</sup> Republic of Rwanda. Law on Mining and Quarry Operations 2014, Section 2(3).

life of the mineral ore body proposed to be mined, whichever is shorter, and may be renewed for further periods of no more than 15 years; and artisanal mining licence, which may be granted for a period not exceeding five years and renewed for further periods of no more than five years. These licences are granted on a first come, first served basis, although they may be obtained through a competitive bidding process used for public procurement, where the Minister decides to use this method. The law requires the Minister to notify the applicant of the decision to grant or deny a mineral licence and, if the application is rejected, to explain to the applicant the reasons for that rejection. Similarly, the law requires the Minister to notify persons seeking the renewal of their licences within sixty days of the decision on the renewal application, and to explain the reason if the application is denied.

The exploration licence confers on the holder the full right to carry out exploration operations in the exploration licence area, which should consist of contiguous blocks not exceeding 400 hectares. Further, the holder of that licence may sell mineral ore specimens and samples obtained from exploration operations without the Minister's prior authorization, but is required to pay taxes associated with the sale of such mineral ores. The holder also has the exclusive right to apply for a mining licence over any portion of the exploration licence area where an economically mineable mineral deposit is discovered. The holder of an exploration licence must meet four key conditions, which are to commence operations within 90 days of the date of issue of the licence; carry out exploration operations in accordance with a programme approved by the Minister; employ and train employees in accordance with terms and conditions agreed upon issue of the licence; and keep exploration records indicating mineral ores discovered.

A small-scale mining licence confers on the holder the full right to carry out exploration and mining operations in the licensed area, which should consist of contiguous blocks not exceeding 100 hectares. In exchange for this right, the holder of a small-scale licence must observe the following conditions: comply with any directives that the Minister may give concerning safety or good mining practices; notify the relevant local government and authorized officer of the intention to begin or cease exploration or mining; carry out rehabilitation and reclamation of mined out areas; and keep accurate records of minerals mined from the mining area.

A large-scale mining licence confers on the holder the full right to carry out mining operations in the licensed area consisting of contiguous blocks not exceeding 400 hectares; those operations may include the treating, smelting, refining, or disposing of the mineral products discovered. In exchange for the grant of this right, the holder of this licence is required to fulfil two critical obligations: conduct mining operations in accordance with a programme approved by the Minister and an environmental management plan approved by relevant authorities; and commence mining operations within 180 days of the licence being issued.

An artisanal mining licence confers on the holder the exclusive right to carry out exploration and mining operations in the licensed area, consisting of contiguous blocks not exceeding 49 hectares, and to sell the mineral ores obtained in that area. In exchange for the grant of this right, the holder is required to fulfil four conditions: comply with any directives that the Minister may give concerning



safety or good mining practices; carry out rehabilitation and reclamation of mined out areas; keep accurate records of mineral ores mined from the licence area; and submit an environmental management plan to be approved by the Minister before commencing mining operations. In practice, mines inspectors have made efforts to organize artisanal miners into cooperatives or small companies so that they can apply for these licences.<sup>104</sup> FECOMIRWA and the Rwanda Mining Association are respectively responsible for these cooperatives and small companies.<sup>105</sup>

Where the holder of any of these licences discovers radioactive minerals, he or she is required to notify the Minister within seven days of the discovery, and may only deal with such minerals in accordance with the terms and conditions of a permit granted by the Minister. The law also requires holders of mineral licences to pay fair and reasonable compensation to the owners or lawful occupiers of the land subject to such licences. Such owners or lawful occupiers of land must make a request for compensation, which should then be negotiated by the parties.

The law also requires mineral rights holders to safeguard workers' health and safety and to comply with environmental laws and regulations. Regarding the latter, all mineral licences must include conditions relating to the rehabilitation of the mined out areas. In addition, mineral licence applicants must provide financial guarantees for the protection of the environment. The holder of a mining licence is also required to give priority to competitive Rwandan contractors for services and to materials and goods produced in Rwanda. Further, a mineral licence may require the holder to explore the feasibility of carrying out inside Rwanda the processing and refining of mineral products or other operations that would add value to or transform the mineral products derived from the applicable mining areas.

The law permits the Minister to enter into mining agreements with mining licence holders in order to "perfect" their rights and obligations; unfortunately, these agreements have tended to be confidential documents.<sup>106</sup> However, a model mining agreement is publicly available and gives an indication of the contents of these agreements. The model requires, for example, the licensee to provide a social action plan, which should be developed from a social impact assessment, another responsibility of the licensee. Second, the model agreement requires the licensee to comply with all applicable laws with respect to the treatment of labour and all issues related to hygiene, health and safety during mining operations, and to practice modern health and safety procedures, in accordance with international best industry practices. The licensee is also required to give priority to goods and services produced by Rwandan citizens when purchasing goods and services related to the mining operations. The licensee should also endeavour to employ Rwandan citizens in at least 33 per cent of all management positions within three years and to increase that level to 50 per cent within five years. In the past, the Government had given licences without exploitation agreements but, since 2014, it has been issuing licences only after applicants have signed these agreements.<sup>107</sup> Further, companies

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104 Wilson, *Environmental, Social and Economic Dimensions*, p. 67.

105 Interview with Officer, Department of Mines and Geology, Kigali, Rwanda, 21 July 2015.

106 Wilson (*Environmental, Social and Economic Dimensions*, p. 36) suggests that this policy should be revised so that only the related Work and Investment Programme is confidential, as that might be regarded as commercially sensitive.

107 Interview with Officer, Department of Mines and Geology, 21 July 2015



that had been granted licences prior to the introduction of this requirement are now being required to obtain exploitation agreements as a precondition for the renewal of their licences. These measures mean that the licensing regime does now provide a mechanism for addressing environmental and social issues.

Rwanda faces various challenges in administering this regime. First, although the Government has adopted a Mining and Quarrying Code of Practice, its implementation is poor, particularly regarding artisanal miners. For example, many cooperatives cannot afford to buy the water pumps that would enable them to clean minerals at the mining sites. As a result, they clean the minerals in nearby rivers, thereby polluting the environment. Further, the Geology and Mines Department lacks the human resources it requires to inspect mines regularly.<sup>108</sup>

Nevertheless, Rwanda has endeavoured to implement the Africa Mining Vision strategies, including improving knowledge of its mineral endowment, legitimizing ASM activities, conducting research and improving mineral sector governance. One major remaining gap is that it has not yet managed to establish linkages between mineral resource extraction and industrial development.<sup>109</sup> A new smelter has recently been opened in Rwanda in an effort to enhance value addition, but the smelter does not have enough power supply. A situation such as this demonstrates the need for regional cooperation, thus enabling the EAC countries to share resources.<sup>110</sup>

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<sup>108</sup> Van Teeffelen, *The EU Raw Materials Policy and Mining in Rwanda*, pp. 37-38.

<sup>109</sup> Wilson, *Environmental, Social and Economic Dimensions*, pp. 38-39.

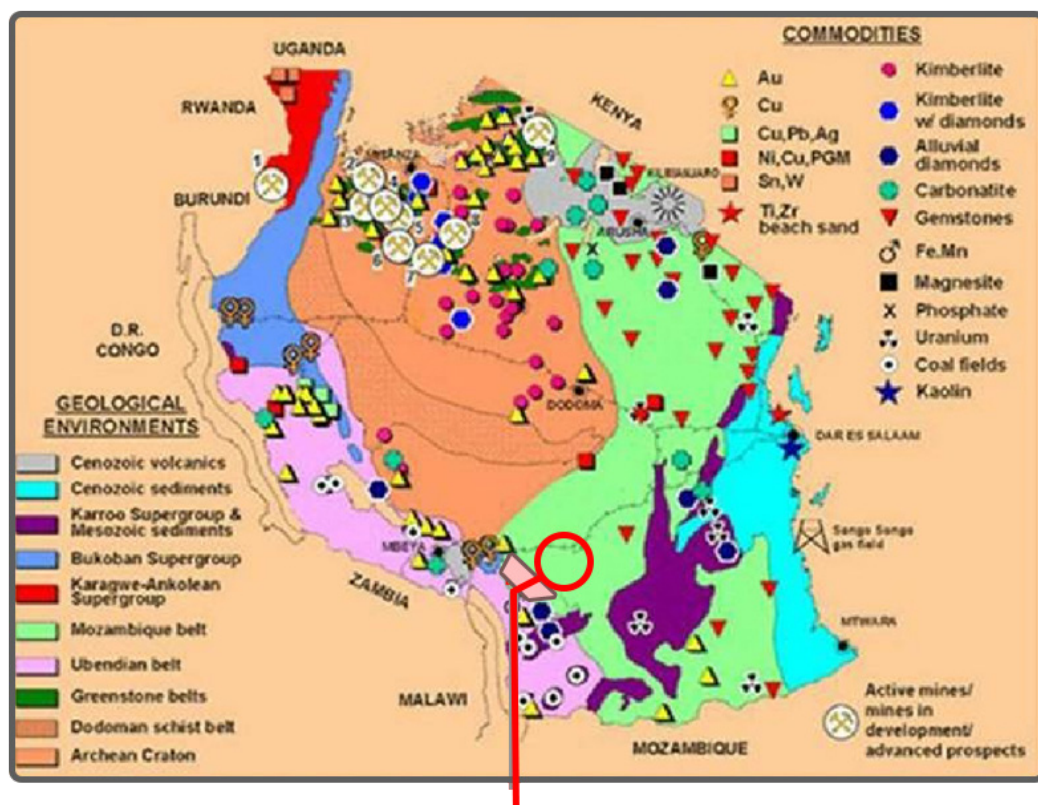
<sup>110</sup> Interview with mining expert, Kigali, Rwanda, 22 July 2015.

**Table 4: Extent of alignment of the policy and regulatory frameworks of Rwanda with the Africa Mining Vision**

Parameter	Achievements	Drawbacks
Mining revenues and mineral rents management	<ul style="list-style-type: none"> <li>Mineral development agreements required for all exploitation activities.</li> <li>Renegotiation clause required for all mineral development agreements.</li> <li>Plans to: establish simple tax regime; limit tax exemptions for mining companies; codify accounting rules and procedures; introduce ad valorem royalty system; exempt taxes on exploratory activities; share benefits with communities.</li> <li>Plans to administer most taxes centrally.</li> </ul>	<ul style="list-style-type: none"> <li>Insufficient capacity to audit mineral production and exports.</li> </ul>
Geological and mineral information systems	<ul style="list-style-type: none"> <li>Plans to invest in geological surveying.</li> </ul>	<ul style="list-style-type: none"> <li>No reliable estimate of deposits.</li> </ul>
Building human and institutional capacities	<ul style="list-style-type: none"> <li>Government has carried out a needs assessment.</li> <li>Licensees required to employ Rwandan citizens.</li> <li>Proposal to train personnel, including revenue officers.</li> <li>Plans to enforce strict skills transfer requirements imposed on mining companies.</li> <li>Plans to develop degree and technical training programs.</li> <li>Plans to develop training and exchange programmes with regional institutions.</li> <li>Plans to increase employment of women.</li> </ul>	<ul style="list-style-type: none"> <li>Limited investment in building local technical skills.</li> </ul>
Artisanal and small-scale mining	<ul style="list-style-type: none"> <li>Regulations on model mines.</li> <li>Plans to: formalize ASM; develop a suitable tax regime for ASM; create a mining development fund; create a technical and financial support scheme; provide business development support.</li> <li>Plans to increase women's participation.</li> </ul>	<ul style="list-style-type: none"> <li>Insufficient regulatory capacity.</li> </ul>
Mineral sector governance	<ul style="list-style-type: none"> <li>Use of licensing regime as a governance tool.</li> </ul>	<ul style="list-style-type: none"> <li>Mineral development agreements are confidential, thus little or no public participation in licensing decision-making.</li> </ul>
Research and development	<ul style="list-style-type: none"> <li>No stated policies or regulations.</li> </ul>	

Parameter	Achievements	Drawbacks
Environment and social issues	<ul style="list-style-type: none"> <li>• Law subjects licensees to requirements of environmental protection, safety of operations, labour and health.</li> <li>• Licensee required to prepare a social action plan.</li> <li>• Plans to: enhance enforcement of environmental regulations; establish a public-private fund for community development.</li> <li>• Plans to give mining companies incentives to engage in community development.</li> <li>• Plans to integrate community development initiatives into local development plans.</li> </ul>	<ul style="list-style-type: none"> <li>• Poor implementation of Mining and Quarrying Code.</li> <li>• Insufficient enforcement capacity.</li> </ul>
Linkages and diversification	<ul style="list-style-type: none"> <li>• Government has opened a smelter.</li> <li>• Licensees required to give preference to local goods and services.</li> <li>• Plans to: diversify exports into other sectors; create opportunities for production of local construction materials; develop business opportunities for gemstone cutting and polishing; develop mineral processing centre; develop mining services sector; and improve electricity supply.</li> </ul>	<ul style="list-style-type: none"> <li>• Insufficient local production.</li> <li>• High energy costs.</li> <li>• Unreliable energy supply.</li> </ul>
Mobilizing mining and infrastructure investments	<ul style="list-style-type: none"> <li>• Plans to: provide partnership funding for small-scale mining; develop a project-financing unit; and create a mining development fund.</li> </ul>	

## D. United Republic of Tanzania



### NORAVIA'S GOLD MINE POSSITION (HQ-P27003) - Njombe District

Gold is the main mineral of the United Republic of Tanzania, and the country accounts for about 2 per cent of the world's gold mine output. It also produces cobalt, nickel, copper, iron ore, titanium, vanadium, niobium, silver, uranium, tantalum, diamond, limestone, gypsum, phosphate, gemstones (particularly tanzanite), graphite, and rare earths. The mining sector contributes about 3.5 per cent of the GDP of the United Republic of Tanzania.<sup>111</sup>

The country began liberalizing its mineral sector in the late 1980s, following disappointments with state control. The Government undertook a mineral sector-restructuring programme, with a view to encouraging and promoting private sector-led development.<sup>112</sup> Within that, it also sought to encourage small-scale and artisanal mining.<sup>113</sup> In 1997, a national mining policy was passed and the Tanzania Investment Act was enacted, aimed at attracting foreign private-sector investment. This was followed by a Mining Act in 1998.<sup>114</sup> The World Bank influenced these reforms and not only played a central role in developing the blueprint for the mining sector, but financed large-scale mining activities.<sup>115</sup> The World Bank also initiated a five-year

111 Thomas R. Yager, "The Mineral Industry of Tanzania", in *2012 Minerals Yearbook* (Washington, D.C., United States Geological Survey, 2014), p. 41.1.

112 Wilbert Kapinga and Aisha Ally Sinda, "Tanzania", in *Minerals and Mining: A Practical Global Guide*, Pedersen, Per Vestergaard, ed. (London, Global Law & Business, 2012), pp. 243-244.

113 Siri Lange, "Gold and Governance: Legal Injustices and Lost Opportunities in Tanzania", *African Affairs*, vol. 110, No. 439, 2011, p. 238.

114 Kapinga and Sinda, "Tanzania", p. 245.

115 Society for International Development, *The Extractive Resource Industry in Tanzania: Status and Challenges of the*

Mineral Sector Technical Assistance project. The reforms included incentives for foreign investments such as low royalty rates, right of mining companies to offset all their capital expenditure against tax in the year in which it is spent, and low taxes on imports of mining equipment.<sup>116</sup> These reforms led to the growth of investments in mineral development, as a result of which the mining sector has become the leading sector in terms of exports. Today, a number of international mining companies operate large-scale mines in the United Republic of Tanzania.<sup>117</sup> However, many citizens believe that the sector has benefited foreign mining companies to their detriment. That belief has been fuelled, for example, by the knowledge that, in the period 1998-2002, “mining companies kept more than 90 percent of the total revenue of exports”,<sup>118</sup> by a failure to share mining contracts and development agreements with the public, and by unmitigated environmental hazards in mining areas.

With respect to environmental hazards, it has been claimed that although licensees usually conduct EIAs prior to large-scale projects, there is no monitoring and evaluation of performance after the projects commence.<sup>119</sup> The Government was also faulted for failing to incorporate into such agreements socioenvironmental terms that could directly address the needs of the local communities in which mining activities occur and protect the environment.<sup>120</sup> Again, the mining companies’ community development spending has been low in comparison to the value of the minerals exported, and has failed to generate significant local economic impacts.<sup>121</sup>

Further, analysis of these contracts and development agreements found that they were faulty in various respects. For example, they did not require the licensees to train local staff or transfer technology, and merely encouraged them to undertake corporate social responsibility activities; they did not have requirements on how mining revenues would be shared between the investor, central government, local governments and local communities;<sup>122</sup> and they contained stabilization clauses that protected “investor rights at the expense of human rights, environmental rights, and labour and health standards”.<sup>123</sup> Further, the stabilization clauses precluded a review of fiscal terms where there were changes in economic circumstances, including mineral prices. In any case, the majority of the existing agreements were concluded before the Government had formulated its strategy for mineral sector development, and consequently did not take into account the country’s long-term development objectives. All in all, the perception is that these agreements have been “extremely favourable” to foreign mining companies and that they should be subjected to public scrutiny, including parliamentary oversight, in order to safeguard the public interest.<sup>124</sup> In addition, large-scale mining operations have generally been detached

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*Mining Sector* (Nairobi, Society for International Development, 2009), p. 30; Madoshi H. Makene and others, “Calling for Justice in the Goldfields of Tanzania”, *Resources*, vol. 3, No. 1, 2012, pp 8-9.

116 Mark Curtis and Tundu Lissu, *A Golden Opportunity? How Tanzania is Failing to Benefit from Gold Mining*, (Dar es Salaam, Christian Council of Tanzania, 2008), p. 8.

117 Kapinga and Sinda, “Tanzania”, p. 245.

118 Lange, “Gold and Governance”, p. 239.

119 *Ibid.*, p. 240.

120 Policy Forum, *The Demystification of Mining Contracts in Tanzania* (Dar es Salaam, Policy Forum, 2012), p. 8.

121 Curtis and Lissu, *A Golden Opportunity?*, p. 10.

122 Josephat Kweka, “The Role of TNCs in the Extractive Industry of the United Republic of Tanzania”, *Transnational Corporations*, vol. 18, 2009, pp. 105, 114.

123 Society for International Development, *The Extractive Resource Industry in Tanzania*, p. 40.

124 Petro S. Magai and Alejandro Marques-Velazquez, *Tanzania’s Mining Sector and Its Implications for the Country’s Development*, Working Paper (Berlin, Berlin Working Papers on Money, Finance, Trade and Development, 2011), p.

from local supply chains, with the result that they are poorly linked to the domestic economy.<sup>125</sup> It has therefore been suggested that avenues should be created for domestic investors to enter into partnerships with foreigners in the ownership and management of the mining companies.

Public disaffection with foreign mining companies prompted the Government to review mining contracts, with a view to explaining the small revenues from mining activities. This review led to the renegotiation of some agreements, in order to, among other things, provide more revenue to the Government and enhance compensation for people who are evacuated to make way for mining activities. The review also led to the promulgation of a new mining policy and law in 2009 and 2010, respectively.<sup>126</sup>

The policy and regulatory environment also favoured large-scale mining to the detriment of small-scale mining. The Government prioritized the development of large and medium-scale mining as an economic strategy, leading to many large tracts of land being allocated to large companies.<sup>127</sup> Although the Government set aside various locations for small-scale mining, it did not effectively protect the rights of small-scale miners once lucrative deposits were discovered. In such situations, the small-scale miners faced many problems, including unlawful evictions.<sup>128</sup> Artisanal miners have also protested against the grant of mining rights to foreign mining companies in areas they claim to have discovered and for which they have obtained mining licences in the past.<sup>129</sup> It should be noted that ASM activities have accounted for various social, environmental and economic problems, including child labour, tax evasion, digging and abandoning of pits, clearing forests, and pollution.

The owners or occupiers of land containing minerals were, in many cases, not paid adequate compensation, leading to conflicts. Often, citizens were not aware of the criteria for compensation, which were in any event not particularly clear. In some cases, the persons affected were not even involved in the process for determining compensation. Many people were also displaced without being compensated or formally relocated.<sup>130</sup> A key challenge is that the majority of those living in rural areas have no titles to the lands they occupy and merely rely on a customary right of occupancy, which does not confer secure tenure in practice. In terms of compensation, the holders of this right have been paid only for the investment or work that they have put into the land, but not for the land itself. Furthermore, displaced people find it “extremely difficult and expensive” to use the legal system to claim the compensation due to them, with the result that such compensation is often lacking, insignificant, or subject to embezzlement by the authorities entrusted to distribute it.<sup>131</sup>

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125 Kweka, “The Role of TNCs in the Extractive Industry”, p. 119.

126 Kapinga and Sinda, “Tanzania”, p. 245.

127 United Nations Environment Programme, *Analysis for stakeholders on formalization in the artisanal and small-scale gold mining sector based on experiences in Latin America, Africa, and Asia: Tanzania Case Study* (Geneva, UNEP, 2011), p.

128 Society for International Development, *The Extractive Resource Industry in Tanzania*, p. 50.

129 Siri Lange, *Land Tenure and Mining in Tanzania* (Bergen, Chr. Michelsen Institute, 2008), p. 1.

130 Society for International Development, *The Extractive Resource Industry in Tanzania*, p. 51.

131 Lange, “Gold and Governance”, pp. 244, 251.

### 1. *The mining policy of 2009*

The 2009 mineral policy of the United Republic of Tanzania seeks to transform the mineral sector, so that it can contribute significantly to the acceleration of socioeconomic development. Its aim is to increase the mineral sector's contribution to GDP and poverty alleviation by integrating the mining industry with the rest of the economy. This mission is to be realized through a number of objectives, including:

1. Improving the economic environment to attract and sustain private investment;
2. Promoting economic integration between the mineral sector and other sectors of the economy;
3. Strengthening the legal and regulatory framework and enhancing capacity for monitoring and enforcement;
4. Participating strategically in viable mining projects and establishing an enabling environment for citizens to participate in ownership of mines;
5. Supporting and promoting the development of small-scale mining;
6. Facilitating, supporting and promoting increased participation of Tanzanians in gemstone mining;
7. Establishing transparent and adequate land compensation, relocation and resettlement schemes in mining operations;
8. Strengthening local community participation in mining projects;
9. Promoting and facilitating value addition activities;
10. Developing a local base for technical capacity;
11. Strengthening the institutional capacity of the Geological Survey of Tanzania;
12. Promoting safety, maintaining hygiene conditions and protecting the environment in mining areas;
13. Encouraging and promoting the participation of women in mining activities and strengthening the enforcement of laws and regulations against child labour in mining activities.<sup>132</sup>

The policy also has as an objective the harmonization of the mineral policy and mining legislation with other policies and legislation related to the administration of

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<sup>132</sup> United Republic of Tanzania, Ministry of Energy and Minerals, *Mineral Policy of Tanzania*, 2009, p. 9.



the mineral sector, presumably including those governing taxation. Since the policy's introduction, the Government has established a minerals audit institution and, with respect to mining revenues and rents management, has renegotiated a number of unfavourable mining agreements. The policy describes government participation in mineral projects as an alternative fiscal instrument for capturing a share of the fiscal benefits generated from mining and also for giving foreign investors an assurance against political risk. In practice, however, the Government does not have a free carrying interest in any existing mining project. The policy has also sought to establish an enabling environment for citizens to participate in the ownership of medium- and large-scale mines, including by facilitating the registering of foreign mining companies on the local stock exchange.

Concerning geological and mineral information systems, the policy underscores improved geologic infrastructure as a prerequisite for promoting investment in the mineral sector and the effective monitoring and management of geo-hazards. The policy therefore calls for the strengthening of the Geological Survey of Tanzania in collecting, processing, interpreting, archiving and disseminating quality geo-scientific information, maps and data. Other policy objectives include strengthening the capacity of the Geological Survey to provide reliable laboratory and geo-technical services and to monitor geo-hazards and the environment; and enhancing collaboration between the Geological Survey and the private sector to promote the country's mineral potential.

Regarding human and institutional capacity, the policy requires the Government to boost its capacity for administration, monitoring and enforcement and, to that end, provided for the creation of a minerals audit agency.

On the issue of artisanal and small-scale mining, the policy notes that the Government has made efforts since 1997 to formalize artisanal miners into small-scale miners and provide extension services, but that these efforts have not enhanced the contribution of small-scale mining to the economy. To address this challenge, the policy outlines how the Government should develop and implement programmes to transform and upgrade small-scale mining into organized and modernized mining; facilitate access of small-scale miners to markets, geological information, and technical and financial services; and work with small-scale miners to ensure environmental protection. The Ministry of Energy and Minerals subsequently established a Small-Scale Mining Development Division under the Commissioner of Minerals, which acts as a national centre for small-scale mining management, and is responsible for coordinating outreach programs, among other things.<sup>133</sup>

The policy also indicates that, although the law prohibits the engagement of children in mining activities, small-scale mining continues to be prone to the use of child labour, causing various social problems. In particular, children working in mines are exposed to harsh conditions, which affect their well-being, and they also miss education opportunities. To address this challenge, the Government seeks to collaborate with stakeholders to strengthen the monitoring and enforcement of laws and regulations on the use of child labour in mining activities.

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<sup>133</sup> UNEP, *Tanzania Case Study*, p. 16.

Regarding mineral sector governance, the policy considers the previous legal framework to have been adequate in terms of ensuring transparency, predictability, minimum discretion and security of tenure, and proposed only that the capacity for monitoring and enforcement should be strengthened. Accordingly, the country has subsequently used the licensing regime to enforce the requirements of the Mining Act 2010.

On research and development, the policy underscored that the development and appropriate utilization of research findings and skilled human resources are vital for the sustainable development of the mineral sector. The Government had previously taken measures to introduce and expand training in relevant fields in the mining industry, but those measures had been deemed inadequate. The research development outputs of the Geological Survey of Tanzania, universities and other training institutions, for example, had not been adequately utilized. To address these challenges, the Government set out its aims in the mining policy of continuing its collaboration with the private sector to promote, support and strengthen training institutions to offer training in technical skills related to the mining industry; continuing its collaboration with mining companies to support the training of citizens in technical skills related to the mining industry; requiring mining companies to employ local experts and develop succession plans for citizens to take over expatriate positions; and working with other States members of the EAC and Southern African Development Community to assess skill deficiencies in the mining industry and to develop and maintain an active database on required skills.

On environmental and social matters, the policy has acknowledged that large-scale mining could lead to the relocation of communities and disruption of their livelihoods. To tackle that issue, the policy sets out that, where relocation is inevitable, the Government is responsible for valuing the land and properties of the affected communities, while the investor would be responsible for the payment of compensation, relocation and resettlement. There is a recognized need to ensure transparent compensation procedures, proper valuation of land and other properties, adequate compensation rates, and prompt payment of compensation. Investors are also required to prepare and implement sound relocation and resettlement schemes. In terms of community development, although mining companies are required to implement credible corporate social responsibility policies, the policy states simply that the Government should “encourage” them to involve local communities in setting priorities for community development projects and socioeconomic matters during the lifespan of their mining projects.

The policy acknowledges the need to strengthen monitoring and regulation of the industry in order to reduce or eliminate its adverse effects on health and safety, the environment, and social issues. The Government has therefore sought to strengthen its enforcement capacity and required mining companies to set aside funds for environmental rehabilitation and mine closure. The policy also outlines the need for laws and regulations on safety, occupational health and environmental issues to be harmonized.

The policy also emphasises that the participation of women in mining activities is an important socioeconomic development activity. The Government has conducted

awareness campaigns and facilitated the formation of mining associations for women, but the policy acknowledges that women face economic and sociocultural barriers that restrict their effective involvement in mining activities and, consequently, only receive minimal benefits from their endeavours. To address these challenges, the Government has continued to promote the participation of women in mining activities and to ensure that all programmes related to mining were based on gender equality and equity.

On the subject of linkages and diversification, the policy states that the government needed to promote investment in the fabrication and manufacturing sectors to stimulate minerals beneficiation and also to promote investment in lapidary, stone carving and jewellery making. It also states that the Government should collaborate with the private sector, regional and international organizations to strategically invest in smelting and refining industries. In this respect, it is noteworthy that the policy states that the Government should work towards harmonizing its mineral policy with that of its neighbours and cooperate with them in enhancing the development of the mineral sector. The policy has also sought to enhance the development of the gemstone mining industry, by facilitating, supporting and promoting the increased participation of citizens in gemstone mining. Also among its aims is the promotion and development of the United Republic of Tanzania as Africa's gemstone centre, ensuring the participation of citizens in owning gemstones mines, promoting the participation of local investors in gemstone mining, and improving collaboration with the private sector to develop gemstone mining. The Government also seeks to promote and facilitate value addition activities, such as gemstone cutting, polishing and jewellery, metal smelting and refinery and, to that end, it has proposed to invest in providing the required technical skills, access to capital and adequate infrastructure and facilities.

The Government is also working to enhance the linkages between the mining sector and the rest of the economy, which it acknowledges are currently weak. Local content accounts for 56 per cent of total procurement, according to a recent assessment of the procurement of goods and services in the major mines operating in the country.<sup>134</sup> The Government is therefore taking various steps to boost local content in mining, including:

1. Developing regulations on local content in mining;
2. Developing and implementing coordinated programs to increase integration of the mineral sector with other sectors of the economy;
3. Developing essential infrastructure in areas where there is potential for establishing new mines;
4. Encouraging local business entities to timely supply quality goods and services;

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<sup>134</sup> Interview with Officer, Ministry of Energy and Minerals, Dar es Salaam, United Republic of Tanzania, 12 August 2015.

5. Monitoring the performance of mining companies on local content;
6. Establishing a National Committee to stimulate local content in mining.

The policy states that, in order to promote the integration of the mineral sector with other sectors, the Government should develop essential infrastructure in mining areas, require mining companies to procure local goods and services, and support citizens to supply quality goods and services to the mining industry.

## **2. *The Mining Act of 2010***

The Mining Act of 2010 established two institutions to administer the mining regime, namely the Commissioner for Minerals and the Mining Advisory Board.<sup>135</sup> The Commissioner is responsible for the day-to-day administration of the regime, and is supported by various officers, while the Board advises the Minister for Mining on various matters relating to the administration of the Act. The President is responsible for appointing the chair of the Board, but its other members are appointed by the Minister. The Act also established the Geological Survey of Tanzania as the national agency responsible for advising the Minister on geological matters and undertaking the geological mapping of the country.

The Act established the following mineral rights: prospecting licence, gemstone prospecting licence, retention licence, special mining licence, mining licence, primary mining licence, processing licence, smelting licence and refining licence.

A prospecting licence confers on the holder the exclusive right to conduct prospecting operations in the prospecting area for minerals to which the licence applies. An applicant seeking a prospecting licence must provide the Commissioner with the following information: the mineral or minerals to be prospected, the area of land over which the licence is sought, a statement of the financial and technical resources available to the applicant, and a statement on the procurement plan of goods and services available in the United Republic of Tanzania. Upon receiving the application, the Commissioner is required to seek the advice of the Board. After receiving the Board's report, the Commissioner is then required to consider the competing bids and to select the bid which is most likely to promote the "expeditious and beneficial development" of the mineral resources of the area, taking into account the applicant's programme of prospecting operations, expenditure commitments, financial and technical resources, and previous experience in conducting prospecting and mining operations.

When an application has been rejected, the Act requires the Commissioner, as the licensing authority, to inform the applicant of the reasons for the decision within four weeks of the application being registered. The prospecting licence may be granted for a term not exceeding four years and may be renewed for an initial period not exceeding three years and a subsequent period not exceeding two years. The holder of a prospecting licence must commence operations within three months, or such further period as allowed by the licensing authority. Further, the holder of a prospecting licence must adhere to the prospecting programme appended to

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<sup>135</sup> United Republic of Tanzania. Mining Act 2010.

the licence and must give notice to the licensing authority of the discovery of any mineral deposit of potential commercial value.

Where the holder of a prospecting licence (other than a prospecting licence for building materials or gemstones) has identified a mineral deposit of potential commercial value but cannot develop it immediately due to technical constraints, adverse market conditions or other temporary economic factors, he or she may apply to the Minister for a retention licence. The application must be accompanied by any information that the Minister may reasonably require, including studies and assessments by appropriate independent experts, indicating the potential value of the mineral deposits, constraints, the likely impact of mining operations on the environment and the manner of eliminating or minimizing any adverse effects. A retention licence may be granted for a period not exceeding five years, and may be renewed once for a further period of five years. It entitles the holder to apply for a special mining licence.

The holder of a prospecting licence or retention licence may apply to the Minister for a special mining licence or mining licence. The only difference between the two is that a mining licence may only be granted for a period not exceeding 10 years, and may be renewed for a further term not exceeding 10 years. Every application for a special mining licence must include information on the proposed plan for relocation, resettlement and compensation of people within the mining area; an environmental certificate; details of expected infrastructure requirements; a procurement plan for the purchase of goods and services available in Tanzania; and a plan for the employment and training of citizens and succession plan for expatriate employees. The special mining licence is granted subject to various conditions, including the provision of an environmental management plan. In practice, affected communities play no formal role in monitoring implementation of the environmental management plan.<sup>136</sup> The special mining licence may be granted for the estimated life of the ore body indicated in the feasibility study report, or such period as the applicant may request, whichever is shorter.

The Act seeks to enhance value addition by requiring mineral rights holders to set aside certain amounts of minerals for processing, smelting or refining within the country. Further, the holder of a prospecting or mining licence is required to pay fair and reasonable compensation to the lawful occupier of any land containing any minerals subject to the licence, where operations interfere with the rights of the occupier. Disputes on the amount of compensation may be referred to the Commissioner for resolution and further appeals are directed to the High Court. Where it is necessary to relocate any occupier of land, the mineral rights holder must submit a plan for compensation, relocation and resettlement of the landowner or occupier.

The primary mining licence targets small-scale miners. Applications for this licence have been decentralized in an effort to make the licensing system more accessible to poorer artisanal and small-scale mining groups,<sup>137</sup> and are made to the Zonal

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<sup>136</sup> Interview with Officer, Tanzania Minerals Audit Agency, Dar es Salaam, United Republic of Tanzania, 10 August 2015.

<sup>137</sup> UNEP, *Tanzania Case Study*, p. 11.

Mines Officer. This licence confers on the holder the right to prospect for and mine minerals within the prescribed area. It is granted for a period of seven years and may be renewed. Primary mining licence holders do not have to complete EIAs, given that they may lack the ability to do so.<sup>138</sup> Nevertheless, the licence is still subject to conditions, including adherence to regulations on safety and protection of the environment. These regulations have been codified in the form of a simple set of regulations, which stipulates the specific measures that must be undertaken.<sup>139</sup> The Zonal Mines Officer also processes the dealer's licence and broker's licence. It should be noted that the Act seeks to prevent conflicts between small-scale and large-scale miners by assigning the Minister the power – to be exercised in consultation with the Board – to designate areas specifically for small-scale prospecting and mining operations. For example, where a prospecting licence expires, or part of it has been relinquished, the Minister may declare the area an exclusive area for small-scale mining.<sup>140</sup> In making this decision, the Minister must consider factors such as geological data and the ability of small-scale operators to extract the mineral deposits in question. Under the Act, gemstone mining is reserved for citizens, as part of an effort to empower local artisanal gemstone miners.<sup>141</sup>

However, the Act's attempts to formalize artisanal mining have been criticized for failing to recognize realities on the ground. For example, it fails to appreciate that informal leasing and transferring of mining titles are common practice. The reality is that most holders of primary mining licences "are not engaged in actual mining activities, but instead lease out the mineral access to pit holders who organize the mining activities".<sup>142</sup> Again, although the sub-leasing of pits contradicts the mining legislation, formal contractual obligations between primary mining licence holders, pit owners and workers are exceptionally rare. As a result, the need has arisen to ensure that the licensing system is better linked to these realities.<sup>143</sup> An additional challenge is that the Tanzania Minerals Audit Agency lacks the capacity to monitor the activities of artisanal miners, the majority of whom remain unregistered. Furthermore, since there is a large number of these miners, the agency can undertake strategic audits only occasionally.<sup>144</sup> Artisanal miners are also difficult to regulate because they tend to be migratory.<sup>145</sup>

The Act requires "authorized miners" to pay royalty on the gross value<sup>146</sup> of the minerals produced under their licences at specified rates, depending on the nature of the mineral in question. It also authorizes the Minister to enter into a development agreement where the capital expenditure of establishing mining operations within the special mining area subject of the agreement is above US\$ 100 million. Such an agreement is made according to a standard model prescribed in regulations

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138 Ibid., p. 13.

139 United Republic of Tanzania, Mining Regulations (Environmental Management and Protection) 1999.

140 Interview with Officer, Ministry of Energy and Minerals, Dar es Salaam, United Republic of Tanzania, 12 August 2015.

141 UNEP, *Tanzania Case Study*, p. 11.

142 J. B. Jönsson and N. Fold, "Handling Uncertainty: Policy and organizational practices in Tanzania's small-scale gold mining sector", *Natural Resources Forum*, vol. 33, No. 3, 2009, p. 214.

143 UNEP, *Tanzania Case Study*, p. 12.

144 Interview with Officer, Tanzania Minerals Audit Agency, Dar es Salaam, United Republic of Tanzania, 10 August 2015.

145 Interview with Officer, Ministry of Energy and Minerals, Dar es Salaam, United Republic of Tanzania, 12 August 2015.

146 The Mining Act defines gross value as "the market value of minerals at the point of refining or sale or, in the case of consumption within Tanzania, at the point of delivery within Tanzania."



made under the Act. The Minister must refer proposals to enter into development agreements to the Board for its advice. Further, all such agreements are subject to a performance review by the parties every five years.

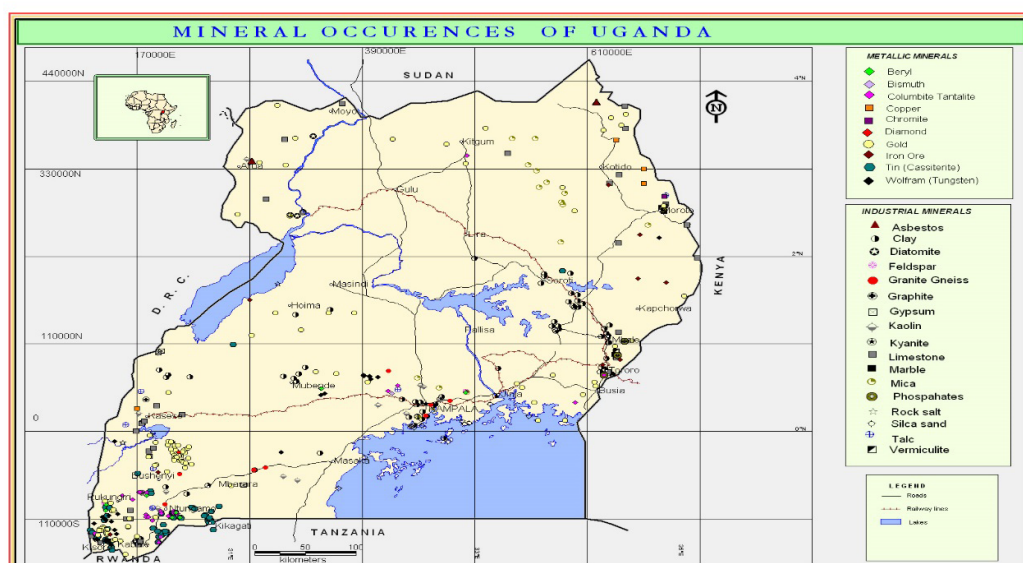
**Table 5: Extent of alignment of the policy and regulatory frameworks of Tanzania with the Africa Mining Vision**

Parameter	Achievements	Drawbacks
Mining revenues and mineral rents management	<ul style="list-style-type: none"> <li>Mineral development agreements required for certain exploitation activities.</li> <li>Renegotiated unfavourable mineral development agreements.</li> <li>Government participation in mineral projects.</li> <li>Plans to harmonize mining policies, including taxation.</li> <li>Plans to establish mineral audits agency.</li> </ul>	<ul style="list-style-type: none"> <li>Insufficient capacity to audit mineral production and exports.</li> </ul>
Geological and mineral information systems	<ul style="list-style-type: none"> <li>Plans to enhance capacity of the Geological Survey of Tanzania.</li> <li>Plans for collaboration between the Geological Survey and the private sector.</li> </ul>	<ul style="list-style-type: none"> <li>No reliable estimate of deposits.</li> </ul>
Building human and institutional capacities	<ul style="list-style-type: none"> <li>Licensees required to employ citizens and develop succession plans.</li> </ul>	<ul style="list-style-type: none"> <li>No clear information on needs.</li> <li>Limited investment in building local technical skills.</li> </ul>
Artisanal and small-scale mining	<ul style="list-style-type: none"> <li>Efforts made to formalize ASM, and provide extension services.</li> <li>Plans to organize and modernize ASM.</li> <li>Plans to assist ASM with access to markets, geological information, and technical and financial services.</li> <li>Plans to strengthen capacity to monitor and enforce laws and regulations.</li> <li>Plans to establish national centre for ASM management and coordination.</li> <li>Plans to work with ASM operators for ensure environmental protection.</li> </ul>	<ul style="list-style-type: none"> <li>Insufficient regulatory capacity.</li> <li>Unrealistic formalization efforts.</li> <li>Widespread use of child labour.</li> </ul>
Mineral sector governance	<ul style="list-style-type: none"> <li>Use of licensing regime as a governance tool.</li> <li>Dispersal of licensing powers.</li> <li>Transparent, predictable and secure tenure.</li> <li>Plans to enhance capacity for regulatory monitoring and enforcement.</li> </ul>	<ul style="list-style-type: none"> <li>Mineral development agreements are confidential, thus little or no public participation in licensing decision-making.</li> </ul>
Research and development	<ul style="list-style-type: none"> <li>Plans to continue collaborating with private sector.</li> </ul>	<ul style="list-style-type: none"> <li>No particular attention to research and development.</li> </ul>



Parameter	Achievements	Drawbacks
Environment and social issues	<ul style="list-style-type: none"> <li>Facilitated formation of women's mining associations.</li> <li>Plans to require investors to pay compensation transparently and promptly, and implement sound resettlement/relocation schemes.</li> <li>Plans to harmonize laws and regulations on safety, health and environmental issues.</li> </ul>	<ul style="list-style-type: none"> <li>Insufficient monitoring and enforcement capacity.</li> <li>Dislocation of communities and disruption of livelihoods.</li> <li>Permissive requirements on community development.</li> <li>Insufficient participation of communities in design and implementation of community development projects.</li> <li>Economic and cultural barriers to women's participation.</li> </ul>
Linkages and diversification	<ul style="list-style-type: none"> <li>Licensees required to give preference to local goods and services.</li> <li>Plans to develop regulations on local content, and programmes on integration of sectors.</li> <li>Plans to establish national committee to stimulate local content in mining.</li> </ul>	<ul style="list-style-type: none"> <li>Insufficient local production.</li> <li>High energy costs.</li> <li>Inadequate energy supply.</li> </ul>
Mobilizing mining and infrastructure investments	<ul style="list-style-type: none"> <li>Plans to: create enabling environment for citizen participation in ownership of mines; facilitate foreign companies to register in local stock exchange; promote investment in fabrication, manufacturing and lapidary; develop essential infrastructure; and partner with private sector to invest in smelting and refining</li> </ul>	

## E. Uganda



Uganda accounts for 4 per cent of the world's production of pumice and pumicite. The country also produces cobalt, gold, iron ore, kaolin, stone aggregates, lead, limestone, niobium (columbium), salt, steel, tantalum, tin, tungsten and vermiculite. Mining accounts for about 0.3 per cent of the GDP of Uganda.<sup>147</sup> The mining regime comprises the Mining Policy of 2000 and Mining Act of 2003, which are both currently under review.

The Mining Policy of 2000 constituted the response to a mining regime that was deemed unsuitable. That regime had, for example, favoured the exploitation of minerals for export and paid scant attention to building local utilization capacity.<sup>148</sup> The policy has therefore sought to establish an "internationally competitive investment environment for the mineral sector in order to develop and maintain a strong, dynamic and profitable mining industry for the benefit of the people of Uganda".<sup>149</sup> It has also sought to encourage local entrepreneurs to develop small-scale mines as a strategy for offering employment and alleviating poverty among the rural population. Through these strategies, the Government hoped that the mineral sector would serve as an "engine of growth" towards industrial development, increased revenue and foreign exchange earnings, and socioeconomic development. The policy outlines two measures as being key to realizing these strategies: first, carrying out geological surveys of the entire country and, second, encouraging artisanal and small-scale miners to form associations and other organizations in order to improve their capacity to produce and market mineral commodities.

### 1. The legislative framework

The Mining Act of 2003 established the Commissioner for Geological Survey and Mines Department, who is appointed by the President, as the main administrative

147 Thomas R. Yager, "The Mineral Industry of Uganda", in 2013 *Minerals Yearbook* (Washington, D.C., United States Geological Survey, 2015), p. 45.1.

148 Republic of Uganda, *Mineral Policy of Uganda*, 2000, p. 12.

149 Ibid., p. 5.

body.<sup>150</sup> It also established the following categories of mineral rights: prospecting licence, exploration licence, retention licence, mining lease, and location licence. It also prohibits dealing in minerals without a mineral dealer's licence. However, the holder of a mineral right may sell any minerals without obtaining a mineral dealer's licence.

A prospecting licence confers on the holder a non-exclusive right to carry on prospecting operations for any mineral for a period of one year. The Act does not stipulate the conditions that should be fulfilled by an applicant for a prospecting licence and simply states that an application must be made to the Commissioner in the prescribed form, upon payment of the prescribed fee, and may contain any other matter that the applicant wishes the Commissioner to consider. Nevertheless, the holder of a prospecting licence is required to submit to the Commissioner geological and financial reports and other prescribed information on a quarterly basis or at other prescribed intervals. Further, the holder of this licence has an obligation to report any mineral discovery to the Commissioner and to repair any damage caused to the surface of the land on or before expiration of the prospecting operations. Any minerals obtained in the course of the prospecting operations are the property of the Government; the holder of the licence cannot dispose of them without the written consent of the Commissioner, save for "such reasonable quantity as may be prescribed for the purpose of sampling, assay, analysis or other examination".<sup>151</sup>

Where the holder of a prospecting licence desires to retain or dispose of such minerals, he or she is required to apply to the Commissioner, stating the nature and quantity of the minerals. The Commissioner will only authorize the applicant to retain any such mineral or dispose of it if he or she is satisfied, respectively, that it is reasonably necessary to enable the applicant to test the mineral bearing qualities of the land on which the applicant is prospecting, or that the applicant has paid the prescribed royalties.

An exploration licence may be granted for a period not exceeding three years, but can only cover an area not exceeding 500 km<sup>2</sup>, although a person may hold more than one such licence. The licence may be renewed for two further periods, each not exceeding two years. This licence confers on the holder the exclusive right to carry out exploration operations in the area of land and for the mineral to which the licence relate. An application for an exploration licence must be accompanied by a plan of the area over which the licence is sought, identify the minerals in respect of which the licence is sought, and provide information on the financial status and the technical and industrial competence and experience of the applicant. It must also provide a proposed programme and estimated cost of exploration operations and the particulars of the applicant's proposals with regard to the employment and training of citizens. However, the applicant is not required to consult members of any local community likely to be affected by the exploration activities.<sup>152</sup> The Commissioner must approve the programme of exploration and be satisfied that the applicant has adequate financial resources, technical competence and experience

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150 Republic of Uganda, Mining Act 2003, Section 13.

151 Ibid., Section 25(1).

152 Human Rights Watch, *How Can We Survive Here? The Impact of Mining on Human Rights in Karamoja, Uganda*, (Human Rights Watch, United States of America, 2014), p. 47.

to carry out effective exploration operations. Further, the holder of an exploration licence must commence operations within four months of the licence being issued and must notify the Commissioner of the discovery of any minerals not covered by the licence.

The holder of an exploration licence may apply to the Commissioner for a retention licence where the mineral deposit that he or she has identified cannot be developed immediately because of “adverse market conditions, economic factors or other factors beyond their reasonable control, which are of a temporary nature”.<sup>153</sup> A retention licence will only be granted where the Commissioner is satisfied that these conditions have been met. A retention licence confers on the holder an exclusive right to apply for a mining lease over the area in respect of which the retention licence has been granted. The licence may be granted for a period not exceeding three years and renewed for a period not exceeding two years. However, the Commissioner may cancel this licence in the even that he or she is satisfied that commercial mineral development of the area subject to the licence has become possible.

The holder of an exploration licence, a retention licence or a location licence may apply for a mining lease. In addition to fulfilling the preconditions for the granting of an exploration licence, a person seeking a mining lease must satisfy the Commissioner that the programme of proposed mining operations takes proper account of the EIA; the proposals on the procurement of goods and services obtainable in Uganda are satisfactory; and the applicant has secured the surface rights of the land that forms the subject of the application. Regarding the latter, the applicant must demonstrate that he or she has reached an agreement with the landowner of the area intended to be mined. Holders of exploration licences and mining leases are also required to carry out EIAs of their proposed operations and may only commence operations after securing a certificate of approval of their operations from the National Environment Management Authority. Further, these mineral rights holders must carry out annual environmental audits, keep records indicating how their operations conform to the EIA, and submit an environmental restoration plan for the exploration or mining area that may be damaged or adversely affected by the exploration or mining operations.

In practice, there are allegations that EIA reports are not shared with or explained to affected local communities, who are consequently left without benchmarks against which they can hold mining companies to account.<sup>154</sup> In addition, the Act does not require applicants for mineral rights to carry out social or human rights impacts assessments.<sup>155</sup> The Commissioner may require mineral rights holders to execute environmental performance bonds to ensure that they fulfil their environmental obligations, but these bonds are not mandatory for all mineral rights holders.

The Act requires the Commissioner to determine applications for mining leases within 60 days of receiving them. A mining lease may be granted for a period not exceeding 21 years, or the estimated life of the ore body proposed to be mined,

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<sup>153</sup> Republic of Uganda, Mining Act 2003, Section 35(1).

<sup>154</sup> Avocats Sans Frontières, *Human Rights Implications of Extractive Industry Activities in Uganda: A Study of the Mineral Sector in Karamoja and the Oil Refinery in Bunyoro* (Avocats Sans Frontières, Kampala, 2014), p. 42.

<sup>155</sup> Human Rights Watch, *How Can We Survive Here?*, p. 49.

whichever is shorter, and may be renewed for a period not exceeding 15 years. It confers on the holder the exclusive right to conduct exploration and mining operations in the mining area. The holder of this licence must commence production on or before the date specified in the programme of development.

The Act permits the Minister to enter into a mineral agreement regarding any matter relating to the operations or activities under an exploration licence or mining lease. This agreement may regulate matters such as the minimum expenditure in respect of exploration or mining operations and the processing of the extracted minerals in Uganda.

The licensing process has experienced various challenges, including the irregular issuance of licences.<sup>156</sup> In 2012, for example, the Government suspended the issuance of new mining licences following revelations that a number of mineral rights had been granted irregularly and had ended up in the hands of speculators who lacked the financial or technical ability to undertake prospecting or mining operations. It was alleged that the process of vetting applications in the Commissioner's office was not rigorous and was open to corruption and favouritism. The Government therefore established a committee consisting of technocrats from different ministries to vet applications for licences under a competitive bidding process. Another challenge is that although the Government carried out a geological survey that covered about 80 per cent of Uganda, the survey did not cover the key mining region of Karamoja, due to instability in that region at the time of the survey. The Ministry of Energy and Mineral Development nonetheless went ahead and issued prospecting licences and mining leases covering approximately 25 per cent of the total land area in Karamoja.<sup>157</sup>

The location licence targets small-scale operations, and is described as a licence for prospecting and mining operations by "methods which do not involve substantial expenditure and the use of specialized technology".<sup>158</sup> There is, therefore, no distinction between artisanal and small-scale mining. Applications for the location licence are also made to the Commissioner and the licence may be granted for a period not exceeding two years and renewed for further periods not exceeding two years at a time. Holders of this licence are subject to less stringent regulations than large-scale miners; they are, for example, exempted from the requirements of EIAs and audits. Despite these provisions, the ASM sector of Uganda remains "largely disorganized and informal" and only about 5 per cent of miners are formally licensed.<sup>159</sup> Part of the problem is that many ASM miners have little or no knowledge of the Mining Act, while those who seek licences encounter significant costs and bureaucratic barriers to obtaining them, in addition to the annual fees and reporting requirements. The licensing procedures and requirements are "quite complex" for local people in regions such as Karamoja.<sup>160</sup> The amount of land available for ASM activity has also reduced, as an increasing quantity of land is devoted to large-scale

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156 Halima Abdallah, Uganda suspends new mining licences issuance. *The East African*, 3 November 2012.

157 ASF, *Human Rights Implications of Extractive Industry Activities in Uganda*, pp. 14-15.

158 The Mining Act defines substantial expenditure as "expenditure in excess of five hundred currency points necessary to bring the mine into production or such other amount as may be prescribed".

159 Alec Crawford, Kristi Disney and Melissa Harris, *Uganda: Assessment of Implementation Readiness* (International Institute for Sustainable Development, Winnipeg, 2005), p. 26.

160 J. Houdet and others, *Cost Benefit Analysis of the Mining Sector in Karamoja, Uganda* (International Union for Conservation of Nature and Natural Resources, Kampala, 2014), p. 28.

prospecting and mining operations. Indeed, most of the areas where artisanal miners are active are already covered by exploration licences.<sup>161</sup> The Government also has limited capacity to monitor the ASM sector and enforce regulations. Limited state capacity has also meant that the Government is unable to mediate disputes between ASM and large-scale mining operations, which can arise, for example, where ASM miners work on or near large-scale mining operations without the consent of the mineral rights holders.

With respect to the compensation for disturbance of land rights, the Act requires the holder of a mineral right to pay the owner or lawful occupier of any land subject to the mineral right “fair and reasonable compensation”. However, the affected owner or lawful occupier of land must demand this compensation within one year of the date when the act that is the basis for the claim occurred. Alternatively, the owner or lawful occupier of land is entitled to a share of the royalties payable in respect of the extracted minerals. These royalties are payable on “the gross value of the minerals based on the prevailing market price of the minerals at such rates as shall be prescribed”.<sup>162</sup> It should be noted that the Act exempts samples of minerals required for the purposes of assay, analysis or other examination, in quantities determined by the Commissioner, from the payment of royalties.

Local communities have complained that they receive little or no compensation and that they are not consulted on the mining operations or the compensation methodology.<sup>163</sup> Where there are attempts at consultation, these are often “not in good faith” and are manipulated by local leaders or local elites, who convene communities to rubberstamp processes with the promise of sinking bore holes or building schools and hospitals, for example. They also do not receive compensation when the land is communally owned, since they cannot prove ownership. In any case, a lack of transparency means that royalty payments often do not reach their intended targets.<sup>164</sup> Furthermore, compensation agreements are prepared in English, which many people in affected communities in regions such as Karamoja do not understand. There have also been inordinate delays in the payment of compensation. Affected communities have also suffered forceful evictions in some cases.<sup>165</sup> The Government now plans to formulate a model community development agreement to alleviate conflicts over competing land uses.<sup>166</sup>

Any person aggrieved by the Commissioner’s decision on the denial or cancellation of a licence may appeal to the Minister. The Minister may, within 60 days of receiving the appeal, set aside or vary the decision about which the complaint was received and must provide the reasons for his or her decision. A person aggrieved by the Minister’s decision may apply to the High Court for judicial review.

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161 United Nations Environment Programme, *Analysis for stakeholders on formalization in the artisanal and small-scale gold mining sector based on experiences in Latin America, Africa, and Asia: Uganda Case Study* (UNEP, Geneva, 2011), p. 13.

162 Republic of Uganda, Mining Act 2003, Section 98.

163 M.A. Rugadya and others, *Tenure in Mystery: Status of Land under Wildlife, Forestry and Mining Concessions in Karamoja Region, Uganda* (TROCAIRE Uganda and Oxfam GB, 2010), p. 20.

164 Crawford, Disney and Harris, *Uganda: Assessment of Implementation Readiness*, p. 19.

165 ASF, *Human Rights Implications of Extractive Industry Activities in Uganda*, pp. 23, 29, 37.

166 Interview with Officer, Department of Geological Survey and Mines, Entebbe, Uganda, 4 August 2015.



## 2. Towards a new policy framework

The Government of Uganda now proposes seeking the resolution of the challenges experienced in administering the former mining regime by establishing a new policy framework. It has so far formulated a draft Minerals and Mining Policy for Uganda 2015, for which the Africa Mining Vision has been a useful guide, and is also reviewing the mining law.<sup>167</sup> The draft policy seeks to address the following key issues:

1. Inadequate legal and regulatory frameworks and institutional capacity;
2. Inefficient regulation and administration of mineral rights;
3. Lack of a harmonized position on competing mineral and surface rights;
4. Lack of value addition in the mineral development value chain;
5. Informal and unregulated artisanal and small-scale mining sector;
6. Limited community and national participation in mineral development;
7. Inadequate regulatory framework on health, safety and environment matters;
8. Lack of regional and international cooperation.<sup>168</sup>

On the question of mining revenues and rents management, the draft policy requires the Government to establish mechanisms for verifying the values of the minerals extracted by licensed persons. This measure is critical to ensuring that the country obtains sufficient revenues from the extraction of mineral resources. Further, the draft policy proposes that the Government should improve the collection, efficiency and transparency of reporting of mining revenues, including promoting initiatives such as the Natural Resource Charter, Extractive Industries Transparency Initiative and Publish What You Pay campaign. On the processing of mineral rights, it states that those rights will be granted on a competitive basis, and that applicants will be guaranteed procedural fairness. Further, mineral rights holders will be subjected to the “use it or lose it” principle so as to minimize speculation, which remains a major problem.<sup>169</sup> The draft policy also proposes the alignment of the Income Tax Act with relevant sector legislation so as to enhance consistency, particularly with respect to defining exploration and development expenditure, and applying the transfer of interest rules to mineral rights. It proposes several measures for achieving the objective of harmonizing the fiscal regime with the mining policy and legal framework: applying fiscal frameworks to the mining sector; making the fiscal regime internationally competitive; creating commensurate and progressive fiscal and administrative sanctions for non-compliance; improving the collection, efficiency and transparency of reporting of mining revenues; creating a mechanism

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<sup>167</sup> Interview with Officer, Department of Geological Survey and Mines, Entebbe, Uganda, 4 August 2015.

<sup>168</sup> Republic of Uganda, *Green Paper on the Minerals and Mining Policy for Uganda 2015*, pp. 12-13.

<sup>169</sup> Interview with Officer, Department of Geological Survey and Mines, Entebbe, Uganda, 4 August 2015.



for promoting inter-agency information and data sharing; dealing with mineral smuggling; enforcing tax payments; and addressing issues of treaty shopping, transfer pricing and non-compliance by mining companies. A related measure is to establish a well-regulated and well-managed mineral royalty scheme that seeks to uplift the socioeconomic welfare of mineral rich communities. The Commissioner, for example, will be required to periodically audit the royalty returns submitted by mining companies and to notify the Uganda Revenue Authority of any inconsistencies in the returns.

Concerning geological and mineral information systems, the draft policy states that the Government will provide the physical, social and institutional infrastructure required to make the mining industry competitive. One significant measure towards achieving this objective is to conduct geological, geochemical and geophysical surveys of the entire country at various scales. A second measure is to ensure the effective collection, analysis, archiving and dissemination of information about the minerals sector.

Regarding human and institutional capacity-building, the Government has established an agency – the Directorate of Geological Survey and Mines – to manage the mining sector. It now aims to ensure the adequate financing and strengthening of the Directorate's institutional capacity, so that it can effectively administer and monitor the sector. The Government also plans to support skills development through formal and industrial training, including by establishing training institutions, requiring licensees to train Ugandan nationals and develop scholarship and apprenticeship schemes for citizens, and collaborating with stakeholders.

With respect to ASM, the Government has tried to formalize artisanal miners into small-scale miners and provide extension services. However, the draft policy considers these measures to have been inadequate. It therefore seeks to augment them by requiring the Government to create clear legal frameworks and regulatory mechanisms to facilitate the organization of ASM, access to property rights and ensuing obligations for ASM. The specific measures include licensing, regulating and monitoring ASM activities; developing suitable formalization strategies; promoting best practices in the ASM sector; educating ASM workers on minimal standards of health; and facilitating and encouraging ASM participation in supply chain initiatives. The Government also proposes establishing minimum standards on health, safety and environment, and training artisanal miners on these standards and also on appropriate technology. The draft policy also acknowledges the role of women and children in artisanal and small-scale mining. It notes that there are barriers that prevent women from effectively participating in mineral development and also that mining deprives children of education opportunities and exposes them to health and safety risks. To address these challenges, the policy proposes the following specific measures: strengthening the role and participation of women in negotiations for loss of land in relation to mining activities; ensuring that all mining programmes, including education and training opportunities, are based on gender equality and equity; and collaborating with stakeholders to strengthen monitoring and enforcement of law and regulations on the use of child labour in mining activities.

On mineral sector governance, the draft policy acknowledges that the mining industry has been plagued by land conflicts and lack of clear mechanisms for compensation, resettlement and dispute resolution. To resolve these problems, it requires the Government to take the following measures:

1. Prescribe criteria for assessing compensation;
2. Mandate mining companies to provide plans for compensation or resettlement for each project, which should be informed by comprehensive feasibility studies carried out with full participation and consultation of projected affected persons;
3. Establish clear procedures and standards for stakeholder consultations and mechanisms for negotiation, mediation and arbitration, with a view to protecting the rights of landowners;
4. Ensure that land-owning communities benefit from mining revenues;
5. Ensure that information is shared with the public and that applicants for mineral rights seek free prior informed consent of communities and local governments concerning the prospecting and mining of mineral resources.

It also requires the Government to establish a model community development agreement, with a view to encouraging mining companies to acquire social licences to operate. Further, the Government will now require mining companies to enter into community development agreements with host communities as a condition precedent to any award of a mining lease.

On environment and social issues, the draft policy notes that exploration and mining activities always negatively impact safety, health and the environment, which necessitates measures to ensure that these impacts are avoided, minimized and mitigated in accordance with environmental, safety, health and mining laws. The Government therefore proposes taking the following specific measures:

1. Promote and enforce best practices for health, safety, and environmental management in mining areas;
2. Provide a legal and regulatory framework for health, safety and environmental management in exploration and mining, post-mining and mine closure operations;
3. Require mining companies to undertake EIAs and social impact assessments, and engage affected communities in these activities;
4. Establish an environmental protection fund to rehabilitate orphaned mines and address other related environmental issues;

5. Strengthen institutional capacity and stakeholder collaboration in monitoring, inspection and enforcement of relevant laws and regulations;
6. Promote the development and application of environmentally friendly technologies and methods in mining activities;
7. Develop guidelines for addressing grievances, disputes and conflicts.

With respect to linkages and diversification, the Government recognizes that value addition can generate enormous economic value, that the mining industry could become a hub for creating backward linkages with industries that manufacture and supply mine inputs, and that it could create forward linkages to beneficiating and processing industries using the raw material commodities mined in the country. To facilitate these linkages, the draft policy proposes that the Government should allocate resources for research and development of the mineral value addition and beneficiation mechanisms and opportunities. The Government must also establish a suitable legal framework and strategies to drive the industrialization, value addition and beneficiation objectives. The draft policy requires the Government to institute certain specific measures, namely to strengthen and maintain a modern mineral analysis and beneficiation laboratory under the Directorate of Geological Survey and Mines; establish benchmarks for beneficiation and value addition; develop appropriate incentives to encourage the establishment of processing and other beneficiation industries; and establish a suitable framework and structures for the regulation of mineral processing and exportation.

Regarding the mobilization of mining and infrastructure investment, the draft policy acknowledges that the minerals sector has not been adequately promoted and marketed. A number of measures are therefore set out in the policy to remedy this problem: establish a mineral promotion and investment unit; develop local mineral markets, in collaboration with stakeholders; acquire information on foreign mineral markets; eliminate barriers to mineral exports; and implement regional and international initiatives on preventing the illegal exploitation of minerals. The draft policy also recognizes that developing the mineral sector and promoting value addition will require investments in infrastructure, including smelters and processing plants. Responsibility for this is placed on the private sector, whose participation the policy proposes to secure through tools such as public-private partnerships.

On the question of regional and international cooperation, the draft policy notes that the successful exploitation of mineral resources, tracking of transnational mining activities, beneficiation and value addition will require a synergetic approach that embraces both international and regional principles. To that end, it requires the Government to collaborate with international and regional bodies, integrate key regional and international principles and guidelines at the domestic level, and cooperate both in the development of human resources and in the harmonization of legislation and technical standards.

**Table 6: Extent of alignment of the policy and regulatory frameworks of Uganda with the Africa Mining Vision**

Parameter	Achievements	Drawbacks
Mining revenues and mineral rents management	<ul style="list-style-type: none"> <li>Competitive bidding for licences.</li> <li>Plans to: establish mechanisms for verifying value of minerals; improve revenue collection efficiency and transparency in reporting revenues.</li> <li>Plans to ensure that communities benefit from mining revenues.</li> <li>Plans to: subject licensees to “use it or lose it” requirement; harmonize fiscal regime with mining policy and legal framework; establish mineral royalty scheme.</li> </ul>	<ul style="list-style-type: none"> <li>Irregular issuance of licences.</li> <li>Mineral samples exempted from payment of royalties.</li> </ul>
Geological and mineral information systems	<ul style="list-style-type: none"> <li>Carried out geological survey, and plans to ensure it covers entire territory.</li> <li>Plans to ensure effective collection, analysis, archiving and dissemination of mineral information.</li> </ul>	<ul style="list-style-type: none"> <li>Geological survey does not cover key mining area of Karamoja.</li> </ul>
Building human and institutional capacities	<ul style="list-style-type: none"> <li>Established Directorate of geological Survey and Mines to manage sector.</li> <li>Plans to: enhance the Directorate's institutional capacity; establish training institutions; require licensees to train nationals.</li> </ul>	<ul style="list-style-type: none"> <li>No clear information on needs.</li> <li>Limited investment in building local technical skills.</li> </ul>
Artisanal and small-scale mining	<ul style="list-style-type: none"> <li>Efforts to formalize ASM operators through licensing and provision of extension services.</li> <li>Plans to: strengthen regulatory capacity; establish minimum health, safety and environment standards; strengthen women's participation.</li> </ul>	<ul style="list-style-type: none"> <li>ASM is largely disorganized and informal.</li> <li>ASM operators are ignorant of policy and legal regime.</li> <li>Complex licensing procedures and requirements.</li> <li>Inadequate land for ASM activities.</li> <li>Limited state capacity to monitor and enforce laws and regulations.</li> <li>Barriers to women's participation.</li> </ul>
Mineral sector governance	<ul style="list-style-type: none"> <li>Use of licensing regime as a governance tool.</li> <li>Plans for clear and effective stakeholder participation mechanisms.</li> </ul>	<ul style="list-style-type: none"> <li>Mineral development agreements are confidential, thus little or no public participation in licensing decision-making.</li> <li>Land conflicts.</li> <li>Communities not consulted on mining operations or compensation.</li> </ul>
Research and development	<ul style="list-style-type: none"> <li>No stated policies.</li> </ul>	<ul style="list-style-type: none"> <li>No particular attention to research and development.</li> </ul>

Parameter	Achievements	Drawbacks
Environment and social issues	<ul style="list-style-type: none"> <li>• Licensees required to pay fair and reasonable compensation.</li> <li>• Plans to: develop model community development agreement; require licensees to provide plans for compensation or resettlement; establish environment protection fund; enforce health, safety and environment requirements; and strengthen regulatory capacity.</li> </ul>	<ul style="list-style-type: none"> <li>• Unclear mechanism for compensation, resettlement and dispute resolution.</li> <li>• Complicated procedure for claiming compensation.</li> <li>• Little or no compensation for communities.</li> <li>• No compensation for communally owned land.</li> </ul>
Linkages and diversification	<ul style="list-style-type: none"> <li>• Plans to: allocate resources; establish a suitable legal framework; and develop appropriate incentives.</li> </ul>	<ul style="list-style-type: none"> <li>• Insufficient local production.</li> <li>• High energy costs.</li> <li>• Inadequate energy supply.</li> </ul>
Mobilizing mining and infrastructure investments	<ul style="list-style-type: none"> <li>• Plans to: establish mineral promotion and investment unit; develop local mineral markets; invest in smelters and processing plants; and secure private sector participation through public-private partnerships.</li> </ul>	

## F. The East African Community's approach to harmonization of mining policies and legal frameworks

The partner States of the EAC recognize the potential of natural resources to boost poverty reduction and intraregional trade and development and have therefore decided to cooperate in the management of their natural resources. The Treaty for the Establishment of the East African Community provides the framework for this cooperation. By this treaty, the EAC partner States have agreed to take concerted measures to foster cooperation in the joint and efficient management and sustainable utilization of natural resources.<sup>170</sup> With respect to managing the mineral resources sector, these countries have agreed to promote joint exploration, efficient exploitation and the sustainable utilization of shared mineral resources; pursue the creation of an enabling environment for investment in the mining sector; promote the establishment of databases, information exchange networks and the sharing of experiences in managing and developing the mineral sector; and harmonize mining regulations to ensure environmentally friendly and sound mining practices.<sup>171</sup> The five states further recognize that development activities, including mining, may have adverse impacts on the environment. They have therefore agreed to develop a common environmental management policy and common environmental control regulations, incentives and standards.

The partner States have since initiated a number of processes and activities to implement these treaty provisions.<sup>172</sup> For example, they have prepared a Protocol on Environment and Natural Resources and have adopted Environmental Impact Assessment Guidelines for Shared Ecosystems. Article 18 of this protocol requires the partner States to:

<sup>170</sup> Treaty Establishing the East African Community, Article 111(1)(a).

<sup>171</sup> Ibid., Article 114(2)(c).

<sup>172</sup> East African Community Secretariat, Brief on Minerals and Mining in the EAC, 2015.

1. Develop and harmonize their policies, laws for the exploitation of mineral resources;
2. Develop common measures for ensuring that mineral resources are exploited in an environmentally sound manner;
3. Develop strategies and programmes for the restoration and rehabilitation of mines and quarries;
4. Cooperate on research and exchange of data and information related to mineral resources;
5. Develop strategies on sustainable production, value addition and marketing of minerals and their products;
6. Establish effective measures to regulate mineral resources trading;
7. Take appropriate measures to prevent, reduce and control pollution resulting from the exploration and exploitation of mineral resources.

The partner States have also developed an Industrialization Policy, with a view to promoting regional industries that use the region's natural resources to provide linkages among industries through diversification, specialization and complementary policies.<sup>173</sup>

More significantly, the partner States have, since 2011, been working towards harmonizing their mineral policies and laws, and have articulated this desire in their current development strategy.<sup>174</sup> The EAC's Terrestrial Ecosystems Working Group, with its Committee on Environment and Natural Resources, is spearheading this harmonization process, which covers areas including access to and ownership of land; access to and ownership of minerals; mineral royalties; procedures for EIAs and monitoring of environmental plans; benefits for communities during and after mining; review and rationalization of artisanal and small-scale mining; value addition to minerals; the role of communities, local authorities, central governments and mining companies; marketing of minerals; and employment and human resources development.<sup>175</sup>

Currently, the EAC Secretariat is mapping the mining policies and laws of the partner States, in order to facilitate their harmonization.<sup>176</sup> A draft of this mapping exercise is due to be considered by the Sectoral Committee on Environment and Natural Resources and adopted by the Council of Ministers in late 2016. A challenge the EAC faces in this regard is that Kenya, Rwanda and Uganda have revised their mining policies and/or laws since the commencement of this mapping exercise.

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<sup>173</sup> Ibid., p. 3.

<sup>174</sup> East African Community, Development Strategy 2011/2012 – 2015/2016.

<sup>175</sup> East African Community Secretariat, Brief on Minerals and Mining in the EAC, 2015, pp. 3-4.

<sup>176</sup> Interview with Officer, Environment and Natural Resources division, East African Community secretariat, Arusha Tanzania, 13 August 2015.

The partner States are concerned that mineral exploitation has been focused on production for export without additional processing to add value, in the form of intermediate goods or final products. A team has been established to undertake a feasibility study on the means of adding value to the exploitation of mineral deposits.<sup>177</sup> As part of the harmonization process, the partner States have identified iron ore, coal, nickel/copper/cobalt and limestone as being strategic to the development of the EAC region.<sup>178</sup> The development of the “vast” mineral potential in the region should be prioritized, indeed fast-tracked, so as to bring about rapid growth in the region. Iron ore, for example, has been identified in every partner State and is critical to expanding the existing steel processing and manufacturing so as to enhance industrial and construction usage.<sup>179</sup> Further, coal has potential for energy generation and iron and steel development in the region. Economic growth in the partner States is constrained by a large electricity deficit,<sup>180</sup> which coal could help to eliminate. Limestone is also critical in the construction industry, as a building block in cement and aggregate production, and in agriculture. The partner States also have considerable potential for development and value addition regarding the 3T minerals.

However, minerals are not being exploited optimally due to a lack of regional coordination, which could, among other things, enhance synergies and information-sharing.<sup>181</sup> The partner States have therefore sought to create mechanisms for better coordination of mineral value addition, and the EAC Secretariat has proposed the establishment of a regional stakeholder technical committee on the development of mineral resources and mineral value addition. Furthermore, the Secretariat commissioned a study to review the mining regimes of the partner States, with the object of identifying gaps and potential areas for reforms, so as to create an enabling environment for mineral value addition. This study recommended, in particular, that the EAC should develop regional mineral value addition strategies for coal, iron ore, and nickel-copper-cobalt, which would form the basis of joint promotion, policy coordination, and appropriate fiscal arrangements.<sup>182</sup> The Secretariat is currently formulating an EAC mineral value addition strategy as a follow-up to the recommendations of this study.<sup>183</sup>

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177 East African Community Secretariat, *Brief on Minerals and Mining in the EAC*, 2015, pp. 3-4.

178 East African Community Secretariat, *Report of the Expert Group Consultative Meeting: Review of the Commonwealth Secretariat Consultants Final Reports on the EAC Mineral Resources Potential and the Legal and Regulatory Frameworks for Mineral Extractive Industries and Mineral Value Addition in EAC Region* (Bujumbura, Burundi, 2013).

179 *Ibid.*, p. 6.

180 P. Precht and others, *Analysis of Mineral Resources Availability and Potential for Mineral Value-addition in the East African Community*, in Economic and Legal Section Special Advisory Services Division Commonwealth Secretariat, 2013, p. 54.

181 East African Community Secretariat, *Report of the Expert Group Consultative Meeting*, p. 6.

182 Precht, *Analysis of Mineral Resources Availability and Potential*, p. 83.

183 Email communication with Officer, Department of Industrial Development, East African Community secretariat, 13 August 2015.



## IV. Conclusions and Recommendations

It is clear that East African countries can learn from each other's experiences as they seek to improve the governance of their mining sectors. In light of the historical mineral policy and legal frameworks in EAC countries, and recent movements towards establishing new frameworks based on many similar tenets of the, several areas of attention have emerged that would help to bring about an approach to governance that enables the inclusive and diversified development of the sector, with positive knock-on effects across the broader economy and society. Policymakers would do well to note the policy gaps in past mineral sector frameworks, and how the pillars of the Africa Mining Vision could help to fill these gaps in the new frameworks that are currently under development.

The proposed legal framework of Kenya offers useful lessons in terms of enhancing transparency and accountability in mineral sector governance. The concentration of powers in the Minister or Commissioner, regarding for example, the granting or revoking of licences, often led to corruption and the hoarding of mineral rights. Dispersing those powers makes sense, particularly if the licensing authority is required to consult a body of experts in exercising them, as it ensures that mineral development agreements can be effectively negotiated and implemented. There is also a need to establish thresholds determining when a Government can enter into such agreements, so that only companies that are able to demonstrate that their proposals will contribute to national development are granted favourable investment terms. In the case of Rwanda, transparency must continue to apply to the 3T mineral value chains, to ensure trust in the original source of these minerals.

Revenue management is one area of governance in which a move towards greater transparency is sorely needed. In each EAC country, bodies established to audit and address tax practices and leakages need to be properly financed and bestowed with a strong mandate. The Rwanda "clear and simple" tax regime should be fully implemented, with reduced bureaucratic burdens on firms and a more streamlined structure while also limiting mining company exemptions. While countries have included a multi-stakeholder approach to policymaking in the past, the involvement of civil society organizations, private sector representatives and others needs to continue beyond consultation and should be a tenet of policy decision-making and implementation; mining contract negotiation and decision-making; monitoring and evaluation; and other vital steps. In every EAC country, there also needs to be greater decision-making inputs from other relevant ministries to enable better and more coordinated industrial, mineral and trade linkages. Government involvement in minerals should not be viewed as a two-dimensional drive to collect more mineral revenues, but rather as nurturing the sectoral linkages that will go on to unlock future diversified revenue streams.

The licensing process should be streamlined, so that each country has only one institution with overall responsibility for licensing. In the United Republic of Tanzania, for example, we have seen that the Minister and the Commissioner are both licensing authorities. Such an arrangement does not bode well for transparency and

accountability and should be rectified by establishing a single licensing authority. There should also be clear timelines for making licensing decisions, and licensing authorities should be required to give reasons for their decisions. Governments need to ensure that licence application systems are not simply structures in name only and that they can function as intended without being circumvented.

Countries should also seek to decentralize the administration of their mining regimes, as has happened in Kenya and the United Republic of Tanzania. Decentralized administration would, in particular, enhance efforts to formalize ASM operations by moving government administrative services closer to resource-challenged artisanal miners.

There needs to be a stronger mandate for general strategies for developing linkages and value addition and for more specific measures to both add value to mineral activities and harmonize mineral policy with strategies for industrialization and trade. This first requires more coherent strategies for linkage and value chain development. In the case of Kenya, the stipulation in the 2016 Act that mineral development agreements should provide for value addition needs to be further elaborated to include how to achieve the diversification and capacity development needed for this value addition and what particular role should be played by local and foreign firms. Parallel investment in other infrastructure, particularly energy, will help to link mining and other interventions and to ensure greater coordination, including at the decision-making level. The Rwanda mineral policy review should encourage more in-country processing of minerals, including cement, brick and tile, in order to facilitate downstream value chains, particularly with the necessary energy inputs and support for a new smelter, and at the same time identify local opportunities for upstream materials procurement. In the United Republic of Tanzania, enhanced gemstone production should be actively pursued alongside industrial mineral development, which should be facilitated through effective policy harmonization under a strong cross-sectoral, ministerial mandate. The new mineral policy framework of Uganda should ensure that resources are allocated for value addition and linkage development as intended, and that mineral policy is better linked with industrial and trade policy. A mineral promotion and investment unit should be established as planned, with a clear strategy for developing local mineral markets and following up on sidestream infrastructure and energy investments.

At a regional level, while the EAC countries have already been working to harmonize mineral policies, these efforts now need to take on a new dimension as the countries review and revise their individual mineral frameworks. The setting of EAC-wide standards and best practices would provide consistent approaches in line with the Africa Mining Vision. Moreover, a regional approach to linking mineral frameworks and industrialization efforts would yield greater success than isolated national linkage strategies. For example, identifying and mapping strategic minerals, the possible linkages with priority manufacturing sectors, and investments required to achieve those linkages, would benefit from information-sharing and joint interventions. Transportation corridors and shared energy networks are just some of the many areas where cooperation can boost the returns on sidestream investments. A regional approach to building value chains is needed so that more effective action can be taken regarding the minerals that have been identified as

having vast potential for the region. Indeed, a consolidated regional value chain approach to mineral policy harmonization and linkage development would be groundbreaking, whereby opportunities for specialization could be established at the country level so as to carve out a niche for mineral-based development within the regional vision. Such measures will require considerable political will and integrated action. International institutions such as the African Minerals Development Centre should seek to draw on their experiences in order to support the EAC in developing this new approach, in particular with the mapping exercise of existing and planned mineral policies in this study.

Local communities need to play a real and active role in the management of natural resources, and thus need to be included in and respected by mineral policy frameworks. Mineral rights holders should be required to negotiate and implement community development agreements and it must be the responsibility of the Government to establish the bare minimum standards for such agreements. These agreements are not intended to place burdens on large firms but rather to act as a tool for dialogue and cooperation between them and local communities. Government interventions should thus both provide incentives for better firm-community relations and ensure that dispute settlement systems function as intended to allow for fair and equitable decision-making. The proposed mining regime of Kenya offers a useful framework for the structure and implementation of these agreements, which should ensure that mining companies obtain much-needed social licences to operate. In addition, affected communities should participate in the implementation of environmental management plans, given the limited enforcement capacities of these Governments. The outcomes of environmental and local impact assessments need to be fully shared with the locally affected communities. The United Republic of Tanzania's plans for compensation, relocation and resettlement should include mandatory elements that are generous to those affected by mining activities. Realizing these objectives would be assisted by the development of a model community development agreement, which should draw on the countries' best practices in order to form an EAC-wide standard for community engagement.

Efforts towards building the capacities of domestic workers and firms need to be backed up by serious commitments to both these groups, through the setting of tangible requirements for foreign firms and partners in local-content and local-hiring policies. The Kenya 2016 Act, for example, states that holders of mineral rights should, to the greatest extent possible, "give preference" to local hiring and procurement, but the success of this approach requires both an overall strategy with a clear vision for the country's future labour supply and domestic firm capability at the higher end of the policy framework and a set of specific targets and instruments to help achieve this vision at the lower end. Training must be geared towards new linkages between the mineral sector and the wider economy, rather than on static skills for mining activities, and should thus address both lower-skill needs as well as the training of technicians and engineers. As with other sectors, the skills gap between labour supply and demand needs to be properly measured through needs assessments, with a strategy to help close this gap through investment in the right types of training programmes. Foreign and large firms must take an active role in training workers in the skills required, rather than hiring workers trained through efforts by the Government or the workers themselves.

The five countries must do much more to realize gender equality and the empowerment of women in the mining sector and to increase opportunities for and encourage women's involvement in mining. To that end, each country should formulate a gender charter for its mining sector, which should also address the employment of women at the higher end of mineral value chains.

Increasing the collection and processing of mineral and geological data and mapping should be a goal of future mineral policy. In the short term this should include greater sharing of methods and technology in partnership with external data providers, as is an option in Kenya. This should evolve to an eventual target of producing that information nationally. More detailed plans are needed for research and development in data-gathering and in the mineral sector in general, including greater funding provisions. The United Republic of Tanzania should seek to strengthen its geological survey capacities while mandating support from foreign and private sector partnerships. Uganda should ensure that future surveys cover all regions of the country.

Environmental protection must be an implementable and measureable element of mining frameworks so as to prevent the level of environmental degradation that was allowed owing to loopholes or an absence of references to such protection in the frameworks of previous mining policies and legislation. Ensuring the inclusion of protection in current frameworks would be to the benefit of local communities, the greater environment and well-being of all citizens, and would help to address the long-term harm caused by over-extraction. As with the community agreements, best practices should be drawn upon in order to formulate a common EAC environmental management policy.

Finally, although EAC country policies all claim to support the growth of ASM, their Governments have tended to prioritize the development of large- and medium-scale mining as an economic strategy and have consequently allocated large tracts of land to large companies. ASM policies have too often been geared towards formalization as the end goal; they should instead embrace a multi-faceted approach to support ASM in its current form and should better link small and informal miners with the national economy. The requirement by Rwanda that an exploration licence can only be renewed upon relinquishment of 50 per cent of the unexplored areas is a useful mechanism for making available much-needed land for ASM activities. In the case of the United Republic of Tanzania, when a prospecting licence expires or part of it is relinquished, the Minister may declare the area exclusive for small-scale mining, if it is suitable for such activity. The country's actions in this sector must also address child labour and human well-being, which are key issues for ASM. As noted in the case of Uganda, despite their limited capacity, artisanal and small-scale miners must still take into account the impact of their activities on the environment and community. These countries continue to struggle in their efforts to regulate artisanal miners. Any regulation must be preceded by an understanding of the nature of their activities, which tend to vary from one jurisdiction to another. Burundi would do well to ensure that formalization would indeed be of benefit to artisanal and small-scale miners, to counter suspicions among some that it may only benefit elites. Burundi and Rwanda should both simplify their registration processes and provide financial and general support to small firms in pursuing formalization. The implementation

of ASM provisions to date has been poor and must be placed as a higher priority in mineral frameworks. Uganda should ensure that it provides assistance to artisanal and small-scale miners as a strategy for poverty reduction, as is intended by its mining policy, including in obtaining licences and meeting reporting requirements and supporting the organizing and formalization of ASM. In this area in particular, the five EAC countries should seek to draw on the positive experience of other countries, such as Mali.

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### **Interviews**

*Interviews were conducted with the following people:*

Minister of State for Mining, Kigali, 22 July 2015.

Officer, Department of Mines and Geology, Kigali, 21 July 2015.

Mining expert, Kigali, 22 July 2015.

Officer, Ministry of Energy and Minerals, Dar es Salaam, United Republic of Tanzania, 12 August 2015.

Officer, Tanzania Minerals Audit Agency, Dar es Salaam, United Republic of Tanzania, 10 August 2015.

Officer, Department of Geological Survey and Mines, Entebbe, Uganda, 4 August 2015.

Officer, Environment and Natural Resources division, East African Community secretariat, Arusha, United Republic of Tanzania, 13 August 2015.

Officer, Department of Industrial Development, East African Community secretariat, 13 August 2015 (via email).

