MEMORANDUM

TO: The Senate Committee on Natural Resources

FROM: Econews Africa

DATE: 25/02/2015

SUBJECT: Proposals on Mining Bill

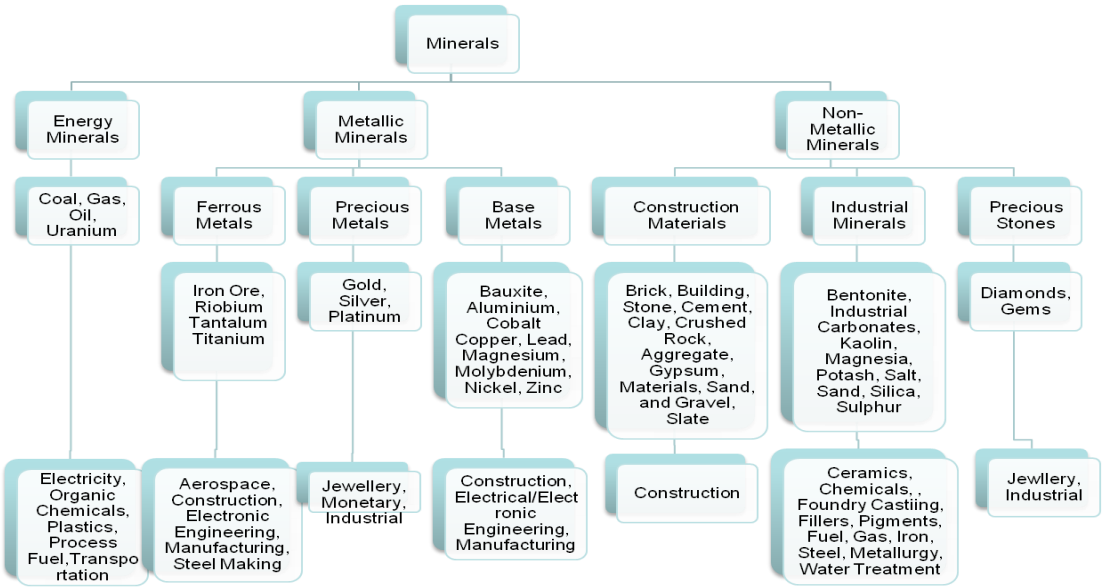
BACKGROUND

The Mining Bill 2014 was passed by the National Assembly in 2014 and forwarded to the Senate given that it is a Bill that affects Counties. Under Article 118(1) (b) of the Constitution, Parliament is required to facilitate public participation and involvement in the legislative and other business of Parliament and its committees. It is on this basis that the Senate has called for the submission of memoranda on various aspects of the Bill before it is deliberated and sent to the President for Assent. This memorandum, therefore, seeks to present views before the Senate on the proposed Bill. The issues raised by Econews Africa are canvassed below.

1. The Minerals Covered by the Bill

Section 2(1) of the Bill makes reference to minerals that have been referred to in the First Schedule. The United Nations Conference on Trade and Development (UNCTAD) categorizes minerals into various classes and includes construction materials such as cement, crushed rock, clay, crushed rock, aggregate, gypsum, sand, gravel and slate. The following table indicates the classification of minerals according to UNCTAD.

Figure 1.1: Classification of Minerals



Source: UNCTAD

While the preliminary part of the Bill indeed proceeds to define construction materials, the first schedule does not provide for these stated minerals. We propose the inclusion of construction materials into the first schedule of the Bill to be covered under the provision in Section 2(1).

2. The Regulation of Coal Mining

The application of the Bill is stated not to extend to petroleum and hydrocarbon gases. It, however, extends to coal. To this effect, Part F of the first schedule includes coal as part of the mineral to be regulated under the Bill. There seems to be a latent conflict with proposals coming from the Ministry of Energy and Petroleum which has included coal under the draft Energy Bill. There is need to provide clarity in terms of which law is actually going to regulate the coal sub-sector. This is important especially given that the proposals under the stated Energy Bill are somewhat limited and do not fully capture many aspects of coal mining and only make provisions in passing.

The insertion of a chapter on coal in the stated Bill may pose a challenge in the implementation of this proposed Bill as the latent conflict will provide impetus for authority being given to two distinct entities to regulate the coal sub-sector. We propose to retain the application of the Bill to the coal sub-sector but emphasize that the Senate be aware of this conflict and act appropriately to extinguish it before it complicates the sector.

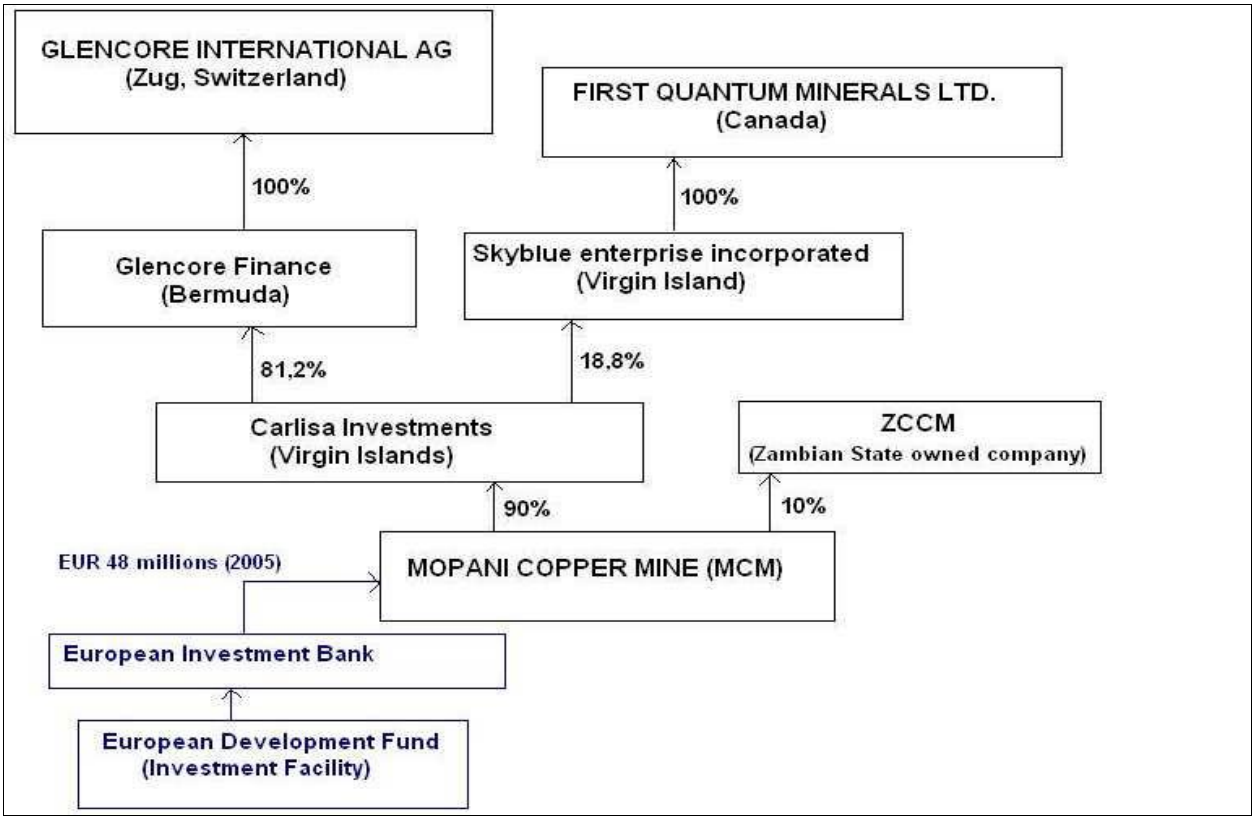
3. The Administration of Mineral Resources

The Constitution defines “natural resources” to mean physical things occurring in nature other than those created by human beings. These include those things that can be used only once or reused severally including rocks, minerals and fossil fuels. It further defines “land” to include natural resources completely contained on or under the surface. The administration of land under the Constitution is vested in the National Land Commission. With this in mind, the administration of minerals by another entity could be challenged on the grounds that it doesn’t speak to the provisions of the Constitution. To this extent therefore, we propose that Parliament considers this matter and provides clarity on how to proceed in order to avoid situations where such kind of matter may arise.

4. Submission of Annual Financial Reports

The Bill, under Section 53(1) requires holders of mineral rights to submit a copy of audited annual financial statements to the Cabinet Secretary. While this is an important aspect to be included in the law, we note the complexity of the international financial system. The extractive sector, in particular, has been notorious for malpractices in the domain of tax avoidance and evasion. To be able to ascertain that the declared amounts are indeed the true statement of accounts, we propose that Parliament considers introducing a requirement that the audited statements also be submitted to the Auditor General who is also answerable to it. This will assist the legislature to come to a conclusion on what are essentially public resources. Given that the Auditor has a duty under the Constitution, the Senate can expect a more accountable framework that can then be able to guide its decisions in ensuring that the country gets full value for its resources. To demonstrate the extent with which extractive companies can plan their affairs to avoid fiscal obligations, we include a structure of Mopani Copper Mines in Zambia which is a documented case of abuse of financial structures.

Figure 1.2: Mopani Copper Mines Tax Structure



5. Minimum Requirements in the Application for Mineral Rights

The Bill makes provision for the application for mineral rights. However, we note that there is no prescribed form with which contractors are supposed to file their applications. It is important to include financial and technical obligations that must be met for an application to be considered. We propose obligations that require the exclusive consideration of applications that meet the financial, technical and professional capacity necessary to fulfill the obligations under the petroleum agreement. This practice helps to exclude parties that enter on a speculative basis without adequate capacity. It is reflected in legislation proposed for the oil and gas sector in Kenya.

In the case of applications for licenses for large scale operations, the Senate could consider some emerging international best practices. A key point would be to consider including information requirements based on the OECD[1] Guidelines on Multinational Enterprises. These rules propose for example that:

i. Enterprises should disclose basic information showing their name, location, and structure, the name, address and telephone number of the parent enterprise and its main affiliates, its percentage ownership, direct and indirect in these affiliates, including shareholdings between them.

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ii. Enterprises should also disclose material information on:

a. The financial and operating results of the company
b. Company objectives.
c. Major share ownership and voting rights.
d. Members of the board and key executives, and their remuneration.
e. Material foreseeable risk factors.
f. Material issues regarding employees and other stakeholders.
g. Governance structures and policies.

iii. Enterprises are encouraged to communicate additional information that could include:

a. Value statements or statements of business conduct intended for public disclosure including information on the social, ethical and environmental policies of the enterprise and other codes of conduct to which the company subscribes. In addition, the date of adoption, the countries and entities to which, such statements apply and its performance in relation to these statements may be communicated.
b. Information on systems for managing risks and complying with laws, and on statements or codes of business conduct.
c. Information on relationships with employees and other stakeholders.

Further to these, the Senate is invited to consider the regulations contained in the Canada Investment Act relating to the screening of investors. These have helped the country to get better deals from investors in the past. In the absence of a concrete provision on local content in the Bill save for "best eandevour" language that is developed, the Act provides a number of parameters that could help review of potential applications including:

- The net effect of the investment (project) on the level of economic activity in Canada, employment, resource processing, utilisation of parts and services produced in Canada, and exports from Canada;
- The degree and significance of participation by Canadians in the business or the effect of the investment on competition within any industry in Canada;
- The compatibility of the investment with national, industrial, economic and cultural policies; and
- The contribution of the investment to Canada's ability to compete in world markets

6. Participation of Affected Communities in Mineral Rights Application

The proposed Bill under Section 34(1) requires the Cabinet Secretary, on receipt of an application, to give notice in writing to the land owner or lawful occupier of the land where the mineral is located, the community and the relevant County Government. Section 34(4) gives rights for persons or communities to object to the grant of a license within 21 days for prospecting and reconnaissance licenses and 42 days for mining licenses. While this is important, we reiterate the need for the applicants to engage the communities at the project area to enable them make informed choices. We are aware of an ongoing process to develop rules to the same effect. We, however, invite the Senate to consider a provision under the

Section indicating that rules promoting the participation of communities shall be developed to that effect. This is not to discount the ongoing process but provide clarity on the matter.

7. Environmental Protection Bonds

Econews Africa lauds the inclusion of a clause requiring license applicants to provide some form of bond to cover the costs associated with environmental and rehabilitation obligations. We however note that the amount is to be determined by the Cabinet Secretary who under Section 181(4) is allowed to release in part the bond upon completion of rehabilitation measures undertaken within the duration of a license. We contend that the closure phase of the mine is the most sensitive and often times the costs of rehabilitation are often grossly underestimated. Given that many companies usually dispose interests towards the end of the life of the mine, we call upon the Senate to consider limiting the release of the bonds until the true costs of the rehabilitation process are established.

8. Regulation of Mining Activities

The proposed Bill, under Section 20, provides regulatory powers of the sector to be exercised through the Director of Mines who, through the Principal Secretary, is responsible to the Cabinet Secretary for the functions of the Directorate of Mines. While this is intended to provide regulatory authority, good practice in the industry points to the need for an independent regulator that can exercise functional discretion subject to the law but without undue direction or control of any person or authority.

In Kenya, this trend can be seen in the proposed Petroleum Exploration and Production Bill of 2014 which, under Section 15, proposes the establishment of the Upstream Petroleum Authority to regulate upstream petroleum operations in Kenya, provide such information and statistics to the Cabinet Secretary as may be required from time to time; and collect, maintain and manage upstream petroleum data. It also has authority to assess field development plans and make recommendations to the Cabinet Secretary for approval, amendment or rejection of the plans; collect, maintain and manage upstream petroleum data; assessing tail-end production and cessation of petroleum activities and decommissioning; verifying the recoverable cost oil and/or gas due to the parties in a petroleum agreement; as well as auditing contractors for cost recovery. The body also monitors and enforces local content requirements and enforces environmental, health, safety and quality standards for the upstream petroleum sector, in coordination with other statutory authorities. We invite the Senate to consider some of these proposals in the Petroleum Bill for inclusion to the Mining Bill.

9. Transparency of the Extractives Sector

Transparency in the extractive sector is an important precondition for promoting better governance of resources. We reiterate that Article 35 of the Constitution provides for the right of all citizens to access information. It requires the State to publish and publicize any important information affecting the nation. With this in mind, we take note that the Bill makes reference to the mining cadastre which will be accessible to the public. While this is laudable, we take note of the fact that contract transparency is not included in this Bill. It will be difficult to estimate what amounts are due to the country, its devolved units and communities in the absence of the primary document that lays out the details.

The reading of Section 211(1) introduces an offence for the disclosure of "confidential information" which is not defined in the preliminary part. This could easily be challenged under Article 35 as well as for violating the Constitutional requirement that an offence must be clearly defined for it to meet the threshold that allows an individual to be charged. We invite the Senate to consider contract transparency as an important part of the process as it would enable the determination of amounts due to the Counties. Further, we propose a consideration of definition of exactly what amounts to confidential information before an offence is proffered.

Prepared by:

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Sent Electronically