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Submission to Senate Standing Committee on Land and Natural Resources

Concerning the Mining Bill, 2014 (Bill 8 of 2014) ("the Bill")

Analysis and recommendations of the Mining Bill, 2014 (Bill 8 of 2014) ("the Bill")".

Submitted on 26th February 2015

The Institute for Human Rights and Business (IHRB) is a global centre of excellence and expertise on the relationship between business and internationally recognised human rights standards. We seek to shape policy, advance practice and strengthen accountability. The IHRB-Nairobi Process made this submission on the draft Mining Bill as part of on-going work to review and comment on draft legislation relevant to the operation of the extractive sector in Kenya.

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Introduction

This brief analysis covers the Mining Bill, 2014 (Bill 8 of 2014) ("the Bill[1]"). According to the Constitution of Kenya and the Mining Bill, all minerals are the property of the Republic of Kenya and are vested in the national government in trust for the people of Kenya, despite any right of ownership in relation to the land where the minerals are found (Section 6 of the Bill). The Bill repeals existing legislation relating to mining and establishes a new legal framework for the management of mineral resources in Kenya.

The analysis below aims to enhance the proposed Bill further by making recommendations on key areas that seek to:

- Reinforce requirements on engagement with communities holding community land that may be covered by mineral rights
- Strengthen requirements on respecting community land rights
- Strengthen provisions on transparency and accountability
- Ensure that provisions are in line with administrative procedure requirements

Part I – General Recommendations: Cross-Cutting Concerns

Summary of Recommendations

- Extend the obligation to compensate, inform and consult with landowners and lawful occupiers of land throughout the Bill.
- Ensure consistency throughout the Bill on the scope of land owner.
- Provide clarity on the use of and compensation for other resources.
- Ensure that impact assessments cover social impacts and consider human rights issues.

Extend the obligation to compensate, inform and consult with the landowner and lawful occupier of land throughout the Bill.

The Bill is progressive in recognising that information sharing, regular consultations and compensation to land owners are crucial steps for mining operations. Section 67 on reconnaissance licenses provides for three key obligations:

- First, there is an obligation to inform and consult the local government, traditional authorities and communities on an ongoing basis about any reconnaissance operations that require physical entry onto the land within their jurisdictions.

[1] Government of Kenya, 'Mining Bill' (2014)

- Second, it requires that holders of reconnaissance licenses abstain from entering into any land that is not included in the license.
- Third, it requires that compensation is paid to users of land for damage to their land and property resulting from reconnaissance operations in the licensed area.

These provisions should apply as well for all the other types of licenses (prospecting, retention, and mining licenses) covered in the Bill.

Ensure consistency throughout the Bill on the scope of land owner.

The Bill does not contain a definition of "land owner" or "occupier" or "user" and deals with them inconsistently. The provisions on notification (such as in Sections 37 & 38) refer only to land owners, while section 153(1)(e) provides that compensation is due to "lawful owner, occupier or user of the land." This is a welcome provision as there may often be multiple interests in the land that should be compensated. However lawful occupiers or users should also be entitled to notice about pending mining rights and in addition, it would be useful to identify how lawful owners, occupiers or users are defined.

Provide clarity on the use of and compensation for other resources.

It is only in Section 65 that the Bill is specific about permitting a license holder to use timber and water resources. In this case it is for the purpose of a reconnaissance license. The Bill should include more specific provisions, particularly with respect to mining operations, about the use of, restrictions on the use of and compensation for use of such natural resources that are often crucial to rural community livelihoods.

Ensure that impact assessments cover social impacts as well and consider human rights issues.

The Bill contains inconsistent references to social impact assessments, alongside consistent references to environmental impact assessments. Given mining's well-documented impacts on local communities, it is important that any impact assessments consistently cover social impacts. The Bill contains welcome references to social heritage assessments. In addition, it is becoming increasingly well-recognised, including by leading mining industry associations, that mining can also have significant adverse impacts on human rights.[2] A reference to assessing human rights impacts would also constitute an important addition in the Bill.

[2] See for example, the International Council on Mining and Metals work on human rights: 'Business and Human Rights'

Part II – Preliminary Provisions

Summary of Recommendations

- Define "artisanal mining" to include use of low technology and minimal machinery.
- Ensure the definition of "community" is in line with article 63(1) of the Constitution.

The preliminary section of the Bill defines terms as used in the Bill. It is important to consider how these terms have been defined in other laws and more importantly in the Constitution to avoid contradictory definitions.

Define "artisanal mining" to include use of low technology and minimal machinery.

The current definition of artisanal mining fails to take account of the prevalence of artisanal mining in the country and tends to be too restrictive by defining this type of mining only with respect to traditional and customary operations. Instead, the definition should be expanded to better reflect reality by including within the definition mining that is informal in nature, use of low technology and machinery in the definition. The subsequent provisions on artisanal mining will then better capture the existing reality, bringing this important segment of the mining sector within the purview of the Bill.

Ensure the definition of "community" is in line with article 63(1) of the Constitution.

Several proposed laws have adopted conflicting and varying definitions of the term "community" which will create confusion when they are implemented. It is thus important to include within the Bill a definition of community consistent with the definition in article 63(1) of the Constitution.[3]

Part III – Ownership of Minerals

Summary of Recommendations

- Ensure issuance of a written acknowledgement upon reporting discovery of minerals.

Part III of the Bill regulates the issuance of mineral rights. Presumably, this is to ensure that the Mining Ministry documents the location of the minerals and formally grants the

[3] Constitution of Kenya, Article 63 (1): "Community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest."

mineral right, having established the existence and the ownership of the land. Issuing a written acknowledgement of the reported minerals would enhance the intent of this provision.

Ensure issuance of a written acknowledgement upon reporting discovery of minerals.

Section 9(1) provides that a person who discovers any minerals for which there is no apparent holder of a mineral right or on any area of land which is not held by that person under a mineral right that confers rights on the holder to conduct prospecting or mining operations, shall report the discovery to the Cabinet Secretary. However, this section does not provide for acknowledgement in writing of the reported discovery. A written acknowledgment will ensure protection of the first right of refusal provided under-subsection 9(2). Adding such a provision would also reduce the possibility of corruption. It is therefore important that the Cabinet Secretary issues a written acknowledgement of the report.

Part IV – Administration

Summary of Recommendations

- Ensure all established new officers are bound by the principles of finance, environment and integrity.
- Allow non-mining activities in the area of large scale mining operations.
- Ensure that a lawful occupier or owner can seek remedy against the Director of Mines from the Cabinet Secretary or by any other lawful means.

Part IV provides for the administration of the Bill and establishes the general powers of the Cabinet Secretary including appointment and function of other offices and officers including the Director of Mines and Geology. The various sections falling under Part IV can be enhanced to improve efficiency of the Ministry's management of minerals.

Ensure all established officers are bound by the principles of finance, environment and integrity.

Section 12(2) provides that in administration of the Act the Cabinet Secretary shall respect and uphold the principles and values enshrined in Article 201 (c) and (d) and Article 69(1) (a) and (h) of the Constitution. Considering that the Bill creates numerous other offices and officers who will report to the CS, to achieve greater accountability of these officers, it is essential to ensure that they are all also bound by the provisions under Chapter 6 of the Constitution on public finance, environment and integrity.

Allow non-mining activities in the area of large-scale mining operations.

Section 13 (3) protects an owner or a lawful occupier of land when a small-scale mining permit has been granted over their land, allowing the lawful occupier to undertake non-mining activities in the area covered by the permit. However, the same provision does

not apply to large-scale operations (Section 60 onwards). To enable owners or lawful occupiers to sustain their livelihoods, the Bill should permit them to conduct non-mining activities both in areas of large-scale as well as small-scale mining operations where such activities do not interfere with on-going operations.

Ensure that a lawful occupier or owner can seek remedy against the Director of Mines from the Cabinet Secretary or by any other lawful means.

Sub-section 20(4) provides that in exercising the powers under subsections (2) and (3), the Director or a duly authorized officer shall ensure that as little damage or inconvenience as possible is caused to the legitimate owner or lawful occupier of the land. This section fails to provide redress mechanisms for instances where damages or inconveniences occur. It is important to ensure that there are effective and expeditious processes for claiming for damages. There is need to establish a redress mechanism through which the lawful owner or occupier can seek remedy against license holder directly or the Director of Mines. This should also apply to section 21 on the functions of the Director of Geology.

Part V - Mining Institutions and Bodies

Summary of Recommendations

- Consider the viability of establishing the National Mining Corporation.
- Establish a more proactive access to information process, in addition to providing for access to information on request.

Part V establishes institutions and bodies dealing with investments and determination of matters relating to mineral rights. It establishes the mining corporation, its board and provides for the appointment of an ad hoc mining tribunal to hear and determine mineral rights matters. Creation of these institutions and bodies may need to be reconsidered based on their financial implications.

Consider the viability of establishing the National Mining Corporation at this point.

Section 22(1) establishes the National Mining Corporation. The corporation shall be the investment arm of the government in relation to minerals. The government is currently cutting down the number of state corporations, mostly due to the financial implications of running these corporations. This casts doubt on the viability of establishing the National Mining Corporation at a time when the government is cutting similar institutions elsewhere and considering the mining sector's contribution to the GDP is a mere 1%. It might be more reasonable to establish the corporation at a later point, once a more significant percentage of the GDP is attributable to the mining industry or when strategic minerals contribute more significantly towards livelihoods in the country.

Establish a more proactive access to information process, in addition to providing for access to information on request.

Section 29(b) provides that the Cabinet Secretary shall ensure that geoscience information is made available to the public on request. This is an important first step. However, as Article 35 of the Constitution provides guarantees of access to information, a more proactive approach to information about natural resources assets that belong to the Kenyan people would be a better approach to implementing this guarantee. The Ministry should therefore not only share information upon request by the public, but take the first initiative to make information publicly available on its website at a minimum.

Part VI - General Provisions on Mineral Rights

Summary of Recommendations

- Convey written feedback on the status of applications to the Mineral Rights Board.
- Ensure inclusion of the Mineral Rights Board where an applicant seeks review or appeals a decision by the Cabinet Secretary.
- Establish an extensive consultative engagement process with the landowner, lawful occupier or community during applications for mineral rights.
- Allow consent by county governments for unregistered community land until a law regulating community land is in place.
- Ensure that the Cabinet Secretary is guided by Part VII of the Land Act 6 of 2012 on compulsory acquisition of land and undertakes an economic benefit analysis to determine national interest.
- Ensure tendering of mineral rights is subject to guidelines developed in consultation with the Treasury and the public procurement regulations.
- Ensure community consultation/engagement forms part of conditions attaching to mineral rights.
- Establish parameters and definition of what constitutes wasteful mining or treatment practices.

Part VI outlines different categories of mineral rights, for both large-scale and small-scale operations and regulates consented and compulsory acquisition. Ensuring clear and consultative processes can enhance the sub-sections under this Section.

Convey written feedback on the status of applications to the Mineral Rights Board.

Sub-section 33(3) provides that the Cabinet Secretary shall notify the Mineral Rights Board of its decision to approve or reject an application before notifying the applicant. Article 47 of the Constitution establishes the right to fair administrative action and requests written reasons for actions by public bodies. In line with this provision, the reasons by the Cabinet Secretary should be conveyed in writing to the Mineral Rights Board and the applicant.

Ensure inclusion of the Mineral Rights Board where an applicant seeks review or appeals a decision by the Cabinet Secretary.

Subsections 33(7)-(9) provide that in case the Cabinet Secretary rejects an application for a mineral right, applicants may apply to the Cabinet Secretary for review and get determination within thirty days. Moreover, the applicant may appeal the decision by the Cabinet Secretary if still aggrieved. It is important to consider that the basic tenets of administrative law bar a public officer from serving as the authority determining the fate of an appeal to a decision made by him- or herself. Subsections 33(7)-(9) seem to allow for a self-review of the Cabinet Secretary's decision. This situation may be resolved by including the Mineral Rights Board into the review and appeal process. Subsection 37(9) provides for a final appeal to the High Court, which is appropriate but a quicker, appropriate administrative appeal process would be welcomed.

Establish a consultative engagement process with the landowner, lawful occupier or community during applications for mineral rights.

Section 34 obliges the Cabinet Secretary to give written notice of the pending application for a mineral right to the land owner or lawful occupier of the land where the mineral is located (Subsection 1). Subsection (3) builds on the notice under Subsection (1) giving the details that should go into the notice and the period within which concerns and objections can be raised for the mining license (42 days), prospecting and reconnaissance (21 days). Proactive community engagement by the local government and the applicant upon notice of the application is critical to ensure that communities understand the implications and benefits of granting a mineral right to the applicant. This enables communities to give consent from an informed position. Subsection 34 (3) fails to require engagement or consultation with the lawful occupier or the community. It is important to ensure that the applicants and the Cabinet Secretary initiate a consultative engagement process with the potentially affected communities to ensure they are aware of the application and their input sought. Such process should include women, youth, people with disabilities and marginalised groups before granting a mineral right.

Include further provisions on the acceptance or rejection of objections to mining rights.

Section 34(5) provides that the Cabinet Secretary shall hear and determine any objections to mineral rights through the Minerals Rights Board without providing any more clarity on the procedures or the substantive reasons as to why objections will be confirmed or rejected. Later provisions in the Act (Sections 37 and 38) require that the land-owners consent is evidenced through a formal agreement for use of the land for mining. This is one clear leverage point for communities but that process involves negotiations and solely between communities and the applicant about the use of land. It is important that there are additional avenues open for communities to address their concerns directly with public authorities, as there may be on a wider range of concerns in addition to negotiating compensation. This should be linked to the more pro-active consultation process raised above.

Clarify that consent from communities is required to grant prospecting and mining rights over community land.

Section 38(1) requires consent from only two bodies – those named in (a) and (b) but that does not include communities themselves. Communities are only covered in 38(2) and it is unclear whether their consent by way of agreement is expressed via the administrative agency in 38(1)(a) or is considered on its own. As community consent is a likely point of contention, it would be clearer to add communities with ownership over the land to Section 38(1), making them 38(1)(c). The Bill does not specify that communities may decide not to consent to mining prospecting or operations on their lands; this is the implication of the requirement of consent but it should be spelled out clearly in the Bill as this is an area of likely contention. The Bill should also be clear that consent or a decision not to consent is subject to limited exceptions set out in the Bill (see below).

Allow consent by county governments for unregistered community land until a law regulating community land is in place.

Section 38 deals with mineral rights on community land. It addresses the conditions for which prospecting or mining rights shall be granted to the applicant. An applicant shall not be granted such mining rights without consent from the 'authority obligated by law relating to administration and management of community land.' This administrative body does not yet exist. It is thus important to consider including transitional provisions until the Community Land Bill passes into law. To avoid creating a vacuum it is important to consider the role of county governments in giving consent where they exercise control over unregistered community land held in trust for communities as provided in Article 63(3) of the Constitution.

Do not allow an override of a community decision except though compulsory acquisition procedures in the national interest.

Section 40(1)(a) gives the Cabinet Secretary power for the compulsory acquisition of land for prospecting and mining in cases where consent is "unreasonably withheld." This provision is problematic for a number of reasons. It is too vague to form an appropriate standard of depriving communities of their Constitutional guarantees to their land under Article 63. The Bill should include or refer to appropriate procedural guarantees for such an important decision making process. In addition, "unreasonable" is not an appropriate standard – it invites subjective decision making without safeguards. This provision should be eliminated and instead replaced solely with the option to override community rights in the case of a national interest, decided in accordance with both procedural and substantive safeguards (see below).

Ensure the Cabinet Secretary is guided by Part VII of the Land Act 6 of 2012 on compulsory acquisition of land and weighs the costs and benefits, including to individuals and communities affected to determine national interest.

Section 40(1)(b) gives the Cabinet Secretary power for the compulsory acquisition of land where it "considers that withholding of consent is contrary to the national

interest". Determining national interest should be a comprehensive and objective process free from any form of politicization. In making this decision, the Cabinet Secretary should also be guided by Part VII of the Land Act 6 of 2012 on the compulsory acquisition of land in addition to Article 40 of the Constitution. To determine national interest, it will be prudent to undertake an economic benefit analysis. This will help prevent instances where benefits to individual persons or companies are masked as national interests.

In addition, it will be important to weigh Constitutional guarantees to individual or communal interests as well as national interest especially on sustainable exploitation of natural resources as provided for under Article 69 of the Constitution to ensure they are appropriately balanced in the analysis. Too often, decisions on compulsory acquisition are made on a presumptive basis that any and all kinds of investment benefits the nation without a finding of a particular national interest. Instead, international human rights standards on the right to housing and the prevention of forced eviction remind governments of the need to demonstrate necessity and proportionality before overriding rights, weighing factors in each circumstance. There are a series of procedural and substantive safeguards that should be put in place to ensure that people are not forcibly evicted (i.e. evicted without protection of their rights).[4] Even if compulsory acquisition is carried out in accordance with Constitutional protections, if resettlement is offered as an alternative, that resettlement is also carried out in accordance with the right to housing so that people are at a minimum, not made worse off. Resettlement operations around mining remain very challenging and lessons learned from other countries should be built int relevant laws and regulations providing detailed standards and protections during resettlement.[5]

Ensure tendering of mineral rights is subject to guidelines developed in consultation with the Treasury and the public procurement regulations.

Section 41(2) establishes that the Cabinet Secretary 'shall make Regulations to provide for tendering guidelines which recognize the uniqueness of procurement and tendering process of minerals.' This should be done in consultation with the National Treasury and be subject to the law on public procurement. It is important to recognise that tendering for mineral rights do not warrant developing regulations specific to minerals. Instead, it is imperative to develop guidelines that are in line with the current law on procurement and the safeguards built into that law.

Ensure community consultation/engagement forms part of conditions attaching to mineral rights.

Section 42(1) outlines conditions which must be met before a mineral right is granted. Community engagement/consultation is central in helping a community develop a good

[4] UN OHCHR, "Basic Principles And Guidelines On Development-Based Evictions And Displacement."
[5] IFC, 'International Finance Corporation Performance Standard 5'; ICMM, 'Land Acquisition and Resettlement – Lessons Learned' (2015) and Owen, J.R. & Kemp, D., Journal of Cleaner Production'Mining-induced displacement and resettlement: a critical appraisal' (2014).

understanding of the intended operations and the associated benefits as a basis for informed consent. Community consultation may help the applicant to understand the community in the area of prospective operations and to consider potential concerns to prevent avoidable challenges after a mineral right has been granted. The section fails to recognise community consultation as a condition to granting a mineral right. It is therefore imperative that community consultation be included as condition before a mineral right is granted to an applicant.

Establish parameters and define wasteful mining or treatment practices.

Section 43(1) requires mineral right holders not to engage in wasteful mining or treatment practices. To give maximum effect to this provision wasteful mining and treatment practices need to be defined clearly. Further, parameters to measure prohibited practices can be helpful to increase understanding. Otherwise, the interpretation of this provision is bound to be subjective and to incite disagreement between operators, the government and local communities.

Part VII – Mineral Agreements

Summary of Recommendations

- Include small-scale mining permit holders in those that should develop a Community Development Agreement.
- Ensure that the mining right holder disposes of obsolete assets at own cost.

Part VII covers mineral agreements with large-scale operators and small-scale operations. It includes important provisions on transparency as well.

Ensure that the revenue transparency provisions include disclosure around all types of revenue received by the government and that the subsequent lessons learned build on international standards.

The Bill currently provides for transparency around revenue paid to the government by mineral rights holders. This is an important first step. However, the Bill should also provide for disclosure of reported revenue the government has received to permit a reconciliation of amounts reported paid with amounts reported received. This is a crucial step in ensuring transparency throughout the entire revenue value chain, in limiting corruption and making the benefits of mining production more transparent to the Kenyan citizenry. The subsequent regulations should reflect international standards on transparency to ensure they capture all types of revenue streams relevant to mining including production entitlements, profits taxes, royalties, dividends, etc.[6] Linking

[6] See EITI, 'Extractive Industries Transparency Initiative Standard' Section 4.1 (February 2016).

disclosure on Kenya's natural resource transactions to its membership and actions under the Open Government Partnership would be an important step as would a decision by Kenya to join the Extractive Industries Transparency Initiative.

Include small-scale mining permit holders in those that should develop a Community Development Agreement.

Small-scale mining also has the potential to cause harm. It is thus important that small-scale mining permit holders commit to the do no harm principle and where applicable commit to develop Community Development Agreements with local communities (CDA). The definition of CDA should therefore include small-scale permit holders.

Ensure that the mining right holder disposes of obsolete assets at own cost.

Section 149 (4) provides for the disposal of movable assets by the mineral right holder. Those assets that are fully depreciated for tax purposes 'vest in the county government without charge on the effective date of such termination.' Regarding any property that is not fully depreciated for tax purposes, the county government or the Republic 'has the right of first refusal for the sale of such assets from the effective date of termination at the depreciated cost.' This provision creates a risk that depreciated assets are dumped with the government or county government which might not have the capacity to handle such assets. It is important to have the mineral right holder dispose of depreciated assets at their own cost if the county government does not want to reclaim the assets.

Part VIII – Surface Rights Compensation and Disputes

Summary of Recommendations

- Provide further guidance on pay "prompt, adequate and fair compensation".

Provide further guidance on pay "prompt, adequate and fair compensation" to the lawful owner, occupier or user of the land.

The Bill sets out the appropriate parameters for compensation but each of these terms can be subject to very broad interpretation. Current experiences in Kenya already demonstrate that this is unsurprisingly a topic on which communities and companies often differ widely. While the Mining Ministry may not be the most appropriate Ministry to develop such guidance, there is a clear need for further guidance on the principles and procedures the define these terms to ensure that there are safeguards to protect individuals and communities who may have little experience in negotiating from exploitation. The Bill recognizes that monetary compensation should not be the only alternative offered to communities (Section 153 – see comments above on resettlement).

Part IX - Financial Provisions

Summary of Recommendations

- Ensure that the avoidance or evasion of tax liability for mineral rights holders shall be considered as "bad faith" action for purposes of this Act.

Ensure that the avoidance or evasion of tax liability shall be considered as "bad faith" action for purposes of this Act.

Section 190 provides for the application of the Income Tax (transfer pricing) rules, 2006 to transactions under this Act. It is important to consider transactions undertaken for the sole purpose of avoiding or evading mineral rights holders' tax liability as "bad faith" action for purposes of this Act. The Cabinet Secretary in concert with the Treasury and the body responsible for revenue collection shall determine what actions amount to bad faith transactions.

Part X – Monitoring, Compliance and Enforcement

Summary of Recommendations

- Ensure that communities and those who are representing them cannot be prosecuted for raising concerns about mining operations.

Ensure that communities and those who are representing them cannot be prosecuted for raising concerns about mining operations.

Section 204 provides that a person "who obstructs or hinders the holder of a mineral right, or an agent or employee of the holder, from doing an act which is authorised under this Act or under the terms of the mineral right commits an offence and liable on conviction" for a fine or imprisonment. While these provisions may be necessary to prevent specific obstruction or sabotage, there should be a specific exemption for communities and their representatives who are exercising their rights to freedom of expression or association or assembly in addressing concerns about mining operations. There has been a noted increase in the prosecution of human rights defenders, particularly around extractive operations in various parts of the world. More specific exclusion of these kinds of peaceful activities from the scope of the criminal liability created under the Bill provides important protections.

Cross-Cutting – Positive Provisions of the Existing Bill

The Bill includes numerous improvements compared to the draft bill dated 17 March 2014. The following provisions are particularly welcome:

- The savings clause for customary usage of certain resources such as clay (Section 7)
- The more proactive approach to notifying land owners or lawful occupiers of the pending grant of a mineral right (Section 34) though this could still be improved further (see above)
- Provisions on community investment and community development agreements (Section 47 et. seq.)
- Provisions on promoting local employment and local procurement, especially where these can be backed up training and collaboration to develop the necessary skills and entrepreneurship
- Improvements on the provisions on transparency, including and in particular on the disclosure of mining agreements via the Ministry's website (Section 117-121) though further detail is needed on revenue transparency
- The differentiated provisions on small-scale and artisanal mining as these are often overlooked in mining laws; however these should be backed up by capacity building and support to these mining communities to ensure that they can meet basic environmental, health and safety requirements (Section 90 and 123 et seq.)
- The prohibition on commencing mining of minerals unless the lawful occupier, owner or user of land is compensated and provisions for a compensation bond (Section 153)
- A chapter on health, safety and environment, the provisions that make clear that license holders are not exempt from the application of other laws or liabilities thereunder and provisions for environmental performance bonds (Part XI)
- Requirements for insurance, particularly covering employees (Section 217).