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**Proposed changes to the law
on access to land for mining in
Uganda, in whose interest:
landholder or investor?**

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Abstract

Mining activities require large tracts of land and directly affect communities living around a mining project. As a developing country seeking to capitalise on its mineral wealth, Uganda is making changes to its laws on access to land for mining. These include a Mining and Minerals Bill 2021 and a Land Acquisition Bill 2018. This paper analyses these proposed laws to address the question, in whose interest are the changes? Do they benefit the landholders and their communities, and/or do they benefit investors? The provisions of the proposed laws are reviewed, and a qualitative methodology used to conduct legal analysis of the laws, policies, and existing literature using examples from a global perspective. This paper focuses on three main developments of Land Use Agreements, compulsory acquisition of land, and in the context of other land use. It concludes that access to land for mining should be a balance between the interests of both landholders and investors; and further, that the provisions of the proposed laws should be implemented in such a way to achieve that balance as doing so facilitates the sustainable development of mining, minerals and metals.

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Abbreviations

AML	Artisanal Mining Licence
EL	Exploration Licence
FDI	Foreign Direct Investment
GIS	Geographic Information System
ICMM	International Council for Mining and Metals
LAA	Land Acquisition Act, Cap. 226
LAB	Land Acquisition Bill, 2018
LL	Location Licence
LUA	Land Use Agreement
M	Million
MA	Mining Act, 2003
ML	Mining Lease
MMB	Mining and Minerals Bill, 2021
NEMA	National Environment Management Authority
PAP	Project Affected Person
PL	Prospecting Licence
RL	Retention Licence
RTA	Registration of Titles Act

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1. Introduction

Access to land is vital for the entire mining cycle from prospecting and exploration to development. The search for economically useful mineral deposits, prospecting¹, using geological, geophysical, or geochemical methods, is conducted on land. The process of determining the size and richness of the mineral deposit, exploration², includes the land-based activity of mine surveying. On land, a deposit may be mined as an open pit mine entailing the removal of the overburden, by underground methods involving sinking of shafts, installation of hoisting equipment and tunnels, or via in-situ recovery, utilizing different sets of boreholes to, first, dissolve the target mineral in a solution and, then, pump it out again. Ultimately, whatever method used requires more land than the land in or on which the mineral deposit occurs.

Mining involves large tracts of land and directly affects communities living around a mining project.³ Therefore, the principles and processes on access to land for mining are arguably the most important aspect of the mining cycle, and the beginning of the mining process. Inevitably, mineral rich countries seeking to develop their mining sectors must develop laws and policies granting access to land for mining. These include constitutional rights, land law, real property law, environment and conservation law, investment law, and international instruments related to all these.

Its unique location in the East African plateau and a diversity of geological formations deems Uganda a developing country with high mineral potential. Mineral deposits include copper, nickel, gold, chromite, iron ores, tin, tantalite, tungsten, limestone, marble, graphite, gemstones, rare earth minerals and other resources including sand and clay. The mineral sector plays a major role in the socio-economic development of the country by providing employment, raw materials for manufacturing and export, and opportunities for new investments. Foreign Direct Investment (FDI) into the sector has grown from \$ 5 million (m) in 2003 to over US\$ 800m in 2017⁴ with opportunity for more investment.⁵

¹ P.V. McDade, University of Dundee. Centre for Petroleum and Mineral Law Studies, *Materials on Mineral Law: A Survey of United Kingdom, Comparative and International Legal Issues Relating to Hard Minerals* (University of Dundee, Centre for Petroleum and Mineral Law Studies 1989) A2-01

² *ibid*

³ Peter D. Cameron and Michael C. Stanley, *Oil, Gas, and Mining : A Sourcebook for Understanding the Extractive Industries* (Washington, DC: World Bank 2017) p. 42

⁴ Mining and Mineral Policy for Uganda 2018, Ministry of Energy and Mineral Development Republic of Uganda

⁵ All \$ figures quoted are United States Dollars

As per the Ugandan Constitution, land is owned by the people/ Ugandan citizens⁶, but subsoil natural resources are vested in the Government on behalf of the Republic of Uganda (the Government).⁷ Mineral rights must therefore be obtained prior to any extraction. The Mining Act, 2003 (MA) provides for different mineral rights which can be acquired and granted. These are: A Prospecting Licence (PL); Exploration Licence (EL); Retention Licence (RL); Mining Lease (ML); or a Location Licence (LL). The nature of mineral rights in Uganda is that they do not confer any legal title to the land itself.⁸ Thus, before a ML can be granted, an investor must have first secured the land surface rights.⁹

Pursuant to revamping the sector and capitalize its potential, the country has in the last three years (2017 to 2020) made significant legislative developments governing the mineral sector. Sections of these legal developments relate to access to land for mining and include both recently passed and commenced Acts of Parliament and proposed Bills at different stages pending enactment.

These developments include: The Mining and Minerals Bill 2021,¹⁰ which would repeal the Mining Act, 2003; The Constitution (Amendment) Bill No.13 of 2017 on compulsory land acquisition by government (subsequently withdrawn); and the Land Acquisition Bill, 2018,¹¹ which would repeal and replace the Land Acquisition Act Cap. 226 of 1965. The above legislation provides for and affects access to land for mining; the correlation between mining and other land uses; and the relationship between mining operations, landholders, and investors. However, this copious array of legislation begs many questions, notably: in whose interest are all these developments?; would they benefit existing landowners and their wider communities?; would they help attract investment, and facilitate, for instance by easing

⁶ The Constitution of the Republic of Uganda Article 237

⁷ *Ibid* Article 244

⁸ Sections 23,

⁹ Section 43 Mining Act, 2003

¹⁰ The first version of this paper submitted on 08/06/2020 was written based on review of the Mining and Mineral Bill 2019 draft dated 12th June 2019 available at <https://www.globalrightsalert.org/publications/draft-mining-and-mineral-bill-2019> accessed April 2020. This paper has been updated and refers to the Mining and Minerals Bill, 2021 Bill No.30 of 2021 published in the Uganda Gazette No.72 Volume CXVI dated 1st October 2021. Also available at <https://parliamentwatch.ug/bills/the-mining-and-mineral-bills-2021/> last accessed 06/03/2022. The Bill was passed by Parliament, with amendments, on 17th February 2022 but the Act is yet to commence.

¹¹ Statement dated March 21 2019 by Minister of Lands Housing and Urban Development on the National Dialogue on Compulsory land acquisition <https://www.mediacentre.go.ug/media/statement-ministry-lands-compulsory-land-acquisition> accessed 19/05/2020

tensions and facilitating co-operation, the sustainable achievement of mining sector social licences to operate?

This paper seeks to analyse the legal developments above, with an emphasis on the Mining and Minerals Bill 2021 (MMB) as the sector primary legislation. This paper sets out the provisions that relate to access to land for mining and evaluates their benefits or detriments in respect of the major stakeholders, in particular: existing landholders¹² and their communities; and mineral rights holders and their supply chains, including mining investors, companies, developers, operators and contractors.

A qualitative methodology is used to conduct legal analysis of laws, policies, international law instruments, existing literature, and using case studies as examples. This paper makes the conclusion that access to land for mining should be a balance between the interests of landholders, and the interests of mineral rights holders. The ultimate beneficiary of these legal developments should be 'sustainable development' achieved from both interests working together.

The purpose of this paper is to contribute to the research and knowledge on access to land for mining in sub-Saharan Africa, and to buttress the use of legislation as a tool to grant access to land for mining by balancing the interests of landholders and investors. This research is topical to the local level of mining in Uganda, and to the wider international discussion on the role of legislation in advancing sustainable development from mining.

¹² For the purpose of this paper the term 'landholder' is used as a collective term. It may denote either a registered landowner, an unregistered landowner, a lawful or *bona fide* occupant, a leasee, sub leasee, licensee, or any other person holding or occupying land in a legal or equitable capacity.

2. Land law in Uganda

As a preface to the new developments, it is necessary to briefly explain the history and background leading to the current land law regime in Uganda in as far it relates to access to land for mining. The nation-state of Uganda was a British protectorate from 1894 to 1962 when she gained independence. She has a total population of 41,335,227 and growing.¹³ The fifth youngest population in the world with a median age of 16.7 years old.¹⁴ The Total area of the country is 241,559 sq km, water and swamps cover 41,743 sq km, leaving land cover of 199,808 sq km.¹⁵ There are 65 recognized indigenous communities / tribes / ethnic groups in Uganda.¹⁶

Before colonialism, land was held communally by different customary groups devoid of private, individual, property rights.¹⁷ In 1900 the British signed an agreement with the chiefs of the Kingdom of Buganda on one hand, and Harry Johnstone on behalf of the Queen on the other hand. The Buganda Agreement created 'Crown land' and 'Mailo land'. *Mailo* land were square miles of land granted as private estates to the Kabaka (King) of Buganda, chiefs and notables. Crown land was all the remainder of the land including forests but excluding private estates already granted to Europeans and missions.¹⁸ Similar agreements were signed in Ankole and Tooro Kingdoms. After 1962 the post-colonial government deemed what was formerly 'crown land' as public land. The law developed with the Public Land Act 1962 and 1969 (repealed). In 1975 past president Idi Amin decreed all land was public land belonging to Government and only leases were to be issued to private individuals.¹⁹ The country endured periods of civil war until 1986. In 1995 the country turned over a new leaf constitutionally with the promulgation of its 1995 Constitution.

¹³ Uganda Bureau of Statistics population clock <https://www.ubos.org/> accessed 19/05/2020

¹⁴ <https://www.weforum.org/agenda/2019/08/youngest-populations-africa/> accessed 19/05/2020

¹⁵ <https://www.gou.go.ug/content/facts-figures> accessed 19/05/2020

¹⁶ The Constitution of the Republic of Uganda, 1995. Third Schedule.

¹⁷ Rose Nakayi and Monica T Kirya, *The legal, policy and institutional framework of land governance in Uganda: a critical analysis* (Human Rights and Peace Centre 2017)

¹⁸ Mugambwa, John Tamukedde. *Evolution of British Legal Authority in Uganda with Special Emphasis on Buganda: 1890-1938*. The Australian National University (Australia), 1986.

¹⁹ Land Reform Decree 1975 (repealed)

2.1 The Constitution of the Republic of Uganda 1995 (as amended)

Article 237 of the Ugandan Constitution provides that all land in Uganda belongs to the citizens of Uganda, with different land rights vested in them in accordance with Uganda's established land tenure systems of Customary, Freehold, Mailo, and Leasehold. Apart from Leasehold, the other forms of land tenures grant ownership in perpetuity. Government or local government may acquire land in public interest and on conditions in the law. Non-citizens may acquire leases in land in accordance with the law. The Constitution provides for 'Public land' (leased to urban authorities) and establishes the Uganda Land Commission. It further recognises 'lawful and *bona fide* occupants' of land ensuring their security of occupancy and mandating Parliament to enact a law regulating the relationship between occupants and registered owners of land, namely the Land Act, Cap.227.

2.2 The Land Act, Cap.227 (as amended)

Enacted in 1997 and commenced in 1998, the Land Act since been amended in 2001, 2004, and 2010. The Act reiterates the provisions of the Constitution and the forms of land ownership tenure recognized by the Constitution, and additionally describes the nature of each of these forms. It provides for district land boards, land committees, communal land associations, and the general management of land. It defines a "lawful occupant" and a "*bona fide* occupant" and provides for tenants by occupancy. Occupants are an important feature of Ugandan land law, demonstrating the multi-faceted nature of co-existing legal and equitable interests in land in Uganda.

2.3 Registration of Titles Act, Cap.230

Having come into force on 1 May 1924, the Registration of Titles Act (RTA) is a remnant of the British protectorate/colonial government land administration, and an implementation of the Torrens system of land registration. It provides for the procedure for registration of land, the Register book and its management, certificates of title, dealings in land including transfers, leases and subleases, caveats, survey and boundaries, and all matters incidental to registered land.

3. Proposed Changes in the Law on Access to Land for mining in Uganda

3.1 The Constitution 1995 and the withdrawn Constitution (Amendment) Bill, 2017

Article 26 of the Constitution enshrines the right to property and protection from the deprivation of property. It provides for the right to own property (land) and the protection from expropriation. It states that no person shall be compulsorily deprived of property except if that acquisition is “necessary for public use” and is made under a law which provides for “the prompt payment of fair and adequate compensation prior to the taking of possession or acquisition of the property”. It grants a right to access to a court of law by any interested person. Article 237 provides that Government or local government may, subject to Article 26, acquire land in public interest and on conditions in the law. This is compulsory acquisition of land.

The principle of ‘fair and adequate compensation prior to taking possession’ implies that the Government cannot acquire or possess privately owned land before it fulfils the conditions set by the law. In the Government’s opinion, this led to significant delays, costs and failure to acquire land for public infrastructure when landowners or persons with an interest in the land/property object to compensation.²⁰ Objections lead to disputes and long drawn court cases to resolve those disputes, while a project stalls. Fair and adequate compensation prior to possession, and the disputes arising from the acquisition process presented practical hindrances and handicapped the implementation of public infrastructure projects. Accordingly, it became necessary to resolve those handicaps. A constitutional amendment was proposed.

The Constitutional (Amendment) Bill²¹ sought to amend Article 26 to resolve the problem of delayed implementation of government infrastructure and investment projects due to disputes arising out of the process of compulsory land acquisition. The proposed

²⁰ Ministry of Lands Housing and Urban Development, *Understanding Land Acquisition challenges that have necessitated the Constitutional (Amendment) Bill 2017* (2017)

²¹ Bill No.13 of 2017. Bills Supplement No.7 to the Uganda Gazette No.33, Volume CX, dated 8th June 2017

amendment was to effectively remove the requirement for compensation prior to taking possession and allow the government to take possession of land/property before compensation is agreed or made, irrespective of a dispute concerning the land acquisition. The tabling of the Bill was met with opposition in Parliament,²² the Ugandan legal fraternity, human rights activists, and the general public.²³ To quell the pushback against the Bill, the Government initiated a nationwide consultation process and the President appointed a Commission of Inquiry into Land whose terms of reference included an assessment of the legal and policy framework of government land acquisition.²⁴ This Bill was so problematic that it was withdrawn in 2018. Law reform was sought in a different direction, the Land Acquisition Act.²⁵

3.2 The Land Acquisition Act, Cap. 226 and The Land Acquisition Bill, 2018

The Land Acquisition Act, Cap.226 (LAA) is a 1965 law providing for the compulsory acquisition of land for public purposes and for matters incidental thereto. It gives the Minister of Lands powers to acquire land and provides the procedure to do so. Commencing with the power to examine or survey land in order to ascertain its suitability for a public purpose. Upon a published statutory declaration that the land is required for a public purpose, the land is marked out and planned. A notice is then published to persons having an interest and inviting claims for compensation. An inquiry is held into the claims and objections regarding compensation and an award made. An interested person may make an appeal against this award. If there is no appeal against the award, the government shall then pay compensation in accordance with the award.

A controversial section of the LAA is Section 7 which provides that the government officer shall take possession of the land as soon as s/he has made an award for compensation. It also allows the government officer to take possession at any time after the declaration is published – before compensation is paid and before any appeal against the award is determined. This provision allowed government to take possession of land before

²² <https://www.independent.co.ug/constitution-bill-compulsory-land-acquisition-splits-ugandas-parliament/> accessed 19/05/2020

²³ <https://www.fhri.or.ug/index.php/pages/whats-new/item/204-battle-lines-drawn-as-land-amendment-causes-uproar> accessed 19/05/2020; <https://www.dobozi.com/index.php/news/national/132-uganda-law-society-asks-government-to-withdraw-the-constitutional-amendment-bill-2017> accessed 19/05/2020

²⁴ <http://www.judiciary.go.ug/data/news/298/The%20Land%20Inquiry%20Commission%20Sworn-in.html> accessed 19/05/2020

²⁵ *Supra* note 20

compensation in circumstances where the minister declared that it is in the public interest to do so.

This provision was contrary to the principle of 'fair and adequate compensation prior to taking possession' and was deemed unconstitutional by the Supreme Court of Uganda. In the Constitutional Petition, Uganda National Roads Authority V Irumba Asumani & another Supreme Court Constitutional Appeal No.2 of 2014, the Supreme Court found that section of the LAA unconstitutional to the extent of its inconsistency with Article 26 of the Ugandan Constitution. It upheld the principle of prompt payment of fair adequate compensation prior to taking possession or acquisition of any property by the State, and expunged Section 7 of the LAA. The expunging of the inconsistent sections of the LAA, its outdated and unfit for purpose provisions from over fifty years ago, and the backlash to the Constitutional (Amendment) Bill No.13 of 2017, led to the need to amend the LAA.

The Land Acquisition Bill, 2018²⁶ (LAB) seeks to bring the law on compulsory acquisition of land in tandem with the 1995 Constitution and the Supreme Court decision. Clause 2 of the Bill provides that its purpose is to reform the law to provide for expeditious procedures for the compulsory acquisition of land. It reiterates the Constitutional right of Government to acquire land in accordance with the provisions of the Constitution. Under the LAB, Government may compulsorily acquire land – “for public use or public interest; in the interest of defence; for public safety; for public order; for public morality; or for public health.” Public use is specified as follows: (the) “use of land by the Government for the benefit of the public for infrastructure and public works including road, railway, airport, airfield, aerodrome, power line, water pipeline, fibre cable, hospitals, public institutions, schools and resettlement due to war, calamities or acts of God.”²⁷

The LAB sets out the procedure to be followed, which is like the procedure in the LAA. It includes a request made by the ministry, department, or agency; a declaration that the land is needed for compulsory acquisition; and notice to interested persons; an inquiry is held,

²⁶ The author accessed and reviewed The Land Acquisition Bill 2018 Draft dated 16th October 2018, and the provisions of the Bill dated 21st March 2019 as restated in LANDNET, *National Dialogue on Compulsory Land Acquisition* (2019) available at <https://www.landnet.ug/national-dialogue-compulsory-land-acquisition-report-last-accessed-04/06/2020>. It is necessary to note that at the time of this paper, this draft is still before the First Parliamentary Counsel and may not be in the same form when gazetted, presented to Parliament or passed into law. The Bill is expected to be reintroduced in 2022 as reported by media <https://www.monitor.co.ug/uganda/news/national/govt-resurrects-emotive-land-acquisition-bill-3843062> accessed 09/07/2022

²⁷ Clause 4 LAB

and an award made. It provides that government shall make prompt payment of fair and adequate compensation prior to taking possession of land and sets a timeline within which to do so. Compensation shall be paid within six months in case of cash payment and one year in case of resettlement and relocation. The LAB introduces the concept of 'underground land' distinguished from 'surface land'. Clause 11(8) provides for the circumstances when the Attorney General may apply to court for the deposit of unclaimed compensation amount in a suspense account, if granted, government shall take possession of the land.

The LAB sets out an extensive dispute resolution mechanism for a person dissatisfied with the compensation awarded. It includes a claim lodged with the implementing agency, the involvement of the Chief Government Valuer, a reassessment, and a meeting to reach a settlement. Another provision introduced by the LAB is the option to, on a voluntary basis, resettle and rehabilitate project affected persons (PAPs) in lieu of cash compensation payment. It provides that the government may restore the livelihoods of PAPs to a state prior to the project. Clause 17 provides that the government shall take possession of the land after the payment of compensation. It allows the Minister to withdraw or revoke an acquisition and establishes a Land Acquisition Tribunal as a specialised body for compensation dispute settlement. The jurisdiction of the tribunal shall be to determine any dispute relating to the amount of compensation awarded by government and an appeal against the decision of the tribunal may be made to the Ugandan High Court.

3.3 The Mining Act 2003 and the Mining and Minerals Bill 2021

The MA reiterates that the property and control of minerals in, on or under any land are vested in government notwithstanding any right of ownership of the land in, on, or under which minerals are found. It limits the area of land in respect of which an EL, RL, or ML may be granted, although a person may hold more than one EL. The MA requires an applicant for a ML to show written proof that he/she has reached an agreement with the landowner of the area he/she intends to mine, and to have secured surface rights of the land.²⁸

The exercise of mineral rights is restricted against any land designated for any public purpose for example land dedicated as a place of burial, of religious significance, or public building site. Further restrictions are against any land within 200 metres of an inhabited house, land reserved for railway track, within 200 metres of the boundaries of a township,

²⁸ Section 42(3) and 43(3)(h)

within 200 metres of a lake or 100 metres of a river except with a permit issued under the environment laws. Other restrictions include against land comprising a street, power station, oil well heads, national parks, game and forest reserves, except with the consent of the relevant authorities.²⁹ The MA retains the right for an owner or occupier to graze stock or cultivate the land to the extent that the grazing or cultivation does not interfere with the mining activities.³⁰

Section 81 of the MA enables the holder of a ML to get a land lease from the landholder. Such a lease grants the exclusive use of the whole or any part of the mining area on such terms as agreed between the landholder and the ML holder. A mineral right holder shall pay a landholder fair and reasonable compensation for the disturbance of their rights, for damage to the surface of the land, and for crops, trees or buildings.³¹ However, a landowner or occupier may opt for a share of royalties instead of compensation. The prescribed rate is 3% on the gross value based on prevailing market price of the minerals.³² For evidentiary purposes, the Commissioner may give a certificate that any land identified is subject to a mineral right.³³ Finally, the MA provides for an environmental restoration plan which must include the restoration of affected land by levelling, re-vegetation, reforestation or contouring and a proposed use for the restored land.

The Mining and Minerals Bill 2021 (MMB) immediately sets the tone of legislative transformation by stating that the purpose of the Act includes to create an enabling environment for the co-existence of mining and other land uses.³⁴ In addition to all the provisions of the current MA above, the MMB introduces several changes.

MMB Clause 9 reiterates that the Ugandan subsoil is the property of the Government, in accordance with the Ugandan Constitution. A mineral right may be acquired and held irrespective of any rights of ownership which any person may have over the land on which the mineral is granted.³⁵

²⁹ Section 78

³⁰ Section 80

³¹ Sections 82

³² Section 83 and 98

³³ Section 97

³⁴ Clause 3(e)

³⁵ Clause 11(2)

Clause 11(4) introduces a major development by providing that a mineral right, except for a prospecting, exploration, and retention licence, shall be granted subject to proof of acquisition of surface rights over the land. It is noted that in the 2003 MA, this requirement was mandatory for only a ML.

In addition to the obligations of a Prospecting Licence holder to repair damage caused to the surface of the land, the MMB adds that this repair shall be to the satisfaction of the minister and the National Environment Management Authority (NEMA).³⁶ It also introduces an obligation for a PL holder to compensate users of land for damage to land and property.³⁷

Another development is the significant difference of the limited area for which an EL may be granted.³⁸ The MA limits the area of land to a maximum of five hundred square kilometres³⁹ whereas the MMB sets a maximum of two hundred fifty square kilometres.⁴⁰ This is a substantial reduction in maximum land size. An EL holder has the obligation to repair damage to the surface of land to the satisfaction of the minister, and to comply with requirements of the National Environment Act 2019.⁴¹ This obligation is also imposed when a mineral right is surrendered.⁴²

In addition to written proof of surface rights acquired from landowners and lawful occupants, an application for a ML must contain identification of interested and affected persons, details of consultation, and results of consultations with landowners and occupiers.⁴³ This is a development to the requirements of the MA which only required that surface rights be acquired. The MMB regulates the size of the area of land that may be granted for a large scale ML, which shall be an area of land that is reasonably required for the proposed mining programme.⁴⁴ The holder of a large-scale ML shall compensate for surface rights, enter into community agreements for use and access to land, and have a land use agreement with the landholder.⁴⁵ A small scale ML application shall have documentary evidence of consent to use the land for mining and proof of surface rights. The MMB also introduces an Artisanal

³⁶ Clause 41(1)(f)

³⁷ Clause 41(1)(g)

³⁸ Except that a person may hold more than one EL but there shall be no amalgamation of the EL areas.

³⁹ Section 27

⁴⁰ Clause 47

⁴¹ Clause 52(1)(e)

⁴² Clause 161

⁴³ Clauses 61(2)(m), 62(2), 63(2)(h).

⁴⁴ Clause 63(2)(a)

⁴⁵ Clauses 63(2)(h) and 71(1)

Mining Licence (AML). An application for an AML shall include evidence of consent from landowners and occupiers to use the land for mining.⁴⁶

An application for a Smelting Licence or a Mineral Refining Licence shall include a compensation, relocation and resettlement plan if there will need to be land acquisition for a processing plant.

MMB Clause 71(1)(k) provides for a Land Use Agreement between a holder of a large-scale mining licence and the registered owner, customary owner, lawful occupant or *bona fide* occupant. Clause 199 provides for a land lease between the applicant for a licence and the landholder, upon such terms as agreed by the parties. Where the mining operations are significant to Government, the land may be acquired through compulsory land acquisition in accordance with the Constitution and the Land Acquisition Act.

The MMB includes a restriction to protect land held communally including cultural sites, use of such land shall only be after consent of the community concerned.⁴⁷ Also, the MMB gives the Minister the mandate to declare additional protected areas. Mineral rights shall be exercised reasonably not to adversely affect the owner or occupier of land.⁴⁸ The holder of a ML may acquire the exclusive right to use land by a land lease from the landholder. The MMB provides for 'on demand compensation'. Disputes regarding compensation shall be determined by arbitration.

In addition to the requirement for an environmental restoration plan in the MA, the minister shall decide whether to accept the plan by considering the steps taken to comply with existing land use policies and plans and consult NEMA.

MMB Clause 257 provides for timelines within which a mineral rights holder shall give notice to persons who claim a right or interest in land affected by the mineral right. The interested persons shall make a claim for compensation, the claim is copied to the Minister, who shall make regulations for payment of compensation and resettlement. The Minister shall also make regulations for: notices and other safety measures to protect landowners or occupiers who graze stock or cultivate the land; and for rehabilitation of land surface disturbances.

⁴⁶ Clause 98(2)(g)

⁴⁷ Clause 197

⁴⁸ Clause 198

4. Evaluation of the proposed Developments in Law and Implications to Landholders and Investors

The proposed changes in the Law on access to land for mining may be reviewed as three major themes.

4.1 Acquisition of land, and rights to land for mining by negotiated agreement or contract

The Ugandan Constitution provides for the right to property. Both the MA and MMB recognise the right of ownership of land held by the people and require the holder of a Mineral right to show that s/he has reached an agreement with a landowner and has acquired surface rights. This may be through negotiated outright purchase. The MA enables the holder of a ML to get a land lease from a landholder. The MMB requires this as a precursor to being granted a mineral right.

The MMB additionally establishes the Ugandan legal form of a Land Use Agreement (LUA). LUAs may be in the form of a lease setting out terms for rent and compensation, and parties may agree to different forms of LUAs as long as they govern the mineral rights holder's use and occupation of the land and the parties' respective rights and obligations.

With a LUA that is a lease, the landowner remains owner of the land, and the mineral right holder is a leasee. The landowner continues to have a legal and vested interest in the land and its use. A LUA and acquisition by contract / negotiated purchase is a tool for landowner participation and involvement.

The MMB provides for engaging communities and entering into community agreements for the use and access to land. The inclusion of land holders as major stakeholders is commendable as an aspect of sustainable mining in line with international standards and guidelines. International Council on Mining and Metal principles of sustainable mining including: Principle 9 Social performance expects local stakeholder engagement; and

Principle 10 expects transparency in Stakeholder Engagement.⁴⁹ The participation of landowners in negotiation, as a requirement of law, is in the interest of the landowners. Additionally, acquisition of access to land by an LUA or any other form of a contract ensures continuity of the legally binding lease, or the purchase of land, or rights to land, irrespective of a transfer of the mineral right.

On the other hand, LUAs are also in the interest of an investor because they provide clear parameters for the operation of a land lease thus managing the relationship between the investor and the landowner. A registered lease agreement renders predictability and certainty while managing the expectations of landholders and minimising ad hoc demands from the landowner.

As an international comparator, Papua New Guinea is an example where LUAs have successfully led to increased landowner participation, access to information, and decision-making processes which in turn minimised social risk and enhanced viability for mining companies.⁵⁰ They are also used to prioritise employment opportunities for landowners and surrounding communities, and to give landowners preference for business spin off opportunities. LUAs open the door for cooperation and mutual benefit, a way for large scale mines to curb illegal mining. LUAs, especially indigenous land use agreements serve the same benefits as Access and Benefits Agreements; Partnering Agreements; Community Joint Venture Agreements; Empowerment Agreements; and Benefit Sharing Agreements.⁵¹

4.2 Compulsory Acquisition of Land by Government

Compulsory acquisition of land by Government reserves the right of Government to acquire land in public interest. Under the LAB, Government may compulsorily acquire land “for the benefit of the public for infrastructure and public works...” Mines and related infrastructure may be public works when the Government has a stake in the mine development.

Compulsory acquisition of land hastens access to land and implementation of public infrastructure projects. The procedure set out in the LAB is systematic with set timelines for each stage of the process and if applied efficiently, it is expeditious. This allows investors to

⁴⁹ International Council on Mining & Metals, *Mining Principles Performance Expectations* (2020)

⁵⁰ Benedict Y. Imbun, ‘Maintaining land use agreements in Papua New Guinea Mining: ‘Business as usual?’ 38 Resources Policy 310

⁵¹ James M Otto, ‘How do we legislate for improved community development’ Extractive industries: the management of resources as a driver of sustainable development Oxford University Press, Oxford 673 at p.7

get access to the land, and the subsequent rights needed to commence operations and development. In comparison to acquisition by agreement where negotiations with different landowners means a multitude of different parties may prolong the entire process. When land is compulsorily acquired from landholders, the 'landowner' becomes the Government through the relevant ministry, department or agency. Therefore, the investor deals with one landowner, one entity. This is in the interest of the investor.

The time limits set by the LAB for payment of compensations stipulates that PAPs must be paid promptly - within six months for cash compensation or one year for resettlement. This is in the interest of the landholders.

However, compulsory acquisition takes away the landholder's veto power into any future activities on the land. The landholders effectively lose all legal rights to that land. If the landholders are aggrieved by compensation rates, the acquisition process, or any other aspect of the project, the project will continue to face resistance and does not obtain a social licence to operate. Whereas landholders may dispute compensation rates and such disputes may be resolved after a reassessment and negotiation, they are not consulted prior to the declaration that the land shall be compulsorily acquired. This may be considered non-participatory and not in the interest of landholders.

As an international comparison, in Ghana, it has been proposed that priority should be given to negotiating with property owners with the aim of acquiring land by agreement, before the last resort to compulsory acquisition.⁵²

The legislative framework should promote negotiation as the first instance, with landholders being empowered to understand their rights and options. Similar proposals have been made for the LAB in Uganda.⁵³ These should be incorporated to serve the interests of landholders, these include involvement of PAPs in the project design; disclosure of information related to the acquisition; negotiation before compensation; payment of full compensation before possession of the land; and public education to empower landholders to understand the processes and procedures of the land acquisition for projects.

⁵² Michael Gyan Nyarko, 'The Right to Property and Compulsory Land Acquisition in Ghana: A Human Rights Perspective' 27 African Journal of International and Comparative Law 100

⁵³ LANDNET available at <https://www.landnet.ug/national-dialogue-compulsory-land-acquisition-report> last accessed 04/06/2020

4.3 Co-existence with other land use

The MMB envisages that mining activities shall co-exist alongside other land uses. It maintains the provisions of the MA which restrict the exercise of mineral rights on land designated for public purpose, and land that is in close proximity with inhabited areas, plus maintaining the right of a landholder to graze stock and cultivate the land. This position is in the interest of landholders because it ensures food security, by allowing the continued cultivation and agriculture. It also preserves the livelihood of surrounding communities by maintaining their economic activities.

It is noted that mining companies control or seek to control significant portions of land that already have pre-existing uses leading to dispossession and large mining concessions which erode communal rights, in order to access natural resources.⁵⁴ It is in the best interest of both the landholders and the investors that land relations between mining companies and pre-existing land users are negotiated to allow mutually beneficial co-existence. Additionally, that the documentation and recognition of pre-existing legitimate land uses are incorporated into Geographic Information System (GIS) maps to inform the mapping of mining concessions.⁵⁵

4.4 Mining, Minerals and Sustainable Development

The concept of 'sustainability' first introduced into international law at the United Nations Conference on Environment and Development held in Rio de Janeiro in 1992 (Earth Summit 1992) is based on marrying the protection of the environment, and promotion of economic growth. As per the Earth Summit 1992, the three requirements of sustainability were specified as follows: preservation of options for future generations; promotion of social and community stability; and maintenance and restoration of the environment.⁵⁶ The Earth Summit 1992's Outcome Document was dubbed 'The Future We Want',⁵⁷ and it recognized the importance of strong and effective legal and regulatory frameworks that deliver economic and social benefits.

⁵⁴ James Mitchell, 'Pulling the rug out from under: The land tenure dynamics of mining concessions in sub-Saharan Africa' 3 *The Extractive Industries and Society* 1117

⁵⁵ *ibid*

⁵⁶ Ana Elizabeth Bastida, Thomas W. Waelde and Janeth Warden-Fernandez, *International and comparative mineral law and policy : trends and prospects* (The Hague : Kluwer Law International 2005) p.129

⁵⁷ Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, vol.I. Restated in the United Nations General Assembly Resolution 66/288 adopted 27 July 2012.

Mining and land laws, such as those for Uganda reviewed above, can efficaciously promote the sustainable development goals of the Earth Summit 1992, where those laws are both well designed and effectively implemented.

5. Conclusions

The proposed changes to the mining and land law regimes in Uganda provide for the acquisition of land rights by negotiated agreement and LUAs, or by compulsory acquisition, and the recognition and retention of other uses of land. These provisions can be implemented to the benefit of both landholders and investors.

LUAs increase landowner participation and access to information while granting predictability of legal obligations to investors. Compulsory acquisition of land should be considered as a last resort in cases where best efforts to achieve land acquisition through negotiated agreement have failed. Existing land uses should be documented and recognised, and that information used to inform the mapping of large mining licences in a way that creates minimal dispossession. The interests of both landholders and investors should be considered and respected when implementing the laws related to land access for mining. Only when both important interests achieve a manageable balance can the relationship created between mining activities and landholders' communities be successful and sustainable. A well-balanced approach to these often-conflicting interests would promote social stability as a principle of sustainability.

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