

HAKIRASILIMALI OPINION ON NATURAL RESOURCE WEALTH BILLS OF 2017

HakiRasilimali is a platform of Civil Society Organizations (CSOs) working on strategic issues around minerals, oil and gas extraction in Tanzania incorporated as a non-profit company under the Companies Act of 2002 (reg .133413). HakiRasilimali is affiliated to Publish What You Pay (PWYP), a global membership-based coalition of civil society organizations (CSOs) in over forty countries united in their call for an open and accountable extractive sector, so that oil, gas and mining revenues improve the lives of women, men and youth in resource-rich countries and that extraction is carried out in a responsible manner that benefits countries and their citizens. HakiRasilimali membership to PWYP is an institutional commitment to global transparency agenda.

After careful analysis, HakiRasilimali hereby presents its opinion on the following bills presented to parliament on the 29th of June 2017:

- 1. The Written Laws (Miscellaneous Amendment) No. 4 Of 2017**
- 2. Natural Wealth and Resource Contracts (Review and Renegotiations of Unconscionable Terms) Act 2017**
- 3. The Natural Wealth and Resources (Permanent Sovereignty) Act 2017**



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1: THE WRITTEN LAWS (MISCELLEONEOUS AMENDMENT) No. 4 of 2017

Some of the salient features include:

Amendment of the Mining Act 2010 to:

1. Introduce new areas and aspects relating to the Mining Sector, these include:
 - a. Mineral processing and its associated issues
 - b. Mineral concentrates and the possible minerals to be found after mineral processing
 - c. Introducing local content requirement which was not covered under the Mining Act before
 - d. Introducing the integrity pledge to be taken by mineral right holders, that they will refrain from corrupt practices as well as pledge to support the country's campaign against corruption
 - e. Introducing the Executive Secretary to the Commission instead of the Secretary to the Board which has been turned into a commission
2. Vest mineral on or under Tanzania's soil and water on the President of the United Republic of Tanzania as a trustee for the United Republic of Tanzania for the people of Tanzania. **An issue to look out here is how mining as a non-union matter has been vested over the President of the United Republic of Tanzania for Tanzanian people, does that cover Tanzania Zanzibar?**
3. Creates a lien for the UR of TZ over any substance or material obtained in the process of mining operation or mineral processing
4. Introduces mining controlled areas and empowers the President to declare any area with mining operations after consultation with the local government and the Ministry responsible for local government a controlled area. Moreover it makes any contravention to the order a criminal offence. **These are highly unchecked discretionary powers given to the President which are susceptible to abuse just like the discretion to enter into MDAs was abused by former Ministers. The powers assume that all Presidents will be patriotic enough to use these powers positively. Moreover, once an area is**

declared a controlled area, some conditions will be issued as well, these tempers with stability and predictability of the Industry and mining operations.

5. Stating people who cannot be granted mineral right to include individuals who are non-Tanzanians who have not been resident in Tanzania for a period of four years and those who have been convicted for any offence relating to dishonesty or any offence under the Mining Act, 2010 or any other similar or related law within or outside Tanzania and has been sentenced to imprisonment or to a fine of not less than 20 Million Tanzanian Shillings in Tanzania or outside.
6. Introducing new requirements for companies that want to conduct mining in Tanzania to have a physical and postal address for purposes of serving notices and to be registered under the Companies Act with an objective of carrying out mining operations. **The issue raised here (Sec. 8 (2)(b) is that, what does the Companies Act mean? As the same is not defined in the proposed amendment, Is it the Companies Act of Tanzania? If so does it mean foreign companies are no longer allowed to undertake mining operations in Tanzania?**
7. Allowing holders of primary mineral license to engage foreign technical assistance upon the approval by the Commission on satisfaction that such support cannot be sourced internally
8. Foreign technical support firms to the same requirements as to companies seeking mineral rights in Tanzania.
9. Tightens the conditions for transferring mineral rights by introducing a requirement that the mineral right holder should have conducted substantial development for consent to transfer to be given. **The good thing with this proposal (Sec. 9(4)) is that it curbs or eliminates people who trade with mineral rights.**

SECTION	PROPOSED SECTION UNDER THE BILL	WEAKNESS	ALTERNATIVE PROPOSAL
Section 4	The Principle Act is amended in section 3, by ...	It refers section 3 of The Principle Act which does not match with the provision referred	Provisions have to be made relevant to the referred

		to the principle Act(Interpretation)	provision of The Principle Act. It should read as section 4of the Act which provides for the Interpretation.
Section 26	There shall be Executive Secretary of the Commission who shall be appointed by the President..	The Executive Secretary as provided under Section 26 is appointed by the President. So as to enhance sense of accountability and transparency.	Appointment of the Executive Secretary as provided under Section 26 should be appointed by the President and approved by being vetted by the Parliament of the United of Tanzania
Section 7 (3)	Amendment of section 8	The term Technical support is not defined under the Law.	Technical Support should be defined under the law.
Section 7 (a) (ii)	Amendment of section 8	Allows Foreigners to be beneficiaries under resident status of over 4 years.	The clause should be narrowed to exclude foreigners completely. Saved for investment purposes only.
Section 10	Repeal & Replacement of section 11 & 12	Is repealed and replaced to the effect that Mining Development Agreements will no longer be used and so discretion of the Minister to enter into such agreements has been removed. Moreover, the government's free carried interest shares are no longer taken at the will of the government and at the percentage it deems fit but are now compulsory in every mining operation under a mining license or a special mining license at a rate of 16 non-dilutable shares in the capital of a mining company. Moreover the government is mandatorily entitled to up to 50% shares in the capital of the mining	The issue to get clarification here is whether the 16 shares, is it 16% shares or 16 shares out of the number of all the shares of the company?

		company which are payable by setting off tax incentives given to the company by the government.	
Section 11 and 12	Repeal and replacement of Part III	have been amended to the effect that the period of the existing MDAs and the periodic reviews shall not be affected by this Act save for as they might be affected by the Natural Wealth and Resource Contracts (Review and Renegotiation of Unconscionable Terms) Act, 2017.	This is a good provision as it does not make the Act apply retrospectively save as it may only be required under the Natural Wealth and Resource Contracts (Review and Renegotiation of Unconscionable Terms) Act, 2017.
Section 19	Role of the Minister	By replacing Part III, the amendment under Section 19 consolidated the roles of the Minister of Minerals that were previously scattered all over the Act and limited them to those policy making, supervision and promotion of the Mineral Sector.	This is a good amendment as it has done away with some of the discretionary powers that the Minister had as well as has left the Minister to exercise effectively an oversight and promotional function. However, the discretionary powers have now been shifted to the President who appoints all the Commissioners in the Mining Commission. This is not a good arrangement as it is susceptible to abuse by the President himself.
Section 21	Establishment of Mining Commission	The amendment has established a Mining Commission which shall be a Body	With regard to the composition, though the Mining Commission

		<p>Corporate capable of suing or being sued in its own name. While establishing the Mining Commission, the amendment has done away with the Mining Advisory Board and allocated all its functions to the Mining Commission. The amendment has also provided the composition of the Commission to include Permanent Secretaries of key Ministries, Commissioners appointed by the President from among public officers, the Deputy Attorney General and Two eminent Persons possessing proven knowledge in the mining sector.</p>	<p>have two eminent persons in the mining Sector, the amendment does not qualify these two persons as to where they can be drawn from, so they can still be drawn from the government or civil society or academia. Moreover, unlike in the Mining Advisory Board, the participation and inclusion of non-state actors in the Mining Commission has been reduced. While in the Board we had the inclusion of the Tanzania Chamber of Minerals and Energy, Higher Learning Institutions, Small Scale Miners, mineral dealers and mining experts all of which are non-state actors, the newly formed Mining Commission does not guarantee the inclusion of non-state actors apart from the representative of the Tanzania Mineral and Energy Chamber and the two eminent persons who may at times be government actors as the amendment does not provide safeguards against that. A point to note here is that the Chairman and Commissioners</p>
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			<p>referred in Section 21(5) to have been referred in Section 21(4)(g) of the amended Part III do not exist as Section 21 (4)(g) provides for the Deputy Attorney General as a member of the Mining Commission. Section 21(4), (5) and (6) of the amended Part III need to be streamlined and harmonized as they do not speak to each other though they are meant to compliment to each other. Moreover, the number of Commissioners forming the Mining Commission is not definite due to the contradictions left by the proposed Section 21. Moreover, the composition has total disregard to gender balance and safeguards to ensure equity in gender representation.</p>
Section 22	Function of the Commission	The Commission has been given broad functions including those of awarding and revoking mineral rights, monitoring and auditing numerous aspects and issues relating to mineral operations	These are broad functions but which are proper. Some new roles have been brought up to ensure that mineral wealth is protected while some roles

			<p>which had been given to other government entities have been consolidated and assigned to the Commission. On the other hand the Commission has not been given any function in relation to the people such as awareness rising, ensuring CSR and Local Content. It has not be mandated to ensure that it provide information to the people who actually own the minerals.</p>
Section 25	Committees of the Commission	The amendment empowers the Commission with powers to formulate Committees to assist in carrying out their functions.	This is a good provision owing to the broad nature of the functions of the Commission. It will ensure that the Commission fulfills it duties.
Section 27	Appointment of Staff of the Commission	The Staff of the Commission shall be appointed by the Commission. The Minister may in consultation with the Commission appoint several officers as it is deemed necessary but all these officers shall be responsible to the Commission	This is a good amendment as it does away with the different lines of authorities that existed before and consolidate hands on powers to the commission which is a body corporate thus enjoying some form of autonomy from the government in its operations. However, no safe guards are put to ensure gender parity in the Committees and appointed staff members of the Commission. We should bear

			in mind that the mineral sector is one of the sectors where the mineral sector is one of the most segregated and so affirmative actions and safeguards are necessary.
Section 28	Prohibition against the disclosure of the information	Section 28(1) still upholds non-disclosure/limited disclosure of information in the mineral sector which is a bar to required transparency and people driven accountability.	Information regarding the mineral sector should be available to uphold transparency and accountability. To avail information to the public.
Section 29 (1)	Mines resident officer	Under Section 29(1) the Commission is mandatorily required to station a Resident Mines Officer in every mine site undertaking mining operation to monitor the operations and ensure that the government is not robbed off its minerals	This is a good arrangement as in the past no one was stationed in the mining site as Zonal and Resident Mines Officers were not stationed in mines. However, how are we going to ensure that the Officer is not corrupted; the Act has to go further and provide for safeguards. A good suggestion is to make it an offence to go contrary to the roles assigned and put a severe offence such as economic sabotage and severe punishment that will discourage being corrupted.
Section 30	Geological Survey Tanzania	Section 30 establishes the Geological Survey	The Bill should establish funding

		of Tanzania and provides its function which includes undertaking geological mapping of Tanzania by themselves or through engaging contractors. This is a good provision as it ensures that the country is aware of its geological potential. However, the Bill does not provide for reliable sources of financing the undertakings of the agency.	for the survey.
Section 27B	Establishment of the gem and mineral houses	Empowers the Commission to establish market and clearing centers for minerals and gems in different areas of Tanzania. This is a good provision as it will ensure that minerals and gems are treated here in Tanzania in an organized manner that increases government scrutiny and revenue collections.	Though the provision gives power to the Minister to make Regulations to guide the centers, still it would have been ideal if the Act could provide for matters such as criminalizing the sale of minerals out of the centers and punishing such acts heavily to ensure compliance.
Section 27C	Establishment of National Gold and Gemstone Reserve	Empowers the Minister for Finance to establish a Gold and Gem Reserve in which Gem and Gold from mentioned sources will be deposited for the government.	It is a good thing to have gold and gem reserve but it has numerous challenges that should be safeguarded here in the Act to ensure that it does not cause deficit or inflation in the country.
Section 27D	Establishment of the Government Minerals Warehouses	Empowers the Minister for Finance to establish a warehouse for all metallic minerals and gem stones won by all mineral rights holders. This is also a good provision as it brings centralized handling of minerals to prevent smuggling and uncontrolled	However, the provisions leaves much wanting, such issues include the purpose of the deposit, security of such minerals as well as it might increase production costs to

		dealing with minerals and gemstones.	artisanal miners as well as lead to penalties such miners. Moreover, for purposes of compliance, violation of the requirement to deposit won minerals should have been penalized otherwise leaving such important provision to Regulations is a way of creating a room for abuse.
Section 27E	Establishment of the National Mineral Resources Data Bank	Establishes the Mineral Resources Data Bank and mandates mineral license holders to furnish mineral information to it for free as well as providing the ownership of such data to the government.	This is a good provision but it does not show how the public can access such information for different reasons such as research and other use by civil societies.
Section 27F	Establishment of Mining Cadastre	Intends at covering and protecting Commissioners and Committee members who undertake or omit to undertake a thing not required or required respectively in good faith.	This is good but the provision has clerical error and should be corrected as in its current situation such cover has been denied. Moreover, Commissioners, Committee members and any public officer who undertakes or omits to undertake a required or an unrequired act maliciously is supposed to be penalized.

2: NATURAL WEALTH AND RESOURCE CONTRACTS (REVIEW AND RENEGOTIATIONS OF UNCONSCIONABLE TERMS) ACT 2017

Section	PROPOSED SECTION UNDER THE BILL	ALTERNATIVE PROPOSAL
Preamble	WHEREAS, by virtue of Article 27 of the Constitution the protection of natural wealth and resources in the United Republic is charged on the People and the Government the control of which is entrusted to the President;	WHEREAS, by virtue of Article 27 of the Constitution the development, management and protection of natural wealth and resources in the United Republic is charged on the People and the Government the control of which is entrusted to the President;
Section 2	This Act shall, without prejudice to the authority of the Revolutionary Government of Zanzibar over ownership and control of its own national wealth and resources, apply to Mainland Tanzania in respect of all arrangements or agreements made over natural wealth and resources by the Government before or after coming into operation of this Act.	<p>Is Mainland Tanzania a sovereign state?</p> <p>The Constitution of URT states:</p> <p>Article 1. Tanzania is one State and is a sovereign United Republic.</p> <p>Article 2.-(1) The territory of the United Republic consists of the whole of the area of Mainland Tanzania and the whole of the area of Tanzania Zanzibar, and includes the territorial waters.</p>
Section 4(1)	For effective performance of oversight and advisory functions stipulated under Article 63(2) of the Constitution, the National Assembly may review any arrangements or agreement made by the Government relating to natural wealth and resources.	The use of the word ' May ' connotes optional

<p>Section 4(1)</p>	<p>For effective performance of oversight and advisory functions stipulated under Article 63(2) of the Constitution, the National Assembly may review any arrangements or agreement made by the Government relating to natural wealth and resources.</p>	<p>Powers to review as opposed to sanctioning and approval of the agreements.</p> <p>Parliament has limited influence on the contracting before it takes place. The Government is only obliged UNDER THIS LAW TO PROVIDE DETAILS OF THE AGREEMENT AFTER IT HAS TAKEN PLACE.</p>
<p>5(1)</p>	<p>All arrangements or agreements on natural wealth and resources made by the Government shall, within six sitting days of the National Assembly next following the making of such arrangement or agreements be reported to the National Assembly.</p>	<p>Under the URT Constitution Article 63 (2)</p> <p>The second part of Parliament shall be the principal organ of the United Republic which shall have the authority on behalf of the people to oversee and advise the Government of the United Republic and all its organs in the discharge of their respective responsibilities in accordance with this Constitution.</p> <p>(3) For the purposes of performing its functions, the National Assembly may:</p> <p>...</p> <p>e) deliberate upon and ratify all treaties and</p>

		agreements to which the United Republic is a party and the provisions of which require ratification.
Section 5	(2) For purposes of subsections (1) and (2), all activities and undertakings relating to exploration of natural wealth and resources shall be conducted by the Government on behalf of the People of the United Republic.	For purposes of subsections (1) and (2), all activities and undertakings relating to exploration of natural wealth and resources shall be conducted in the interest of the People of the United Republic.
Section 6	(1) Pursuant to paragraphs (c) and (i) of Article 9 of the Constitution, it shall be unlawful to make any arrangement or agreement for the extraction, exploitation or acquisition and use of natural wealth and resources except where the interests of the People and the United Republic are fully secured and approved by the National Assembly.	
Section 7	(1) Where the Government has served notice of intention to re-negotiate the arrangement or agreement in terms of section 6 and the other party fails to agree to re-negotiate the unconscionable terms or no agreement is reached with regards to unconscionable such terms shall cease to have effect to the extent of unconscionable terms and shall, by operation of this Act, be treated as having been expunged. (2) For the purpose of subsection (1), the provisions of this Act shall have over-riding effect over any other law governing administration and management of natural wealth and resources.	THE SUPREMACY OF THE LAW ARGUMENT When Acts of Parliament are in conflict, which law overrides the other one

<p>Section 10</p>	<p>(1) Any arrangement or agreement for extraction, exploitation or acquisition and use of natural wealth and resources shall require that earnings from disposal or dealings be retained in the banks and financial institutions established in the United Republic.</p>	<p>(1) Any arrangement or agreement for extraction, exploitation or acquisition and use of natural wealth and resources shall, where feasible, require that earnings from disposal or dealings be retained in the banks and financial institutions established in the United Republic.</p> <p>Key issues:</p> <p>What is the absorption capacity of the economy? How developed is the financial sector?</p> <p>Are we ignorant of the international investment financing structures? Whoever finances decides the operational and collecting bank for the credit.</p>

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Notes:

- The urgency and secrecy has not allowed sufficient public consultation, analysis or debate. If the government and Parliament are truly interested in “ensuring that the interest of the People are paramount” then they should allow for public debate and consideration of these bills that will have national implications.
- The bills overall seem to concentrate power within the government and the Presidency at the detriment of the people and their representatives(National Assembly) and leaves significant opening for rent-seeking, exploitation by powerful elites.
- Local communities and everyday citizens are not prioritized in these amendments and new proposals, without which the voices and choices of the people will not be taken onboard.
- It seems unclear HOW the government will determine if “unconscionable” terms are “contrary to good conscience” Assessment criteria must be clarified.
- Critical that this act makes reference to and enforces the implementation of CONTRACT TRANSPARENCY – agreements should and must be made available to the public so that everyday citizens are aware and can hold their government and the companies accountable. It’s critical for oversight actors like National Assembly, regulatory agencies CSOs to build trust with citizens and build their own capacity in negotiations.
- The other aspect in the Bill is the definition of unconscionable’ as that is the basis for any review and or renegotiation.

On defining what could be unconscionable; there is reference to agreement terms that undermine the effectiveness of State measures to protect the environment. This could be expanded to include community rights

- It should be made clear under Part II Powers of the National Assembly that the National Assembly must review all arrangements or agreements made by government. This will ensure that reviews are not subject to much discretion and cherry-picking.
- Under procedure for review there is no time-frame within which Parliament should complete its review

- On defining unconscionable- we can expand this to include agreements or arrangements that have terms binding the State to confidentiality in parts or the whole agreement.
- On completion of renegotiation, currently Bill only says a report will be laid down before Assembly. It should read a report and the renegotiated agreement will be put before national assembly for review.



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3: THE NATURAL WEALTH AND RESOURCES (PERMANENT SOVERIGNTY) ACT 2017

Section	PROPOSED SECTION UNDER THE BILL	ALTERNATIVE PROPOSAL
Section 2	This Act shall, without prejudice to the authority of the Revolutionary Government of Zanzibar over ownership and control of its own national wealth and resources, apply to Mainland Tanzania.	<p>Sovereignty Claim: Can Mainland Tanzania claim sovereignty without Zanzibar? The Constitution of URT states: Article 1. Tanzania is one State and is a sovereign United Republic.</p> <p>Article 2.-(1) The territory of the United Republic consists of the whole of the area of Mainland Tanzania and the whole of the area of Tanzania Zanzibar, and includes the territorial waters.</p>
Section 4.	1) The People of the United Republic shall have permanent sovereignty over all natural wealth and resources.	To add: Any investment should be subject to written consent by the community
Section 4	(2) The ownership and control over natural wealth and resources shall be exercised by, and through the Government on behalf of the People and the United Republic	The ownership and control over natural wealth and resources shall be exercised in the interest of the People of the United Republic
Section 6	1) Pursuant to paragraphs (c) and (i) of Article 9 of the Constitution, it shall be unlawful to make any arrangement or agreement for the extraction, exploitation or acquisition and use of natural wealth and resources except where the interests of the People and the United Republic are fully secured and approved by the National Assembly.	There is need to define interest of the people in the definition section
Section 9	1) Any arrangement or agreement for the extraction,	1) Any arrangement or agreement for the extraction,

	exploitation or acquisition and use of natural wealth and resources shall ensure that no raw resources shall be exported for beneficiation outside the United Republic.	exploitation or acquisition and use of natural wealth and resources shall, where feasible , ensure that no raw resources shall be exported for beneficiation outside the United Republic Comment: This is due to challenges in technology and market demands eg Uranium or rare earth
Section 10	(1) Any arrangement or agreement for extraction, exploitation or acquisition and use of natural wealth and resources shall require that earnings from disposal or dealings be retained in the banks and financial institutions established in the United Republic.	Comments: <ul style="list-style-type: none"> • It requires more thinking as huge influx of hard currency can negatively impact of the economy. • The banking sector absorption capacity need to be studied.
Section 12	All arrangements or agreements entailing extraction, exploitation or acquisition and use of natural wealth and resources may be reviewed by the National Assembly.	Replace May with Shall Include 'approved and' All arrangements or agreements entailing extraction, exploitation or acquisition and use of natural wealth and resources shall be approved and reviewed by the National Assembly.

General Comments:

- The law proposes that Natural resource ownership and control being vested and concentrated in the President and the government. How will there be accountability and oversight on the government? How does this law build the ability of the National Assembly to hold government accountable and to mitigate any abuse of powers vested on the agencies?

- The principle/ideal of 'beneficiation' is a good one to maximize value-add in the country however they should be a transitional plan to achieve this that includes incentives for businesses to invest in value-add industries, processing facilities, and a training plan to build a workforce in the future. Otherwise, this could make investment in TZ so prohibitive that investors run away completely. Also there is need to think about how to ensure beneficiation process does not itself open doors for corruption and rent seeking by the government or powerful elites.
- Neither is beneficiation right for ALL raw materials, thus the law could give mandate to state agency to determine strategic minerals for beneficiation possible (determinants could include market, financing, feedstocks, power etc)
- The law talks about equitable stake without defining what it is in the definition section. This can be subject to individual interpretation based on the information and context
- There is requirement for earnings to be locally banked but it is not clear if this is 100% of the earnings, and whether should indigenous banks or just banks domiciled in Tanzania even where they are multinational.
- It also does not consider the impact of huge money to the local economy includes inflation and possible slowdown of financing for the projects by overseas specialized funds.

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