



REVIEW OF THE DRAFT MINES AND MINERALS BILL 2015

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1. Introduction and Background

Malawi has generally relied on agriculture for its economic development. It is now however increasingly realized that heavy dependency on agriculture, and especially rain-fed agriculture, is very risky not least because of the effects of climate change and a rapidly growing population and shrinking land holdings. Hence the Malawi Growth and Development Strategy seeks to promote economic diversification and has identified mining as a key sector to contribute to the country's economic development.

Malawi adopted a Mines and Minerals Policy in 2013. One of the main policy deliverables is the need to enact a new mining legislation to replace the Mines and Mineral Act 1981. This Act has been overtaken by several policy initiatives in almost all areas affecting mining such social, economic, environment, natural resources, fiscal, labour relations among others that have been adopted and implemented over the years. Mining legislation therefore needs to be aligned to the evolving policy landscape as well as address regional and international instruments related to mining to which Malawi is a party.

Consequently, the Ministry of Natural Resources, Energy and Mining commenced a review of the Mines and Minerals Act 1981 through a consultancy, which has produced a draft Mines and Mineral Bill 2015 currently under discussion within Government. Civil society institutions including CEPA have also been preparing their contributions to the policy and legislative process in the mining sector through policy dialogues and debates. Hence CEPA has produced a Model Mining Policy Framework as well as elements of a mining legislation. Indications are that the draft Mines and Mineral Bill will be presented to Parliament in the next sitting of the National Assembly and civil society institutions need to find space to provide their inputs in the process of drafting the bill.

This brief therefore seeks to analyze and review the draft Mines and Minerals Bill 2015 to highlight areas in which civil society need to provide input so as to ensure that the Bill addresses the gaps and weaknesses identified in various policy debates and dialogues. We have therefore analyzed documentation provided by stakeholders such as the Natural Resources Justice Network and conducted key informant interviews to inform the review recorded here. This brief therefore highlights gaps or weakness that need to be addressed in the draft Bill and makes recommendations for civil society to consider when engaging Government.

2. Key Policy Issues for Consideration in the Drafting of the Mines and Minerals Bill 2015

The MGDS states that the contribution of the mining sector to the country's GDP grew from 3% in 2005 to 10% in 2009 as a result of the opening of the Kayerekera Uranium Mine. It is however recognized that the sector faces some serious challenges for it to reach its full potential and account for 20% of GDP as planned. The challenges include inadequate institutional capacity, absence of an independent regulatory authority for mining, and low investment in mining. The Government seeks to increase production and value addition in the mining

sector through increased exploration and mining, improved legal and institutional framework, increased participation by small and medium scale miners, and updated geological information systems.

Among the key strategies, the MGDS requires Government to produce detailed geological maps, strengthen institutional capacity, enforce environmental, occupational safety and health legislation and developing an integrated data management system. Some of these strategies are reflected in the Mines and Minerals Policy 2013 and some of them are now being implemented. For example, the geological mapping is underway, a mining cadaster is also developed; and the Mines and Minerals Act 1981 is being revised. The Mines and Minerals Policy 2013 is however hardly comprehensive to inform a responsive mining governance framework¹. Hence civil society and other stakeholders have conducted several policy dialogues, which can help improve the policy landscape to contribute to the development of a comprehensive mining legislation.

The CEPA Report² outlines some of the key policy and legislation elements that need to be considered in the development of the Mines and Mineral Bill. The following are some of the major policy considerations adapted from that report:

(a) Mining Governance and Regulatory Framework

- The need for policy consistency to build investor confidence;
- Introduce general principles to guide the overall legislation framework such as sustainable development and public participation objectives;
- Provide for a requirement for the Minister to present each year a state of mining report to the National Assembly either annually or biannually;
- Ensure security and continuity of tenure with reasonable exclusivity, enforceability and transferability of rights;
- The need for programmes towards meaningful empowerment and participation of nationals to enable them hold public officials who manage mineral benefits accountable;
- Need to impose reasonable social obligations upon holders of exploration and mining licenses and should make commitment to social obligations a requirement for the granting and renewing of exploration and mining licenses; the principles and modalities of these obligations should be articulated in policy and legislation and be incorporated in mining licenses/development agreement; and,
- Link corporate social responsibility programmes with the granting of exploration and mineral development rights; and,

¹ CEPA, 2014, Report on Policy and Institutional Analysis in Malawi, (CEPA, Blantyre).

² Ibid

- Establish broad-based mineral boards to act as advisor and public watchdog in minerals administration.
- Designate a one stop shop for mining investments;

(b) Mineral Administration and Development Systems

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

(c) Environment Management

- Incorporate principles of integrated environmental management and basic environmental impact assessments before the granting of exploration rights. For mining rights, the international principles of integrated environmental management should apply for all projects;

- Adopt an integrated resource use and management framework which maps and profiles all resources in a mining area and seeks to enhance their sustainability;
- Make it mandatory for mining companies to provide for rehabilitation of land and pay for adverse impacts on community livelihoods;
- Incorporate post-mining use of land issues into the process of granting exploration and mining licenses;
- Incorporate multiple land use planning into the license granting process; and,
- Introduce a Minerals Development Fund to include provision for environmental disasters and social decline as a consequence of mining into mining policy and legislation.

(d) Artisanal and Small-Scale Mining (ASM)

- Develop specific and appropriate legislation for the ASM sector and allocate resources for administration of relevant legislation, training and education in the sub-sector, providing support for the development of cooperatives; and assisting with seed finance, marketing of output and other technical matters;
- Designate certain areas of known mineral potential for ASM and reserve the right to operate these designated areas exclusively for their nationals.
- Develop special mineral development rights for the sector that are simple to apply for, easy to comply with, transferable and give adequate security of tenure. Allocate the issuing, registering and managing ASM rights to local government authorities but coordinated by the mining ministry.
- Develop, adopt and enforce appropriate and uniform health, safety and environmental guidelines for the sector;
- Enact policies to remove barriers to the participation of women in the sector;
- Ensure that employment and working conditions for miners are within internationally accepted standards through enforcing the adoption of health, safety and environmental standards;
- Make employment of child labour a punishable offence;
- Make mineral rights tradable to enable miners to use them as collateral in order to access finance from commercial banks;

(e) Mining Taxation

- Reserve the right of the state to acquire local equity stakes in mineral development projects on commercial terms;

- Negotiate tax treaties with the home countries of investors to avoid double taxation on the investor;
- Use withholding taxes but set rates at internationally competitive rates;
- Provide relief for import and export duties on minerals sector items;
- Protect the domestic tax base by introducing transfer-pricing rules based on OECD (arm's length) principles.
- Avoid tax stability or tax holiday agreements for specific investors unless as a temporary measure;
- Provide royalty tax by law rather than by negotiation with individual investors;
- Ensure that the minimum tax rate is kept at an internationally competitive minimum;
- Establish a mechanism for distributing mineral revenues at the district and village levels to strengthen decentralization processes and to optimize the contribution of mining growth to sustainable development at the local level.

(f) Research and Development (R&D): Through mineral development plans:

- Fund fundamental research and encourage industry participation in funding applied research programmes in the mineral sector;
- Collaborate in research, encourage skills and technology transfers within the region; and
- Encourage technological innovation, support development of small-scale sector to fabricate for local markets and develop a sector strategy to include R&D, training, marketing, finance, technology and management skills.

(g) Human Resources and Skills Development: Through mineral development plans

- Encourage industry participation in professional training and development programmes through the provision of fiscal incentives to encourage skills development programmes;
- Develop mining-related skills development programmes;
- Require companies to present social and labour plans as part of the package for accessing mine development rights and encourage companies to train employees in alternative skills in order to manage downscaling; and,

(h) Women and Mining

- Implement and enforce specific provisions for gender equality and equity and develop targeted policies to empower women in mining and/or support gender equality in mining policies with appropriate legislation;
- Develop and implement education programmes to increase women's access, adaptability in the minerals industry and ensure retention of skilled women in the minerals sector. Training programmes should be extended to include officers in the mining ministry.
- Introduce communication and sensitization programmes to remove resistance against women empowerment and to remove cultural barriers preventing women's participation and contribution to the sector and develop and apply punitive policy measures aimed at discouraging discrimination against women in the minerals sector;
- Adopt an "Affirmative action" approach to foster the enrolment of women in technical and other key disciplines for minerals development.
- Facilitate the creation of strong women miner's network and link these with rural women groups and deploy resources to these associations and networks;
- Address social issues associated with women in mining effectively and involve women in the adoption of minerals policies that tackle Human Rights issues;
- Strengthen and/or create national Gender and Women in Development Policies in order to guide empowerment of women in the mining sector. In the medium term, initiatives similar to the empowerment charters in South Africa should guide the women empowerment process in the region; and,
- Develop educational programmes aimed at both increasing men's sensitivity to women issues and women's empowerment in all sectors of minerals development.

These policy guidelines are useful in bench marking the provisions of the draft Bill. Where some provisions cannot be directly incorporated into the bill, they can be included in the mines development plans, which are pre-conditions for licensing and can also be incorporated into regulations made under the Bill.

3. Review of the Draft Mines and Minerals Bill 2015

Part I: Preliminary

- The short title to the Bill repeats the current version of the Mines and Mineral Act 1981. We propose however that the Bill should be entitled the Mines and Mineral Development Bill to reflect the overall policy thrust which is

intended to promote the development of the mining sector so as to increase its contribution to the national economy.

- The long title should also be revised in the same vein to read: ‘An act to provide for the prospecting, mining and processing of minerals in Malawi; and for matters related thereto’. This would capture the mining sector development policy objective in the long title.
- The Bill stipulates its purposes in section 3. This is not the usual format legislation generally takes in this country. The purpose of the Act is usually contained in the memorandum delivered by the Minister responsible together with the Bill, but is not part of the Bill.
- The provision on ownership of minerals in section 4 is consistent with section 207 of the Constitution, which vests all lands and territories in the Republic. This formulation has also been repeated in the Land Bill 2013 and should be retained. State ownership of mineral wealth is both a sovereign as well as stewardship expression entitling and mandating the state to manage resources for all the people of Malawi.
- We propose that a new Part II be inserted. This would articulate, instead of but taking into account the purposes of the Bill, the general principles for the development and management of the mining industry. Some of the general principles to be highlighted are;
 - ✓ Sustainability principle,
 - ✓ public participation and community beneficiation,
 - ✓ polluter pays principle,
 - ✓ the precautionary principle
 - ✓ free prior informed consent;
 - ✓ revenue transparency and accountability,
 - ✓ local employment and local economy development,
 - ✓ post mining closure economic considerations; and
 - ✓ women and mining.
- Most of these are reflected in the draft Bill; highlighting these upfront however has the advantage that the intention is for the principles to influence the entire scheme of the law and not just specific parts where they are mentioned.
- Some of the principles can be incorporated into mine development plans which will be part of the license conditions. Hence community agreements or corporate social responsibility requirements can incorporate community benefits. While this may be done by providing in the draft Bill for a percentage of the profits to be given to community projects, an alternative can be to provide for these to be negotiated between the community represented by civil society they may nominate, the proposed licensee and the MMC. This would better incorporate the free prior informed consent

principle as a license would only be issued if the community has agreed with the proposed licensee.

- The new Part II should further articulate mechanisms for coordination between the mining institution and related sector agencies such as those responsible for land matters, environment, forestry, water, finance among others. These provisions should address reporting mechanisms to enable these stakeholders to attend to cross cutting and emerging issues, which arise from the impacts of mining activities. This would culminate into adoption of guidelines for mitigating jurisdictional conflicts and better coordination.

4. Part II – Administration

New Institutional Framework:

- The draft Mines and Minerals Bill 2015 establishes a Mineral Resources Committee (MRC). The composition is entirely public sector comprising principal secretaries and directors of government departments responsible for sectors related to or affected by mining. The functions and roles of the MRC are essentially advisory to the Minister especially in licensing matters.
- Curiously though the advice is binding on the Minister since he cannot reverse the recommendations nor is the recommendation appealable to the Minister. This formulation is problematic as it invites conflicts between the technical and political departments of the ministry. In any event the Minister is the head of the department/ministry, hence the fettering provisions cannot enhance effective mining governance.
- The draft bill does not provide any specific roles and functions of the Minister except in a few sections such as signing licenses, land access issues, among others. The relationship between the Minister, the Commissioner and the Director is not clear from the draft Bill.
- The draft Bill also establishes the Office of Commissioner for Mines. The Commissioner is supposed to be independent of the MRC or the Minister responsible for mines and minerals, though he or she advises the Minister and the MRC. The Commissioner seems to be the regulatory head of the mining ministry; however the Bill also creates the Department of Mines to be headed by the Director of Mines again appointed under the Bill. A look at the functions of the department shows that it has compliance monitoring functions including responsibility over mining inspections, which the Commissioner is also mandated to do. The provisions establishing the Board, the Office of the Commissioner for Mines and the Department and the Director of Mines are two wieldy and conflict with each other and therefore need to be revised. There is need for clear lines of authority between the MRC, the Minister, the Commissioner and the Director of Mines.

- The draft Bill also creates a Department of Geological Survey to be headed by a Director.
- The establishment of departments is a departure from the usual approach in Malawi legislation. Normally legislation establishes positions responsible officers and provides them with their powers, functions and responsibilities. This draft bill states that the roles of functions of public officers are stipulated in the bill but nowhere are these stated; instead there are departmental responsibilities. This needs to be revised so that duties are given to officers.

Our Recommendations

- The draft bill must stipulate the roles and functions of the minister responsible for mining. These roles include providing policy directions and supervision of various offices; the duty to report to the National Assembly either annually or bi-annually. This would stipulate the general outlook and prospects, the compliance of mining licensees with their contractual obligations and especially with their corporate social obligations. This would provide room for MPs to provide feedback and where necessary seek amendments of agreements or legislation to enhance effective mining governance.
- Establish a Mines and Mineral Commission (MMC) to be appointed by the Minister; this should be a regulatory body for the mining sector. The MRC seems to be adhoc and has evolved from the licensing committee that was set up administratively. The Commissioner for Mines will be the executive head of the MMC to implement MMC policy decisions. The nomenclature of the office can be changed to Director General, especially because there will be directors under him/her.
- The MMC to consist of representatives of key government departments such as mines, environmental affairs, finance, economic planning, lands, geological survey; and non-state actors such as civil society representatives, and the professions such as engineering, law, accountancy and academia;
- The Bill should give power to the MMC to establish sub committees to advise the Commission on specific issues; these may coopt special interest groups where necessary including local communities around a mining area, which is the subject matter under consideration. The provisions on appointment of experts under the current draft Bill can be modified to address this.
- Provide functions of the Commission including grant, renewal and revocation of licenses; scrutinizing and approving mining agreements and setting the requisite investment targets and monitoring compliance with applicable policies and legislation. Under the current Bill, the MMC has some of these functions though there is division of labour: the Commissioner has power to grant licenses for small scale and artisanal mining while the MMC has responsibility for medium to large scale mining, albeit with the MMC having advisory powers only for the Minister to grant. There is no justification for this division of labour. The Commissioner must carry out decisions of the

MMC and be answerable and accountable to the MMC. We therefore propose the modification of these provisions to give all licensing responsibilities to the Commission and the Chairman of the Commission to issue all licenses as decided by the Commission. No need for ministerial signature.

- Provide for appointment of Commissioner of Mines/Director General who shall be secretary for the Commission and its executive head; to be assisted by such public officers as may be appointed by the Minister responsible for Mines. There may be directors to be responsible for specific mining issues such as Mining Safety, Licensing or Geological Survey. Provide for functions and powers of the Commissioner, other public officers such as inspectors as the Act may establish. There are provisions in the draft Bill for this and can be modified accordingly.
- Establish a Mining Development Corporation, with a board of directors, chief executive and management; provide functions which are mainly facilitating development of the mining industry, development of public private partnerships in the mining industry including investment decision making; the MDC can also develop mining ventures either on its own or in partnership with other investors. The MDC to facilitate acquisition of equity in mining ventures and promote participation of Malawians in mines investments.
- The MDC will be a development and investment promotion arm for mining. It would be a separate entity from the MMC but would liaise with the Department of Geological Surveys on mining potential and market these to potential investors.
- The main attraction of this formulation is to separate the regulatory from the developmental functions in the mining industry thereby promote checks and balances and hence promote sustainable mining instead of the current institutional framework in which these functions are fused and often the regulatory ones are subsumed.
- Establish Mining Development Fund to be funded from levies on the licensees and such further sources as Parliament may allocate. The fund will be managed by the MMC and will be responsible for financing promotional and regulatory activities including mine closure and post closure stabilization. The drafting can take the form of provisions of similar nature under various statutes.
- Provide a framework for institutional accountability and transparency including mechanisms for access to information. Any restrictions on access to information should be those which can be acceptable under the Constitution.

5. Part III: Mineral Tenements

- This part provides general provisions for applications, grant, renewal, extensions and revocation of mineral tenements.

- The Bill defines mineral tenements as the a non-exclusive prospecting license, a reconnaissance license, an exploration license, a retention license, a small-scale mining license, a medium-scale mining license or a large-scale mining license, as the context requires, but does not include an artisanal mining permit.
- The more detailed provisions for each of the licensing regimes are then provided in Parts IV to X. These are fairly standard provisions and are comprehensive. These provisions however need substantial editing not just in terms of language and internal consistency but also in the context of the recommendations we have made in the discussion on institutional framework above. In particular, they should incorporate the general principles outlined thereunder such as polluter pays, free prior informed consent, among others.
- It is noteworthy that Part VII dealing with conditions for the grant of medium and large-scale mining license applications requires the preparation of a number of plans to accompany the application. Most of these address the need to incorporate local community concerns. They provide space for articulating more detailed corporate social responsibilities along the lines of the policy guidelines outlined in section 3 of this report. The plans would form specific commitments to be incorporated by reference in the mining agreements. The following are the plans required:

In the case of an application for a medium-scale mining license,

- a community engagement plan ;
- a prefeasibility study;
- a mining operations plan;
- a mine site plan meeting;
- a mine waste management plan;
- a resettlement management plan;
- an employment and training plan;
- a goods and services procurement plan; and
- a rehabilitation and closure plan;

In the case of an application for a large-scale mining license;

- a community engagement plan;

- a feasibility study (not a prefeasibility study);
- a mining operations plan;
- an employment and training plan;
- a goods and services procurement plan;
- a mine site plan;
- a mine waste management plan;
- a rehabilitation and closure plan;
- a resettlement management plan; and
- a business development assistance plan;

6. Small-scale and artisanal mining

- The draft needs to define small-scale mining, especially in relation to scale and output. This is important considering the limited regulation of this regime intended to promote local economic empowerment.

7. Part XI: Reserved Minerals

- This part deals with the regulation and management of reserved minerals which are defined as gold, silver, precious stones and any other mineral which may be prescribed.
- The conditions for licensing of reserved minerals require that the licensee should be not less than 21 years old. There is need to ensure that this requirement is harmonized with all other licensing regimes.
- The provisions provide regime for regulating precious minerals and have been substantially retained from the current Mines and Minerals Act 1981.

8. Part XII: Restrictions, Surface Rights and Compensation

- These provisions provide for rights of access to land subject to a mineral tenement and sets up a regime for facilitating access and payment of compensation where damage or loss has been suffered by the land owner or lawful occupier of such land.
- The provisions give power to the Minister to order access to land where in the opinion of the MRC consent has been unreasonably withheld. This of course sets up conflict with the landowner and it is not clear how

access can be forced without compulsory acquisition of such land. This provision needs to be revised.

- In addition, it is not clear why a determination by the MRC should be enforced by the Minister as if there are special enforcement powers given to the Minister under the draft Bill. We propose that the MRC or Commissioner be given such power. In any event since the issue has to do with land rights, it is necessary to involve the Minister responsible for lands.
- There is provision for compensation where there has been loss or damage arising from the activities of the mineral tenement holder. Such compensation may be agreed upon between the landowner or lawful occupier and the mineral tenement holder. In the absence of agreement the Commissioner will decide. Guidelines for assessing compensation are provided. However determining compensation for loss of or damage to land is the responsibility of the ministry of lands; the role of the Commissioner therefore needs to be revised accordingly.
- While agreement is preferable in that a market price may be attained, the level of literacy in mining areas is likely to work against landowners who may agree to inadequate compensation for lack of information. We therefore propose that compensation should be supervised by the Commissioner even where there is agreement to ensure there is adequacy and third party involvement. This is also beneficial to the investor since inadequate compensation has in recent times triggered fresh demands for more compensation where communities perceive they should have received more.
- The draft Bill also stipulates that any dispute as to who the rightful owner of the land is shall be decided by the MRC and the decision of the MRC shall be final. This provision is untenable in two respects. In the first place the MRC is ill equipped to deal with land ownership disputes. Secondly, the provision ousts the jurisdiction of the courts and violates section 41 of the Constitution, which gives every person rights of access to courts. This provision should therefore be deleted and or revised accordingly.
- This Part also provides for the issuance of a land access order where access to land subject to a mineral tenement has been denied. The land access order will be issued in consultation with the ministry responsible for lands. It is interesting to note that here the ministry of lands is called upon to participate in the issuance of a land access order while with regard to the directive by the Minister to allow a mineral tenement holder to access land without consent of the owner or lawful occupier without consent there is no consultation with the ministry of lands. It is necessary therefore for these provisions to be harmonized and rationalized.

- Any party wishing to appeal against a land access order must do so to the Minister and the Bill states that the decision of the Minister is final. This again flouts access to justice provisions of the Constitution.

9. Part XIII: Enforcement

- This Part makes provision for enforcement of the Bill. It provides for the establishment of the inspectorate and the compliance monitoring regime for the Bill.
- The drafting as elsewhere is problematic. It is unnecessary for the Director of Mines to consult inspectors to set up an inspectorate programme.
- Some of the provisions under this Part are clearly unconstitutional. For example the Bill suggests that a person suspected of committing a crime under the Act may be compelled to provide information. Yet the Constitution provides for the right to remain silent and to be avoid self incrimination.
- In relation to the fines upon conviction there are a number of provisions in the draft Bill where the fines will be provided in the Regulations. There are two problems with this. First this clearly is not the usual way penal provisions are drafted. In the absence of regulations the provision will be unenforceable since in most cases regulations may take years before they are promulgated. Secondly, in terms of the General Interpretation Act no regulation may provide for fines in excess of K1, 000.00. Hence, even if the Fines and Conversions Act was taken into account the fine under any regulation would be miniscule. It is necessary therefore for the Bill to stipulate the fines.

10. Part XIV: Fiscal Provisions

- These provisions regulate the payment of royalty and prohibit the export of minerals by mineral tenement holders who have not paid the royalty payable.
- They also deal with transfer pricing and require arms length pricing where the sale of minerals are made to an affiliated company defined as one in which the tenement holder has 5% or more of the shares of the buyer.
- The Part further makes provision for fiscal transparency. It requires the mineral tenement holder to provide reports to responsible government departments and gives power to government to order independent audits of the financial statements of the tenement holder. This fiscal transparency is clearly in favour of Government. There is no provision for government to be accountable in the manner it deals with earnings from mineral taxes and royalties. The Bill needs to deal with this and make access to such information a right for every Malawian.

- This Part further entitles Government to acquire a free equity ownership in a large-scale mining company. This is in addition to the ground rent, tax, royalties payable by the company. In addition Government may impose as a precondition for a license for large-scale mining, a requirement that the company offers equity to Malawian citizens.
- The Part makes detailed provisions for environmental protection including the need for a rehabilitation and mine closure plan or a financial assurance where the former is not required such as in the case of a medium scale mining operation. This Part needs to be linked to the proposed Mines Development Fund which should specifically be an independent fund for mines development and post mining rehabilitation and stabilization issues.
- The draft Bill does not have specific provisions for mining safety and health part from including such conditions in licenses as well as in environmental protection and health management. The Mines and Minerals Act 1981 did not provide for safety and health but regulations were promulgated to fill the gap and the same approach has been taken in this draft bill. We propose the bill make provisions for key principles for mining safety outlining the institutional roles including the powers and functions of inspectors. The details can be incorporated into regulations.

11. Specific Drafting Issues

In this section we highlight some of the drafting issues that need to be addressed by the draftsman as highlighted in the track changes to the bill. They are as follows:

- Provide for a new Part II to articulate general principles as proposed in this brief. This will replace section 3. Section 4 will be in the new Part II.
- The new Part II should also articulate sector coordination arrangements so that it is made clear that no license will be issued unless the licensee has complied with all existing legislation and has obtained the requisite free prior informed consent from the local communities.
- A new Part III to deal with institutional arrangements. The Part should outline the powers and functions of the Minister responsible for mining such as sector coordination, reporting to the National Assembly and policy guidance. The provisions of section 6 in the draft Bill should be deleted.
- This Part should establish the MMC with its powers and functions as well as appointment of the Commissioner for Mines or Director General for Mines with his/her powers and functions. It should provide for appointment of public officers in the public service including inspectors and registrar, with their respective powers and functions. Many of these already exist in the draft Bill and will need rearrangement and tidying up to ensure they reflect the recommendations made in this brief.

- The new Part III should also set up a Mines Development Corporation which will be a state entity to be responsible for promoting mining issues. This should lay out the roles and functions of the MDC, its management structure such as appointment of CEO; the relationship between the MMC and the MDC as well as between the Department of Geological Surveys, the MMC and the MDC. As the promotional and investment arm of mining, the MDC will also negotiate and manage Government equity in mining ventures and be responsible for encouraging local ownership as well as promoting small scale mining investments for local and women empowerment as outlined in the policy guide in section 2 of this brief.
- The drafts person will utilize the provisions in the draft Bill that deal with the roles, powers and functions of the MMB, the Department of Mines, the Office of the Commissioner, and the Director of Mines. These provisions will now be used for establishing the MMC and the MDC taking into account the separation of regulatory and promotional functions as necessary.
- Based on these recommendations all regulatory and enforcement provisions will now be the responsibility of the MMC while promotional ones will be under the MDC.
- The Bill should establish the position of Director of Geological Surveys with the functions as stipulated instead of Department. Legislation generally establishes offices and not departments. In addition officers can be appointed to work with the Director.
- Any director appointed under the Bill would be under the MMC and report to the Commissioner/Director General.
- The current Part III will be a new Part IV. In revising this new Part IV, the drafts person will have to take into account the proposals we have made in the foregoing sections regarding the need to incorporate the general principles, the new institutional arrangement and the need for internal and cross sector coordination. In particular, the pre-conditions for licensing should include free prior informed consent frameworks with signed community agreements as the case may be.
- The current Parts IV - X provide detailed provisions for grant, revocation and expiry of licenses. These Parts will be renumbered and the comments regarding revising the new Part IV in the above bullet will apply to the revision of the new Parts V – XI.
- Need to strengthen community development provisions in separate provisions and not just in mining plans. Local communities need support from CSOs in negotiating and community development agreements.

- Need to make provision for the establishment of a Community Trust Fund to be administered by community leaders and CSO representatives. A percentage of the revenues realized from mining go directly to the communities through the trust fund.
- New Part XII provides for compensation and related dispute resolution. The revision to be done in accordance with the comments above.
- New Part XIII on enforcement to reflect the proposed institutional arrangements
- New Part on fiscal arrangements: the roles and functions of the MMC and the MDC need to be spelt out. Linkage with the Mines Development Fund to be articulated.
- The transitional provisions under new Part XXI to provide for regulations under the Mines and Minerals Act to continue to apply until replaced or otherwise revoked.
- The rest of provisions to be edited to ensure language issues, internal consistency are achieved.

12. Conclusions and Recommendations

This brief has analyzed the draft Mines and Minerals Bill 2015 based on a version dated February 2015. The draft Bill provides for the institutional framework for the governance of the mining sector; the types, process for granting, renewal or revocation of mining licenses; the rights duties and responsibilities of holders of various mining licenses; the issues of access to land subject to mineral claims as well as issues of compensation where there is loss or damage; enforcement of the license conditions and the Act; and the fiscal provisions under the draft Bill.

We have outlined some of the policy guidelines articulated by civil society institutions that can inform the drafting of the finalization of the Mines and Minerals Bill. These can act as benchmarks to determine how the draft Bill has addressed certain key stakeholder issues.

We have noted some anomalies with respect to the proposed institutional framework for mining. In particular, there is a lot of duplication in the roles of the Minister responsible for mining, the proposed Mines and Minerals Board, the Commissioner for Mines and Minerals as well as the Department and Director of Mines. These need to be revised so that either we have two departments with regulatory and development functions or we have one department combining these two functions. We have made recommendations based on the need to reduce conflict of interest between the development advocates and those expecting more regulatory focus.

The provisions dealing with licensing procedure and the conditions for licensees of various types are comprehensive enough. We have however recommended that the mining development plans required for medium and large-scale mining licensees should include many of the socio-economic concerns that have been outlined in the policy guidelines in section 2 of this brief. In particular, the development plans should be developed based on certain formats or guidelines that will incorporate these policy issues. The draft Bills articulate land access provisions very well and the principles of compensation that need to be followed. We have made suggestions to improve these in this brief.

In general there has been considerable improvement in the provisions of the draft Bill. There is need for substantial editing in terms of use of language to accord with the Malawi style of drafting and also ensure internal consistency and coordination, and avoid conflicting mandates.