

UNIVERSITY OF THE WESTERN CAPE

FACULTY OF LAW

**The potential impacts of contract review on foreign direct investments
in mining resources: Case study of Tanzania and Democratic Republic
of Congo**



A mini-thesis submitted in partial fulfillment of the requirements for the degree of LL.M in
International Trade, Investment and Business Law

UNIVERSITY of the
WESTERN CAPE

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CERTIFICATION

The undersigned certify that she has read and hereby recommend for acceptance by the University of Western Cape a research work paper titled *The Potential Impacts of Contract Review on Foreign Direct Investments in Mining Resources: Case Study of Tanzania and Democratic Republic of Congo* in fulfillment of the requirement for the award of Masters of laws (LL.M) Degree of University of Western Cape



.....
Prof Wandrag (University of Western Cape)

UNIVERSITY of the
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Date.....

DECLARATION

I, Egidius Mwijage Mweyunge, declare that this dissertation is my own original work and that it has not been presented and will not be presented to any University for a similar or any other degree award.

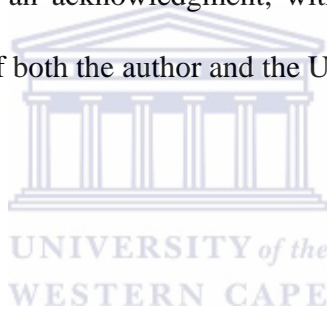
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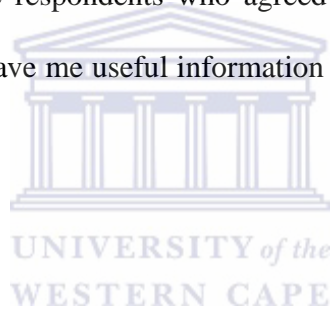
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Last but not least, I thank all the respondents who agreed to give me their valuable time to answer my questions and finally gave me useful information for this work. I am deeply indebted to them for their cooperation.



DEDICATION

I would like to dedicate this work to my little girl Gianna. I dedicate it to her as the fatherly offer to her. I also dedicate this research to my lovely wife Lucy and members of the whole family for without their love and advice I could not have reached this far. **MAY THE ALMIGHTY GOD BLESS YOU ALL**



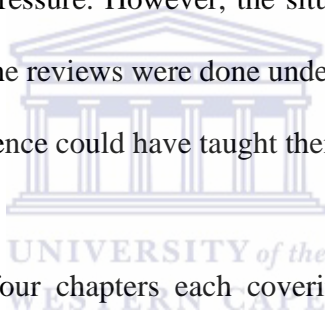
KEY WORDS

Tanzania, DRC, Mineral Contracts, Contracts Review, Bomani Commission, Investment, Foreign Direct Investment, Minerals Resources, Tanzania Environmental policy



ABSTRACT

This work deals with the potential impacts of contract review on foreign direct investments in mining resources. The research has cited Tanzania and the Democratic Republic of Congo as the case study because the two countries have experienced the problems generated from mining contracts review programmes. Indeed, there are some variations on the nature of the environments in which the reviews were made. While in the DRC the reviews were done amid civil wars (whose root cause was wealth emanating from mineral resources), in Tanzania the reviews were done without such pressure. However, the situation seems to have not been fully solved neither in Tanzania where the reviews were done under “peaceful” environment nor in the DRC where at least the past experience could have taught them a lesson.



The mini thesis is divided into four chapters each covering a distinct topic for discussion. Chapter one serves as an introduction highlighting on the mission and vision of the research. It also spotlights the scope and limitation of the research. Chapter two is a discussion on the mining sector and foreign direct investments in Tanzania and the concept of mining contracts review based on the Bomani Commission report. In fact this chapter together with chapter three are the core of the research. In chapter two facts are laid bare of how the mining operations are done in Tanzania and how the management is undertaken. While in the subsequent chapter to wit chapter three, the same is observed but now targeting the Democratic Republic of Congo. The researcher has used these two chapters to demonstrate how inefficient the African governments are in running and maintaining the mineral resources by which they are endowed plentifully.

Chapter four is also formal in the sense that the researcher provides his point of view on how matters could be rectified. It is a firm view of the researcher that if the governments take heed to what is recommended, there will much improvements in the mining sector which can be recorded in shorter span of production.



ABBREVIATIONS

\$	US Dollar
ACP	African, Caribbean and Pacific Countries
AFGEM	African Gem Resources Mining Company
ASM	Artisanal and Small Scale Mining
BEE	Black Economic Empowerment
Cap.	Chapter (of the laws)
COMESA	Common Market for Eastern and Southern African Countries
Dr.	Doctor
DRC	Democratic Republic of Congo
ECA	Economic Commission for Africa
EU	European Union
FDI	Foreign Direct Investment
GDP	Gross Domestic Production
GEC	Global Enterprises Corporation
GN	Government Notice
i.e	That is
ICSID	International Centre for the Settlement of Investment Disputes
IDC	Industrial Development Cooperation
IMF	International Monetary Fund
IPA	Investment Promotion Authority of the
J.	Justice/Judge
JKT	National Service Wing (of the Tanzania People's Defence Force)
Kgs	Kilograms
LSM	Large Scale Mining
Ltd	Limited
MIEC	Multinational Industrial Enterprise Charter
MIGA	Multilateral Investment Guarantee Agency
MoU	Memorandum of Understanding
MP	Member of Parliament
MSP	Mineral Sector Policy
NDC	National Development Cooperation
NGO	Non Governmental Organization
No.	Number
P.	Page
Rtd	Retired
S.	Section
SADC	Southern African Development Cooperation
SPSS	Statistical Package for Social Science
Sq. Km	Square Kilometre
STAMICO	State Mining Company
T. Sh	Tanzanian Shilling

TANESCO	Tanzania Electrical Supplies Company (Limited)
TCME	Tanzania Chamber of Minerals and Energy
TIC	Tanzania Investment Centre
TRA	Tanzania Revenue Authority
UK	United Kingdom
UNESCO	United Nations Education, Science and Cultural Organization
US	United States (of America)
Vol.	Volume
ZCCM	Zambia Consolidated Copper Mine



LIST OF STATUTES

Atomic Energy Act Cap 188
Companies Act 2002
Diamond Industry Protection Ordinance
Employment and Labour Relations Act 2004
Executive Agency Act No. 30 of 1997
Financial laws (Miscellaneous Amendment) Act 1997
Foreign Exchange Act 1992
Gemstone Industry (Development and Protection) Act 1967
Gold Trading Ordinance
Land Act No. 4 of 1999
Mining (Controlled Areas) Ordinance
Mining (Loans) Ordinance
Mining Act 1998
National Economic Empowerment Act 2004
National Environment Act 2004
Tanzania Investment Act 1997
The Mining Act 2010



CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND TO THE STUDY

Tanzania is endowed with huge mineral deposits. She is the world's third largest producer of gold after South Africa and Ghana.¹ From the year 2000, the Tanzanian Government has conducted studies to formulate policies and strategies that will be used to economically empower Tanzanians so that they own, run and benefit from their economy. At this juncture, the National Economic Empowerment Policy and National Economic Empowerment Act have been in place since 2004. In order to operationalize this Policy, various programs and initiatives have been underway to enhance facilitation of economic actors in the country.² Huge investments have been made in various areas which are potential for minerals, particularly gold.³

However, the huge profit from these investments in the mining sector is not reflected in national development projects that could have tangible effects on the living conditions of the average Tanzanians. There have been public outcries that mining investments in Tanzania cause more problems than it was anticipated.⁴ A lot of wealth is taken from

¹ Kabelwa George, 'Potential Impacts of FDI on Economic Development in Tanzania', A paper prepared for a Policy Dialogue for Accelerating Growth and Poverty Reduction in Tanzania, held at the Conference Hall, ESRF, on 25th May 2006. Available at www.tanzaniagateway.org/docs, (accessed on 18 September 2010).

² Eliseta Isaac Kwayu, the Executive Secretary of the National Economic Empowerment Council, Ministry of Planning, Economy and Empowerment: Empowerment of Economic Actors in Tanzania. A Paper Presented at a Policy Dialogue Seminar Organized by ESRF 7th September, 2006.

³ Ministry of Energy and Minerals. The Mineral Policy of Tanzania. Oct. 1997. Available at http://docs.google.com/viewer?a=v&q=cache:6JtaH_Ea7Yg, (accessed on 24th Dec. 2011)

⁴ Brief on the mineral sector in Tanzania. Available at www.mem.go.tz (accessed on 20 September 2010).

Tanzania to other countries from which the mining companies originate and the Tanzanian wealth benefit those countries.⁵

It is worth noting that mining contracts have been condemned to be the major reasons for depriving Tanzanians of their wealth obtained from mining activities.⁶

Mwalimu Julius Nyerere⁷ had a great concern for natural resources when he said:

‘... (We) will do everything in our power to make sure that our children’s grandchildren will be able to enjoy this rich and precious inheritance.’⁸ He further stressed that by saying: *‘We will leave our mineral wealth in the ground until when we have our own geologists and mining engineers.’*⁹ His concern was to have the proper share in our resources, bearing in mind that Tanzania is the sole producer of some precious gemstones in the world like Tanzanite. Minerals like Tanzanite were named after their discovery in Arusha, Tanzania, and the country should think critically before granting licences to the big mining companies. This has resulted in the current review of mining contracts.¹⁰

Nyerere’s speech turned the spotlight on the irregularities that could have happened in the allocation of contracts, and forcing the Tanzanian government to consider the review of all the mining contracts. What was implied in Nyerere’s speech is that he himself could not have allowed these irregularities to happen. The point here is that the contracts

⁵ Ministry of Energy and Minerals. Available at http://docs.google.com/viewer?a=v&q=cache:6JtaH_Ea7Yg

⁶ Ministry of Energy and Minerals. The Demystification of Mining Contracts in Tanzania. Available at <https://google.com/viewer?a=v&q=cache:nfagg7omGaoJ>. (accessed on 24th Dec. 2011)

⁷ Mwalimu Nyerere was the first President of Tanzania, now is recognised as a father of nation. And his most important speech was during the Arusha manifesto 1961.

⁸ Brief on the mineral sector in Tanzania, available at www.mem.go.tz (accessed on 20 September 2010).

⁹ Chambi Chachage ‘Mwalimu in our popular imagination-the relevance of Nyerere Today’, available at <http://allafrica.com/stories/>. (Accessed on 19/September/2010).

¹⁰ Ministry of Energy and Minerals. Available at <https://google.com/viewer?a=v&q=cache:nfagg7omGaoJ>.

the people are complaining about and pressing for their review were entered into by the same Government, and the possibility of the same mistakes taking place are even higher.

Many mining companies have been attracted to invest in Tanzania's economy due to her large deposits of gold and the ongoing discovery of various minerals in Tanzania, leaving aside other investors in other sectors who are now flooding the country. The investment interest had attracted two of the world's major gold producers to invest in gold mining in Tanzania, Barrick Gold and Anglo Ashanti.¹¹

The Mining contract review strategy is not unique to Tanzania, since other countries, and especially of the African continent, have experienced the same in the past. The Democratic Republic of Congo (DRC) offers a vivid example, although the situation with regard to the contract review is somewhat different in that country.

For those contracts which were entered into during the civil war and at the time when the country was facing great political instability during the dictatorial reign of the then President Mobutu Seseseko,¹² who plundered the country's resources and misused a lot of money, part of which he deposited in foreign countries. During his reign, most Congolese were subjected to abject poverty.

Unlike in Tanzania, mining in the DRC has been the backbone (or pronoun, to use Mobutu's term) of the Congolese economy since colonial times. The country possesses

¹¹ Ministry of Energy and Minerals. Available at <https://google.com/viewer?a=v&q=cache:nfagg7omGaoJ>.

¹² Mobutu Sese Seko Nkuku Ngbendu wa Za Banga, was President of Democratic Republic of Congo (also known as Zaire for much of his reign) from 1965 to 1997. While in office he formed an authoritarian regime, amassed vast personal wealth, and attempted to purge the country of all colonial cultural influence, while maintaining an anti – communist stance available at http://en.wikipedia.org/wiki/Mobutu_Sese_Seko. (Accessed on 19 September 2010).

valuable mineral reserves of copper, cobalt, gold, diamonds, coal, petroleum, and other resources. Currently, approximately US\$, 2 billion is being invested in the exploitation of minerals on industrial and quasi- industrial scale.¹³ This gives a picture of the mineral wealth in the country.

1.2 STATEMENT OF THE PROBLEM

Contract review strategies which have been carried out in Tanzania since 2008 raise social, political, economic and legal questions which have various implications.

Firstly, there is an indication of political interferences in the whole review process. In that, there is a fear that any potential significant benefit from the reviews may not be effective as long as politicians may not be willing to pursue their implementation. For instance,

*‘The chief executive officer of a foreign company with vast mining interests in Tanzania, James Sinclair, has sought to assure international investors that President Jakaya Kikwete will not change existing fiscal policies in the sector despite a longstanding public outcry that the nation is not benefiting enough from mining receipts’.*¹⁴

The above quotation is a clear indication of how much influence these investors have on politicians and hence on the whole review exercise.

¹³ Jean – Inc Muke minaluba 'DR Congo mining contract Review: A new chance of growth' available at <http://www.mbmavocats.cd> (accessed on 02/04/2007).

¹⁴ This was a press release following the Bomani Commission Report submitted to the President on May 24, on 30 May, Making the submission of the statements via his company's website www.tanrange.com. Sinclair furthermore declared that he was not worried about the future, saying that they had been friends of the President for more than 20 years. 'What's important to know, however, is that the man who will make the final decision on the recommendations is the President not the committee.' He continues: 'President Kikwete is an extremely knowledgeable and capable man who will do nothing to disturb the balanced fiscal policies that have produced enormous growth in Tanzania's economic base, most of it fuelled by international investors.' <http://www.jamiiforums.com/jukwaa-la-siasa/13353-bomani-committee-hiding-the-truth-2.html> (accessed on 15 September 2010).

Secondly, there is an issue with regard to the institutional framework for managing the local mining sector. If the country does not have such a framework then there is a real problem. Thirdly, if greater care is not taken with contracts review, the country might lose investors, and may also be sued in courts of law.

However, the situation is somewhat different in DRC, since the contracts that were entered into during the wars are protected by the military regime, one of the manifestations of which is for a general of the army to provide certain companies with soldiers to defend them.

But since the democratic government is now in place in DRC, the same question about whether the review process can be fair in Tanzania is raised.

RESEARCH OBJECTIVES

The general objective of the proposed research is to critically analyse the review of mining resources contracts in Tanzania and DRC. The specific objectives of the research are:

- To examine the implications of the contract reviews on Foreign Direct Investments (FDI) both in Tanzania and the DRC;
- To critically analyse the Bomani Commission Report on contract review in Tanzania; and
- To make recommendations on the appropriate action to be taken in respect thereof.

1.3 HYPOTHESIS

The hypothesis of this study is that the reviews of mining contracts in both Tanzania and DRC impact negatively on FDIs. Foreign investors will cease investing in these countries

for fear of huge losses to be incurred if their contracts are reviewed and thereafter annulled. One needs to bear in mind that investment in mining costs the investors' huge sums of money. For example, Barrick Gold has invested almost US\$, 3 billion in the Tanzanian mining sector.¹⁵ If the contracts awarded to Barrick Gold are thus reviewed and annulled, the company will lose that sum. The resulting consequences will extend to every Tanzanian through social, political, economic and legal arenas at varying degrees.

1.4 SCOPE OF THE STUDY

Since an enquiry into mining could be very wide, in the sense that it covers many issues, a limited but refined scope is proposed for this research. The issue of reviewing the contracts in Tanzania will have to confine itself to the Bomani Commission Report in relation to its impact on FDIs. On the other hand, the contract review in DRC will be for the 2007-2010 period.

1.5 SIGNIFICANCE OF THE STUDY

It is a paradoxical phenomenon for a country which is richly endowed with natural resources is listed among the world's poorest countries. Besides gold, there is a host of other minerals that are mined in the country. The big question that begs an answer is why the country is still poor in terms of infrastructure and social services, and why is the Government so critically dependent on developed countries for budget support and loans while it has vast mineral reserves worth billions of dollars?

This study is significant because it will enable the targeted countries (Tanzania and DRC) to not only appreciate the need to review mining contracts but also pay attention to other

¹⁵ Baricck Gold general notes, available at http://en.wikipedia.org/wiki/Barrick_Gold (Accessed on 15 October 2010).

factors, such as the need to have an appropriate institutional framework to manage the mining sector. Otherwise, looking at the situation in both countries now, even if each country (Tanzania and DRC) acquires 95 per cent of accrued shares in the mining operations whilst the foreign companies get only 5 per cent as a result of the review, the impacts will remain the same. Although the situation in DRC is more or less the same, there is a need to think of what society needs and what would be of benefit to it. Certainly, communities in mineral deposit locations should be the primary beneficiaries.

The case seems to be different in some of the mining areas whereby the remarks of a Member of the Tanzanian Parliament, Honourable James Lembeli, who once complained in Parliament that if your constituency is surrounded by mineral deposits, that is tantamount to a curse.¹⁶ The message he sought to relay was that mining companies did virtually nothing to develop mining areas; and that, in some cases, their operations produced chemicals that tended to affect the inhabitants and destroyed the environment. The honourable MP was referring to the situation in his constituency - Kahama in Shinyanga region of Tanzania.

1.6 RESEARCH METHODOLOGY

I wish to state, at the outset, that this is not a very unique research about mining sector. Others in the past have been conducted researches on this particular area as well as other related matters in the past. For this reason, the researcher has used a multi-methodology approach for the purpose of handling the research materials in order to find answers to the research questions and/or test the hypotheses. The research was based on a diversified targeted population in the sense that there was no limitation as to gender, age, education,

¹⁶ Available at www.parliament.go.tz/POLIS/PAMS/Docs/HS-19-9-2010.pdf, (accessed on 5 October 2010).

race and background of participants, provided that the person in question possessed the capacity to participate.

The research was quantitative in nature based on trend study. In the course of research, the researcher capitalized on the existing literature and data to identify the trend from which to draw conclusions. In the course of research, therefore, the researcher applied what is commonly known as multivariate analysis technique since a mono technique could have led to biased results.

From the outset, the research commenced with documentary review in various libraries for the purpose of building a clear concept to which the research could be linked up with. For this particular stage, three months were devoted specifically for documentary review; and after that, the study shifted into the field where the information gathered from libraries was collaborated with the real data/information obtained from the field. From various libraries, the researcher explored documentary materials relevant to mines and mineral explorations. A comparative study of the theories was made and from this, the historical background of the targeted countries (Tanzania and the DRC) was considered while taking note of the different doctrines that have guided the mining industry for ages not only in the two countries, but in many other countries as well.

Furthermore, the researcher had an opportunity to test the people's understanding of the theories and how the respondents in the study area accept those theories (how do they accommodate and implement the idea?). Lastly, the researcher tested the efficacy of the theories and the application of the legislative measures related to mines and mineral development in Tanzania. This line of advancement in research was done while

considering the current undisputable need for change and the prevailing actual environments, together with the laws/legislation that is currently in operation.

Location of the Study Area

The field study was conducted in Arusha, Geita, Shinyanga and a few areas where small-scale miners operate. The cited areas were preferred for the following reasons:

Arusha is the home of tanzanite gemstones and the only area with such minerals in the world. Mining operations there have been controversial - characterized mainly by frequent conflicts between small-scale and large-scale miners. A research was very important on this area to determine who has the right over what.

Geita and Shinyanga (especially Kahama District) are the most highly mineral stocked areas in the country. They are the focal points in this research for reasons that these areas attract a lot of people from within and outside Tanzania who crowd into the places for seeking employment in the mines as labourers or to engage themselves in small-scale mining activities. Mining problems in these places thus reflect what is happening in the rest of the country, and particularly, in the whole African continent.

Research Design

This research was designed to be conducted on a multi-disciplinary research approach. This design allowed the researcher to collect data at any single point with utmost accuracy. The design has a peculiar quality of cross-section response; it is therefore ideal for the researcher, considering the limited time and resources at his disposal.

Sampling Technique

Two types of sampling techniques were applied for the whole period of research with the intention of extracting enough and reliable information. On one hand, the study applied purposive or deliberate sampling. This type of sampling was applied to the groups of respondents who are few in number. These included financial institutions, government departments and agencies, law enforcement organs and administrative organs in large scale mining companies.

On the other hand, the researcher applied random sampling. This was applied to small-scale miners, ordinary citizens and smiths (gold, silver and other gemstone smiths). Because of their large number, any other method of data sampling applied upon this group could have led to biasness. By applying random sampling, there was every possibility that the response from this group would be more unbiased than the first group.

While the group in the first sampling technique (i.e. financial institutions, government departments and agencies, law enforcement organs and administrative organs in large scale mining companies) is criticized for the poor implementation of the mining policy, the group in the second sampling technique (i.e. small-scale miners, ordinary citizens and metal smiths) is seen to have given an impartial view to the questions that were directed to it. This fact makes this group an important sample population in this research.

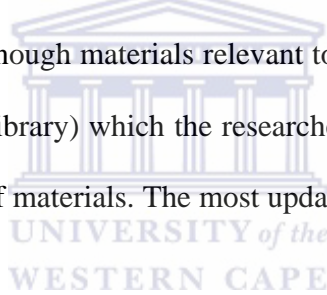
The respondent groups as listed above have been preferred as the main focus of research because they are the main stakeholders in the mining industry in the country but they have been acrimoniously blaming each other for both the failure and the success of the mining policy.

Data collection

Data was collected basically via one method, which is secondary data collection.

Secondary data Collection: This is the initial method that was applied by the researcher. In fact, the researcher began with this as soon as he began to formulate the researchable topic. It mainly involved library research. In the libraries, the researcher explored various things, including history, theories, doctrines, legislations and precedents relevant to the mining industry.

Two kinds of libraries were accessed, to wit; the first were physical libraries mainly of higher learning institutions, and a library at the ministry of energy and minerals. These libraries are stocked with enough materials relevant to this research. The second was the electronic library (*on line* library) which the researcher used to access the protected and more compacted deposits of materials. The most updated and more recent literatures were found in these libraries.



Data processing

Descriptive statistics was applied to all variables. Analysis was done using Statistical Package for Social Science (SPSS) which is computer software whose relevance and application conform to the objectives of the study

1.7 LIMITATION OF THE STUDY

The potential impact of contract review on foreign direct investment in mining resources is a very wide topical area of study. Indeed, no investment in minerals is expected to be spared by the review screening. Talking of mineral contract review in the country without discussing the nature of operation of various mines, the mining activities at various levels

and without specifically identifying the boundaries of coverage, it may either leave the author with too wide area of research that the researcher may fail to cover or confuse the reader over what exactly the focus of the research is. This challenge has been tackled as follows:

Throughout this paper, mineral contracts review has been used to reflect the laws, rules, guidance and regulations necessary for transparency in the mining industry. But even then, the scope seems to be too wide, and thus devoid of any meaningful focus. For this reason, this research has concentrated on how mines are managed, management of foreign mining companies, and the relationship between the mineral deposits found in the country and the development level of the citizens.

The discussion however, is limited by the inefficiencies of the mining policy, the involvement of other stakeholders (apart from the government) in the mining industry and the laws related to the control of minerals in the country. It has not been possible for this particular research work to exhaust all relevant areas connected with the mining industry but the researcher believes that the work will serve as a milestone for future researchers, and mineral explorers-cum-exploiters.

1.8 ANALYSIS, RECOMMENDATIONS AND CONCLUSIONS

In the subsequent chapters, the researcher is trying to give an analysis of how the reviewing of the mining contracts in Sub-Saharan countries but with specific reference to Tanzania is done. In chapter two, observations are made on how in Tanzania the Boman Commission encouraged the review of the mining contracts, especially after realizing that prior to the review, the nation was benefitting very little from mineral exploitation.

In the third chapter, attempts are made to exemplify how a mining contract is entered into in the DRC so as to compare it with the process in Tanzania. This approach has been influenced by the fact that DRC has a long standing experience in review missions. Their shortfalls might give the Tanzanians and others the right bearing. Chapter four is reserved for the author's exclusive comments and recommendations aimed at facilitating better ways of the mineral sector's management. It is hoped that pursuit of the comments and recommendations will enable the respective countries to benefit immensely from the mining sector.

CHAPTER TWO

THE MINING SECTOR AND FOREIGN DIRECT INVESTMENTS IN TANZANIA AND THE CONCEPT OF MINING CONTRACTS REVIEW BASED ON THE BOMANI COMMISSION REPORT

2.1 INTRODUCTION

In the following chapter, the researcher will discuss in detail the Mining Sector and Foreign Direct Investments in Tanzania and the Concept of Mining Contracts Review Based on the Bomani Commission Report.¹⁷ The mining sector has a very high potentiality of becoming the biggest contributor to the nation's Gross Domestic Product (GDP). What is basically needed is serious supervision and harmonization of this sector with other sectors so as to yield consolidated development.

There is a need for a serious and committed political administration and clearly structured political ideology to tap these resources; otherwise the mining sector will continue benefiting big multinational companies which are undertaking the exploitation, while the indigenous people remain marginalised. This chapter, therefore, has a specific objective of shedding light on the current situation, the factors that have caused it, and the consequences thereof.

2.2 THE LEGAL FRAMEWORK

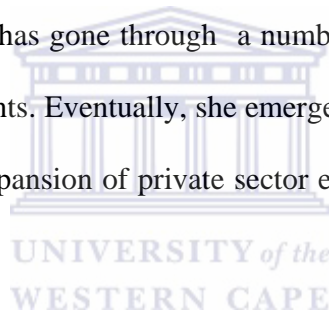
The Mining Sector and Foreign Direct Investments are very wide areas of study that each on its own is capable of forming the basis of an independent study. For this reason, this chapter is specifically focussed on Tanzania and the discussion will be specifically centred on the following: various sectarian policies dealing or directly touched by the

¹⁷ This was a presidential Commission and just released its report in 2007

mining sector. The discussion in the order of preference will be centred on the following: Tanzania Investment Policy of 1996 and Tanzania Investment Act, 1997, the Environmental Policy of 1996, the Mineral Policy of 1997, the Mining Act 2010, effectiveness of the legal framework, the mining companies situated in Tanzania, the concept of mining contracts review and the Bomani Commission Report.

2.2.1 National Investment Policy

Tanzania, with an area of 945,000 Square kilometres, has an estimated population of around 40 million people and covers a mass area of diverse topographical nature. Since independence, the country has gone through a number of political policies that affected her economy and investments. Eventually, she emerged in the 1990s with a policy that is more favourable for the expansion of private sector expansion and sustainable economic development.



The current predominantly market-oriented economy is enjoyed particularly in the investment sector, the external sector, monetary management and agricultural market arrangements. This policy has spearheaded the removal of restrictive regulations and bottleneck over the private sector. This, to a great extent, is favouring and in fact has acted as an attraction to investors in the mining sector, since the foreign exchange system has been fully liberalized for payments and funds transfer for current international transactions. Pursuant to the reforms that have been brought about by the investment policy, the long term development objectives have been designed for revitalizing and

raising the level of productivity in the leading productive sector, the mining industry being among them.¹⁸

It is now confirmed that Tanzania has an enormous deposit of minerals currently being exploited and some still unexploited. However, the mineral sector is contributing very little to the national economy. The minerals that are found in plenty in the country include gold,¹⁹ tanzanite in northern Tanzania, nickel in north western Tanzania, coal and iron in southern highlands, natural gas in the coastal line, and so forth. This is apart from the other hydrocarbon deposits and building materials. The National Investment Policy therefore addresses some of the investment concerns in order to serve these areas with mineral deposits for the purpose of easy exploitation. The policy identifies the communication sector, transport sector, tax regime, infrastructure and energy as potential areas that have to be improved in order to attract investors in the mining sector and consequently improve the nation's economy. This will be in line with one of the components of the state's goals as explained in the Investment Policy paper at P.12²⁰ and one of the nation's specific objectives.²¹

In fact, this is geared at transforming the country's social-economic set up, which, according to the policy, will not depend only on established conducive and amicable environments, but will give priority also to the promotion and development of productive

¹⁸ others are agriculture manufacturing and construction

¹⁹ found in the Archean greenstone belts around lake Victoria and western central and southern Tanzania

²⁰ that is to ensure economic property and improve the living standard of the people

²¹ that is attaining a high rate of annual GDP growth averaging 8-9% P.a –p.13

economic sectors, especially the manufacturing industry, mining, agriculture, natural resources and tourism.²²

In order to ensure that the Tanzanians are benefiting from their resources, a call is made for the promotion of joint ventures in economic sectors such as mining, manufacturing, agriculture and tourism.²³ The advocacy is made against the glaring fact that, if Tanzanians are left on their own to attain optimal exploitation of minerals, they will fail outright, because these indigenous investors are engaged mostly in small and medium scale production whose profit margin is very minimal.

The investment policy in a nutshell has six objectives which serve as a mirror for the investors before they may conclusively determine on whether to invest or otherwise. We will cite objects (c) (d) (e) and (f), which are critical to this research.²⁴

Read together, these sub-paragraphs give an impression that the country has devised a policy that is conducive to foreign investors²⁵ without ignoring the well-being of its own people. The foregoing may not be reasonably achieved unless the policy pinpoints specific spots that could be easily monitored. The investment policy therefore is spotlighting eleven objects as guiding beacons for eventual successful implementation of the six objectives mentioned above. Relevant to this research are paragraphs (a),²⁶ (d)²⁷ (f).²⁸

²² Para 2.2.1 of the National investment policy

²³ S.2.2.4

²⁴ P.16-17

²⁵ Encourage inflow of external resources, encourage and facilitate adoption of new technologies in activities with direct bearing on productivity enhancing transparency and reviewing investment process for investment approval.

²⁶ optimum utilizations of the nations natural and other resources

The country has the potential to enter into a new era of investment transformation if it successfully tackles the contemplated specific objects. Streaming down this transformation will eventually lead to sectarian improvement including the mining sector. The policy highlights five important strategies as means of effecting improvements in the mining sector, one of whose benefits will be to attract investors. It is anticipated that these will further stabilize the investments in the sector, enabling the investors to contribute to the nation's development more beneficially. These strategies are:

- i. The provision of mechanisms for managing the allocation of mining rights. This shall be done for the purpose of encouraging broad-based growth in mining. If successfully done, it will encourage investment in the sector.
- ii. Adoption of supportive measures for small-scale miners. The situation currently indicates that most of the indigenous miners are engaged in small-scale activities and lack technical know-how.

This strategy is thus aimed at enabling them to promote their activities and they are optimistic that this will be a plus in the nation's economy and offer valuable support to large-scale miners.

²⁷ achievement of identifiable and substantial foreign exchange savings through efficient productive activities

²⁸ Improvement of linkages among various economic sectors involved in the production of goods and services

- iii. The foregoing²⁹ will be complemented with the provision by the State, of a legal and institutional mechanism to ensure that there is harmony between small-scale and large-scale mining activities.
- iv. The policy is also focused on promoting and encouraging consolidation of the sector, considering that, minerals that are extracted and exported without being processed have less value; whereas value added mineral products fetch higher profits for the country.
- v. Private exploration. As has been discussed above, Tanzania is endowed with vast deposits of minerals and it is believed that a great number of them are yet to be discovered³⁰ and exploited.

For this reason, dependency on government funds for exploration will slow down the process of meeting mining policy objectives. The policy therefore contemplates putting in place incentives to encourage private sector investments in exploration, efficient mining and marketing of the country's mineral resources.³¹

2.2.2 The Government

According to the investment policy, the government has delegated the execution of duties to agencies, confining itself to the task of formulating the policies and monitoring their

²⁹ Support for small-scale miners

³⁰ According to Business International Herald Tribune, October 26, 2006. Available at: http://www.ihf.com/articles/ap/2006/10/26/business/AF_FEA_FIN_Tanzania_Mining.php, accessed (March 25, 2008) quoted in "the Demystification of Mining Contracts in Tanzania" Tanzania becomes Africa's third largest producer of gold.

³¹ P. 19-20 of the policy paper

implementation. Section 4.1.1³² stipulates that the government's role is the provision of clear policy guidelines, stimulation and promotion of investment sectors and overseeing the general development in investments.

For proper execution and effective investment, the government of the United Republic of Tanzania established the Investment Promotion Authority (IPA) which is charged with the promotion, coordination and monitoring of all kinds of investment, be it local or foreign. It was intended that the operation of this agency would assist the nation to eliminate bureaucracy surrounding the whole process of promoting the country as an ideal place for investment.

The investment policy identifies twelve basic functions as basic to investment. Functions nine and ten are almost summarize the whole activities of the IPA; i.e. to expedite the processing and approving of investments by making sure that certificates and incentives are granted expeditiously while monitoring the impact of investment on both the economy and the environment.

It is the mission of the policy also to make IPA facilitate and speed up acquisition of all necessary permits and decisions precedent for the investors. That further means that without IPA in place, investors will never be certain of a conducive environment for investment. The question however, is: How effectively is the IPA discharging its obligations?³³

Economic development cannot be attained if appropriate plans are not executed at sectarian level at which monitoring and supervision is easy to undertake. In order to

³² At page 25 of the policy paper

³³ Page 29 of the policy paper

attain success at sectarian level, financial institutions have to be strengthened. Without strengthening them, very few investors would be attracted because no investor would fancy incurring losses. Thus, from the 1980s, the countries embarked on a number of financial reforms but taking into account the internationally acceptable and prudential regulations and supervisions. Through these improvements (and the liberalization of trade) more banks and other financial institutions have established their business in the country, thereby availing investors a wide option of choosing which bank/financial institution to use as a trading partner.³⁴

Considering that the country is not a lonely island and that developments in the neighbouring countries would definitely affect her, she has endeavoured to enter into Regional and Sub-regional markets for the purpose of protection of investments and enable equitable business dispute settlement.

To this end, the country is a member of the Multinational Industrial Enterprise Charter (MIEC), the Economic Commission for Africa (ECA), and the Southern African Development Community (SADC), to mention just a few. Together with these memberships, the policy sees to it that the country is a signatory to the International Centre for the Settlement of Investment Disputes (ICSID).

The policy aims to ensure that investment in the country is done more transparently. This could not be achieved without an efficient and effective legal system without which there cannot be an assurance for the sanctity of property rights and enforcement of contracts. This is very important to all investors in the mining sector because it has been pointed out

³⁴ This incentive has come with the trade liberalization since from the mid 1960's to early 1990's only public banks and financial institutions were rendering monetary service in the country

in the previous paragraphs that all investors (especially the foreigners) would not commence their business without entering into secure contracts.

In pursuance of this, the country has undertaken some legal reforms involving the establishment of proper legal institutions, for example, the industrial court, the commercial court and strengthening the existing claim courts. These are not going directly to the roots of the mining sector but they are significant. If these are absent, investors would hesitate to establish their business in the country.

The last point to highlight on the investment policy is the amicable solutions for investment disputes in case the government is a party of those investment disputes. The investment policy provides that, in the event of a dispute, the two sides will strive to resolve it amicably. As a procedure, arbitration may follow if an amicable solution doesn't materialise. The arbitration, however, is pursued through the internationally recognized procedures. Among others, the policy recognizes the rules and procedures for arbitration of the International Centre for the Settlement of Investment Disputes (ICSID) and the Multilateral Investment Guarantee Agency (MIGA).

Where the investor is a local entity, the dispute settlement may take legal channels through local courts and at that moment all parties (the government and the local investors) are deemed to be equal before the law.

The policy recognizes the exigent need of having sure sources of power. Thus apart from the government restructuring the sole electricity power supply utility firm, TANESCO, the policy is encouraging private sectors to play a role in electrification initiatives.

In summarising what is viewed under the investment policy, the obligations of the investors are pointed out in the policy paper. Five factors are listed as precedents for the investors to abide by. Combined, these require the investor to be transparent in accounts, be accessible and cooperate with the local authorities whenever required to do so.³⁵

Judging the policy from its wording, any reasonable person would acknowledge that it reflects a sound strategy. Since it was formulated in 1997 up to now (2012) very little has been realized, especially in respect of how indigenous people are supposed to benefit from mining projects. It is obvious that there is an exigent need of revisiting and restructuring the policy.

2.2.3 The Environmental Policy 1996

The National Environmental Policy of 1996 was adopted for the purpose of harmonizing environmental management in Tanzania while making sure that economic activities in the country are undertaken sustainably.³⁶ The policy makers were aware that the lives of all Tanzanians without exception depend solely on the environment, and therefore their lives and those of the future generations would not be maintained if the environment were neglected.

For this reason, it is a mission of the policy that maintaining and caring for the environment is not a matter of choice but an obligation³⁷ because environment is part and

³⁵ Section 5.0 at page 51

³⁶ The introduction to the policy spells clearly that the meaning or the word environmental includes *inter alia* any solids, liquids, gases, heat, sound vibration or radiation resulting directly or indirectly from the activities of man

³⁷ paragraph 2 of the introductions says that Tanzanians do not have the luxury Ignoring the fundamental stresses at the interface of developments and environment

parcel of our lives, and to some extent may be a factor in determining real economic positions. It is an undisputable fact the most problems that are connected with underdevelopment, such as poverty and poor health, stem from the failure to harmonize the environment and development. That means once the two are harmonized, the people's development level may rise significantly.

It follows that every project undertaken, be it development or investment-oriented, must have pre-planned strategies for environmental protection as the introduction to the policy says, "environment is the first victim of acute poverty...and desertification."³⁸ That is why the policy³⁹ prioritizes sustainable development with a focus on managing the environment for the benefit of future generations. That means that whatever is done in the mines today should focus on the potential effects to the posterity.⁴⁰ This focus, however, is not peculiar to Tanzania, since it is believed to be a product of the United Nations Conference on Environment and Development. The conference enshrined the integration of environmental concerns and economic development in the Rio Declaration on Environment and Development.⁴¹ Moreover, the country is actively taking part in the implementation of a number of worldwide and regional environmental treaties, from which the policy has borrowed substantially.

The environmental policy, as pointed out above, is focused on making sure that whatever might be done to the environment should take into account the need for dependency on other sectors. That is, one sector should act in collaboration with other sectors; otherwise

³⁸ Paragraph 4 of the introduction

³⁹ Environmental policy

⁴⁰ The government is pursuing explicit policy objectives which take into account its role of steering social sectors in environmental management

⁴¹ Tanzania participated actively in this conference

the results may not be promising. This tie with the spirit of Agenda 21, which stresses the need to move from a development model that legalizes independent actions of individual sectors to intersectional integration between sectors.

It is therefore a fact that whatever is provided in the environmental policy has been provided in such ways that the mining, investment, agriculture, and other sectors shall not be affected. Likewise policies in those other sectors (the mining sector included) shall make sure that the environment is preserved at all costs.

The words of paragraph 9 of the environmental policy summarise the nature of the inter-sectarian cooperation that is anticipated and the nature by which it may be carried out.⁴²

2.2.4 Why Implement National Environmental Policy Now?

Since independence, or right from colonial times, the country has been formulating development plans and therefore the National Environmental Policy cannot be said to be a new invention, rather, it is a document seeking to improve the framework for fundamental changes without which sustainable development will be difficult to achieve.⁴³

During the old regime⁴⁴, decisions affecting the environment were made haphazardly. It was the objective of the policy therefore that environmental consideration was brought into the focus of decision makers so as to make it part and parcel of the mainstream of decision making in the country.

⁴² S. 9 (a) (b) (c) (d)

⁴³ S.17

⁴⁴ before the introduction of the environmental policy

As to why the policy has been preferred at this particular time, the answer is simple. As nations advance forward and becoming aggressive with development, the environment is being degraded at a fast speed. Indeed, the present generation is abdicating its responsibility of becoming trustees of the environment for the future generation. For this reason, the policy spells out the objectives whose benefits are reproduced here below:

- a) To ensure sustainability, security and equitable use of resources for meeting the basic needs of the present and future generations without degrading the environment or risk health or safety.
- b) To prevent and control degradation of land, water, vegetation, and air which constitute our life support systems
- c) To promote international cooperation on the environment agenda and expand participation and contribution to relevant bilateral, sub-regional, regional and global organizations including implementation of international treaties.⁴⁵
- d) Examined very closely, it is crystal clear that the policy wants to leave no stone unturned in connection with environment viz a vis development. The emphasis is on the equitable use of resources. Definitely there shall be no equitable use if any development project disregards environmental development.⁴⁶

⁴⁵ S. 18 P. 90-100

⁴⁶ pursuant to the provisions of s.20 the policy is focusing on satisfactions of basic needs while at the same time protecting environment in the cause of development

2.2.5 Environment Vs Technology

Most development projects use various technologies, and if not cared for, they may cause disasters to the environment. The mining sector is leading in this regard because of the nature of the machines applied,⁴⁷ the volume of work undertaken and the type of chemicals applied. The use of science and technology however may not be avoided in the production of minerals because the technology in the mining sector at all levels has a bearing on the quality of the product and in the type and amount of the resulting waste and emission.⁴⁸

For this reason, the environmental policy advocates for technologies that are environment-friendly. These will see to it that the results of activities of any project technology should be “process and product.” This is what should be the target and/or vision of every mining project. Section 29 of the policy is more explicit on this when it says: “The primary policy objective shall be the promotion of the use of environmentally sound technologies, that is, technologies that protect the environment, are less polluting, *use all resources in a more sustainable manner, recycle more of their wastes and products and handle residue wastes in a more acceptable manner than the technologies for which they are substitutes*” (emphasis added).

Considering that much of the mining work done in Tanzania is artisanal,⁴⁹ environmental policy provides for the dissemination of environmental education for the purpose of coaching people to become responsible for their own destiny. This should be done by

⁴⁷ emitting noise and dust

⁴⁸ p. 13

⁴⁹ Art. 54 of the national Environmental policy

involving government institutions and NGOs that will give people who are dealing with or who are directly affected by environmental activities.⁵⁰

Knowing that almost every mining project is a potential user of dangerous and poisonous chemicals that are very dangerous to human lives like mercury, the policy had no reservations in making provisions that provide for the control and use of these substances. Thus the policy intends to prevent, reduce, control and eliminate damage and/or minimize the risk thereof from the generation, management, transportations, handling and disposal of hazardous waste, other wastes and emissions. The policy establishes six criteria by which the environment may be protected in mining areas, important of them all is S. 54 (f)⁵¹ which in fact summaries the rest.

This section provides for the regular and periodic environmental audits to be maintained to ensure the adoptions of environmentally sound practices in mining operations. This means if the policy is followed to the letter, environmental disasters that are looming at mining sites would be avoided. However, like in all other policies, the question remains: Who should execute the policy effectively?

If the objective of the policy in respect to the mining industry is to prevent, reduce, control and eliminate damages but up to now there are big problems connected with mineral extraction, then there must be something wrong with the policy⁵²

⁵⁰ According to the Environmental Policy paper, NGOs poses diverse experience, expert and capacity.

⁵¹ Page 22 of the policy paper

⁵² According to Policy Forum in Demystification of Mining Contracts in Tanzania, Experience has shown that extractive industries do not yield a significant positive impact unless there are concerted efforts to build up local industry capacity. In the view of Policy Forum the government of Tanzania has not contracted with the companies to implement and/or set up a capacity-building mechanism so that over time, the need to rely on the (currently unlimited) foreign expertise will diminish.

2.2.6 The Mining Policy

The mining policy is a remnant of the Mineral Sector Policy (MSP) that was formulated by the government of the United Republic of Tanzania in 1997. The aim and objective of the MSP was and still is to drive the development and exploitation of minerals in the country.⁵³

In formulating this policy, the government had a vision of having a very strong, vibrant, well-organized private sector moulded to lead a large and small-scale mining industry in the country while making sure that activities related to it are conducted in a safe and environmentally-sound manner. The policy also envisaged to make sure that the mineral sector's contribution to the national coffers is in excess of 10percent of the GDP. Lastly, it was the desire of the government through this policy, to ensure that a well-developed gemstone cutting and jewellery industry is established in the country, to make Tanzania to be the gemstone centre for Africa. Registering these achievements would translate into the mining sector becoming a highly dependable generator of employment opportunities. To demonstrate its determination in implementing this policy, the government of the United Republic of Tanzania repealed and replaced some laws that were directly touching the roots of the mineral industry in the country. These are: the Mining (Controlled Areas) Ordinance, the Mining (Loans) Ordinance, The Gold Trading Ordinance, the Diamond Industry Protection Ordinance, and the Gemstone Industry (Development and Protection)

⁵³ Policy Forum TANZANIA. Found at <http://www.tanzaniageteway.org/news/news/article.asp?ID=57> (accessed on 13/05/2011).

Act, 1967.⁵⁴ The policy recognized the importance of other legislations in the country that needed to function in collaboration with the Mining Act 1998.⁵⁵

In the year 2009, the country formulated the Mining Policy that was a result of several attempts to make the mining sector become among the major contributors to the nation's GDP.⁵⁶ The mining policy was expected to act as a linkage between the mining sector and other sectors in enhancing the nation's economy.⁵⁷ Factors that were contemplated as measures for the achievement of the foregoing objective are: increasing employment opportunities in the mines, fair and adequate compensation for relocated communities. Again, very little has been realized on this score, since communities living in mineral potential areas have been facing hard times as insecurity is rife in permanent residential settlements around mines.

Evidence shows that large and medium scale mining companies require large tracts of land but the Tanzania mineral geological positions covers areas already inhabited by locals. This means that when mines have to be set up, local inhabitants are displaced, leading to disruptions of their socio-cultural and economic activities. Such displacement

⁵⁴ the Fourth Schedule and Part I of the Fifth Schedule to the Mining Act, 1998 for the saving and transitional provisions.

⁵⁵ The Mining Act, 1998 governed the mining sector legislation; while the National Environmental Act, 2004 the Employment and Labour Relations Act, 2004 the Companies' Act, 2002, and a host of other laws remained relevant to the business of mining in the country

⁵⁶ Some of these steps were the setting up a Presidential commission to revisit mining contracts in the country in 2007 with the objective of establishing modalities to maximize mining proceeds and reviewing how things were operating. Out of this, some mining companies to wit Barrick Gold Mine and Resolute Mines signed new agreements waiving tax concession and therefore making them pay tax earlier. Another step was the establishment of the Bomani Commission which came up with constructive proposals that sought for both policy and legislative reforms in the sector.

⁵⁷ This could be done by making the mining sector to be a big market to locally produced goods and services such as labour, power. Very unfortunately this objective has failed to be achieved because the big investors have shown very little cooperation

is usually carried out by the government and in most cases the locals are not compensated but are physically tortured and harassed.

2.2.7 The Mining Act 2010

The Mining Act⁵⁸ was published in the government Gazette⁵⁹ on 28th May 2010. The Act repealed and replaced its predecessor to wit the Mining Act No. 5 of 1998.⁶⁰ The Mining Act, 1998 (as amended) was the principal and comprehensive law governing the mining sector by repealing and replacing *inter alia*, the Mining Act, 1979. The Act came into force on July 1st, 1999.⁶¹ However, very little has been changed in respect to the mining policy in the country since the administration, control and monitoring established under the old regime were also blessed by the new Act and therefore continue to exist and function as if the old Mining Act⁶² is still in force. Section 116 (2) provides *inter alia* for the continuance of effectiveness of subsidiary legislations which in fact are providing for the day-to-day monitoring of the mining activities in the country. These are not shaken by the 2010 Act. This is akin to preserving old wine in a new calabash.

To prove how the new law is just a duplicate of the old law that has very little input, S. 116(3) confirms the legality of the licenses and agreements obtained/entered through the old law. The section provides: “Notwithstanding the repeal of the mining Act under subsection (1) all mineral licenses and authorizations granted or issued and agreements entered in accordance with the provisions of the repealed Act shall be deemed to have

⁵⁸ Act No. 15 of 2010

⁵⁹ GN No. 22 Vol. 91

⁶⁰ Cap 123

⁶¹ Policy Forum paper at P. 1 available at www.policyforum.go.tz accessed on 14 may 2011.

⁶² <http://www.tzonline.org/pdf/nationalenvironmentalpolicy.pdf> accessed on 14 may 2011.

been granted issued or authorized under this Act. Subject to modifications as may be determined under this Act in respect of the particular grantor authorizations “

The law itself does not specifically provide for the modalities of making modifications expressed under S. 161(3). That further implies that the executives within the relevant authority/ministry will be left with a discretion of how and when to make such modifications.

Considering that most African governments are run negligently, it won't be surprising that such modifications might not be made, thereby compelling mining operations to operate under old legal and administrative systems.

The legislature purposely suppressed what otherwise could have come as a challenge to unmonitored and unbalanced exploitation of minerals in the country. This fact is unveiled by the provision of S. 161(4) that blesses all decisions that were made basing on the provisions of the repealed law.

The blessing was done notwithstanding the fact that some decisions might have been made lately without taking into consideration the interests of the Tanzanian general public. The relevant section provides: “all agreements made and entered in terms of the repealed Act, all appointments and decision made under the repealed Act should be deemed to have been made under this Act, *until terminated, surrendered , reviewed, removed, cancelled or expired*” (emphasis added). This means all agreements and decisions made under the old law will continue to have full force of law as if the old law

has never been repealed. This is because the agreements and decisions made under the old law are varied, there needs to be either an authoritative decision to terminate, review and cancel or discretion to abandon the agreement that has expired.

It is a common knowledge that most of the mineral exploitation agreements last not less than 99 years. Blessing such agreements which sometimes might be dubious on the face of records is like not having any new law in place. Above all, the terminations, reviews, removal and cancellation that is referred to by this Act, is not properly regulated. There are procedures for every factor but there is no provision exerting pressure on relevant authorities to make sure that such an action does not take place, and then the responsible person shall be held accountable. The intentions might be to terminate, review, remove, or cancel, and yet the responsible person/authority decides to keep silent. At such time and according to the provisions of this law, no law shall be deemed to have been transgressed and the responsible person/authority will continue to enjoy the trappings of the position one holds, instead he/she has to be reprimanded or penalized through different punishments.

At such point and under such circumstances, the trust conferred to the responsible person/authority will absolutely be deemed to have been abused.

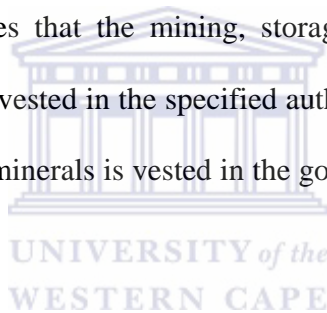
The above notwithstanding to the Act itself will be examined to see in which way it is promoting or hampering the mining industry in Tanzania. The Act is subdivided into eleven parts, nine of which are highly important. The parts that are not more important to

the contents of this research are parts I and XI⁶³. For the purpose of this research, analysis will be done on the following parts: Part II,⁶⁴ Part III,⁶⁵ Part IV,⁶⁶ Part VI,⁶⁷ Part VII,⁶⁸ Part VIII,⁶⁹ and Part IX⁷⁰.

It is quite obvious from the above scenario that the new Mining Act is constructed in a way that all important areas relevant for the mining industry are touched. The question, however, remains: How best is this Act implemented?

i) The control of minerals

Control of minerals implies that the mining, storage, processing and exportation (or importation) of minerals is vested in the specified authority. Pursuant to the provisions of section 5,⁷¹ the control of minerals is vested in the government of the United Republic of Tanzania.



This authority applies irrespective of whether the minerals in question are in or under the land. The country whose power of controlling the extraction of minerals is not defined

⁶³ part one deal with the preliminaries –short title and commencement application, reapplication to petroleum and interpretation; while part eleven deals with repeals and savings provisions

⁶⁴ control of minerals, minerals rights and exclusivity be developments agreement exclusive area for primary licences and specified gemstone

⁶⁵ Geological services Mining Advisory Board and zonal Mines offices

⁶⁶ Conditions for grant of prospecting licence grant renewal and relinquishment of prospecting licence and obligations of holder of a prospection licence. Application for special mining licence duration of special mining licence and right of holder of special mining licence application for mining licence Grant of mining licence and Renewal of land subject to mineral rights, maximum area for mineral rights and termination of mining licence where production is insufficient

⁶⁷ Royalties, payment in lies of royalties and for sorting fees.

⁶⁸ security of gold and gemstones mining operations, removal of minerals and wasteful practices

⁶⁹ Commissioner may decide disputes, enforcement of commissioners order and Rules

⁷⁰ Radioactive minerals insurance and in dimities, regulations and obstruction of holder of mineral rights

⁷¹ Act No. 15/2010.

by this Act, but recourse is made to the Constitution of the United Republic of Tanzania (1977) which provides the definition of the powers and the name of the United Republic of Tanzania.⁷² But again it would remain controversial and confusing if the person whose power emanates from the authority of the United Republic. This person without reservation is the President of the United Republic of Tanzania. This is because under the Land Act,⁷³ all land in the United Republic of Tanzania is held under the trusteeship of the President of United Republic of Tanzania. Since minerals may be found above or below the land, it naturally follows that all minerals are part and parcel of land and therefore legally held under the President's trust. In accomplishing this task, the President is expected to delegate his powers to suitable persons and suitable corporate bodies.

For a person, a body corporate and/or any entity to access minerals in Tanzania, he/she must seek minerals right under Act No. 15 of 2010. The right over minerals that is sought under section 6 can be granted depending on the division in which it applies. That is under division "A" a right might be granted for prospecting license or for a gemstone prospecting license or for retention license. Under division "B" the right may be granted in respect to special mining license or just a mining license. Under division "C" the right is for primary mining license. Under division "D" the rights that may be granted fall under three categories namely; processing license, smelting license and refining license.

It is not necessary that only one right should be granted exclusively in one area. Pursuant to the provision of Section 7(2), the licensing authority may grant more than one mineral

⁷² The Constitution of the United Republic of Tanzania of 1977.

⁷³ Act No. 4 of 1999

right over the same mining area.⁷⁴ The problem is with the discretion that is given to the minister⁷⁵ under Section 7(3) whereof he/she may approve a source for the public interests.

The construction whose undertaking involves public interest like the construction of tunnels, roads, dams, and aerodromes, should follow procedures for identifying and granting permission for the land. Apart from that, the sources of building materials for such projects should not be rigorous. The minister is just requested and the permission is granted although it is a requirement of the law that the minister shall not approve a source in the mining area shall be identified as remains base that the mining area shall be identified as such following a successful survey and mapping of the area.⁷⁶ Where the survey has not been undertaken, it again remains a fact that the minerals might be lying under the land and yet the minister, on account of lacking awareness on the matter, he/she might proceed to grant a right for the source of materials from that portion of land. The person/company that asked for the right might be aware of the minerals deposits⁷⁷ and that fact becomes a catalyst for him to apply for such a right. By the time the minister realizes his/her errors and withdraw the right under S. 7(5) it would have been already too late to save the resources of the country.

The control of the minerals goes as far as requiring the rightfully owner to take care of and make sure that the indigenous people surrounding the mines benefit from the

⁷⁴ provided that the mineral right owner has consented to

⁷⁵ the minister responsible for mining

⁷⁶ Section 21 of the Mining Act, 2010.

⁷⁷ this is quite possible considering the current technological advancement

extracted minerals. Thus the Act under S. 10(4)(c)–(f) requires the rightful owner to take care of the environment - covering even matters that are not covered by regulations of general applications,⁷⁸ ensuring that goods and services that are available in Tanzania will not be procured from somewhere else and making sure that the Tanzanians who are now employed in the mines are further trained and prepared for future succession.

The law here does not spell out the way in which the succession shall be made. Once the company acquires the minerals right, the first thing to anticipate is the amount of deposits available in the particular place. Following this, the prospector will be in a position of determining the duration of his application.

Reasonably the more deposits underground, the more lengthy right will be applied for. Despite the fact that the law provides for succession, but logically the indigenous people won't achieve anything if the law does not limit the years in which a particular company may operate in a particular deposit; leaving a substantial amount for succession.

ii) Advise on mineral Exploitation and use

Minerals are precious and they form the bulk of the economy in any country where they are available. In the event that every person, be it a citizen or a foreigner, has a right to search and own minerals, the result would be catastrophic. For this reason the geological survey⁷⁹ is done by the geological agency.⁸⁰ This agency, pursuant to the provisions of Section 21 has the responsibility of advising the minister on geological matters. But the minister may not act upon any proposal or advice unless has first been routed through the

⁷⁸ Section 10(4)(c)

⁷⁹ not only for minerals but also for all other surveys related

⁸⁰ established under the executive agencies Act No. 30 of 1997

mining advisory board first. This is the higher advisory body whose advise the minister is not expected to disregard.

The composition of the board indicates that the members are drawn from all important areas either affected or directly dealing with minerals. However, the law imposes no mandatory obligation on the minister on whether to draw members from all nine sections spelled out in Section 23(b). What the law says is that the minister may appoint not more than nine other members. That means legally (although this might be illogical) the minister may appoint only three members and yet the board shall be deemed to have been legally constituted.

iii) Conditions

Part IV of the Act is very important because it is out of this part that the conditions for application and grants of rights are found. The part provides also the types of minerals which may be prospected and the right granted upon. The part is sub-divided into five divisions, each spelling an exclusive point for the smooth implementation of the Act. More focus is on division (s.39-53) of this part for it provides for the special mining license and mining license. Subject to the provisions of Section 4⁸¹, the special mining license means a license for large scale mining operation whose capital investment is not less than US \$ 100,000,000 or its equivalent in Tanzanian shillings.⁸²

But this part to some extent discriminates small scale miners. Under the provision of s. 40(1), once an application has been made for special mining license and the relevant area

81 Interpretation section

82 by 2011 when writing this research the equivalency is standing at T. Shs. 160,000,000,000/=

covers/includes/extends to the area subject to a prospecting license issued to another person, the latter shall be relinquished.

Section 40(1) refers to the termination of the prospecting of a special mining license⁸³ within the area of his prospecting license. The law is creating confusion here as it does not clearly spell out who actually is entitled to the said special mining license. That if the area applied for the special mining license is extending to an area covered by a prospecting license and the holder of the prospecting license has been terminated at the instance of the aspirant for special mining license, reasonably the holder of prospecting license, cannot be granted a special mining license on the same area. This may create confusion and conflict among the two prospectors.

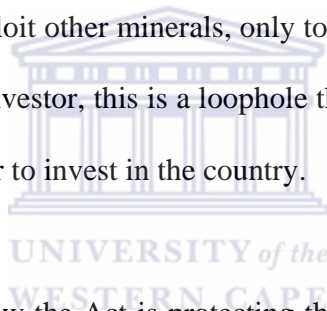
The rights that are conferred on the holder of special mining license indicate that the nation is wholly prepared to assist the investors for their efforts to contribute to the nation's coffers. Holders of special mining license definitely may not be Tanzanians holding 100percent of the shares in the companies so applying. This is because raising T. shs 160,000,000,000/= is not easy, and is actually synonymous with daydreaming. Foreign applicants are thus given unfair advantage in acquiring this type of license.⁸⁴ It is therefore a requirement of this Act that investors in this category should not be harassed otherwise they may quit. That is why Section 46 that is specifying the rights of holders of special mining license is a bit loose. The looseness was made purposely by the legislator so as to attract the investors. For example the section provides that the holders of the

⁸³ upon application to the licencing authority

⁸⁴ although in some cases they may join hands with the Tanzanians

special mining license may prospect within the mining area for any mineral specified in the license.

That is, for example, the holder applies for the mining and extraction of nickel. But on the license he has declared that copper may potentially be available in the mining area. The latter mineral to wit copper will come as a product of the first although failure to extract the second product area may not entitle the right holders to lose his right. The law, however, does not set out the modality by which this prospector should declare the time at which he commenced a special mining license (which obviously covers a large area) and therein continue to exploit other minerals, only to declare after he has already made a big profit out of it. To an investor, this is a loophole that benefits him and if not sealed, it may attract such an investor to invest in the country.



The conflicting issue is how the Act is protecting the interests of the Tanzanians living near and around the mines. According to Section 49(2) (*e*), a prospector of the mining license shall apply for the right not exceeding ten years. This right may be renewed for another ten years⁸⁵ provided the holder of the right complies with the requirements as stipulated.

There is no provision which gives the local people a voice on the determination of the renewal. The prospector on first application may make a firm pledge to provide various forms of assistance to the local people, but if he doesn't fulfill the pledge he is not taken to task. What will ensue is for the right holder and the licensing authority to determine

⁸⁵ Section 53

the renewal even if the local people have been least assisted. In the recommendation section of this research we shall propose what should be done to rectify this problem.

iv) Royalties

Royalties are not defined by the law⁸⁶ and therefore the section dealing with royalties' leaps forward and provide for the authority and nature by which the royalty shall be paid. According to this section, every authorized miner shall pay to the government of the United Republic of Tanzania a royalty on the gross value of minerals produced under his/her license.⁸⁷ Like in the preceding sections, a payment of royalties in this respect is a bit loose. The amount of royalty is determined on the "gross" basic which according to the provision of Section 87(b) means the market value at the point of refining or sale. The percentage of royalty has been greatly lowered to attract the investors but has very little impact on the Tanzanians.

For example, Section 87 (1) (c) requires the right owner to pay to the government of the United Republic of Tanzania only 4percent of the market value of minerals at the point of refining or sale. This is very small royalty considering the fact that most Tanzanians are dependent on these minerals. The owner of the mining company is left with a lion's share of 96 per cent that enables him reap super profit. This situation is tolerated because Tanzanians themselves have not advanced technologically to the point of being able to exploit their own resources. They have to concede to any proposal⁸⁸ so as to make ends meet.

⁸⁶ Act 15/10

⁸⁷ Section 87(1)

⁸⁸ although the reasonableness of S. 87(1) is highly questionable

v) Radioactive minerals

Tanzania is ranked seventh in the world in holding uranium deposits. This is a very dangerous type of mineral since it possesses a high percentage of radioactive substances that are dangerous to human life. The Act⁸⁹ gives a very little consideration to the exploitation of minerals rich in radioactive substances. In order to be sure about what should be done while exploiting, transporting or trading such high-risk minerals, Act No, 15/10 has to be read together with the Atomic Energy Act Cap 188. Moreover, inhabitants of areas rich in radioactive deposits are not wholly protected by the law. This type of minerals is safe while under the soil but there are dangerous when exploited even if there is a scintilla of it in the sand from the mines. Section 108(4) provides that a radioactive mineral means a mineral containing by weight at least 1/20 of 1percent of uranium or thorium or a combination of both. According to this section, the sand carrying these elements is equally dangerous. Even the Atomic energy Act⁹⁰ does not protect the vulnerable citizens who circumstantially find themselves already exposed to radioactive substances, especially from the mines or from the leak while on transit.

There are so many areas in the mining Act that need to be revisited despite the fact that the Act has greatly improved the policy. This might be the result of the “Bomani report”

2.3 EFFECTIVENESS OF THE LEGAL FRAMEWORK

2.3.1 Mining Companies Operating in Tanzania

In this section, major mining companies that are conducting their mining business in Tanzania will be analysed. The focus is on major mining companies because they are the ones that are more affected by either the policy change or policy formulation. Again,

⁸⁹ No. 15/10

⁹⁰ cap 188

considering the fact that mining business is a liberalized activity, there are so many small mining companies that analysing any of them would cost enormous time, energy and resources.

(a) Barrick Gold Corporation

This company is registered in Canada and has various operations around the world. For Tanzania the company operates three gold mines whose first project was that of Bulyanhulu which is run by Barrick's subsidiary company known as Bulyanhulu Gold Mine Ltd. This mining company is capable of producing 11.34 tons of gold, 7.5 tons of silver and 18.9 tons of copper per year. Between 2001 and 2005 the company reimbursed into the government royalty of USD 15.18.

The second mine operated by Barrick in Tanzania is North Mara situated in Tarime District. Barrick is running this mine through its subsidiary company North Mara Gold Mines Company Ltd. The mine is estimated to hold a gold deposit of almost 116.23 tonnes. The third mine operated by Barrick in Tanzania is Tulawaka located in Biharamulo district. This mine is run in partnership with Pangea Minerals Ltd (a subsidiary company of Barrick) that holds 70percent and Miners de Nord also from Canada that holds 30percent of the shares. The mine has the capacity of producing 3.88 tons of pure gold per year.

(b) Pangea Mineral Limited

As has been disclosed above, this company is running the Tulawaka mine under the auspices of Barrick Gold Corporation. The mine is estimated to hold a deposit of about 91 tons of gold.

(c) Anglo Gold Ashanti Limited

This is the merger of two companies namely; Anglo Gold Company of South Africa and Ashanti Gold Field of Ghana. It operates Geita Gold Mine that originally was owned rightfully by Cluff Resources PLC Ltd, a company registered in England. Subsequently, the rights and assets of Cluff were bought by Ashanti Gold Field registered in Ghana. In the year 2000, Ashanti Gold Field's right was bought by Anglo Gold Company of South Africa. In the same year, AngloGold Company and Ashanti Gold Field of Ghana merged to form a new company know as Anglo Gold Ashanti Limited that is now running Geita Gold project.

(d) Resolute Tanzania Limited

This is a Tanzanian company running the Gold mine located at Lusu in Nzega district. The company is medium sized and its operations have been moderate since up to 2005 it had paid a total amounts of USD 28.09 million to the government (11.14) being royalty and USD 16.95 million being other taxes.

(e) TanzaniteOne Ltd

This is yet another Tanzanian company. It is undertaking its mining activities in Simanjiro, Arusha. The project commenced with Merelani Mining Company Ltd. This is a subsidiary company of Africa Gem Resources (AFGEM). TanzaniteOne acquired everything that belonged to AFGEM in 2004 and started running the project. However, in the area there are also a good number of small-scale miners.

(f) Will Croft Company

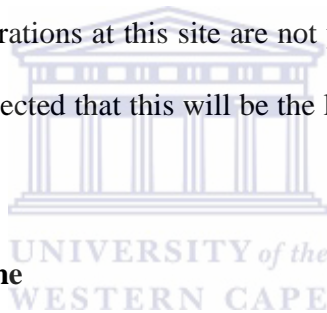
This is the oldest mining company in the country. It is registered in South Africa and a subsidiary company of De Beers Group of South Africa. It commenced its diamond mining in Kishapu, Shinyanga, in 1951. It is running the Mwadui diamond mine with 75 percent of shares in partnership with the government of Tanzania with 25 percent of shares.

(g) Xstrata Nickel

This company is running the Kabanga Nickel mine in Kagera Region in partnership with Barrick Company. The operations at this site are not yet in full swing but when it comes into full operations it is expected that this will be the largest nickel producing mine in the world.

(h) Buhemba Gold mine

It has been preferable to mention the mine by the name of its location rather than the company's name which is located in Mara region. This company has been a source of controversy over the ownership of the companies that have been exploiting the minerals on this site. Initially the mine was owned by Suma Jumbo JKT (a wing of the Tanzania People's Defence Forces) and Tanganyika Gold Mines of Australia at an aggregate of 50 percent each. Later in 2003 the government of Tanzania issued a mining certificate to Meremeta Company Ltd which was later transpired that the government of Tanzania and Triennex Proprietary (Pty) Ltd of South Africa owned the gold mine at an aggregate of 50percent of shares each.

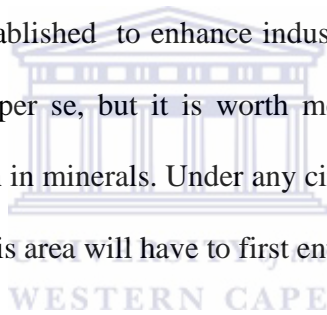


The Meremeta issue raised a hot debate in the Parliament over who really owns it. Nevertheless, it is on record that the companies mentioned in this paragraph have at one time or another actively participated in mineral extraction in Tanzania.

(i) El-Hillal Minerals Ltd:

This is a purely Tanzania company that has a diamond mining licence for Shinyanga (Mwadui). Its development as compared to other foreign companies is not competitive; nonetheless, it is satisfactory.

(j) NDC: This stands for the National Development Corporation, government agency or corporation that was established to enhance industrial development in the country. It is not a mining company per se, but it is worth mentioning since it has a right over several areas which are rich in minerals. Under any circumstances, any company that will get the mining right over this area will have to first enter into agreement with NDC.



NDC owns the Mchuchuma coal mines located in Ludewa that is estimated to have 159 million tons of coal reserve or 377 tons of resource. Currently negotiations are under way to get capable international investors to run the project that has the potentiality of becoming a base load for other industries and producing electricity to be fed into the nation grid.⁹¹

Apart from Mchuchuma, NDC also owns the right over Liganga iron ores, also located in Ludewa District- Njombe region. The deposits are extending over a wide area estimated

⁹¹ Bomani Report at 19

to carry around 1218 million tons of iron ores.⁹² The government, however, is encouraging small-scale mines for the production of sponge iron believed to be deposited along Maliyatabu A and B and Ng'oloko hills. Implementation is yet to be executed. Apart from iron, the reserve is also rich in Titanium and Vanadium which are highly precious.

(k) Kiwira Coal Mines Ltd.

Again this is a purely Tanzanian company. It was established way back in 1998 under the Companies Act⁹³ for the purpose of exploiting coal at Kiwira.⁹⁴ It started as a complete subsidiary company of State Mining Company (STAMICO- holding 100percent) before it was privatised in 2005. At that juncture it was taken over by another Tanzanian company known as Tan Power Resources (70 percent) and STAMICO retained 30 percent of shares. Its performance has been very poor and actually is on the verge of collapsing.

It is worth repeating, at this juncture, that the country is well endowed with mineral resources. Articles under which companies listed as actively engaged in minerals exploitation may change at any time depending on who comes in and who goes out at what time.

⁹² Mkelema-Maganga Matitu 98 million tons, Maganga-Luhaha 240 million tons; Magendiguruime-Mwaselenga 160 million tons; Liganga 320 million tons and Ngongwa-Merere 400 million tons

⁹³ Cap 212

⁹⁴ the objective was to produce coal for industrial use (Base **load**) and electricity for national grid consumptions

2.3.2 The concept of mining contracts review

The Bomani Commission Report

This Commission was formed on 12 November 2007 by the president of the United Republic of Tanzania.⁹⁵ Its advent had a very long and interesting historical background for the whole matter was surrounded by the government's determination to make sure that the mining sector contributes enormously to the nation's economy. For this reason, the Mining Act was passed in Parliament in 1998.⁹⁶ The 1998 Act capitalized on the Mining Policy 1997 which in their togetherness served at least for 9 years as the guiding principles for explanation, exploitation and trading of minerals in Tanzania⁹⁷

While inaugurating the Parliament of the United Republic of Tanzania in 2005, the president promised to form that commission for it was crystal clear that from 1997 there had been an increase in investment toward mining activities and the mineral production had gone up. However, citizens were constantly lamenting over rising inflation and the mining companies were equally lamenting that they were still operating at a loss and therefore not capable of paying the required taxes.

There was an exigent need therefore for the government to harmonize the regime for the benefit of the people of Tanzania. Before the formation of the Bomani commission, the government had endeavoured to solve the problem by establishing various committees.⁹⁸

⁹⁵ J.K. Kikwete

⁹⁶ later to be re-enacted with substantial amendments 2010

⁹⁷ introduction to the report

⁹⁸ the Mboma committee of 2002 for solving the Mererani dispute between AFGEM and small- scale miners, the Kipokola committee of 2004 for reviewing of the mining policy, the Masha committee of 2006 for analyzing the mining sectors tax system, the government negotiating team between the government, the Tanzania chamber of minerals and energy – TCME and private mining companies to see the possibility of

The Bomani Commission was composed of 12 members under the chairmanship of Justice (Rtd) Mark Bomani. Other members were five MPs, two directors from the ministry of constitution legal affairs and the ministry of land housing and human settlements, one tax consultant from Price Water House Coopers, the chairman of the Dar-es-Salaam stock exchange market, a commissioner from the ministry of finance and a senior state attorney from the ministry of energy. The commission was required or rather asked to review or analyze mining contracts and other documents relevant in respect of big mining companies in the country, the tax regime applies in the mining sector, the government's supervision scheme over major mining companies the reciprocal rights between an investor and the property owner of minerals, the views of the TCME on the end of its assignment (i.e. at the end of the three-month time frame).

In order to accomplish its assignment, the commission visited various institutions associated with the mining industry in some way. These included, but not limited to, the ministry of minerals and energy; the Bank of Tanzania; the Tanzania Revenue Authority; the Tanzania Investment Centre; the State Mining Corporation; the Geological Survey Agency; the Mining Advisory Committee; Mining Institute; Gemstone Board; Ministry of Lands, Housing and Human Settlements; the National Development Corporation (NDC); The Civil Aviation Authority; and the Registrar of the Treasury.

It also visited eight countries to enquire into how they operate in order to share their experience on how minerals are handled in those states. Four of the countries visited were from Africa namely South Africa, Ghana, Botswana and Zambia; two from Asia namely

amending some of the mining agreements articles so as to harmonize the give and take. This team is popularly known as Bukuku's committee

Japan and Thailand; and one country was from North America and that is Canada; and the last in the list was Australia. Almost all of these countries have major mining companies, and the commission visited their mining sites.⁹⁹

In the course of undertaking its mission, the commission discovered that the country has a vast deposit of minerals¹⁰⁰ and they further discovered that the mining sector had practically contributed nothing to the national economy up to 1990s¹⁰¹.

This commission realized that the government became aware of this fact and that was one of the factors that compelled the government to come up with the Mining Policy of 1997. Before the policy became operational, the government made amendments to the financial laws (miscellaneous amendments) Act, 1977, enacted the Mining Act 1998 and amended the Foreign Exchange Act 1992. All these it was found out were for the purpose of attracting investors so that, ultimately, the mining sector could contribute reasonably to the national economy.

The commission revisited the mineral sector supervision modality. This was for the purpose of ascertaining whether the supervision is carried out properly and whether the sector was generating enough funds for the government coffers.

It was realized that the mining department in the parent ministry has a defined administrative structure but which, unfortunately, is not helpful as the eight zone offices and mining advisory boards are not of help to the ministry.

⁹⁹ a total of twelve mines were visited

¹⁰⁰ a total tonnage of almost 2899 million tonnes and 50.9 million carats of diamond

¹⁰¹ the few mining companies that were opened before independence and were run by the government had collapsed

On Page 23, the report notes: “ the establishment indicates great weakness despite the fact that it was revised in 2006 (adopted by the government in 2007).” Some of the shortcomings that were uncovered and that would need prompt responses are:

a) The gold audit programme is incapacitated by the insufficiency of experts almost in every of its major offices; lack of laboratory equipment and lack of co-ordination between the unit and other stakeholders such as TRA and TIC.

b) The TANSORT (the Ministry of Energy and Minerals’ division located in London) has a deficit of manpower and faces high management costs (the Division was specifically established to sort diamond produced by Williamson Diamonds Limited that sells all of its produce to de Beers of South Africa- but de Beers itself being a partner to the mine).

c) The Geological survey of Tanzania (established under S.245 of the Executive Agency Act No. 30/97 and published in the GN No. 4/418/05) has also a deficiency of experts and it is not yet recognized by the international standards organization (ISO).

It was in the view of the commission that if these problems are given due attention the mining sector could be improved.

On how much does the mining sector contribute to the government coffers and improve the living standard of the indigenous people, the commission’s report is breathtaking for national income generation. While in 2001 the country was producing 5,577,907 kgs of various minerals and 254,251 carats of diamond, in 2006 there was an increase up to 6,969,435 kgs and 272,204 carats respectively and thus fetched USD 312.2m and 856.70 respectively.

It was recorded that the mining sector contributed 3.85 to the nation's GDP and the royalty that was reimbursed to the government in 2006 was USD 26 million. Despite all these achievements, the commission realized that the local people, especially those who are displaced to leave their places for mining operations were not adequately compensated.

The mining sector's contribution to the GDP is comparatively very small and there is a poor relationship between the giant miners and the indigenous people surrounding the mines (paragraph 2.14 of the report at P. 35)

The commission met with various stakeholders, gathered their opinions on how the mining sector is run and the shortcomings that these stakeholders view as impeding the mining sector development were presented and discussed. The main areas that were discussed are the mining company's employees and employment in mining companies, people living around mines, small scale miners cum mining experts. In all these areas (discussed on pages 39-76 of the report) it was realized that failure to implement the mining policy, failure to realize the required yield from minerals towards the GDP and failure to maintain good relationship between the large-scale miners and small-scale miners as well as local people, cannot reasonably be attributed to one side only. Both the government of the United Republic of Tanzania, large-scale mining companies, small-scale mines and the local people all have at one point failed to accomplish some of their obligations, and as consequence creating an unsatisfactory environment for mining operations.

All the countries visited have their achievements and shortcomings to the extent that no country may be said to have sustainable achievements. For example, the government in South Africa does not deal directly with investment in minerals, although it has established an agency that procures shares from mining companies for subsequently selling the same to the indigenous. The agency (Industrial Development Corporation - IDC) is the equivalent of Tanzania's NDC, but their objectives are different. Since South Africa is prospering in the mining sector, why can't NDC of Tanzania learn something from IDC? On the other hand, Australia has a different approach by which the government (in Papua New Guinea) owns 5percent of the shares while mining companies own 95percent of the shares at any particular mine.

The 5percent that is the government's due, is shared equally between the central government and the local government. This could be a demonstration for Tanzania where indigenous people are consistently crying for failure to benefit from mines around them. The system in Papua New Guinea (Australia) can be compared with that of Zambia where every foreign investor is mandatorily required to enter into partnership with the Zambian government

In the most of the countries visited, minerals and the mining business is supervised either by the local government (Australia) or by a commission/department contributed under the relevant ministry. All in all, the governments are always monitoring the operations closely to ensure efficiency. In Botswana, for example, the president himself is the chairman of the mineral supervision special committee.

Most interestingly the Bomani commission analysed the tax system of all of the countries visited. The commission was more interested on how these countries adapt royalties, the income tax from minerals, customs duties and tax exemption on the mining sector. The tax imposed on mining companies varies from one country to another. Important and common among them all is the fact that a certain amount of royalty is left to the local authority around the mine for the benefit of the local people. There is no common agreed standard that covers every aspect of tax to harmonize the system in the visited countries.

For example, while other countries charge royalty on the gross value (of the miners), South Africa does not, however, it is now considering to do so. Canada on its part acknowledges the need to have royalty but the system is undertaken by the local government basing on the local government legislations.

It suffices to say here that the commission realized that there is a big difference of how the tax regimes for the mining sector are run in those countries and the situation in Tanzania. It is not possible to adopt all of those systems for own use. (Page 102 of the report).

Basing on this analysis, the commission made a number of recommendations, ranging from the government and investors' obligations to the relationship between the mining sector and electrification. Important to this research is that the commission recommended to the minister responsible for minerals to enter into agreement/contract with every company holding a mining licence that the latter should set aside adequate funds or collateral for the preservation of the environment.

It was also the commission's recommendation that all mining companies be registered under the Dar es Salaam stock exchange market (P.124). It is the view of this researcher that if these recommendations are adhered to there will be a great improvement in the mining sector.

2.3.3 Conclusion.

The Bomani Commission in Tanzania unveiled issues which had been obscured from the eyes of Tanzanians for ages. What has been discussed and observed in this chapter is based on the findings that were made by the Bomani Commission. Since the Commission's report is based on research and has incorporated the requirements of the Foreign Direct Investment with international standards, it is a recommendation of this researcher that there is no any other viable way for the Tanzanians to benefit from their natural resources unless the Bomani Commission's report is used as a guide if some minor changes are made now and then depending on the prevailing situation at any given time in history.

CHAPTER THREE

THE CONCEPT OF MINING CONTRACT REVIEW IN THE DEMOCRATIC REPUBLIC OF CONGO

3.1 INTRODUCTION

In this chapter, it is intended to analyse the concept of mining contract review in the Democratic Republic of Congo (DRC), formerly Zaire. It is called a concept in consideration of two main theories. First it is a concept in the sense that the review came as a novel idea by which the administration of the new regime in DRC was inspired to control the local mining sector. But on the other hand, the review strategy is a concept in the sense that if successfully implemented, it might be a model for other countries to follow.

For the above reasons, in this chapter, the analysis shall be made on the situation during the civil war in DRC when the reviews of the Commission Report on mining contract and the impact of the contracts were done on the mining industry. For a better precision, while talking on the situation during the civil war, focus shall be put on the foreign direct investment policy in the DRC and coverage shall be made on some selected mining companies in the DRC.

3.2 THE SITUATION DURING THE CIVIL WAR

The Democratic Republic of Congo is a country well-endowed with natural resources, especially minerals. It is estimated that the country has the largest deposits compared to other countries in the central African region. “By any measure, the Democratic Republic of Congo (DRC) is one of the most mineral rich nations on earth. Copper and cobalt alone provided one third of the government’s revenue during Mobutu’s regime.”¹⁰² Immediately after independence, the mining sector in the DRC was the exclusive contributor to the national coffers. However, the control of the sector was either in the hands of a small group of people or poorly managed by the State. Thus, instead of the sector becoming a money-spinning source it has turned out to be a source of corruption by not benefiting either the country or the Congolese people.

This situation is not only unique for DRC; Francis DJ in assessing the situation in Sierra Leone had this to say: “The 10-year-old, brutal civil war in Sierra Leone has been seen largely as a conflict over the country’s rich diamond resources. They have certainly fuelled the war but aren’t they its primary cause? Or are fundamental grievances and social injustice at the root of the conflict? Does the focus on diamonds have more to do with protecting the legitimate diamond and arms trade?”¹⁰³

¹⁰² The Carter Center. Review of DRC Mining Contracts - Update and Recommendations. November 30, 2007, available at www.cartercenter.org/.../drc_mining_contract accessed on 13/12/2011.

¹⁰³ David J. Francis lectures in the Department of Peace Studies at Bradford University (UK). Diamond and the Civil Wars in Sierra Leone. the Courier ACP-EU July-August 2001 P. 73

Under the presidency of Mobutu Sese Seko, the administration became more autocratic, eventually resulting to a civil war that lasted for five years.¹⁰⁴ During this time, Mobutu regime was doing everything within its power to get enough funds for financing wars against the rebels in the struggles to remain in power. The only reliable source of funds was the mining sector. Some scholars have attributed civil wars in some counties to the availability of natural resources. That the more natural resources the country has the more likely for it to fall into civil wars.

Commenting on this allegation, Ross M had this to say: “recent studies have found that natural resources and civil war are highly correlated. According to Collier and Hoeffler [1998, 2001], states that rely heavily on the export of primary commodities face a higher risk of civil war than resource-poor states. Fearon and Laitin [2002]; de Soysa [2002], each using unique data sets, found that oil-exporting states are more likely to suffer from civil wars. Fearon [2002] also shows that the presence of certain types of resources (gemstones and narcotics) tends to make wars last longer. Similarly, Doyle and Sambanis [2001] demonstrate that civil wars are harder to end when they occur in countries that depend on primary commodity exports. Buhaug and Gates [2002] show that the presence of mineral resources in a conflict zone tends to increase a conflict’s geographical scope.”¹⁰⁵

¹⁰⁴ 1998-2003 inclusive

¹⁰⁵ Michael Ross (Assistant Professor). How Do Natural Resources Influence Civil War? Evidence from 13 Cases Department of Political Science, UCLA, June 11, 2003 available at <http://www.sscnet.ucla.edu/polisci/faculty/ross/HowDoesNat3.pdf>. Accessed on 10/12/2011

Michael Ross is making reference to the Collier-Hoeffler's arguments on their observation that "natural resources offer rebel groups unusual funding opportunities, because resources typically produce rents and are location-specific. If rebels try to loot or extort money from manufacturing firms, the firms will relocate to a safe area or be forced out of business; but if they extort money from resource firms, the firms cannot relocate, and can often make payments to rebels. States whose economies are more heavily based on resource exports should therefore also face a higher risk of civil wars."¹⁰⁶

Driving the point home, Katshung JY¹⁰⁷ has the following to comment: "There is a debate about whether the exploitation of mineral resources is a main aim for foreign intervention or whether mining initiatives is a way of financing the war effort. It has long been established that the exploitation of these resources, including 'coltan' (columbite-tantalite), gold, and diamonds in the eastern Congo, and diamonds, copper, cobalt, and timber in central DRC, contributed to and exacerbated the conflict in the country. Concerned with reports of pillaging of resources by the foreign forces, the UN Security Council mandated an independent panel to investigate these allegations. In fact, in its presidential statement dated 2 June 2000 (S/PRST/2000/20), the Security Council requested that the Secretary-General establish a Panel of Experts on the illegal exploitation of natural resources and other forms of wealth of the DRC."¹⁰⁸

¹⁰⁶ Michael Ross, *How do Natural Resources Influence Civil War*. At 3.

¹⁰⁷ Dr Joseph Yav Katshung is a lecturer in the Faculty of Law at the University of Lubumbashi, an advocate at Lubumbashi Bar Association and the coordinator of the UNESCO Chair for Human Rights, Democracy, Good Governance, Conflict Resolution and Peace at the University of Lubumbashi, DRC

¹⁰⁸ Dr Joseph Yav Katshung *Greasing the wheels of reconciliation in the Great Lakes region*. *African Security Review* 16.3 Institute for Security Studies. P. 119

It is most obvious that minerals were hunted not only by the government of Mobutu but also the insurgents (some of whom had already penetrated the government) who were also much depending on the minerals as the source of their funding for the civil wars. This is the scenario that prevailed in the years between 1998 and 2003 during which 61 mining contracts were signed.¹⁰⁹ The environment surrounding the signing of these contracts did not avail them an opportunity to be transparent. Rather, the whole process was beleaguered by corruption. Most of the people in the DRC itself and even beyond its borders were of the firm belief that the national riches had been exchanged for war spoils and political favours

After scavenging the country for almost 35 years, Mobutu was toppled by Laurent Kabila. Kabila had systematically constructed civil-cum-guerrilla war strategies by which for several years he was leading the insurgents especially in the eastern part of the country against Mobutu. It was under this move that in 1996 Kabila as a leader of rebel movement in the eastern Zaire¹¹⁰ handed several rich mining concessions to foreign companies.¹¹¹ These mineral business deals enabled Kabila to get enough money to fund his anti-Mobutu war, and to eventually topple the despotic president. But following this change of government, the situation in the country was not peaceful. There were some remnants of army personnel who were still loyal to Mobutu who maintained operations against the Kabila government. The United Nations was circumstantially forced to send in “peace keeping troops.” However, it is alleged that some of the peace keeping troops

¹⁰⁹ The five years of civil wars against the administration of Mobutu Seseseko did not end with the downfall of Mobutu but rather the insurgents continued to roam around although now not against Mobutu but against his successors (the two Kabila(s)).

¹¹⁰ Present day DRC

¹¹¹ Jean-Luc Mukeminalumbu. D.R Congo mining Contracts Review: A New change of Growth. Kinshasa 2nd April 2007

indulged themselves in mineral deals for their own benefits. Thus, the United Nations report and International NGO's reports accused foreign armies of perpetuating the wars so they could continue exploiting Congo's reserves.¹¹²

At this time, neighbouring Rwanda and Uganda were naturally attracted into the DRC conflicts for one reason that some of the insurgents in these two countries had made the DRC forests their homes and base from where they attacked their own countries. The home governments were aggrieved and wanted to contain these dissidents inside the DRC boundaries. In fulfilling their objectives, the Rwanda and Uganda governments decided to support the revolts in DRC. With this external support, the civil wars intensified in DRC and it was systematically becoming evident that it was beyond the government's control. There was nothing more the Kabila government could have done other than looking outside also for assistance. Zimbabwe and Namibia very quickly came to the assistance of DRC but of course on some considerations. Mr. Kabila and his government then signed some business deals with allies Zimbabwe and Namibia whereof these countries were assured of some mineral resources in turn for their military support.

Eventually the Kabila's government was controlling the whole of DRC. One of the costs for bringing this government into power was the signing of several mining contracts.¹¹³ Of course it is not a bad thing to sign such contracts because any country aspiring for development could have done so. The only bad thing on these contracts is that they were (and still are) extremely unfavourable for the DRC. Since mining has been the backbone of the Congolese economy since colonial times, those contracts concerned the vital

¹¹² Jean-Luc Mukeminalumbu D.R Congo mining contract review

¹¹³ It is believed that about 61 mining contracts were signed during this time

mining resources in the DRC entailing obligations for the coming decades. Although the contracts were deemed to have been entered for the interests of the public, but the negotiations and approval of those contracts took place with a total absence of transparency. In some of the contracts, the time and place of signing and the underlying terms remains to be a national maze.

During the whole time of civil wars, the mining sector remained almost unattended and it was left to benefit only a handful of people instead of benefiting the whole nation. The Carter Centre in its document titled Review of DRC Mining Contracts¹¹⁴ was of the view that hundreds of millions of dollars were spent to help bring an end to war in Congo. It further observed that all those who were assisting in bringing about the end of civil wars left the irregularities in the mining sector unattended. The non-attendance to this sector was attributed to many reasons, two important among them being that:- (a) firstly, paying attention to the mining sector could have destabilized the move towards fair election that was in full swing; (b) secondly, it was argued that international donor countries stopped pressing for reform when the investment climate began to improve in late 2004. In the face of corruption allegations and human rights abuses, these countries have made only cautious criticisms¹¹⁵.

The availability of minerals fuelled the civil wars in the DRC to persist for a long time. This is according to the theory that was developed by Michael Ross that natural resources may prolong the duration of civil war, independent of its effects on the incidence of civil war... resource wealth can lengthen a conflict if it enables the rebels to fund themselves,

¹¹⁴ The Carter Center. Review of DRC Mining Contracts - Update and Recommendations

¹¹⁵ The Carter Center at 1 quoting the view of the International Crisis Group (ICG)

and hence continue fighting instead of being crushed or forced to the negotiating table.”

¹¹⁶ Most of Ross’ inputs in this argument are found in the reports of Global Witness, a London-based NGO.¹¹⁷

But it is also argued that some of the soldiers, especially the commanders, may fuel the civil wars to prolong for a long time in as long as they are benefiting from the exploitation of minerals. This fact does not apply to the dissidents only but also to government officers and peace keeping missions.¹¹⁸ While quoting several sources, Ross on this point has the following suggestion: “resource wealth discourages peace settlements, if wartime looting is sufficiently profitable for either soldiers or their commanding officers. Sherman [2000: 699], for example, suggests that rebel groups in Angola, Sierra Leone, Democratic Republic of Congo (DRC) and elsewhere enrich themselves through the sale or exchange of diamonds...economic interests not only shape the conflict but also perpetuate it if the economic advantage of fighting outweighs that of peace.”¹¹⁹

The presence of the United Nations Organization’s Peace keeping mission in DRC brought hopes that may be the civil wars would end soon letting the minerals of DRC to benefit the indigenous. However, despite all these hopeful developments, Congolese are still living in fear. According to John Katunga, the mineral rich regions in the eastern DRC are still plagued by violence and insecurity.¹²⁰ A clear analysis of the matter reveals

¹¹⁶ Ross Michael, How do Natural Resources Influence Civil War at 13.

¹¹⁷ Available at www.globalwitness.org accessed on 10/12/2011.

¹¹⁸ In 2009-2010 Indian soldiers listed in the United Nations

Organization Mission in the DRC (MONUC) were accused of enriching themselves with Congolese minerals

¹¹⁹ Ross Michael, How do Natural Resources Influence Civil War at 13.

¹²⁰ Katunga John. Report from Africa. Population, Health, Environment, and Conflict: Minerals, Forests, and Violent Conflict in the Democratic Republic of the Congo. ECSP Report. Issue 12. P. 15, available at <http://zunia.org/uploads/media/knowledge/ReportFromAfrica1210.pdf> accessed on 29/8/2011.

that the prevalence of violence is highest in areas considered to be rich in coltan and cassiterite (the Kivu provinces), gold (Kivu provinces and Province Orientale), and diamonds (Province Orientale). This has been the main reason behind the fighting that continues around key mining towns in North Kivu between pro-Rwandan groups, the national army, and militias; and in South Kivu, national army soldiers and Rwandan Hutu rebels seek to control mines and their revenues. According to John Katunga, foreign rebels and militia groups (mainly from neighbouring Rwanda and Burundi) still operating in eastern DRC remain motivated by the money gained from exploiting minerals and other natural resources.¹²¹

3.2.1 Foreign Direct Investment Policy in DRC

As has been argued above, DRC is highly endowed with mineral resources. For a long time the country has been a target of foreign investors not for the purpose of aiding development for the benefit of the Congolese but rather for acquiring resources. On this point Francis **DJ** had the view that the wars in former Zaire and Angola in the 1960s and 1970s were about the domestic and international exploitation of strategic minerals. But the role played by these minerals – especially diamonds, oil, uranium, cobalt, gold and copper – in fuelling conflicts was veiled during the Cold War because of the focus on East-West ideological conflict. But the rivalry between superpowers in countries such as Angola and Zaire was not only about ideology and shaping post-colonial African diplomacy. At its heart was control over strategic resources.¹²²

¹²¹Katunga John.

¹²²David J. Francis lectures in the Department of Peace Studies at Bradford University (UK). Diamond and the Civil Wars in Sierra Leone. at. 73-74

The DRC has fallen victim of “conflict diamonds.” This scenario that is most common in mineral-rich African countries describes the diamonds that originate from territories controlled by rebel forces fighting to overthrow a legitimate and internationally recognised government. In fact for DRC (and some other African countries) now the issue is not diamond but rather all types of minerals. Of recent, some analysts have preferred to expand the definition of this scenario of conflict diamonds to include minerals that originate in areas controlled by government forces trading in illegal minerals/diamonds.

On the face of records, diamonds plays a major role by fuelling wars in Africa by way of illegal diamond trade. According to Francis DJ, this is a role played by the rather unusual criminal networks (forged between rebel factions, warlords, corrupt politicians and so forth). Some people also use the terms ‘blood diamonds’ and ‘war diamonds’ to describe their role in funding wars and conflicts.¹²³ Mineral proceeds (akin to conflict diamonds) as the currency of war have generated huge personal fortunes for warlords, rebel movements and their regional and international clients. It was estimated that in the DRC by 1999 approximately \$35 million worth of diamonds were produced in rebel-held territories.¹²⁴ The bad thing is that the proceeds from the sale of conflict diamonds have been mainly used to buy weapons.

That is the position that existed in the late 1990’s. Laurent Kabila thought of rectifying the situation before he stepped into power. Thus in 1996 he handed several rich mining concessions to foreign companies thinking that the wealth was being plundered by

¹²³ Francis David J. at 73

¹²⁴ Francis David J. at 74

Mobutu's government. What ensued is that during the years of war and transition, numerous mining contracts have been signed that are extremely unfavourable for the DRC. Those contracts concern the vital mining resources in the country and entail obligations for the coming decades. The negotiations and approval of those contracts took place with a total absence of transparency. Because the contents of those contracts remain unknown to the Congolese people, the DRC endeavoured to review the mining contracts with an objective of making all contracts benefit the entire population of DRC.

The country therefore established a commission to review at least 60 mining contracts signed before and during the civil wars. The review was not unexpected as it is believed that problems in the contracts were identified by NGOs, the World Bank, a parliamentary commission of the DRC, and professional consultants paid by the Bank.¹²⁵ For this reason since March 2007 all negotiations on mining contracts were suspended until the commission has finished its work. The movement (of establishment of a Mining Review Commission) is highly appreciated since the mining contract review is vital to the development of the DRC.¹²⁶ Implementation of the review programme was in full support of the government. According to the Carter Centre report, in February 2007, following the first elections in decades, a new government was installed in the DRC under President Joseph Kabila and Prime Minister Antoine Gizenga. This government immediately issued a "Governance Contract," laying out its priorities and commitments in which transparency in the mining sector and renegotiation, if necessary, of existing agreements were given first priority. The World Bank and European Commission directly entered

¹²⁵The Carter Center. Review of DRC Mining Contracts - Update and Recommendations November 30, 2007. At 2

¹²⁶ Jean-Luc Mukeminalumbu (MBM-Conseil). D.R Congo Mining Contracts Review: A New Chance of Growth Kinshasa, 2nd April 2007 at 2.

into the deal by drafting the text of the Governance Contract, which was intended to translate the goals outlined in the Bank's Poverty Reduction and Growth Strategy Paper into action strategies.¹²⁷

It is not easy to make a prompt assessment whether the objectives of the Commission were met. However, among other things, it was supposed to elucidate all mining contracts inherited from the past regimes, and where such contracts or any one of them would be seen to be engulfed in an obscured environment, then to revise it/them with a view of restructuring it/them by either renegotiating, revoking or cancelling them. This could not be done, however, without setting up an independent mechanism to monitor the implementation of these and future mining contracts. The success or failure of the commission was hooked on the nature of its operations. As a matter of ethical considerations, the Commission was supposed to be transparent and reliable all along the review, by publishing all the contracts and different steps of the review and involving as many civil societies as possible in the review work so as to eliminate all possible chances of suspicions and untrustworthiness.¹²⁸

The government's support to the establishment of the Commission did not come from the air. There were significant reasons to support the Commission on the basis that most problems in the contracts were well documented. The documentation was based on the studies that had been conducted under several initiatives. Three among these were a project backed up by the World Bank,¹²⁹ the Duncan & Allen review,¹³⁰ and audits by

¹²⁷ The Carter Center Review of DRC Mining Contracts. At 2

¹²⁸ Jean-Luc Mukeminalumbu At 3

¹²⁹ The Lutundula Report done in 2005 under the Parliamentary Commission

¹³⁰ undertaken by a US law firm April 2006

Ernst & Young.¹³¹ The common factor among all these reports is that they all detailed serious failings in the agreements or their implementation. The substantiation of the foregoing is not to the 100 percent mark since the Duncan & Allen review and the Ernst & Young audits remained secret after completion. However, this deficit is complemented by reports from some NGOs and a leaked memo from one of the principal World Bank mining officers noting similar concerns with the contracts.¹³²

Since the environments in the mining sites were greatly damaged, the DRC administration under Joseph Kabila determined to restructure the mining sector so as to make it environmental friendly. It was difficult for the DRC government to stand alone and execute this task. A foreign assistance was absolute. The government then collaborated with the World Bank Group and USAID to rebuild institutions that will guarantee effective management of the mining and forest sectors. The institutions were required (still required a today) to conform to the existing international frameworks and also making sure that environmental issues are given top priority.¹³³

Almost all of the companies that engaged in mineral exploitation were foreign. This necessitated the need of making arrangements that could compel the mining companies to take into consideration the needs and aspirations of the communities living around these resources via a participatory decision-making process.¹³⁴ The good result of this was that the government of Kinshasa developed a Mining Code¹³⁵ something that further

¹³¹ April 2006

¹³² The Carter Center. Review of DRC Mining Contracts. At 3

¹³³ Katunga John at 17

¹³⁴ Katunga John at 17

¹³⁵ With the support of the World Bank Group

motivated more international investors.¹³⁶ The high demand of minerals the world over, taken together with the existence of the mining codes have been a new attraction for foreign investors to rethink on coming back to DRC. A good example may be taken of the World Bank that committed USD1.83 billion in loans and grants from 2001-2005 to encourage stability and provide capacity for the government to provide basic services.¹³⁷

The government, however, did not enjoy a smooth ride over these initiatives. The Mining code for example, is apparently favouring private investors. This can be impliedly adduced from the World Bank's approach to restructuring the bankrupt Gécamines, most of whose assets were hurriedly sold to private investors.¹³⁸ But sometimes the World Bank has been criticized as not being a good ally to DRC but a short cut response according to Global Witness is that the government's interference and delays in the restructuring program have undercut implementation of World Bank programs. As the World Bank is a heavy financier for developing countries, that was a blow to DRC and some analysts think that it may further discourage foreign investors.

Within the government itself representatives recognize that the Mining Code was a good attempt to harmonize laws regulating the mining sector and end the prevailing chaos. This firm belief is challenged by the facts that the implementation of the plan faces strong opposition created in part by the Mining Ministry lacking capacity for follow-up; loopholes regarding artisanal miners, especially the identification and allocation of concessions. In 2006 Global Witness reported that international investors are ignoring the conditions of the Mining Code for the export of raw minerals, leading to huge loss of

¹³⁶ The Mining Code is available online (in English) at http://www.miningcongo.cd/codeminier/codeminier_eng.pdf accessed on 20/12/2011.

¹³⁷ Katunga John at 17.

¹³⁸ Global Witness, (2006). 35 in Katunga John 17.

returns for the government. Any scintilla of truth in this allegation will make foreign investment in the sense of fuelling development to lose its real meaning.

Because there is still a very long way to go and the people of DRC would appreciate any kind assistance focusing on their development, the government has widely opened its doors various international bodies, as well as the World Bank and the International Monetary Fund (IMF), to continue to support the Mining Codes. The World Bank and the IMF should refocus capacity-building efforts in the mineral sector at the national (ministerial) and local levels, and encourage the creation of a special parliamentary commission on mines.

3.2.2 Selected Mining Companies in DRC

In the DRC, mining companies are potentially most significant development partners. Most of them were operating in the country before the commencement of the civil wars and furthermore, many are lauded for their respect for the contract review process. During this process, most of them were willing to engage on the merits of their contracts with both the Revisitation Commission and civil society.¹³⁹

As has been said above, the DRC is highly gifted and endowed with mineral resources. Major exploitation of these minerals started way back in the 1960s when Zaire (present time DRC) was the leading producer of copper and cobalt. According to Kevin PCJ D'Souza, gold was first discovered in north eastern DRC in 1903 and a number of mining companies entered the region to exploit its resources.

¹³⁹The Carter Center Review of DRC Mining Contracts - Update and Recommendations November 30, 2007. P.12

Following independence in 1960, the state nationalised many existing companies including the Belgian company **Société des Mines d'Or de Kilo – Moto (SOKIMO)** which became the **Office des Mines d'Or de Kilo-Moto (OKIMO)**¹⁴⁰ From the beginning, exploitation was done under concessions most of which were owned by state mining parastatals. For example, copper concessions were formerly managed by **Gécamines**.¹⁴¹ However, in the 1990's following the intensification of civil wars, most of the parastatals began to crumble although they were transferring their shares to other companies.¹⁴² It is of no use therefore to deliberate on the companies that were exploiting minerals in DRC. Examination of the current companies will be more relevant to this study.

Currently in the DRC, mineral exploitation is done under three major modes. The first one is large scale mining (LSM) mainly operated by big mining companies (especially multinational companies). The second is the Artisanal and Small-scale Mining (ASM) that is employing a multitude of people and spread all over the country. The last one is informal and unofficial involvement of the military and local authorities in the illegal mineral trade.¹⁴³ But the fact remains that a greater percentage of the minerals escapes the nation's screens unnoticed. According to Kevin PCJ D'Souza there is a general consensus from most agencies that around 60 per cent of mineral produce passes through

¹⁴⁰ Kevin PCJ D'Souza. Artisanal Mining in the DRC (Key Issues, Challenges and Opportunities). WARDELL ARMSTRONG LLP (a collaborative effort between the World Bank's OGMC Group, DFID's Policy Division, Sustainable Development Group, DFID's DRC office, and the World Bank hosted Communities and Small scale Mining (CASM) initiative) August 2007 (Version 1.3). P. 3

¹⁴¹ Générale des Carriers et des Mines, the state owned Parastatal Mining Company

¹⁴² Gécamines transferred its shares to SOFRECO but the transfer did not improve production in the mines formerly owned by Gécamines. While the production is going down the external debts of the companies are increasing.

¹⁴³ Both in trafficking and seeking

illegal channels, through Kasumbalesa on the Zambian border (with small amounts passing westwards via Lake Moero).¹⁴⁴

After independence through to 1995 mineral rights in the DRC could only be held by the government through State owned companies. The leading companies in this operation were Gécamines, MIBA, Sominki, and Okimo. Following the inability to manage during civil wars, it was apparent that the companies¹⁴⁵ were now crumbling to the ground. In 1994/95, in face of the inability of the state companies to maintain production, the government boldly decided to allow the companies to enter into partnerships with private companies. This implied that the mineral rights were now to be vested in the partnership. Among other things the partnerships were to specify the investments, internal management of the partnership as well as the modalities of exploration, development, mining and commercialization.¹⁴⁶

Currently, there are four key mining areas in the DRC as follows: (1) The Orientale & Équateur located in the extreme north eastern corner of DRC. In this area the major minerals that are found are Gold & Diamonds. The activity is employing 60-150,000 and 100,000 for gold and diamond as ASM respectively. Big companies engaged in mining activities in this area are: OKIMO (Office des Mines d'Or de Kilo Moto), AngloGold Ashanti, Moto Gold Mines, Mwana Africa, Barrick, Tangold, Greendale Universal, Borgakim Mining, Kibali Gold, Blue Rose, Amani Gold, velaphanda Holdings and Afri Minerals. (2) The Kivu (North and South) & Maniema that is rich in Cassiterite, Coltan

¹⁴⁴ Kevin PCJ D'Souza.

¹⁴⁵ State owned companies

¹⁴⁶ The World Bank *Democratic Republic of Congo Growth with Governance in the Mining Sector Document Report No. 43402-ZR of May 2008 P. 132*

& Gold. The activity is employing 150,000 in Southern Kivu, 200,000 in Northern Kivu and 50,000 in Maniema area as ASMs. Big companies engaged in mining activities in this area are Banro Corporation, Metal Processing Congo and Groupe Minier Bagandula.

(3) The Kasai (Occidental & Oriental) mining area that is rich in Diamonds. More than one million miners are engaged in this area as ASMs. Big companies engaged in exploitation activities in this area are MIBA (Minière de Bakwanga) & First African Diamonds Ltd., De Beers, Oryx Natural Resources (Sengamines/Emikor), BHP Billiton, Mwana Africa, Rio Tinto, SouthernEra, Gravity Diamonds, Alrosa, Pangea DiamondFields, Affinor Resources, BRC Diamond Corp and Midamines.

(4) The last and biggest mining area in the country is Katanga. The area is rich in Copper & Cobalt, Gold, Uranium and Manganese. Around 150,000 miners are engaged as ASMs. For copper and cobalt, the big companies engaged are Gécamines (Générale des Carrières et des Mines) Anvil Mining, Kingamyambo Musonoi Tailings (KMT), First Quantum Minerals, Katanga Mining, Tenke Mining (Freeport McMoRan/Lundin Group), Nikanor /DCP (KOV), Global Enterprises Corp, International Panorama Resources, Metrorex, Kumba Resources, Kabankola Mining (KMC), Central African Mining & Exploration (CAMEC), Copper Resources Corp (MMK), Platmin Congo, Costamin, Congo Star Resources, Africo Resources, Orgaman, Tiger Resources, Teal Exploration & Mining, Melikor Resources, Kakanda Development Corp/PTM Minerals, George Forrest Int / Outukumpu (STL), Sodimco, Feza Mining, Casmin, Colec Group, Rubicon Minerals and China Sun Group HiTech. Gold Fields and Cluff Mining is engaged in Gold mining, Brinkley Mining in Uranium and Manganese in the area is exploited by Enterprise Minière de Kisenge-Manganese.¹⁴⁷

¹⁴⁷ Kevin PCJ D'Souza, at. 2

Greenock Resources Inc.

This is a Canadian-based mineral development company focused on early- to mid-stage properties that have high potential for near-term production. The company's main operation area in the DRC is in Kakanda (copper/cobalt). Greenock Resources Inc. ("Greenock" or the "Company") is focused primarily on: (1) its Kakanda copper/cobalt project (51percent to 70 percent interest subject to final joint venture terms and payment "pas du porte" concession payment) and the other 30percent to 49percent held by Gécamines, the state-owned mining company.

The Company has indulged itself in a major investment under which it is reprocessing the Kakanda tailings and developing associated Kakanda hard rock deposits as an economic project of sufficient scale to attract major investors.¹⁴⁸ According to the Greenock Resources Inc. this project (the Kakanda project) has NI 43-101 Measured and Indicated Resources of 18.5 million tonnes with an average grade of 1.25percent copper and 0.15percent cobalt. The adjacent hard rock deposits have a historical resource of 18.6 million tonnes with an average grade of 3.19percent copper and 0.19percent cobalt.¹⁴⁹ Greenock Resources Inc along with 60 other mining companies in December 2009, they received approval from the DRC government confirming their legitimate contractual claims on Kakanda. Consistent operation in the area has been fuelled by the recent rise in

¹⁴⁸The World Bank. Democratic Republic of Congo Growth with Governance in the Mining Sector Document Report No. 43402-ZR of May 2008 P. 132

¹⁴⁹ Greenock Resources INC Update Report January 11, 2011 P.2 (available at [eResearch Corporation www.eresearch.ca](http://www.eresearch.ca))

copper prices combined with improved capital markets that is now attracting growing interest by competitors in the area.¹⁵⁰

Beginning in 2007, Greenock invented a modality of engaging into the minerals exploitation in the DRC by which a strategic joint venture was formed between Gécamines (La Générale des Carrières et des Mines, which is a state-owned mining company in the Democratic Republic of Congo) and PTM Minerals (Cayman) Ltd. The objective was to develop the Kakanda project.¹⁵¹ Subsequently in December 2008, Gécamines and PTM signed a memorandum of understanding (MOU) to establish a joint venture in the name of “Kakanda Mining Development” to explore the Kakanda tailing deposits. By this memorandum Greenock was mandated to be a major shareholder with up to a 70percent interest.¹⁵² This strategic joint venture is a positive development in reducing project risk and improving project financing. The Company is also looking for other strategic partners to finance the Kakanda project.¹⁵³

Gécamines¹⁵⁴

This is a state owned parastatal mining company. From the 1960’s it was the sole state owning parastatal mining company for copper although its facilities have been deteriorating with time. This resulted to the stagnation of production in Katanga with total capacity utilization estimated at less than 10percent, and an alleged external debt of

¹⁵⁰ According to Greenock Resources INC Update Report January The price of copper increased significantly over the last 10 years, moving from under US\$1.00 per lb to as high as US\$4.00 per lb before the global economic slowdown that began in summer 2008. Although the price subsequently retreated to under US\$1.50 per lb in late 2008, it rose sharply through 2009 and 2010 and is now trading at US\$4.35/lb (close of January 11, 2011). Global demand is strong, with China leading the way, and supply is constrained.

¹⁵¹ PTM is a wholly-owned subsidiary of Greenock

¹⁵² currently the Company holds 51 per cent .

¹⁵³ Greenock Resources INC. Update Report. P. 4

¹⁵⁴ Générale des Carriers et des Mines. To date Gécamines’s facilities are managed by SOFRECO

USD2.5 billion.¹⁵⁵ At a certain point the World Bank disengaged itself from the mining activities in Zaire.¹⁵⁶ The World Bank reinitiated involvement with the DRC at Joseph Kabila's request in early 2001. Reforming the mining sector and the most significant state-owned mining company, Gécamines, were high on the World Bank's list of immediate reforms for the Congo. The World Bank was the leading force in drafting the new mining code adopted in 2002. The Code was written to attract foreign private investment and bring some degree of uniformity to the mining industry.¹⁵⁷

In 2005 Gécamines concluded a controversial contract with a major American company Phelps Dodge¹⁵⁸ that holds rights to the world's largest untapped copper reserves, Tenke Fungurume. The contract was highly criticized out of its obscurity. Phelps Dodge (now owned by Freeport McMoRan) remains the only company involved in the contract review at this time. However, it holds rights to the world's largest untapped copper reserves, Tenke Fungurume. The contract for Tenke Fungurume was strongly criticized at the time it was concluded in 2005, in part because the circumstances for such a major agreement were inconsistent with the internationally agreed efforts to reform the copper-cobalt parastatal, Gécamines. The World Bank engaged a consulting company to assist in restructuring Gécamines. The consultant insisted on a suspension until existing contracts could be reviewed. At that juncture the law firm of Duncan & Allen was contracted for the review on that basis. The firm raised serious questions about, among other things, the validity of the rights to Tenke Fungurume that were the subject of the contract with Phelps Dodge.

¹⁵⁵ Kevin PCJ D'Souza.

¹⁵⁶ Present time DRC

¹⁵⁷ The Carter Center Review of DRC Mining Contracts.

¹⁵⁸ Currently owned by Freeport McMoRan

To everyone, Gécamines meant DRC and DRC represented Gécamines. For this reason, the World Bank pressurized its consultants to work gallantly and really they were active in many areas of the Congo's mining industry, particularly the privatization of mining in Katanga¹⁵⁹ and restructuring the country's giant copper-cobalt parastatal Gécamines. Two firms were hired to perform two different things to wit: the UK-based firm of IMC was retained to write a report detailing possible reforms for Gécamines. At the same time, the Washington-based law firm, Duncan & Allen, with a long history of involvement in DRC mining, was hired to assist in reviewing Gécamines' contracts. Under this restructuring, the World Bank program remained responsible for hiring and paying the new Director of Gécamines.

But all these efforts did not give absolute relief to Gécamines. The unofficial message transmitted to The World Bank's DRC Country Director, expressed very serious concerns about new contracts that had been concluded by Gécamines; especially with three major contracts: that is: the Kinross Forrest contract, Global Enterprises Corporate contract, and Lundin and Phelps Dodge contracts. Generally it was revealed that the contracts removed "75percent of the productive base" of Gécamines. On the face of every contract mentioned above it was clear that they were full up of problems. It was the view of the consultants that allowing such contracts to operate would imply incapacitating development. There is no record of the World Bank having taken any action in relation to these contracts entered between Gécamines and other companies as listed above. In fact

¹⁵⁹ This is the location of the country's vast copper and cobalt reserves

these contracts remain in effect today and are among those being reviewed by the Revisitation Commission.¹⁶⁰

Katanga Mining Limited¹⁶¹

The company has been working on the restructuring mode from one stage to another since July 8, 2004. The company has its registered and head offices located Canon's Court, 22 Victoria Street, Hamilton, HM EX and Bermuda.

In 2008 the number of directors was increased to ten while permitting the corporation to enter into agreements with the holders of Common Shares relating to the appointment of directors who have since then been terminated by mutual agreement.¹⁶² In early January 2009 the authorized share capital of the corporation was further increased to consist of 1,000 Common Shares with a par value of \$12.00 each and 5,000,000,000 Common Shares with value of \$0.10 each. Subsequently this was removed by the amendment of the bye-laws in May 2010. In its day to day operations, the company has entered into inter-corporate relationships with other subsidiaries under which several joint ventures are undertaken. For example, the "**Kamoto Joint Venture**" was formed in 2004 for the purpose of holding, redeveloping, rehabilitating and operating certain exploration and mining properties.¹⁶³ Another outstanding venture that was formed is known as *DCP*

¹⁶⁰ The Carter Center Review of DRC Mining Contracts - Update and Recommendations. (November 30, 2007) 12

¹⁶¹ The Corporation was incorporated under the Laws of Bermuda on October 7, 1996 as New Inca Gold Ltd. On July 8, 2004, the Corporation consolidated its common shares on a ten-for-one basis and changed its name to Balloch Resources Ltd. On November 30, 2005 the Corporation changed its name to Katanga Mining Limited. On November 2, 2007

¹⁶² This can be inferred from the General Developments in the Business of Katanga–2009 Developments – Termination of Relationship Agreements available at http://www.katangamining.com/kat/investor_relations/annual-info-forms/aif-2011/aif-2011.pdf accessed on 26/12/2011.

¹⁶³ The agreement was between KFL Limited ("KFL") and La Générale des Carrières et des Mines ("Gécamines")

*Joint Venture*¹⁶⁴ entered between Global Enterprises Corporation Limited ("GEC") and Gécamines on September 9, 2004 ("DCP Joint Venture Assets"). Later GEC and Gécamines incorporated and organized a company in the DRC known as DRC Copper and Cobalt sarl ("DCP") to hold the DCP Joint Venture Assets. DCP was owned 75percent by GEC and 25percent by Gécamines. Katanga acquired a 100percent interest in GEC as part of the acquisition of Nikanor PLC ("Nikanor") in January of 2008.

In April 2007 the DRC government formed the Commission of inquiry to review approximately 60 mining agreements entered into by parastatal companies of the Congolese government. The KCC Joint Venture Agreement and the DCP Joint Venture Agreement were among the mining agreements to be reviewed. The Commission's report strongly opposed the partnership between Gécamines and the other companies.¹⁶⁵ Towards the last quarter of 2008 the DRC Ministry of Mines issued terms of reference for the renegotiation and/or termination of the mining contracts entered into by KCC and DCP. This resulted into another agreement of July 2009 under which Gécamines, KFL and GEC, in the presence of KCC, DCP, La Société Immobilière du Congo ("SIMCO"), Katanga Mining Holdings Limited, Katanga Mining Finance Limited and KML (BVI) Holdco Ltd. entered into an agreement (the "Amended Kamoto JV Agreement"). This agreement resulted in the termination of the KCC Joint Venture Agreement and DCP Joint Venture Agreement.

¹⁶⁴ This is a joint venture that was formed in order to extract and transform copper, cobalt and associated mineral substances in an area close to the Kamoto Joint Venture Assets, namely the deposits of KOV, Kananga and Tilwezembe. ("DCP Joint Venture Assets") pursuant to a joint venture agreement dated September 9, 2004 between Global Enterprises Corporation Limited ("GEC") and Gécamines

¹⁶⁵ This was before Katanga Company acquired Nikanor

In late 2007, Katanga Mining Company announced that it had reached an agreement with the board of directors of Nikanor on the terms of a recommended merger of the two companies mandating Katanga to become the owner (directly or indirectly) of a number of companies. Pursuant to this agreement, Katanga became the indirect owner of GEC, which was the owner of 75 percent of DCP.

The Merger was implemented by way of a take-over bid for Nikanor shares on the basis of 0.613 Common Shares of Katanga and \$2.16 in cash (by way of a cash return by Nikanor) for each Nikanor share held. It was commonly agreed that Katanga issue and deliver 127,168,221 Common Shares from treasury (i) as consideration for the Nikanor shares tendered to the offer and (ii) for certain convertible securities of Nikanor outstanding prior to the Merger.¹⁶⁶

On February 8, 2008, Katanga announced to enter into an agreement between KFL, Gécamines and KCC providing that, in exchange for certain compensation, security and payment, the portion of the concessions held by KCC representing the Mashamba West and Dikulwe deposits would be released to Gécamines.¹⁶⁷

Under this agreement, Gécamines was required to replace these deposits by July 1, 2015 with other deposits having a total tonnage of 3,992,185 tons of copper and 205,629 tons of cobalt according to international standards. The parties have agreed to fix the

¹⁶⁶ Available at www.sedar.com accessed on 11/12/2011.

¹⁶⁷ These deposits which were included in the June 23, 2006 amended technical report of Katanga and were not scheduled to start producing oxide ores until 2020 and 2023, respectively.

equivalent value of the deposits released at \$285 million, payable on July 1, 2015. The parties will calculate the proportion of the reserves replaced by Gécamines on July 1, 2015. In the event that there shall be detected any kind of shortfall, the shortfall shall be calculated and the financial compensation shall be payable as the shortfall percentage multiplied by \$285 million. Any remaining payments were due to be paid from Gécamines' future revenues (being dividends and royalties due from July 1, 2015) received from the Merged JV Company until completion of full payment.

In early 2008 the DRC government wanted the Katanga Mining Company to discuss with it certain issues on its mining activities. The discussion would dwell on: (i) the submission of feasibility studies by KCC and DCP; (ii) Gécamines' role in the management of the Kamoto Joint Venture and the DCP Joint Venture; (iii) the submission of schedules of achievements for social projects; and, (iv) re-examination of royalty payments for lease facilities. The discussions held fruits in the sense that on August 5, 2008, Katanga announced the signing of a memorandum of understanding ("MoU") with Gécamines that was the basis for: (i) amending the Kamoto Joint Venture Agreement to incorporate provisions of the Concession Release Agreement; (ii) merging the DCP Joint Venture and Kamoto Joint Venture; and (iii) addressing the requirements of the DRC government resulting from the review of mining partnerships with Gécamines. The memorandum of understanding targeted seven major areas among them, that:

(i) DCP and KCC were to be merged into a single joint venture company (the "Merged JV Company");

- (ii) 75 percent of the share capital of the Merged JV Company was to be allocated to Katanga's wholly-owned subsidiaries, KFL and GEC or their related entities, and 25 percent to Gécamines and its subsidiary; consistent with each of the Kamoto Joint Venture Agreement and the DCP Joint Venture Agreement;
- (iii) upon implementation of the Amended Kamoto JV Agreement, 5 percent of all additional joint venture funding until the project reached 150,000 tonnes of copper output per year was to be non-interest bearing and the remaining 95 percent was to bear interest at a rate not greater than LIBOR plus 3 percent and;
- (iv) the board of directors of KCC was to be increased to eight members, three of whom will be appointed by Gécamines, and KCC will assume day-to-day management of the Merged JV Company's operations within 12 months from the date of the MoU.

From August 12, 2008 the Company has been engaging in a *Rehabilitation Project Update*.¹⁶⁸

3.3 THE COMMISSION REPORT ON MINING CONTRACT REVIEW

The government of the DRC¹⁶⁹ signed the Memorandum for the revision of mining contracts on the 20th April 2007 for the review of mining contracts signed between private companies and the government or State owned enterprises. It was feared that the agreements were a result of corruptions and most people believed that the national riches

¹⁶⁸ For example the Kamoto rehabilitation project that was expected to be completed by the end of 2008, providing a production capacity of 70,000 tonnes of copper and 3,000 tonnes of cobalt per annum. Under this phase, a third cascade mill was being rehabilitated and 58 flotation cells were being added to the circuit in the Kamoto operating concentrator (the "Kamoto Concentrator"). At the Luilu hydrometallurgical plant (the "Luilu Metallurgical Plant"), a new roaster was being constructed and leaching and electro-winning capacity was to be doubled. Katanga also announced the continued development of the KOV Open Pit, construction of a new leach facility, a new processing plant and an acid plant

¹⁶⁹ Minister of Mines

had been exchanged for war spoils and political favours. John Strelau of the Carter Centre was of the view that the mining review offered an opportunity for the Government to distinguish itself from the past and to prove its commitment to turn mineral wealth into development for the country.¹⁷⁰

The commission had the timeframe of three months to complete the work from the 15th of May to the 15th of July 2007.¹⁷¹ It was very important at this time to establish this commission and subsequently publish its report because the mining industry was hard hit by lack of transparency, the unrealistic time frame and the limited involvement of civil society in the work of the inter - ministerial commission. However, the publication of the report is far from sufficient to address the deficiencies in the review process. The commission finished its work in mid-October 2007 but its report was not released till on the 20th day of March 2008 despite a persistent demand of the same from the Congolese and international community.¹⁷² This report was but a milestone in the whole process of restructuring the mining industry in the DRC for the eventual sustainable development of the country.¹⁷³ Individuals, civil societies and international communities,¹⁷⁴ were equally impressed but insisting that the negotiations process be open.

The Commission's summary findings were communicated to the companies concerned individually and also through the website of the Ministry of Mines. The companies however reacted to this communication in varied ways ranging from downplaying the

¹⁷⁰ Hakes D 'The Mining Review in the DRC: Missed Opportunities, Failed Expectations, Hopes for the Future'. (April 3, 2009).

¹⁷¹ The Commission did not finish its work up to mid-October 2007

¹⁷² The withholding of the report for almost six months rose great suspicions from the public

¹⁷³ Available at www.freewebs.com/contratsminiers accessed on 21/12/2011.

¹⁷⁴ Especially the Belgian government

scope of the proposed changes to their contract and emphasizing their belief in its juridical validity to hinting at the possibility of international arbitration.¹⁷⁵

The Commission's assignment however, did not solve all of the contemplated problems in the mining industry. Unfortunately, this does not appear to have happened. Although the full results have not been disclosed, the known outcomes confirm the most skeptical opinions.¹⁷⁶ This is confirmed by the fact that following the release of this report, the DRC Government announced that it would set up a task force comprising of the Chief of Staff of the President of the Republic and 8 senior ministers that would guide the next phases of the review process. According to Claude Kabemba, the Commission comprised of 28 members to wit: The Principal Private Secretary; 2 advisors from the ministry of mines ; 2 delegates representatives from the Presidency ; 2 delegates from the prime Minister's office ; 2 delegates from Ministry Finance ; 2 delegates from Ministry in Charge of the Budget; 2 delegates from Ministry Justice ; 2 delegates from Ministry without Portfolio ; 2 delegates from Ministry in charge of Industry; 4 delegates from General Secretary of Mines ; 4 delegates from Cadastre Minier and 4 delegates from technical institutions (CTCPM).¹⁷⁷ Acting on the report of the Commission, DRC terminated some of the agreements putting forward some of the reasons like non-payment of royalties.¹⁷⁸

¹⁷⁵ This is a position that was taken by First Quantum Minerals Company

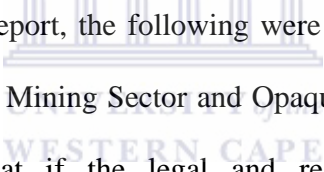
¹⁷⁶ Hakes Deborah The Mining Review in the DRC.

¹⁷⁷ Kabemba Claude. 'Is a Genuine and Transparent Process of Mining Contracts Renegotiation Possible in the DRC?' available at http://archive.revenuewatch.org/dakar/RWI_Dakar_KABEMBA_DRC.doc accessed 29/12/2011.

¹⁷⁸ For example At the beginning of August, the government of the Democratic Republic of Congo (DRC) announced that it terminated its copper and cobalt mining contract with First Quantum for the IFC-backed Kingamyambo Musonoi Tailings (KMT) project

3.4 IMPACTS OF THE CONTRACTS REVIEW ON MINING

The review of the mining contracts that came not as an accident in the DRC was indispensable for the appraisal of contracts and the reform of the mining sector as essential to the consolidation of democracy in the DRC.¹⁷⁹ Mining has been the backbone for a historical period now. Due to its vast deposits of minerals DRC is popularly called a “geological scandal”, possessing valuable mineral reserves of copper, cobalt, gold, diamonds, coltan, coal, petroleum, and other commodities. In 2007, approximately US\$ 2 billion was being generated by exploitation of minerals on an industrial, quasi-industrial and artisanal scale (ASM). Despite this precious netting, very few Congolese benefited. However, the wealth has attracted foreign looters.¹⁸⁰



Out of the Commission’s report, the following were realized: Corruption and Spoils of the war, Governance of the Mining Sector and Opaque mining contracts. On the face of records, it is obvious that if the legal and regulatory framework is relatively straightforward there are huge gaps in the government’s capacity to administer the mining sector. It was also in the vision of the Commission that as in many other countries, the extractive industries are uniquely susceptible to corruption and non-transparent practices.¹⁸¹ Finally it was revealed that during the years of war and transition, numerous mining contracts that are extremely unfavourable for the DRC were

¹⁷⁹ The Carter Center Review of DRC Mining Contracts - *Update and Recommendations* November 30, 2007. 1

¹⁸⁰ Jean-Luc Mukeminalumbu. *DRC Mining Contracts Review: a New Chance of Growth*. 1

¹⁸¹ Transparency International ranks DRC as one of the world's most corrupt countries

signed.¹⁸² All of the above have great impact on the mineral exploitation and the whole economy of DRC in general.

The review report is reported to have impacted the mining sector although in its accomplishment of its work it is alleged that: (i) There was no valuation of the assets prior to the contract (ii) There was a lot of unexplained variation in the contractual terms (iii) There was lack of mechanism by which to enforce the company's work commitments (iv) The failure to provide protections for the parastatal as a minority shareholder and (v) Absence of critical information.¹⁸³

However, the review report has incited the international community to invest a significant sum of money to support stable and accountable institutions in the DRC. For the protection of their investments, a number of donors pressed for the rule of law and measures to combat corruption, and have financially supported programs towards these ends. Nevertheless, most countries have remained aloof from the mining contract review, refusing to take a public position on the need for review or to support aspects of the process.¹⁸⁴

¹⁸² Those contracts concern the vital mining resources in the country and entail obligations for the coming decades

¹⁸³ *The Carter Center 4-5*

¹⁸⁴ *The Carter Center 6*

CHAPTER FOUR

ANALYSIS, RECOMMENDATIONS AND CONCLUSION

4.1 COMPARATIVE ANALYSIS OF THE TANZANIAN AND DRC MINING CONTRACTS REVIEWS

Tanzania like the DRC, is endowed with a substantial amount of minerals although the mineral contents of the two countries may not be matched. According to the United Nations Organisation, the two countries are a fraction of the African continent which is well endowed with mineral resources. It harbours the world's largest mineral reserves of platinum, gold, diamonds, chromite, manganese, and vanadium. Yet these statistics are probably underestimated due to limited geological mapping of the continent. In addition, the continent produces about 17 per cent of the world's uranium. Most of these minerals are exported as ores, concentrates or metals without significant downstream processing to add value.¹⁸⁵

According to Claude Kabemba, the DRC holds roughly one-third of the world's cobalt reserves and 10 percent of its copper reserves.¹⁸⁶ The two countries are experiencing the same problem to wit the dominant economic dogma post-World War II that pushed for an open trade policy climate in Africa promising that countries endowed with natural resources would experience economic growth by exporting their raw resources as their comparative advantage.¹⁸⁷ While Tanzania has enjoyed her independence with full opportunities to reveal to the world how best she may use her natural resources for the benefit of her citizens without disqualification, DRC on the other hand has experienced a

¹⁸⁵ United Nations Economic Commission for Africa *Africa Review Report on Mining Executive Summary* P.2

¹⁸⁶ Kabemba C *Is a Genuine and Transparent Process of Mining Contracts Renegotiation Possible in the DRC?* P. 2

¹⁸⁷ Kabemba C. 4

generation of wealth squandering especially following Mobutu's coming to power with the backing of Western powers. Congolese leaders have enjoyed political and economic benefits from the illegal and uncontrolled external exploitation of the country's minerals. Politically these leaders have been receiving security of their regimes while economically they have been benefiting financially from the selling of the resources.

Proceeds from such illicit business are used to buy the opposition and civil society. According to the "All Party Parliamentary Group Report on the Great Lakes of November 2002" as quoted by Claude Kabemba, while members of the ruling elite were the main beneficiaries of the economic anarchy, others (including foreign business people) sought opportunities to take advantage of a system of corruption and the lack of governance.¹⁸⁸

However, in the two countries like in some other African countries, there has been improved stability in the political and economic environment. This has led to increased investment in their minerals sectors while very limited or no investment in the minerals linkage sectors. There is also an emergent realization that mining could be a key instrument in establishing infrastructure (transport, energy and water) for the development of other sectors, such as agriculture and forestry.¹⁸⁹

From what has been discussed in paragraphs two and three, the contracts in the two countries between governments and mining companies are often performed in secrecy, with confidentiality clauses. In most of the cases, the citizens are precluded from knowing exactly what is the government harvesting from these minerals when in fact

¹⁸⁸ Kabemba C. 4-5

¹⁸⁹ United Nations Economic Commission for Africa

these citizens are the real owners of mineral wealth. According to the United Nations' report, this stems from inadequate democratic governance structures and institutional capacities in the area of revenue management.

Another big problem related to the minerals sector that is common to the two countries is that despite the increased participation of civil society organizations and non-governmental organizations (NGOs), their involvement cannot engage government in revenue accounting matters. That means there is less transparency and accountability.¹⁹⁰ With the current trend in the world, it is also evidenced that in the two countries there has been an increase in multi-stakeholder involvement in the development of mineral policy and legislation.

African participation in ownership of mineral assets has increased (usually as part of the so-called Black Economic Empowerment (BEE)), as has gender awareness and female involvement in mining and mine ownership.¹⁹¹ In the past, mineral exploitation in the two countries was under the state owned cum controlled corporations.¹⁹² Following the 1980's-1990's economic reforms the two countries followed suit by conceding to private mining investment. It may not be said with certainties that this shift has been of any benefit to the two countries and their citizens. This is because governments are forced to make major concessions to attract mining capital into their economies due to strong global competition for such capital.¹⁹³

¹⁹⁰ United Nations Economic Commission for Africa. 5

¹⁹¹ United Nations Economic Commission for Africa.

¹⁹² In Tanzania the mining was being pursued through the public body known as State Mining Corporation (STAMICO) while in DRC it was Gécamines

¹⁹³ *United Nations Economic Commission for Africa. 6*

Because of the lack of seriousness and patriotism, taxation of the minerals industry remains an issue between governments and mining companies due to the perceived conflict between what constitutes just compensation for the risks mining companies take and equitable resource rents accruing to the owners of mineral wealth, there is a trend, though it lacks unanimity, towards sharing tax revenues between central, regional and local governments with local communities receiving a proportion of mining taxes.¹⁹⁴

For the purpose of making more people benefit from the minerals, the two countries have consented to the establishment of Artisanal and Small-scale Mining (ASM) that is a labour-intensive sector presenting a greater opportunity for job creation especially in rural areas. There is the realization that strategies for ASM need to be rooted into broader rural development plans and that there is need to provide greater support to address a range of shortcomings including technology, marketing, and skill deficiencies. There has been growing awareness to address the poor environmental and healthy practice characteristic of ASM. It is further recognized that ASM has negative impacts associated with child labour and the impoverishment of miners.¹⁹⁵

4.2 **RECOMMENDATIONS**

Despite the fact that most African mining countries have rewritten their mining codes in the last 20 years to reflect a shift from government as an owner/operator to regulator/administrator, with the private sector assuming the lead in mineral development projects, still such reviews are not doing any good apart from benefiting the ruling privileged cliques. Countries which have gone this route include the Democratic Republic of the Congo (DRC), Ghana, Guinea, Namibia, Nigeria, the United Republic of

¹⁹⁴ Chambi Chachage 'Mwalimu in our popular imagination-the relevance of Nyerere Today'

¹⁹⁵ Chambi Chachage 'Mwalimu in our popular imagination-the relevance of Nyerere Today'

Tanzania and Zambia. It is true that the new codes have been objectively aiming at attracting FDIs, driven by the need to privatize mining projects and have not necessarily been development-oriented. Public participation in drawing these codes is very small. It is therefore strongly recommended that there must be greater participation in drawing both the contracts and the involved codes. At least all States which are not faring well in the mining sector should be advised to turn south of the continent and learn what the three extreme southern countries have achieved. In Malawi, Namibia and South Africa the new codes have involved extensive consultation. This is worth copying.

4.3 **CONCLUSION**

There is undisputable great need for the mineral producing countries in Africa to review mining contracts and publish their results to demonstrate transparency and to enable members of the public to submit comments. This might be a very difficult step to take since governments have been unwilling to do so, citing a number of excuses, ranging from the financial requirements involved in producing copies to be distributed to the stakeholders, to the need to respect unspecified confidentiality clauses. Most governments capitalize on this issue of confidentiality advanced at various stages as justification for not publishing the contracts. It cannot be disputed also that in other countries, the governments and companies have tended to use confidentiality as an excuse for resisting publication of contracts, payments and other information, thereby hindering efforts to increase transparency (both Tanzania and the DRC cannot be excluded from this fact).

There is a clear contradiction between this position and the official commitment of countries to principles of transparency.¹⁹⁶ For this reason and if at all the African governments want to benefit their people from these resources, there is no any shortcut way/means apart from openly reviewing the confidentiality clauses that are practically enshrined in every mineral contract.¹⁹⁷



¹⁹⁶ For example like the ones enshrined in EITI for DRC and the Mining Policy in Tanzania

¹⁹⁷ *The Congolese Mining Sector in The Balance: Lack of transparency risks undermining review of mining contracts* A Global Witness Briefing. (1 October 2007). P.8

BIBLIOGRAPHY

Books

Abiodun AMJ & Olonisakin, Funmi *Peacekeepers, Politicians, and Warlords: The Liberian Peace Process* (1999). New York: United Nations University Press

Campbell B & Campbell KB *Mining in Africa: regulation and development* (2009) London: Pluto Press

Kabemba C *Is a Genuine and Transparent Process of Mining Contracts Renegotiation Possible in the DRC?* (2008) Revenue Watch Institute

Kriesberg L *Constructive conflicts: from escalation to settlement* (1998) New York: Rowman and Littlefield

Lemarchand R "The Crisis in the Great Lakes". In John Haberson & Donald Rothchild (eds.), *Africa in World Politics* 3 ed. (2000). Boulder: Westview Press.

Peleman J "Mining for Serious Trouble: Jean-Raymond Roule and his Corporate Empire Project," in Abdel-Fatau Musah and J. 'Kayode Fayemi, (eds) *Mercenaries: An African Security Dilemma* (2000) London: Pluto Press,

Articles

Chachage, Chambi (2009) 'Mwalimu in our popular imagination-the relevance of Nyerere Today', available at <http://pambazuka.org/en/category/features/59510>

De Kock, Petrus 'The DRC at 50: Confronting the challenges of peace and territorial consolidation' Governance of Africa's resources programme (2010), *South African Institute of international Affairs (SAIIA)*.

D'Souza, Kevin PCJ 'Artisanal Mining in the DRC (Key Issues, Challenges and Opportunities) (2007) WARDELL ARMSTRONG LLP (a collaborative effort between the World Bank's OGMC Group, DFID's Policy Division, Sustainable Development Group, DFID's DRC office, and the World Bank hosted Communities and Small scale Mining (CASM) initiative)

Francis, David J 'Diamonds and the Civil War in Sierra Leone' (2001) *The Courier* No.187, July-Aug 2001, pp.73-75

Hakes, Deborah 'The Mining Review in the DRC: Missed Opportunities, Failed Expectations, Hopes for the Future.' April 3, 2009'

MacGaffey, J (1991) 'The Real Economy of Zaire: The Contribution of Smuggling and other Unofficial Activities to National Wealth'. London: James Currey.

Mbendi Information for Africa. (2004 'Democratic Republic of the Congo-Mining: Copper and cobalt mining'. Available at www.mbendi.co.za/indy/ming/nkcb/af/zr/p0005.htm November 17.

Mukeminalumbu Par Jean – Luc, 'DR Congo mining contract Review; A new chance of growth 02/04/2007.

Olan'g Silas (2010) 'Tanzania Passes a New Mining Law and Builds Capacity for Informed Policy Debate' May 21, 2010. Available at www.revenuewatch.org, (accessed on 14 October 2010)

Reports

Bomani Commission Report. Swahili version available at <http://swahili.policyforum-tz.org/files/ripotiyabomani.pdf> (accessed on 9 august 2010).

Curtis M & Lissu T *A Golden Opportunity?: How Tanzania is Failing to Benefit to from Gold Mining*, Christian Council of Tanzania (CCT), National Council of Muslims in Tanzania (BAKWATA) and Tanzania Episcopal Conference (TEC) (March 2008) Dar es Salaam, Tanzania

Democratic Republic of Congo Mining Report

Des Forges A. *Human Rights Watch – World Report 2001: DRC*. New York, April

Global Witness *Digging in corruption: Fraud, abuse and exploitation in Katanga's copper and cobalt* (July 2006)

Goldstuck, Alison (2010) 'Securing a social licence to operate? From stone age to New age mining in Tanzania' Governance of Africa's Resources Programme, South African Institute of international Affairs, Research Report

Greenock Resources INC Update Report (January 11, 2011)

Katunga J "Report from Africa. Population, Health, Environment, and Conflict: Minerals, Forests, and Violent Conflict in the Democratic Republic of the Congo". *ECSP Report*. Issue 12 (2006-2007)

Lambrechts K (editor) "Breaking the Curse: How Transparent Taxation and Fair Taxes can Turn Africa's Mineral Wealth into Development" (2009) Open Society Institute of Southern Africa, Johannesburg Third World Network Africa, Accra Tax Justice Network Africa, Nairobi Action Aid International, Johannesburg Christian Aid, London, (report). http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/25_03_09_breaking_the_curse.pdf (accessed on 18th august 2010).

Mhinda AM 'CSO perspective Mining Reforms in Tanzania: Concerns and opportunities for engagement Tanzanian' Tanzania Mineworkers Development Organisation Arusha, CCIC Policy Seminar May 13, 2009, available at www.ccic.ca/.../002_trade_2009-05_mhinda_presentation.pdf, (accessed on 5th September 2010).

Mineral Policy (Tanzania) available at www.tzonline.org (accessed on 10 October 2010)

Mineral Sector overview in Tanzania available at www.mem.go.tz, (accessed on 20th September 2010)

Mines. Washington, DC: Global Witness. Available online at <http://www.globalpolicy.org/>

Mukeminalumbu J (MBM-Conseil). (2007) "D.R Congo Mining Contracts Review: A New Chance of Growth Kinshasa", 2 April 2007

NDF mining, Final draft report Tanzania available at www.ndf.fi/docs/NDF-mining-Final-draft-report-Tanzania.pdf, accessed on October 2010-10-16.

Organisation for Economic Co-operation and Development (OECD) & African Development Bank (ABD). (2006, May). "Democratic Republic of Congo." In *African environmental outlook, 2005-2006* (pp. 215-227). OECD & ABD. Available online at www.oecd.org/dataoecd/13/8/36746740.pdf

Report on Minerals Royalty forms and Rates Applicable in the Mining Industry, available at www.mem.go.tz, (accessed on 10th October 2010)

The Carter Center *Review of DRC Mining Contracts - Update and Recommendations* November 30, 2007

The Congolese Mining Sector in The Balance: Lack of transparency risks undermining review of mining contracts (1 October 2007) A Global Witness Briefing.

The United Republic of Tanzania President's Office Planning Commission *The National Investment Promotion Policy* October 1996

The United Republic of Tanzania Vice President's Office *The national Environment Policy*. Dar-es-Salaam, December

The World Bank "Democratic Republic of Congo Growth with Governance in the Mining Sector" *Document Report No. 43402-ZR* (May 2008)

UN Security Council 2001a "Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and" *United Nations Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo* October 2002 www.smartsanctions.se/stockholm.

Discussion Papers

Andersson J & Slunge D “Tanzania – Environmental Policy Brief” *Sida-funded Helpdesk for Strategic Environmental Assessment at the Environmental Economics Unit* (2005), Göteborg University and Maria Berlekom at SwedBio

Campbell, Bonnie (ed) ‘Regulating Mining in Africa: For Whose benefit?’ Discussion Paper 26 (2004) available at www.nai.uu.se/electronic_publications

De Kock P *The DRC at 50: Confronting the challenges of peace and territorial consolidation’ Governance of Africa’s Resources Programme* (2010) South African Institute of international Affairs

George K “Potential Impacts of FDI on Economic Development in Tanzania”, *A paper prepared for a Policy Dialogue for Accelerating Growth and Poverty Reduction in Tanzania, held at the Conference Hall, ESRF, on May 25th, 2006* Available at www.tanzaniagateway.org (accessed on 18 September 2010)

Goldstuck A “Securing a social Licence to operate?, From stone age to New age mining in Tanzania” *Research report 7, Governance of Africa’s resources programme, South African Institute of international Affairs (SAIIA)*, Feb 2010

Ross M “How Do Natural Resources Influence Civil War? Evidence from 13 Cases” *Department of Political Science, UCLA*, June 11, 2003

Websites

www.Africa-Confidential.com

<http://allafrica.com/stories>

http://www.cbfp.org/en/THE_FORESTS_OF_THE_CONGO_BASIN_State_of_the_Forest_2006.pdf

www.ccic.ca/.../002_trade_2009-05_mhinda_presentation.pdf

http://en.wikipedia.org/wiki/Barrick_Gold

http://en.wikipedia.org/wiki/Mobutu_Sese_Seko

eResearch Corporation www.eresearch.ca

www.freewebs.com/contratsminiers

www.globalwitness.org

<http://www.globalpolicy.org/security/issues/congo/2006/07digging.pdf>

http://www.ihf.com/articles/ap/2006/10/26/business/AF_FEA_FIN_Tanzania_Mining.php

<http://www.jamiiforums.com/jukwaa-la-siasa/13353-bomani-committee-hiding-the-truth-2.html>

http://www.katangamining.com/kat/investor_relations/annual-info-forms/aif-2011/aif-2011.pdf

www.lexadin.nl/wlg/legis/nofr/oeur/lxwetan

<http://www.mbendi.co.za/indy/ning/nkcb/af/zr/p0005.htm>

<http://www.mbm>

http://www.mbm_avocats.cd

www.mem.go.tz

http://www.miningcongo.cd/codeminier/codeminier_eng.pdf

www.nai.uu.se/electronic

http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/25_03_09_breaking_the_curse.pdf

www.ndf.fi/docs/NDF-mining-Final-draft-report-Tanzania.pdf

www.parliament.go.tz/

www.parliament.go.tz/POLIS/PAMS/Docs/HS-19-9-2010.pdf

www.revenuewatch.org

<http://swahili.policyforum-tz.org/files/ripotiyabomani.pdf>

www.smartsanctions.se/stockholm

www.tanrange.com

www.tanzaniagateway.org/docs

<http://www.tanzaniageteway.org/news/news/article.asp?ID=57>

www.tzonline.org