



Columbia Center on Sustainable Investment

A JOINT CENTER OF COLUMBIA LAW SCHOOL
AND THE EARTH INSTITUTE, COLUMBIA UNIVERSITY

Comments on Uganda's Mining Act and Regulations

Scope of the review

At the request of Global Witness, the Columbia Center on Sustainable Investment (CCSI) undertook a review of Uganda's 2003 Mining Act (the **Act**) and the Mining Regulations 2004 (SI 2004 No. 71) (the **Regulations**) currently being revised in Uganda.

CCSI reviewed this mining legislation with the view to address specific questions highlighted by Global Witness in relation to:

- Oversight and governance mechanisms in relation to the discretionary powers of the Minister; Commissioner and/or other public officers;
- Environmental provisions to minimize pollution and environmentally-unfriendly mining practices;
- Community consultation requirements;
- Mechanisms to limit smuggling and the underreporting of minerals; and
- The fiscal regime.

Note that the review of the foregoing issues is strictly limited to the contents of the Act and the Regulations. CCSI did not review any additional legislation currently in force in Uganda, nor did it consider the quality of the institutions enforcing the legislation in its responses.

Overarching comments

Uganda's mining Act and Regulations present concerns mainly related to:

- The absence of a consultation requirement with communities either prior to or during a mining investment;
- The discretionary powers of the Commissioner;
- The lack of clearly defined institutional roles of the Commissioner and Inspector of Mines, as well as the relationship between them and between the Commissioner and the Executive Director of NEMA;

- The absence of a requirement for independent verification or certification of environmental and auditing reporting requirements; and
- Weak penalties for non-compliance with the provisions of the Act and Regulations.

Methodology

Each issue is presented as follows:

- The key points section summarizes the main issues identified in relation to the scope of the review.
- Useful tools and resources are included after the key points.
- A brief summation of the contents of the relevant provisions is then provided, with critical comments emphasized in italics and best practices underlined.
- Annex 1 sets out a more comprehensive list of useful resources.

Issues

1. The governance mechanisms (over discretion of the Commissioner, Inspector of Mines, Mister, and other public officers)

Key points

- The duty and roles of the Minister, Commissioner, and Inspector of Mines are not clearly defined in the Act.
- There is no provision for the independent oversight of the Commissioner, Inspector of Mines, or other public officers in the exercise of their duties under the Act and Regulations, although there may be additional provisions under other legislation applicable to public officers in Uganda.
- There are no clear limits to the discretion that may be exercised by the Minister and the Commissioner.
- The Commissioner is empowered to take a number of key decisions, including in relation to the granting of licenses (see, for example, section 43(3) of the Act) and certain environmental issues, without needing to consult the Cabinet, other relevant agencies, or an independent commission.
- No clarification is provided as to the separate roles and functions of the Inspector of Mines and the Commissioner in relation to inspections. Similarly, the relationship between the Commissioner and the Executive Director of NEMA is unclear.
- There is only limited provision for the review of the decisions of the Commissioner.

Tools & Resources

Examples of legislation limiting the discretionary power of the commissioner or Minister in the regulation of the mining sector by establishing multi-disciplinary commission or advisory board

- **Ghana:**

- Minerals Commission Act, 1993:
<http://www.epa.gov.gh/ghanalex/acts/Acts/MINERALS%20COMMISSION%20ACT,1993.pdf>
- Minerals Act of 2006: See in particular, sections 100 and 102:
<http://faolex.fao.org/docs/pdf/gha85046.pdf>
- **Sierra Leone:** Mining Act of Sierra Leone 2009, Articles 10-20: <http://www.sierra-leone.org/Laws/2009-12.pdf>
- **Namibia:** Minerals (Prospecting and Mining) Act 1992 - See in particular sections 4-5 on the appointment and powers of the Commissioner, and sections 9-15 on the appointment, role, and functions of the independent board: www.mme.gov.na/pdf/minerals_act_1992.pdf

Legislative provisions - Overview of the role, powers, and oversight of the Commissioner, Inspector of Mines, and Minister

a. Appointment

- There are no provisions setting out the qualifications a Commissioner is required to have for his post, or providing for a vetting process for the appointment of the Commissioner. The Act just defines “Commissioner” as “the Commissioner for the Geological Survey and Mines Department,” who is appointed by the President pursuant to section 13 of the Act.
- There is also no mention of how the Inspector of Mines is appointed, though it is presumably also the President who does so.

b. Powers

- **Powers of the Commissioner:** There is no comprehensive provision that sets out all the powers and duties of the Commissioner. Rather, these are found in a number of provisions scattered throughout the Act. Under the Act, the powers of the Commissioner include, but are not limited to:
 - The power of inspection and information gathering under sections 14, 64, and 107 of the Act;
 - The grant, transfer, renewal, and cancellation of licenses, mining leases and export/import permits under sections 6(4), 10, 20, 27, 36(1), 43(4) 57, 59, 70, 73, 74, 116, and 117 of the Act;
 - The suspension of a licence or mining lease on the grounds of wasteful mining and treatment practices that are not remedied;
 - The power to inquire into and decide any disputes between persons engaged in small-scale mining operations – either months themselves or between themselves and third parties under section 61;
 - The power to record mineral rights in the register under section 93(1) of the Act;
 - The collection of annual mineral rents under section 106;
 - The power to request changes to the environmental plan under section 109(1), to accept an environmental restoration plan under section 110(3), to require the last holder of an exploration licence or mining lease to restore land to its original condition

- under section 111(1), and to require an exploration licence or mining lease holder to provide an environmental performance bond; and
- The power to make new regulations for the conservation and development of mines and minerals under section 121 of the Act.
- **Commissioner's powers of inspection and information gathering:**
- The Commissioner has a wide set of powers of entry onto any land, prospecting area, exploration area, mining area, mine, factory, or premises where minerals are kept or processed for the purpose of carrying out inspections, gathering information, or generally checking compliance with the Act as set out in section 14. These powers are not subject to any restrictions other than that the entry be at a reasonable time and that the Commissioner and others' authorized to enter must ensure that as little damage and inconvenience as possible is caused to the owner or lawful occupier of the land. For examples of some of the types of additional restrictions that could be included, see section 5(2)-(3) of Namibia's Minerals (Mining and Prospecting) Act.
 - Sections 64-66 of the Act confer additional powers on the Commissioner and other public officers to inspect mining operations. *The exercise of such powers is again not subject to any restrictions other than that the inspections be carried out at a reasonable time.* However, no Commissioner or other public officer or person authorized to carry out the inspections may exempt any person from (1) complying with a notice to remedy dangerous or defective machinery or conditions at a mine site, or (2) any liability to any damages, penalty, or forfeiture for not going so (section 67 of the Act).
- **Commissioner's power to delegate inspection rights:**
- To exercise the powers set out in section 14, the Commissioner may delegate or assign any of the powers to any other public officer appointed by the President (under section 13(1) of the Act), although the Commissioner retains the right to exercise any of the powers so delegated or assigned.
 - The Inspector of Mines has the same powers set out in section 14 as the Commissioner, but it is unclear whether these inspection powers have been delegated to the Inspector of Mines, or equally granted to him. *In this regard, the Act contains no provisions delineating the functions of the Inspector of Mines, or his or her relationship to the Commissioner. It is therefore unclear how these powers are to be exercised as between the Inspector of Mines and the Commissioner. By comparison, see for example, section 102 of the Ghana Minerals Act 2006, which provides for a Minerals Commission, of which the Inspectorate is a subdivision, is clearly authorized to exercise powers similar to those set out in section 14 of the Act.*
 - *The Commissioner can override the decisions of any other public officer exercising a power attributed to a Commissioner under section 14. However, it is unclear whether the Commissioner is ultimately responsible/ accountable for any powers, duties, or functions delegated or assigned (section 13(2) of the Act).*
- Two express powers are conferred on the Minister under the Act (1) the power to exclude or modify the provisions of the Act as they apply to the granting of a location licence (section 54)

and (2) the power to waive, in whole or in part, the payment of royalties (section 99). The exercise of both powers is subject to cabinet approval.

- **Liability:**

- o The Minister, Commissioner, and other public officers appointed to exercise any functions under the Act are not liable for any actions carried out or omitted to be taken in the exercise or performance of their functions, so long as they have acted in good faith (section 16 of the Act). *No mention is made of what the sanction would be if such public officer is found not to have acted in good faith.*

c. **Conflict of interests**

- Public officers are prohibited from acquiring any direct or indirect interest in any mineral right, or any share in a company carrying out any prospecting, exploration, or mining operations in Uganda (section 17 of the Act).
- *However, the penalty for such a conflict of interest is minimal. Any contravention of section 17 by a public officer may merely result in a fine of up to 100 currency points and/or imprisonment for up to one year, as well as a court order for the forfeiture and disposal of the public officer's interest and/or shares as the Commissioner sees fit.*

d. **Administrative review of decisions**

- The only recourse for a person aggrieved by a decision of the Commissioner is to request in writing an administrative review of the decision by the Minister (section 118 of the Act). However, it is then in the Minister's discretion to confirm, set aside, or vary the decision complained of. *It is unclear whether this right of administrative review also applies to the acts or omissions of the Inspector of Mines or other public officers authorized to exercise any functions under the Act.*
- If the Minister refuses or fails to review a decision of the Commissioner, or otherwise aggrieves a person by his or her act or omission, the aggrieved party has a right to apply to the Ugandan High Court for judicial review within 45 days of such rejection, act, or omission (section 119 of the Act).
- Ideally there would be more oversight of the Commissioner's decisions before they are taken – particularly in relation to the grant or renewal of licences and mining leases, as well as the determination of environmental decisions.

e. **Promulgation of Regulations**

- The Minister is empowered to make any regulations for the conservation and development of mines and minerals (section 121). *In so doing, the Minister is not constrained to outline criteria which could constrain the Minister's, the Commissioner's or any other public officer's discretion to decide. By contrast, see for example, section 110 of the Ghana Minerals Act which states that the Minister may promulgate regulations which provide "in circumstances where the Minister is exercising a discretionary power under [the Ghana Minerals] Act, specific criteria which, if satisfied by the holder or other person bringing an application before the Minister, obliges the Minister to approve the application."*

- f. The absence of an independent body or mining commission to monitor and oversee the implementation of the Act, including the exercise of powers of the Minister, Commissioner, and other public officers
- Most of the powers of the Commissioner may be carried out at the Commissioner's discretion. It is only in certain cases in relation to the environment, that the Commissioner is required to consult another body (for example, see sections 64-65 of the Regulations).
 - The establishment of a national mining commission could serve as additional protection against arbitrary or corrupt decision-making in the exercise of the Commissioner's and other public officers' powers, including the award, renewal, transfer, and cancellation of mining contracts.
 - Such a board or commission could be composed of representative of various key government ministries, as well as unions and civil society as is provided for under the 2011 Mining Code of Guinea.¹ Also see sections 9-15 on the appointment, role, and functions of the independent board in Namibia's Minerals (Mining and Prospecting) Act and Ghana's Mineral Commission Act.
 - The Commissioner would then be required to act in consultation with the board or commission when exercising its powers.
 - The board or commission could additionally be required to review key decisions made by the Commissioner and could even be required to issue opinions on whether certain key decisions meet legal requirements and promote the interests of the country.

2. Environmental regulation to deter pollution/negligent environmental practices

Key points

- There are some environmental provisions in the Act and Regulations, with limited approval requirements and no independent audit requirements. *It is not always clear how these requirements interact with the requirements of relevant environmental legislation. This is particularly so when it comes to the review or approval by the Commissioner of environmental plans and reports, where it is not clear what role National Environment Management Authority (NEMA) is required to play.*
- While an environmental management plan (EMP) is required, the Act and Regulations are silent about the enforcement or monitoring of the environmental management plan.
- Environmental audits are not required to be independently verified or certified by a third party expert.
- The Commissioner may, but is not required to take action to require a mining lease holder to restore a mining site post-mine closure.
- Penalties for non-compliance with environmental requirements are generally weak.

Useful tools and resources

- **EIA law matrix** - A website that enables users to easily access EIA laws and regulations, to view summaries of the EIA system for selected countries, and to make comparisons among all of the laws included in the database: <http://www.elaw.org/elm>.

¹ Natural Resource Governance Institute, "Guinea's New Mining Code Heralds Good Governance," available at: <http://www.resourcegovernance.org/news/guineas-new-mining-code-heralds-good-governance>.

- **Guidebook for evaluating mining project EIAs** - The guidebook aims to help governments, public interest lawyers, grassroots advocates, and community members understand mining EIAs, identify flaws in mining project plans, and explore ways that mining companies can reduce the public health hazards associated with mining: <https://www.elaw.org/mining-eia-guidebook>.
- **Initiative for Responsible Mining** - IRMA Standard for Responsible Mining (Draft 1.0), Chapter 5.1 Environmental and Social Impact Assessment (ESIA), available at: http://www.responsiblemining.net/irma-standard/draft_07-2014/chapter-5.1-environmental-and-social-impact-assessment-esia/.
- **International Finance Corporation (IFC) performance standards on environmental and social sustainability**: IFC Performance Standard 1- Assessment and management of environmental and social risks and impacts, available at: http://www.ifc.org/wps/wcm/connect/c8f524004a73daeca09afdf998895a12/IFC_Performance_Standards.pdf?MOD=AJPERES.

Legislative provisions

- a. Environmental requirements to be satisfied to obtain a mining licence
 - *The environmental requirements for obtaining licenses pursuant to the Act are not clearly set out.*
 - o To obtain an exploration licence, there appear to be no environmental (or social) requirements. However, an environmental impact assessment (EIA) and certificate of approval from NEMA are required to commence operations (section 108 of the Act).
 - o The environmental requirements for obtaining a mining lease are also vague in the Act. The Act just states that a mining lease cannot be granted unless the Commissioner is *satisfied* that the proposed mining programme takes into proper account of “environmental impact assessment, environmental impact research, environmental statement and safety factors” (section 43(3)(b) of the Act).
 - o However, the form (VI) application for a mining licence set out in schedule 1 of the Regulations requires a certificate of approval of an EIA by NEMA to be appended to the licence application.
 - Any exploration licence and mining lease must contain a condition that the licence or lease holder will take all steps to prevent or minimise pollution of the environment in accordance with the standards and guidelines set out in the National Environment Statute 1995 (section 109 of the Act).
 - This condition is included in forms XIX (form of exploration licence) and XXII (mining licence) set out in schedule 1 to the Regulation.
 - *However, a licence or lease holder can obtain a separate pollution licence to exceed the specified standards and guidelines set out in the National Environment Statute. The Act is silent as to how such a pollution licence is obtained, though Part VIII of the National Environment Statute 1995 provides that approval from technical environmental committee is required.*

b. Requirements for an Environmental Impact Assessment and an Environmental Management Plan

Environmental impact assessments (EIA)

- Exploration licence and mining lease holders must carry out an EIA in accordance with the National Environment Statute 1995 before commencing operations (section 108 of the Act). In addition, the Commissioner *may, but is not required to* subsequently request further EIAs to be carried out, which will then be reviewed by NEMA (section 68 of the Regulations). *NEMA does not seem to have the right to request further EIAs.*
- The requirements for what should be included in the EIA are set out in section 68(2) of the Regulations and include “the impacts of the activities in magnitude, extent, duration and persistence of the effects on the environment.” There is also a reference to environmental impact assessment guidelines for the mineral sector developed by NEMA.
- At a minimum, any EIA should identify and assess all potentially significant social and environmental impacts of a mining project and include the assessment of:
 - o “impacts during all stages of the project lifecycle, from pre-construction through post closure;
 - o direct, indirect, induced and cumulative impacts;
 - o other short- and long-duration impacts within the project’s zone(s) of influence; and
 - o potential impacts of extreme events.”²
- EIA’s should also be required to be updated periodically.
- *Finally, note that under the Act and Regulations there is no requirement for affected community members or other stakeholders to be consulted during the EIA process.*

Environmental management plans (EMP)

- Exploration licence holders and mining lease holders must submit an environmental management plan (EMP) to the Commissioner and the Executive Director of NEMA (section 109 of the Act). *It is unclear whether there is any requirement for either the Commissioner or the Executive Director to approve the EMP, although either person can request revisions to it.*
- Exploration licence holders must additionally prepare an environmental project brief before the commencement of work for approval by the Commissioner in consultation with NEMA (section 64-65 of the Regulations). The project brief must identify the environmental impacts of the exploration activities as well as mitigation measures. *Prior to approving the project brief, the Commissioner may, but is not required to, require the exploration licence holder to carry out an EIA.*

² IRMA Standard for Responsible Mining (Draft 1.0), Chapter 5.1 Environmental and Social Impact Assessment (ESIA), available at: http://www.responsiblemining.net/irma-standard/draft_07-2014/chapter-5.1-environmental-and-social-impact-assessment-esia/.

c. Environmental monitoring and auditing requirements

Annual environmental audits

- Annual environmental audits are required to be carried out by exploration licence and mine lease holders. Records of the audits must be kept, including details of how far the operations conform to the EIA (section 108 of the Act).
- *The audits are not required to be independently verified or certified.*
- It is also unclear how the content of the audits differs from the environmental monitoring plan (see below).

Environmental monitoring plan

- An environmental monitoring plan is also required to be developed by each exploration licence and mining lease holder. It must include:
 - o A methodology for monitoring compliance with the EIA;
 - o Key indicators of environmental impact; and
 - o A schedule for monitoring each indicator (section 67 of the Regulations).
- *The Regulations are silent as to whether the environmental monitoring plan is required to be approved, and if so, by whom.*
- *There is also no independent auditing requirement to verify or certify compliance with the plan -* Exploration licence and mining lease holders are instead required to *self-report* on the findings of the activities under the environmental monitoring plan on a quarterly basis to the Commissioner and the Executive Director of the NEMA.
- Where the reports show that the impacts are worse than anticipated in the EIA, the Commissioner, after consultation with the Executive Director, may advise the licence or lease holder to remedy the negative impacts, including by carrying out a further EIA.
- *The only penalty for failing to comply with such advice is that the Commissioner will publicize the facts, contents and recommendations given to the exploration licence or mining lease holder in the national media.*

d. Water

- A water permit is required to be obtained for the use of water on a mining site (section 87(2) of the Act). Details regarding the right to use water are set out in Part II of the Water Statute 1995 (Statute No. 9 of 1995). *We have not reviewed the Water Statute.*
- Water may not be obstructed, dammed, diverted, polluted or otherwise interfered with, except in accordance with Part II of the Water Statute 1995 (section 86 of the Act).
- *Subject to the Water Act, Cap 152 and the NEMA Act, Cap 153, the Regulations provide that a location licence holders and mining lease holders may dispose of tailings from mining operations or mineral processing operations in nearby water courses (section 73 of the Regulations). This can clearly result in negative environmental implications on the surrounding water courses and sources.*
- The Act is also silent on the risk of competition for water between mines and other users, including communities. To limit this risk, it is a best practice to impose a “zero water discharge” requirement and only grant a water permit once the Commissioner, in consultation with the

relevant water or environmental authority, has verified that the mining lease holder has used its best effort to maximize water efficiency in mine water use, including through recycling and re-use of mine water, water treatment, and the careful management of tailings.³

- The EIA should also include an assessment of the cumulative impact of a mining operation on surrounding water courses.

- e. **Wasteful mine operations or treatment practices**
 - *The Commissioner has the discretion to decide whether a mining licence holder is using wasteful mining or treatment practices, and can require the licensee to justify to the Commissioner why he is using such practices (section 51 of the Act). No guidelines as to what the standards of operations or waste treatment are referred to.*
 - If the licence holder fails to do so within the specified period, the Commissioner can order him or her to cease such practices, and may otherwise cancel the mining licence or suspend it for a period that the Commissioner thinks fit.

f. **Mine closure**

Environmental Restoration Plan

- An exploration licence holder or mining lease holder must submit a costed environmental restoration plan to the Commissioner (section 110 of the Act and section 66 of the Regulations). Under the Act and Regulations, the plan does require review or approval by NEMA.
- At the request of the Commissioner, an exploration licence holder or mining lease holder will be required to submit an environmental bond commensurate with the costs set out in the environmental restoration plan.

Post-closure restoration

- Where an exploration licence or mining lease is terminated, *the Commissioner may, but is not required to, serve notice on the licence holder to take certain action to restore the land. The costs of such action can be deducted from an environmental bond provided to the Commissioner under section 112(1) of the Act. The licence or lease holder is liable to pay for any amounts not covered by the environmental bond.*
- While this is a good provision, the requirement for a mineral right holder to restore the land should be mandatory, rather than being an optional requirement that can be enforced at the Commissioner's discretion.

³ See CCSI's Policy Paper on how to leverage mining-related water infrastructure for development (2014), available at: <http://ccsi.columbia.edu/files/2014/05/CCSI-Policy-Paper-Leveraging-Mining-Related-Water-Infrastructure-for-Development-March-20141.pdf> and other CCSI papers on this topic set out in Annex 1.

3. Appropriate protocol for consulting with land owners/communities BEFORE project initiation and settling with members whose land will be affected

Key points

- There are no requirements for social impact assessments (or, at least an environmental and social impact assessment (ESIA)), social management plans, human rights impact assessments, or a consultative process under the Act and Regulation.
- Weak protections are included to protect or compensate existing rights to the use of land.

Tools and resources

- **Democracy and Rights: Human Rights Impact Assessment Tool** - This guide is a step-by-step process that allows assessment teams to take stock of the positive and negative human rights impacts of an investment project. Throughout the steps, information and additional references are provided including reference documents on human rights, examples of research techniques, relevant websites, and details on where to find specific information: <http://hria.equalit.ie/en/>.
- **IFC: Stakeholder Identification and Analysis** - http://www.comdev.org/userfiles/PartOne_StakeholderIdentification_0.pdf
- **IFC: Stakeholder Engagement: Feasibility studies and project planning** - A guide that details how to engage project stakeholders in environmental and social impact assessment (ESIA) studies, as well as describing actions that must be taken to ensure that all stakeholders are listened to and included in the project's feasibility assessment: http://www.ifc.org/wps/wcm/connect/641d3c0048855b7c890cdb6a6515bb18/PartTwo_FeasibilityStudies.pdf?MOD=AJPERES
- **Namati: Community Guide to Getting a Fair Deal from Companies and Investors** - A "How To" guide for rural communities considering whether to share their land and natural resources with investors. The guide explains how a community can proactively prepare themselves before an investor approaches them, what questions community members should ask both themselves and investors before going into contract negotiations, and how to ensure that they receive truly equitable benefits in return for sharing their land and resources. The guide also includes actions that communities can take if, having already signed an agreement in the past, they feel as though they are being treated unfairly or want to enforce elements of the contractual agreement: <http://namati.org/resources/community-guide-to-getting-a-fair-deal-from-companies-and-investors-2/>.
- **UN-REDD's Guidelines on free, prior and informed consent (2013)**, available at: http://www.unredd.net/index.php?option=com_docman&task=doc_download&gid=8717&Itemid=53.

Legislative provisions

- The Act provides that no mining lease will be granted unless an applicant has secured the surface rights of the land which is the subject of the application (section 43(3)(h)). *No further information or clarification is provided in respect of this requirement.*

- The landowner or lawful occupier of the land initially retains the right to graze stock or to cultivate the land to the extent that such activities do not interfere with the prospecting, exploration, or mining activities (section 80 of the Act).
- *However, any loss or damage to stock or crops that arises out of such exploration or mining activities must be borne by the land owner or lawful occupier of the land and not the licence or lease holder.*
- *In addition, if the licence holder or lease holder considers the landowner or lawful occupiers' activities to interfere with his or her rights, the right of the landowner or lawful occupier to graze cattle or to farm can be terminated.*
- A mining lease holder may also require an exclusive use of the whole or a part of the mining area by obtaining a land lease or other rights to use the area from the landowner (section 81 of the Act).
- Any disputes or disagreements between a mineral right holder and a land owner or lawful occupier in relation to such a lease, including the rents payable, must be decided by arbitration (sections 81(2) and 82(2) of the Act). *Such a dispute resolution mechanism may not be affordable for the land owner.*
- A licence or lease holder may be required to compensate a landowner or lawful occupier for compensation for disturbance of rights under certain circumstances (section 82-83 of the Act). A failure to pay, or to pay satisfactory compensation must be referred to arbitration. Again, *arbitration may not be a viable option for the land owner or lawful occupant.* Best practice includes early community consultations and local grievance mechanisms.

4. Limiting and deterring underreporting and smuggling

Key points

- Many safeguards are in place to ensure monitoring of mining activities, licensing requirements, and inspection of mining operations.
- What might be weak is the penalty associated with the offences as well the contents of the export and import permits.

Legislative provisions

- a. Effective mechanisms for monitoring of mining activities and inspection of mines and output

Right to inspect and power to require information

- The Act confers broad powers of inspection on the Commissioner, the Inspector of Mines, and authorized officers to inspect any land, including prospecting areas, exploration areas, and mining areas, factories and premises where minerals are kept or processed and mining operations (section 14 of the Act).
- The Commissioner is additionally given the right to inspect mining operations and to require further information from licence and lease holders (sections 64 and 107).

- Pursuant to these powers, the Commissioner and other public officers are allowed to enter the land at reasonable times to ascertain information related to the conduct of operations, including for the purposes of verifying reported information regarding mining output.
- In addition, section 52 of the Regulations requires all license and mining lease holders to keep a daily record of all activities for inspection purposes, including detailed geological and production information.
- Section 83 of the Regulations stipulate that a fine is payable for any failure to provide, or for providing false information provided pursuant to section 52.

Reporting requirements

- Holders of each type of licence and mining lease are required to provide regular reports (time frame specified for each type of license)(See section 24 for a prospecting license, section 32.2 for an exploration license, section 50.2 for a mining license, section 60.2 for a location license, section 72 for a mineral dealer, and section 75 for a goldsmith).
- These reporting requirements are complemented by section 120(1)–(2), which sanction as an offence any act to purposefully and misleadingly change the value and quantity of minerals, or the area of land.
- *However, note that the penalty for this offence is not particularly stringent (250 currency points and /or imprisonment between 2 and 5 years).*

b. Conditions to apply for, renew, and revoke any license as well as to use the minerals under a license

Several provisions in the Act and the Regulations regulate the licensing regime and the use of minerals, and to that extent, stipulate safeguards against smuggling:

- Section 10 of the Act empowers the Commissioner to require additional information/ make investigations in relation to a mineral application.
- Section 24 of the Act requires the holder of a prospecting license to report a mineral discovery to the Commissioner.
- Section 25(1) of the Act states that all minerals obtained under a prospecting licence are the property of the Government and section 25(2) limits the disposition of minerals obtained during the prospecting phase to geological work and upon consent of the Commissioner.
- Section 27(2) of the Act limits the area of land for exploration to 500 square km and requires the programme for exploration operations to be approved by the Commissioner and attached to the exploration licence.
- Section 32 of the Act imposes strict obligations on the exploration license holder related to work program, duty to declare findings of additional minerals, duration and term of the exploration license.
- Sections 35 and 36 of the Act impose strict conditions and procedures to retain the license in case of temporary economic impediments (such as adverse market conditions, or temporary economic factors that are beyond the reasonable control of the licence holder).
- Section 41 of the Act requires the submission of a detailed application for a mining lease, which proves the technological and financial capacity of the license holder, as well as its estimates of

the geological potential and its plans to develop the deposits (similar information is required for an exploration license in section 26).

- Section 43(3)(a) of the Act explains that the license holder cannot claim for an area of land in excess of what is needed by the license holder's work program.
- Section 47 of the Act stipulates specific conditions and the procedures for the renewal of a license limiting the renewal period to 15 years and asking for geological justification.
- Section 48 of the Act explains when the work program can be amended to include the mining of another mineral that has been discovered in the mining area. In this regard, the mining lease holder must notify the Commissioner within 30 days after the discovery of the mineral.
- Sections 53(2) of the Act requires a mining lease holder to notify the holder of a mining license where, for reasons beyond his/ her reasonable control, he or she has to cease, suspend or curtail production within 14 days of doing so.
- Sections 56 of the Act details the application requirement for a location licence setting out in particular the mineral, area sought and the capabilities involved to develop the minerals.
- Sections 59 of the Act explains that all location licences are limited to 2 years, but can be renewed for several 2-year periods if the Commissioner has no reason to revoke (such as the holder has entered into an arrangement to sell the license to a non-Ugandan citizen or company, no mining operations have taken place, the applicant is in default...).
- Sections 115 of the Act makes clear that no mineral can be disposed in ways not specified by a license and not authorized by the Commissioner – doing so would constitute an offense liable for a penalty (250 “currency points” or/and 2 years of imprisonment). *This penalty needs to be seen in the local context but might appear to be too weak to deter from the offense.*
- Section 80 of the Regulations prohibits persons from moving any minerals at night without the prior written authorization of the Commissioner.

c. Licensing for export/imports and dealing

Similarly, we note that the Act tightly regulates the authorization for the export, import, and dealing of minerals:

- Section 69 of the Act stipulates that no person may buy or sell, either as a principle or agent, any minerals unless he is a licensed mineral dealer. In addition, a licensed mineral dealer is only allowed to buy minerals during the course of his or her business from a person who acquired minerals legally in accordance with the provisions of the Act and/or the Regulations.
- Section 70 of the Act sets out the requirements for a mineral dealers' licence.
- Section 71 of the Act and section 81 of the Regulations specify that all mineral dealers are required to pay royalties to the Commissioner for every mineral bought, received, or exported. The Commissioner can require the mineral dealer to provide security for the due payment of the royalties.
- Section 73 of the Act sets out the requirement to obtain a goldsmith license to manufacture products out of precious minerals.

- *However, note that in relation to retail shopkeepers, section 74 of the Act provides that the Commissioner may, at his/her own discretion grant a license exception to a retail shopkeeper whose primary or sole occupation is not the gold business. This exception can constitute a risk for the enforcement of the licensing regime.*
- Sections 76 and 77 of the Act explain that any use of the mineral that is not specified by the license will be considered as an offense that can lead to the cancellation of the license.
- Sections 116 and 117 of the Act further provide that the export and import of minerals necessitate a permit, a form of which is included in the schedule to the Regulations. *We note here that the forms are rather light for those permits and only require basic information (name of applicant, name of holder of a license, number of packages, mineral, quantity, district and country of origin, identification marks of the packages provided by the applicant). More information could be required in the applications to better facilitate the tracing of minerals.*

5. Fiscal Regime: Royalties

Key points

- The fiscal royalty regime is well designed to avoid transfer pricing.
- Too much discretion is given to the Minister in terms of its right to waive the royalty, although such a decision is subject to the approval of the cabinet.
- There is an institutional risk to stipulate that the royalty monies should be paid to the Commissioner.

Legislative provisions - Royalty regime under the Act

- The royalty is imposed on gross production (section 98 of the Act).
- The Regulations specify a reference price to assess the valuation of minerals, being “the latest price on the London Metal Exchange or any other Metal Exchange or market as known to the Commissioner; and in the absence of proof to the contrary—
 - a) gold shall be deemed to be ninety-five per centum fine;
 - b) tin ore shall be deemed to contain seventy-five per centum tin;
 - c) the valuable contents of other metals, ore or minerals shall be such as the Commissioner may determine,”
 (section 72 of the Regulations).
- These provisions are effective means to minimize the risk of transfer pricing and improper invoicing.
- *However, a risk of transfer pricing remains when the mineral is exported to a refinery, since the value should only be “the gross sum realized as shown by the original sales account” to be shown to the Commissioner. If the arm’s length principle is not specified here, the sales could be valued at below the market rate.*
- Sections 102-104 of the Act provide effective mechanisms of royalty payment monitoring (including in the case of stockpiling).
- *The most problematic issue of the proposed royalty regime is section 99 of the Act, which gives discretion to the Minister, with the approval of the Cabinet, to waive the royalty at its own satisfaction,” if he or she considers it expedient to do so in the interests of the production of any such mineral.” This section might generate the possibility of the creation of many exception*

regimes with no transparent justification.

- Furthermore, section 71 of the Regulation specifies that the royalty should be “paid to the Commissioner.” *To minimize the risk of embezzlement, it would be better for the royalty monies to be paid to a trust fund or escrow account.*

Annex 1: Some useful tools and resources

1. Advising on Mining Agreements

- a. **MMDA** - A collection of examples from existing mine development agreements and other materials that are designed to help negotiators and drafters by stimulating them to think about some of the difficult issues of legality, fairness, and balance presented by large-scale investment: <http://www.mmdaproject.org/>
- b. **Liberia** : Western Cluster Concession Agreement (2011): An example of a mining concession agreement that includes many good practice provisions. Available on www.resourcecontracts.org at:
<http://www.resourcecontracts.org/#documents?search=liberia&countries=liberia&resource=iron-ore&document=1506145-western-cluster-liberia-2011>

2. Recommendations on an effective process for conducting environmental impact assessments

- a. **EIA law matrix** - A website that enables users to easily access EIA laws and regulations, to view summaries of the EIA system for selected countries, and to make comparisons among all of the laws included in the database: <http://www.elaw.org/elm>
- b. **Guidebook for evaluating mining project EIAs** - The guidebook aims to help governments, public interest lawyers, grassroots advocates, and community members understand mining EIAs, identify flaws in mining project plans, and explore ways that mining companies can reduce the public health hazards associated with mining:
<https://www.elaw.org/mining-eia-guidebook>
- c. **Initiative for Responsible Mining** - IRMA Standard for Responsible Mining (Draft 1.0), Chapter 5.1 Environmental and Social Impact Assessment (ESIA), available at:
http://www.responsiblemining.net/irma-standard/draft_07-2014/chapter-5.1-environmental-and-social-impact-assessment-esia/.
- d. **International Finance Corporation (IFC) performance standards on environmental and social sustainability**: IFC Performance Standard 1- Assessment and management of environmental and social risks and impacts, available at:
http://www.ifc.org/wps/wcm/connect/c8f524004a73daeca09afdf998895a12/IFC_Performance_Standards.pdf?MOD=AJPERES.

3. Minimizing a mine's water footprint

- a. **Guidance on how to leverage mining-investments in water infrastructure for development** – CCSI has developed a framework in relation to the shared use of water-related mining infrastructure, an important component of which includes guidance on how to require mining companies to minimize their water footprint (both in terms of the quantity of fresh water mining operations require to operate and the amount of waste water they discharge).
See in particular:
 - **Policy Paper on leveraging investments in water infrastructure for broad-based economic development: Models, opportunities, and challenges** -
<http://ccsi.columbia.edu/files/2014/05/CCSI-Policy-Paper-Leveraging-Mining-Related-Water-Infrastructure-for-Development-March-20141.pdf>

- **Framework to approach shared use of mining-related infrastructure: Chapter 3:** http://ccsi.columbia.edu/files/2014/05/A-Framework-for-Shared-use_March-2014-2.pdf
- **Case studies on shared use:**
 1. Mozambique – see chapter 3: http://ccsi.columbia.edu/files/2014/05/Case-Study_Mozambique-FINAL.pdf-1.pdf
 2. Sierra Leone– see chapter 3: http://ccsi.columbia.edu/files/2013/11/Case-Study_Sierra-Leone_March-2014-2.pdf
 3. Liberia– see chapter 3: http://ccsi.columbia.edu/files/2013/11/Case-Study_Liberia-March-2014-1.pdf

4. Some guidance on effective community consultations and engagements

- a. **Democracy and Rights: Human Rights Impact Assessment Tool** - This guide is a step-by-step process that allows assessment teams to take stock of the positive and negative human rights impacts of an investment project. Throughout the steps, information and additional references are provided including reference documents on human rights, examples of research techniques, relevant websites, and details on where to find specific information: <http://hria.equalit.ie/en/>.
- b. **IFC: Stakeholder Identification and Analysis** - http://www.commdev.org/userfiles/PartOne_StakeholderIdentification_0.pdf
- c. **IFC: Stakeholder Engagement: Feasibility studies and project planning** - A guide that details how to engage project stakeholders in environmental and social impact assessment (ESIA) studies, as well as describing actions that must be taken to ensure that all stakeholders are listened to and included in the project’s feasibility assessment: http://www.ifc.org/wps/wcm/connect/641d3c004885b7c890cdb6a6515bb18/PartTwo_FeasibilityStudies.pdf?MOD=AJPERES
- d. **Namati: Community Guide to Getting a Fair Deal from Companies and Investors** - A “How To” guide for rural communities considering whether to share their land and natural resources with investors. The guide explains how a community can proactively prepare themselves before an investor approaches them, what questions community members should ask both themselves and investors before going into contract negotiations, and how to ensure that they receive truly equitable benefits in return for sharing their land and resources. The guide also includes actions that communities can take if, having already signed an agreement in the past, they feel as though they are being treated unfairly or want to enforce elements of the contractual agreement: <http://namati.org/resources/community-guide-to-getting-a-fair-deal-from-companies-and-investors-2/>.
- e. **UN-REDD's Guidelines on free, prior and informed consent (2013)**, available at: http://www.unredd.net/index.php?option=com_docman&task=doc_download&gid=8717&Itemid=53.
- f. **World Resources Institute: Mining and Critical Ecosystems: Mapping the Risks** - Guidelines for assessing the viability of a project in environmentally or socially vulnerable areas that can help governments determine “no-go” areas for mining. It offers a general framework that can be used to identify risk areas globally and to support open and transparent

consultative processes:

http://www.commddev.org/userfiles/files/876_file_WRI_mining_critical_ecosystems_full.pdf

5. Ensuring accountability and transparency by both mining companies and government

- a. **Examples of legislation limiting the discretionary power of the commissioner or Minister in the regulation of the mining sector by establishing multi-disciplinary commission or advisory board:**
- Ghana:
 1. Minerals Commission Act, 1993:
<http://www.epa.gov.gh/ghanalex/acts/Acts/MINERALS%20COMMISSION%20ACT,1993.pdf>
 2. Mineral Act of 2006: See in particular, sections 5 and 100 - 102:
<http://faolex.fao.org/docs/pdf/gha85046.pdf>
 - Mining Act of Sierra Leone 2009, Articles 10-20: <http://www.sierra-leone.org/Laws/2009-12.pdf>
 - Namibia's Minerals (Prospecting and Mining) Act 1992:
www.mme.gov.na/pdf/minerals_act_1992.pdf
- b. **IIED: Investment Contracts and Sustainable Development** - This guide discusses options to structure investment contracts in the natural resource sector in ways that maximize the investment's contribution to sustainable development. The guide draws on test trainings in Ghana and Central Asia and aims to provide up-to-date and comprehensive learning material for both host governments and civil society. It can be used as a background document for training sessions, but it may also be used by readers accessing the material on their own: [http://www.negotiationsupport.org/tools-resources?f\[0\]=field_attr_topics%3AMonitoring](http://www.negotiationsupport.org/tools-resources?f[0]=field_attr_topics%3AMonitoring).
- c. **Implementing the EITI for impact: A handbook for policy makers and stakeholders** - This particular guide is aimed at policymakers, industry, and civil society members who wish to implement the EITI standard. It details what types of regulations must be implemented to become a candidate for the EITI and to comply and remain EITI-compliant:
<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTOGMC/EXTTEXTINDTRAINI/0,,contentMDK:23227853~pagePK:64168445~piPK:64168309~theSitePK:3634715,00.html>
- d. **NRGI: Enforcing the Rules: Conclusions and Recommendations** - A report that aims at helping government and civil society actors understand the challenges and good practices associated with effective oversight and enforcement in the mining industry -
<http://www.resourcegovernance.org/publications/enforcing-rules-conclusion-and-recommendations>.
- e. **NRGI Guide to the EITI Standard** - An online, interactive reference that allows users to explore the opportunities in the EITI Standard in seven policy areas. These areas are based on the extractive industries decision chain and reflect some of the governance challenges most frequently raised by stakeholders. The guide also covers two process areas: civil society participation and multi-stakeholder group governance:
<http://www.revenuewatch.org/eitiguide/>
- f. **World Bank Contract Monitoring Roadmap** - A step-by-step guide to understanding how to monitor a contract in the extractive industries, including tools, resources and case studies

for each step. It leads the reader through the process of choosing a monitoring goal, establishing the monitoring mechanism, collecting and analysing data, and finally publicizing and using data to ensure contract implementation:

<http://worldbank.azure.inprogress.co.za/>.

Also see the Negotiation Support Portal at <http://www.negotiationsupport.org> for more useful tools and resources.

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