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POSITION PAPER
ON
THE LEGAL FRAMEWORK FOR THE DEVELOPMENT
OF THE MINING INDUSTRY

PRESENTED TO THE COMMISSION

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POSITION PAPER ON THE LEGAL FRAMEWORK OF THE MINING INDUSTRY.

General Overview:

1.0 Introduction:

The mining sector is one of Tanzania's major economic sectors that the country depends on for its foreign currency earnings and economic development. The mining sector offers many slots for employment. In the next twenty five to thirty years the sector is supposed to contribute to the national economy to the extent of at least 10% of the GDP.¹

1.1 Tanzania has a very large potential in the mining of gold, gemstones, coal and base metals. The country is on the fast track to become a significant gold producer during 2000 and 2001. For many years a small output of alluvial gold was recovered unofficially and smuggled out of the country. However, major international mining groups have been busy exploring a greenstone belt near lake Victoria and have come up with substantial deposits.

1.2 Large-scale investment in gold has already begun. There are several

¹ National Mining Policy 1997.

gold mining projects that have or will be coming on-stream in the next couple of years. The first of these mines began producing gold in November 1998 and is operated by Resolute of Australia and Ashanti Goldfields (which recently took over the interest of SAMAX). The mine will initially produce 180,000 ounces of gold per annum. In mid-2000, Sutton Resources opened its gold mine at Bulyanhulu. This mine, the largest in East Africa, has an initial capacity of 300,000 ounces per annum. In the following year, it is likely that Ashanti Goldfields mine at Geita will come into operation, with a production capacity in excess of 300,000 ounces. Soon thereafter, another mine in Musoma will start producing at the rate of 150,000 ounces per year. By the end of 2002, Tanzania is expected to be producing more than 900,000 ounces of gold a year. That level of production would represent an addition of over US\$200 million to Tanzania's exports at today's depressed world gold prices. It is likely that Tanzania would be producing more than 1,500,000 ounces by the middle of the decade.

- 1.3 The largest mining potential outside gold includes the Kabanga nickel deposit, the large coal reserves in the Ruhuhu area, and the iron reserves in nearby Liganga. These deposits are now attracting the interest of some of the largest mining houses around the world. Other major investors in the mining sector include Barrick Gold Corporation (USA), Pangea Goldfields (Canada) and Anglo American (SA) for gold; De Beers (SA) for diamonds; and Anglo American (SA) for nickel and cobalt.

Tanzania can also earn much foreign exchange from other mining

operations especially gemstones and Tanzanite, if there would be an appropriate consolidation of production and marketing of these minerals. One other possibility in mining is to have structured artisanal gold mining.

Government has taken strong measures to increase mining activities in future. These include passing of the new Mining Act in April 1998, revising the tax structure and the mining policy, and adding emphasis on marketing of Tanzania's mineral potential.

- 1.4 In 1997, the government of Tanzania adopted a mineral policy document for the development of the mineral sector. The main aim of the policy is to clearly define the roles of the Government, large -scale and small-scale miners in the industry. The policy is put in place for purposes of attracting and enabling the private sector to take the lead in exploration, mine development, mineral beneficiation and marketing.
- 1.5 The role of the government is defined as one focussing on regulating, promoting and facilitating private investment. As a service provider the government is to offer extension services to artisanal and small-scale mining activities. The overall output being that the mineral sector will have a strong, vibrant, well-organised and private sector-led large and small-scale mining industry managed in a safe and environmentally sound manner and contributing significantly to the

national economy whilst achieving its goals in accordance with the 2025 national development policy targets.

1.6 Since the start of the implementation of this policy, Tanzania has been the major focus of Africa's gold exploration and development. As a result the mining industry has grown by 27% in 1999 a major increase from previous years' 17%. Up to 15% of Africa's exploration expenditure has been spent in Tanzania, thought to have Africa's largest gold reserves after South Africa. Diamonds, gold, nickel and gemstones play key roles in Tanzania's growing minerals industry. However, nearly all major developments have been seen in the gold sector.

1.7 Based on ongoing projects and developing mines, Tanzania's estimated gold reserves have been calculated at a conservative total of 25 Moz. In order to develop this major resource, investment capital totalling \$655 million dollars is envisaged, which will result in production from most of Tanzania's commercial mines beginning in 2000. The Lake Victoria Goldfields region hosts all of these gold deposits. Gold is located within structurally controlled shears and faults, similar to gold deposits already being exploited in Australia and Zimbabwe.

1.8 Tanzania's first gold mine, Golden Pride, was officially opened in

February 1999. The mine is situated south of Lake Victoria, approximately 750km from Dar es Salaam. The property is wholly owned and operated by Resolute Mining. The mine has proven ore reserves totalling 2.7 Moz which equates into an annual production of 180 000 oz/year with cash costs of \$200/oz. The mine produced 220 000oz in 1999, well above expectations.² Higher grades exist at depth, which will be accessed by a footwall decline.

1.9 The Geita mine was once East Africa's largest gold producer with more than 900,000 ounces of gold produced between 1938 and its closure in 1966. AngloGold and Ashanti Goldfields have continued work on Geita, resulting in calculating ore reserves as containing an estimated 6.4 Moz. Initial production in the year 2000 was 177 000 oz, with production expected to increase to more than 500 000 oz annually. Cash costs are estimated at \$180/oz.

1.10 The third gold mine being constructed is Barrick's Bulyanhulu mine which has one of the largest gold reserves in East Africa. Gold resources are estimated at over 10 Moz with production due to begin in early 2001. The mine will produce 450 000oz /year at cash costs of \$130/oz and a life of mine of 15 years. Barrick is investing a total of \$280 million into the Bulyanhulu project.

1.11 Barrick has continued to establish its presence in Tanzania by a

² Tesha A.L. Cooperation between small scale and large scale mining 2000

friendly takeover of Pangea Goldfields, which has several promising projects being developed in the country. Included is the Golden Ridge Project, situated 30km from Barrick's Bulyanhulu mine. After acquiring the remaining 50% interest in the project in early 1999, Barrick Gold Corporation commenced an aggressive exploration program. Resources are estimated in excess of 1.5 Moz. Pangea also has a joint venture agreement with AngloGold (70%) in the Kahama project, with reserves estimated at 26 Mt grading 2.3 g/t gold, with a cut-off grade of 1 g/t. The resource is located within the top 175m, therefore making it amenable to open pit mining. In order to maintain its 70% interest in the project, AngloGold completed a feasibility study in October 2000. Kahama is situated approximately 50 km south of Golden Ridge in the Shinyanga region some 150km south of Mwanza. Pangea has also been evaluating the 70% owned Tulawaka deposit that has an estimated resource containing 1.1 Moz of gold or 1.67Mt grading 19 g/t gold. Minieres du Nord owns the remaining 30%.

- 1.12 Several other projects in Tanzania are currently undergoing feasibility studies and could see production in the next one year. Perth-based Spinifex Gold is continuing to promote its Buckreef / Rwamagaza project as well as the high grade Nyakafuru deposit, which has an initial resource estimated at 371 500 oz grading at 4.90 g/t gold. This is despite the fact that Ashanti had withdrawn from the original joint venture agreement. Newmont and Tan Range have joint venture agreements on four prospects: Luhala, Kabahelele, Mulehe and

Mnekezi. Of the four, Luhala appears to hold the most potential, with positive gold results located over a large area. Tan Range has a joint venture with Barrick on its Itetemia prospect, adjacent to Barrick's Bulyanhulu mine development.³

³ Tesha A.L. op.cit

Legislation Overview

2.0 The Colonial Period;

Although it is true to say that during the German rule in Tanganyika there were some mineral discoveries, the government refused to involve itself in terms of provision of infrastructure. Its ordinances were basically geared towards small reef miners rather than large-scale mining, and generally there were hardly any incentives to warrant investment by large scale miners.⁴ There were however a few companies which operated in the country before World War I.

2.1 Generally speaking the British policies in the 1920s remained indifferent to large-scale mining. The 1920 Mining Ordinance was formulated in more or less the same terms as those of the German colonial period. However, in 1921 there was a discovery of alluvial and reef gold at Lupa and in the lake zone. This discovery propelled the government to being more supportive to the mining industry. Thus in 1923 there was formed a department of Geological Survey with its offices in Dodoma. This department was responsible for general geological mapping and prospecting exercise.

⁴ Lemelle, 1986:56

2.2 By the mid 1920s there was a considerable increase in gold earnings and this forced the government to re-examine its policies in the mining sector in terms of investment protection and incentives and with regard to issues of land alienation. The Tanganyika Order-in-Council had defined all lands as “public lands” in relation to which native interests were to be given due regard since Tanganyika was a protectorate. All legal rights to land required for mining was vested in the Governor.

Article 8. (3) of the Order-in-Council stated :-

“ All mines and minerals being in, under, on any lands in the occupation of any native tribe or any members thereof or person not possessed of the right to work such mines and minerals shall be vested in the Governor...,in like manner as the mines and minerals in, under or on any public lands.”

2.3 In 1929, the 1920 Ordinance was amended following recommendations by a commission formed in 1927. For Governor Cameron and the colonial government the new legislation was meant to encourage large-scale investments in the mining industry while at the same time discouraging both large-scale speculative capital as well as small-scale penniless miners⁵. By and large the legislation was aimed at controlling the accelerated gold rush so as to prevent the emergence of a class of poor whites as the secretary to Native Affairs, P.E. Mitchell cynically called settler diggers who eked out a bare subsistence. The government was by now in favour of bigger

⁵ Lemelle op. cit 93

concerns, which meant large-scale companies based in Britain and South Africa. Section 28 of the Ordinance went as far as limiting the number of alluvial claims that could be held by an individual prospector. The 1929 Ordinance was repealed in 1931 by basically repealing this section. This was as a result of concerted efforts of settlers and white small-scale miners. The result of this repeal was an influx of miners from countries around Tanganyika. In 1931 alone there were two hundred Europeans from Congo –DRC and Zambia and from within East Africa who flocked to the Lupa to prospect and dig gold. Hundreds followed these in the next four years. According to the mines inspector they arrived in Lupa by “bicycle, on foot, riding donkeys, or anything on four wheels which could be induced to move”.⁶

- 2.4 Under the 1929 Ordinance, prospecting by private firms was supposed to be done in association with the government, which in turn granted licences to qualified adults at its own discretion for a nominal fee. During the colonial period the government prohibited prospecting for diamonds throughout the country, save for the Williamson Diamond Company, as well as coal, helium, and salt. In certain specified areas it had also prohibited for prospecting in gold, gypsum, meerschaum, kaolin, radioactive minerals and minerals for cement production. The 1929 Ordinance remained in force for 50 years regulating the mining industry.

⁶ Roberts 1986:556

3.0 Independence Period:

- 3.1 Although there was a lukewarm attitude in the 1961-1964 World Bank prepared three-year Development Plan, there was no question of the sector facing major policy or legal obstacles to investment in the newly independent nation except to a limited degree between 1969 and 1979.

- 3.2 Up to 1963, the major legislation regulating the mining industry remained the 1929 Mining Ordinance, and the Companies Ordinance of 1959. The Companies Ordinance was basically for incorporation, internal regulation, and winding up of companies and other associations. The 1963 Investment and Protection Act furthermore guaranteed full and fair compensation in case of nationalisation. This legislation also provided for provisions on foreign exchange controls, which restricted repatriation of earnings from the country without the investor acquiring an “approved status.” The two 1967 manuals for investors and the 1979 guidelines for investors generally gave protection to companies and shareholders “in accordance with the principles of English Commercial Law”

- 3.3 The 1960s saw considerable legal interventions in the mining industry. First, there was the Gemstone Industry (Development and Promotion) Act in 1967. This Act was designed to curb illegal dealings in gemstones particularly smuggling to neighbouring Kenya and other countries. Section 3 of this Act stated that any unauthorised

- person found with gemstones “shall be guilty of an offence and shall be liable to imprisonment for a term not exceeding five years.”
- 3.4 A Mining Ordinance (Amendment) Bill was introduced in 1969, which was designed to amend the 1929 Ordinance. This bill depicted the height of the Tanzania government efforts to control the mining industry. This basically arbitrary bill was intended to grant to the Minister power to issue or renew, or refuse to issue, or refuse to renew exclusive prospecting licences on the basis of whether the later accorded with public interests. Interpretation of what constituted “public interest” was vested in the Minister and was discretionary.
- 3.5 In 1979 a fundamental change of direction emerged with the introduction of the Mining Act of that year which in effect replaced the 1929 Ordinance that had hitherto governed the mining framework. This legislation was accompanied with the Petroleum (Exploration and Production) Act, 1980 and later supplemented by the Mining (Royalty) Regulations of 1989 and the Investment Promotion and Protection Act of 1990. The 1979 Mining Act is the one that governed all mining activities except in hydrocarbons up to 1998. The Act vested ownership of all mineral resources in the State and set out a framework for licensing all prospecting activities. This Act was once more designed to encourage large-scale mining operations in the country although it also provided for small-scale mining activities.

- 3.6 The Mining Act of 1979 was to be complemented by the Mining Policy Paper of 1983. Incorporated in this paper was a small-scale mining policy that officially encouraged Tanzanians to participate in mining alongside their other activities.
- 3.7 The passing of the National Investment (Promotion and Protection) Act of 1990, the promulgation of the Investment Code and creation of the Investment Promotion Centre (IPC) represented further steps in the deregulation of mining. Two important aspects of mining policy underwent crucial changes: the complete removal of remnants of the government monopoly in mining and the removal of government intervention in mining operations even where the government held some shares. More significantly an area of ambiguity was created as to who gave the go-ahead for foreign mining operations.⁷ Some of these operations appear to have subsequently entered the country directly through the intervention of the IPC, others seem to have had gone through both the IPC and the Ministry, while others yet again appear to have dealt only with the Ministry.

4.0 The Mining Act 1998

- 4.1 The basis for the repeal of the 1979 legislation and the enactment of the 1998 Mining Act is the Tanzania Mining Policy of 1997. The drive of this policy is to liberalise the mining sector and complete the

⁷ Chachage S.L.C. The Meek Shall Inherit The Earth But Not Mining Rights: The Mining Industry And Accumulation In Tanzania.1995:63

government withdrawal from the same. Thus the legislation brings to a bare minimum the role of government in the sector.

4.2 The Act is geared towards assisting in the transition from small-scale artisanal mining into modern industrial scale operations.

The Act vests the title to minerals in the ground in the United Republic of Tanzania, applying the principle that no prospecting or mining operations can take place without acquiring a mineral right granted or deemed to have been granted under this act.

4.3 Measures to safeguard the environment and health and safety of the population and the workforce have been incorporated in the new code. However, necessary environmental regulations which would have set appropriate environmental, health, and safety standards; establish procedures for reviewing performance and monitoring compliance; and ensure that new projects are designed and developed according to acceptable standards are not yet in place.

4.4 Administration of the Mining Act 1998 is by the minister responsible for mineral affairs and the commissioner for mineral resources. Under the Act, the mineral rights concern large-scale and small-scale operations.

- ? A Reconnaissance License is issued for one year and renewed for a period not exceeding a year. License preparation fee is US \$250, annual rent is US \$10/km² and renewal fee is US \$ 200. The license may be either exclusive or non-exclusive. Applications should provide a work programme. Half-yearly reports must be submitted and on expiry of the period, all data, maps and reports under license must be surrendered to government. The license holder may apply for a prospecting license covering all or part of the area.
- ? Prospecting license is issued for a period of up to three years and is renewable two times for a period up to two years each. At each renewal at least 50% of the area is relinquished. License preparation fee is US \$400, annual rental is US \$30/km² and renewal fee is US\$200. Applicants must submit particulars of financial and technical capabilities, work programme and budget, and proposals for employment and training Tanzanians. License holders are required to submit quarterly reports, including copies of all data, maps, logs, interpretations, etc. etc.
- ? A mining license will only be granted to the holder of a prospecting license over the area. The license is granted for a period of 25 years or the life of the mine. It is renewable for a period not exceeding 15 years. License preparation fees is US 600, annual renewal rent is US\$ 1500/km² and renewal fees is US\$200. The applicant must submit a feasibility report including environmental and health safeguards, plans for local sourcing of goods and services and employment and training of Tanzanians. The license holder must submit regular reports according to regulations.

- ? Under section 15 of the Mining Act the minister may enter into a mineral agreement (not inconsistent with the Act) for the purpose of granting a prospecting or mining license in order to define terms and conditions to be included in the license.
- ? Agreement should be made with the lawful occupiers of land and their written consent obtained to carry out mining or prospecting operations. Compensation may be payable. The minister may intervene if consent is withheld unreasonably.
- ? There are prospecting rights and mining claims by small-scale Tanzanians, companies or co-operatives. Their rights are available only in designated areas for prescribed minerals. Prospecting rights are granted for a period of 12 months and are renewable. The holder can peg a claim and register with the Commissioner. The claim holder can prospect and mine this claim. It is valid for one year and renewed as long as operations continue. Claim holders must pay royalties and submit returns. Non-compliance leads to cancellation of rights. Claim preparation and annual fees are Tsh.5, 000 and Tsh.6,000 respectively.

4.5 Although the mining industry is governed by this one major piece of legislation, i.e. *The Mining Act, No. 5 of 1998*, there are other equally important legislation which impact on this sector that need to be harmonized. Some of these are *The Land Act, No 4 of 1999*, *The Village land Act, Act No 5 of 1999*, *The National Parks ordinance Cap 412*, *The Ngorongoro Conservation Ordinance cap 413*, *The Forest Ordinance Cap 389* *The NEMC Act No 19 of 1983*. *The Wildlife*

Conservation Act no12 of 1974, The Marine Park Act No 29 of 1994, The Game Park Laws Act No 14 of 1975.

- 4.6 Mining Laws need to be reviewed and harmonized with other statutes being administered by other Institutions that directly or indirectly affect the development of the mining sector to avoid unnecessary legal and institutional conflicts.
- 4.7 The Mining Policy of 1997 spelt out that, all laws are supposed to establish a co-ordinate consultative mechanism within the government especially with central ministries and institutions responsible for planning, health, finance, environment, lands, water, works, law and order, and regional authorities for the effective development of the sector.

5.0 The Environmental and Social Sustainability of Mining Development.

- 5.1 Mining it is said is the original dirty industry. According to Young ⁸, a German scholar, Georgius Agricola wrote in 1550,
- “ The fields are devastated by mining operations. ...Woods and grooves are cut down, for there is need of endless amount of wood for timbers, machines, and the smelting of metals. And when the woods and grooves are felled, there are exterminated the beasts and

- birds.....Further, when the ores are washed, the water which has been used poisons the brooks and streams, and either destroys the fish or drives them away.”
- 5.2 This was over four centuries ago when mining technology was at its most primitive stage; and yet in the mining industry today the balance has not changed. The huge technological advancement in mineral production has only resulted in a high increase in environmental destruction.
- 5.3 In Tanzania when people talk of environmental harm they miraculously skip the mining sector and concentrate instead on issues such as overgrazing, deforestation, dynamite fishing etc. Whenever government officials and policy makers acknowledge environmental problems, they do so only in relation to the destructiveness and irrationality of small-scale miners. So the often-suggested solution is to replace these mischief-makers with large-scale miners! However, whilst it is true that small-scale mining endangers the environment and health, it is also true that large scale mining is even more damaging.
- 5.4 Sustainable mining development requires balancing protection of the Flora and Fauna and Natural environment with the need for Social and Economic development. This will comply with the vision for the next

⁸ Young 1992:16

25 - 30 years which need mineral sector to have a strong, vibrant, well organized private sector led, large and small scale mining Industry well defined in the Laws and conducted in a safe and environmentally sound manner.

6.0 Environment Law

6.1 The environmental laws covered in the Mining Act deals specifically with the mining operations and in particular for those applicants and/or holders of the Special Mining Licences (SML), Mining Licences (ML) and Gemstone Mining Licences (GML). Applicants for SML are required to submit an Environmental Management Plan (EMP) and Environmental Impact Assessment (EIA) on the proposed mining operations from independent consultants of international standard short listed by the applicant and approved by the government of Tanzania.

6.2 Furthermore, the law allows the holder of the SML to make amendments to the Environmental Management Plan (EMP) which are usually appended to the licence submitted to the Ministry for approval. Applicants for ML and GML do not have to submit EMP or EIA during application unless the mining operations fall within a scale of operations set out in the regulation, in which case the applicant will have to commission and produce an EIA from independent consultants. As for the former, the applicant is only required to include in the feasibility study such measures as the applicant proposes to take

in relation to any adverse impact to the environment. For the latter, i.e. GML applicants, only a description of such measures as the applicant proposes to take in relation to any adverse impacts on the environment is needed.

- 6.2 The Act sets out provisions for Development Agreement, Surrender, Insurance & Indemnities and Regulation. The Minister may, on behalf of the Government of Tanzania enter into a development agreement not inconsistent with the Act with the holder, or an applicant. The agreement may contain provisions binding on the United Republic of Tanzania relating to a SML or mining operations to be conducted under a SML relating to environmental matters.
- 6.3 On surrendering, the holder of a licence will only be issued a certificate of surrender if the licensing authorities are satisfied that the applicant will leave the land to be surrendered in good condition according to good prospecting and mining practice.
- 6.4 The Act further stipulates that the holder insure for pollution and environmental damage, caused in the course of or as a result of mining operations.

6.5 The Mining Act, 1998 provides for regulations to be made on the avoidance of pollution to the air, surface and ground water and soils, as well as all matters relating to the protection of the environment and the minimisation of all adverse impacts to the environment including the restoration of land on which mining operations have been conducted; These are not yet in place.

7.0 Environmental Management

7.1 To be fair to the government it must be stated that it has very impressive plans and strategies, which unfortunately have not yet been implemented. The government has stated that as far as the mining sector is concerned, its objective is to provoke the use of best practices in environmental management systems in mining development. And towards achieving this objective it has set out strategies which include:

- ? Drawing up comprehensive environmental management programmes for the 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 of setting up 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
- ? Abating the use of toxic chemicals and pollutants by promoting environment friendly technologies

7.2 In the past, environmental management and the enforcement of health and safety regulations in mining have been hindered by lack of adequate regulations, institutional coordination and modern equipment. As a result there was an increase in the uncontrolled extraction of minerals and the use of unsafe mining, leading to loss of lives of many small-scale miners in Mererani, Geita and other areas. This situation has further led to severe environmental damage and to appalling living conditions in mining communities. Mining camps are often plagued by poor sanitation, high congestion, poor hygiene and

- prevalent conflicts with farmers and livestock keepers. This situation has not changed today in spite of government's well thought out strategies.
- 7.3 The review and harmonization of laws will address and solve the problems and reduce or eliminate the adverse environmental effect of mining, improve health and safety conditions in mining areas and address social issues affecting women, children and local communities around the mining areas.
- 7.4 The aim of this review is to come up with a legal and regulatory framework based on strategies of: -
- (i) Ensuring a well developed legal framework which will include harmonization and consolidation of all statutes under which mineral sector operates into one mining code which sets out environmental and bio - diversity protection, clear, simple and transparent procedures for allocation of rights, the transition from exploration to mining rights and the transfer of these right.
 - (ii) Stream-lining the licensing procedures to harmonize small scale and large-scale mining operations ensuring transparency and fairness by conferring ownership of minerals rights on the basis of "*first come first served*". This can help in solving conflicts between small-scale miners carrying artisanal and small-scale

mining activities and other large-scale mining companies. Tensions that exist in mining areas between these two groups have at times resulted in deaths, as was the case in Mahenge.⁹

8.0 The Need for an Efficient Legal and Regulatory Framework.

8.1 The outcome of review and a well-developed legal framework will be the establishment of an internationally competitive legal framework to attract and sustain foreign and local investment in the mineral sector and to create a stable and conducive business climate. The Legal framework will also deter the information hoarding on new discoveries, freezing of exploration acreage for speculative purposes, transfer pricing and tax evasion. It will further improve the licensing system to ensure exclusivity of licensed areas. In addition to that, it will ensure that contractual rights and obligations are protected and providing for settlement of disputes through the courts or by local or international arbitration.

9.0 A Brief Analysis Of The Mining Act, Act No 5 Of 1998 And Its Impact On Other Laws.

9.1 All mining activities are governed by *Mining Act, Act No 5 of 1998* together with other mining regulations. The Act makes provisions for prospecting of minerals, mining and dealing in minerals and related

⁹ On January 29, 1993, a small scale miner (Hussein Matonya) was shot dead and two others were injured by two Thais from Tom Mines at Lukande. The small scale miners were being accused of illegally mining in areas licensed to the Thai company.

- matters. The application of this Act extends in respect of seabed and sub-soil of continental shelf, as well as the land beneath the territorial waters of the United Republic of Tanzania.
- 9.2 Section 6(1) restricts persons from carrying on mining operations on any level to which this Act applies except under the authority of a mineral right, granted or deemed to have been granted under this Act.
- 9.3 Section 14 empowers the Minister responsible for minerals in consultation with the Mining Advisory Committee to designate any vacant area as an area exclusively reserved for prospecting and mining operation, if he determines that it would be in the interest of the orderly development of the Mining Industry in Tanzania. This must be done through a publication in the official Gazette,
- 9.4 The word "vacant area" here is not specifically defined whether it also includes National Parks or Forest Reserve and such like protected areas.
- (a) The above section gives rights to the holder of a mining license to:
“...erect the necessary equipment, plants and buildings for the purpose of mining, transporting...”

- 9.5 This might result in changes to the landscape with subsequent typical changes in Flora and Fauna in National Parks, Forest Reserves and other protected areas with a general decline to the diversity and abundance of species. In geomorphology, progressive improper mining and ecological changes are usually adverse leading to a reduction in species diversity, or biological productivity or both. The conservation of biomass which are the habitat of spectacular wildlife and ecosystem and which is important for the life of human beings and other living organisms as well as the tourism sector, has to be taken into consideration.
- 9.6 The Act does not for instance provide for specific provisions on the protection and restriction of The Ngorongoro Conservation Area, a world heritage, which is among the most attractive areas in the world, the only place in Tanzania where one can find few black Rhinoceros and other endangered species. In relation to mining, apart from section 95(c) Cap.412, Cap.389, Act No 12 of 1974 which lays down restrictions on the rights of a holder of a mineral right in National Parks, in any Game Reserve and in any Forest Reserve, this is however overridden by the Mining Act which gives a mining license holder exclusive rights where the area is declared as a mining area, provided that it is a protected area.
- 9.7 Under the Mining Act, the Commissioner is given immense power to issue to any individual, partnership or company, prospecting rights over the mining area. The prospective right authorizes the holder to

- prospect for all minerals as may be specific in the right in any area of Tanzania.
- 9.8 It is submitted that there are conflicts real and potential between *The Mining Act of 1998*, *The National Parks Ordinance Cap 412*, *The Ngorongoro Conservation Ordinance*, *The Forest Ordinance* and *The National Environment Management Commission Act No.19 of 1983*.
- 9.9 It is further submitted that there is also some overlapping of responsibilities and powers conferred between the Minister for Natural Resources and Tourism, and the Commissioner of Minerals, and the National Environment Management Commission in relation to mining in the protected areas leading to adverse environmental impact, especially environmental degradation and pollution.
- 9.10 The presence of such overlaps and the granting of exclusive rights to the holders of mining licenses under the Mining Act, the exercise of improper mining in the protected areas is highly expected, with the concomitant outcome of disturbances of the Natural geological, stratigraphic conditions of the overburden rocks (including soil) which is the habit for living organisms in National Parks, Game Reserves and Forest reserves.
- 9.11 The National Parks Act 1974 and other legislation governing and pertaining to the protected areas cannot gainsay the *Mining Act (1998)*

in respect of protected areas (National Parks and Forest Reserve). For instance where section 6(1) (2) of the National Parks Act empowers the President to declare or proclaim any land to be a National Park or alter boundaries of such a park, the proviso of this section allows Mining within such area thus limiting the jurisdiction of this Act.

"Provided that, subject to the proviso of this section, nothing in this section shall affect any Mineral Right."

9.12 Though Section 15 provides for restriction on the exercise of mining rights by a person who holds a mining right over restricted land, he may nevertheless enter or exercise the same within a National Park if he first has given written notice to the Commissioner for Lands.

9.13 The Mining Act is in conflict with the National Parks Act of 1974. The National Parks Act Provides for restriction on land use in relation to National Parks. Section 17(1) of the same provides that: -

"No person shall, save under and in accordance with a permit in writing signed by an authorized officer, within any National Park (a) dig, lay or construct any pit full etc"

- 9.14 But the power and Jurisdiction of this section is ousted by section 32(1) and 34(2) of the Mining Act (1998) by giving exclusive right to carry any prospective operation including the right to enter the area and erect camps and temporary buildings, installation which might cause environmental degradation and effect wildlife, Forest Reserve and other protected areas if not properly managed. From the foregoing discourse one can observe the implication of the Mining Act in relation to the protected areas.
- 9.15 Though section 3(5) and 64(2) provides that every applicant for a special mining license shall commission and produce to the Minister an environmental impact assessment from an independent agent of international standing short listed by the applicant and approved by the government of the United Republic, still the National Environmental Management Council (NEMC) which is the government organ responsible for environmental control is not mentioned here and nor is it involved in the entire process.
- 9.16 As is often the case, the owners of mines and plants are profit oriented and often reluctant to do an extra bit of work that does not generate income, it is most likely that no one will bother to take trouble to comply with the above conditions or at best they will just cut corners to obtain the necessary permits.

9.17 Although section 15 of the Forest Ordinance Cap 389 provides for restriction and prohibition within forest reserve I - (1) - (2) “Any person who in any Forest Reserve without a license or other lawful authority (I) cuts (ii) clears (iii) construct or reopens work place (iv) damages, defaces, alter removes, shall be guilty of an offence against this ordinance;” This power is ousted and gainsaid by the Mining Act.

9.18 Moreover section 32 (1) of the Forest Ordinance has some weaknesses and contradicts the above section because it recognizes mining activity in the Forest Reserve as it provides as follows: -

"Nothing in this ordinance shall derogate from a mining claim or a prospecting right issued under the Mining Act or an exploration right"

10.0 Shortcomings Of The Mining Act, Act No. 5 Of 1998.

1. The Act does not provide for heavy penalties to defaulters who hold mining a license in case of improper mining affecting the environment of the protected areas e.g National Parks, game/marine Reserves, Forest reserves and other protected areas while this is provided for by section 17(2) of the National Parks Act, 1974.
2. The Act does not provide for the involvement of NEMC in the supervision of the protected area.

3. The Act does not provide for the involvement of the Minister responsible for Natural Resources and nor does it provide for Consultation with National Parks and Game Reserve wardens when issuing mining license in National Parks and other protected areas thus causing conflict and misunderstanding between them.
4. The Act does not specifically provide for the protection of the Ngorongoro Conservation Area in relation to mining activities.
5. Given the widespread lack of consultation in general and failure to involve the participation of National Park and Game Reserve wardens, in the provision of the Act, it is likely that a number of mining licenses given out by the Minister responsible for minerals or the Commissioner for Mining may be a breeding ground for litigations.
6. The Act does not provide for the right to adequate compensation to land owners in the areas declared for mining activities.
7. The Act does not provide for the mandatory use of modern mining equipment, sanitation and health care of miners (employees).

- 10.1 The Mining Act should be amended in some of its punishing sections and provide heavy penalties for defaulters and reduce exclusive rights of holders of mining license over protected areas. The drafters of the Act ought to have involved the Minister for Natural Resources and Tourism, National Parks and Game Reserves wardens, Forest Reserves officers, The Ngorongoro Conservator, NEMC, and other Land administrative Institutions and authorities.
- 10.2 When legislating on the Mining Act, Parliament should not only have considered the economic point of view and World Bank/Donor pressures, but it should have also considered the environmental impact on the protected areas. Some of the provisions of the Mining Act which ouster the jurisdiction and powers in legislation of the National Parks, Ngorongoro Conservation Area, Forest Reserves and other protected areas on the restriction of mining and entry should be amended so as to recognise the protected areas specifically.
- 10.3 The Mining Act should have considered these other legislation that provide for restrictions on mining and entry into protected areas. It should also have considered other associate legislation which impact on the mining sector in general.
- 10.4 Planning and provision of minerals waste disposal areas has to be given careful consideration in all mining and prospecting projects.

The Government has to provide for effective measures to ensure the survival and conservation of the undisturbed ecosystem and the management of the exploited species on a sustainable basis when it comes to the exploitation of minerals in those areas.

10.5 Though in terms of policy and legislation the Government has made adequate provisions covering the protection of the environment, against effects of mining activities (section 64 and 95) still there is lack of efficient administration and supervision of legislation on mining and environmental pollution particularly when one considers the fact that these mining activities are being undertaken by multinationals which are bigger and more powerful than the government itself. On the other hand one could foresee administrative bottlenecks whereby NEMC could be involved in inter-ministerial and/or in inter-departmental arguments. This is more so when the ministry responsible for mining prepares and administers environmental legislation as well!!

11.0 Conclusion

11.1 The main purpose of this review is, therefore, twofold; First to align the legal frame work of the mining industry with the mining policy and to see that they both aim at achieving the National Development Policy 2025 objectives; and secondly the review aims at rationalising the various legislation that impact on the mining industry legal frame

work for purposes of removing any conflicts or potential conflicts between the concerned authorities.

11.2 The limited desk study so far undertaken has revealed, first, that such conflicts are inevitable simply because the authorities responsible for the management of land, village land, the environment, water, livestock, agriculture and minerals are different and have their own very strong legal frameworks and policies. These policies and legal frameworks are not first of all necessarily in line with the National Development Policy 2025. Furthermore, when these policies and legal frameworks were being designed, the designers did not necessarily consult each other. Each ministry concerned came up with its own policy and consequent legislation. This was the time for policies, visions and missions and therefore every ministry went out to win this race.

11.3 Secondly, the implementation of the mining policy, which basically embodies more liberalisation of the industry, is in practice confusing support to the mineral sector with selling off of mineral rights and the facilitation of illegal dealing. Various studies have shown that illegal mineral dealings are conducted more by the large-scale miners rather than by the small scale ones. The large-scale miners indeed accumulate but at the expense of small-scale miners and the exchequer.¹⁰ Since small-scale mining has been contributing 80 per cent of official mineral revenues and is in the short-run more

¹⁰ Chachage S.L.C. op.cit.

promising than large-scale mining, it becomes imperative therefore that appropriate measures be taken to systematically support it. A legal framework for the industry should be designed so as to be able to render this necessary support.

11.4 There is every reason therefore for the Commission to undertake an in depth study and come up with recommendations that ensure that the Minerals Industry Policy is implementable, that is to say that the policy is implemented on a levelled legal playing field. It is imperative that the Law Reform Commission comes out with recommendations that will re-align the Mining Policy with its legal framework as well as the National Development Policy 2025. Moreover, the legal framework for the mining industry should not be in conflict or in contradiction with other legislation impacting upon it. The Mining Industry should be made to operate in consonance with other major operating industries such as the tourism industry, agriculture Industry, the livestock industry etc. etc. because it is part and parcel of the entire social and economic environment on whose proper management the life of Tanzanians depend.

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