

**ENVIRONMENTAL IMPACT ASSESMENT FOR MINING ACTIVITIES
IN TANZANIA: *LEGAL ANALYSIS***

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Submitted as the dissertation component in partial fulfillment of the academic requirements for the degree of Master of Laws in the Faculty of Law, University of KwaZulu-Natal, Pietermaritzburg.

DECLARATION

I, Daniel Mirisho Pallangyo, do hereby declare that, unless specifically indicated to the contrary in this text, this dissertation is my own original work and has not been submitted to any other university in full or partial fulfillment of the academic requirements of any other degree or other qualification.

Signed at Pietermaritzburg on 15 November 2005.

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ABBREVIATIONS

CBOs - Community Based Organisations
CCD - Convention to Combat Desertification
CSD - Commission on Sustainable Development
DFID - Department for International Development
EAC - East African Community
EIA - Environmental Impact Assessment
EIS- Environmental Impact Statements
EMA - Environmental Management Act
EU - European Union
GEF - Global Environment Facility
IFAD - International Fund for Agricultural Development
IUCN- International Union for Conservation of Nature and Natural Resources
JET - Journalist Environmental Association of Tanzania
NAP - National Action Programme to Combat Desertification
NAPA - National Adaptation Programme of Action
NBSAP - National Biodiversity Strategy and Action Plan
NDF - National Desertification Fund
NEAC - National Environmental Advisory Committee
NEMC - National Environment Management Council
NEPAD - New Partnership for Africa's Development
NGOs - Non-Governmental Organisations
SEA-Strategic Environmental Action
ToR- Terms of Reference
UNEP- United Nations Environment Programme.
VPO - Vice President's Office
WSSD - World Summit on Sustainable Development

ABSTRACT

In this study, an analysis of laws pertaining to environmental protection in the mining in Tanzania is done. The study develops understanding of various environmental laws and institutions for the purposes of setting context and clarity for the subsequent chapters. The major discussion evolves around environmental protection offered in Tanzania mining and investment laws. In understanding this, a detailed discussion of coverage of environmental issues in the Tanzania Mining Act, 5 of 1998 and the Tanzania National Investment Act, 26 of 1997 is made. After this discussion, the recommendations are given.

Despite Tanzania mining, especially large-scale mining being one of the main growing industries in Tanzania, it is concluded that environmental management in mining has been hindered by inadequate legal protection, lack of coordination, insufficient funding and expertise. As a result there has been uncontrolled extraction of minerals and the use of unsafe mining methods and severe environmental damage and appalling living conditions in the mining communities. The challenge associated with the mining sector today in Tanzania is ensuring sustainability and integrating environmental and social concerns into mineral development programmes. Sustainable mining development requires balancing the protection of the flora and fauna and the natural environment with the need for social and economic development. To address the environmental problems associated with mining, the Government's policy is to reduce or eliminate the adverse environmental effects of mining, improve health and safety conditions in mining areas, and address social issues affecting local communities. EIA is recommended as one of the major tools for achieving these solutions and has been discussed.

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CHAPTER ONE

1.1 INTRODUCTION

Tanzania has diverse mineral resources.¹ The list ranges from precious minerals, namely gold, silver and platinoid-based (and other), such as zink, lead, copper, nickel, tin, tungsten, cobalt and beach sand minerals.² Others in the list include ferrous metals, namely iron and chromium, precious stones and gemstones, i.e. diamonds, rubies, tanzanite, gem garnets, emeralds, tourmaline, spinel, zircon, sapphire and peridot. Also found are industrial minerals such as, graphite, mica, kaolin, bauxite, to mention but a few. Energy minerals include salt, soda ash, gypsum and limestone.³

Mining, especially large-scale mining is one of the main growing industries in Tanzania.⁴ The mining sector has already recorded an impressive growth of around 17% a year between 1997 and 1999.⁵ Estimates show that mining will contribute more than \$ 1 billion a year and contribute over 10% of the GDP.⁶ Over the past decade, the global mining industry has undergone dramatic changes that may have far-reaching implications for Tanzania. Like many other developing countries, the country has embarked on wide ranging structural reforms aimed at opening up their economies to foreign trade and investment. With these trend-setting developments, and in order to take advantage of the

¹ A detailed listing of minerals available in the country, production and marketing history is found in Chachage, C.S.L. "The Meek shall Inherit the Earth but not the Mining Rights, in Gibbon P. (ed.) *Liberalised Development in Tanzania, Studies in Accumulation Processes and Local Institutions*" (1995), the Nordic Institute for African Studies, Uppsala, Sweden. See also Nanyaro, J.T. "The Mining Sector of Tanzania: Current Status and Strategies for its Sustainable Development in the 21st Century (1994) Dar es salaam, Tanzania. See more on this in chapter 3 of this work.

² Kulindwa, K., Mashindano, O., Shechambo, F. and Sosovele, H. *Mining for Sustainable Development in Tanzania* (2003), Dar es salaam University Press at 2

³ Ibid at 3.

⁴ Mwalyosi, R. & Hughes R. 'The Performance of EIA in Tanzania: an Assessment'. (1998) IRA Research Paper No 41/IIED Environmental Planning Issues No. 14 at 8.

⁵ Phillips, C. *et al* "Tanzania's Precious Minerals Boom: Issues in Mining and Marketing", (2001), at 3.

⁶ Ibid.

opportunities offered by renewed interest in mining in Africa, the mining sector in Tanzania decided to make a smooth transition towards a modern and viable mining industry.⁷

A major objective of the mining sector policy in Tanzania is to alleviate poverty in the country by creating gainful and secure employment in the mineral sector and to provide alternative sources of income particularly for the rural population.⁸ Although the policy also stresses on the environmental protection and management, this aspect is not given enough attention.

Mining operations can be a source of environmental destruction if they are not well managed and controlled.⁹ Environmental impacts of the production of minerals depend on such factors as the ecological character of the mining site, the quantity of materials being removed and the chemical composition of the surrounding rocks and soil as well as technologies being used.¹⁰ Mining has an impact on the physical and chemical characteristics of the environment, e.g. soil, water, atmosphere and other physical resources on top of its influence on biological entities, e.g. flora, fauna, their structure and functions.¹¹ Chiras argues that mining causes major environmental impacts, even in the best regulated countries.¹²

⁷ The Mineral Policy of Tanzania, Ministry of Energy and Minerals URT at 8.

⁸ Ibid. The government capitalizes on these natural riches thus, for example, since 1998 Tanzania has been opening one gold mine every year. Currently the country has mining investment worth over 1 billion US dollars and boasts six modern gold mines in operation producing 1,500,000 ounces of gold worth more than 400 million US dollars annually. For example, there are the South Africa's Anglo-Gold and London-based Ashanti Goldfields, sharing the Geita deposit. There is also Resolute Golden Pride Mining Company in Nzega.

⁹ Chiras, D. *Environmental Science: Action for Sustainable Future*, (1993), 4th ed. Benjamin/Cummings Publishing Company, at pp 308.313. Rock wastes from open pit mines, for example, are typically deposited on the land near the mine-burying vegetated areas. Mine wastes may also erode into streams, clogging channels and causing a number of problems as flooding etc.

¹⁰ Chachage, C.S.L. "Mining and Environmental Issues Under SAPS in Tanzania: Examples from Three Case Studies, in Bagachwa, M.S.D. and Limbu, F.(eds) *Policy Reform and the Environment in Tanzania* (1995a) Dar es salaam University Press, Tanzania, at 13.

¹¹ Kulindwa, K. et al, op cit note 2 at 10.

¹² Chiras, D. *Environmental Science: A System Approach to Sustainable Development* (1998) Wadsworth Publishing Company, at pp 306-308. The mineral production consumption cycle produces extra-ordinary environmental impacts. The most noticeable occur in the mining and

Although the mining industry occupies a relatively small part of the land surface, it does have significant and often irreversible impacts. By its nature, mining has a permanent environmental impact in that a non-renewable natural resource is exhausted.¹³ Environmental impacts can occur during all the phases of a mining project, exploration, disposal of waste rock and overburden, ore processing and plant operation, tailings (processing wastes) management, infrastructure (access and energy) and construction of camps and towns.¹⁴ For instance, the major impacts of abandoned mine sites are acid mine drainage, loss of productive land, visual effects, surface and groundwater pollution, soil contamination, siltation, contamination of aquatic sediments and fauna, air pollution from dust, risks posed by abandoned shafts and pits, and landslides due to collapse of waste and tailings dumps.¹⁵

This being the case, environmental protection in mining activities should be given the first priority for sustainable mining. The legislation pertaining to environmental protection, particularly mining industry in Tanzania has been

smelting phases. For example mining disturbs large areas tropics and also forests are leveled to make room for mines. Moreover, mine wastes devastate the land.

¹³ Ibid, at 307.

¹⁴ Ibid, at 306. See also Balkau, F. "Abandoned Mine Sites: Problems, Issues and Options" (1999). He gives a number of examples such as;

- Environmental problems related to copper mining in Zambia prior to privatisation;
- Abandoned pits and shafts over a large area of unregulated artisanal mining in West Africa. This pose a safety risk to local population and animals; and
- Tailings dumps from past mining activities around Johannesburg in South Africa, which are a source of dust affecting the health of neighbouring populations. In some cases the responsibility for the rehabilitation of the dumps can be attributed, but economic conditions have prevented rehabilitation.

¹⁵ Boocock, C.N. "Environmental Impacts of Foreign Direct Investment in the Mining Sector in Sub-Saharan Africa. Boocock argues that acid mine drainage is the largest liability in this field and this has been a long time problem. These problems pose safety risk to local populations and animals. This creates several issues which need to be addressed, such as;

- The extent of current damage;
- The effects of the damage on local and national development;
- What are the rehabilitation costs, and who is liable for them;
- Did the original activity contribute to development, and to what extent;
- Did local authority approve the activity at the time;
- Do the sites have potential for redevelopment; and
- What legislation, if any, exists concerning the sites?

weak and uncoordinated.¹⁶ The primary purpose of this dissertation is to provide an evaluation of environmental protection offered under the Mining legislation in Tanzania. This dissertation begins by outlining the overview of environmental law and institutions in Tanzania in order to give a clear understanding when discussing environmental protection covered under mining laws. To understand the environmental protection offered in mining activities further, the investment to the sector is also discussed. This analysis will lead to the formulation of recommendations for enhancing the environmental performance in the mining sector in order to maximize the benefits of the investment.

The mining industry has in recent years turned its attention to the environmental impacts of its activities, and in particular is addressing the issue through the Global Mining Initiative¹⁷ and the Mining, Minerals and Sustainable Development Project (MMSD) which is addressing the issue of the contribution of the mining sector to sustainable development.¹⁸ In 1998 the industry started the Industrial Network for Acid Prevention as part of its contribution to dealing with the legacy of abandoned mines. Projects can also have major socio-economic impacts. Positive impacts can include increased employment, better health care, improved infrastructure and schooling. On the negative side there may be disruption of traditional cultures, introduction of STD's, basic commodity price increases, population displacement, land use conflicts and loss of livelihood.¹⁹

In the following chapters, the problem will be approached by looking at the environmental regulatory framework concerning the mining industry in Tanzania, as well as examples of particular projects for which some data is available. An attempt will be made to assess whether environmental regulations are respected and enforced, and whether or not mining companies are in advance of current laws. In addition to regulatory requirements, the environmental

¹⁶ Kulindwa, op cit note 3 at 106.

¹⁷ www.globalmining.com.

¹⁸ www.iied.org/mmsd/.

¹⁹ Ibid.

behaviour of the industry is a function of the corporate culture and the company commitment to the environment, as well as leverage by financial institutions.

Chapter two gives an overview of environmental law institutions in Tanzania for the purpose of setting context and provide clarity for the subsequent chapters. Chapter three discusses environmental protection offered in the mining legislation in Tanzania. In bringing more understanding to this chapter, EIA guidelines and procedures, public participation under the guidelines and access to information is discussed. Chapter four discusses investments in the mining industry and the environmental protection offered under the investment laws. Chapter five gives the researcher's recommendations and conclusions.

1.2 Tanzania: Geographical location and legal system

Tanzania is in Eastern Africa bordering the Indian Ocean between Kenya and Mozambique. It includes the isles of Zanzibar, Pemba and Mafia. Tanzania has a total surface area of 945,090 sq km of which 22 million ha. (23%) is allocated to reserves (largest share of land resources allocated by any country in Sub-Saharan Africa), which includes National Parks (4.2 million ha.), Game Reserves (7.7 million ha.), and Forest Reserves (10.1 million ha.)²⁰ Tanzanian legal system is based on the common law. The Judiciary consists of three organs: the Court of Appeal of the United Republic of Tanzania, (CAT) the High Court of Tanzania Mainland Tanzania (HC) and the High Court of Tanzania Zanzibar (HCTZ), the Judicial Service Commission for Tanzania Mainland. Magistrates Courts and Primary Courts. The Judicial Service Commission for Tanzania Mainland consists of: the Chief Justice of the Court of Appeal of Tanzania (Chairman); the Justice of the Court of Appeal of Tanzania; the Principal Judge of the High Court; and two members appointed by the President.²¹

²⁰ See Tanzania national website <http://www.tanzania.go.tz>.

²¹ Ibid. See map 1.

CHAPTER TWO

ENVIRONMENTAL LAWS AND INSTITUTIONS IN TANZANIA

2.1 INTRODUCTION

Over the past few decades, environmental protection has emerged from a point of obscurity to one of the important issues of our time. Both at the international and national planes, the dominant theme of the environmental protection movement is achievement of sustainable development.²² It is the theme, which underlies the Rio Declaration on Development and Environment, the Tanzania National Environmental Action Plan (NEAP) and the Tanzania National Conservation Strategy for Sustainable Development (NCSSD).²³ The contemporary international norm which underpins environmental law generally is undoubtedly the notion of sustainable development. The Pioneering World Commission on Environment and Development (the Brundtland Commission) convened by the United Nations General Assembly in 1983 in response to global environmental concerns, describes sustainable development as; 'the development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.²⁴

²² The Principles of sustainability were accepted by all nations at the Earth Summit in Rio in 1992 and reaffirmed in Johannesburg in 2002. The 1992 United Nations Conference on Environment and Development (UNCED) was historic watershed. It placed the environment crisis at the top of the International agenda, and linked environment with development in a new paradigm of sustainable development.

²³ The National Environmental Management Council, the national Conservation Strategy for Sustainable Development (NCSSD), January 1994

²⁴ Glazewski J. *Environmental Law in South Africa*, (2000) Butterworths, 2nd ed. pp 14-15. This definition contains within it two key concepts:

- the idea of limitations imposed by the state of technology and social organisation on the environment's ability to meet present and future needs; and
- the concept of 'needs' in particular the essential needs of the world's poor, to which overriding priority should be given.²⁴

The general principles that states should ensure the development and use of their natural resources in manner which is sustainable emerged in the run-up to UNCED, although the idea underlying the concept of sustainable development have a long history in international legal instruments and the term itself began to appear in treaties in the 1980's in the period prior to the publication of the Brundtland report in 1987. The general principle of sustainable development has been first referred in a preamble to the 1992 EEA Agreement.

According to the NEAP, the key policy instruments and strategies for achieving sustainable development are environmental impact assessment, environmental legislation, economic instruments, environmental indicators and standards, and public participation.²⁵

The purpose of this chapter is to give an outline of the environmental law, policy and institutions in Tanzania. Since this dissertation does not examine environmental law and policy in Tanzania, this chapter is intended to give an understanding of environmental law and policy to make the following chapters clearly understood.²⁶

2.2 INTERNATIONAL AND REGIONAL LEGAL FRAMEWORK

In 1989, the General Assembly of the United Nations called for a global conference to devise strategies that would halt and reverse the negative impacts of anthropogenic activities on the environment and promote sustainable development. The United Nations Conference on Environment and Development (UNCED) held in Rio de Janeiro, Brazil, 3-14 June, 1992 fulfilled the mandate given to it by the General Assembly by adopting Agenda 21, which is a programme of action for sustainable development into the 21st century. The Rio Declaration on Environment and Development; and First Principles, a non - legally binding authoritative statement of principle for a global consensus on the management, conservation and sustainable development of all types of forests.²⁷

Thus, during the 1992 United Nations Conference on the Environment and Development (UNCED) held in Rio de Janeiro, Tanzania, together with other countries made a declaration to abide by the principle of sustainable development based on the recognition that "the current generation should meet

²⁵ See Mwalyosi, R and Hughes, R. op cit fn 4 at 13.

²⁶ The concept of environmental law is new in Tanzania. However, although it may be submitted that up to now, the issues pertaining to environment are not legally well addressed, the current situation is promising.

²⁷ 'Institutional Aspects of Sustainable Development in the United Republic of Tanzania', (1999), UNDPat6.

their needs without compromising the ability of future generations to meet their needs".²⁸

The government is signatory and has acceded to a number of other International/Regional environmental treaties as follows:

- Convention on Biological Diversity ratified on 8 March, 1996;
- Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region and Related Protocols ratified on 1 March, 1996;
- United Nations Convention to Combat Desertification ratified April, 1997;
- United Nations Framework Convention on Climate Change ratified in April, 1996;
- The Vienna Convention on the Protection of Ozone Layer and Montreal Protocol on Substances that Deplete the Ozone Layer acceded on 7 April, 1993 and 16 April, 1993 respectively;
- Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal acceded on 7 April, 1993, and,
- Bamako Convention on Ban of the Import into Africa and the Control of Transboundary Movements of Hazardous Wastes within Africa ratified on 7 April 1993.²⁹

One of the challenges that faced Tanzania after acceding to the Rio Declaration was taking necessary legislative steps to ensure sustainable development.³⁰ Therefore, Tanzania took concerted efforts to alleviate environmental concerns

²⁸ Sustainable Development means that people can make their living without destroying the natural resources and ecosystems necessary for meeting their needs and supporting the diversity of their life on the planet. See Mohamed, T. 'The Challenges of Sustainable Development after Johannesburg' A paper presented in March 20, 2003 Santiago, Chile. The definition contains within it two key concepts; the idea of limitations imposed by the state of technology and social organisation on the environment's ability to meet present and future needs; and the concept of 'needs' in particular the essential needs of the world's poor, to which overriding priority should be given. See Sands, P. *Principles of International Environmental Law*, (2000) at 13.

²⁹ Mwalyosi, R. 'Impact Assessment and the Mining Industry: Perspectives from Tanzania', IAIA '04, Vancouver, Canada, April, 2004.

³⁰ See NEMC, The National Conservation Strategy for Sustainable Development (NCSSD), Jan.1994.

with a view to achieving sustainable development. Although progress in many areas remains slow, the Government is nevertheless engaged in a major exercise aimed at formulating or reviewing national policies for the sectors.³¹ Thus, the Planning Commission under the President's Office is charged with national development planning and economic management. The main function of the Planning Commission is economic management and coordination of development activities including integration of environmental concerns in development planning. At the central and local government levels, there are several line ministries and government departments whose work is of relevance to environment and sustainable development.³²

In addition to the government organisations, there are more than 100 non-governmental organizations (NGOs) and community based organizations (CBOs) which are involved in implementing programmes which relate to the environment and sustainable development. Academic institutions, the business community and professional associations are also involved in this task.³³

Specific activities related to the commitment to environmental concerns at the national level included the finalisation and endorsement of the National Environment Action Plan, which reflects the findings and recommendations of the National Conservation Strategy for Sustainable Development, and the drafting of a national environmental policy.³⁴ Participation in these activities included government agencies, the private sector, NGOs, local communities, and

³¹ This has been done since 1997 when the environmental policy was formulated.

³² Ibid. Chapter 8 of Agenda 21 on policy making for sustainable development recognizes that country specific laws are among the major important instruments for transforming environment and development policies into action. Recognizing the importance of science and its potential impact on sustainable development, the government of Tanzania must put a higher education policy to provide the direction and guidance to stakeholders and service providers.

³³ Ibid. Most NGOs are either registered as societies under the Ministry of Home Affairs or as Companies limited by guarantee under the Registrar of Companies. Generally speaking, the smaller NGOs are community based and are continuously affected by problems of leadership and lack of financial resources. Research NGOs are affiliated with universities and other academic institutions.

³⁴ National Environmental Policy was drafted in 1997. These policies resulted into sectoral policy reforms thereafter and finally the enactment of Environmental Management Act, 20 of 2004.

academia. Sectoral activities included among others, the preparation of a national mining sector and environmental policy.³⁵

2.3 ENVIRONMENTAL LAW AND INSTITUTIONS IN TANZANIA

"Environmental law" is a new term in Tanzania, although some of the many concepts in environmental law have existed since the birth of the nation and before.³⁶ Also, in some senses, most laws pertain to some aspect of the natural or human environment and may be called environmental laws in the sense that they regulate uses of the environment.³⁷

In some respects, however, laws that purely regulate the use of the environment so that the state may benefit from private development, through payment of license fees or economic royalties, do not always effectively conserve the environment for purposes of sustainable development. Therefore, the best way to define the laws addressed in this study is "those laws which pertain to environment," some of which may be "environmental laws".³⁸

The phrase "environmental law" is a combination of the words "environment" and "law". In its modern conception, "environment" is treated as including the physical surroundings that are common to all of us, including air, space, waters, land, plants and life.³⁹ However, Kidd concludes that the dictionary definition of 'environment' is a relative one, since it deals with the circumstances surrounding something or someone.⁴⁰

³⁵ See the Division of Environment, Ministry of Tourism, Natural Resources and Environment, Report of Existing legislation pertaining to environment, 1994

³⁶ See Kulindwa, K. *et al* op cit note 2 at 6.

³⁷ Ibid.

³⁸ See the definition of 'environmental law' above.

³⁹ Ball, S. and Bell, S. *Environmental Law*, Blackstone Press Ltd, (1991), at 2

⁴⁰ See Kidd, M. *Environmental Law, A South African Guide*, (1997) JUTA & Company Ltd. at 1. The Concise Oxford Dictionary 7th edn (1982) defines 'environment' as 'surrounding; surrounding objects, region, or conditions, especially circumstances of life of a person or society.

In the case of the term, 'law', it may be defined as a set of enforceable rules and principles regulating behaviour of individuals in the society.⁴¹ Environmental law therefore constitutes enforceable rules and principles regulating the activities of persons, natural or legal, which have an impact on any of the media mentioned above as forming part of the environment.⁴²

2.3.0 National Environmental Policy

The term 'policy' may be defined as a set of principles that guide a regular course of action.⁴³

The National Environmental Policy⁴⁴ provides a framework for making fundamental changes that are needed to bring environmental considerations into the mainstream of decision-making in Tanzania. It also seeks to provide policy guidelines and plans and gives guidance to the determination of priority actions, for monitoring and regular review of policies, plans, and programmes. It further provides for sectoral and cross-sectoral policy analysis thus exploiting synergies among sectors and interested groups.⁴⁵

The overall objectives of the National Environmental Policy are, therefore, to ensure sustainable and equitable use of resources without degrading the environment or risking health or safety; to prevent and control degradation of land, water, vegetation, and air which constitute the essential life support systems; to conserve and enhance natural and man-made heritage, including the

⁴¹ Osborn's Concise Law Dictionary, 7th Edition, (1983), at 197. Roger Bird further puts that law is an obligatory rule of conduct.

⁴² See Goodland, R; Mercier, R; and Muntemba, S. (eds), Environmental Assessment (EA) in Africa: A World Bank Workshop, June 25, (1995), The World Bank, Washington. At Africa Environment Information <http://www.neafrica.com/environment>.

⁴³ Osborn's Concise Dictionary, 7th Edn, Sweet & Maxwell, at 225.

- De facto policies are those which can be inferred by observing patterns of action and behaviour among key players.
- De jure policies are those that are stipulated in documents such as legal Acts and regulations and formulated policies in documents originating from stakeholders such as professional associations and organisations.

⁴⁴ For a stimulating account of the evolution of policies and approaches of environmental protection, see Michelson, M. *The Environmental Age*, (1986) Cambridge University Press.

⁴⁵ See Tanzania Environmental Resource Center at www.tanzania.go.tz/environment

biological diversity of the unique ecosystems of Tanzania; to improve the condition and productivity of degraded areas including rural and urban settlements in order that all Tanzanians may live in safe, productive and aesthetically pleasing surroundings; to raise public awareness; to promote individual and community participation; and to promote international cooperation.⁴⁶

The National Environmental Policy also provides for the execution of a range of strategic functions using policy instruments such as environmental impact assessments, environmental legislation, economic instruments and environmental standards, and indicators. A framework is also provided for institutional arrangements and coordination.⁴⁷ The role of major groups such as non-governmental and community based organizations, and the private sector is underscored. Capacity building and human resource development are emphasized.⁴⁸

Thus, the National Environmental Policy provides a set of principles and objectives for an integrated and multi-sectoral approach addressing the totality of the environment. With the enunciation of the Policy, the main challenge is to ensure that all sectors and interested groups take priority actions in a mutually supportive manner. It is in this regard, therefore, that an action plan was developed as a first step towards the incorporation of environmental concerns in the national development planning process.⁴⁹

The NEAP⁵⁰ seeks, among other things, to integrate the environmental policy and the conservation strategy into the planning process; involve stakeholders in environmental management; promote environmental education and public awareness; promote research and technology initiatives; evolve and strengthen a national environmental information system; promote environmental impact

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ See Michelson, M. *op. cit* fn 11 at 36

⁵⁰ NEAP deals with the formulation of environmental policies.

assessments; guide the development of a framework environmental legislation; and prepare a long term investment plan to address major environmental concerns.⁵¹

Until recently, environmental issues were the responsibility of sectoral ministries. However, institutional structures and strategies are changing towards cross-sectoral coordination with the growing awareness of the importance, severity, cross cutting, and complex nature of environmental issues. In line with this new thinking, the government has recently reviewed all sectoral policies to ensure that they are consistent with current macro-economic reforms and national environmental policy. The underlying premises of the sectoral policy reviews are the need to balance accelerated economic growth with more efficient and sustainable use of the environment and natural resources; and the need to integrate environmental management into all sectors.⁵²

A good example is the mining sector policy which is aimed at creating an enabling environment for investors in the sector.⁵³ Specifically, the government revised the legal framework related to mining in order to increase consistency and transparency.⁵⁴ In this regard the following legislations were revised: the Mining Act of 1979; the Income Tax Act of 1973; and the Investment Promotion Act of 1991. The Model Mineral Agreement was reviewed and mineral licensing procedures streamlined. The divestiture of public mining companies and the re-organization of the State Mining Company (STAMICO) are also done. The environmental impacts of the mining sector were addressed through the Mining Sector Environmental Action Plan and includes provision for health, safety, and environmental regulations.⁵⁵

⁵¹ Ibid

⁵² Donnelly, A. *et al* "A Directory of Impact Assessment Guidelines". Second Edition (1998) International Institute for Environment and Development (IIED)

⁵³ This will be explained in detail in Chapter 3 of this work.

⁵⁴ This review resulted into a 1998 Mining Act which repealed the 1979 Mining Act. This is also elaborated in chapter three of this study.

⁵⁵ Donnelly, A. *et al* op cit fn 27.

2.3.1 Environmental Legislation

The Constitution of the United Republic of Tanzania was amended in 1984 to provide for the Bill of Rights.⁵⁶ Article 14 of the Bill of Rights stipulates that every person has a right to life and to the protection of life by society. The High Court in a landmark ruling in the case of *Festo Balegele v. Dar es Salaam City Council*⁵⁷ interpreted this article to mean that persons are entitled to a healthy environment, and held that the City's decision to locate the garbage dump near residential areas violated plaintiffs' constitutional rights to a healthy environment.⁵⁸

In addition, Article 9 of the Constitution requires Government to ensure that national resources are harnessed, preserved, and applied toward the common good. Although this Article is part of the non-judicial "fundamental objective and directive principles of the state policy" provisions of the Constitution, it portrays the commitment of the Government to ensure sustainable development.^{59,60}

⁵⁶ See URT Constitution of 1977 as amended.

⁵⁷ Misc. Civil Case No. 90 of 1991. See also the case of *Felex Joseph Mavika vs. Dar es salaam City Commission*; Civil Case No. 316 of 2002. In this case, the Plaintiffs instituted a main case claiming remedies from the Defendants. They also applied for an interim order to restrain the Respondents from dumping solid and liquid wastes in Vungunguti area (Dar es salaam) because of pollution of the area's environment as well as endangering lives of the Plaintiffs and their families and other residents pending the determination of temporary injunction. This case was still pending in the High Court of Tanzania in Dar es salaam when this work was compiled.

⁵⁸ Ibid.

⁵⁹ www.iied.org/docs/cases; see International Institute for Environment and Development.

⁶⁰ Under the *Constitution of the United Republic of Tanzania of 1977*, policies and laws respecting natural resource management, are established and implemented by the central government. Parliament has exercised its constitutional authority to make laws concerning resources and the environment, but, as discussed above, local governments have been delegated specific powers of implementation and enforcement that differ depending on the particular resources and laws involved. Zanzibar, although a part of Tanzania, has a unique legal status. According to Article 2(1) of the Constitution, the territory of the United Republic consists of the whole area of mainland Tanzania and the whole of the area of Tanzania Zanzibar, and includes the territorial waters. One mainland Tanzania law (the Fisheries Act of 1970) does not cover the territorial waters of Zanzibar, and Zanzibar has its own fisheries legislation. (See Makaramba, R. & Stolla, F. "Tanzania Coastal Management Partnership" (1999), a joint initiative between the National Environment Management Council, the University of Rhode Island/Coastal Resources Center and the United States for International Development Policy and Legal Analysis of Tanzania Coastal and Marine Resource Management, University of Dar es salaam.

For instance, the Tanzania Investment Act, 1997 stipulates that one of the functions of the Investment Promotion Center (IPC) is to be liaison with appropriate agencies to ensure investment projects use environmentally sound technologies and restore, preserve, and protect the environment. Under this important step, IPC vets unscrupulous investors who may want to maximize profits at the expense of the environment.⁶¹

The country's major sources of law include: the common law; principles of equity; statutes of general application; Islamic law in some instances; customary law; international conventions to which Tanzania is a party; constitutional law; and principal, subsidiary, and case law. However, the main sources of environmental law are the common law⁶² and statutory law in the form of principal legislation,⁶³ subsidiary legislation and International law and the Constitution.

The management of the activities that affect environment in Tanzania has been undertaken on the basis of a plethora of laws and regulations. Almost the whole corpus of environmental law is statutory based. Few cases (as shown above) have been decided on the basis of these laws. However, the common law of torts on

⁶¹ *ibid*

⁶² "Common law" refers to binding rules and principles of laws developed by the courts over time, as opposed to laws enacted by Parliament. The common law rules that are applicable in Tanzania are those developed by the Tanzanian courts, both colonial and post-colonial, as well as those that were in force in England on 22 July 1920. The most important common law principles that are relevant to environment are the torts of negligence, nuisance and the rule in *Rylands v. Fletcher*. These torts are covered by any standard book on the law of tort. Environmental torts have been defined more extensively in the common law of other countries. However, where these rules have evolved in commonwealth countries, they may be argued to apply in Tanzania, as "persuasive authority" to the courts. For example, the courts of India and Australia have extensively defined common law environmental torts. Therefore, even where no specific precedent exists in the Tanzanian context (and some already do), it is fair to say that these developed environmental common law rules may very well bind individuals and businesses in the future. (This is by the Virtue of the Judicature and Application of Laws Ordinance, Cape 453).

⁶³All laws enacted by the Parliament in Tanzania are known as principal legislation. The National Environmental Action Plan (NEAP) and the NCSSD note that there are over 50 principal laws which relate to environmental issues. Many of the laws are outmoded, most are not understood or currently enforced and overlap in terms of functional authority. Further, most of the existing laws are penal in nature. However, these laws fail to induce compliance because the *ex ante* value of the penalties prescribed is far below the cost of compliance. The NCSSD notes that there is a need to develop and implement new, integrated, enforceable and effective laws that are based upon sound social, ecological, economic and scientific principles.

nuisance and negligence are applicable in Tanzania. Thus, since these laws are widely scattered, their enforcement (or non-enforcement) has often led to conflicts between different departments of government, thus undermining their effectiveness. Legislation aimed at regulating the use and management of natural resources has evolved along sectoral lines, governing specific environmental media.⁶⁴

The complexity of environmental problems means that many sectors of the government and society are involved in actions to address them. In Tanzania, the Office of the Vice President is responsible for the environment. This office, using the Division of Environment, is responsible for the development of policy options, and coordination of the broad-based environmental programmes and projects. It is also responsible for facilitating meaningful involvement of civil society in environmental activities. In particular, the office is charged with the duties and responsibilities of environmental research, environmental policy making, environmental planning, environmental monitoring, and environmental coordination of both national and international environmental issues. The strategic functions of the Office of the Vice President form the basis for the effective inter-ministerial cooperation and coordination, which, for example, has been underscored in the NEAP.⁶⁵

Tanzanian laws that pertain to the environment may be grouped in four main categories: land use laws; natural resources and conservation areas laws; pollution-related legislation; and, overall environmental management legislation.

This study addresses first, second and the last category especially overall environmental management legislation and the laws pertaining to mining in Tanzania.⁶⁶

⁶⁴ See NEAP at 42

⁶⁵ Division of Environment, Ministry of Tourism, Natural Resources and Environment, Report on Existing Legislation Pertaining to Environment, 1994.

⁶⁶ This is well explained in chapter 3 of this work.

2.3.2 The National Environment Management Council Act, 1983

The National Environment Management Council Act, 1983 was the first law to demonstrate government interest in development that included environmental considerations.⁶⁷ The Act created the National Environment Management Council (NEMC) in 1983 for the purpose of "acting as an advisory body to the government on all matters relating to the environment." As part of its advisory capacity, NEMC was given the duty to formulate and recommend policy, coordinate activities, evaluate and improve existing policies, stimulate public and private participation in programmes and activities for national beneficial use of natural resources, specify standards and norms, establish and operate a system of documentation, formulate proposals for legislation, establish and maintain liaison in other national and international organizations, and undertake general environmental education programmes.⁶⁸

In addition, the Director General of the Council was given specific duties to "consider means and initiate the steps for the protection of the environment and for preventing, controlling, abating or mitigating pollution, carrying out investigations into the problems of environmental management, obtaining advice from experts, to review progress of attainment of purposes of the Act and to promote and carry out short and long-term planning and projects in environmental management and protection."⁶⁹

To date, most of NEMC's activities have involved preparation of the National Conservation Strategy for Sustainable Development. The Division of Environment, in the Ministry for Tourism, Natural Resources and Environment, is the government body for overall environmental matters.⁷⁰

⁶⁷ This was the first law to address environmental issues in Tanzania. This law has recently been repealed by Environmental Management Act, 20 of 2004.

⁶⁸ See Division of Environment, Ministry of Tourism Natural Resources and Environment, Report on Existing Legislation Pertaining to Environment, 1994.

⁶⁹ Ibid.

⁷⁰ Ibid.

Apart from the Vice President's Office and NEMC, many government ministries have been undertaking activities relevant to the implementation of Agenda 21.⁷¹ The complexity and inter-relatedness of environmental problems have necessitated the involvement of almost every sector in environmental protection. The Government institutions and ministries which have been more directly involved in the implementation of Agenda 21 are the Prime Minister's Office; the Planning Commission; the Ministry of Agriculture; the Ministry of Water, Energy and Minerals; the Ministry of Lands, Housing and Urban Development; the Ministry of Education and Culture; the Ministry of Science, Technology and Higher Education; the Ministry of Community Development, Women Affairs and Children; the Ministry of Industries and Trade; and the universities.⁷²

Chapter 8 of Agenda 21 on policy-making for sustainable development recognizes that country specific laws are among the major important instruments for transforming environment and development policies into action. This can be accomplished not only through "command and control" methods, but also by using a framework for economic planning and market instruments. Major constraints facing environmental management in Tanzania include the lack of capacity to enforce environmental laws and lack of working tools.⁷³

Tanzania has a number of other statutes sometimes referred to as environmental laws, but which are actually resource exploitation statutes. These include the Mining Act (1998), Fisheries Act (1974), Water Utilization and Control Act (1974), and the Forest Ordinance (1959). All these Acts are currently under review to reflect sustainable utilization of resources. The challenge ahead is to

⁷¹ Agenda 21 elaborates upon the concept of sustainable development and issues related to it. Taken together, they constitute the framework for international law in the field of sustainable development. 14 chapters address the issues which are primarily environmental and the rest of the chapters address the issues pertaining to sustainable development, including social and economic dimensions of development; the participatory role of major groups; and financial and other means of implementation. See Rio Declaration, Principle 21; Chapter 39, para 39; UNGA. Res. 44/228 (1989); and WCED, *Our Common Future*. 43 (1987).

⁷² Division of Environment, Ministry of Tourism, Natural Resources and Environment, *op cit* fn 28.

⁷³ See Lawyers' Environment Action Team (LEAT) (1999) "Environmental Impact Assessment of Foreign Investment Projects: A Study in the Law, Policy and Governmental Decision-making in Tanzania at www.lead.or.tz/publications/foreign.investment/index.php.

incorporate the requisite institutional machinery and enforcement authority, including effective judicial procedures and compliance with international agreements into these laws, and to ensure their periodic review.⁷⁴

2.3.3 The Environmental Management Act, 20 of 2004

The Environmental Management Act was passed by the National Assembly in 2004,⁷⁵ and in the beginning of 2005⁷⁶ the President assented to the Act. The Act repeals and replaces the National Environment Management Council Act, 1983.

This Act is a framework Act (comprehensive umbrella) in that it is the legislation governing environmental aspects in Tanzania. The Act includes provisions for; legal and institutional framework for sustainable management of environment;⁷⁷ an outline principles for management,⁷⁸ impact and risk assessments,⁷⁹ prevention and control of pollution,⁸⁰ waste management,⁸¹ environmental quality standards,⁸² public participation,⁸³ compliance and enforcement;⁸⁴ and the basis for implementation of international instruments on environment.⁸⁵ However, the Act further repeals the National Environment Management Act, 1983 and provides for continued existence of the National Environment

⁷⁴ See the Commission for Environmental Impact Assessment, Utrecht, Netherlands at www.eia.n1/os/pdf/tanzaniapdf2004-03-18.

⁷⁵ The first draft of the Environmental management Act, 2004 was released in November 2003 and was subject to consultation involving over 140 stakeholders from different sectors, districts and regions. Comments and suggestions from these workshops were used to produce a 2nd draft of the Act which was considered by the Cabinet and was submitted in the National Assembly in 2004. The Act provides for detailed measures for the protection of ecological processes, the sustainable utilization of ecosystems and for environmental protection.

⁷⁶ On the 11th day of February, 2005.

⁷⁷ See Part V of the Act.

⁷⁸ See Part II of the Act.

⁷⁹ See Part VI of the Act

⁸⁰ See Part VIII of the Act.

⁸¹ See Part IX of the Act.

⁸² See Part X of the Act.

⁸³ See Part XIV of the Act.

⁸⁴ See Part XVI of the Act.

⁸⁵ See Part XV of the Act.

Management Council;⁸⁶ and provides for establishment of the National Environmental Trust Fund to provide for other related matters.

Additionally, the Act (Environmental Management Act, 2004) establishes a national Environmental Regulatory Body (ERB),⁸⁷ which oversees Environmental Units (EUs) at district and sectoral levels. The ERB and EUs are responsible for screening projects and the review of EIA reports. The ERB is to be consulted during scoping, although this is the responsibility of the proponent. ERB is also responsible for approving terms of reference prepared after scoping.⁸⁸

Local authorities are supposed (under the Act) to be the principal executive agencies of environmental policies and regulations. These local authorities are argued to work with environmental NGOs and community-based organisations (CBOs) which are coordinated by Vice President's Office (VPO) and the Tanzania Association of Non-governmental Organisations.⁸⁹ Local government is however weak and coordination with central government is lacking. Local authorities and institutions dealing with environmental management have often very few resources including environmental experts and funds.⁹⁰

2.4 POLICY INSTRUMENTS FOR ENVIRONMENTAL PROTECTION

As noted earlier, environmental degradation has emerged as one of the important issues of the century and has resulted in new approaches to supplement penal laws and environmental protection. These are outlined in Tanzania's NEAP⁹¹ as environmental impact assessment, economic instruments and public

⁸⁶ Sections 16-29 of the Act.

⁸⁷ Section 12 of the Act.

⁸⁸ In the absence of a robust institutional and legislative framework, it is perhaps not surprising that the quality and effectiveness of EIA in Tanzania has been highly variable.

⁸⁹ Tarr, P. "Environmental Impact Assessment in Southern Africa" op.cit at note 18.

⁹⁰ Ibid.

⁹¹ See Principle 17 of the Rio Declaration.

participation.⁹² Each aspect is briefly discussed hereunder for the purposes of a better understanding of chapter three.

2.4.1 Environmental Impact Assessment

One of the policy instruments considered most effective for the achievement of sustainable development is the requirement that environmental impact assessment (EIA)⁹³ shall be undertaken for all proposed activities that are likely to have significant adverse impacts on the environment and which are subject to a decision of a competent national authority⁹⁴. The National Environmental Action Plan describes the objective of EIA as "allowing maximisation of long-term benefits of development while maintaining the natural resource base."⁹⁵ However, the objectives of EIA are broader as they seek to protect the environment in the wider sense, and not just natural resources. Thus, an activity which would raise noise levels near a hospital or school or which can affect the human-made environment such as archaeological sites, historic towns, monuments and artifacts or relics, may also be subjected to environmental impact assessment.⁹⁶ Such assessment forms the basis for refusal of permission to undertake a particular activity or grant of permission with conditions necessary to minimise the effect on the environment.⁹⁷

Different countries have adopted different elements of the traditional EIA process, which originated in the United States. For example, some countries mandate EIA for all projects, while others limit the process to those which have a certain level of government involvement, such as the requirement of licensing

⁹² Tarr, P. "Environmental Impact Assessment in Southern Africa" A SAIEA publication. http://www.saiea.com/saiea-book/Tanzania_1.PDF.

⁹³ See the schedule to the new Environmental Management Act, 2004. However, this aspect is explained in detail in chapter three of this study.

⁹⁴ NEAP, at 3.

⁹⁵ NEAP, at 3, para 8(a)

⁹⁶ Post-completion follow-up does almost not seem to exist in Tanzania. The reason might be that proponents do not always have ownership of donor-supported projects and that there is little accountability for the recommendations contained within the environmental impact statement.

⁹⁷ See Tarr op cit fn 91.

and permitting or the expenditure of funds, and a test of potentially significant environmental impacts.⁹⁸

The new Environmental Management Act, 2004 provides that, “Any person, being a proponent or a developer of a project or undertaking of a type specified in the Third Schedule to this Act [i.e. the Environmental Management Act, 2004], to which environmental impact assessment is required to be made by the law governing such project or undertaking [...] shall undertake or cause to be undertaken, at his own cost, an environmental impact assessment study”. “An Environmental Impact Assessment study shall be carried prior to the commencement or financing of a project or undertaking”. “A permit or licence for the carrying out of any project or undertaking in accordance with any written law shall not entitle the proponent or developer to undertake or to cause to be undertaken a project or activity without an environmental impact assessment certificate issued under this Act.”⁹⁹

Institutional arrangements for environmental management in Tanzania have now been agreed upon. EIA provisions contained in the new legislation (Environmental Management Act, 2004) makes an important contribution to institutionalizing environmental management. The Act includes provisions for incorporating EIA/SEA in national, sectoral, district and community planning processes -although there is extremely limited capacity at the latter levels.¹⁰⁰ The system establishes an Environmental Regulatory Body, which will delegate responsibilities to the district and sectoral levels through Environmental Units. These units will be responsible for screening proposals. They will also be

⁹⁸ EIA is now a law in Tanzania. See 3rd Schedule of the Environmental Management Act, 20 of 2004. This law was assented by the president Benjamin Mkapa early 2005.

⁹⁹ Lumbanga, M.Y.C. “Environmental Management Act, 2004”, a Bill for Submission to the National Assembly, Published for the general information to the public, April 2004, Dar es salaam.

¹⁰⁰ Dalal-Clayton, B. & Sadler, B. “The Status and Potential Strategic Environmental Assessment” (2003), International Institute for Environment and Development (IIED).

consulted by the proponents during scoping and will review EIA reports. The terms of reference for EIA studies will be approved at the central level.¹⁰¹

2.4.2 Strategic Environmental Assessment

Strategic Environmental Assessment (SEA) is defined and understood. However, many definitions have common or overlapping aspects. Put simply, SEA refers to a formal, systematic process to analyse and address the environmental effects of policies, plans and programmes and other strategic initiatives.¹⁰² This process applies primarily to development-related initiatives that are known or likely to have significant environmental effects, notably those initiated individually in sectors, such as transport and energy, or collectively through spatial or land use change. As with EIA, SEA can and should be interpreted broadly, for example to include social, health and other consequences of a proposed action and their relationship to sustainable development concepts and strategies.¹⁰³

The terms “policy”, “plan” and “programme” also mean different things in different countries.¹⁰⁴ Even within the same country, the terms can be used flexibly or interchangeably in the case of plans and programmes. Generally, policy is understood to be an overall directive which outlines guides or sets a context for the proposed action(s) a government or organization intends to take. It may take the form of a law, document, statement or precedent.¹⁰⁵

¹⁰¹ Ibid.

¹⁰² Hussein, A.; Ron, B. and Sadler, B. “Environmental Impact Assessment and Strategic Environmental Assessment: Towards Integrated Approach”, (2004) UNEP. Accessed from <http://www.unep.ch.etu>.

¹⁰³ Ibid

¹⁰⁴ See Mwalyosi, R. “Impact Assessment and the Mining Industry: Perspectives from Tanzania”, (2004) at 15. Typically, policy is implemented by plans and programmes, which set out actions, options and measures to be carried out in a sector or area. For practical purposes, developing countries and those transitional countries that are not in accession to the European Union can move forward by subjecting whatever is normally understood to be a policy, plan or programme to SEA.

¹⁰⁵ Ibid, at 16

SEA extends the aims and principles of EIA to the higher levels of decision-making when major alternatives are still open and there is far greater scope than at the project level to integrate environmental considerations into development goals and objectives. It allows problems of environmental deterioration to be addressed at their “upstream source” in policy and plan-making processes, rather than mitigating their “downstream symptoms” or project-level impacts. As such, SEA directly responded to what the World Commission on Environment and Development (1987) called “*the chief institutional challenge of the 1990s*”.

In addition, SEA can provide early warning of large-scale and cumulative effects, including those resulting from a number of smaller-scale projects that individually would fall under thresholds for triggering a project EIA. When applied systematically, this process affords a means of environmental clearance of key issues related to whether, where and what forms of development are environmentally sound and appropriate.¹⁰⁶

Unfortunately, the environmental laws in Tanzania put emphasis on EIA more than SEA.¹⁰⁷ Part VII of the new Environmental Management Act, 2004 provides that SEA should be carried for the enhancement, management and conservation of the environment, or sustainable management of natural resources.¹⁰⁸ By the time this work is constructed, the regulations to implement this law are not yet in place hence we can't comment on its efficiency.

2.4.3 Use of Economic Instruments

Concern with protecting the environment for the benefit of present and future generations is now at the centre of the international agenda. Awareness of the extent of the damage done to our environment through unsustainable economic activities is steadily growing. In particular there is growing awareness of the need

¹⁰⁶ By doing so, SEA facilitates and contributes to sustainability assurance, for example by evaluating the effect of a national transport plan or programme, *inter alia*, against CO₂ emission commitments made by a country under the Kyoto Protocol.

¹⁰⁷ The discussion on EIA is under chapter three of this chapter.

¹⁰⁸ Sections 104-106 of the Environmental Management Act, 2004.

for international actions to implement realistic and workable solutions for the reduction of these man-made environmental impacts.¹⁰⁹

Principle 16 of the Rio Declaration¹¹⁰ states that individual countries should endeavor to internalize their environmental costs through the use of economic instruments. The same principle also states clearly that the polluter must pay for the damage which arises as a result of his activities. Agenda 21 states, moreover, that it is essential to design economic and political reforms which promote effective planning and use of resources for sustainable development on the basis of sound economic and social policies, integration of social and environmental costs, and pricing of resources.¹¹¹

Economic instruments applied in environmental protection and resource conservation should encompass all tools that are designed to influence economic behaviour. They usually include funds for environmental cleaning or progressive investment, deposit schemes for containers, subsidies, emission charges, product charges, exemption fees, and administrative fees to supervise environmental protection and resource conservation, non-compliance fees, and tradable emission quotas.¹¹²

Traditionally, in Tanzania, environmental protection litigation and standards have been enforced through imposition of negative sanctions prescribed by the laws themselves. This approach is increasingly supplemented by use of economic instruments.¹¹³

¹⁰⁹ Doug, M. 'Green Taxation and Environmental Policy,' Paper presented to the annual meeting of the Environmental Studies Association of Canada, June 5, 1995.

¹¹⁰ UNCED, Rio de Janeiro, 3-14 June 1992.

¹¹¹ Wana, X. 'Taxation Policy: Its Role in Environmental Protection and Resource Conservation in China,' University of California, Berkeley at 2.

¹¹² *Ibid.*

¹¹³ See National Environmental Management Council (NEMC) (2002) "Tanzania Environmental Impact Assessment Procedures and Guidelines" Revised in March 2004.

2.4.4 Tax relief and subsidies

Environmental taxation has been widely applied in a number of countries, such as consumer taxes, fees paid for direct resource use, waste disposal, and income taxes. Mining and real estate taxes are also widely applied, as well as subsidies to encourage specific resource exploitation, in order to regulate and better manage the extraction and utilization of mineral resources. The mining tax, for example, increases the unit cost of exploitation while other factors remain constant and thus help lowering overall level of resource exploitation and presumably preventing aggressive exploitation and damage to the environment.¹¹⁴ In the European Union, a comprehensive ecological taxation system is under formulation.¹¹⁵

Taxation is mainly a government instrument for raising revenue; however taxation may also be used to achieve other objectives such as encouraging or discouraging certain activities or behaviour. The government can use taxation to support environmental protection by waiving or imposing lower taxes on environmentally friendly technologies or products. Governments can also induce compliance with environmental standards by providing government subsidies for those who adopt methods of abating pollutants which arise from production or consumption.¹¹⁶

The NEAP indicates that tax relief and subsidies are among the key policy instruments the Government of Tanzania deploys in pursuit of sustainable development. However, the possibility of this happening depends much more on the current fiscal policies and realities. At the moment, the country is facing difficult budgetary problems and the International Monetary Fund, World Bank and other donors who support both the development and recurrent budgets are

¹¹⁴ See Gaines, S. and Westin R. *Taxation for Environmental Protection: A Multinational Legal Study* (1991). Quorum Books. New York.

¹¹⁵ See European Commission, Tax provisions with a potential impact on environmental protection. Office for Official Publication of the European Commissions. Luxembourg.

¹¹⁶ Ibid

strongly against tax relief and government subsidies. These options are therefore not likely to be used in the near future.¹¹⁷

Taxation may be, and has been, used as a disincentive to environmental degradation by imposing taxes on environmentally damaging processes, products, as well as consumption patterns. In addition to the preventive aims, taxes so raised have been committed to environmental protection activities in Tanzania. Normally, taxes on a particular industry or product would go to support remedial measures for the element of the environment damaged by the industry or product. For example, money raised from taxing wood products of a particular tree may be used in planting new trees of the same species.¹¹⁸

The NEAP proposed the establishment of an environmental tax on permits, imports and domestic goods, earmarked for the following areas:

- Air pollution enforcement and subsidy programs
- Water pollution enforcement and subsidy programs
- Solid waste management/pollution enforcement and subsidy programs
- Protection of public health through enforcement of public health laws, and
- Land reclamation activities.¹¹⁹

2.4.5 Polluter Pays Principle

The "polluter pays principle" refers to a device of internalizing environmental costs by making those who benefit from the environmentally damaging activity bear the costs of the damage. The polluter pays principle is implemented through

¹¹⁷ See NEAP at 4.

¹¹⁸ See Milne, G. "Swedish Support to the National Environmental Management Council in Tanzania". Sida Evaluation 00/5.

¹¹⁹ NEAP at 4

charging polluters for the right to pollute. This may be achieved through a variety of means, including taxes and fees on licences. The difference between these kind of taxes and environmental taxes discussed above lies in their respective objectives. While "green taxes" aim at raising money from polluting activities with the principal objective of putting the sums so raised into environmental protection, "polluter pays" taxes are mainly intended to punish the polluter without necessarily using the monies raised for environmental protection activities. The other method which is increasingly being used to implement the polluter pays principle is the legal imposition of compensatory damages as well as environmental reparation features which hereto have seldom been included in pollution control legislation. In the near future, compensation and reparation (in the form of environmental clean-up) are features likely to replace penal sanctions as the main characteristics of environmental law. This, in turn, will dramatically increase the cost of polluting the environment.¹²⁰

The application of economic tools also has a strong incentive in stimulating the application of new techniques in industry. Usually, with the increase of pollution tax, the polluter must pay more attention on adopting new techniques to decrease the pollutant discharge.¹²¹

Environmental taxes have been used to promote economic efficiency by requiring polluters to pay the economic costs that their pollution imposes on others, costs sometimes called "negative externalities." Secondly, the "Polluter Pays" principle has assured fairness in allocating cleanup costs by making sure that they are borne by the polluter rather than the innocent public.¹²²

In industries where there are large environmental risks, smaller firms often lack the financial wherewithal to guarantee cleanup if a major accident or leak should occur. Taxes which finance cleanup or insurance funds have proved to protect the

¹²⁰ Ibid

¹²¹ Ibid.

¹²² The Survey of 472 State Environmental Tax Instruments, at <http://www.rprogress.org/sustEcon/taxcode.shtml>.

environment, by allowing small operators to stay in business because they are often supported by the industries which pay the tax.¹²³

2.5 CONCLUSION

This chapter has discussed the environmental law, policy and institutions in Tanzania. From this discussion, it can be said that the environmental issues are often complex and emotive.¹²⁴ In Tanzania, this concept is new as far as the legal part of it is concerned. This being the case, the environmental issues are not adequately addressed by the laws. The Bill of Rights chapter in the Constitution of the United Republic of Tanzania (URT) does not directly and adequately address environmental matters. It does not directly spell out the environmental right, which could prompt the development of environmental laws and other laws which are relevant to the subject. We should also note that the constitutional provision of the same is important to provide the framework for the administration of environmental laws.

The Environmental Management Act, 2004¹²⁵ came into force when it was assented by the President in February this year (2005), but it will only be effective after the promulgation of regulations to implement it by the Minister. This Act provides for detailed measures for the protection of ecological processes, the sustainable utilization of ecosystems and for the environmental protection as a whole, but we will not know how effective the Act is until the regulations are made to implement it. This is due to the fact that the practice has shown that there is the lack of capacity to enforce environmental laws and lack of working tools.

The following chapter discusses the environmental protections offered under the mining laws especially the Mining Act, 1998.

¹²³ Ibid

¹²⁴ Glazewski, J. Environmental Law in South Africa. (2000), Butterworths, at 6.

¹²⁵ See the discussion at para 2.3.3

CHAPTER THREE

ENVIRONMENTAL PROTECTION IN THE MINING LAWS

3.1 INTRODUCTION

The mining sector is very important in economic development of Tanzania. It is said to contribute to about 2.3 per cent of the GDP, which is projected to account 10 per cent in 2025 as stated in the Development Vision 2025.¹²⁶ It is one of the leading components in generating foreign exchange earnings within the non-traditional exports. Further is has great potentials for employment opportunities and spearheading for both the forward and backward linkage of Tanzania's economy.¹²⁷

This chapter discusses the environmental management and protection considerations in the Mining Act, 1998. In doing this, the chapter examines the coverage of environmental issues in the Mining Act, 1998 when the Act is read together with the repealed National Environment Management Act, 1983 and the new Environmental Management Act, 2004.

Tanzania has a great potential particularly for gold, base metals, diamonds, ferrous minerals and a wide variety of gemstones, some of, which are unique such as tanzanite. Coal, uranium, and various industrial minerals such as soda, kaolin, tin, gypsum, phosphate and dimension stones are available at attractive economic rates. The following are minerals that have attracted most interest in the recent years:¹²⁸

¹²⁶ Boocock, C.N. "Environmental Impacts of Foreign Direct Investment in the Mining Sector in Sub-Saharan Africa", (2002), at 1.

¹²⁷ Mwalyosi, R. & Hughes, R. 'The Performance of EIA in Tanzania'. (1998) IRA Research Paper No 41/IIED Environmental Planning Issues No 14 at 10.

¹²⁸ Ibid.

- Gold that is found in greenstone belts located in the east and south of Lake Victoria, and rock formation in the south and southwest of the country;
- Base metals which are found in a belt running from Kagera through Kigoma to Mbeya, Ruvuma and Mtwara regions, and,
- Gemstones, which are found in eastern and western belts running from Kenya border in the northern part to Mozambique in the south and Mbeya and Rukwa regions.
- Gold and diamonds which have always been the mainstay of the country's mineral production.¹²⁹

Tanzania has been a significant diamond producer for several decades, with the bulk of production coming from the Williamson Diamonds Mine at Mwadui in Shinyanga region. The commercial production of William Diamonds Mine began in 1925. Over 300 kimberlites are known in Tanzania of which 20% are diamondiferous. Some 600 dipolar magnetic anomalies with similar geophysical characteristics to known kimberlite pipes have been recorded during recent geophysical surveys. Also of relevance are the pseudo-kimberlites or para-kimberlites along the young craters where diamonds have been discovered. Alluvial diamonds have been recorded but a large deposit of economic exploitation has not yet been found. Locating shallow buried superficial deposits using airborne infrared surveys may prove useful.¹³⁰

Gold offers one of the best areas for investment. The current perceived opportunities range from former mines in the Archaean Greenstone belts around Lake Victoria, Proterozoic rocks and conceptual grass root plays in younger rocks. Gold exploration has grown rapidly during the 1990's using modern technology and refined models. Investigation has mainly been focused on the greenstone

¹²⁹ See Chachage, C.S.L. "The Meek shall Inherit the Earth but not the Mining Rights, in Gibbon P. (ed) *Liberalised Development in Tanzania, Studies in Accumulation Processes and local Institutions*" (1995), the Nordic Institute for African Studies, Uppsala, Sweden.

¹³⁰ Chachage (1995), op cit at not 1. See also Kulindwa, et al op cit at note 2.

belts around Lake Victoria with particular attention on the shear hosted gold mineralization associated with Banded Iron Formations (BIF), tufts and volcano-sedimentary exhalative. Several "world class" gold deposits have already been discovered in the Lake Victoria Goldfields and are at different stages of development. These deposits have reached various stages of development. Gold targets have also been revealed in the Proterozoic rocks in the Southwest of Tanzania. In this case, gold is associated with BIF, and in gneisses and granites in shear zones.¹³¹

3.2. THE MINING ACT, 1998 – COVERAGE OF ENVIRONMENTAL ISSUES

The Tanzania mining industry is administered by the Ministry responsible for mining, currently the Ministry of Energy and Minerals. The Mining Act, 1998¹³² is the Principal Legislation governing the application and grant of mineral rights (mining and exploration licences), and trading of minerals.¹³³ The Act came into operation on 1st July 1999, and the regulations thereunder were made and came into operation on 2nd July 1999. Special consideration was given to small-scale mining such as to increase the duration of the primary mining licenses¹³⁴ from one year to five years. In addition, the primary mining license was incorporated in the mineral rights thus providing the holder with the same incentives provided

¹³¹ Ibid; see also Nanyaro, J.T. "The Mining Sector of Tanzania: Current Status and Strategies for its Sustainable Development in the 21st Century (1994), Dar es salaam, Tanzania. This list is not exhaustive as Tanzania is also endowed with other various species of coloured gemstones, ferrous metals, coal, industrial minerals etc. Evidence has shown that Tanzania has abundant mineral reserves in various areas and the number of new discoveries during the liberalization period kept increasing. See the United Republic of Tanzania (URT), "Speech by the Minister for Energy and Minerals, Hon. Abdallah Omar Kigoda, (MP), Introducing to the National Assembly the Ministry's Estimates of Public Revenue and Expenditure for Financial year 1997/98", Ministry of Energy and Minerals, Dar es salaam, Tanzania.

¹³² Act No 5 of 1998.

¹³³ Pallangyo, D.M. 'The Mining Laws and Small-scale Mining in Tanzania: A Case Study of Artisanal and Small-scale Miners in Mirerani, Manyara, Tanzania', (2004), a paper submitted in partial fulfillment of the requirement for the degree of bachelor of laws (LL.B) of Tumaini University, 2004, at 32.

¹³⁴ Primary licence is the one granted under Division D of the Mining Act, 1998. (Section 65). Other types of licences are; prospecting licence, retention licence, special mining licence, mining licence, and gemstone mining licence.

to large/medium scale miners such as reduction of import duty on equipment and fuel.¹³⁵

Before discussing the relevant part (that which covers the environmental issues) of the Mining Act, 1998, it is worthwhile to briefly look at the mineral policy of 1997, its objectives and the salient features of the Act to set the clarity.

3.2.1 Mineral Sector Policy of 1997

Tanzania recognises the need to put in place an internationally competitive investment environment for the mineral sector. The vision for the next 25-30 years for the mineral sector is to have a strong, vibrant, well-organised private sector led, large and small-scale mining industry conducted in a safe and environmentally sound manner contributing in excess of 10% of the GDP.¹³⁶ In this regard, the Government issued the Mineral Policy for the mineral sector development in 1997.

The aim of the policy was to attract and enable the private sector to take the lead in exploration, mine development, mineral beneficiation and marketing. The role of the Government focuses on regulating, promoting and facilitating private investment. The Government also acts as a service provider in the case of extensional services for large scale and artisanal and small-scale mining.¹³⁷

The policy provides that to ensure the sustainability of mining, there is a need to integrate environmental and social concerns into mineral development

¹³⁵ Pallangyo, D.M. op.cit, at 26

¹³⁶ Tanzania Opportunities for Mineral Resources Development, Ministry of Energy and Minerals, (1991)

at 57

¹³⁷ Mining Policy Statement No. 3.2 of 1997 at 8. The policy further provides that the government of Tanzania recognizes the positive contribution of the artisanal and small-scale mining sub-sector to the economy which includes the discovery of mineral occurrences, mineral production and the creation of employments and incomes of the rural communities. In view of this, the government is committed to supporting the small-scale mining sub-sector by facilitating the transformation of the present artisanal mining activities into more organized and modernized small-scale mining units, and by promoting modalities of mineral marketing which encourage transparent business transactions and discourage smuggling. (ibid; 3.3 at 9)

programmes. Sustainable mining development requires balancing the protection of the flora and fauna and natural environment with the need for social and economic development.¹³⁸

On environmental protection, the policy states that environmental problems can arise from large as well as medium and small-scale mining operations. In general, mining activities can cause land degradation, air pollution and water contamination. Open pit mines alter the natural habitat and require dust, drainage and storm water control. Underground operations cause less land disruption but are prone to surface subsidence. Mineral beneficiation operations are potentially more damaging to the environment because of chemical contamination of waterways and air pollution. Although the entire mining industry must adhere to the same environmental standards, the requirements for meeting established standards vary according to the scale of operations. The objective of the government is to foster the use of best practices in environmental management systems in mining development.¹³⁹

As for environmental management for small-scale mining, the policy provides that the environmental problems associated with small-scale and artisanal

¹³⁸ Ibid; 3.3.12 at 21.

¹³⁹ Ibid; Policy Statement No. 3.3.12.1 of 1997 at 21. the strategies for protecting the environment under this policy are as follows;

- Drawing up comprehensive environmental management programmes for mining industry;
- Establishing effective environmental regulations and putting in place procedures for monitoring compliance;
- Setting up and strengthening the institutional capacity especially the field offices (zonal and district mines offices) for monitoring and enforcing environmental regulations;
- Requiring new projects to carry out baseline environmental studies and prepare environmental impact assessment and environmental action plans;
- Instigating environmental audits to evaluate the performance of existing mines and identify areas for improvement;
- Specifying procedures for determining environmental liability;
- Providing rules for setting reclamation funds to reinstate land to alternative uses after mining;
- Setting appropriate guidelines for allowing the conduct of mining in restricted areas such as forests, national parks, sources of water and other designated areas; and
- Abating the use of toxic chemicals and pollutants by promoting of mining in restricted areas such as forests, national parks, sources of water and other designated areas.

- to ensure that wealth generated from mining support sustainable economic and social development to minimise or eliminate adverse social and environmental impact of mining activities ;
- to promote and facilitate mineral and mineral based products' marketing arrangements;
- to alleviate poverty especially for artisan and small scale miners; and
- to promote and develop Tanzania as the gemstone centre of Africa.¹⁴²

The Government of Tanzania proclaimed the National Mineral Policy in 1997 with a view to increasing the role of the private sector in the economy, encouraging and facilitating development of the mineral sector and rationalizing the mineral sector among other things, so as to increase private sector investment and to generate wealth to help other government programs geared at poverty alleviation.¹⁴³

Thus, although the policy states that the Government aims at stressing on environmental management and the enforcement of health and safety regulations in the mining, one would agree with Jairo that the main purpose of 1997 mineral policy was to increase the role of foreign investment in the mining sector.¹⁴⁴ As we shall see later in this chapter, little has been done to ensure the environmental protection in all mining activities in Tanzania.

3.2.2 Salient Features of the Mining Act, No. 5 of 1998.

Salient features of the Mining Act 1998 are as follows:

- right to trade in mineral rights;

¹⁴² Ibid; Policy Statement No. 3.2, 1997

¹⁴³ Jairo, D. 'Mining in Tanzania', (1999), London, at 97.

¹⁴⁴ In a nutshell, the 1997 National Mineral Policy was in tandem with the major reforms undertaken by the Government, specifically, promoting the private sector as the driving force of Tanzania's economy and limiting the role of government in the economy to that of regulator and facilitator of private commercial activity, with no equity participation in mining companies. Thus, the Mining Act, 1998 was a translation into law the spirit of the National Mineral Policy. Both the policy and the law provide 'a lip service' to real issues of environmental protection.

mining tend to be severe and geographically dispersed, and call for special attention. Deforestation, particularly the felling of mangroves for salt preparation is a common problem. Patterns of land use are also affected by the loss of arable and pastoral land, soil erosion and acidification. The effect on water consists of river blockages, siltation, and pollution by toxic chemicals (e.g. cyanide and mercury). Air pollution results from dust and gas emissions into the atmosphere.¹⁴⁰

Special effort is needed to raise environmental awareness and to promote environmentally friendly behaviour among artisanal and small-scale miners. Such effort will require a combination of persuasion and penalty approaches.¹⁴¹

The mineral policy objectives are:

- to stimulate exploration and mining activities;
- to regulate and improve artisanal mining;

¹⁴⁰ Ibid, Policy Statement No. 3.312.2 of 1997 at 23. To prevent, reduce, control or eliminate the adverse effect of small-scale mining on the environment, the government applies the following strategies;

- Demonstrating and encouraging the application of environmentally-sound technologies as well as mining methods;
- Preparing and distributing information booklets and handbooks in Kiswahili on acceptable mining practices and spelling out the environmental obligations for mineral title holders and the legal consequences of non-compliance;
- Improving environmental awareness through the media;
- Building partnerships with non-governmental organisations (NGOs), private companies and individuals to ensure better environmental awareness and management;
- Establishing stricter environmental standards in densely mined area;
- Empowering mining extension officers of designated agents to conduct regular monitoring;
- Specifying environmental control measures such as pollution taxes, fines and other penalties based on the “polluter pays” principle; and
- Establishing proper authority structures, especially miner’s security units in mining camps to uphold law and order and facilitate enforcement of health and safety regulations.

¹⁴¹ The policy seems to promise a lot but in a real fact, this has been only empty words as seen in par 3.3.2 of this chapter. The policy goes on to state that the framework provides clear, transparent, and simple procedures for the granting, sale, and transfer of mining rights. It also specifies the obligations of the investor and guarantees certain rights. And also that the fiscal regime is articulated to be stable, non distortionary and internationally competitive. This is a very high goal practically because there is an outcry all over the country on the same issue.

- simplification and consolidation of past statutes on mining and mineral trading;
- improved security of tenure through removal of most past ministerial discretionary powers and introducing a mining advisory committee responsible of advising the Minister on decisions to make;
- enhanced clarity and transparency;
- fair, streamlined and non-discriminatory licensing procedure, and,
- environmental management.¹⁴⁵

This study discusses the last feature, looking at the extent into which the Act covers the environmental management protection in mining activities.¹⁴⁶

3.3 EIA AND MINING IN TANZANIA

Despite the absence of a clear institutional framework, environmental impact assessment has been applied in Tanzania largely on ad-hoc basis for over 20 years.¹⁴⁷ Since the first EIA in 1980s, several have been undertaken including in the mining sector. In Tanzania, significant mining started in the 1990s following the trade liberalization policy.¹⁴⁸

In the past, environmental management in mining has been hindered by lack of coordination, insufficient funding and expertise. As a result there has been uncontrolled extraction of minerals and the use of unsafe mining methods and severe environmental damage and appalling living conditions in the mining communities. The challenge associated with the mining sector today in Tanzania

¹⁴⁵ Pallangyo, D.M. op.cit at 30.

¹⁴⁶ The Mining Act, 1998, provides the security of tenure, the progression from prospecting to mining license (Mineral Right), streamlining licensing procedures by introducing a mineral titles register, stabilizing fiscal package by including basic rates like royalties and standardizing environmental guideline. There is a standard separation between rates of prospecting (or prospecting license), less environmental destructive ways related to the searching of minerals, and the right of mining (or mining license) related to the exploitation of minerals.

¹⁴⁷ Mwalyosi, R. "Impact Assessment and the Mining Industry: Perspectives from Tanzania" A paper presented in April 2004 in Vancouver, Canada.

¹⁴⁸ Ibid

is ensuring sustainability and integrating environmental and social concerns into mineral development programmes.¹⁴⁹

As mineral policy states, sustainable mining development requires balancing the protection of the flora and fauna and the natural environment with the need for social and economic development. In view of these challenges, the government's policy for the development of the mining sector aims at attracting and enabling the private sector to take the lead in exploration, mining development, mineral beneficiation and marketing. The role of the public sector is to stimulate and guide private mining investment by administering, regulating and promoting the growth of the sector.¹⁵⁰

To address the problems associated with mining, the Government's policy seeks to reduce or eliminate the adverse environmental effects of mining, improve health and safety conditions in mining areas, and address social issues affecting local communities. EIA is recommended as one of the major tools for achieving these solutions. Although EIA is a legal requirement in all development activities including mining, it may take many years to achieve the objectives since the necessary EIA culture and relevant institutions to coordinate and manage the mining environment have to be built.¹⁵¹

The EIA ¹⁵² may be defined as the documentation of an environmental analysis which includes identification, interpretation, prediction, and mitigation of impacts caused by proposed project.¹⁵³ EIA is utilised to provide a basis for intra-agency review of project impacts and is designed to provide adequate information for judging whether an environmental impact statement should be prepared.¹⁵⁴

¹⁴⁹ See Clay, J.W. 'Towards Sustainable Shrimp Aquaculture', (1997), World Aquaculture, September 1997.

¹⁵⁰ Mwalyosi, R. *op. cit* note 3.

¹⁵¹ *Ibid*; See also Coleman, D. and Nixon, F. *Economics of Change in Less Developed Countries*, 3rd Edn., New York and London, Harvest Wheatsheaf.

¹⁵² Hereinafter referred to as EIA.

¹⁵³ Jeremy Ridl, 'IEM' 'Lip-Service and Licence' (1994) 1 SAJELP 66.

¹⁵⁴ RK Jain, LV Urban and GS Stacey, *Environmental Impact Analysis-A New Dimension in Decision Making* (1997) at 18.

The concept of EIA is further referred to mean the examination, analysis and assessment of planned activities with a view to ensuring their environmental soundness and sustainable development.¹⁵⁵ It is a valuable means of promoting the integration of environmental and natural resource issues into planning and program implementation.¹⁵⁶ The purpose of incorporating EIA approaches has been described as subjecting a proposed action to an examination of what the possible environmental impacts of that action would be and to find ways to mitigate any negative long term impacts.¹⁵⁷

EIA may also be a process which brings the proposed action into the public forum and provides an opportunity for comment and feedback.¹⁵⁸ In this sense, and depending on the nature and extent of that participation, EIA processes are seen as mechanisms for public participation and the democratization of decision-making processes in matters of environmental governance and natural resource allocation and use. As such, EIA processes may result in a proposed project being abandoned, but in most cases they result in a better project more in harmony with long-term needs and with little negative environmental impact.¹⁵⁹ This aspect is further discussed hereunder.

3.3.1 EIA under the Mining Act, 5 of 1998

Historical background

Until early 2005,¹⁶⁰ there was no national requirement for EIA in Tanzania and the country has only an EIA guideline under the National Environmental

¹⁵⁵ Lissu, T.A. "Environmental Impact Assessment of Foreign Investment Projects: A Study in the Law, Policy and Governmental Decision-making in Tanzania", (1999), Unpublished Research Report, LEAT and SRDA.

¹⁵⁶ Lissu, T.A.M. and Magabe, A.B. 'Coastal Erosion and Control of Human Activities Along Beaches: A Case Study of the Northern Beaches of Dar es salaam', (1994) Research Paper Submitted in Partial Fulfillment of the Requirements of the Degree of Bachelor of Laws of the University of Dar es salaam, Faculty of Law, at pp 18-20.

¹⁵⁷ Ibid.

¹⁵⁸ MTNRE, National Environmental Action Plan: A First Step, Dar es salaam, MTNRE, at 42.

¹⁵⁹ Ibid.

¹⁶⁰ This was when the Environmental Management Act 20 of 2004 was signed by the President of Tanzania.

Management Council Act, 1989.^{161,162} This goes for mainland Tanzania. At the island of Zanzibar formal requirements for EIA are in place but do not cover SEA.¹⁶³ For Tanzania as a whole¹⁶⁴, EIA is routinely applied to aid-funded development projects, but adequate expertise and a firm institutional and legal framework for its implementation are lacking.¹⁶⁵ EIA has had, until 1998, very little impact on decision-making in the country and in most of these cases EIAs “were extremely late in starting, were under-resourced, and generally omitted to involve stakeholders to any meaningful extent. Few examples could be found where dialogue between EIA practitioners and proponents led to design modifications in a development project before proponents submitted their environmental impact statement. Moreover, compliance with the recommendations of the EIA has been the exception rather than the rule. Consideration of alternative project options is often absent or extremely weak, and a few EIA practitioners seriously consider cumulative impacts.”^{166,167}

It is under the Mining Act, 1998¹⁶⁸, in which an attempt has been made to incorporate EIA requirements into planning and decision-making processes in

¹⁶¹ Act No. 19 of 1989. This Act is repealed by Environmental Management Act, 20 of 2004 but the guidelines are still in force.

¹⁶² Information from Mwakaje, A., Institute of Resource Assessment, Tanzania.

¹⁶³ See Dalal-Clayton, B. and Sadler, B. “The Status and Potential of Strategic Environmental Assessment”, (2003), International Institute for Environment and Development (IIED).

¹⁶⁴ Tanzania is the union of the former Tanganyika and Zanzibar. Once Tanzania is used in this study, it means the union.

¹⁶⁵ See Lissu, T.A.M. “Environmental Impact Assessment of Foreign Investment Projects: A Study in the Law, Policy and Governmental Decision-making in Tanzania”, (1999), at 26.

¹⁶⁶ Dalal-Clayton and Sadler, *op cit* at note 14.

¹⁶⁷ Relatively comprehensive EIA statements have been prepared before mining commenced in all major gold mining projects in Tanzania. The EIAs are usually undertaken by expertise from within Tanzania and abroad. The EIA processes and statements are reviewed by an established interdisciplinary review panel chaired by the national EIA Authority - NEMC. Apart from undertaking EIA, all mining companies are required to furnish general management plans (GMPs) as a compliance requirement. GMPs are closely monitored for air, water and environmental quality. Since 2001 these companies compete annually for the “Presidential Environmental Excellence Awards” which also involve non-mining companies in Tanzania. Environmental excellence in mining includes issues related to quality of process management; and mine socio-economic impact on the surrounding local communities and; environmental management of the mine site including decommissioning. The first Award in 2001 went to Resolute (Tanzania) Ltd. –Golden Pride Project located in Nzega. Geita Gold Mine (GGM) also demonstrates environmental excellence by achieving the ISO14001 international standard for environmental management. The basis for GGM’s certification is its established environmental management system. (See Mwalyosi, 2004).

¹⁶⁸ Act No. 5 of 1998.

the mining sector which has assumed a prominent place in the Government's drive to attract investors in the country. This legislation makes extensive provision for environmental matters in relation to mining activities, introducing for the first time mandatory EIA requirements as a condition for granting various categories of mining licences. Under section 38(4)(c), every application for a special mining license must include or be accompanied by the applicant's environmental management plan (EMP), including his proposals for the prevention of pollution, waste treatment, protection and reclamation of land and water resources and for eliminating or minimizing adverse effects on the environment of mining operations. This requirement is also applicable in cases of application for renewals of the special mining license.¹⁶⁹

In addition, the Act requires every applicant for the special mining licence to commission and produce to the Minister responsible for mining an EIA on proposed mining operations from independent consultants of international standing short-listed by the applicant and approved by the Government.¹⁷⁰ Applications under this section are required to be submitted to the Mining Advisory Committee (MAC) created under section 20 of the Act to advise the Minister.¹⁷¹ This applies to applications for renewals as well.¹⁷² A special mining license has a maximum life span of twenty five years or may be granted for the estimated life span of the mineral ores to be mined whichever is the shorter.¹⁷³

Failure to comply with these requirements is apparently fatal, for the Minister shall grant the special mining license to the entitled applicant only if "... the applicant's environmental management plan takes proper account of the environmental impact assessment commissioned under section 38(5) and conforms to the Regulations and to established international standards and practice and meets reasonable standards established by the Government for the

¹⁶⁹ Section 42 (2)(d) of Mining Act, 1998.

¹⁷⁰ Section 38(5) of the Mining Act, 1998.

¹⁷¹ Section 38(6) of the Mining Act, 1998.

¹⁷² Section 42(3) of the Mining Act, 1998.

¹⁷³ Section 40(a) of the Mining Act, 1998.

management of mining operations".¹⁷⁴ An application for the renewal of a special mining license may also be rejected if the EMP does not satisfy the requirements of section 39(1)(d). This applies to application for renewals of the gemstone mining license as well¹⁷⁵.

It is not sufficient that applicants for mining licenses must submit EMPs and EIAs alone. They must also comply with those plans and EIAs. It is a condition under the Act that a holder of a special mining license must develop the mining area and carry on mining operations in substantial compliance with his environmental management plan;¹⁷⁶ or else provide for the posting of a rehabilitation bond to finance the costs of rehabilitating and making safe the mining area on termination of the mining operations where the holder of the license has failed to meet his obligations in this respect.¹⁷⁷

The stringent requirements described above in relation to special mining licenses apply as well to the shorter duration concessions such as the mining license and the gemstone mining license, whose maximum life span is ten years. For example, applicants for these licenses must include a feasibility study which would set out measures the applicants propose to take in relation to any adverse impacts on the environment.¹⁷⁸ If the application for any of these licenses falls under section 64 it must include the EIA on the proposed mining operations by independent consultants of international standing as well as an EMP.¹⁷⁹ Section 64 requires applicants for licenses to commission and submit EIAs and EMPs as set out in the Regulations where mining operations to be carried out fall within the scale of mining operations set out in the Regulations.¹⁸⁰

In the event the environmental management plan fails to take proper account of the EIA or the Regulations as per section 64(1) established by international

¹⁷⁴ section 39(1)(d)

¹⁷⁵ section 53(3)(d)

¹⁷⁶ Section 44(a) of Mining Act, 1998.

¹⁷⁷ Section 44(d); see also section 49(2) (d) of the same Act.

¹⁷⁸ Sections 47(2)(a)(i) and 51(3) (e).

¹⁷⁹ Sections 47(2)(h) and 51(3)(f).

¹⁸⁰ See Schedule 1 of the Mining (Environmental Management and Protection) Regulations, 1999.

standards and practice or reasonable standards established by the Government, the Minister shall not grant the application for the license.¹⁸¹ Holders of these licenses have a further duty to take all appropriate measures for environmental protection.¹⁸² Although holders of the various categories of licenses under this Act have the option to surrender their licenses to avoid being bound by the strict rigours of these provisions, the Minister is nevertheless empowered to refuse the surrender of the license if he is satisfied that the applicant will not leave the land to be surrendered in a condition which is safe and conforms to the requirements of the EMP or of the applicable Regulations relating to safety and environmental management.¹⁸³

The Mining Act further grants the Minister considerable law-making powers¹⁸⁴ to make regulations for the avoidance of the pollution of air, surface and ground waters and soils and for regulation of all matters relating to the protection of the environment and for minimization of all adverse impacts to the environment including the restoration of land on which mining operations have been conducted.¹⁸⁵

The Mining Act, 1998, on the other hand, contains provisions which seriously water down and may - given Tanzania's politico-administrative context and

¹⁸¹ Sections 48(e) and 52(1)(g).

¹⁸² Sections 49(2)(c) and 53(2)(c)

¹⁸³ Section 56 (c).

¹⁸⁴ Section 110(2)(j). Pursuant to these powers, in late 1998 the Minister made proposals for the promulgation of Mining (Environmental Management and Protection) Regulations, 1999, among a string of other proposed by-laws under this Act. These regulations provide a comprehensive mechanism for putting into effect the provisions of the Act relating to environmental matters that I have examined above.

¹⁸⁵ The subsidiary legislation, the Mining (Environment Management and Protection) Regulations, 1999 (the Regulations) describe in details the principles outlined in sections 38(5) and 64 of the Act. For instance, the government process of approving a mining project involves project screening, scoping, EIA and EMP evaluation by experts from the National Environment Management Council (NEMC), the Vice Presidents Office – Division of Environment, the Ministry of Water, the Ministry of Natural Resources and Tourism, the Ministry of Lands and Human Settlement and the Ministry of Energy and Minerals (Minerals Division). Furthermore, representations from the relevant Regional Administration, Local Government Authorities and the public are sought and considered during the approval process. The approved EMP is subject for review by the government experts at the end of a 2 year period and thereafter every five years. The licensing authority will take into consideration any representation from members of the public.

historical experience - render useless the rigorous environmental management and protection provisions examined above. This relates to omission of requirements for public participation in the EIA processes and the wide discretionary powers, which the Minister enjoys under the Act.¹⁸⁶

The fact that ministerial discretion in public decision-making processes in Tanzania has been widely abused for personal gain has been widely documented. The verdict of the Presidential Commission of Inquiry Against Corruption (the Warioba Commission) published in November 1996 was unequivocal in this respect: "... The country has witnessed the disappearance of transparency in transacting public business at all levels. Discretionary powers have been used in a manner that has created loopholes for favouritism and discrimination.... The basis on which decisions are taken has not been clear. This situation has created big loopholes for corruption and has generated more corruption".¹⁸⁷

Abuses of tax exemption powers, imports support schemes, awards of Government contracts, grants of hunting concessions, land allocations, overseas medical treatment, involving high state officials and senior politicians were also extensively documented and acknowledged by the Warioba Commission which, in its stinging report, denounced the "grand corruption involving high level leaders and public servants whose involvement in corruptive practices is a result of excessive greed for wealth accumulation and money".¹⁸⁸ These widespread abuses were made possible by the overbearing concentration of powers and authority in the executive organs of the state as exemplified by wide discretion with little or no meaningful 'checks and balances' and accountability of the rulers to the ruled.

That wide ministerial discretion has been a running theme in Tanzania's legal and constitutional history also finds ample proof in the Mining Act, 1998. Under

¹⁸⁶ See Mwalyosi, R and Hughes, R. 'The Performance of EIA in Tanzania: An Assessment, (1998), London, IIED/Dar es salaam, IRA. At 8-11

¹⁸⁷ Tanzania (URT) Presidential Commission of Inquiry Against Corruption: Report on the Commission on Corruption, Vol. 1 at pp 61-64

¹⁸⁸ Ibid, vol. 1 at 5

section 10(1), for instance, the Minister may enter into a development agreement not inconsistent with the Act with a holder or an applicant for a mineral right relating to the grant of mineral rights, the conduct of mining operations under the special mining license or the financing of any mining operations under the special mining license. This agreement may contain provisions which are binding on the Government relating to the special mining license or the mining operations to be conducted under the said license which guarantee fiscal stability of a long term mining project and for that purpose make special provisions for payment of royalties, taxes, fees.¹⁸⁹

The effect of this provision is that where, say, the holder of a special mining license informs the Minister that payment of royalties, taxes or mining fees in respect of his mining operations will cause 'fiscal instability' to his project the Minister may enter into an agreement with the holder of the license to waive or defer the payment of the royalties, taxes or fees, thus restoring the mining project to 'fiscal stability'! Given the often secretive, usually technocratic and generally unaccountable ministerial decision-making processes in this country, the opportunities for "grand corruption", favouritism and malpractice abound in the exercise of discretion under this section.¹⁹⁰

The agreement between the Minister and the holder or applicant of a mineral right may also contain provisions relating to the circumstances or manner in which the Minister or the Commissioner of Mines (another licensing authority under the Act) may exercise discretion conferred upon them by the Act or the Regulations.¹⁹¹ Here the Minister or the Commissioner may agree to defer the payment of the said royalties, taxes or fees or reduce the rate thereof. Indeed under section 64(2), the Minister may exempt an applicant for a mineral right from the Regulations after the particular applicant has submitted to the Minister a requirement for the consideration of environmental information.

¹⁸⁹ Section 10(2)(a) of Tanzania Mining Act, 1998. See also Lissu, T.A. "Environmental Impact Assessment of Foreign Investment projects: A Study in the Law, Policy and Governmental decision-making in Tanzania", (1999) at 19

¹⁹⁰ Ibid, at 19.

¹⁹¹ See section 10(2)(b) of Mining Act, 1998.

The agreement between the Minister and the holder or applicant for a mineral right may also contain provisions relating to environmental matters including in respect of matters which are project specific and are not covered by regulations of general application, provisions intended to define the scope and limit the extent of obligations or liabilities of the holder of a special mining license.¹⁹² Here the Minister may choose to overlook the requirements for the commission and submission to him of an EIA or an EMP for a specific project. Indeed, under the proposed regulations for environmental management and protection, the Minister may direct that a particular application is exempt from the Regulations or it requires consideration of environmental information and is, therefore, subject to the Regulations.¹⁹³ Again the result is likely not to be the elimination of corruption and inefficiency but the creation of new networks of patronage that encourage their own forms of political corruption and cronyism. Tanzania is not likely to be an exception in this respect as these processes have also been observed by scholars and publicists in other countries.¹⁹⁴

Compared to the wide latitude that the Minister and other functionaries within the Ministry of Minerals enjoy, opportunities for public participation in decision-making processes concerning such matters as granting of mining licenses and the negotiation of the terms and conditions under which the grantees shall operate are conspicuous by their absence. The role of the general public in such important and public processes as preparation, review and approval of EIA studies in respect of mining projects has also not been provided for. As we shall see with examples of what is happening in the mining areas, this want of public participation has serious implications on the various rights and interests of stakeholders such as local communities in mineral rich areas. This aspect is discussed in detail under 3.3.2.

¹⁹² Section 10(2)(c).

¹⁹³ Regulation 3.

¹⁹⁴ See Mwalyosi, R. *op cit* at 12, note 3.

3.3.2 NEMC's EIA Guidelines and Procedures

As discussed in chapter two, the National Environment Management Act, 1983¹⁹⁵ established the National Environment Management Council (NEMC) and bestowed upon it the functions of advising the Government on all matters relating to the environment. In particular, the Council is enjoined to formulate policy on environmental management; coordinating the activities of all institutions concerned with environmental matters; evaluating existing and proposed policies and activities on pollution control and enhancement of environmental quality; recommending measures to ensure Government policies take adequate account of environmental effects; etc¹⁹⁶. It may also be involved in initiating legislative processes as its other function is to "formulate proposals for legislation in the area of environmental issues and recommend their implementation by the Government."¹⁹⁷

In addition, the Act establishes the office of the Director General of the Council who is the Chief Executive Officer¹⁹⁸ with wide ranging duties in environmental matters. He is, for instance duty-bound "to consider means and initiate steps for the protection of the environment and for preventing, controlling, abating or mitigating pollution; and investigate problems of environmental management, among others."¹⁹⁹ It is on the basis of these statutory functions that NEMC has been reviewing various development projects in the country in order to ensure that they conform to requisite environmental standards.²⁰⁰

¹⁹⁵ Act No 19 of 1989. This Act has been recently repealed and replaced by Environmental Management Act, 20 of 2004. However, the new Act still uses the same guidelines and Procedures.

¹⁹⁶ Ibid, section 4.

¹⁹⁷ Section 4(j).

¹⁹⁸ Section 6

¹⁹⁹ Section 7(a-f)

²⁰⁰ An important agency concerning EIA in Tanzania is the National Environment Management Council (NEMC), and it is mainly to "perform an advisory role to the government on all matters relating to environment management"

NEMC is placed under the Vice-President's Office (VPO) and the Chief Executive of NEMC is called Director General. NEMC's roles and responsibilities are mainly advisory. The mission of NEMC is to be "the leading technical advisory, co-ordination and regulatory agency responsible for the protection of the environmental and sustainable use of the natural resources in Tanzania.

It is also on this basis that NEMC prepared Environmental Impact Assessment Guidelines and Procedures in 1997 to guide developers to carry out development projects in an environmentally responsible way. These Guidelines and Procedures hold particular importance in so far as they have sought to incorporate issues of public participation and access to information in environmental decision-making processes in respect of projects with likely environmental impacts.²⁰¹

The new Environmental Management Act, 20 of 2004 in Tanzania, has just been assented by the president this year (2005). The Act provides that EIA is mandatory under the 3rd schedule to the Act. The said schedule provides; “Any person, being a proponent or a developer of a project or undertaking of a type specified in the Third Schedule to this Act [i.e. the Environmental Management Act, 2004], to which environmental impact assessment is required to be made by the law governing such project or undertaking [...] shall undertake or cause to be undertaken, at his own cost, an environmental impact assessment study”. “An Environmental Impact Assessment study shall be carried prior to the commencement or financing of a project or undertaking”. “A permit or licence for the carrying out of any project or undertaking in accordance with any written law shall not entitle the proponent or developer to undertake or to cause to be

It is responsible in consultation, collaboration and partnership with other entities concerned with environmental matters and the public at large, for facilitating and promoting such measures as necessary to help achieve an important quality of lives for Tanzanians”. One of its six stated functions is to “Assess, monitor and evaluate all activities that have impact on the environment

²⁰¹ In 1997 the Cabinet approved a National Environmental Policy (NEP), which was prepared by VPO, and added enforcement and EIA arbitration roles for NEMC. NEP:

- “seeks to provide the framework for making the fundamental changes that are needed in order to incorporate environmental considerations into the mainstream of decision-making.”
- “seeks to provide guidance and planning strategies in determining how actions should be prioritised, and provides for the monitoring and regular review of policies, plans and programmes”
- “provides for sectoral and cross-sectoral policy analysis, so that compatibility among sectors and interest groups can be achieved and the synergies between them exploited”.

NEP has however no legal backing and it is therefore dependent on that responsible authorities enforce the need to undertake EIAs. The responsible authorities do not always have EIA reports as conditional when granting developers the authority to proceed with their projects. The sectoral policies provide a list of projects prescribed for EIA. However they do not define any threshold when it comes to project size, area of development, production criteria, etc. (See Tarr, 2003).

undertaken a project or activity without an environmental impact assessment certificate issued under this Act.”^{202;203}

3.3.3 Public Participation under EIA Guidelines and Procedures

There are numerous stages which are required to be fulfilled before a particular project is implemented. There is, for instance, a classification exercise or the preparation of a preliminary environmental report to show whether a proposed project will cause significant adverse environmental impacts. As in the United State²⁰⁴, the report is used as an aid by an agency in determining whether an EIS must be prepared when the impacts of a project are unknown or the need for a more detailed EIS is uncertain. If the project is shown to be likely to have environmental impacts, then the project proponent will be required to prepare and submit Environmental Impact Statement (EIS) to NEMC.²⁰⁵

Three stages are involved in this exercise at the centre of which is public participation and access to information provisions. These are scoping, preparation of Terms of Reference and preparation of the EIS.²⁰⁶ Scoping is done

²⁰² Lumbanga, M.Y.C. “Environmental Management Act, 2005” A Bill for Submission to National Assembly. Published for general information to the public. Chief Secretary of President’s office of Tanzania 14th July, 2004. Dar es salaam, Tanzania. There are other laws dealing with EIA as well. Tarr (2003) writes that NEP, “the National Conservation Strategy for Sustainable Development, the National Environmental Action Plan and specific policies such as those on land, mining, energy, water, agriculture, population and fisheries recognizes EIA as a means of ensuring that natural resources are soundly managed, and of avoiding exploitation in ways that would cause irreparable damage and social costs.”

²⁰³ NEMC’s directorate’s principle objective is to “institutionalise EIA as a mandatory guiding tool in achieving sustainable socio-economic development and ecological sustainability”. Its primary functions are to:

- “collaborate with legal division in the formulation of EIA policy and legislation,
- finalise national and sectoral EIA policies, procedures and guidelines,
- establish an appropriate monitoring and auditing system,
- conduct public awareness activities on EIA, and
- collaborate with national, regional, and international institutions dealing with EIA and related matters”

²⁰⁴ NEMC’s Procedures and Guidelines are in many respects similar to EIA procedures under the United States’ National Environmental Policy Act, 1970, 42 U.S.C. ss. 4321-4347 (1994).

²⁰⁵ Lissu, T.A.M. op.cit at note 10

²⁰⁶ NEMC, “Technical Review of an Environmental Impact Assessment for an Environmentally Responsible Prawn Farming Project in the Rufiji Delta, (1997) Tanzania, Dar es salaam.

by the project proponent or by his consultants in order to identify the main issues of concern in consultation with NEMC and the relevant sectoral authorities as well as the affected and interested persons. It is the responsibility of the project proponent to make sure that all the concerned parties are given adequate opportunity to participate in the scoping exercise. The objective of their inclusion is to determine how their concerns will be addressed in the ToR for the EIA study.²⁰⁷

The EIA Procedures and Guidelines also insist that in order to ensure satisfactory public involvement, the project proponent should initiate a public information campaign in the area likely to be affected by the proposed project and that any concerns raised by the members of the public are recorded and addressed in the EIS.²⁰⁸ These requirements have been implemented with success in the United States whose NEPA and its associated regulations require federal agencies to respond to stakeholders' concerns and comments on EIS in the form of additions to, or modifications of, a proposed action; a correction of inaccurate factual information; or an explanation of why the comments do not warrant an action on the part of the agency.²⁰⁹

The scoping requirements are set out in clearer terms in volume two of the EIA Procedures which provides for "Screening and Scoping Guidelines".²¹⁰ The latter insist, in no uncertain terms, that the project proponent and his consultants "will have final responsibility for scoping." A scoping program, according to this document, should indicate the following matters:

- The authorities and members of the public, i.e. stakeholders, who are likely to be affected by the proposed project.
- How will these stakeholders be notified?

²⁰⁷ Ibid, vol. 1 para 2.3.1

²⁰⁸ Ibid.

²⁰⁹ See Stevenson, 'Analysis of NEPA's Procedural Aspects', (1999) at 4.

²¹⁰ See the Draft Summary of the Review Report for Prawn Farming Project in the Rufiji River Delta, (1997) Tanzania, Dar es salaam, NEMC.

- What methods are to be used to inform them of the project proposal and solicit their comments?
- At what stage of the assessment process will opportunities be provided for public participation and input?

Public consultation is, according to this document, mandatory when undertaking environmental impact assessment. At the minimum the proponent must meet with the principal stakeholders to inform them about the proposed activity and to solicit their views about it. Furthermore, more problematic activities should involve more extensive consultations. The results of these consultations must be documented in the EIA report.²¹¹

There can be seen at least four constraints towards public participation in EIA practice Tanzania:

- “Inadequate scoping, poor terms of reference and insufficient time: EIAs are often commissioned as ‘afterthoughts’ in the project planning and implementation process, leaving little opportunity for public involvement, or the consideration of alternative project options”
- “Socio-cultural factors: Tanzanians consider themselves a ‘non-participatory society’ ”
- “Misconceptions: Some believe that EIA documentation is confidential, i.e. belonging to the one who finances the project (which is certainly not the case).”
- “A lack of trust: NGOs are often distrusted by the private sector and parts of central government.”²¹²

3.3.4 Access to Environmental Information

To comply with the public participation requirements analysed above, the project proponent is further required to give background information²¹³ on the nature of

²¹¹ Ibid

²¹² Tarr, P. “Environmental Impact Assessments in Southern Africa” (2003), a SAIEA publication at <http://www.saiea.com/saiea-book/Tanzania1.pdf>

the proposed project, i.e. purpose and need for the project, proposed actions, location, timing, method of operation of likely impacts, etc. This is required "in order to assist interested and affected parties to comment constructively and form an informed position during the scoping process."²¹⁴ The Guidelines also require the project proponent to "establish a list of interested and affected parties" as well as develop the methods of notifying them about the project proposal. They also require the consultation process to record the fears, interests

²¹³ A Tanzanian citizen's right to obtain and impart information is enshrined in the constitution. This constitutional right is given in its broadest sense to include rights to give and receive information on environment and natural resource management. Articles 18 and 27 are the most relevant constitutional provisions.

- Article 18(1) of the constitution stipulates that "subject to the laws of the land, every person is entitled to freedom of opinion and expression; that is to say, the right to freely hold and express opinions and seek, receive, and impart information and ideas through any media and regardless of frontiers...Freedom from interference with correspondence [is also guaranteed]."
- Article 18(2) states further that "every citizen has a right to be kept informed of developments in the country and in the world which are of concern to the life of the people and their work and of question or concern to the community."
- Article 27(1) highlights the importance of sustainable use of natural resources for the benefit of the citizens of Tanzania by providing "that every person is obliged to safeguard and protect the natural resources of the United Republic, state property and all property jointly owned by the people, as well as to respect another person's property."
- Article 27(2) provides further that "all persons shall be by law required to safeguard state and communal property, to combat all forms of misappropriation and wastage and to run the economy of the nation assiduously with the attitude of people who are masters of the fate of their own nation."
- Article 18 of the constitution read together with Article 27 provides a clear constitutional basis for the right to obtain and share information on the environment and natural resource management.

Thus, by interpretation at least, the right of citizens to access environmental information is ensured. In practice, however, Tanzanians rarely enjoy this right.

Despite the constitutional mandate, the government often has not informed the public and has at times even misled people about decisions and projects that could potentially degrade the environment, threaten livelihoods, and endanger health. When the public does learn of such acts through unofficial channels, inquiries often fall on deaf ears. As a result, the public is often unaware of the possible hazards or potential benefits of many government decisions and projects. Moreover, without effective access to environmental and other information, Tanzania's citizens are not involved in public policy-making processes to the extent necessary to achieve sustainable development.

²¹⁴ Ibid, para 2.3.1

and aspirations of the community so that these can be addressed in the subsequent EIA study.^{215, 216}

The Guidelines and Procedures have a lot of shortcomings. Ever since they were prepared and adopted by NEMC, which recommended that they be adopted by the Government in order to give them legislative 'teeth', they have not been passed by the Government as subsidiary legislation. Their effectiveness has, therefore, depended solely on administrative practice and the goodwill of investors who feel that NEMC's stamp of approval is important for them to secure finance for project implementation. However, this state of affairs leaves the door wide open for judicial challenge of the legality of the Guidelines and Procedures by a well informed and stubborn project developer.

3.3.5 Access to environmental information and EIA in Mining

It is clear from the foregoing analysis, therefore, that the EIA regime in Tanzania is not only founded on shaky legal foundations, it also has to operate in a suffocating socio-economic and political environment brought on by the convergence of factors such as an apparent unwillingness on the part of the Government of Tanzania to promulgate a stringent EIA regime and the powerful corporate interests keen on investing in the exploitation of the country's natural resources with minimum attention to environmental considerations. Indeed, an examination of the emerging practice shows a growing pattern of paying lip service to the requirements for EIA while sabotaging its effectiveness as a

²¹⁵ Ibid, para 2.3.3

²¹⁶ It is a measure of effectiveness of these procedures and regulations that when they were used for the first time during the EIA processes for the controversial Rufiji Delta Prawn Farming Project in southern Tanzania, the level of participation and the informedness of the contributions from various stakeholders were unprecedented. Local communities, NGOs, government departments and the press were all galvanized into a debate which ultimately led to a recommendation by NEMC that the implementation of the project be stopped on socio-economic and environmental grounds.

planning tool as well as a mechanism for democratizing environmental decision-making through public participation, access to information and justice.

In a study on the performance of EIA in Tanzania Mwalyosi and Hughes, (1998) found the following weaknesses:

- Although EIA is sometimes perceived as impeding development, there is a widespread desire among Tanzanians to adapt EIA to the national context.
- EIA processes are initiated too late in the project cycle to influence project design and in many cases; EIAs are undertaken as 'stand alone' processes. There is almost no integration between EIA and project design.
- Little attention is given to involving key stakeholder groups, especially the local people.
- EIAs are often under-assessed and the expertise employed is often inappropriate, while EIA review is *ad hoc*.
- Foreign expertise dominates the EIA industry with little use of nationals (Tanzanians), which in the long term impedes EIA national capacity building.
- In general, EISs are descriptively strong, but analytically weak and do not consider cumulative impacts; and few assess project alternatives. Compliance issues are often unclear in the EISs and the quality of EIAs is often not of a good standard.
- The quality of EIAs appears to be constrained by resources, time limitations, and lack of political commitment.
- The institution likely to be responsible for managing the EIA process in Tanzania - the NEMC - has so far fulfilled an advisory role, since it lacks legal powers for enforcement. This weakness is aggravated by the shortage of relevant expertise and its lack of representation at district and local levels.²¹⁷

²¹⁷ Mwalyosi, R. & Hughes, R. 'The Performance of EIA in Tanzania: an assessment' (1998). IRA Research Paper No. 41/IIED Environmental Planning Issues No. 14.

3.4 CONCLUSION

This chapter discussed the environmental protection offered under the Mining Act, 1998 in Tanzania in so far as EIA is concerned. From the aforesaid discussion, one may say that environmental management in mining has been hindered by lack of coordination, insufficient funding and expertise. As a result there has been uncontrolled extraction of minerals and the use of unsafe mining methods and severe environmental damage and appalling living conditions in the mining communities. The challenge associated with the mining sector today in Tanzania is ensuring sustainability and integrating environmental and social concerns into mineral development programmes.²¹⁸ However, sustainable mining development requires balancing the protection of the flora and fauna and the natural environment with the need for social and economic development.²¹⁹

In view of these challenges, the government's policy for the development of the mining sector should not only aim at attracting and enabling the private sector to take the lead in exploration, mining development, mineral beneficiation and marketing, but also give priority to the protection of the environment. The role of the public sector can be to stimulate and guide private mining investment by administering, regulating and promoting the growth of the sector. Moreover, to address the problems associated with mining, the Government's policy is to reduce or eliminate the adverse environmental effects of mining, improve health and safety conditions in mining areas, and address social issues affecting local communities. EIA is recommended as one of the major tools for achieving these solutions. Although EIA has recently been a legal requirement in all development activities including mining, it may take many years to achieve the set objectives

²¹⁸ The Mineral Policy of Tanzania (1997) recognizes the need for sustainability of mining through integration of environmental and social concerns into the mineral development programmes. Sustainable mining is seen as that which balances the protection of the flora and fauna and the natural environment with the need for social and economic development. To address the problems associated with mining, the policy is to initiate actions to: (a) reduce or eliminate the adverse environmental effects of mining; (b) improve health and safety conditions in mining areas; and (c) address social issues affecting women, children and local communities.

²¹⁹ See Mwalyosi, B.B.R. 'Impact Assessment and the Mining Industry: Perspectives from Tanzania' (2004) IAIA'4, Vancouver, Canada, at p. 1.

since the necessary EIA culture and relevant institutions to coordinate and manage the mining environment have to be built.

The following chapter discusses the foreign investments in the mining sector in Tanzania in connection with the environmental protection in the mining.

CHAPTER FOUR

FOREIGN INVESTMENTS AND ENVIRONMENTAL PROTECTION IN MINING

4.1 INTRODUCTION

Tanzania has important natural resources that offer investment opportunities in mining and other sectors.²²⁰ In order to be able to examine the effectiveness of mining laws in as far as environmental protection is concerned, we must read these laws with investment laws.²²¹ This is due to the fact that the 1997 mining policy mainly aimed at creating a good environment for foreign investment in the

²²⁰ Other sectors are such as tourism, agriculture, and manufacturing. Six land-locked countries have access to the outside world through Tanzanian ports. Tanzania has good arable land, unique tourist attractions, inexpensive labor, political stability and an improving free market policy orientation.

²²¹ Laws and Regulations Governing Investments in Tanzania are:

- Tanzania Investment Act, 1997 (No. 26 of 1997), (This Act guides investment activities in Tanzania and provides for more favourable conditions for investors);
- Financial Laws (Miscellaneous Amendments) Act, 1997 (Act No. 27 of 1997), (Aimed at amending certain financial laws, in order to address areas in affected legislations that had potential conflict with some provisions in the Tanzania Investment Act of 1997. The legislations which were affected by this Act are some sections of the Income Tax Act, 1973, Customs Tariff Act 1976, Sales Tax Act, 1976 (since repealed) and the Immigration Act, 1995);
- Capital Markets and Securities Act, 1994 (No. 5 of 1994), (This Act provides for the establishment of a Capital Markets and Securities Authority (CMSA) for the purpose of promoting and facilitating the development of capital markets and securities in Tanzania);
- Banking and Financial Institutions Act 1991 (No. 12 of 1991), (An Act intended to harmonise the operations of all financial institutions in Tanzania, to foster sound banking activities, to regulate credit operations, and to provide for other matters related to these purposes);
- The Land Act, 1999 (No. 4 of 1999), (Provides for basic law in relation to land other than village land, the management of land, settlement of disputes and related matters);
- The Village Land Act, 1999 (No. 5 of 1999), (Provides for the management and administration of land in villages, and for related matters);
- Value Added Tax Act, 1997 (No. 24 of 1997), (Provides for the imposition of tax to be known as Value Added Tax on supplies of goods and services and for related matters);

sector.²²² Both the mineral policy of Tanzania and Tanzania Investment Center (TIC) stress to formulate and implement a mining taxation regime which will attract foreign investors. At the same time, the central objective in Tanzania's fiscal policy formulation is to balance the national interest with those of the investors by ensuring that the mining tax regime is equitable, stable and predictable, undistorted and competitive both locally and internationally.²²³ These are ambitious objectives, which cannot be achieved easily without jeopardizing the interests of any stakeholders and the environment. As submitted earlier in chapter one, mining is an extractive business, which can lead to serious environmental problems if it is not well controlled. This control should be seen in the laws regulating the same.

This part intends to examine investment law and policy in Tanzania particularly in respect of foreign investment in Tanzania with a view to showing the manner in which social and environmental considerations have been integrated in the decision-making processes regarding foreign investment and the regulation thereof.

The central argument that is pursued herein is to the effect that in the current climate of economic liberalization and re-regulation of the state, policy pronouncements and legal provisions in respect of environmental protection may in fact count for little. That in an all pervasive neo-liberal, neo-corporate paradigm which is bent on securing and protecting the interests of - largely foreign - investors and the bureaucratic interests of those in the positions of power and influence within the Tanzanian state, the ends of the law may actually

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- Immigration Act, 1995 (No. 7 of 1995), (Aimed to provide for the enactment of one law for control of immigration in the United Republic of Tanzania and for matters incidental to or connected with immigration); and
 - Foreign Exchange Act, 1992 (No. 1 of 1992), (Act to provide for the administration and management of dealings and other acts in relation to gold, foreign currency, securities, payments, debts, imports, exports, transfer or settlement of property).

²²² This is explained in detail under chapter 2 and 3 of this work.

²²³ See Kulindwa, *et al*, *op cit*, note 2 at 128.

be sabotaged or selectively and cynically manipulated to serve other ends.²²⁴ This is a very important question given the nature and character of Tanzania's economy, which is basically rural and predicated on the exploitation of natural resources.

Foreign investment which is flowing into the country is also based on the exploitation of the finite natural resources such as minerals, wildlife/forestry and coastal and marine resources. Therefore, the nature and character of the regulatory system for this investment has significant impacts not only on the management and ultimate sustainability of the natural resources but also on the livelihood of various rural communities who depend on the natural resource bases for both their physical and cultural survival. It also has significant impacts in the political sphere as economic deregulation in Tanzania also seems to have gone hand in hand with the 'deregulation' of the political morals of public officials and public institutions.²²⁵

It is important to understand that issues of environmental management are not just legal or technical issues to be left to the bureaucrats and "experts". They can only be properly understood in the light of the ongoing socio-economic and political processes; and in the current dispensation they must be seen against the background of the deregulation and re-regulation of the state to serve capital and 'the market'. These issues represent the central questions of politics and exercise of state power in the allocation and distribution of resources to various social groups in the country.²²⁶

4.2 Investment Promotion and Protection Act, 1990

This act established the Investment Promotion Centre that has the functions and powers in relation to the promotion, coordination, regulation and monitoring of

²²⁴ See Lissu, T.A. "Environmental Impact Assessment of Foreign Investment Projects: A Study in the Law, Policy and Governmental Decision-making in Tanzania", (1999), at 16

²²⁵ Ibid, at 17.

²²⁶ Peter, C.P. "Promotion and Protection of Foreign Investment in Tanzania: A New Investment Code", (1993), at 32.

both foreign and local investments.²²⁷ It provided for procedures to be followed in application for a certificate of approval of enterprises and areas of investment for both national and foreign individuals. It provided that application shall be made in accordance with such procedures and form as may be prescribed by the Tanzania Investment Centre and shall be accompanied by a statement on the likely contribution of the enterprise to the objective as provided for under subsection (1) of Section 13 and such other information as may be required by the Centre.²²⁸ It further provided for the consideration of application that the Investment Promotion Centre shall satisfy itself of the likely contribution by the enterprise to the economic development and benefit of Tanzania.²²⁹

Although, the Investment Promotion and Protection Act, 1990 made mining as one of the priority areas for investment in Tanzania, the status carried with it certain advantages for the investor.²³⁰ This is due to the fact that the Act does not oblige the investors to mitigate the negative impacts of their ventures on the environment.²³¹

4.3 The National Investment Act, 26 of 1997

This Act updated the NIPPA. In this Act, IPC was transformed into a new organization known as the Tanzania Investment Center (TIC). Therefore, the Tanzania Investment Act, No. 26 of 1997, vested the task of facilitating and coordinating private sector investments on the Tanzania Investment Center (TIC). The center has recently been reinforced to manage the increasing trend of applications so as to improve their efficiency and effectiveness in their

²²⁷ The Act was enacted in August 1990, and was repealed by Tanzania Investment Act, 1997. It's normally referred to as NIPPA. NIPPA provided for priority investment areas, accorded qualified investors generous incentives and attractive benefits, spelled out guarantees against nationalization, and provided assurances for dispute settlement.

²²⁸ Section 12.

²²⁹ Section 13(1).

²³⁰ See Peter, C.P. op cit, note 218 at 30. . The minerals which are particularly mentioned as ones of priority in the Act are gold, diamonds, gemstones and all other minerals, metallic and non-metallic

²³¹ Ibid, at 32.

objectives.²³² The Act has been strengthened by the enactment of the Land Act, 1999 and the Village Land Act, 1999 which provide for the right to acquire land in urban and rural areas respectively. The two-land legislation sets out the fundamental principles of the national land policy which facilitates an equitable distribution of and access to land by all citizens and investors.²³³

Likewise, commenting on the impact of macro-economic policies adopted by the Government of Tanzania since mid of 1980s, a National Conservation Strategy for Sustainable Development (NCSSD) prepared by the National Environment Management Council (NEMC) singled out privatization and encouragement of foreign investors as having substantial impact on the environment.²³⁴ It noted, taking leaf from the Report of the Presidential Commission of Inquiry into Land Matters, that one of the tendencies which have gathered considerable momentum in recent years is the alienation and allocation of rural and village lands to outsiders, thus subjecting the lands to intensive uses for short-term gain.²³⁵

²³² The objectives of TIC are as set in the 1996 National Investment Policy as follows;

- Maximum mobilization and utilization of domestic capacity including cooperation with other developing countries as well as industrialized countries;
- Maximum promotion of export of goods and services to enhance the development of a dynamic and competitive export sector;
- The encouragement and facilitation of the adoption of new technologies in activities that especially have a direct bearing on productivity, quality and increased competitiveness;
- Deregulation of the investment approval process;
- Creates balance between administrative controls and market forces as a means of allocating resources;
- Re-emphasise political pluralism to enhance democracy; and
- Rededicates the nation's adherence to rule of law.

²³³ See www.cats-net.com/tic. The law is also argued to give equal opportunity for women to acquire, hold, use and deal with land to the same extent and subject to the same restrictions as is a right to any man.

²³⁴ NEMC, National Conservation Strategy for Sustainable Development (NCSSD), (1995), at 22.

²³⁵ Ibid. The NCSSD document further observed that the trend away from direct state involvement in economic activity which has obviously stimulated economic growth has, however, not been replaced with effective regulatory framework which could allow market forces to work effectively while safeguarding certain national interests such as environmental quality and equitable income distribution. It further observed that the absence of a legal regime for EIA in the planning processes was one of the "legal issues of national concern", noting that "without a mandatory EIA process, no obligation exists to assess and monitor the effects of projects and government activities on the environment". It, therefore, urged the promotion of EIA methodology in the planning and implementation processes of all relevant ministries regulating government activities as well as private investment, especially the Investment Promotion Centre (IPC, now known as TIC) "where most investment projects are scrutinized". In addition, it proposed the creation of a legal regime requiring mandatory EIA of major development projects with significant impacts on

As noted earlier, in 1994, the Government came up with a National Environmental Action Plan (NEAP) which was touted as 'a first step' in making the fundamental changes needed to bring environmental considerations into the mainstream of decision-making in Tanzania.²³⁶ The NEAP, dubbed as the outcome of "distillation of lessons and thoughts on environment and development from a national perspective", gave recognition to environmental impact assessment as one of the "priority instruments" of environmental policy.²³⁷ In surprisingly candid and forthright terms, this document condemned environmental legislation in Tanzania as being "obsolete", with few statutes containing requirements for public participation in environmental management, public right to enforce the laws, legal requirements for management planning with an emphasis on long-term sustainability of resources, environmental impact assessment and standards and licensing schemes for appropriate behaviour.²³⁸ The NEAP also urged the incorporation of EIA approaches into all aspects of planning and decision-making. Arguing that successful implementation of the environmental policy and action plan required finding the right balance between the environmental constraints and the need for human action, this document proposed the incorporation of EIA requirements "for all major projects with a significant impact on the natural and human environment".²³⁹

The foregoing concerns are reflected in the National Environmental Policy which was passed in December 1997.²⁴⁰ The policy has recognized the importance of EIA as a planning tool to integrate environmental considerations in decision-making process in order to ensure that unnecessary damage to the environment

the environment, with the EIA procedures requiring cross-sectoral consultation in specific cases of government decision-making.

²³⁶ See a foreword by Minister of Tourism, Natural Resources and Environment, in MTNRE, "National Environmental Action Plan: A First Step," (1994) at iv.

²³⁷ *Ibid*, at 25.

²³⁸ *Ibid*, at 30.

²³⁹ *Ibid*, at 42.

²⁴⁰ Tanzania National Environmental Policy, 1997.

is avoided.²⁴¹ It has, furthermore, proclaimed the need for making EIA processes a mandatory requirement "to ensure that environmental concerns receive due and balanced consideration in reconciling urgent development needs and long-term sustainability".²⁴² The policy has, in addition, promised the formulation of requisite guidelines and specific criteria for conducting EIA processes as part of the strategies to implement the policy.²⁴³ The cornerstone of these processes, according to the Policy, is the institution of the mechanisms for public consultations and public hearings in the EIA procedures.²⁴⁴

It is, however, in relation to foreign investment that the continuity in past policies is even more striking and disturbing. As I have shown, there was no obligation on investors to mitigate the negative impacts of their ventures on the environment under the 1990 legislation. That legislation was repealed and replaced by the National Investment Act, 1997²⁴⁵, which was enacted (according to its preamble) "to provide for more favourable conditions for investors...." This has been done admirably, as it gives investors extraordinarily generous incentives in the form of tax relief and concessional tax rates,²⁴⁶ guarantees and protections in the form of unconditional transfer of capital, profits, etc. and guarantees against

²⁴¹ Ibid, para 65.

²⁴² Ibid, para 65.

²⁴³ Ibid, para 66.

²⁴⁴ Ibid, para 66.

²⁴⁵ Act No.26 of 1997. This is an act to guide investment activities in Tanzania, to provide for more favourable conditions for investors. It provides definitions for *inter alia* local investor, foreign investor and local capital. This Act does not, in terms of Article 2, apply to: -

- Investments in mining and oil exploration currently covered under the Petroleum (Exploration and Production) Act, 1980, and the Mining Act 1998;
- Investments in Zanzibar, which are administered under a separate legislation applicable in Zanzibar only;
- Investment below US\$ 300,000 and US\$ 100,000 for foreign investor (wholly owned or joint venture) and local investor respectively.

²⁴⁶ Ibid, sections 19-20. These incentives were given added force by the corresponding amendments of the relevant taxation legislation such as the Income Tax Act, 1973, Customs Tariff Act, No. 12 of 1976 and the Immigration Act, 1995 to bring them into conformity with new investment regime. Also, the National Assembly passed Financial Laws (Miscellaneous Amendments) Act, No. 27 of 1997.

expropriation, nationalization or compulsory acquisition.²⁴⁷ Investors are even entitled to an initial automatic immigration quota of up to five persons during the start up period which quota may be raised under certain circumstances.²⁴⁸

In addition to these generous incentives, the Government also seems to have resisted calls to subject foreign investors to any standards of responsible environmental behaviour by not making any mandatory or voluntary EIA requirements in all investment projects, foreign or local. In fact, under this law, there is absolutely no mention of the word 'environment' anywhere and no environmental obligations whatsoever are imposed upon investors.²⁴⁹

4.4 CONCLUSION

This chapter discussed the foreign investments and environmental protection in the mining. From this discussion, we may say that there is a need for more effective environmental management mechanisms in Tanzania. The omission of EIA requirements in various environmental and natural resource management legislation has been a source of considerable criticism in both the official and academic literature on natural resource management in the country. Much of this criticism has centred on the need to have effective regulatory controls in place in view of the growing importance of foreign investment in Tanzania. For instance,

²⁴⁷ Ibid, sections 21 and 22.

²⁴⁸ See Lissu, op cit at 23.

²⁴⁹ The fact that the Tanzania Investment Act imposes no specific requirements for investors to comply with any environmental conditions would appear to be a significant step backwards, as the original Bill for the Act which was submitted to Parliament (in 1997) had a provision requiring the TIC to "liaise with appropriate bodies or agencies to ensure that investment projects use environmentally viable technology to restore, preserve and protect the environment." This provision was deleted in the final version of the Bill which was enacted into law. It was an important provision that could have ensured that the TIC vets, at the application stage, investors who are out to maximize short-term profits at the expense of the environment. That it was removed from the final Bill suggests that the various political statements and "pledges" about the Government's strong commitment to environmental issues is empty rhetoric which cannot stand up to rigorous scrutiny. This is in sharp contrast with the considerable lengths taken to attract these new economic 'messiahs' as shown above; as well as by the fact that such mundane and elementary matters as incorporation and registration of companies, filling in of VAT, investment registration and immigration forms and the obtaining of necessary approvals, licenses, facilities or services will be done or 'facilitated' for them by the Tanzania Investment Centre. They need not even apply for their own immigration permits as this will be done on their behalf by the TIC.

a 1993 analysis of the now repealed National Investment (Promotion and Protection) Act, 1990²⁵⁰, - which, according to a prominent legal scholar, had given investors "very generous incentives and guarantees" - showed that the Act placed very minor obligations on the investor.²⁵¹ No obligation was, for example, placed on the investor to clean up the environment if his venture were to be found to have caused environmental degradation or pollution.²⁵²

However, there is evidence to indicate that there are negative regulatory effects in management of foreign investment in the mining sector as discussed above. The lack of institutional capacity, finance and in some cases political will, as well as lobbying by investors, is hampering efforts of the sector to implement effective environmental regulation. In addition, social impacts of foreign investment in the mining industry have also been negative in some cases.

Another major problem facing Tanzania is environmental management of artisanal and small-scale mining. Part of the problem is due to the fact that the government tends to establish different legal requirements in function of the size or type of mining activity. This may imply support by government institutions in assisting small-scale and artisanal miners in managing the environment. Problems will arise should a small scale mine, by virtue of the discovery of increased reserves or increased production be reclassified as a large-scale mine. Will the company concerned be liable for environmental damage that may have occurred previously even if its operations obeyed the law, or will this be a liability for the government?

The following chapter gives the concluding remarks and recommendations.

²⁵⁰ Act No. 1 of 1990

²⁵¹ Peter, C.M. "Promotion and Protection of Foreign Investment in Tanzania: A New Investment Code", ICSID Review-Foreign Investment Law Journal, at 57.

²⁵² Ibid.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 CONCLUSIONS

This study analysed the general aspects of environmental law, environmental aspects of the mining laws and the integration of mining laws and other laws in as far as environmental issues are concerned. Despite the notable economic benefits accruing from mining sector, there are still a number of critical factors which require immediate attention if it is to contribute more.

The general examination of law and practice on environmental protection under mining laws in Tanzania can be broadly summed up to say that environmental law is still relatively new and evolving. Despite the enactment of the framework legislation (Environmental Management Act, 20 of 2004), the evolution of this law is proceeding on a sectoral and ad hoc manner rather than being comprehensive and multisectoral.²⁵³ For example, there is no framework EIA legislation or other statute which makes provisions for EIA procedures or guidelines to cover all sectors and a broad range of activities which are normally subject to EIA studies²⁵⁴. Indeed there are only sectors (for example, mining and marine resources in Marine Parks and Reserves) that have EIA provisions in their statutes. The rest are outside this legislative scheme and whatever EIA scrutiny of activities thereat has been undertaken gratuitously.²⁵⁵

²⁵³ In order for the new Act to be operative, the regulations must be made and adopted by the Minister responsible for environmental matters as subsidiary legislation.

²⁵⁴ NEMC's Procedures and Guidelines do not qualify as such since they have a lot of shortcomings as seen in chapter three.

²⁵⁵ See Lissu, T.A. "Environmental Impact Assessment of Foreign Investment Projects: A Study in the Law, Policy and Governmental Decision-making in Tanzania", (1999), at 29. Given the uneven development of the EIA law, practice has been equally uneven and inconsistent. EIA studies have been undertaken in sectors or on activities in which there are no legal requirements, as in the case of the Rufiji Delta Prawn Farming Project and in the National Parks; while it has not been undertaken in other areas even where there were legal requirements as in the case of the Bwejuu Island when AFC had planned to build a hatchery for its prawn farms in the Rufiji Delta. It is fair to say, therefore, that whether or not an EIA study is undertaken has depended not on the legal

In the context of the economic crisis that countries such as Tanzania are going through and in the context of the liberalization policies adopted ostensibly to deal with that crisis, the exploitation of natural resources is intensified by opening up key natural resource sectors of the economy to foreign capital in the form of foreign direct investment. This opening up leads directly to the intensification of conflicts over the access to and control of natural resources between rural communities on the one hand, and the state and big foreign capital on the other; as well as increased pressure on the natural resources which threatens ecological balance of key ecosystems.²⁵⁶ Most of the large-scale mining companies comply with national rules and regulations of the mining sector but they are reluctant to go beyond compliance because this is not a legally binding requirement. The mining companies argue that they pay all the required taxes and royalties to the government and therefore it is the government's responsibility to return some of the mining revenues back to the local communities for development. Thus, little is done to help the surrounding communities despite the fact that they are the most impacted by the mining activities.^{257,258}

requirements; rather it has depended on other dynamics such as requirements of project financing. Many multilateral and bilateral financial institutions now require EIAs as part of conditionalities for project funding. The result of this is that EIAs - where they are undertaken - are carried out without good faith. They are not seen as genuine processes to examine the impacts of projects and their mitigation as well as examining various alternatives but as a time wasting hindrance to development and a drain on project resources. That is why in the case studies examined herein the EIA processes did not seem to make impact on the approval of the relevant projects.

²⁵⁶ Ibid, at 30.

²⁵⁷ Mwalyosi, R. "Impact Assessment and the Mining Industry: Perspectives from Tanzania", (2004) at 9. This has impact on the local economy also in that large mining investments increasingly open up remote areas where local Communities are often outside the economic mainstream of the national economy. In Tanzania there is limited institutional capability to manage the social and economic implications of such sudden growth of investments in remote areas. Any local income from mining is mainly through auxiliary activities such as sale of food, operating restaurants and sale of soft drinks and alcohol, etc. In a number of cases, the poor local communities have been forced off their land by mining projects. Needless to say, local communities are least empowered in demanding fair compensation. In some areas mineral officials have forced small-scale miners to accept and sign value agreements with large-scale miners thereby losing their properties by being bought off by mining companies many of them at very low prices. Such pressures magnify the extent of conflicts over resource use.

²⁵⁸ Mining is expected to create badly needed jobs, help build schools, roads and other needed infrastructure in the surrounding rural areas. Kulindwa et al. (2003) showed that approximately 20-60 people are employed per claim title. The number of employees tends to increase during the peak production period and shrink during the low season. GGM, the biggest mine in East Africa to date, boasts 2,400 employees (of which 93% are Tanzanian nationals). This makes GGM one of the biggest private sector employers in Tanzania. Nevertheless, employment does not necessarily

However, the expansion of mining in farmland increases environmental destruction risks, especially in areas that are already vulnerable such as the Lake Victoria Catchment areas including Shinyanga, Mwanza and Musoma Regions.²⁵⁹ The local communities in these regions are largely dependent on crop and livestock production for their livelihoods. The long-term implications include accelerated food insecurity, generation of a landless class, increased poverty, and rapid environmental degradation (including vegetation and topsoil loss).²⁶⁰

Additionally, as a result of the convergence of interests between actors within the state and its agencies and foreign investors, issues of legality and socio-economic and ecological sustainability of foreign investment projects are easily sacrificed on the altar of short term corporate profit and personal gain. Not accustomed to being bound by the law, high officials in the government are hardly ever concerned with issues of legality even though they are aware that they were breaking the law. Nor are they overly worried about the consequences of their decisions in terms of social and environmental impacts of the projects they approve for implementation. This is symptomatic of a larger political problem of the accountability of public officials and institutions which require concerted political action.

Furthermore, the examination also underscores the importance of access to information by the public, local communities and activist organizations. Access to information is one of the most important tenets of a democratic society. Secrecy deprives people of the power to decide. Without information, the public is

fall within the locality or even within the same district. Rather, employment cuts across the nation suggesting that mining employment has an impact at national level rather than on local communities.

When claim holders enter into agreements with large-scale miners they are restricted to a few development activities within the holdings. In many cases such restrictions have affected negatively the employment of members of the village communities in mining areas.

²⁵⁹ Mwalyosi, R. op cit at 12.

²⁶⁰ Many mining projects are relatively short-lived. Thus, it is no accident that "ghost towns" are a common problem associated with mining sites. Even where a mine proves profitable over decades, rather than years, the profits of mining tend to be deployed in opening up new prospects, rather than consolidating existing ones.

powerless to act. With information, the public can act to make sure that illegal conduct ceases, that victims are fairly compensated, that problems are appropriately resolved, and that future injuries are prevented. Secrecy also undermines the proper functioning of government. Democracy shrivels without substantially free access to information. If government officials are kept in the dark, they are unable to perform their duty. When people do not know the facts, they cannot put pressure on government to pass laws necessary to promote the general welfare or to enforce existing laws.

A good example is the case of the Rufiji Delta Prawn Farming Project which was relatively easy for the public to intervene in the debate on the viability of the project because considerable amount of information was made available to the public.²⁶¹ As a result, the level of public participation in the debate on the project was very high. NGOs, local communities and the general public both in and out of the country were able to intervene at crucial moments and considerable pressure was brought to bear on the investor and the Government. The EIA processes were fairly open, involving - for the first time - a public hearing in which various issues in respect of the project were debated with the active participation of the Delta communities.²⁶²

It was through these fairly open EIA processes that considerable amount of information was generated which enabled the Rufiji people and social and environmental activists to challenge the viability of the project and its supposed benefits, both in the courts as well as in the arena of public debate. The above is all the more significant as there were no legal requirements for EIA in respect of the project area which tells us that the state, which has exhibited such undisguised disdain for legality and the rule of law, can still be made accountable through sustained and organized popular pressure. In this respect, independent organizations of the people acting in unison with social and environmental activists and organizations may be the only way forward in protecting

²⁶¹ Lissu, T.A. *op.cit* at 32.

²⁶² *Ibid.*

environmental and natural resources against irresponsible exploitation for short term gain of the corporate interests and their state backers.

In this respect, it is mistaken to regard issues of social and ecological sustainability as just technical issues to be left for the scientists, bureaucrats and politicians to decide.²⁶³ They are also fundamental political issues in which the working people have a stake and their participation may be the only way to defend their interests and livelihoods. In this sense, it is equally important to subject scientific reports and analysis of projects to rigorous and critical scrutiny to ensure that whatever their conclusions are, they are based on objectively verifiable facts and evidence.

There is also a serious problem on the matter of using appropriate technology. Most of the mining technology applied by large-scale mining companies is open pit technology. According to Mwalyosi,²⁶⁴ out of 6 large-scale mining companies, currently only one uses underground mining technology. Open pit areas become permanently damaged and cannot be put to any economic or social use.

Sometimes mining proponents indicate a commitment towards social and economic development for the surrounding communities. However, little is known about whether these commitments are fulfilled. The reason being partly because there is no proper follow up by the relevant authorities due to low capacity and lack of mechanisms to force them to abide by their commitments. Dealing directly with local communities is difficult as there is no proper institutional set-up. This creates high transaction costs for investors and may

²⁶³ The Rufiji Delta Prawn Farming Project which was done by Mr. Lissu also revealed the dangers of unquestioning faith in "scientific objectivity". The prawn project showed quite clearly that, unfortunately, sciences can also be bought and compromised. This is particularly so in the context of liberalization policies which have exacerbated a crisis of our universities and research institutions through deep cuts in funding. Academics and scientists are thus forced to rely more and more on consultancies in order to survive in the face of the economic crisis. In this environment, it is very tempting for intellectuals to "toe the line" by writing investor-friendly "scientific" reports in order to assure future consultancies even if it means sacrificing the interests of the majority of the people by helping push through dubious projects such as the one under examination.

²⁶⁴ Mwalyosi, op cit at 10.

deter them from helping the local communities. Often investors have used local NGOs where they exist to try to channel investors' support to the local communities. Where these NGOs are not in place investors are reluctant to provide money direct to the local authorities for reasons that include low capacity and corruption.²⁶⁵

5.2 RECOMMENDATIONS

In view of the arguments and issues raised herein it logically follows that there is serious need for policy and legal reform along the following lines:

- That there should be a review of the mining laws including EIA. The Mineral Sector Policy is seen to be an important tool for alleviating poverty in the country by creating gainful and secure employment in the mineral sector; by providing alternative sources of income particularly for the rural population and by ensuring environmental protection and management. Although there are strategies set to fulfill this goal, mining companies do not want to undertake activities beyond compliance requirements. Obviously, improving the social services and livelihoods of the neighbouring communities is a pre-requisite for sustainable mining.
- That given the importance accorded to foreign investment by the government and given the potential for widespread environmental abuse by investors, the present foreign investment legislation should be substantially amended to provide for obligation on investors to undertake environmental protection measures similar to, or better than, those under the mining legislation. That is to say, investors generally should be subjected to rigorous requirements for EIA and EMP and compliance thereof. Indeed, as we have seen, the Tanzania Investment Act, 1997 has no provisions for environmental protection. It does not make sense to

²⁶⁵ The researcher's personal interaction with the chairman of the Tanzania Mine Workers Development Chairman and the Mirerani Village Elders; Mr. Mushi Ngao and mama Justo.

exclude investors from the rigours of EIA law when their activities are liable to cause environmental harm.

- That the Mining Act, 1998, should be similarly amended to either completely remove or seriously curtail the exercise of ministerial discretion in respect of compliance with environmental standards which should be made mandatory to all investment projects with potential for adverse environmental impacts. In similar vein the Act should also be amended to remove powers of oversight and approval of EIA and EMP from the ministry responsible for mining to avoid conflict of interests.
- Local communities should organize to secure and defend their access to natural resources in view of the propensity of the state to secure the resources for investors and at the expense of the communities. It is only through organized power that the voice of the communities will be heard.
- Environmental activists and NGOs should also forge closer links with local communities and seek to take joint position in matters of environmental protection and community rights.
- That there is a need for Strategic Environmental Assessment (SEA).²⁶⁶ Most of the mining projects are located within the Lake Victoria Basin yet every project has had a separate EIA.²⁶⁷ Such assessments are likely to miss out the cumulative impacts associated with mining in the basin. Although the mining projects are located in specific localities (districts), there are associated impacts such as employment, communicable diseases etc. that cross district and regional boundaries. SEA would have assisted strategic decision-making, including spatial planning, improving the quality of policies, plans and programmes, thus contributing to more

²⁶⁶ This aspect is discussed in chapter two, para 2.4.2 of this work.

²⁶⁷ Mwalyosi, R. and Hughes, R. "The performance of EIA in Tanzania: An Assessment", (1998), IRA Research Paper No. 41/IIED Environmental planning Issues No. 14.

sustainable development. In fact, linking spatial planning with SEA is crucial for sound development, and provides an opportunity to introduce sustainability principles into decision-making. This would require integration of environmental, social and economic issues in the mining projects in Tanzania.²⁶⁸

- That the government should restructure apex environmental institutions to provide clear role and authority for the implementation and enforcement of environmental and natural laws and the gathering and sharing of information.²⁶⁹ Collecting, managing and disseminating environmental information would be facilitated by empowering a single government agency with broad administrative responsibilities and enforcement authority. Other ministries and government departments would be required to involve and inform the central agency in all environmental and natural resource matters. This environmental agency would be well positioned to be the custodian of all government information related to the environment. Such coordination on the environment would facilitate monitoring and compliance to regulations. It would also make the government more transparent to the public.²⁷⁰
- While the National Environmental Management Act gives the National Environmental Management Council advisory power and responsibilities of coordination, public participation and information sharing, the National Environmental Policy vests the Division of Environment with enforcement powers.²⁷¹ Given that many environmental decisions in Tanzania are subject to political pressure, it would be useful to consider establishing by statute a semi-autonomous institution with regulatory powers. This

²⁶⁸ See Kulindwa, *et al* op cit note 2 at 131.

²⁶⁹ This aspect is discussed in chapter three para 3.3.4 of this work.

²⁷⁰ William, D. R. and Porter, J.S. "Access to Environmental Information in Tanzania", (1999) accessed from <http://www.daneparairie.com>

²⁷¹ This aspect is covered under chapter two para 2.3.3 of this work.

institution could also have environmental information management and dissemination responsibilities.²⁷²

- That the government should conduct -- and encourage private institutions to conduct -- broad public education and outreach efforts regarding citizen rights and participation opportunities.²⁷³ Few Tanzanians and civil society organizations are adequately informed about their rights and responsibilities related to the environment. Few fully understand government roles and responsibilities regarding the environment and natural resources. Through such education the constitutional rights to be informed and have access to information can come to life. Through education, the public can better understand its rights to participate in government decision-making, monitor government performance and demand compliance, and ensure environmental accountability.²⁷⁴

Despite the notable economic benefits accruing from the mining sector, these are the challenges that need an immediate attention in order to develop distinct and practical environmental laws in Tanzania. Paying attention to these concerns will make the sector contribute more into the national economy.

²⁷² Ibid.

²⁷³ This aspect is discussed in chapter three, para 3.3.3 of this work.

²⁷⁴ Ibid.

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